

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),
 SCRPC; 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.

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SC Court of Appeals

JENNIFER A. ROSENBAU
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

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This matter comes before the Court pursuant to Plaintiffs' Motion to Certify a Class in accordance with the provisions of Rule 23, SCRPC, and is on remand from the South Carolina Supreme Court after its majority decision that the class action provisions of Rule 23, SCRPC, 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), SCRPC.

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2
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), SCRCF, 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.

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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.” SCRCF, 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), SCRCF.

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.” SCRCF, 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

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7

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.

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8

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), SCRPC, 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, SCRPC, 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.

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12

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), SCRCF, 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.

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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 of 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.

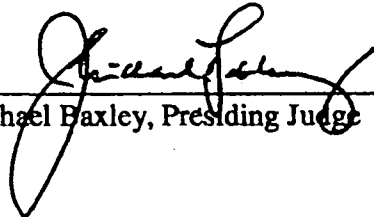
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The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result 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