THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-97-3166

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

v.

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

OF WHOM Georgia-Pacific Corporation and/or Georgia Pacific, LLC is..... Appellant

APPELLANT GEORGIA-PACIFIC LLC'S REPLY IN SUPPORT OF ITS PETITION FOR REHEARING

INTRODUCTION

The Plaintiffs' return to Georgia-Pacific's petition for rehearing is unpersuasive. The most glaring deficiency is Plaintiffs' failure to address Georgia-Pacific's central argument, that the deficiencies in the class notice are effectively unreviewable in the event a judgment is rendered in Georgia-Pacific's favor. The Plaintiffs also make the conclusory argument that the benefits accorded a litigant by the *res judicata* doctrine are

not substantial, while ignoring the authorities cited by both parties that demonstrate that avoidance of the burden and expense of re-litigation of the same issues is a fundamental principle of law. The unique circumstances of this case demonstrate that the interlocutory orders at issue are subject to immediate review.

ARGUMENT AND AUTHORITIES

I. The Class Notice Order is Immediately Appealable because it (A) Affects a Substantial Right and (B) Cannot be Reviewed after Final Judgment.

Plaintiffs agree with Georgia-Pacific that the test for appealability of the Class Notice Order is whether the order (A) affects a substantial right and (B) prevents a later appeal of the contested issue.[1] Here, the Class Notice Order adversely affects Georgia-Pacific's substantial right to *res judicata* protection and the ability to assert the defense of *res judicata* if it prevails in this matter,[2] and this right cannot be vindicated on appeal after final judgment. An interlocutory appeal is therefore proper.

A. *Res Judicata* is a Substantial Right.

Plaintiffs are correct that there is no authority squarely addressing whether the ability to assert *res judicata* is a substantial right within the meaning of S.C. Code Ann. § 14-3-330(2). This is hardly surprising as it is self-evident that the right not to be exposed to continual re-litigation of the same claims is substantial. Over the years, the courts have identified a variety of rights that are sufficiently substantial to support an immediate

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[1] (Pls' Resp. at 11.) *See also Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006).

[2] Res Judicata is an affirmative defense. *Dawkins v. Mozie*, 399 S.C. 290, 294, 731 S.E.2d 342, 345 (Ct. App. 2012). An order that effectively strikes out a defense affects a substantial right and is immediately appealable. *Edwards*, 369 S.C. at 94, 631 S.E.2d at 530.

appeal.[3] Contrary to Plaintiffs' view, however, there is no comprehensive list of rights qualifying as substantial. Instead, when analyzing this question, the courts consider (1) the importance of the right at issue and (2) the unique factual circumstances of the case.[4] Both of these factors support interlocutory review of the Class Notice Order.

1. *Res judicata* is an important right closely related to due process.

One of the principal purposes of any litigation is to obtain a final and binding judgment. A judgment would be a hollow victory if it were continually subject to attack. Following this reasoning, this Court has repeatedly held that the principle of *res judicata* serves several important public interests:

> *Res judicata* precludes parties from subsequently relitigating issues actually litigated and those that might

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[3] *E.g.*, *Neeltec Enters, Inc. v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) (order requiring the plaintiff to substitute two different defendants affected a substantial right); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 457, 661 S.E.2d 81, 89-90 (2008) (order establishing an "opt in" procedure for a class action affected a substantial right of class members); *Eldridge v. City of Greenwood*, 308 S.C. 125, 126, 417 S.E.2d 532, 533 (1992) (order prohibiting landowners who were contemplating filing a class action from communicating with potential class members affected a substantial right); *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 847 (Ct. App. 2007) (a pre-trial order suppressing evidence that significantly impairs the prosecution of the case affects a substantial right); *Lakes v. State*, 333 S.C. 382, 385, 510 S.E.2d 228, 230 (Ct. App. 1998) (order denying plaintiff's request to proceed *in forma pauperis* affects a substantial right).

[4] *See, e.g.*, *Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (an order disqualifying counsel affected a substantial right; a litigant's right to choose its own counsel is a substantial right because it is "closely related to the right to a particular mode of trial, a well-established substantial right" and "[d]eprivation of the right to ones preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system."); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 85, 620 S.E.2d 333, 338 (Ct. App.), *aff'd in relevant part*, 653 S.E.2d 276 (S.C. 2007) (an order granting temporary custody to the father affected the mother's substantial rights "under the unique factual circumstances of the present case"; the Court reasoned that "[m]atters involving the custody of one's child certainly constitute a 'substantial right' as contemplated in the South Carolina statute" because "parenting is a fundamental constitutional right and due process is mandatory when such a right is jeopardized.") (citing *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)).

> have been litigated in a prior action. *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 249, 551 S.E.2d 274, 278 (Ct. App. 2001) (citation omitted). The doctrine 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. *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). "*Res 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. *Res judicata* ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Nelson v. QHG of S. C., Inc.*, 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct. App. 2003) (quoting James F. Flanagan, South Carolina Civil Procedure 642 (2d ed.1996)), *rev'd in part on other grounds,* 362 S.C. 421, 608 S.E.2d 855 (2005).[5]

Depriving Georgia-Pacific of its right to *res judicata* from a final judgment as to absent class members in this case would undermine the time-honored principle of finality in litigation, which is critical to the operation of our adversary system.[6]

Moreover, a right qualifies as substantial if it is closely related to an already well-established substantial right. For example, in *Hagood*, the Supreme Court held that the choice of counsel is a substantial right because it is "closely related to the right to a particular mode of trial, a well-established substantial right."[7] Here, the elimination of Georgia-Pacific's *res judicata* protection is closely related to—and, in fact, springs directly from—the Class Notice Order that fails to provide due process. And this Court

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[5] *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81-82 (Ct. App. 2007). *Duckett* is also cited in Plaintiffs' Return and then dismissed without analysis. (Pls' Resp. at 12 n.8.)

[6] Plaintiffs mischaracterize Georgia-Pacific's position as asking this Court to ensure that "any future judgment in this case is invulnerable to collateral attack." (Resp. at 16.) Georgia-Pacific is asking this Court to ensure that the Class Notice Order complies with due process ***now*** so that *res judicata* can, as it should, attach to the final judgment in this case. To extent to which the resulting judgment in this case may be collaterally attacked is an issue for another day.

[7] 362 S.C. at 198, 607 S.E.2d at 710.

has held that fundamental constitutional rights—such as the right to due process—are substantial rights under Section 14-3-330(2).[8] Thus, Georgia-Pacific's closely related right to *res judicata* protection and to the ability to assert a *res judicata* defense must also qualify as substantial.

2. The facts of this case are unique.

Not only is *res judicata* an important right, but the circumstances involved in this case are unique and would not, as Plaintiffs suggest, open the floodgates of interlocutory appeals in class actions. The procedural posture of this case is highly unusual. The Court approved a class notice that was distributed to absent class members ***before*** the class representatives were required to identify the most basic information about the litigation, including what claims are being tried on a class basis and what damages plaintiffs seek.[9] It is also unusual, to say the least, for a class notice to be approved that fails to disclose that would-be class members are waiving valuable damages claims by not taking affirmative action to exclude themselves from the class.[10] Finally, our Supreme Court has set out "***minimum***" standards that all class notices must meet, including the

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[8] *Widdicombe*, 366 S.C. at 85, 620 S.E.2d at 338; *see also Eldridge*, 308 S.C. at 126, 417 S.E.2d at 533 (holding that order limiting first amendments right to free speech by potential class representatives affected a substantial right) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981)); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.' We have long recognized that the Amendment's Due Process Clause, ... includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.') (citation omitted); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173-75 (1974) (due process considerations prompted the mandatory notice requirement in Rule 23).

[9] (*See* GP's Obj. to Class Notice, attached hereto as Exhibit A.)

[10] (*Id.*)

requirement that the notice "describe the action and the plaintiffs' rights in it."[11] Claims by defendants that a class notice fails to meet the bare minimum standards of due process are rare indeed.

B. The Class Notice Order Prevents a Judgment From Which an Appeal May Later be Taken.

Plaintiffs do not address Georgia-Pacific's argument that the merits of the class notice cannot be effectively raised by Georgia-Pacific by appeal after the entry of final judgment. Rather, Plaintiffs argue that an appeal is not proper because SCRCP 23(d) gives lower courts discretion to enter orders protecting the class and, therefore, the trial court could—theoretically—correct the defective class notice at some later date. The primary problem with Plaintiffs' position is that it applies the wrong test. As our Supreme Court has explained, the relevant inquiry under Section 14-3-330(2) is whether the order "prevent[s] a judgment from which an appeal may later be taken ...."[12] Or, as this Court has explained, '[i]mmediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case.'[13] Thus, the test turns on whether the order can be meaningfully reviewed on direct appeal after the entry of a final judgment, not on whether the trial judge has some hypothetical ability to change his mind. If the order affects a substantial right and cannot be reviewed

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[11] *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004) (emphasis added and citation omitted).

[12] *Edwards*, 369 S.C. at 94, 631 S.E.2d at 531.

[13] *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304 n.7, 705 S.E.2d 475, 479 (Ct. App. 2011) (quoting *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000)).

after the conclusion of the case, then an immediate appeal under Section 14-3-330(2) is warranted.[14]

As explained in Georgia-Pacific's petition, the Class Notice Order cannot be reviewed on direct appeal because Georgia-Pacific's *res judicata* protection only attaches upon a final judgment in Georgia-Pacific's favor. Plaintiffs completely fail to address the scenario where a judgment is rendered in favor of Georgia-Pacific. Georgia-Pacific obviously cannot appeal a judgment in its own favor. Hence, the ***only*** appellate avenue that will allow for the review and correction of the defects in the Class Notice Order and the restoration of Georgia-Pacific's substantial right to finality is an interlocutory appeal. There is no other option.[15]

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[14] The authorities cited by Plaintiffs are not to the contrary. In *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 809 (1995), the court held that the refusal to enforce a settlement agreement was not immediately appealable because the order could easily be reviewed after final judgment. In *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010), the court considered two orders. As to the first order, which was a denial of a directed verdict, the court cited the longstanding rule that such orders are not immediately appealable because they can be effectively reviewed post-judgment. *Id.* at 574, 698 S.E.2d at 859. The court dismissed the appeal of the second order, which was the grant of a directed verdict under SCRCP 54(d) on some (but not all) claims, because the unique language in Rule 54(d) stated that the verdict was subject to revision and the trial court had never issued a written order. *Id.* at 577-78, 698 S.E.2d at 861-62. By contrast, Rule 54(d) has no application to this case and, moreover, the trial court has issued a written order here. *See also Pocisk v. Sea Coast Constr. of Beaufort*, 380 S.C. 584, 588, 671 S.E.2d 98, 100 (Ct. App. 2009) (appeal dismissed because appellant could seek review of the order granting relief from a consent judgment following final judgment in the case).

[15] In addition to the authorities cited in its Petition for Rehearing, a decision issued only months ago by the Second Circuit Court of Appeals demonstrates the looming prejudice Georgia-Pacific faces due to the constitutionally inadequate class notice in this case. In *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 226 (2d Cir. 2012), the court held that defendant would be required to defend a suit alleging that it violated the FDCPA even though the plaintiff was indisputably a member of an earlier class action settlement, because the notice in the prior class action did not comply with due process.

Plaintiffs only response is to suggest that the trial court might use its broad class management discretion under Rule 23(d) in some unspecified way to address deficiencies in the class notice. This fails to pose or answer the real question. If the trial court does not reverse itself, can Georgia-Pacific seek appellate relief that will restore its right to *res judicata* protection? The answer is "no," which very simply demonstrates the propriety of, and necessity for, this immediate appeal. It is untenable to suggest, as Plaintiffs seem to do, that the class management powers supplied by Rule 23(d) extinguish the right to an immediate appeal when a substantial right is affected in a manner that cannot be corrected after final judgment is entered. There is no authority for this position.[16]

Further, Plaintiffs' suggestion that the error in the Class Notice Order will be corrected later by the trial court is fanciful. First, the class notice was drafted by Plaintiffs and approved by the Court without modification. Certainly the Plaintiffs will not seek to have the notice they proposed revised and resent. Second, the Court has already adopted a Case Management Order that contemplates a trial plan, discovery and a trial. Lastly, it is clear that the trial court would not be receptive to a motion to revise and resend the class notice at this stage of the proceedings. For example, on argument for reconsideration of the class certification decision (the same hearing in which argument was made on the Class Notice Order), the trial court stated:

> THE COURT: I don't see any reason that we need to hash out any more oral arguments. ***I know that I'm never going***

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[16] If Plaintiffs' position were valid, then interlocutory appeals could never proceed in the class context because Rule 23(d) allows a trial judge to enter an order any time after certification to protect the class. We can be assured that this position is not correct, however, because the Supreme Court has held that an interlocutory order entered in the class context was appealable. *See Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008).

> ***to convince the defendants I'm right, and I don't really see them arguing about it anymore is going to serve any purpose***, so I'm going to deny the motions to reconsider. I think you fleshed out every possible argument you could, and ***if you want to appeal, then no hard feelings on that***, so the motion to reconsider is denied.
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> * * *

(02/23/12 Hearing Tr. at 1, 21, attached hereto as Exhibit B (emphasis added).)

Accordingly, because *res judicata* protection and the ability to raise *res judicata* as a defense is a substantial right and because the Class Notice Order cannot be reviewed on direct appeal if Georgia-Pacific prevails, this Court should hear this dispute now and correct the errors in the Class Notice Order.

II. The Right to Cure Order Denies Georgia-Pacific's Statutory Right to a Stay and to Participate in Genuine Settlement Efforts.

Plaintiffs argue that the Right to Cure Order is not appealable because a stay is not a substantial right. The cases cited by Plaintiffs, however, are inapposite. In *Carolina Water Serv., Inc. v. Lexington County Joint Mut. Water & Sewer Comm'n*, the court held that an order lifting a discretionary stay was not appealable.[17] And in *Edwards*, the court held that an order granting a discretionary stay was not appealable.[18] Neither of these decisions involves, as this case does, a trial court refusing to impose a ***mandatory*** stay that is guaranteed by statute.[19]

Similarly, Plaintiffs overreach on the import of the *Grazia v. S.C. State Plastering, LLC* decision. While it is true that *Grazia* held that the Right to Cure Act and Rule 23 are not hopelessly incompatible, the Supreme Court left it to the trial courts to devise a method, based on the facts before them, to comply with both statutes in the class

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17 373 S.C. 96, 644 S.E.2d 681 (2007).

18 369 S.C. at 95-95, 631 S.E.2d at 530-31.

19 *See* S.C. Code Ann. § 40-59-830.

action setting.[20] Georgia-Pacific's argument on appeal is that the method chosen by the lower court here improperly deprives Georgia-Pacific of its statutory right to a stay. Indeed, the trial judge indicated that he was unsure whether his chosen method was correct and encouraged an appeal on this very issue:

> THE COURT: Our state Supreme Court has said we can have class action construction cases. It's up to the trial Court to figure out how to deal with reconciling this notice of right to cure statute, which seems irreconcilable with class actions, and this is my proposal. ***I may be right, I may be wrong*** ....
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> * * *
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> ... ***I know why you think I'm wrong. I may be. But, you know, I'm just moving the ball forward, and this is the way we go, and if you want to appeal on this issue, I encourage you to do it sooner rather than later*** because this is the plan that we're going to go forward to get this case ready for a trial early next year.

(02/23/12 Hearing Tr. at 21, 23-24, attached hereto as Exhibit B (emphasis added).)

Accordingly, the Court should also review the Right to Cure Order and restore Georgia-Pacific's statutory and substantial right to a stay.[21]

III. The Intertwined Orders Doctrine Applies to the Class Certification Order and related Order Denying the Motion to Strike.

Plaintiffs do not argue that the intertwined orders doctrine should be abolished or that the relevant orders are not intertwined. Instead, Plaintiffs assert that review of the intertwined orders would cause further delay and suggest that the court decline to review

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[20] 390 S.C. 562, 575, 703 S.E.2d 197, 203 (2010) (holding that the trial court must use the Right to Cure Act "to determine whether or not a class action is feasible under the circumstances in each individual case" and then devise a way to comply with the Act's notice, investigation and settlement provisions).

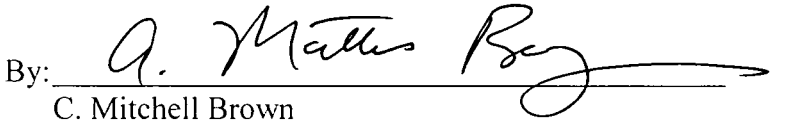
[21] Although Georgia-Pacific incorporates the substantive arguments made by Del Webb on the appealability of the Right to Cure Order, Georgia-Pacific does not agree with Del Webb's suggested 9-year timetable for discovery in this case.

the intertwined orders on that basis. If Plaintiffs were truly concerned about delay, however, they would agree that the far more efficient course of action here would be to review all of the related orders at once. Reviewing two orders now while leaving the related orders for another day would undermine judicial economy, promote piecemeal appeals, and needlessly prolong this litigation.

CONCLUSION

For all of the foregoing reasons, Georgia-Pacific respectfully submits that its Petition for Rehearing should be Granted and Respondents' Motion to Dismiss should be denied.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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October 29, 2012

Exhibit A
(Georgia-Pacific's Objections to Plaintiffs' Proposed Class Notice)

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NO. 2007-CP-07-3166
JIM LANCASTER, NANCY LANCASTER, ART HOLLAND, JEANNETTE HOLLAND, WENDELL TURNER, PHYLLIS TURNER, JACK BENNETT, JOAN BENNETT, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS, vs. 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-07-3166 **GEORGIA-PACIFIC'S OBJECTIONS TO PLAINTIFFS' PROPOSED CLASS NOTICE, DATED MARCH 2, 2012, AND REQUEST FOR DECERTIFICATION**

Georgia-Pacific hereby objects to Plaintiffs' proposed form of class notice, dated March 2, 2012 ("Notice"):

1. Georgia-Pacific incorporates by reference the objections made in its "Objections and Suggested revisions to Plaintiffs' Proposed Class Notice," dated February 20, 2012, and the objections Georgia-Pacific made before the Court at the hearing held on February 23, 2012.

2. As stated more fully in Georgia-Pacific's briefs in opposition to class certification, in its oral argument on the same and in its Rule 59(e) motion (all of which are

incorporated herein by reference), Georgia-Pacific objects to Plaintiffs' proposed Notice because it will not fully inform putative class members regarding, among other things: (i) the rights and claims potentially waived or lost by not opting out; (ii) the variable claims that each putative class member is able to pursue against each Defendant or the variable arbitration clauses and warranty claims available to each putative class member as to different Defendants; (iii) which claims are being abandoned or deferred by Plaintiffs; (iv) what evidence is available to each putative class member (and for what purpose(s) it may be used) to pursue their claims; (v) the conflicting interests that each putative class member and the Plaintiffs' counsel have with respect to pursuing Plaintiffs' theory of the case, including the theory of concurrent causation; and/or (vi) the nature of the representative trial and/or individual proceedings that will occur. Because the homeowners and homes potentially subject to this class are so different, it is simply not possible to provide adequate information to putative class members that would allow them to fully and fairly assess whether it is in their individual interest to remain in this class by not opting out or, instead, whether it is in their interest to pursue individual relief outside of the class. Plaintiffs' proposed Notice therefore violates Due Process and the law of this State. "The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . The notice should describe the action and the plaintiffs' rights in it.'" *Salmonsen v. CDG, Inc.*, 377 S.C. 442, 457 (2008) (emphasis added and internal citations omitted). This Notice does not – and

no notice could be crafted for this class that would – fully inform potential class members of their rights.

3. The Notice states that "the Court has determined that certain claims common to the class will be tried in one proceeding" when in fact the Court has requested that Plaintiffs submit a scheduling order that calls for additional discovery and inspections to determine whether a representative trial can be conducted and, if so, on what claims, elements and defenses.

4. By way of example, but not limitation, depending on the age of the particular home, the operation of the statute of repose, the operation of the statute of limitations, the date upon which damage was observed by any given homeowner, and the representations and warranties in existence and relied upon by any given homeowner, each potential class member may be barred from asserting claims against some, but not all, Defendants in different ways. Some potential class members are barred by repose from asserting negligence claims against Del Webb Communities, Inc. and Razor Enterprises while others are not. Some potential class members are barred by statute of limitations from pursing any claims as to some Defendants but not others. Some potential class members may have express warranty claims against Georgia-Pacific that others do not. It is simply not possible to inform the potential members of this class, as certified, of all their potential rights in the action so that they can compare those rights with what would be available to them if they pursued an individual action. The Notice is therefore objectionable.

5. Plaintiffs' counsel has an inherent and palpable conflict of interest with putative class members. On the one hand, Plaintiffs' counsel has a financial interest in ensuring that

each homeowner remains in the class. On the other hand, many homeowners may, depending on their individual circumstances, have a legal and financial interest in taking advantage of the settlement process in the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code §§ 40-59-810 *et seq.* ("Right to Cure Act") (and thus remove themselves from the class) or by expressly opting out because (i) of the risk of waiving or losing other potential claims against Defendants for alleged home damage, or (ii) the potential class member has stronger, better or different claims against some Defendants but not others and would be prejudiced by the pursuit of a concurrent causation theory. The Notice does not – and cannot possibly – resolve this inherent conflict.

6. Georgia-Pacific objects to this Notice and the approval of any notice because the Court's class certification decision is in error and because the Court has not approved a trial plan. The Court has also not identified (i) which class representatives will proceed with the case; (ii) which representative homes will be at issue in the trial; (iii) which claims, defenses or issues will be tried on a representative basis and which will require individualized inquiry; and/or (iv) which causes of action will be asserted and tried as to each Defendant on a representative basis. The rights a potential class member may have in this class cannot be known when these decisions have not yet been made.

7. The Notice does not adequately inform potential class members that, if they fail to opt out and Plaintiffs do not prevail, the class members will be barred from pursing any claims that were brought or could have been brought in the class action. This violates the Due Process rights of the class members and Defendants.

8. The Notice does not inform class members that if the representative homeowners have suffered less damage than the class member, the class member will (under Plaintiffs' theory) be bound by the lesser damage calculation. The Notice does not inform class members that, if they do not opt out, they will (under Plaintiffs' theory) be barred from ever recovering damages associated with costs already incurred to make repairs to their home or the PrimeTrim® in their home. In fact, the Notice does not describe in any fashion the damages a class member who does not opt out will be eligible to recover or those species of damages that are being waived by not opting out.

9. The Notice does not inform potential class members that, under Plaintiffs' theory, if their home has been maintained differently or was constructed differently than the representative homes, the class member may nonetheless be bound by the judgment as to the representative homes.

10. The Notice does not propose a process that is consistent and will comply with the Right to Cure Act and *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562 (2010). Moreover, the Notice does not inform potential class members that Georgia-Pacific is entitled to participate in the inspection and cure process contemplated by the Right to Cure Act.

11. The fact that no notice that adequately informs the potential class members of their rights in the action can be crafted for this class as certified demonstrates that this class was improperly certified. Georgia-Pacific requests that it be decertified.

Respectfully submitted this ___ day of March, 2012.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
JIM LANCASTER, NANCY LANCASTER, ART HOLLAND, JEANNETTE HOLLAND, WENDELL TURNER, PHYLLIS TURNER, JACK BENNETT, JOAN BENNETT, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,	)	CASE NO. 2007-CP-07-3166
PLAINTIFFS,	)	**GEORGIA-PACIFIC'S OBJECTIONS TO PLAINTIFFS' PROPOSED SCHEDULING ORDER, DATED MARCH 2, 2012, AND REQUEST FOR DECERTIFICATION**
vs.	)	
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.	)	

Defendant Georgia-Pacific hereby objects to Plaintiffs' Proposed Scheduling Order of March 2, 2012 ("Scheduling Order"), as follows:

1. Georgia-Pacific incorporates by reference the objections made in its "Objections to Plaintiffs' Proposed Trial Plan and Request for Decertification," dated February 20, 2012, and Georgia-Pacific's objections made before the Court at the hearing held on February 23, 2012.

2. As stated more fully in Georgia-Pacific's briefs in opposition to class certification, in its oral argument on the same and in its Rule 59(e) motion (all of which are

incorporated herein by reference), Georgia-Pacific objects to Plaintiffs' proposed Scheduling Order because Court's class certification decision is in error.

3. The parties previously submitted competing trial plans to the Court. The Court declined at the February 23, 2012 hearing to enter any trial plan or to resolve the disagreement amongst the parties regarding the contours of any representative trial and any later, individual trial. As a result, the parties do not know what the Court will order as to (i) which claim elements, defenses or issues will be tried on a representative basis; (ii) which claim elements, defenses or issues will require individual proceedings; (iii) what causes of action will be tried on a representative basis; and/or (iv) what process will be used to resolve individualized issues that must be resolved after the representative trial. The inability to create a trial plan at this juncture – and the fact that the Court needs additional discovery to conclude how and whether this class can be managed and tried consistent with Due Process, Rule 23 and the laws of this State – demonstrates that this class was certified in error and should be decertified. The proposed Scheduling Order contemplates discovery designed to justify a certification that is not warranted. Nor can such discovery advance the trial of any representative portion of this matter because the Court has not resolved the substantial disagreements over the contours of any such representative trial.

4. Georgia-Pacific objects to any process under the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code §§ 40-59-810 *et seq.* ("Right to Cure Act") that is representative. If the process contemplated in the Scheduling Order is designed to allow the parties to develop individualized defenses and to explore the variability among homes potentially in this class, that process must

include all homes in the class. Georgia-Pacific objects to any limitation on its right to pursue fully each defense available to it with respect to any home and/or homeowner ultimately included within this class. The inspection and cure process proposed by Plaintiffs is also inconsistent with the language and intent of the Right to Cure Act and the *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562 (2010) decision.

5. Georgia-Pacific objects to any representative trial in this matter. Discovery to date and the record before the Court on class certification establish that that there can be no representative home or homes on which a trial and judgment could be held that would fairly bind all class members and Defendants consistent with Rule 23, Due Process and the laws of this State. Georgia-Pacific reserves all rights to argue for the decertification of this class following the Right to Cure and inspection process contemplated by the proposed Scheduling Order. Georgia-Pacific objects to any representative or "bellwether" trial on the issues of defective product design, breach of implied or express warranty, negligent construction, causation and/or damages and does not agree that the process set forth in the Scheduling Order can or will make a representative or "bellwether" trial on these or any other issues in this case possible under Rule 23, Due Process or the laws of this State.

6. Georgia-Pacific objects to the post-September 1, 2012 merits discovery schedule contained in Plaintiffs' proposed Scheduling Order because, under that order, the Court will not even rule on a trial plan and the number of representative homes to be tried until after the Right to Cure process is completed. Any attempt to set dates for merits discovery now is premature.

Respectfully submitted, this 2nd day of March, 2012.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
JIM LANCASTER, NANCY LANCASTER, ART HOLLAND, JEANNETTE HOLLAND, WENDELL TURNER, PHYLLIS TURNER, JACK BENNETT, JOAN BENNETT, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,	)	CASE NO. 2007-CP-07-3166
Plaintiffs,	)	
vs.	)	
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,	)	**CERTIFICATE OF MAILING**
Defendants.	)	

I hereby certify that copies of the preceding document have been served on the following individual(s) by depositing the same via Electronic Mail and properly addressed as follows:

Pleading: **GEORGIA-PACIFIC'S OBJECTIONS TO PLAINTIFFS' PROPOSED CLASS NOTICE AND PROPOSED RESCHEDULING, DATED MARCH 2, 2012, AND REQUEST FOR DECERTIFICATION**

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Linda Kitchens

March 2, 2012.

Exhibit B
(02/23/12 Hearing Transcript)

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF BEAUFORT 2007-CP-07-03166

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,

Plaintiffs,

vs.

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 COMPANY, LLC,

Defendants.

February 23, 2012

Charleston, SC

- - - - - - - -

TRANSCRIPT OF PROCEEDINGS

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B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

THE COURT: I don't see any reason that we need to hash out any more oral arguments. I know that I'm never going to convince the defendants I'm right, and I don't really see them arguing about it anymore is going

to serve any purpose, so I'm going to deny the motions to reconsider. I think you fleshed out every possible argument you could, and if you want to appeal, then no hard feelings on that, so the motion to reconsider is denied.

Giving people the right to opt out, dealing with the right to cure, and then getting on a plan and get this stuff set for trial. So here are my parameters on this: We got about 800 people in this class we estimate; is that right?

MR. DAPORE: That's correct, Your Honor.

THE COURT: We need to get those folks notified that they're members of a class and they have the right to opt out. Then we have got to struggle with reconciling their right to cure, defendant's right to cure, set out by the statute and whether or not they have the right to look at every one of those houses or whether or not they do it in some sort of representative capacity.

This is, of course, as y'all know, a novel issue in this state, and I can't see of any reason why we

would have a class and then have to give -- go through the process of having every single one of those houses inspected kind of defeats the whole purpose, and I have decided we're going to go this route: We got about 800 homes. We're going to send out -- after we have got, basically, a number of people left after they have or have not exercised their right to opt out, we're going to take 10 percent of those and give the defendants a right to exercise those right to cure, rights that they have

under the statutes. In other words, let's just use a number of 800 because it's an easy number, so if we end up with 800 folks left in the class, we're going to take 80 of those and give the defendants the right under the statute to go in, look at those houses, and exercise their right to cure rights in a representative capacity, since this is what class action lawsuits are about, and then, ultimately, if we go to trial, we have to decide how many cases are we -- how many houses are we going to use?

And I think a number that I've settled on is going to be 1 percent, which would be 10 percent of the 10 percent; in other words, about eight, so we start out with 800, we go down to 80, and once we get the right to cure done, we get things discovered, ready for trial, we're going to try to estimate somewhere around eight,

might be a little bit less if we have a lot of people opt out or a lot of people get satisfied after their right to cure, so we got to pick a number and we got to do something, so my thoughts on that are let's get this class certification notice out of the way and then start picking up some numbers for some dates to get this thing set for trial and get it set for trial sometime in the early part of next year.

Just coincidentally, we got notice from court administration yesterday and they're already setting terms. They're starting their process of setting terms of court for next year, and I have to give them notice of any kind of cases that we have that might need more, you

know -- might need a couple weeks and where it's at, and that's the kind of thing they plan around.

So I would like to try to get this, if possible, set, tell Court administration we'll be ready to do it around February the 1st of next year. That's my plan, so let's see what we can do about accomplishing those goals today.

Mr. DaPore, you're the plaintiff. You represent the plaintiff. I'm going to give you first shot at what you think is a workable solution. I'm going to give you some numbers. I was taking some notes as I was thinking about this a little bit ago. We got to send

this class notice out. How long do you think these folks would need to have before they opt out to give -- to send out, to send them back the notice to opt out? I would then propose letting you pick the 10 percent of what is left to say these are the folks that we want to have -- that the defendants have the right to cure, and then how long that would take?

My own notes, just so you know what my thinking is, is I had originally put down here picking those 80 by middle of next month, middle of March, but in really kind of thinking this through a little bit after I wrote down my first set of notes, we probably ought to have the results of who opted out first, so you might want to push these numbers back accordingly, but I'll just give you an idea of what I'm thinking about, so originally I was thinking, move this thing along, get those 10 percent of whoever they're going to have the right to exercise their right to cure on real soon after

we get the results of the class certification notices back in.

Then they could start their discovery of those a couple of weeks after that. I am looking at giving them roughly -- let's see, three months to do that and then once the results of those -- that testing or whatever needs to be done to give them their right to

cure rights, report back to the Court and once we have those results in, we're going to take a look at whether or not it would make any sense to channel these into some subclasses or not, and then whatever other discovery might need to be done, wrap that up within a couple of months, get this case mediated by -- well, I had originally put down 11/1.

I might need to push that down to get it done by the end of the first of the year or -- end of the year or very first part of the year, and then get it on trial, get it set for trial, by February 1st. That's kind of what I'm thinking. Mr. DaPore, what are you thinking?

MR. DAPORE: Your Honor, I think it sounds like a workable plan. I'm assuming what the Court's thinking was is that assuming all -- which is probably not going to happen that all 800 say they're not going to opt out --

THE COURT: I'm thinking the vast majority of them are going to do nothing.

MR. DAPORE: We're going to choose 80 and then take 10 percent of that, which means we're going to allow Del Webb to do -- right to cure on the 80 houses as

far as the inspection, and then we're going to assume once we get done with the right to cure, we're going to randomly pick, I assume, eight of those houses to try?

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THE COURT: Right, right.

MR. DAPORE: Probably, and I think the other counsel would agree with me, you obviously need to identify who those eight people are before we can begin discovery with those eight houses. In the interim what we could do is do discovery of our experts, almost contemporaneous with the right to cure. I think it's a workable plan to give them 90 days, Del Webb, because they have got a lot more means or methods to get inspections on that many. 80 homes within 90 days doesn't sound too unreasonable. I believe it sounds like a workable solution.

As far as the actual trial of the eight homes, I don't know that we need to cross that bridge today, exactly how that would work, but it sounds like a workable plan to me.

THE COURT: We're just going to push forward and do something. Okay. All right. Who wants to tell me all the problems they have with that on the defense's side first?

MR. REMAR: I'll start, Your Honor. As Your Honor knows, we are really in unchartered waters here. We're have looked and not found any published South Carolina case that talks about how a class action should be tried. The trial plan that the plaintiffs propose, we

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think, would put this case on the rocks of that unchartered sea.

What the Court just proposed, I must tell Your Honor in looking at all the federal cases which are the only ones I think we can have guidance on that the Court's proposal has some serious errors in it, and with all due respect, Your Honor, let me just tell you what I think the main problem is, putting aside the right to cure, which Georgia-Pacific obviously wanted to participate in, but that's primarily a dispute between Del Webb, Razor, D.J., and the plaintiffs.

The Court, in order to try a class action, the case law is absolutely clear that there must be a sufficient number of representative plaintiffs who have common issues that are going to be determinative of the class.

We respectfully, as Your Honor knows, believe that there are too many individualized questions here for this case to be tried in that manner, and we obviously preserve those objections, but if the Court is going to proceed on a trial of this case, the only way that it could be conceivably done is if the plaintiffs go out and actually develop a representative sample of the 800 homes that are in this community.

THE COURT: That's why I came up with 80.

MR. REMAR: Well, the question would be, are those 80 truly representative of all the individualized factors that are in play here?

THE COURT: We got no way of knowing.

MR. REMAR: That's the plaintiff's -- if the Court has made --

THE COURT: That's why I told them, they get to choose, and I'm assuming they're going to pick their 80 worst.

MR. REMAR: That's just the point, Your Honor. They would have to make an evidentiary showing in a statistically reliable way that those 80 homes represent all of the various individualized conditions that the plaintiffs' experts and everyone in this courtroom agrees exist out there.

These homes were built over a period from 1994 to 2006. There are myriad different design features, different installation techniques. There is a whole series of different factors here, and I would submit to you, to Your Honor, that some Courts have taken an approach similar to the one that Your Honor has called the bellwether trial approach, and that is even disfavored, but if you're going to proceed that way, Your Honor, what the Courts say is that in a bellwether trial, a random sample of cases, large enough to yield reliable

results, is tried to a jury.

Now, we don't believe that can be done in this case, but if the Court is going to proceed that way, I think what Your Honor should do is direct the plaintiffs to come up with a statistically significant, random sample of these homes and then have those be tried in some manner of subclasses, and we do need to know at the beginning of the case, Your Honor, who those representative plaintiffs are going to be and what claims

they're going to assert and against who, otherwise we're here in sort of limbo.

If I might ask the Court, when Your Honor indicated that there would be three months of discovery, was that on the -- are you suggesting we would do formal discovery on the 80 homes or was that just inspection of --

THE COURT: You get the right to exercise the rights afforded you under the right to cure on the 80 homes. Then once we finish up with that, then we're going to proceed to trial on roughly 10 percent of those, in other words, eight, so you'll do formal discovery or more in depth discovery on the eight that are going to trial.

MR. REMAR: I see. Your Honor, the -- with all due respect, I think the problem -- and I think it

would be clear error, is to just choose the plaintiffs to randomly, or however they do it, choose eight homes and then have the entire class be bound by that eight. There is also the question of how we're going to deal with the damages.

THE COURT: That's what class actions do, is they take a representative number of them and then they bind everybody else.

MR. REMAR: No, Your Honor, what they do is they take a representative sample of the entire class and then come in and demonstrate to the Court in a factual way that there is statistical reliability to the ones that they've chosen and that those homes, in fact, if

tried, could resolve the common issues that are determinative of the case.

THE COURT: Well, you just took the $5 version of what I just said. I speak in simple man terms, but yeah, we try these things. They try to convince the jury that this is a very small number, they respect a larger number, and this is what's wrong, give us a verdict, and then give us a big verdict.

So if that is what you do in a class action lawsuit -- I don't know of any other way to do it other than doing what y'all have insisted from the beginning; that is, don't make this a class, give us a right to look

at 800 homes and try 800 different cases. We're past that, rear-view mirror. We're moving forward.

MR. REMAR: I understand that, Your Honor, and, as I said, the Court has made that ruling. We have preserved our objections to it. But if the Court is going to proceed in that manner, we suggest we do it at least in a way that will be fair to the defendants and to all the class members, and the way that is generally done is that there is some type of showing, and the Court is the gatekeeper of that, not the jury.

The Court is the gatekeeper. These plaintiffs, in this case eight, are they representative in a statistically proven way of the 800 other people that live in this community that have a whole myriad of variations?

I mean, the Turner home that the plaintiffs propose would be the single trial, to give Your Honor example, it's not representative of this -- of the

community.

THE COURT: That's why I projected the one house equals 800 homes approach. Mine is basically going to be 1 percent on trial, because I think 10 percent is an unworkable number, but we have to come up with a number.

MR. REMAR: And then it has to be derived

that those eight are representative of whole community.

THE COURT: Maybe you missed that point. At some point after we get the results in of the right to cure process, we're going to discuss whether or not we further delineate subclasses, but that's in there as part of my proposal. This isn't the end of it, but it's the beginning, and we got to move the ball forward. This is a five-year-old case. We're moot. We're going nowhere.

MR. REMAR: If I may inquire as to how the Court is handling the damages aspects of the case --

THE COURT: At this point, I'm not. You know, when we get closer to trial, we'll figure out how to deal with damages, but right now we've just got to figure out how to deal with identifying a class, preserving what rights I think you have under the notice of right to cure statute, get the case on discovery, and then, when we move the ball down forward a little bit, figure out how to present this case to a jury. I don't have the answer to every question that's going to come up today.

MR. REMAR: So at this point, Your Honor is not adopting the plaintiff's proposal on how we try the

damages portion.

THE COURT: We're not discussing trial yet. We're discussing the plaintiff to get to trial today.

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We're still on the back stretch, but we're approaching that final turn.

MR. REMAR: I think we do agree that if this case is going to proceed over our objections that the notice should go out that class members should have 30 days in which to opt in or opt out, that after that 30 day period, the right to cure process should begin. Once the right to cure process is concluded, if Your Honor is going to give the parties time to -- well, after that is concluded, then I would think that discovery would begin both on the -- however many plaintiffs are selected, the manner in which they're selected, the merits of the case and expert testimony, expert witnesses, I think at least Georgia-Pacific and the plaintiffs agree that's probably six months.

THE COURT: Sounds like we're in line, because my proposal, again, was once we get to the opt -- when we get the results of the opt out done, then we begin the process of giving y'all your right to cure rights, I'll give you roughly 90 days to do that, get the results of those in, let's take a look at them, do we need to see what's left at that point, and see if we need to divide into subclasses, figure out a number that's representative of what's left, which I'm estimating today to be eight, gets you another 90 days to do discovery on

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those, and then let's get this thing ready for trial, mediated, do any kind of motions that are left, and then get the case tried first part of next year sometime.

MR. REMAR: I would just suggest to Your Honor that in terms of the discovery that I don't think we can really begin, from our points, the merits of discovery until we know -- first until the Court has made a determination that these are the people and their representative, and then we need to do discovery on them as well as complete the expert discovery.

THE COURT: Okay. I don't think we're not saying the same thing.

MR. REMAR: All right. Well --

THE COURT: I'm asking y'all to participate. I know that you don't want to do it this way. As far as I'm concerned, you're not waiving your rights to do it -- to -- you're not waiving your rights by going, oh, we don't want to be here. We think class action is wrong, but I know this, you know, I got to move this thing forward and it's their case.

I'm letting them have first shot at it, and if you want to come in and say, We disagree with everything that's being done, that's fine. We'll end up doing it my way, but I'm saying, okay, let's listen and we can all agree this is a workable plan.

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MR. REMAR: Just so it's clear, we understand the Court has made the ruling and we respect that, but we have worked with Mr. DaPore and his group, the class notice company. We've proposed a notice. We're very

close on that. We're not obstructionists on the trial plan. We have noted that in our papers, that I think the plaintiffs were agreeable to that schedule, so in terms of those issues, we're not trying to be obstructionists.

The only point I'm making to Your Honor is that if we're going to try the case, we need to try it at least in a way that resolves the common issues among the class and it's done in a way that we have sufficient number of representative plaintiffs who have been determined to be representative in the statistically valid way.

That's the plaintiffs' burden to come forward with. I understand Your Honor will then make a decision on that after we finish the right to cure process, so we're ready to try the case, we just want to try it right, if it has to be tried.

THE COURT: We'll find out if we did it right somewhere down the road, but we're going to do something.

MR. REMAR: Mr. Culpepper knows more about this than I do.

MR. CULPEPPER: Could I just ask one

question? There were a handful of issues that particularly troubled Georgia-Pacific when we came into the courtroom today. One is the issue about the issue Mr. Remar touched on, who the class representatives would be. Another is our uncertainty about which issues are being deemed as common issues and susceptible to class wide resolution and which aren't.

There seems to be an agreement. Clearly, there are some issues that aren't and some are. We're

concerned which causes of action were still being asserted towards Georgia-Pacific, and I had anticipated there would be a lot of discussion about that. I think what I hear the Court saying, and I just want to be sure, there will be a three-month period devoted to right to cure process which will also allow parties to inspect this 1 percent, and then we'll all get together again and issues such as the one I've just been described will be resolved at that point.

THE COURT: There you go. You're listening. Thank you.

MR. CULPEPPER: Thank you, Your Honor.

THE COURT: All right. Anyone else?

MR. RAWL: Yes, sir, Your Honor. On behalf of Dell Webb, of course, Del Webb does not agree with Your Honor's rulings, but we understand them.

A couple of issues just to throw out there. First, Court's suggestion that we randomly pick eight representatives to try this case kind of flies in the face of all class action law. The named representatives are the ones that brought this case. They're the Lancasters, the Bennetts, the Turners. Those are the individuals that we did a Rule 23 analysis on. Those were the people who were found -- that you found to be adequate class representative.

If you're going to choose additional class representatives and somebody else to try this case, what the case law says is you have to go through the Rule 23 analysis again to determine these people are adequate

class representatives.

THE COURT: That's what we'll be doing after the right to cure.

MR. RAWL: Also, with regard to subclasses, if there are any subclasses that the plaintiffs were seeking, those should have been sought at the time of the Rule 23 analysis. The U.S. Supreme Court says -- the South Carolina Supreme Court says each subclass must individually meet all Rule 23 standards for any subclass that is proposed again, we have to go through a Rule 23 analysis again, and, frankly, the idea that the plaintiffs are now suggesting that the class that they

proposed this Court certify can't go forward as it is is an admission that there is no commonality, and that's what the plaintiffs are saying, that all the people in this class don't have the same problems, that we now have to get subclasses. Before you even have a subclass --

THE COURT: We may. We may go forward with no subclasses, but there is a plan we're going forward with after today that gives us the opportunity after you get your right to cure process done in which we will analyze and see whether or not we divide into subclasses. I don't know whether it's appropriate at that point or not, but that's down the road.

MR. RAWL: And that actually brings us to the next point. Your Honor, all these issues that you are saying are down the road are all of the issues that the plaintiffs had the burden to prove up front. The fact that the Court doesn't know how we're going to deal with the damages in the trial and the Court doesn't know

whether we're going to have subclasses or not and the Court doesn't know how we're going to deal with these issues six months down the road is per se evidence the plaintiffs haven't carried their burden as to show how this case is going to be managed as a class.

And I understand the Court's rulings, I just want to point out some of the recent Supreme Court, both

U.S. and South Carolina Supreme Court issues. Initially, Del Webb disagrees with some of what my colleagues just said from Georgia-Pacific. The Wal-Mart case, the U.S. Supreme Court has just held last year that you can't do a statistical analysis of the class and then multiply that number and have some type of recovery, and specifically what that Court said is -- this is the U.S. Supreme Court in the Wal-Mart case.

In response to the trial Court's suggestion that a claim could be resolved by looking at a sample set of the class members and then multiplying by the average to arrive at the entire class recovery without investigating each individual' claim, the Supreme Court said, quote, We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge or modify any substantive right, a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to each individual claim.

The problem comes down to what plaintiffs' experts say, which is they don't know what's wrong with any house they've not inspected. And that brings us to

the right to cure process, and what I think Your Honor is ruling is that Del Webb will be entitled to protection in the right to cure process on 10 percent of the houses but

denied on the other 20 percent.

THE COURT: Pretty much it. Let me ask you this: Is there any way you can appeal this?

MR. RAWL: Yes.

THE COURT: Great. Why don't you do that, because I don't have the answer. I'm just trying to move it forward, you know?

MR. RAWL: My frank answer to you is --

THE COURT: If you're going to do it, do it soon so we don't waste a lot of time, and then do it after we've started -- you know, move it along and then at the end of the time, you know, then you appeal. I don't get offended by people appealing. I understand you're doing your job, but we just got to do something.

MR. RAWL: Your Honor, our appeal rights --

THE COURT: Our state Supreme Court has said we can have class action construction cases. It's up to the trial Court to figure out how to deal with reconciling this notice of right to cure statute, which seems irreconcilable with class actions, and this is my proposal. I mate be right, I may be wrong, because it sounds like my brother Baxley is waiting on me, and so I waited on him long enough.

MR. RAWL: We provided to you what Judge Baxley ruled. What Judge Baxley ruled, and I'm assuming

you read his order because we provided it, is that after the right -- after the opt out period, the individual plaintiffs will actually have to provide notice and specific notice as to each house, and there are 4,000 some odd thousand houses in that case, so each homeowner will have to provide notice, and then the defendants will have the right to go through and inspect and/or try to determine whether or not an offer would be made.

Judge Baxley has ruled that every homeowner is in the lawsuit. Keep in mind that the right to cure act is not just for the defendants, it's also for the plaintiffs. It's the homeowner's protection that they might need to get their claim settled sooner rather than later to avoid litigation, and so the homeowner has the right to give notice of what they believe their problems to be, and that notice that is provided to the defendant, or the putative defendant, and the way I think the act should work, you know, the defendant then comes in and inspects what the plaintiff says is wrong with the house.

THE COURT: Wouldn't they have that same right if they just opted out of this lawsuit, filed their own, and said, Come look at my house?

MR. RAWL: If they opt out, and that is one of the issues I think we're going to have to go through, is what has to be included in the notice. All the

information has to be provided to the plaintiffs to know what their rights are so they can make an educated decision on whether or not they need to opt out or not, but what the Court keeps saying is that the defendants

will have the right to do their right to cure. What the act says is the defendants are entitled to notice of what the problem is on each individual homeowner's house, prior to litigation going forward.

What we have here is the problem, and what Mr.. -- for example, what Mr. DaPore is saying he wants to give representative notice on behalf of all homeowners.

THE COURT: Let me stop you because we're just rehashing, and I know what you're saying. I know what the issues are. I know why you think I'm wrong. I may be. But, you know, I'm just moving the ball forward, and this is the way we go, and if you want to appeal on this issue, I encourage you to do it sooner rather than later because this is the plan that we're going to go forward to get this case ready for a trial early next year.

So if you want to appeal on that and give me some input on what you think about the dates and times, but I think between the five years' worth of hearings and all the things you filed, we are covered abundantly by the fact that you don't think this is the right thing to

do and what your client's rights are and why they're prejudiced. We're just kind of wasting time doing that again today.

MR. RAWL: And I in no way am trying to offend you in any way.

THE COURT: I'm not offended, I'm really not. I'm just saying it as politely as I can, Mr. Rawl. Let's move on, and if you want to comment on what I propose for a plan, I know you think it's wrong and I know you got

your reasons why you think it's wrong, but this is what I'm doing, and if you want any input on these dates and the actual times we do the stuff, now is the time.

MR. RAWL: I'm not trying to suggest you change your mind on your reconsideration. What I'm asking about is how you propose the right to cure process will work.

THE COURT: I just told you. We're going to get 80 of them and those folks are going to have -- your folks come in and look at their houses, and they can make them an offer if they want and say, This is how we get it fixed, and once that 90 days is up, we're going to evaluate how many houses we have left, and right now I'm looking at a number of roughly 1 percent of whatever we have that have opted -- have not opted out and pick those for trial and move forward for a trial from the early

part of next year.

MR. RAWL: May I ask the Court a question?

THE COURT: Uh-huh.

MR. RAWL: What does the Court propose defendants inspect on those houses?

THE COURT: Whatever you want to.

MR. RAWL: And that is the problem: We don't know. What the plaintiffs have testified to is they don't know what's wrong with the houses. What the plaintiffs' experts have testified to is that they don't know that anything is wrong with the house until they go in, in effect, and give us a report.

THE COURT: Well, at some point in time, if

nobody can find anything wrong with the houses, then you'll get summary judgment granted, but they're going to pick 80 homes, give you those names, say these are the representatives that the judges said represent the number of the people that have not opted out, 10 percent of those, roughly, and go inspect those, look at all the right to cure rights and remedies that you have under that statute, and then we move forward, and if there is nothing wrong with they of these houses, then make a motion for summary judgment.

MR. RAWL: Your Honor, with regard to the 80 houses you rule will go forward on the right to cure

process, are you ruling the plaintiffs have to give the defendants notice under statute?

THE COURT: They have to pick the 80.

MR. RAWL: Do they have to specifically give us notice of what is specifically wrong with those 80 houses?

THE COURT: I don't know. If you have it in front of you and give me a copy, I'll tell you exactly what they have to have in that, but I don't know right off the top of my head.

MR. RAWL: I quoted in my brief to you.

THE COURT: Okay. Well, look, this is what I had from my afternoon hearing. I had roughly that to take home last night for my case this morning, so I don't mean to be flippant, but I read a lot last night, and I didn't memorize the statute, so -- it's laid out there what we have to do under that.

MR. RAWL: Basically, what the statute says

is for each home, each homeowner, the plaintiff has to say that they believe there is a construction defect and specifically what that defect is.

THE COURT: Okay.

MR. RAWL: And if they believe it's a construction defect, then they have to say what the results on that house are of the defect.

THE COURT: Okay.

MR. RAWL: What the plaintiffs' experts have said is each house is different, and so the results are going to be different for each house, so I just want to be sure the Court is ruling the plaintiffs have to follow that statute on each one of the individual eight houses because it's going to be 80 different things wrong.

THE COURT: Whatever the statute says that they have to do, that's what they have to do.

MR. RAWL: Okay. Thank you, Your Honor. My client made a motion to stay pursuant to the right to cure act with regard to all putative class members. I'm assuming that you are denying that motion except for the 10 percent of them.

THE COURT: Correct.

MR. RAWL: But you are granting the motion as to 10 percent.

THE COURT: Well, I haven't thought about that -- to stay it.

MR. RAWL: The statute says if the plaintiffs have not complied with the statute, the Court must stay the case upon a motion.

MR. DAPORE: Can I be heard on that?

THE COURT: Go ahead.

MR. DAPORE: The four reps complied with the

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statute, and that has been admitted by Del Webb. We went through that process, made a demand on all the houses that remove, replace it with this material, they decided not do that, made a different offer, and they rejected it and they agreed we have complied as far as the Court rep.

We should be allowed at least at this point, since the class has been certified, to go ahead and send out the notice. We are generally in almost 100 percent with Georgia-Pacific on the content of their notice and our notice. We're not in agreement with Del Webb. In the meantime, while the right to cure statute is being complied with, and I believe in a correct way in a representative capacity and a statistically significant sampling, the Court has come up with what I think is a very good idea.

I believe the case could be stayed as far as discovery, but I believe the notice should go out because the notice needs to get out to these classes. The class has been certified.

THE COURT: The notice of the class certification?

MR. DAPORE: Correct.

THE COURT: We're in agreement on that.

MR. RAWL: So is the Court now saying at the time the notice goes out it's staying the case but it's

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not staying the case until the notice goes out?

THE COURT: What do you want to do that I -- when you say it's stayed or not stayed, you got some plan? You want to be doing something? I'm missing the significance of your motion.

MR. RAWL: The way the statute normally works is if somebody brings a case that is -- and the homeowner has not complied with the statute then the defendant -- actually, the plaintiff can make it also, but either party can make a motion to stay pending full compliance with the act. And so not until the parties agree or another party makes a motion to say the act has been complied with, is the stay lifted.

THE COURT: I'm not going to stay the rest of the case because we're moving forward in a representative capacity. So the people that aren't in the 80, the other 710, roughly, or 720, I guess, they're -- they're still part and parcel of the lawsuit, they're just not going to be participating in the day-to-day actions of the case, unless they have to be picked as one of the initial ten or the later -- or initial 80 or the later eight.

But I don't see the significance of staying their case. I mean, I can see where you get to trial and go, Oh, well, they can't have any damages awarded to the class because 90 percent of them are stayed, so I'm not

really sure that I'm following your need to have the rest of it stayed.

MR. RAWL: I think the idea behind the act is that for any homeowner that falls under the act, the

party is going to try to settle that individual claim with that individual homeowner without litigation having to go forward. And so if litigation is going forward, before the act is complied with, meaning either my client settles with the homeowner or my client does not settle with the homeowner, until the time my client does not settle with the homeowner, what the act says is that the case should not move forward.

And what I think your ruling is is that my client will have the opportunity to meet with 10 percent of the class and to settle the individual claims of those 10 percent, you know, but not with regard to the other 90 percent. 90 percent will not have the right to have their claim resolved pursuant to the act before litigation goes forward, before the case goes forward.

THE COURT: I understand, I think, what you're saying is that we could have theoretically 10 percent of the class settled out and then, you know, there is nobody left to try on what I've done. We will -- as I indicated when the notice of right to cure time frame is over with, we will sit down and reevaluate

what's left at that point and make adjustments as necessary as to do we need to expand the class, subclasses, or how to treat it.

I can tell you that if y'all have settled, you know, the vast majority of those cases under the right to cure, well, then, I may very well revisit as to whether or not we need to do it for everybody else, because if it was something that we got rid of 10 percent of the case in three months on that, well, then, I might

very well view the whole thing differently.

But, again, we're in unchartered waters so we're kind of moving forward today.

MR. RAWL: And that is what I'm trying to figure out is why, while we're going through the right to cure process, will the rest of the case be stayed so will the only thing the parties will be working on is the right to cure process for the lucky 10 percent?

THE COURT: I guess to the extent you're saying nothing else gets done with the 90 percent of the people that aren't part of my initial 10 percent, yeah, nothing is going to be done with it.

MR. RAWL: Okay. And that raises my next question, which is, is the Court saying we can go forward with discovery on the individual issues with regard to the other 90 percent?

THE COURT: No. We're not going to go forward with discovery until after we have finished the right to cure part and gotten into the final -- these are the people that are going to go to trial, and then we're only going to do discovery on those people that we're going to trial on. That's my plan right now.

MR. RAWL: Okay. And one of the reasons I'm trying to get clarification on what you mean, Your Honor, is because, you know, in the notice to the class members, we have to explain to them what's going forward. They only get one option to opt out, so this notice has to say 10 percent of you will be able to go through a right to cure process and may be able to settle the claim, your

claim before litigation. Those people will be chosen by plaintiff's counsel.

The other 90 percent will sit by and wait until that process is over. And so, I mean, exactly how Your Honor intends to do that, in other words, exactly what that order is going to say --

THE COURT: I don't know that it needs to say it that way, but -- again, we'll revisit the results. We'll revisit what we have left at the end of the initial right to cure.

MR. RAWL: And one of the issues that my client raised is my client asked for reconsideration of

your decision to certify the class. I understand that Your Honor's denying that. My client also asked for clarification of certain issues that need to be included in the notice to the class members.

You know, after the class notice goes out, that is all the information that these homeowners will receive with regard to their rights on whether or not they should opt out or not opt out. So after this opt out period is over, you know, anything else that the Court decides, those homeowners are stuck in this case.

The only way they can get out of the case at that point is with a dismissal with prejudice, because anything else would be an opt-in class, which we know we can't have.

So, you know, the notice at this point, there are several issues that need to be clarified with regard to how to draft the notice. My client submitted a proposed notice trying to guess what the answer to some

of these issues would be, but we don't know what the issue is -- the answers are going to be. We know the answers to those questions before a final draft notice can go out. We know several things would be of the utmost importance to class members, and I listed them out, but I think we need clarification on what J.P. suggested what claims are being tried on behalf of the

class?

THE COURT: I don't think we need to be as specific as you're suggesting today.

MR. RAWL: And I respectfully disagree. I think you have to tell the plaintiff. In this case, so far the plaintiff's experts have found six things that they claim could be wrong with the insulation on the house. They don't know with regard to each house but those six things.

THE COURT: There may be other things that they found during this process of looking at these houses so then oh, you can't fix those because those weren't listed as the six things that were listed in the initial notice so you're sorry, you're out, and I don't really feel like that is necessary to do at that point.

MR. RAWL: The point Your Honor is making is exactly what I'm saying. The plaintiffs had the opportunity at the Rule 23 hearing to say what the common issues were. They still have not said any one issue with insulation that can be decided with regard to one house and applied to any other house out there.

The plaintiffs' experts have said you can

look at any other issue on one house and all of their experts said so. The plaintiffs' problem is we need to know what that list is because if you're a homeowner in

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Sun City Hilton Head and you receive this notice and it says these are the claims that we're making, if you have any other claims, you need to opt out.

THE COURT: I get your point, I read your point, and I'm not inviting further oral arguments on it today. You're protected to the extent your made your memorandum part of the record. You've made it, but we're just not going to sit here, and I've already denied the motion for reconsideration.

MR. RAWL: And, again, I'm just trying to make sure I'm protecting my client's rights on that point, so are you also denying my client's request for clarification?

THE COURT: Yes.

MR. RAWL: There are a handful of other motions that have not been dealt with. Are we going through those?

THE COURT: What motions do we have left that you're referring to?

MR. RAWL: My client also made a motion for summary judgment.

THE COURT: Right. That's denied as well.

MR. RAWL: Is there any way that my client -- can I can tell him what the basis was?

THE COURT: No, because I don't have to do

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that on a denial for a motion for summary judgment because every time I do that, then somebody invariably down the road says, Oh, Judge, you wrote this line in that order and you're -- that's -- the law of the case and you stuck with it. If I grant a summary judgment motion, I have to tell you why and spell it out, but I don't have to on denial of one, and they come back to haunt me when I write anything other than denied, so you got it. It's denied. I think I learned that from your dad.

MR. RAWL: With regard to the issues that it is -- that every party agrees are individual to each class member, for example, statute of limitations, and the trial plan that Joe submitted, he said he wanted a common issues trial first and then after that he followed with what the U.S. Supreme Court said in Wal-Mart, which is you have to do individual discovery as to every homeowner because the statute of limitations issues, statute of repose, the proximate cause issues, all of those, I believe, everybody is in agreement they are individual to each house, so at what time will the discovery go forward on those issues and will those issues be decided by a jury, after a common issues trial or before?

THE COURT: I don't know. What's your

thoughts on that, Mr. DaPore?

MR. DAPORE: I think they would go forward with the dispositive motions stage, which would be before the common issues trial.

MR. RAWL: And my client has no problem with that, Your Honor, keeping in mind that you're talking about probably three to four depositions per homeowner to determine whether or not the statute of limitations has run, so we're looking at eight years of discovery before we get to dispositive motions.

THE COURT: We'll probably visit that issue when we get to the end of the right to cure phase and we're looking at what do we do then for discovery. So I'm inclined to say that is a dispositive motion, and we'll get a little discovery maybe on that, but I don't know the answer right now.

MR. RAWL: For example, what we did on the named plaintiffs, we know of several other homeowners in Sun City Hilton Head that will testify just what the named plaintiffs testified to, which is they knew of PrimeTrim problems six years before suit was filed. They brought it up to Del Webb, told Del Webb they thought it was their fault, and Del Webb said no.

So it's kind of a very straightforward statute of limitations argument, but it's going to be

individual for each plaintiff, and so at some point, in order to get that evidence, we'll have to go forward with individual discovery on each homeowner. My client would like to do that before a trial, because --

THE COURT: You can do it before, before the trial, obviously. But that will be something we visit again when we get the results of the right to cure process done. And we start looking at this discovery to get ready for trial, then we'll revisit whether or not

you get to depose each and every homeowner on the statute of limitations issue only.

MR. RAWL: And all the issues that all the parties agree will require individual discovery to each house. There are numerous issues, and one of the issues --

THE COURT: You haven't agreed on anything yet in this case, so that might be --

MR. RAWL: Your Honor, I think most of the facts are undisputed, it's just the law that's being applied to those guys, and one of the issues that we're -- the next issue that we have to tell the homeowners in a notice, and it comes -- I'm just making sure the Court didn't intend to treat these eight houses and -- if those eight homeowners, all of their claims are barred from the statute of limitations pursuant to a jury

finding that they all knew or should have known of PrimeTrim issues prior to this case being brought, okay, you know, is the Court's intention then to take that ruling that those eight have been claims that are barred by the statute of limitations and apply it to all the rest such that the other 892 homeowners' claims are also barred?

THE COURT: I don't know that I'm prepared to say that today. Again, that's something we'll look at down the road.

MR. RAWL: And the reason, if that is what the Court's intention is, we have to tell the homeowners in the notice that, for example, your actual house will

not be inspected. The actual problems on your house will not be inspected. Your plan will be completely based on one of your neighbor's houses or eight of your neighbor's houses and what the jury finds is or is not wrong with that house, and so --

THE COURT: I don't know that I necessarily agree that we have to get that specific in it.

MR. RAWL: But from my client's standpoint, if the notice is not sufficient and if the notice doesn't actually fully explain the homeowner's rights and what they're losing if they don't opt out and what they're gaining if they don't opt out, then what happens is, is,

you know, after we do -- let's say the defendants do win this case, and say I wasn't given notice that my actual claims were going to be considered --

THE COURT: I understand what you're saying, and when we leave out of here today I've given Mr. DaPore the opportunity to submit me a final -- Georgia-Pacific are real close on a proposed order. They're listening to what you have to say and they're giving their input, and so, you know, you'll get a chance to submit something as well, but, you know, I don't know that I'm -- I agree with you that everything you say needed to be put in that notice at this point. Res judicata is down the road, way down the road.

MR. RAWL: And the problem is res judicata is directly at issue at the notice standpoint because after the homeowner makes the decision to opt out or not --

THE COURT: I understand the significance of res judicata in the notice stage.

MR. RAWL: But they're stuck at that point, so if they didn't give -- the biggest issue in this case, and it's undisputed from the standpoint of notice, is that the plaintiffs are waiving any damages related to trim board that has already been repaired. So if one homeowner out there has pulled off half the trim board and had it replaced and it cost him $5,000, that claim

has been waived in this case. It is undisputed.

Now, you have to tell the homeowner in the notice that if you do not opt out, this claim has been waived. If not, that homeowner's due process rights have been violated and all defendants due process rights are violated, so, you know, what the law says is once the plaintiffs start waiving claims, they're not adequate representatives and class cert should be denied.

We're past that. Your ruling on the last that says there is not adequate representation if claims are waived, if undisputed claims are waived, you've ruled that even though the claims are waived, they're still adequate representatives. At this point we're in kind of novel areas where we have undisputed waiver of claims, but a class is still going forward, and so it makes the notice issue that much more important because now it is undisputed that if they don't opt out, claims will be waived. And so all these issues of how the case is going to be tried, what claims are remaining? What the homeowners is going to waive if they don't opt out?

For example, you know, my client has a contract with probably more than half of the homeowners.

There is a attorney's fee provision in that contract, and so we know that 100 of the houses, there is a serious statute of repose issue, so do you not have to tell the

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homeowner, You may have a statute of repose issue. If your case is barred by statute of repose, you may have to pay Dell Webb's attorneys fees? Or if you knew of this claim more than three years prior to this date, then you have a statute of limitations issue and your claim may be dismissed? If your claim is dismissed and you have a contract with Dell Webb, you may have to pay attorney's fees.

All of these issues are absolutely critical due process issues that these homeowners have to know at the time of notice to know whether or not they opt out or not, because after the opt out period, the only way they get out then is a dismissal with prejudice, and as Your Honor just said, you're familiar with res judicata.

If a homeowner has significant roof problems in their house, they have minor trim board problems in their house, and they have a claim against my client, Del Webb, if they do not opt out of this case, then their roof problems have been waived by res judicata, because they knew or should have known and you can't bring two different lawsuits again Del Webb at the same time.

They can dismiss them out of the class action, but to do so they would have to do it as a dismissal with prejudice or an opt out class, so the plaintiffs know that any other claim against Del Webb

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that any of these other 800 people have has to be waived if they don't opt out of the class, and so I think that if you're not going to say they are not adequate representatives, you would at the very least have to put in the notice that if you have any other claims against Del Webb or any other problems and you do not opt out, then you have a chance that that claim will be waived.

If you don't say that in the notice, my client's due process rights are protected. That homeowner is going to come back and say, I wasn't told that. That wasn't in the notice. This wasn't adequate. My due process rights were violated. I want the judgment set aside. So what that does is puts my client in the position of being the only entity protecting the rights of the homeowners.

If this case goes forward as a class action, it is critically important to my client that the homeowners get all due process rights, because if they don't, my client's due process rights are violated and whatever happens gets set aside and we come back before you again on the exact same issue again and we're trying the case the second time.

So that is why, Your Honor, I think that all of these issues have to be clarified.

THE COURT: Okay.

MR. RAWL: In order to know what has to be put in the notice if we're going to go forward on a class in this case.

THE COURT: Let's do this: I'm going to give

everybody an opportunity to send me a class certification notice by the end of the day Friday the 2nd of March, and, also, if you can get together on a scheduling order based on the parameters of what I've laid out today, that's great. If you can't work it out, then they can submit their own proposed orders, but give them to me by the end of the day next Friday.

MR. RAWL: Your Honor, I have another motion that is very much related to the last one.

THE COURT: What is that?

MR. RAWL: Which is my client has made a motion for injunctive relief.

THE COURT: Are you guys really having a problem with them talking to clients and --

MR. RAWL: Absolutely.

THE COURT: I'm listening -- I saw Joe's response and he's like, look, I haven't talked to anybody, have you? And so what is the problem?

MR. RAWL: I'll tell you that I think Joe is a very stand up gentleman, and I don't think Joe is going to intentionally do anything wrong.

THE COURT: But --

MR. RAWL: In the plaintiff's proposed notice, they list their phone number to call if any homeowner has any question about class certification, or whether they should opt out.

THE COURT: Who else would they call?

MR. RAWL: That's the problem. What we have is we have a situation where there is a conflict of interest between the homeowners, the putative class

members and the lawyers, and the reason is every plaintiff's lawyer has a financial interest in signing up clients because they'll get a percentage of the recovery and so they have an interest. What we have here is a financial interest and the class members waiving their rights, waiving their rights to collect on damages that they've already had repaired, waiving their rights to have their roof fixed or any other claim that may be going forward against Del Webb, and if this wasn't a class action, plaintiff's counsel would not even be able to give any advice to a prospective client until they sent that person to another lawyer that said --

THE COURT: This kind of argument, though, is inherent in every class action lawsuit, and I just don't really think that that is the basis for injunctive relief.

MR. RAWL: Just so I could be clear, Your Honor, this is a very novel issue in class action lawsuits. The issue is really novel, and what is novel about it is usually when there is a waiver of claims and the putative class members have to waive claims in order to be in the class, those cases are only not certified as a class. In this case, we know of waiver of claims, several different categories, it's undisputed, but we're going forward as a class, and so that is what is new and different about this case.

We're in unchartered territory now because this class is going forward with waiver of claims, and so what we have is class counsel, who I don't think they're

going to intentionally do anything wrong, but if they have any advice at all, it's a violation of the homeowner's due process rights to have adequate counsel that does not have a conflict, and that's what my client can't have, and the notice can't say, call these plaintiff's lawyers.

You know, I provided law to the Court that says they don't actually represent these people until the opt out period is over. So after the exclusion period is over, then, theoretically, plaintiff's counsel and then all the homeowners have the same goal, which is to get the most amount of money. Before that time it may be by

far in the best interest of the homeowner to opt out, but it's by far the best interest of class counsel and class representatives for the homeowner not to opt out.

MR. BUCKLEY: Your Honor, I might be able to save us about an hour. We can agree on behalf of the plaintiffs that as to what the plaintiff's counsel, Mr. DaPore and I, can tell anyone who calls that number, and we will write it down and we will give it to Amanda DeMato, our paralegal. The notice can provide that they will contact Amanda DeMato. She will read it to them, and what it will contain is something like this: We will send you a copy of the pleadings of all parties, and we will send you a copy of the Court's order certifying the class. You've already received the class notice. If you need any further legal advice, retain your own attorney.

That's pretty simple.

THE COURT: Would that satisfy you, Mr. Rawl?

MR. RAWL: I apologize, but it would not

because then you get into a situation where the notice still says to call plaintiff's counsel, which is a conflict of interest. Somebody says I called plaintiff's counsel, and then there is an argument about what was and what was not said. The only thing that will satisfy my client is an injunction that says plaintiff's counsel, any of their employees may not give -- have any

communication with any putative class member until after the exclusion period.

THE COURT: All right. I think what they proposed is going to satisfy it. I think it's not as big of an issue as you consider it to be, but it's a novel issue, and, again, I'm going to respectfully decline your request for injunctive relief. Mr. Buckley and Mr. DaPore, put that in their notice.

MR. RAWL: At this time, can I consider that motion denied?

THE COURT: Correct. Do you have anything else?

MR. RAWL: Without rehashing everything that I've put in my filings to you, I think that you have addressed all of my motions. I would ask that you consider clarifying some of the issues that will be put into a class notice so that we can try to rectify at least some of the due process issues. Thank you.

MR. BUCKLEY: Can we revisit the injunction issue before you rule because he's going to appeal that.

THE COURT: What do you want to do?

MR. BUCKLEY: What I want to do is grant his

motion in the form I suggested so he can't appeal. I'm curious, because the next thing he's going to do, he's going to move to compel arbitration, and that's going to

be denied because he's waived it and he's going to appeal that, and he's going to try to prove to you that he can put this case off until 2024, as he's suggested in his proposed scheduling order.

And I don't want the Court to give him the opportunity to accomplish what he has vowed to accomplish, which is to put this case off far enough where you'll retire, Joe DaPore will die, I'll retire, and all four of our plaintiffs will be dead because two are dead already. If you make it mutual, you know, if you make it mutual as to him as well, and grant it --

MR. DAPORE: We can live with not talking to anybody. We want him to live with not talking to anybody.

THE COURT: I will grant the injunctive relief and prevent you both from talking to anybody.

MR. RAWL: I just want to make sure there was no motion pending before the Court with regard to injunctive relief against my client or me.

THE COURT: Would you have a problem? You want to talk to him or what?

MR. RAWL: I'm not going to say one way or another. It's not an issue before the Court at this time. I can tell you I personally do not intend to talk to anybody, but --

THE COURT: They said the same thing.

MR. RAWL: And I just want to make sure that you're granting my motion as filed.

THE COURT: I'm going to grant a mutual restraining order that neither of you talk to --

MR. BUCKLEY: We make a motion for the same injunction with the qualifications that I stated earlier about what we would be allowed to put in the notice about contacting counsel.

THE COURT: Okay. And if you get contacted by anybody, you designate a paralegal and read them the same thing.

MR. RAWL: And I apologize, Your Honor, I just want to make sure I'm clear about what the ruling is. Your ruling is their office can still have contact --

THE COURT: If they get contacted by somebody, this is how they will handle it. They will designate a person in their office to say essentially what Mr. Buckley said, and that is, you know, this is the case. We will send you a copy of the pleadings and the orders that have been signed today, and if you get called by somebody, then you can designate somebody in your office to say essentially the same thing.

MR. RAWL: That's not what I requested, so my

motion is denied and you altered it. What I'm asking is the Court to rule there is a conflict of interest and for the Court to say plaintiffs's counsel may not have any contact with any putative class members until after the

exclusion period.

THE COURT: Well, I don't know that I granted everything that you asked for, but that's what I granted, that he can have limited contact and he's restrained from giving individual advice to people when they call in and ask for it during that period of time, and then if they want any particularized advice as to their claim, then they will be directed to seek outside counsel.

MR. RAWL: And to the extent any other relief was requested in my motion is denied?

MR. BUCKLEY: Your Honor, at this point I'm going to renew my request that you hold all this in abeyance, allow the class notice to go out, and then rule on that issue, perhaps as soon as the class notice, or class opt out period has expired because, again, what he's going to do is he's going to appeal your ruling because you denied all or some portion of the injunctive relief motion, and then he's going to try to claim that stays everything, including class notice. And we're going to be two years in Columbia because he's not going to be satisfied with the Court of Appeals. Then we'll go

to the Supreme Court. So I would ask that you just hold it in abeyance. Don't rule. That's in the interest of justice.

THE COURT: Is that what your intentions are?

MR. RAWL: I will not tell you. That will not be an issue for my client to decide. This issue is the exact same issue, adequacy of representation issue. It's exactly the issue that you asked earlier that if you intend to appeal this grant of class certification, do it

sooner rather than later. This issue would take all issues on class certification to the appellate courts immediately should my client so decide. Even holding a motion for injunctive relief in abeyance would be, in fact, a denial of it.

THE COURT: Why don't you send me a copy of what you propose in your order, and I'll take a look at it and decide how I'm going to rule on that.

MR. REMAR: Judge, could I make a comment? Georgia-Pacific doesn't have a dog in this fight, but we're not interested in undue delay either, and I would suggest if the parties actually look at Mr. Rawl's motion that the Court can grant it because what he asked for is an injunction against communicating with the prospective class members regarding the contents of the issues addressed in Court's order. They said they're not going

to communicate, publishing any statement interpreting, explaining, or otherwise commenting on the Court's order. They said they're not going to do that, taking any action intended to advise or inform residents of Sun City Hilton Head of their legal rights. They said they're not going to do that, taking any action intended to influence the decision of respective class members whether to opt out of putative class. They said they're not going to do that. They said all they're going to do is submit to the Court a proposed statement that says to people, here, if you want the complaint, here is the complaint. If you want the Court's order, here is the Court's order, and if you want advice go get another lawyer.

That's not violating any of the things Mr. Rawl is complaining about, so I would suggest the Court grant his motion as stated and direct the plaintiffs to submit to the Court the statement they're going to give to parties who might call them.

MR. BUCKLEY: That's probably actually a good resolution, Your Honor. Grant his motion --

MR. DAPORE: As written.

THE COURT: Well, then that's what we're going to do then.

MR. RAWL: To make sure I understand, my motion is granted as written.

THE COURT: That's what it looks like.

MR. RAWL: Thank you.

THE COURT: Anything else?

MR. BUCKLEY: I don't want him to get real cute with us, Judge. We're going to send you a proposed order if that's okay.

THE COURT: That's fine. I'm in Beaufort next week.

MR. BUCKLEY: I don't want him to claim you made a finding that we had a conflict of interest and try to disqualify us.

THE COURT: Send me a proposed order along with everything else by the end of the week next week. So I'm actually going to be in Beaufort next week, so, you know, but I'm not going to be back here until Friday, but I will be back here Friday, so send me something, and I think the week after that I'm in Moncks Corner, so if you get it to me by the end of the day -- tell you what:

Make it by noon Friday, and I know I'll be back in sometime over the weekend to get my stuff backed up to go to Berkeley, because I'm doing civil that week, so I got to take my criminal stuff with me next week, so I'll have them with me, and then I'll look at it and decide what I'm going to sign.

MR. RAWL: Is there any way we can have a

shorter time frame?

THE COURT: No. Because I'm going to be in Beaufort doing something else next week.

MR. RAWL: Will I get a chance to look at that proposed order granting my motion before it's signed?

THE COURT: Yeah, you'll get a chance to look at it, and I'll assign it sometime next week. I wouldn't dwell on taking a long time to look at it.

MR. RAWL: My client wants it decided one way or another as quickly as possible.

THE COURT: When he submits it to me by noon on Friday, he'll submit it to you on noon on Friday with the same e-mail, and I'll promise you I probably won't look at it over the weekend, but the first part of the next week I'll be starting a two week long construction case, and at some point in time I will -- in between sleep and eat, I will read this stuff, plus whatever I know they will want me to read and the other things I have to do.

I'll do my best. But don't dwell on taking a long time to send me your objections.

MR. CULPEPPER: Mr. DaPore is right. We made suggestions, and I heard the word agree and I would like to be clear we object, as does Mr. Rawl, sending any

class notice because we don't think it can define the rights that the absent class members might have in this class and for a variety of other reasons. Within the confines of the Court's order, I don't want to revisit that. I just want to make it clear the objection, and once we understand that the judge is -- your order is going to go anyway, we're happy to work with Mr. DaPore, and that's what we're doing.

THE COURT: The Court acknowledges that you are not agreeable.

MR. CULPEPPER: Thank you, Your Honor.

THE COURT: Anything else?

MR. BUCKLEY: I agree.

MR. RAWL: Are we going to get a written order on all the motions that have been submitted?

THE COURT: Yes. Anything else?

MR. REMAR: Nothing from Georgia-Pacific.

THE COURT: All right. Have a great day.

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(Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 23rd of February 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 24, 2012

_____

Circuit Court Reporter

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-07-03166

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

v.

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

OF WHOM Georgia-Pacific Corporation and/or Georgia Pacific, LLC is ..... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Georgia-Pacific Corporation and/or Georgia Pacific LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Appellant Georgia-Pacific's LLC Reply in Support of its Petition for Rehearing

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October 29, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, Mr. and Mrs. Wendell Turner, on behalf of themselves and others similarly situated v. Georgia-Pacific Corporation and/or Georgia-Pacific LLC and Grayco Home Center, Inc.
Case No. 2007-CP-07-03166
SC Court of Appeals Case Tracking No. 2012-210927 (consolidated with 2012-211920)
Our File No. 10770/01650

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant Georgia-Pacific's LLC Reply in Support of its Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. By copy of this letter to counsel of record, we are serving them with a copy of this Reply.

Very truly yours,

A. Mattison Bogan

AMB:lpw
Enclosure
cc: Robert L. Widener, Esquire
A. Victor Rawl, Jr., Esquire
Joseph E. DaPore, Esquire
Edward D. Buckley, Esquire

Russ G. Hines, Esquire
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