

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

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Appeal from Beaufort County  
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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Case No. 2007-CP-07-3166

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

Respondents,

v.

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

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**SC COURT OF APPEALS**

Defendants,

Of whom Del Webb Communities, Inc., an  
Arizona Corporation, and Georgia-Pacific  
Corporation and/or Georgia-Pacific LLC are

Appellants.

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**RESPONDENTS' RETURN TO  
APPELLANTS' PETITIONS FOR REHEARING**

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Case No. 2007-CP-07-3166

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As requested by this Honorable Court, the Respondents, by and through their undersigned counsel, respectfully submit this return to the petitions for rehearing filed by the Appellants, Del Webb Communities, Inc. (“Del Webb”) and Georgia-Pacific Corporation and/or Georgia-Pacific LLC (“Georgia-Pacific”).

### **PROLOGUE**

“[I]f the case goes forward as a class with approximately 800 houses, then the undersigned expects there to be approximately four depositions per house on average, for a total of 3200 depositions. Assuming all parties can dedicate a [sic] least one full time lawyer, then the expected discovery should take about 9 years.”

—Del Webb’s counsel<sup>1</sup>

### **INTRODUCTION**

No, that is not a misprint. Del Webb’s counsel actually contends— “[a]ssuming,” of course, “all parties can dedicate a[t] least one full time lawyer”—that discovery in this already five-year-old case will take about **9 more years**, with more than **3,000** depositions to be taken in the interim. Del Webb has even presented a proposed scheduling order with a summary

judgment-motion deadline of January 15, **2024**, with trial not to take place until two months after such motions are ruled upon. (See **Exhibit 1.**) Respectfully, the notion that this litigation (commenced in 2007) should span the better part of **two decades** is absurd, and unjust, and it underscores the misguided nature of all of the interlocutory (and unduly dilatory) appeals taken in this case.

At the heart of these appeals is the Appellants' displeasure with the circuit court's decision to certify this class action. To be sure, they strongly disagree with that decision. Much of their briefing to this Court on the issue of appealability appears indeed to be devoted to re-arguing their shared position that this case is not amenable to class treatment because of the existence of individualized issues. But the circuit court's grant of class certification was a valid exercise of its sound discretion in this matter—which matter, the Respondents note, involves homes in a single, planned retirement community, developed by Del Webb, with Del Webb serving as the general contractor for construction of all class homes, into all of which

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<sup>1</sup> The above quotation is from page 24 of Del Webb's Motion to Conduct Discovery as to Individual Class Members. A copy of the motion along with its attached Proposed Discovery Scheduling Order is attached hereto as **Exhibit 1**, which is incorporated herein by reference.

Georgia-Pacific's PrimeTrim<sup>®</sup> product was incorporated.<sup>2</sup> And, the circuit court's decision in this regard was certainly preceded by ample opportunity for the Appellants to be heard in opposition via voluminous written submissions and extensive oral argument.

Notably, the Appellants do not even attempt to argue that the order about which they appear to be most aggrieved (the Order Granting Class Certification) is now appealable on its own; rather, they ask for it to tag along with some order—any order—that the Court might find to actually be immediately appealable.<sup>3</sup> As this Court correctly determined in dismissing their appeals, however, the Appellants' attempt to take an immediate appeal

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<sup>2</sup> In this regard, the Respondents note an inaccuracy on page 7 of Del Webb's Return to Respondents' Motion to Dismiss Appeal. Del Webb states that "[t]he claim that PrimeTrim is inherently defective is made against co-Defendant Georgia-Pacific only as the manufacturer of PrimeTrim – it is not made against Del Webb." (Del Webb's Return to Respondents' Motion to Dismiss Appeal p. 7.) This is not correct. The Respondents claim that Del Webb's incorporation of a defective product into the class homes constitutes breach of the implied warranty of workmanlike service because the homes are not free of latent defects. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 561, 658 S.E.2d 80, 89 (2008) ("[T]his Court has embraced the notion that in constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is free of latent defects."). That said, Del Webb is correct that the Respondents allege it is responsible for deficient installation of PrimeTrim<sup>®</sup> throughout the class homes. (See, e.g., Correspondence regarding Georgia-Pacific's observations of Del Webb's deficient installation of PrimeTrim<sup>®</sup> without proper flashing/caulking in "several hundred homes" during their construction, copies of which are attached hereto as **Exhibit 2**, which is incorporated herein by reference.)

<sup>3</sup> Indeed, the Appellants only argue that certain of the orders they appealed are immediately appealable under S.C. Code Ann. § 14-3-330(2) and that the remainder of the orders, which they necessarily concede are not otherwise immediately appealable (among them the Order Granting Class Certification), should now be reviewed on appeal via the "doctrine of pendent appellate jurisdiction" or the "intertwined orders doctrine."

from the class certification decision is unavailing, because **none** of the **eleven** total interlocutory orders that they have appealed is immediately appealable. None of these orders is a final judgment. None involves the merits. None discontinues this action, prevents a later appeal, grants or refuses a new trial, or strikes out an action or defense. None abridges Del Webb or Georgia-Pacific's constitutional right to a jury trial. Not one of them is immediately appealable.

Respectfully, the argument that the Appellants present in their petitions for rehearing is no different than that already duly considered and correctly disposed of via this Court's June 1, 2012 order of dismissal (the "Subject Order"). The Court should adhere to the Subject Order, and deny the petitions for rehearing. The Subject Order is correct on its merits, in the interest of judicial economy, and justly avoids the possibility of undue disruption or delay of the adjudication of this (already aged) matter (involving the claims of a class of retirees) in the circuit court.

## **BACKGROUND**

First, Del Webb noticed an appeal from six interlocutory orders entered by the circuit court in the conduct of this class action.<sup>4</sup> Then, Georgia-Pacific followed suit, noticing its own appeal from six interlocutory orders of the circuit court, three of them being the same as those appealed by Del Webb. When the circuit court entered an “Order Regarding Interlocutory Appeals,” Del Webb appealed that order too, as well as the circuit court’s order denying Del Webb’s motion for reconsideration thereof—Del Webb also filed an “emergency” petition for relief.

So, between the two of them, the Appellants noticed appeals from the following eleven interlocutory orders:

### **Appealed by Both Del Webb and Georgia-Pacific**

1. Order Approving Notice of Class Action (Appellants’ Joint Appendix pp. 3-8.)
2. Preliminary Case Management and Scheduling Order (Appellants’ Joint Appendix pp. 15-17.)
3. Order Granting Class Certification (Appellants’ Joint Appendix pp. 18-26.)

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<sup>4</sup> By order entered May 28, 2008, this case was designated complex and assigned to the Honorable Roger M. Young, Sr. (*See* Order Establishing Complex Case Designation and Appointment of Judge Roger M. Young as Case Manager, a copy of which is attached hereto as **Exhibit 3**, which is incorporated herein by reference.) Accordingly, Judge Young was the presiding circuit judge with respect to all appealed orders, and he continues to preside over the circuit court with respect to this case.

### Appealed by Del Webb Only

4. Order Denying Del Webb Communities, Inc.'s Motion to Stay Action Pending Compliance with SC Code § 40-59-810, *et seq.* (Appellants' Joint Appendix pp. 9-10.)
5. Order Denying Del Webb Communities, Inc.'s Motion to Conduct Discovery as to Individual Class Members (Appellants' Joint Appendix pp. 1-2.)
6. Order Denying Del Webb Communities, Inc.'s Motion for Reconsideration and/or Clarification (Appellants' Joint Appendix pp. 27-28.)
7. Order Regarding Interlocutory Appeals (*See* Del Webb's [(Third)] Notice of Appeal dated May 31, 2012, a copy of which is attached hereto as **Exhibit 4**, which is incorporated herein by reference.)
8. Order Denying Reconsideration of Order Regarding Interlocutory Appeals (*See* Del Webb's [(Second)] Notice of Appeal dated May 25, 2012, a copy of which is attached hereto as **Exhibit 5**, which is incorporated herein by reference.)

### Appealed by Georgia-Pacific Only

9. Order Denying Georgia-Pacific LLC's Motion to Stay Action Pending Compliance with SC Code § 40-59-810, *et. seq.* (Appellants' Joint Appendix pp. 11-12.)
10. Order Denying Georgia-Pacific's Motion to Strike Affidavits of Andy W.C. Lee, Derek Hodgin, and Thomas J. Carlson (Appellants' Joint Appendix pp. 13-14)
11. Order Denying Georgia-Pacific's Motion to Reconsider, Alter, or Amend the Judgment (Appellants' Joint Appendix pp. 29-30.)

Via the Subject Order, this Court consolidated and dismissed all

appeals noticed by Del Webb and Georgia-Pacific, determining that “none of the underlying orders are immediately appealable” and that, as such, Del Webb’s appeals relating to the Order Regarding Interlocutory Appeals were moot. In light of such dismissal, the Court determined that it did not need to act on Del Webb’s “emergency” petition for relief. The instant petitions for rehearing followed.

## ARGUMENT

**I. Rehearing is unwarranted. The Court correctly dismissed all appeals noticed by Del Webb and Georgia-Pacific, because none of the interlocutory orders they appealed are immediately appealable.**

**A. General response to petitions for rehearing**

Rule 201(a), SCACR, addresses judgments, orders and decisions subject to appeal, and, in pertinent part, provides that “[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision.” “As a general rule, only final judgments are appealable.” Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). “To promote judicial efficiency and orderly adjudication of disputes on appeal, this rule seeks to prevent multiple appeals of non-final matters.” Jean Hoefler Toal et al., Appellate Practice in South Carolina 83 (2002); cf. Senter v. Piggly Wiggly Carolina Co., Inc., 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000)

("This procedure will advance the salutary consideration of avoiding 'piecemeal litigation' which would occur if immediate review of such pretrial motions were either mandated or permitted.").

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

Here, none of the appealed orders is a final judgment; they are all interlocutory orders. In view of the policy in furtherance of judicial efficiency and orderly adjudication of disputes on appeal by preventing multiple appeals of non-final matters,<sup>5</sup> it should be noted that all of the subject interlocutory orders were issued in the context of a class action. Even in non-class litigation, "a trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct,

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<sup>5</sup> Toal, supra at 83.

modify, or otherwise change its findings of facts and conclusions of law before entry of judgment or decree;”<sup>6</sup> in the context of a class action, Rule 23(d)(2), SCRCP, expressly provides that “[t]he court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended.” Our Supreme Court has explained that this “specifically permits the trial court to maintain continual control over class action proceedings . . . .” Salmonsens v. CGD, Inc., 377 S.C. 422, 454, 661 S.E.2d 81, 88 (2008). Accordingly, the Respondents submit that it is all the more appropriate in the context of class litigation for appeal to follow final judgment. Cf. Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (“Orders under

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<sup>6</sup> See PPG Indus., Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988); see also Blyth v. Marcus, 335 S.C. 363, 367, 517 S.E.2d 433, 434 (1999) (“A defendant can bring a subsequent summary judgment motion after his first motion had been denied. The rationale behind these cases is that the denial of a motion for summary judgment is an interlocutory decision which the trial judge can reconsider until the end of trial.”); City of Wood River v. Geer-Melkus Constr. Co., Inc., 233 Neb. 179, 183, 444 N.W.2d 305, 308 (1989) (“No court is required to persist in error, and, if [the judge] concludes that a former ruling was wrong, [the judge] may correct it at any time while the case is still in his control.”) (quoting Tady v. Warta, 111 Neb. 521, 526, 196 N.W. 901, 903 (1924)); Dawkins, Inc. v. Huff, 836 So.2d 1062, 1065 (Fla. 5th DCA 2003) (“[W]e observe that a court always has jurisdiction during the progress of a case to set aside or modify an interlocutory order before final judgment. . . . [S]uch orders remain within the inherent power of the court to control the progress of the case prior to final judgment.”); Helping Others Maintain Env'tl. Standards v. Bos, 406 Ill. App.3d 669, 698, 941 N.E.2d 347, 373 (2d Dist. 2010) (“A trial judge possesses the inherent authority to review, modify or vacate an interlocutory order at any time until it enters a final judgment.”). As the Supreme Court of Nebraska noted in City of Wood River, this ruling is “consistent with the inherent power of the court to control its own proceedings and the policy of favoring appeal only at the end of all lower court proceedings.” 233 Neb. at 183, 444 N.W.2d at 308.

Rule 23, SCRPC are interlocutory and thus, immediate appealable only in certain circumstances.”).

“Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within § 14-3-330.” Wilson, 367 S.C. at 13, 625 S.E.2d at 208. Here, the Appellants’ argument in favor of immediate appealability is founded solely upon subsection (2) of § 14-3-330, which relates to orders affecting a “substantial right,”<sup>7</sup> and provides as follows:

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

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

“Generally, this subsection has only been used when the trial order affected the ‘mode of trial’ because if those orders are not immediately appealed, no appellate review is available to correct any error.” Toal, supra at 87.

“[T]he ‘mode of trial’ exception to the general rule that only final orders are appealable is confined to orders which abridge a party’s constitutional right

to trial by jury.” Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (citing Salmonsens, 377 S.C. at 461, 661 S.E.2d at 91). Our Supreme Court has explained that “[u]nder § 14-3-330 . . . an order must affect a substantial right **and** prevent a judgment from which an appeal may later be taken in order to be immediately appealed.” Edwards v. SunCom, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006) (emphasis in original).

None of the orders that the Appellants appealed are immediately appealable under § 14-3-330(2). None affects a “substantial right” and prevents a judgment from which an appeal may later be taken. None affects the “mode of trial.” This Court correctly issued the Subject Order dismissing these appeals, properly avoiding any possibility of undue disruption or delay of the adjudication of this matter in the circuit court, and also discouraging similar dilatory conduct in other litigation.

#### **B. Specific response to petitions for rehearing**

Based upon the argument that the Appellants have presented in favor of their immediate appealability, the Respondents have grouped certain of the subject orders together for discussion. Again, the Appellants have not advanced any argument in favor of the immediate appealability of a number

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<sup>7</sup> To be clear, the Appellants do not argue that any of the subject orders is appealable under subsection (1) of § 14-3-330 as an order involving the merits.

of the orders that they have appealed besides their request that these orders be allowed to tag along on appeal by virtue of the “doctrine of pendent appellate jurisdiction” or the “intertwined orders doctrine” if the Court finds another order to be immediately appealable.

- **Order Approving Notice of Class Action**

According to the Appellants, the content of the class notice is deficient, and, if they are correct in this regard, any judgment later rendered in this action will be vulnerable to collateral attack, denying them their “substantial right”<sup>8</sup> to the res judicata effect of the judgment. Respectfully,

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<sup>8</sup> The Respondents note that Del Webb does not appear to set forth any authority for the proposition that res judicata constitutes a “substantial right.” Georgia-Pacific states that “[t]here can be little doubt that the finality and preclusive effect of res judicata is a substantial and important right.” (Georgia-Pacific’s Return to Respondents’ Motion to Dismiss Appeal p. 9; Georgia-Pacific’s Petition for Rehearing p. 9.) But the authority Georgia-Pacific actually cites in support of this statement does not actually identify res judicata as a “substantial right.” One of the two cited cases, Widdicombe v. Tucker-Cales, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005) does not address res judicata at all. The Widdicombe Court found an immediate appeal appropriate under § 14-3-330(2) because “[m]atters involving the custody of one’s child certainly constitute a ‘substantial right’ as contemplated in the South Carolina statute.” Id. at 85, 620 S.E.2d at 338. This is wholly irrelevant to the present matter, however. The other case cited by Georgia-Pacific, Ducket v. Goforth, 374 S.C. 446, 464, 649 S.E.2d 72, 81-82 (Ct. App. 2007) (internal citations omitted), explained that res judicata is a “doctrine” that “flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action,” and that “[r]es judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies,” and that “[r]es judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues,” but it did not describe res judicata as a right. The Respondents respectfully submit that the Appellants’ analysis is conclusory and therefore insufficient to warrant rehearing, because it puts the cart before the horse, simply assuming that res judicata is a “substantial right” for purposes of § 14-3-330(2) analysis, without actually substantiating this proposition.

the Appellants' argument is unavailing.

As an initial matter, this is an interlocutory order under Rule 23, and it is not immediately appealable. Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (“Orders under Rule 23, SCRCP are interlocutory and thus, immediate appealable only in certain circumstances.”).

Moreover, Rule 23(d) expressly confers upon the circuit court discretion regarding orders in the context of class actions. It provides as follows:

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) As soon as practicable, after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. (2) The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended. It may order that notice be given in such a manner as it may direct of the pendency of the action by the party seeking to maintain the action on behalf of the class. It may order that notice be given in such manner as it may direct of a proposed settlement, of entry of judgment, or any other proceedings in the action including notice to the absent persons that they may come in and present claims and defenses if they so desire. (3) Whenever the representation appears to the court inadequate fairly to protect the interests of absent persons who may be bound by the judgment, the court may at any time impose additional conditions

on the representative parties, or order an amendment of the pleadings, eliminating therefrom all reference to the representation of the absent persons, and in that event the court shall order entry of the judgment in such form as to affect only the parties to the action and those adequately represented.

As the Salmonsens Court explained, “Rules 23(d)(1) and (2) of the South Carolina Rules of Civil Procedure specifically permit the trial court to maintain continual control over class action proceedings, including the method of class notification.” 377 S.C. at 454, 661 S.E.2d at 88. Further still, the Court explained that, “[a]s emphasized from the text, our state rule provides a trial court with broader discretion to make decisions regarding class notification procedures than the federal rule.” Id. at 455, 661 S.E.2d at 89.

The Appellants ask this Court to simply seize control of the conduct of this pending class action from the circuit court because they find fault with the class notice that it approved. The Respondents, of course, contend that the notice is, as the circuit court found, appropriate; however, in any event, class notice remains subject to the circuit court’s continual control under Rule 23, should it determine that other action is needed in this regard. Del Webb admits that its “substantial right” to res judicata is not “triggered” until final judgment. (Del Webb’s Return to Respondents’ Motion to

Dismiss Appeal p. 2.) Because of the circuit court's continuing control over class-action proceedings (which includes the ability to require the Respondents to amend their pleadings or to assert certain claims or even the ability to decertify the class<sup>9</sup>), it cannot now be said that the validity of a future judgment in this litigation is, in fact, affected.

Further, the essence of the Appellants' challenge to the class notice is that the interests of the absent class plaintiffs are not adequately represented. Adequacy of representation is not only a due process requirement, but also a class action prerequisite under Rule 23(a). *Compare Hospitality Mgmt. Assocs. v. Shell Oil Co.*, 356 S.C. 644, 654 591 S.E.2d 611, 616 (2004) ("If the due process requirements of (1) notice; (2) an opportunity to be heard; (3) an opportunity to 'opt out;' and (4) adequate representation are met, the foreign court properly asserts personal jurisdiction over the absent class plaintiffs."), *and* Rule 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds . . . (4) the representative parties will fairly and adequately protect the interests of the class . . . ."). The circuit court obviously disagreed with the Appellants in granting class certification. (Appellants' Joint Appendix pp. 24-25) ("The Court finds no serious challenge to the adequacy of Plaintiff's

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<sup>9</sup> Salmonsén, 377 S.C. at 454, 661 S.E.2d at 88 ("[C]lass certification may be altered at

counsel; they have been involved in other class litigation, have numerous years of litigation experience in construction litigation, and are capable of handling the claims through to conclusion. . . . The Court also has considered the affidavits of the class representatives and finds them to be educated, responsible, and concerned neighboring homeowners, not having claims materially different from or antagonistic to the other class members.”). The Appellants’ appeal of the Order Approving Notice of Class Action is an attempted backdoor immediate appeal of the class certification order, which is, again, not permitted. Salmonsens, 377 S.C. at 448, 661 S.E.2d at 85 (“The general rule established by this Court is that class certification orders are not immediately appealable.”); Id. at 452, 661 S.E.2d at 87 (“Because a decision by this Court to grant immediate appellate review of a class certification order would represent a significant departure from this states established appealability jurisprudence, we decline to do so. We reiterate that the orders not prevent a judgment from which an appeal may be taken nor do they discontinue the action.”).

Further still, the Appellants essentially ask this Court to rule that they have a substantial right to ensure via interlocutory appeal that any future judgment in this case is invulnerable to collateral attack. They present no

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any time prior to a decision on the merits.”).

authority in support of such a right, and the Respondents question whether, as a practical matter, such a preemptive collateral attack is even possible. Allowing an such an appeal would set the stage for an interlocutory appeal in every class action, with the class opponents simply raising some alleged deficiency in the class notice to create an appeal.

- **Preliminary Case Management and Scheduling Order**
- **Order Denying Del Webb Communities, Inc.’s Motion to Stay Action Pending Compliance with SC Code § 40-59-810, *et seq.***
- **Order Denying Georgia-Pacific LLC’s Motion to Stay Action Pending Compliance with SC Code § 40-59-810, *et. seq.***

These orders can be collectively referred to as the “Right to Cure Orders.” Throughout this litigation, Del Webb in particular has attempted to wield the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, §§ 40-59-810 to -860 (the “Right to Cure Act”), as a sword to gut this class as opposed to an olive branch to resolve the class-wide problem it created. The Appellants’ premature appellate challenge to the “Right to Cure Orders” is more of the same in this regard.

As an initial matter, the Appellants cite no authority for the proposition that the Right to Cure Act confers upon them any “substantial right.” Moreover, the relationship between the Right to Cure Act and class

actions under Rule 23, SCRCP, was recently addressed by our Supreme Court in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010). In Grazia, the Supreme Court harmonized the stay and notice provisions within the Right to Cure Act, found the Right to Cure Act to be compatible with Rule 23, and reversed the circuit court's decision to strike the class action allegations from the plaintiffs' complaint. The Court explained that "rights under the Right to Cure Act notice provisions are not new substantive rights . . . ," expressly noting that, under the Right to Cure Act, "the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim." Id. at 573, 703 S.E.2d at 202. Under the Grazia Court's holding, the rights afforded under the Right to Cure Act are not substantive and are akin to discovery rights. And discovery orders are not immediately appealable. Hamm v. S.C. Pub. Serv. Comm'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) ("Discovery orders, however, are interlocutory and are not immediately appealable.").

Moreover, the Grazia Court rejected the notion that the Right to Cure Act did not allow for representative compliance, and explained that, in an action containing class allegations, after the circuit court has determined that the Rule 23(a) prerequisites to a class action are met, the circuit court may

then find that representative notice under the Right to Cure Act is appropriate. Id. at 575-76, 703 S.E.2d at 204. Specifically, the Court instructed that, “[u]pon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class actions are required to prove.” Id. at 576, 703 S.E.2d at 204. The circuit court, of course, made this determination in favor of the Respondents. Having done this, “the court may then find that representative notice under the Right to Cure Act is appropriate.” Id. The circuit court has likewise made this finding and outlined this process in the Preliminary Case Management and Scheduling Order. The circuit court has acted entirely consistent with the Grazia Court’s directive and the Appellants’ challenge in this regard is frivolous.

Further, the enforcement mechanism of the Right to Cure Act is a stay of the action pending compliance with the Right to Cure Act. S.C. Code Ann. § 40-59-830. Accordingly, the most that the Appellants could have been denied on account of alleged noncompliance with Right to Cure Act is a stay, and an immediate appeal does not lie from an order denying a stay. See Carolina Water Service, Inc. v. Lexington County Joint Mun. Water and Sewer Comm’n, 373 S.C. 96, 644 S.E.2d 681 (2007) (holding that an order lifting a stay is not immediately appealable); Edwards, 369 S.C.

at 94-5, 631 S.E.2d at 530-31 (“The order here does not discontinue the proceeding. It merely temporarily stays the matter pending a ruling by the FCC. Accordingly, we find an order granting a stay is not immediately appealable.”).

Further still, the Right to Cure Orders do not prevent a judgment from being rendered in the action or prevent the Appellants from seeing review of these orders at final judgment. *Cf. Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 809 (1995) (holding that the circuit court’s refusal to enforce an alleged settlement agreement was not subject to immediate appeal under § 14-3-330, and explaining that “[t]he order in this case does not prevent a judgment from being rendered in this action, and appellant can seek review of the current order in any appeal from final judgment.”). And, of course, as a general proposition, allowing immediate appeals in conjunction with the Right to Cure Act will invite dilatory interlocutory appeals.

Further still, the Preliminary Case Management and Scheduling Order is, on its face, preliminary. The other Right to Cure Orders, which were entered essentially contemporaneous with the Preliminary Case Management and Scheduling Order, by their own terms reflect a lack of finality, providing that, “[t]he Court further notes that, in accordance with its authority to

maintain continual control over class action proceedings and the Supreme Court's decision in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010), it will address issues pertaining to S.C. Code Ann. §§ 40-59-810 to -860 in this case in due course." This is consistent with the broad and continuing case management authority granted the circuit court under Rule 23(d), and also with the specific managerial role conferred upon Judge Young by the Order Establishing Complex Case Designation and Appointment of Judge Roger M. Young as Case Manager. (See **Exhibit 3.**)

- **Order Denying Del Webb Communities, Inc.'s Motion to Conduct Discovery as to Individual Class Members**

Del Webb argues that this order is appealable under § 14-3-330(2)(c) because it strikes its affirmative defenses. Simply put, it does not, and it is not appealable, because it does not remove any material issue from this case or prevent it from being litigated on the merits, to the extent that such litigation is indeed necessary. See Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (2011) ("An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and prevents the party from seeking to correct any errors in the order during or

after trial.”). It is merely an interlocutory case management/discovery order, within the circuit’s discretion, which is part of the circuit court’s attempt to conduct an adjudication of common issues before dealing with any remaining individual issues—issues which may be wholly avoided if the defendants prevail in the adjudication of common issues. *See* 3 Newberg on Class Actions § 9:53 (4th ed.) (“To avoid . . . difficulties [with individual issues], some courts have suggested split trials—trying common issues in one proceeding and individual questions in a second.”); Id. at § 9.59 (“[T]he chief judicial management tool for handling individual issues is to sever them for subsequent trial, with or without severed discovery opportunities.”); Id. at § 9.61 (“One popular option in adjudicating class actions is to devise a plan for initially resolving the common issues, and then, only in the event the plaintiffs are successful, the court will turn its attention to the details of a management plan for the remaining individual issues.”).<sup>10</sup> Such an order is not immediately appealable. Eldridge, 308 S.C.

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<sup>10</sup> Indeed, the class notice explains:

The Court has determined that certain claims common to the class will be tried in one proceeding. If a judgment is entered against the Plaintiffs, you will be bound by that judgment and will have no further claims against the Defendants. If judgment is entered for the Plaintiffs, you will then have to participate in a subsequent proceeding to determine whether you are entitled to a monetary award, and, if so, the amount of any such award.

at 127, 417 S.E.2d at 534 (“Orders under Rule 23, SCRCR are interlocutory and thus, immediate appealable only in certain circumstances.”); Hamm, 312 S.C. at 241, 439 S.E.2d at 853 (“Discovery orders, however, are interlocutory and are not immediately appealable.”); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000) (an order bifurcating discovery it not immediately appealable).

Moreover, the relief requested in Del Webb’s motion was patently absurd and its appeal from the denial of such relief is patently frivolous. As noted above, Del Webb’s motion sought asked the Court to allow it to engage in a 9-year discovery process, with some 3,000-plus depositions to be taken, and enter a scheduling order essentially establishing a “trial-not-before” date sometime in 2024, which would also require the Respondents to provide an expert report for each class home. (See Exhibit 1.) The circuit court’s denial of such an unduly burdensome and abusive request is squarely within its sound discretion. See Hamm, 312 S.C. at 241, 439 S.E.2d at 854 (“When the discovery process threatens to become abusive or to create a particularized harm to a litigant or third party, the Rules allow the trial judge broad latitude in limiting the scope of discovery.”); see also Palmetto Alliance v. South Carolina Pub. Serv. Comm’n, 282 S.C. 430, 434, 319

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S.E.2d 695, 698 (1984) (scope and conduct within sound discretion of trial judge).

- **Order Granting Class Certification**
- **Order Denying Del Webb Communities, Inc.’s Motion for Reconsideration and/or clarification**
- **Order Denying Georgia-Pacific’s Motion to Reconsider, Alter, or Amend the Judgment**
- **Order Denying Georgia-Pacific’s Motion to Strike Affidavits of Andy W.C. Lee, Derek Hodgin, and Thomas J. Carlson<sup>11</sup>**

It is clear that these orders are not immediately appealable. *E.g.* Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (“Orders under Rule 23, SCRPC are interlocutory and thus, immediate appealable only in certain circumstances.”). Neither Del Webb nor Georgia-Pacific even argues that they are immediately appealable; they just ask that they tag along for immediate appellate review should the Court find another order to be immediately appealable. Of course, the Respondents respectfully submit that none of the interlocutory orders the Appellants have appealed is immediately appealable, as the Court has already correctly determined. Assuming, *arguendo*, however, that the Court may disagree, in no event should these class certification-related orders be subjected to immediate

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(Appellants’ Joint Appendix p. 7.)

<sup>11</sup> Georgia-Pacific’s motion precipitating this order is part and parcel of its effort to opposed class certification.

appellate review. *See* Salmonsens, 377 S.C. 422, 661 S.E.2d 81 (even where it addressed the merits of another issue that it found to be immediately appealable, our Supreme Court expressly refused to entertain an interlocutory appeal of the circuit court's class certification decision despite argument against precedent that it do so).

- **Order Regarding Interlocutory Appeals**
- **Order Denying Reconsideration of Order Regarding Interlocutory Appeals**

As the Court correctly found in the Subject Order, review of these orders is unnecessary because none of the underlying orders on appeal is immediately appealable.


### **CONCLUSION**

For the foregoing reasons, and any other reasons evidenced by their other submissions to this Court, the Respondents ask that the Court deny the petitions for rehearing filed by Del Webb and Georgia-Pacific's appeal.

**<SIGNED ON THE FOLLOWING PAGE>**

Respectfully submitted,

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*Attorneys for the Respondents*

Charleston, South Carolina

Dated: 10/17/12

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

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Appeal from Beaufort County  
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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Case No. 2007-CP-07-3166

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

Respondents,

v.

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

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OCT 19 2012  
**SC Court of Appeals**

Of whom Del Webb Communities, Inc., an  
Arizona Corporation, and Georgia-Pacific  
Corporation and/or Georgia-Pacific LLC are

Defendants,

Appellants.

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**PROOF OF SERVICE**

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Case No. 2007-CP-07-3166

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*Attorneys for the Respondents*

I, Russell G. Hines, of Young Clement Rivers, LLP, do hereby certify that a copy of the **Respondents' Return to Appellants' Petitions for Rehearing** in the above-captioned matter was served on all other parties to this litigation by depositing a copy of the same in the United States Mail, postage prepaid, on October 17, 2012, addressed as follows to their attorneys of record:

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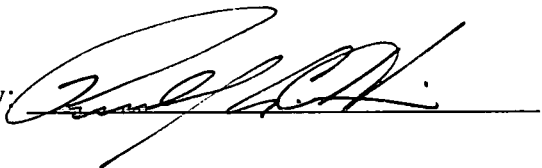
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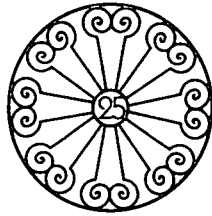
*Attorneys for Defendant DJ Construction Co., LLC*

YOUNG CLEMENT RIVERS, LLP

By: 

Charleston, South Carolina

Dated: 10/12/12



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October 17, 2012

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

Re: Jim Lancaster et al. vs. Georgia-Pacific Corporation et al.  
Circuit Case No.: 2007-CP-07-3166  
Appellate Case No.: 2012-210927 (consolidated with 2012-211920)  
YCR File No.: 13376-20070735

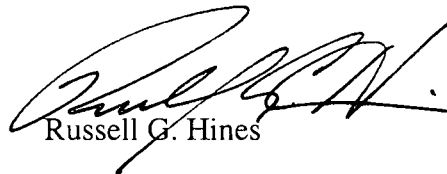
Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter please find the original and seven (7) copies of the **Respondents' Return to Appellants' Petitions for Rehearing** along with the original and two (2) copies of a **Proof of Service** for the same. Kindly return a stamped copy of the motion and proof of service to me in the enclosed envelope. Of course, if you have any questions or concerns please let me know.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

  
Russell G. Hines

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OCT 19 2012

**SC Court of Appeals**

Enclosures

cc: (All below via U.S. Mail)  
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**SC COURT OF APPEALS**

Jenny Abbott Kitchings, Clerk of Court  
October 17, 2012  
Page 2

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