

THE STATE OF SOUTH CAROLINA)
)
BEAUFORT COUNTY)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

v.)

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

Defendants.)

Case No. 2007-CP-07-03166

**DEL WEBB COMMUNITIES, INC.'S
MOTION TO CONDUCT
DISCOVERY AS TO INDIVIDUAL
CLASS MEMBERS**

Without waiving its motion for reconsideration of the court's order granting class certification, Del Webb moves the court to allow individual class member discovery and for the eventual entry of a scheduling order requiring the plaintiffs to provide an expert report specifically addressing each class member's individual claims. As explained in its Memorandum in Opposition to Class Certification, it is unheard of to have a class certified in construction defect cases that involve installation issues. The problem is the myriad of individual, house specific issues that require discovery. Accordingly, if the court does not deny class certification, discovery will need to be conducted as to all remaining class members.¹

I. Plaintiffs' Experts Have Testified That Each Individual Class Member's House Will Have To Be Inspected.

Plaintiffs' experts' testimony demonstrates that no dispositive common issue exists:

¹ Del Webb does not waive its argument that class certification is improper in this case and does not waive the right to continue to seek to have the class decertified because of lack of compliance with the Rule 23 factors.

Exhibit 1

Q. And you can't tell me whether there was any damage behind the PrimeTrim on that uninspected house, correct?

A. Correct.

Hodgin, Derek A., P.E. - Vol. III, 40:10-40:13, Nov. 19, 2010:

Q. And if there is damage, you can't tell me the proximate or root cause of the damage of -- any water damage to the OSB, correct?

A. To the OSB or the PrimeTrim?

Q. The OSB, damage behind the PrimeTrim.

A. No.

Hodgin, Derek A., P.E. - Vol. III, 40:14-40:19, Nov. 19, 2010.

Q. So in general, just by looking at one of the named Plaintiffs' houses, you can't tell me any construction deficiencies whatsoever with regard to an uninspected house, correct?

A. Not specifically, no.

Hodgin, Derek A., P.E. - Vol. III, 42:17-42:21, Nov. 19, 2010.

As plaintiffs' experts testified, there is no issue that could be determined with regard to Del Webb for the whole class by looking only at the named plaintiffs' houses, dealing only with the named plaintiffs' claims, or by deposing only the named plaintiffs. Accordingly, if class certification is not denied, discovery will have to go forward with regard to every class member.

II. Each of Plaintiffs' Claims Requires Individual Proof as to Every Class Member.

In order to prove any of the elements of the alleged causes of action (duty, breach of duty, causation, damages, and representations as to warranty issues) individualized proof as to each of the putative class members would be necessary. All of plaintiffs' causes of action require individualized proof as to each of the putative class members.

A. Plaintiffs' Negligence Claim Requires Individualized Proof as to Each of the Putative Class Members.

In order to establish a cause of action for negligence, Plaintiffs must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a

negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty. *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86 (1998). None of the elements are susceptible to class wide proof, but rather would require house specific evidence to prove negligence for every homeowner.

1. Duty.

Plaintiffs allege that defendants had a duty to abide by the relevant building codes, relevant manufacturers' specifications, and relevant industry standards. However, none of these issues are common to all houses in the alleged class. The duty would depend on which building code applied in the year the house was built, what version of PrimeTrim manufacturers' specifications related to that year, and so on. Even if you only look to what relates to the seven categories of things that plaintiffs' experts claim could be "improper," there would be numerous variations/combinations of building codes, manufacturers' specifications, and industry standards that would apply to the different putative class members' houses. Plaintiffs' experts agree that you would have to know which specifications match up to which house:

Q. I think so far, at least in your deposition, there have been now three different versions of PrimeTrim installation instructions marked as exhibits.

A. I believe so.

Hodgin, Derek A., P.E. - Vol. IV, 312:21-312:25, Dec. 13, 2010.

Q. And with regard to any house at Sun City Hilton Head that you're going to give an opinion on with regard to whether the installation of PrimeTrim meets the manufacturer's installation instructions, you would have to know which set of instructions applied at which time and which applied to that house, correct?

A. I believe that would be correct, yes.

Hodgin, Derek A., P.E. - Vol. IV, 321:25-322:7, Dec. 13, 2010.

Q. And it makes a difference which set of PrimeTrim installation instructions you look at with regard to complying with the instructions, correct?

A. It does.

Hodgin, Derek A., P.E. - Vol. IV, 315:14-315:18, Dec. 13, 2010. Plaintiffs' experts also state that there are different building codes that would relate to the houses at issue:

Q. Let me just ask you this, is it your understanding that those houses were constructed between 1994 and 2002?

A. I think that's my understanding. I think that's what I've been told.

Q. So over that eight-year period of time, is it your understanding that different building codes apply?

...

A. There would be different building codes, yes.

Q. Do you know which ones they would be?

A. Well, it would be the '92 CABO, '95 CABO, and I'd have to check my files to see when Beaufort County adopted the 2000 IRC.

Carlson, Thomas J. - Vol. III, 72:23-73:14, Dec. 10, 2010.

Accordingly, because the building codes, manufacturers' specifications, and industry standards would vary from house to house, discovery regarding these issues will differ from house to house.

2. *Breach of Duty*

After the duty is determined for a given house (the relevant building codes, relevant manufacturers' specifications, and relevant industry standards for the given house), an examination of each of the seven factual issues outlined by plaintiffs' experts would have to be conducted for each house. The relevant duty/standards for each of the seven categories would have to be compared to the actual condition of each house. For example, with regard to flashing over PrimeTrim at the head of a window on a house constructed in 1995, the standards that

would apply for the dates of construction for the house would be compared to the actual condition of flashing at the house (*i.e.*, is flashing required (and if so in what configuration) by the 1995 code, the 1995 version of the manufacture's specifications, or by 1995 industry standards? If so, is there flashing on the house and how was it configured?) It is undisputed that some houses have flashing over PrimeTrim at the window heads, while others do not. Accordingly, in order to prove breach of the standards (duty), there would have to be an individual inquiry into each house in the proposed class as to each of the following:

- The date of construction of the house. (There are numerous different combinations of building codes, industry standards, and manufacturer requirements that might apply depending upon the date of construction).
- Then it would have to be determined whether any of the PrimeTrim on a house was installed by the defendants.²

² Q. But for the purposes of this deposition, if trim board has been replaced on the houses, it would be important for you to know that in determining, you know, who was at fault in the installation of those boards, correct?

A. That's correct.

Hodgin, Derek A., P.E. - Vol. III, 180:20-180:25, Nov. 19, 2010.

Q. You would agree that any trim product that was used on an addition to a house, an addition that was not built by the original builder or installer, would not be the responsibility of the builder or the installer, correct?

A. Correct.

Hodgin, Derek A., P.E. - Vol. III, 185:22-186:3, Nov. 19, 2010.

Q. You would agree that the builder and/or installer would not be responsible for the methods utilized in installing replacement trim on any given house, correct?

A. Yes. They would only be responsible for their own work.

Q. So if there was any defect in the installation of replacement trim boards, that would not be the responsibility of the builder or installer, correct?

A. I agree.

Q. And from the builder and installer standpoint, even if that replacement board was PrimeTrim, that would not be the responsibility of the builder or the installer, correct?

A. I agree.

Hodgin, Derek A., P.E. - Vol. III, 178:25-179:16, Nov. 19, 2010.

Q. So is what you're testifying to that you may be able to tell in some circumstances that a replacement product was used but not in all circumstances?

- For PrimeTrim that was installed by defendants, are any of the seven (7) possible alleged defects found on that house.

Plaintiffs' experts admit that they don't know whether there is a problem with PrimeTrim installation until they inspect the given house:

Q. Would it be fair to say that before you can give an opinion as to whether the installation methods were proper with regard to PrimeTrim, you would have to inspect the installation on that given house?

A. I think that that's fair to say.

Carlson, Thomas J. - Vol. III, 55:23-56:3, Dec. 10, 2010.

Q. So is it fair to say that, in general, that you can't tell me anything specific about any defects with the house at Sun City Hilton Head until you inspected it?

A. In terms of the installation, I would say that's correct.

Hodgin, Derek A., P.E. - Vol. III, 31:19-31:24, Nov. 19, 2010. Accordingly, an inspection of every class member's house would be required, and expert testimony regarding every house would be required for plaintiffs to prove breach of duty. Defendants are entitled to do discovery on these issues.

3. *Damages*

In their pleadings, plaintiffs make every effort to paint the image of a very manageable class with all putative plaintiffs suffering the same injury, with the same amount of damages. This ignores reality.

A. That's correct.

Q. And even to tell, in some of the circumstances you would have to do some type of destructive testing?

A. Correct.

Q. Or, of course, you could ask the homeowner if they've ever replaced any of their trim?

A. Well, you could do that, but they may not know exactly where and how much trim was replaced, so I'd feel better about the destructive testing.

Hodgin, Derek A., P.E. - Vol. III, 182:9-182:24, Nov. 19, 2010.

First of all, plaintiffs' experts admit that if the PrimeTrim boards are installed incorrectly, but show no deterioration or damage, then they would not need to be replaced because of the installation error.³ Plaintiffs admit that they do not know if the named plaintiffs have damage behind their trim.⁴ Plaintiffs admit that they do not know if all putative class members have any

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- ³ Q. So from the builder or installer's standpoint, you're actually looking to see whether the installation method caused damage to the board or otherwise to the house, correct?
- A. Well, out of completeness of my report, I tried to include that there were places where it was properly installed and improperly installed. And I didn't -- I think that was one of the exercises we talked about earlier, to try to go through each one and do a more specific job delineating, all right, if it was installed improperly, did that result in any of the damages that you observed on the board or not? And that's an exercise we haven't done yet.
- Q. Just to make sure I understand what you're saying, if the board was installed improperly but shows no damage in your opinion because of that improper installation, you would not fault the builder for the replacement cost of that board?
- A. I mean, it would still be a technical violation of the code or the application instructions. But if there's no damage, the only reason we would be replacing it is because of another issue, which is the defective trim.
- Q. In other words, there are several situations if you go and look at a house where there may be some type of installation defect that occurred years ago that didn't ever result in damage and it's not worth repairing that issue 16 years later when there's no damage?
- A. I agree with you.

Hodgin, Derek A., P.E. - Vol. III, 170:23-172:4, Nov. 19, 2010.

- ⁴ Q. And even as to just the four named Plaintiffs' houses, you can't identify today the extent of any consequential damages that have resulted because of any improper installation of the trim, can you?
- A. That would be true.

Carlson, Thomas J. - Vol. III, 200:21-201:1, Dec. 10, 2010.

- Q. So just overall, with regard to 137 Robert E. Lee, you did several destructive test cuts; is that fair?
- A. Yes.
- Q. And some of those cuts showed damage or deterioration to the trim boards, correct?
- A. Yes, sir.
- Q. And some of the test locations showed trim that did not manifest any physical compromise at this point?
- A. That's correct.

...

- Q. So did you find some locations on 137 Robert E. Lee Lane where the deteriorated PrimeTrim and/or the installation of the PrimeTrim caused some deterioration to the HardiePlank that was on the house?
- A. No. I said the damage is outboard of it. It's discolored, but it's not damaged.

damage behind their trim.⁵ And plaintiffs' experts admit that there may be houses that have no damage in the putative class.⁶ For the houses that do have damage, the extent, area of damage

Q. Okay. So with regard to all the locations that you did destructive testing on 137 Robert E. Lee, the only damage that you observed was to the PrimeTrim itself?

A. Correct.

Hodgin, Derek A., P.E. - Vol. III, 249:17-250:20, Nov. 19, 2010.

⁵ Q. Actually, on 102 Honey Hill, you can't tell me whether any PrimeTrim has deteriorated at all, can you?

A. That would be correct.

Q. And you wouldn't be able to do that without doing some type of inspection, correct?

A. Correct.

Q. And you can't tell me whether there's any damage behind any of the PrimeTrim at that house, at 102 Honey Hill, correct?

A. Correct.

Carlson, Thomas J. - Vol. III, 62:19-63:4, Dec. 10, 2010.

Q. And you would not be able to tell me whether there's any damage behind any of the PrimeTrim at 102 Honey Hill without doing some type of investigation and pulling off the PrimeTrim itself, correct?

A. You can even do an inspection and not be able to determine whether there's damage.

Q. In order to determine damage on any given house, you'd actually have to remove the PrimeTrim on that house to see behind it, correct?

A. I'd have to take it on a case-by-case basis.

Carlson, Thomas J. - Vol. III, 63:5-63:22, Dec. 10, 2010.

Q. Okay. For any house in Sun City Hilton Head, to determine whether there was damage behind the PrimeTrim, you would actually have to remove the PrimeTrim on that house, correct?

A. To know with certainty, that would be correct.

Carlson, Thomas J. - Vol. III, 63:23-64:5, Dec. 10, 2010.

⁶ Q. Now, with regard to all damage on any house behind PrimeTrim --

A. Correct.

Q. -- if I wanted to know, Mr. Carlson, tell me the location of damage -- of all damage behind PrimeTrim on this house, you wouldn't be able to do that until all the PrimeTrim was removed, correct?

A. I think that's correct.

Q. And if there was no outward sign of damage, when looking at a house, before you removed the PrimeTrim, you wouldn't be able to tell me whether there was any damage behind the PrimeTrim without removing the trim, correct?

A. It's possible that there is no damage behind the PrimeTrim at one of the houses at Hilton Head. The possibility exists.

and repair will vary for each house.

Accordingly, it is clear that damages would have to be determined on a house by house basis, and would require expert testimony for each house. Plaintiffs' experts agree that just inspecting the named plaintiffs houses provides no information as to the condition of any other house.⁷ One reason for the individual inquiry is that there is no way to tell the extent of any

Carlson, Thomas J. - Vol. III, 83:5-83:21, Dec. 10, 2010.

- 7 Q. And in general, just by looking at the four named Plaintiffs' houses, you can't tell me anything about the installation or damage related to PrimeTrim on the hypothetical house?
- A. Let me just make sure I'm on the same page with you.
- Q. Yes, sir.
- A. I've only looked at the four houses of the class reps, not looked at any other houses --
- Q. Correct.
- A. -- and then we have this hypothetical house at Sun City that I haven't looked at?
- Q. Right. That has PrimeTrim and HardiePlank.
- A. I don't think I can tell you anything about that house --
- Q. Right.
- A. -- that I haven't seen. The only thing with any high degree of probability I could probably tell you about that hypothetical house was it's one story. I couldn't go a whole lot beyond that.

Carlson, Thomas J. - Vol. III, 91:16-93:24, Dec. 10, 2010.

- Q. Let me ask you in this way, then: From looking at the results of the destructive testing of any of the seven houses that you have done destructive testing to, just by doing destructive testing on that house, you can't tell me -- and this is similar to the line of questioning I just asked you -- you can't tell me where PrimeTrim is damaged on any house that you've not tested, correct?
- A. No, not specifically.
- Q. And just by looking at -- or doing destructive testing to one of the named Plaintiffs' houses, you can't tell me whether another house in Sun City Hilton Head even has PrimeTrim, correct?
- A. That's correct.
- Q. And you can't tell me if any of the PrimeTrim on that uninspected house has deteriorated, correct?
- A. Not specifically, no. Not without doing a survey.
- Q. And you can't tell me whether any PrimeTrim on that house has been flashed, correct?
- A. Correct.
- Q. And you can't tell me whether there was any damage behind the PrimeTrim on that uninspected house, correct?
- A. Correct.

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- Q. And if there is damage, you can't tell me the proximate or root cause of the damage of -- any water damage to the OSB, correct?
- A. To the OSB or the PrimeTrim?
- Q. The OSB, damage behind the PrimeTrim.
- A. No.
- Q. And you can't tell me the installation methods utilized for the PrimeTrim on that house without inspecting it first, correct?
- A. That's correct.
- Q. And you can't tell me by looking at just one of the named Plaintiffs' houses which PrimeTrim boards would need to be replaced specifically on any uninspected house, correct?
- A. I think the way I answered that before was that there would be -- you know, exposed boards would need to be replaced, the vertical trim, the base of the wall, around the windows and the fascia.
- Q. Let me change the question a little bit. I apologize. You did explain that earlier. With regard to any trim boards that may need to be replaced because of installation methods and not because of the underlying defective nature of the product, you can't tell me which boards would need to be replaced on any house without inspecting it first, correct?
- A. That's correct.
- Q. And just by looking at one of the named Plaintiffs' houses, you can't tell me whether the uninspected house has any type of addition to that house, correct?
- A. Correct.
- Q. And you can't tell me whether or how much any of the PrimeTrim has been replaced by either PrimeTrim or some other product, correct?
- A. Correct.
- Q. And you can't tell me what installation details, whoever the repair contractor was that replaced PrimeTrim, utilized, whether they flashed the trim correctly, correct?
- A. Correct.
- Q. And you can't tell me without -- just by looking at the Lancaster house whether the uninspected house has any other problems related to the installation of PrimeTrim or some other construction defect, correct?
- A. Correct.
- Q. And you can't tell me whether the homeowner that owns the uninspected house has any mold issues or health issues that are derived from mold from wet OSB or framing members, correct?
- A. Correct.
- Q. So in general, just by looking at one of the named Plaintiffs' houses, you can't tell me any construction deficiencies whatsoever with regard to an uninspected house, correct?
- A. Not specifically, no. We would need to look at the consistency of the seven that we have. Maybe there's some records that would indicate, you know, the PrimeTrim or the extent of maintenance, and you would look at the contractors, if there was a change in subcontractors. But I agree, as far as the installation methods, you wouldn't know specifically without looking at each house.

Hodgin, Derek A., P.E. - Vol. III, 39:11-44:6, Nov. 19, 2010.

damage to the substrate until you tear off the PrimeTrim.⁸ And, the trim would have to be removed from any given house to get an accurate estimated cost of repair.⁹ Finally, plaintiffs' experts agree that whether there are any consequential damages at all on any given house is an unknown issue.¹⁰

Defendant should be allowed to do discovery as to these issues on a house by house basis.

4. Proximate Cause

While there may be damage to the PrimeTrim or to the framing members behind the PrimeTrim, Plaintiffs have the burden of proving that the breach of duty (PrimeTrim installation defect) proximately caused the damage. Specifically, plaintiffs bear the burden of proving that any damage was proximately caused by plaintiffs' experts' seven (7) issues. Initially, plaintiffs' experts admit that the amount of PrimeTrim that might be affected by installation would be

⁸ Q. And why are you going to have some guesswork and allowances?

A. Because until you tear into the house and remove the trim, you're not going to know the extent of those consequential damages.

Hodgin, Derek A., P.E. - Vol. IV, 289:20-25, Dec. 13, 2010.

⁹ Q. For the one house that we're talking about, in order to give an accurate price to repair damage behind the PrimeTrim, you would have to know what that damage was first, correct?

A. I think that would be correct.

Carlson, Thomas J. - Vol. III, 175:24-176:3, Dec. 10, 2010.

¹⁰ Q. So as we sit here now, do you know -- other than pulling off the existing PrimeTrim and replacing the existing PrimeTrim and adding the flashing that you claim should be there, does anything else need to be done to these houses?

A. I think to the extent that there's underlying damage, that would need to be addressed. And I don't know how Mr. Carlson is dealing with that, because it's an unknown issue.

Hodgin, Derek A., P.E. - Vol. III, 193:3-193:11, Nov. 19, 2010.

Q. So you can't tell whether there is damage to the PrimeTrim board that you're referring to itself or damage behind the PrimeTrim board unless you do a destructive testing?

A. Correct.

Hodgin, Derek A., P.E. - Vol. III, 61:24-62:3, Nov. 19, 2010.

different on each house.¹¹ Then, for areas where damage is found, plaintiffs' experts explain that there are many other issues (unrelated to PrimeTrim installation) that could be the cause of damage to the OSB or Framing behind PrimeTrim at houses in Sun City, and more importantly, that destructive testing will be required on each house to determine whether damage was proximately caused by PrimeTrim installation issues.¹² Plaintiffs' expert Mr. Carlson testifies

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- ¹¹ Q. And so -- when I say that, you would go through the photos of each residence and look for boards that were -- showed some type of deterioration or damage, and then you'd have to see whether or not you thought that any of the deterioration or damage had to do with the installation methods or not?
- A. Right.
- Q. And so at the end of the day, theoretically, we could have a mapping of the house where you can say, This board, you know, may have been affected; this board would -- in my opinion would not be affected, correct?
- A. Right.
- Q. And that map on the seven different houses that you've looked at, you would expect to be different, correct, because not all of the boards are damaged, right?
- A. I believe that's correct. I would have to go through the exercise before I could tell you for sure.

Hodgin, Derek A., P.E. - Vol. III, 56:16-57:11, Nov. 19, 2010.

- ¹² Q. And if -- and it's possible that there is damage to OSB behind PrimeTrim that was not caused by either the installation of the PrimeTrim or the defective nature of PrimeTrim itself, correct?
- A. That's possible.
- Q. Sure. It could be a leaky window, right?
- A. Right.
- Q. It could be some other source of water that you would have to track down to determine the source of water that's causing the OSB to deteriorate, correct?
- A. That's possible, yes.
- Q. And you won't know the actual proximate cause or underlying root cause of any water damage until you determine the source of that water, correct?
- A. Yes.
- Q. So for any water damage or deterioration that you may find behind PrimeTrim boards in Sun City Hilton Head, you would have to make a further determination that that deterioration is related to PrimeTrim and not some other water source, correct?
- A. I believe that's correct. There's typically a combination of where the water is coming in and the extent of damage. But I guess specific to the PrimeTrim, when the PrimeTrim gets wet and is in that path of the water, there's typically deterioration of the PrimeTrim. As to the deterioration of the OSB, I agree with you that there could be another cause besides the deterioration of the PrimeTrim that could cause that damage.

Hodgin, Derek A., P.E. - Vol. III, 18:15-19:24, Nov. 19, 2010.

that there were several issues unrelated to PrimeTrim that he would expect to be the cause of water damage behind trim boards.¹³

Q. Okay. Who would you recommend paying for that repair if it's not related to the installation of PrimeTrim or not related to the inherent defective nature of PrimeTrim?

A. It would depend on the source of the water intrusion. It could be a window issue. It could be an improper installation issue. Not necessarily the PrimeTrim; it could be the improper installation of the window. So there's other construction defects that could have led to the damage of the OSB.

Q. So it could be the installer of the window; it could be the manufacturer itself; it could be the installer of the roof/wall intersection flashing?

A. Sure.

Q. It could be the installer of the weather-resistant barrier that wasn't lapped correctly?

A. Yeah. All of those are possibilities.

Q. And we would not know who to look for with regard to any of that type of damage until you pointed out what that damage was and gave us your opinion as to what the cause of that underlying damage was, correct?

A. I believe that's correct.

Hodgin, Derek A., P.E. - Vol. III, 20:17-21:17, Nov. 19, 2010.

Q. For these seven houses, are you comfortable in testifying, that as to a reasonable degree of engineering certainty, that there is no damage to the OSB behind the PrimeTrim anywhere on those houses that is related to anything other than PrimeTrim and/or PrimeTrim installation?

A. No.

Q. And what would you have to do to be able to make such testimony?

A. We'd have to look at each area of the OSB damage.

Q. And you've not done that yet?

A. No.

Q. And in fact, to be able to tell us the underlying or the proximate cause of any OSB damage on any house at Sun City Hilton Head, you would actually have to do a destructive testing on that house, correct?

A. I believe so, yes.

Hodgin, Derek A., P.E. - Vol. III, 22:23-23:21, Nov. 19, 2010.

¹³

Q. So let's say on any given house at Sun City Hilton Head that has HardiePlank siding and PrimeTrim trim, you pull off the windowsill trim piece and you find damage to the OSB at the bottom corner of the window. What would you have to do to determine the source of that water?

A. You would have to look at the conditions before you started taking it apart. And then as you take it apart, if you're going to do a diagnostic -- if that's your purpose, is to diagnose what's wrong, you take it apart surgically, piece by piece, so you can see how it was assembled.

Q. And with damage to OSB and framing at the bottom corner of the window, what would be the primary areas that you would initially suspect would be the source of the water?

A. Well, you're giving me a hypothetical.

Q. Yes, sir.

Furthermore, plaintiffs' experts agree that to determine the proximate cause of damage to or behind PrimeTrim on any given house, house specific analysis is required.¹⁴

Accordingly, expert analysis and testimony will be required to prove proximate cause on a house by house basis. Furthermore, plaintiffs' experts agree that the proximate cause for each incidence of damage on each house may be a disputed factual issue.¹⁵ Discovery should be allowed on each of these issues.

A. You could have a window leak. Typically, when you have damage to a house like the houses at Sun City, there are multiple causes. It's very rare when you can point to one cause. Typically, there's multiple causes. It could be improper installation of the materials, it could be deficient painting; it could be lack of flashing; it could be a window installation issue; it could be sealant issues, or any combination of those.

Carlson, Thomas J. - Vol. III, 21:6-23:14, Dec. 10, 2010.

14 Q. Okay. For any house in Sun City Hilton Head, to determine whether there was damage behind the PrimeTrim, you would actually have to remove the PrimeTrim on that house, correct?

A. To know with certainty, that would be correct.

Q. And with regard to any damage behind the PrimeTrim, like we discussed earlier, in order to determine the root, underlying or proximate cause of that damage, you would have to determine the source of the water getting to that damage, correct?

A. I would agree with that.

Carlson, Thomas J. - Vol. III, 63:23-64:10, Dec. 10, 2010.

¹⁵ Q. With regard to these other issues beyond just the simple replacement of trim boards themselves, you would agree that reasonable experts could disagree as to the cause of any damage found on the house, right?

A. Did you say cause or cost?

Q. Cause.

A. Cause. Sure.

Hodgin, Derek A., P.E. - Vol. IV, 295:20-296:3, Dec. 13, 2010.

Q. With regard to the cause of any water damage to OSB or framing members that may be located behind PrimeTrim, is it your experience that often experts disagree as to the cause of water damage?

A. I totally agree on that.

Carlson, Thomas J. - Vol. III, 71:24-72:4, Dec. 10, 2010.

Q. So if we -- it would be foreseeable to you that on some house at Sun City Hilton Head we could pull off a piece of PrimeTrim under a window and find some damage to OSB, and you may believe that the damage is caused by one thing, while other experts in the case may believe it's caused by something else?

B. Plaintiffs' Implied Warranty Claims Require Individualized Proof as to Each of the Putative Class Members.

The discovery necessary for Implied Warranty claims is very similar to that required for negligence claims. Individualized proof is required for damages and proximate cause as to each house.

The South Carolina Supreme Court has repeatedly held that plaintiffs must prove both damages and proximate cause in order to maintain causes of action for breach of implied warranty. In 2006, the South Carolina Supreme Court upheld the grant of summary judgment in a breach of implied warranty case because plaintiffs had no proof of physical injury to person or property. *Wilson v. Style Crest Prods.*, 367 S.C. 653, 657 (S.C. 2006). The Supreme Court described the case as follows:

In their complaint, the Homeowners allege: 1) negligence; 2) negligence per se; 3) breach of express warranty; 4) breach of implied warranty of workmanlike service; 5) breach of implied warranty of merchantability; 6) fraud and misrepresentation; 7) negligent misrepresentation; and 8) fraudulent concealment. In two separate orders, the circuit court granted the Defendants' summary judgment motions primarily on the ground that the Homeowners have not suffered any actual damages. The Homeowners appeal only the grant of summary judgment as to: Count 3 (breach of express warranty) against only the Home Defendants; and Counts 4, 5, and 8 (breaches of implied warranty of workmanlike service and merchantability and fraudulent concealment) against both Defendants. The Homeowners do not appeal the grant of summary judgment as to the other claims, i.e. negligence/tort claims.

...

The Homeowners concede that they have not suffered any personal injuries or physical damage to their homes. However, they contend they have suffered an economic loss by purchasing a defective product. ... The pivotal issue in this case is whether the Homeowners must prove an actual injury to person or property to bring their warranty and fraudulent concealment claims.

Id. (upholding summary judgment for plaintiffs' failure to prove actual injury).

A. That would be an anticipated event.

Carlson, Thomas J. - Vol. III, 72:5-72:12, Dec. 10, 2010.

Further, the Supreme Court has specifically held that plaintiffs must also prove that the breach of warranty was the proximate cause of the damage. In *Young v. Tide Craft, Inc.*, the Supreme Court stated that in actions

based on alternative theories of negligence, breach of implied warranty, and strict liability in tort ...Proximate cause is an essential element common to all three theories of recovery advanced by the respondent in this case. Prosser, *Law of Torts*, § 103, pp. 671-2 (4th Ed. [*462] 1971) (common elements); *Royal v. Black & Decker Manufacturing Co.*, 205 So. (2d) 307 (Fla. App. 1968) (common denominators); and *Williams v. Brasea, Inc.*, 497 F. (2d) 67 (5th Cir. 1974) cert. den. 423 U.S. 906, 96 S. Ct. 207, 46 L. Ed. (2d) 136 (1975).

Young v. Tide Craft, Inc., 270 S.C. 453, 461-462 (S.C. 1978). The Court has likewise held that:

A common element of actions for strict liability and breach of implied warranty is proof the product was not reasonably fit or safe for its intended use. *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E. (2d) 129 (1982). The proof must be sufficient to show not only that the product was defective but that the defect was the direct and efficient cause of plaintiff's injury. *Benford v. Berkeley Heating Co.*, 258 S.C. 357, 188 S.E. (2d) 841 (1972); *Madden v. Cox*, 284 S.C. 574, 328 S.E. (2d) 108 (Ct. App. 1985).

Livingston v. Noland Corp., 293 S.C. 521, 524 (S.C. 1987).

Furthermore, with regard to the breach of implied warranty cause of action, plaintiffs allege that they have been injured and otherwise damaged in that moisture has intruded into the subject residence causing water damage. Accordingly, as demonstrated above in the discussion of plaintiffs' negligence claim, it is clear that (1) plaintiffs must prove that any damage was proximately caused by PrimeTrim installation; and (2) that this will require individual inquiry (and expert opinion) regarding each house.

For the reasons explained above, individual class member discovery is required.

C. Defendants' Affirmative Defenses Require Individualized Proof as to Each of the Putative Class Members.

Other individual issues that the court would have to address for each class member involve the applicable affirmative defenses. Again, Rule 23 may not limit, alter or abridge any

of a defendant's defenses as to each of the plaintiffs. The United States Supreme Court just ruled that a class may not be certified on the assumption that defendants will not be allowed to prosecute their individual defenses as to individual class members. *See Wal-Mart*. Class certification may not prevent a defendant from pursuing his affirmative defenses. Accordingly, discovery would have to be conducted with regard to each plaintiff on each of the below defenses. A partial list of applicable defenses that will require house by house discovery and factual findings are below:

1. Statute of Limitations

The proposed class includes houses built from 1994 - 2002 (over an eight year period). Named plaintiffs did not bring their claims against Del Webb until April 30, 2009. Many of the homeowners knew or should have known about trim issues prior to April 30, 2006, and those homeowners' claims will be barred. Defendants are entitled to pursue this defense with regard to each individual homeowner, requiring discovery specific to each homeowner (including depositions of the homeowners, depositions of any home inspectors they may have hired, and document discovery). Determination of the discovery date of any PrimeTrim deficiencies would have to be made on a case-by-case basis for application of the statute of limitations. The court and/or a jury would have to consider this defense for each individual class member. Further, as demonstrated below in the "typicality" section, each named plaintiff has serious statute of limitations problems. Other homeowners will probably be in the same situation.

2. Statute of Limitations

Again, the proposed class includes houses built from 1994 - 2002. Named plaintiffs did not bring their claims against Del Webb until April 30, 2009. In South Carolina, the applicable statute of repose is 13 years. Thus, any owners of a house with a certificate of occupancy date prior to April 29, 1996 will have their claims barred. There are over 100 houses that would fall

into this category. Defendants are entitled to pursue this defense with regard to each individual homeowner, requiring discovery specific to each homeowner.

3. Failure to Mitigate Damages

The defense of failure to mitigate damages will require individualized proof for each putative class member. It is undisputed that homeowners have the duty to repair problems when they are discovered. One of the named plaintiffs admits to failing to mitigate damages.¹⁶ As one of plaintiffs' primary allegations against Del Webb relates to consequential damages (water damage behind the PrimeTrim), this defense is of substantial importance and will require discovery and jury determinations specific to each homeowner.

4. Contributory Negligence or Intervening Cause

Defendants would also be entitled to do discovery with regard to whether the plaintiff or another third party caused damage to the PrimeTrim. Homeowner maintenance is always a substantial issue in houses that are as old as the proposed class in this case.¹⁷

-
- ¹⁶ Q. Would you agree with me that by leaving rotting trim up for 2 to 3 years without fixing it, you worsened the problem of damage underneath that trim?
A. I would agree with that statement.
Q. And so you could have mitigated those damages or lessened them if you had undertaken yourself to repair in that time period, right?
A. Yes.

Lancaster, James, 47:23-48:5, Apr. 2, 2009.

¹⁷ Plaintiffs and their experts testified as follows:

- Q. Okay. You don't know what type of homeowner maintenance any other homeowner has done to their PrimeTrim and/or HardiePlank on other houses in Sun City Hilton Head, do you?
A. I know of neighbors who have replaced boards themselves, but I don't know any more than that.
Q. Of the 800 putative class members, can you tell me what homeowner maintenance has been done for all 800 houses?
A. No.

Turner, Wendell, 29:20-30:5, Sept. 16, 2010.

Also, there are homes in Sun City that have replaced or repaired PrimeTrim for numerous reasons (including adding onto the home, PrimeTrim damage caused by the homeowner, etc.). It is undisputed that these PrimeTrim issues would not be the responsibility of the defendants.

5. Contract Defenses

Many putative class members are original purchasers and have entered into contracts with Del Webb. Those contracts have many provisions that would disallow them from participating in this class and/or cause them to have to answer to different legal defenses. Specifically, there are different contract versions depending on what year the plaintiffs purchased their house. Depending on the version, the purchaser (putative class member) would not be able to participate in the class because (1) the purchaser waived implied warranties, (2) the purchaser waived all claims outside of the Del Webb written warranty, or (3) the claim is subject to arbitration.

(a) Some Putative Class Members Have Specifically Waived All Implied Warranties

The South Carolina Supreme Court has specifically held that waivers of implied warranties are enforceable:

We agree with the Supreme Court of Alabama "that the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability." *Turner v. Westhampton Court, L.L.C.*, 903 So.2d 82, 93 (Ala.2004). To maintain the protection of purchasers, however, disclaimer can be permitted only if strict conditions are satisfied. We adopt the requirements set forth by the Washington Court of Appeals: the

Q. So the rate of deterioration of PrimeTrim on any given house could be affected by the level of homeowner maintenance, correct?

A. It could be.

Carlson, Thomas J. - Vol. III, 94:16-94:19, Dec. 10, 2010.

Q. For example, whether or not they keep a good coat of paint on it, correct?

A. That would be one maintenance issue.

Q. Another maintenance issue would be maintaining the caulk joints, correct?

A. Depending on how the joints are configured, that would be correct.

Carlson, Thomas J. - Vol. III, 94:20-95:1, Dec. 10, 2010.

disclaimer "must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 106 P.3d 258, 263 (Wash. Ct. App. 2005).

Kirkman v. Parex, Inc., 369 S.C. 477, 485 (S.C. 2006).

In this case, some of the putative class members are original purchasers and have a contract with Del Webb. These original purchasers have specifically disclaimed all implied warranties, and accordingly may not maintain a cause of action for breach of implied warranties (nor may they be class representatives for such an action). One of the Sales Agreement that was entered into for one of the putative class members specifically states (also in all caps and bold):

DEL WEBB WARRANTS THE HOME IN ACCORDANCE WITH THE DEL WEBB HOME WARRANTY DATED APRIL, 1999, WHICH IS INCORPORATED HERIN BY THIS REFERENCE (THE "WARRANTY"). THE WARRANTY IS BEING PROVIDED BASED ON AGREEMENT THAT PURCHASER WILL LOOK TO THE WARRANTY AS THE SOLE MEANS OF RECOURSE IN THE EVENT OF ANY DEFECT CLAIM RELATED TO THE HOME OR PROPERTY. TO THE EXTENT PERMITTED BY LAW, PURCHASER WAIVES (1) ANY AND ALL ADDITIONAL WARRANTIES, EXPRESS OR IMPLIED, TO WHICH PURCHASER MAY BE ENTITLED, INCLUDING WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, HABITABILITY, OR WORKMANLIKE CONSTRUCTION, AND (2) ANY CLAIM FOR INCIDENTAL, SECONDARY, OR CONSEQUENTIAL DAMAGES INCURRED AS A RESULT OF ANY DEFECTIVE MATERIAL OR WORKMANSHIP IN THE HOME OR PROPERTY.

(Section 4.1 (Warranties).) Accordingly, all original purchasers have waived all implied warranties. They may not maintain an action for breach of implied warranties, and therefore the motion for class certification must be denied.

(b) Some Putative Class Members Have Specifically Waived All Claims Outside of the Del Webb Written Warranty.

The same language that is cited in bold in section a. above states:

THE WARRANTY IS BEING PROVIDED BASED ON AGREEMENT THAT PURCHASER WILL LOOK TO THE WARRANTY AS THE SOLE MEANS OF

RECOURSE IN THE EVENT OF ANY DEFECT CLAIM RELATED TO THE HOME OR PROPERTY.

Accordingly, these original purchasers may not maintain either negligence claims or implied warranty claims. Their recourse would be limited to the written warranty and a breach of contract claim should Del Webb not follow the warranty. Accordingly, discovery would have to be conducted to see if these plaintiffs made a proper warranty claim related to the PrimeTrim.

(c) Some Putative Class Members Have Specifically Agreed to Arbitrate Any Claim Related To The Construction of Their Houses

Many of the original purchasers in the putative class will have contracts that contain the same or similar language to that in the contract referenced above, that contains the following arbitration provision:

4.3 Arbitration.

Any controversy or claim arising out of or relating to this Agreement or Your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall take place in Beaufort County, South Carolina or at a place mutually agreed upon by both parties.

After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act. The Act is found at South Carolina Code Section 15-48-10 et seq. The rules of the American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding and the method of appointment of the arbitrator. The arbitration shall take place in Beaufort County or at a place mutually agreed upon by the parties.

Judgment upon any award rendered by arbitration may be entered in any court having jurisdiction over the matter. The cost of the arbitrator(s) shall be borne equally by the Purchaser and Seller. Any party to this Agreement may bring action, including a summary or expedited proceeding, to compel arbitration of any court having jurisdiction over such action, and the prevailing party in any such

action and in any arbitration shall be entitled to recover attorney fees and costs which shall be determined and awarded by the arbitrators.

Any doubts as to the scope of arbitrable issues should be resolved in favor of arbitration.

The South Carolina Supreme Court recently stated as follows:

We observe at the outset that it is the policy of this state to favor the arbitration of disputes. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. *Id.* at 597, 553 S.E.2d at 118-119.

Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 129, 678 S.E.2d 435, 437 - 438 (2009).

The scope of the present arbitration agreement covers the claims alleged by the plaintiffs. The arbitration agreement specifically states that it applies to: "every controversy or claim arising out of or relating to this Agreement, or the breach thereof..." The contract is for the construction of the house, which would include installation of the trim. As all allegations in the Third Amended Complaint are related to the construction of the residences, any original purchaser in the proposed class must be dismissed and/or compelled to arbitration.

III. Summary of House Specific Issues.

Again, all of the elements of each cause of action and each affirmative defense require individualized, house by house discovery and proof. Therefore, the court would have to engage in individual inquiry related to each of the following issues if the class were certified:

1. Is there PrimeTrim on the house?
2. Was the PrimeTrim installed by Del Webb? Or was the PrimeTrim installed by a repair contractor hired by the homeowner (to either repair PrimeTrim that was originally installed or to build an addition on the home)?

3. For originally installed PrimeTrim on the home, what installation methods were used?
4. What year was the house constructed? What building code, manufacturer's installation version, and industry standards relate to that year of construction?
5. Is there any PrimeTrim originally installed on the home that does not meet the above standards?
6. For any PrimeTrim board that was originally installed in a "defective" manner, are any of those PrimeTrim boards damaged?
7. If there are originally installed PrimeTrim boards that are damaged, what was the proximate cause of the damage to the PrimeTrim (installation method used, defective nature of PrimeTrim, another construction defect on house that allowed water behind PrimeTrim, lack of homeowner maintenance, some other issue)?
8. If the proximate cause of the PrimeTrim board's damage was the installation method, what is the cost to repair that location, and are other accessories needed such as flashing?
9. If there are PrimeTrim boards with installation "defects," is there water damage behind that PrimeTrim board?
10. What is the extent of damage behind the trim (OSB, framing, other)?
11. What is the proximate cause of the damage behind the PrimeTrim? Is it installation of PrimeTrim, defective nature of PrimeTrim, or some issue unrelated to PrimeTrim (such as window leak, window installation, roof leak, or some other construction defect; or is it homeowner maintenance related)?
12. Is there other damage on the home proximately caused by the improper installation of PrimeTrim (that is not immediately behind the PrimeTrim)?
13. If there is damage that was proximately caused by the installation of PrimeTrim, what is the extent of that damage and the estimated cost to repair?
14. Was the house built more than 13 years before suit was filed (statute of repose)?
15. Did the homeowner know (or should he have known) about PrimeTrim problems more than 3 years prior to filing suit (statute of limitations)?
16. How long has the homeowner known that there was a problem (mitigation of damages)?
17. Did the homeowner enter into a contract with Del Webb (contract defenses)?

Any efficiencies hoped to be gained by certifying a class in this case have long been extinguished in the face of the many individual inquiries that would be required. However, should the case go forward as a class, massive individual discovery will have to go forward in order to prosecute the merits of both the underlying claims and defenses.

IV. Request for Scheduling Order.

As the parties do not know how the court will rule on the outstanding motions for reconsideration and for clarification, we do not know exactly what claims will remain. Accordingly, we do not know exactly how a scheduling order should look. However, if 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 least one full time lawyer, then the expected discovery should take about 9 years. Del Webb requests that plaintiffs provide expert reports as to the specifics of their claims as to each homeowner (as it is undisputed that the claims vary by house) prior to entering into house specific discovery. A proposed scheduling order is attached hereto. (Again, defendant is not waiving the other motions and arguments with regard to stay, the right to cure process,

class decertification, and etc. by proposing this scheduling order. Depending on other rulings in this case, numerous changes may be required to the proposed order.)

Respectfully submitted,

MCNAIR LAW FIRM, P.A.

By



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Attorneys for Defendant Del Webb
Communities, Inc.

Dated: February 20, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

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

Case No. 2007-CP-07-03166

Plaintiffs,

v.

CERTIFICATE OF SERVICE

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

Defendants.

I, Pamela K. Jolley, an employee of the McNair Law Firm, P.A., do hereby certify that I served a copy of **Del Webb Communities, Inc.'s Motion to Conduct Discovery as to Individual Class Members** upon all counsel in this matter, by depositing the same in the United States Mail, postage prepaid, addressed as follows, this 20th day of February 2012.

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Exhibit 1

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A handwritten signature in cursive script that reads "Pamela K. Jolley". The signature is written in black ink and is positioned above a horizontal line.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

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

Case No. 2007-CP-07-03166

Plaintiffs,)

v.)

**PROPOSED DISCOVERY
SCHEDULING ORDER**

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

Defendants.)

1. Plaintiffs shall send court-approved class notice to all putative class members by April 15, 2012.

2. The opt-out/exclusion shall expire on June 1, 2012.

3. Each class member shall be required to comply with the provisions of the South Carolina Notice and Opportunity to Cure Residential Construction Defects Act. (Each class member must provide written notice under the Act to include the specific construction defects alleged to be found on the house, the specific location of said alleged defects, and the specific damage and locations of said damage that is a result of the alleged defects on that particular house.) The written notice must be signed by the homeowner. Any class member that has not

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

Roger Young, Circuit Court Judge

WE AGREE AND CONSENT:

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