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EXHIBIT A

ELECTRONICALLY FILED - 2022 Jul 28 11:37 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP230974

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT CASE NO.: 2022-CP-23-_____
Robert Baddorf, Barbara Briggs and Jo Anne Gregory, individually, and on behalf of all others similarly situated, Plaintiffs, v. D.R. Horton, Inc., Defendant.	**SUMMONS**

TO: D.R. HORTON, INC.:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to said Complaint on the subscribers at their offices, Lyles & Associates, LLC, located at 1037 Chuck Dawley Boulevard, Suite G-100, Mt. Pleasant, South Carolina 29464, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for the relief demanded in the Complaint and will seek a default judgment against you.

Respectfully submitted,

LYLES & ASSOCIATES, LLC

*s/ Robert T. Lyles, Jr.*_____
Robert T. Lyles, Jr. (SC Bar # 10299)
1037 Chuck Dawley Blvd, Suite G-100
Mount Pleasant, South Carolina 29464
T: 843-577-7730
Email: rtl@lylesfirm.com
Attorney for Plaintiffs

July 28, 2022
Mount Pleasant, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL
COUNTY OF GREENVILLE	)	CIRCUIT
	)	CASE NO.: 2022-CP-23-_____
	)	
Robert Baddorf, Barbara Briggs and Jo Anne Gregory, individually, and on behalf of all others similarly situated,	)	
	)	**COMPLAINT**
Plaintiffs,	)	**(Defective Construction)**
	)	**(Class Action)**
v.	)	**(Jury Trial Demanded)**
	)	
D.R. Horton, Inc.,	)	
	)	
Defendant.	)	

Plaintiffs, Robert Baddorf, Barbara Briggs and Jo Anne Gregory, individually, and on behalf of all others similarly situated, complaining of the above-named Defendant, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. The Eagles Glen subdivision ("Eagles Glen") is a neighborhood of approximately 128 single-family homes located off Brushy Creek Road in Greenville County, South Carolina.

2. Plaintiff Robert Baddorf ("Plaintiff Baddorf") is a citizen and resident of Greenville County, South Carolina.

3. Plaintiff Baddorf owns a home within Eagles Glen that is located at 123 Noble Wing Lane, Taylors, South Carolina, 29687.

4. Plaintiff Baddorf purchased his home on or about January 31, 2019.

5. Plaintiff Jo Anne Gregory ("Plaintiff Gregory") is a citizen and resident of Greenville County, South Carolina.

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6. Plaintiff Gregory owns a home within Eagles Glen that is located at 115 Crowned Eagle Drive, Taylors, South Carolina, 29687.

7. Plaintiff Gregory purchased her home from the prior homeowner on or about June 7, 2019.

8. Plaintiff Barbara Briggs ("Plaintiff Briggs") is a citizen and resident of Greenville County, South Carolina.

9. Plaintiff Briggs owns a home within Eagles Glen that is located at 116 Crowned Eagle Drive, Taylors, South Carolina, 29687.

10. Plaintiff Briggs purchased her home, along with her husband, Robert Briggs, on or about September 4, 2018.

11. Plaintiffs Baddorf, Briggs and Gregory bring this action on behalf of themselves and a proposed Class of other similarly situated Eagles Glen homeowners (collectively "Plaintiffs" or "Plaintiffs and the Class").

12. Defendant D.R. Horton, Inc. ("D.R. Horton" or "Defendant") is a corporation organized under the laws of the State of Delaware.

13. At all times relevant to this action, D.R. Horton conducted business in Greenville County, South Carolina.

14. D.R. Horton is the developer, builder, and seller of the Plaintiffs' and Class's homes and properties in Eagles Glen ("the Residences").

15. At all times relevant to this action, D.R. Horton coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale, and/or repair of the Residences.

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16. This Honorable Court has jurisdiction over all parties hereto and over all subject matter alleged herein.

17. Venue is proper in Greenville County as the most substantial part of Plaintiffs' and the Class's alleged injuries and D.R. Horton's alleged acts or omissions took place in Greenville County.

18. Plaintiffs are informed and believe that well over two-thirds of the Class are citizens of Greenville County, South Carolina.

19. Plaintiffs are informed and believe that all or nearly all of the Class are citizens of South Carolina.

FACTUAL ALLEGATIONS

20. This matter arises out of the design, development, and construction of the Residences' grading and storm water management (hereinafter collectively "drainage") and repairs to yards, and other components required due to the same.

21. At the time their Certificates of Occupancy were issued, the Residences contained latent and undisclosed drainage defects. The latent and undisclosed defects, in combination with fortuitous weather and repeated water inundation and/or other events, have resulted in consequential damage to non-defective portions of the Residences including non-defective portions of the real property, improvements to the real property, and other damage.

22. D.R. Horton should have known of the existence of the latent defects for many reasons, including their post-construction repair efforts.

23. Plaintiffs and members of the Class have previously put D.R. Horton on notice of one or more of the deficiencies. However, D.R. Horton has not rectified the problems and their various and sundry repair attempts have been inadequate, are failing, or have failed.

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24. A preliminary inspection of the Residences evidences insufficient drainage; inadequate grading; improper sloping; flooding and erosion of the Residences' yards; and, other resulting consequential damage to non-defective building components, other improvements to the real property and other non-defective portions of the real property.

25. D.R. Horton had a duty to design, develop, construct and/or repair the Residences' drainage in a workmanlike manner with suitable materials, free from all defects, and in accordance with the applicable building code, permitted building plans, good workmanship, and construction industry and engineering standards.

26. Plaintiffs are informed and believe that the Residences' drainage is not in compliance with applicable building codes, the permitted plans, proper workmanship, and industry standards and must be corrected or replaced.

27. D.R. Horton's acts and omissions have resulted in the above deficiencies, consequential damages, and partial loss of use and enjoyment.

28. These deficiencies and resulting damages show that D.R. Horton breached its duties to Plaintiffs and the Class.

29. Remedying the above wrongs will result in additional consequential damages and loss of use.

30. As a direct and proximate result of D.R. Horton's violation of its legal duties, Plaintiffs and the Class have been proximately damaged in an amount to be determined by the trier of fact and have had to incur reasonable attorneys' fees and costs for the retention of experts to determine the damage and scope of work for repair.

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31. Upon information and belief, the drainage damages, including flooding and erosion, commenced shortly after completion of the Residences and have occurred and have been occurring in each and every year since commencement.

CLASS ACTION ALLEGATIONS

32. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiffs bring this action, both individually, and on behalf of a Class of similarly situated claimants. The Class is more particularly defined as follows:

> All persons and entities that own a residential lot within the Eagles Glen subdivision in the suburb of Taylors, Greenville County, South Carolina.
>
> Plaintiffs propose that the class be divided into subclasses if, and as necessary, to align class interest.
>
> Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) D.R. Horton and any entity in which D.R. Horton has a controlling interest or which have a controlling interest in D.R Horton and their legal representatives, assigns and successors of D.R. Horton and D.R. Horton's current or former employees, investors, members, or officers; (c) any former Eagles Glen lot owner; (d) any current Eagles Glen homeowner that has previously released the claims set forth herein; and, (e) all persons who properly execute and file a timely request for exclusion from the Class.

33. *Numerosity*: The Class concerns approximately one hundred and twenty-eight (128) properties, owned by people geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of two hundred and fifty members (250) members.

34. *Commonality*: Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

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a. Whether D.R. Horton negligently designed, constructed and/or repaired the Residences' drainage;

b. Whether D.R. Horton breached their implied warranties in connection with the Residences' drainage ;

c. Whether D.R. Horton knew or should have known of the latent defects;

d. Whether D.R. Horton failed to disclose defects and/or unsuccessful repairs;

e. Whether D.R. Horton has acted or refused to act on grounds generally applicable to the Class;

f. Whether D.R. Horton's conduct was reckless, willful, wanton, or the like, entitling Plaintiff Baddorf and the Class to punitive damages.

35. *Typicality*: Plaintiffs' claims are typical of the claims of the Class, as all such claims arise out of D.R. Horton's wrongful conduct in developing, building, and/or repairing the Residences' drainage and Plaintiffs and the Class's ownership of these Residences that contain latent drainage defects.

36. *Adequate Representation*: Plaintiffs will fairly and adequately protect the interests of the Class and have no interests antagonistic to those of the Class. Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex litigation, including class actions involving drainage defects.

37. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the Class predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-

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by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single Court.

38. D.R. Horton has acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because D.R Horton engaged in a uniform and common practice. All Class members have the same legal right to and interest in redress for damages associated with the defective drainage conditions existing at their Residences.

39. Plaintiffs and the Class envision no unusual difficulty in the management of this action as a class action.

40. Each Class member has an interest of more than $100.00.

41. The amount of money at stake for each Class member is not sufficient for each member to hire their own counsel and engineers and bring their own action.

ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

42. D.R. Horton is estopped from relying on any statutes of limitations or repose by virtue of its acts. Upon information and belief, D.R. Horton should have known the Residences' drainage was defectively designed and/or constructed and failed to alert Plaintiffs and the Class of these defective conditions.

43. D.R. Horton had a duty to inform Plaintiffs and the Class of the drainage defects described herein, which they should have known. Notwithstanding its duty, D.R. Horton never disclosed these defects to Plaintiffs or the Class.

44. Despite exercising reasonable diligence, Plaintiffs and the Class could not have discovered the drainage defects at their Residences.

45. Given D.R. Horton's failure to disclose this non-public information about the

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defective nature of the Residences' drainage– information over which they had exclusive control – and because Plaintiffs and the Class could not reasonably have known of the defective nature of their Residences' drainage, D.R. Horton is estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

46. D.R Horton is further estopped from relying upon any statute of limitations as they have repeatedly represented to Plaintiffs and the Class that they had or were correcting the work.

47. The equitable tolling doctrine further precludes D.R. Horton from relying on a statute of limitations defense.

ESTOPPEL FROM ASSERTING THE ARBITRATION PROVISION AND WARRANTY DISCLAIMERS CONTAINED IN D.R. HORTON'S PURCHASE CONTRACTS

48. D.R. Horton is also estopped/barred from asserting the Arbitration Provision and Warranty Disclaimer Provisions contained in D.R. Horton's purchase contracts because these provisions did not survive closing and/or merged with Plaintiff and the Class's deeds.

49. D.R. Horton is also estopped/barred from asserting the Arbitration Provision and Warranty Disclaimer Provisions contained in D.R. Horton's purchase contracts because these provisions are unconscionable and unenforceable.

50. Plaintiffs Baddorf and Brigg's purchase contracts contain the same or similar "Warranties and Disclaimers" and "Arbitration" provisions that the South Carolina Supreme Court has already deemed are "clearly one sided and oppressive". *Smith v. D.R. Horton*, 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

51. Plaintiffs Baddorf and Briggs' purchase contracts attempt to disclaim implied warranty claims and prohibit any monetary damage by providing that D.R. Horton "shall not be liable for any reason, under any circumstances, to Purchaser or anyone claiming through Purchaser for monetary damages of any kind. . .".

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52. Any such provisions purporting to waive all implied warranties and all relief are void pursuant to public policy and South Carolina law.

53. As a result, D.R. Horton cannot rely on their warranty disclaimers, and cannot compel Plaintiffs Baddorf and Briggs or other original purchaser members of the Class into arbitration, based on D.R. Horton's purchase contracts. *Id.* ("We. . .hold the arbitration provision is unconscionable, and thus, unenforceable").

ESTOPPEL FROM ASSERTING THE ARBITRATION PROVISIONS AND WARRANTY LIMITATIONS IN EXPRESS WARRANTIES

54. D.R. Horton is estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in its express warranties because Plaintiffs and the Class do not currently allege a breach of express warranty claim.

55. D.R. Horton is also estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in its express warranties or the like because these provisions and limitations are conflicting, procedurally burdensome, unconscionable, and/or not geared towards an unbiased decision by a neutral decision-maker.

56. D.R. Horton is further estopped/barred from relying on Warranty Limitations contained in its express warranties or the like by virtue of its conduct and such warranties' failure to serve its essential purpose.

57. By virtue of D.R. Horton's acts, the drainage work performed at the Residences has not lived up to D.R. Horton's warranties. Given its defective condition, the drainage of the Residences has not proven to be of reasonable or acceptable quality.

58. D.R. Horton, in the exercise of required diligence, which failed to occur, should have known that the drainage of the Residences was defective, unfit, and unmerchantable.

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59. D.R. Horton's warranties are woefully inadequate to repair and replace the drainage defects, let alone to reimburse for any damage suffered to the Residences' yards and other property. The remedies available in D.R. Horton's warranties are limited to such an extent that they do not provide a minimum adequate remedy and fail their essential purpose.

60. As such, D.R. Horton is precluded from relying on the Arbitration Provisions and Warranty Limitations contained in their express warranties or the like as a defense to the claims asserted herein.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to D.R. Horton)

61. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

62. D.R. Horton, either on its own or through their agents, servants, and employees undertook and owed duties to Plaintiffs in connection with the work it performed on the Residences' drainage.

63. D.R. Horton had a duty to perform their drainage work at the Residences in accordance with applicable codes, approved plans and specifications, industry standards, and in a careful, diligent, and workmanlike manner, free from defects.

64. D.R. Horton also had a duty to provide accurate information about the Residences' drainage and to disclose defective conditions.

65. D.R. Horton breached its duties to Plaintiffs in a manner that was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

a. In failing to use due care in developing and/or constructing the Residences' drainage;

b. In failing to provide adequate drainage for the Residences;

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c. In failing to develop and/or construct the Residences' drainage in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices;

d. In failing to properly supervise the drainage work performed at the Residences;

e. In failing to properly coordinate the subcontractors and trades;

f. In failing to act as a reasonable person would in the circumstances then and there prevailing;

g. In failing to provide accurate information about the Residences' drainage;

h. In failing to make proper repairs; and,

i. Other deficiencies or failures as will be proven at trial.

66. Plaintiffs have been damaged as a direct and proximate result of the negligence, carelessness, recklessness, gross negligence, willfulness, and wantonness of D.R. Horton.

67. The violation of applicable building codes constitutes negligence *per se* and may constitute evidence of gross negligence.

68. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, Plaintiffs are entitled to an award of punitive damages against D.R. Horton.

69. As a result of D.R. Horton's negligence and/or gross negligence, Plaintiffs are entitled to a judgment against D.R. Horton for all actual, direct, indirect, resulting, consequential, and punitive damages in an amount to be determined at the trial of this case.

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranties as to D.R. Horton)

70. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

71. D.R. Horton implicitly warranted that the Residences' drainage would be developed, constructed, and/or repaired in a careful, diligent, and workmanlike manner, with

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suitable materials and components that complied with applicable building codes, industry standards, and industry practice.

72. D.R. Horton implicitly warranted that the Residences' drainage would be merchantable, free from latent defects, and fit for the particular purpose.

73. D.R. Horton breached their implied warranties by developing, constructing, and/or repairing the Residences' drainage in a defective manner as set forth above.

74. As a direct and proximate result of D.R. Horton's breach of its implied warranties, Plaintiffs have been damaged and are entitled to a judgment against D.R. Horton for all actual, direct, indirect, resulting, and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices as to D.R. Horton)

75. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

76. D.R. Horton is a person within the meaning of the South Carolina Unfair Trade Practices Act (the "Act").

77. D.R. Horton developed and sold the Residences and, therefore, engaged in commerce as defined by the Act.

78. D.R. Horton's above-described actions, including placing Residences with defective drainage into the stream of commerce; failing to oversee and control the workmanship and quality of the Residences' drainage; failing to properly repair defective conditions; failing to comply with the building codes, industry standards, and industry practice; attempting to disclaim and eviscerate any and all relief to the owners; and, other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices within the meaning of the Act.

79. D.R. Horton knew or should have known that its conduct was in violation of the Act.

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80. D.R. Horton's conduct is capable of repetition and, upon information and belief and in accord with the allegations herein, has been repeated in the other neighborhoods developed by D.R. Horton.

81. D.R. Horton's conduct adversely affects the public interest as well as many South Carolina citizens.

82. As a direct, foreseeable, and proximate result of D.R. Horton's unfair and deceptive practices, the individual owners of the Residences, including Plaintiffs, have been damaged and are entitled to a judgment against D.R. Horton in amount to be proven at trial.

WHEREFORE, Plaintiffs demand a trial by jury and pray for actual and consequential damages expected to exceed three million five hundred thousand dollars, statutory and punitive damages, reasonable attorneys' fees, costs of suit, prejudgment interest, and granting of such further relief as the Court deems just and proper.

LYLES & ASSOCIATES, LLC

s/ Robert T. Lyles, Jr.
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Attorney for Plaintiffs

July 28, 2022
Mount Pleasant, South Carolina

EXHIBIT B

ELECTRONICALLY FILED - 2026 Apr 06 9:04 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2303974

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

CASE NO. 2022-CP-23-03974

Robert Baddorf, Matthew Crider, Jo Anne Gregory, Luke Hoopes, Vincent Pino, Ronald Rossi, Leandro Soriano, James Stanley, Individually, and on behalf of All Others Similarly Situated,

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

Southern States Resources, LLC, Raby Construction Company, LLC, Builders FirstSource – Southeast Group, LLC, Lansing Building Products, LLC, Cannady's Siding & Gutter, Inc., P&L Enterprises, LLC, Southern Siding & Gutters, LLC, Meridian Brick, LLC,

D.R. HORTON, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUBCLASS CERTIFICATION

General Shale Brick, Inc., M&L Reyna Construction, LLC, Saldana Brothers, Inc., VL Concrete, Inc., Sandlapper Concrete, LLC, Five Star Foundation, LLC, Star Concrete Specialists, LLC, Brundage Bone Concrete Pumping, Inc., RL Grading, Inc., Bold Mountain, LLC f/k/a Bold Mountain, Inc., Kodiak Company, LLC f/k/a Kodiak Construction, LLC, Gun Range Builder, LLC, Signature Scapes, Inc., Long Heating & Air Conditioning, Inc., and L&M Electric, Inc.

Third-Party Defendants.

Bold Mountain d/b/a Kodiak Construction,

Fourth-Party Plaintiff,

v.

Robbins Landscaping, Inc.,

Fourth-Party Defendant.

Southern State Resources, LLC,

Fourth-Party Plaintiff,

v.

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A Grade Above Others, LLC and CCAD, LLC,

Fourth-Party Defendant.

M&L Reyna Construction, LLC,

Fourth-Party Plaintiff,

v.

Jesus Jimenez,

Fourth-Party Defendant.

P& L Enterprises, LLC,

Fourth-Party Plaintiff,

v.

G&A Construction; JNC Siding Contractors, LLC; Agilberto Rubio; Elvin Mejia Cedillo; Adolfo Sales Amaya; Jose Fidel Espinal; and Marlon E. Mejia Cedillo,

Fourth-Party Defendants.

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Builders FirstSource-Southeast Group, LLC, Fourth-Party Plaintiff, v. Silver Line Building Products, Corp., Fourth-Party Defendant.

Defendant D.R. Horton, Inc. ("D.R. Horton") hereby submits this Memorandum in Opposition to Plaintiffs' Motion for Class Certification ("Class Motion"). Plaintiffs' Second Motion for Class Certification. The Motion should be denied, as the Rule 23 prerequisites cannot be met.

I. INTRODUCTION

The primary considerations for certifying a class action are whether (1) the class is so numerous the joinder is impracticable (Numerosity); (2) there are questions of law or fact common to the class such that answering the questions as to a class representative will answer the questions as to all absent class members (Commonality); (3) whether the claims and defenses of the class representatives are typical of the absent class members (Typicality); (4) whether the class representative will fairly represent the interests of the absent class members (Adequacy of Representation); and (5) the amount in controversy exceed one hundred dollars. SCRCP 23. Here, Plaintiffs fall short on four (4) of the five (5) elements.

The first element that must be satisfied is numerosity. As shown below, the numerosity requirement cannot be met because joinder is not impracticable under the facts of this case.

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As to typicality, the defects themselves are not typical to the homes in the neighborhood, In addition, the proposed class representatives do not have typical defects to the remaining putative class members.

Commonality and typicality have been soundly defeated in this case by the work of D.R. Horton's expert witness, Exponent, and by the deposition testimony of the proposed class representatives.

Finally, neither the proposed current counsel nor the current proposed class representative can provide adequate representation to the putative class.

For these reasons and the many others set forth below, a class action is not proper in this case.

II. CLASS ACTION REQUIREMENTS AND LEGAL STANDARD

The general requirements for class certification were addressed at length in D.R. Horton's Memorandum in Opposition to Plaintiffs' First Motion for Class Certification. As set forth above, all of those class certification requirements must still be met, even where there are multiple class or "subclasses."

Even where there are subclasses, the class action was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *Dukes*, 564 U.S. at 348. Rule 23(a), SCRCP, It is also crucial that where there is no South Carolina law, [South Carolina courts] look to the construction placed on the Federal Rules of Civil Procedure." *Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

The burden of establishing any class or subclass is also paramount to the court's consideration of the present subclasses. The party or parties seeking class certification—here, the

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Plaintiffs-- bear the burden of proving the five prerequisites to class actions for each subclass. Rule 23(a), SCRCP; *Waller v. Seabrook Island Prop. Owner's Ass'n*, 300 S.C.465, 467, 388 S.E.2d 799, 801 (1990). "The failure of the proponents to satisfy any one of the prerequisites is fatal to class certification." *Id.* (citing *Tolbert v. Daniel Const. Co.*, 332 F. Supp. 772 (D.S.C. 1971)).

The court must also still conduct a "rigorous analysis" to determine whether the prerequisites for class certification are satisfied. *Id.* at 467, 799 S.E.2d at 801. Because "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiffs' cause of action," this rigorous analysis frequently "**entail[s] some overlap with the merits of the plaintiffs' underlying claim.**" *Dukes*, 564 U.S. at 351. Though class certification should not be "conditioned on the merits of the case," the court may "look beyond the pleadings to the extent necessary to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Clark v. Experian Info. Sols., Inc*., 2001 U.S. Dist. LEXIS 20024, 2001 WL 1946329, at *1 (D.S.C. Mar. 19, 2001).

Failure to satisfy even one element of Rule 23(a) "is fatal to class certification." *Gardner v. S.C. Dep't of Rev*., 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003). The only difference here is that the Court must make the "rigorous analysis" for each subclass.

III. ESSENTIAL FACTS FOR CONSIDERATION

A. Timeline of Case

Attached as **Exhibit 1** is a timeline created to show the events set forth below.

As the Court will no doubt recall, this case began in July of 2022 as a single-issue construction defect case alleging defects in grading and storm water drainage. Plaintiffs hired an expert witness—Rhett Whitlock, --as its "vertical" expert for the neighborhood in **December of**

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2021 to perform an inspection of the properties prior to filing suit. Plaintiffs also then hired Andy Sherard, its "horizontal "or grading/drainage expert, in **December of 2021**. The lawsuit was filed several months later and alleged one defect. It is crucial that the Court realized that **no more defects were alleged or complained about by homeowners until well after this lawsuit was filed**.

As confirmed by one of the Plaintiffs' initial class representatives in his deposition, the Lucey Law Firm was actually representing the original class representatives in this case **from the very beginning**:

3 Q. And who do you understand to be -- well, I
4 think we've already answered that.
5 How did the Lucey law firm become involved
6 in this case?

7 MR. LYLES: Instruct you not to disclose
8 any communication you had with any of your
9 lawyers.1
10 THE WITNESS: Yes, sir.

11 A: When it became clear that we were not going
12 to get anything fixed through D.R. Horton, I
13 started looking for a lawyer because I thought
14 that might be the way to go, among other things.
15 And one of my neighbors -- I talked with some
16 neighbors. One of my neighbors referred me to a
17 guy whose name I can't remember now. Give me a
18 second. I'll remember his name.

19 BY MS. WOOTEN:
20 Q: Sure.
21 A: I can't remember his name. But I emailed --
22 or I called him, and he recommended Dabny [Lynn, of the Lucey Law Firm].

23 Q: And this was after you already had an
24 attorney in the case?

25 A: Oh, no. This was the first contact with an
1 attorney.

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Baddorf deposition, Exhibit 13, pp. 16-17.

. . .

1 Q Okay. So from the very beginning, the Lucey
2 law firm has been involved in this case on behalf of
3 the class?

4 MR. LYLES: Object to the question.
5 Instruct you not to disclose any communication
6 you've had with any of your lawyers.

7 THE WITNESS: Yes.

Baddorf Deposition, p. 18, ll. 1-7 (**Exhibit 13**).

This fact becomes crucial in the adequacy of counsel argument, *infra*. Having already filed a class action against D.R. Horton, the Lucey Law Firm apparently was well aware that it could not file another class action against D.R. Horton (See, disqualification of counsel argument in Adequacy Section, *infra*).

In the meantime, as the Court may be aware, a verdict was entered in the "Rose Hill" case (*Zitek v. D.R. Horton, Inc*., Case No. 2019-CP-04-01942)(although D.R. Horton had obtained a favorable settlement after the Plaintiffs' case was presented). That verdict was entered in September of 2023. Not until after that verdict did the Plaintiffs have Dr. Whitlock make another site visit and allege exact same group of defects that were manufactured into a purported class in the "Rose Hill" case.

After nearly two years of litigating the single-issue drainage defect case, in February 2024, the Plaintiffs officially added the Lucey Law Firm to the case and, out of the blue, filed a motion to amend the complaint and a motion for class certification for numerous newly alleged defects. The new Complaint and Motion were accompanied by previously undisclosed Affidavits from Whitlock and Sherard. By virtue of these Affidavits, the case suddenly morphed from a one-issue

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case to a multi-issue, complex case alleging four (4) more major defects, including concrete cracking; brick defects; stone defects; and window defects.

Despite the pendency of the lawsuit for nearly two years, the Plaintiffs never notified D.R. Horton of the new "defects" alleged by Dr. Whitlock until the Affidavits were filed in February of 2024. Later, and only after pre-certification discovery, D.R. Horton discovered that the additional "inspections" by Dr. Whitlock to support his new allegations had been performed in December of 2023. See, **Exhibit 2** (Whitlock chart depicting at least eight (8) site visits, including December 5 of 2023.)

Plaintiffs' Amended Complaint filed on March 13, 2024, alleged "failure[s] in exterior building envelope (including masonry and siding cladding and fenestration systems)" and "cracking concrete" across the putative class. (Am. Compl. ¶ 24). Plaintiffs allege in the Amended Complaint that these deficiencies have caused water intrusion and other damage to non-defective parts of the residences.

With their Third Amended Complaint, not filed until September 11, 2024, after the Court had entered its discovery order and ordered homeowner surveys to be returned by September 13, 2024, Plaintiffs added additional allegations of "improper ductwork and insulation-related deficiencies". (Third Am. Compl. ¶ 21) ("HVAC issues). Plaintiffs now carry the burden of showing that each of these alleged deficiencies exist in sufficient uniformity across the putative class.

Even as this case continues, the Plaintiffs continue to manufacture "new" defects in an effort to get a class certified, despite more than ten (10) site visits by their experts since 2021 (see, Whitlock Chart, **Exhibit 2**, showing eight (8) site visits prior to the subsequent two (2) site visits

by his company at D.R. Horton's destructive testing). See, D.R. Horton's Motion to Exclude New Alleged Defects, filed herewith.

A. Differences in Construction

D.R. Horton hired individual subcontractors with expertise in different trades to complete construction of the homes. Eagles Glen was built over a five-year period from 2016 to 2020, including the grading and site construction, accomplished by the developer. As a result, the homes throughout Eagles Glen were constructed by different subcontractors and different combinations of subcontractors. In fact, there were at least one hundred fourteen (114) different subcontractors and vendors who supplied labor and/or materials for Eagles Glen. See, Vendor Spend worksheet, previously produced to the Court (the Court may recall that the Vendor Spend worksheet in this case took up an entire box of documents to present during the first class certification hearing).

Homeowners were provided a number of different homes with varying plans to choose from, with varying stories, layouts, garage sizes, and multiple options for exterior materials and window type and placement. Homes have differing combinations of exterior cladding, to include siding, shakes, brick, and stone.

As explained in detail below, there are numerous differences among the homes and subclasses in this neighborhood that prevent class certification:

1. Subsequent purchasers vs. original purchasers;
2. Identity of subcontractors;
3. Type of house plan from among 24 completely different plans;
4. Those with statute of limitations problems s. those without such problems
5. Arbitration clauses for original purchasers in contract with D.R. Horton;
6. Nature and extent of defects;

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EXHIBIT 1

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Timeline of Events

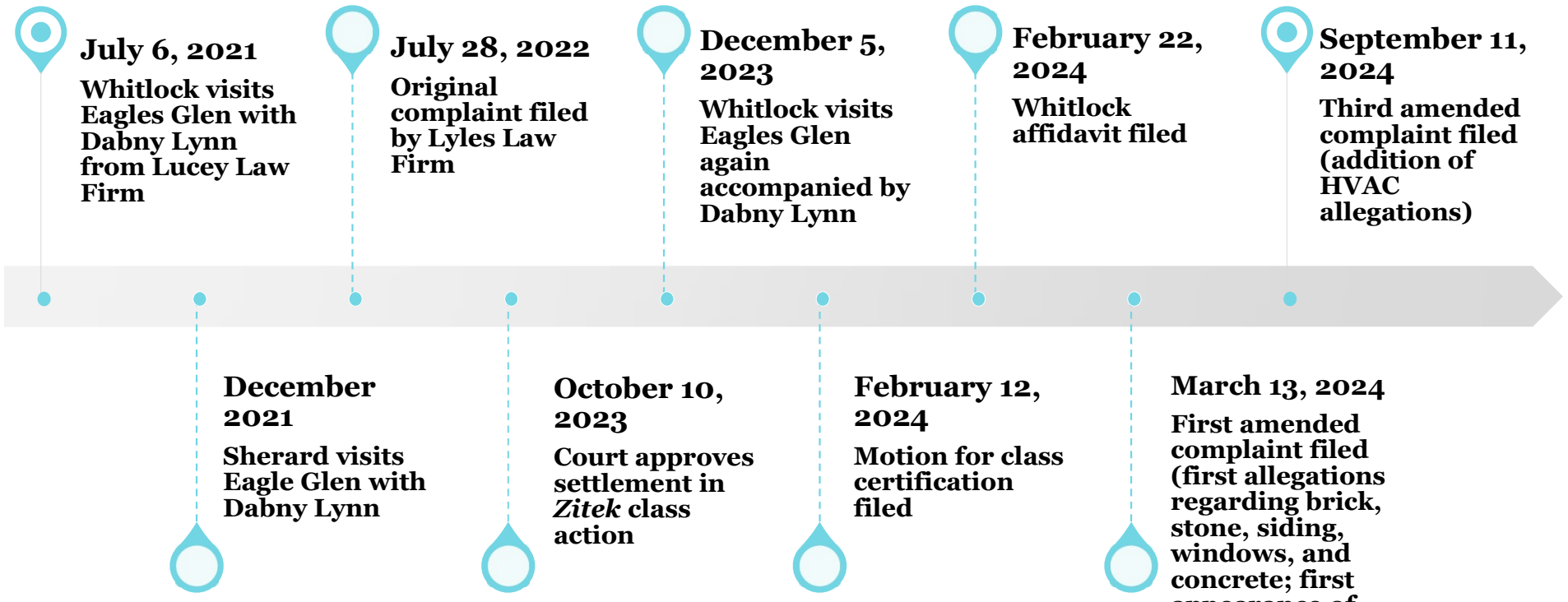


EXHIBIT C

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
CASE NO. 2022-CP-23-03974

Robert Baddorf, Matthew Crider, Jo Anne Gregory, Luke Hoopes, Vincent Pino, Ronald Rossi, Leandro Soriano, James Stanley, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

Southern States Resources, LLC, et al.

Third-Party Defendants.

Bold Mountain d/b/a Kodiak Construction,

Fourth-Party Plaintiff,

v.

Robbins Landscaping, Inc.,

Fourth-Party Defendant.

FOURTH AMENDED SUMMONS
(Defective Construction)
(Class Action)
(Jury Trial Demanded)

Southern State Resources, LLC,

Fourth-Party Plaintiff,

v.

A Grade Above Others, LLC et al.

Fourth-Party Defendants.

M&L Reyna Construction, LLC,

Fourth-Party Plaintiff,

v.

Jesus Jimenez,

Fourth-Party Defendant.

P& L Enterprises, LLC,

Fourth-Party Plaintiff,

v.

G&A Construction, et al.

Fourth-Party Defendants.

Builders FirstSource-Southeast Group, LLC,

Fourth-Party Plaintiff,

v.

Silver Line Building Products, Corp., et al.

Fourth-Party Defendants.

Southern Siding and Gutters, LLC,

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Fourth-Party Plaintiff,

v.

Carlos Ramos, et al.

Fourth-Party Defendants.

Long Heating & Air Conditioning, Inc.,

Fourth-Party Plaintiff,

v.

Soto HVAC, et al.

Fourth-Party Defendants.

Signature Scapes, Inc.,

Fourth-Party Plaintiff,

v.

Reymond H. Cash III d/b/a Steadfast Landscapes n/k/a Steadfast Landworks, LLC, et al.

Fourth-Party Defendants.

Cannady's Siding & Gutter, Inc.,

Fourth-Party Plaintiff,

v.

Arturo Licona Mendoza, et al.

Fourth-Party Defendants.

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TO: THE ABOVE-NAMED DEFENDANT

YOU ARE HEREBY SUMMONED and required to Answer the Fourth-Amended Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint on the subscriber, at the address shown below, within fifteen (15) days after service hereof, not including the day of such service, and if you fail to answer the complaint within the time stated above, judgment by default will be rendered against you for the relief demanded in the complaint.

LYLES & ASSOCIATES, LLC

s/ Joseph Daniel Winterstein
Robert T. Lyles, Jr. (SC Bar # 10299)
Joseph D. Winterstein (SC Bar # 105344)
2113 Middle Street, Suite 202
Sullivan's Island, South Carolina 29482
843-577-7730
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and

JUSTIN O'TOOLE LUCEY, P.A.

Justin O'Toole Lucey (SC Bar # 15438)
Dabny Lynn (SC Bar # 78703)
Charlotte B. Winckler (SC Bar # 105887)
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Attorneys for Plaintiffs

November 13, 2025
Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Robert Baddorf, Matthew Crider, Jo Anne Gregory, Luke Hoopes, Vincent Pino, Ronald Rossi, Leandro Soriano, James Stanley, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

Southern States Resources, LLC, et al.

Third-Party Defendants.

Bold Mountain d/b/a Kodiak Construction,

Fourth-Party Plaintiff,

v.

Robbins Landscaping, Inc.,

Fourth-Party Defendant.

Southern State Resources, LLC,

Fourth-Party Plaintiff,

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
CASE NO. 2022-CP-23-03974

FOURTH AMENDED COMPLAINT
(Defective Construction)
(Class Action)
(Jury Trial Demanded)

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v.

A Grade Above Others, LLC, et al.

Fourth-Party Defendants.

M&L Reyna Construction, LLC,

Fourth-Party Plaintiff,

v.

Jesus Jimenez,

Fourth-Party Defendant.

P& L Enterprises, LLC,

Fourth-Party Plaintiff,

v.

G&A Construction, et al.

Fourth-Party Defendants.

Builders FirstSource-Southeast Group, LLC,

Fourth-Party Plaintiff,

v.

Silver Line Building Products, Corp., et al.

Fourth-Party Defendants.

Southern Siding and Gutters, LLC,

Fourth-Party Plaintiff,

v.

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Carlos Ramos, et al.

Fourth-Party Defendants.

Long Heating & Air Conditioning, Inc.,

Fourth-Party Plaintiff,

v.

Soto HVAC, et al.

Fourth-Party Defendants.

Signature Scapes, Inc.,

Fourth-Party Plaintiff,

v.

Reymond H. Cash III d/b/a Steadfast Landscapes n/k/a Steadfast Landworks, LLC, et al.

Fourth-Party Defendants.

Cannady's Siding & Gutter, Inc.,

Fourth-Party Plaintiff,

v.

Arturo Licona Mendoza, et al.

Fourth-Party Defendants.

Plaintiffs, Robert Baddorf, Matthew Crider, Jo Anne Gregory, Luke Hoopes, Vincent Pino, Ronald Rossi, Leandro Soriano, James Stanley, individually, and on behalf of all others similarly

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situated, complaining of the above-named Defendant, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. The Eagles Glen subdivision ("Eagles Glen") is a neighborhood of approximately 127 single-family homes located off Brushy Creek Road in Greenville County, South Carolina.

2. Plaintiff Robert Baddorf, as trustee of the Petra Baddorf Family Trust ("Plaintiff Baddorf"), is a citizen and resident of Greenville County, South Carolina.

3. Plaintiff Baddorf owns a home within Eagles Glen that is located at 123 Noble Wing Lane, Taylors, South Carolina, 29687.

4. Plaintiff Baddorf purchased his home on or about January 31, 2019.

5. Plaintiff Matthew Crider ("Plaintiff Crider") is a citizen and resident of Greenville County, South Carolina.

6. Plaintiff Crider owns a home within Eagles Glen that is located at 211 Talon Court, Taylors, South Carolina, 29687.

7. Plaintiff Crider purchased his home from the prior homeowner on or about November 14, 2017.

8. Plaintiff Jo Anne Gregory ("Plaintiff Gregory") is a citizen and resident of Greenville County, South Carolina.

9. Plaintiff Gregory owns a home within Eagles Glen that is located at 115 Crowned Eagle Drive, Taylors, South Carolina, 29687.

10. Plaintiff Gregory purchased her home from the prior homeowner on or about June 7, 2019.

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11. Plaintiff Luke Hoopes ("Plaintiff Hoopes") is a citizen and resident of Greenville County, South Carolina.

12. Plaintiff Hoopes owns a home within Eagles Glen that is located at 200 Talon Court, Taylors, South Carolina, 29687.

13. Plaintiff Hoopes purchased his home from the prior homeowner on or about June 14, 2024.

14. Plaintiff Vincent Pino ("Plaintiff Pino") is a citizen and resident of Greenville County, South Carolina.

15. Plaintiff Pino owns a home within Eagles Glen that is located at 117 Noble Wing Lane, Taylors, South Carolina, 29687.

16. Plaintiff Pino purchased his home from the prior homeowner on or about November 21, 2022.

17. Plaintiff Ronald Rossi ("Plaintiff Rossi") is a citizen and resident of Greenville County, South Carolina.

18. Plaintiff Rossi owns a home within Eagles Glen that is located at 11 Noble Wing Lane, Taylors, South Carolina, 29687.

19. Plaintiff Rossi purchased his home on or about May 20, 2019.

20. Plaintiff Leandro Soriano ("Plaintiff Soriano") is a citizen and resident of Greenville County, South Carolina.

21. Plaintiff Soriano owns a home within Eagles Glen that is located at 110 Crowned Eagle Drive, Taylors, South Carolina, 29687.

22. Plaintiff Soriano purchased his home on or about November 20, 2017.

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23. Plaintiff James Stanley ("Plaintiff Stanley") is a citizen and resident of Greenville County, South Carolina.

24. Plaintiff Stanley owns a home within Eagles Glen that is located at 210 Talon Court, Taylors, South Carolina, 29687.

25. Plaintiff Stanley purchased his home from the prior homeowner on or about March 24, 2022.

26. Plaintiffs Baddorf, Crider, Gregory, Hoopes, Pino, Rossi, Soriano, and Stanley bring this action on behalf of themselves and proposed Classes of other similarly situated Eagles Glen homeowners, (collectively "Plaintiffs" or "Plaintiffs and the Classes").

27. Defendant D.R. Horton, Inc. ("D.R. Horton") is a corporation organized under the laws of the State of Delaware.

28. At all times relevant to this action, D.R. Horton conducted business in Greenville County, South Carolina.

29. D.R. Horton is the developer, builder, and seller of the Plaintiffs' and Class's homes and properties in Eagles Glen ("the Residences").

30. At all times relevant to this action, D.R. Horton coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale, and/or repair of the Residences.

31. This Honorable Court has jurisdiction over all parties hereto and over all subject matter alleged herein.

32. Venue is proper in Greenville County as the most substantial part of Plaintiffs' and the Classes' alleged injuries and Defendant's alleged acts or omissions took place in Greenville County.

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33. Plaintiffs are informed and believe that well over two-thirds of the Class are citizens of Greenville County, South Carolina.

34. Plaintiffs are informed and believe that all or nearly all of the Class are citizens of South Carolina.

FACTUAL ALLEGATIONS

35. This matter arises out of the design, development, construction, sale and/or repair of the Residences.

36. At the time their Certificates of Occupancy were issued, the Residences contained latent and undisclosed defects. The latent and undisclosed defects, in combination with fortuitous weather and other events, have resulted in consequential damage to non-defective portions of the Residences and the real property on which they are located.

37. D.R. Horton should have known of the existence of the latent defects for many reasons, including its post-construction repair efforts.

38. Plaintiffs and members of the Class have previously put D.R. Horton on notice of one or more of the deficiencies. However, D.R. Horton has not rectified the problems and its various and sundry repair attempts have been inadequate, are failing, or have failed.

39. A preliminary inspection of the Residences evidences insufficient storm water drainage; failure in exterior building envelope (including masonry and siding cladding and fenestration systems); cracking concrete; improper ductwork and insulation-related deficiencies; failure of other building components; water intrusion; and, consequential damage to non-defective building components.

40. D.R. Horton had a duty to design, develop, construct and/or repair the Residences in a workmanlike manner with suitable materials, free from all defects, and in accordance with the

applicable building codes, permitted building plans, good workmanship, and construction industry and engineering standards.

41. D.R. Horton, both as general contractor, and by placing the Residences into the stream of commerce, is directly and vicariously liable for the defective and faulty work of its subcontractors or "partners".

42. Plaintiffs are informed and believe that various building components of the Residences, including those listed above, are not in compliance with applicable building codes, the permitted plans, proper workmanship, and industry standards and must be corrected or replaced.

43. D.R. Horton's acts and omissions have resulted in the above deficiencies, consequential damages, and partial loss of use and enjoyment.

44. These deficiencies and resulting damages show that D.R. Horton breached its duties to Plaintiffs and the Classes.

45. By its conduct, D.R. Horton has damaged Plaintiffs as Plaintiffs must either pay to repair the defects, or disclose the existence of the defects to subsequent purchasers and suffer the consequential loss of resale value by burdening the purchaser with the defects.

46. Remedying the above wrongs will result in additional consequential damages and loss of use.

47. As a direct and proximate result of D.R. Horton's violation of legal duties, Plaintiffs and the Classes have been proximately damaged in an amount to be determined by the trier of fact and have had to incur reasonable attorneys' fees and costs for the retention of experts to determine the damage and scope of work for repair.

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48. Upon information and belief, the resulting damage from the above deficiencies commenced shortly after the Residences were initially completed and/or sold and remained latent until later manifestation.

CLASS ACTION ALLEGATIONS

49. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiffs bring this action, both individually, and on behalf of seven Classes (or subclasses) of similarly situated claimants. These Classes are more particularly defined as follows:

a. Window: Owners of all Residences;

b. Siding: Owners of all Residences;

c. Concrete/Radon: Owners of all Residences;

d. Grading/Stormwater Drainage: Owners of all Residences;

e. HVAC: Owners of all Residences;

f. Stone: Owners of the 93 Residences clad in part with stone veneer; and

g. Brick: Owners of the 27 Residences clad in part with brick veneer

These Classes exclude 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner who has released the claims set forth herein; and 3) all persons who execute and timely file a request for exclusion from the Classes (as to all or any class).

50. *Numerosity*: These Classes collectively concern approximately one hundred and twenty-seven (127) properties, owned by people geographically dispersed throughout the State of South Carolina. Each of these Classes are expected to include between forty (40) members and one hundred and ninety members (190) members, inclusive of co-owners), the joinder of whom in one action is impractical.

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a. The window, siding, concrete/radon, storm water drainage, and HVAC subclasses each concern all of the Residences and are expected to exceed one hundred and ninety members;

b. The stone subclass concerns 93 of the Residences and is expected to exceed 130 members; and,

c. The brick subclass concerns 27 of the Residences and is expected to exceed 40-members.

51. *Commonality*: There are common contentions/claims that bind these homeowners' claims to "determinative issues", including, by way of example and not by limitation:

a. The common contention that every class member is injured having purchased a home that contains latent defects, i.e., components which do not comply with the building code, D.R. Horton's permitted plans, industry standards, and/or good workmanship, the non-compliance which must be repaired or disclosed upon resale;

b. The common question of whether D.R. Horton's construction and sale of these homes with defective components breached D.R. Horton's implied warranties;

c. The common question of whether D.R. Horton's conduct in the construction and sale of these homes constituted negligence/gross negligence;

d. The common contention that D.R. Horton's standard construction practices and/or uniform "hands-off" policy caused or contributed to these defects and injured homeowners; [1]

e. The common contention that these homes require similar repairs that can be estimated using a single damage model;

f. The common contention that these homeowners are entitled to recovery for the loss of use of their homes while repairs are underway; and/or

g. Within each class/subclass, there are common defects giving rise to common claims, for example:

i. Siding: siding that is cracked, improperly fastened, discolored, and/or improper clearance from the ground/hardscape;

[1] D.R. Horton has repeatedly defended construction claims in this and other cases with the mantra that it relies upon the expertise of its subcontractors.

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ii. Window: windows that have fractured vinyl frames, displaced or damaged compression pads in the joint slots, and missing AAMA Certification labels;

iii. Concrete/Radon: cracked concrete foundations and garages that are not sealed in accordance with the construction documents, and /or industry standards;

iv. Grading and stormwater drainage: yards that are improperly sloped yards, inadequate drainage, and failure to follow the permitted drainage plans;

v. HVAC: ductwork that is improperly installed, inadequate insulation, and/or ducts that are dirty with construction debris/dirt/dust because they were not protected during construction.

vi. Brick: missing through wall flashing, brick that is improperly supported, and brick that is poorly/improperly weeped; and

vii. Stone: missing through wall flashing, stone that is not properly adhered, improper clearance between stone and hardscape/landscape, and stone that is missing weep screeds.

52. *Typicality*: Each named Plaintiffs' claims are typical of his/her Class's claims because all have allegedly suffered similar types of injuries (certain construction defects and repair costs) based on a similar set of facts (building code violations and D.R. Horton's building practices) which produces similar legal theories (violation of D.R. Horton's legal duties and implied warranties).

53. *Adequate Representation*: Each Plaintiff will fairly and adequately protect the interests of the Class he/she represents. No Plaintiff has interests antagonistic to the members of the Class that each Plaintiff is nominated to represent (or of any other class). Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex

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litigation, including class actions involving construction defects. The proposed class representatives are as follows: [2]

a. Window: Plaintiff Rossi;

b. Siding: Plaintiff Stanley;

c. Concrete/Radon: Plaintiff Rossi and Plaintiff Crider;

d. Stormwater: Plaintiff Pino;

e. HVAC: Plaintiff Crider;

f. Stone: Plaintiff Soriano; and

g. Brick: Plaintiff Hoopes;

h. Plaintiffs Gregory and Baddorff are nominated to serve as co-representatives of one or more of the foregoing classes; and;

i. Additionally, as the Court has indicated its preference for seven classes in lieu of the two to three suggested by Plaintiffs, Plaintiffs may nominate additional representatives to, inter alia, ensure continuity in representation over the expected duration of this suit.

54. *Superiority*: This class action with segregated defect classes is appropriate for certification because a class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of each of the Classes is impracticable. Should individual Class members be required to bring separate actions for separate defects, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management

[2] Plaintiffs reserve the right to supplement/change these designations in compliance with SCRCP and other legal precedent.

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difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single court.

55. D.R. Horton has acted on grounds generally applicable to each of the Classes. Class certification is appropriate under South Carolina law because D.R. Horton engaged in a uniform and common practice, it is undisputed that D.R. Horton placed all homes into South Carolina's stream of commerce, and it is undisputed that these homes are all governed by the same building code (the 2015 IRC) and the same permitted plans. All Class members in each class have the same legal right to and interest in redress for damages associated with the defective conditions existing at their Residences in each class (some residents may not be a part of the slightly smaller stone class nor the 40 plus person brick class).

56. Plaintiffs and the Classes envision no unusual difficulty in the management of this action as a class action.

57. Each Class member has an interest of more than $100.00 in his/her respective claim in each class.

58. The amount of money at stake for each Class member is not sufficient for each member to hire their own counsel and engineers and bring their own action.

ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

59. D.R. Horton is estopped from relying on any statutes of limitations or repose by virtue of its acts. Upon information and belief, D.R. Horton should have known the Residences were defectively designed and/or constructed and failed to alert Plaintiffs and the Classes of these defective conditions.

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60. D.R. Horton had a duty to inform Plaintiffs and the Classes of the defects described herein, which it should have known. Notwithstanding its duty, D.R. Horton never disclosed these defects to Plaintiffs or the Class.

61. Despite exercising reasonable diligence, Plaintiffs and the Classes could not have discovered the defects at their Residences.

62. Given D.R. Horton's failure to disclose this non-public information about the defective nature of the Residences – information over which it had exclusive control – and because Plaintiffs and the Classes could not reasonably have known of the defective nature of their Residences, D.R. Horton is estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

63. D.R Horton is further estopped from relying upon any statute of limitations as it has repeatedly represented to Plaintiffs and the Classes that it had or was correcting the work.

64. The equitable tolling doctrine further precludes D.R. Horton from relying on a statute of limitations defense.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to D.R. Horton)

65. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

66. D.R. Horton, either on its own or through its agents, servants, and employees, undertook and owed duties to Plaintiffs in connection with the work it performed on the Residences.

67. D.R. Horton had a duty to perform its work at the Residences in accordance with applicable codes, approved plans and specifications, industry standards, and in a careful, diligent, and workmanlike manner, free from defects.

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68. D.R. Horton also had a duty to provide accurate information about the Residences and to disclose defective conditions.

69. D.R. Horton breached its duties to Plaintiffs in a manner that was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

a. In failing to use due care in designing, specifying, and constructing the Residences;

b. In constructing Residences with the above identified latent defects;

c. In failing to develop and/or construct the Residences in accordance with applicable building codes, permitted plans, standard building practices, and accepted construction and design industry standards and practices;

d. In failing to properly supervise and coordinate the subcontractors and trades;

e. In failing to provide accurate information about the Residences;

f. In failing to make proper repairs; and,

g. Other deficiencies or failures as will be proven at trial.

70. Plaintiffs have been damaged as a direct and proximate result of the negligence, carelessness, recklessness, gross negligence, willfulness, and wantonness of D.R. Horton.

71. The violation of applicable building codes constitutes negligence *per se* and may constitute evidence of gross negligence.

72. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, Plaintiffs are entitled to an award of punitive damages against D.R. Horton.

73. As a result of D.R. Horton's negligence and/or gross negligence, Plaintiffs are entitled to a judgment against D.R. Horton for all actual, direct, indirect, resulting, consequential, and punitive damages in an amount to be determined at the trial of this case.

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FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranties as to D.R. Horton)

74. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

75. D.R. Horton implicitly warranted that the Residences would be developed, constructed, and/or repaired in a careful, diligent, and workmanlike manner, with suitable materials and components that complied with applicable building codes, plans, industry standards, and industry practice.

76. D.R. Horton implicitly warranted that the Residences would be merchantable, free from latent defects, fit for the particular purpose, and habitable.

77. D.R. Horton breached its implied warranties by developing, constructing, and/or repairing the Residences in a defective manner as set forth above.

78. As a direct and proximate result of D.R. Horton's breach of its implied warranties, Plaintiffs have been damaged and are entitled to a judgment against D.R. Horton for all actual, direct, indirect, resulting, and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices as to D.R. Horton by Individual Plaintiffs)

79. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

80. D.R. Horton is a person within the meaning of the South Carolina Unfair Trade Practices Act (the "Act").

81. D.R. Horton developed and sold the Residences and, therefore, engaged in commerce as defined by the Act.

82. D.R. Horton's above-described actions, including placing Residences with defects into the stream of commerce; failing to oversee and control the workmanship and quality of the Residences; failing to properly repair defective conditions; failing to comply with the building

codes, industry standards, and industry practice; attempting to disclaim and eviscerate any and all relief to the owners; and, other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices within the meaning of the Act.

83. D.R. Horton knew or should have known that its conduct was in violation of the Act.

84. D.R. Horton's conduct is capable of repetition and, upon information and belief and in accord with the allegations herein, has been repeated in the other neighborhoods developed by D.R. Horton.

85. D.R. Horton's conduct adversely affects the public interest as well as many South Carolina citizens.

86. As a direct, foreseeable, and proximate result of D.R. Horton's unfair and deceptive practices, the individual Plaintiffs have been damaged and are entitled to a judgment against D.R. Horton in amount to be proven at trial, together with treble damages and attorney fees.

WHEREFORE, Plaintiffs demand a trial by jury and pray for actual and consequential damages for each class, cumulatively expected to exceed fifteen million dollars, statutory and punitive damages, reasonable attorneys' fees, costs of suit, prejudgment interest, and granting of such further relief as the Court deems just and proper.

[signature on following page]

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Respectfully submitted,

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Attorneys for Plaintiffs

November 13, 2025
Mount Pleasant, South Carolina

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EXHIBIT D

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Robert Baddorf and Jo Anne Gregory, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

Southern States Resources, LLC, Raby Construction Company, LLC, Builders FirstSource – Southeast Group, LLC, Lansing Building Products, LLC, Cannady's Siding & Gutter, Inc., P&L Enterprises, LLC, Southern Siding & Gutters, LLC, Meridian Brick, LLC, General Shale Brick, Inc., M&L Reyna Construction, LLC, Saldana Brothers, Inc., VL Concrete, Inc., Sandlapper Concrete, LLC, Five Star Foundation, LLC, Star Concrete Specialists, LLC, Brundage Bone Concrete Pumping, Inc., RL Grading, Inc., Bold Mountain, LLC f/k/a Bold Mountain, Inc., Kkodiak Company, LLC f/k/a Kodiak Construction, LLC, Gun Range Builder, LLC, and Signature Scapes, Inc.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
CASE NO. 2022-CP-23-03974

ORDER

Bold Mountain d/b/a Kodiak Construction,

Fourth-Party Plaintiff,

v.

Robbins Landscaping, Inc.,

Fourth-Party Defendant.

Southern State Resources, LLC,

Fourth-Party Plaintiff,

v.

A Grade Above Others, LLC and CCAD, LLC,

Fourth-Party Defendant.

M&L Reyna Construction, LLC,

Fourth-Party Plaintiff,

v.

Jesus Jimenez,

Fourth-Party Defendant.

P& L Enterprises, LLC,

Fourth-Party Plaintiff,

v.

G&A Construction; JNC Siding Contractors, LLC; Agilberto Rubio; Elvin Mejia Cedillo; Adolfo Sales Amaya; Jose Fidel Espinal; and Marlon E. Mejia Cedillo,

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Fourth-Party Defendants.

Builders FirstSource-Southeast Group, LLC,

Fourth-Party Plaintiff,

v.

Silver Line Building Products, Corp.,

Fourth-Party Defendant.

ORDER DENYING CLASS CERTIFICATION

This matter is before the Court on Robert Baddorf and Jo Anne Gregory's ("Plaintiffs") Motion for Class Certification. The Court heard oral arguments regarding Plaintiffs' Motion for Class Certification on March 24, and March 25, of 2025 and recorded the hearings via Webex. After an opportunity to review all pleadings, memorandums in support and in opposition thereto, as well as the supporting documentation provided by counsel, and consideration of oral arguments and relevant case law, this Court finds that Plaintiffs have failed to satisfy the prerequisites for a class action as set forth in Rule 23(a), SCRCP. For reasons set forth more fully herein, Plaintiffs' Motion for Class Certification is hereby Denied.

RELEVANT FACTUAL BACKGROUND AND PROCEDURAL BACKGROUND

This is a putative class action in which Plaintiffs allege numerous defects in construction of one hundred twenty-seven (127) single-family homes in Eagles Glenn Subdivision in Greenville County, South Carolina. The subdivision was built by Defendant, D.R. Horton, Inc. (D.R. Horton), over a period of five (5) years, from 2016 to 2020. Plaintiffs argue that this Court should grant class certification because it potentially involves one hundred twenty-seven (127) homeowners who own homes in the Eagles Glenn neighborhood built by D.R. Horton that are "riddled" with similar building code violations and latent and patent defects that require similar repairs.

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This case began in July 2022 as a single-issue construction defect case alleging defects in grading and storm water drainage. In February 2024, an Amended Complaint was filed on March 13, 2024 and Motion for Class Certification for numerous alleged defects changed this case from a single-issue case to a multi-issue, complex case, which alleged four more major defects including concrete cracking, brick defects, stone defects and window defects. This Court issued an August 6, 2024 Discovery Plan Order permitting D.R. Horton to send "pre-certification surveys" out to all homeowners. A Third Amended Complaint was filed September 11, 2024, in which Plaintiffs added additional allegations of "improper duct work and insulation- related deficiencies." (Third Am. Compl., paragraph 21). Plaintiffs have identified eight (8) completely distinct issues/defects that involve: (1) Brick; (2) Stone; (3) Concrete garages; (4) Concrete foundation cracking; (5) Windows; (6) Siding; (7) Storm water drainage; and, (8) HVAC issues.

Plaintiffs moved to certify this case as a class action under Rule 23 of South Carolina Rules of Civil Procedure. Plaintiffs propose the Court certify the class under the following definition:

> *All persons and entities that own single-family house developed/built by D.R. Horton within the Eagles Glenn subdivision in Taylors, South Carolina.*
>
> *This class excludes 1) any affiliate or current employee of D.R. Horton 2.) Any current Eagles Glenn owner that has a pending suit against D.R. Horton or who has released the claims set forth herein; and, 3) All persons who properly execute and file a timely request for exclusion from the class.*

See Plaintiffs' Third Amended Summons and Complaint Pg. 10.

Plaintiffs argue that the proposed class satisfies the elements of Rule 23, SCRCP, and that class certification is appropriate in this case.

LAW

The class action is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S.Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–

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701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id*. (citing *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Califano v. Yamasaki*, 442 U.S. 682, 701, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176. In such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. . . " *Id*.

Rule 23(a), SCRCP, ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The mandatory prerequisites for class actions are found in Rule 23, SCRCP, which states:

> Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if the Court finds 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4) the representative parties will fairly and adequately protect the interest of the claims; and, 5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds $100.00 for each member of the class

Rule 23(a), SCRCP.

The first four of these five requirements are typically referred to, respectively, as the numerosity, commonality, typicality, and adequacy of representation requirements. In pursuing class certification, Plaintiffs bear the burden of "proving the five requirements" and "the Court must apply a rigorous analysis to determine each prerequisite is satisfied." *Gardner v. South*

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Carolina Department of Revenue 353 S.E.1, 20-21, 577 SE2d 190, 200 (2003) Failure to satisfy even one of the five requirements is fatal to class certification. *Id.*

ANALYSIS

Plaintiffs argue that this case mirrors another upstate case, *Zitek v. D.R. Horton*, et al, which involved a neighborhood of Two Hundred Twenty (220) homeowners with the same claims against the same builder, which was certified as a class. The Court is not persuaded by this.

Numerosity

Plaintiffs' Third Amended Summons and Complaint alleges:

> "The Class concerns approximately 128 properties, owned by people geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of (200) members."

See Plaintiffs' Third Amended Summons and Complaint Pg. 11.

Rule 23(a)(1), SCRCP, requires the class to be so numerous that joinder of all members is impracticable. The difficulty inherent in joining as few as forty (40) class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet Rule 23(a)(1)'s "numerosity" element. *Newberg on Class Actions* § 3:12 ("[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone."). The named Plaintiffs have shown the potential class involves approximately one hundred twenty-eight (128) properties and is expected to be in excess of two hundred (200) members when spouses and co-owners are considered.[1] Furthermore, the potential damages of each proposed claim exceed one hundred dollars ($100.00) for each proposed class member. Since the class of potential plaintiffs

[1] The Court is aware that the exact number of properties involved in this matter is one hundred twenty-seven (127) as argued by D.R. Horton during the hearing; however, for purposes of analyzing numerosity the Court believes the number is a difference without a distinction given that both numbers are well above forty (40).

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is so numerous as to make joinder of all its members in a single lawsuit impracticable, the required numerosity showing has been made.

Commonality

The Plaintiffs allege that D.R. Horton defectively designed and constructed homes in Eagles Glen subdivision and that as many as eight (8) defects related (1) Brick; (2) Stone; (3) Concrete garages; (4) Concrete foundation cracking; (5) Windows; (6) Siding; (7) Storm water drainage; and (8) HVAC issues have been discovered in the homes post-construction. Due to the alleged defects, the Plaintiffs have brought causes of action against D.R. Horton for negligence and gross negligence; breach of implied warranties; and violations of the South Carolina Unfair Trade Practices Act on behalf of all of the people that own a single-family house developed/built by D.R. Horton within the Eagles Glenn subdivision. The class representatives claim that the common legal and factual issues that bind the class together are:

a. Whether D.R. Horton negligently designed, constructed and/or repaired the Residences;
b. Whether D.R. Horton breached their implied warranties in connection with the Residences;
c. Whether D.R. Horton knew or should have known of the latent defects;
d. Whether D.R. Horton failed to disclose defects and/or unsuccessful repairs;
e. Whether D.R. Horton has acted or refused to act on grounds generally applicable to the Class;
f. Whether D.R. Horton's conduct was reckless, willful, wanton, or the like, entitling Plaintiffs and the Class to punitive damages.

See Plaintiffs Third Amended Summons and Complaint pg. 11.

Plaintiffs' Complaint attempts to bind the class representatives claims with the proposed class members claims by generally articulating eight (8) separate and unrelated alleged construction defects as one (1) all-encompassing class action against D.R. Horton for defectively designing and constructing their residences. The Plaintiffs believe that each of the alleged defects

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can be traced to a single common issue that binds all of the Plaintiffs' claims together—D.R. Horton's standard design and construction practices. The Court disagrees.

Commonality is established by a party showing "there are questions of law or fact common to the class." Rule 23(a)(2), SCRCP. The party seeking class certification "must articulate the existence 'significant common, legal, or factual issues' which bind the proposed class together." *Gardner v. S.C. Dept. of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003)(citing *Boggs v. Divested Atomic Corp.*, 141 F.R. D. 58, 64 (S.D. Ohio (1991)). "Critically, '[n]ot every issue in the case must be common to all class members.'" *Id.* (citing *O'Connor v. Boeing North Amer., Inc.*, 184 F.R.D. at 311, 329 (C.D.Cal.1998)). "Commonality is met only where the class shares a determinative issue." *Id.* at 21, 577 S.E.2d at 200–201 (2003); *see also Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir.1990) (finding "certification is only proper when a determinative critical issue overshadows all other issues" and that "question[s] [that are] in no way dispositive and [which] simply propels the action into a posture where judicial scrutiny is necessary for just adjudication" are insufficient to establish commonality under Rule 23(a)(2), FRCP); *Peoples v. Wendover Funding Inc.*, 179 F.R.D. 492, 498 (D.Md.1998) ("[A] representative plaintiff cannot establish commonality ... if the court must investigate each plaintiff's individual claim.").

Factual differences among the class members' cases will not preclude certification if the class members share the same legal theory. *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 498, (D. Md. 1998) *(citing Brown v. Eckerd Drugs*, Inc., 663 F.2d 1268, 1275 (4th Cir.1981), vacated on other grounds, 457 U.S. 1128, 102 S.Ct. 2952, 73 L.Ed.2d 1345 (1982); see also DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1174 (8th Cir.1995) (commonality satisfied where class members had differing mortgage contracts with defendant, but all alleged over-escrowing of funds)). Moreover, commonality requires the Plaintiffs to demonstrate that the class members

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"have suffered the same injury," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (citing *General Telephone Co. of Southwest v. Falcon*, 457 US 147,102 S.Ct. 2364, 72 L.Ed.2d 740). The very purpose of a class action is to avoid the necessity of requiring individual members to prove the elements of the cause of action. *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978). The claims must depend upon a common contention and it must be of such a nature that it is capable of class wide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2552, 180 L. Ed. 2d 374 (2011).

In this case, the pre-class certification homeowner surveys indicate that each home allegedly has a unique mix of alleged defects that will need to be individually considered when evaluating each of the proposed class members' claims. Thus, not all of the factual issues or legal theories alleged by the class representatives are shared by all of the proposed class members. For example, ninety-six (96) homeowners represent that their homes have insufficient storm drainage issues; eighty-six (86) homeowners report foundation issues; sixty-four (64) homeowners allege issues with siding; forty-one (41) homeowners represent that their homes have defective windows. Eighteen (18) homeowners indicated that they had issues with drainage, foundation, siding, and windows; forty-six (46) homeowners only indicated problems with three of the issues listed above; thirty-two (32) homeowners indicated problems with two of these issues; and thirty-one (31) homes indicated experiencing issues with only one alleged defect.

Given that not all of the proposed class members have suffered the same injuries from the same defects, not all of the Plaintiffs share the same interests in resolving every claim alleged by the class representatives. Since the Plaintiffs do not share the same interests in resolving every

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claim alleged, class certification would inevitably lead to conflicts among the class members who only have an interest in litigating issues that will lead to making them whole again. While the class representatives are correct that each proposed class member will ultimately have to prove that D.R. Horton defectively designed or constructed their particular home in one way or another, the claims lack a central common contention that binds all of the alleged defects to a determinative issue that would make class certification appropriate in this case.

Since there are many different factual issues and legal theories that not shared by each proposed class member the Court believes that class certification is not appropriate and would create confusion for the Court and for potential jurors if the case were to proceed to trial. The Court derives its decision in part from the Supreme Court of Nevada's reasoning in *Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530 (2005)* due to the many legal and factual similarities between the cases. In *Shuette,* three homeowners brought a class action law suit on behalf of two hundred six (206) homeowners in a residential subdivision against Defendant Beazer Homes Holdings Corp. and Beazer Homes Nevada (Beazer Homes), the home builder of the residential subdivision, on grounds that their houses were being damaged by expansive soils, as well as thirty (30) additional constructional defects unrelated to the soils condition. *Id*. at 843, 124 P.3d 535. The homeowners' Complaint asserted breach of express and implied warranties, negligence, and negligent misrepresentation as theories of liability. *Id*. Plaintiffs sought class certification and the Judge assigned to the case granted class certification. *Id*. After final judgment, the Defendant Beazer Homes Appealed. *Id*. at 845, P.3d 537.

When first addressing the issue the Supreme Court of Nevada stated "as a practical matter, single-family residence construction defect cases will rarely be appropriate for class action treatment." *Id*. at 854, P.3d 542. The Court reasoned construction defect cases typically involve

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"issues of causation, liability defenses, and damages, that cannot be presumed through the use of generalized proof, but rather require each party to individually substantiate his or her claims." *Id*. at 855, P.3d 543. Ultimately, the Court held that the case should have never been certified as a class action. *Id*. at 858, P.3d 544. In reaching its decision, the Court documented many of the issues that arose after class certification including the fact that individualized proof of causes and defenses related to the Plaintiffs' expansive soil claims became necessary because the expansive soils varied among the lots within the subdivision. *Id*. at 858-859, P.3d 545. The Court also noted that class certification led to a prejudicial presentation of property damages by the Plaintiffs because the homes contained varying degrees and types of property damage caused by different defects that could not fit into a simple damages equation and required separate additional litigation. *Id*. at 859, P.3d 545. Moreover, the Court explained class certification prevented the Defendant Beazer Homes from sufficiently raising certain comparative negligence defenses as to certain homeowners. *Id*.

Similar to the facts in *Shuette*, the Plaintiffs in this case have brought a class action lawsuit on behalf of one hundred twenty-seven (127) homeowners of a residential subdivision against a home builder for multiple alleged defects with the homes. Additionally, like in *Shuette*, not all of the homes involved in this case suffer from a singular design or constructional flaw that has damaged every home in the same way. Furthermore, like the Plaintiffs in *Shuette*, the Plaintiffs in this case intend on introducing evidence regarding several different types of property damage that are not common to all the homes involved in this case. Finally, like the Plaintiffs' claims in *Shuette*, the negligence and South Carolina Unfair Trade Practices Act claims in this case cannot be resolved with generalized proof. Thus, the Court believes many of the same issues discussed in *Shuette* would also arise in this case if class certification was granted. In such a case, the

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justification for class certification is absent because it will be neither more efficient, equally as fair for the Parties, or less costly for the Court.

Based on the analysis above, the Court finds that there are no significant common legal or factual issues that sufficiently bind the class representatives claims to the proposed class members claims. Therefore, the Court holds that commonality has not been established under Rule 23(a)(2), SCRCP. The Plaintiffs' argument that denial of class certification will lead to one hundred twenty-seven (127) or so identical trials about each individual home in the Eagles Glen neighborhood is unsupported. If the class is not certified, it will not result in 127 identical trials because not every home involved in this litigation share the same defects. In fact, to grant class certification in this case would violate the very purpose of a class action law suit which is to "avoid the necessity of requiring individual members to prove the elements of the cause of action." *See O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978).

Typicality

Rule 23(a)(3), SCRCP, requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The commonality and typicality requirements of Rule 23(a) tend to merge. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n. 5, 131 S. Ct. 2541, 2551 n. 5 180 L. Ed. 2d 374 (2011). Both serve as guide posts for determining whether under the particular circumstances maintenance of 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. *Id*. Therefore, in light of the Court's ruling on commonality, the Court believes it is unnecessary to resolve whether the named plaintiffs' have satisfied the typicality requirement. However, the Court will reiterate that the class representatives' claims are not typical of the claims or defenses of the entire proposed class. The Court's

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commonality analysis and the pre-class certification homeowner surveys show that each class member has a unique mix of alleged defects that they wish to litigate and the proposed class members have no interest in resolving every allegation raised in Plaintiffs third summons and complaint. Therefore, the claims and defenses of the representative plaintiffs do not satisfy the typicality requirement.

Adequacy of Representation

Rule 23(a)(4), SCRCP, requires that the "representative parties will fairly and adequately protect the interest of the class." "The principle factor in determining the adequacy of class representatives is whether the Plaintiffs have the ability and commitment to prosecute the action vigorously." *S.C. Nat'l Bank vs. Stone*, 139 F.R.D. 325, 329-30 (D.S.C. 1991). Adequacy is important because it involves the due process rights of class members who will not be able to speak for themselves in court. *C Hospitality Mgmt. Assocs. v. Shell Oil Company*, 356 S.C. 644, 663-64, 591S.E.2d 611, 621 (2004). The fact that a proposed class representative is a property owner in a large or highly populated developments does not, in and of itself, qualify him or her to bring a class action on behalf of the remaining property owners. *Waller v. Seabrook Island Prop Owners Ass'n.,* 300 S.C. 465, 468, 388 SE2d 799, 801(1990). The United States Supreme Court has long held that to be adequate representatives, the class representatives must "possess the same *interests* and suffer the *same injury* as the class members." *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-626, 117 S. Ct. 2231, 2250-2251 138 L. Ed. 2d 689 (1997)(Emphasis added)(citation and internal quotation marks omitted). Unquestionably, Plaintiffs' counsel is qualified and experienced to handle class action lawsuits. However, neither of the class representatives can provide adequate representation, due to the individualized facts of their cases or defense unique to their claims.

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Plaintiff Gregory purchased her home from Gary P. Runyan and Teresa G. Runyan on May 24, 2019. The only alleged construction defect identified in Ms. Gregory's Affidavit is "insufficient drainage, inadequate grading, improper sloping and flooding and erosion of the yard." (Gregory Aff, paragraph 4). Ms. Gregory did not identify any defects related to siding, foundation cracks, garage cracks, windows or stone veneer. Further, to satisfy the requirements of adequacy, a proposed class representative must "be of a character to vigorously pursue the case." *Monroe v. City of Charlottesville,* 579 F3d 380, 385 (4th Cir. 2009). "Findings that a representative lacks sufficient interest…or either knowledge or an understanding of the case…are grounds for denying class certification." *Id.* Gregory testified that she has not communicated with the putative class members to date nor was able to articulate what she had done to keep the putative class members informed regarding the process. (Gregory Depo. 22:21, 24:15-25: 6). As such, Gregory should not be named as a class representative as requested by Plaintiffs because she cannot adequately protect the interest of the absent class members and has failed to do so to date.

Robert Baddorf is the trustee of the Petra Baddorf Family Trust dated April 11, 2006, (the "Trust"), which owns the property located at 123 Noble Wing Lane (the "Baddorf Home"). The Trust purchased 123 Noble Wing Lane on March 1, 2019. The fact that Baddorf owns his home and trust creates the potential for a conflict of interest and casts further doubt on his ability to adequately represent the putative class. "[A] Plaintiff who sues on behalf of a class…assume[s] a fiduciary obligation to absent members of the class…" *Premium Inv. Corp v. Green,* 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct App. 1984). As a trustee, Baddorf owes separate fiduciary obligations to the trust beneficiaries, including duties of loyalty, reasonable care, skill and caution. S.C. Code Ann §§62-7-802-804. Federal Courts have noted that a trustee serving as a class representative can lead to "an agent of two principles have conflicting interests." *Dechert v Cadle Co.* 333 F.3d

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801, 803 (7th Cir. 2003). When confronted with the bankruptcy trustee as a class representative, a fiduciary "has a duty to seek maximize the value of his claim, and this duty may collide with his fiduciary duty as class representative…to represent all members of the class equally." *Id.* In *Dechert,* the court concluded that the trustee's obligation to the estate in bankruptcy prevented him adequately representing absent class members and vacated class certification. *Id.* at 803-04. In this case, Baddorf's status as a trustee is the type of potential "conflict of interest between named parties and the class they seek to represent" that renders him an inadequate class representative. See *Amchem*. 521 U.S. at 625.

This Court also notes that concerning the horizontal construction claims, Mr. Baddorf and Ms. Gregory are not adequate class representatives. Their adequacy to serve as class representative is necessarily lacking given the unique aspects of their individual claims. With respect to Mr. Gregory's property, Plaintiffs' expert Sherard has not performed the necessary individual evaluation to determine the extent of his proposed repairs. If it turns out that she does not require any repairs, based on the horizontal construction, those repairs are minimal (as she believes to be the case)(installation of a French drain- *See Gregory Dep.* 102:10-24), then resolution of her claim would not advance the interests of unnamed class members with different issues, and could be detrimental to unnamed members with more serious issues. Likewise, Mr. Baddorf has installed a large retention wall on his property and performed other measure to address his alleged drainage issues. The fact that Mr. Baddorf has attempted to remedy his property outside the current litigation alters the nature of his claim. He will presumably seek to recover monetary damages for past expenditures, which is fundamentally a different type of claim. Unless Mr. Baddorf waives any claim related to past expenditures, he would be in an adverse position to unnamed class members who have not undertaken any remedial measures, as a limited fund would necessarily

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have to be allocated between past repairs and future repairs. Moreover, his claims are subject to defenses such as betterment, voluntariness, laches and estoppel that are neither common to other homeowners or typical to the putative class.

In addition, there are clearly arguments concerning statute of limitations. Namely, that both Plaintiffs admit that they knew about drainage issues related to their respective properties more than three years before bringing the lawsuit. Mr. Baddorf submitted a warranty request to D.R. Horton on July 1, 2019 (Baddorf Dep. 143). Similarly, Ms. Gregory testified that she observed drainage issues in June 2019 (Gregory Dep. 83).

The proposed Representative Plaintiffs do not adequately represent the interests of the putative plaintiff class. In the present case, I find that certification would be improper because Plaintiffs have failed to show that their interests are not antagonistic to those of other putative class members. I therefore find the Representative Plaintiffs cannot carry their burden of proof that they are adequate representatives of the putative class members.

CONCLUSION

The Representative Plaintiff and putative class have failed to establish all the threshold elements required under Rule 23, SCRCP, and therefore, the Court denies certification of the class requested in this case, without prejudice. The Court is willing to entertain a Petition for proposed sub-classes to be considered, but there will be no overarching class. Each proposed sub-class, if approved by this Court, would also need to satisfy the five requirements under Rule 23(a), SCRCP.

It is hereby Ordered that Plaintiffs' Motion for Class Certification is denied, without prejudice. **IT IS SO ORDERED**.

_____

The Honorable Patrick C. Fant, III
Thirteenth Judicial Circuit, Presiding Judge

June_____, 2025
Greenville, SC

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Greenville Common Pleas

Case Caption: Robert Baddorf , plaintiff, et al vs. D R Horton Inc , defendant, et al

Case Number: 2022CP2303974

Type: Order/Other

So Ordered

Patrick C. Fant, III

EXHIBIT E

ELECTRONICALLY FILED - 2026 Mar 17 10:19 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2303974

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT CASE NO.: 2022-CP-23-03974
Robert Baddorf, Matthew Crider, Jo Anne Gregory, Luke Hoopes, Vincent Pino, Ronald Rossi, Leandro Soriano, and James Stanley, individually, and on behalf of all others similarly situated, Plaintiffs, v. D.R. Horton, Inc. Defendant	**NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION(S)** **(Complex Case Assignment: Judge Fant)**
D.R. Horton, Inc. Third-Party Plaintiff, v. Southern States Resources, LLC, et. al. Third-Party Defendants, AND ALL RELATED ACTIONS	

TO: THE ABOVE-NAMED PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE that Plaintiffs will move before the Presiding Judge ten (10) days after service of this Notice, or at such time the Court may schedule, for an Order certifying the following Classes (or subclasses) of homeowners in Eagles Glen under Rule 23, SCRCP:

1. Stone: Owners of all Residences with stone veneer;[1]
2. Window: Owners of all Residences;
3. Siding: Owners of all Residences;
4. Concrete/Radon: Owners of all Residences;

[1] *See* Plaintiffs' Fourth Amended Complaint. ("Residence" is defined as the 127 homes and properties in the Eagles Glen subdivision developed, built, and sold by D.R. Horton, Inc.)

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5. HVAC: Owners of all Residences;

6. Stormwater: Owners of all Residences; and

7. Brick: Owners of all Residences with brick veneer.

These Classes exclude 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner that has a pending suit against D.R. Horton or who has released the claims set forth herein; and 3) all person who properly execute and file a timely request for exclusion from the Classes (as to all or any class).[2]

The grounds for this Motion are that the proposed Classes satisfy the elements of Rule 23, *SCRCP*, and class treatment is appropriate in this case, in the following particulars:

1. Six of the seven proposed classes consist of the 150 to 190 owners of 92 to 127 homes at Eagles Glen, the joinder of whom is impractical.

    a. The proposed brick class contains approximately fifty owners (including co-owners and spouses) of the twenty-eight brick residences at issue, which still qualifies for certification because of impracticality, numerosity, the fluidity of the membership, and the avoidance of potential confusion by have a partial joinder of homeowners, in contrast to the other certified classes;

2. Questions of law and fact are common to the Class members in each class.

3. The Class representatives' claims are typical of the Class members' claims in each class.

4. The Class representative(s) and counsel will fairly and adequately protect the interests of the Classes.

5. The amount in controversy exceeds $100.00 for each Class member, in each class.

Plaintiffs further move that the following be designated to represent each of the proposed classes:

[2] There are no known excluded class members under exclusions (1) and (2), and exclusion number (3) is not yet relevant.

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a. Leandro Soriano be designated as the Stone Class Representative;

b. Ronald Rossi be designated as the Window Class Representative;

c. James Stanley be designated as the Siding Class Representative;

d. James Stanley be designated as the Stormwater Class Representative;

e. Ronald Rossi and Matthew Crider be designated as the Concrete/Radon Class Representatives;

f. Luke Hoopes be designated as the Brick Class Representative; and,

g. Matthew Crider be designated as the HVAC Class Representative.[3]

Additionally, Plaintiffs request that:

1. Leave be granted to nominate additional representatives as necessary to, *inter alia*, ensure continuity in representation over the expected duration of this suit;

2. The Court approve and appoint Class Counsel;

3. The Court approve the proposed Notice of Class Action and Exclusion Request Form attached as Exhibit "A"; and

4. Class Counsel be authorized to email the Notices of Class Action and Exclusion Request Form to all class members whose email address is known and to all others at their last known address as maintained by Greenville County Tax Assessor's office.

This Motion will be supported by the evidence produced thus far in this matter, affidavits, a supporting memorandum of law, arguments of counsel or any other material the Court may receive.

(*signature page to follow*)

[3] Additionally, Plaintiffs move that Baddorf and/or Gregory serve as co-class representative if, and as, necessary.

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ATTORNEYS FOR PLAINTIFFS

March 17, 2026
Sullivan's Island, South Carolina

EXHIBIT F

ELECTRONICALLY FILED - 2026 Jul 15 9:56 AM - GREENVILLE - COMMON PLEAS - CASE#2022CP2303974

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Robert Baddorf and Jo Anne Gregory, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

Southern States Resources, LLC, Raby Construction Company, LLC, Builders FirstSource – Southeast Group, LLC, Lansing Building Products, LLC, Cannady's Siding & Gutter, Inc., P&L Enterprises, LLC, Southern Siding & Gutters, LLC, Meridian Brick, LLC, General Shale Brick, Inc., M&L Reyna Construction, LLC, Saldana Brothers, Inc., VL Concrete, Inc., Sandlapper Concrete, LLC, Five Star Foundation, LLC, Star Concrete Specialists, LLC, Brundage Bone Concrete Pumping, Inc., RL Grading, Inc., Bold Mountain, LLC f/k/a Bold Mountain, Inc., Kkodiak Company, LLC f/k/a Kodiak Construction, LLC, Gun Range Builder, LLC, and Signature Scapes, Inc.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
CASE NO. 2022-CP-23-03974

ORDER GRANTING PLAINTIFFS' MOTION FOR CERTIFICATION OF DEFECT CLASSES

Bold Mountain d/b/a Kodiak Construction,

Fourth-Party Plaintiff,

v.

Robbins Landscaping, Inc.,

Fourth-Party Defendant.

Southern State Resources, LLC,

Fourth-Party Plaintiff,

v.

A Grade Above Others, LLC and CCAD, LLC,

Fourth-Party Defendant.

M&L Reyna Construction, LLC,

Fourth-Party Plaintiff,

v.

Jesus Jimenez,

Fourth-Party Defendant.

P& L Enterprises, LLC,

Fourth-Party Plaintiff,

v.

G&A Construction; JNC Siding Contractors, LLC; Agilberto Rubio; Elvin Mejia Cedillo;

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Adolfo Sales Amaya; Jose Fidel Espinal; and Marlon E. Mejia Cedillo,

Fourth-Party Defendants.

Builders FirstSource-Southeast Group, LLC,

Fourth-Party Plaintiff,

v.

Silver Line Building Products, Corp.,

Fourth-Party Defendant.

This matter is before the Court on Plaintiffs' Motion for Certification of the following Classes: (1) Stone, (2) Window, (3) Siding, (4) Concrete/ Radon, (5) HVAC, (6) Stormwater and (7) Brick. The Court has exercised its discretion to rule on the matter without oral argument, finding that the memoranda, pleadings, exhibits, and applicable law adequately present the issues and provide a sufficient basis for the Court's determination. The following Classes are certified: (1) Stone, (2) Window, (3) Siding, (4) Concrete[1], (5) HVAC, (6) Stormwater, and (7) Brick. In approving each of these Classes, the Court approves the Plaintiffs' Notice Plan as set forth in Exhibit A to the Stone memorandum, as applied to each Class.

The Court notes, in the June 4, 2025 Order, the defects were analyzed collectively, which was problematic because not all class members suffered the same injuries from the same alleged defects, and the claims lacked a common contention tying all defects together for class certification. However, now that the defects have been separated into seven Classes, the analysis

[1] For the reasons documented below, radon is excluded from the concrete claim and is not certified.

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is viewed in a different light and shifts to an individualized assessment of whether each defect can support class certification on its own.

The Court finds there is sufficient evidence of commonality and typicality of the Plaintiffs' claims against D.R. Horton to maintain each of the Classes. The long-established law is that every issue need not be identical with each class member. Ultimately, the sufficiency and accuracy of expert opinions will be a credibility determination at trial.

Plaintiffs' Counsel are unquestionably qualified and experienced in handling class action litigation. The Court is not concerned about concurrent representation as the various class actions are unrelated. Moreover, D.R. Horton has failed to establish any actual conflict of interest. Additionally, the putative class is separately represented by Lyles and Associates, who also serve as counsel in this matter. The Court finds that Plaintiffs' Counsel fairly and adequately represent the interest of each Class certified below.

RELEVANT FACTUAL BACKGROUND AND PROCEDURAL BACKGROUND

This is a putative class action in which Plaintiffs allege numerous defects in construction of one hundred twenty-seven (127) single-family homes in Eagles Glenn Subdivision in Greenville County, South Carolina. The subdivision was built by Defendant, D.R. Horton, Inc. (D.R. Horton), over a period of five (5) years, from 2016 to 2020.

This case began in July 2022 as a single-issue construction defect case alleging defects in grading and stormwater drainage. Plaintiffs filed an Amended Complaint and Motion for Class Certification in March 2024 alleging numerous additional defects, changing this case from a single-issue case to a multi-issue, complex case. The Amended Complaint added four (4) more major defects, including concrete cracking, brick defects, stone defects, and window defects. This

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Court issued an August 6, 2024 Discovery Plan Order permitting D.R. Horton to send "pre-certification surveys" out to all homeowners. A Third Amended Complaint was filed September 11, 2024, in which Plaintiffs added additional allegations of "improper duct work and insulation-related deficiencies."

On June 4, 2025, this Court entered an Order Denying Class Certification and allowing the Plaintiffs to petition for approval of proposed defect Classes by this Court if each Class satisfied the five requirements under Rule 23, SCRCP.

On November 13, 2025, a Fourth Amended Complaint was filed alleging seven defect Classes, including (1) Window, (2) Siding, (3) Concrete/ Radon, (4) Grading/ Stormwater Drainage, (5) HVAC, (6) Stone, and (7) Brick. On March 17, 2026, Plaintiffs filed a Motion for Class Certification of each of the seven (7) proposed defect Classes. Plaintiffs now argue that each Class individually satisfies the elements of Rule 23, SCRCP, and that separate class certification of each defect is appropriate.

This Court was scheduled to hear several pending motions on June 4, 2026, including motions to exclude expert testimony. However, by agreement of the parties, certain motions were withdrawn, while others were postponed for consideration until after class certification was decided. Specifically, the Plaintiffs and Defendants, D.R. Horton, Inc. ("Horton"); Builders FirstSource – Southeast Group, LLC ("BFS"), Silver Line Building Products, Corp. ("Silver Line"), Southern Siding & Gutters, LLC ("Southern Siding"), Cannady's Siding & Gutter, Inc. ("Cannady"), P&L Enterprises, Inc., ("P&L)"), Marlon E. Mejia Cedillo ("Marlon Cedillo"), Elvin Mejia Cedillo ("Elvin Cedillo"), G&A Construction ("G&A"), Agilberto Rubio ("Rubio"), Adolfo Sales Amaya ("Amaya"), Sergio Giovanni Villatoro Perez ("Perez"), R. Rivera Construction, LLC

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("Rivera"), Jose Fidel Espinal ("Espinal"), Carlos Ramos ("Ramos"), JNC Siding Contractors, LLC ("JNC"), and Florina Yanez ("Yanez") agreed to withdraw the following Motions:

1. Plaintiffs' Motion to Strike and Exclude the Affidavit of Matthew Perella, the Affidavit of Randall Still (including referenced exhibits), and Horton's Exhibit 36 (PowerPoint);
2. Horton's Motion to Quash the Subpoena of Matthew Perella;
3. Horton and the Window and Siding Subcontractors' Joint Motions to Exclude the Newly Alleged Expert Opinions offered by Warren Maddox and Dr. Whitlock;
4. Horton's Motion to Strike Plaintiffs' Expert Andrew Schauder; and
5. Plaintiffs' Motion to Strike Horton's Sur-Reply.

Once the Court was notified of the parties' agreement and could consider all of the parties' submissions, it was appropriate to move forward with deciding individual class certification.

LAW

The class action is "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S.Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). To justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." Id. (citing *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Califano v. Yamasaki*, 442 U.S. 682, 701, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176. In such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. . . " Id. Rule 23(a), SCRCP,

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ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The mandatory prerequisites for class actions are found in Rule 23, SCRCP, which states: "Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if the Court finds 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4) the representative parties will fairly and adequately protect the interest of the claims; and, 5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds $100.00 for each member of the class." Rule 23(a), SCRCP. The first four of these five requirements are typically referred to, respectively, as the numerosity, commonality, typicality, and adequacy of representation requirements. In pursuing class certification, Plaintiffs bear the burden of "proving the five requirements" and "the Court must apply a rigorous analysis to determine each prerequisite is satisfied." *Gardner v. South Carolina Department of Revenue*, 353 S.E.1, 20-21, 577 SE2d 190, 200 (2003). Failure to satisfy even one of the five requirements is fatal to class certification. Id.

Commonality is established by a party showing "there are questions of law or fact common to the class." Rule 23(a)(2), SCRCP. The party seeking class certification "must articulate the existence 'significant common, legal, or factual issues' which bind the proposed class together." *Gardner v. S.C. Dept. of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003)(citing *Boggs v. Divested Atomic Corp*., 141 F.R. D. 58, 64 (S.D. Ohio (1991)). "Critically, '[n]ot every issue in the case must be common to all class members.'" Id. (citing *O'Connor v. Boeing North Amer., Inc*., 184 F.R.D. at 311, 329 (C.D.Cal.1998)). "Commonality is met only where the class shares a determinative issue." Id. at 21, 577 S.E.2d at 200–201 (2003); see also *Stott v. Haworth*, 916 F.2d

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134, 145 (4th Cir.1990) (finding "certification is only proper when a determinative critical issue overshadows all other issues" and that "question[s] [that are] in no way dispositive and [which] simply propels the action into a posture where judicial scrutiny is necessary for just adjudication" are insufficient to establish commonality under Rule 23(a)(2), FRCP); *Peoples v. Wendover Funding Inc*., 179 F.R.D. 492, 498 (D.Md.1998) ("[A] representative plaintiff cannot establish commonality ... if the court must investigate each plaintiff's individual claim."). Factual differences among the class members' cases will not preclude certification if the class members share the same legal theory. *Peoples v. Wendover Funding, Inc*., 179 F.R.D. 492, 498, (D. Md. 1998) (*citing Brown v. Eckerd Drugs, Inc*., 663 F.2d 1268, 1275 (4th Cir.1981), vacated on other grounds, 457 U.S. 1128, 102 S.Ct. 2952, 73 L.Ed.2d 1345 (1982); see also *DeBoer v. Mellon Mortgage Co*., 64 F.3d 1171, 1174 (8th Cir.1995) (commonality satisfied where class members had differing mortgage contracts with defendant, but all alleged over-escrowing of funds)). Moreover, commonality requires the Plaintiffs to demonstrate that the class members "have suffered the same injury," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (citing *General Telephone Co. of Southwest v. Falcon*, 457 US 147,102 S.Ct. 2364, 72 L.Ed.2d 740). The very purpose of a class action is to avoid the necessity of requiring individual members to prove the elements of the cause of action. *O'Quinn v. Beach Associates*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (S.C.1978). The claims must depend upon a common contention and it must be of such a nature that it is capable of class wide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2552, 180 L. Ed. 2d 374 (2011).

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Rule 23(a)(3), SCRCP, requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The commonality and typicality requirements of Rule 23(a) tend to merge. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n. 5, 131 S. Ct. 2541, 2551 n. 5 180 L. Ed. 2d 374 (2011). Both serve as guide posts for determining whether under the particular circumstances maintenance of 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. Id.

Rule 23(a)(4), SCRCP, requires that the "representative parties will fairly and adequately protect the interest of the class." "The principle factor in determining the adequacy of class representatives is whether the Plaintiffs have the ability and commitment to prosecute the action vigorously." *S.C. Nat'l Bank vs. Stone*, 139 F.R.D. 325, 329-30 (D.S.C. 1991). Adequacy is important because it involves the due process rights of class members who will not be able to speak for themselves in court. *C Hospitality Mgmt. Assocs. v. Shell Oil Company*, 356 S.C. 644, 663-64, 591S.E.2d 611, 621 (2004). The fact that a proposed class representative is a property owner in a large or highly populated developments does not, in and of itself, qualify him or her to bring a class action on behalf of the remaining property owners. *Waller v. Seabrook Island Prop Owners Ass'n*., 300 S.C. 465, 468, 388 SE2d 799, 801(1990). The United States Supreme Court has long held that to be adequate representatives, the class representatives must "possess the same interests and suffer the same injury as the class members." *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-626, 117 S. Ct. 2231, 2250-2251 138 L. Ed. 2d 689 (1997)(citation and internal quotation marks omitted).

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STONE

The Stone Class is defined as: Owners of all Residences with stone veneer. . . [excluding] 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner that has a pending suit against D.R. Horton or who has released the claims set forth herein; and 3) all persons who properly execute and file a timely request for exclusion from the Stone Class. "Residence" is defined as the 127 homes and properties in the Eagles Glen subdivision developed, built, and sold by D.R. Horton, Inc.

The Court has reviewed all memoranda, exhibits, and expert opinions filed by all parties, including the Plaintiffs, Defendant D.R. Horton, and Stone Contractors.

The first prerequisite is numerosity. Of the 127 homes in Eagles Glenn, 92 have the same stone veneer manufactured by Anatoliy and all are members of the proposed class. The Court finds, consistent with the June 4, 2025 Order, that numerosity is satisfied for the same reasons set forth in the prior order.

The second prerequisite is commonality. Plaintiffs' engineering expert observed the exterior of all 92 stone homes, inspected the stone at 58 stone homes, and observed the behind the wall stone conditions of 15 stone homes. Plaintiffs allege seven (7) stone-related defects. Plaintiffs' expert opined that defects (1) and (2) regarding missing weep screeds/flashing and clearance were observed at every home inspected. Importantly, D.R. Horton acknowledges in its Opposition that "the absence of flashing/weep screeds at the base of the wall is a common condition." (Horton's Omnibus Opp., p. 126). Exponent's report also includes a 100% prevalence rate for this condition. The Court further finds the photos, expert opinions, and other exhibits submitted by the parties demonstrate that the other defects, even if not present in every home, are common or present

common questions appropriate for class-wide resolution. Individual trials are neither necessary nor an efficient use of judicial resources. Therefore, the Court finds that the second prerequisite is satisfied.

The third and fourth prerequisites are typicality and fair and adequate representation by the class representative. Soriano's defect claims include cracking, loose, and falling stone like the other class members and shares the same claims with them, including missing flashing/weep screeds and clearance. A single determination of whether D.R. Horton is liable or not liable for the stone issues will resolve Soriano's stone claims and all other Stone Class members' claims without the need for any individual inquiries. Therefore, the Court finds that Class Representative Soriano's claims are typical of the Class claims. No material conflicts exist between Soriano and the other putative Stone Class members. Soriano has met with Class Counsel, reviewed documents and expert materials, sat for a deposition, permitted all parties to inspect his home on two different occasions, and permitted Plaintiffs' experts and Horton's experts to perform destructive testing on his home. Soriano is engaged and has sufficient knowledge of the case. The Court further finds that Soriano will fairly and adequately represent the Stone class and is qualified to be a representative of the Stone Class.

The amount in controversy exceeds $100 for each class member. Accordingly, the fifth prerequisite is satisfied.

The Court finds that the five prerequisites of Rule 23, SCRCP, are satisfied. Therefore, the Plaintiffs' Motion to Certify the Stone Class is hereby, Granted.

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WINDOWS

The Window Class is defined as: Owners of all Residences. . . [excluding] 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner that has a pending suit against D.R. Horton or who has released the claims set forth herein; and 3) all persons who properly execute and file a timely request for exclusion from the Window Class. "Residence" is defined as the 127 homes and properties in the Eagles Glen subdivision developed, built, and sold by D.R. Horton, Inc.

The Court has reviewed all memoranda, exhibits, and expert opinions filed by the Plaintiffs, Defendant D.R Horton, and Third- Party Defendants Silver Line Building Products Corp., Silver Line Building Products LLC, and Builders FirstSource Southeast Group LLC.

The first prerequisite is numerosity. All 127 homes in Eagles Glenn have the same windows manufactured by Silver Line. The Court finds, consistent with the June 4, 2025 Order, that numerosity is satisfied for the same reasons set forth in the prior order.

The second prerequisite is commonality. Plaintiffs' expert, WDP, reported a 100 percent incidence rate, and Defendant's expert, GCI, reported a 9.1 percent incidence rate. The Court finds that the parties' differing incidence rates are not necessarily contradictory, as they are based on different units of measurement (per-home versus per-opening) and, therefore, do not defeat commonality under Rule 23, SCRCP. Defendant's expert concedes to this point on page 27 of 49 in the Preliminary Evaluation of Alleged Window Construction Defects. The class members share substantially similar defects, including corner failures, leakage, and water intrusion issues. These defects require the same repairs: removal and reinstallation, and result in comparable damages. The claims of these class members share common questions which are capable of class resolution.

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Individual trials are neither necessary nor an efficient use of judicial resources. Therefore, the Court finds that the second prerequisite is satisfied.

The third and fourth prerequisites are typicality and fair and adequate representation by the class representative. Rossi has similar window defects and claims to those of other class members. Rossi's window defect claims include, among others, corner failures and related leakage and insufficient water resistance which the experts have also determined to be common defects at the other homes. Rossi also has separated miters, fractured vinyl window frames, misplaced gaskets, and a window in his home failed a sill dam test. A single determination of whether D.R. Horton is liable or not liable for the window issues will resolve Rossi's window claims and all other Window Class members' claims without the need for any individual inquiries. Therefore, the Court finds that Class Representative Rossi's claims are typical of the class claims. Rossi has been engaged with this case from the beginning and has met with Class Counsel, spoken with his neighbors, reviewed documents and expert materials, sat for a deposition, permitted all parties to inspect his home on two different occasions, and permitted Plaintiffs' experts and Horton's experts to perform destructive testing on his home. The Court finds that Rossi will fairly and adequately represent the Window Class and is qualified to serve as a representative.[2]

The amount in controversy exceeds $100 for each class member. Accordingly, the fifth prerequisite is satisfied.

[2] The Court is aware that a Joint Motion for Summary Judgment is pending. Should Plaintiff Rossi's claim be dismissed as barred by the Statute of Limitations, Plaintiffs' Counsel may move for substitution of the Windows Class representative.

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The Court finds that the five prerequisites of Rule 23, SCRCP, are satisfied. Therefore, the Plaintiffs' Motion to Certify the Window class is hereby, Granted.

SIDING

The Siding Class is defined as: Owners of all Residences. . . [excluding] 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner that has a pending suit against D.R. Horton or who has released the claims set forth herein; and 3) all persons who properly execute and file a timely request for exclusion from the Siding Class. "Residence" is defined as the 127 homes and properties in the Eagles Glen subdivision developed, built, and sold by D.R. Horton, Inc.

The Court has reviewed all memoranda, exhibits, and expert opinions filed by all parties, including the Plaintiffs, Defendant D.R. Horton, and the Siding Contractors.

The first prerequisite is numerosity. All 127 homes in Eagles Glenn have the same Hardie fiber cement siding on three or more sides. The Court finds, consistent with the June 4, 2025 Order, that numerosity is satisfied for the same reasons set forth in the prior order.

The second prerequisite is commonality. Plaintiff's expert observed and inspected the siding of 81 Eagles Glen homes and documented siding defects at each of those homes. Additionally, when the siding findings in Exponent's Statistical Analysis from Destructive Testing are considered collectively, there is sufficient evidence that a majority of homes have at least one of the defects present. The class members share substantially similar defects, including cracking, discoloration, improper fastening, and improper flashing. These defects require the same repairs:

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removal and reinstallation, and result in comparable damages.[3] The Court recognizes the Siding Contractor's argument that different subcontractors may have performed work on different homes. However, the various subcontractors do not defeat commonality where the claims arise from the same project, the same siding, and involve the common question of whether it was defectively installed by D.R. Horton and whether D.R. Horton is liable for the defects. Individual trials are neither necessary nor an efficient use of judicial resources. Therefore, the Court finds that the second prerequisite is satisfied.

The third and fourth prerequisites are typicality and fair and adequate representation by the class representative. A single determination of whether D.R. Horton is liable or not liable for the siding issues will resolve Stanley's siding claims and all other Siding Class members' claims without the need for any individual inquiries. The Court notes that the claims at bar in this action are merely against Defendant D.R. Horton for the purposes of class certification. Accordingly, the fact that there are many subcontractors and non-signatory contractors does not defeat class certification. Similarly to the other class members, Stanley's siding defect claims include cracking, discoloration, improper fastening, improper flashing, and improper clearance. Therefore, the Court finds that Class Representative Stanley's claims are typical of the class claims. Stanley has met with Class Counsel, spoken with his neighbors, reviewed documents and expert materials, sat for a deposition, permitted all parties to inspect his home on two different occasions, and permitted Plaintiffs' experts and Horton's experts to perform destructive testing on his home. Stanley's has

[3] The Court notes that the repairs may not require removing and replacing all of the siding in Eagles Glen but will likely be limited to the defective siding. However, damages are a matter to be determined by the jury.

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sufficient knowledge of the case. The Court further finds that Stanley will fairly and adequately represent the Siding class and is qualified to be a representative of the Siding Class.

The amount in controversy exceeds $100 for each class member. Accordingly, the fifth prerequisite is satisfied.

The Court finds that the five prerequisites of Rule 23, SCRCP, are satisfied. Therefore, the Plaintiffs' Motion to Certify the Siding class is hereby, Granted.

CONCRETE

The Concrete Class is defined as: Owners of all Residences. . . [excluding] 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner that has a pending suit against D.R. Horton or who has released the claims set forth herein; and 3) all persons who properly execute and file a timely request for exclusion from the Concrete Class. "Residence" is defined as the 127 homes and properties in the Eagles Glen subdivision developed, built, and sold by D.R. Horton, Inc.

The Court finds that the Concrete Class will consist only of claims related to concrete cracking issues. Claims concerning radon are excluded from the Class. Only four (4) radon tests show elevated levels in the seventeen (17) homes tested. (See, Radon Test Results produced by Plaintiffs). Furthermore, all radon-related claims are based on the potential risk of radon exposure and therefore require an individualized inquiry into whether damages exist and, if so, the extent of those damages for each homeowner. These speculative issues cannot be established through common proof. The Court also recognizes that there may be a synergistic effect between smoking and radon exposure, which makes this even more individualized. The Court finds that the Plaintiffs' radon claims do not satisfy commonality and typicality prerequisites of Rule 23, SCRCP.

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Accordingly, radon-related claims are excluded from the Concrete Class. However, the Court acknowledges the serious nature and potential dangers associated with radon exposure. Individual homeowners may bring their own causes of action regarding radon if they have viable claims.

The Court has reviewed all memoranda, exhibits, and expert opinions filed by the Plaintiffs, Defendant D.R Horton, and Third- Party Defendants VL Concrete Inc. and Sandlapper Concrete, LLC. Brundage Bone Concrete Pumping Inc. has been dismissed from this action.

The first prerequisite is numerosity. All 127 homes in Eagles Glenn have concrete foundations. The Court finds, consistent with the June 4, 2025 Order, that numerosity is satisfied for the same reasons set forth in the prior order.

The second prerequisite is commonality. Of the 79 total homes inspected by WDP, 99 percent had concrete/foundation cracks in multiple locations. The Court finds that there are no material differences in the experts' opinions, all which indicate that the presence of concrete cracking is a common issue in the homes. (Moore Depo. Trans 86, 87; Bishop Depo. Trans. 465–475). Furthermore, 86 of 112 survey responses indicated "yes" to foundation problems. The Class members share substantially similar concrete/ foundation cracking defects. These defects require the same repairs: sealing of the concrete cracks. The claims of these class members share common questions which are capable of class resolution. Individual trials are neither necessary nor an efficient use of judicial resources. Therefore, the Court finds that the second prerequisite is satisfied.

The third and fourth prerequisites are typicality and fair and adequate representation by the class representative. A single determination of whether D.R. Horton is liable or not liable for the concrete foundation issues will resolve the representatives' concrete claims and all other Concrete

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Class members' claims without the need for any individual inquiries. Both Crider and Rossi have claims typical to the class, including excessive cracking in the concrete foundation. Therefore, the Court finds that Class Representatives' claims are typical of the class claims. Both Crider and Rossi have been in communication with Class Counsel, spoken with neighbors, reviewed documents and expert materials, been deposed, allowed for intrusive inspections and destructive testing to their homes, sufficiently understand the class process, and the importance of their roles. The Court further finds that Crider and Rossi will fairly and adequately represent the Concrete Class and are qualified to be representatives of the Concrete Class.

The amount in controversy exceeds $100 for each class member. Accordingly, the fifth prerequisite is satisfied.

The Court finds that the five prerequisites of Rule 23, SCRCP, are satisfied. Therefore, the Plaintiffs' Motion to Certify the Concrete class is hereby, Granted.

HVAC

HVAC: Owners of all Residences . . . [excluding] 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner that has a pending suit against D.R. Horton or who has released the claims set forth herein; and 3) all persons who properly execute and file a timely request for exclusion from the [HVAC Class]. "Residence" is defined as the 127 homes and properties in the Eagles Glen subdivision developed, built, and sold by D.R. Horton, Inc. The Court finds that the HVAC Class will not include dust related "defects."

The Court has reviewed all memoranda, exhibits, and expert opinions filed by the Plaintiffs and Defendant D.R Horton.

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The first prerequisite is numerosity. All 127 homes in Eagles Glenn have the same HVAC systems. The Court finds, consistent with the June 4, 2025 Order, that numerosity is satisfied for the same reasons set forth in the prior order.

The second prerequisite is commonality. The class members share substantially similar defect claims, including ductwork, exhaust, and clearance-related defects. Further, the Court finds that D.R. Horton's HVAC defenses largely rely on its airflow measurements. D.R. Horton argues that airflow is consistent and sufficient in a majority of homes. This is a common class-wide defense by D.R. Horton, which supports certification for global resolution. The airflow measurements and severity of the defects relate to the amount of damages and are an issue for the jury to determine. These defects require the same relief: money to correct the defective HVAC systems. The claims of these class members share common questions which are capable of class resolution. Individual trials are neither necessary nor an efficient use of judicial resources. Therefore, the Court finds that the second prerequisite is satisfied.

Defendants raise an issue with the chart submitted as Plaintiff's exhibit 19.43. Upon review, the Court finds that the bottom row is simply a scrivener's error and the row directly above it titled "% of Sample Exhibiting Condition" provides the applicable statistics.

The third and fourth prerequisites are typicality and fair and adequate representation by the class representative. A single determination of whether D.R. Horton is liable or not liable for the HVAC issues will resolve the representative's HVAC claims and all other HVAC Class members' claims without the need for any individual inquiries. Plaintiffs' expert has determined that Crider's HVAC system contains 7 of the 9 alleged defects. Therefore, the Court finds that Class Representative Crider's claims are typical of the class claims. Crider has met with Class Counsel, reviewed documents and expert materials, sat for a deposition, permitted all parties to inspect his

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homes, and permitted Plaintiffs' experts and Horton's experts to perform destructive testing on his home. The Court further finds that Crider will fairly and adequately represent the HVAC class and is qualified to be a representative of the HVAC Class.

The amount in controversy exceeds $100 for each class member. Accordingly, the fifth prerequisite is satisfied.

The Court finds that the five prerequisites of Rule 23, SCRCP, are satisfied. Therefore, the Plaintiffs' Motion to Certify the HVAC class is hereby, Granted.

STORMWATER

The Stormwater Class is defined as Owners of all Residences. . . [excluding] 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner that has a pending suit against D.R. Horton or who released the claims set forth herein; and 3) all persons who execute and timely file a request for exclusion from the Stormwater Class. "Residence" is defined as the 127 homes and properties in the Eagles Glen subdivision developed, built, and sold by D.R. Horton, Inc.

The Court has reviewed all memoranda, exhibits, and expert opinions filed by the Plaintiffs, Defendant D.R. Horton, Defendant Bold Mountain d/b/a Kodiak Construction, LLC, Raby Construction Co, LLC, Southern States Resources, LLC, A Grade Above Others., LLC, Davdon Services, LLC, CCAD, LLC, Robbins Landscaping Inc., and Signature Scapes, INC.

The first prerequisite is numerosity. All 127 lots in Eagles Glenn have grounds that are affected by the improper grading and drainage. The Court finds, consistent with the June 4, 2025 Order, that numerosity is satisfied for the same reasons set forth in the prior order.

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The second prerequisite is commonality. In its June 4, 2025 Order, this Court found that the landscaping claims required individualized inquiries regarding the nature and extent of the alleged defects and any necessary repairs. The Order primarily focused on the inadequacy of the two proposed class representatives.

The class members share substantially similar issues as a result of the defective and improper grading, including yard saturation, erosion, inability to properly drain stormwater, and barren areas. The Court finds that the topographical survey performed by Plaintiffs' expert Sherard confirms defective horizontal work. D.R. Horton argues that the topographical study provides no insight into the topography of the homes at the time D.R. Horton completed construction. However, the court finds that the exhibits submitted by Plaintiffs are sufficiently compelling evidence that the grading and drainage issues were present and known by D.R. Horton at the time of construction. Moreover, after reconsideration of the pleadings, the expert findings, and the parties' additional submissions, the Court concludes that its prior Order placed a disproportionate amount of weight on every factual distinction of the two proposed class representatives in reaching its conclusion. Where a claim consists of only a single alleged defect, however, limited individualized inquiries do not necessarily preclude class treatment. Such inquiries may still be resolved on a class-wide basis.

Sherard's opinions that all homes suffer from the same common defects are bolstered by Horton's homeowner questionnaires. Ninety-six (96) of the one hundred and twelve (112) survey responses reported drainage problems according to D.R Horton's survey chart. All affected lots require the same remedial work of regrading to achieve compliance with the building code requirements and to remedy the identified defects. Stormwater remediation requires coordination across all neighboring properties, which further supports class certification. The claims of these

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class members share common questions which are capable of class resolution. Individual trials are neither necessary nor an efficient use of judicial resources. Therefore, the Court finds that the second prerequisite is satisfied.

The third and fourth prerequisites are typicality and fair and adequate representation by the class representative. Similarly to the Stormwater Class members, Stanley's defect claims include grading that is not in compliance with the permitted plans, improper sloping, ineffective draining systems, and improper clearance. A single determination of whether D.R. Horton is liable or not liable for the stormwater/ drainage issues will resolve Stanley's claims and all other Stormwater Class members' claims without the need for any individual inquiries. Therefore, the Court finds that Class Representative Stanley's claims are typical of the class claims. Stanley has sufficient knowledge of the case and has engaged in this case by meeting with Class Counsel, reviewing documents and expert materials, sitting for a deposition, and permitting all parties to inspect his home on multiple different occasions. The Court further finds that Stanley will fairly and adequately represent the Stormwater class and is qualified to be a representative of the Stormwater Class.

The amount in controversy exceeds $100 for each class member. Accordingly, the fifth prerequisite is satisfied.

The Court finds that the five prerequisites of Rule 23, SCRCP, are satisfied. Therefore, the Plaintiffs' Motion to Certify the Stormwater class is hereby, Granted.

BRICK

The Brick Class is defined as: Owners of all Residences with brick veneer. . . [excluding] 1) any affiliate or current employee of D.R. Horton; 2) any current Eagles Glen owner that has a

pending suit against D.R. Horton or who has released the claims set forth herein; and 3) all persons who properly execute and file a timely request for exclusion from the Brick Class. "Residence" is defined as the 127 homes and properties in the Eagles Glen subdivision developed, built, and sold by D.R. Horton, Inc.

The Court has reviewed all memoranda, exhibits, and expert opinions filed by all parties, including the Plaintiffs, Defendant D.R. Horton, and Brick Contractors.

The first prerequisite is numerosity. Of the 127 homes in Eagles Glenn, 28 have the same brick veneer supplied by General Shale. Rule 23, SCRCP requires that joinder be impracticable, not that a specific numerical threshold be met. There are 28 homeowners with the same brick defect claims, making joinder impracticable and class treatment significantly more efficient. Accordingly, the Court finds that numerosity is satisfied.

The second prerequisite is commonality. Dr. Rhett Whitlock observed the brick veneer at all 28 brick veneer homes, inspected the brick veneer at 19 homes and tested, or observed testing, at the brick veneer of 13 homes, including the home of Luke Hoopes. Plaintiffs' expert found that all homes inspected contain at least two substantial brick code violations. D.R. Horton concedes that there is a common and typical defect where flashing does not extend to the brick face. (See, D.R. Horton's Memorandum in Opposition to Plaintiffs' Second Motion for Subclass Certification at pg. 149.) Exponent's report also includes a 96.4% prevalence rate for this condition. The Court further finds the photos, expert opinions, and other exhibits submitted by the parties demonstrate that the other defects, even if not present in every home, are sufficiently common to present common questions appropriate for class-wide resolution. Individual trials are neither necessary nor an efficient use of judicial resources. Therefore, the Court finds that the second prerequisite is satisfied.

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The third and fourth prerequisites are typicality and fair and adequate representation by the class representative. Plaintiffs' expert, WDP, reports that Hoopes' brick defect claims are typical of all other members of the Brick Class. Hoopes additionally has brick defect claims, including cracking, loose, and separating brick. A single determination of whether Horton is liable or not liable for the brick issues will resolve Hoopes' brick claims and all other Brick Class members' claims without the need for any individual inquiries. Therefore, the Court finds that Class Representative Hoopes' claims are typical of the class claims. Hoopes does not have any conflicts of interest and Hoopes has met with Class Counsel, reviewed documents and expert materials, sat for a deposition, permitted all parties to inspect his home on two different occasions, and permitted Plaintiffs' experts and Horton's experts to perform destructive testing on his home. The Court further finds that Hoopes will fairly and adequately represent the Brick class and is qualified to be a representative of the Brick Class.

The amount in controversy exceeds $100 for each class member. Accordingly, the fifth prerequisite is satisfied.

The Court finds that the five prerequisites of Rule 23, SCRCP, are satisfied. Therefore, the Plaintiffs' Motion to Certify the Brick class is hereby, Granted.

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CONCLUSION

The Court finds that seven proposed Classes satisfy the five prerequisites of Rule 23, SCRCP. Therefore, the following Classes are certified: (1) Stone, (2) Window, (3) Siding, (4) Concrete, (5) HVAC, (6) Stormwater and (7) Brick.

AND IT IS SO ORDERED.

_____

The Honorable Patrick C. Fant, III
Thirteenth Judicial Circuit, Presiding Judge

July ____, 2026
Greenville, SC

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Case Caption:	Robert Baddorf , plaintiff, et al vs. D R Horton Inc , defendant, et al
Case Number:	2022CP2303974
Type:	Order/Other

So Ordered

Patrick C. Fant, III

EXHIBIT G

ELECTRONICALLY FILED - 2026 Oct 13 12:28 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2303974

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP2303974

Robert Baddorf et al
PLAINTIFF(S)

D R Horton Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

See page two below.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☑ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/13/2026 .

Southern Siding & Gutters Llc for Southern Siding & Gutters Llc
Soto Hvac, Llc
Mauricio Pena
Izamar Gomez, Individually And D/B/A Pena/Gomez Construction, Llc
Pena/Gomez Construction, Llc
Jesus Perez
Steadfast Landscapes
Steadfast Landworks, Llc
Littlejohn Landscapes
Raymond H. Cash, III
Richard Littlejohn
Kodiak Construction
Bold Mountain Inc
RL Grading Inc
Soto HVAC LLC
P&L Enterprises Llc
Cannadys Siding & Gutter Inc
Lansing Building Products Llc
Mary McHugh Webb for R Rivera Construction LLC
Builders Firstsource Southeast Group Llc
Southern Siding & Gutters Llc for Southern Siding & Gutters Llc
Arturo Licona Mendoza
Anthony J Rash for Lansing Building Products Llc
D R Horton Inc
Steadfast Landworks LLC
Martin Ramos Valenzuela
Carlos Ramos

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2026 Oct 13 12:28 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2303974

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

This matter is before the Court on Defendants' Motions to Alter or Amend (Reconsider) Pursuant to Rule 59(e), South Carolina Rules of Civil Procedure (SCRCP). The SCRCP "contemplates two basic situations in which a party should" file a Rule 59(e) motion: (1) where the party "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it[;]" and (2) the "party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. S.C. DOT, 361 S.C. 9, 21, 602 S.E.2d at 780 (2004). Rule 59 motions should be granted if the circuit court finds that there has been an intervening change of controlling law, that new evidence has become available, or that there is a need to correct a clear error or prevent manifest injustice. Robinson v. Wix Filtration Corp. LLC, 599 F.3d 403, 411 (4th Cir. 2010).

The July 15, 2026 Order granting Defect Class Certification is consistent with Henson v. S.C. Dep't of Corr., No. 2025-000689, 2026 WL 2106838 (S.C. July 22, 2026). The undersigned conducted a rigorous analysis of all requirements under Rule 23, SCRCP, finding the existence of significant common issues, which are determinative, in each of the respective Defect Classes. There is a common contention in each of the Defect Classes which is capable of class wide resolution. It should be noted that the Plaintiff's do not have any claims against the subcontractors. Nothing in the Defect Class Certification Order affects any of the substantial rights of the subcontractors.

After careful consideration of the motion, file, and materials submitted, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no legal basis to alter or amend the prior Order. Further, the Court finds no intervening change of controlling law, no new evidence that has become available, no clear error that is needed to be corrected, and no manifest injustice to prevent. Accordingly, Defendants' Motions to Alter or Amend (Reconsider), pursuant to Rule 59(e), SCRCP, is DENIED.

And it is so Ordered.

ELECTRONICALLY FILED - 2026 Oct 13 12:28 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2303974

Greenville Common Pleas

Case Caption:	Robert Baddorf , plaintiff, et al vs. D R Horton Inc , defendant, et al
Case Number:	2022CP2303974
Type:	Order/Electronic Form 4

So Ordered

Patrick C. Fant, III

EXHIBIT H

ELECTRONICALLY FILED - 2026 Aug 03 9:03 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2303974

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

CASE NO. 2022-CP-23-03974

Robert Baddorf, Matthew Crider, Jo Anne Gregory, Luke Hoopes, Vincent Pino, Ronald Rossi, Leandro Soriano, James Stanley, Individually, and on behalf of All Others Similarly Situated,

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

Southern States Resources, LLC, Raby Construction Company, LLC, Builders FirstSource – Southeast Group, LLC, Lansing Building Products, LLC, Cannady's Siding & Gutter, Inc., P&L Enterprises, LLC, Southern Siding & Gutters, LLC, Meridian Brick, LLC, General Shale Brick, Inc., M&L Reyna Construction, LLC, Saldana Brothers, Inc., VL Concrete, Inc., Sandlapper Concrete, LLC, Five Star Foundation, LLC, Star Concrete Specialists, LLC, Brundage Bone Concrete Pumping, Inc., RL Grading, Inc., Bold Mountain, LLC f/k/a Bold Mountain, Inc., Kodiak Company, LLC f/k/a Kodiak Construction, LLC, Gun Range Builder, LLC, Signature Scapes, Inc., Long Heating & Air Conditioning, Inc., and L&M Electric, Inc.

Third-Party Defendants.

Bold Mountain d/b/a Kodiak Construction,

D.R. HORTON, INC.'S MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT OF THE SAME

Fourth-Party Plaintiff,

v.

Robbins Landscaping, Inc.,

Fourth-Party Defendant.

Southern State Resources, LLC,

Fourth-Party Plaintiff,

v.

A Grade Above Others, LLC and CCAD, LLC,

Fourth-Party Defendant.

M&L Reyna Construction, LLC,

Fourth-Party Plaintiff,

v.

Jesus Jimenez,

Fourth-Party Defendant.

P& L Enterprises, LLC,

Fourth-Party Plaintiff,

v.

G&A Construction; JNC Siding Contractors, LLC; Agilberto Rubio; Elvin Mejia Cedillo; Adolfo Sales Amaya; Jose Fidel Espinal; and Marlon E. Mejia Cedillo,

Fourth-Party Defendants.

Builders FirstSource-Southeast Group, LLC,

Fourth-Party Plaintiff,

v.

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Silver Line Building Products, Corp.,

Fourth-Party Defendant.

PROCEDURAL BACKGROUND

This putative class action concerns alleges construction defects in all 127 single-family homes of the Eagles Glen subdivision, which D.R. Horton built and sold between 2016 and 2020. What began in July 2022 as a single-issue case addressed to grading and stormwater drainage expanded, through successive amendments, into a multi-defect complex action.

On June 4, 2025, following two days of oral argument, the Court denied class certification of the single overarching class Plaintiffs then proposed. (June 4, 2025 Order at 1, 16–17.) The Court's reasoning bears directly on the present motion. Applying the same "rigorous analysis" and "same injury" standard invoked here, the Court held that commonality was not satisfied because "the claims lack a central common contention that binds all of the alleged defects to a determinative issue," and because the homeowner survey data showed that "each home allegedly has a unique mix of alleged defects that will need to be individually considered." (*Id.* at 8–10.)

The Court properly and expressly adopted the reasoning of *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005), that "single-family residence construction defect cases will rarely be appropriate for class action treatment" because they involve "issues of causation, liability defenses, and damages [] that cannot be presumed through the use of generalized proof, but rather require each party to individually substantiate his or her claims." (*Id.* at 10–11.) The Court further found the proposed representatives inadequate and atypical, in part because both were subject to statute of limitations defenses and other individualized defenses not shared by the class. (*Id.* at 13–16.) In denying certification, the Court stated it would "entertain a

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Petition for proposed sub-classes," each of which "would also need to satisfy the five requirements under Rule 23(a), SCRCP." (*Id.* at 16.)

Despite the lack of any supporting case law for the proposition, the Court allowed the Plaintiffs a "second bite at the apple" by submitting "subclasses" to reconsider the ruling on class certification. The Court also did not allow a hearing on the subclass issue. Though the Court is now calling the class seven separate classes, the reality is that just as the Court had contemplated in its previous Order, there are now seven "subclasses" that are not compliant with existing South Carolina law.

On November 13, 2025, Plaintiffs filed a Fourth Amended Complaint alleging seven defect subclasses: Window, Siding, Concrete/Radon, Grading/Stormwater Drainage, HVAC, Stone, and Brick. In response, on March 17, 2026, the Plaintiffs filed their Notice of Motion and (Second) Motion for Class Certification(s). The issues in this Motion have been completely briefed.

LEGAL STANDARD

This Court possesses broad authority to reconsider and revise its certification ruling. A motion to alter or amend under Rule 59(e), SCRCP, "is not only a vehicle to request the trial court 'alter or amend the judgment,' but also a vehicle to seek 'reconsideration' of issues and arguments." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). A party "is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented," and may properly do so "when [it] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and [it] wishes for the court to reconsider or rule on it." *Id. See also* Rule 59(e), SCRCP.

The Court's reconsideration authority is at its zenith because the Order is interlocutory. A class-certification order "may be conditional, and may be altered or amended before the decision

on the merits." Rule 23(d)(1), SCRCP. Our appellate courts have confirmed that "[c]lass certification may be altered at any time prior to a decision on the merits." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). The Court may therefore modify, narrow, or vacate certification whenever continued adherence to the Order would be inconsistent with Rule 23. Indeed, the Court has a continuing obligation to ensure the Rule 23 prerequisites remain satisfied and to decertify or modify a class that does not satisfy them.

That obligation is exacting. The party seeking certification bears the burden of "proving the five requirements" of Rule 23(a), SCRCP, and "the Court must apply a rigorous analysis to determine each prerequisite is satisfied." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 20–21, 577 S.E.2d 190, 200 (2003). Failure to satisfy even one of the five requirements is fatal to class certification. *Id.*; *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990).

Where an issue bearing on certification overlaps with the merits, the Court must resolve it rather than defer it, because commonality demands a common contention "of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Certification is proper "only when a determinative critical issue overshadows [predominates over] all other issues." *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990).

In addition, as set forth below, a recent, binding opinion from the South Carolina Supreme Court has clarified that our courts must consider "predominance" as a factor in class certification analysis, just as the federal rules require. Because the Court did not perform a predominance analysis, the Order should be reconsidered on that basis alone. Additionally, because the

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requirement of predominance has not been proved by the Plaintiffs, the Court should reverse its decision certifying the seven subclasses.

Applying these standards, the Order should be altered or amended for the reasons set forth below. At a minimum, dissemination of class notice should be stayed pending the Court's ruling.

GENERAL ARGUMENT

A. The *Henson* Case

The South Carolina Supreme Court has just decided a case that presents a sea change for this Court's analysis of class certification in the present case. *Calvin Henson v. South Carolina Department of Corrections*, Op. No. 28343 (S.C. July 22, 2026) (copy attached as **Exhibit 1** hereto), changes the analysis on class action certifications in two major and critical ways: (1) the Court established, without any doubt, that predominance is a requirement for certification of class actions in this State; and (2) the Court held that South Carolina Rule 23 does not "endorse a more expansive view of class action availability than its federal counterpart." Both of these premises, now explicitly overruled by *Henso*n, have been centerpieces of the Plaintiffs' class action certification arguments in the present case.

For years, South Carolina Plaintiffs, including the present Plaintiffs, have argued that unlike the federal courts, South Carolina has no "predominance" requirement. In *Henson,* the South Carolina Supreme Court put this argument to rest for good. In *Henso*n, Justice Few made it clear that South Carolina Rule 23(a) has always contained—and continues to contain—a predominance requirement, even though the language of the Rule is not identical to its federal counterpart.

The *Henson* Court stated that it was not changing the law at all, but is simply describing what Rule 23(a) has required for the last 41 years. The result of this ruling is that every state court putative class actions must analyze predominance.

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It is well known that the South Carolina state version of Rule 23 says nothing about predominance. From that silence, class action plaintiffs' counsel, including the present Plaintiffs, argued that South Carolina had deliberately chosen a more permissive path than the federal system. In *Henson*, however, the Court explained that, far from expanding the availability of class actions, the omission of the Federal Rule 23(b) and (c) language was intended to *restrict* it. The Court relied in part on the late Dean Harry Lightsey and Professor Emeritus James Flanagan—the original reporters for our Rules of Civil Procedure—who wrote that the drafters "specifically rejected the most expansive use of the class action" and omitted the federal categories "in part, to avoid adopting by implication the broad federal precedent then-existing." As Lightsey and Flanagan put it, the requirement "that the common questions predominate over individual issues . . . is inherent in the general conditions for class actions." *Henson*, at p. 6, quoting Harry M. Lightsey, Jr. & James F. Flanagain, South Carolina Civil Procedure 199 (1st ed. 1985). In so holding, the Court noted that "it is not possible to achieve the efficiencies the class action procedure was designed to bring to litigation without a qualitative analysis of commonality **and some form of a predominance requirement.**" *Henson*, at p. 16 (emphasis added).

The Court went on to explain that the mere existence of one or more common questions does not suffice to demonstrate commonality under Rule 23(a)(2), SCRCP. Drawing on the seminal decision in *Gardner v. South Carolina Department of Revenue*, the Court reaffirmed that commonality requires "a determinative critical issue **[that] overshadows all other issues**" and that a class plaintiff "must articulate the existence of significant common, legal, or factual issues which bind the proposed class together." Henson at pp 6, 14 (emphasis added). The commonality standard the Court embraced echoes *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338

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(2011): what matters is "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes*, at p. 350.

The Court also noted that in a negligence case, such as the present case, a jury must necessarily hear testimony and consider evidence on whether the Defendant's allegedly negligent conduct proximately caused damage to the Plaintiffs, as proximate cause is "an essential element of every negligence case." *Henson*, p. 8, citing *Hurd v. Williamsburg County*, 363 S.C. 421, 427, 611 S.E.2d 488, 492 (2005) ("In a negligence action the plaintiff must prove proximate cause"). In this case, the jury will be required to determine whether each defect has proximately caused damages to each Plaintiff under the Plaintiffs' negligence theory.

The Court went on to expressly overrule *Littlefield v. S.C. Forestry Commission*, 337 S.C. 348 (1999), relied upon by the Plaintiffs in the present case, to the extent it held that by omitting the additional federal requirements, Rule 23, SCRCP "endorses a more expansive view of class action availability than its federal counterpart." That case was the direct opposite of the inherent-predominance theory, and it is now overruled to that extent.

The new, overarching message of *Henson* is that a class should not now be certified simply because a common question exists. To certify a class in this state, a plaintiff must show that the common questions are determinative and predominate over the individualized ones, and courts must scrutinize how the case would actually be tried before certifying. Under the facts of *Henso*n, the Court concluded that trying the inmates' claims as a class would require individualized findings on class membership, negligence, proximate cause, and damages all of the potential members, overwhelming any common question. *Henson*, p. 11-12, 18. The Court reversed the circuit court's certification order and remanded, requiring individual claims. *Id*. at

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28. This Court should do the same, by reconsidering its Order and denying class certification under the new *Henson* standards.

B. Subclasses without a properly certified overarching class are improper in South Carolina.

Although the Court's Order on the Plaintiffs' Second Motion to Certify ignores the issue that subclasses have never been allowed in South Carolina absent a certified over-arching class, the reality is that the "classes" that have been certified are actually subclasses of an **uncertifiable, overarching class**. The Court recognized this fact in its original Order denying class certification, stating that it would "entertain a Petition for proposed sub-classes," each of which "would also need to satisfy the five requirements under Rule 23(a), SCRCP." (*Id.* at 16.) (June 4, 2025 Order of this Court).

Even the Plaintiffs' own documents also support its realization that its seven "classes" are actually "subclasses." *See*, Plaintiffs' Notice of Motion and (Second) Motion for Class Certification(s), in which the Plaintiffs state that they are seeking an Order "certifying the following classes (or subclasses) of homeowners. . .." Plaintiffs' previously filed documents acknowledge that these are actually subclasses. There is **no authority** to support a contrary conclusion.

It bears repeating that there are **zero cases in South Carolina that have ever allowed subclasses to proceed where there is no overarching class.** Plaintiffs asked the Court, from the beginning, to certify "subclasses" as the Court referenced in its June 4th Order. Plaintiffs admit, however, that subclasses without an "umbrella" class would be atypical. (Plaintiffs' Omnibus Motion, pg. 18, fn. 7). In fact, subclasses without an overarching or "main" class **has never been allowed in any known South Carolina or Fourth Circuit case**. Rather, "subclasses" are intended to, and have been used to, separate sub-units of **otherwise proper overarching classes**.

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C. Subclasses are not a mechanism whereby an uncertifiable class can be certified or resurrected.

1. Unlike Federal Rule 23, Subclasses are not provided for in South Carolina's Rule 23.

Rule 23, SCRCP, is modeled substantially on the corresponding Federal Rule. However, certain requirements and provisions of the Federal Rules were omitted when the South Carolina Supreme Court promulgated Rule 23, SCRCP. In interpreting the South Carolina Rules of Civil Procedure, the rules of construction for statutes apply. *Maxwell v. Genez*, 356 S.C. 617, 620, 591S.E.2d 26 (2003) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.") "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578 (2000) (citing Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Despite the South Carolina Supreme Court listing requirements for class action certification that are similar to the federal rules, **Rule 23, SCRCP, is devoid of any reference to subclasses**. If the South Carolina Supreme Court intended to allow subclasses, there was ample opportunity to include subclasses as an option. The South Carolina Supreme Court chose not to do so. Importantly, when the South Carolina Supreme Court promulgated Rule 23, SCRCP, it was no doubt aware of Rule 23, Fed. R. Civ. P., which explicitly includes a reference to subclasses. In the notes and comments sections of Rule 23, SCRCP, the Supreme Court consistently referenced the federal rules of civil procedure and explained the differences between the South Carolina rules of civil procedure and the federal rules of civil procedure. "When one provision does not include a right that is included in a related provision, legislative intent is that a right will not be implied where it does not exist." *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245 (2007). Had our Supreme Court intended subclasses to be a

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mechanism for assisting uncertifiable subclasses in South Carolina, it would have explicitly included that intent. However, it did not, and therefore, subclasses are not a tool by which courts may certify new "subclasses" or resurrect Plaintiffs' failed class.

2. South Carolina case law holds that subclasses are inappropriate for saving uncertifiable class actions.

There are no known cases in South Carolina or the Fourth Circuit that allow subclasses that are not part of an already-certified global class or global class that meets the requirements of Rule 23, SCRCP. *Jessica S. Cook v. S.C. Pub. Serv. Auth.*, 2019 S.C. C.P. LEXIS 7822 (Hampton County Cir. Ct. November 1, 2019) (establishing subclasses where a class was being certified); *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986) (discussing the use of subclasses in determining initial membership in the class in the context of a **certified class**); *Campbell v. S.C. Dep't. of Corr.*, 2021 S.C. C.P. LEXIS 1984 (Richland County District Court 2021) (reference to the possibility of subclasses in an action where the parties preliminarily agreed to a class action and the court conditionally certified a class).

In the one case in which subclasses were proposed in a context similar to this matter, the Circuit Court **denied the use of subclasses**. In *Mulcahey v. Columbia Organic Chems. Co.*, the plaintiffs attempted to certify a class action that was denied by the circuit court. 1995 S.C.C.P. LEXIS 1 (Richland County District Court 1995). There, "plaintiffs attempt[ed] to salvage a commonality argument by suggesting that any impediment can be cured by the [c]ourt ordering subclasses be established." *Id.* at 10. The district court found that argument unpersuasive because, *inter alia*, "the [c]ourt found **no authority in South Carolina** for creation of subclasses such as those proposed by [p]laintiff," and unlike the Rule 23, Fed. R. Civ. P., Rule 23, SCRCP contains no provisions whereby subclasses are a mechanism to save an uncertifiable class. *Id.* Plaintiffs' statement that "'subclasses' without some form of umbrella 'class' is atypical" is partially correct;

however not only are these kinds of subclasses "atypical," **they are nonexistent**. This Court's permitting of subclasses is **clear, reversible error**. This Court should reconsider and reverse its ruling on this ground alone.

D. Recent Courts that have performed a "rigorous analysis" have refused to certify classes in similar cases.

It bears repeating that courts who have performed a "rigorous analysis" and issued detailed, thorough orders have denied class certification in similar cases brought by the Lucey Law firm. Two Lucey Law Firm cases, decided on the same date in 2016, denied class certification **even on a one-issue case**, due to lack of commonality and typicality. These cases were decided by Judge Norton in the United States District Court. *Naparala v. Pella Corp.*, No. 2:14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72442, at *26 (D.S.C.June 3, 2016); *Romig v. Pella Corp.*,No. 2-14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72437 (D.S.C. 2016).The allegations in these two cases were as the same type as those in the present case, and very similar to those alleged for the "window" subclass in the present case. The Plaintiffs in *Naparala* and *Romig* sued the window manufacturer, alleging three different defects in the windows, just as counsel has done in the present case.

Judge Norton made the following holdings in these case: "A showing of commonality does not simply entail raising common questions but a showing that "the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed.2d 740 (1982)). "Th[e] language [of Rule 23(a)(2)] is easy to misread, **since [a]ny competently crafted class complaint literally raises common 'questions.**'" *Id*. (emphasis added)

Judge Norton noted that these window cases presented a number of individual inquiries, particularly with respect to causation. He recognized that the scope of "causation" issues presented by plaintiff's claim is not limited to determining the cause of each class member's damages. He

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went on to say that while individual causation in the case would certainly require its own set of individualized inquiries, each class member will also need to show that they satisfied the notice requirement under [the manufacturer's] limited warranty. This is very similar to the case at bar, in which each Plaintiff will have to show, individually, that they complied with the Notice to Cure statute and did not make repairs without notice to D.R. Horton.

Moreover, Judge Norton noted that inquiries about causation in these cases are likely to be very fact intensive, as it will be necessary to differentiate what damage was caused by defective "failure paths" and damage was caused by independent factors, such as improper installation, condensation, or other causes. Judge Norton also noted that differentiating defect-related damage from non-defect-related damage was already a highly disputed issue in this litigation, as it is in the present case. The need to prove notice of a defect and the possibility that some failures might be deemed non-defective "will only exacerbate the problems posed by these individual inquiries on a class-wide basis."

Judge Norton also noted that the window defendant was likely to have affirmative defenses available against many class members, especially with regard to the statute of limitations. He then stated that to the extent class members seek to avail themselves of equitable tolling of that statute, it would be necessary to determine whether such class members: (i) relied on [the defendant's] actions or representations, and (ii) did not unreasonably delay filing suit after discovering the true facts. *Naparala* at *34-35. These are the **identical issues presented in the present case** as to the statute of limitations.

The *Naparala* Order goes on to note that there is no question that individual inquiries into causation and affirmative defenses may preclude class certification. *Id*., quoting *Lienhar*t v. *Dryvit Sys*., 255 F.3d at 149 (4th Cir. 2001) (holding that need for "individualized proof of damage

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causation" destroyed predominance); *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d at 342-43 (4th Cir. 1998) (recognizing that "when the defendant's affirmative defenses [] may depend on facts peculiar to each plaintiff's case, class certification is erroneous" and where "each putative class member's claim for [] damages was inherently individualized," they were "not easily amenable to class treatment"). A number of courts have found such inquiries to preclude class certification, despite the existence of a common defect issue. *Naparala*, citing *City of St. Petersburg v. Total Containment, Inc.,* 265 F.R.D. 630, 636 (S.D. Fla. 2010) (plaintiffs bringing claims based on defective pipes failed to satisfy predominance in light of "individual issues going to liability and damages"); *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc*., 254 F.R.D. 68,75 (E.D.N.C. 2008) (plaintiffs bringing claims based on defective farm equipment failed to satisfy predominance where causation issues and affirmative defenses would dominate most every class member's case, "even assuming that [plaintiffs] were able to prove that the [equipment was]defective").

The *Naparala* court also cited *Brown v. Electrolux Home Products, Inc*., 817 F.3d 1225, 2016 WL 1085517 (11th Cir. 2016), as instructive. In *Brown*, the Eleventh Circuit reversed the district court's decision to certify a class of washing machine purchasers bringing breach of warranty and other claims against the manufacturer. The court found that the district court failed to consider certain state-law issues which could require individual proof. *Brown,* 817 F.3d1225, Id. at *8. Notably, these issues included a **pre-suit notice requirement** not unlike the notice of defect requirement in this case. *Id*.

On top of this, the court found that the need to address various affirmative defenses—including statute of limitations defenses—provided an independent bar to class certification. See *Id*. at 75 ("[E]ven if the court agreed with [] plaintiffs that common questions would predominate

over the individual causation questions, . . . plaintiffs have not shown that common questions would predominate over the individual affirmative defenses . . ..”). “The breach of express warranty claim in this case, . . ., will likely require numerous individualized inquiries into causation and affirmative defenses.” *Naparala* at *36. Based on this law and the fact that there were multiple defects alleged on one issue, Judge Norton refused to grant class certification on either of the Lucey Law Firm’s cases. The present subclasses all follow the facts of *Naparala*.

Another very similar recent case decided by Judge McCoy in Berkeley County is *Lakeview Commons HOA, Inc. v. Quinn*, Case No. 2018-CP-08-02142. In that case, **like the present case**, Plaintiffs filed multiple Amended Complaints, with continuous updates on alleged defects. In that case, in denying class certification, Judge McCoy found that the depositions of the proposed class representatives showed that each revealed different defects among neighborhood homes. Judge McCoy also noted that the report from the Plaintiffs’ expert witness, Ross Clements (a well-known Plaintiffs’ expert in South Carolina), “observed ‘defects’ in the townhouses, but some defects existed only in certain townhouses.” *Lakeview Commons* at *. 4.

Important factors in the Court’s determination that there was no commonality, were that: different subcontractors provided goods and services to different homes; that disparate damages would be incurred, based on differing defects in different homes; and that there were different legal issues depending on the facts of each case. These are identical to the considerations in the present case.

The *Lakeview* court next noted that the typicality requirement entails consideration of whether the named Plaintiffs can prove: (1) they were injured by the same conduct that has injured other class members and (2) whether other Plaintiffs’ claims are based upon conduct that is not unique to the named Plaintiffs. Lakeview, at *10, citing *Osgood v. Harrah's Entm't, Inc.*, 202

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F.R.D. 115, 124 (D.N.J. 2001). Here, D.R. Horton has provided a comprehensive analysis of why each proposed class representative has not been injured the same as others, and why their claims are different from others in their proposed subclasses. *See*, Adequacy Section of D.R. Horton's Brief in Opposition to Second Motion for Class Certification.

E. The Court Ignored the Disingenuousness of Plaintiffs' allegations and those of their experts.

The record evidence shows that this entire lawsuit is at most a conglomeration of a few homes, in a large neighborhood, with alleged defects that are not common across any of the seven (7) subclasses. This is, in fact, a case **manufactured by Plaintiffs' counsel** into a purported class action. This is not the type of case that the class action vehicle is intended to serve.

The facts and disingenuousness bear repeating. This case began in 2021, after WDP found a few garages with concrete cracks. After a verdict was obtained in the Rose Hill case in Anderson County, Plaintiffs' counsel, after sitting on this case for a year and a half, sent WDP and Andy Sherard out to the neighborhood to find further issues to try to get another class certified. After homeowner surveys were done, showing that only grading could in any way be considered a "common" issue (at the time the surveys were completed), Plaintiffs' counsel sent an HVAC "expert" out to the neighborhood to try to find other issues. Of course, this evidence was admitted despite the prejudice to D.R. Horton of not having surveys to see if homeowners actually suffered HVAC issues. As the case moved on, these "experts" continuously added more and more manufactured defects.

The best example of this is found in the manufactured "radon issue" presented to this Court at the last minute. As the Court learned in the briefings and deposition of the radon expert presented by Plaintiffs, there was never any evidence of a class-wide radon problem. Plaintiffs knew this for over a year but decided to present an expert anyway. The Plaintiffs' experts had lost the battle for

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a concrete class (because the cracks do not exceed the required width), so a desperate attempt was needed to salvage this class. The expert put forth the ridiculous and unsupportable theory that any radon in a home is a "defect." The absurdity of this position should have shown the Court to what lengths these Plaintiffs would go to invent issues for their case.

What this Court has done is certified a class, manufactured by counsel and its expert witnesses over a number of years drummed up by a few disgruntled homeowners. This case is not about helping homeowners in need. It is about obtaining windfalls for homes that **have no damage and few or no defects** and lining the wallets of counsel. As shown in the homeowners' many depositions, Mr. Lucey has never even met even one of these homeowners. See, Stanley Depo. 40:12 – 13, Rossi Depo. 72:4 – 13, Soriano Depo. 134:18 – 21, Hoopes Depo. 41:19 – 20, Crider Depo. 29:25 – 30:1.

This Court should follow the example of Judges Norton and McCoy, and many more, who rigorously analyzed similar purported class actions and put a stop to them.

ADEQUACY

A. Inadequacy of Counsel and Class Representatives

The Order treats Rule 23's adequacy requirement in a conclusory manner, largely adopting Plaintiffs' positions with little analysis. D.R. Horton respectfully requests the Court issue a revised Order to address the merits of Defendant's arguments.

i. Timeline of Litigation and Adequacy of Class Counsel

The Order notably fails to confront the procedural history of this action, which makes clear that Plaintiffs' counsel—and the Lucey Law Firm in particular—have been pulling the strings from the beginning. The Lucey Law Firm were involved for at least a year before the original complaint was filed, and for more than two-and-a-half years before making a formal appearance. (*See* D.R.

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Horton's Mem. Opp'n Pls.' Second Mot. Subclass Certification at 43–45 & n.3.) Crucially, despite maintaining that their representation in other cases against D.R. Horton does not present a conflict, they waited until *after* obtaining approval for a settlement in a similar class action to make that appearance. (*See id.* at 45 n.6.)

The Order dismisses Defendant's concerns about the Lucey Law Firm's participation in other litigation against D.R. Horton by noting the presence of co-counsel in this case and describing other cases as "unrelated." (Order at 4.) However, the Order identifies no case law or rule to support this position, nor does the Order address the case law cited by Defendant, which makes clear that multiple representations are not proper. (*See* Mem. Opp'n at 45–47.) Moreover, the pleadings in the other cases brought by the Lucey Law Firm against D.R. Horton reveal uncanny similarities with Plaintiffs' claims here. *See, e.g.*, Summons & Complaint at 7, *Williams v. D.R. Horton, Inc.*, No. 2025-CP-04-02216 (S.C. Ct. Com. Pl. Sept. 5, 2025) (alleging, *inter alia*, defective siding and masonry, water intrusion, and poor drainage), attached hereto as **Exhibit 4**. Clearly this spate of putative class actions against D.R. Horton by the Lucey Law Firm are not "unrelated," and the Order should be revised to address these legitimate concerns raised by Defendant.

ii. Adequacy of Proposed Subclass Representatives

Plaintiffs' designated class representatives also lack the characteristics necessary to adequately represent the proposed subclasses. However, as with the Order's discussion of Plaintiffs' counsel, the Order largely ignores Defendant's arguments and evidence in lieu of boilerplate recitations. The Order finds the proposed representatives adequate based on little more than the fact that they met with Plaintiffs' counsel, sat for depositions, and allowed their homes to be inspected. That is insufficient to satisfy Plaintiffs' burden of proving that the representatives

share similar interests with absent class members, can keep absent class members reasonably informed, and can advocate effectively on behalf of absent class members. Therefore, at a minimum, the Order should address Defendant's arguments and identify the law and evidence that justify the Court's decision.

1. James Stanley: Siding and Grading

James Stanley, proposed representative for the siding and grading subclasses, demonstrated a host of reasons for why he is inadequate as a class representative. (*See* Mem. Opp'n at 51–54.) He lacked understanding about this litigation, as well as the defects for which he is supposed to represent his neighbors. (*See id.*) What knowledge he possesses appears to come directly from Plaintiffs' counsel and their experts. (*See id.* at 51, 53.) The Order glosses over these deficiencies because Stanley "met with Class Counsel, spoke[] with his neighbors, reviewed documents and expert materials, sat for a deposition," and allowed the parties and experts to inspect his home. (Order at 15; *see also id.* at 22.)

The record contradicts this conclusion, as it shows that Stanley had in fact *not* spoken with his neighbors to any significant extent, at least not without counsel present. (Mem. Opp'n at 52–53.) Moreover, allowing experts and the parties to inspect his home says nothing about *Stanley's* participation in the case or ability to advocate on behalf of his neighbors.

Stanley's involvement had largely been limited to preparing for his deposition. (*Id.* at 52.) There is little to suggest that he will be anything other than a mouthpiece for the information "given him by counsel." *Kelley v. Mid-Am. Racing Stables, Inc.*, 139 F.R.D. 405, 410 (W.D. Okla. 1990). That does not support the adequacy requirement needed for class certification. *See id.* (noting that a class representative must have sufficient knowledge "to ensure that the party is not simply lending his name to a suit controlled entirely by the class attorney" (citation omitted)).

2. Leandro Soriano: Stone

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Leandro Soriano is Plaintiffs' proposed representative for stone defects. Like Stanley, the Order credits him with being "engaged and ha[ving] sufficient knowledge of the case" because he "met with Class Counsel, reviewed documents and expert materials, sat for a deposition," and allowed the parties and experts to inspect his home. (Order at 11.)

However, inconsistencies in his deposition testimony about how and when he came to be a class representative place his credibility in question. (*See* Mem. Opp'n at 54–59.) He also expressed limited knowledge about the alleged defects in the neighborhood, the class action procedure, and his role in this litigation as a representative. (*See id.* at 59–63.)

These deficiencies go unmentioned in the Order in favor of a conclusory statement that "Soriano is engaged and has sufficient knowledge of the case." (Order at 11.) However, the Order offers no analysis or evidence to support this conclusion and should be revised to address this deficiency.

3. Luke Hoopes: Brick

The Order states that Luke Hoopes will adequately represent the brick subclass because he "met with Class Counsel, reviewed documents and expert materials, sat for a deposition," and allowed the parties and experts to inspect his home. (Order at 24.) However, as with the other proposed representatives, he had limited knowledge of the case aside from "his review and regurgitation of Plaintiffs' expert reports, provided to him by counsel." (Mem. Opp'n at 66.)

Hoopes is further inadequate to serve as a class representative as he alleges unique damages to the bricks over his garage. (*Id.* at 67.) The Order nonetheless concludes that his damages are "typical," can be resolved simultaneously with those alleged by other homeowners, and do not create a conflict of interest. (Order at 24.)

The Order should be revised to show why Hoopes's lack of knowledge, overreliance on

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information from Plaintiffs' experts as transmitted to him by counsel, and unique damages do not render Hoopes inadequate to represent the brick subclass.

4. Matthew Crider: HVAC and Concrete

Matthew Crider is proposed to represent the HVAC and concrete subclasses. The Order concludes that he can adequately represent the concrete subclass because he has "been in communication with Class Counsel, spoken with neighbors, reviewed documents and expert materials, been deposed," and allowed the inspection and expert testing of his home. (Order at 18.) The Order makes the same conclusion for the HVAC subclass because Crider "met with Class Counsel, reviewed documents and expert materials, sat for a deposition, permitted all parties to inspect his home[]," and allowed expert testing of his home. (*Id.* at 19–20.)

However, the record suggests that Crider has *not* communicated with his neighbors about *either* defect. (*See* Mem. Opp'n at 67–68, 71.) Like the other proposed representatives, his knowledge was largely limited to what he had been told by Plaintiffs' counsel and experts. (*See id.* at 68–69.) In addition, contrary to the Order's findings, (*see* Order at 18), Crider was unaware of any destructive testing of concrete at his home, and certainly unaware of the results of any such testing. (*See* Mem. Opp'n at 69–70.)

The Order also finds that Crider's alleged damages are sufficiently similar to absent class members despite Plaintiffs' expert concluding "that Crider's HVAC system contains" only "7 of the 9 alleged defects." (Order at 19.) For his part, Crider was unaware whether his neighbors had experienced similar issues as himself. (*See* Mem. Opp'n at 71.) Therefore, it is unclear whether Crider's damages are truly "typical" of his neighbors and the putative class.

Finally, D.R. Horton raised legitimate concerns about Crider's credibility given his previous firing for alleged financial misconduct. (Mem. Opp'n at 71–73.) The Order fails even

to mention these concerns. Therefore, Defendant requests the Court issue a revised Order to address this omission.

5. Ronald Rossi: Windows and Concrete

Like Crider, the Order finds Ronald Rossi adequate to represent the concrete subclass because he has "been in communication with Class Counsel, spoken with neighbors, reviewed documents and expert materials, been deposed," and allowed the inspection and testing of his home. (Order at 18.) The Order makes a similar conclusion for the windows subclass, stating that Rossi "has been engaged with this case from the beginning and has met with Class Counsel, spoken with his neighbors, reviewed documents and expert materials, sat for a deposition," and allowed the parties to inspect and experts to test his home. (*Id.* at 13.) As with Crider, however, the record reveals serious concerns about Rossi's credibility, which the Order fails to address.

Rossi's window testimony was wildly inconsistent and contradicted his previous responses to a homeowner survey. (*See* Mem. Opp'n at 74–79.) His change in tune—and newfound concern over alleged issues he previously was unaware of—appears to come entirely from Plaintiffs' counsel and experts. (*See id.* at 76–78.) As a result of these inconsistencies, Rossi is "vulnerable to serious attacks upon [his] credibility," which provides a sufficient basis "to justify denying [him] a fiduciary role as class representative[]" for both subclasses. *Kline v. Wolf*, 702 F.2d 400, 401, 403 (2d Cir. 1983); (*see* Mem. Opp'n at 79.) As the Order recognizes, Rossi is also vulnerable to a statute of limitations defense on the window claim, (Order at 13 n.2), providing yet another reason he is inappropriate to serve as a class representative. (*See* Mem. Opp'n at 79–80.)

For the concrete subclass, Rossi's testimony reveals that he has limited knowledge about the scope, nature, and cause of the alleged defects. (*See id.* at 80–81.) That testimony also raises doubts as to whether his concerns about radon exposure are genuine or, like so much else in this

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case, a product of counsel's making.[1] (*See id.* at 81.) Combined with his lack of knowledge about his duties as a fiduciary, Rossi's testimony leaves the impression that he views his role as little more than a middleman for Plaintiffs' counsel. (*See id.* at 81–82.) The Court should revise the Order to address these concerns.

6. Robbert Baddorf and Jo Anne Gregory

Plaintiffs also attempt to designate Robert Baddorf and Jo Anne Gregory—the original class representatives—as "co-representatives" of the various subclasses, as needed. (Fourth Am. Compl. ¶ 53(h).) The Order says nothing of this request. Therefore, D.R. Horton requests the Court explicitly refute Plaintiffs' use of Baddorf and Gregory as "backup" class representatives. (*See* Mem. Opp'n at 82–84.) The Court should make clear that Plaintiffs cannot rely on Baddorf and Gregory as an alternative basis to support class certification.

B. Conclusion

Plaintiffs' proposed subclass representatives are inadequate for many reasons, (s*ee id.* at 43–85), which concerns are largely absent from the Court's Order. D.R. Horton asks the Court to correct this oversight with a revised Order denying class certification or, at a minimum, addressing Defendant's arguments directly.

BRICK

I. CERTIFICATION OF THE BRICK CLASS SHOULD BE RECONSIDERED AND REVERSED

A. Commonality As To All Brick Defects Alleged Has Not Been Demonstrated By The Plaintiffs And Class Certification Is Improper.

[1] Although the Court denied certification of the radon claims, Rossi's testimony on the issue reflects on his overall credibility. *See Kline*, 702 F.2d at 403 (recognizing that doubts about a witness's credibility on one issue can render them inadequate to represent a class on a different issue).

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Under South Carolina law, Courts ***must*** conduct a "rigorous analysis" to determine whether the prerequisites for class certification are satisfied. *Waller*, 300 S.C.465, 467, 388 S.E.2d 799, 801. Specifically, the Court must find that Plaintiffs have demonstrated that their proposed Brick Subclass has "the capacity of a class-wide proceeding to ***generate common answers*** apt to drive the resolution of the litigation." In completely ignoring the variety of the installation of brick on each of the Subject Properties (which causes these issues to be far more complex), Plaintiffs utterly failed to establish commonality under Rule 23(a)(2), SCRCP. Further, Plaintiffs rely on Dr. Whitlock's questionable methodology which offers only isolated examples and sweeping generalizations in lieu of data. Furthermore, Plaintiffs presented no unifying, critical issue capable of tying this putative brick class together, nor could they demonstrate that forcing these claims into a class action serves any valid procedural purpose over individual lawsuits.

Unfortunately, this Court did not properly consider the dearth of evidence provided and the Plaintiffs' utter lack of evidence that the brick issues are common or typical. Moreover, this Court wholly disregarded D.R. Horton's evidence and selectively cherry-picked Exponent's observations. This departure from South Carolina law constitutes a fundamental failure to apply the required rigorous analysis, and the Order Granting Certification of the Brick Subclass should be reconsidered and reversed.

i. The Court Failed To Provide Commonality Analysis On Six (6) Of The Seven (7) Alleged Brick Defects.

Of the seven (7) total defects brought by the Plaintiffs, the Order Granting Subclass Certification states that the "Plaintiffs expert found that all homes inspected contained at least two substantial brick code violations." Order Granting Subclass Certification, p. 23. The Court did not even identify those two defects for the record. In fact, the only analysis in the Order Granting Subclass Certification on the brick is a misstatement by the Court that "D.R. Horton concedes that

there is a common and typical defect where flashing does not extend to the brick face." *Id.* [2] In addition, the Order Granting Subclass Certification failed to address whether commonality and typicality existed as to six (6) of the alleged brick defects in its Order Granting Subclass Certification.

Plaintiffs' first alleged defect is made up of four (4) different issues with fasteners/wall ties, and includes "that [they] are not sized correctly, not corrosion resistant, not spaced properly, and not secured into studs." Dr. Whitlock's opinion offers only sweeping claims, few photographs, and a superficial review of these four (4) different purported brick defects related to fasteners/wall ties. For example, Dr. Whitlock provided between two (2) and four (4) photos to demonstrate that each of the issues are common and typical, despite there being twenty-eight (27) brick homes (instead of twenty-eight (28), as held by this Court in its Order Granting Subclass Certification). Rather than demonstrating how each condition could be extrapolated to the Brick Subclass, Dr. Whitlock presented disconnected allegations without conducting adequate investigation as to whether the allegations are common or typical. This piecemeal, anecdotal approach cannot satisfy the rigorous requirements of class certification. This Court lacked any meaningful details regarding the underlying basis for these alleged defects and Dr. Whitlock failed to provide any material analysis on whether these alleged defects are common or typical of the Subject Properties.

In essence, by certifying a class based on this group of alleged defects, the Court's logic is reduced to a simple premise: *Dr. Whitlock said so, so it must be true.* This is made apparent by this Court's failure to address Exponent's detailed and thorough investigation. First, Exponent clarified that missing brick ties in select test cuts do not prove they were omitted entirely; factors

[2] While D.R. Horton concedes that Exponent found this condition in a majority of homes, it does not concede that it is a defect.

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like heavy mortar, home construction, or other variables may have simply obscured them from view.[3] Exponent further found that brick ties were located within the limited testing access; every single home contained brick ties that were properly attached to the structure; and every single brick tie was properly sized and adequate for the job. Additionally, Exponent determined that only one (1) of thirteen (13) homes, and only one (1) of twenty-three (23) inspections sites, exhibited improper support as alleged by Dr. Whitlock.[4] At every location where Exponent was able to identify brick ties, all brick ties were attached to the structure, attached to the brick, and were quality brick ties. Of the thirteen (13) homes Exponent observed only five (5) containing at least one (1) instance of through-brick or stair-step cracking in the brick. This Court conducted no analysis on the commonality or typicality of these facts, thereby side-stepping the rigorous analysis on commonality as to improperly installed fasteners/wall ties.

Plaintiffs' third alleged defect is "[b]rick air cavity that is clogged with mortar and 1" air gap not maintained." Dr. Whitlock opined that the existence of mortar within the drainage cavity violates R702.7.3 and R703.8.4. R702.7.3. As demonstrated clearly by Exponent, Dr. Whitlock's analysis on this defect is simply not true. Rather, the South Carolina Residential Building Codes and industry standards allow for mortar to be present within the air cavity when installing brick on the exterior facade. *See*, Exponent PowerPoint, pp. 52-54. Exponent further observed zero (0) out of the twenty-two (22) locations were this alleged defect was present. Following a troubling pattern, this Court simply chose to ignore this critical point and did not address this alleged defect in the Order Granting Subclass Certification.

[3] This same logic applies to Dr. Whitlock's observations.
[4] However, even for this one home, Exponent found no evidence of damage associated with the lack of brick ties

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Plaintiffs' fourth alleged defect is "[m]issing drainage weeps below brick window row-lock sills and improperly spaced weeps along brick walls." *See* Plaintiffs' Memo in Support of its Motion to Certify the Brick Defect Class, p. 6. Dr. Whitlock's Supplemental Affidavit (recently filed on March 16, 2026) further undermines the establishment of a viable brick "subclass," as it focuses narrowly on four (4) properties, including the proposed class representative Luke Hoopes, without providing a sufficient evidentiary basis to demonstrate that the alleged defect is present across the Subject Properties and that these four homes are representative of the broader Brick Subclass.

Further, this Court simply brushed aside Exponent's observations that identified only limited instances of missing weeps, directly challenging the integrity of Dr. Whitlock's claims. For example, Exponent found missing weeps below rowlocks occurred only at five (5) of eleven (11) locations. In addition, Dr. Whitlock alleged weeps were missing at the base of the brick walls. Exponent observed this to be true at only four (4) of twenty-two (22) locations. Also, Dr. Steffey opined that the observed instances of these "defects" were not sufficient enough to be extrapolated throughout the neighborhood found the stone to be properly installed and provided statistical data and analysis. Certification based on such flimsy evidence is improper; this Court must, at a bare minimum, determine how this alleged defect constitutes a common issue among all of the Brick Subclass.

Plaintiffs' fifth alleged defect is the "[g]arage lintels that are not properly supported and not corrosion resistant." Dr. Whitlock's contention is that the brick installation at the Subject Properties violated R703.8.3. Aware that his brick analysis fell short of the threshold for class certification, Dr. Whitlock's belatedly offered "analysis" in addition to his earlier-alleged lintel defects, including: (1) deflection greater than the Code allows, (2) improperly fastened shelf

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angles, (3) improperly sized lintels, (4) improperly sized masonry columns beside openings, (5) improperly oriented lintels, (6) improper bearing, (7) improper corrosion resistance, (8) missing movement joints, and (9) cracking in the veneer around lintels. Five (5) of these defects were **never identified prior to March 16, 2026**, including improperly fastened shelf angles; improperly sized lintels; improperly sized masonry columns beside openings; improperly oriented lintels; and missing movement joints. The Court should not have considered any of this late-identified evidence as having any credibility whatsoever. WDP has been investigating this neighborhood searching for defects to manufacture since 2021. All of a sudden, he comes up with nine new defects, months after the other parties had the chance to inspect all of his previously manufactured defects. The Court should have recognized this very disturbing trend in all of the Plaintiffs' evidence.

Amplifying the cracks in Dr. Whitlock's credibility, his new "analysis" is entirely devoid of any underlying data. Dr. Whitlock never proffered any figures showing how many Subject Properties contained brick lintels above the garage. In contrast, Exponent's analysis proved conclusively that the garage lintel condition alleged by the Plaintiff was **limited to one Subject Property**.[5] Further, Exponent's analysis shows that **all lintels** that were observed had the rust inhibitive coating required by code, demonstrating that the lintel defects are neither widespread nor representative of the proposed brick subclass. Unfortunately, the Court omitted any discussion of this critical point, leaving this core defect entirely unaddressed in the Order Granting Subclass Certification.

[5] Exponent's report shows that only one of the homes had a sagging lintel and it was the same This is the same home in which structural issues were identified above by Whitlock.

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Plaintiffs' sixth alleged defect is that the "[b]rick rowlock sills that are not properly sloped at most locations and not flashed." *See* Plaintiffs' Memo in Support of its Motion to Certify the Stone Defect Class, p. 7. Dr. Whitlock opined that "all 28 brick-clad homes in Eagles Glen are missing Code-prescribed weeps and flashing that extend to the surface of the walls as required," and "[a]ll 13 brick-clad homes tested also had **one or more** of these additional drainage-related failures: . . .b) improperly sloped rowlocks." Only four (4) photos were utilized to assert that improper sloped rowlocks were a common and typical defect in the Subject Properties. No further explanation regarding the interpretation of Figure R703.8 was provided by Dr. Whitlock. Once again, Exponent demonstrated that these purported defects are isolated occurrences that do not reflect systemic issues throughout Eagles Glen. See, Exponent PowerPoint, pp. 74-75.

As for the brick rowlocks not being properly sloped, Exponent found this allegation in only three (3) out of the nine (9) locations inspected. In addition, the "missing flashing below" the rowlock sills was found in only two (2) of those nine (9) locations. Exponent's inspections and analysis have found that the alleged conditions occur in isolated cases. The Court apparently simply chose to ignore this critical point.

D.R. Horton made almost identical arguments as to Plaintiffs allegations of the brick veneer installed was not properly supported by the foundation. Exponent found that Dr. Whitlock did not provide sufficient evidence that inadequate brick support was common and typical, or that it resulted in damage. *See* Exponent PowerPoint, pp. 76-77. Furthermore, the BIA Technical Note, which Dr. Whitlock provided as support for his position is merely a guideline as the South Carolina Residential Building Code "does not appear to prohibit the installation of brick veneers that partially extends over flatwork." *Id*. These arguments too went ignored and unaddressed by the

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Court in its Order Granting Subclass Certification. Certifying a subclass on a defect on this amount of flimsy evidence that was completely disproven is legally flawed and logically irreconcilable.

ii. The Court Erred In Finding That The Allegations Of Two Defects In All Of The Homes Was Sufficient To Establish Commonality Under Rule 23.

Recently, the South Carolina Supreme Court recognized that "there is a qualitative component to the analysis of commonality; that is, the simple fact there are **one or more common issues will not suffice**." *Calvin Henson v. SCDOC and SCDJJ*, page 14. The reason behind this is that in order to establish commonality, the party seeking class certification must show that "significant common, legal, or factual issues" exist which bind the putative class together. *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (citation omitted). "[T]his means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together." *Id*. As the Supreme Court has highlighted, the commonality requirement "is easy to misread, since [a]ny competently crafted class complaint literally raises common 'questions,'" and merely "[r]eciting these questions is not sufficient to obtain class certification." *Dukes*, 564 U.S. at 349 (first alteration in original) (citation and internal quotation marks omitted). In comparison, this Court found commonality was sufficiently establish merely by Dr. Whitlock finding "all [of the] homes inspected contained at least two substantial brick code violations."

The Supreme Court in *Henson* heavily relied on *Gardner* and *Dukes* when discussing establishing commonality under Rule 23; both cases addressing the role damages play in class actions. Specifically, the Court re-emphasized that, contrary to the current Plaintiffs' arguments, plaintiffs in class action cases must "demonstrate that the class members *have suffered the same injury*." *Id.* at 350 (emphasis added) (citation and internal quotation marks omitted). Plaintiffs cannot demonstrate commonality if the court must investigate each plaintiff's individual claim.

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Gardner, 353 S.C. at 22, 577 S.E.2d at 201; *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (stating that "[a] question is not common . . . if its resolution turns on a consideration of the individual circumstances of each class member" (citation and internal quotation marks omitted)).

The Supreme Court in *Henson* found that "to meet the Rule 23(a)(2) commonality requirement, 'that common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke'." *Id.* at page 15 (citing Dukes, 564 U.S. at 350). The Supreme Court went further still, flatly dismissing Plaintiffs' claim that South Carolina law lacks a "predominance requirement" comparable to federal rules. *Id*. Holding that "the same statements of our commentators and courts as to what is required before certifying a class action also include the substance of the federal 'predominance' requirement." To further emphasize this duty, this Court must perform a predominance inquiry to determine "whether the common, aggregation-enabling, issues in the case more prevalent or important than the non-common, aggregation-defeating, individual issues."

The United States Supreme Court class action law is abundantly clear that not only **must damages be present**, but that **all class members must allege the same injury**. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) (stating that, to be adequate, a class representative must "possess the same *interest* and suffer the same *injury* as the class members" (emphasis added) (citation and internal quotation marks omitted)). Even if this Court found that the failure of the flashing to extend to the brick face was prevalent in all of the Subject Properties, this still would not justify certification of the Brick Subclass.

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Judge Norton addressed this in two (2) cases brought by the Lucey Law Firm in 2016 which alleged three (3) different defects an one-issue class involving windows. See *Naparala v. Pella Corp.*, No. 2:14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72442, at *26 (D.S.C. June 3, 2016); *Romig v. Pella Corp.*,No. 2-14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72437 (D.S.C. 2016). Judge Norton performed a rigorous analysis and held "[a] showing of commonality does not simply entail raising common questions but a showing that 'the class members 'have suffered the same injury'." (citing *Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374). Again, holding that the "**language of Rule 23(a)(2) is easy to misread, since [a]ny competently crafted class complaint literally raises common 'questions'.**" *Id*. (emphasis added) (internal citations omitted). The class members claims of negligence "must depend upon a common contention [,]" which "must be of such a nature that is capable of classwide resolution." *Id.* Judge Norton went on to address the numerous problems such a class would encounter if certified.

First, Judge Norton noted that the window cases presented a number of **individual inquiries**, specifically as to causation. Indicating that the scope of "causation" issues presented by plaintiff's claim is not limited to determining the cause of each class member's damages. Similar to the *Henson* ruling, Judge Norton held that the individual causation of each property would certainly require its own set of individualized inquiries, therefore each class member will also need to show that they satisfied the notice requirement under [the manufacturer's] limited warranty.

Second, Judge Norton noted that inquiries about causation in these cases are likely to be **very fact intensive**, as it will be necessary to differentiate what damage was caused by which "failure paths" and damage was caused by independent factors, such as improper installation, condensation, or other causes.

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Third, Judge Norton also noted that the window **defendant was likely to have affirmative defenses available against many class members, especially with regard to the statute of limitations**. He then stated that to the extent class members seek to avail themselves of equitable tolling of that statute, it would be necessary to determine whether such class members: (i) relied on [the defendant's] actions or representations, and (ii) did not unreasonably delay filing suit after discovering the true facts. *Naparala* at *34-35.

The *Naparala* Order goes on to note that there is no question that individual inquiries into causation and affirmative defenses may preclude class certification. *Id*., quoting *Lienhar*t v. *Dryvit Sys*., 255 F.3d at 149 (4th Cir. 2001) (holding that need for "individualized proof of damage causation" destroyed predominance); *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d at 342-43 (4th Cir. 1998) (recognizing that "when the defendant's affirmative defenses [] may depend on facts peculiar to each plaintiff's case, class certification is erroneous" and where "each putative class member's claim for [] damages was inherently individualized," they were "not easily amenable to class treatment").

The *Naparala* Order goes on to note that there is no question that individual inquiries into causation and affirmative defenses may preclude class certification. *Id*., (quoting *Lienhar*t v. *Dryvit Sys*., 255 F.3d at 149 (4th Cir. 2001) (holding that need for "individualized proof of damage causation" destroyed predominance); *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d at 342-43 (4th Cir. 1998) (recognizing that "when the defendant's affirmative defenses [] may depend on facts peculiar to each plaintiff's case, class certification is erroneous" and where "each putative class member's claim for [] damages was inherently individualized," they were "not easily amenable to class treatment")). A number of courts have found such inquiries to preclude class certification, despite the existence of a common defect issue. *Naparala*, citing *City of St.*

Petersburg v. Total Containment, Inc., 265 F.R.D. 630, 636 (S.D. Fla. 2010) (plaintiffs bringing claims based on defective pipes failed to satisfy predominance in light of "individual issues going to liability and damages"); *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc*., 254 F.R.D. 68, 75 (E.D.N.C. 2008) (plaintiffs bringing claims based on defective farm equipment failed to satisfy predominance where causation issues and affirmative defenses would dominate most every class member's case, "even assuming that [plaintiffs] were able to prove that the [equipment was] defective"). Undoubtedly, the necessity for individualized determinations regarding causation and affirmative defenses renders certification if the Brick Class not impossible.

B. The Court Failed To Consider Manageability And Efficiency Of The Stone Class.

As previously discussed, this Court must consider the manageability and efficiency when certifying a class. *Calvin Henson v. SCDOC and SCDJJ*, page 5. Plaintiffs' common question establishes "whether the brick installed" at the Subject Properties "met the applicable construction requirement" and D.R. Horton negligence associated with those "construction requirements." These questions cannot be resolved on a class-wide basis because the alleged defects are not uniformly present, and D.R. Horton maintains individualized defenses as to each specific property. For instance, at 200 Talon Court, which has brick that covers the entire front exteriors of the first and second elevations (including over the garage), Exponent found weeps present, however no brick ties were identified at the cut locations. Exponent PowerPoint, pp. 4, 47, 69. In comparison, at 117 Noble Wing, which is a one-story home that has brick on only a portion of the front elevation (not over the garage), Exponent found multiple brick spaced properly. Exponent PowerPoint, pp. 4, 40-42. Such variance inevitably introduces property-specific questions of causation and damages, which are questions this Court cannot answer without resorting to impermissible individual trials. Moreover, variables such as differing subcontractors, individual installation

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crews, and weather conditions at the time of construction defeat any claim of uniformity. Establishing liability would therefore require an individualized, Subject Property specific inspection to determine whether any of the seven (7) alleged defects are even present.

Under *Henson*, certifying a subclass for these brick defects is a clear error. First, the Court would have to make individualized factual findings for every Subject Property just to establish whether each of the alleged defect exists. Second, a jury would have to weigh the evidence for each Subject Property to determine if D.R. Horton or its subcontractors were negligent as a result of the brick installation for the specific Subject Property. Third, because proximate cause is an essential element of every negligence claim, the jury would have to evaluate cause-in-fact for each individual defect. Finally, the jury would be tasked with assessing individualized damages, despite the fact that Plaintiffs have provided the Court with no evidence of damage resulting from the brick installation.

Mirroring the same theory that was thoroughly discredited in *Henson*, Plaintiffs contend that a single general finding of negligence against D.R. Horton will answer the common questions posed by the Brick Subclass. But the Supreme Court of South Carolina warns against such blind acceptance, cautioning this Court to severely question whether resolving liability at trial will truly be so effortless. *Henson*, No. 28343, 2026 LX 390608, supra, at p. 14. Assessing whether D.R. Horton or its subcontractors were negligent under South Carolina law requires a highly individualized factual inquiry for every Subject Property, resulting in widespread liability variations across the Brick Subclass. *Id*. at 17 ("Each of these scenarios presents significantly different facts on the question of whether prison officials were negligent under South Carolina law, depending on when and where a particular rape occurred. In turn, these different factual scenarios create significant variability in the likelihood of SCDC or SCDJJ facing civil liability"); see also,

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Stoneledge, 425 S.C. at 294-295, 821 S.E. 2d at 518-519 ("negligence is not actionable unless it is a proximate cause of the injury" and "proximate cause is a question of fact for the jury."). Consequently, negligence regarding brick installation cannot be resolved on a uniform, class-wide basis, rendering certification of the Brick Subclass entirely improper. Resolving these claims on a class-wide basis is legally untenable, inevitably trapping the Court and jury in an endless series of individual trials for each Subject Property.

C. Plaintiff Hoopes Is Not An Adequate Class Representative.

This Court makes the blanket claim that Hoopes' defect claims are like the other class members, and he share the same claims as them, those claims being "cracking, loose, and falling brick." On its face this claim is false, as Plaintiff Hoopes' home has brick installed over the garage door which is only located on a limited number of the Subject Properties.

Furthermore, Plaintiff Hoopes could not even testify what damages were associated with his alleged defects:

> Q. Okay. Do you know what lintel he's talking about here in his damage estimate for you?
> A. I do not precisely, no.
> Q. Have you asked anybody to explain to you what these damages are for?
> MR. WINTERSTEIN: Objection.
> A. I've relied on our expert for his assessment of what would be – what the damages are and what would be the means of remedying them.
> …
> Q. Have you asked anybody to explain to you what these damages are for?
> MR. WINTERSTEIN: Objection.
> A. I have not.

See, Hoopes Depo. 219:23 – 220:16, Exhibit 31 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. In fact, Plaintiff Hoopes made no attempt to even understand the extent of damages to the Brick Subclass members he is purported to represent.

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> Q. Have you tried to contact your expert to educate yourself on his damage estimate to determine for your class members what is going to be done to their home.
> MR. WINTERSTEIN: Objection.
> A. I have not.

See, Hoopes Depo. 225:2 – 7, Exhibit 31 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. Despite this testimony, the Court found him to be an adequate representative.

Plaintiff Hoopes also testified that he made no attempt to even to communicate with the Birck Subclass members.

> Q. What efforts have you made to contact folks that have brick on their homes or issues with brick on their homes in this case?
> A. While in this case, I have not contacted them…

See, Hoopes Depo. 29:20 – 24, Exhibit 31 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. Nor did he reach out to the Dr. Whitlock regarding the alleged brick defects.

> Q. Have you talked to any of your expert witnesses int his case? When I say your expert witnesses, I mean the expert witnesses that are fired by the Plaintiffs in this case.
> A. I have not had a direct conversation with them.

See, Hoopes Depo. 39:6 – 11, Exhibit 31 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. Process of elimination, Hoopes relied completely on the information provided to him by Plaintiffs' counsel.

While being unable to identify whether which Subject Properties have insufficient weeping is damaging to his testimony, his inability to even voice the damage or potential impact from the improper installation of brick over the garage or any of the alleged brick defects is indefensible. Especially since he has been tasked with representing all the claims within the Brick Subclass, yet

his testimony fails to provide any understanding or knowledge regarding the installation, condition, or even alleged defects of other Subject Properties. Even taking all of the above testimony into consideration, the Order Granting Subclass Certification states that Hoopes is qualified to serve as class representative. This is contrary to South Carolina law.

As previously discussed, the South Carolina Supreme Court in *Henson* held that an inmate was not consider a member of the class "unless Henson – as the class representative – first proves the inmate was raped. This is a question of fact as to which SCDS and SCDJJ enjoy the right to a trial by jury." *Calvin Henson v. SCDOC and SCDJJ*, page 8. The Supreme Court does not say the Plaintiffs' attorney or the Plaintiff experts, it specifically names the class representative is the individual to prove these questions of fact. *Id*. To the contrary, the Supreme Court indicated that Henson was requires\d to present individualized evidence to satisfy the burden of proving that each inmate would not have been raped but for the wrongful conduct of SCDC or SCDJJ. *Id*.

This Court's conclusion that Hoopes satisfies Rule 23 adequacy requirements is directly contradicted by his own testimony. Beyond his fatal inability to identify properties with weeping deficiencies or articulate any tangible damage from the alleged brick defects, his total detachment from this litigation confirms he is an utterly inadequate class representative. As *Henson* makes clear, a class representative cannot function as a mere passive vessel for class counsel or retained experts. Certifying the Brick Subclass with a representative who exhibits complete ignorance of the core defects constitutes an abandonment of the Court's duty under South Carolina law.

D. <u>Conclusion</u>

Rule 23 does not permit this Court to sidestep its statutory mandate. In failing to analyze commonality for each individual defect, the Court abandoned its most basic judicial duty. Granting

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class certification absent a rigorous, defect-by-defect evaluation constitutes clear legal error, and these unaddressed commonality issues must be challenged and reversed.

STONE

II. CERTIFICATION OF THE STONE CLASS SHOULD BE RECONSIDERED AND REVERSED

A. Commonality As To All Stone Alleged Defects Has Not Been Demonstrated By The Plaintiffs And Class Certification Is Improper.

The "rigorous analysis" this Court must conduct for class certification includes a commonality analysis on whether Plaintiffs' proposed Stone Subclass has "the capacity of a class-wide proceeding to **generate common answers** apt to drive the resolution of the litigation." *See*, *Waller*, 300 S.C. at 467, 388 S.E.2d at 801, *see also*, *Dukes*, 564 U.S. at 350. Here, Plaintiffs failed to demonstrate that the alleged Stone Subclass has met the requirement for commonality under Rule 23(a)(2), SCRCP, as they failed to show that a determinative issue binds the proposed class together or that a class action would serve as a better procedural mechanism than separate litigation. In addition, the Plaintiffs have failed to show that a common issue predominates over individualized issues.

South Carolina law recognizes that "there is a qualitative component to the analysis of commonality; that is, **the simple fact there are one or more common issues will not suffice**." Calvin *Henson v. SCDC, et al.*, p. 22. To establish commonality, the party seeking class certification must show that "significant common, legal, or factual issues" exist which bind the putative class together. *Id*. at 21, (citing *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (citation omitted)). The Supreme Court in *Henson* outlined this in practical terms: "this means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together." *Id*. As the Supreme Court further noted, the commonality requirement

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"is easy to misread, since [a]ny competently crafted class complaint literally raises common 'questions,'" and merely "[r]eciting these questions is not sufficient to obtain class certification." *Dukes*, 564 U.S. at 349, 131 S. Ct. at 2551, 180 L. Ed. 2d 389 (first alteration in original) (citation and internal quotation marks omitted).

Moreover, in establishing commonality, **plaintiffs** must "demonstrate that the class members **have suffered the same injury**." *Id.* at 350 (emphasis added) (citation and internal quotation marks omitted). Plaintiffs cannot demonstrate commonality **if the court must investigate each plaintiff's individual claim**. *Gardner*, 353 S.C. at 22, 577 S.E.2d at 201; *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (stating that "[a] question is not common . . . if its resolution turns on a consideration of the individual circumstances of each class member" (citation and internal quotation marks omitted)). Importantly, the party opposing class certification bears no burden whatsoever in this analysis. All of the burden rests on the Plaintiffs. *See* Rule 23(a), SCRCP; *Waller*, 300 S.C.465, 467, 388 S.E.2d 799, 801 (1990).

In a very recent opinion that is binding upon this Court, the Supreme Court of South Carolina addressed commonality, stating "to meet the Rule 23(a)(2) commonality requirement, 'that common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of **each one of the claims in one stroke'**." *Id.* at page 23 (citing Dukes, 564 U.S. at 350, 131 S. Ct. at 2551, 180 L. Ed. 2d at 389).

The Supreme Court went further and addressed the argument made by the Plaintiffs herein, i.e., that unlike the federal courts, South Carolina does not have a "predominance requirement." *Id*. at 23. Critically to this case, the *Henson* court disagreed, holding that "the same statements of our commentators and courts as to what is required before certifying a class action also include the

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substance of the federal 'predominance' requirement." *Id*. at 25. The court went on to hold in *Henson* that the Court **must** perform a predominance inquiry and ask "whether the common, aggregation-enabling, issues in the case more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id*. The Court has not done so here. As follows, it is clear that common issues do not predominate.

B. <u>The Court Failed To Conduct a Commonality Or Predominance Analysis On Six (6) Of The Eight (8) Alleged Stone Defects.</u>

Of the eight (8) alleged stone defects, the Order Granting Subclass Certification only addresses two, stating that the "Plaintiffs expert opined the defects (1) and (2) regarding missing weep screeds/flashing and clearance were observed at every home inspected." Order Granting Subclass Certification, p. 10 (the Order Granding Subclass Certification incorrectly identified seven (7) stone-related defects). This statement alone demonstrates the absence of the rigorous analysis required for class certification, leaving the other six (6) defects unaddressed.

Even if the Court considers the remaining alleged defects, there is insufficient commonality among them. Plaintiffs' third and fourth alleged defects are "insufficient stone embedment in mortar setting bed" and "poor adhesion of stone to mortar setting bed." *See* Plaintiffs' Memo in Support of its Motion to Certify the Stone Defect Class, p. 7. Plaintiffs presented the Court with these sweeping conclusions without a shred of supporting evidence. Dr. Whitlock has provided no statistically based analysis that these alleged defects are either common or typical for the subject properties in Eagles Glen. Dr. Whitlock failed to provide any information on what houses this defect was present in or even the number of subject properties in which the alleged defect was present. Furthermore, Dr. Whitlock provided no evidence that the stone did not generally meet the required 50 psi of shear strength or the stone manufacturers' instructions. Further, the Court failed to consider Exponent's conclusion that the stone is be properly installed. Exponent, unlike WDP,

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provided statistical data and analysis to support its conclusion. For these reasons, certification is improper.

Plaintiffs' fifth and sixth alleged defects are "insufficient mortar setting bed thickness" and "insufficient scratch coat thickness (below mortar setting bed)." *See* Plaintiffs' Memo in Support of its Motion to Certify the Stone Defect Class, p. 7. Once again, Dr. Whitlock presented zero statistical data to prove that these alleged defects are common to or typical of the homes in Eagles Glen. Exponent found the stone to have been properly installed and provided numerous examples of the majority of locations where the ½" mortar thickness guidance was met. Exponents' expert conclusions on this issue were not addressed by the Court.

Plaintiffs seventh alleged defect is "incorrectly fasten lath (below scratch coat)." *See* Plaintiffs' Memo in Support of its Motion to Certify the Stone Defect Class, p. 7. Without comprehensive evidence, Plaintiffs have alleged that the lath supporting the stone adhesive layers were improperly secured on the Subject Properties. In fact, the only evidence provided to the Court by Dr. Whitlock is that that "lath fastening into sheathing alone does not meet the requirements under Table R703.3.2." *See* Whitlock WDP Adhered Veneer Preliminary Findings, WDP_043528. That is the only observation provided to the Court in Plaintiffs' pursuit of establishing commonality and typicality as to this alleged defect. As noted above, Dr. Whitlock neglected to furnish data or conduct comprehensive analysis concerning the prevalence or typicality of the purported stone adhesive failures throughout the homes. In comparison, Exponent pulled a random sample of homes, based on Dr. Duane Steffey's statistical analysis, from which to perform destructive testing. As a part of Exponent's destructive testing, it removed stone sections from the front exterior facades of thirteen (13) homes. The findings showed very few defects and certainly none that were common. across twenty-two (22) inspection locations. All homes had proper felt paper installation,

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with **only a single instance of missing or improperly embedded lath and just one case of inadequately fastened lath**. *See*, Exponent PowerPoint, p. 5, 82. Additionally, the observations of the twenty-five (25) locations revealed **no loose stone or mortar**. And although Exponent did document cracking in the stone and mortar at 6 homes, certainly this number is far short of establishing a common defect. Moreover, Dr. Whitlock failed to establish any causal relationship between these cracks and the allegedly deficient lath installation. The Court failed to acknowledge the discrepancy between the experts on this issue and the substantial evidence provided by Exponent **against** finding any defective condition.

Plaintiffs eighth alleged defect is "missing sealant joints and geometry for same between the stone and penetrations (windows, doors, trim and other components)." *See* Plaintiffs' Memo in Support of its Motion to Certify the Stone Defect Class, p. 7. In support of his position, Dr. Whitlock indicated that the MVMA Installation Guide was violated and therefore an alleged defect exists. However, Dr. Whitlock ignores the fact that the MVMA is merely an advisory trade publication and acknowledges that it has not been adopted in South Carolina. As such, the Court cannot certify a class based on an alleged violation of an unenforceable, non-binding guideline.

C. The Masonry Veneer Manufacturers Association (MVMA) Guide Is Not A Standard Established By The South Carolina Residential Building Code

The Order Granting Subclass Certification improperly elevates the installation guidelines published by the Masonry Veneer Manufacturers Association (MVMA) to a mandatory, legally binding standard of care owed by contractors when constructing a home. This is incorrect.

Under South Carolina law, residential construction standards are strictly defined by statutory authority—specifically S.C. Code Ann. § 6-9-10 *et seq.* and the regulations are further promulgated by the South Carolina Building Codes Council, which is operated under the South Carolina Department of Labor, Licensing and Regulations. The MVMA Installation Guide is an

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advisory, third-party trade organization publication; it has never been enacted by the South Carolina General Assembly. Furthermore, it has not been adopted or incorporated by the Building Codes Council into the South Carolina Residential Building Code, nor by Greenville County.

While Dr. Whitlock repeatedly attempts to impose the MVMA installation guide as a standard for contractors to follow when installing stone, and yet he admits that the South Carolina Residential Building Code references the manufactures instructions, ***not the manufacturer's association installation guide***.

> Q. And I believe we already talked about, ***the code does not specify the stone manufacturer's association but says the manufacturer's requirements and suggestion, correct?***
> A. ***That's correct.***
> Q. All right. What other industry standards require flashing at this location?
> A. I believe that's it.

See, Whitlock Depo p. 418:3 – 11, Exhibit 3 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification.

Although Plaintiffs may claim that the MVMA installation guide applies based on references in the manufacturer instructions of the stone installed at the Subject Properties**, they have failed to identify any manufacturers used by D.R. Horton's Subcontractors**. In fact, without any supporting evidence, Dr. Whitlock simply assumed the materials were manufactured by Anatoliy. This assumption was then taken as fact by this Court when it held that "92 have the same stone veneer manufactured by Anatoliy." Order Granting Subclass Certification, p. 10. In reality. Dr. Whitlock cannot verify that Anatoliy stone was used at Eagles Glen, nor has he reviewed any relevant manufacturer's instructions for the stone that was installed.

> Q. Sure. And if you had read the stone manufacturer's association -- or the actual stone manufacturer's standards, you would be able to tell me if those are violated, but you haven't done that, correct?
> MS. LYNN: Objection.

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A. **I don't believe that stone manufacturer has been identified by D.R. Horton yet.**

See, Whitlock Depo 213:10 – 17, Exhibit 3 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification.

Accordingly, it is clear error to state in the Order that Anatoliy was the manufacturer of the stone and, consequently, that manufacturers' instructions were violated at Eagles Glen and resulted in defects. In fact, in WDP Stone Rebuttal filed on April 22, 2026, Dr. Whitlock indicated that "Horton and their subcontractors have not identified the manufacturers of the stone" and the installation instructions of Anatoliy Stone provided as evidence by Dr. Whitlock were produced by D.R. Horton in the Rose Hill litigation. Furthermore, D.R. Horton's subcontractors installed the stone veneer "turnkey" and therefore were responsible for providing and installing the stone for each Subject Property. There is zero record evidence to support that Anatoliy was installed on all the Subject Properties. Dr. Whitlock's entire premise that D.R. Horton violated the manufacturers' instructions for stone is purely speculative, as Dr. Whitlock has never read these instructions and does not even know if they exist. This unsupported allegation should not be in the Court's Order.

D. <u>The Court Failed To Address D.R. Horton's Argument That The Missing Flashing At Base Of Wall For Stone Exterior Walls Is Not A Defect, And The Plaintiffs Have Not Provided Proof of Resulting Damage Because Of These Alleged Violations.</u>

The alleged defects identified by the Court regarding "missing weep screeds and flashing" is not a defect under the South Carolina Residential Building Code because the MVMA installation guide is not applicable. To allege that D.R. Horton's subcontractor improperly installed flashing and weep screeds, and thus that a defect exists, Dr. Whitlock relies on the example drawings in the MVMA Installation Guide as evidence of a the "defect," which, again, is not a requirement for builders under South Carolina law.

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In its Order, the Court stated that "D.R. Horton acknowledges in its Opposition that 'the absence of flashing/weep screeds at the base of the wall is a common condition. Exponent's report also includes a 100% prevalence rate for this condition." Order Granting Subclass Certification, p. 10. However, this statement overlooks D.R. Horton's argument that this condition is not a defect in South Carolina. As previously mentioned, D.R. Horton and its subcontractors bear no legal responsibility to adhere to trade association recommendations that have not been formally integrated into mandatory building codes.

Furthermore, the Court failed to address Exponent's observation that there is no evidence of damage caused by the alleged improper flashing. In fact, the lack of damage is evidence that the installation of stone did not "prevent water from entering the wall cavity or reaching structural framing component," and was not in violation of R703.4. The intent of the code has been met; it has preventing water intrusion. Not only can the Plaintiffs not show that all of the Stone class members suffered "the same" damages from this alleged defect, but they also cannot show that any class member suffered **any damage**. This alone prohibits certification of the Stone Subclass.

Additionally, Exponent's findings indicated only three (3) out of the eleven (11) locations observed were missing flashing above the windows and doors. Exponent's destructive testing was done according to proper statistical methodology, and it demonstrates that the alleged defect is not common or typical among the Subject Property, which the Court overlooked in its Order Granting Subclass Certification.

For these reasons, the Court's reliance on the alleged absence of flashing as a basis for commonality is misplaced. The condition cited in the Order Granting Subclass Certification is not a defect. There is no common damage, because there is **no damage**. Plaintiffs' theory depends entirely on nonbinding MVMA guidance that has no force of law in South Carolina or Greenville

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County. Moreover, Exponent's statistically valid testing revealed that the alleged flashing defect above windows and doors was present in only three of eleven locations tested, demonstrating that even if the condition were cognizable, it is not common across the purported class.

Finally, the Court's Order improperly conflates D.R. Horton's acknowledgment that a condition exists with a concession that the condition constitutes a code violation. This interpretation disregards both the plain language of the applicable code provisions and the undisputed absence of any resulting damage.

E. <u>Plaintiffs' Additional Reliance On MVMA Installation Standards For Several Other Alleged Defects Is Fundamentally Misplaced And Goes Unaddressed By The Order Granting Subclass Certification.</u>

The failure of the Court to address this argument is significant, as for one of the alleged defects, the only standard Dr. Whitlock relies on is the MVMA installation guide. Plaintiffs alleged that the missing sealant between the stone and dissimilar material is a code violation and accordingly is a defect. Dr. Whitlock bases this opinion on the MVMA installation guide, even though he acknowledged that the MVMA does not control. *See*, Whitlock Depo p. 418:3 – 11. He goes on to further to acknowledge that the South Carolina Residential Building Code has no backer rod and sealant requirements:

> A. I don't believe the code does specifically. It just requires flashing of door openings and window openings.
> Q. Right.
> A. The manufacturer's instructions, I believe, would require a backer rod and sealant.
> Q. Which manufacturer of what?
> A. The manufacturer's association is what I'm talking about specifically.
> Q. The stone or the door?
> A. Stone.
> Q. **And I believe we already talked about, the code does not specify the stone manufacturer's association but says the manufacturer's requirements and suggestion, correct?**
> A. **That's correct.**

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> Q. All right. What other industry standards require flashing at this location?
> A. I believe that's it.

See, Whitlock Depo p. 417: 17 – 418: 11, Exhibit 3 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. Despite this argument being provided to the Court, the applicability of MVMA installation guide as a standard and the existence of a defects as to the missing backer rod and sealant were not addressed by the Order Granting Subclass Certification.

Furthermore, the Plaintiffs alleged three separate defects as to the stone adhesive layers and stucco/base coat: inadequate thickness, insufficient coverage of the lath substrate and incomplete coverage of the stone backing. Dr. Whitlock references R703.12, MVMA standards and TMS 602, specifically 3.3C, as the applicable building codes. Like many of the other alleged stone defects, the Court's Order Granting Subclass Certification makes no mention of this alleged defect or D.R. Horton's oppositional arguments. First, the court failed to address that Dr. Whitlock once again relied on the MVMA standards, which are not applicable in this case. Furthermore, the Court failed to even mention or consider Exponent's destructive testing analysis which revealed that of the twenty-five (25) locations observed there were **no instances** of loose stone or compromised mortar. Additionally, out of the twenty-two (22) locations observed, only one (1) lath was not present or embedded to the mortar. These are facts that the Court may not simply ignore.

With regards to the minimum adhesive layer thickness requirements for stone installation, the code does not specify any such requirements. Such standards are established under ASTM C1780. Exponent found no damage, as the stone installation exhibits no evidence of water infiltration, moisture-related deterioration, or associated damage such as loose or fractured stone.

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Again, these actual, record facts were ignored in the Court's Order. No damage means that there can be no common damage.

F. <u>It Is Improper To Certify A "Stone Subclass" Based On A Building Code That Greenville County Does Not Enforce.</u>

As previously stated, the Order Granting Subclass Certification only address two (2) of the eight (8) defects alleged by the Plaintiffs in their Motion for Certification, the first being missing weep screeds/flashing and the second being clearance of the installed stone. As to the clearance issue, Dr. Whitlock opined that all Eagles Glen homes fail to meet code clearance requirements. However, this Code section is not enforced in Greenville County. Plaintiffs are aware of this fact and became aware of this fact in the Rose Hill case in Anderson County. In fact, Dr. Whitlock admitted that he does not know whether Greenville County enforces this issue:

> Q. And you also mention that the stone hasn't been brought to grade. Of the houses you looked at -- we don't know how many -- how many are -- I believe it's to grade, you're trying to say, or are you saying actually the stone is below grade?
> MS. LYNN: Objection.
> A. Brought to and in some cases below grade.
> Q. Okay. How many of the -- we don't know how many houses you looked at, but how many are at or below grade?
> MS. LYNN: Objection.
> A. I think all that I looked at.
> Q. **Have you talked to the Greenville County inspectors to find out if they prohibit that particular condition?**
> A. **No.**

See, Whitlock Depo p. 189:23 – 190:15, Exhibit 3 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. Again, it is the Plaintiffs' burden to show that there are defects and that those defects are common When their own expert cannot even say whether a particular code is not enforced, the burden **simply cannot be met as a matter of law**. In addition, as a matter of logic, if the Greenville County building inspectors have chosen not to enforce the stone clearance requirement, the mere violation of the code cannot constitute a defect.

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If such a certification were to be made, every subdivision built in Greenville County would have grounds for a class certification, without providing damages or even if damages are a likely result of the violation.

Furthermore, the Court failed to address the fact that even Dr. Whitlock cannot testify to the original grade at these homes and whether the stone originally had proper clearance, because he only recently inspected the Subject Properties. In most cases, the Subject Properties were not inspected until almost five (5) years after the Certificate of Occupancy was issued. The undisputed evidence also shows that during this time; homeowners have performed extensive renovations to their grading and landscaping. *See*, Alteration Photographs, Exhibit 41 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. Therefore, and despite his attempts, Dr. Whitlock's evidence **does not provide any evidence** that the grade originally provided by D.R. Horton did not meet the code requirements. Despite these contentious issues surrounding this alleged defect, the only acknowledgement made by the Court in its Order is that the Plaintiffs' expert opined that the defect was observed at every home inspected. None of the arguments above are even addressed in the Order.

G. <u>The Court Failed To Consider Manageability And Efficiency Of The Stone Class.</u>

This Court must consider the manageability and efficiency when certifying a class. *Henson,* No. 28343, 2026 LX 390608, supra, at p. 7. Plaintiffs alleged common question is stated: "whether the stone veneer cladding systems installed" at the Subject Properties "met the applicable construction requirement" and D.R. Horton's "negligence" associated with those "construction requirements." These answers cannot be made on a class-wide basis because the alleged defects are not uniformly present and individual defenses are available to D.R. Horton as to specific Subject Properties. For instance, at 302 Bald Eagle Drive, which has minimal stone installed on

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the first and second front elevations, Exponent found a lack of base of wall flashing, however felt paper and lath were properly installed. In comparison, 120 Crowned Eagles Drive, which has stone only on the bottom of the first front elevation, Exponent found the felt paper was installed properly installed but also discovered the improper embedment of the lath. See, Exponents PowerPoint pp. 5, 81-82, 89 Exhibit 36 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. This variance will cause discrepancies in causation and damages to which the Court will not be able to answer without engaging in mini trials. Essentially, determining liability would require a property-by-property inspect to identify which, if any, of the eight (8) alleged defects exist on any given home.

When applying the Supreme Court analysis in *Henson*, for each potential stone class member, the Court will have to hear testimony and consider evidence as to whether that Subject Property had stone defects and then make an individual determination of membership. by making a factual finding of a defect. Second, a jury would then have to hear testimony and consider evidence of the action of D.R. Horton and its subcontractors as to whether they were negligent in installing the stone. Third, a jury will have to hear testimony and consider evidence on whether D.R. Horton and its subcontractors alleged negligent conduct proximately caused each individual defect, "as proximate cause is an essential element of every negligence case." *Id*. at 11 (citing *See Hurd v. Williamsburg Cnty.*, 363 S.C. 421, 427, 611 S.E.2d 488, 492 (2005) ("In a negligence action the plaintiff must prove proximate cause."). Finally, the jury would be tasked with assessing individualized damages, even though Plaintiffs have provided the Court with no evidence of damage resulting from the stone installation. Similar to *Henson*, the Plaintiffs argue that the common question that me be resolved by one finding of negligence on the part of D.R. Horton. *Id*. at 14. The South Carolina Supreme Court in *Henson* holds that this is not so simple.

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The Court took into consideration that "compliance with applicable standards" could vary over the years and "significantly different facts on the question of whether prison officials were negligent under South Carolina law." *Id*. at 14, 17.

Here, each Subject Property presents significantly distinct issues of law and fact regarding whether D.R. Horton or its subcontractors were negligent under South Carolina law. In turn, these different factual scenarios create significant variability in the likelihood of D.R. Horton facing liability as to each Subject Property. Therefore, the question of whether D.R. Horton was negligence as to the installation of stone is not going to be the same for all class members and Class Certification as to the Stone Subclass is improper.

H. <u>Plaintiff Soriano Is Not An Adequate Class Representative.</u>

The Court makes the blanket claim that Soriano's defect claims are like the other class members, and he share the same claims as them, those claims being "cracking, loose, and falling stone" and "missing flashing/weep screeds and clearance." This blanket statement is simply not supportable under the factual record in this case. Plaintiff Soriano could not even testify if his property was missing flashing; in fact, he could not even define what flashing was.

> Q. Is your home missing flashing?
> MS. WINCKLER: Objection.
> A: I mean, it's -- I don't know if it's my home, but I know it's been noted in the report that there's some flashing missing.
> Q. Okay. But I'm asking about your home.
> A. I -- I don't know because I'm not an expert on these things. I -- I don't know.
> Q. Do you know what flashing is?
> A. No.

See, Soriano Depo p. 200:13 – 24, Exhibit 30 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. To add insult to injury, Plaintiff Soriano was unable to testify whether the stone installed for his own residence was insufficiently waterproof.

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Q. Okay. Does your home show issues with insufficient waterproofing with the stone veneer?
MS. WINCKLER: Objection.
A. A. I don't know that.

See, Soriano Depo p. 261:7 – 10 Exhibit 30 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. Additionally, Plaintiff Soriano was unable to provide any information on how many of the Subject Properties were damaged as a result of the improper clearance, whether it was below grade, and further testified as to the following:

Q. Okay. And how does that impact your house? How does the stone touching the concrete impact your house?
A. **Because I don't have any clearance.**
Q. How does the lack of clearance impact your house?
A. **Because you can see in the pictures that there's no -- there's -- there's no clearance in it, there's no gap.**
Q. And how does the lack of gap impact your house? MS. WINCKLER: Objection.
A. **There's no -- there's no clearance to it. Whoever built it, they just built it as what you see right now in the picture.**
Q. **And how is that a problem?**
MS. WINCKLER: Objection.
A. **Because, from what I understand, that it doesn't meet the coding.**
Q. Okay. So what is the code meant to prevent?
MS. WINCKLER: Objection.
A. Having it done the right way, however it's built.

See, Soriano Depo p. 203:20 – 204:21 Exhibit 30 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. While being unable to define flashing or identify whether his residence has insufficient waterproofing is damaging to his testimony, his inability to even voice the damage or potential impact from the alleged improper clearance is inexcusable. Specifically, he is a fact witness to be used by Plaintiffs to represent all the claims of the Stone Subclass, and he cannot testify as to the commonality and typicality of the improper flashing and clearance, despite those being the only two claims addressed by the Court in its Order Granting Subclass Certification. Soriano cannot even provide testimony on either issue.

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In *Henson*, the Supreme Court held the order certifying class required that an individual inmate not be include into the class "unless Henson – as the class representative – first proves the inmate was raped. This is a question of fact as to which SCDC and SCDJJ enjoy the right to a trial by jury." *Id.* at 10. The Supreme Court does not say the Plaintiffs' attorney or the Plaintiff experts must be adequate on these issues; rather, the court specifically held that **the class representative** had the individual obligation to prove these questions of fact. *Id*. In fact, the Supreme Court indicated that Henson, as the class representative, was required to present individualized evidence to satisfy the burden of proving that each inmate would not have been raped but for the wrongful conduct of SCDC or SCDJJ. *Id*. Here, this means that under *Henson*, Plaintiff Soriano must present individualized evidence to show that each class member would not have suffered damages but for the conduct of D.R. Horton. Plaintiff Soriano falls woefully short of this burden.

The Court's blanket assertion that Plaintiff Soriano is an engaged and adequate representative for the Stone Subclass flies in the face of the evidentiary record. Plaintiff Soriano's own testimony reveals an abysmal failure to satisfy basic adequacy standards. Under *Henson*, a class representative cannot function as a mere rubber stamp for class counsel or experts; the law requires the representative himself to prove the foundational facts of the claim. To certify a stone subclass or class based on a class representative who has complete ignorance of the very defects at issue is clear error.

I. Conclusion

For the foregoing reasons, this Court committed clear error in granting certification of the Stone Subclass. Under the South Carolina Supreme Court's binding mandate in *Henson v. SCDC*, Plaintiffs bore the unshifting burden to demonstrate that significant, class-wide issues predominate over individual ones. A burden they failed to meet on every level. This Court erred egregiously: it

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completely ignored six (6) alleged defects, manufactured mandatory building standards out of unenforceable installation guidelines, and certified a class where no common defect or damage exists. Resolving Plaintiffs' claims would inevitably force the Court into individual trials as to each Subject Property to determine liability, causation, and damages, defeating the core purpose of Rule 23, SCRCP. Compounded by a designated class representative who cannot explain or substantiate the claims he purports to lead, class certification was improper as a matter of law and must be reversed.

CONCRETE

III. CERTIFICATION OF THE CONCRETE CLASS SHOULD RECONSIDERED AND REVISED

A. The Order conflates the type of repair with the existence and scope of injury.

Commonality requires more than a shared repair vocabulary. Under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011), class members must "have suffered the same injury," and the common contention must be "capable of classwide resolution — which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." The Concrete Class fails this standard because the Order's commonality finding rests on the premise that all homes require "the same repairs: sealing of the concrete cracks." (Order at 17.) That premise proves far less than it appears.

The record bears this out. Plaintiffs' expert inspected a sample of 62 homes in Eagles Glen and found that not one had a garage slab crack or a foundation crack exceeding the width that South Carolina residential construction standards describe as warranting repair. (Ex. 26 to D.R. Horton's Mem. in Opp. Pls' Mot. Class Certification, pp. 136-37.) The estimated proportion of class homes with such cracks is zero, and with 95% confidence no greater than 3.9%. (*Id.*) Those standards, not just the presence of a crack, are what separate an actionable defect from no defect

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at all. The Order's premise that every home requires the same repairs assumes precisely what the evidence disproves: that each home has a crack severe enough to warrant repair. A common answer to how such a crack would be sealed cannot "resolve an issue that is central to the validity of each one of the claims in one stroke" when few (if any) class members have such a crack in the first place.

The word "sealing" describes a repair method that is applicable to any concrete crack regardless of its origin, severity, or legal significance. It says nothing about whether a given home has an impermissible crack, how many it has, how wide or deep they are, whether they are structurally significant or merely cosmetic, or whether they were caused during construction. A home with two hairline shrinkage cracks at a control joint and a home with fifty cracks and no control joint do not share the "same injury." Both may be described as needing "sealing," but the number, width, depth, location, pattern, and structural classification of the cracking, and therefore whether an actionable defect exists at all, vary from home to home and can be established only through individualized inspection and analysis.

This is not a damages-variation problem that can be deferred to later proceedings; it is a liability problem at the threshold. Whether a particular home has an actionable cracking defect in the first place is the predicate question that must be answered before any class-wide resolution is available. *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21—22, 577 S.E.2d 190, 200—201 (2003) (quoting *Peoples v. Wendover Funding Inc.*, 179 F.R.D. 492, 498 (D. Md. 1998) ("[A] representative plaintiff cannot establish commonality . . . if the court must investigate each plaintiff's individual claim."). The Order does not answer that question; it assumes the answer and moves to remedy. That inversion of the Rule 23 analysis is clear error.

B. <u>The Order applies two different, irreconcilable commonality standards to the concrete cracking and radon claims.</u>

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The Order excluded radon claims from the Concrete Class because those claims "require an individualized inquiry into whether damages exist and, if so, the extent of those damages for each homeowner" and "cannot be established through common proof." (Order at 16.) The Court further noted that "there may be a synergistic effect between smoking and radon exposure, which makes this even more individualized." (*Id.*) On that basis, radon was properly excluded: its individualized character defeated commonality, and individual homeowners were left to bring their own causes of action if they had viable claims.

The cracking claims present the same analytical problem. Whether a compensable concrete defect exists at a given home, and its extent, is precisely an individualized inquiry into "whether damages exist and, if so, the extent of those damages for each homeowner." The number, location, pattern, and severity of cracking at each of the 127 homes — and the threshold question of whether any particular crack is actionable rather than cosmetic — cannot be established through common proof. The injury and its extent must be assessed home by home in both cases.

There is no real distinction between the radon exclusion and the cracking certification. In both situations, the claimed defect is present at some homes and not others (or in materially different degrees); the existence and extent of the injury requires individual inquiry; and common proof cannot establish classwide liability. The Order acknowledges this dynamic and resolves it correctly for radon. It resolves it inconsistently for cracking. If the Court's radon analysis is sound, and D.R. Horton submits that it is, it compels the same result for the concrete cracking claims. D.R. Horton respectfully requests that the Court reconcile its own reasoning and either decertify the Concrete Class or, at minimum, narrow it to homes that can demonstrate an actionable cracking defect through a defined, classwide method of proof.

C. <u>The evidentiary record does not satisfy the rigorous analysis required to certify</u>

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the Concrete Class.

Even setting aside the foregoing legal analysis, the evidentiary foundation the Order identifies is insufficient to meet Plaintiffs' burden of "proving the five requirements" of Rule 23, SCRCP through rigorous analysis. *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 20–21, 577 S.E.2d 190, 200 (2003). The Order relies on three categories of evidence, each of which is materially deficient.

First, the WDP inspection data. Plaintiffs' expert WDP inspected 79 of the 127 class homes. (Order at 17.) The "99 percent" figure (that 99% of inspected homes had concrete cracking "in multiple locations") therefore describes only approximately 62% of the class. The Order, like WDP's "expert" analysis, offers no sampling methodology, no margin of error, and no statistical basis for extending that finding to the forty-eight uninspected homes. A "rigorous analysis" cannot certify 127 homes on the basis of inspections covering 79. The uninspected homes' condition is unknown, and whether they have actionable cracking cannot be inferred from a partial sample without expert analysis of extrapolation to the entire class.

Second, the precertification survey is improperly cited in the Order. The Order cites that "86 of 112 survey responses indicated 'yes' to foundation problems." (Order at 17.) Two problems undermine reliance on this figure. "Foundation problems" is undefined and materially broader than concrete cracking: it could encompass settlement, drainage-related conditions, soil movement, or any other issue a homeowner associates with their foundation. The survey was not designed to identify actionable cracking defects of the kind alleged, and lay self-reports are not a substitute for the rigorous analysis that certification requires. Moreover, the same survey data was cited by the Court in the June 2025 Order denying certification to demonstrate that different homeowners had different mixes of alleged defects, a finding that drove the original certification denial.

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Secondly, the Order cites Moore Depo. Trans. 86–87 and Bishop Depo. Trans. 465–75 for the proposition that "there are no material differences in the experts' opinions, all which indicate that the presence of concrete cracking is a common issue in the homes." (Order at 17.) The fact that cracking is common, even if true, does not establish that an actionable defect is common. The deponents should be read as agreeing that cracks exist, not that a classwide actionable defect exists.

Rather, South Carolina residential construction standards treat a crack as a defect warranting repair only once it crosses a defined threshold. (Ex. 26 to D.R. Horton's Mem. in Opp. Pls' Mot. Class Certification, pp. 136-37, n.120, 123 (citing *S.C. Residential Construction Standards*, 1995 ed.)) A crack narrower than the governing standard is not a violation and is tolerated by code. (*Id.*) Measured against those thresholds, the inspections of 62 homes in Eagles Glen found not one garage slab crack and not one perimeter foundation crack exceeding the width South Carolina requires before repair is warranted. (*Id.* at 136-37) Not one crack in the entire subdivision was found to be in excess of applicable standards. (*Id.*) The Plaintiffs' argument that cracking is "common" ignores the fact that cracks measuring below these standards are neither defects warranting resolution nor capable of class-wide proof.

D. <u>The class definition is overbroad because it turns on ownership, not injury.</u>

The Concrete Class, like the Window Class, is defined by ownership of a home in Eagles Glen rather than by the presence of an actionable defect. (Order at 16.) That definition is inconsistent with *Wal-Mart*'s "same injury" requirement and sweeps in homeowners whose claims require individual inquiry before any class-wide resolution can apply.

The precertification survey data confirms the scope of the problem. Of 112 survey respondents, eighty-six (86) self-reported "foundation problems." (June 4, 2025 Order at 9; July 2026 Order at 17.) That leaves twenty-six respondents who self-reported no foundation issue at

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all, plus fifteen homes not represented in the survey. The class as certified includes all of them. A homeowner who has not reported a foundation problem, and who may have no actionable cracking at all, nonetheless qualifies as a class member by virtue of owning a home in Eagles Glenn. Including that homeowner requires an individualized threshold inquiry before any classwide resolution can apply: does this home have an actionable crack? That inquiry is precisely what the class action mechanism is meant to avoid, and its necessity here defeats the commonality the Order claims to find.

The Court itself recognized this dynamic in its June 2025 denial of the overarching class, finding that certification was inappropriate because "not all of the proposed class members have suffered the same injuries from the same defects." (June 4, 2025 Order at 9.) That reasoning applies with equal force to the Concrete Class, where the class is defined by ownership and not by injury.

E. The proposed class representatives are not typical of a class including homes with minimal or cosmetic concrete cracking.

Rule 23(a)(3), SCRCP, requires that the claims of the representative parties be typical of the class. Crider and Rossi are the named Concrete Class representatives, each credited by the Order with "excessive cracking in the concrete foundation." (Order at 18.) That characterization is significant in two respects. First, it implies a severity threshold that the Order never denies: not all cracking, but "excessive" cracking. If "excessive" cracking is the representative condition, then members whose homes have only minimal or cosmetic cracking do not share the same claims. Proof of Crider's and Rossi's claims would not amount to proof of the class's claims, and a liability finding in the representatives' favor would not necessarily establish liability as to the balance of the class.

Second, Rossi's adequacy as a Concrete Class representative is independently impaired by the same statute of limitations motion that threatens his Window Class standing. The June 2025

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Order denying certification found the original class representatives inadequate in part because both faced individualized statute of limitations defenses not shared by the class. (June 4, 2025 Order at 15–16.) Rossi faces the same infirmity. A representative whose unique defenses "threaten to become the focus of the litigation" is not positioned to fairly and adequately represent class members who face no such defense. *See Harris v. Sand Canyon Corp.*, 2010 U.S. Dist. LEXIS 74228, at *32 (D.S.C. July 22, 2010).

For all of the foregoing reasons, D.R. Horton's motion to reconsider should be granted as to the Concrete Class. D.R. Horton requests that the Court reverse its decision to certify the Concrete Subclass.

WINDOWS

IV. CERTIFICATION OF THE WINDOW CLASS SHOULD BE RECONSIDERED AND REVERSED

A. The Order's failure to identify a single common defect defeats commonality.

Commonality requires more than a collection of allegations about the same product. The party seeking certification "must articulate the existence of significant common, legal, or factual issues which bind the proposed class together," and those issues must be capable of classwide resolution "in one stroke." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Certification is appropriate "only when a determinative critical issue overshadows all other issues." *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990). The Window Class fails this standard at the threshold, because the Order never identifies the determinative issue.

The Order's commonality discussion identifies "corner failures, leakage, and water intrusion issues" as the conditions shared by class members. (Order at 12.) Yet the Order's own typicality analysis for the proposed class representative lists a materially different and broader set

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of conditions at Rossi's home: "separated miters, fractured vinyl window frames, misplaced gaskets," and a window that failed a sill dam test. (Order at 13.) These are distinct conditions with distinct causes, distinct mechanisms of failure, and distinct proof requirements. The Order never reconciles these conditions into a single common contention, and it does not identify which, if any, of them is the "determinative critical issue" that overshadows all others.

It bears emphasis that Judge Norton confronted exactly this problem in *Naparala v. Pella Corp.*, No. 2:14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72442, at *26 (D.S.C. June 3, 2016), and *Romig v. Pella Corp.*, No. 2:14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72437, at **22-24 (D.S.C. June 3, 2016), two parallel cases in which he denied certification for want of commonality and typicality on allegations closely resembling those pressed here. As Judge Norton explained:

> A showing of commonality does not simply entail raising common questions but a showing that "the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Th[e] language [of Rule 23(a)(2)] is easy to misread, since [a]ny competently crafted class complaint literally raises common "questions."

Naparala, 2016 U.S. Dist. LEXIS 72442, at *17.

Applying that standard, Judge Norton found that the window allegations spawned a series of individualized inquiries. *Id.* at **26, 33. Each class member would separately have to establish that they satisfied the notice requirement under the manufacturer's limited warranty, an inquiry no common answer could resolve. *Id.* at *33. Here, too, each Plaintiff must individually establish, among other things, that they complied with the South Carolina Notice and Opportunity to Cure Act, that they did not undertake repairs to the windows, and whether the condition is traceable to a manufacturing defect or an installation defect.

The *Naparala* Order further recognized that individualized inquiries into causation and affirmative defenses may independently preclude certification. *Id.* at **39-40 (citing *Lienhart v.*

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Dryvit Sys., Inc., 255 F.3d 138, 149 (4th Cir. 2001) (need for "individualized proof of damage causation" destroyed predominance), and *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342–43 (4th Cir. 1998) (certification is erroneous where a defendant's affirmative defenses "may depend on facts peculiar to each plaintiff's case," and claims that are "inherently individualized" are "not easily amenable to class treatment")). As Judge Norton observed, courts have repeatedly found such inquiries to bar certification even where a common defect is alleged. *Naparala*, 2016 U.S. Dist. LEXIS 72442, at *40 (citing *City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 636 (S.D. Fla. 2010) (plaintiffs alleging defective pipes failed to satisfy predominance in light of "individual issues going to liability and damages"), and *Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, 254 F.R.D. 68, 75 (E.D.N.C. 2008) (plaintiffs alleging defective farm equipment failed to satisfy predominance where causation issues and affirmative defenses would dominate nearly every class member's case, "even assuming that [plaintiffs] were able to prove that the [equipment was] defective"))).

The court also identified affirmative defenses as an independent bar. Even setting causation aside, the need to litigate defenses peculiar to each class member, including statutes of limitations, defeated predominance in its own right. *See id.* at *43 ("[E]ven if the court agreed with [] plaintiffs that common questions would predominate over the individual causation questions, . . . plaintiffs have not shown that common questions would predominate over the individual affirmative defenses . . .."). Judge Norton thus concluded that the express warranty claims "will likely require numerous individualized inquiries into causation and affirmative defenses." *Id.* at *43. On that law, and given that the plaintiffs there, like Rossi here, pressed multiple distinct defect conditions under a single claim, he denied certification of the putative class.

This deficiency is precisely what caused the Court to deny certification on June 4, 2025. In

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that ruling, the Court found that "the claims lacked a common contention tying all defects together for class certification." (Order at 2; June 4, 2025 Order at 10.) The stated cure was to separate the defects into seven subclasses, each built around a single, articulable common question. But within the Window Class, the Order re-bundles a grab bag of structurally unrelated conditions under the label of "substantially similar defects" without ever naming the common question their resolution would answer. The same deficiency persists today. D.R. Horton respectfully submits that the Court should reconsider its current order and apply to the Window Subclass the standard it correctly applied in June 2025.

B. <u>The Court misapplied the incidence-rate evidence, mischaracterized a methodological acknowledgment as a merits concession, and attributed to the sole Defendant a report belonging to a different party.</u>

The Order confronts a significant factual divergence in the expert evidence: Plaintiffs' expert, WDP, reported a 100% incidence rate, while Silver Line Building Products' expert, GCI, reported a 9.1% incidence rate. (Order at 12.) The Court resolves this divergence by treating the two figures as measuring different things (per-home versus per-opening) and concluded that the difference therefore did not defeat commonality. That conclusion is incorrect in several respects.

First, the per-opening rate is the more probative of the two. The question for commonality is whether a systematic, class-wide defect exists in the Silver Line windows as installed in Eagles Glen. A 9.1% per-opening rate means that approximately 91% of window openings in the subdivision exhibit no defect. That is not the profile of a common, uniform condition; it is the profile of a sporadic, opening-specific condition with individualized causes. Any home with even a single affected opening registers in WDP's 100%-of-homes figure, but that metric does nothing to establish that the mode of failure is common across those homes. For purposes of whether a common issue ties the class together, what matters is the defect rate at the unit of analysis (the

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window opening), not the rate at which at least one problem appears somewhere in any given house.

Second, the Order misreads GCI's position. The Court found that GCI "concedes" its 9.1% rate and WDP's 100% rate are not contradictory, citing page 27 of 49 of GCI's Preliminary Evaluation of Alleged Window Construction Defects. (Order at 12.) But GCI's statement on that page is a methodological observation — an acknowledgment that the two figures use different denominators and therefore measure different things. That is a measurement-unit observation, not a concession that a common defect exists, and not a concession that the per-opening incidence rate is insufficient to defeat commonality. The Order **converts a statement about arithmetic into a substantive concession it does not contain**. Reconsideration is warranted on this mischaracterization of the record.

Third, and more fundamentally, the report the Order repeatedly attributes to "Defendant's expert" is not the Defendant's at all. D.R. Horton is the sole named Defendant in this action. GCI is the retained expert of Fourth-Party Defendant Silver Line Building Products, which has its own distinct interest in defending the window product as the manufacturer. Nowhere in the Court's Window Class analysis does the Order cite or engage any expert materials submitted by D.R. Horton itself; the only defense-side expert the Court analyzes is GCI, which it misidentifies as Horton's.

By casting a fourth-party defendant's report as "the Defendant's", the Order manufactures a "concession" that D.R. Horton never made: the sole Defendant conceded nothing about window incidence rates, and its own expert materials were never brought to bear on the commonality question at all. A ruling that resolves commonality by attributing a concession drawn from a different party's expert to the sole Defendant, while never engaging that Defendant's own

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evidence, is not the product of the rigorous analysis Rule 23 demands. *See Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003).

Had the Court reviewed and cited Horton's own expert submissions, it would have found affirmative evidence of exactly the individualized, opening-specific variation that defeats commonality. Exponent, Horton's retained expert, observed 85 windows with frame cracks across the 62 homes it inspected, an average of just 1.4 windows per home. But because each home contains an average of 18.6 windows, that figure means only that around 7% of all windows in Eagles Glen show frame cracks. Exponent's own extrapolation confirms the same rate: its estimate of approximately 174 cracked windows subdivision-wide (95% confidence interval of 138 to 210), measured against the roughly 2,362 windows across all 127 homes, is again just 7% of the total. (Ex. 26 to D.R. Horton's Mem. in Opp. Pls' 2nd Motion for Class Certification, p. 136). By either measure, over 90% of the windows exhibit no frame cracks. Those figures describe a sparse and scattered condition, not a uniform class-wide defect.

Exponent's other findings confirm this point. Exponent's sill dam testing produced leakage in only 6 of 46 windows tested across 26 homes, meaning roughly 87% of the windows subjected to a direct water intrusion test did not leak at all. This finding shows that the homes conclusively do not display the same or even similar damages to one another. The Court completely ignored this critical finding in its order.

Taken together, Horton's expert evidence shows that frame cracking, leakage, and water intrusion are neither uniform across the class nor traceable to a single common cause. They appear sporadically, at different openings, in different homes, for different reasons.

If anything, the Court's misattribution understated the evidence against certification. Properly identified, GCI's 9.1% per-opening rate is not a concession grudgingly extracted from

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D.R. Horton, but an affirmative finding by a defense-aligned expert that approximately 91% of windows exhibit no defect. This evidence negates the class-wide uniformity that commonality requires. The Court's error thus operated to Plaintiffs' benefit: it recast affirmative evidence of individualized variation as a neutralized "concession," and it did so while overlooking D.R. Horton's own expert submissions entirely.

The incidence-rate problem also infects the Order's repair scope finding. The Order states that the class members' defects "require the same repairs: removal and reinstallation." (Order at 12.) But if only approximately 9% of openings are defective, **the class does not uniformly require removal and reinstallation of every window**. Identifying which openings require repair, and confirming the cause of failure at each, is an individualized inquiry. The asserted commonality of repair method thus collapses for the same reason as the asserted commonality of defect.

Finally, the Court may not simply take Plaintiffs' expert findings as incontrovertible truth. Rather, it must rigorously analyze all evidence presented. The Order indicates that only some expert findings were considered, while D.R. Horton's expert findings, which are more reliable and precise than those set for by Plaintiffs' expert, were not considered at all. [6]

C. Certification of the Window Class with a class representative that may not have a viable claim inverts the Rule 23 order of operations and should be corrected.

At the time of certification, a Joint Motion for Summary Judgment targeting Rossi's claim on statute of limitations grounds was pending and unresolved. (Order at 13 n.2.) The Court nonetheless certified the Window Class with Rossi as its sole representative and noted that, if his

[6] D.R. Horton's expert findings, as well as those of W. Randall Still, Sr., expert for Builders FirstSource Southeast Group, LLC, tell the Court conclusively that Plaintiffs' experts incorrectly performed destructive testing on the windows by exceeding the required water depth and pressure required by the International Residential Code and the testing protocol. (Ex. 25 to D.R. Horton's Memorandum in Opp. Plaintiffs' Motion for Subclass Certification, Cliff Bishop, Ph.D., P.E., *Review of WDP Sill Dam Testing* (Apr. 2, 2026); Still Affidavit, ¶ 12 (Apr. 6, 2026)).

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claim is dismissed, "Plaintiffs' Counsel may move for substitution of the Windows Class representative." *Id.* That sequencing is legally untenable and should be corrected on reconsideration.

Rules 23(a)(3) and (4), SCRCP, require that the representative parties' claims be typical of the class and that the representative fairly and adequately protect the class's interests. The United States Supreme Court has held that a class representative must "possess the same interest and suffer the same injury as the class members." *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997). A representative whose claim is time-barred possesses no cognizable claim at all, is not a class member within the meaning of Rule 23, and cannot be typical or adequate. *See East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). Certifying the class contingent on a motion that may eliminate the only named representative does not cure this deficiency. It simply defers it.

Nor does the anticipated substitution procedure resolve the problem. Substitution of a class representative after certification requires its own adequacy and typicality analysis. *See* Rule 23(a)(3) and (4). The class cannot be properly certified today around a representative who may be replaced tomorrow by someone whose qualifications have not yet been assessed. Instead, the Court should deny class certification based on the available evidence and entertain a new motion for class certification if (and only if) a proper class representative is submitted and proven to be adequate. The Court may not do the Plaintiffs' work for them. The Plaintiffs alone are tasked with submitting an adequate class representative.

D. Rossi is atypical as a class representative even if his claim survives the Motion for Summary Judgment.

Even setting aside the Motion for Summary Judgment entirely, Rossi's claims do not satisfy the typicality requirement of Rule 23(a)(3), SCRCP. Typicality requires that "the claims . .

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. of the representative parties are typical of the claims . . . of the class." Rule 23(a)(3), SCRCP. The commonality and typicality requirements "tend to merge," both serving as "guide posts for determining whether under the particular circumstances maintenance of 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." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011).

The conditions the Order identifies as common to the Window Class are corner failures, leakage, and water intrusion. (Order at 12.) Rossi's home presents a materially broader and different defect profile: separated miters, fractured vinyl window frames, misplaced gaskets, and a sill dam test failure, in addition to any leakage. (Order at 13.) The Order quite properly does not find these additional conditions to be common across the class. A representative whose home presents defects beyond and different from the common defects will not, in litigating his own claims, prove the class's claims. His additional defects may introduce different causation theories, different repair methodologies, and different damages frameworks that are not shared by class members who present only the conditions identified as common. Proof of Rossi's claims does not amount to proof of the class's claims. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982) (recognizing a "wide gap" between class representative's proof that he suffered discrimination in one employment practice and proof that the class suffered the same injury).

Rossi's exposure to a unique statute of limitations defense compounds the problem independently. When a proposed representative faces a significant individual defense not shared by the class, his claims are not typical of the class. *See Parks Auto. Group, Inc. v. GMC*, 237 F.R.D. 567, 571 (D.S.C. Mar. 10, 2006); *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 342 (4th Cir. 1998). The unique defense will consume litigation resources and strategic attention

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that are not shared by the rest of the class. Whether or not the motion is ultimately granted, its pendency at the time of certification was itself a reason to defer certification.

For all of the foregoing reasons, D.R. Horton's motion to reconsider should be granted as to the Window Class. D.R. Horton requests that the Court reverse its ruling certifying the Window Subclass.

SIDING

V. CERTIFICATION OF THE SIDING CLASS SHOULD BE RECONSIDERED AND REVERSED

The Court has not performed its analysis as required by the binding precedent reiterated in *Henson v. SCDOC*, *supra*. *Henson* clarified that this Court is required to determine whether common questions predominate over individual questions. *Calvin Henson v. SCDOC and SCDJJ*, 2026 S.C. Lexis 122 (July 22, 2026). This inquiry is a central part of the "rigorous analysis" the Court must conduct when considering whether to certify a class. *See Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003). Such a rigorous analysis necessarily includes the consideration of the common questions upon which Plaintiffs base their endeavor for class certification and any individual questions that require resolution before the merits of the case may be settled. Respectfully, this Court's Order also fails to consider two of Plaintiffs' proposed common questions as they relate to siding and is completely devoid of any discussion of individual questions that persist throughout Eagles Glen generally and for certain alleged siding defects specifically. Moreover, the Order fails to consider the concerns of class-wide damages determinations.

A. Plaintiffs' Purported Common Questions Require Individualized Inquiries.

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Rule 23(a)(2) SCRCP requires that Plaintiffs show there are questions of law or fact common to the class. "This Rule 23(a)(2) requirement is universally referred to as 'commonality.'" *Henson*, 2026 S.C. Lexis 122. The requirement that common questions predominate over individualized questions is inherent in Rule 23 SCRCP, and proving predominance is required when pursuing class actions in South Carolina. *Id. Henson* clarified South Carolina law on predominance and stated plainly that Plaintiffs have the burden of showing that their purported common questions **predominate over individualized inquiries** *Id.* This Court failed to analyze whether Plaintiffs met this burden. Under *Henson*, predominance is a requirement and must be considered in any class action certification.

B. Plaintiffs' first purported common question necessarily requires individualized analysis not suitable for class-wide resolution.

Plaintiffs' first purported common question in the siding "class" is, "[w]hether the fiber cement siding installed at Eagles Glen met the applicable construction requirements[.]" (Memorandum in Support of Plaintiffs' Motion to Certify The Siding Defect Class at p. 4). The Court's lone reference to this purported common question is in response to a subcontractor's argument that commonality is defeated at least in part because multiple subcontractors were responsible for siding installation. (Order at p. 15). This Court failed to make the required analysis as to how this common question must be answered, which requires an individualized approach.

As an initial matter, this Court stated, "[a]ll 127 homes in Eagles Glenn (sic) have the same Hardie fiber cement siding on three or more sides." (Order at p. 14). There has been no investigation to determine whether all 127 homes in Eagles Glen have the same Hardie fiber cement siding. Ironically, determining whether all 127 Eagles Glen homes have Hardie fiber cement siding would require an individual inspection of all 127 homes in Eagles Glen, their

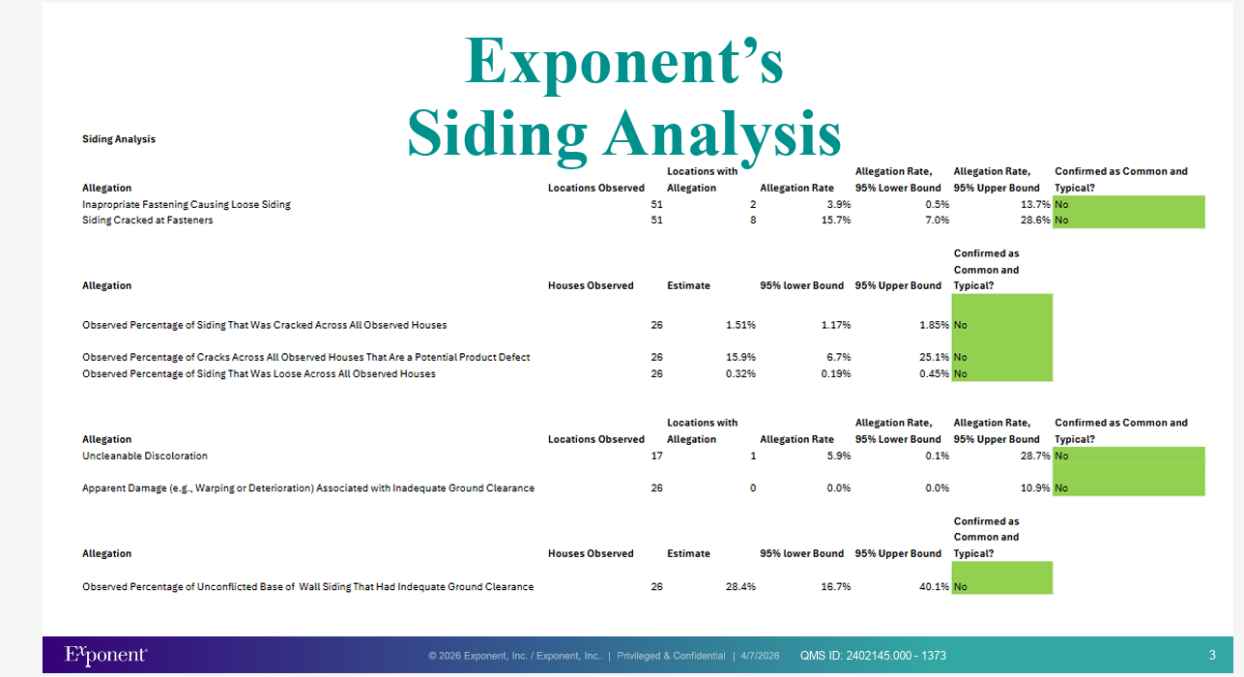
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building plans, their building records, and purchase orders for each of the 127 homes, which does not lend itself to class-wide adjudication.

Moreover, answering Plaintiffs' first purported common question requires an individualized approach, and the evidence in the record shows the same. The Plaintiffs sought certification of a siding class based upon purported defects related to (1) shrinkage cracking; (2) discoloration; (3) improper fastening/loose; (4) improper flashing detailing; and (5) improper clearance. [7] Proving whether these alleged defects exist, where they exist, and to what extent they exist requires individual investigations of each home. Indeed, performing a rigorous analysis as this Court is required to do requires an individual analysis of each home and its purported defects **to determine whether the fiber cement siding meets applicable building requirements**.

Generally, Plaintiffs allege that D.R. Horton violated construction requirements, including building codes and manufacturer's warranties, when installing the fiber cement siding. Even if the answer to this purported common question could drive the resolution of the case, which it cannot, determining the answer to the "common" question requires individualized inquiries. Specifically, not every home in Eagles Glen possesses every siding defect alleged by Plaintiffs. This Court agreed when it stated, "when the siding findings in Exponent's Statistical Analysis from Destructive Testing are considered collectively, there is sufficient evidence that a majority of the homes have at least one defect present." (Order at p. 14). Exponent's chart details how not every home possesses every siding defect.

[7] These are the defects that Plaintiffs allege. However, this Court provides no determination as to whether the siding class is certified as to each of the alleged defects or a portion of the alleged defects. Specifically, the Court apparently attempts to list the defects on page 14 of the Order but fails to include improper clearance in the list. To the extent that this Court reaffirms its order certifying a siding class, D.R. Horton requests that this Court clearly outline the defects the parties are litigating.



Exponent's Siding Analysis

Siding Analysis

Allegation	Locations Observed	Locations with Allegation	Allegation Rate	Allegation Rate, 95% Lower Bound	Allegation Rate, 95% Upper Bound	Confirmed as Common and Typical?
Inappropriate Fastening Causing Loose Siding	51	2	3.9%	0.5%	13.7%	No
Siding Cracked at Fasteners	51	8	15.7%	7.0%	28.6%	No

Allegation	Houses Observed	Estimate	95% lower Bound	95% Upper Bound	Confirmed as Common and Typical?
Observed Percentage of Siding That Was Cracked Across All Observed Houses	26	1.51%	1.17%	1.85%	No
Observed Percentage of Cracks Across All Observed Houses That Are a Potential Product Defect	26	15.9%	6.7%	25.1%	No
Observed Percentage of Siding That Was Loose Across All Observed Houses	26	0.32%	0.19%	0.45%	No

Allegation	Locations Observed	Locations with Allegation	Allegation Rate	Allegation Rate, 95% Lower Bound	Allegation Rate, 95% Upper Bound	Confirmed as Common and Typical?
Uncleanable Discoloration	17	1	5.9%	0.1%	28.7%	No
Apparent Damage (e.g., Warping or Deterioration) Associated with Inadequate Ground Clearance	26	0	0.0%	0.0%	10.9%	No

Allegation	Houses Observed	Estimate	95% lower Bound	95% Upper Bound	Confirmed as Common and Typical?
Observed Percentage of Unconflicted Base of Wall Siding That Had Indequate Ground Clearance	26	28.4%	16.7%	40.1%	No

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Just because one house may have construction defects does not necessarily mean another house has construction defects. In fact, there are homes within Eagles Glen that exhibit no defects. *See*, Affidavits of Jackie L. Rogers and Josh Hilliard and Statement of Janice A. Brock, previously submitted to this Court on March 21, 2025. However, without an individualized investigation, the total number of homes without defects, and the differences between each home that has defects, cannot be discovered.

Moreover, the Order is devoid of even a mention of D.R. Horton's evidence and argument related to the alleged improper clearing siding defect. As a result, there is no resolution to the indisputable fact that determining whether improper clearance is a defect caused by D.R. Horton necessarily requires an individualized approach. D.R. Horton provided ample evidence that post-construction alterations made by Homeowners in Eagles Glen artificially create this perceived building code violation. (*See* D.R. Horton Ex. 36 at p. 31). In addition, Exponent's investigation confirmed that this code section for clearance on stone is not enforced in Greenville County. Of

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course, a determination of the homes to which this argument may apply also requires an individualized investigation of homes at which Plaintiffs argue this violation exists.

C. Plaintiffs' Purported Common Question Regarding Subcontractors

Plaintiffs' Memorandum in Support of Siding Class Certification states, "[t]he common denominator as to causation of most defects in this case, and all siding defects, is Horton's failure to ensure that its subcontractors comply with proper building practices…" (Memorandum in Support of Plaintiffs' Motion to Certify The Siding Defect Class at p. 4). This is an embedded purported common question that relates to the question of whether D.R. Horton installed the siding in accordance with building requirements. D.R. Horton utilized multiple siding subcontractors throughout Eagles Glen. To determine whether D.R. Horton adequately ensured these subcontractors complied with building requirements **absolutely would require** an investigation to determine (1) the identity of the subcontractors, (2) which subcontractors worked on which homes (which requires a review of records for each home in Eagles Glen), (3) whether those homes exhibit building requirement violations (which requires an inspection of each home in Eagles Glen), (4) the communications D.R. Horton had with those subcontractors, and (5) the instruction or guidance D.R. Horton gave those subcontractors related to siding and specific homes.

This Court stated in its Order that it was essentially irrelevant that D.R. Horton utilized multiple subcontractors to install siding at Eagles Glen. (Order at p. 15 stating, "the various subcontractors do not defeat commonality where the claims arise from the same project, the same siding, and involve the common question of whether it was defectively installed by D.R. Horton…"). However, Plaintiffs made it relevant when they alleged that a common denominator was **whether D.R. Horton ensured those subcontractors complied with building practices**. Answering Plaintiffs' purported common question related to subcontractors requires an

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individualized investigation. The Court's Order does not consider this critical element and thus is in error.

D. <u>Plaintiffs' second purported common question likewise necessarily requires individualized analysis not suitable for class-wide resolution.</u>

Plaintiffs' second purported common question is, "[w]hether these homeowners are damaged because the as-built conditions do not meet these requirements." A related and embedded common question set forth by Plaintiffs is the reasonable cost to remove and replace the siding. These questions are similar and each of them require an individualized inquiry and investigation of each home. This Court failed to adequately analyze these questions and merely stated that "these defects require the same repairs: removal and re-installation, and result in comparable damages." (Order at pp. 14-15). However, this Court fails to analyze the extent of the repairs, and how the extent of the repairs will almost certainly vary from home to home.

Determining whether the Eagles Glen homeowners are even damaged at all by defectively installed siding cannot be answered by examining one home. That is not how construction defect cases work and attempts to convince this Court that there are common, class-wide damages are misrepresentations. For example, homeowners A and B may have loose siding and lack adequate flashing; however, homeowner A may have no damage from these defects (i.e. homeowner A's home does not show any signs of water intrusion or missing siding). Meanwhile, homeowner B's home shows signs of water intrusion and siding planks are missing. **The only way to determine whether homes exhibit resulting damage is to go home-by-home and document whether and what type of damage may be present**. Moreover, determining which particular pieces of siding that actually suffer from defects requires an individualized investigation into each Eagles Glen home. Discovering the answer to this "common" question necessarily requires an individualized investigation.

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This Court correctly stated the law on three occasions in its Order, and the Court's statement conflicts with Plaintiffs' flawed understanding of the law. (Order p. 6 stating, "[t]o justify a departure from that rule, 'a class representative must be part of the class and **possess the same interest and suffer the same injury**." Order, p. 6, quoting *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 97 S. Ct. 1891, 52 L.Ed.2d 453 (1977) (emphasis added); (Order p. 8 stating, "Moreover, commonality requires the Plaintiffs to demonstrate the class members have suffered **the same injury.**" (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350, 131 S. Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (emphasis added); (Order p. 9 stating, "The United States Supreme Court has long held that to be adequate representatives, the class representatives must 'possess the same interests and suffer the **same injury** as the class members. (quoting *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-626, 117 S. Ct. 2231, 2250-2251 138 L.Ed.2d 689 (1997) (emphasis added). To determine whether the homeowners suffer the same injury requires an individualized approach. Such an individualized approach would allow all parties to discover that very few, if any, homeowners in Eagles Glen have suffered the same injury – that point stands for *all* of Plaintiffs' proposed subclasses.

Moreover, what a reasonable cost may be to repair any damage found in any Eagles Glen home likewise requires an individualized investigation. This Court hints at this point by stating that it "notes that the repairs may not require removing and replacing all of the siding in Eagles Glen but will likely be limited to the defective siding. However, damages are a matter to be determined by the jury." (Order at p. 15). By making this statement, the Court points out the flaw in Plaintiffs' purported common question – **even if defective siding installation is present, not every home will have the same extent of defective siding**. As the Court states, the jury will be required to make individualized determinations as to the amount of damages appropriate for each

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home – which defeats the purpose of class adjudication. *Henson*, 2026 S.C. Lexis 122 (July 22, 2026) *(*stating that the question of damages clearly requires individual findings by a jury). The Court was on the right track with its understanding of damages, but it stopped short in its analysis.

Importantly, if the Court allows Plaintiffs to make a generic damages argument, the Court opens the door to potential windfalls or even shortfalls for certain homeowners. For example, if homeowner A has 2 pieces of defective siding that need replacement, that may cost only $300. If, however, homeowner B has 35 pieces of defective siding that need replacement that may cost $5,000. Now consider that homeowner C requires removal and replacement of all siding, and the same costs $20,000. Which damages amount should be awarded for siding? If homeowner C is class representative Stanley, and the class is awarded $20,000 each for siding replacement, then homeowners A and B achieve tremendous windfalls. However, if homeowner A is class representative Stanley, and the class is awarded only $300 each, then homeowners B and C are left with woefully insufficient awards. Determining appropriate amount of damages to avoid windfalls and shortfalls necessarily requires individualized investigations, which defeats commonality.

E. <u>This Court Failed to Consider The Notice and Opportunity to Cure Statute and its Impacts.</u>

S.C. Code Ann. 40-59-810, et seq. (the "Notice and Opportunity to Cure Act") is an absolutely required consideration in any construction law case, yet this court completely failed to acknowledge the same -- much less analyze the impacts it may have on this case. Indeed, courts are required to stay and/or dismiss cases where claimants fail to strictly adhere to the procedures set forth in the Act. *Grazia v. S.C. State Plastering,* LLC, 390 S.C. 562, 572, 703 S.E.2d 197, 202 (stating that "…the General Assembly also included a stay provision in the Right to Cure Act to specifically address situations where claimants file an action prior to full compliance with the notice provisions); *See McIntire v. Seaquest Development Company, Inc., et al,* CA No. 2016-CP-

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10-1833 S.C. C.P. LEXIS 252 (holding that where repairs are made prior to compliance with the Notice and Opportunity to Cure Act, dismissal is required); *See* Order Granting Defendant's Motion to Stay Pending Compliance with Notice and Opportunity to Cure Act, *Ryan and Cassandra Duke v. D.R. Horton, Inc.*, 8:24-cv-07495-TMC (March 25, 2025) (D.S.C.) (issuing a stay in a case where plaintiffs represented by The Lucey Law Firm failed to comply with the Notice and Opportunity to Cure Act).

In failing to analyze the relationship between the Notice and Opportunity to Cure Act and the Eagles Glen homeowners, this Court failed to acknowledge the fact that many homeowners failed to comply with the Act and therefore have claims that require dismissal. There are instances of repairs that D.R. Horton is presently aware of as noted in D.R. Horton's Memorandum in Opposition to Class Certification;[8] however, there are undoubtedly instances of which D.R. Horton is not presently aware but is entitled to discover. Of course, such discovery would require an individualized investigation into each Eagles Glen homeowner and would include written discovery, requests for production, site visits, and likely numerous depositions to determine if Eagles Glen homeowners have had repairs completed without giving proper notice to D.R. Horton.

Moreover, this Court failed to acknowledge or analyze the possibility that, should Plaintiffs be awarded an amount of monetary damages, **homeowners who should have no legally cognizable claim because of their failure to comply with the Act would still receive monetary compensation**. This potential windfall to both counsel and uninjured homeowners is unacceptable and contrary to the statute and to the basic tenets of our judicial system. Moreover, D.R. Horton

[8] Particularly relevant to siding are instances of post-construction homeowner landscaping and alterations to the clearance of the siding to the grade. There are a plethora of instances where this alleged issue has been altered, or even created, by homeowners. *See* D.R. Horton's Memorandum in Opposition to Plaintiffs' Second Motion for Subclasses pp. 111-113.

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cited a case in which the judge denied class certification where determining whether individual homeowners met a notice requirement for a limited warranty required individualized inquiries. *See* D.R. Horton's Memorandum in Opposition to Plaintiffs' Second Motion for Subclasses pp. 33-34 (discussing *Naparala v. Pella Corp,* No. 2:14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72442, at *26 (D.S.C. June 3, 2016 and *Romig v. Pella Corp*, No. 2-14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72437 (D.S.C. 2016). This Court failed to even discuss the striking similarities between the individual inquiry required to determine whether a homeowner satisfied warranty notice requirements and the individual inquiry required to determine whether a homeowner complied with the Notice and Opportunity to Cure Act.

Despite the severe risk of homeowners and their counsel receiving monetary awards when there is no legally cognizable claim, this Court completely failed to acknowledge or even discuss the Act and its potential implications. This failure is error and does not comply with the "rigorous analysis" standard with which it is required to comply.

F. <u>Plaintiffs' Reliance on a Purported "Agreement" Whereby D.R. Horton Waived Dismissal of Cases is Misguided.</u>

Plaintiffs have argued that D.R. Horton waived its right to make any claims related to the Notice and Opportunity to Cure Act based upon a limited "agreement" that was only necessary because Plaintiffs did not even to attempt to comply with the Notice and Opportunity to Cure Act's inspection requirements. In their Reply to Defendants' Motion in Opposition to Certify Defect Classes ("Plaintiffs' Reply"), Plaintiffs argue that because a "representative right to cure process" was agreed upon and completed between March and April 2024, D.R. Horton has waived all of its rights related to the Notice and Opportunity to Cure Act. (Plaintiffs' Reply p. 22).

As an initial matter, it is exceedingly important to understand that D.R. Horton is not required or obligated by any statute or case law to reach an agreement to have its Notice and

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Opportunity to Cure Act rights permitted. **D.R. Horton is statutorily entitled to receive notice of alleged defects and to be afforded the opportunity to inspect those alleged defects. It is D.R. Horton's position that any "agreement" does not affect its rights under the statute. The statute provides clearly that every homeowner must comply, and any attempt by the Plaintiffs to offer less than all of the homes does not abrogate D.R. Horton's rights under the statute.** This same principle applies for The Lucey Law Firm's practice (attempted in this case as well as all others) of requiring contractors to sign agreements or "waivers of liability" in exchange for "permission" to inspect residences where they have brought defect claims. This is completely contrary to the Notice and Opportunity to Cure Act because contractors do not need permission – they are statutorily permitted to inspect alleged defects brought forth by claimants. The Court simply should not permit such practices that are intended to "trick" others into "agreements" that are contrary to the legislative intent in this State for contractor inspections.

In addition, to reiterate the response D.R. Horton preciously stated in its Sur-Reply to Plaintiffs' Reply ("Sur-Reply p. 44), Plaintiffs overextend the applicability of the parties' agreement and misunderstand the Notice and Opportunity to Cure Act. The agreement between the parties related solely to inspection rights and was brought about because D.R. Horton threatened to seek a stay of the case unless Plaintiffs complied with the inspection obligations in the Notice and Opportunity to Cure Act. D.R. Horton did not, and likely cannot, waive any part of the statute or the related case law that says where repairs are made prior to compliance with the Notice and Opportunity to Cure Act, those claims should be dismissed.

Furthermore, even if this Court agrees the "agreement" between the parties overextends to claimants whose claims must be dismissed, that only applies beginning on March 13, 2024. D.R. Horton "agreed" to **not to seek a stay of the case**, not to waive its right to inspect all homes, in

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exchange for inspections of the alleged defects. As discussed *supra*, the enforceability of any such agreement is questionable at best; however, if this Court finds such an agreement enforceable and that it overextends to claimants who made repairs, the "agreement" does not relieve homeowners who made repairs prior to the April 2024 inspection of their consequences under the Notice and Opportunity to Cure Act. Homeowners were required to provide notice via certified mail before making any repairs to those alleged defects, and if they did not, those claims must be dismissed. Ironically, if the "agreement" is applicable, this raises yet another individual question – which homeowners made repairs to alleged defects in violation of the Notice and Opportunity to Cure Act and whether the "agreement" applies to them based upon timeline.

G. <u>It is Clear that Common Questions Do Not Predominate.</u>

"The class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation." *Henson*, 2026 S.C. LEXIS 122, 9 (July 22, 2026) (quoting Harry M. Lightsey Jr. & James F. Flanagan, South Carolina Civil Procedure 199 (1st ed. 1985). "The Court should first determine the existence of common questions, and then whether they are sufficiently central to justify the class action." *Id.* As stated herein, this Court failed to acknowledge all of Plaintiffs' common questions and therefore failed to determine whether they are sufficiently predominant to justify the class action.

Moreover, had the Court performed the proper analysis and adhered to the "rigorous analysis" standard, it would have found that the common questions do not exhibit predominance over the individual investigations and questions that are required to answer them. Plaintiffs "merely [r]eciting [common] questions is not sufficient to obtain class certification." *Dukes*, 564 U.S. at 349. As *Henson* has clarified, those common questions must predominate over the individual questions. The following individual questions predominate:

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- Determining whether all individual homes in Eagles Glen contain the same siding;
- Determining whether alleged siding defects exist in Eagles Glen homes;
- Determining where alleged siding defects exist in Eagles Glen homes;
- Determining the type of alleged siding defects in each Eagles Glen home;
- Determining the extent of alleged siding defects in Eagles Glen homes;
- Determining which homes in Eagles Glen exhibit which alleged defect
- Determining how many and which Eagles Glen homes have installed post-construction landscaping such that the purported improper clearance defect is the fault of the homeowner
- Determining the identify of siding subcontractors
- Determining which subcontractors worked on which Eagles Glen homes
- Determining whether the Eagles Glen homes on which different subcontractors performed work exhibit defects
- Determining the communications D.R. Horton had with those subcontractors related to specific Eagles Glen homes
- Determining the instruction or guidance D.R. Horton gave those subcontractors related to specific Eagles Glen homes
- Determining whether individual Eagles Glen homeowners are experiencing damage due to defective siding
- Determining the extent and type of any damage from alleged siding defects;
- Determining the cost to remedy any defective siding to Eagles Glen homeowners
- Determining whether individual Eagles Glen homeowners properly complied with the Notice and Opportunity to Cure Statute.

These questions are essential in properly analyzing the Plaintiffs' claims and whether they have claims at all. As such, it is clear that individual questions predominate over the recited common questions, and a proper "rigorous analysis" would have certainly led the Court to this conclusion.

H. <u>Conclusion</u>

This Court must reconsider its Order Granting Class Certification for the Siding Class. As is clearly demonstrated hereinabove, Plaintiffs' common questions do not predominate over the numerous, essential individualized questions required to resolve this matter. Moreover, this Court failed to consider the implications of the Notice and Opportunity to Cure Act as well as the inherent variation in the amount of damages across Eagles Glen homeowners even if defects are proven.

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For these reasons, this Court must reconsider its Order, reverse its decision, and DENY class certification.

GRADING

VI. CERTIFICATION OF THE STORMWATER/DRAINAGE CLASS SHOULD BE RECONSIDERED AND REVERSED

E. The Plaintiffs Stormwater/Drainage Alleged Defects are Neither Common Nor Typical.

This Court is obligated to conduct a "rigorous analysis" before ruling on class certification. *Waller*, 300 S.C. 465, 467, 388 S.E.2d 799, 801. This mandate requires a strict evaluation of commonality, specifically, whether the proposed stormwater/drainage subclass possesses "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. Here, Plaintiffs completely failed to identify a single determinative issue that binds this proposed Stormwater Subclass together, nor can they show that class litigation will be more efficient individual actions, or that this case will be able to proceed in a manner that individual drainage issues do not end up dominating trial. The Court has not held Plaintiffs to their strict evidentiary burden. Rather, the Court ignored D.R. Horton's quite robust expert testimony, refusing to meaningfully evaluate ABS's expert evidence. This was a major oversight.

The Supreme Court of South Carolina recognizes that "there is a qualitative component to the analysis of commonality; that is, the simple fact there are one or more common issues ***will not suffice***." *Calvin Henson v. SCDOC and SCDJJ*, page 14. South Carolina explicitly rejects the notion that a class can be certified on statement of superficial similarities alone. To establish commonality, the party seeking class certification must show that "significant common, legal, or factual issues" exist which bind the putative class together. *Gardner*, 353 S.C. at 21, 577 S.E.2d,

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at 200 (citation omitted). In analyzing commonality, "the [C]ourt should first determine the existence of common questions and then evaluate whether they are sufficiently central to justify the class action." Henson, p. 8-9, (citing Harry M. Lightsey & James F. Flanagan, *South Carolina Civil Procedure* § 23.B.3); *see also Gardner*, 353 S.C. at 22, 577 S.E.2d at 201 (reversing the circuit court's certification of a class because "factual differences . . . are the crux of a predominant legal issue," and stating, "A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates the benefits of a class action suit."); *McGann*, 287 S.C. 561, 568, 340 S.E.2d 154, 158 (stating "commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem, even though some individual issues may be litigated in any event" (citation omitted)).

In *Henson*, the proposed class representative argued that the common question before the jury was whether SCDC or SCDJJ were liable for the sexual assault that occurred to inmates in their care. *Id*. at 14 The South Carolina Supreme Court stated its doubt that the trial of such a question would be so simple. *Id*. Given the "significantly different facts on the questions of whether prison officials were negligent under South Carolina law… In turn, these different factual scenarios created significant variability in the likelihood of SCDC or SCDJJ facing civil liability…" *Id*. at 17. The *Henson* court held that it was "not convinced even this question" of negligence on the part of SCDC and SCDJJ was "truly common to the entire class." *Id*. at 18. The Supreme Court further found that even if the common question could be determined on a class-wide basis "the questions of proximate cause and damages clearly require individual findings by a jury." *Id*.

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Here, the Plaintiffs argue that the jury can determine a common question that will resolve the issue of D.R. Horton's alleged negligence as to the alleged stormwater defects. This is incorrect, there is no common question that is capable of resolving drainage issues for the entire neighborhood. Rather, each subject property presents significant questions of law and fact as to whether D.R. Horton or its subcontractors were negligent, i.e., whether any Code violations exist, whether any defects exist at each individual home, and whether damages actually exist. In turn, these different factual scenarios create significant variability in the likelihood of D.R. Horton facing liability. For example, Steven Moore, D.R. Horton's grading and drainage expert, observed that twenty-three (23) of the fifty-six (56) lots he evaluated (41%) had significant alterations of landscaping or added hardscaping post-closing, which he opined affects the drainage at not only the altered homes, but neighboring homes as well. These modifications present significant affirmative defense, as the lots have been significantly altered from the original grade installed at the time of Certificate of Occupancy. These alterations include the installation of firepits, fences, walkways, gardening beds, pools, tennis courts, playgrounds, large flower beds, etc. Such questions of law and fact must be pursued on an individual basis as to each Subject Property within Eagles Glen and cannot be resolved in one single class-wide determination.

The entire purpose of a class action is to advance "the efficiency and economy of litigation," not to construct an unmanageable vehicle for baseless claims. *Calvin Henson v. SCDOC and SCDJJ*, p. 5. Reaffirming this standard in *Henson*, the Supreme Court reiterated that a common issue "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 15 (citing *Dukes*, 564 U.S. at 350). The *Henson* court dismantled the notion advanced by Plaintiffs that South Carolina state courts lack a "predominance

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requirement," holding unequivocally that South Carolina law incorporates "the substance of the federal 'predominance' requirement." *Id.* Consequently, this Court was required to undertake a predominance inquiry evaluating "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* The extensive post-closing homeowner renovations, the significant variation in lot sizes, and Plaintiffs' total inability to prove what original grading looked like at the time of sale, much less actual evidence of flooding, shatters any delusion that a single predominant question of law or fact can resolve this litigation on a classwide basis. At a bare minimum, this Court should reconsider its Order on the predominance basis alone.

F. The Court Erroneously Relied On Sherard's Topographical Survey, Which Cannot Establish Original Grade.

Sherard opined that Subject Properties were improperly graded/sloped in the rear and side yards, had ineffective drainage systems and lack insufficient clearance. These opinions were completely based on a Topographical Survey issued on February 19, 2024, despite the last Certificate of Occupancy being issued in 2019, almost five years before the Survey was performed. **Without analyzing changes to grading that can occur, and have occurred, over time, the Court agreed**, holding that the topographical survey performed by Plaintiffs' expert Sherard "confirmed defective horizontal work." While the Court recognized that D.R. Horton argued the survey provides no legal insight into the Subject Properties at the time the Certificates of Occupancy were issued, the Court did not address this argument.

In fact, Plaintiffs **failed to provide any evidence** to show that the grade provided in the Topographical Survey matches the grade originally provided by D.R. Horton's subcontractors. Even Andy Sherard testified that his opinions were based on the current conditions of the site, **not the condition of the grading at the time the Certificates of Occupancy were issued**.

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> Q. Sure. Were you retained to evaluate the code compliance of the grading and lots in this neighborhood?
> A. I was.
> Q. Okay. And to evaluate the code compliance of the grading and contractor, do you need to know what the lot looked like at the time it was CO'd and/or sold?
> A. No, I do not. Not for my purposes, no.
> Q. Okay. To evaluate whether or not the original work was code compliant, **do you need to know if the site you visit in 2021 and 2024 is the same or substantially similar to how it was CO'd and sold**?
> A. Yeah. **No. I am -- I am basing my opinions upon the conditions at the site, period**. not. Not for my purposes, no.

Sherard Depo., 43:6 – 44: 1 (lines 14, 23 removed), Exhibit 40 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification.

Sherard and this Court ignored the substantial homeowner renovations and refused to consider how water collection patterns changed after the installation of hardscapes by these homeowners.

> Q. **Okay. Does hardscape prevent natural water sinking into the soil?**
> A. **Certainly hardscape is an impervious surface as compared to grass, yes**.
> Q. Okay. And if the entire backyard or the vast majority of the backyard of 225 Talon Court is impervious, hardscape, pool, brick, concrete, do additional measures have to be taken to capture and move that water away?
> A. I don't -- no, not necessarily

Sherard Depo. 70: 15 – 71:1 (line 24 removed), Exhibit 40 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification.

Sherard failed to factor these massive modifications made by the homeowners into his Topographical Survey and even his analysis of whether D.R. Horton violated applicable codes and standards. The Court overlooked the fact that Steven Moore evaluated all thirty-eight (38) lots that Sherard surveyed for his topographical survey and determined that nine (9) of the lots—a full

twenty-four percent (24%)—had substantial rear yard modifications that significantly impact drainage. Moreover, when reviewing aerial imagery of Eagles Glen from January 2026, Moore identified at least six (6) swimming pools, a tennis court (or pickleball court), and numerous retaining walls and oversized patios constructed in rear yards. Moore Affidavit ¶10(b). According to Moore, these modifications will modify rear yard drainage patterns and impact the height of the exposed foundation, thereby resulting in noncompliance with applicable code requirements. *Id*. Moore additionally opined that such significant alterations would have required the delivery of materials and equipment through side and back yards during construction, which could also have impacted the shape and performance of drainage swales and yard slopes. *Id*.

The Court failed to analyze why these variables alone do not destroy commonality and typicality. Because of the number and significance of yard alternations, Sherard cannot ***credibly*** testify to a reasonable degree of scientific certainty as to the state of the grading and drainage at the time the Certificates of Occupancy were issued. This is important, as D.R. Horton can only be liable for the work it performed. **It cannot be found negligent for work that was performed by the putative class members and the contractors individually hired by them to perform these modifications.**

As it now stands, D.R. Horton may face liability for grading conditions that only occurred after each home was sold. D.R. Horton should not be held liable for grading and drainage conditions that are the result of later installed an in-ground pool, tennis court, retaining wall, or other major additions altering the property's topography and changing the drainage plan for the neighborhood. Holding D.R. Horton liable for current conditions when Plaintiffs cannot show the original state of grading, and where homeowners have made alterations, violates due process.

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For these reasons alone, class certification of the Stormwater/Drainage Subclass is improper.

G. The Court Erred In Finding D.R. Horton Violated South Carolina Building Codes and Standards

The relevant Code provision provides that "standing or ponding water shall not remain for periods in excess of 48 hours in the immediate area after a rain, except that in swales, which drain other areas, or in areas where sump pumps, discharge, a longer period can be anticipated." *See*, South Carolina Residential Construction Standards, ¶4. The Court failed to address that Sherard testified that he has never inspected the site within forty-eight (48) hours following a rain event to assess drainage compliance with applicable code provisions. Therefore, Sherard cannot testify that there is standing or ponding water on the Subject Properties forty-eight hours after a rain.

> A. Well, 48 hours is the code requirement for water to drain.
> Q. In the approximately three years that you've been investigating this project, have you confirmed that water is sitting in any yard for greater than 48 hours?
> A. I have not been there for 48 hours at any time throughout the three years.

Sherard Depo. 244:22 15 – 245:5 (line 3 removed) Exhibit 40 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. The Court did not address this issue in its Order Granting Subclass Certification. Sherard could not testify to flooding on the Subject properties, and while he suspected flooding in his visual inspections, he did not receive confirmation of this hypothetical flooding until the topographical survey was completed in 2024.

> A. If not all, 90 percent of them have flooding yards. Based on the — well, ultimately — excuse me. Initially my visual inspection led me to suspect that the yards were very flat and subject to flooding. The survey that was conducted ultimately confirmed that [9].

[9] If Sherard alleges that the yards were very flat and subject to flooding, commonality cannot exist as Stanley, the class representative for Stormwater/Drainage Subclass testified that his yard is not

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> Q. How does the survey confirm flooding?
> A. As we were looking at earlier, the — when you can look at the spot elevations that are flat or essentially flat, it's going to lead to a flooding situation. The water has nowhere to drain until it builds up enough depth to begin flowing.
> Q. In the time period since these homes have been built, have you seen any flooding?
> A. I have not been to the site during a heavy rain, no, sir.

Sherard Depo. 243:3 – 22 (lines 5-7 removed) Exhibit 40 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. Once again, D.R. Horton pointed out that the Survey is not of the original grade installed by D.R. Horton's subcontractors.

Most importantly, and unlike Sherard, Mr. Moore did not identify widespread flooding or standing water in any of the yards. Moore's conclusions are based on firsthand field observations of Eagles Glen yards following significant rainfall events. In fact, "ABS evaluated five (5) lots on sheet C-1.0, lots number 29, 31, 33, 35 and 37 rear yards. Each rear yard provides for positive drainage off of the rear of the lot. This contradicts Mr. Sherard's broad statement that 90 percent of lots were flooding entirely based on his evaluation of his own, (however irrelevant), survey." Moore Affidavit ¶ 10(c).

Additionally, a representative of ABS was sent to view each and every lot in Eagles Glen after a significant rainfall. As demonstrated in the NOAA Report below, between May 4, 2024,

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flat, and therefore cannot even suffer from the same defect that Andy Sherard indicates is common or typical of the subclass:

> Q. Okay. Number 2 he says, "Rear yards that have been graded flat." Do you see that?
> A. Yes.
> Q. Okay. Do you have any evidence that your rear yard was graded flat?
> A. My yard is not graded flat.

Stanley Depo., 99: 23 – 100: 4, Exhibit 32 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification.

and May 9, 2024, approximately 2.91 inches of rain fell at Eagles Glen. *Id*. Following this rainfall, ABS photographed every home in the Eagles Glen, definitively finding that not even one of the lots in the neighbor had standing water in the front or side of the yards after 48 hours. *Id*.

2024-05-04	74	64	69.0	3.2	0	4	0.43	0.0	0
2024-05-05	81	62	71.5	5.4	0	7	T	0.0	0
2024-05-06	83	64	73.5	7.2	0	9	0.34	0.0	0
2024-05-07	87	64	75.5	8.9	0	11	0.09	0.0	0
2024-05-08	89	66	77.5	10.6	0	13	0.22	0.0	0
2024-05-09	74	64	69.0	1.9	0	4	1.83	0.0	0

The Court's Order does not analyze how such a class can be certified in the absence of evidence of any violation of the residential construction standards. This was error. It is also unclear how any alleged "common" remedial work of regrading can be accomplished where so many alternations have been made to the various lots. Given these alterations, the Court does not explain why individualized inquiries are unnecessary. Class-wide treatment of this issue strips D.R. Horton of its due process right to defend itself against each home-specific defect.

H. The Court Failed To Consider Manageability And Efficiency Of The Stormwater/Drainage Subclass.

The Court must consider manageability and efficiency of trial when certifying a class. *Calvin Henson v. SCDOC and SCDJJ*, page 5. Plaintiffs' common question is stated: "whether the grading/drainage installed" at the Subject Properties "met the applicable construction requirement" and D.R. Horton's negligence associated with those "construction requirements." Plaintiffs' Memo in Support of Motion to Certify the Stormwater Class, p. 4. These answers cannot be made on a class-wide basis because the alleged defects are not uniformly present at each home and the individual defenses available to D.R. Horton vary by property. For instance, at 210 Talon Court, Plaintiff Stanley has a backyard that slopes towards the home. Further, a stone hardscape with a firepit and stone barrier was installed post construction by the homeowner. See, Alteration Photos.

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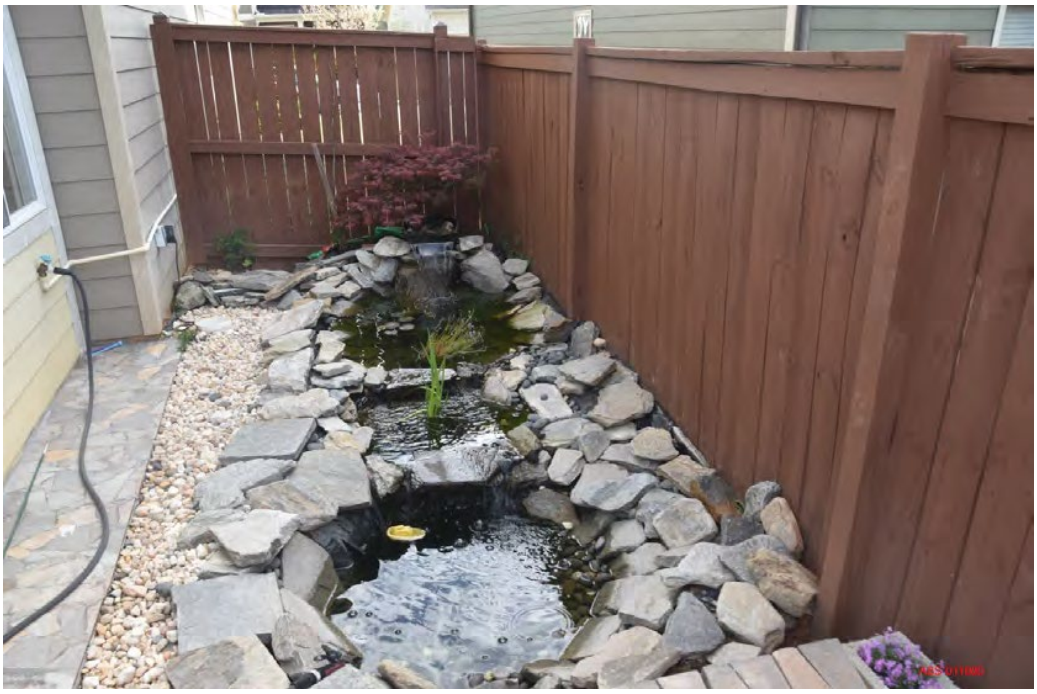


Compare this property to 225 Talon Court, in which the homeowners installed a full size in ground pool in their back yard, along with a retaining wall and additional patio space. a retaining wall.



At 130 Crowned Eagle Drive, the homeowner installed a koi pond.

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Regarding remediation for stormwater and grading, if any remediation was required it would have to be done "one lot at a time" as the "lots can drain to the front, to the rear, or both front and rear" and while "it likely requires coordination with the adjacent properties" it will not be the same for every lot. ABS Response to Court Order Granting Class Certification, p. 3, Attached as **Exhibit 3**. These variations in drainage patterns result in variations in alleged defects, their causation, and resultant damages, which questions cannot be answered apart from individual analysis of each home in Eagles Glen. Furthermore, there are varying conditions, including the modifications made by homeowners, the subcontractors hired to perform the original work, the individual team performing the work, and even maintenance differences between homeowners. These conditions can create variety in each subject property. Determining liability requires a property-by-property inspection to identify which, if any, of the four (4) alleged defects exist on any given home. As such this issue cannot be resolved on a class-wide basis and a trial of this issue will necessitate individual examination of each home.

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Applying the Supreme Court analysis in *Henson*, for ***each potential Stormwater/Drainage class member***, a jury will have to hear testimony and consider evidence as to whether that particular subject property had stormwater/drainage defects when it was turned over to the owner by D.R. Horton and then make an individual determination as to whether there is a defect. Second, a jury would then have to hear testimony and consider evidence of the action of D.R. Horton and its subcontractors as to whether they were negligent in installing the original grade. Third, a jury will have to hear testimony and consider evidence on whether D.R. Horton and its subcontractors alleged negligent conduct proximately caused each individual defect, "as proximate cause is an essential element of every negligence case." Finally, a jury will have to hear testimony and consider evidence as to each individual putative class member's damages and any modifications performed after closing. In addition, D.R. Horton would be able to make an opening statement, present their own testimony and evidence and then make a closing argument as to each putative class member, regardless of whether this enormous task may be completed with one jury, or require 127 juries. Class treatment is neither efficient, nor possible.

I. Plaintiff Stanley Is Not An Adequate Class Representative.

The Court concludes that Stanley's stormwater/drainage defect claims are like the other class members, and he shares the same claims as them, those claims being "grading that is not in compliance with the permitted plans, improper sloping, ineffective draining systems, and improper clearance." However, the only evidence of grading defects provided by Stormwater/Drainage Class Representative, James Stanley, is contained in the following deposition excerpts:

> Q. What evidence do you have that your yard is not sloped appropriately away from the home?
> A. At the end of the day, it's pooling water in my yard. I'm not sure, you know. I'm not an expert on what slope is required to be there to be sloped away from the home.

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> Q. Do you know of any area in your yard that is not sloped appropriately away from your home?
> A. I don't know, because I don't know what slope is required to be appropriately sloped away from the home.
> Q. Do you see anything in your yard that you think is not appropriately sloped that you look at and you say, that doesn't look like it's sloped right?
> A. I'm not sure.

Stanley Depo., 99:7 – 22, Exhibit 32 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. In fact, Stanley cannot even testify if anyone made any alterations to the drainage plans:

> Q. Do you know if anyone in your neighborhood has made any changes to that original drainage -- site drainage plan that D.R. Horton had?
> MS. LYNN: Objection.
> A. I don't know. I wouldn't know how to read the original plan, so I wouldn't know.
> Q. Have you asked anyone to let you know whether there's been changes made to it?
> MS. LYNN: Objection.
> A. I have not.

Stanley Depo., 101:5 – 16, Exhibit 8 to D.R. Horton Memo in Opposition to Plaintiffs' Second Motion for Class Certification. While being unable to identity if his yard is improperly sloped is damaging to his testimony, his inability to even voice if there have been alterations to the drainage plan is unjustifiable. Specifically, as he is a fact witness to be used by Plaintiffs to represent all the claims of the proposed class, however he cannot identify whether the first two defects alleged by the Plaintiffs are even present in his home. Despite this, the Order Granting Subclass Certification states that Stanley is engaged and has sufficient knowledge of the case. This is contrary to the facts and the law as stated in *Henson*.

In *Henson*, the Supreme Court held the order certifying class required that an individual inmate not be include into the class "unless Henson – as the class representative – first proves the

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inmate was raped. This is a question of fact as to which SCDS and SCDJJ enjoy the right to a trial by jury." *Calvin Henson v. SCDOC and SCDJJ*, page 8. The Supreme Court was deliberate in its choice of words and assigned that evidentiary burden to the class representative himself, not Plaintiffs' counsel, and certainly not their parade of hired experts. *Id.* In fact, the Supreme Court indicated that Henson was required to present individualized evidence to satisfy the burden of proving that each inmate would not have been raped but for the wrongful conduct of SCDC or SCDJJ. *Id*.

The Court's declaration that Stanley is an engaged, adequate representative for the Stormwater/Drainage Subclass simply does not align with the facts or the *Henson* court's requirements. Stanley's own testimony shows a failure to meet even the bare minimum adequacy requirements: he cannot testify as to whether his own home is improperly sloped, let alone the condition of drainage systems across the rest of the putative class. Under *Henson*, a class representative cannot serve as a mouth-piece for class counsel or hired experts. Rather, as the *Henson* court emphasized, the law requires the representative himself to establish the foundational facts of the claim. Certifying a subclass led by a class representative who is utterly oblivious to the core defect at issue is error.

J. <u>Conclusion</u>

For the foregoing reasons, certification of the Stormwater/Drainage Subclass was clear error and must be reconsidered and reversed. Under the rigorous standards re-affirmed in *Henson*, Plaintiffs failed to establish commonality, typicality, or predominance, presenting instead a chaotic mix of property-specific variables, including extensive post construction homeowner modifications, unverified original site conditions, and Sherard who admitted to never inspecting the properties within the code-defined 48 hours following a rainfall. Compounding these

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evidentiary failures, Plaintiff Stanley lacks even a basic understanding of the alleged drainage defects on his own lot, rendering him legally inadequate under *Henson* to represent the class. Certifying this Stormwater/Drainage Subclass further strips D.R. Horton of its due process right to present individualized defenses of the altered lots and forces the Court into an unmanageable series of individual trials as to liability, proximate cause and damages. Accordingly, D.R. Horton respectfully requests that this Court grant its Motion for Reconsideration and reverse the Order certifying the Stormwater/Drainage Subclass.

HVAC

VII. CERTIFICATION OF THE HVAC CLASS SHOULD BE RECONSIDERED AND REVERSED

The Court has not performed its analysis as required by the binding precedent reiterated in *Henson v. SCDOC*, *supra*. *Henson* clarified that this Court is required to determine whether common questions predominate over individual questions. *Calvin Henson v. SCDOC and SCDJJ*, 2026 S.C. Lexis 122 (July 22, 2026). This inquiry is a central part of the "rigorous analysis" the Court must conduct when considering whether to certify a class. *See Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003). Such a rigorous analysis necessarily includes the consideration of the common questions upon which Plaintiffs base their endeavor for class certification and any individual questions that require resolution before the merits of the case may be settled. Respectfully, this Court's Order fails to adequately consider any of Plaintiffs' proposed common questions as they relate to HVAC and is completely devoid of any discussion of individual HVAC questions that persist throughout Eagles Glen. Moreover, the Order fails to consider the concerns of class-wide damages determinations.

A. Plaintiffs' Purported Common Questions Require Individualized Inquiries.

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Rule 23(a)(2) SCRCP requires that Plaintiffs show there are questions of law or fact common to the class. "This Rule 23(a)(2) requirement is universally referred to as 'commonality.'" *Calvin Henson v. SCDOC and SCDJJ*, 2026 S.C. Lexis 122 (July 22, 2026). The requirement that common questions predominate over individualized questions is inherent in Rule 23 SCRCP, and proving predominance is required when pursuing class actions in South Carolina. *Id. Henson* clarified South Carolina law on predominance and stated plainly that Plaintiffs have the burden of showing that their purported common questions **predominate over individualized inquiries** *Id.* This Court failed to analyze whether Plaintiffs met this burden. Under *Henson*, predominance is a requirement and must be considered in any class action certification.

As an initial matter, the Court incorrectly stated in its Order that "All 127 homes in Eagles Glenn (sic) have the same HVAC systems." This is a gross misstatement of the facts. Plaintiffs' own expert admitted during deposition testimony that homes in Eagles Glen utilize different HVAC systems and manufacturers.

Q. Which manufacturer did this ductwork?
A. I don't remember the manufacturer right

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off. I would have to go back. There -- there is a couple of different types of -- brands of flexible ductwork that were used. Some -- even in the same house, there is two different brands of duct -- of flexible duct, so...
Q. Got you. So each house may have more than one type of ductwork in it?
MS. LYNN: Objection. D
THE WITNESS: Different manufacturer, yeah. But it's still flexible ductwork.

(Maddox Dep. Tr. 86:24 – 87:10).

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THE WITNESS: Yeah. That's okay. There -- there is a couple of manufacturers that I typically see. There is -- Quietflex is one. Flexmaster is another. I know I remember seeing one photograph in this -- as I went through my photographs, and it was -- I don't remember the name, Kim. I would have to -- I would have to run through my photographs to find it. But it was one that I haven't seen a lot of. It's just a different manufacturer. I just -- I don't typically see their ductwork around the -- around the upstate or in the -- I'll say in South Carolina I don't see a lot of their ductwork used.
BY MS. WOOTEN:
Q. Okay. So the answer is, right now you

don't know who the manufacturers are, but there -- you do know there were different ones, even sometimes in the same house?
A. Yes.

(Maddox Dep. Tr. 88:11 – 89:4).

Q. Okay. And how many homes have Honeywell systems?
A. All the ones that were zone control, you know, which we mentioned earlier. You know, there are some that don't have -- you know, there may be, you know, 20 percent of the homes that don't have zone.
Q. Okay. And as far as the remaining 87 homes, you don't know how many of those have Honeywell systems, either?
A. No, I don't.

(Maddox Dep. Tr. 70:14-24).

Moreover, D.R. Horton's HVAC expert indicates that each floor plan at Eagles Glen has a different ducting arrangement, some floor plans feature junction boxes, and some do not. Some floor plans utilize rigid ductwork, and some do not. Some floor plans feature two air handling units - one for each floor - while some feature a single air handling unit with zone dampers. HVAC system size likewise varies – some have systems with higher capacity while others have systems

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with lower capacity. *See* **Exhibit 2**. Clearly, the statement that all homes in Eagles Glen contain the same HVAC system is incorrect.

B. <u>Plaintiffs' first purported common question necessarily requires individualized analysis not suitable for class-wide resolution.</u>

Plaintiffs' first purported common question is "[w]hether the HVAC systems installed at Eagles Glen met the applicable construction requirements applicable to Eagles Glen." (Memorandum in Support of Plaintiffs' Motion to Certify The HVAC Defect Class at p. 4). Answering this purported common question requires an individualized approach, and the evidence in the record shows the same. The Plaintiffs sought certification of an HVAC class based upon purported defects related to (1) crimped, sagging, and improperly installed flex duct, (2) missing dampers in duct runouts, (3) zone dampers not installed properly, (4) compressed insulation on rigid ductwork, (5) insufficient bathroom exhaust air flow, (6) unsealed exterior wall penetrations, (7) inadequate undercuts at interior doors, and (8) insufficient clearance at electrical disconnects. (Plf.'s Memo in Support of HVAC Class Certification at p. 6).[10] Proving whether these alleged defects exist, where they exist, and to what extent they exist requires individual investigations of each home. Plaintiffs' own expert admitted that not all defects are present in all homes:

> A. There are some de -- other defects.
> And -- and some are -- I'll say some are -- are
> common among all houses, and some are common only
> among probably 50 percent of the houses.

(Maddox Dep. Tr. 62:10-13).

[10] D.R. Horton is not waiving its right to maintain its motion to exclude newly alleged HVAC defects including, without limitation, (1) missing dampers in duct runouts, (2) unsealed exterior wall penetrations, and (3) insufficient clearances at electrical disconnects.

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Indeed, performing a rigorous analysis as this Court is required to do requires an individual analysis of each home and its purported defects **to determine whether the HVAC installation meets applicable building requirements**.

Generally, Plaintiffs allege that D.R. Horton violated construction requirements, including building codes and manufacturer's warranties, when installing the HVAC systems. Even if the answer to this purported common question could drive the resolution of the case, which it cannot, determining the answer to the "common" question requires individualized inquiries. Specifically, not every home in Eagles Glen possesses every defect alleged by Plaintiffs. This is evidenced by Warren Maddox's testimony cited above – Maddox Dep Tr. 62:10-13. Just because one house may have construction defects does not necessarily mean another house has construction defects. In fact, there are homes within Eagles Glen that exhibit no HVAC defects. However, without an individualized investigation, no one, including this Court, can determine which homes do not have defects.

The Order also lacks proper analysis of D.R. Horton's evidence and arguments. The Order merely states that D.R. Horton's defense is a "class-wide defense which supports certification for global resolution" without analyzing D.R. Horton's position in any meaningful way. (Order at p. 19). The Court failed to consider D.R. Horton's other arguments including that Maddox failed to provide evidence proving the alleged HVAC defects are common across Eagles Glen and improperly concluded that Maddox's chart was simply a scrivener's error. As stated in D.R. Horton's materials, this was much more than a scrivener's error – **Maddox utilized an entirely incorrect denominator from another, unrelated subdivision to make calculations that are directly related to the frequency of alleged defects.** Respectfully, that amounts to substantially

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more than a scrivener's error that negatively affects D.R. Horton's position in this case, and the Court has exhibited a misunderstanding of the chart, its contents, and what it purports to show.

The chart attempts to extrapolate findings from Maddox's control group of homes, which was improperly hand-selected by Plaintiffs' counsel, to the entirety of Eagles Glen. The important aspect of the chart is not, as the Court states, the percentage of the "control group" that exhibits the alleged condition. Again, the "control group" is forty (40) homes **that counsel already knows may exhibit defects**. The important part, and what is necessary to attempt to show commonality, is the extrapolation of the occurrences in the "control group" to the entirety of Eagles Glen. **This is why using an entirely improper denominator is so important. When a smaller denominator (99 v. 127) is used, *the percentages are improperly inflated leading to the mistaken belief that alleged occurrences are more common than they are in reality***. Again, this was much more than a scrivener's error.

C. Plaintiffs' second purported common question likewise necessarily requires individualized analysis not suitable for class-wide resolution.

Plaintiffs' second purported common question is, "[w]hether these homeowners are damaged because the as-built conditions do not meet these requirements." A related and embedded common question set forth by Plaintiffs is the reasonable cost to repair any alleged HVAC defects. These questions are similar and each of them requires an individualized inquiry and investigation of each home. This Court failed to adequately analyze these questions and merely stated that "these defects require the same relief: money to correct the defective HVAC systems." (Order at p. 19). **The only way to determine whether homes exhibit damage and the extent of any repair required is to go home-by-home and document whether and what type of damage may be present**. As discussed *infra*, even if the Court's statement regarding damages is correct, which it is not, determining how much money a homeowner should receive is a highly individualized

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inquiry. Discovering the answer to this "common" question necessarily requires an individualized investigation.

Further, this Court's Order does not consider that the Plaintiffs have failed to prove that the allegedly defective HVAC systems demonstrate the same injury. In three places in the Order, the Court has correctly stated that the law requires the same injury to be demonstrated in order the meet class action certification requirements. (Order p. 6 stating, "[t]o justify a departure from that rule, 'a class representative must be part of the class and possess the same interest and suffer **the same injury**" (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (emphasis added); (Order p. 8 stating, "Moreover, commonality requires the Plaintiffs to demonstrate the class members have suffered **the same injury.**" (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (emphasis added); (Order p. 9 stating, "The United States Supreme Court has long held that to be adequate representatives, the class representatives must 'possess the same interests and suffer **the same injury** as the class members." (quoting *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-626, 117 S.Ct. 2231, 2250-2251 138 L.Ed.2d 689 (1997)). To determine whether the homeowners suffer the same injury as the class representatives requires an individualized approach in this case. These homes are not Ford Pintos, coming from an assembly line with identical parts. Rather, they are individually built homes, built by different craftsmen, with differing materials and differing techniques. Discovering defects necessarily requires an individualized look at each home.

Such an individualized approach would allow all parties to discover that very few, if any, homeowners in Eagles Glen have suffered the same injury – that point stands for *all* of Plaintiffs' proposed classes. Moreover, what a reasonable cost may be to repair any damage found in any Eagles Glen home likewise requires an individualized investigation.

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Determining whether and to what extent the Eagles Glen homeowners are damaged by defectively installed HVAC cannot be answered by examining one home. That is not how construction defect cases work and attempts to convince this Court that there are common, class-wide damages are misrepresentations. For example, homeowners A and B may have sagging ducts and inadequate undercuts at doors; however, homeowner A may have no damage from these defects (i.e. homeowner A's home does not exhibit decreased airflow or temperature variance). Meanwhile, homeowner B's home may have decreased air flow and temperature variance. **The only way to determine whether homes exhibit any damage is to go home-by-home and document whether and what type of damage may be present**. Discovering the answer to this "common" question necessarily requires an individualized investigation.

Moreover, this Court statement that, "[t]hese defects require the same relief: money to correct the defective HVAC systems" necessarily requires an individualized investigation. Determining the amount of money that may be reasonable to repair any damage found in any Eagles Glen home requires an individualized investigation. This Court hints at this point by stating elsewhere in the order that it understands not all homes require identical repair. [11] By making this statement, the Court points out the flaw in Plaintiffs purported common question – **even if defective HVAC installation is present, not every home will have the same extent of defective HVAC**. As the Court states on page 15 of its Order, the jury will be required to make individualized determinations as to the amount of damages appropriate for each home – which defeats the purpose of class adjudication. *Henson*, 2026 S.C. Lexis 122 (July 22, 2026) (stating that the question of

[11] "This Court notes that the repairs may not require removing and replacing all of the siding in Eagles Glen but will likely be limited to the defective siding. However, damages are a matter to be determined by the jury." (Order at p. 15).

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damages clearly requires individual findings by a jury). The Court was on the right track with its understanding of damages, but it stopped short in its analysis.

Importantly, if the Court allows Plaintiffs to make a generic damages argument, the Court opens the door to potential windfalls or even shortfalls for certain homeowners. For example, if homeowner A has ductwork that only requires uplifting and placing into a strap, that may cost only $300. If, however, homeowner B has dampers that require installation in duct runouts and replacement of doors due to improper undercuts, that may cost $5,000. Now consider that homeowner C requires removal and replacement of an entire HVAC system or installation of another unit to cover a second story, and the same costs $20,000. Which damages amount should be awarded for HVAC? If homeowner C is the class representative and the representative is awarded $20,000 for the HVAC repair, then homeowners A and B achieve tremendous windfalls. However, if homeowner A is the class representative, and the representative is awarded only $300, then homeowners B and C are left with woefully insufficient awards. Determining appropriate damages to avoid windfalls and shortfalls necessarily requires individualized investigations, which defeats commonality.

D. <u>This Court Failed to Consider The Notice and Opportunity to Cure Statute and its Impacts.</u>

S.C. Code Ann. 40-59-810, et seq. (the "Notice and Opportunity to Cure Act") is an absolutely required consideration in any construction law case, yet this court completely failed to acknowledge the same -- much less analyze the impacts it may have on this case. Indeed, courts are required to stay and/or dismiss cases where claimants fail to strictly adhere to the procedures set forth in the Act. *Grazia v. S.C. State Plastering,* LLC, 390 S.C. 562, 572, 703 S.E.2d 197, 202 (stating that "…the General Assembly also included a stay provision in the Right to Cure Act to specifically address situations where claimants file an action prior to full compliance with the

notice provisions); *See McIntire v. Seaquest Development Company, Inc., et al,* CA No. 2016-CP-10-1833 S.C. C.P. LEXIS 252 (holding that where repairs are made prior to compliance with the Notice and Opportunity to Cure Act, dismissal is required); *See* Order Granting Defendant's Motion to Stay Pending Compliance with Notice and Opportunity to Cure Act, *Ryan and Cassandra Duke v. D.R. Horton, Inc.*, 8:24-cv-07495-TMC (March 25, 2025) (D.S.C.) (issuing a stay in a case where plaintiffs represented by The Lucey Law Firm failed to comply with the Notice and Opportunity to Cure Act).

In failing to analyze the relationship between the Act and the Eagles Glen homeowners, this Court failed to acknowledge the fact that most homeowners failed to comply with the Act and therefore have claims that may be subject to dismissal. As D.R. Horton previously noted and this Court failed to consider, several proposed class representatives readily admit they have altered their HVAC systems since D.R. Horton's construction. Leandro Soriano, the proposed stone class representative, admitted in his deposition that he has had his air conditioning unit replaced. Soriano Dep. Tr. 83:7-12 (*see* Ex. 23 to Soriano Deposition). Mr. Soriano later clarified that this included ductwork alteration and that he presently experiences no issues with his HVAC system. Soriano Dep. Tr. 259:20-261:4. Further, Mr. Soriano testified that his neighbor across the street had his air conditioning unit changed out sometime in 2019 or 2020. Soriano Dep. Tr. 180:8-19; 261:5-262:5. Proposed siding and grading/drainage class representative James Stanley also admitted he had repairs done to his HVAC system. Stanley Dep. Tr. 96:15-20. Luke Hoopes, the proposed brick class representative, also admitted that he had repairs done to his HVAC system. Hoopes Dep. Tr. 65:11-25. Yet another proposed class representative, Ronald Rossi, a proposed concrete class representative, has an agreement with Preferred Home Services whereby routine inspections and service are performed on the HVAC system. Rossi Dep. Tr. 133:11-20. Mr. Rossi further admitted

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that Preferred Home Services has performed work on the ducts of the HVAC system, and that the ductwork of each home is "particular to the home." Rossi Dep. Tr. 133:21-135:6. Other Eagles Glen homeowners have provided affidavits that they are not experiencing any HVAC issues. [12]

Moreover, this Court failed to acknowledge or analyze the possibility that, should Plaintiffs be awarded an amount of monetary damages, **homeowners who should have no legally cognizable claim because of their failure to comply with the Act would still receive monetary compensation**. This potential windfall to both counsel and uninjured homeowners is unacceptable and contrary to the basic tenets of our judicial system. Moreover, this Court's Order is absent of any consideration of the case cited by D.R. Horton where the judge denied class certification finding whether individual homeowners met a notice requirement for a limited warranty required individualized inquiries. *See* D.R. Horton's Memorandum in Opposition to Plaintiffs' Second Motion for Subclasses pp. 33-34 (discussing *Naparala v. Pella Corp,* No. 2:14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72442, at *26 (D.S.C. June 3, 2016 and *Romig v. Pella Corp*, No. 2-14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 72437 (D.S.C. 2016). This Court failed to even discuss the striking similarities between the individual inquiry required to determine whether a homeowner satisfied warranty notice requirements and the individual inquiry required to determine whether a homeowner complied with the Notice and Opportunity to Cure Act.

Of course, determining whether proper notice had been provided would require an individualized investigation into each Eagles Glen homeowner and would include written discovery, requests for production, and likely numerous depositions to determine if Eagles Glen homeowners have had repairs completed without giving proper notice to D.R. Horton.

[12] Josh Hilliard Aff. ¶ 7 (DRH_004343-44); Janice Brock Aff. ¶ 7 (DRH_004345-47); Jackie L. Rogers Aff. ¶ 6 (DRH_004348-49).

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Despite the severe risk of homeowners and their counsel receiving monetary awards when there is no legally cognizable claim, this Court completely failed to acknowledge or even discuss the Act and its potential implications. This failure is error and does not meet the "rigorous analysis" standard with which the Court is required to comply.

E. Plaintiffs' Reliance on a Purported "Agreement" Whereby D.R. Horton Waived Dismissal of Cases is Misguided.

Plaintiffs have argued that D.R. Horton waived its right to make any claims related to the Notice and Opportunity to Cure Act based upon a limited "agreement" that was only necessary because Plaintiffs did not even to attempt to comply with the Notice and Opportunity to Cure Act's inspection requirements. In their Reply to Defendants' Motion in Opposition to Certify Defect Classes ("Plaintiffs' Reply"), Plaintiffs argue that because a "representative right to cure process" was agreed upon and completed between March and April 2024, D.R. Horton has waived all of its rights related to the Notice and Opportunity to Cure Act. (Plaintiffs' Reply p. 22).

As an initial matter, it is exceedingly important to understand that D.R. Horton is not required or obligated by any statute or case law to reach an agreement to have its Notice and Opportunity to Cure Act rights permitted. **D.R. Horton is statutorily entitled to receive notice of alleged defects and to be afforded the opportunity to inspect those alleged defects. It is D.R. Horton's position that any "agreement" does not affect its rights under the statute. The statute provides clearly that every homeowner must comply, and any attempt by the Plaintiffs to offer less than all of the homes does not abrogate D.R. Horton's rights under the statute.** This same principle applies for The Lucey Law Firm's practice (attempted in this case as well as all others) of requiring contractors to sign agreements or "waivers of liability" in exchange for "permission" to inspect residences where they have brought defect claims. This is completely contrary to the Notice and Opportunity to Cure Act because contractors do not need permission –

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they are statutorily permitted to inspect alleged defects brought forth by claimants. The Court simply should not permit such practices that are intended to "trick" others into "agreements" that are contrary to the legislative intent in this State for contractor inspections.

In addition, to reiterate the response D.R. Horton preciously stated in its Sur-Reply to Plaintiffs' Reply ("Sur-Reply p. 44), Plaintiffs overextend the applicability of the parties' agreement and misunderstand the Notice and Opportunity to Cure Act. The agreement between the parties related solely to inspection rights and was brought about because D.R. Horton threatened to seek a stay of the case unless Plaintiffs complied with the inspection obligations in the Notice and Opportunity to Cure Act. D.R. Horton did not, and likely cannot, waive any part of the statute or the related case law that says where repairs are made prior to compliance with the Notice and Opportunity to Cure Act, those claims should be dismissed.

Furthermore, even if this Court agrees the "agreement" between the parties overextends to claimants whose claims must be dismissed, that only applies beginning on March 13, 2024. D.R. Horton "agreed" to **not to seek a stay of the case**, not to waive its right to inspect all homes, in exchange for inspections of the alleged defects. As discussed *supra*, the enforceability of any such agreement is questionable at best; however, if this Court finds such an agreement enforceable and that it overextends to claimants who made repairs, the "agreement" does not relieve homeowners who made repairs prior to the April 2024 inspection of their consequences under the Notice and Opportunity to Cure Act. Homeowners were required to provide notice via certified mail before making any repairs to those alleged defects, and if they did not, those claims must be dismissed. Ironically, if the "agreement" is applicable, this raises yet another individual question – which homeowners made repairs to alleged defects in violation of the Notice and Opportunity to Cure Act and whether the "agreement" applies to them based upon timeline.

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F. <u>It is Clear Common Questions Do Not Predominate.</u>

"The class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation." *Henson*, 2026 S.C. LEXIS 122, 9 (July 22, 2026) (quoting Harry M. Lightsey Jr. & James F. Flanagan, South Carolina Civil Procedure 199 (1st ed. 1985). "The Court should first determine the existence of common questions, and then whether they are sufficiently central to justify the class action." *Id.* As stated herein, this Court failed to acknowledge all of Plaintiffs' common questions and therefore failed to determine whether they are sufficiently central to justify the class action.

Moreover, had the Court performed the proper analysis and adhered to the "rigorous analysis" standard, it would have found that the common questions do not exhibit predominance over the individual investigations and questions that are required to answer them. Plaintiffs "merely [r]eciting [common] questions is not sufficient to obtain class certification." *Dukes*, 564 U.S. at 349. As *Henson* has clarified, those common questions must predominate over the individual questions. The following individual questions predominate:

- Determining whether all individual homes in Eagles Glen have the same HVAC systems;
- Determining whether alleged HVAC defects exist in Eagles Glen homes;
- Determining where alleged HVAC defects exist in Eagles Glen homes;
- Determining the type of alleged HVAC defects in each of the Eagles Glen homes;
- Determining the extent of alleged HVAC defects in Eagles Glen homes;
- Determining which homes in Eagles Glen exhibit which alleged defect;
- Determining how many and which Eagles Glen homes have altered, repaired, or even replaced their HVAC systems;
- Determining the identify of HVAC subcontractors
- Determining whether individual Eagles Glen homeowners are experiencing damage due to defective HVAC installation;
- Determining the extent and type of damage from alleged HVAC defects;
- Determining the cost to remedy any defective HVAC;
- Determining whether individual Eagles Glen homeowners properly complied with the Notice and Opportunity to Cure Statute.

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These questions are essential in properly analyzing the Plaintiffs' claims and whether they have claims at all. As such, it is clear that individual questions predominate over the recited common questions, and a proper "rigorous analysis" would have certainly led the Court to this conclusion.

G. Conclusion

This Court must reconsider its Order Granting Class Certification for the HVAC Class. As is clearly demonstrated hereinabove, Plaintiffs' common questions do not predominate over the numerous, essential individualized questions required to resolve this matter. Moreover, this Court failed to consider the implications of the Notice and Opportunity to Cure Act as well as the inherent variation in the amount of damages across Eagles Glen homeowners even if defects are proven. For these reasons, this Court must reconsider its Order, reverse its decision, and DENY class certification.

Respectfully submitted,

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August 3, 2026
Greenville, South Carolina

EXHIBIT 1

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Calvin Henson, Daniel James Collins, Jason Robinson, Russell Taylor and All Those Similarly Situated, Respondents,

v.

South Carolina Department of Corrections and the South Carolina Department of Juvenile Justice, Petitioners.

Appellate Case No. 2025-000689

ON WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS

Appeal from Dorchester County
Heath P. Taylor, Circuit Court Judge

Opinion No. 28343
Heard May 19, 2026 – Filed July 22, 2026

REVERSED AND REMANDED

Andrew F. Lindemann, Lindemann Law Firm, P.A., of Columbia, for Petitioners South Carolina Department of Corrections and South Carolina Department of Juvenile Justice.

David Allan DeMasters, Riley Pope & Laney, LLC, of Columbia, for Petitioner South Carolina Department of Juvenile Justice.

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Hugh W. Buyck, Gordon Wade Cooper, Jeffrey Herman Lappin, Buyck Law Firm, LLC, of Mt. Pleasant, all for Petitioner South Carolina Department of Corrections.

Andrew Spencer Platte, Earhart Overstreet, of Charleston; Arnold S. Goodstein, Goodstein Law Firm, LLC, of St. George; C. Alan Runyan, of Beaufort; C. Carter Elliott Jr., Andrew William Kunz, Lauren Knight Slocum, Elliott, Phelan, Kunz & Slocum, of Georgetown, all for Respondents.

JUSTICE FEW: The circuit court certified two classes of similarly situated plaintiffs pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure. The classes include all inmates who were sexually assaulted while in the custody of the South Carolina Department of Corrections (SCDC) or the South Carolina Department of Juvenile Justice (SCDJJ) "from 2012 until present." SCDC and SCDJJ appealed the certification order, but the court of appeals dismissed the appeal on the basis that an interlocutory order certifying a class is not immediately appealable. We issued a common-law writ of certiorari to directly address the circuit court's order certifying the classes. We reverse the certification order and remand the case to the circuit court for discovery and trial only in the individual capacity of each named plaintiff.

I. Facts and Procedural History

Plaintiffs Calvin Henson, Daniel James Collins, Jason Robinson, and Russell Taylor—each an inmate at SCDC or SCDJJ—filed this lawsuit in their individual capacities and as purported representatives of a class of similarly situated inmates. The named plaintiffs—whom we refer to collectively as Henson—allege prison officials were negligent in failing to implement and enforce appropriate policies and procedures and in failing to provide sufficient prison staff. Henson claims SCDC and SCDJJ's adoption of and compliance with these policies and procedures and provision of a sufficient staff of prison guards "would have prevented the sexual assaults" they contend they suffered.

Henson filed a motion to certify a class under Rule 23(a), requesting the class be defined as "All individuals that have been under the custody and care of the South Carolina Department of Corrections ('SCDC') or the South Carolina Department of Juvenile Justice ('SCDJJ') in South Carolina from 2012 until present who were

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victims of rape and/or sexual assault." The memorandum Henson filed in support of the motion indicated the class could include anywhere from 1,600 to 64,000 inmates for SCDC and 70 to 2,800 juveniles for SCDJJ. Henson argued "common issues of fact and law clearly predominate over individual class member issues" because "all inmates find themselves in the same situation where" SCDC and SDCJJ negligently failed to protect them from being raped. Henson later filed a reply memorandum that included statistics SCDC and SCDJJ are required to maintain under the federal Prison Rape Elimination Act (PREA)[1] showing 1,768 inmates reported sexual assaults to SCDC and SCDJJ between 2012 and 2022.

The circuit court found Henson satisfied all elements of Rule 23(a). As to Rule 23(a)(2), the court found the "common legal theories shared by the putative class members and the finding of a foreseeable injury of the putative class members due to the actions of" SCDC and SCDJJ satisfied the requirement of the Rule. The court then issued an order certifying two classes with the following class definitions:

> All individuals that have been under the custody and care of the South Carolina Department of Corrections ("SCDC") in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.
>
> All individuals that have been under the custody and care of the South Carolina Department of Juvenile Justice ("SCDJJ") in South Carolina from 2012 until present who were victims of a nonconsensual sexual battery.

SCDC and SCDJJ appealed the class certification order to the court of appeals. The court of appeals dismissed the appeal, finding the order was not immediately appealable. *Henson v. S.C. Dep't of Corr. & S.C. Dep't of Juv. Just.*, S.C. Ct. App. dated Jan. 3, 2025. SCDC and SCDJJ then filed a petition requesting this Court

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[1] Congress enacted PREA in 2003 to—among other reasons—"make the prevention of prison rape a top priority in each prison system" and "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape." 34 U.S.C.A. § 30302(2)-(3). The United States Department of Justice (DOJ) issued a final agency rule in 2012, "adopting national standards to prevent, detect, and respond to prison rape, as required" under PREA. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37106 (June 20, 2012) (effective Aug. 20, 2012).

issue a writ of certiorari either: (1) to the court of appeals pursuant to Rule 242(a), SCACR, or (2) to the circuit court pursuant to our authority to issue a common-law writ of certiorari. We declined to issue a writ of certiorari to the court of appeals, but we granted the request to issue a common-law writ of certiorari to the circuit court. *See generally State v. Price*, 441 S.C. 423, 433, 895 S.E.2d 633, 638 (2023) (explaining this Court "may use a common-law writ of certiorari to correct errors of law, particularly where a trial court exceeded its authority" (citing S.C. Const. art. V, § 5; S.C. Code Ann. § 14-3-310 (2017))).

II. Immediate Appealability and Common-Law Certiorari

Even though we denied the request for a writ of certiorari to the court of appeals, we emphasize the court of appeals was correct to dismiss the appeal. In previous opinions discussing the immediate appealability of interlocutory class certification orders, we used flexible language indicating class certification orders may be immediately appealable under limited circumstances. *See, e.g.*, *Hensley v. S.C. Dep't of Soc. Servs.*, 429 S.C. 144, 148, 838 S.E.2d 510, 512 (2020) ("[C]lass certification orders are *ordinarily* not immediately appealable." (emphasis added)); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008) ("The *general rule* established by this Court is that class certification orders are not immediately appealable." (emphasis added)); *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." (emphasis added)), *overruled in part on other grounds by Hughes ex rel. Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 442 S.C. 113, 139 n.7, 898 S.E.2d 102, 116 n.7 (2024); *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*." (emphasis added)). Pursuant to our decision today, however, an interlocutory order granting or denying class certification is *never* immediately appealable to the court of appeals. There are no exceptions.[2]

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[2] Nothing in our decision today affects the validity of the separate principle, "The appellate courts have discretion . . . to consider an unappealable order if an appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 495 n.2, 450 S.E.2d 616, 618 n.2 (Ct. App. 1994) (citing *Hite v. Thomas & Howard Co. of Florence*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991)). We discussed this principle in several cases as being applicable to class certification orders if the appellate court has before it another order that is immediately appealable. *See, e.g.*, *Salmonsen*, 377 S.C. at 449, 661 S.E.2d at 85 ("This Court . . . has reviewed interlocutory orders involving

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In very rare circumstances, however, this Court has exercised its discretion to use a common-law writ of certiorari to correct a trial court's errors of law. *Price*, 441 S.C. at 433, 435 n.5, 895 S.E.2d at 638, 639 n.5. We have emphasized we will use this authority only where "exceptional circumstances" exist, *Laffitte v. Bridgestone Corporation*, 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009), and we "will not . . . use a common-law writ of certiorari as a substitute for a party's right of appeal," *Price*, 441 S.C. at 434, 895 S.E.2d at 639. Our hesitance to use this authority is demonstrated by the fact we have done so in published opinions only a handful of times over the past hundred years. As we will emphasize again below, we caution litigants dissatisfied with a circuit court's ruling on class certification that they should not lightly seek review of that ruling through a common-law writ of certiorari.

III. Rule 23(a)—Class Certification Requirements

Our rules of civil procedure are generally designed "to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. This is particularly true for the class action procedure set forth in Rule 23(a), which we adopted in 1985 based on the then-existing language of Rule 23(a) of the Federal Rules of Civil Procedure.[3] *See* Rule 86(a), SCRCP ("These rules shall take effect on July 1, 1985."); Rule 23(a), SCRCP Note (stating the language of Rule 23(a) "is drawn principally from Federal Rule 23(a)"). Shortly before we adopted Rule 23(a), the Supreme Court of the United States observed that a "principal purpose" of the class action procedure was "the efficiency and economy of litigation." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553, 94 S. Ct. 756, 766, 38 L. Ed. 2d 713, 726 (1974); *see also Am. Pipe & Constr. Co.*, 414 U.S. at 555-56, 94 S. Ct. at 767, 38 L. Ed. 2d at 728 (adopting a particular interpretation of Rule 23 because doing so was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve"). This purpose of

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class certification when they contain other appealable issues." (citing *Ferguson*, 349 S.C. at 565, 564 S.E.2d at 98, and *Eldridge*, 308 S.C. at 127, 417 S.E.2d at 534)). Under the *Roberts* and *Hite* principle—whether the appeal is taken from another order in the same case or a separate ruling in the same order—the consideration of the interlocutory certification order is within the appellate court's discretion because the appeal is taken from an immediately-appealable order or ruling, not from the certification order or ruling.

[3] The federal rule has been amended several times since 1985, but we have not amended Rule 23(a) of the South Carolina Rules of Civil Procedure.

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achieving efficiency through the use of a class action is accomplished by requiring representatives of and counsel to a proposed class to satisfy each of the elements of our Rule 23(a), particularly the Rule 23(a)(2) requirement that "there are questions of law or fact common to the class." This Rule 23(a)(2) requirement is universally referred to as "commonality."

This Court recently discussed this Rule 23(a)(2) commonality requirement and the imperative of efficiency in class action litigation in *Hensley*, stating "there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote." 429 S.C. at 152, 838 S.E.2d at 514. We noted the court of appeals had reversed the circuit court's class certification order in that case "on the basis the [plaintiffs] did not satisfy the commonality requirement of Rule 23(a)," 429 S.C. at 148, 838 S.E.2d at 512, and "on the basis that there is some predominance-related requirement in Rule 23(a)," 429 S.C. at 152, 838 S.E.2d at 514. We did not reach the merits of those two points in *Hensley*, however, because we found the interlocutory class-certification order was not immediately appealable. 429 S.C. at 154, 838 S.E.2d at 515. We did point out, though, the court of appeals' recognition of a predominance requirement "has support in academic sources and in our precedent." 429 S.C. at 152, 838 S.E.2d at 514.

Today, we do reach the merits of commonality and predominance. Our analysis of these issues requires us to consider the relationship that a class representative must demonstrate to exist between questions that are common to all class members and questions that must be litigated on an individual basis. We begin with a passage we quoted in *Hensley*, 429 S.C. at 152-53, 838 S.E.2d at 514, written in 1985 by Professor Emeritus James F. Flanagan—the original reporter for our Rules of Civil Procedure—and the late Professor and former Dean Harry M. Lightsey Jr.:

> [T]he class action must be a better procedural mechanism for resolving the litigation than named joinder or separate litigation. Under Fed. R. Civ. P. 23(b)(3), this is reflected in the requirement that the common questions predominate over individual issues. Although not specifically required by this Rule, it is inherent in the general conditions for class actions. The Court should first determine the existence of common questions, and then whether they are sufficiently central to justify the class action.

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Harry M. Lightsey Jr. & James F. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE 199 (1st ed. 1985).

This Court discussed the necessary relationship between common and individual questions in *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). We began our discussion in that case by recognizing that "[n]ot every issue in the case must be common to all class members." 353 S.C. at 21, 577 S.E.2d at 200 (citation omitted). We then acknowledged there were "at least two common questions of law" in the case whose resolution applied equally to all class members. 353 S.C. at 22, 577 S.E.2d at 201. We focused, however, on the legal requirement that individual class members "cannot prevail unless they establish they were prejudiced." *Id.* We explained commonality requires that "a determinative critical issue overshadows all other issues." 353 S.C. at 21-22, 577 S.E.2d at 201 (quoting *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990)). We held the circuit court erred in certifying the classes because—in that particular case—the necessity of having each individual class member prove prejudice "negates the benefits of a class action suit."[4] 353 S.C. at 22, 577 S.E.2d at 201.

IV. Analysis of Common and Individual Questions in this Case

With this backdrop in mind, we turn to the three issues presented to the Court by SCDC and SCDJJ. Each of these issues in some fashion invokes the efficiency concerns at the root of the requirements of commonality and predominance. For example, SCDC and SCDJJ argue "the class definitions as adopted by the trial court" are not "proper under South Carolina law" because they do not "allow for the manageability and efficiencies required of a class action." To address this and the other issues SCDC and SCDJJ raise on appeal and the elements of Rule 23(a), we consider how this case would actually be tried as a class action.

First—according to the circuit court's certification order—the class includes only inmates who were "victims of a nonconsensual sexual battery"—or in common terms—inmates who were "raped." This means an individual inmate may not be included in the class unless Henson—as the class representative—first proves the inmate was raped. This is a question of fact as to which SCDC and SCDJJ enjoy the

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[4] In *Gardner*, the trial court also certified a class of defendants. 353 S.C. at 9, 577 S.E.2d at 199. Focusing on the reality that the prejudice analysis would be different not only between class members, but also between defendants, we held certifying each class was error. 353 S.C. at 20-23, 577 S.E.2d at 200-01.

right to a trial by jury. *See* S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate."). Therefore, for each potential class member, a jury will have to hear testimony and consider evidence as to whether that particular inmate was raped, and then make an individual determination of class membership by making a factual finding that the inmate was or was not raped.

Second, a jury will have to hear testimony and consider evidence of the actions of SCDC and SCDJJ as to whether they were negligent in failing to prevent the rapes. This is the primary question Henson argues is common to all class members, and thus, he argues, may be resolved at trial with one class-wide finding by a jury. We will discuss this "common question" extensively below.

Third, a jury will have to hear testimony and consider evidence on whether SCDC and SCDJJ's allegedly negligent conduct proximately caused each individual rape, as proximate cause is an essential element of every negligence case. *See Hurd v. Williamsburg Cnty.*, 363 S.C. 421, 427, 611 S.E.2d 488, 492 (2005) ("In a negligence action the plaintiff must prove proximate cause."). Proximate cause "is a question of fact for the jury" and "requires proof of . . . causation-in-fact." *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). "Causation-in-fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence . . . ." *Id.* (quoting *Bramlette v. Charter-Med.-Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990)). On this point, it is obvious that even perfect compliance with all applicable standards for prison management under PREA or otherwise is not going to prevent all sexually inappropriate conduct in prisons. Thus, as to each individual class member, Henson must present individualized evidence to satisfy the burden of proving "but for" cause—that is, Henson must prove each inmate would not have been raped but for the wrongful conduct of SCDC or SCDJJ.

Finally, a jury will have to hear testimony and consider evidence as to each individual inmate's damages.

As we mentioned above, SCDC and SCDJJ's internal records contain 1,768 reports of sexual assaults in the prisons during the applicable time period. The circuit court wrote in its order this number "appears to be the minimum of potential putative class members." Using this "minimum" number—and recognizing that no inmate may become a member of the class until a factual determination has been made as to whether the inmate was raped—the circuit court must begin the trial of this case as a class action by conducting one or more mini-trials in which a jury makes at least 1,768 separate findings of fact as to whether each individual inmate was raped. As

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to each of these 1,768 factual questions, Henson must present testimony and evidence to support the contention the individual inmate was raped. Many of these presentations will meet legal challenges on motions for directed verdict or otherwise. In addition, as to each inmate, SCDC or SCDJJ is entitled to make an opening statement, present their own testimony and evidence, and then make a closing argument. Regardless of whether this enormous task may be completed with one jury, requires 1,768 juries, or could be managed with some number in between, the task would—to put it mildly—overwhelm the court.

Importantly, this overwhelming portion of the jury's work is only to determine class membership. After class membership is determined, class counsel is required to send notice to each of the class members and provide an opportunity for each member to opt out. *See generally Salmonsen*, 377 S.C. at 457, 661 S.E.2d at 89 ("[I]n order to provide minimal due process, absent class plaintiffs[] must receive notice plus an opportunity to be heard and participate in the litigation." (quoting *Hosp. Mgmt. Assocs. v. Shell Oil Co.*, 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004))); *Salmonsen*, 377 S.C. at 460, 661 S.E.2d at 91 (stating "we adopt the 'opt-out' class action and notification procedure as the exclusive method of class action litigation in this state").

After notice has been provided and the final composition of the class has been determined, another jury trial must take place. In that trial—which almost certainly cannot be conducted with the same jury that determined class membership—a jury must resolve the liability of SCDC or SCDJJ.

Henson argues this is a common question that may be resolved by one finding of negligence on the part of SCDC and SCDJJ. We question whether the trial of this question will be so simple. The certified class includes all inmates who were raped "from 2012 until present." Compliance with applicable standards for prison management is not a static matter, and can vary over the years. For example, if the applicable standards for the conduct of prison officials change, or if SCDC or SCDJJ's degree of compliance with those standards changes, then the answer to the question whether the conduct of SCDC or SCDJJ management constitutes negligence could also change. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374, 390 (2011) (discussing commonality and stating, "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the

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generation of common answers." (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009))).

To illustrate this point, we turn to PREA.[5] Congress and the DOJ changed the PREA standards several times during the period of time covered by the circuit court's class definitions—"from 2012 until present"—each in a manner that could make a significant difference in the likelihood of SCDC or SCDJJ facing civil liability for an individual rape. The first change occurred in 2014 when the DOJ set a May 15, 2014 deadline, requiring states for the first time to provide (1) "assurances" to the DOJ of progress toward PREA compliance, or (2) "certifications" of actual compliance.[6] The second change was made in 2016, providing that after 2022 states were no longer permitted to simply assure progress towards PREA compliance but were required to certify existing compliance.[7] The third change—also made in 2016—provided a state may maintain federal funding for its prison system by auditing some—but not necessarily all—of its prisons for PREA compliance. This third change permitted states to make an "emergency assurance" from 2022 until 2025 certifying "that the State has audited not less than 90 percent of prisons" for

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[5] Henson does not specifically rely on PREA in the Amended Complaint. There can be no doubt, however, PREA will be a significant factor in determining the standard of care owed by prison officials. In the Act itself, Congress set forth one of the purposes of PREA as to "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape." 34 U.S.C.A. § 30302(3). We use this discussion of PREA as an illustration of how difficult it might be to determine negligence on a class-wide basis based on any standard, not to suggest PREA is the exclusive or even primary source of the standard of care.

[6] *See* 34 U.S.C.A. § 30307(e)(7)(A) (designating the effective date for the requirement that states submit a certification or assurance); Press Release, Department of Justice, Department of Justice Announces 48 States and Territories have Committed to Ending Prison Rape (May 28, 2014), https://www.prearesourcecenter.org/sites/default/files/content/department_of_justice_prea_compliance_press_release.pdf (last visited July 14, 2026) (stating "May 15, 2014, was the deadline for states and territories to submit certifications or assurances" of PREA compliance for fiscal year 2014).

[7] Justice for All Reauthorization Act of 2016, Pub. L. No. 114-324, 130 Stat. 1948 (codified at 34 U.S.C.A. § 30307(e)(2)(D)(ii)).

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the purpose of PREA compliance.[8] South Carolina's response to PREA varied over this period of time from (1) no reporting to the DOJ until 2014, (2) submitting assurances of future compliance from 2014 to 2022, and then (3) instead of certifying compliance, submitting "emergency assurances" until 2025.[9]

Consider several potential class members: one raped in 2012 when no reporting of PREA compliance was required, one raped in 2018 when states were permitted to simply assure progress toward PREA compliance, and one raped in 2024 when states were required to certify compliance. Also consider as to the 2024 rape—which occurred at a time when South Carolina made an "emergency assurance" indicating it audited some but not all prisons for PREA compliance—whether the rape occurred in a prison that had been audited for compliance with PREA or occurred in a prison not audited. Finally, consider the type of prison facility in which the rape occurred, because PREA standards vary between the various types. *Compare* 28 C.F.R. §§ 115.11 to -93 (2026) ("Standards for Adult Prisons and Jails"), *with* 28 C.F.R. §§ 115.211 to -293 (2026) ("Standards for Community Confinement Facilities").[10]

Each of these scenarios presents significantly different facts on the question of whether prison officials were negligent under South Carolina law, depending on when and where a particular rape occurred. In turn, these different factual scenarios create significant variability in the likelihood of SCDC or SCDJJ facing civil liability for an individual rape. This means it is somewhat—if not highly—likely the answer to the question whether prison officials were negligent in failing to prevent the rape

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[8] Justice for All Reauthorization Act of 2016, Pub. L. No. 114-324, 130 Stat. 1948 (codified at 34 U.S.C.A. § 30307(e)(2)(D)(iii)).

[9] *See* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., *Certification and Assurance Submissions* for Fiscal Years 2014-2025, https://bja.ojp.gov/program/prea/overview (last visited July 14, 2026) (listing certifications, assurances, and emergency assurances of PREA compliance by fiscal year under the "Governors' PREA Certifications and Assurances" heading).

[10] *See* 28 C.F.R. § 115.5 (2026) (defining "Community confinement facility" as "a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community correctional facility (including residential re-entry centers), other than a juvenile facility, in which individuals reside as part of a term of imprisonment or as a condition of pre-trial release or post-release supervision").

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is not going to be the same for all class members. Thus, we question whether it will be sufficient to have one jury answer the negligence question on a class-wide basis, or it will be necessary for one or more juries to answer the negligence question separately for each class member. In other words, because it is entirely possible a jury might find the applicable defendant negligent as to a rape that occurred in 2012 but then find the defendant not negligent for a rape that occurred later, or the other way around, we are not convinced even this question is truly common to the entire class.

Next, regardless of whether that second question may be treated as one common to the entire class, the questions of proximate cause and damages clearly require individual findings by a jury. In fact, one or more juries must make at least 1,768 separate determinations of whether Henson proved proximate cause as to each class member, and then consider separate damages calculations for 1,768 class members. As to each of these factual questions, Henson must make an individualized factual presentation, and SCDC or SCDJJ is entitled to make an opening statement, present its own testimony and evidence, and then make a closing argument.

But the 1,768 "minimum" is clearly not the applicable number. It is a central tenet of class action law that class counsel owes a fiduciary duty to the entire class, including absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 2974, 86 L. Ed. 2d 628, 642 (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *Premium Inv. Corp. v. Green*, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984) ("[A] plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class.").[11] In their memorandum in support of the motion for class certification—apparently believing using a large number would improve their standing in some manner—Henson indicated the class could include as many as 64,000 inmates from SCDC and 2,800 inmates from SCDJJ. Because class counsel owes a fiduciary duty to each of those 66,800 individuals, counsel is not free to pursue only the strongest claims, but must also pursue recovery for potential class members whose claims may be doubtful. Thus, it is difficult to imagine how counsel

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[11] *See also* MANUAL FOR COMPLEX LITIGATION § 21.12 (4th ed. 2004) ("Rule 23 and the case law make clear that, even before certification or a formal attorney-client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole.").

might pare down the number of potential members of the classes even to the overwhelming "minimum" of 1,768.

V. Commonality and Predominance Under Rule 23(a), SCRCP

SCDC and SCDJJ do not frame their issues in this petition in terms of commonality or predominance. For example, as to one of the issues, they argue Rule 23 should "be interpreted as containing an implicit threshold requirement that the members of a proposed class be readily identifiable," and, "A class definition must be crafted in such a way that the putative class members are readily . . . ascertainable by objective criteria." Thus, they argue, this Court should "recognize an 'ascertainability requirement' under Rule 23, SCRCP." They also argue the circuit court erred in certifying the classes because "the class definitions . . . create what are commonly referred to as 'fail-safe' classes."[12] As to the issue we referenced in section IV, SCDC and SCDJJ argue:

> If the Court allows these fact-intensive and fail-safe class definitions to proceed on remand, the trial court will be required to engage in hundreds of mini-trials . . . just to determine whether particular SCDC inmates and SCDJJ juveniles meet the class definitions. That will render the classes unmanageable . . . and, more importantly, defeat the efficiencies at the heart of the class action process.

In recent years, this Court has refocused the analysis of questions governed by our Rules to the actual language of the Rule. *Swing v. Swing*, 445 S.C. 340, 346, 914 S.E.2d 158, 161 (2025); *see also Whitfield v. Schimpf*, 444 S.C. 633, 656 n.7, 911 S.E.2d 310, 322 n.7 (2025) (stating, "This Court has recently emphasized that trial courts should apply the language of the Rules," and collecting cases). That focus is no less important under Rule 23(a) than it was under the Rules we discussed in those cases. In class action litigation, however, the necessity of courts also focusing on the efficiency of the class action procedure is inescapable. Thus, we understand SCDC and SCDJJ's focus on "efficiencies," as this Court itself emphasized efficiency not only earlier in this opinion, and in *Hensley* as referenced above, but

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[12] *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014) (explaining "a fail-safe class 'is defined so that whether a person as a member depends on whether the person has a valid claim'" (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012))).

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also—using other terms—in *Gardner*. *See Gardner*, 353 S.C. at 22, 577 S.E.2d at 201 (holding the "individualized examination" of the prejudice question "negates the benefits of a class action suit").

With the goal of the efficiency of the class action in mind, therefore, we turn back to the language of the Rule and the "commonality" requirement—set forth in Rule 23(a)(2). In the Rule's terms, the commonality requirement is that "a party must show . . . 'there are questions of law or fact common to the class.'" *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (quoting Rule 23(a), SCRCP). "In practical terms," as we stated in *Gardner*, "this means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together." *Id.* (internal quotation marks omitted). In *Gardner*, despite our acknowledgement there were two questions common to all class members, we found the class representatives did not satisfy the commonality requirement because neither of those two issues was "a determinative issue." 353 S.C. at 21-22, 577 S.E.2d at 200-01. In *Hensley*, we stated "there must be a proper balance between common and individualized issues in order to achieve the efficiencies the class procedure was designed to promote." 429 S.C. at 152, 838 S.E.2d at 514. In *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986)—the very first class action decided by our appellate courts after Rule 23(a) was adopted—Judge Goolsby wrote for the court of appeals that commonality requires "that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem." 287 S.C. at 568, 340 S.E.2d at 158 (quoting Lightsey & Flanagan, *supra* at 198). In *Gardner*, *Hensley*, and *McGann*, this Court and the court of appeals recognized there is a qualitative component to the analysis of commonality; that is, the simple fact there are one or more common issues will not suffice.

These statements of our commentators and courts as to what is required before certifying a class action are consistent with the Supreme Court of the United State's treatment of commonality in *Dukes*. Contrary to earlier statements in the federal courts that commonality requires only that some question be common—regardless of the importance of the issue to the outcome of the litigation[13]—the *Dukes* Court

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[13] *See, e.g.*, *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001) ("The test for commonality is not demanding. All that is required for each class is that there is one common question of law or fact: The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members." (citations and internal quotation marks omitted)). The Fifth Circuit later recognized *Dukes* abrogated *James* and other cases setting forth a more relaxed

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recognized the qualitative component of the analysis. The Court began by stating the "crux of this case is commonality," and quoted Rule 23(a)(2), FRCP. 564 U.S. at 349, 131 S. Ct. at 2550, 180 L. Ed. 2d at 389. The Court noted—again quoting Professor Nagareda—"That language is easy to misread, since 'any competently crafted class complaint literally raises common "questions."'" 564 U.S. at 349, 131 S. Ct. at 2551, 180 L. Ed. 2d at 389. The Court then explained that to meet the Rule 23(a)(2) commonality requirement, "That common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 564 U.S. at 350, 131 S. Ct. at 2551, 180 L. Ed. 2d at 389-90. The Court continued with the statement we quoted above—"commonality" requires "the capacity of a class-wide proceeding to generate common answers apt to *drive the resolution of the litigation*." 564 U.S. at 350, 131 S. Ct. at 2551, 180 L. Ed. 2d at 390 (emphasis omitted) (emphasis added).

We turn next to the concept of "predominance"—not specifically set forth in our Rule. We often hear that South Carolina does not have what the federal courts call the "predominance" requirement. We noted in *Hensley*, for example, the circuit court in that case stated, "South Carolina has no predominance . . . requirement." 429 S.C. at 151-52, 838 S.E.2d at 514. This idea stems from the fact the drafters of our Rule 23 omitted the language of Federal Rule 23(b) and (c), and specifically the Rule 23(b)(3) requirement "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (1967).

The reasons for this omission are not entirely clear. *See generally* Lightsey & Flanagan, *supra* at 191-95 (discussing the omission). It is clear, however, the omission was not intended to expand the scope of class actions. "Several factors argue against an expansive class action rule." Lightsey & Flanagan, *supra* at 193; *see also* 1 James F. Flanagan et al., SOUTH CAROLINA CIVIL PROCEDURE 257 (4th ed. 2020) ("The history of the class action in this jurisdiction reflects its equitable origins and the joinder considerations found in the [Field Code]; both combined to limit its application as a procedural device." (citing A. Camden Lewis and Michael G. Sullivan, LEWIS AND SULLIVAN ON CLASS ACTIONS (S.C. Bar 2005))). Lightsey and Flanagan suggested in 1985 that the omission of the Federal Rule 23(b) language was actually an effort to restrict the use of class actions, stating, "The drafters of the

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commonality analysis. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839-42 (5th Cir. 2012).

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new South Carolina Rules specifically rejected the most expansive use of the class action and omitted the language of Federal Rule 23(b) and (c) which defined the three general categories of class actions, and how they are to be treated in Federal Courts." Lightsey & Flanagan, *supra* at 194. Flanagan and his coauthors restated this suggestion in the current edition, "The drafters of the South Carolina Rules omitted the language of Federal Rule 23(b) and (c), . . . in part, to avoid adopting by implication the broad federal precedent then-existing."[14] Flanagan et al., *supra* at 257.

Thus, the same statements of our commentators and courts as to what is required before certifying a class action also include the substance of the federal "predominance" requirement. In *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016), the Supreme Court stated, "The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" 577 U.S. at 453, 136 S. Ct. at 1045, 194 L. Ed. 2d at 134 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249, 138 L. Ed. 2d 689, 712 (1997)); *see also Tyson Foods*, 577 U.S. at 453, 136 S. Ct. at 1045, 194 L. Ed. 2d at 134 ("The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" (quoting 2 W. Rubenstein, NEWBERG ON CLASS ACTIONS § 4:50 (5th ed. 2012))). These statements from the Supreme Court are substantively indistinguishable from our statements in *Gardner* that the class plaintiff "must articulate the existence of significant common, legal, or factual issues which bind the proposed class together," and requiring "a determinative issue." 353 S.C. at 21, 577 S.E.2d at 200-01 (internal quotation marks omitted).

As we seek to read and apply Rule 23(a) as a whole and in its proper historical context, it becomes clear it is not possible to achieve the efficiencies the class action procedure was designed to bring to litigation without a qualitative analysis of commonality and some form of a predominance requirement. We recognized this when we required "a determinative issue" under commonality in *Gardner*. 353 S.C. at 21, 577 S.E.2d at 200-01. Lightsey and Flanagan recognized this when they wrote "the requirement that the common questions predominate over individual issues . . .

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[14] *But see Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) ("By omitting the additional requirements, Rule 23, SCRCP, a more expansive view of class action availability than its federal counterpart."). To this extent only, we overrule *Littlefield*.

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is inherent in the general conditions for class actions." Lightsey & Flanagan, *supra* at 199. Neither this Court nor the court of appeals has ever acknowledged the popular notion that South Carolina does not require predominance. In fact, the court of appeals wrote in *Hensley* "there is some predominance-related requirement in Rule 23(a)," a comment we quoted with some indication we agreed. 429 S.C. at 152, 838 S.E.2d at 514.

Thus, whatever language is used to describe the principle of "commonality," and however we attempt to understand the omission of the word "predominate" from Rule 23, our commentators and courts have articulated over the last forty-one years a relatively strict and qualitative set of requirements for class certification under Rule 23(a), all designed to ensure "a proper balance between common and individualized issues."[15] *Hensley*, 429 S.C. at 152, 838 S.E.2d at 514. Today, we embrace the "inherent" requirement of predominance from Lightsey and Flanagan. We uphold the necessity of "significant common, legal, or factual issues which bind the proposed class together"—"a determinative issue" as we explained in *Gardner*. We change nothing in our law. Rather, to simply summarize what our Rule 23(a) standard has always required, a class plaintiff must demonstrate to the trial court that questions common to all class members are of such a critical degree of importance to the overall resolution of the litigation that the class-wide answers to those common questions are determinative, and thus overshadow the necessity of trying any individualized questions.

In section IV of this opinion, we engaged in a careful analysis of how this case would actually be tried as a class action. This is the "rigorous analysis" the Supreme Court required in *Tyson Foods* and *Dukes* and which we required in *Gardner* and other cases. *See Tyson Foods*, 577 U.S. at 453, 136 S. Ct. at 1045, 194 L. Ed. 2d at 134 (stating predominance "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case"); *Dukes*, 564 U.S. at 350-51, 131 S. Ct. at 2551-52, 180 L. Ed. 2d at 390 (stating commonality requires "a rigorous analysis"); *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990) ("It is imperative the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied."); *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 ("[T]he court must apply a rigorous analysis to determine each prerequisite is satisfied." (citing *Waller*)). Our analysis of a potential class-action

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[15] As this discussion makes clear, even as we rely on the comments of Dean Lightsey and Professor Flanagan, we respectfully disagree with their statement, "There is no qualitative . . . test in the Rule." Lightsey & Flanagan, *supra* at 198.

trial in this case demonstrates conclusively that Henson cannot meet the Rule 23(a) standard. To the extent there is a common question here, it is overwhelmed by the numerous individual questions the jury and the trial court must litigate.

VI. Conclusion

We reiterate that interlocutory class certification orders are never immediately appealable to the court of appeals. We emphasize that this Court will accept a petition for a common-law writ of certiorari on an interlocutory class-certification order only in rare and exceptional circumstances. As we explained here, this case is one of those very rare cases that meets the standard for our immediate review. On the merits, we reverse the circuit court's order certifying the classes and remand the case to the circuit court for discovery and trial of only the individual claims of the four named plaintiffs.

REVERSED AND REMANDED.

KITTREDGE, C.J., JAMES, HILL and VERDIN, JJ., concur.

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EXHIBIT 2

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Exponent®

Reviewing of Court Order on Class Certification

August 3, 2026

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Stone

- The court has stated that the Plaintiffs reported there are 7 stone defects. This is incorrect. In WDP's supplemental affidavit and Plainttif's second motion for class certification memorandum, there are 8 reported stone defects.
- Out of the 8 reported defects, Exponent determined that 5 of the reported defects (insufficient mortar embedment, poor mortar adhesion, improper mortar bed thickness, improper scratch coat thickness, and incorrect fastening) relate to prescriptive code requirements for adhering stone to the exterior wall. WDP conveniently did not consider that the code also includes a performance requirement (i.e., the shear strength of the stone assembly needs to be at least 50 psi) **as an alternative** to the prescriptive code requirements. WDP did not perform any shear testing and has failed to demonstrate that the stone assemblies across the community did not meet both the prescriptive and performance requirements. Therefore, there is not sufficient evidence confirming the subject 5 conditions resulted in common and typical issues with loose stone and are defects. Further, Exponent's analysis also determined that the following conditions associated with the subject 5 reported defects were not confirmed as common and typical (emphasis on "Stone and Mortar Loose"):

Allegation	Locations Observed	Locations with Allegation	Allegation Rate	Allegation Rate, 95% Lower Bound	Allegation Rate, 95% Upper Bound	Confirmed as Common and Typical?
Felt Paper Not Present	22	0	0.0%	0.0%	12.7%	No
Lath Not Present or Not Embedded in Mortar	22	1	4.5%	0.1%	25.3%	No
Lath Not Fastened	22	1	4.5%	0.1%	23.8%	No
Stone and Mortar Loose	25	0	0.0%	0.0%	11.3%	No

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Stone

- As for reported “Missing Weep Screed/Flashing,” while the condition may be common, **it is not a defect**. The Plaintiffs have not demonstrated a single instance where the missing weep screeds/flashing have caused damage, confirming that “Missing Weep Screed/Flashing” is not a defect (causation and damages not proved).
- As for reported “Inadequate Clearances,” while the condition may be common, it is not a defect. The Plaintiffs have not demonstrated a single instance where the reportedly inadequate clearances have led to damage, confirming that “Inadequate Clearances” is not a defect. The authority having jurisdiction also does not enforce any specific clearances, further confirming that “Inadequate Clearances” is not a defect (causation and damages not proved).
- As for reported “Missing Sealant Joints at Fenestrations,” it is not a defect. The Plaintiffs have not demonstrated a single instance where the reportedly missing sealants have led to damage, confirming that “Missing Sealant Joints at Fenestrations” is not a defect. The code also does not prescribe sealants at joints between stone and fenestrations, further confirming that “Missing Sealant Joints at Fenestrations” is not a defect.

- In the order granting motion for certification, the court simply goes over the Plaintiff’s observations and does not consider that the Plaintiff’s investigations were not performed in a manner that is statistically supportable. Exponent’s investigations were performed in a statistically supportable manner.

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Brick

- In WDP's supplemental affidavit and Plainttif's second motion for class certification memorandum, there is a summary of 8 reported brick defects. Out of the 8 reported defects, Exponent determined that 4 of the reported defects (improperly sized fasteners, incorrect fastening, improper support, and non-code-compliant wall ties) relate to prescriptive requirements for the securement of the brick veneer to the exterior wall, and 4 of the reported defects (inadequate flashing, missing and misplaced weeps, clogged air cavities, and improperly sloped rowlock) relate to prescriptive requirements affecting the facade's water-shedding capabilities.
  - Regarding the **securement of the brick veneer**, Exponent evaluated conditions that would affect the securement where the following statistical analysis shows that the reported defects were not confirmed to be common and typical:

Allegation	Locations Observed	Locations with Allegation	Allegation Rate	Allegation Rate, 95% Lower	Allegation Rate, 95% Upper Bound	Confirmed as Common and Typical?
Brick Ties Not Apparent	23	12	52.2%	25.5%	78.0%	No
Brick Ties Not Attached to Structure	11	0	0.0%	0.0%	23.8%	No
Brick Ties Not Attached to Brick	11	0	0.0%	0.0%	23.8%	No
Inadequate Quality Brick Ties	11	0	0.0%	0.0%	23.8%	No
Signs of Distress Indicative of Inadequate Anchorage/Support	23	1	4.3%	0.1%	23.1%	No
Visual Signs of Lintel Sagging at Garage [House in General]	7	1	14.3%	0.4%	57.9%	No
Identified at Least One Instance of Through-Brick or Stair-Step Cracking at House	13	5	38.5%	13.9%	68.4%	No

  - Regarding the **façade's water-shedding capabilities**, Exponent evaluated conditions that would affect the securement where the following statistical analysis shows that 6 out of 7 of the reported defects were not confirmed to be common and typical:

Allegation	Locations Observed	Locations with Allegation	Allegation Rate	Allegation Rate, 95% Lower	Allegation Rate, 95% Upper Bound	Confirmed as Common and Typical?
Weeps Missing Below Row-Lock Sill	11	5	45.5%	16.7%	76.6%	No
Weeps Missing Along Wall at Test Location	22	4	18.2%	5.2%	40.3%	No
Flashing Not Present	22	6	27.3%	9.0%	53.8%	No
Where Present, Flashing Does Not Extend to Brick Face	16	13	81.3%	52.5%	96.4%	Yes
Where Present, Base Flashing Not Located in First Full Course	9	2	22.2%	2.3%	62.7%	No
Where Present, Flashing Not Properly Lapped With WRB	13	2	15.4%	1.2%	50.6%	No
Flashing Missing Below Brick Row-Lock Sills	9	2	22.2%	2.8%	60.0%	No

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Brick

- As for reported “Flashing Not Extending to Brick Face,” while the condition may be common, it is not a defect. The Plaintiffs have not demonstrated a single instance where the reported condition has led to damage, confirming that “Flashing Not Extending to Brick Face” is not a defect. The building code does not require the flashing to extend to the face (i.e., daylight), further confirming that “Flashing Not Extending to Brick Face” is not a defect.

- As for reported “Improperly Sized Fasteners,” it is not a defect. The court should consider that WDP improperly measured the width of the corrugated ties from the crest to the center of the ties, rather than measuring from crest-to-crest. Further, WDP has not demonstrated a single instance where the reported condition has led to damage or instability, confirming “Improperly Sized Fasteners” is not a defect.

- As for reported “Clogged Air Cavities,” it is not a defect. The court should consider that the presence of mortar droppings within the brick air cavity is not a code violation; rather, it is normal and expected per the building code. Further, WDP has not demonstrated a single instance where the reported condition has led to damage, confirming “Clogged Air Cavities” is not a defect.

- Regarding the Court’s statement that “D.R. Horton concedes there is a common and typical defect where flashing does not extend to the brick face” which it supports by stating “Exponent’s report also includes a 96.4% prevalence rate for this condition,” Exponent’s statisticians would like to emphasize that the statement is partially incorrect.
  - The 96.4% represents an **upper bound** for the prevalence of the condition; **the average and lower bounds should also be considered** when evaluating how prevalent a condition may be across the entire community (i.e., the range should be considered, not just the mean or upper bound). Exponent only emphasizes this point to make sure the court is properly considering the prevalence rate ranges for other conditions.

- Exponent observed greater than 4-inches of bearing support at the lintels at 5 homes out of 6 homes that were destructively tested specifically at garages, including at the class representative 200 Talon Court.

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Windows

- The court states “Rossi’s window defect claims include, among others, corner failures and related leakage and insufficient water resistance which **the experts have also determined to be common defects at the other homes.**” This is incorrect. Exponent did not determine that any reported issues with the windows were confirmed as common and typical.
- In WDP’s supplemental affidavit and Plainttif’s second motion for class certification memorandum, there are 3 reported window defects. The court does not enumerate these reported defects for individual consideration.
  - Window Frame Corner Failures (i.e., cracking at corner joints, separations of the corner joints, and misplaced or missing gaskets at the corner joints);
  - Insufficient Water Leakage Resistance;
  - Missing Code-Required Certification Labels.
- Regarding “Window Frame Corner Failures,” the Plaintiffs have not provided sufficient evidence demonstrating reported corner failures affect the performance of the windows. Further, the Plaintiffs have not provided sufficient evidence demonstrating that the reported corner failures are due to a construction defect rather than other potential factors. Therefore, the “Window Frame Corner Failures” are not a defect.
- The court does not consider that WDP’s leak testing was not performed in accordance with industry standards and improperly resulted in leaks.
  - WDP incorrectly assumed an Exposure C category for its wind analysis;
  - The pressures utilized by WDP during its leak testing exceeded the pressures specified in the applicable standard;
  - WDP incorrectly measured water head heights during its leak testing;
  - The duration of the leak tests performed by WDP were not compliant with the applicable standard;
  - Per the applicable standard, the testing performed by WDP is not appropriate as the sole basis for a forensic evaluation focused on demonstrating a window does not have sufficient water resistance.
- Exponent’s leak tests were performed in accordance with industry standards and confirmed that leaks were not common and typical.

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Windows

- Regarding “Missing Code-Required Certification Labels,” Exponent determined that a window product label was found on the side of the **vast majority of windows**. The subject label indicated the manufacturer, product line, and a CCL number from the Window & Door Manufactures Association’s Hallmark Certification program. The CCL number indicated that for the manufacturer of the windows (Silver Line), all of its Series 2900 products meet the AAMA/WDMA/CSA 101/I.S.2/A440 standards as required by the code. Therefore, “Missing Code-Required Certification Labels” is not a defect. Further, Exponent determined that missing labels were not confirmed as common and typical. Lastly, WDP has not demonstrated a single instance where the reportedly missing labels have led to damage or affected the performance of the windows, further confirming that “Missing Code-Required Certification Labels” is not a defect.
- In its preliminary assessment, Exponent determined through statistical analysis that the total number of windows in the community is ~1,042. Exponent’s field observations and analyses estimated the number of windows with frame cracks to be ~161, with a 95% statistical confidence between 124 and 198. These results confirm corner cracks are not common and typical.
- In its preliminary assessment, Exponent determined through statistical analysis that the total number of windows in the community is ~1,042. Exponent’s field observations and analyses estimated the number of windows with missing foam inserts to be ~413, with a 95% statistical confidence between 326 and 501. These results confirm missing foam inserts are not common and typical.

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Siding

- In WDP's supplemental affidavit and Plaintiff's second motion for class certification memorandum, there is a summary of 5 reported siding defects (improper fastening, improper flashing/detailing, improper clearance, shrinkage cracking, and discoloration). The Court enumerates a similar listing of defects the class reportedly with the notable omission of "improper clearance."
- Out of the 5 defects listed by the Plaintiff, Exponent determined all these reported defects were not confirmed as common and typical. Exponent's analysis of siding conditions, which could affect the quality of the siding installation/performance, determined that all were not confirmed as common and typical:

Siding Analysis						
Allegation	**Locations Observed**	**Locations with Allegation**	**Allegation Rate**	**Allegation Rate, 95% Lower Bound**	**Allegation Rate, 95% Upper Bound**	**Confirmed as Common and Typical?**
Inapropriate Fastening Causing Loose Siding	51	2	3.9%	0.5%	13.7%	No
Siding Cracked at Fasteners	51	8	15.7%	7.0%	28.6%	No
Allegation	**Houses Observed**	**Estimate**	**95% lower Bound**	**95% Upper Bound**	**Confirmed as Common and Typical?**	
Observed Percentage of Siding That Was Cracked Across All Observed Houses	26	1.51%	1.17%	1.85%	No	
Observed Percentage of Cracks Across All Observed Houses That Are a Potential Product Defect	26	15.9%	6.7%	25.1%	No	
Observed Percentage of Siding That Was Loose Across All Observed Houses	26	0.32%	0.19%	0.45%	No	
Allegation	**Locations Observed**	**Locations with Allegation**	**Allegation Rate**	**Allegation Rate, 95% Lower Bound**	**Allegation Rate, 95% Upper Bound**	**Confirmed as Common and Typical?**
Uncleanable Discoloration	17	1	5.9%	0.1%	28.7%	No
Apparent Damage (e.g., Warping or Deterioration) Associated with Inadequate Ground Clearance	26	0	0.0%	0.0%	10.9%	No
Allegation	**Houses Observed**	**Estimate**	**95% lower Bound**	**95% Upper Bound**	**Confirmed as Common and Typical?**	
Observed Percentage of Unconflicted Base of Wall Siding That Had Indequate Ground Clearance	26	28.4%	16.7%	40.1%	No	

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Siding

- The court should consider that WDP has not met the burden of proof to distinguish between cracking caused by construction vs other factors. Further, the court should consider that some degree of cracking is normal and expected (i.e., are not necessarily indicative of defective construction).
- Exponent did not observe any water damage or performance issues (nor did WDP report water damage or performance issues) across the community associated with cracking that would be normal and expected. The properties have been in service for approximately 8 years. If damage from cracked siding was going to occur, it likely would have already manifested.
- The court should consider that clearance between the lowest course of siding and the ground surface was variable around each home and that the majority of the siding had adequate clearances and/or the owners had installed flower beds after the construction that affected the siding clearance. Further, WDP has not demonstrated a single instance where the reported condition has led to damage, confirming “improper clearance” is not a defect.

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Concrete

- The Court identified “Concrete/Foundation Cracking Defects” as the sole common defect of the class.
- Exponent evaluated 4 conditions related to the garage slabs and determined that all were not confirmed as common and typical.

Garage Slabs

Allegation	Locations Observed	Locations with Allegation	Allegation Rate	Allegation rate, 95% Lower Bound	Allegation rate, 95% Upper Bound	Confirmed as Common and Typical?
Observed Cracks Outside of Control Joint	26	17	65.4%	44.3%	82.8%	No
Where Observed Cracking Exceeded South Carolina Residential Construction Standards	17	0	0.0%	0.0%	16.2%	No
Gravel Not Present Beneath Slab	23	2	8.7%	1.1%	28.0%	No
Vapor Barrier Not Present Beneath Slab	23	0	0.0%	0.0%	12.2%	No

- Regarding the observation of “slab cracks outside of control joints,” **it is not a defect**. Exponent determined that **none of these cracks exceeded South Carolina Residential Construction Standards**, and were thus, not a defect.

- The Court did not limit the concrete subclass to those residence with garage slab cracking outside control joints.
  - More than a third of residences Exponent inspected (34.6%) had no apparent garage slab cracking outside of control joints;

    (e.g., 216 TC, 229 TC, 3 NW, 33 NW, 116 CE, 128 CE, 121 NW, 38 NW) [See photographs on Slides 8 & 9 of *2402145_Baddorf v DR Horton_Exponent Response for Concrete Slabs and Radon].*
  - Cracking at concrete control joint is the purpose of a control joint;

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Concrete

- The Court should consider that **not all concrete foundations/slabs cracks constitute a "defect."** The Court is incorrect in stating that, **"there are no material differences in the experts' opinions, all which indicate that the presence of concrete cracking is a common issue in the homes."**
  - Plaintiff's expert conceded that "[i]n residential construction, some amount of concrete shrinkage-related cracking is normal and expected" but has failed to identify and prove which residence featured any of the above defects in construction of the garage slab [Exhibit E to Whitlock's Supplementary Affidavit].
  - Exponent did not observe a single instance among the inspected residences where the garage slab cracking exceeded the threshold for repairs per the South Carolina Residential Construction Standards (i.e., the cracking is not considered a defect/damage).
    - SCRC requires repairs for slab cracks wider than 5/16" and with a vertical offset greater than 5/16" [See Exponent's *Preliminary Assessment of Reported Construction Defects* dated October 22, 2024. Pp. 119 & 120].
    - Referenced standards state that cracking of slab-on-ground can be expected even if installed correctly

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Concrete

- Even if the garage slab cracking observed outside the control joints was a “defect,” the Court is incorrect in stating that, **“These defects require the same repairs: sealing of the concrete cracks.”**
  - In general, the unique crack widths, pattern, and presence (or lack) of a vertical offset greatly change the potential cause(s) and importance of the garage slab cracking;
- Even if the garage slab cracking observed outside the control joints was a “defect,” WDP has not proven that slab cracking outside of the garage slab was confirmed to be common and typical.

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HVAC

- Exponent disagrees that all homes in the Eagle's Glen Neighborhood have the same HVAC system.
  - Each floor plan of the Eagle's Glen neighborhood has a different ducting arrangement depending on where the rooms are located relative to the air handling unit (the air handling unit is the part of the HVAC system that houses the blower, furnace, and air conditioning coil).
    - Some floor plans feature junction boxes, and some do not. Alleged defects concerning the junction boxes are not common among all homes.
    - Some floor plans utilize rigid ductwork, and some do not. Alleged defects concerning rigid ductwork insulation are not common among all homes.
  - Some floor plans feature two air handling units: one for each floor. Some feature a single air handling unit with zone dampers. Alleged defects concerning zone dampers do not apply to homes with two separate air handling units.
  - Not all homes have the same size HVAC system. Some have systems with higher capacity, and some have systems with lower capacity.

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EXHIBIT 3

ELECTRONICALLY FILED - 2026 Aug 03 9:03 PM - GREENVILLE - COMMON PLEAS - CASE#2022CP2303974

August 3, 2026

The Honorable Patrick C. Fant, III

Re: Baddorf and Gregory v. DR Horton et al., Case No. 2022-CP-23-03974
Expert Observations Regarding the Court's Order Granting Stormwater Drainage Subclass Certification

Dear Judge Fant:

My name is L. Steven Moore, PE, RRC, REWC, and I am currently employed with Applied Building Sciences, Inc. (ABS) in Charlotte, North Carolina, as Director Emeritus. I have been retained by D.R. Horton to serve as an expert witness regarding the alleged stormwater and drainage defects in the above-referenced case. I have rendered several opinions in the case.

I am writing to respectfully submit this professional assessment regarding the Court's Order Granting Subclass Certification, dated July 15, 2026, specifically as to the Stormwater Drainage Subclass. Upon reviewing the Court's order and the documentation upon which it relies, I have identified several misapprehensions that I believe significantly impact whether the alleged defects can be considered common or typical.

The Court held in the Order Granting Subclass Certification that "all 127 lots in Eagles Glenn have grounds that are affected by the improper grading and drainage." Order Granting Subclass Certification, p. 20.

That statement that all 127 lots are affected by improper grading and drainage is emphatically false. In fact, multiple lots do not exhibit any drainage or grading issues attributable to D.R. Horton at the time of the certificate of occupancy. Substantial changes by current or past homeowners to rear and side elevations have not been taken into consideration for any alleged issues. Further, not one instance of standing water or a grading issue has been documented in the field by the Plaintiffs' expert, Andy Sherard, who admits to never having been on-site during or after a rain event. This is critically important because the South Carolina Residential Construction Standards, see standard addressed within this document), state that standing water may remain on a lot for up to forty-eight (48) hours.

Further, ABS personnel evaluated and photographically documented all lots forty-eight (48) hours after an approximate 2.91-inch weather event (over a few days) and not even one lot in the neighborhood had standing water in the front or side yards.

In addition, during ABS's onsite investigations, ABS observed that only 15 lots of the 56 lots

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(26.8%) had a flat or negative slope on a single elevation. This is not enough to establish a common or typical defect. It is impossible to determine the condition of these lots at the time of closing, whether changes have occurred since that time, the cause of the currently observed slope, and whether there are any resulting damages.

Sherard further admitted under oath that not a single lot had been damaged by lot grading and drainage and further that the South Carolina Residential Construction Standards allowed for up to 48 hours for water to dissipate. (See below Residential Construction Standards). Additionally, he has not witnessed water standing anywhere longer than 24 hours.

The Court's Order also states that "the topographical survey performed by Plaintiffs' expert Sherard confirms defective work." Order Granting Subclass Certification, p. 21. Again, there is no scientifically supportable basis for this statement.

The topographical survey cannot be utilized to determine defective horizontal work, as it does not document the conditions at the time of the certificates of occupancy. Sherard admitted in his deposition that the grades in the survey were only from the time the survey was taken and are not representative of the original development. Sherard Depo. 43:6 – 44:1. Further, having a simple survey spot elevation of 0.01' lower than the surrounding area does not represent a flooding problem, nor is it confirmed that the low spots have been there for over five (5) years since the houses were originally constructed by D.R. Horton. Sherard does not even recognize that his own survey demonstrates that there is positive drainage off the back of many lots, for example sheet C-1.0. lots 29, 31, 33, 35, and 37 all show positive drainage off the rear of the lot.

The Court went on to hold that "ninety-six (96) of the one hundred and twelve (112) survey responses reported drainage problems." Order Granting Subclass Certification, p. 21.

The South Carolina Residential Construction Standards (SCRCS) states: *"The builder, to ensure proper drainage away from the home, shall have established the necessary preliminary grades and swells. Standing or ponding water shall not remain for periods in excess of 48 hours in the immediate area after a rain, except that in swales, which drain other areas, or in areas where sump pumps discharge, a longer period can be anticipated. Consideration must be given to the type of soil present and to the relationship to surrounding terrain. The possibility of standing water after an unusually heavy rainfall should be anticipated. No grading determination shall be made while there is frost or snow on the ground, or while the ground is saturated."*

Sherard evaluated the properties for violation of this SCRCS standard and provided no documented evidence of any such violation. Moreover, no evidence of any drainage issues at the time of closing has been provided to this Court. Homeowners are apparently expecting the yard

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and swales to immediately be dry after a rain event, which is impossible to achieve. The Court is in error utilizing a non-scientific survey response to justify class action status for grading and drainage.

Next, the Court found "all affected lots require the same remedial work of regrading to achieve compliance with the building code and to remedy the identified defects." Order Granting Subclass Certification, p. 21. This statement is unsupportable by record evidence.

All 127 lots are uniquely different in their relative elevation to the street, to each other, to the size of the lot, size of the structure, the topography, and to modifications made after D.R. Horton sold the house such that is impossible to rationally state that the same remedial work of regrading is required. In addition, the defects for each lot have not been identified at all. The Court makes the statement of substantially similar issues including yard saturation, erosion, inability to properly drain stormwater, and barren areas. Sherard, nor one single representative of the Plaintiffs has ever evaluated the site after a rain event, so that the alleged issue of yard saturation or the inability to drain stormwater is not founded on any historical, documented, factual data. Sherard during his deposition stated that there might be a couple of locations with erosion, but certainly it was not a wide-spread problem. Sherard Depo. 277:25 – 278:16. Homeowners are required to maintain their yards, including side swales. ABS personnel observed a few barren areas alongside elevations that homeowners were utilizing as walking trails. To state that barren areas are a defect is a complete misrepresentation of the facts.

In addition, significant modifications to multiple lots across the entire subdivision have been made. These modifications include at least six (6) pools, one (1) pickleball court, retaining walls, and numerous oversized patios that had been constructed in rear yards over the entire subdivision, as well as walking trails, sidewalks, and raised planters in the side yards. These significant additions, such as the pool and pickleball court, will certainly modify the rear yard drainage. Walking trails, sidewalks, and raised planters have significantly impacted or eliminated the side yards' swales. Finally, construction of these improvements requires material and equipment to access the rear yards generally via the side yards. Equipment and personnel will alter the drainage in the rear yard and swales and likely affect the slope and shape of the swales, such that the rear yard and side and rear swales do not provide for proper grades or drainage. These modifications by homeowners provide, to a reasonable degree of engineering certainty, that each lot must be evaluated and, if required, a unique approach determined for each lot. It is totally unreasonable from an engineering or construction view point to assume that each lot will require the same remedial work.

Additionally, the Court held "stormwater remediation requires coordination across all neighboring properties, which further supports class certification."

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Lot stormwater and grading remediation is addressed one lot at a time. Lots can drain to the front, to the rear, or both front and rear. It likely requires coordination with the adjacent properties, but may not in every case. Due to the multiple and significant homeowner modifications, drainage patterns must now be evaluated uniquely on a case-by-case basis to attempt to provide the best approach to a modified condition not of D.R. Horton's making. As identified in multiple cases, not every lot even requires a modification, as no issues have been identified. It is not reasonable to perform a global storm drain evaluation of an entire neighborhood or even a street, as the alleged problems, if they exist, should be addressed one lot at a time based on the existing storm drain system and any documented issues.

Lastly, the Court found "Stanley's defect claims include grading that is not in compliance with the permitted plans, improper sloping, ineffective drainage system, and improper clearance."

Mr. Stanley admitted under oath that he had no photos of standing water on his lot. He stated he knows of no damage to his home or yard due to grading or drainage issues, in fact stating "I'm – yea I'm not sure if there is any damage at this point." Stanley Depo. 85:18 – 25. Mr. Stanley is unable to identify whether his lot requires a slope away from his house or whether any area of his lot has an improper slope. Furthermore, he is unable to evaluate and understand grading plans or determine if modifications to the grading plans occurred after D.R. Horton's subcontractors completed their work. Stanley Depo. 100:20 – 101:11.

In addition, significant modifications were made to both of Stanley's neighbor's yards including the addition of a pool on one side and a pickleball court on the other side, but he is unable to evaluate the impacts the pool and pickleball court had on the drainage plan, including to his own yard. Stanley Depo. 54:19 – 55:9, 282:19 – 25, 85: 5-16. Mr. Stanley has stated the he cannot read the grading plans, doesn't understand slopes, and cannot identify any grading or drainage issues. Stanley Depo. 100:20 – 101:11, 112:5 – 15, 171:7 – 18, 276:17 – 277:6.

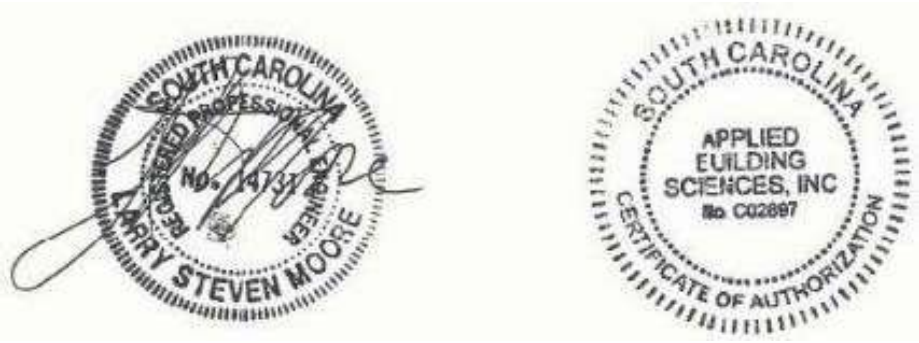
Stanley, as the drainage class representative, cannot even identify any damage caused by grading and drainage. As such, Stanley's sworn testimony is exactly opposite of the basis the court used to justify Stanley's knowledge of the case and the conclusion that he will fairly and adequately represent the stormwater case.

To a reasonable degree of engineering certainty, the findings in the Court's Order Granting Subclass Certification regarding the Stormwater Drainage Subclass are unsupported by the physical evidence, code standards, and record testimony. The assertion that all 127 lots share a common, systemic grading defect requiring uniform remediation ignores critical evidence regarding the site. Specifically, that no standing water exceeding South Carolina Residential Construction Standards has been documented, only a fraction of lots exhibit flat or negative slopes, and widespread post-closing homeowner modifications (such as pools, courts, and land alterations) have fundamentally

changed each individual lot. Furthermore, Plaintiffs' own expert has never observed the site during or after a rain event, and the named class representative cannot identify any drainage defects or resulting damage on his own property. In short, the Court has misstated and misconstrued the evidence in this case about drainage and grading. There should be no class certified on the record before this Court.

Cordially,

APPLIED BUILDING SCIENCES, INC.



August 3, 2026

L. Steven Moore, PE, RRC, REWC

Larry Steven Moore
Digitally signed by Larry Steven Moore
Date: 2026.08.03 11:27:57 -04'00'

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EXHIBIT 4

ELECTRONICALLY FILED - 2026 Sep 03 9:23 PM - ANDERSON - COMMON PLEAS - CASE#2025CP0402974

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON Derek Williams, Corey Smith, William Wyatt, and Heather Iwinski, individually, and on behalf of all others similarly situated, Plaintiffs, v. D.R. Horton, Inc., Alpha & Omega Construction, LLC, Cannady Siding & Gutter, Inc., L & M Electric, Inc., Long Heating & Air Conditioning, Inc., and M&L Reyna Construction, LLC, Defendants.	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NO.: 2025-CP-04-_____ **SUMMONS** **(Defective Construction)** **(Class Action)** **(Jury Trial Demanded)**

TO: THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the Lucey Law Firm, at their offices at 415 Mill Street, Mount Pleasant, South Carolina 29464, within thirty (30) days after the service thereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint, plus interest and costs.

[SIGNATURE PAGE TO FOLLOW]

JUSTIN O'TOOLE LUCEY, P.A.

s/ Justin Lucey

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September 5, 2025
Mount Pleasant, South Carolina

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ELECTRONICALLY FILED - 2026 Sep 03 9:23 PM - ANDERSON - COMMON PLEAS - CASE#2025CP0402974

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON Derek Williams, Corey Smith, William Wyatt, and Heather Iwinski, individually, and on behalf of all others similarly situated, Plaintiffs, v. D.R. Horton, Inc., Alpha & Omega Construction, LLC, Cannady Siding & Gutter, Inc., L & M Electric, Inc., Long Heating & Air Conditioning, Inc., and M&L Reyna Construction, LLC, Defendants.	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT CASE NO.: 2025-CP-04-_____ **COMPLAINT** **(Defective Construction)** **(Class Action)** **(Jury Trial Demanded)**

Plaintiffs, Derek Williams, Corey Smith, William Wyatt, and Heather Iwinkski, individually, and on behalf of all others similarly situated, complaining of the above-named Defendants, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. The Rivermill subdivision ("Rivermill") is a neighborhood of 99 single-family homes located off State Highway 143 (River Road) in Anderson County, South Carolina.

2. Plaintiff Derek Williams ("Plaintiff Williams") is a citizen and resident of Anderson County, South Carolina.

3. Plaintiff Williams owns a home within Rivermill that is located at 423 Brandybuck Drive, Piedmont, South Carolina 29673.

4. Plaintiff Williams purchased his home from the prior owners on or about March 19, 2020.

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5. Plaintiff Corey Smith ("Plaintiff Smith") is a citizen and resident of Anderson County, South Carolina.

6. Plaintiff Smith owns a home within Rivermill that is located at 165 Rivermill Place, Piedmont, South Carolina 29673.

7. Plaintiff Smith purchased his home from the prior owners on or about April 29, 2022.

8. Plaintiff William Wyatt ("Plaintiff Wyatt") is a citizen and resident of Anderson County, South Carolina.

9. Plaintiff Wyatt owns a home within Rivermill that is located at 126 Rivermill Place, Piedmont, South Carolina 29673.

10. Plaintiff Wyatt purchased his home from D.R. Horton on or about June 3, 2020.

11. Plaintiff Heather Iwinski ("Plaintiff Iwinski") is a citizen and resident of Anderson County, South Carolina.

12. Plaintiff Iwinski owns a home within Rivermill that is located at 406 Brandybuck Drive, Piedmont, South Carolina 29673.

13. Plaintiff Iwinski purchased her home from D.R. Horton on or about December 7, 2017.

14. Plaintiffs bring this action on behalf of themselves and a proposed Class of other similarly situated Rivermill homeowners (collectively "Plaintiffs" or "Plaintiffs and the Class").

Designer/Builder/Seller Defendant

15. Defendant D.R. Horton, Inc. ("D.R. Horton") is a corporation organized under the laws of the State of Delaware.

16. At all times relevant to this action, D.R. Horton conducted business in Anderson

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County, South Carolina.

17. D.R. Horton is the designer, builder, and seller of the Plaintiffs' and Class's homes and properties in Rivermill ("the Residences").

18. At all times relevant to this action, D.R. Horton coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, marketing, construction, sale, and/or repair of the Residences.

Other Defendants

19. The "Other Defendants" in this matter include the following:

20. Defendant Alpha & Omega Construction, LLC (hereinafter "Alpha Omega"), is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Alpha Omega supplied materials, installed roofing and/or performed repairs, among other work, at the Residences.

21. Defendant Cannady Siding & Gutter, Inc. (hereinafter "Cannady") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Cannady supplied materials, installed siding, and/or performed repairs, among other work, at the Residences.

22. Defendant L & M Electric, Inc. (hereinafter "L & M Electric") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, L & M Electric supplied materials, installed electrical systems and/or performed repairs, among other work, at the Residences.

23. Defendant Long Heating & Air Conditioning, Inc. (hereinafter "Long") is a corporation organized and existing under the laws of the State of South Carolina. At all times

relevant to this action, Long supplied materials, installed HVAC systems and ductwork, and/or performed repairs, among other work, at the Residences.

24. Defendant M&L Reyna Construction, LLC (hereinafter "M&L Reyna") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, M&L Reyna supplied materials, installed masonry veneer (brick and/or stone) and/or performed repairs, among other work, at the Residences.

25. This Honorable Court has jurisdiction over all parties hereto and over all subject matters alleged herein.

26. Plaintiffs are informed and believe that more than two-thirds of the Class are citizens of Anderson County, South Carolina.

27. Plaintiffs are informed and believe that all or nearly all of the Class are citizens of South Carolina.

FACTUAL ALLEGATIONS

28. This matter arises out of the design, construction, sale and/or repair of the Residences.

29. At the time the building permits were issued for the construction of the Residences, the State of South Carolina and Anderson County had adopted the 2015 and 2018 International Residential Building Code ("IRC").

30. The requirements of the IRC have the force and effect of law in South Carolina.

31. At the time their Certificates of Occupancy were issued, the Residences contained latent and undisclosed defects. The latent and undisclosed defects, in combination with fortuitous weather and other events, have resulted in consequential damage to non-defective portions of the Residences and the real property on which they are located.

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32. These latent defects constitute violations of the IRC, industry standards, and manufacturer's instructions and are also poor workmanship.

33. The latent defects, singularly and collectively, have additionally damaged the value of the Residences, and therefore damage Plaintiffs and the Class, in that the defects must be corrected or disclosed to potential buyers.

34. Defendants should have known of the existence of the latent defects for one or more reasons, including their claimed expertise, the legal requirement that they comply with the IRC, and post-construction repair efforts.

35. Plaintiffs and the Class have previously put D.R. Horton on notice of one or more of the deficiencies. D.R. Horton, in turn, should have put the Other Defendants on notice of these deficiencies. However, no Defendants have rectified these problems, and their various and sundry repair attempts have been inadequate, are failing, or have failed.

36. A preliminary inspection of the Residences evidences failure in exterior building envelope (including roofing, masonry and siding cladding, and fenestration systems); flooring, MEP (mechanical, electrical, plumbing) deficiencies; water intrusion; insufficient storm water drainage; and consequential damage to non-defective building components.

37. Defendants had a duty to design and/or construct the Residences in a workmanlike manner with suitable materials, free from all defects, and in accordance with the applicable building codes, permitted building plans, good workmanship, and construction industry and engineering standards.

38. Plaintiffs are informed and believe that one or more of above building components of the Residences are not in compliance with applicable building codes, the permitted plans, proper workmanship, and industry standards and must be corrected or replaced.

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39. Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

40. These deficiencies and resulting damages show that Defendants breached their duties to Plaintiffs and the Class.

41. Remedying the above wrongs will result in additional consequential damages and loss of use.

42. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and the Class have been proximately damaged in an amount to be determined by the trier of fact and have had to incur reasonable attorneys' fees and costs for the retention of experts to determine the damage and scope of work for repair.

43. Upon information and belief, the resulting damage from the above deficiencies commenced shortly after the Residences were initially completed and/or sold and remained latent until later manifestation.

CLASS ACTION ALLEGATIONS

44. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiffs bring this action, both individually, and on behalf of a Class of similarly situated claimants. The Class is more particularly defined as follows:

> All persons and entities that own a single-family house designed/built by D.R. Horton within the Rivermill subdivision in Piedmont, South Carolina.
>
> The Class includes (1) a subclass of the first owners of the Residences who purchased their homes directly from D.R. Horton (referred to as the "Upstream Class") and; (2) a subclass of the subsequent owners of the Residences who did not purchase directly from D.R. Horton (referred to as the "Downstream Class").
>
> Plaintiffs Wyatt and Iwinski are nominated to represent the Upstream Class, and Plaintiffs Smith and Williams are nominated to represent the Downstream Class.
>
> The Class excludes (1) any affiliate or current employee of Defendants; (2) any current Rivermill owner that has a pending suit against D.R. Horton or who has

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released the claims set forth herein; and (3) all persons who properly execute and file a timely request for exclusion from the Class.

45. *Numerosity*: The Class contains approximately ninety-nine (99) properties, some owned by people geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of one hundred thirty members (130) members.

46. *Commonality*: Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

a. Whether D.R. Horton can force the Class to arbitrate their claims;

b. Whether the Defendants' design and/or construction of the Residences was deficient or defective;

c. Whether the Defendants' design and/or construction of the Residences was in violation of the building code;

d. Whether the foregoing conduct constituted a breach of the Defendants' duties to Plaintiffs and the Class;

e. Whether the foregoing constituted a breach of the Defendants' implied warranties in connection with the Residences;

f. Whether Defendants knew or should have known of the latent defects;

g. Whether Defendants have acted or refused to act on grounds generally applicable to the Class; and

h. Whether Defendants' conduct was reckless, willful, wanton, or the like, entitling Plaintiffs and the Class to punitive damages.

47. *Typicality*: Plaintiffs' claims are typical of the claims of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, constructing, and/or selling the

Residences and Plaintiffs' and the Class's ownership of these Residences that contain latent defects.

48. *Adequate Representation*: Plaintiffs will fairly and adequately protect the interests of the Class and have no interests antagonistic to those of the Class. Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex litigation, including class actions involving construction defects.

49. *Amount in Controversy:* Each Class member has an interest of more than $100.00.

50. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common course of practice/standard operating procedures which resulted in common and typical deficiencies. All Class members have the same legal right to and interest in redress for damages associated with the defective conditions existing at their Residences.

51. Plaintiffs and the Class envision no unusual difficulty in the management of this action as a class action.

52. Should individual Class members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single court.

53. The amount of money at stake for each Class member is not sufficient for each member to hire their own counsel and engineers and bring their own action.

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ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

54. Defendants are estopped from relying on any statutes of limitations or repose by virtue of their acts. Upon information and belief, Defendants should have known the Residences were defectively designed and/or constructed and failed to alert Plaintiffs and the Class of these defective conditions.

55. Defendants had a duty to inform Plaintiffs and the Class of the defects described herein, which they should have known. Notwithstanding their duty, Defendants never disclosed these defects to Plaintiffs or the Class.

56. Despite exercising reasonable diligence, Plaintiffs and the Class could not have discovered the defects at their Residences.

57. Given Defendants' failure to disclose this non-public information about the defective nature of the Residences – information over which they had exclusive control – and because Plaintiffs and the Class could not reasonably have known of the defective nature of their Residences, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

58. Defendants are further estopped from relying upon any statute of limitations as they have repeatedly represented to Plaintiffs and the Class that they had corrected or were correcting the work.

59. The equitable tolling doctrine further precludes Defendants from relying on a statute of limitations defense.

ESTOPPEL FROM ASSERTING THE WARRANTY DISCLAIMERS CONTAINED IN D.R. HORTON'S PURCHASE CONTRACTS

60. Defendants are estopped/barred from asserting any Warranty Disclaimer Provision contained in D.R. Horton's purchase contracts and associated documents because Plaintiffs are not

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suing based upon these documents and, regardless, these provisions are unconscionable and unenforceable.

61. Plaintiffs Wyatt's and Iwinski's purchase contracts attempt to disclaim any and all implied warranty claims and prohibit any monetary damage.

62. Any such provisions purporting to waive all implied warranties and all relief, including monetary relief, are void pursuant to public policy and South Carolina law.

63. As a result, Defendants cannot rely on these warranty disclaimers as they are unconscionable and unenforceable.

ESTOPPEL FROM ASSERTING THE WARRANTY LIMITATIONS IN EXPRESS WARRANTIES

64. Defendants are estopped/barred from asserting the Warranty Limitations contained in D.R. Horton's express warranties because Plaintiffs and the Class do not currently allege a breach of contract claim or a breach of express warranty claim.

65. Defendants also estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in D.R. Horton's express warranties or the like because these provisions and limitations are conflicting, procedurally burdensome, unconscionable, and/or not geared towards an unbiased decision by a neutral decision-maker.

66. Defendants are further estopped/barred from relying on Warranty Limitations contained in their express warranties or the like by virtue of their conduct and such warranties' failure to serve its essential purpose.

67. By virtue of Defendants' acts, the work performed at the Residences has not lived up to their warranties. Given the Residences' defective condition, their building components have not proven to be of reasonable or acceptable quality.

68. Defendants, in the exercise of required diligence, which failed to occur, should have

known the Residences were defective, uninhabitable, unfit, and unmerchantable.

69. Defendants' warranties are woefully inadequate to repair and replace failed building components in the Residences, let alone to reimburse for any damage suffered to the underlying components and other property. The remedies available in Defendants' warranties are limited to such an extent that they do not provide a minimum adequate remedy and fail their essential purpose.

70. As such, Defendants are precluded from relying on the Arbitration Provisions and Warranty Limitations contained in D.R. Horton's and/or their express warranties as a defense to the claims asserted herein.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to Defendants)
(By Upstream and Downstream Classes as to All Defendants)

71. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

72. Defendants, either on their own or through their agents, servants, and employees, undertook and owed duties to Plaintiffs and the Class in connection with the work they performed on the Residences.

73. Defendants had a duty to perform their work at the Residences in accordance with applicable codes, approved plans and specifications, industry standards, and in a careful, diligent, and workmanlike manner, free from defects.

74. Defendants also had a duty to disclose or warn about defective conditions in the Residences.

75. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

a. In failing to use due care in designing and/or constructing the Residences;

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b. In failing to provide adequate drainage, exterior building envelopes, and other building components for the Residences;

c. In failing to design and/or construct the Residences in accordance with applicable building codes, approved plans, specifications, and details, standard building practices, and accepted construction and design industry standards and practices;

d. In failing to properly select their subcontractors;

e. In failing to properly supervise and coordinate the subcontractors and trades;

f. In failing to act as a reasonable person would in the circumstances then and there prevailing;

g. In failing to provide accurate information about the Residences; and

h. Other deficiencies or failures as will be proven at trial.

76. Plaintiffs and the Class have been damaged as a direct and proximate result of the negligence, carelessness, recklessness, gross negligence, willfulness, and wantonness of Defendants.

77. The violation of applicable building codes constitutes negligence *per se* and may constitute evidence of gross negligence.

78. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, Plaintiffs and the Class are entitled to an award of punitive damages against Defendants.

79. As a result of Defendants' negligence and/or gross negligence, Plaintiffs and the Class are entitled to a judgment against Defendants for all actual, direct, indirect, resulting, consequential, and punitive damages in an amount to be determined at the trial of this case.

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FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranties as to Defendants)
(By Upstream and Downstream Classes as to All Defendants)

80. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

81. Defendants implicitly warranted that the Residences would be designed and/or constructed in a careful, diligent, and workmanlike manner, with suitable materials and components that complied with applicable building codes, industry standards, and industry practice.

82. Defendants implicitly warranted that the Residences would be merchantable, free from latent defects and fit for the particular purpose.

83. D.R. Horton further implicitly warranted that the Residences would be habitable.

84. Defendants breached their implied warranties by designing and/or constructing the Residences in a defective manner as set forth above.

85. As a direct and proximate result of Defendants' breach of their implied warranties, Plaintiffs and the Class have been damaged and are entitled to a judgment against Defendants for all actual, direct, indirect, resulting, and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices as to D.R. Horton by Individual Plaintiffs Only)

86. Plaintiffs repeat and re-allege the above paragraphs as if fully set forth verbatim.

87. D.R. Horton is a person within the meaning of the South Carolina Unfair Trade Practices Act (the "Act").

88. D.R. Horton designed, built, and sold the Residences and, therefore, engaged in commerce as defined by the Act.

89. D.R. Horton's above-described actions, including placing Residences with defects into the stream of commerce; failing to oversee and control the workmanship and quality of the

Residences; failing to properly repair defective conditions; failing to comply with the building codes, industry standards, and industry practice; attempting to disclaim and eviscerate any and all relief to the owners; and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices within the meaning of the Act.

90. D.R. Horton knew or should have known that its conduct was in violation of the Act.

91. D.R. Horton's conduct is capable of repetition and, upon information and belief and in accord with the allegations herein, has been repeated in the other neighborhoods developed by D.R. Horton.

92. D.R. Horton's conduct adversely affects public interest as well as many South Carolina citizens.

93. As a direct, foreseeable, and proximate result of D.R. Horton's unfair and deceptive practices, the individual owners of the Residences, including Plaintiffs, have been damaged and are entitled to a judgment against D.R. Horton in an amount to be proven at trial, together with treble damages and attorney fees.

WHEREFORE, Plaintiffs demand a trial by jury and pray for actual and consequential damages expected to exceed ten million dollars, statutory and punitive damages, reasonable attorneys' fees, costs of suit, prejudgment interest, and granting of such further relief as the Court deems just and proper.

[SIGNATURE PAGE TO FOLLOW]

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JUSTIN O'TOOLE LUCEY, P.A.

s/ Justin Lucey

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