STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

MADISON AT HAMLIN PLANTATION TOWNHOME ASSOCIATION, INC. and SANDY RANDALL and CHERIE BEROTTI, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

BUILDERS SUPPORT SERVICES OF THE CAROLINAS, INC. individually and f/k/a JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC. individually and f/k/a JOHN WIELAND HOMES AND NEIGHBORHOODS OF NC, INC. individually and f/k/a JOHN WIELAND HOMES AND NEIGHBORHOODS OF SC, INC; JOHN WIELAND HOMES OF SC, INC.; JOHN WIELAND HOMES, INC; JOHN WIELAND HOMES OF CHARLESTON, INC.; AAA PLUMBING; AMERICAN RESIDENTIAL SERVICES, LLC; BUILDERS FIRSTSOURCE- SOUTHEAST GROUP, LLC; CAROLINA CUSTOM SECURITY, INC.; CREATIVE TOUCH INTERIORS, INC. individually and f/k/a RICE PLANTERS CARPETS, INC.; FOGEL SERVICES, INC.; LARRY'S TERMITE CONTROL, INC; MCCLELLAN PLUMBING, LLC; NEIGHBORHOOD MANAGEMENT ASSOCIATES, INC.; GEORGE RYAN BUTLER; PAUL SPENCER; and JOHN DOE 1-50;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-10-05559

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

ORDER

THIS MATTER CAME BEFORE THE COURT on September 10, 2014, upon motion by the Plaintiffs to certify a class of homeowners in this matter. Plaintiffs, Madison at Hamlin

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Plantation Townhome Association, Inc., and Sandy Randall and Cherie Berotii, individually, and on behalf of all others similarly situated (hereinafter collectively referred to as "Plaintiffs"), were represented by attorneys, Justin Lucey and Joshua Evans; Defendants, Builders Support Services of the Carolinas, Inc., individually, and f/k/a John Wieland Homes and Neighborhoods of the Carolinas, Inc., individually, and f/k/a John Wieland Homes and Neighborhoods of NC, Inc., individually, and f/k/a John Wieland Homes and Neighborhoods of SC, Inc.; John Wieland Homes of SC, Inc.; John Wieland Homes, Inc.; John Wieland Homes of Charleston, Inc. (hereinafter "Wieland Defendants"), were represented by Tom Hildebrand. Various subcontractor/supplier Defendants were also in attendance through counsel.

Having reviewed the submissions of the parties and having heard the oral arguments presented by counsel, Plaintiffs' Motion for Class Certification is GRANTED.

INTRODUCTION

Plaintiffs' Motion for Class Certification seeks to certify, as a class, all persons and entities that are members of The Madison at Hamlin Plantation Townhome Association, Inc. (the "Association"). The members of the Association consist of the owners of the townhomes located within the Madison at Hamlin Plantation development ("Madison townhomes"), all of which were designed and constructed by the Weiland Defendants during 2002 and 2005.

Plaintiffs, Sandy Randall and Cherie Berotti, are owners of Madison townhomes which are suffering from construction defects. Specifically, the Madison townhomes are alleged to suffer latent defects including, but not limited to, roof leaks, inadequate waterproofing and improper flashing installation, all of which allow for water intrusion or otherwise compromise the homes' integrity, resulting in damage to the homes as well as to other property. Based on engineering investigations of Madison, Plaintiffs' experts opine these defects are common to all of the buildings and have caused similar damage to the residences.

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SUMMARY OF PERTINENT FACTS

A.) Overview of Madison

Completed by Defendants between 2002 and 2005, Madison consists of one hundred and fourteen (114) townhomes situated in twenty-five (25) buildings within Hamlin Plantation, a neighborhood located in Mt. Pleasant. According to Plaintiffs, Madison's construction issues first came to light when one owner lost a contract for the sale of her home in 2013. An inspection performed in anticipation of the sale revealed significant water intrusion into the residence and extensive hidden damage. When several other similar issues arose contemporaneously, Madison consulted with construction professionals and counsel. According to his expert report and Affidavit, Madison's engineer, Russell Mease, has determined and documented that common, neighborhood-wide construction defects exist[1] and that these defects have resulted in water intrusion, component and structural degradation, termite infestation, and consequential damages.[2] (*See* Mease Report[3]).

1.) **Madison – Commonly Constructed with Shared Components**

Not only does the Mease Report evidence that the townhomes suffer common defects and common damages, the Report, along with the homeowners' purchase contracts and governing regime documents, evidence that the townhomes were commonly constructed and share common components. Specifically, the Report and purchase contracts reveal that all of the townhomes were constructed by the Wieland Defendants over the course of a four-year period. (*See* Mease Report and Homeowner Purchase Contracts). Moreover, the Report and governing regime documents indicate that the townhomes share roofs, exterior walls, foundations, and common walls, common

[1] Specifically, Mr. Meese opines that "the documented pattern of deficiencies evidence that the deficiencies are substantially similar in all homes in this subdivision. . ." (*See* Mease Affidavit).

[2]Defendants do not present any forensic evidence which contradicts the common defects and damages documented by Mease.

[3]Mr. Mease's expert report and Affidavit are hereinafter collectively referred to as "the Mease Report" or "the Report".

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walls which the Report further notes serve life-safety, fire-preventive purposes for all residents. (*See* Mease Report and Madison Declaration). Additionally, the Report and photographs of the Madison buildings show that the buildings' major, exterior components are all identical: asphalt shingle covered main roofs; and cementitious siding on main walls over woven building paper. (*See* Report and Madison Photographs). Thus, while there are some standard variations in certain building components such as garages, dormers, front entry ways, and rear porches, the Report, purchase contracts, regime documents and Madison photographs evidence that all buildings' major, exterior components consist of the same materials and all buildings share other common components.

2.) **Madison – Common Governance and Common Management**

Also, the Madison townhomes are commonly governed by a set of regime documents, and its "common" elements are managed by the Association. (*See* Madison Declaration). Specifically, the "Declaration of Protective Covenants for Madison at Hamlin Plantation Townhomes" filed on June 15, 2001 and recorded at Book R 374, Page 211 provide for the Association to maintain and repair the Areas of Common Responsibility. (*See* Madison Declaration, Art. V, Sec. 1). This includes "all roofs, downspouts and gutters. . .all exterior building surfaces with the exception of hardware and glass. . ." The Covenants further provide (1) "the Association shall have the right, but not the obligation, to maintain property not owned by the Association where the Board has determined that such maintenance would benefit all the owners;" and (2) "The Association shall repair incidental damage to any Unit resulting from performance of work which is the responsibility of the Association." *Id.*

3.) **Madison – Common Defects and Common Damages**

The Mease Report evidences that the Madison townhomes contain common, latent defects including, but not limited to, improperly installed siding facades, roofing, flashing, and weather barrier, all of which result in repeated water intrusion and other similar, consequential damages.

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As evidenced by to the Mease Report, the principal, common defect is the improper integration of exterior envelope components, a condition which permits water intrusion that consistently damages the exterior sheathing and walls. The report reflects that the major exterior envelope components (shingles, siding, building paper, and flashing) are improperly installed, sealed, or lapped, allowing regular, common points of water entry behind the weather barriers at typical locations on all buildings.

The Mease Report also notes that both the siding and the roofing are improperly fastened to the buildings, and thus, neither are properly installed to withstand a design weather event (e.g., hurricane) as required by the building code. Other common deficiencies documented by Mr. Mease include the use of improper fasteners for deck and porch rails, which have prematurely failed; and perforated draft stopping/fire assemblies in the common walls. Numerous other common deficiencies, and their common, resulting damages, are documented in the Mease Report.[4]

B.) Procedural Background and Proposed Class

On September 20, 2013, Plaintiffs commenced this suit by filing a Class Action Complaint which, as amended, asserts a number of claims including negligence/gross negligence, breach of warranty, breach of fiduciary duty, strict liability and unfair trade practices against Wieland Defendants. On February 24, 2014, Plaintiffs filed a Motion for Class Certification,[5] along with supporting Affidavits, requesting the certification of the following Proposed Class:

PROPOSED CLASS

The class Plaintiffs requests this Court to certify is defined as follows:

> All persons and entities that are members of The Madison at Hamlin Plantation Townhome Association.

[4] According to Plaintiffs, the common, neighborhood-wide draft stopping deficiencies identified by Mr. Mease within his report were further highlighted when a fire occurred in one of the townhomes, resulting in smoke damage to neighboring units.

[5] The Wieland Defendants filed a Memorandum in Opposition to Class Certification on September 8, 2014. Plaintiffs' Memorandum in Support of Class Certification was filed on September 9, 2014. Several other Defendants filed opposition memoranda at or before this hearing.

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> Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and their legal representatives, assigns and successors of Defendants and Defendants' current or former employees, investors, members, or officers; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

Plaintiffs propose that an opt-out class be certified. *See Salmonsen v. CGD, Inc.*, 377 S.C. 442, 459-60, 661 S.E. 2d 81, 91 (2008) (concluding the adoption of opt-out class action and notification is the exclusive method of class action litigation in this state), and that sub-classes be used as necessary to further align class interests.

CLASS ACTION PRINCIPLES

South Carolina courts give Rule 23 an expansive, rather than a restrictive construction, adopting a standard of flexibility in application which best serves the affected parties and promotes efficiency in a particular case. *Littlefield v. S. C. Forestry Comm'n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) (recognizing Rule 23, SCRCP, "endorses a more expansive view of class action availability"). In fact, the South Carolina Supreme Court recently touted Rule 23's expansive nature and the benefits in liberally applying Rule 23 in favor of class certification, notably in the construction-defect context, where a court finds all Rule 23(a)'s prerequisites are satisfied. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) ("this Court has expressed the viewpoint that class actions are favored in this state. . .").

South Carolina courts enjoy significant discretion in reviewing a motion for class certification, and a court may certify a class if, following a "rigorous analysis," the court finds the Rule 23(a) requirements have been met. *Waller v. Seabrook Island Prop. Owners Assoc.*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990) ("[A] trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion. . .It is imperative the court apply a rigorous

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analysis to assure the prerequisites of Rule 23(a) have been satisfied. . ."); *see also Dukes*, ___ U.S. ____, 131 S. Ct. at 2551 (noting the plaintiff must "affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove [that], in fact, [the requirements of Rule 23 are satisfied.]"

Specifically, under South Carolina's Rule 23(a), the Plaintiffs must demonstrate:

(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 class representatives are typical of the claims or defenses of the class;

(4) the class representatives will fairly and adequately protect the interests of the class; and

(5) the amount in controversy exceeds one hundred dollars per class member.

South Carolina's Rule 23(a) is nearly identical to its federal counterpart, and accordingly, South Carolina looks favorably on federal precedent interpreting this language. *Waller*, 300 S.C. at 467, 388 S.E.2d at 801 (noting Rule 23(a), SCRCP, is principally drawn from Rule 23(a), FRCP).[6] South Carolina's Rule 23 is materially different from the Federal Rule, however, in that it does not require Plaintiffs satisfy any predominance, superiority or ascertainability requirement in order to achieve class certification – class certification, under South Carolina law, only requires Plaintiffs satisfy the five, above-listed prerequisites. *Littlefield*, 337 S.C. at 355, 523 S.E.2d at 784 ("Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, [SCRCP] intentionally omitted from our state rule the additional requirements found in [Rule 23(b), FRCP].").

[6] In fact, the first four class action prerequisites listed under Rule 23(a), SCRCP – numerosity, commonality, typicality, and adequacy – are the same prerequisites listed under Rule 23(a), FRCP, with South Carolina adding a fifth prerequisite, amount in controversy, not contained in the Federal Rule.

DISCUSSION

Plaintiffs satisfy each of the five prerequisites necessary to maintain this class action, even under a rigorous analysis of the same, and therefore, this Court finds class certification is appropriate under Rule 23(a), SCRCP.

1.) Numerosity

First, Plaintiffs satisfied Rule 23(a)'s numerosity requirement by demonstrating "the class is so numerous that joinder of all members is impracticable." Rule 23(a)(1), SCRCP. Numerosity is "not dependent on a specific number of class members," and "[t]here is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied." *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) *quoting Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967); *Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978) ("The issue [of numerosity] is one primarily for the [c]ourt, to be resolved in light of the facts and circumstances of the particular case."). Indeed, "numerosity" is really a question of "impracticable joinder" which "depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *George v. Duke Energy Ret. Cash Balance Plan*, 259 F.R.D. 225, 231 (D.S.C. 2009) (citations omitted).

Here, the record contains sufficient documentation evidencing the size of the Proposed Class is potentially so numerous that joinder is impractical. Simply stated, there are at least one hundred and fourteen owners of Madison townhomes, all of whom qualify as potential class members because all own homes commonly designed, commonly constructed, and commonly suffering from similar defective conditions and resulting damage. *See, e.g., Cypress*, 375 F.2d at 652-54 (Fourth Circuit approving certification of class containing 18 potential members); *see also Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) ("While 25

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members is a small number compared to the size of the other classes being considered, it is a large number when compared to a single unit. *I see no necessity for encumbering the judicial process with 25 lawsuits if one will do.*") (emphasis added). Given there are in excess of one hundred and fourteen (likely more considering spouses and co-owners) Madison homeowners whose residences containing latent defects, Plaintiffs satisfy the "numerosity" requirement for class certification.

By this same token, Plaintiffs satisfy the impractical joinder analysis given that the joinder of one hundred and fourteen or more homeowners, some dispersed throughout a sizable geographic area, is difficult and impractical to achieve, and difficult to manage if achieved. *See, e.g., City of Ann Arbor Employees' Retirement Sys. v. Sonoco Prods. Co.*, 270 F.R.D. 247, 251 (D.S.C. 2010) (granting plaintiff's class certification motion, in part, on the basis that "[g]iven the number and likely geographical dispersion of potential class members, joinder would be impracticable). Moreover, many of the Madison homeowners do not have the ability to bring their own claims because of the efforts and financial resources required to pursue construction defect-related litigation on the few exterior components for which the homeowners are responsible. In other words, judicial economies of time, effort and expense support certifying a class of Madison homeowners to promote uniformity of decision among these similarly situated persons as opposed to trying a hundred plus individual suits involving the same defendants, the same defects, the same claims, and the same or similar damage.[7]

[7] Further, an alleged class that has a fluid, changing membership can be accommodated by the class action device. This is especially true where the alleged class has constant defining characteristics. James F. Flannagan, South Carolina Civil Procedure, 184 (3rd ed. 2010). Here, the proposed class consisting of Madison homeowners may have changing membership based on the sale and purchase of the townhomes; however, the construction defects allegedly existing within the townhomes, defects allegedly caused by the Defendants, are the constant defining characteristic of the class. Consequently, the requirement of Rule 23(a) in this case is not only satisfied by the number of putative class members, but also by additional factors such as potential change in ownership and the otherwise inability of owners to properly pursue their own claim because of lack of time or resources, or the individual investment necessary.

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2.) Commonality

Second, Plaintiffs' satisfy Rule 23's commonality requirement because several common legal and factual questions exist among Class members. *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 157 (Ct. App. 1986) (noting "a single, common question" can fulfill the Rule 23(a)(2), SCRCP, commonality requirement) (citations omitted); *see also Dukes*, ___ U.S. ___, 131 S. Ct. at 2556 (noting Rule 23(a) does not require that all questions of law or fact raised in the litigation be common; indeed, even a single question of law or fact common to the members of the class will satisfy the commonality requirement.); Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176, n. 110 (2003) (For purposes of Rule 23(a)(2), "even a single common question will do.").[8] "A question is ordinarily understood to be a subject or point open to controversy. . .[t]hus, a question common to the class must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims." *Dukes*, ___ U.S. ___, 131 S. Ct. at 2562. (dissent). Similarly stated, what is necessary for certification are common issues, the resolution of which will advance the litigation. *McGann*, 287 S.C. at 568, 340 S.E.2d at 157 ("Ultimately, 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. . .") (citations omitted); *Dukes*, ___ U.S. ___, 131 S. Ct. at 2551 (noting commonality requires "a common contention of such a nature that it is capable of class-wide 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."); Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009) ("What matters to class certification. . .is not the raising of common questions. . .but, rather

[8] Thus, the threshold of "commonality" is not high under South Carolina's Rule 23, and contrasts with the "more demanding" predominance showing required by Federal Rule 23. *Amchem Products v. Windsor*, 521 U.S. 591, 623-24 (1997); 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3:10 n.9 (4th ed. 2002) (noting commonality "is easily met in most cases").

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the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.")

Here, Plaintiffs demonstrate as least four primary questions, all of which will produce answers central to the validity of Plaintiffs' claims:

(1) Whether Madison contains latent defects;

(2) Whether Defendants contributed to Madison's defective condition;

(3) Whether Madison's defective condition proximately caused resulting damage; and

(4) How much will the repair of Madison's defective condition and resulting damage cost?

In addition to raising common questions, Plaintiffs' claims also arise from a common nucleus of facts given their homes, all of which allegedly contain similar latent defects and resulting damage, were commonly developed and commonly constructed, using purportedly the same construction plans, the same materials, the same developer, and nearly the same building code (while Charleston moved from CABO 1995 to IRC 2000 during the construction of Madison, the relevant building code provisions remain essentially unchanged). (*See* Mease Report; Homeowner Purchase Contracts; Madison Photographs).

Notably, the Mease Report provides that the relevant portion of each building, the exterior envelope, is nearly identical to the other buildings' exterior envelope. (*See* Mease Report). The Mease Report further provides that all main roofs, on each of the twenty-five buildings, are comprised of asphalt shingles suffering from the same installation deficiencies; all main walls, on each of the twenty-five buildings, are clad with cementitious siding over a weather barrier with both evidencing the same deficiencies; the exterior, ground level walls of the minority of units that have drive-under garages that are mostly brick clad, and suffer from the same brick façade deficiencies. *Id.* While there may be some variation in the extent of the

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damage, this variation ultimately becomes academic as all units and buildings are defective to the extent that a complete recladding of the exterior has been specified by Mr. Mease. *Id.*

Because Plaintiffs' claims are essentially based upon the same contentions (i.e., defective construction), and the Mease Report evidences these contentions are common among the Association members (owners of Madison townhomes), it follows said contentions are "of such nature that [they] are capable of class-wide resolution." *Dukes*, ___ U.S. ___, 131 S. Ct. at 2551. In other words, proof of common defects, common failures and common damage exist as to the Madison townhomes, and therefore, class certification is appropriate because the class action vehicle best serves to resolve such "common" issues "in one stroke" for all members of the class. *Id.*[9]

3.) Typicality

Third, Plaintiffs satisfy Rule 23(a)'s typicality requirement.[10] Typicality is satisfied if "the claims or defenses of the [class representative] are typical of the claims or defenses of the class." Rule 23(a)(3), SCRCP. Typical does not mean identical, and Rule 23(a)'s typicality requirement is satisfied if the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Whirlpool II*, 722 F.3d at 852. In other words, the principal "typicality" inquiry is whether

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[9] *See also Butler v. Sears, Roebuck and Co. ("Butler II")*, 727 F.3d 796, 798 (7th Cir. 2013) *cert denied, Sears, Roebuck and Co. v. Butler*, ____ S. Ct. ____, 2014 WL 684064, at *1 (Feb. 24, 2014) ("[t]he basic question presented. . .are [washing] machines defective in permitting mold to accumulate and generate noxious odors? – is common to the entire [class], although damages are likely to vary across class members. . .); *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation* ("Whirlpool II"), 722 F.3d 838, 853 (6th Cir. 2013), *cert denied, Whirlpool Corp. v. Glazer*, ___ S. Ct.____, 2014 WL 684065, at *1 (Feb. 24, 2014) (noting class certification requires only a single common question of law or fact, the answer to which would drive the resolution of the claims of the class); *Cobb v. BSH Home Appliances ("BSH")*, 2013 WL 1395690, at * 1 (9th Cir. 2013), *cert denied, BSH Home Appliances v. Cobb*, ____ S.Ct. ____, 2014 WL 684056, at *1 (Feb. 24, 2014) (denying appeal of district court order granting class certification; *Donovan v. Philip Morris USA, Inc. (Donovan II)*, 2012 WL 957663, at *2 (D. Mass. Mar. 21, 2012) (noting class certification should only be denied on commonality grounds where "there is no common question that could generate a common answer to resolve an issue central to the litigation.").

[10] Generally, the commonality and typicality requirements "tend to merge" because both "serve as guideposts 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." *Dukes*, ___ U.S. at ___, 131 S. Ct. 2551-52.

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the class representative's claims have the same essential characteristics as the claims of the other members of the Class. As the Supreme Court observed in *Dukes*, the typicality analysis aids courts in "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." *Dukes*, ___ U.S. ____, 131 S. Ct. at 2551, n.5 *quoting Gen. Tel Co. of Southwest v Falcon*, 457 U.S. 147, 157-58, n. 13 (1982).

Generally, the typicality requirement is satisfied in instances where plaintiffs' claims arise out of a defendant's common course of conduct. *Bates v. Tenco Services, Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990) ("The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs. The plaintiffs' claims for damages stem from effects of the defendants' activities on the plaintiffs' property. . . . Whether each potential member of the class has suffered the same degree of harm, or each and every type of harm, does not preclude a finding of typicality.") Thus, in a class action involving several homeowners pursuing construction defect-related claims, the class representative need only allege injury stemming from "defective conditions caused by defendants" to satisfy Rule 23's typicality requirement. *Id.; see also Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 422, 717 S.E.2d 765, 775 (Ct. App. 2011), *cert. granted* June 26, 2014 ("In this case, we find the representatives claimed damages arising from construction defects and loss of use. . .We find the representatives' claims were typical of the claims of the other class members."). Simply stated, the same defective conditions, allegedly caused by the same developer, giving rise to homeowner claims in the first place, establish the "typicality" of same.

In light of the foregoing, Plaintiffs satisfy Rule 23(a)'s typicality requirement because the claims asserted by Plaintiffs are typical of the claims of the Class. Specifically, Madison's class

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representatives share attributes typical of each proposed Class member. Indeed, the class representatives' claims are based upon a common nucleus of operative facts arising out of Defendants' common course of conduct, conduct which directly involved the construction of Madison. Accordingly, the class representatives' claims each arise from the same practice giving rise to the claims of the Class – Defendants' allegedly flawed construction of Madison. Accordingly, Madison's class representatives and the proposed Class necessarily pursue the same legal theories: the class representatives own townhomes located within Madison, and their homes contain latent defects allegedly caused by the Defendants. Exactly like the class representatives, the proposed Class *also* own townhomes within Madison, and their townhomes *also* contain latent defects allegedly caused by the Defendants. Where, as here, the class representatives and all class members own substantially similar residences, and they advance the same legal theories regarding those residences, the typicality requirement is satisfied. *See Pope, supra; see also Saltzman v. Pella Corp.*, 257 F.R.D. 471, 479 (N.D. Ill. 2009) (finding typicality where class members and class representatives advanced consistent legal theories arising out of defective Windows), *aff'd*, 606 F.3d 391 (7th Cir. 2010) (per curiam); *Brooks v. GAF*, 2013 WL 461468, at *3 (D.S.C. 2013) (finding Plaintiffs met Rule 23's typicality requirement for class certification in an action concerning defective shingles).

In sum, Plaintiffs' claims are legally and factually consistent with those sought on behalf of the proposed Class, and thus, Plaintiffs' claims are typical of the Class members' claims under Rule 23(a). *Id.*; *see also In Re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*, 2014 WL 104964 at *4 (W.D. Ok. 2014) ("Differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory.") (citations omitted).

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4.) Adequacy

Fourth, Plaintiffs satisfy Rule 23(a)'s adequacy requirement. The principal factor in determining the adequacy of a class representative is whether the Plaintiff has the ability and commitment to prosecute the action vigorously. *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 325, 329-30 (D.S.C. 1991). There are two criteria to which courts look in determining whether the class representative adequately protects the interests of the class: (1) The class representatives should not have any significant antagonistic or conflicting interests to the unnamed Class members; and (2) it must appear the class representatives will vigorously prosecute the interests of the class through qualified counsel. *Runion v. U.S. Shelter*, 98 F.R.D. 313, 316 (D.S.C. 1983); *Nat'l Ass'n of Regional Med. Programs, Inc. v. Matthews*, 551 F.2d 340, 345 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977). In addition, it must appear the class representatives voluntarily accept the fiduciary relationship towards all the members of the putative Class. *Id.*

As owners of a Madison townhome, these class representatives "possess the same interest and suffer the same injury as the class members." *Gunnells v. Healthcare Services, Inc.*, 348 F.3d 417, 425 (4th Cir. 2003). Indeed, no material conflict exists between the class representatives (owners of a Madison townhome, and thus, Association members) and the class members they seek to represent (also owners of Madison townhomes, and thus, Association members). Moreover, the class representatives and their counsel are committed to aggressively pursuing this litigation on behalf of the other Madison homeowners whose homes contain latent defects. (*See* Randall Affidavit; Berotti Affidavit; Lucey Affidavit).

Notably, Plaintiffs' counsel has practiced before this Court, as well as federal court, in a number of complex commercial and consumer actions, and thus, this Court is aware of counsel's competency in litigating complex actions as further described in Counsel's Affidavit. (*See* Lucey

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Affidavit). Accordingly, this Court is satisfied the class representatives and their counsel will fairly and adequately protect the interests of the class.

5.) Amount in Controversy

Fifth, and finally, Plaintiff's satisfy Rule 23(a)'s amount in controversy requirement. Rule 23(a)'s prerequisite requires the "amount in controversy" to exceed one hundred dollars for each member of the proposed class. This amount is based on the amount claimed by the plaintiffs, and where plaintiffs' claim damages greater than one hundred dollars per class member, the "amount in controversy" requirement is satisfied. *Gardner v. Newsome Chevrolet-Buick*, 404 S.E.2d 200, 201 (S.C. 1991). Here, the amount in controversy exceeds one hundred dollars per class member, and this is verified by the Mease Affidavit.

DEFENDANTS' OPPOSITION IS LEGALLY INSUFFICIENT

Given Plaintiffs' satisfaction of all Rule 23(a) requirements necessary for class certification, coupled with the benefits class certification serves in promoting the efficient handling of this case, any challenge proffered by Defendants as to this Court's grant of class certification is presently insufficient to defeat class certification. The Madison townhomes share their roofs, exterior walls, and cladding, share common construction details, and all are alleged to suffer common defects and common resulting damages which are addressed in a single repair scope and a single repair estimate. Thus, any purported individualized differences in subcontractors or floor plans, does not likely change the common facts and common questions which exist among the class. Additionally, Defendants failed to introduce any evidence substantiating any material differences in the two, governing building codes or other material differences in their written submissions opposing class certification or during the September 10, 2014 motion hearing.

Moreover, the subcontractors' objections to a class being certified because of the complexity of the case or because they only worked on some residences misses an important point: all are

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already part of the Association's suit, irrespective of the class certification. All the class certification does is ensure that 100% of this dispute is resolved, rather than piece-mealing it, by consolidating the regime's claims (based upon its repair obligation) and the owners' claims (based upon ownership rights).

Finally, even if differences between first and subsequent owners exist among the class, this does not defeat class certification;[11] rather, this Court can, and does, create two subclasses, one consisting of first owners and one consisting of subsequent owners.

CONCLUSION

Following a rigorous analysis of the Rule 23(a), SCRCP, prerequisites, this Court finds Plaintiffs satisfy the Rule's numerosity, commonality, typicality, adequacy and amount in controversy requirements, and thus, class certification is warranted.

Accordingly, it is hereby:

ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Class Certification is GRANTED;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the following Class is CERTIFIED:

> All persons and entities that are members of The Madison at Hamlin Plantation Townhome Association.
>
> Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and their legal representatives, assigns and successors of Defendants and Defendants' current or former employees, investors, members, or officers; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

[11] Defendants may assert that first owners contractually released certain rights or remedies.

RMDJ/17

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Sandy Randall and Cherie Berotti are appointed as class representatives; and Sandy Randall is appointed as the class representative of the sub-class of subsequent owners; and Cherie Berotti is appointed as the class representative of the sub-class of first owners.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Justin Lucey and Joshua F. Evans of Justin O'Toole Lucey, P.A. are appointed as class counsel; and

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the attached notice plan, notice form, and opt-out form are approved for implementation by class counsel as detailed in the attached documents.

AND IT IS SO ORDERED!

R. Markley Dennis, Jr.
Circuit Court Judge of the Ninth Judicial Circuit

Charleston, South Carolina

September 24, 2014

RMDD/18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

MADISON AT HAMLIN PLANTATION TOWNHOME ASSOCIATION, INC. and SANDY RANDALL and CHERIE BEROTTI, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

BUILDERS SUPPORT SERVICES OF THE CAROLINAS, INC. individually and f/k/a JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC. individually and f/k/a JOHN WIELAND HOMES AND NEIGHBORHOODS OF NC, INC. individually and f/k/a JOHN WIELAND HOMES AND NEIGHBORHOODS OF SC, INC; JOHN WIELAND HOMES OF SC, INC.; JOHN WIELAND HOMES, INC; JOHN WIELAND HOMES OF CHARLESTON, INC.; AAA PLUMBING; AMERICAN RESIDENTIAL SERVICES, LLC; BUILDERS FIRSTSOURCE- SOUTHEAST GROUP, LLC; CAROLINA CUSTOM SECURITY, INC.; CREATIVE TOUCH INTERIORS, INC. individually and f/k/a RICE PLANTERS CARPETS, INC.; FOGEL SERVICES, INC.; LARRY'S TERMITE CONTROL, INC; MCCLELLAN PLUMBING, LLC; NEIGHBORHOOD MANAGEMENT ASSOCIATES, INC.; GEORGE RYAN BUTLER; PAUL SPENCER; and JOHN DOE 1-50;

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-10-05559

NOTICE OF CLASS ACTION

THIS NOTICE MAY AFFECT YOUR RIGHTS. PLEASE READ CAREFULLY!

TO: ALL PERSONS AND ENTITIES THAT ARE MEMBERS OF THE MADISON AT HAMLIN PLANTATION TOWNHOME ASSOCIATION

1. WHY SHOULD I READ THIS NOTICE?

A lawsuit which may affect your rights is pending in the Court of Common Pleas of Charleston County, known as *Madison at Hamlin Plantation Townhome Association, et al., v. Builders Support Services of the Carolinas, Inc., et al.*, Civil Action No. 2013-CP-10-05559. This lawsuit is brought by Sandy Randall and Cherie Berotti, as well as the Madison at Hamlin Plantation Townhome Association, Inc. (collectively the "Plaintiffs") against Builders Support Services of the Carolinas, Inc., individually and f/k/a John Wieland Homes and Neighborhoods of the Carolinas, Inc., individually and f/k/a John Wieland Homes and Neighborhoods of NC, Inc., individually and f/k/a John Wieland Homes and Neighborhoods of SC, Inc.; John Wieland Homes of SC, Inc.; John Wieland Homes, Inc.; John Wieland Homes of Charleston, Inc. (hereinafter "Wieland Defendants") and various subcontractors and suppliers.

If you presently are a member of the Madison at Hamlin Plantation Townhome Association, your rights may be affected by this action. You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of the Class, or whether to opt out of the proposed Class.

In a Class Action, one or more people, called named Plaintiffs (in this case Sandy Randall and Cherie Berotti), sue on behalf of people who have similar claims. All these similarly situated people are a Class or Class Members. One court resolves the issues for all Class Members, except for those who exclude themselves from the Class.

2. WHAT IS THE LAWSUIT ABOUT?

In the complaint, Plaintiffs allege that Defendants were engaged in the business of design, construction, and sale of townhomes. The Complaint further alleges that the townhomes constructed by the Defendants are defective and the latent construction defects have since resulted in water intrusion into the townhomes, causing damage to their homes. The Plaintiffs seek to recover the losses resulting from the defective nature of the homes, including repair costs and loss of use during repairs. The Defendants have denied the allegations of the Plaintiff and alleged a number of defenses. The Court has not ruled on the merits of the case.

The Court has ruled that this lawsuit may be maintained as a claim on behalf of a class consisting of all persons and entities that are members of the Madison at Hamlin Plantation Townhome Association, excluding any Judge presiding over this action and members of their families; Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and their legal representatives, assigns and successors of Defendants and Defendants' current or former employees, investors, members, or officers; and all persons who properly execute and file a timely request for exclusion from the Class.

The Court has appointed Sandy Randall and Cherie Berotti as the representatives of the Class. Ms. Berotti will represent a subclass of first owners and Ms. Randall will represent a subclass of subsequent owners.

The attorneys for the Class are Justin Lucey and Joshua F. Evans of Justin O'Toole Lucey, P.A., whose telephone number and address appear below. Any questions regarding their representation of the Class shall be directed to them.

Justin Lucey, Esquire
Joshua F. Evans, Esquire
Justin O'Toole Lucey, P.A.
415 Mill Street
Mt. Pleasant, SC 29464
(843) 849-8400 (phone)
(843) 849-8406 (fax)
jevans@lucey-law.com
Attorneys for Plaintiffs Class

The attorneys for the Wieland Defendants are Thomas C. Hildebrand, Jr., Krista McGuire, and Kristina Baxley, whose telephone number and address appear below.

Thomas C. Hildebrand, Jr., Esquire
Krista McGuire, Esquire
Kristina Baxley, Esquire
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
(843) 727-2653 (phone)
(843) 727-2680 (fax)
kristinabaxley@parkerpoe.com
Attorneys for Wieland Defendants

3. WHAT DO I NEED TO DO TO JOIN THE CLASS?

This notice is being published to alert you to the pendency of this suit. To be a member of this class, you do not need to do anything. If you do nothing, you will remain as a member of the class, and you will be bound by any decision of the court affecting the class and the outcome of this case.

4. HOW DO I EXCLUDE MYSELF FROM THE CLASS?

If you are entitled to be a member of the class and want to opt out or exclude yourself from the lawsuit, you need to sign the attached request for exclusion and return it to the below attorney on or before _____, 2014. If you opt out of the class, you will not be able to participate in the lawsuit recovery should there be one.

Joshua F. Evans, Esquire
Justin O'Toole Lucey, P.A.
415 Mill Street
Mt. Pleasant, SC 29464
(843) 849-8400 (phone)
(843) 849-8406 (fax)
jevans@lucey-law.com

5. HOW WILL CLASS COUNSEL FEES AND EXPENSES BE PAID?

Class counsel will only be paid if there is a recovery. If there is a recovery, Class Counsel will petition the Court for an award of one-third (1/3) of the Recovery for attorneys' fees for all services rendered to the Class, plus their out-of-pocket litigation expenses. The attorneys' fees and costs awarded by the Court shall be paid from any funds generated as a result of the Class Action. All payments of Class Counsel must be approved by the Court, and will be considered at a Fairness Hearing or at other hearings to be scheduled by the Court.

6. WHERE DO I GET ADDITIONAL INFORMATION?

You may direct inquiries to Plaintiffs' counsel at the addresses listed above. **DO NOT CONTACT THE COURT.**

This Notice provides only a summary of matters regarding the case. You may also seek independent legal counsel as to your rights at your own personal expense.

JUSTIN O'TOOLE LUCEY, P.A.

By: _____

Justin Lucey, Esquire
Joshua F. Evans, Esquire
Justin O'Toole Lucey, P.A.
415 Mill Street
Mt. Pleasant, SC 29464
(843) 849-8400 (phone)
(843) 849-8406 (fax)
Attorneys for Plaintiffs Class

September _____, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON MADISON AT HAMLIN PLANTATION TOWNHOME ASSOCIATION, INC. and SANDY RANDALL and CHERIE BEROTTI, individually, and on behalf of all others similarly situated, Plaintiffs, vs. BUILDERS SUPPORT SERVICES OF THE CAROLINAS, INC. et al., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2013-CP-10-05559 **REQUEST FOR EXCLUSION**

REQUEST FOR EXCLUSION

I/We, _____, hereby declare my/our decision to be excluded as a Class Member(s) in the above-referenced action.

_____
Signature Date

Mailing Address: _____

Phone Number(s): _____

Address of subject residence (if different from above: _____

_____

_____

Notice Plan

MADISON AT HAMLIN PLANTATION TOWNHOME ASSOCIATION, INC. and SANDY RANDALL and CHERIE BEROTTI, individually, and on behalf of all others similarly situated,

v.

BUILDERS SUPPORT SERVICES OF THE CAROLINAS, INC., et al.
Court of Common Pleas, Charleston South Carolina
Case No. 2013-CP-10-05559

The following represents the Parties' proposed plan for providing notice of the class action Settlement to the Class Members in this case.

1. Given that the members of the Madison at Hamlin Plantation Townhome Association can be definitively identified for purposes of notice by public records, specifically including deeds, tax records, and registered agents for corporate-like entities, Plaintiffs shall cause personal notice to be effected on class members by First-Class Mail, and supplemental notice by publication shall not be necessary.

2. Plaintiffs' counsel shall cause the attached Notice to be deposited in First-Class Mail within twenty (20) days from the filing of the Order Granting Class Certification or any Order ruling on a Motion to Reconsider.

3. The Notice shall provide an opt-out period of approximately thirty (30) days. Therefore, the Notice shall provide that the opt-out period shall end at a date approximately fifty (50) days from the filing of the Order.

4. Should any Notice be "Returned to Sender" due to address issues, Class Counsel shall endeavor to procure a better address and re-send the Notice.

5. Class Counsel shall serve and file a Report on Notice and Opt-outs at the conclusion of the opt-out period.

JUSTIN O'TOOLE LUCEY, PA
Attorney at Law

Justin Lucey
Joshua F. Evans
Stephanie D. Drawdy
Harper L. Todd
Dabny Lynn
James L. Floyd, III

415 Mill Street, Mount Pleasant, SC 29464
Phone: 843.849.8400 · Fax: 843.849.8406 · office@lucey-law.com

Reply to:
P.O. Box 806
Mount Pleasant, SC 29465

September 19, 2014

Via Hand Delivery
The Honorable R. Markley Dennis, Jr.
Charleston County Courthouse
100 Broad Street
Charleston, SC 29401

Re: Madison, et al. v. Builders Support Services of the Carolinas, Inc., et al
Case No.: 2013-CP-10-5559

Dear Judge Dennis:

Attached is the Word version of the proposed Order Granting Plaintiffs' Motion for Class Certification in the above referenced matter, should the Court need to make any edits. Please contact our office if you have any questions.

With best regards, I remain

Very truly yours,

Joshua F. Evans

JFE/bb
Enclosure