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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,..... Appellant,

and

South Carolina State Plastering, LLC,..... Appellant,

v.

Del Webb Communities, Inc., Pulte Homes, Inc.,
and Kephart Architects, Inc., ... Third-Party Defendants,

OF WHOM Del Webb Communities, Inc., and Pulte Homes, Inc., are, ... Appellants.

MOTION TO DETERMINE APPEALABILITY

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INTRODUCTION

This appeal involves a putative class action. There can be no class action unless the trial court first certifies that the putative class meets the five specific requirements of numerosity, commonality, typicality, adequate representation, and sufficient amount in controversy imposed by Rule 23(a), SCRCP. The plaintiff "bear[s] the burden of proving the five prerequisites," and the trial court "must apply a *rigorous analysis* to determine" whether the plaintiff's evidence satisfies each of the five prerequisites. *Gardner v. S.C. Dep't of Rev.*, 577 S.E.2d 190, 200 (S.C. 2003) (emphasis added). The trial court's duty to apply a "rigorous analysis" is critical, because it ensures that the due process rights of the absent class members and the defendants will be protected in a class action trial. Absent class members will be bound by the judgment in the trial, and it would be a travesty to bind them to an adverse judgment if their claims are not sufficiently similar to those of the class representatives or if the class representatives had conflicts of interest that prevented them from adequately representing the class.

Here, the appealed orders will force this case to a trial on the merits as a class action without a ruling that the class meets the class certification requirements of Rule 23, SCRCP. The appealed orders are interlocutory, which raises the question of whether the orders are immediately appealable. Research reveals no case directly on point with the particular facts and circumstances of this case, and the appealability of interlocutory orders is decided on a case-by-case basis. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 773 S.E.2d 144, 146 (S.C. 2015). Accordingly, Appellant submits this motion to determine appealability.For the reasons set forth below, it is respectfully submitted that the appealed orders are immediately appealable.

BACKGROUND FACTS and PROCEDURAL HISTORY

The Grazias (plaintiffs) are homeowners in the Sun City residential development in Bluffton, South Carolina. Del Webb was the builder, and State Plastering was the subcontractor that applied exterior stucco to most of the homes in the development. The plaintiffs brought a putative class action against State Plastering for alleged defects in the exterior stucco work, and State Plastering brought in Pulte and Del Webb as third-party defendants (all jointly referred to as the defendants). The trial court (Judge Early) granted the defendants' motion to strike the class allegations, holding that a class action was inherently incompatible with the requirements of the Right to Cure Act.[1] The plaintiffs appealed, and the Supreme Court reversed in a 3-1-1 decision. *See generally Grazia v. S.C. State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010).

The Supreme Court reversed and remanded, holding that a class action was not inherently incompatible with the Right to Cure Act. The Supreme Court noted that "the question of whether certification of a class in this case is proper, much less the manner in which it could be achieved and managed, [was not] before the Court." *Grazia*, 703 S.E.2d at 203 n.5. The Supreme Court also outlined the procedure to be followed on remand. First, if and when a motion for class certification was filed, it would be "*incumbent* upon the circuit court to determine whether or not the action *meets each of the five* prerequisites" imposed by Rule 23, SCRCP for any class action. *Id.* at 204 (emphasis added). Second, "*[i]f and when these prerequisites are met*," the circuit court could consider whether the class action and class members could satisfy the requirements of the Right to Cure Act. *Id.* (emphasis added).

[1] The Right to Cure Act, officially entitled the "Notice and Opportunity to Cure Construction Dwelling Defect Act," is set forth at S.C. Code Ann. §§ 40-59-810 to -860 (Rev. 2011). It imposes various pre-trial procedural requirements for bringing residential construction defect claims, all of which are designed to promote settlement discussions and settlement before the filing of a complaint.

After remand, the case was designated as complex civil litigation and assigned to the Honorable J. Michael Baxley. The plaintiffs filed a motion for class certification, and Judge Baxley issued his Preliminary Order in which he made a "preliminary finding" that the plaintiffs' proposed class met the requirements of Rule 23, SCRCP, and set forth the procedures for compliance with the Right to Cure Act. (Tab A at 1).[2] As shown later, the only reasonable reading of Judge Baxley's Preliminary Order is that he was not making a final determination on class certification. Rather, he created a preliminary class for the purpose of "class" compliance with the Right to Cure Act and would thereafter use the information gathered in the Right to Cure process to determine whether a class should be certified for a trial on the merits. (See Arg. I, *infra*).

The defendants appealed the Preliminary Order, arguing *inter alia* that Judge Baxley had improperly deviated from the process outlined by the Supreme Court in *Grazia, supra.* This Court dismissed the appeal, finding that the Preliminary Order was not immediately appealable. (Order, Aug. 31, 2012, App. Case No. 2012-212364). This Court denied the defendants' petition for rehearing, and the defendants petitioned the Supreme Court for a writ of certiorari, which the Supreme Court denied. (Sup. Ct. Order, Dec. 10, 2013, App. Case No. 2013-000233).

After remand, the parties proceeded under the Right to Cure process established by the Preliminary Order, gathering voluminous evidence on the homes in the class which included questionnaire answers from thousands of homeowners, inspections of thousands of homes, depositions of some homeowners, and destructive testing on some homes. Judge Baxley retired, and the Honorable Edgar W. Dickson was appointed to replace him. By April 2016, the parties were nearing the completion of the Right to Cure process imposed by the Preliminary Order, and

[2] The full title of Judge Baxley's order was: "Order Making *Preliminary Finding* that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Forth Procedures for Compliance with the Right to Cure Construction Dwelling Defect Act." (Emphasis added).

Judge Dickson issued a scheduling order in May 2016. (Tab B at 1). As one would have anticipated under the plain language of Judge Baxley's Preliminary Order, the scheduling order set a date for a "*final* hearing" on class certification and continued the existing stay on merits discovery "until the Court issues its ruling on *final* certification." (*Id.* at 2, ¶¶ 3(c) and 4) (emphasis added).

In compliance with the terms of Judge Dickson's scheduling order (Tab B at 2, ¶ 3(a)), the defendants submitted briefs and additional evidence in August 2016 to be presented at the September 1, 2016, "final hearing" on whether a class should be certified for a trial on the merits. Judge Dickson, however, cancelled the hearing and issued an order holding that Judge Baxley's Preliminary Order was, in fact, a final determination on the question of class certification, and that Judge Dickson would not entertain any further arguments on the issue of class certification. (Tab C at 1-4, *passim*) (hereinafter referenced as "No Motions Order"). Judge Dickson's "No Motions Order" is completely at odds with the Supreme Court's opinion in *Grazia, supra*, Judge Baxley's Preliminary Order, Judge Dickson's own scheduling order, and the due process rights of the absent class members and the defendants. And, as shown below, it is immediately appealable.

ARGUMENT

I. Judge Baxley's Preliminary Order was not intended to be and was not a final determination on class certification.

The first question to be decided is whether Judge Baxley's Preliminary Order was a final determination on class certification as ruled by Judge Dickson. It plainly was not.[3]

A trial court's order is to be construed like any other written instrument. *Petition of White*, 385 S.E.2d 211, 215 (S.C. App. 1989); *Weil v. Weil*, 382 S.E.2d 471, 474 (S.C. App. 1989). The

[3] Judge Baxley and Judge Dickson referred to the hearing and determination on class certification required by the Preliminary Order as being a "final" determination and "final" hearing. Ordinarily, no class certification order is truly final until after final judgment, and the issue remains viable throughout the course of the case. Rule 23(d)(1), SCRCP (providing that class certification orders may be altered or amended until final determination of the merits). Judge Dickson, however, has ruled that he will not entertain any further arguments on class certification. (Tab C at 2).

controlling inquiry is the intent of the authoring judge. *O'Banner v. Westinghouse Elec. Corp.*, 459 S.E.2d 324, 327 (S.C. App. 1995). That intent must first be gleaned from the order itself under the plain and ordinary meaning of the words used in the order. *Eddins v. Eddins*, 403 S.E.2d 164, 166 (S.C. App. 1991); *Management Recruiters, Inc. v. R.J.R. Mechanical, Inc.*, 404 S.E.2d 908, 909 (S.C. App. 1991). If the language of the order is plain and unambiguous (as it is here), there is no room for construction and the order must be enforced as written. *Petition of White*, 385 S.E.2d at 215; *Weil*, 382 S.E.2d at 474. If, but only if, there is some ambiguity within the four corners of the order, then, and only then, the court may go beyond the four corners of the order and consider extrinsic evidence to determine the meaning of the order. *Id.*; *Reading v. Ball*, 354 S.E.2d 397, 399 (S.C. App. 1987) (if order is ambiguous, may resort to record to construe it); *Drawdy v. Drawdy*, 328 S.E.2d 133, 135 (S.C. App. 1985) (same). Here, a plain reading of Judge Baxley's Preliminary Order yields the inescapable and unambiguous conclusion that the Preliminary Order was a preliminary certification for purposes of the Right to Cure process only, and not a final certification for purposes of a trial on the merits. Rather, the Preliminary Order clearly contemplated that a full and final evidentiary hearing on the Rule 23 requirements for a class action trial would be held after the completion of the Right to Cure process.

At the hearing that resulted in the Preliminary Order, the plaintiffs argued that their evidence proved the required showings under Rule 23 and, therefore, the class should be certified for a trial on the merits. The defendants countered that the plaintiffs' evidence failed to satisfy the Rule 23 requirements and, therefore, class certification should be denied. Rather than decide whether the class should be certified for a trial on the merits, Judge Baxley created a middle ground in his Preliminary Order. He found that the plaintiffs had made a sufficient evidentiary showing to justify certifying the class but only on a "preliminary" basis. He reserved the question of

whether the class should be certified for a trial on the merits until after the parties completed the Right to Cure process. He would then hold an additional hearing for the taking of additional evidence, including the evidence gathered during the Right to Cure process, and he would then make a final determination of whether the class should be certified for a trial on the merits.

Judge Baxley opened his Preliminary Order with a finding that the "[p]laintiffs' *proposed* Class *preliminarily meets* the requirements for class certification." (Tab A at 2) (emphasis added). He then described the Preliminary Order as "set[ting] forth the procedures and requirements for compliance [with the Right to Cure Act] in this *putative* class setting." (*Id.*) (emphasis added). The opening paragraph of the Preliminary Order concluded that, after the compliance with the Right to Cure procedures set forth in the Preliminary Order, "the Court *will make a final decision* as to whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the" Right to Cure process set forth in the Preliminary Order. (*Id.*) (emphasis added).[4]

Judge Baxley acknowledged the numerous evidentiary problems and failures argued by the defendants "and recognize[d] that factual and legal differences may exist within the *putative* class." (Tab A at 10) (emphasis added). Because of those evidentiary problems, Judge Baxley made it clear that the class was being certified on a preliminary basis only: "For these reasons, this Order makes *only a preliminary finding* that the requirements of Rule 23 *have been met* by [the plaintiffs]." (*Id.*) (emphasis added). Judge Baxley intended to supplement the existing evidence on class certification with the information developed in the Right to Cure process and otherwise to later decide whether the class should be certified for a trial on the merits, including the possibility of using sub-classes to address the factual and legal differences existing within the

[4] Judge Baxley also later noted that, because other subcontractors applied the stucco exterior to some of the homes in Sun City but were not a party to the action, "the *putative* class [was] limited homes (sic) on which [State Plastering] installed the stucco in whole or part." (*Id.* at 3) (emphasis added).

putative class. (*Id.*). Regarding the affirmative defenses raised by the defendants as to some of the homes in the putative class, Judge Baxley ruled that he would address those issues "*should* a Class be *finally* certified." (*Id.*) (emphasis added). He concluded his preliminary Rule 23 analysis: "Accordingly, *for purposes of* attempted compliance with the Right to Cure [Act], this Court finds that [the plaintiffs] have met the requirements of Rule 23(a), and are entitled to a *preliminary determination* that [the plaintiffs] may proceed *at this juncture* using a class approach." (*Id.* at 11) (emphasis added). Judge Baxley later reiterated the preliminary nature of the class certification, noting that "based upon the Right to Cure responses, the Court will make a *final determination* of class certification." (*Id.* at 12) (emphasis added).

The only reasonable reading of Judge Baxley's Preliminary Order is that he did not make a final determination on whether the putative class should be certified for a trial on the merits. He repeatedly referred to the class as being "putative" (*i.e.*, merely alleged) and repeatedly stated that the class was being certified on a preliminary basis only. This preliminary certification was for the specified purpose of working through the Right to Cure process on a "class" basis. Upon completion of that process, Judge Baxley would then return to the question of class certification and make a final determination, based upon all of the evidence and including the evidence produced by the Right to Cure process, as to whether the class should be certified for a trial on the merits. There is no other reasonable reading of Judge Baxley's Preliminary Order.

II. Judge Dickson ignored and misconstrued the plain meaning of Judge Baxley's Preliminary Order, and he further erred by refusing to hold a final and full evidentiary hearing on the issue of class certification as envisioned by the Preliminary Order.

Judge Dickson ruled in his "No Motions Order" that Judge Baxley's Preliminary Order was a final determination on class certification and that the class would therefore proceed to a trial without any further hearings or determinations on whether the class should be certified for a trial

on the merits – Judge Dickson expressly refused to entertain any further arguments on class certification. (Tab C at 2). This was manifest error under the plain meaning of the Preliminary Order. Moreover, Judge Dickson impermissibly overruled Judge Baxley's finding that the evidence did not yet meet the requirements to certify a class for a trial on the merits, and that this issue would be revisited in a full evidentiary hearing after the completion of the Right to Cure process. See *Frampton v. South Carolina Dep't of Transp.*, 752 S.E.2d 269, (S.C. App. 2013) (one circuit court judge cannot overrule another on the manner in which the case is to be tried).

Judge Dickson's "No Motions Order" is replete with errors. First, the order treats the appeal of the Preliminary Order as having been a "review" of that order. (Tab C at 2, 4). The merits and meaning of the Preliminary Order was never reviewed on appeal, because the appeal was dismissed for lack of appellate jurisdiction.

Second, Judge Dickson (like Judge Baxley before him) mistakenly concluded that the Supreme Court's opinion in *Grazia, supra*, was a ruling on the merits of class certification in this case. (Tab C at 3) ("the Supreme Court had the clear opportunity to *deny class status in this very case* but affirmatively chose not to do so.") (emphasis added). This is simply wrong. As the Supreme Court expressly ruled in *Grazia*, no motion for class certification had been filed at the time of the appealed order in *Grazia*, and the question of whether a class should be or could be certified in this particular case was not before and not decided by the Supreme Court in *Grazia*, 703 S.E.2d at 203 n.5 and 204. Rather, the only issue before the Supreme Court was the purely legal question of whether the Right to Cure Act was so inherently incompatible with a class action that there could never be a class action for alleged residential construction defects that were subject to the Right to Cure Act. *Id.* at 203 n.5.[5]

[5] The Supreme Court specifically ruled as follows: "[T]he question of whether certification of a class in this case is proper, much less the manner in which it would be achieved and managed, is not an issue that is properly before the

Third, Judge Dickson refused to consider the briefs submitted on class determination after completion of the Right to Cure process, because "[n]o motion accompanied [these] filings and no action is hereby taken." (Tab C at 2). No motion was necessary, because the issue of final class certification remained open under the Preliminary Order and, therefore, the plaintiffs' motion for class certification remained pending before the court. Judge Baxley plainly ruled in his Preliminary Order that the issue of class certification would be revisited after completion of the Right to Cure process, at which time the court would hold a full evidentiary hearing and decide whether the class should be certified for a trial on the merits. Moreover, the briefs were filed as specifically directed by Judge Dickson in his own scheduling order, which itself set a hearing date for a final hearing on the issue of whether the preliminary class determination should be or could be converted into a final class certification for a trial on the merits. (Tab B at 2, ¶¶ 3-4).

Finally, and most importantly, Judge Dickson ignored the plain and unambiguous meaning of the Preliminary Order. Judge Baxley plainly ruled that the question of certifying a class for a trial on the merits remained opened and was to be decided after the Preliminary Order in a full evidentiary hearing that would include the results of the Right to Cure process. To justify his rewrite of the Preliminary Order as being a final class certification order, Judge Dickson impermissibly went outside the four-corners of the unambiguous Preliminary Order to consider statements made by Judge Baxley after the Preliminary Order as extrinsic evidence on the meaning of the Preliminary Order. Moreover, those statements are taken out of context, and Judge Baxley never issued any order or made any statement that altered the fact that his Preliminary Order was not a final determination on class certification for a trial on the merits.

Court. Consequently, the issue is not whether *these* claims could be properly certified, but rather whether class certification could be achieved under *any circumstances* under the Right to Cure Act." *Grazia*, 703 S.E.2d at 203 n.5 (emphasis by court). The question of whether a class action would be or could be proper in this case was a matter to be decided by the trial court, upon a motion for class certification made after the remand in *Grazia*. *Id.* at 204.

Throughout his "No Motions Order," Judge Dickson repeatedly states that Judge Baxley's Preliminary Order was a final determination on class certification. (Tab C, *passim*). Notably and tellingly, however, Judge Dickson never cites anything in the Preliminary Order itself to support this conclusion. (*Id., passim*). This is not surprising, because the only reasonable reading of the Preliminary Order is that Judge Baxley was not making a final determination on class certification, and that a final decision would not be made until after a full evidentiary hearing that included the evidence gathered in the Right to Cure process. (See Arg. I, *supra*). To avoid this, Judge Dickson relied on comments made by Judge Baxley after the Preliminary Order.[6]

Judge Dickson never found and the plaintiffs have never argued that Judge Baxley's Preliminary Order was ambiguous, and it clearly is not. Nevertheless, Judge Dickson went outside the four corners of the Preliminary Order to determine its meaning based on extrinsic evidence. The only way to get outside the four corners of the Preliminary Order, however, is to first find that it is ambiguous. *Petition of White* and *Weil*, both *supra*. The Preliminary Order is not ambiguous and, therefore, Judge Dickson erred in going outside the four corners of the order to give it a meaning that has no support in Preliminary Order itself. Moreover, Judge Dickson relied on extrinsic evidence of post-order statements by Judge Baxley that are quoted out of context and thereby mask the true import of the statements.

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[6] Judge Dickson referenced the Preliminary Order for a few statements that have nothing to with the question of whether the Preliminary Order was a final determination of class certification. First, he noted Judge Baxley's rejection of the defendants' argument that the factual and legal differences within the individual cases "automatically defeat a class action" in this case. (Tab C at 3). This is true but, as shown earlier, Judge Baxley specifically ruled that this issue would be revisited and finally determined based on the evidence to be submitted and considered at a later date, including the evidence produced by the Right to Cure process. (See Arg. I, *supra*). Second, Judge Dickson noted Judge Baxley's observation that a class approach was the best approach. (Tab C at 3). Again, this is true, but Judge Baxley thereafter specifically ruled that the class approach being used was "for [the] purposes of attempted compliance with the Right to Cure [Act]" and, therefore, Judge Baxley made a "*preliminary determination* that [the plaintiffs] may proceed *at this juncture* using a class approach." (Tab A at 11) (emphasis added). Third, Judge Dickson noted that Judge Baxley, like Judge Dickson, viewed the Supreme Court's decision in *Grazia, supra*, as being an approval of using a class action in this case. (Tab C at 3). As shown earlier, this is a mistaken reading of *Grazia*. See n.5 and accompanying text, *supra*.

First, Judge Dickson quoted the following statement by Judge Baxley at a motion hearing held on April 30, 2012: "It takes us back to the issue . . . that you continue to argue, which is that we shouldn't have a class. Well, I made that decision against you." (No Motions Order at 2). This quote comes from the hearing on the motion to reconsider and clarify the Preliminary Order and, more specifically, from a colloquy between Judge Baxley and defense counsel on the issue of clarifying the class definitions set forth in the Preliminary Order. (Tab D at 5, 70-72). Judge Baxley declined to clarify the definition in an order but invited suggested changes in the form of a proposed class notice that he would consider in making the upcoming decision on the form of the class notice. (*Id.* at 71). Defense counsel responded that it was very difficult to determine who should be and not be in the class. (*Id.*). Judge Baxley's response included the statement quoted by Judge Dickson (in underlining below), but his response considered in context and its entirety shows no intent to change the clear meaning of the Preliminary Order:

> **The Court:** Right. It takes us back to the issue, [defense counsel], that you continue to argue, which is that we shouldn't have a class. Well, I made that decision against you. And again ultimately, *who knows where this case will go.* But, that decision in this case [*i.e.*, the Preliminary Order], hard fought, *preliminarily made in favor of* [the plaintiffs], and I just simply decline to back up and start all over again and say well, no this is too much trouble, we are not going to have a class.

(Tab D at 71-72) (italics added) (underlined portion quoted by Judge Dickson in No Motions Order). In short, Judge Dickson erred in two respects. First, the Preliminary Order is not ambiguous and, therefore, extrinsic evidence cannot be used to determine the meaning of the Preliminary Order or create the impression of ambiguity. Second, Judge Baxley's above-quoted statement, when considered in full and in context, does not demonstrate any intent to change the plain meaning of the Preliminary Order. To the contrary, Judge Baxley continued to refer to the Preliminary Order as "*preliminarily made* in favor of" the plaintiffs and, in an obvious reference

to the future hearing to be held on final class determination, Judge Baxley observed: "who knows where this case will go [?]"

Second, Judge Dickson quotes the following colloquy from the February 1, 2013 hearing on finalizing the content of the Class Notice to be sent to the members of the preliminary class created in the Preliminary Order:

> **Counsel:** - - - and one of the first places that appears in that statement, It should include, at a very minimum, it should include the words "the Court has preliminarily certified.
>
> **The Court:** Well, let me just broach that now. I don't believe that's appropriate . . . because when I said I preliminarily certified it, what I mean was that's a certification . . ..

(Tab C at 2). From this statement, Judge Dickson inferred that Judge Baxley's failure to refer to the class certification as "preliminary" in his subsequent Order Approving Class Notice showed that the Preliminary Order was, in fact, a final determination on class certification. (*Id.* at 2-3).

The purpose of the February 1, 2013, hearing was to finalize the Class Notice envisioned by the Preliminary Order. (Tab E at 5). As requested by Judge Baxley, the parties had submitted competing proposals, and the hearing was held to "hammer out the differences between them." (*Id.* at 8). Judge Baxley and the parties engaged in this process by working from the plaintiffs' proposal. (*Id.* at 17).

An issue arose as to the failure of the plaintiffs' proposal to advise the class members, as required by the Preliminary Order, that class certification was preliminary only. The Preliminary Order provided in relevant part as follows:

> [The] Notice should inform the potential class members that *class certification is preliminary at this juncture pending the results of the Right to Cure process*; that once the opt-out period has ended, a Right to Cure document must be individually completed for each claimant; a brief description of the Right to Cure process (a more detailed description will come with the Right to Cure document itself); that *based upon the Right to Cure responses, the Court will make a final determination of class certification*; and, that the potential *class members will be notified of this final decision and the legal ramifications thereof.*

(Tab A at 12) (emphasis added). A colloquy ensued, and Judge Baxley expressed a concern that the language envisioned by the Preliminary Order might confuse the potential class members. Therefore, he approved the absence of such language in the Class Notice, but he noted that the issue of class certification would still be revisited after completion of the Right to Cure process as envisioned by the Preliminary Order. If that hearing resulted in the preliminary class not being certified as a class for a trial on the merits, then the class members would be notified of that. (See generally Tab D at 36-39). Here, in his "No Motions Order," Judge Dickson quoted only part of this colloquy to change the meaning of the Preliminary Order.

The language quoted by Judge Dickson appears in the statement by Judge Baxley (quoted below in full), in which Judge Baxley first responded to the absence of any "preliminary only" language in the Class Notice (underlined language is the language quoted by Judge Dickson):

> **The Court:** Well, let me just broach that now. I don't believe that's appropriate [including the "preliminary only" language], because when I said I preliminarily certified it, what I meant was that's a certification, *it's just not in its final form because we have to deal with the Right to Cure Statute*. But I don't want to confuse the homeowners with the concept that, well, all of these pages you're looking at *may be reversed as some later point in the process*.
>
> I would say that the presumption is that it will not be reversed, or it would not have been *preliminarily certified* to begin with. But secondly, I believe that's going to interject confusion and uncertainty into this entire process, particularly when we're dealing with laymen.
>
> What do you [defense counsel] – how do you respond to that?

(Tab E at 37-38) (italics added) (underlining represents language quoted by Judge Dickson). Defense counsel responded that he was only trying to follow the language in the Preliminary Order. (*Id.* at 38). Judge Baxley respond with his last comment on the matter (never mentioned by Judge Dickson), stating in full as follows:

> **The Court:** Well, *that's valid, but* I believe *as a policy decision at this juncture*, I'm going to alter what sounds like the plain meaning of what you read [from the Preliminary Order] so as to not confuse the potential Class members *with the preliminary status of the class. Of course, we all know that if we determine, as the [preliminary] order says, later on that we cannot, due to the particular facts and circumstances of these cases, the Right to Cure Act, and the Class status we must decertified (sic)* well, we'll just lay that news on the Class at that time, *without warning them in advance that such could happen.* Because, again, I feel like it's an unlikely circumstance, and it is one that is confusing to the layman. So I will follow the plaintiffs' proposed language with regard to whether the Class is *preliminarily certified.*

(*Id.* at 38-39) (all emphasis added). In short, although Judge Baxley altered the language to be put in the Class Notice, a review of his entire colloquy with defense counsel demonstrates that he did not alter the preliminary nature of the class as set forth in the Preliminary Order. To the contrary, the colloquy demonstrates that Judge Baxley still viewed the class determination as preliminary and still envisioned (as set forth in the Preliminary Order) that the issue of class certification would be revisited after the completion of the Right to Cure process, with a final determination to be made at that time on whether the class should be certified for a trial on the merits. All of this explains why Judge Baxley did not mention the class as being preliminary in his subsequent Order Approving Class Notice. It simply was not relevant to the subject matter of that order.

In summary, the plain and unambiguous meaning of the Preliminary Order was that the class was being certified on a preliminary basis only, and the issue would be revisited in a subsequent final and full evidentiary hearing, including the evidence yielded by the Right to Cure process outlined in the Preliminary Order. Since the Preliminary Order is not ambiguous, it was error for Judge Dickson to consider any extrinsic evidence on the meaning of the Preliminary Order, including any comments by Judge Baxley made from the bench in 2012 and 2013, long after the entry of the Preliminary Order in 2011. In any event, when that extrinsic evidence is considered in its entirety and in proper context, it is clear that Judge Baxley never changed the

preliminary nature of the class certification set forth in the Preliminary Order. He never converted or viewed the Preliminary Order as being a final determination on class certification for a trial on the merits. He never abandoned the procedure set forth in the Preliminary Order that final class certification would be determined after a future and full evidentiary hearing that included the evidence to be gathered during the Right to Cure process. Thus, Judge Dickson erred in rewriting and overruling Judge Baxley's Preliminary Order to make it a final determination on class certification, and he likewise erred in refusing to hold the scheduled hearing on whether the preliminary class certification should be made final for a trial on the merits.[7]

[7] The defendants filed a motion to reconsider Judge Dickson's "No Motions Order." Judge Dickson dismissed the motion without considering it, ruling that: (1) his "No Motions Order" was interlocutory and therefore not appealable; (2) a motion to reconsider cannot be made and is not available for an interlocutory, unappealable order; (3) a motion to reconsider is available and applies only when there has been an appealable final adjudication on the merits; and (4) therefore, he dismissed the motion without considering it. (Tab F at 1-2). Judge Dickson's order was based on a fundamentally flawed view of South Carolina law.

First, as shown herein, the "No Motions Order" is immediately appealable despite being interlocutory. Second, Judge Dickson, as a circuit court judge, does not have subject matter jurisdiction to determine the appellate jurisdiction of this Court or the Supreme Court, *i.e.*, to determine whether the "No Motions Order" is immediately appealable. Third, and perhaps most importantly, Judge Dickson's dismissal of the motion to reconsider is based on an erroneous understanding of motions to reconsider.

A motion to reconsider serves two distinct and separate functions. First, the motion is the means for asking the trial court to reconsider its actual ruling and change its mind on that ruling. The Supreme Court has referred to this function as the moving party's right to a "second bite at the apple." See generally *Elam v. South Carolina Dep't of Transp.*, 602 S.E.2d 772 (S.C. 2004). It has nothing to do with appealability or error preservation, and it is available for any order. For example, it is axiomatic that the denial of a summary judgment is never appealable, even after a judgment on the merits. Under Judge Dickson's view of motions to reconsider, a party could not move to reconsider the order, even though summary judgment was denied on the basis of the failure to present any evidence on an issue that the opposing party had conceded. Thus, a party that was absolutely entitled to summary judgment as a matter of law could never get any relief from an order that erroneously and mistakenly denied summary judgment, and that would have been changed if the moving party had simply moved to reconsider the order.

The second function of a motion to reconsider involves the preservation of issues for appellate review. It is axiomatic that a timely motion to reconsider is required to preserve any issue for appeal that was raised to but not ruled upon by the trial court, or that was ruled upon but never raised to the trial court. It is equally axiomatic that a motion to reconsider must be made within 10 days after receiving notice of the entry of the order. Under Judge Dickson's view of motions to reconsider, a party could never preserve issues for eventual appellate review of an interlocutory order after a final judgment on the merits, because it cannot make a timely motion to reconsider the interlocutory order. Nothing in the SCRCP, the SCACR, or South Carolina case law supports Judge Dickson's ruling that a motion to reconsider cannot be made except for orders that are immediately appealable.

III. Judge Dickson's "No Motions Order" is immediately appealable.

Judge Dickson's "No Motions Order" is an interlocutory order and, therefore, the question of whether it is immediately appealable is to be determined under S.C. Code Ann. § 14-3-330 (Rev. 2017). As demonstrated below, this order is immediately appealable under subsection (1) and subsection (2)(a) of § 14-3-330.[8]

A. The "No Motions Order" affects the merits of this case and is therefore immediately appealable under § 14-3-330(1).

An interlocutory order is immediately appealable under § 14-3-330(1) if it affects the merits. The cornerstone order in every class action is a class certification order that defines the class and the issues for a trial on the merits, and that sets forth the court's findings and conclusion on whether the putative class survives a "rigorous analysis" of the five certification requirements in Rule 23, SCRCP. Here, as a result of Judge Dickson's failure to abide by the plain meaning of Judge Baxley's Preliminary Order, the parties are being forced to trial without such an order. Moreover, Judge Dickson has pronounced that he will not review the evidence, will not make any Rule 23 findings, and will not otherwise entertain any further argument on the issue of whether

[8] Section 14-3-330 provides in full as follows:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

the class should be certified for a trial on the merits. This directly and adversely affects the merits of the case, because it sends an uncertified class to a trial on the merits. It does so without considering whether subclasses are needed to address the factual and legal differences that exist between the homes in the class, a procedural safeguard plainly contemplated by Judge Baxley in the Preliminary Order that would protect the due process rights of the absent class members and the defendants. It also impermissibly cuts off the parties' right under Rule 23(d)(1) to seek alteration and amendment of the certification order until final judgment, which is yet another procedural safeguard designed to protect the due process rights of the absent class members and the defendants. In short, Judge Dickson's order directly and adversely affects the merits of this case by refusing to address and decide the single-most important question in any class action, to-wit: whether the class can be and should be certified for a trial on the merits.

In addition, an interlocutory order that affects the merits is sufficiently final and immediately appealable under § 14-3-330(1) if "[n]o further action is required in the [trial] court to determine the parties' rights" on the matter decided in the interlocutory order. *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 468 (S.C. 2006) (order unsealing a family court divorce file for discovery of evidence relevant to a civil action held immediately appealable). Here, no further action is required by the trial court, because Judge Dickson has ruled that he will not "entertain *any* further argument on the issue" of class certification. (Tab C at 2) (emphasis added). Contrary to the admonition in Rule 23(d)(1), SCRCP, that the issue of class certification may be reconsidered at any time before a decision on the merits, Judge Dickson's ruling precludes any further argument by the defendants. Rule 43(i), SCRCP ("Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."). Thus, the "No Motions Order" is sufficiently final and immediately appealable under § 14-3-330(1).

B. The "No Motions Order" affects a substantial right and is therefore immediately appealable under § 14-3-330(2)(a).

An interlocutory order is immediately appealable under § 14-3-330(2)(a) if it affects a "substantial right" and effectively decides the matter and prevents a judgment from which an appeal can be taken after final judgment. Manifestly, a fundamental and "substantial right" in every class action is the right to have a full hearing on and final determination of whether a class should be certified under the rigorous requirements of Rule 23 *before* the case is tried on the merits as a class action. Judge Dickson has denied that right in his "No Motions Order" by converting Judge Baxley's Preliminary Order into a final determination on class certification and precluding any further argument on the issue of class certification. Despite the plain meaning of the Preliminary Order, Judge Dickson has ordered this case to a trial on the merits as a class action without a full evidentiary hearing on and a final determination of whether the preliminary class created by the Preliminary Order meets the rigorous requirements of Rule 23 for all class actions.

Here, in an appeal after a final judgment on the merits, it will be impossible to determine whether a class should have been certified for a trial on the merits, because the "No Motions Order", has prevented a full and proper determination on this cornerstone question. Indeed, Judge Dickson has already precluded defendants from presenting evidence that the class should not be certified and has ruled that he will not consider certification further. Thus, the record on appeal after a trial on the merits will lack the evidence required to determine class certification, because the defendants are not being permitted to enter that evidence into the record. As a necessary result, any appeal will require a remand to determine the question of whether a class should be certified, and the losing party will have to appeal again, even though there has already been a trial on the merits. Allowing an immediate appeal of the "No Motions Order" will prevent this bizarre procedural quagmire and ensure that, upon an appeal after a final judgment the merits, the appellate

courts will be able to immediately review and decide with finality the question of whether a class should have been certified in this case for a trial on the merits.[9]

C. The "No Motions Order" is immediately appealable under § 14-3-330(2)(a), because disallowing an immediate appeal would result in piecemeal litigation and limit the remedies available in an appeal after final judgment.

The avoidance of piecemeal litigation and the promotion of judicial economy is the public policy underlying § 14-3-330, and the question of whether an interlocutory order "is immediately appeal is determined on a case-by-case basis." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 773 S.E.2d 144, 146 (S.C. 2015). An interlocutory order is immediately appealable if preventing an immediate appeal "would encourage piecemeal litigation and limit [the appellant's] appellate remedies after the first trial" on the merits. *Id.* Here, disallowing an immediate appeal of the "No Motions Order" will result in piecemeal litigation and limit the appellate remedies available in an appeal after a trial on the merits.

As noted earlier, any appeal after final judgment in favor the plaintiffs will result in piecemeal litigation of the class certification issue, because it will be necessary to remand the issue for a final determination and subsequent appeal. Moreover, there is a substantial possibility that the remand could result in even greater piecemeal litigation due to the following:

1. As Judge Baxley noted in his Preliminary Order, the evidence presented to him revealed the distinct possibility that subclasses would be needed to address the potential factual and legal differences between the homes in the putative class, including the resolution of the affirmative defenses asserted in the case.

2. On remand from an appeal after a trial on the merits, if the trial court decides that a class could be certified but that subclasses are necessary to resolve all issues in the case, then the only remedy would be a new class action trial.

[9] If the defendants prevail in the trial on the merits, they will nevertheless be subject to claims by the preliminary class members that their due process rights were violated in the class certification process and, therefore, they should not be bound by the result of the trial. This "due process" problem can be only be avoided by following the process set forth in Preliminary Order, to-wit: a full evidentiary hearing and a full determination as to whether the preliminary class in fact meets the rigorous requirements of Rule 23 for any class action. This will protect the due process rights of the absent class members and thereby protect the finality of any judgment rendered after a trial on the merits.

3. This order would then be appealed and, if affirmed there would be a remand for the new trial.

4. After the new trial, the losing party would again appeal.

In short, disallowing an immediate appeal of the "No Motions Order" will produce rather than avoid piecemeal litigation and, therefore, it is immediately appealable under *Morrow, supra.*

In addition, disallowing an immediate appeal of the "No Motions Order" will limit the remedies available in an appeal after the merits. In an ordinary class action, a successful appeal after a final judgment on the merits would include the appellate remedy that it was error to certify the class and a resulting reversal of the class judgment. Here, the extraordinary circumstances of this case, *i.e.*, a trial on the merits without a final determination on whether a class should be certified, precludes this appellate remedy. A reversal of the "No Motions Order" will have only one potential appellate remedy, that being a remand for a final determination and the inevitable appeal from that determination. In short, disallowing an immediate appeal in this case will limit the remedies available in an appeal after a trial on the merits and, therefore, the "No Motions Order" is immediately appealable under *Morrow, supra.*

D. The "No Motions Order" is immediately appealable under § 14-3-330(2)(a), because it will be difficult if not impossible to demonstrate prejudice in an appeal after final judgment.

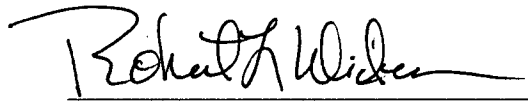
An interlocutory order is immediately appealable when "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interest because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the [interlocutory order]." *Hagood v. Sommerville*, 607 S.E.2d 707, 710 (S.C. 2005). Here, in an appeal after final judgment, it will be impossible to demonstrate any prejudice from the certification of the class, because there has never been a full and final

hearing on and determination of whether a class should be certified. Moreover, it will be difficult and likely impossible to demonstrate that the evidence at trial failed to prove liability for the class claims, because the class (and therefore the class claims) was not finally determined, defined, and established before the trial on the merits. Accordingly, the "No Motions Order" is immediately appealable under *Hagood, supra.*

CONCLUSION

The Preliminary Order established a two-step process for complying with the Supreme Court's directive in *Grazia, supra.* First, Judge Baxley certified the class on a preliminary basis only, so that a class approach could be used in satisfying the requirements of the Right to Cure Act. Second, after the completion of the Right to Cure process, Judge Baxley would hold a full evidentiary hearing to determine whether the plaintiffs' evidence, as supplemented by the results of the Right to Cure process and otherwise, satisfied the "rigorous analysis" of whether the class should be certified for a trial on the merits. After Judge Baxley's retirement, Judge Dickson short circuited Judge Baxley's carefully planned two-step process by refusing to undertake the second step of determining whether the preliminary class should be certified as a class for a trial on the merits. To achieve this, Judge Dickson ignored the plain meaning of Judge Baxley's Preliminary Order and impermissibly rewrote it as being a ruling that the class had been certified for a trial on the merits. As a result, Judge Dickson has ordered this case to a trial on the merits without any finding by any judge that the plaintiffs have met their heavy burden of presenting evidence that survives the "rigorous analysis" for a class action trial on the merits. For this reason, and for the reasons set forth above and those submitted by Appellant South Carolina State Plastering by separate motion in this Court, it is respectfully submitted that the appealed orders are immediately appealable.

Respectfully submitted,



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February 15, 2017
Columbia, SC

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NUMBER: 07-CP-07-1396

ANTHONY AND BARBARA GRAZIA, individually and on behalf of all other similarly situated Plaintiffs, Plaintiffs, vs. SOUTH CAROLINA STATE PLASTERING, LLC, Defendants.	)	**ORDER MAKING PRELIMINARY FINDING THAT PLAINTIFFS' PROPOSED CLASS MEETS THE REQUIRMENTS OF RULE 23(a), SCRCP; SETTING PARAMETERS FOR PUTATIVE CLASS; DISMISSING PLAINTIFFS' UNFAIR TRADE PRACTICES CLAIM WITHOUT PREJUDICE; IMPOSING A STAY OF PROCEEDINGS; AND, SETTING FORTH PROCEDURES FOR COMPLIANCE WITH THE RIGHT TO CURE CONSTRUCTION DWELLING DEFECT ACT**
SOUTH CAROLINA STATE PLASTERING, LLC, Third-Party Plaintiff, vs. DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC., and KEPHART ARCHITECTS, INC., Third-Party Defendants.	)	

This matter comes before the Court pursuant to Plaintiffs' Motion to Certify a Class in accordance with the provisions of Rule 23, SCRCP, and is on remand from the South Carolina Supreme Court after its majority decision that the class action provisions of Rule 23, SCRCP, are not incompatible with the requirements of the Right to Cure Construction Dwelling Defect Act (hereafter, Act) (S. C. Code Ann. 40-59-810, et. seq.). See Grazia v. S. C. State Plastering, LLC, et. al., 390 SC 562, 703 SE 2d 197 (2010). After a thorough review of the South Carolina

Rules of Civil Procedure, relevant case law, the specific appellate decision in this case, extensive memoranda of law and correspondence submitted by counsel, affidavits, and the various oral arguments presented by all parties at multiple hearings, the Court finds that Plaintiffs' proposed Class preliminarily meets the requirements for certification, hereby establishes the parameters of the putative Class, approves the proposed Class representatives and counsel, imposes a stay of proceedings in order to permit Plaintiffs and Defendant to comply with the Act, and sets forth the procedures and requirements for compliance in this putative class setting. Thereafter, the Court will make a final decision as to whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the notices and responses required under the Act. See Rule 23(d)(1), SCRCP.

The named Plaintiffs (Anthony and Barbara Grazia) and those they represent as proposed class members are all individuals or legal entities who own stucco-clad residences in the Sun City development of Bluffton, Beaufort County, South Carolina ("Sun City"). There are currently about 140 individual cases already pending in Beaufort County, and Plaintiffs allege there are an approximate additional 4,000 similar housing units that are not yet in litigation. The pending cases have been declared complex and assigned to this Court for disposition. To attempt to individually try the already pending cases and those yet unfiled would be overwhelming to this Court and all judicial resources available within the Fourteenth Judicial Circuit, and has the potential impact of denying meaningful access to the justice system for some of the parties.

The Plaintiffs' complaint focuses on damages allegedly flowing from defects in exterior wall stucco design, construction, manufacture, and application. Plaintiffs allege that the Defendants participated in the design and installed the stucco system in the Grazia residence and

many other Sun City residences as well, and the Third-Party Defendants, who have extensively participated in opposing this motion, were the designers and sellers of the residences.

As a threshold issue, Plaintiffs attempt to certify a Class that consists of all stucco-clad residences within the Sun City Development, but have named as the sole Defendant South Carolina State Plastering, LLC (SCSP), the entity that performed the stucco work on the vast majority of the homes at Sun City. South Carolina State Plastering in turn filed suit against third-party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. as the entities engaged in the development, layout, design, and were allegedly ultimately responsible for construction of the Sun City Development, asserting that any work done by SCSP was at the direction of and in accordance with the specifications and instructions of Del Webb/Pulte. Kephart Architects, Inc., who designed some of the Sun City homes, was also brought in as a third-party Defendant. Of the 140 Sun City stucco cases already pending, counsel agree that less than ten (10) do not involve stucco applied in whole or in part by SCSP. Of the approximate 4000 cases not yet filed, counsel agree that almost all, if not every one, involve stucco applied in whole or in part by SCSP. Accordingly, because no other stucco applicators are a party to this action and have not been permitted to contest the allegations or afforded due process of notice and an opportunity to be heard on the issue of class certification, the putative class is limited those homes on which SCSP installed the stucco in whole or in part.

With regard to those homes, by competent evidence presented to this Court, including affidavits and testimony of an architect, engineer, and a general contractor, the Court finds that the Plaintiffs' case presents a single critical issue that is common in law and fact: the improper design, mix, and installation of stucco exterior wall systems by SCSP on the houses at Sun City Hilton Head built before July 31, 2007. These design, manufacture, and installation issues have

led to generally consistent claimed problems within these structures, and generally consistent damages flowing therefrom. These damages include, according to the complaint, cost of repairs, loss of use, depreciation, incidental and consequential losses, and sums previously paid for attempted repairs. A discussion of the specific certification requirements of Rule 23(a), SCRCP, follows.

The "Numerosity" Requirement of Rule 23(a)(1)

The numerosity requirement of 23(a)(1) is often referred to as the impracticality of joinder requirement. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d, § 1762. No arbitrary measure of impracticability or numerosity has been established, and this issue is determined by the facts of each case. The objective of this requirement is to prevent members of a class from being unnecessarily deprived of their rights and a day in court by either the opposing party or by a few members of the proposed class. Ripply v. Denver U.S. National Bank, 260 F. Supp. 704, 712 (D. Colo. 1966). In this case, the Court finds that the numerosity requirement is met. The Plaintiffs have presented credible evidence, including testimony of Pulte representatives, that the number of houses clad with stucco in a similar manner as the Plaintiffs' house is over 4,000. There is no possibility that each case could be tried individually or joined as individual cases. Because the volume of cases presented here would certainly overwhelm the Beaufort County docket, and because joinder is impractical, this Court finds that the Rule 23 requirement of numerosity has been met.

Questions of Law and Fact Common to the Class

The Court finds that this case satisfies the commonality requirement because it is limited to claims related to the design, installation, and condition of the stucco cladding, and common issues of fact and law exist. To establish commonality, a party must show that "there are

questions of law or fact common to the class." SCRCP, Rule 23(a)(2). See McGann v. Mungo, 287 S.C. 561, 567-568, 340 S.E. 2d 254, 157-158 (Ct. App. 1986). In practical terms, this means the party must articulate the existence of "significant common, legal, or factual issues" that bind the proposed class together. Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003). The Court must examine whether, in its judgment, the issues are similar such that class resolution will provide a more efficient method of resolving the litigation.

After a thorough review of the allegations, defenses, and facts distilled thus far in the cases, this Court finds that all of the owners in the class are similarly affected by the alleged acts of the Defendants, and each owner may face significant costs to repair their houses. Common legal and factual questions that exist in each case include, but are not limited to, whether (1) the original design of the stucco system was proper and (2) the installation of the system was proper.

The Court finds that Plaintiffs have met their burden of proving commonality. Specifically, pursuant to South Carolina law, Plaintiffs have established the following three elements of commonality:

1) That there is a common determinative issue of fact or law that overshadows all other issues; namely, the structures in question have problems with (a) head flashing above doors and windows, (b) stucco control joints, and/or (c) moisture encapsulation by failing to leave a gap between the stucco exterior and the structure slab.

2) That the Court will not have to investigate each class member's individual claim for purposes of establishing or failing to establish liability; and,

3) That the damages determination, should Plaintiffs prevail on liability, will be comprised of a core set of similar inquiries for each structure.

The "Typicality" Requirements of Rule 23(a)(3)

South Carolina requires that a plaintiff prove that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3), SCRCP.

These requirements "ensure that only [those] who can advance similar factual and legal arguments are grouped together as a class." Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997). See also, General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2370 n. 13, 72 L.Ed.2d 740 (1982)(commonality and typicality "serve as guideposts" to determine whether "a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence"); Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998)(commonality and typicality not satisfied when "taken as a whole the class claims were based on widely divergent facts").

The typicality requirements focus on the characteristics of the class representative. Typicality entails an inquiry into whether the named plaintiff's individual circumstances and the legal theory upon which the claims are based are typical with respect to the claims of other class members. The typicality requirement focuses on the consideration of whether the representative's interests are truly aligned and consistent with those of the class members. Smith v. The B&O Railroad Company, 473 F. Supp. 572 (D. Md. 1979). The Court finds that Plaintiffs satisfy these requirements.

In this case, plaintiffs assert that the design and installation of the stucco is improper on over 4000 Sun City Homes. Evidence has been reviewed by this Court in the form of expert testimony and affidavit. This Court finds that evidence establishes typicality.

The proposed class representatives' claims are typical because each class member owns a residence with a similar allegedly defective stucco system allegedly designed, installed, and/or sold by the Defendants/third-party Defendants. Rule 23(a)(3) requires that "the claims or defenses of the representative parties" be "typical of the claims or defenses of the class."

Decisions construing Rule 23(a)(3) have given it a liberal construction, holding that a claim is typical if it arises from the same events, practices, or course of conduct that gives rise to the claims of other class members and if the claims are based on the same legal theories. See, e.g., Senter v. General Motors Corp., 532 F.2d 511 (6th. Cir.), *cert. denied* 429 U.S. 870 (1976); 1 H. Newberg, Newberg on Class Actions §3:13 (2002) (cases collected). The typicality requirement "may be satisfied even though varying fact patterns support the claims or defenses of individual class members, or there is a disparity in the damages claimed by the representative parties and the other members of the class." 7A Wright and Miller, Federal Practice & Procedure §1764 (1986). Here, the Court finds that the claims of Anthony and Barbara Grazia are typical of the claims of the other homeowners.

Adequacy of Class Representatives and Counsel

Rule 23(a) also requires that "the representative parties will fairly and adequately protect the interests of the class." SCRCP, Rule 23(a)(4). Adequacy of representation consists of two components: (1) there must be no disabling conflicts of interest between the class representative and the class and (2) the class representative must be represented by counsel competent and experienced in the kind of litigation to be undertaken. See Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983), *cited with approval in* Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 388 S.E. 2d 799 (1990). In this case, the Court finds that the proposed class representatives and the class members' interests are identically aligned. They seek to have their homes repaired and hold liable those responsible for the damages. This Court notes that the Grazia complaint was filed in 2007 and that the Grazias have pursued this claim in a representative capacity for four (4) years, including a trip to the Supreme Court and back, as have their counsel. Plaintiffs' counsel are qualified, experienced, and able to conduct class

litigation. Attorney W. Jefferson Leath, Jr. has approximately thirty (30) years of experience in construction litigation and is familiar with issues surrounding class litigation, as is Attorney Michael S. Seekings with more than twenty (20) years' experience, and Attorneys John T. Chakeris and Phillip W. Segui, Jr., are similarly experienced.

The Amount in Controversy Meets the Statutory Requirement

Defendants argue that some houses in the putative class have no damage at all; thus, they further argue that Plaintiffs do not meet the one hundred dollar ($100.00) per claim threshold amount for a class to be certified. This argument is disputed by the Plaintiffs, who counter that even if damage is not currently visible on a particular structure, the defective stucco system will eventually cause damage. Plaintiffs allege that the only appropriate repair is to de-clad and then re-clad the houses with an appropriate stucco system, at a cost of approximately $75,000.00 per structure. Clearly, after reviewing the pleadings and the evidence of record, the Court finds that plaintiffs' allegations of the amount in controversy well exceed Rule 23's threshold requirement.

Responses of the Defendants in Opposition to Class Certification

The Defendants have raised numerous legal and factual arguments in opposition to class certification, contesting all requirements of Rule 23. First, Defendants argue Plaintiffs' claims under the SC Unfair Trade Practices Act are by law not amenable to class action prosecution. This position is correct, and as a part of this preliminary Order, these claims will be dismissed without prejudice by the Court. See Grazia v. S. Carolina State Plastering, LLC, at id. The dismissal is without prejudice at this juncture; however, in the event a Class is certified with finality in this case, the dismissal will be with prejudice.

On the issue of dismissing the Unfair Trade Practices Claim (UTPA), counsel for Del Webb/Pulte argues that the Court does not have the authority to *sua sponte* dismiss this claim

without a motion from Plaintiffs or any other party to do so; rather, the Court's only option is to deny certification of the class. The Court does not accept this argument. In moving for class certification, Plaintiffs have implicitly requested the dismissal of the UTPA claim, and in open Court on the record acknowledged that South Carolina law does not permit the UTPA claim to be prosecuted in a representative capacity, and acquiesced in the dismissal. Rule 23(d), SCRCP, permits the Court to impose such terms as are necessary to protect the interests of the parties. This dismissal protects the interests of the third-party Defendant, who now complains of it. Thus, third-party Defendant's objection is overruled.

The Defendants further argue that a class action will be of no benefit to the parties because each claim will still have to be individually investigated and determined, including individual structure destructive testing, and the damages for each home separately calculated. Moreover, Defendants argue that similarity of claims, in and of itself, does not meet the commonality requirement of Rule 23, and the alleged specific defects at the Grazia home are not probative as to the alleged problems at other claimants' residences.

To demonstrate this argument, Defendants raised factual points in opposition to class certification. They argue that some of the homes in question may have alleged defects as to inadequate or thin application of stucco, while others have a problem with the mix of ingredients used to create the stucco. Some houses have alleged problems with head flashing, some with sealant joints, others with control joints, some have cracking stucco while others do not, and some houses have alleged problems with weep configurations while others do not. The houses in question do not all use the same type stucco system or stucco product, and the stucco systems may be manufactured by different companies. Moreover, because the completion date of these structures spans a period of almost ten years, construction standards may differ. Some houses

may have had multiple owners who may have altered the stucco. Defendants also argue that certain members of the putative class are subject to certain affirmative defenses, while others are not, and that the class action procedure cannot be used to alter substantive law and deprive Defendants of these defenses with respect to any individual claim.

The Court is cognizant of Defendant's and third-party Defendants' arguments, and recognizes that factual and legal differences may exist within the putative class. For these reasons, this Order makes only a preliminary finding that the requirements of Rule 23 have been met by Plaintiffs. The Court intends to employ the Right to Cure process as outlined below to further analyze and perhaps organize the various claims that exist in these cases. The Court opines that there may be certain sub-groups formed within the class action to facilitate the determination of liability and damages issues, if such procedure is found to be fair and efficient. See McGann v. Mungo, 287 S.C. at 570-71, 340 S.E.2d at 159 ("In any case, the problem of determining initial membership in the class affords no basis for dismissal of the action since the circuit court can either require the plaintiffs to replead, redefine the alleged class itself, or designate subclasses."). Moreover, should a Class be finally certified, after the passage of an appropriate period for discovery as to the applicability of affirmative defenses, the Court will require the Defendants to provide a listing of claimants for whom Defendants allege a specific affirmative defense is applicable, and the Court may thereafter form additional sub-groups within the Class to accommodate these defenses. The specifics of these procedures, if necessary, will be deferred until further development of the evidence through the discovery process. The Court specifically rejects Defendant's and third-party Defendants' contention, however, that the factual and legal components within the cases automatically defeat a class action approach to resolution

of this litigation, or the typicality, commonality, or adequacy of the named Plaintiff's representation of the class.

After hearing arguments of counsel and reviewing the pleadings and exhibits submitted, it appears to the Court that common issues exist for all homes to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, as specifically defined below. While the Court recognizes Defendants' argument that not all of the pending stucco cases are exactly the same, it is the firm belief of this Court that common, core issues are present in all the cases and that a class approach is not only the best, but the only method available to enhance judicial economy, promote efficient disposition of these cases, and reduce litigation costs.

State case law directs that this Court take an expansive rather than narrow view of class action motions. Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) ("Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart"). This Court finds that this case presents a core set of facts contemplated by Rule 23 when considering certification. Moreover, the Supreme Court had the clear opportunity to deny class status in this very case but affirmatively chose not to do so, instead emphasizing in its decision the vitality of the class action doctrine to preserve the resources of the Court and the parties. See Grazia v. S. Carolina State Plastering, LLC, *Id.*, rehearing denied (Jan. 20, 2011).

Accordingly, for purposes of attempted compliance with the Right to Cure Construction Dwelling Defect Act, this Court finds that Plaintiffs have met the requirements of Rule 23(a), and are entitled to a preliminary determination that Plaintiffs may proceed at this juncture using a class approach. The class is preliminarily recognized as follows: All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City

Hilton Head to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab. Further, Anthony and Barbara Grazia are approved as representatives of the putative class, and attorneys W. Jefferson Leath, Jr., Michael S. Seekings, John T. Chakeris, and Phillip W. Segui, Jr., are found to be competent and capable class counsel.

Requirement of Notice to Putative Class Members

The Court has requested the parties to reach an agreement on the contents of an opt-out class notice to all potential members. Counsel has been unable to do so. Accordingly, each party is requested to present to the Court a proposed opt-out Notice of Class Action and Exclusion Request Form for distribution to all potential class members within thirty (30) days of the date of this Order, consistent with the remaining provisions of this Order. This Notice must contain the standard information concerning the obligations, rights, and ramifications of acceptance or rejection of class membership, and include a date certain for closure of the opt-out period. Additionally, this Notice should inform the potential members that class certification is preliminary at this juncture pending the results of the Right to Cure process; that once the opt-out period has ended, a Right to Cure document must be individually completed for each claimant; a brief description of the Right to Cure process (a more detailed description will come with the Right to Cure document itself); that based upon the Right to Cure responses, the Court will make a final determination of class certification; and, that the potential class members will be notified of this final decision and the legal ramifications thereof.

Once the parties have submitted a proposed Notice to Potential Class Members and Exclusion form, the Court will either choose one party's form or combine portions of the submitted forms to reach its decision as to the final format of the document. It is likely that an additional hearing may be conducted on this matter prior to a final decision, and in such hearing the Court will resolve related issues such as the timetable for initiating the notice process, the necessity and authorization of permission to enter a property for inspection, and the result of failure of cooperation by a particular claimant.

Compliance with the Right to Cure Act and Future Imposition of Stay

The following procedures are imposed, pursuant to Rule 23(d)(2), SCRCP, to fairly and adequately protect the divergent interests of the multiple parties before the Court. Within seven (7) days following the closure of the opt-out period, Plaintiffs shall be required to provide to this Court at the Hartsville office, Defendants, third-party Defendants, and filed with the Clerk of Court a complete list of the proposed class, identifying the properties by name of owner(s) and street address. This listing shall be organized in two separate ways – one shall be in alphabetical order by name of the owner with street address and contact information included (mailing address if different from street address and home telephone number, or cellular number if no home number exists), and a second shall be a listing by street address, set forth street by street in sequential address number, with name of owner(s) included. Once this listing is filed and distributed as outlined above, it may only be amended (except for a change in contact information) by motion of a party and written permission of the Court, which shall not be freely given. At the time this listing is filed with the Clerk, pursuant to S. C. Code Ann 40-59-830, a Stay of proceedings shall be imposed until the requirements of the Act are met and procedures set out thereunder are completed. This Stay shall be automatic without need of issuance of a

further Order from this Court. This Stay shall remain in effect until the conclusion of the claims procedure for all properties as outlined below, and shall be ended only upon issuance of an Order Lifting Stay from this Court after proper motion of any party.

To provide structure for compliance in such a large number of cases, Plaintiffs shall be given a period of one hundred and eighty (180) days from the imposition of the Stay to provide Defendants with the notice of claim required by Section 40-59-840 for all properties within the proposed class. Rather than provide all notices at once at the end of this entire period, working from either the alphabetical list or the sequential street list at the choice of Plaintiffs' counsel, Plaintiffs must provide one fourth of the total notices due on the final day of each forty-five day period within the given one hundred eighty days. In setting these deadlines, the Court realizes that this is an ambitious schedule; however, given the current age of this case and the number of potential claims, the need for timely disposition of this litigation demands that both parties acquire adequate staff to meet the timetables set forth herein.

JMB 14

Because there is no specific exclusion in either case law or the language of the Act, the notice to the contractor required under the Act must be filed in a representative capacity by proposed class counsel, and must be signed by counsel and dated as to the date of service to contractor. For purposes or record keeping and administration, Contractor SCSP shall receive service of the notices in a representative capacity through counsel. The date of service on each individual notice shall trigger the response dates as set forth herein. Because of the magnitude of the number of claims, the amount of work required in the initial investigation of the claims by contractor, and the fact that Plaintiffs have chosen to proceed by class action, the Court will grant a period of sixty (60) days to contractor to provide the individual claim response required by Section 40-59-850, and failure to respond within sixty (60) days shall be deemed a denial of the

claim. These claim responses shall be signed and dated by counsel, and shall be served upon class counsel. If contractor does respond with an offer of settlement, claimant shall be given thirty (30) days after the date of service to respond to contractor's offer as required by Section 40-59-850(b).

The required content for each notice of claim is set forth in Section 40-59-840. Proposed class counsel is hereby advised that, for purposes of analyzing and organizing class certification issues, specificity of the exact nature of the stucco defect and defect results with regard to each individual property shall be required. A uniform notice listing all possible defects and all possible damages within the class will not suffice.

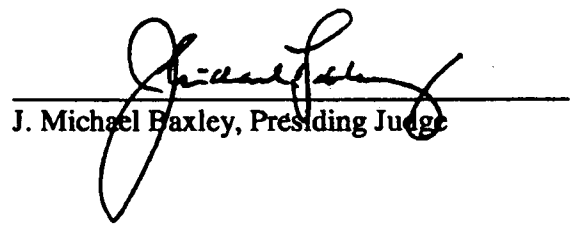
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel specifically excluded. However, an inspection may not be cancelled or postponed because one or more of the attorneys for any party cannot be present. The contact information is provided on the alphabetical list of potential class members so that the parties may engage in the inspection process directly between themselves without need of counsel, if such is determined to be practicable by all concerned.

Conclusion

Compliance with all of the procedures and requirements contained in this Order will prove beneficial for everyone involved in this dispute. At this juncture in this litigation, the use of the class action vehicle will operate to conserve valuable judicial resources as well as concentrate and clarify the common issues of law and fact that predominate this dispute. At the

same time, the rights and interests of all parties will be fully protected by adhering to the guidelines outlined by the Court.

IT IS SO ORDERED.



J. Michael Baxley, Presiding Judge

Hartsville, South Carolina

December 8, 2011

EXHIBIT B

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT ANTHONY AND BARBARA GRAZIA, individually and on behalf of all other similarly situated Plaintiffs Plaintiffs, vs. SOUTH CAROLINA STATE PLASTERING, LLC. Defendant. and SOUTH CAROLINA STATE PLASTERING, LLC. Third-Party Plaintiff, v. DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC. AND KEPHART ARCHITECTS, INC., Third-Party Defendants.	IN THE COURT OF COMMON PLEAS THE FOURTEENTH JUDICIAL CIRCUIT CASE NO.: 2007-CP-07-1396 **SCHEDULING ORDER**

Counsel for the parties appeared before me for a status conference on April 22, 2016. As the parties are beginning to conclude the Right to Cure phase of this litigation, it is the Court's desire and intention to set forth a schedule that will govern going forward. Although counsel have discussed this with the Court and among themselves, this Order is by directive of the Court and is not by the consent of the parties. All objections that have been expressed are preserved.

1. All responses to Right to Cure Questionnaires must be delivered to counsel for SCSP on or before May 31, 2016. After that deadline, the parties may make motions as to the treatment of non-responsive class members.
2. Additionally the parties agree that there are people on the preliminary class list who do not properly qualify as members of the preliminary class. A consent order removing these people from the list should be submitted for each name that the parties agree to. Should there be people on the list that Defendants wish to remove that Plaintiffs disagree with, then Defendant shall file a motion making this request.
3. A hearing on the parties position on Class Certification will be held Thursday, September 1, 2016 at 10:00 AM at the Beaufort County Courthouse. The following briefing schedule will be followed:
    a. To the extent any party wishes to submit a brief relative to class certification parties shall submit and serve said brief on or before August 1, 2016 (or 30 days prior to the hearing.)
    b. Parties shall submit and serve any brief in response on or before August 15, 2016 (or 15 days prior to the hearing.)
    c. Briefs should contain a statement of evidence or testimony that they intend to proffer to the Court at the final hearing.
4. The stay on discovery in this case shall remain in effect until the Court issues its ruling on final certification.
5. Whereas the parties desire to maintain the status quo during the mediation process, the time period for South Carolina State Plastering to comply with its rights pursuant to SC Code 40-59-850 as to the plaintiffs/class members shall be extended until the later of 1)

September 1, 2016; or 2) 45 days after the mediator (John Freud) notifies this court that he has declared an impasse in the ongoing mediation.

6. Trial scheduled for December 5, 2016, for a two week term.

IT IS SO ORDERED!

May 16, 2016

Edgar W. Dickson
Chief Administrative Judge

EXHIBIT C

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2007-CP-07-1396
ANTHONY and BARBARA GRAZIA, individually and on behalf of all other similarly situated Plaintiffs, Plaintiffs, v. SOUTH CAROLINA STATE PLASTERING, LLC, Defendant.	**ORDER** **(NO MOTIONS PENDING)**
SOUTH CAROLINA STATE PLASTERING, LLC, Third-Party Plaintiff, v. DEL WEBB COMMUNITITES, INC., PULTE HOMES, INC., and KEPHART ARCHITECTS, INC., Third-Party Defendants.	

This matter is currently pending before this Court as a class action. The class was certified by Order of Judge Baxley on December 8, 2011 following a hearing on October 5, 2011. Prior to certification, the South Carolina Supreme Court remanded the matter extolling in their decision the utility of the class action device to save the resources of the courts and the parties, and stating "class actions are favored in this state." *Grazia v. S.C. State Plastering, LLC*, Op. No. 26882 (S.C. Sup. Ct. filed Oct. 4, 2010) The Defendants sought to have Judge Baxley reconsider class certification. By order dated May 7, 2012, Judge Baxley dismissed Defendants' Motions to

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Reconsider. An appeal was taken and on August 2012 the appeal was dismissed by the South Carolina Court of Appeals.

Notwithstanding the fact that the issue of class certification was long ago decided and reviewed, the direct defendant, South Carolina State Plastering, LLC (hereinafter "SCSP"), has now filed with this Court a pleading styled "South Carolina State Plastering, LLC's Supplemental Memorandum of Law and Facts in Opposition to Plaintiffs' Motion for Class Certification"[1]. No motion accompanied the filings and no action is hereby taken.

The issues now raised by the Defendants in their papers to the Court are, upon review, yet another after-the-fact attempt to seek reconsideration of class certification and to rehash the very issues that were argued before the Court on October 5, 2011, nearly five (5) years ago (as well as in many subsequent hearings). Based on the voluminous record and the many rulings previously entered, the Court will not, again, reconsider the issue of class certification or entertain any further argument on the issue.

The Court would remind counsel of the following statements made by Judge Baxley following the publication of his class certification order. At a motion hearing on April 30, 2012, Judge Baxley stated, "It takes us back to the issue... that you continue to argue, which is that we shouldn't have a class. Well, I made that decision against you," (*Motion Hearing* 71:21-23, April 30, 2012), and at a subsequent hearing on the class notice of February 1, 2013, Judge Baxley again address the issue,

> **COUNSEL:** - - - and one of the first places that appears is in that statement, It should include, at a very minimum, it should include the words "the Court has preliminarily certified.
> **THE COURT:** Well, let me just broach that now. I don't believe that's appropriate... because when I said I preliminarily certified it, what I meant was that's a certification... (*Tr. R.* 37:9-16, Feb. 1, 2013)

[1] By separate filing, Third-Party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. ("Webb/Pulte") has joined this untimely and improper motion.

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Judge Baxley's rulings could not be more clear and this Court will not, in fact cannot, disturb them. The matter of class certification was long-ago settled. The class is defined as follows: "All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City Hilton Head to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab." Judge Baxley did a thorough review of the Rule 23 requirements in determining and certifying the class.

The Court would further remind all counsel of Judge Baxley's continued rejection of challenges to the class, "The Court specifically rejects Defendant's and Third-Party Defendants' contention...that the factual and legal components within the cases automatically defeat a class action approach to resolution of this litigation, or the typicality, commonality, or adequacy of the named Plaintiff's representation of the class." He continued to address the arguments and subsequently dismissed them, stating that "it is the firm belief of this Court that common, core issues are present in all the cases and that a *class approach is not only the best, but the only method available* to enhance judicial economy, promote efficient disposition of these cases, and reduce litigation costs." (*Order* dated Dec. 8, 2011 at 11) (*emphasis added*) Moreover, Judge Baxley noted that the Supreme Court had the clear opportunity to deny class status in this very case but affirmatively chose not to do so, instead emphasizing in its decision the vitality of the class action doctrine to preserve the resources of the court and the parties. (*Id.* at 11)

Furthermore, in his Order Approving Class Notice that Judge Baxley himself wrote, he once again declined to refer to the class as "preliminary," for the reason that it was not and is not

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preliminary. Judge Baxley's failure to do so even further evidences his intention that the class was, indeed, already certified.

A class has been certified, and this Court will not allow Defendants to seek reconsideration of Judge Baxley's Order when reconsideration was already denied and that decision was appealed. All procedural attempts by Defendants to question the certification in this Court have been pursued and have been unsuccessful.

By this Order all further discussion on the issue of class certification is terminated as previously decided and moot.

IT IS SO ORDERED.

Edgar W. Dickson
PRESIDING JUDGE

Orangeburg, South Carolina
Dated: Sept. 7, 2016

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EXHIBIT D

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
	)	
Anthony and Barbara Grazia, Individually and on Behalf of All Other Similarly Situated Plaintiffs Plaintiff,	)	April 30, 2012
Versus	)	2007-cp-07-01396
South Carolina State Plastering, LLC Defendant.	)	
South Carolina State Plastering, LLC, Third-party Plaintiff,	)	
Versus	)	
Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc., Third-party Defendant.	)	

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

Pamela Ozment-Cartee
Circuit Court Reporter

MR. SEGUI: Good afternoon, Your Honor. Phillip Segui, also representing the Plaintiffs.

THE COURT: All right. Thank you, ladies and gentlemen. We are glad to have this distinguished group of lawyers with us here in Darlington for hearings in, and our record should reflect this is Grazia and others versus South Carolina State Plastering and others. And this is case 07CP071396, which is a case that I have under complex jurisdiction out of Beaufort County.

Of course, just by way of historical reference so we will know where we are today, the Court previously issued an Order which preliminarily certified a class, and set some other procedural dictates for this case to proceed. There was a Rule 59 Motion filed to reconsider, as well as to clarify, and that is on our docket for today.

The Plaintiffs have objected on a basis that that is not a proper vehicle, and we will take that up when we start. But, we have that issue.

We also have the issue of what I am going to call a Temporary Restraining Order by consent, a little bit unusual. And then a Motion by Mr. Kendall, I believe, to clarify the terms of the Temporary Restraining Order, which is also on the agenda for today.

And then late on Friday, we received a Motion concerning individual discovery within the class vehicle. I don't have

Complaint. So, I would think it would be the same thing if the Plaintiffs' lawyers allege at the risk of Rule 11, and our rules against Barratry and Champerty, and everything else we have out there. They want to get out there and say that there are some people who have damages, actually didn't. Well, they do that at their risk. But that is just my gut reaction to what I'm hearing.

MR. RAWL: Thank you, Your Honor. But, one thing I would like to point out is in your example, each one of those four people is represented by a lawyer or they would not have filed suit.

THE COURT: Right.

MR. RAWL: In this case, we are trying to determine who is going to be dragged into a lawsuit, and bound by this Court's decision, that did not on their own accord go find a lawyer and file suit. These decisions right now are due process issues, because we are pulling somebody who is not filing their lawsuit, and binding them to decision.

THE COURT: Right. Which is your opposition to the entire class vehicle. And we have fought that battle. And I just decline to make any changes at this point to the preliminary certification order on that issue. Anything else?

MR. RAWL: Yes, sir, Your Honor. Each of you're A, B, and C, I apologize, I don't understand exactly what you mean. I will start with C. The Court says quote, "The presence of

moisture encapsulation by failing to leave a gap between the stucco exterior and the structure slab." end quote. And I apologize, I do not understand what the Court means. Is that anybody who receives a notice with this class definition have a hard time understanding what that means.

THE COURT: Again, I am going to decline to give you a more further technical definition other than the order which I do not believe, does not need clarification on that issue. It speaks fairly clearly as to what it means, and if you wish to describe it further in the opt out notice, please put that in the recommended notice that you will provide to the Court within thirty days of today. I simply cannot at this point begin to parse and start -- we will be so confounded by the time we get twenty minutes further into the parts of the definitions, that we will be back to square one. So, I decline to do it.

MR. RAWL: I apologize, Your Honor. I think that is actually absolutely true, that the more we look at it, the harder it is to determine who would be in the class, and who would not be in the class.

THE COURT: Right. It takes us back to the issue, Mr. Rawl, that you continue to argue, which is that we shouldn't have a class. Well, I made that decision against you. And again ultimately, who knows where this case will go. But, that decision in this case, hard fought, preliminarily made in

favor of the opposing party, and I just simply decline to back up and start all over again and say well, no this is too much trouble, we are not going to have a class.

MR. RAWL: One last issue. I have several specific questions about the class, but I won't go into each one of them. They are in my Briefing.

THE COURT: Thank you.

MR. RAWL: They are all in there. Can I ask one last question, which is, does the Court --- at some point we are going to get past the Right to Cure process, and we will get past the opt out process, and we will have a group of people that are left that will be in a class, or could be in a class if they meet this definition. At some point is the Court foreseeing allowing the defendants discovery to determine whether or not those class members actually comply with the Court's class definition?

THE COURT: In other words you are saying, can you contest at any point their ability to be in the class?

MR. RAWL: Well, at some point what we know is that a lot of those four thousand don't have any of these three issues. Your Honor has ruled, and the Plaintiffs are going to be sending notices to lots of people who don't have these issues. So, at some point, are the defendants and the third-party Defendants going to have the ability to determine or make an argument through discovery and say these five hundred

EXHIBIT E

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	CASE NO.: 2007-CP-07-01396
ANTHONY GRAZIA AND BARBARA GRAZIA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	
PLAINTIFFS,	)	
vs.	)	TRANSCRIPT OF RECORD
SOUTH CAROLINA STATE PLASTERING, LLC.,	)	
DEFENDANT.	)	
SOUTH CAROLINA STATE PLASTERING, LLC.,	)	
THIRD-PARTY PLAINTIFF,	)	
vs.	)	
DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC., AND KEPHART ARCHITECTS, INC.,	)	
THIRD-PARTY DEFENDANTS.	)	

February 1, 2013

Charleston, South Carolina

MR. COBB: Good morning. I'm David Cobb, here for Kephart Architects.

THE COURT: Mr. Cobb, good to see you. You're welcome to come beyond the bar, if you wish.

MR. COBB: I'm sitting with my friends.

THE COURT: All right. Very good.

Since we're not normally in this county where we -- where we are meeting today here in Charleston, why don't we let our bailiffs introduce themselves, so we will know with whom we are working.

Mr. Sutton, we will start with you.

MR. SUTTON: Neil Sutton.

THE COURT: Thank you.

MR. ROBINSON: Reynolds Robinson.

THE COURT: Thank you, Mr. Robinson.

All right. Ladies and gentlemen, we are glad to be here today. Also, Caroline Leonard is our non-jury coordinator here in Charleston County, who was kind enough to come and sit with us today here in this non-Charleston case. So we're glad to have you with us as well.

All right. Let's talk a little bit about where we are in this process. Of course, today's hearing was set for the purpose in the case of Grazia and others versus South Carolina State Plastering and others. We're here for the purpose of finalizing the opt-out Notice.

bring a lot of extra paper with me.

THE COURT: Okay. And do you have a copy of the opt-out Notice itself that you sent yesterday?

MR. KENDALL: Yes, Your Honor.

THE COURT: A printed copy?

MR. KENDALL: The exclusion form and the Notice? Is that what you're asking about? Let me give you everything that I E-mailed yesterday.

THE COURT: Yes, that would be helpful.

MR. KENDALL: Your Honor, we E-mailed a Notice, an Exclusion Request Form, and a Right to Cure Questionnaire.

THE COURT: All right. Now let me just simply say that we had taken the prior document, we highlighted differences, so that we will be -- we will not be fully apprised of changes between the two, but perhaps we can work through that during the session today.

What I had anticipated us doing, and I appreciate you sending us a potential listing of issues to discuss, was that we would take the Notices, I guess section by section, and hammer out the differences between them and resolve each section as we go. That was my suggestion, not to demand it, but simply to put that out there. Your outline that you handed up doesn't exactly follow that process.

Let me hear from -- well, let's start with the

standpoint also, we just want to make sure we're not waiving that issue.

THE COURT: Okay.

MR. RAWL: We understand that the purpose today is to reach a resolution of a document that's the best possible document that could go out.

THE COURT: Okay. Thank you.

What I would propose that we do is take this Class Notice and work from the plaintiffs proposal, and we would break it down into the Roman numeral category, such that we've got the, what I'm going to call the introduction, and then we start with Number 1: Why should I read this notice?

And just debate or discuss among yourselves number-by-number and make a decision as we go. We would take, like where there are subparts, 2.1, 2.2, we will take the whole thing at the same time, like all of Section 2.

And my suggestion would be that we start by letting the plaintiff defend what they propose and letting the defendants tell us why it's not an appropriate proposal and what would be better. Now I suggest that for want of a better procedure, and let's begin with the face page and the introduction before we get to Roman Numeral One.

And who will be arguing for the plaintiff? Mr.

THE COURT: No, I'm starting off by looking at the one that we had previously.

MR. KENDALL: Okay. Fair enough. I just wanted to sing along with you.

MR. SEEKINGS: That's the one I think that we're operating off of too, Your Honor.

MR. KENDALL: And so, Your Honor, you're looking at the second paragraph, the last two sentences was your first question? Am I in the right place?

THE COURT: Well, yes, but now I'm wondering if this is appropriate to work off of this old document when you proposed this new one. But I don't have a way to tell what's different about this new one from the one that we had previously, nor what's different from the -- from what the plaintiff proposed. So tell me what would you propose?

MR. KENDALL: A couple of the highlights, we first of all, Your Honor, I think -- a lot of the -- a lot of the differences are for stylistic, perhaps and whatnot, but in general the concern that we have about the Paragraph One is, first of all, it does not -- there are some statements in there that are inconsistent with what was required -- what the Court required to be in the order or in the Notice.

Specifically, in Paragraph Two, the last line it says

that the Court certified this civil action to proceed as a Class action. Your order made very clear that this was in all respects to indicate that this was a preliminary certification and there would be subsequent discussions and refinements and/or un-certifications down the road. That's -- that's a problem with me throughout this order, ---

THE COURT: Right.

MR. KENDALL: --- and one of the first places that appears is in that statement. It should include, at a very minimum, it should include the words "the Court has preliminarily certified."

THE COURT: Well, let me just broach that now. I don't believe that's appropriate, Mr. Kendall, because when I said I preliminarily certified it, what I meant was that's a certification, it's just not in its final form because we have to deal with the Right to Cure Statute. But I don't want to confuse the homeowners with the concept that, well, all of these pages you're looking at may be reversed at some later point in the process.

I would say that the presumption is that it will not be reversed, or it would not have been preliminarily certified to begin with. But secondly, I believe that's going to inject confusion and uncertainty into this entire process, particularly when we're dealing with laymen.

What do you -- how do you respond to that?

MR. KENDALL: Well, we were trying to comply by the words of your order.

THE COURT: Right.

MR. KENDALL: And I'm not -- I'm not throwing back your language. Please don't take me to be disrespectful. But why we have it in there, in your order you had said this Notice must contain standard information. And then it said the Notice should inform potential members that Class certification is preliminary at this juncture, pending the results of the right to cure process. Once the opt-out period has ended, the right to cure document must be individually -- and so forth, it talks about that.

And then it says the Court will make a final determination of Class certification, and the potential Class members will be notified of this final decision. We were simply trying to enact what we thought you meant, which was to tell them that there are -- this thing could change.

THE COURT: Well, that's valid, but I believe as a policy decision at this juncture, I'm going to alter what sounds like the plain meaning of what you read so as not to confuse the potential Class members with the preliminary status of the Class. Of course, we all know that if we determine, as the order says, later on that we

cannot, due to particular facts and circumstances of these cases, the Right to Cure Act, and the Class status and we must decertified, well, we'll just lay that news on the Class at that time, without warning them in advance that such could happen. Because, again, I feel like it's an unlikely circumstance, and it is one that is confusing to the layman. So I will follow the plaintiffs' proposed language with regard to whether the Class is preliminarily certified.

MR. KENDALL: Your Honor -- thank you, Your Honor. And for my record-keeping assistance, do you anticipate -- would just the oral amendment to the order stand, or would you issue something different on that?

THE COURT: I'm going to let this record stand for itself, and I would decline to issue a further written order. We may yet have in here somewhere that it is preliminary, but I just in this -- throughout the proposal that you made and right here in this instance, I don't believe it's in the best interest.

MR. KENDALL: I understand.

THE COURT: We'll consider that when we get to the end of this process.

MR. KENDALL: Very good.

Your Honor, a number of the differences that we have with what was proposed by the plaintiff and one of the

EXHIBIT F

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2007-CP-07-1396
ANTHONY and BARBARA GRAZIA, individually and on behalf of all other similarly situated Plaintiffs, Plaintiffs, v. SOUTH CAROLINA STATE PLASTERING, LLC, Defendant. SOUTH CAROLINA STATE PLASTERING, LLC, Third-Party Plaintiff, v. DEL WEBB COMMUNITITES, INC., PULTE HOMES, INC., and KEPHART ARCHITECTS, INC., Third-Party Defendants.	**ORDER DISMISSING DEFENDANTS' MOTIONS TO RECONSIDER PURSUANT TO RULE 59(e)**

A Motion to Reconsider and/or Alter or Amend Order (No Motions Pending) dated September 9, 2016 was filed by Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter "Webb/Pulte") on September 23, 2016, which Motion was subsequently joined by Defendant South Carolina State Plastering, LLC (hereinafter "SCSP") on October 3, 2016.

The Court's Order dated September 9, 2016 was interlocutory, and therefore Defendants' Motions to Reconsider were improvidently filed. As this Court has previously ruled, there is no provision in Rule 59(e), SCRCP, allowing a party to challenge an interlocutory order. Indeed, rule

59 motions are permitted only after final, appealable adjudications on the merits. Accordingly, once again, the Court hereby dismisses Defendants' Motions to Reconsider as improper.

AND IT IS SO ORDERED.

Edgar W. Dickson
Presiding Judge

Orangeburg, South Carolina
Dated: Dec. 29, 2016

DAVID RAMSAY HOUSE
c. 1740

LEATH, BOUCH & SEEKINGS, LLP
COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

January 3, 2017

VIA USPS
The Honorable Jerri Ann Roseneau
Beaufort County Clerk of Court
P.O. Box 1128
Beaufort, SC 29901

RE: *Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC*
Case No.: 2007-CP-07-1396
LBS File No. 1351.2

Dear Ms. Roseneau:

Please find enclosed for filing the original and one (1) copy of the Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e), and the Order Requiring Mediation. Please file the original orders, file stamp the copies, and return the copies to me in the enclosed, self-addressed, stamped envelope.

By copy of this correspondence, I am forwarding the same to all counsel of record. If you have any questions or concerns, please do not hesitate to call our office.

Thank you and with best regards, I am

Yours very truly,

LEATH, BOUCH & SEEKINGS, LLP

Brittany Huskey
Paralegal to Michael S. Seekings

/bah
Enclosures as stated
cc: All Counsel of Record (via e-mail only)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,..... Appellant,

and

South Carolina State Plastering, LLC,..... Appellant,

v.

Del Webb Communities, Inc., Pulte Homes, Inc.,
and Kephart Architects, Inc., ... Third-Party Defendants,

OF WHOM Del Webb Communities, Inc., and Pulte Homes, Inc., are,..... Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Appellants Del Webb Communities, Inc. and Pulte Homes, Inc.'s *MOTION TO DETERMINE APPEALABILITY* by depositing a copy in the United States Mail, postage prepaid, on February 15, 2017, addressed to all attorneys of record, as follows:

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