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JUN 09 2017

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT ) FOURTEENTH JUDICIAL CIRCUIT
) S.C. SUPREME COURT
) 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
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

RECEIVED

JUN 09 2017

SC Court of Appeals

SOUTH CAROLINA STATE
PLASTERING, LLC,
Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC.,
PULTE HOMES, INC., and KEPHART
ARCHITECTS, INC.,
Third-Party Defendants.

11 DEC 19 PM 3:31
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, 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), SCRPC.

*Job 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), SCRPC, 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 (7<sup>th</sup> 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 (6<sup>th</sup> Cir. 1998)(commonality and typicality not satisfied when "taken as a whole the class claims were based on widely divergent facts").

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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.

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**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

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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, SCRCF, 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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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), SCRPC, 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

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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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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.

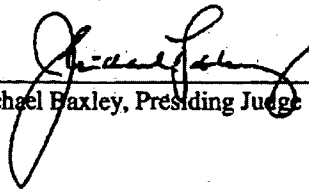
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel 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

FORM 4

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT )

Case 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, )

and )

SOUTH CAROLINA STATE )  
PLASTERING, LLC, )

Third-Party Plaintiff, )

v. )

DEL WEBB COMMUNITIES, INC., )  
PULTE HOMES, INC. and )  
KEPHART ARCHITECTS, INC., )

Third-Party Defendants. )

**ORDER DISMISSING DEFENDANTS'  
MOTIONS TO RECONSIDER AND  
DENYING DEFENDANTS' MOTIONS  
FOR CLARIFICATION  
OF ORDER PRELIMINARILY  
CERTIFYING CLASS**

2012 MAY -7 PM 3:49  
JERRI ANN ROSENEAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

*Just*

This civil litigation involves allegations of defective construction relating to stucco application on approximately 4,000 homes located at the Sun City Development in Beaufort County, South Carolina. The case has been declared complex and assigned to this Court for disposition. On December 8, 2011, this Court issued an Order making a preliminary finding that Plaintiffs' proposed class meets the requirements of Rule 23(a), SCRCP, and this Order was filed with the Clerk of Court on December 15, 2011. Subsequently, on January 3, 2012, Defendant South Carolina State Plastering, LLC and Third-Party Defendants Del

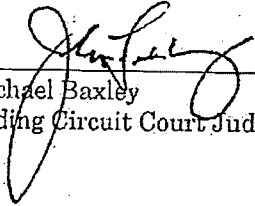
Webb Communities, Inc. and Pulte Homes, Inc. filed Motions to Reconsider and/or Motions for Clarification, pursuant to Rule 59(e), the matter that is presently before the Court. The Court heard arguments on these motions on April 30, 2012, and after hearing these arguments and reviewing the memoranda submitted by the parties, the Court dismisses the Motion to Reconsider and denies the Motion for Clarification.

The Court's Order dated December 8, 2011 was interlocutory in nature, and thus Defendants' Motions to Reconsider were improvidently filed. There is no provision in Rule 59(e), SCRPC, allowing a party to challenge an interlocutory order. Indeed, Rule 59 motions are permitted only after final, appealable adjudications on the merits. Accordingly, **the Court hereby dismisses Defendants' Motions to Reconsider as improper.**

During the April 30 hearing, Defendants were also permitted to address the various portions of the Court's Order for which they sought clarification. After carefully considering on the record each of the concerns raised by Defendants, the Court determined that the Order was clear and complete as originally issued and thus no further clarification was necessary. Therefore, **the Court hereby denies Defendants' motions for clarification.**

Accordingly, the parties have thirty (30) days from the date this Order denying clarification is served upon them to submit a proposed opt-out notice to putative class members as outlined in the initial Order.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
J. Michael Baxley  
Presiding Circuit Court Judge

May 1, 2012  
Hartsville, SC



State of South Carolina  
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL  
BAXLEY  
JUDGE

531 EAST CAROLINA AVENUE  
HARTSVILLE, SOUTH CAROLINA 29550  
TELEPHONE: (843) 383-4114  
FAX: (843) 383-4118  
E-MAIL: [baxleyj@sccourts.org](mailto:baxleyj@sccourts.org)

May 3, 2012

The Honorable Jerri Ann Roseneau  
Beaufort County Clerk of Court  
Attention: Jamie  
Post Office Box 1128  
Beaufort, SC 29901

Re: Grazia, et al v. SC State Plastering, LLC, et al  
Case Number: 07-CP-07-1396

Dear Jamie:

Enclosed is a Form 4 Order that has been prepared in the above matter. Please file this order and serve it on the parties. Thank you for your assistance in this matter.

Sincerely yours,

*J. Michael Baxley*

J. Michael Baxley

JMB/jlc  
Enclosure

12 MAY - 7 PM 3:54  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.  
RECORDS & CLERK BUREAU



STATE OF SOUTH CAROLINA )

COUNTY OF BEAUFORT )

ANTHONY AND BARBARA GRAZIA, )  
individually and on behalf of all other )  
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DEL WEBB COMMUNITIES, INC., )  
PULTE HOMES, INC., and KEPHART )  
ARCHITECTS, INC., )

Third-Party Defendants. )

IN THE COURT OF COMMON PLEAS )  
FOURTEENTH JUDICIAL CIRCUIT )

C/A No.: 2007-CP-07-1396 )

**ORDER APPROVING CLASS NOTICE,  
MAILING LIST, AND PROCEDURES  
FOR RIGHT TO CURE PROCESS**

2014 APR 18 PM 2:01  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

**NOTICE TO ALL PARTIES:** This Order is being issued during an ongoing scheduled mediation in this litigation, set before Bradish J. Waring, Esquire, which began on March 18, 2014. Implementation of this Order is being delayed until an impasse is declared by the mediator. Once an impasse is declared, in writing by the mediator, this Order is in full force and effect. The purpose of this delay is to avoid the parties incurring the expense and significant time consumption of launching the notice process, while at the same time advising all parties of what procedures will be in place should the mediation fail and this litigation proceed.

**I. INTRODUCTION**

This Order represents the culmination of several hearings the Court has conducted on the issues of class notice, the class mailing list proposed by class counsel, and the Right to Cure

Construction Dwelling Defect ("RTC") process that will follow the mailing of class notice.<sup>1</sup> In addition to formally approving the Notice and Exclusion forms that will be mailed to the putative class, it is the Court's intention that this Order shall establish the parameters and timelines that will govern the RTC process following the mailing of class notice.

## II. CLASS NOTICE/EXCLUSION FORMS AND MAILING LIST

### A. Class Notice/Exclusion Form.

The form and substance of the Notice and Exclusion Forms to be mailed to putative Class Members has been the subject of intense review by the Court and debate by all parties. Multiple versions have been proposed, rejected, altered, and amended. The Court finds that the final form of the Notice, attached hereto as Exhibit One, gives appropriate notice to the putative class members of this lawsuit and will allow them to make an informed decision as to whether or not to proceed further as a member of the Plaintiff Class. Moreover, this Notice comports with the requirements of Rule 23, SCRPC, prevailing state case law, and traditional notions of due process. Accordingly, the Court approves the attached Class Notice/Exclusion form.

### B. Mailing List Proposed by Class Counsel.

The mailing list for the Class Notices submitted by the Plaintiffs and attached hereto as Exhibit 2 has also been the subject of great controversy and debate. This mailing list was prepared by Class Counsel by cross-referencing a homeowner list provided by Del Webb Communities, Inc./Pulte Homes, Inc. ("Webb/Pulte") with the Sun City Property Owners' Association and the public records of the Beaufort County land registrar.<sup>2</sup> Prior to the hearing on

<sup>1</sup> The Court held hearings on these matters on February 1, 2013 in Charleston, South Carolina; February 25, 2013 in Darlington, South Carolina; and by telephone on March 7, 2013 and April 29, 2013. The delay between those hearings and the issuance of this Order was occasioned by appeals over various issues in this comprehensive case.

<sup>2</sup> One of several objections that SCSP raised was that the list - which is a list of the homes built by Pulte - initially provided to Class Counsel through an email, is an unreliable basis for drafting a mailing list for class notice, and further, that it constitutes hearsay. The Court denies this objection.

April 29, SCSP submitted motions<sup>3</sup> that raised myriad objections,<sup>4</sup> chief among them that without conducting discovery on the mailing list proposed by class counsel, SCSP was unable to object to inclusion of any home on the proposed mailing list. The Court denies the objections raised by SCSP and declines to allow discovery at this time on the mailing list proposed by Class Counsel for several reasons, primary among them the fact that this case is already six years old and further delay at this stage is not in the interests of justice. Defendant did note that one house, belonging to Mr. Oros, should be excluded because it no longer had any stucco that was installed by SCSP. Plaintiffs have agreed to this exclusion.

The Court finds that the proposed mailing list provided by the Plaintiffs, and the process employed to produce this list, meets the test of adequacy and sufficient accuracy for this stage of the litigation. Accordingly, the mailing list proposed by Class Counsel is hereby approved. A copy of the mailing list is attached to this Order as Exhibit 2. Given the concerns and objections raised by SCSP, however, the Court will permit SCSP, during the RTC process, to eliminate errors in the mailing list and/or remove homeowners that do not meet the class criteria. A Court Order will be required to add or delete a name from the mailing list after the issuance of this present Order.

<sup>3</sup> SCSP filed a Motion to Determine Class Membership and Specific Objections and Motion in Opposition to Mailing List Proposed by Class Counsel. Webb/Pulte joined in these filings.

<sup>4</sup> SCSP raised these additional objections in their motions: (1) the proposed mailing list had never been submitted to the Court; (2) the Plaintiffs had the burden to prove that this list contained appropriate class members; (3) that requiring the Defendant to object to the proposed class list as opposed to requiring Plaintiffs to prove/support the list was an impermissible burden shift; (4) that Defendant did not have electronically searchable records by which to be able to dispute the Plaintiffs' proposed mailing list without discovery or undue burden; (5) that even if the burden remained on the Defendant to disprove the proposed mailing list, then Defendant should be allowed reasonable discovery to accomplish this; and, (6) that if discovery was not allowed at this time, then discovery and the ability to contest class membership should be available at a later date.

### III. PROCEDURE FOR MAILING CLASS NOTICE AND RTC PROCESS

Within sixty (60) days of the issuance of a written declaration to this Court by the mediator that the mediation effort has ended without reaching settlement of this litigation, counsel for Plaintiffs shall mail a copy of Exhibit 1 to each homeowner on the Mailing List (Exhibit 2), and shall on that date notify all other counsel of the mailing. The putative class members shall be permitted sixty (60) days from the date of mailing to exclude themselves from the Class, if they desire to do so. Following the sixty (60) day opt-out period, the exclusion forms will be tabulated, and the Class will be considered complete. Plaintiffs' counsel must file the final Class List with the Clerk of Court within ten (10) days of the close of the opt-out period. The Court is aware that subsequent motions may be filed by the Plaintiffs contesting any exclusion forms received from persons who have agreed to exclude themselves from the Class as a result of outside agreements made with Webb/Pulte. These motions, if any, are reserved for future determination.

9/24  
Within ten (10) days of the filing of the final Class List with the Clerk of Court, Plaintiffs' counsel shall mail to the Class the RTC Questionnaire attached hereto and approved as Exhibit 3, and shall on that date notify all other counsel of the mailing. Class members will be given a sixty (60) day period from the date of mailing to return the Questionnaire to Plaintiffs' counsel. Plaintiff's Counsel shall have additional time to contact class members that do not timely return the Questionnaire, but at some point to be determined in the future, class members who fail to return the RTC Questionnaire shall have their claims dismissed, with prejudice.

No later than the sixtieth (60) day after the close of the sixty (60) day period to return the RTC Questionnaires, Plaintiffs shall begin notifying Defendant SCSP of alleged construction defects pursuant to the requirements of the South Carolina Notice and Right to Cure Act (S.C.

Code Ann. § 40-59-810, *et. seq.*) (hereinafter "the Act"). Class Members and Defendant SCSP will be accorded the rights and remedies afforded by the Act.

At that juncture for purposes of compliance with the Act, and to facilitate the inspection process, the Class will be divided into four relatively equal geographic quadrants or groups. In addition, although the Third-Party Defendants do not have any rights under the Act, SCSP shall have the right to send copies of the Notices and Questionnaires to Webb/Pulte and Kephart Architects, Inc. ("Kephart") and request that they take part in the inspection of any given home. Any such inspection shall occur at the same time as SCSP's inspection. Thus, any further reference below to "Defendants" with respect to their rights and responsibilities in the inspection process shall include Third-Party Defendants, if the presence at inspection of those Third-Party Defendants is requested by SCSP.

*YJB*  
*5*

No later than the sixtieth day after the close of the (60) day period to return RTC Questionnaires, Plaintiffs' Counsel shall deliver to counsel for SCSP, via e-mail, the following information for the first twenty-five (25) percent of Class Members: (1) the notice pursuant to the Act for each individual house; and (2) a copy of that homeowner's completed Questionnaire. Defendant SCSP shall have ninety (90) days from the date of electronic delivery of this information to inspect those houses and comply with the Act. On the day following the end of the 90 day inspection period, Plaintiffs' counsel shall deliver via e-mail the same information for the next 25% of the Class, and Defendant SCSP shall have 90 days from the date of electronic delivery of this information to inspect those houses and comply with the Act. This process shall repeat two (2) more times with the same allotted time periods.

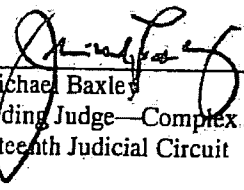
The inspections permitted to the Defendant shall follow this protocol:

1. If a Questionnaire returned by a homeowner lists interior damage due to water intrusion or if the homeowner responds that he/she does not know whether such

interior damage exists, then upon prior notice to counsel for Plaintiffs, Defendant shall be permitted a reasonable inspection of the damaged interior area in question, or the entire interior if the homeowner does not know whether such damage exists;

2. If interior moisture damage is listed on a Questionnaire, Defendant shall be permitted to perform reasonable moisture meter testing of the building interior, limited to no more than four areas, all of which shall be fully repaired and the results furnished to the Plaintiffs;
3. If Defendant desires to perform destructive testing on any of the homes, they shall be required to file a motion with the Court in order to perform such testing. Multiple homes may be included in the same motion. The motion must include a detailed description of the test procedures, the purpose of the test, the likely damage or inconvenience resulting from the test, and whether Plaintiffs' counsel objects to such test. Destructive testing does not include moisture and other testing that requires an opening no greater than a pinhole, which shall then be repaired; any further injury or intrusion is considered "destructive." As the RTC inspection process proceeds, the parties may move the Court to alter this definition of "destructive." Any testing results, reports, or photographs taken by any party during the inspection process will be furnished to all parties. If destructive testing goes forward, all parties shall be given the opportunity to observe the destructive testing;
4. A homeowner who refuses to permit interior inspection as outlined herein, or who refuses to permit testing as outlined herein, shall sign an affidavit prepared by Plaintiffs' counsel formally refusing such procedure. The affidavit shall clearly state that in so refusing, the homeowner understands that his/her claim will be dismissed with prejudice by the Court for failure to comply with the RTC Act, and such claim shall then be dismissed by the Court; and,
5. Upon motion of any party, as the opt-out period and the RTC inspection process move forward, the Court reserves the right to amend this Order either substantively or procedurally as the interests of justice and judicial economy require.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
J. Michael Baxley  
Presiding Judge—Complex Jurisdiction  
Fourteenth Judicial Circuit

Hartsville, South Carolina

April 9, 2014

EXHIBIT 1

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, )

**NOTICE OF CLASS ACTION**

vs. )

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. )

**TO: ALL OWNERS OF RESIDENCES AT SUN CITY, HILTON HEAD, HAVING STUCCO EXTERIORS INSTALLED BY SOUTH CAROLINA STATE PLASTERING, LLC, PRIOR TO JULY 31, 2007:**

**THIS NOTICE MAY AFFECT YOUR RIGHTS.**  
**PLEASE READ IT CAREFULLY.**

**\*\*\*YOU ARE NOT BEING SUED\*\*\*  
\*\*\*THIS IS NOT A SOLICITATION FROM A LAWYER\*\*\*  
\*\*\*A SOUTH CAROLINA COURT AUTHORIZED THIS NOTICE\*\*\***

**\*\*\*YOU MUST RETURN THE ENCLOSED FORM BY \_\_\_\_\_ 2013,  
IF YOU DO NOT WANT TO PARTICIPATE IN THIS CASE**

**1. WHY SHOULD I READ THIS NOTICE?**

The Court has approved this Notice to you and has included information that it believes you need to know to decide whether to remain in the Class or to exclude yourself/opt-out of the Class. You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of the Class, and whether to opt-out of the Class. You should carefully read below to decide whether it is in your best interest to opt-out or stay in the Class.

You have been identified as one of 4,300 potential members of a Class on whose behalf certain claims are being asserted in the above-captioned civil action pending in the Beaufort County Court of Common Pleas (the "Court"). The Court certified this civil action to proceed as a class action on behalf of the Class defined below.

If you own a residence in Sun City having a stucco exterior installed by South Carolina State Plastering, LLC prior to July 31, 2007, your rights may be affected by this action. You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of the Class, and whether to opt-out of the proposed Class. In a Class Action, one or more people, called named Plaintiffs (in this case Anthony and Barbara Grazia), sue on behalf of people who have similar claims. All these similarly situated people are a Class or Class members. One court resolves the issues for all Class members, except for those who exclude themselves from the Class.

This action is pending in the Court of Common Pleas for Beaufort County, South Carolina, in a lawsuit known as Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs vs. South Carolina State Plastering, LLC. While the Plaintiffs (and Class) are only suing (and may only recover against) South Carolina State Plastering, LLC in this case, South Carolina State Plastering (SCSP) has brought a third-party action entitled: South Carolina State Plastering, LLC v. Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc., Civil Action No. 07-CP-07-1396. If you are a member of the Class, and do not exclude yourself from the Class (i.e., opt out of the Class), the result of this pending litigation will permanently affect your rights against the Defendants.

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.

## 2. WHAT IS THE LAWSUIT ABOUT?

The Plaintiffs have alleged that South Carolina State Plastering has improperly installed stucco on some houses in Sun City Hilton Head. Plaintiffs are requesting that South Carolina State Plastering pay money to the Plaintiffs and Class members to cover the cost to repair alleged damage caused by the alleged improper stucco installation. South Carolina State Plastering denies the allegations made by Plaintiffs and denies that there are any widespread stucco installation problems in Sun City Hilton Head.

### 2.1. WHAT CLAIMS ARE INCLUDED IN THIS LAWSUIT?

The suit alleges negligence and breach of implied warranty of good and workmanlike services. Plaintiffs are only pursuing three (3) alleged stucco installation issues in this lawsuit. This lawsuit is limited to recovering damages caused by one or more of the following three (3) alleged stucco installation defects:

- (1) The lack of head flashing above doors and windows,
- (2) The failure to install stucco control joints, and/or
- (3) The presence of moisture encapsulation by the failure to leave a gap between the bottom of the stucco exterior and the structure slab.

The Class is seeking to recover money for damages caused by one or more of the above three (3) alleged defects.

### 2.2. WHAT CLAIMS ARE NOT INCLUDED IN THIS LAWSUIT?

#### A. Stucco Application Issues Not Included in This Case.

Any issues other than the three (3) issues in Section 2.1 above will not be included in this lawsuit. If you have damage to your house solely related to a stucco issue not included in Section 2.1, then you will not be able to recover for those damages (in this lawsuit or any other lawsuit) if you remain in this Class.

There may be stucco homeowners in Sun City Hilton Head that have other stucco problems (such as thin application, improper mix, or improper installation) which are not included in Section 2.1 above, and also do not include one of the three (3) conditions listed in Section 2.1 above.

If you have one of these other stucco problems, you will not be able to recover funds for damage caused by those issues if you stay in the Class. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

B. Past Repairs Not Included:

The Named Plaintiffs have agreed not to request the recovery of any funds already expended by Class members or to recover funds already paid for repairs to stucco or behind stucco. If you have paid money for stucco related repairs, you will not be able to recover those funds if you stay in the Class. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

C. Legal Causes of Action Not Included:

The Named Plaintiffs will not pursue claims brought under the South Carolina Unfair Trade Practices Act (SCUTPA). Under SCUTPA, if a Defendant is found to have acted unfairly, the Plaintiffs and Class members could recover treble (triple) damages, costs, and attorneys' fees. If you stay in the Class, you will not be able to bring a SCUTPA claim against Defendant for stucco related issues, and you will be barred from recovery of treble damages, costs, and attorneys' fees. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

3. **WHAT DO I NEED TO DO TO JOIN THE CLASS?**

If you wish to join the Class, you do not need to take any further action and your interest as a member of the Class will be represented by Class Counsel without individual charge to you. (See Paragraph 8 for Class Counsel's fees and costs.) You are not required to hire your own attorney but may do so at your own expense. You will be bound by the result in the case.

4. **HOW DO I EXCLUDE MYSELF FROM THE CLASS?**

To opt-out of the Class, you must complete, sign and submit the Exclusion Request Form which is included with this Notice. Please send your completed form to:

John T. Chakeris, Esq.  
The Chakeris Law Firm  
231 Calhoun Street  
P. O. Box 397  
Charleston, SC 29402  
Telephone: (843) 853-5678

You should submit a separate Exclusion Request Form for each property you own. If you do not receive a form or if you desire additional copies, you may obtain such copies by writing or calling the address above.

**AN OWNER OR OWNERS OF A HOME WHO FAILS TO SUBMIT AN EXCLUSION REQUEST FORM BY MIDNIGHT ON \_\_\_\_\_, 2013, WILL AUTOMATICALLY BE INCLUDED IN THE CLASS. IF YOU DO NOT OPT-OUT OF**

**THE CLASS, YOU WILL BE BOUND BY ALL ORDERS AND JUDGMENTS ENTERED BY THE COURT. THIS IS YOUR ONLY OPPORTUNITY TO OPT-OUT OF THE CLASS.**

**IF YOU ARE A PUTATIVE CLASS MEMBER AND PROPERLY AND TIMELY REQUEST EXCLUSION FROM THE CLASS, YOU WILL NOT RECEIVE ANY BENEFITS OF THIS ACTION AND YOU WILL NOT BE BOUND BY ANY FURTHER ORDERS OR JUDGMENTS ENTERED FOR OR AGAINST THE CLASS. YOU MAY PURSUE AT YOUR OWN EXPENSE WHATEVER RIGHTS YOU MAY HAVE AGAINST THE DEFENDANT, IF ANY.**

**5. IF I STAY IN THE CLASS, MAY I BRING ANOTHER LAWSUIT LATER AGAINST SOUTH CAROLINA STATE PLASTERING?**

Not related to stucco claims. If you stay in the Class, you will be bound by the result of this lawsuit – win or lose. If you do not submit a timely Exclusion Request Form, you will not be allowed to bring an individual lawsuit against South Carolina State Plastering for stucco claims.

**6. IF I DO NOT EXCLUDE MYSELF FROM THE CLASS, WILL I HAVE ANY RESPONSIBILITIES?**

**YES. SEE BELOW.**

Under South Carolina's Opportunity to Cure Construction Defects statute, the Defendant in this case is granted the opportunity to inspect allegedly defective stucco if it requests to do so. Once the opt-out period in this case has expired, the action will be stayed so that the requirements of the Opportunity To Cure Act can be met. If you remain in the Class, an Opportunity to Cure notice of individual claim will be mailed to you to be completed and returned by mail to Plaintiff's counsel. The notice will ask you to describe any stucco-related problems you are currently experiencing with your home.

After the Notice is issued, the Defendant will be permitted to inspect your home, offer to remedy the defects, and offer to settle or deny the Claim. If you remain in the Class, and the Defendant chooses to do so, you must allow a home inspection which will take place at a time agreed on by Counsel. The inspection, if any, will be non-invasive and non-destructive, and will be done at no cost to you. The inspection, if any, will be conducted by Class Counsel, under the supervision of the Court.

If the Defendant offers to remedy the defect(s) stated in the Notice or if a monetary offer is made to you, Class Counsel will communicate with you and respond on your behalf. Should you choose to accept the offer, the Court will be advised and a settlement of your Claim may occur.

If you and the Defendant cannot settle the dispute regarding your house pursuant to the Opportunity to Cure Act, then the class action will proceed, and you will be bound by the decision of the court with regard to judgments and rulings in this class action.

#### **6.1. PARTICIPATION IN THE LITIGATION.**

If you do not opt-out of the Class pursuant to Section 4 above, and if you do not settle/resolve your claim pursuant to Section 6 above, then you will be required to take part in the litigation. The claims brought on behalf of the Class and/or the defenses asserted by Defendant may require one or more of the following: 1) you may be required to provide documents and/or information related to you, your house, your house purchase, and any house repairs; 2) you may be required to testify at a deposition about these same issues; 3) your house may be inspected, 4) testing may be conducted on your house, and/or 5) you may be required to testify at the trial of the case.

As a Class member, you will not have any right to control the litigation. In the event that a settlement is reached, you will have the right to submit an objection to the Court. If trial results in an unfavorable outcome, you will not have an individual right to appeal your claim, or to direct that the class representative pursue an appeal.

#### **7. WHO REPRESENTS THE PARTIES:**

Class Counsel for the Plaintiffs is as follows:

John T. Chakeris, Esq.  
The Chakeris Law Firm  
231 Calhoun Street  
P.O. Box 397  
Charleston, SC 29402  
Telephone: (843) 853-5678

W. Jefferson Leath, Jr., Esq.  
Michael S. Seekings, Esq.  
Leath, Bouch & Seekings, LLP  
92 Broad Street  
P.O. Box 59  
Charleston, SC 29402  
Telephone: (843) 937-8811

Phillip W. Segui, Jr., Esq.  
Segui Law Firm, PC  
864 Lowcountry Blvd, Suite A  
Mt. Pleasant, SC 29465  
Telephone: (843) 884-1865

Counsel for Defendant and Third-Party Defendants is as follows:

Attorney for Defendant South Carolina State Plastering, LLC:  
Everett A. Kendall, II, Esq.  
Christy E. Mahon, Esq.  
Sweeny Wingate & Barrow, P.A.  
1515 Lady Street  
P.O. Box 12129  
Columbia, SC 29211

Attorney for Third-Party Defendants Del Webb Communities, Inc., and Pulte Homes, Inc.:  
A. Victor Rawl, Jr., Esq.  
McNair Law Firm  
P.O. Box 1431  
Charleston, SC 29402

Attorney for Third-Party Defendant Kephart Architects, Inc.:  
David S. Cobb, Esq.  
Turner, Padgett, Graham & Laney, P.A.  
40 Calhoun Street, Suite 200  
P. O. Box 22129  
Charleston, SC 29413

**8. HOW WILL CLASS COUNSELS' FEES AND EXPENSES BE PAID?**

If any funds are generated for any class member(s) (either through settlement or judgment), then Class Counsel will request that the Court award to Class Counsel a portion of the funds generated as attorneys' fees for all services rendered to the Class, plus their costs and expenses. **THE ATTORNEYS' FEES AND COSTS AWARDED BY THE COURT SHALL BE PAID ONLY FROM ANY FUNDS GENERATED AS A RESULT OF THE CLASS AND NO INDIVIDUALS WILL BE RESPONSIBLE FOR ANY FEES, COSTS, OR EXPENSES OUT OF POCKET.** All payments to Class Counsel must be approved by the Court, and will be considered at a Fairness Hearing or at other hearings to be scheduled by the Court. Any Attorneys' Fees and Costs that may be awarded as part of the settlement of any claims resolved through the South Carolina Right To Cure process will be addressed similarly.

**9. WHERE DO I GET ADDITIONAL INFORMATION?**

This Notice provides only a summary of matters regarding the case. You may seek the advice and guidance of your own private attorney, at your own expense, if you wish. For more details about matters discussed in this Notice, you may desire to review certain documents related to the litigation such as the Complaint, the Answer of the Defendant, and the Court's Order certifying the Class. If you wish to obtain additional information, you may do so by writing or calling Plaintiffs' Counsel at one of the addresses listed above. **DO NOT CONTACT**

**THE COURT.**

**AN OWNER OF A RESIDENCE IN SUN CITY WHO FAILS TO SUBMIT A COMPLETE, VALID AND TIMELY EXCLUSION REQUEST PURSUANT TO THIS COURT-APPROVED NOTICE WILL BE AUTOMATICALLY INCLUDED IN THE CLASS. IF YOU DO NOT OPT-OUT OF THE CLASS BY TIMELY RETURNING A VALID EXCLUSION REQUEST AS REFERENCED IN PARAGRAPH 4 ABOVE, YOU WILL BE A MEMBER OF THE CLASS AND BOUND BY ALL ORDERS AND JUDGMENTS OF THE COURT.**

**EXCLUSION REQUEST**

This is a request to be excluded from a class action.

**READ THE ATTACHED LEGAL NOTICE CAREFULLY BEFORE  
FILLING OUT THIS FORM**

To: John Chakeris, Esq.  
The Chakeris Law Firm  
P. O. Box 397  
Charleston, SC 29402

Re: Anthony and Barbara Grazia, individually and on behalf of all other similarly  
situated Plaintiffs vs. South Carolina State Plastering, LLC

**THIS FORM IS TO BE FILLED OUT ONLY IF YOU DESIRE TO BE  
EXCLUDED FROM THE CLASS**

**DO NOT fill out this form if you wish to be included in the class. If you wish to be  
excluded, this form must be mailed no later than \_\_\_\_\_, 2013.**

I acknowledge receipt of the Notice of Preliminary Class Certification in this case, describing the proposed settlement and my rights thereunder. **Please exclude me from membership in the class and from this lawsuit.** I understand that by signing below that I may be able to pursue my own claim separately. I also understand that if I wish to pursue a claim, I must do so separately using my own attorney at my own expense. I understand that I will not be bound by any ruling in this lawsuit and that I will not receive any funds that may be generated by this lawsuit.

I certify by signing below that I own the below referenced house in Sun City Hilton Head. **This form must be signed by ALL owners of the house.**

Sun City Hilton Head House Address: \_\_\_\_\_

\_\_\_\_\_  
Owner Signature

\_\_\_\_\_  
Co-Owner Signature

\_\_\_\_\_  
Owner Name (Print)

\_\_\_\_\_  
Co- Owner Name (Print)

EXHIBIT 2

No.	Lot Address	Owner First Name	Owner Last Name	Other Name	Mailing Address
7	Alton Bay	Marvin & Mary	Smitherman	Marvin & Mary Smitherman Revocable Trust	
8	Alton Bay	Joseph Rita	Vignati, Jr.		
9	Alton Bay	Richard Linda & Aimee	Bouch		
11	Alton Bay	Doug and Kay Long	Lancaster	Lancaster/Long Family Trust	
15	Alton Bay	Joseph & Jean	Boniferno		
16	Alton Bay	Frank & Lois	Silva		
17	Alton Bay	John & Mary	Jenkins		
19	Alton Bay	Paul Everett and Jane	Bundelle		
21	Alton Bay	Wilm & Ann	Wadd		
3	Amaryllis Lane	Chik & Debra	Beed		10795 Falling Water Ln Unit B, Woodbury, MN 55129
5	Amaryllis Lane	Roger & Donna	Lucas		
7	Amaryllis Lane	Thomas L. and Margaret H. (John)	Ott		
8	Amaryllis Lane	Richard & Linda	Claus		
9	Amaryllis Lane	Richard & Mary	Whitney		
10	Amaryllis Lane	Kirana & Brenda	Russo		
11	Amaryllis Lane	Daniel & Rebecca	Dietrich		
12	Amaryllis Lane	James I & Lucilla V	Peppers		
13	Amaryllis Lane	Stuart & Margaret	Frasman		
14	Amaryllis Lane	Robert and Jean	Andreassen		
15	Amaryllis Lane	Walter G. and Carol S.	Orashan		
16	Amaryllis Lane	Robert & Carol	Hedrick		
17	Amaryllis Lane	Dorothy	Burch		
18	Amaryllis Lane	Ronald C. and Audrey	Adams		
19	Amaryllis Lane	Willford & Theresa	Wheatley		
2	Andover Place	Jerril A	Husch		
4	Andover Place	Susan E	Volk		
6	Andover Place	Mary Ann L	Flabig		4 Nicole Ct, Patchogue, NY 11772
8	Andover Place	Herman C. and Marilyn	Hauptich		
10	Andover Place	Bonita B.	Greary		
12	Andover Place	Donna	Devine	Donna O'Donnell n/n/a Donna Lee Devine	
14	Andover Place	Joan S	Caribbers		
16	Andover Place	Gerald D & Jane H	Shields		
18	Andover Place	Lawrence & Madeline	Johnson		181 Ridgewood Dr, Inman, SC 29943
20	Andover Place	Philip & Kay	Jones		
22	Andover Place	Edith M	Ceresia		
24	Andover Place	Barry	Punbury		
26	Andover Place	Donald & Shirley	Cannon		10 Whiting Brook Ln, Meriden, CT 06450
28	Andover Place	Katharina	Mohay		
30	Andover Place	Jean	Keyes		
32	Andover Place	Donald P & Maurine A	Mayer		
34	Andover Place	James B	Conroy		
36	Andover Place	John W and Jane A	Collins	Ronald L & Janice L Falar Living Trust	500 Woodhaven Dr Apt 3409, Hilton Head Island, SC 29921
38	Andover Place	Jennifer	Thomas		
40	Andover Place	David & Nancy	Beaver		
42	Andover Place	Elizabeth J	Mathias		1329 Penderson Ct, New Albany OH 43054
44	Andover Place	Frank G & Judith S	Murn		
46	Andover Place	Henry J & Christine M	Pitts		PO Box 22943, Sacramento, CA 95822
48	Andover Place	Salvatore & Sandy	Zalman		
50	Andover Place	Robert W & Violet M	Kaczal		221 Neutral Ln, Hardaway, SC 29905
52	Andover Place	Josephine C	Bishoff		
54	Andover Place	John & Joel	Vanhackel		2239 May Wine Ln, O'Fallon, MO 63368
56	Andover Place	Richard G & Evelyn K	Pinto		
58	Andover Place	Eleanore	Fisall		52375 Falcon Ridge, Chesterland, OH 44024
60	Andover Place	Richard & Susan	Farey		18990 Appalosa Ln, Frenchtown, MT 59834
62	Andover Place	Alan & Anne Nelson	Zapla		
64	Andover Place	Rita	Kanleiter	Richard E Zephi, Trustee	
66	Andover Place	Ronald & Dolores	Chapman		
68	Andover Place	James J	McKellan		
70	Andover Place	William H & Millie C	Baratta	James J Baratta	883 The Hideout, Lake Ariel, PA 16842
72	Andover Place		Spellman		

100	Andover Place	Eward J & Noreen E	Hector		
101	Andover Place	Gregory J	Long		
103	Andover Place	James J & Marie J	Hogan		
104	Andover Place	Nancy L	Hicks		203 Woodbine Ave, Steamshipland, NY 10314
2	Ansley Place	Faye	Sherwood		
28	Ansley Place	Carl	Shirman		
2	Apple Lane	Sandra	Hedger		
4	Apple Lane	Makolm B & Mary Ann	Mansfield Family Trust		
5	Apple Lane	John C & Patricia A	Mansfield		
6	Apple Lane	Richard M & Peggy M	Maynes		
7	Apple Lane	Donald T & Maria M	Kupperman		
8	Apple Lane	Nevra	Bland		
9	Apple Lane	Ralph E & Barbara K	Manning		
10	Apple Lane	Anthony & Joan	Wilson		
11	Apple Lane	Edward J & Patricia A	Zachitella		
12	Apple Lane	Leonard & Patricia	O'Reilly		
1	Arabella Lane	Catherine	Beers		
2	Arabella Lane	Robert & Beverly	Kross		
3	Arabella Lane	Gerald F & Elin L	Johnson		
4	Arabella Lane	Don & Myra	Blank		
5	Arabella Lane	Peter & Jane B	Rudolph-Mitchell		
6	Arabella Lane	Donald & Barbara	Stotes		
8	Arabella Lane	Beverly Joanne	Conoir		
9	Arabella Lane	Anthony & Sharon	Vance		
10	Arabella Lane	Phillip & Constance	Troia		
11	Arabella Lane	Frederic & Katherine	Guido & Sheahan		9300 Marmo Cir # 101, Naples, FL 34114 76 Dehaven Dr 614, Yonkers, NY 10703
12	Arabella Lane	Harvey & Margaret	Harrison		
13	Arabella Lane	Roger & Corale	Shantz		
15	Arabella Lane	William R & Judith A	Morris		
16	Arabella Lane	Edward H & Julia D	Bruckegg		
17	Arabella Lane	Joseph J & Geraldine M	Bancroft		
18	Arabella Lane	William Lewis	Alton		3031 Bth St, Colchagua Falls, OH 44231
19	Arabella Lane	Joseph & Marjorie A	Amica		
20	Arabella Lane	Suzanne L & James S	Shirahm		
21	Arabella Lane	Dennis & Malena	Lucas		
1	Argent Way	John & Jean	Wright		
594	Argent Way	John & Sandy	Woodlett		
596	Argent Way	James	Straves		
518	Argent Way	Robert J & Marjorie A	Starbell		
600	Argent Way	Robert & Lucille	Panglona		
601	Argent Way	John Hawkins & Irene Schmidt	Richardson		
602	Argent Way	Susan	Simon		
606	Argent Way	Robert & Carol	Egloff		
607	Argent Way	Annur L & Julia	Mick		
1	Aston Court	Donald C Angove & Ruth A Brown	Conroy		
2	Aston Court	Patrick J Crowley & Kim Halvorsen			
3	Aston Court	David R & Susan J			
4	Aston Court	William M & Melissa J			
5	Aston Court	Anthony J & Lucille K			
6	Aston Court	Hedy			
7	Aston Court	Lelaine			
8	Aston Court	Shirley			
9	Aston Court	Donald S & Louetta V Revocable Living Trust			
1	Astral Lane	Ann S			
2	Astral Lane	Betha			
3	Astral Lane	Robert R & Mary Katherine			
4	Astral Lane	Max & Susan			
5	Astral Lane	Stephen & Paulette			
6	Astral Lane	Sharon Anne			
7	Astral Lane	Jean			
8	Astral Lane	Jean Augustinsky Revocable Family Trust			
9	Astral Lane				
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7	Baldwin Lane	Donald W & Anna S	O'Leary		
9	Baldwin Lane	Jesse & Linda	Moran		
11	Baldwin Lane	Wolfgang & Waltraud	Kuetsler		
12	Baldwin Lane	Richard E & Renee	Fordyce		
13	Baldwin Lane	Aileen A	Jaczo		
15	Baldwin Lane	Karen L	Kuebel	Karen L. Kuebel, Truzena	
17	Baldwin Lane	Solitz Family Trust			
18	Baldwin Lane	Steven & Felicia			
1	Basil Court	William F			
9	Basil Court	Rita			
11	Basil Court	James B. Margatet	McMaster		
13	Basil Court	James	Niemeyer		
17	Basil Court	Thomas & Linda	Fillon		
19	Basil Court	Robert & Catherine	Woliver		
21	Basil Court	Jeffrey & Virginia	Moore		
23	Basil Court	Jon & Judith	Westfall		
25	Basil Court	Richard & Juliana M.	Waldin	552 Fifth St, PO Box 371392, Monterey, CA 94037	
3	Basket Walk Drive	William & Noeen	Zalno		
4	Basket Walk Drive	Joe and Marie	Gardner		
5	Basket Walk Drive	Mary Ann	Staropa	8199 S Bedford Rd, Macedonia, OH 44056	
6	Basket Walk Drive	Kathleen & Lynne	Stanic		
7	Basket Walk Drive	William & Lyette M	Miller		
8	Basket Walk Drive	Ronald & Marlene	Lank	39600 Caleno Dr, Elyria, OH 44035	
9	Basket Walk Drive	Robert & Elaine	Donovan		
10	Basket Walk Drive	Boris & Tamara	Semlitsch		
11	Basket Walk Drive	Chester & Catherine D	Goffman		
12	Basket Walk Drive	Anthony & Carol	Zava		
13	Basket Walk Drive	Mary J & Thomas R	Burr		
17	Basket Walk Drive	Fortunato & Lona	Thibault		
20	Basket Walk Drive	William & Judy	Palane		
21	Basket Walk Drive	Wallis Y	Hilbert		
23	Basket Walk Drive	Lawrence & Martha A.	Washington		
24	Basket Walk Drive	Ralph & Sharon	Waldman		
25	Basket Walk Drive	Robert & Nancy	Fennington	20 Canier Bluff, Ohio, SC 29925	
26	Basket Walk Drive	Henry L	Hoffman		
27	Basket Walk Drive	Nancy	Hill		
28	Basket Walk Drive	Bill & Pat	Paulin	Nancy / Paulin, Trustee	
29	Basket Walk Drive	Robert & Antonette	Van Housen		
30	Basket Walk Drive	Peter & Doris	Meister		
32	Basket Walk Drive	Harvey & Diane	Gibertina		
33	Basket Walk Drive	John E & Juliana	Wagner		
34	Basket Walk Drive	Thomas K & Theresa S	Rosen		
35	Basket Walk Drive	Bernard L. and Mary F.	Lalshaw		
36	Basket Walk Drive	Ray & Patricia	Shapiro		
37	Basket Walk Drive	Robert A	Lee		
38	Basket Walk Drive	Albert & Ellen	Keedy	1547 King Albert Dr, Pithsburg, PA 15237 PO Box 2132, Abingtown, PA 18210	
39	Basket Walk Drive	Denise	Kelish		
40	Basket Walk Drive	Patricia Abbuzzo & Fran Weinstein	Jackson	Dennis & Jackson Revocable Living Trust	
41	Basket Walk Drive	Robert & Mary	Wells		
42	Basket Walk Drive	Michael & Linda	Akey	4918 Dongan Hills Ave, Staten Island, NY 10305	
43	Basket Walk Drive	Neuwan	Sullivan		
45	Basket Walk Drive	Paulette	Torsello		
46	Basket Walk Drive	Charles M & Lynelle R	Jones		
47	Basket Walk Drive	James & Margaret	Somerville	60 Heritage Lakes Dr, Bluffton, SC 29910	
49	Basket Walk Drive	Laurie J. & Glenda M.	Reiners	123 Bradland Park Rd, Baden, PA 15001	
51	Basket Walk Drive	Thomas & Donna	Canwell		
52	Basket Walk Drive	Phillip & Thelma	Stam	Stain Family Trust	
53	Basket Walk Drive	Mark E & Brenda J	Ketzer		
55	Basket Walk Drive	Patrick & Germaine	Rocco		
57	Basket Walk Drive	Suzan Leigh	Oteefe		
59	Basket Walk Drive	Felin	Poplin, Jr.		

60	Basket Walk Drive	Randall & Pamela	Duncan	3813 E Regents Cir, Bloomington, IN 47401
61	Basket Walk Drive	Timothy R & Anita A	Brady	63 Mulberry Circle, Johnston, RI 02919
62	Basket Walk Drive	Catherine	Pratt	PO Box 21113B Atlanta, GA 31131
63	Basket Walk Drive	David & Elizabeth	Freeman	
64	Basket Walk Drive	Ernest & Ida	Frederick	
65	Basket Walk Drive	Kenneth & Darlene	Creal	
66	Basket Walk Drive	Frances R.	Asinger	
67	Bayberry Drive	Vernon & Maue	Butler	
68	Bayberry Drive	John A	Verstraete	
69	Bayberry Drive	Carol & Robert	Valentine	
70	Bayberry Drive	Joan	Krbulach	
71	Bayberry Drive	Joseph & Mary Lou	Tredley	
72	Bayberry Drive	Diane Z	Lepis	
73	Bayberry Drive	John & Kathleen	Sweeney	49 Peninsula Dr, Hilton Head Island, SC 29921
74	Bayberry Drive	Carol Ann	Ward	
75	Bayberry Drive	Dennis & Janet	Clark	
76	Bayberry Drive	Harold D. & Karen A.	Granny	
77	Bayberry Drive	Sue	Tranwood	
78	Beaufort River Road	Veronica	Pine	
79	Beaufort River Road	Joan R.	Becker	Veronica Pine Revocable Living Trust
80	Beaufort River Road	William & Barbara	McAuliffe	
81	Beaufort River Road	Charlene	Maguire	
82	Beaufort River Road	Albert A. & Joan H.	Gatto	
83	Beaufort River Road	James	Conolly	
84	Beaufort River Road	Carol & Yolande	Ahuz	3787 Oily Ave, Spring Hill, FL 34609
85	Beaufort River Road	Linda H.	Johnson	75 Concession Oak Dr, Bluffton, SC 29906
86	Beaufort River Road	Naimit & Beverly	Thiel	PO Box 2695, Bluffton, SC 29909
87	Beaufort River Road	Conie	Arankwah	
88	Beaufort River Road	Linda & Alfred	Myra	
89	Beaufort River Road	Water and Cheryl	Bleached	
90	Beaufort River Road	Debra	Lanzar	2136 Stanley Rd, Grand Island, NY 14072
91	Beaufort River Road	Ellen I	Mearns	
92	Beaufort River Road	Paul & Joyce	Beck	
93	Beaufort River Road	Rose Marie	Adams	
94	Beaufort River Road	Charles & Gypsie	Barabate	
95	Beaufort River Road	Norman & Constance	Serpa	
96	Beaufort River Road	Virginia	Coates	
97	Beaufort River Road	George & Patty	Canino	
98	Beaufort River Road	Ronald W	Conner	52 Holland St, Moultonborough, NH 03254
99	Beaufort River Road	Richard & Theresa	Neureuther	
100	Becket Place	Fred & Joyce	Pitman	
101	Becket Place	James E & Ann E	Gwene	
102	Becket Place	Lawrence E & Fosius	McCaba	
103	Becket Place	Cecil Shetter Trust	Bridges	
104	Becket Place	Ralph A & Susanmah	Utzinger	
105	Becket Place	Richard E & Phyllis I	Bloch	
106	Becket Place	Palmer & Patricia	Levy	
107	Becket Place	Robert G & Barbara K	Sherman	
108	Belvidere Court	Shirley J	Jensen	Shirley J. Jensen, Trustee
109	Belvidere Court	Ariens E	Hobart	
110	Belvidere Lane	Arthur & Myra	Kruik	
111	Belvidere Lane	Joseph & Theresa	Scott	
112	Belvidere Lane	Hessok	Mertel	
113	Belvidere Lane	Alex & Kelly	Tan	Hisook Martel Trust Agreement
114	Belvidere Lane	James & Elaine	Dennis	
115	Belvidere Lane	William & Diane	McKinney	William N McKinney, Jr. & Diane McKinney
116	Belvidere Lane	Donald W & Sally A	Cramble	Revocable Living Trust
117	Belvidere Lane	Francis & Hannah F	Hovle	
118	Belvidere Lane	Ronald & Dorothy	Petersen	

11	Belvedere Lane	James & Bonnie	Dove		
15	Belvedere Lane	Mary Ann	Sullivan		
16	Belvedere Lane	Sherry & Robert	Becker	Mary Ann Sullivan Trust Agreement	
17	Belvedere Lane	Uma D	Wilson		
18	Belvedere Lane	Henry & Gill	Neubert		
19	Belvedere Lane	Zemkowski Family Revocable Living Trust			
20	Belvedere Lane	Gail D	Henderson	Gail D. Henderson, Trustee	
21	Belvedere Lane	John & Ann	Collins		
22	Belvedere Lane	Arthur & Bjorg	Larsen	Arthur & Bjorg Larsen Revocable Living Trusts	
23	Belvedere Lane	Luks	Wellman		
24	Belvedere Lane	Donald & Mary	Kaynowick		
25	Belvedere Lane	Clifford & Martha	Skinner		
26	Belvedere Lane	Valdis & Valdis	Viparis		
27	Belvedere Lane	Joseph & Louise	Martinek		
28	Belvedere Lane	Gordon E & Sandra	Mesallie		
29	Belvedere Lane	Claudia	Lafala	Claudia Lafala, Trustee	
30	Belvedere Lane	Tony & Karen	Grazia		
31	Belvedere Lane	John T & Barbara A	Becker		3 Jansho Rd South, Sherman, CT 06784
32	Belvedere Lane	Robert & Marilyn	Lange	Robert & Marilyn Lange Revocable Living Trust	
33	Belvedere Lane	Ingild	Lochmann		
34	Belvedere Lane	Elizabeth	Holloran		
35	Belvedere Lane	James	Smereca		
36	Belvedere Lane	Robert & Sandra	Smoll		
37	Belvedere Lane	Noah & Mary Helen	Rosenstein		
38	Belvedere Lane	Andrew & Joan	Mulrain		61 Senat Rd, Clifton Park, NY 12065
39	Belvedere Lane	Elizabeth A	Roberts		
40	Belvedere Lane	Anthony & Jane	Averano		
41	Belvedere Lane	Joan	Hillman		
42	Belvedere Lane	Howard & Mary	La Blinc	Howard J & Mary O Lablanc Revocable Living Trust	
43	Belvedere Lane	Larry & Lori	Lennard		
44	Belvedere Lane	Henry & Nancy	Shinsky		
45	Belvedere Lane	Gary & Brenda	DeFost		
46	Belvedere Lane	Joseph & Mary	Doyle		
47	Belvedere Lane	James M & Ann M	Whalen		
48	Belvedere Lane	Timothy & Carol	Gwynette		
49	Belvedere Lane	Michael & Helen	Berrel		
50	Belvedere Lane	John & Carol	Mierz		
51	Belvedere Lane	John & Linda M	Hinson		
52	Belvedere Lane	Frank & Patricia	Bain		2835 NW 70th Ave, Miramar, FL 33063
53	Belvedere Lane	Ronald & Dolores A	Martin		10 Sunflower, Bluffton, SC 29909
54	Belvedere Lane	John E & Margaret M	Bedore		134 Ivy Hill Rd, Red Bank, NJ 07701
55	Belvedere Lane	Shannon & Valerie	Lupchak		12 Elmwood Dr, Teaneck, NJ 07608
56	Belvedere Lane	Michael P & Joanne M	Molloy		184 N. Meridian Rd, Mt. Pleasant, MI 48858
57	Belvedere Lane	Robert D & Shirley J	Chmura		
58	Belvedere Lane	Rosemary J	Copas		
59	Belvedere Lane	Anthony J & Joan P	Jorgensen		513 Woodshire Dr, Kingsport, TN 37663
60	Belvedere Lane	Raymond & Geraldine	Weber		
61	Belvedere Lane	Jarome & Sarah	Landy		
62	Belvedere Lane	Pamela	Walker		
63	Belvedere Lane	George Blank & John Westover	Schaler		
64	Belvedere Lane	Kindy Revocable Living Trust			
65	Belvedere Lane	Peter & Linda	Nagy		111 Honey Hill Dr, Bluffton, SC 29905
66	Belvedere Lane	Janel S	Hine		19317 N. Vista Montana Court, Surprise, AZ 85387
67	Belvedere Lane	Earl & Erlene	McBowell		
68	Belvedere Lane	Dennis & Denise	Gudera		7009 W 83 St, Minneapolis, MN 55436
69	Belvedere Lane	Ira & Carol A	Bell		40 Balswood Court, Red Bank, NJ 07701
70	Belvedere Lane	Jeanette E	Kesseling		15 Florence St, Kingston, NY 12402

71	Bilmore Drive	Rita	Iaker	Philip McCarthy, Trustee	
72	Bilmore Drive	Phillip	McCarthy		
73	Bilmore Drive	William	Heins		
74	Bilmore Drive	Mary	Carroll		
75	Bilmore Drive	Patrick	Breman		
76	Bilmore Drive	Jackson Family Revocable Trust			
77	Bilmore Drive	Shirley & Dorothy	Sousa	Sousa Revocable Living Trust	
78	Bilmore Drive	Leonard & Jean	Sousa		
79	Bilmore Drive	John & Anna B.	Higgins		
80	Bilmore Drive	Walt & Helen	Susan	Sagan Family Trust	99 Clare Pass, Saratoga Springs, NY 12866
81	Bilmore Drive	R. Toni Larosa Gerken Revocable Living Trust	Klotz		
82	Bilmore Drive	George & Kathleen	Sanders		18 Canaville Ln, Olatia, SC 29599
83	Bilmore Drive	Frederick & Mary	Yarnas		2108 Catherine St, Huntington, PA 16657
84	Bilmore Drive	Lucas & Maria Helena	Burnard		
85	Bilmore Drive	Randall Lee	Cook		
86	Bilmore Drive	Virginia	Yarnet		
87	Bilmore Drive	John T. & Cindy A. Menegay	Shirock		
88	Bilmore Drive	John T. & Cindy A. Menegay	Selfert		
89	Bilmore Drive	Fred & Nancy	LeRose	Fred C. & Nancy T. Shirock, Trustee	24166 Vastano, Murietta, CA 92557
90	Bilmore Drive	Jay & Mary	Taylor		
91	Bilmore Drive	Elizabeth	Shirock		
92	Bilmore Drive	Charles	Selfert		
93	Bilmore Drive	Robert & Martha	Grealy	Charles F. Keller Trust	
94	Bilmore Drive	Lincoln & Mary Lee	Turney		
95	Bilmore Drive	William B. Martha	Isabel		
96	Bilmore Drive	James G	Barnes		
97	Bilmore Drive	Richard Rossigo & Ganage York			
98	Bilmore Drive	Gerard	Garman		
99	Bilmore Drive	Tallmir & Gloria	Cucic	Gerald R. Corman Living Trust	130 Ambleside Way, Ahmstet, OH 44001
100	Bilmore Drive	Cynthia & Lauren	Helmey		
101	Bilmore Drive	Judy T	Carson		
102	Bilmore Drive	Edwin C. & Judy K	Coldwell		
103	Bilmore Drive	John H. & Rita C	Fryer		
104	Bilmore Drive	Samuel & Viola L	Rosenberg		PO Box 3486, Bluffton, SC 29910
105	Bilmore Drive	Carole A. Hicks	Berry		
106	Bilmore Drive	Edward & Sue	Donnelly		
107	Bilmore Drive	Brian & Anne	Williams		
108	Bilmore Drive	Peter & Emilia	Rogers		
109	Bilmore Drive	Martha M	Espalio		11 Park Lane, Massachusetts, NY 11758
110	Bilmore Drive	Maria F	Laflert		
111	Bilmore Drive	Antonia & Mary Grace	Toker		
112	Bilmore Drive	Milton & Elken	Madrava		
113	Bilmore Drive	Roger P. & Lydia D	Baker		
114	Bilmore Drive	Paul R. Metz Revocable Trust	Louis		323 Ent Dr, Schuett, NY 11733
115	Bilmore Drive	Margaret M	Bergman		
116	Bilmore Drive	Shoreline Funding, LLC			
117	Bilmore Drive	Robert L	Bonner		PO Box 5733, Hilton Head Island, SC 29934
118	Bilmore Drive	Frank D. & Cynthia Y	Nappi		
119	Bilmore Drive	Gerald & Joanne	Schaffer		
120	Bilmore Drive	Susan E	Kerr	Susan E. Kerr, Trustee	
121	Bilmore Drive	Suzanna Trust of the Butler			
122	Bilmore Drive	Richard & Carol	Barlon		
123	Bilmore Drive	Shirley M	Guz		
124	Bilmore Drive	James & Charlotte	Fischer		
125	Bilmore Drive	Unda	Strom	Linda A. Strom Revocable Living Trust	
126	Bilmore Drive	Rosemary	Fitzpatrick	Dorothy R. Fitzpatrick Revocable Living Trust	366 W20721 Tans, Muskego, WI 53150
127	Bilmore Drive	Dorothy			
128	Bilmore Drive	Jane M. Fogg & Maureen O'Rourke			
129	Bilmore Drive	Christie			
130	Bilmore Drive	Adrian E. & Carol L	Walle		
131	Bilmore Drive		Gaulet		

76	Bishop Street	Nicholas T & Juana Ang	Watson			
77	Bishop Street	Lewis & Barbara	Freedman	Lewis & Barbara Freedman, Trustees		
78	Bishop Street	Savannah	Bank			857 WM Hilton Pkwy, Hilton Head Island, SC 29928
1	Bouquet Lane	Boyer & Susan	Bank			
2	Bouquet Lane	William & Jacquelin	Bank			
3	Bouquet Lane	Robert & Eileen	Bank			
4	Bouquet Lane	Joan M	Bank			
5	Bouquet Lane	Paul & Cindy A	Bank			
6	Bouquet Lane	Daniel & Mary	Bank			
7	Bouquet Lane	Samuel J & Norma M	Bank			
8	Bouquet Lane	Franklin & Bronhike	Bank			
9	Bouquet Lane	David & Patricia	Bank			
10	Bouquet Lane	Robert & Barbara	Bank			
11	Bouquet Lane	Joanna M	Bank			
12	Bouquet Lane	Richard & Sylvia	Bank			
13	Bouquet Lane	Sara N	Bank			
14	Bouquet Lane	Richard & Louise	Bank			
15	Bouquet Lane	Paul & Theresa	Bank			
16	Bouquet Lane	Richard & Louise	Bank			
17	Bouquet Lane	David & Joanne	Bank			
18	Bouquet Lane	Artlene J	Bank			
19	Bouquet Lane	Robert & Anne	Bank			
20	Bouquet Lane	Catherine R	Bank			
21	Bouquet Lane	Stanley & Gladys	Bank			
22	Bouquet Lane	Larry & Ovis	Bank			
23	Bouquet Lane	Timothy & Colleen	Bank			
24	Bouquet Lane	Sherry	Bank			
25	Bouquet Lane	Johnnie & Pauline	Bank			
26	Bouquet Lane	John & Lillian	Bank			
27	Bouquet Lane	Joseph	Bank			
28	Bouquet Lane	Henry	Bank			
29	Bouquet Lane	Larry & Meredith	Bank			
30	Bouquet Lane	Dorale & Roberts	Bank			
31	Bouquet Lane	Diane	Bank			
32	Bouquet Lane	Donald & Patricia	Bank			
33	Bouquet Lane	Rose Marie	Bank			
34	Bouquet Lane	Martin & Judith	Bank			
35	Bouquet Lane	Gerald & Kathleen	Bank			
36	Bouquet Lane	Carolyn Ann	Bank			
37	Bouquet Lane	John & Mary Jane	Bank			
38	Bouquet Lane	John F. & Barbara	Bank			
39	Bouquet Lane	Christopher & Karen	Bank			
40	Bouquet Lane	Wayne & Philip	Bank			
41	Bouquet Lane	Richard B & Marjorie A	Bank			
42	Bouquet Lane	Francis & Ette	Bank			
43	Bouquet Lane	Orville M & Claire B	Bank			
44	Bouquet Lane	Constance	Bank			
45	Bouquet Lane	Harvey & Janet	Bank			
46	Bouquet Lane	Gerald M & Eileen	Bank			
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49	Bouquet Lane	Barbara	Bank			
50	Bouquet Lane	Albert & Linda	Bank			
51	Bouquet Lane	Inf	Bank			
52	Bouquet Lane	Sandra	Bank			
53	Bouquet Lane	Doreen	Bank			
54	Bouquet Lane	Kevin	Bank			
55	Bouquet Lane	Callisto Road	Bank			
56	Bouquet Lane	Thomas P	Bank			
57	Bouquet Lane	Gerald & Donna	Bank			
58	Bouquet Lane	Ann	Bank			
59	Bouquet Lane	Cynthia	Bank			
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27	Callisto Road	Cyrus Kilgore & Catherine Ekins					
28	Callisto Road	Barbara	Crescenzo				29 Federal St, Beverly, MA 01915
29	Callisto Road	John L & Jane F	Olasky				
30	Callisto Road	Judith L	Davis				
31	Callisto Road	William	Coyell				PO Box 677, Richland Center, WI 53581
32	Callisto Road	John P & Eileen F	Grimaldi				92 Tranhaven Rd, West Sauceta, NY 14224
33	Callisto Road	Suzanne & Patricia	Savone				
34	Callisto Road	David	Franz				23 Stonehedge Way, Bluffton, SC 29910
35	Callisto Road	Charisa & Dorothy	Carroll				
36	Callisto Road	Jerry G & Carol A	Frick				
37	Callisto Road	Linda	Burton				
38	Callisto Road	James & Barbara	Bacon				
39	Callisto Road	Walter & Barbara	Therowski				
40	Callisto Road	Robert & Oriahia	Dix				8576 Barbara Dr, Mentor, OH 44060
41	Callisto Road	Sandra	Goodman				
42	Callisto Road	David & Ruth	Lichina				
43	Callisto Road	Lois & Karen	Benedict				
44	Callisto Road	Maia Marie	Hudarek				
45	Callisto Road	Robert & Patricia	Wilford				
46	Callisto Road	John & Deborah	Stankewicz				
47	Callisto Road	Francis J	Ryan				
48	Callisto Road	Ralph S & Elva J	Phive				
49	Callisto Road	William F & Lucina	Gifford				
50	Callisto Road	Daniel C & Patricia C	Ugerman				
51	Callisto Road	Ronald M. Jude	Cheeman				
52	Callisto Road	Deva & Susan	McCloskey				
53	Callisto Road	Catherine F	Borcherting				
54	Callisto Road	Walt Aomi & Ellen Betz	Fealey				
55	Callisto Road	Edwin & Mary	Kaufman				
56	Callisto Road	Richard & Theodora	Mudgett				
57	Callisto Road	John & Winifred	Miller				
58	Callisto Road	Ronald & Patricia					
59	Callisto Road	Philip Tannenholz & Janet Dow					
60	Callisto Road	Robert V & Suzanne L					
61	Callisto Road	Jon & Cheryl					
62	Callisto Road	Walt					
63	Callisto Road	William & Constance					
64	Callisto Road	John & John					
65	Callisto Road	Shirley					
66	Callisto Road	Use D					
67	Callisto Road	Michael & Helene A					
68	Callisto Road	Lizabeth M					
69	Callisto Road	Walter & Rosemary					
70	Callisto Road	Zona					
71	Callisto Road	Stewart & Usha					
72	Callisto Road	Sandra					
73	Callisto Road	Harriet M					
74	Callisto Road	James & Cheryl					
75	Callisto Road	Barbara					
76	Callisto Road	John & Jacquelyn					
77	Callisto Road	Beremiah F & Regina M					
78	Callisto Road	Walter & Adèle					
79	Callisto Road	Christopher & Elizabeth J.					
80	Callisto Road	John & Denise					
81	Callisto Road	Gregory & Linda S					
82	Callisto Road	Sylvester & Marilyn					
83	Callisto Road	Norman					
84	Callisto Road	Carol					
85	Callisto Road	Robert & Mary Ann					
86	Callisto Road	Kenneth & Paty					
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2	Cattails Lane	Thomas & Elaine	Cooper			
4	Catalpa Lane	Dennis & Patricia	Prosser			
6	Ceres Court	Betsy Jean	Brown			55 Sunbeam Dr, Bluffton, SC 29909
7	Ceres Court	Irving M & Dorella C	McNair			16 Sandhich Dr, Mountstown, NJ 07960
8	Ceres Court	Nicholas & Theresa	Wells			
9	Ceres Court	Theophil	Grossarth			
10	Ceres Court	Peter M & Daria	Buzsaki			
11	Ceres Court	Peter & Lorrette	Haste			
12	Ceres Court	Willard H & Bernice	McGinnis			
13	Ceres Court	Francis	Dei			
14	Ceres Court	Bart & Erin	Dispasale			
15	Ceres Court	Robert W & Deanne Ann	Mooney			
16	Ceres Court	Neal & Lynn	Shiver			
17	Ceres Court	William H	Albert			
18	Ceres Court	Robert & Shirley	Krone			550 Gresham Rd, Kaysville, GA 30816
19	Ceres Court	Lawrence J & Joan E	Schieritz			
20	Ceres Court	Rudolf W & Judy	McClain			3403 Tudor Drive, Pompton Plains, NJ 07444
21	Ceres Court	Terrence E & Deborah C	Fitzroy			
22	Cherry Lane	Ann & William	Parry-Solomon			35 Southern Red Rd, Bluffton, SC 29906
23	Cherry Lane	Helen	Klusk			
24	Cherry Lane	Kathryn	Farrall			
25	Cherry Lane	Alan M	Kusman			24 East Cobble Hill Rd, Londondrills, NY 12211
26	Cherry Lane	George S & Sherry L	Mayo			
27	Cherry Lane	Mario & Angela	Prosca			
28	Cherry Lane	Eleanor	Lesser			
29	Cherry Lane	Robert J & Jean A	Dudich			
30	Cherry Lane	Seig & Judith	Galter			
31	Cherry Lane	Bernard & Mary Ann	Schroder			
32	Cherry Lane	William & Elaine	Maury			
33	Cherry Lane	Richard & Yvonne	Deus			
34	Cherry Lane	William & Frances	Truel			
35	Cherry Lane	Charles W	Unglesby			2028 Leighton Plwy, Niskayuna, NY 12305
36	Cherry Lane	John & Theresa	Logan			
37	Cherry Lane	Robert & Nancy	Panico			
38	Cherry Lane	Ray & Ruth	Tucker			
39	Cherry Lane	The Christ Living Trust				
40	Cherry Lane	Martin J	Mak			
41	Cherry Lane	William & Evelyn	Musay			
42	Cherry Lane	Joseph & Barbara	Pratt			
43	Cherry Lane	Dale & Patricia	Dicoct			
44	Cherry Lane	Thomas & Helen	Sullivan			
45	Cherry Lane	Margaret	Mala			
46	Cherry Lane	Daryl & Cynthia	Hartley-Leonard			
47	Cherry Lane	Judith L	Orsky			12 Westford Dr, Hilton Head Island, SC 29922
48	Cherry Lane	William & Mary	Homboral			
49	Cherry Lane	Robert & Arnel	Crall			
50	Cherry Lane	Frank W	Wickery			
51	Cherry Lane	Patrick Patten & Margaret Cook	Miller			
52	Cherry Lane	Lorraine	Russell & Jerilyn			
53	Cherry Lane	Herman & Francesca	Bermysh			
54	Cherry Lane	Michael F	Wiese			
55	Cherry Lane	Michael F	Stalove			
56	Cherry Lane	Lewis C & Lois H	Deely			
57	Cherry Lane	James & Jane	Jehsan			
58	Cherry Lane	John M & Martha J	Seymore			
59	Cherry Lane	William & Carol A	O'Brien			
60	Cherry Lane	Edwin	Shang Kinassy			
61	Cherry Lane	Margaret & David	Winfelinski			
62	Cherry Lane		Feldkamp			
63	Cherry Lane					286 Hawking Dr, Galena, OH 43021

4	Clover Drive	George & Susan	Kreck	
5	Clover Drive	Richard W & Anita K	Matheny	
6	Clover Drive	Margaret	DiMarco	Margaret Christeen DiMarco, Trustee
7	Clover Drive	Ginasta Family Revocable Living Trust		
8	Clover Drive	Michael & Renita		
9	Clover Drive	Jean	Lafarere	
10	Clover Drive	Jack & Krysta	Hillman	
11	Clover Drive	Donald & Elizabeth	Scotts	
12	Clover Drive	Richard & Joan	Wilman	
13	Clover Drive	Margaret	Herberger	
14	Clover Drive	William & Joan	Mess	
15	Clover Drive	Marc	Connelly	
16	Clover Drive	Marion	Weston	14362 Fredricksburg Dr 8602, Orlando, FL 32817
17	Clover Drive	Marjaret	Scheer	
18	Clover Drive	Robert & Melody	Cleary	
19	Clover Drive	Ronald & Evelyn	Keane	
20	Clover Drive	James & Arlene	Dierz	
21	Clover Drive	Leonard & Rita	Mullin	
22	Clover Drive	Susan L	Cornai	121 Walker Lane, Gibsonsia, PA 15104
23	Clover Drive	Suzanne F	Mann	
24	Clover Drive	Paul F	Senke	
25	Clover Drive	George & Cheryl	Cosch	
26	Clover Drive	John	Rinck	
27	Clover Drive	Kenneth & Andrea	Cunningham	
28	Clover Drive	Steven & Sharon	Ruth	
29	Clover Drive	Clark & Paula	Deaton	
30	Clover Drive	Dennis & Gloria	Beach	205 Beth Ct, Atlanta, GA 30350
31	Clover Drive	James & Margaret	Winkler	
32	Clover Drive	Paul L & June	Quill	
33	Clover Drive	Sabr	Marischen	
34	Col. Thomas Heyward Road	John	Serrago	
35	Col. Thomas Heyward Road	John & Judith	Donnelly	
36	Col. Thomas Heyward Road	Joseph	Barry	John & Judith Barry, Trustee
37	Col. Thomas Heyward Road	Mirzita	Phillips	
38	Col. Thomas Heyward Road	Lewis	Morson	
39	Col. Thomas Heyward Road	Patricia D	Cosbin	
40	Col. Thomas Heyward Road	Bruce G	Zomba	Patricia D Zomba Revocable Living Trust
41	Col. Thomas Heyward Road	Donald & Linda	Marshall	
42	Col. Thomas Heyward Road	Raymond & Diane	Buck	
43	Col. Thomas Heyward Road	Richard & Nancy	Stone	
44	Col. Thomas Heyward Road	David & Janice	Roff	
45	Col. Thomas Heyward Road	Lawrence	Ferguson	
46	Col. Thomas Heyward Road	John	Ritchford	Lawrence Ritchford, II, Trustee
47	Col. Thomas Heyward Road	John & Shelby	Prindley	
48	Col. Thomas Heyward Road	Ellen O'Connell Revocable Living Trust	Ruggers	2009 Palmetto Point, Ponte Vedra Beach, FL 32082
49	Col. Thomas Heyward Road	John & Caroline		
50	Col. Thomas Heyward Road	Sharon & Charles	Renaud	
51	Col. Thomas Heyward Road	Todd & Leif	Zaid	
52	Col. Thomas Heyward Road	William & Vicki	Pitts	
53	Col. Thomas Heyward Road	Richard & Suzanne	Clark	William & Vicki Clark, Trustee
54	Col. Thomas Heyward Road	Robert & Gretik	McIntosh	
55	Col. Thomas Heyward Road	Barry & JoAnn	Chase	Robert & Gretik Chase, Trustee
56	Col. Thomas Heyward Road	Vincent & Eileen	Zweiban	
57	Col. Thomas Heyward Road	Gene	Lobik	
58	Col. Thomas Heyward Road	Hugh & Ellen	Capponi	Gina V Capponi Family Trust
59	Col. Thomas Heyward Road	Walter & Virginia	Loveloy	
60	Col. Thomas Heyward Road	Robert & Bernadette	Stone	2400 Willow Dr, Irwin, PA 15142
61	Col. Thomas Heyward Road	David & Diane	Patrick	
62	Col. Thomas Heyward Road	Lawell & Gloria	Hurt	
63	Col. Thomas Heyward Road	Suzanne	Rennie	
64	Col. Thomas Heyward Road	Shirley	Young	
65	Col. Thomas Heyward Road		Scott	

EXHIBIT 3

Name of Claimant (pre-printed)  
Address of property (pre-printed)

**SOUTH CAROLINA NOTICE AND OPPORTUNITY TO CURE DWELLING DEFECTS ACT**

INDIVIDUAL NOTICE OF STUCCO CLAIM TO SOUTH CAROLINA STATE PLASTERING, LLC

1. Do you have stucco on the exterior of your home?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know
2. Does the stucco on your home lack head flashing above any windows or doors?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know
3. Does the stucco on your home lack control joints?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know
4. Does the stucco on your home lack control joints specifically at corners of windows and doors?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know
5. Does the stucco on your home have a gap between the bottom of the exterior stucco and the structure slab?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know
6. Are there visible cracks in the exterior stucco on your home?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know
7. Are there cracks in your exterior stucco greater than 1/16 of an inch wide (you can fit a quarter sideways into the crack)?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know
8. Are there places on your home where the exterior stucco is falling off?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know
9. Is there any noticeable damage to the exterior stucco on your home?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know  
If yes, please describe:

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10. Is there any damage to the interior of your home resulting from defective exterior stucco installation or design?

\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know  
If yes, please describe:

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11. What year was your home built? Year: \_\_\_\_\_ or \_\_\_\_\_ I don't know

12. Have any repairs been made to the exterior stucco of your home since the time that it was built?  
\_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know.

If yes, when were the repairs made, by whom were they made, and what was the nature of the repair:

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13. Please describe any stucco-related problems you are currently experiencing with your home, if any:

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14. Do you have any comments, photographs, inspection reports or other information that you would like for South Carolina State Plastering to consider in evaluating your claim? If so, please attach.

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I certify that the above answers are true to the best of my knowledge.

\_\_\_\_\_  
Homeowner's signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Phone number and email address

\_\_\_\_\_  
Date

Return this form to Plaintiffs' counsel Michael S. Seekings (843-730-5369) in the envelope provided no later than \_\_\_\_\_.

Specific Addressee:

\_\_\_\_\_

\_\_\_\_\_

Dear \_\_\_\_\_,

The enclosed questionnaire is being sent to you because the Court has determined that you are a member of the class of Plaintiffs in a case entitled *Grazia v. South Carolina State Plastering, LLC* (07-CP-07-1396). The case involves claims against South Carolina State Plastering regarding alleged defective stucco construction on residences within Sun City, Hilton Head.

The purpose of this questionnaire is to comply with a statute called "The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, (S.C. Code Ann. §40-59-810 et. seq.). The purpose of the law is to give the contractor the opportunity to resolve an alleged construction defect problem with the owner. This law requires an individual who alleges a construction defect in his/her home to specifically notify the contractor of that defect, and the law gives the contractor a period of time to inspect the alleged defect and make an offer of settlement to remedy the problem. If your individual stucco claim resolves through this process, then the matter will be ended with respect to your individual property, and you will not need to participate further in the class action. Please complete the attached questionnaire and return it in the enclosed envelope no later than \_\_\_\_\_. It is important that you return the questionnaire by the deadline date; otherwise, your claim may be dismissed for failure to comply with the Opportunity to Cure law.

Any questions concerning this letter or enclosed questionnaire should be directed to:

Michael S. Seekings, Attorney  
Post Office Box 59  
Charleston, SC 29402  
(843) 730-5369

Thank you for your cooperation in this matter.

Sincerely yours,

Designated Plaintiff's Counsel

STATE OF SOUTH CAROLINA )

THE COURT OF COMMON PLEAS )

COUNTY OF BEAUFORT )

FOR THE FOURTEENTH CIRCUIT )

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

Civil Action No.: 2007-CP-07-1396 )

Plaintiffs, )

v. )

ORDER GRANTING SOUTH )  
CAROLINA STATE PLASTERING, )  
LLC'S MOTION FOR DESTRUCTIVE )  
TESTING )

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. )

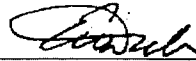
FILED FEB 12 PM 4:14

This matter is before the Court upon the Motion of the Defendant, South Carolina State Plastering, herein after "SCSP", for an order seeking to conduct destructive testing at certain houses located in Sun City in Hilton Head. This hearing was held on November 2, 2015 wherein the Court discussed the matters with the parties. Subsequently the Court has received additional briefings from the parties on this issue. Having taken all matters in to consideration, the Court hereby grants SCSP's motion. Therefore, SCSP is permitted to conduct destructive testing on 91 houses located in Sun City Hilton Head pursuant to the protocol developed by its expert, Rimkus Consulting, a copy of which was attached to the motion. SCSP may conduct destructive testing on the <sup>47</sup> ~~91~~ homes listed on Exhibit A, attached to this Order. In the event any

*Grazia, et al v SCSP, et al*  
*Case No. 2007-CP-07-1396*  
*Order Granting South Carolina State Plastering, LLC's Motion For Destructive Testing*

one of these homes is not available for destructive testing within the testing period, Plaintiffs' counsel shall notify SCSP and SCSP may substitute another randomly selected house from the class list. Plaintiffs' counsel shall make a good faith effort to work with SCSP's experts to coordinate the schedule. Testing may begin on or after ~~January~~ <sup>February</sup> 4, 2016.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
The Honorable Edgar W. Dickson

Beaufort, South Carolina  
January 29, 2016

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS  
) THE FOURTEENTH JUDICIAL CIRCUIT  
) CASE NO.: 2007-CP-07-1396

) 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.

**SCHEDULING ORDER**

2016 MAY 26 AM 11:23  
JEREMY AMMONS  
CLERK OF COURT

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.

13

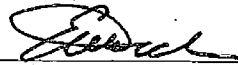
1. All responses to Right to Cure Questionnaires must be delivered to counsel for SCSP on or before May 31, 2016. After that deadline, the parties may make motions as to the treatment of non-responsive class members.
2. Additionally the parties agree that there are people on the preliminary class list 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*



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Edgar W. Dickson  
Chief Administrative Judge

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. )

2016 SEP -9 AM 10:44  
JERRI ANN ROSENEAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

**ORDER**  
**(NO MOTIONS PENDING)**

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

1/4

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"<sup>1</sup>. 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)

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

2/4

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


3/4/11

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

Changeling, South Carolina  
Dated: Sept. 7, 2016

4/4

**Brittany Johnson**

---

**From:** Mike Seekings  
**Sent:** Friday, September 02, 2016 2:56 PM  
**To:** eak@swblaw.com; Vic Rawl; dcobb; methridge@carlockcopeland.com  
**Cc:** Jefferson Leath; john@chakerislawfirm.com; psegui@seguilawfirm.com; Brittany Johnson; Christi Daniels  
**Subject:** ORDER  
**Attachments:** ORDER - 9.2.2016.pdf

Counsel

In accordance with Judge Dickson's directive, sent via e-mail on August 26th, attached please find an Order terminating discussion of the issue of class certification. Under separate cover this Order is being mailed to the Court for signature with a self addressed stamped envelope for its prompt return to this office. Upon receipt of a signed copy I will have it filed in Beaufort County.

Mike

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)**

2017 JAN -6 PM 12:32  
JERRI ANN ROSENBAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

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), SCRCF, 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



**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

2017 JAN -6 PM 12:32  
JERRI ANN ROSENEAU  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

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)

**Marshall C. Crane**

---

**From:** Dickson, Edgar W. Law Clerk (John Dodds) <edicksonlc@sccourts.org>  
**Sent:** Tuesday, March 21, 2017 10:59 AM  
**To:** Rawl, Vic  
**Cc:** Mike Seekings; Jefferson Leath; john@chakerislawfirm.com; psegui@seguilawfirm.com; Rett Kendall; dcobb; Ellie Martin; Christi Daniels; Alicia Petit; Stephen M. Bowden (stephen@chakerislawfirm.com); Brittany Johnson; Frampton, Hal; Mike Ethridge; Widener, Robert; Miller, Dana  
**Subject:** RE: Grazia, et al. v. SCSP, et al.

Mr. Rawl,

Thank you for voicing your concerns. The Lancaster case you cited reads as follows: "Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court." Judge Dickson is of the opinion that a status conference, wherein the parties will simply discuss matters pertinent to this case and in which Judge Dickson will not make any binding rulings, is not a matter "affected by the appeal." A status conference in this context would simply be a device used to keep everyone on the same page and to avoid further delay. However, Judge Dickson will defer to the good judgment of the attorneys in this case.

Since we will not have a status conference, here is what you can expect from Judge Dickson: on the day the remittitur is received, if at all, from the Court of Appeals, Judge Dickson will issue an order setting the trial date for thirty (30) days after the date of the remittitur; in addition, you should expect Judge Dickson to require you all to submit your pretrial briefs, voir dire, and proposed jury instructions to the court five (5) days after the date the court receives the remittitur, if at all, from the Court of Appeals. Thank you, and please let me know if you have any questions or concerns.

Best,  
John Dodds

-----Original Message-----

**From:** Rawl, Vic [mailto:VRawlJr@mcnair.net]  
**Sent:** Monday, March 20, 2017 6:17 PM  
**To:** Dickson, Edgar W. Law Clerk (John Dodds) <edicksonlc@sccourts.org>  
**Cc:** Mike Seekings <mseekings@leathbouchlaw.com>; Jefferson Leath <jl@leathbouchlaw.com>; john@chakerislawfirm.com; psegui@seguilawfirm.com; eak@swblaw.com; dcobb <dcobb@turnerpadget.com>; Ellie Martin <emartin@seguilawfirm.com>; Christi Daniels <christi@chakerislawfirm.com>; Alicia Petit <alicia@chakerislawfirm.com>; Stephen M. Bowden (stephen@chakerislawfirm.com) <stephen@chakerislawfirm.com>; Brittany Johnson <bjohnson@leathbouchlaw.com>; Frampton, Hal <HFrampton@mcnair.net>; Mike Ethridge <meethridge@ethridgelawgroup.com>; Widener, Robert <RWidener@MCNAIR.NET>; Miller, Dana <DLMiller@mcnair.net>  
**Subject:** RE: Grazia, et al. v. SCSP, et al.

Dear Judge Dickson and John,

Respectfully, we believe that it would be improper for the Circuit Court to have a status conference or take any other action at this time.

As expressly set forth in the Court of Appeals' order (attached), the Court of Appeals has not yet returned the remittitur to the Circuit Court. The Court of Appeals states that it will return the remittitur in accordance with Rule 221(b), SCACR, which requires the Court of Appeals to hold the remittitur for at least 15 days following its order to give the losing party time to petition for rehearing. Under Rules 221(b) and 242(c), SCACR, if a party petitions for rehearing and the petition is denied, the Court of Appeals must wait a further 30 days to allow time to file a Petition for Certiorari with the Supreme Court before returning the remittitur to the Circuit Court. The South Carolina Supreme Court has recently clarified this issue for the trial bench. The Court specifically ruled that until the remittitur is sent by the Court of Appeals to the Circuit Court, the Court of Appeals retains exclusive jurisdiction of the matter. See *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 137, 742 S.E.2d 867, 868 (2013) ("The appellate court retains jurisdiction until the remittitur is sent to the lower court."). In the attached order, the Court of Appeal specifically states that remittitur has not yet been returned.

Del Webb intends to file a petition for rehearing and, if unsuccessful, a petition for certiorari. Thus, we do not expect the remittitur to be returned for at least 45 days. Moreover, Del Webb's petitions for writs of certiorari and mandamus remain pending in the Supreme Court. Because this Court does not possess the remittitur, we believe it would be improper for the Court to take any action with respect to this matter. We would therefore request that the Court hold off on scheduling any status conferences or other matters until the remittitur is returned and this Court can properly act in this case.

Respectfully submitted,

Vic

A. Victor Rawl Jr.  
Shareholder and Chair of Class Action Practice Group [vrawl@mcnair.net](mailto:vrawl@mcnair.net)

McNair Law Firm, P.A.  
Charleston Office 100 Calhoun Street | Suite 400 | Charleston, SC 29401  
843 723 7831 Main | 843 805 6577 Fax  
Mailing Post Office Box 1431 | Charleston, SC 29402 VCard | Bio URL | Website

-----Original Message-----

From: Dickson, Edgar W. Law Clerk (John Dodds) [<mailto:edicksonlc@sccourts.org>]  
Sent: Monday, March 20, 2017 5:51 PM  
To: Mike Ethridge <[methridge@ethridgelawgroup.com](mailto:methridge@ethridgelawgroup.com)>  
Cc: Mike Seekings <[mseekings@leathbouchlaw.com](mailto:mseekings@leathbouchlaw.com)>; Jefferson Leath <[jl@leathbouchlaw.com](mailto:jl@leathbouchlaw.com)>; john@chakerislawfirm.com; psegui@seguilawfirm.com; Rawl, Vic <[VRawlJr@mcnair.net](mailto:VRawlJr@mcnair.net)>; eak@swblaw.com; dcobb <[dcobb@turnerpadget.com](mailto:dcobb@turnerpadget.com)>; Ellie Martin <[emartin@seguilawfirm.com](mailto:emartin@seguilawfirm.com)>; Christi Daniels <[christi@chakerislawfirm.com](mailto:christi@chakerislawfirm.com)>; Alicia Petit <[alicia@chakerislawfirm.com](mailto:alicia@chakerislawfirm.com)>; Stephen M. Bowden <[stephen@chakerislawfirm.com](mailto:stephen@chakerislawfirm.com)>; Brittany Johnson <[bjohnson@leathbouchlaw.com](mailto:bjohnson@leathbouchlaw.com)>  
Subject: Re: Grazia, et al. v. SCSP, et al.

Judge Dickson can do Wednesday any time after 10am,

> On Mar 20, 2017, at 5:01 PM, Mike Ethridge <[methridge@ethridgelawgroup.com](mailto:methridge@ethridgelawgroup.com)> wrote:

>  
> John,  
> I am available tomorrow morning before 9:30. After that I'm in back to back meetings all day. I am available add day on Wednesday.

>  
> Thanks,  
> Mike

> -----Original Message-----

> From: Dickson, Edgar W. Law Clerk (John Dodds)  
> [mailto:edicksonlc@sccourts.org]  
> Sent: Monday, March 20, 2017 4:55 PM  
> To: Mike Seekings <mseekings@leathbouchlaw.com>  
> Cc: Jefferson Leath <jl@leathbouchlaw.com>; john@chakerislawfirm.com;  
> psegui@seguilawfirm.com; Vic Rawl <VRawlJr@mcnair.net>;  
> eak@swblaw.com; dcobb <dcobb@turnerpadget.com>; Mike Ethridge  
> <methridge@ethridgelawgroup.com>; Ellie Martin  
> <emartin@seguilawfirm.com>; Christi Daniels  
> <christi@chakerislawfirm.com>; Alicia Petit  
> <alicia@chakerislawfirm.com>; Stephen M. Bowden  
> (stephen@chakerislawfirm.com) <stephen@chakerislawfirm.com>; Brittany  
> Johnson <bjohnson@leathbouchlaw.com>  
> Subject: Re: Grazia, et al. v. SCSP, et al.

>  
> I just sent Judge Dickson a text, and he asked if the attorneys would be available tomorrow via telephone. He can do whatever time is best for everyone. Please let me know at your earliest convenience. If tomorrow doesn't work, he is available Wednesday as well.

>  
>> On Mar 20, 2017, at 4:44 PM, Dickson, Edgar W. Law Clerk (John Dodds) <edicksonlc@sccourts.org> wrote:  
>>

>> Mr. Seekings,

>>  
>> I will speak with Judge Dickson first thing tomorrow and let you know. Thank you for the heads up, and please let me know if I can be of any assistance in the meantime.

>>  
>> Best,  
>> John

>>  
>>> On Mar 20, 2017, at 3:39 PM, Mike Seekings <mseekings@leathbouchlaw.com> wrote:  
>>>

>>> John,

>>> As you know, the Court of Appeals has dismissed all filings of the Defendants and has returned the case to the Circuit Court for trial. I am writing today to inquire about Judge Dickson's availability to meet with counsel and hold a status conference given that trial is now just a few weeks away. I thought it might be helpful for us to get together to discuss pretrial matters and the process of jury selection. While I believe you have been provided with all of the filings and the Order of the Court of Appeals, please let me know if you or Judge Dickson need anything further from us.

>>>  
>>> By copy of this email, I am advising all counsel of my communication with the Court. Thank you in advance for your assistance.

>>>  
>>> Mike

>>>

>>> Michael S. Seekings  
>>> Leath, Bouch & Seekings, LLP  
>>> 92 Broad Street  
>>> Post Office Box 59  
>>> Charleston, South Carolina 29402  
>>> Phone: (843) 937-8811  
>>> Direct Dial: (843) 513-1073  
>>> Fax: (843) 937-0606

>>>

> ~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

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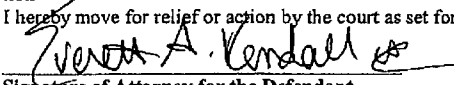
PRIVILEGE AND CONFIDENTIALITY NOTICE: This communication (including any attachments) is being sent by or on behalf of a lawyer or law firm and may contain confidential or legally privileged information. The sender does not intend to waive any privilege, including the attorney-client privilege, that may attach to this communication. If you are not the intended recipient, you are not authorized to intercept, read, print, retain, copy, forward or disseminate this communication. If you have received this communication in error, please notify the sender immediately by email and delete this communication and all copies.

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. )  
 )  
 SOUTH CAROLINA STATE PLASTERING, )  
 LLC, )  
 )  
 Third-Party Plaintiff, )  
 )  
 vs. )  
 )  
 DEL WEBB COMMUNITIES, INC., PULTE )  
 HOMES, INC., and KEPHART )  
 ARCHITECTS, INC., )  
 )  
 Third-Party Defendants. )

IN THE COURT OF COMMON PLEAS )  
 )  
 FOURTEENTH JUDICIAL CIRCUIT )  
 )  
 CASE NUMBER: 07-CP-07-1396 )

**DEFENDANT'S MOTION TO RECONSIDER AND/OR MOTION FOR CLARIFICATION**

12 JAN -5 PM 3:59  
 DEPARTMENT OF COURT SERVICES  
 CLERK OF COURT

name, S.C. Bar no. & address of Plaintiff's attorney		name, S.C. Bar no. & address of Defendant's attorney	
John T. Chakeris, Esquire The Chakeris Law Firm 231 Calhoun Street Post Office Box 397 Charleston, SC 29402 (843) 853-5678 Fax: (843) 853-5677 john@chakerislawfirm.com	Phillip W. Segui, Jr., Esquire Segui Law Firm, LLC 864 Lowcountry Boulevard Suite A Mount Pleasant, SC 29464 (843) 884-1865 Fax: (843) 884-0136 psegui@seguilawfirm.com	Christy Mahon, Esquire Everett A. Kendall, Esquire Sweeny, Wingate & Barrow, P.A. 1515 Lady Street Post Office Box 12129 Columbia, South Carolina 29211 SC Bar #: telephone: (803) 256-2233 fax:(803) 256-9177 e-mail: cem@swblaw.com other:	
W. Jefferson Leath, Jr., Esquire Michael S. Seekings, Esquire Leath, Bouch & Crawford 92 Broad Street Post Office Box 59 Charleston, SC 29402 (843) 937-8811 Fax: (843) 937-0606 jl@leathbouchlaw.com; mseekings@leathbouchlaw.com			
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (Complete SECTIONS II AND III)			
<b>SECTION I: Hearing Information</b>			
Nature of Motion: Motion to Reconsider/Motion for Clarification			
Estimated Time Needed: None		Court Reporter Needed: No	
<b>SECTION II: Motion Type</b>			
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for the Defendant		1/3/12 Date Submitted	
<b>SECTION III: Motion Fee</b>			
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> Exempt: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support			

(check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect	
<input type="checkbox"/> Indigent Status	<input type="checkbox"/> State Agency v. Indigent Party
<input type="checkbox"/> Sexually Violent Predator Act	<input type="checkbox"/> Post-Conviction Relief
<input type="checkbox"/> Motion for Stay in Bankruptcy	
<input type="checkbox"/> Motion for Publication	<input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)
<input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing form motion made in open court per judge's instruction	
Name of Court Report: _____	
<input checked="" type="checkbox"/> Other: _____	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.	Judge: _____
<input type="checkbox"/> Other: _____	CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected By: _____	DATE FILED: _____
(Print Name)	
<input type="checkbox"/> MOTION FEE COLLECTED: _____	
<input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

SCCA/233 (11/2003)

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, )

Defendant. )

---

SOUTH CAROLINA STATE )  
PLASTERING, LLC, )

Third-Party Plaintiff, )

vs. )

DEL WEBB COMMUNITIES, INC., )  
PULTE HOMES, INC., and KEPHART )  
ARCHITECTS, INC., )

Third-Party Defendants. )

**DEFENDANT'S MOTION TO  
RECONSIDER AND/OR MOTION FOR  
CLARIFICATION**

12 JAN - 5 3:59  
BEAUFORT COUNTY  
SOUTH CAROLINA

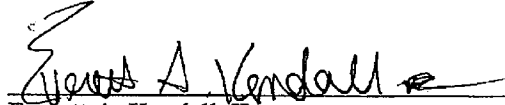
**TO: W. JEFFERSON LEATH, JR., ESQUIRE, MIKE SEEKINGS, ESQUIRE,  
PHILLIP W. SEGUI, JR., ESQUIRE, JOHN T. CHAKERIS, ESQUIRE,  
ATTORNEYS FOR THE PLAINTIFFS AND TO THE PLAINTIFFS  
ABOVE-NAMED:**

**YOU WILL PLEASE TAKE NOTICE** that the Defendant, South Carolina State Plastering, LLC, by and through its undersigned attorneys, hereby moves this Court to reconsider, alter or amend its Order of December 8, 2011, filed December 15, 2011, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The basis for this motion is fully set forth in the Memorandum attached hereto and incorporated herein. This

Motion is further supported by any Memorandum in Support that may be filed by Third-Party Defendants.

Respectfully submitted,

**SWEENEY, WINGATE & BARROW,  
P.A.**



Everett A. Kendall, II  
Christy Mahon  
1515 Lady Street  
Post Office Box 12129  
Columbia, South Carolina 29211  
(803) 256-2233

**Attorneys for South Carolina State  
Plastering, LLC**

Columbia, South Carolina  
January 3, 2012

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

**MOTION TO RECONSIDER AND / OR  
ALTER OR AMEND ORDER (NO  
MOTIONS PENDING) DATED  
09.09.2016**

2016 OCT -3 PM 12:49  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

COMES NOW Defendant South Carolina State Plastering and, by and through the undersigned attorneys and pursuant to Rule 59(e), SCRCF, hereby move to alter and amend the Court's order entered on September 9, 2016 captioned ORDER (NO MOTIONS PENDING) (the "Order"). This motion is being filed out of an abundance of caution, as neither SCSP nor Del Webb has yet received written notice of the entry of the Order and merely determined that it was entered on September 9 by reference to the Beaufort County Public Index.

The grounds for this motion are as follows:

1. Defendant SCSP incorporates by reference all arguments made by Third-Party Defendants Del Webb Communities Inc. and Pulte Homes, Inc. in their Motion to Reconsider and / or Alter or Amend Order (No Motions Pending) dated 9.9.2016.
2. Defendant reiterates the arguments included in SCSP's Supplemental Memorandum of Law and Facts in Opposition to Plaintiff's Motion for Class Certification
3. The Order Making Preliminary Finding that Plaintiffs' Proposed Class Meeting the Requirements of Rule 23(a), SCRCF; 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 entered December 19, 2011 states that the class was only certified on a preliminary basis. Therefore, Defendant SCSP should still have an opportunity to submit memoranda and evidence on the issue of whether the class should be finally certified.
4. Upon information and belief, the briefs submitted by SCSP and the Third-Party Defendants, which were requested by the Court in its Scheduling Order of May 26, 2016, contain arguments and evidence including those based on the Right to Cure Process and were, upon information and belief, not taken into consideration.
5. Judge Baxley's Orders contemplate a final hearing on the class certification factors (outlined in SCRCF, Rule 23) which was to go forward after the completion of the Right to Cure process which is ongoing.

6. Defendant SCSP has not yet had the opportunity to present its, "statement of evidence or testimony that they intend to proffer to the Court at the final hearing" as set forth in the Court's Scheduling Order of May 26, 2016.
7. Other such arguments as may be included in a supporting brief submitted prior to a hearing on this matter.

This motion is based on the pleadings, the record, the orders entered to date, discovery and other materials of record, the evidence that would have been presented at a final certification, arguments of counsel, applicable law, and any memorandum or other material to be submitted to the Court at or before a hearing on this motion.

Wherefore, SCSP respectfully request that the Court withdraw its Order of September 9, 2016, hold a final class certification hearing, admit and consider all proper and probative evidence regarding final certification, and then render a full decision analyzing whether Plaintiffs have met their burden for finally certifying a class in this case.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

*Nicholas J. Paton for*

---

R. Michael Ethridge  
Laura E. P. Paton  
40 Calhoun Street, Suite 400  
Charleston, SC 29401-3531  
T 843.727.0307  
F 843.727.2995  
[methridge@carlockcopeland.com](mailto:methridge@carlockcopeland.com)  
[lpaton@carlockcopeland.com](mailto:lpaton@carlockcopeland.com)

and

Everett A. Kendall, II  
Sweeny, Wingate & Barrow, P.A.  
1515 Lady St. (29201)  
PO Box 12129  
Columbia, SC 29211  
T 803.256.2233  
F 803.256.9177

Attorneys for Defendant South Carolina State  
Plastering, LLC

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

**CERTIFICATE OF SERVICE**

2016 OCT -3 PM 12:49  
JENNIFER A. ROSENEAU  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

I hereby certify that I have this day served a copy of the within and foregoing *Motion to Reconsider and / or Alter or Amend Order dated 9.9.2016* upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

W. Jefferson Leath, Jr.  
Michael S. Seeking  
92 Broad Street  
Charleston, SC 29402  
*Attorney for Plaintiffs*


John T. Chakeris  
231 Calhoun Street  
Charleston, SC 29402  
*Attorney for Plaintiffs*

Phillip W. Segui, Jr.  
864 Lowcountry Blvd., Ste. A.  
Mt. Pleasant, SC 29465  
*Attorney for Plaintiffs*

A. Victor Rawl, Jr.  
McNair Law Firm, PA  
100 Calhoun Street, Suite 400  
Charleston, SC 29401  
T 843.723.7831  
*Attorney for Third-Party  
Defendants Del Webb  
Communities, Inc. and Pulte  
Homes, Inc.*

David S. Cobb, Esq.  
Turner, Padgett, Graham &  
Laney  
P.O. Box 22129  
Charleston, SC 29413  
*Attorneys for Kephart  
Architects, Inc.*

This 29<sup>th</sup> day of September, 2016.

  
Amanda Terrien  
Paralegal to Laura Paris Paton

LAW OFFICES

**CARLOCK, COPELAND & STAIR, LLP**

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

LAURA PARIS PATON

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CHARLESTON, SC 29401-3531

ATLANTA OFFICE  
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404.522.8220

DIRECT DIAL NUMBER  
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TELEPHONE 843.727.0307

E-MAIL ADDRESS  
lpaton@carlockcopeland.com

www.carlockcopeland.com

REPLY TO CHARLESTON  
OFFICE

FACSIMILE  
843-727-2995

September 29, 2016

**VIA FIRST CLASS MAIL**

Jerri Ann Roseneau, Clerk  
Circuit Court of Beaufort County  
Post Office Box 1128  
Beaufort, SC 29901-1128

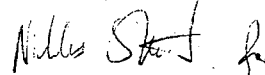
Re: Anthony and Barbara Grazia v. South Carolina State Plastering, LLC.  
CCS File No.: 3526-47645  
CA No.: 2007-CP-07-1396

Dear Ms. Roseneau:

Enclosed herewith for filing in the above-referenced matter please find the original and one copy of Defendant South Carolina State Plastering's Motion to Reconsider and/or Alter or Amend Order (No Motions Pending) dated 9.9.2016. By copy of this correspondence, I have served the same upon all counsel of record.

Please file the original and return one clocked-in copy to me in the envelope provided. If you have any questions, please do not hesitate to contact me.

Sincerely yours,



LAURA PARIS PATON

LPP/amt  
Enclosures  
cc: All Counsel of Record

5555653v.1

0078

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

IN THE  COURT OF COMMON PLEAS  
 FAMILY COURT

GRAZIA,

) CASE NO.: 2007-CP-1396

Plaintiff,

vs.

) MOTION INFORMATION AND COVER SHEET

SOUTH CAROLINA STATE PLASTERING

Defendant,

check box above indicating submitting party

Name, S.C. bar no. and address of plaintiff's attorney W. Jefferson Leath, Jr. Michael Seekings 92 Broad Street Charleston, SC 29402		Name, S.C. bar no. and address of defendant's attorney Laura Paton (74125) Carlock, Copeland & Stair, LLP 40 Calhoun Street, Suite 400 Charleston, SC 29401	
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: SCSP's Motion to to Reconsider and / or Alter or Amend Order (No Motions) 9.9.2016			
Estimated Time Needed : 30min		Court Reporter Needed: Yes	
SECTION II: Motion Type			
<input checked="" type="checkbox"/> Written motion attached Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.  <u>s/ Laura Paris Paton, Esq.</u> Sept. 19, 2016  Signature of Attorney for Defendant Date submitted			
SECTION III: Motion Fee			
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act. <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69. SCRCF) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____			
JUDGE'S SECTION			
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____		JUDGE: _____  CODE: _____ Date: _____	
CLERK'S VERIFICATION			
DATE FILED			
Collected by: _____ (print name)			
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____			

DATE FILED  
2016 OCT -3 PM 12:49  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

LAW OFFICES

**CARLOCK, COPELAND & STAIR, LLP**

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

LAURA PARIS PATON

DIRECT DIAL NUMBER  
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www.carlockcopeland.com

ATLANTA OFFICE  
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Suite 3600  
Atlanta, Georgia 30303  
404.522.8220

REPLY TO CHARLESTON  
OFFICE

September 29, 2016

**VIA FIRST CLASS MAIL**

Jerri Ann Roseneau, Clerk  
Circuit Court of Beaufort County  
Post Office Box 1128  
Beaufort, SC 29901-1128

Re: Anthony and Barbara Grazia v. South Carolina State Plastering, LLC  
CCS File No.: 3526-47645  
CA No.: 2007-CP-07-1396

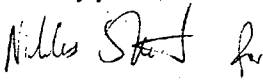
2016 OCT -3 PM 12:49  
JERRI ANN ROSENEAU  
CLERK OF COURT  
BEAUFORT COUNTY, S.C.

Dear Ms. Roseneau:

Enclosed herewith for filing in the above-referenced matter please find the original and one copy of Defendant South Carolina State Plastering's Motion to Reconsider and/or Alter or Amend Order (No Motions Pending) dated 9.9.2016. By copy of this correspondence, I have served the same upon all counsel of record.

Please file the original and return one clocked-in copy to me in the envelope provided. If you have any questions, please do not hesitate to contact me.

Sincerely yours,

  
LAURA PARIS PATON

LPP/amt  
Enclosures  
cc: All Counsel of Record

5555653v.1

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 ANTHONY AND BARBARA GRAZIA, )  
 individually and on behalf of all other similarly )  
 situated Plaintiffs, )  
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 vs. )  
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 SOUTH CAROLINA STATE PLASTERING, )  
 LLC, )  
 Defendant. )  
 )  
 SOUTH CAROLINA STATE PLASTERING, )  
 LLC, )  
 Third-Party Plaintiff, )  
 )  
 vs. )  
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 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

**SOUTH CAROLINA STATE  
 PLASTERING, LLC'S MEMORANDUM  
 IN SUPPORT OF ITS MOTION TO  
 RECONSIDER AND/OR ALTER OR  
 AMEND ORDER (NO MOTIONS  
 PENDING) DATED 09.09.2016**

2016 NOV -7 PM 3:26  
 BEAUFORT COUNTY, S.C.  
 CLERK OF COURT

The Defendant South Carolina State Plastering (hereinafter "SCSP"), by and through the undersigned attorneys, hereby submits the following memorandum and authorities in support of its Motion to Reconsider and/or Alter or Amend Order (No Motions Pending) Dated 09.09.2016.<sup>1</sup> For the reasons set forth herein, SCSP respectfully requests that the Court grant its

<sup>1</sup> Contrary to the arguments of Plaintiffs' counsel, a Motion to Reconsider is appropriate. In Johnston v. Bowen, 313 S.C. 61, 63-64, 437 S.E.2d 45, 47 (1993), after denial of defendant's motion for summary judgment, defendant moved to reconsider and the trial court amended the order to condition denial subject to further discovery; on appeal from the trial court order amendment, the Supreme Court held: "The trial court interlocutory orders are amendable." See also PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 334-35 (Ct. App. 1988) ("A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree.").

Motion to reconsider, alter, or amend its prior Order, find that the class has not been finally certified, and allow consideration of the evidence and arguments of Defendant SCSP regarding final class certification.

### ARGUMENT

**I. Judge Baxley's December 19, 2011 Order did not certify the Class with finality and Defendant SCSP is entitled to submit memoranda and evidence on the issue of whether the putative class should be finally certified**

Judge's Baxley's December 19, 2011 Order did not make a final decision certifying the class in this case. This Court's Order of September 9, 2016 misconstrues that Order based on legally and factually irrelevant subsequent events. Therefore, the Court should reconsider, alter, or amend its previous ruling and allow the presentation of evidence on this issue.

**a. Judge Baxley intended his findings to be preliminary and provisional**

In December 2011, Judge Baxley issued an order "preliminarily recogniz[ing]" a class defined as: "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 the 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." Order Preliminarily Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a) SCRCF; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Parameters for Compliance with the Right to Cure Construction Dwelling Defect Act, December 8, 2011 ("Preliminary Order") at 11-12. No less than a dozen times in the Preliminary Order, including in the title of the Order itself, Judge Baxley highlighted that his findings were

preliminary, not final, and/or would be re-evaluated. Thus, in its Preliminary Order on December 8, 2011, the Court made the following findings and set forth the future steps toward final certification:

[T]he Court finds that Plaintiffs' proposed Class preliminarily meets the requirements for certification, hereby establishes the parameters of proceedings in order to permit Plaintiffs and Defendant to comply with the Act, and sets forth the procedures and requirements for compliance with this 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.

Preliminary Order at 2 (emphasis added). The Court made it clear that this "finding" was "for purposes of attempted compliance with the Right to Cure Construction Dwelling Defect Act." *Id.* at 11.

In addition to stating numerous times that the Order was only preliminary, other portions of the Order also indicate this intention by reference to future consequences of the final decision.. For instance, the Order indicates that the Plaintiffs' UTPA claims would be dismissed without prejudice "at this juncture; however, *in the event a Class is certified with finality in this case*, the dismissal will be with prejudice." Preliminary Order at 8 (emphasis added). This language clearly indicates that the class certification was not final. Further, the Order goes on to state that because "factual and legal differences may exist within the putative class . . . this Order makes only a preliminary finding that the requirements of Rule 23 have been met by Plaintiffs."

*Id.* at 10. Thus, the plain language of the Order clearly states that it is granting only preliminary certification.<sup>2</sup>

**b. Judge Baxley's Orders contemplated a final hearing on the Rule 23, SCRPC, class certification, to be held following the completion of the Right to Cure Process**

Judge Baxley's Orders also made it clear that a final hearing on the issue of class certification was contemplated. As mentioned above, the Preliminary Order stated that only after the proceedings took place to permit Plaintiffs and Defendant to comply with the Right to Cure Construction Dwelling Defect Act, would "the Court . . . 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.*" Preliminary Order at 2 (emphasis added). Similarly, the Order states that because the "this Order makes only a preliminary finding that the requirements of Rule 23 have been met," that "[t]he Court intends to employ the Right to Cure Process . . . to further analyze and perhaps organize the various claims that exist in this case." *Id.* at 10. The Order clearly contemplates not only a later final decision, but also that the decision would take into account specific additional facts learned during the Right to Cure process. Because these facts have not been taken into account, the Court should reconsider, alter, or amend its prior Order to allow a hearing on final certification of the class.

**c. Subsequent statements by Judge Baxley cannot be construed to modify the plain language of the written Order.**

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<sup>2</sup> Neither of the prior appeals in this case reviewed the issue of class certification. In *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010), the Supreme Court specifically stated that "the 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 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." *Id.* at 575, 703 S.E.2d at 203 n.5 (emphasis in original). The second appeal in this case was related to the injunction restricting communications between Plaintiffs' counsel and potential class members. *Grazia v. S.C. State Plastering, LLC*, 2013 S.C. App. Upub. LEXIS 602 (Ct. App. 2013).

The September 9, 2016 impermissibly relies upon comments by Judge Baxley found in hearing transcripts. Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) (“The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties.”) Although the Plaintiffs may argue that Judge Baxley’s intentions should be extrapolated from hearing testimony, the plain language of the Order, cited above, clearly states that the Court’s decision was “preliminary” and that a “final decision” would be made after compliance with the Notice and Opportunity to Cure Act.

In addition, the issue being addressed in the quoted hearing—the language of the Notice to Class Members—was only one aspect of the case management process created by the Preliminary Class Order. The cited quote, and the hearing itself, had nothing to do with the discovery rights that were postponed during the Right to Cure Process, the need of the Court to review information obtained in the RTC process, and rights of the Defendant to address defenses through discovery. Even if the Notice requirements in the Preliminary Class Order were modified by the Court’s subsequent approval of the Class Notice, the remainder of the Order remained in tact. However, the September 9, 2016 Order effectively nullifies the post-Right to Cure protections that were assured by Judge Baxley.

**II. Defendant SCSP is entitled to consideration of the arguments and evidence requested by the Court in its May 26, 2016 Scheduling Order, including arguments and evidence based on the Right To Cure Process**

At the time of the preliminary ruling, little class discovery and no merits discovery had been conducted. Thus, the Court was correct in 2011 in not making a final certification decision on the record presented because, at the time of the Court’s decision, the Court had only limited

information before it.<sup>3</sup> “[D]iscovery into the merits of the claim is necessary before entering findings of fact on whether Rule 23 standards have been met.” *Johnson v. Flakeboard Am. Ltd.*, No. 4:11-2607-TLW-KDW, 2012 WL 2237004 at \*6 (D.S.C. Mar. 26, 2012) (emphasis added).

The Preliminary Order specifically states that the Right to Cure Process is an interim step before final certification and that further factual considerations will be made by the Court as a result of information gleaned from both the Right to Cure and the discovery process. Recognizing that the Defendant and Third-Party Defendants have made numerous objections to class certification, the Court stated:

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 . . . to further analyze and perhaps organize the various claims that exist in these cases. . . . Moreover, should a class be finally certified, after 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 the 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.

Preliminary Order at 10 (emphasis added).

Through the Right to Cure Process, the parties have obtained a significant amount of information that should be reviewed by this Court. This data has been obtained from approximately 3800 responses to the Right to Cure Questionnaires, “walk around” inspections of

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<sup>3</sup> As the United States Supreme Court has made clear, Rule 23 is not “a mere pleading standard.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather, to obtain final certification under Rule 23, the plaintiff must “prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Id.* (emphasis in original). The court may only conclude that a plaintiff has met these requirements after a “rigorous analysis.” *Id.* at 351. It is entirely appropriate for this inquiry to “entail some overlap with the merits of the plaintiff’s underlying claim.” *Id.* Obviously, the Court can only conduct a “rigorous analysis” of the Rule 23 requirements if the defendant has been given a full and fair opportunity to develop evidence that the requirements have not been met. Without such an opportunity, the court’s resulting analysis could not fairly be characterized as “rigorous.”

approximately 4100 houses, interior inspections of 21 houses, and destructive examination of twenty-one houses. Although the parties have not completed class discovery, the information that has been obtained should also be reviewed and taken into consideration. This includes testimony of expert witnesses, homeowners, parties and repair contractors; documents obtained by subpoena from third-party inspectors; and tens of thousands of photographs taken by numerous people over the last fifteen years. In addition, the documents of SCSP and Pulte regarding the design, construction, sale and repairs of houses should be considered. Due process requires that this Court undertake a "rigorous analysis" of all available evidence.

Specifically, although SCSP has been prohibited from engaging in full discovery of the class allegations in this case, to which they are entitled, the following documentary and factual information has been obtained since the issuance of the Class Notice and RTC Order in 2014:

- Signed agreements by hundreds of homeowners not to participate in class action
- Opt-out forms
- Class List and Amended Class List
- 4121 Responses to the Right to Cure Questionnaire
- Data and photographs from "walk-around inspection of more than 4100 houses.
- Data and photographs from interior inspections of 21 houses
- Data and photographs from destructive testing on 21 houses
- Photographs and documentary evidence related to repairs performed by Pinnacle and Premier
- Third-Party Inspection reports for hundreds of houses
- Depositions of the following:
  - Doug Van Lerberghe (Kephart representative)
  - Betty Fisher (homeowner)
  - Edith Flansbury (homeowner)
  - Francis Ginhardt (homeowner)
  - Justin Harvey (Premier/Pinnacle representative)

- Joseph Laferra (homeowner)
- Ruth Lewis (homeowner)
- Eric Luandblandt (Pulte representative)
- Richard McCollum (homeowner)
- John Murphy (homeowner)
- Douglas Olsen (homeowner)
- Sandra Paine (homeowner)
- Donald Petrin (homeowner)
- Gerald Pierce (homeowner)
- Marion Shuttleworth (homeowner)
- John Tyrell (homeowner)
- Barbara Weikel (homeowner)

All of this relevant evidence should be considered by the Court in deciding whether the requirements of Rule 23 are met, whether this case can be tried as a class action in a single trial, and how the trial of this case will proceed. However, the Court's Order that the preliminary class certification will not be revisited prevents a consideration of this, and other evidence, that should be considered by the Court in making its final determination regarding certification of the putative class in this case. Therefore, the Court should reconsider, alter, or amend its prior Order and allow Defendant SCSP to present its evidence regarding the propriety of certifying the class in this case.

**III. Defendant SCSP is entitled to present its "statement of evidence or testimony that they intend to proffer to the Court at the final hearing" as set forth in the Court's May 26, 2016 Scheduling Order**

Defendant SCSP is also entitled to present its "statement of evidence or testimony that they intend to proffer to the Court at the final hearing." In the Court's May 26, 2016 Scheduling Order, the Court recognized that the class was "a preliminary class" and discussed the removal of individuals from "the preliminary class list." Scheduling Order, p. 2. This recognition of the preliminary nature of the class is consistent with both the prior orders of Judge Baxley, and the earlier Order to Permit Property Owner Depositions, December 18, 2015, which also recognized

the existence only of a “preliminarily certified class.” Order to Permit Property Owner Depositions, p. 2. Further, the Scheduling Order stated that SCSP would be allowed to present a “statement of evidence or testimony that they intend to proffer to the Court at the final hearing.” However, because the Court has now determined that Judge Baxley’s Order certifying the class was final, not preliminary, Defendant SCSP has been prevented from presenting this evidence to the Court.

As set forth in Section II, *supra*, there has been extensive additional evidence bearing on class certification discovered since the issuance of the Class Notice and the commencement of the Right to Cure portion of this litigation. Because the determination of whether or not to certify a class is a fact-driven determination, Defendant SCSP was entitled to present the evidence discovered subsequent to the December 2011 Order. This is especially true in the instant case, where the evidence discovered through the Right to Cure Process demonstrates that the putative class is “no more than a hodgepodge of factually as well as legally different plaintiffs that should not . . . be cobbled together for trial.” *Lienhardt v. Dryvit Sys.*, 255 F.3d 138, 147 (4th Cir. 2001) (quoting *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998)). Therefore, the Court should reconsider, alter, or amend its prior Order and allow SCSP to present this evidence, pursuant to the May 26, 2016 Scheduling Order.

**IV. The Supreme Court has Not had the Opportunity to Deny Class Certification and Judge Baxley’s Preliminary Decision has Not Been Reviewed by the Appellate Courts.**

Judge Baxley misconstrued the decision and mandate of the Supreme Court. The Supreme Court did not have the opportunity to deny class status in this very case. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010). The *Grazia* case went to the Appellate Courts in 2010 on appeal from Judge Early’s Order striking the Plaintiffs’ class

allegations on the grounds that the “Notice and Opportunity to Cure” statute was fatally incompatible with the class action Rule 23 provisions. In examining that issue, the Court determined that the statute at issue and the Rule 23 provisions were not “fatally incompatible.” However, there was no order on a motion to certify the class before the Appellate Court. Thus, the Supreme Court did not have the opportunity or the authority to review the propriety of class certification.

Likewise, Judge Baxley’s preliminary decision has not been reviewed by the appellate courts of this state. Judge Baxley refused to even rule on the Defendants’ motion for reconsideration of the December 8, 2010 Order. Instead, he dismissed the motion as “improper” because the order was not a final decision, but interlocutory.<sup>4</sup> The Defendants filed notices of appeal seeking review, but those appeals were dismissed as premature and the Supreme Court denied petitions for immediate review by a writ of certiorari. Thus, the appellate courts of this State have not opined on Judge Baxley’s findings as to the “preliminary class.”

**V. Incorporation of all other arguments included in SCSP’s Supplemental Memorandum of Law and Facts in Opposition to Plaintiff’s Motion for Class Certification and all arguments made by Third-Party Defendants in their Motion to Reconsider and/or Alter Amend Order (No Motions Pending) dated 9.9.2016**

The Court should also reconsider its Order because the putative class in this case does not satisfy the requirements of Rule 23, SCRCF. As Defendant SCSP set forth in great detail in their previously submitted Supplemental Memorandum of Law and Facts in Opposition to Plaintiffs’ Motion for Class Certification,<sup>5</sup> the Plaintiffs “bear the burden of proving [the] five prerequisites

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<sup>4</sup>See footnote 1 regarding authority for motion for reconsideration of interlocutory orders.

<sup>5</sup> Although this Memorandum was previously submitted to the Court, because the Court takes the position that the class was finally certified prior to the submission of this Memorandum and out of an abundance of caution, the Memorandum is attached hereto as Exhibit A, to insure its inclusion in the record.

under South Carolina law” to certify the class. *Gardner v. South Carolina Dep’t. of Revenue*, 353 S.C. 1, 20, 577 S.E. 2d 190, 200 (2003) (citing *Waller v. Seabrook Island Property Owners Ass’n*, 300 S.C. 465, 388 S.E. 2d 799 (1990)). In the instant case, Plaintiffs have failed to establish commonality of claims between class members or the typicality of the claims of the Grazias, which are unique in a number of particulars. **Exhibit A**, pp. 14-28. See also (Order Denying Plaintiffs’ Motion for Class Certification *Dickerson v. Dan Ryan Builders, Inc.* Case pp. 7-9 Attached here at **Exhibit B**, (September 27, 2016).

Further, as the United States Supreme Court has repeatedly held, “[r]ule of procedure shall not abridge, enlarge or modify any substantive right.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)). For this reason, Defendant SCSP is entitled to challenge Plaintiff’s proof and establish its affirmative defenses at an individual level. *Wal-Mart v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541 (2011). This is particularly important in the instant case, where the elements and facts of both the alleged claim and the affirmative defenses vary widely among the claimants and, therefore, individual proof is required. This makes it infeasible to protect the due process rights of all litigants in an aggregated trial of 4300 claims, each with individualized issues of proof. See Exhibit A, pp. 28-38.

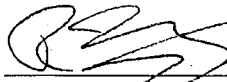
In addition to the specific issues set forth herein, Defendant SCSP would reiterate and reincorporate by reference all of the arguments set forth in its Supplemental Memorandum of Law and Facts in Opposition to Plaintiff’s Motion for Class Certification. The Defendant SCSP also incorporates by reference all the arguments made by Third-Party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. in their Motion to Reconsider and/or Alter or Amend Order (No Motions Pending) dated 9.9.2016, as well as any supporting Memoranda and Exhibits.

CONCLUSION

Based on the foregoing, Defendant SCSP respectfully submits that the Court's determination that Judge Baxley's prior orders indicated an intent to finally certify the class was error. Defendant SCSP respectfully requests that the Court reconsider its ruling to the contrary, allow Defendant SCSP to present evidence in opposition to final class certification, and find that final class certification is improper based on the facts of this case.

Respectfully submitted,

CARLOCK COPELAND & STAIR, LLP



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*Attorneys for South Carolina State Plastering, LLC*

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BEAUFORT )

IN THE COURT OF COMMON PLEAS  
THE FOURTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2007-CP-07-1396

ANTHONY AND BARBARA GRAZIA, )  
individually and on behalf of all other similarly )  
situated Plaintiffs, )

**CERTIFICATE OF SERVICE**

Plaintiffs, )

vs. )

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. )

2016 NOV -7 PM 3:26  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

I hereby certify that I have this day served a copy of the within and foregoing *South Carolina State Plastering, LLC's Memorandum in Support of its Motion to Reconsider and/or Alter or Amend Order (No Motions Pending) Dated 09.09.2016* upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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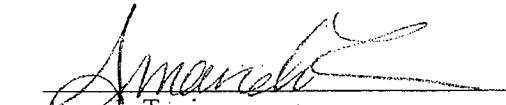
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LLC*

This 2<sup>nd</sup> day of November, 2016.

  
Amanda Terrien  
Paralegal to R. Michael Ethridge and  
Laura Paris Paton

STATE OF SOUTH CAROLINA ) THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF BEAUFORT ) FOR THE FOURTEENTH CIRCUIT

Anthony and Barbara Grazia, ) Civil Action No.: 2007-CP-07-1396  
 individually and on behalf of all other )  
 similarly situated Plaintiffs, )  
 Plaintiffs, )

v. )

South Carolina State Plastering, LLC, )  
 Defendant. )

SOUTH CAROLINA STATE  
 PLASTERINGS, LLC'S  
 SUPPLEMENTAL  
 MEMORANDUM OF LAW AND  
 FACTS IN OPPOSITION TO  
 PLAINTIFFS' MOTION FOR CLASS  
 CERTIFICATION

And )

South Carolina State Plastering, LLC )  
 Third-Party Plaintiff )

v. )

Del Webb Communities, Inc. , Pulte )  
 Homes, Inc., and Kephart Architects, )  
 Inc., )

Third-Party Defendants. )

The factual and procedural developments of the last five years demonstrate unequivocally that a class of homeowners cannot and should not be certified. This Supplemental Memorandum in Opposition is offered to highlight the impact of these developments on the Court's decision of whether to finally certify the proposed class action.<sup>1</sup> South Carolina State Plastering, LLC ("SCSP") respectfully urges this Court to deny Plaintiffs' Motion to Certify.

<sup>1</sup> All evidence, law and argument previously provided to the Court in its Response and Memorandum in Opposition to Plaintiffs' Motion to Certify, filed on or about July 1, 2011, are fully incorporated herein. While some duplication is inevitable, SCSP intends that the two briefs be read together.



The dire predictions made five years ago have all borne out to be true. As stated in SCSP's Response and Memorandum in Opposition to Plaintiffs' Motion to Certify ("Initial Memo"), filed in July 2011:

In seeking certification of a class of some 4,100 homeowners in Sun City Hilton Head, Plaintiffs' virtually assure that this Court will be confronted with 4,100 individual claims, complete with written discovery, depositions, site inspections, destructive testing, expert witnesses, motions practice, trials and appeals. While attempting to increase the odds of attaining class status by reducing the class issues to three "defects" and a partial scope of repair, Plaintiffs have left the larger portion of the substantive issues to be addressed on an individualized basis. The unintended (and undesired) consequences of class certification will ensure that the individual homeowners of Sun City who may have legitimate concerns about the construction of their homes will not have the opportunity for timely redress of their complaints. Justice, rather than being served, will be thwarted.

Initial Memo at 1-2. Moreover, information received through the "Right to Cure" process and limited discovery make clear that the requirements for class certification are not met and that this case cannot be tried in this format as a practical matter. Finally, this case cannot proceed to trial as scheduled because SCSP has not been given the opportunity to engage in full pre-certification or merits discovery due to the stay imposed under the "Right to Cure" process and the Court's orders.

#### ISSUES BEFORE THE COURT

I. THIS COURT CAN AND SHOULD REVIEW THE ENTIRE RECORD *DE NOVO* AND DECIDE WHETHER THIS LITIGATION SHOULD PROCEED AS A CLASS ACTION.

A. This Court is not bound by Judge Baxley's prior decisions on issues involving certification.

There has been no final decision regarding class certification that binds this Court. While ordinarily one Circuit Court Judge cannot modify or overrule the prior orders of another, there is no risk of that in deciding issues regarding class certification. Moreover, addressing this very

issue, our Supreme Court has stated that "class certification may be altered at any time prior to a decision on the merits." *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E. 2d 81, 88 (2008).

B. Judge Baxley clearly intended that his findings were preliminary and provisional.

The South Carolina Supreme Court charged the trial court with determining how to harmonize the purpose of the Right to Cure Act with the efficiencies of class action. *Grazia v. South Carolina State Plastering*, 390 S.C. 562, 574-75, 703 S.E.2d 197, 203 (2010). Judge Baxley, the then-appointed trial judge for the Sun City cases, apparently took direction from the Supreme Court's conclusion that "the purpose [of the Right to Cure Act] is better served by allowing the use of the Right to Cure Act's stay provision to allow a court to determine whether or not a class action is feasible under the circumstances in each individual case . . ." *Id.* at 575.

In December 2011, Judge Baxley issued an order "preliminarily recogniz[ing]" a class defined as: "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 the 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." Order Preliminarily Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a) SCRCF; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Parameters for Compliance with the Right to Cure Construction Dwelling Defect Act, December 8, 2011 ("Preliminary Order") at 11-12.

No less than a dozen times in the Preliminary Order, Judge Baxley highlighted that his findings were preliminary, not final, and/or would be re-evaluated. Thus, in its Preliminary Order on December 8, 2011, the Court made the following findings and set forth the future steps toward final certification:

[T]he Court finds that Plaintiffs' proposed Class preliminarily meets the requirements for certification, hereby establishes the parameters of proceedings in order to permit Plaintiffs and Defendant to comply with the Act, and sets forth the procedures and requirements for compliance with this 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.

Preliminary Order at 2 (emphasis added). The Court made it clear that this "finding" was "for purposes of attempted compliance with the Right to Cure Construction Dwelling Defect Act." *Id.* at 11.

C. **Judge Baxley intended to review fully the factual record developed through the Right to Cure process and discovery before making a final decision regarding class certification.**

At the time of the preliminary ruling, little class discovery and no merits discovery had been conducted. Thus, the Court was correct in 2011 in not making a final certification decision on the record presented because, at the time of the Court's decision, the Court had only limited information before it.<sup>2</sup> "[D]iscovery into the merits of the claim is necessary before entering

<sup>2</sup> As the United States Supreme Court has made clear, Rule 23 is not "a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather, to obtain final certification under Rule 23, the plaintiff must "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). The court may only conclude that a plaintiff has met these requirements after a "rigorous analysis." *Id.* at 351. It is entirely appropriate for this inquiry to "entail some overlap with the merits of the plaintiff's underlying claim." *Id.* Obviously, the Court can only conduct a "rigorous analysis" of the Rule 23 requirements if the defendant has been given a full and fair opportunity to develop evidence that the requirements have not been met. Without such an opportunity, the court's resulting analysis could not fairly be characterized as "rigorous."

findings of fact on whether Rule 23 standards have been met." *Johnson v. Flakeboard Am. Ltd.*, No. 4:11-2607-TLW-KDW, 2012 WL 2237004 at \*6 (D.S.C. Mar. 26, 2012) (emphasis added).

The Preliminary Order specifically states that the Right to Cure Process is an interim step before final certification and that further factual considerations will be made by the Court as a result of information gleaned from both the Right to Cure and the discovery process. Recognizing that the Defendant and Third-Party Defendants have made numerous objections to class certification, the Court stated:

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 . . . to further analyze and perhaps organize the various claims that exist in these cases. . . . Moreover, should a class be finally certified, after 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 the 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.

Preliminary Order at 10 (emphasis added).

Through the Right to Cure Process, the parties have obtained a significant amount of information that should be reviewed by this Court. This data has been obtained from approximately 3800 responses to the Right to Cure Questionnaires, "walk around" inspections of approximately 4100 houses, interior inspections of 21 houses, and destructive examination of twenty-one houses. Although the parties have not completed class discovery<sup>3</sup>, the information that has been obtained should also be reviewed and taken into consideration. This includes

<sup>3</sup> See discussion in the next section regarding the limitations that have been placed on the parties' ability to engage in class or merits discovery.

testimony of expert witnesses, homeowners, parties and repair contractors; documents obtained by subpoena from third-party inspectors; and tens of thousands of photographs taken by numerous people over the last fifteen years. In addition, the documents of SCSP and Pulte regarding the design, construction, sale and repairs of houses should be considered. Due process requires that this Court undertake a "rigorous analysis" of all available evidence.

## II. THE COURT SHOULD ESTABLISH A DISCOVERY PLAN

- A. The Parties have not been permitted to engage fully in pre-certification discovery or any merits discovery due the stay imposed by Judge Baxley.

Prior to this appeal and remand of this case from the Supreme Court, depositions of the Grazias and the Grazias' experts were taken, where they were questioned primarily on issues specific to the Grazia residence. After remand, in March 2011, Judge Baxley entered an order permitting Class Discovery on a compressed schedule, with a deadline of May 31, 2011. In April 2011, Plaintiffs' counsel filed a Motion for Protective Order to block the depositions of individual homeowners, both in the *Grazia* case and in their individual cases. On May 6, 2011, Judge Baxley issued an order permitting these depositions only in the *Grazia* case and "only on issues related to class certification." See Order dated May 6, 2011 (permitting limited depositions). Judge Baxley specifically stated that "[d]efendants will be able to depose these homeowners fully at a later date in their individual cases (and in the *Grazia* case should a class be certified.)" *Id.* The schedule was subsequently amended by Order entered June 13, 2011, imposing a deadline of June 29, 2011, for class discovery.

Pursuant to these orders, Defendant only deposed the Plaintiffs and thirteen homeowners between June 1 and June 22, 2011. This is approximately three-tenths of one percent of the total number of class members. Also, these homeowners were among the few homeowners who had

filed individual lawsuits against SCSP. Questions asked in these depositions were limited to the "class certification issues" and did not provide information relating to elements of individualized proof or potentially applicable affirmative defenses.

No discovery of any type took place between June 23, 2011, and July 24, 2015. Pursuant to the Preliminary Order of December 8, 2011, the entire case, including discovery, would be stayed upon the filing of the "Class List." This list was filed July 10, 2014. On July 24, 2015, a year later, this Court issued an order permitting some specifically defined discovery, most of which required the Defendant and Third-Party Defendants to produce information to Plaintiffs. SCSP was permitted, however, take "depositions of certain homeowners to be identified by SCSP." Ultimately, only 15 depositions were taken.

The litigants are in exactly the discovery position that Judge Baxley intended through his several orders. This is manifest in the Preliminary Order, where it states: "Moreover, should a Class be finally certified, after the passage of an appropriate period for discovery as to the applicability of affirmative defenses . . . until further development of the evidence through the discovery process." Preliminary Order at 10 (emphasis added).

To date, the only homeowners who have produced any documents in this case are the *Grazias*. Only thirty homeowners, including the Plaintiffs, have been deposed at all, and those only in a limited fashion.<sup>4</sup> This is wholly insufficient to allow SCSP to defend the claims being asserted against it. Failure to allow an appropriate time and scope of discovery will substantially prejudice the Defendant. The Court should assist the parties in developing a discovery plan that

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<sup>4</sup> Throughout this case, the parties have quantified the magnitude of the class in terms of the number of houses. Given that most houses are owned by more than one person, the actual number of claimants likely approaches 8,000-10,000. As such, the actual percentage of claimants deposed is less than three percent.

will provide a workable process by which the Defendant can be afforded its due process right to defend itself against the claims asserted by the Grazias and the individual homeowners.

- B: Discovery on the underlying merits of the case is required for SCSP to challenge proof offered by Plaintiffs and to prosecute affirmative defenses.

Plaintiffs' experts agree that evidence obtained from the Grazias' house provides no useful information regarding the condition, the cause of the condition, or the scope of injury to any other house in Sun City Hilton Head.<sup>5</sup> Therefore, in order to obtain the information need to challenge Plaintiffs' proof, evidence must be gathered from every house relating to every claim. In addition, the affirmative defenses that have been asserted by SCSP relate to the knowledge and actions of individuals, in particular the individual claimants. For example, because a Statute of Limitations defense turns on "discovery" based on what the claimants "knew or should have known," depositions must be taken to understand all relevant facts and circumstances.

### III. THE COURT SHOULD CONSIDER THE PRACTICAL MATTER OF WHETHER AND HOW THIS CASE CAN BE TRIED AS A CLASS ACTION.

By Order dated May 16, 2016, this Court set the trial of this case to begin December 5, 2016. Without the benefit of surveying the factual record, the Court indicated that two weeks would be reserved for the trial. However, with a more complete estimation of the magnitude of the documentary evidence to be offered, and the volume of testimony to be presented, this Court should now engage in the sort of "mental dress rehearsal" described by Judge Gergel in *Noell v. Hudd* to determine whether the Due Process rights of the absent class members or the Defendants can be protected adequately in this manner. This exercise should consider evidence that will be proffered, the testimony that will be proffered, the quantity of documents and

witnesses, the number of issues that will be raised and the manner of proof required, the amount of time required for the presentation of evidence, the contents, complexity of the jury charges, the number of types of issues to be resolved by the jury and length of time required for deliberation.

#### UPDATED FACTUAL RECORD

Prior to the cessation of the limited discovery allowed leading up to the initial hearing on the Plaintiffs' Motion to Certify a Class, the following documentary, testimonial and factual evidence was available to the Court. Although some of this evidence was actually submitted to the Court for consideration, much of it was merely referred to pending the more thorough review that was contemplated after the Right to Cure Process.

- Contracts between Dell Webb/Pulte and South Carolina State Plastering setting forth the work to be performed by SCSP.
- House plans for approximately 60 different house models showing details for the installation of stucco systems and all other components of construction.<sup>6</sup>
- Construction files of SCSP for approximately 5000 houses built in Sun City Hilton Head between 1998 and 2007.
- Manufacturer specifications manuals for STO and Masterwall products that were utilized in Sun City Hilton Head between 1998 and 2007.
- Warranty claims and repair work orders for houses in Sun City Hilton Head between 1998 and 2007.
- Stucco manufacturer inspection and warranty information for hundreds of houses.
- Photographs taken by Tom Carlson, Bob Sisroy, Larry Elkin, Skip Lewis and others of thousands of houses in Sun City Hilton Head.

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<sup>5</sup> A thorough discussion of this point, with a plethora of quotations from the many experts, can be found in SCSP's Response and Memorandum of Law in Opposition to Plaintiffs' Motion to Certify at 24-31 and the Appendix thereto at 2-51.

<sup>6</sup> A list of the house models and the years each was used is attached at Exhibit 1.

*Defendant's Supplemental Memorandum of Law in  
Opposition to Class Certification  
2007-CP-07-1396*

- Inspection reports and field notes for thousands of houses made by experts for Plaintiffs, SCSP and Pulte.
- Inspection reports by third-party inspection companies of hundreds of houses in Sun City Hilton Head
- Deposition transcripts of:
  - Tom Abruzzo (homeowner)
  - Donald Avedon (homeowner)
  - Jean Bongiorno (homeowner)
  - William Box (homeowner)
  - Tom Carlson (Plaintiffs' expert)
  - Pete Conley (SCSP representative)
  - George Craft (homeowner)
  - Carol Crowe (homeowner)
  - David Fleishhauer (homeowner)
  - Robert Gallagher (Plaintiffs' expert)
  - Anthony Grazia (Plaintiff)
  - Barbara Grazia (Plaintiff)
  - Tom Greger (homeowner)
  - Edwin Leinberger (homeowner)
  - Darla Lunsford (homeowner)
  - Robert Mcelfresh (homeowner)
  - Joel Serkes (homeowner)
  - Peter Sherratt (Plaintiffs' expert)
  - Robert Sisroy (Plaintiffs' expert)
  - Patricia Swank (homeowner)

Since the issuance of the Class Notice and RTC Order in 2014, the parties have obtained the additional documentary and factual information described below:

- Signed agreements by hundreds of homeowners not to participate in class action
- Opt-out forms
- Class List and Amended Class List
- 4121 Responses to the Right to Cure Questionnaire
- Data and photographs from "walk-around inspection of more than 4100 houses.
- Data and photographs from interior inspections of 21 houses
- Data and photographs from destructive testing on 21 houses

- Photographs and documentary evidence related to repairs performed by Pinnacle and Premier
- Third-Party Inspection reports for hundreds of houses
- Depositions of the following:
  - Doug Van Lerberghe (Kephart representative)
  - Betty Fisher (homeowner)
  - Edith Flansbury (homeowner)
  - Francis Ginhardt (homeowner)
  - Justin Harvey (Premier/Pinnacle representative)
  - Joseph Laferri (homeowner)
  - Ruth Lewis (homeowner)
  - Eric Luandblandt (Pulte representative)
  - Richard McCollum (homeowner)
  - John Murphy (homeowner)
  - Douglas Olsen (homeowner)
  - Sandra Paine (homeowner)
  - Donald Petrin (homeowner)
  - Gerald Pierce (homeowner)
  - Marion Shuttleworth (homeowner)
  - John Tyrell (homeowner)
  - Barbara Weikel (homeowner)

All of this relevant evidence should be considered by the Court in deciding whether the requirements of Rule 23 are met, whether this case can be tried as a class action in a single trial, and how the trial of this case will proceed.

#### LAW AND ANALYSIS

#### **I. THE COURT MUST RIGOROUSLY ANALYZE WHETHER THE PLAINTIFFS HAVE MET THEIR BURDEN OF ESTABLISHING EACH PRE-REQUISITE TO CLASS CERTIFICATION.**

Rule 23, SCRPC establishes five prerequisites for having an action to be held to be a class action. These mandatory requirements are as follows:

- (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of

the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP.

The Plaintiffs “bear the burden of proving [the] five prerequisites under South Carolina law.” *Gardner v. South Carolina Dep't. of Revenue*, 353 S.C. 1, 20, 577 S.E. 2d 190, 200 (2003) (emphasis added) (citing *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E. 2d 799 (1990)); see *City of Ann Arbor Employees' Retirement System v. Sonoco Products Co.*, 270 F.R.D. 247 (D.S.C. 2010). “Failure to satisfy even one prerequisite is fatal to class certification.” *Gardner*, 353 S.C. at 20, 577 S.E. 2d at 200.

In deciding whether class certification is proper, the court must apply a rigorous analysis to determine whether each prerequisite is satisfied. *Waller*, 300 S.C. 465, 388 S.E.2d 799 (1990); *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (2003); see also *Brown v. Nucor Corp.*, 576 F.3d 149, 162 (4th Cir. 2009) (providing that this rigorous analysis requires the court to conduct a close examination “not just of the plaintiffs' claims as pled, but of the evidence to support those claims in order to make an appropriate judgment on Rule 23 certification.”) (emphasis added); *Noel v. Hudd Distribution Services, Inc.*, 274 F.R.D. 187 (D.S.C. 2011) (when determining whether the requirements of Rule 23 have been met, the Court must not merely rely on the allegations found in the plaintiff's complaint, but must “tak[e] a close look at relevant matters,” conduct “a rigorous analysis of such matters,” and make “findings that the requirements of Rule 23 have been satisfied”).

Plaintiffs must also demonstrate how they intend to prove their claims on a class-wide

basis so that the Court can "envision the form trial on those issues would take." *Noel*, 274 F.R.D. at 187. Stated differently, the Court must conduct a thoughtful examination that envisions how a class action would unfold—a "mental dress rehearsal of anticipated proof, the jury instructions, the verdict sheet, and the burdens imposed on the jury." *Id.*

## II. RULE 23, A PROCEDURAL RULE, MAY NOT ABRIDGE OR MODIFY SUBSTANTIVE LAW

It is a fundamental maxim of law that a procedural rule of civil procedure (such as Rule 23) may not alter or abridge substantive law. The United States Supreme Court has repeatedly mandated that: "Rules of procedure shall not abridge, enlarge or modify any substantive right." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)). The Fourth Circuit has specifically addressed this issue in *Broussard v. Mieneke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). There the Court held that a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. . . . It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members." *Id.* at 345.

Because Rule 23 may not alter substantive law, Plaintiffs must prove every element of every cause of action for every claimant. Rule 23 does not allow the Plaintiffs to take any "short cuts" in proving their case simply because the claimants are class members and not named plaintiffs. Also, Rule 23 may not limit, alter or abridge any of a defendant's defenses as to each of the plaintiffs – namely, in this case, statute of limitations, comparative negligence, failure to mitigate damages, intervening/superseding negligence, betterment and others. *See Henry Schein v. Stromboe*, 102 S.W.3d 675, 693-95 (Tex. 2002) (internal citations omitted).

ARGUMENT

I. CLASS CERTIFICATION SHOULD BE DENIED BECAUSE THE SUPPOSED  
"COMMON FACTS" ARE NOT SUFFICIENTLY DETERMINATIVE TO MEET  
THE "COMMONALITY" REQUIREMENTS.

A. Under Gardner v. SCDOR, Plaintiffs must show that the common issues  
"overshadow" all other issues.

Although South Carolina did not adopt verbatim the language of the Federal Rules of Civil Procedure 23(f), the analytical framework is clearly part of our jurisprudence. When determining whether to certify a class, the trial court must "weigh" the common issues against the individualized issues to determine whether the commonality requirement is met. The weight given to each is established by the extent to which the issue is determinative of the outcome of the case.

In Gardner, our Supreme Court overturned the trial court's certification of a class based on the insufficiency of the common issues. 353 S.C. at 1, 577 S.E.2d at 190. Citing multiple federal court decisions where the "predominance" standard was in effect, the Court described the need for "significant common, legal or factual issues" to bind the class together. *Id.* at 21, 577 S.E.2d at 200 (citing Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 64 (S.D. Ohio 1991)). The Court reasoned that, although not every issue need be common, "[c]ommonality is met only where the class shares a determinative issue." *Id.* at 200-01 (emphasis added). The Court then favorably cited the holding of the Fourth Circuit to wit: "certification is proper only when a determinative critical issue overshadows all other issues." Stott v. Haworth, 916 F.2d 134, 145 (4th Cir. 1990) (emphasis added).

Again, citing the Fourth Circuit, our Supreme Court stated that determinative issues are contrasted with those that simply "propel the action into a posture where judicial scrutiny is

necessary for just adjudication.” *Id.* (quoting *Stott*, 916 F.2d at 145). The Supreme Court rejected the plaintiffs’ assertion that a “common tread” bound the class together because “the factual differences are the crux of the predominant legal issue. A representative class cannot exist where the court must investigate each plaintiff’s . . . claim . . . . Requiring such individualized examination negates the benefits of a class action suit.” *Id.* at 201 (citing *O’Quinn v. Beach Associates*, 242 S.E. 2d 734, 738 (1978)).

B. The “common issues” proffered by the Plaintiffs do not determine any legal issue in this case.

Throughout this case, Plaintiffs have cited six factual issues as the basis for asserting a class action. These are briefly summarized as:

1. A single-family residence in Sun City Hilton Head;
2. Built prior to July 31, 2007;
3. Where South Carolina State Plastering applied the stucco in whole or in part;
4. The house lacks head-flashing at windows and doors;
5. The house lacks control joints at the corners of windows and doors; and
6. Moisture is encapsulated at the base of walls due to improper weep configuration.

Those six facts, even if all true, would dispose not of a single claim against South Carolina State Plastering, much less every claim. As such, these “common issues” are not determinative and cannot serve as the basis for certifying a class action.

Plaintiffs have alleged two legal theories: negligence and breach of warranty. With regard to both, Plaintiffs allege that they have been injured and otherwise damaged because moisture intruded into their residence causing water damage. The elements for which Plaintiffs

bear the burden of proof are similar for each cause of action. Boiled down to their essence, Plaintiffs must answer the following questions to prove a claim for any given house:

1. What work did SCSP undertake?
2. By what standard is that work to be evaluated?
3. What did SCSP do wrong?
4. What is the nature and extent of any injury that was caused by SCSP's work?
5. What recovery are Plaintiffs entitled to as result of the injury caused by SCSP?

While some of the "common facts" may be relevant to answering these questions, they do not determine the answer to any of them, much less determine the ultimate outcome.

Moreover, there is limited "common evidence" available to the Plaintiffs. Common evidence is not "similar" evidence, but rather, evidentiary matter that could be re-used in multiple cases. For example, the testimony of Pete Conley regarding the corporate history of South Carolina State Plastering could be considered "common," though not determinative of any claim. To the contrary, testimony regarding the materials used on the Grazias' home would not be common as the different materials were used on other houses.

The variations of the factual scenarios that will be developed by the individualized facts are legion and far exceed the quantity and weight of the few purported common issues. Following is brief description of some of the factual and legal variations that will develop in the trial of this case if it is certified as a class.

#### Duty

Plaintiffs must establish the basis and extent of the legal duty owed by SCSP to owners. The legal duty that may be owed by SCSP arises from the scope of the work performed by SCSP on a given house. To prove this duty, Plaintiffs must first prove that SCSP performed the original work

on the residence and that no intervening repair or modification has superseded that work. SCSP did not install the stucco on every house in Sun City and did not always install stucco only. Furthermore, the contract documents and work orders will show that the scope of work, particularly with respect to system types and accessories, varied throughout the project. Some houses where SCSP did the original installation have been subsequently repaired or modified by other contractors. Testimony from Pulte and Pinnacle representatives, as well as tens of thousands of documents will demonstrate modifications that have been made since SCSP began work almost 20 years ago.

#### Standard of Care

Once a duty has been established, the Plaintiffs must prove the standard of care that the duty requires. This will not be determined as a matter of law, but rather by the jury, taking into consideration multiple sources.<sup>7</sup>

Plaintiffs cannot prove the standard of care applicable to each homeowner by reference to any single standard. Rather, the evidence before this Court demonstrates dozens of possible combinations of applicable contracts, specifications, building codes, industry standards, and manufacturers instructions that apply these to the construction of the 4300 houses that are part of this proposed class. The "Standards Matrix," attached at Exhibit 2, illustrates the mosaic of combinations that must be considered when determining the standard of care applicable to any given house.

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<sup>7</sup> "The fact finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case." *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393, S.C. 240, 247, 711 S.E.2d 908, 912 (citing *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006)). The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. *Madison*, 371 S.C. 123, 638 S.E.2d 650 (2006); see also *Elledge v. Richland/Lexington Sch. Dist. Five*, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) (stating the general rule that evidence of industry standards is relevant to establishing the standard of care in a negligence action).

Breach of the Standard of Care

Plaintiffs have consistently proffered three factual conditions which they contend are a breach of the standard of care. Defendants do not admit that the alleged conditions exist on every house. This is well documented in the reports of multiple inspectors, the responses to the Right to Cure Questionnaires, and the myriad photos taken over the last 8 years. While much evidence has been discussed that may establish the existence of those conditions, this evidence does not prove that SCSP breached its duty. Plaintiffs carry the burden of proof and persuasion that SCSP was unreasonable, careless or wanton as to each claimant. There is no presumption that will favor Plaintiffs on this issue. South Carolina does not recognize the doctrine of *res ipsa loquitur*,<sup>8</sup> nor strict liability in home construction.<sup>9</sup> Thus, Plaintiffs must prove the breach of the standard of care that occurred with respect to each house. Because 4100 homes were built one at a time over 13 years, there is not a single act of breach that can be used generally by the putative class. Instead, the specific breach of duty must be proven for every house.

In addition, Defendants are entitled to offer evidence that the SCSP was not unreasonable, careless or wanton in its actions or decisions. Defendants are entitled to prove that there was no breach of the standard of care under the facts and circumstances extant at the time each house was constructed.

<sup>8</sup> Fletcher v. Medical University of South Carolina, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010) (citing Snow v. City of Columbia, 305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n. 7 (Ct. App. 1991) ("In an action for negligence, the plaintiff must prove by direct or circumstantial evidence that the defendant did not exercise reasonable care. South Carolina's rejection of *res ipsa loquitur* is consistent with its general adherence to fault based liability in tort."); see also O'Leary-Payne v. R.R. Hilton Head, II, Inc., 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006)

<sup>9</sup> Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008).

Injury

Injury is an essential element of a plaintiff's negligence claim. 65 C.J.S. *Negligence* § 54. A plaintiff in a negligence action therefore is required to adduce evidence showing there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury. *Id.* If the negligent act or omission has resulted in no injury or loss to anyone, it is merely *injuria sine damno* even though it involved a violation of a statute or ordinance. *Id.* Therefore, Plaintiffs must prove an injury for each putative class member.

Plaintiffs have suggested that the holding of *Kennedy v. Columbia Lumber* somehow relieves them of the obligation of proving injury. 299 S.C. 335, 384 S.E.2d 730 (1989). Plaintiffs have argued that the mere violation of a building code entitles the Plaintiffs to take whatever corrective action is necessary to remedy the violation. This is a gross distortion of *Kennedy*.

In *Kennedy*, the Supreme Court addressed two questions, only one of which is relevant here: Will the economic loss rule be applied in a single-family new residential construction defect case to bar recovery in a negligence action? The Court reasoned that "[a]ny builder who violates such a duty should justly be held accountable for the losses that his breach caused, whether they be physical harm or the diminution in the value of the house." *Id.* at 346, 384 S.E.2d at 737. In its holding, the Court rejected the application of the economic loss rule under the facts before it and concluded that "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage." *Id.* at 347, 384 S.E.2d at 737.

Implicit in the Court's analysis is the requirement that injury, whether physical harm or economic loss, must still be proven, and must have been caused by the defendant's negligence.

There is nothing in *Kennedy* that suggests that injury is presumed.<sup>10</sup> Plaintiff must prove that the alleged defects have resulted in physical or economic injury.

Plaintiffs have argued on many occasions that the presence of a code violation requires the strip and re-clad of the house. While this may be their position, it cannot be determined by the Court as a matter of law. The jury must find that this method of repair is reasonable in light of all of the facts and circumstances. See *Sea Side Villas II Horizontal Property Regime v. Single Source Roofing, Corp.*, 64 Fed Appx. 367, 374 (4th Cir. 2003) (citing *Scott v. Fort Roofing and Sheet Metal Works, Inc.*, 385 S.E.2d 826, 827, (1989) and *Coleman v. Levkoff*, 122 S.E. 875 (1924)). Those facts and circumstances will vary depending upon many factors specific to the individual house, for example whether there is only minor cracking or significant water damage with mold growth.

#### Causation in Fact

Causation in fact is proven by establishing the injury would not have occurred "but for" the defendant's negligence. When the cause of a plaintiff's injury may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing the defendant's conduct proximately caused his injuries. *McKnight v. S. Carolina Dep't of Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009). Causation is a question of fact that must be determined by a jury.

Proof of cause-in-fact places on the Plaintiffs the burden of proving with respect to every house, that but for the alleged breach of duty, the complained of injury would not have occurred. To do so, they must show that water infiltration has occurred, how water infiltrated the building

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<sup>10</sup> Presumed injury is recognized for causes of action that are not applicable here, eg. defamation *per se*. *Parrish v. Allison*, 376 S.C. 308, 321, 656 S.E.2d 382, 389 (Ct. App. 2007).

envelope, that SCSP was responsible for this cause and that there are no other causes unrelated to SCSP's scope of work. This cannot be accomplished looking only at the Grazias' house.

With regard to proximate cause and damages, Plaintiffs' experts also agree that they will have to do inspections/testing on each home in the putative class in order to be able to testify (1) whether there is any damage behind the stucco, (2) the extent of the damage, and (3) whether any of the damage was proximately caused by the installation of stucco (or some other issues).<sup>11</sup> Evidence obtained through the Right to Cure process and from the limited discovery that has been conducted indicate that there are many potential causative factors of stucco failures and water infiltration, with varying degrees of severity. This includes leaking windows, failed sealant joints, vent penetrations and lack of maintenance.

#### Consequential Damages

In their Complaint, Plaintiffs have alleged that homeowners suffered various types of damages including past costs of repair, future costs of repair, loss of use and diminution of value. By definition, these damages are specific to each homeowner, and not common to the group. For example, proof of diminution of value will require proof as to purchase price, current market value, prevailing market value, and many other house specific factors. There is no generalized formula that can be applied to calculate damages.

Although Plaintiffs contend that all houses must be stripped and reclad and that there is little variation in that cost, this is a question for the jury. In its defense, SCSP will present alternate scopes and methods of repair for those houses which may have been damaged as a result of defects in its work. Documents obtained from Pulte and Pinnacle prove that the cost of the repairs that have

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<sup>11</sup> A complete discussion of the expert testimony on this point is contained in SCSP's Initial Memo at pages 24-31.

been performed to date vary widely based on the degree of damage and the size and configuration of the house.

- C. The law is not common because the laws on joint and several liability and applicable Building Codes have changed over the 10-year period in which these houses were built.

Joint and Several Liability

The law applicable to class members whose houses were completed after July 1, 2005 is different from those built before. *See S.C. Code Ann. § 15-38-15*. As a result, Defendants are entitled to request that the jury apportion fault to other potential tortfeasors for all houses completed within the 25 months prior to July 31, 2007.

Building Codes

Building Codes are adopted by the local jurisdiction, and similar to municipal ordinances, the Court cannot take judicial notice of the Building Codes, instead they must be proven through evidence. *See Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 92-93, 344 S.E.2d 869, 872 (Ct. App. 1986). The homes in Sun City Hilton Head were constructed under an array of building codes and standards spanning from 1994 to the present, *see Standards Matrix at Attachment 1*. The Authority Having Jurisdiction (AHJ) for Sun City Hilton Head is the Beaufort County Inspection Department.

Below is a summary of the building code adoption history for Beaufort County.

October 11, 1993-1992	CABO One and Two Family Dwelling Code
October 23, 1995 -	1995 CABO One and Two Family Dwelling Code
June 10, 2002 -	2000 International Residential Code
July 1, 2005 -	2003 International Residential Code
May 1, 2010 -	2006 International Residential Code

In many instances, these Building Codes incorporate or refer to standards promulgated by industry groups and to manufacturer instructions. Two significant industry standards for

installation of stucco are ASTM C-926 and ASTM C-1063. During the construction of the subject homes, the following revisions of these standards existed during the period of construction.

ASTM C-926 Standard Specification for the Application of Portland Cement-Based Plaster

- 1994 Edition
- 1998 Edition
- 2006 Edition

ASTM C-1063 Standard Specification for the Installation of Lathing and Furring to Receive Interior and Exterior Portland Cement-Based Plaster

- 1994 Edition
- 1996 Edition
- 2003 Edition
- 2006 Edition
- 2008 Edition

Sun City Hilton Head provided the following information regarding the cement plaster rendering and the windows used for the homes.

*Cement Plaster Rendering*

1994 to January, 1998 -	Master Wall OCS (one coat stucco)
January, 1998 to January, 2002 -	Master Wall Three Coat Stucco (Cemplaster)
January, 2002 to May, 2005 -	Master Wall OCS
May, 2005 to April, 2007 -	Sto 005
April, 2007 to Present -	Master Wall OCS

*Windows*

1994 to 1999	Capitol series 650 and 680
1999 to 2000	Capitol series 3500
2000	Capitol series 650
2001 to Present	Capitol series 850 (new production of old models)
2006 to Present	Silverline series 2900 (new production of new models)

Based on these data, there are at least thirteen different building code/stucco material/window/stucco standards combinations that were utilized in homes at Sun City Hilton

Head.<sup>12</sup> The chart attached at Attachment 1 illustrates the myriad combinations that must be considered with respect to the 4300 houses in the purported class.

The Court will be required to charge the jury on the law that is applicable to this case. The law that must be charged must be that which is applicable to the house under consideration. For example, only the law applicable to the Grazias' house can be given to the jury in the *Grazia* case. To do otherwise would be a clear error of law and would hopelessly confuse the jury.

**II. THE FACTS AVAILABLE TO THE COURT CLEARLY DEMONSTRATE THAT THE CLAIMS AND DEFENSES APPLICABLE TO THE GRAZIAS ARE NOT TYPICAL OF EVERY OTHER ABSENT CLASS MEMBER.**

**A. The facts supporting the basic elements of Plaintiffs' claims are not typical of all other putative class members.**

As discussed above, the facts supporting Plaintiffs' claims in both negligence and warranty are not common because they are unique to each house and its owners. The same uniqueness defeats the requirement of typicality as well. Plaintiffs' claims are unique in the following particulars:

- The scope of work performed by SCSP
- The design criteria specified by the design professional
- The type of stucco system used and the manufacturer of the system
- The accessories and other wall assemblies used and the manner of integration into exterior cladding
- The age of the house
- Issues affecting the quality and character of the stucco materials used including sand, cement, and water mixture; cure times; exposure to sun and wind; thickness of various coats
- Other construction issues that may be the cause-in-fact of cracking and/or water infiltration, including unsuitable fill and compaction leading to settlement; improper

<sup>12</sup> See Expert Report of Larry Elkin App. B to Initial Brief.

wall framing; lack of kick-out flashings at roof-to-wall intersections; improper sealant of penetrations; and additions of sun-rooms

- Nature and extent of injury to the house, including deterioration of the exterior cladding; damage to other building components and interior finishes; damage to personal property; presence and effect of mold and other fungal growth
- Damages relating to cost of removing and replacing defective stucco materials; cost of repairing resulting damages to other property;
- Claims for loss of use and diminution in value which are necessarily affected by original purchase price; general and specific market conditions; desirability of house design elements such as access and security issues; overall condition of the property considering wear and tear and maintenance.

The lack of typicality created by the numerous variables and incalculable permutations is confirmed by the testimony of Robert Sisroy, one of Plaintiffs' defects experts. After inspecting more than 250 houses, Mr. Sisroy still lacked significant and critical information concerning both the houses he inspected and the other potential members of the class.<sup>13</sup>

**B. Challenges that will be made against the Grazias' proof, and the affirmative defenses that will be pursued, are specific to the Grazias, and therefore not typical of other putative members of the class.**

In its prior Memorandum, SCSP has detailed the various affirmative defenses that apply on an individualized basis and must be proven on an individualized basis. The affirmative defenses include the Statute of Limitations, which would completely bar the recovery of some homeowners; comparative negligence and failure to mitigate, which would reduce the ability of some homeowners to recover proven damages; and intervening/superseding negligence, which would cast liability on third-parties and bar recovery against SCSP.<sup>14</sup>

Similarly, challenges to the proof that will be offered by Plaintiffs will be made on an individualized basis. For example, as has been previously presented in the Initial Brief, Plaintiffs'

<sup>13</sup> See full discussion of Mr. Sisroy's expert opinions contained in Initial Brief at 25-26.

expert have testified that the Grazias have not experienced moisture intrusion into the house as a result of any of the defects listed in the class-definition, and thus cannot prove causation.

C. The Grazias' claims cannot be typical of all other claimants due to a class-action settlement involving MI Windows.

Many of the residences at Sun City have previously been the subject of a separate class action lawsuit that directly relates to the claims and defenses presented by the Grazias. In *In re M.I. Windows and Doors, Inc.*, MDL No. 2333; Case No. 2:12-cv-01297-DCN (D.S.C. Filed Mar. 11, 2013), owners of certain tape-glazed windows manufactured and sold by M.I. Windows and Doors, Inc. (hereinafter "M.I.") brought an action against the company alleging that a number of windows manufactured between 2000 and 2010 "contain defects that permit water intrusion, water penetration, and leakage . . . resulting in damage to the windows, adjoining finish, walls of the main structure, and the main structure . . . includ[ing] but not . . . limited to premature wood rot, and the formation of algae, mold, mildew, mineral deposits, and microbial growth at the location of the leaks, adjoining finish, and walls, as well as damage to the main structure." Master Complaint at ¶ 3, attached hereto at Exhibit 3. The parties settled this action and, in July 2015, the District Court approved final settlement and dismissed the case with prejudice.<sup>15</sup>

The approved settlement involved tape-glazed windows manufactured by M.I. between July 1, 2000 and March 31, 2010, and included many different models and series. Settlement Notice at pp. 4-8, attached hereto at Exhibit 5. Included in this settlement are 3500 series windows and the 650 and 680 series. *Id.* Del Webb utilized M.I. windows from the 3500 series in 1999-2000 and windows from the 650 and 680 series from 2000-2008 in its new construction. Thus, any homes in

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<sup>14</sup> A full discussion of these issues can be found in SCSP's Initial Brief at pages 37-43.

<sup>15</sup> A copy of the Settlement Order is attached hereto at Exhibit 4.

Sun City constructed during these time periods should have M.I. windows that are the subject of the class settlement in Lakes of Summerville.

These homes encompass a large portion of the proposed class. Of the 4168 homes in the proposed class for which this defendant has closing data, all but 337, or 92% of the homes in the class, were purchased during the dates covered in Lakes of Summerville settlement. Even assuming that it took a year for manufactured windows to find their way into the homes in the Sun City development, all but 606, or 85% of the 4168 homes in the proposed class for which closing data is available were purchased after July 1, 2001.

The Plaintiffs assert that common issues of fact for the class action include the lack of head-flashing and control joints around windows and doors of the homes in Sun City, which led to or will lead to water intrusion in these areas of the homes. However, the approximately 85% of homes that are subject to the class settlement in *In re MI Windows* will be subject to different defenses, including issues of proof of causation and proof of damages, than the remaining homes by virtue of the previously litigated existence of defects in the windows which allow water intrusion at these locations.<sup>16</sup> Depending on the date of the home's construction, the type of windows utilized, and the specific issues at each home, a significant portion of the homes at the development may have already been litigated. Likewise, depending on the date of the home's construction, the type of windows utilized, and the specific issues at each home, a significant portion of the homes at the development may already have had a remedy for water intrusion in certain parts of the home.

The determination of whether or not those damages fall within the purview of the *In re MI Windows* settlement is a fact intensive, home specific determination that cannot properly be

undertaken in the context of a class action proceeding. The existence of the *In re MI Windows* settlement is yet another example of the Plaintiffs' failure to show that the claims/defenses of the representatives are typical of the claims/defenses of the class as a whole. See Rule 23(a), SCRCF.

**III. THE TRIAL OF THIS CASE MUST NOT FORECLOSE THE DEFENDANT'S ABILITY TO DEFEND ITSELF.**

- A. Use of the class action format does not change the elements of proof or the availability of defenses.

The United States Supreme Court has repeatedly mandated that: "Rules of procedure shall not abridge, enlarge or modify any substantive right." *Ortiz*, 527 U.S. at 845 (quoting *Amchem Prods., Inc.*, 521 U.S. at 613; see also, *Broussard*, 155 F.3d at 345 (a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. . . . It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members.")).

Likewise, as explained by the Court in *Wal-Mart*, Rule 23 may not limit, alter or abridge any of a defendant's defenses as to each of the plaintiffs – namely, in this case, statute of limitations, contributory negligence, failure to mitigate damages, and intervening/superseding negligence of others.

The systemic urge to aggregate litigation must not be allowed to trump our dedication to justice, and we must take care that each individual plaintiff's - and defendant's - cause not be lost in the shadow of a towering mass litigation.

Although a goal of our system is to resolve lawsuits with "great expedition and dispatch and at the least expense," the supreme objective of the courts is "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." This means that "convenience and economy must yield to a paramount concern for a fair and impartial trial."

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<sup>16</sup> Further militating against a finding of commonality is the fact that in the responses to the Right to Cure questionnaires sent to homeowners in the alleged class, approximately 17% of the responses included comments about issues related to the windows or areas surrounding the windows.

And basic to the right to a fair trial - indeed, basic to the very essence of the adversarial process - is that each party have the opportunity to adequately and vigorously present any material claims and defenses.

*Henry*, 102 S.W.3d at 693--95 (Tex. 2002) (internal citations omitted); *see also Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998) (finding that the class action device does not "alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon) or the identity of the substantive law").

A. "fair trial" in this case will require that SCSP have the right to conduct merits discovery, the right to challenge and counter Plaintiffs' proof at trial, and to offer its own evidence in its case-in-chief. If any of these rights are abridged through an expedited or truncated trial, SCSP's due process rights will have been violated.

B. Sampling is not a permissible substitute for proof.

Plaintiffs are essentially relying on a sample of one to prove their case in chief and impermissibly seek to limit SCSP to the same sample. The error of this approach is obvious. The Supreme Court in *Wal-Mart* ruled that the trial court's suggestion that the class claims could be resolved by looking at "a sample set of the class members" and then multiplying "by the average" to "arrive at the entire class recovery - without further individualized proceedings . . ." was error. 564 U.S. 338, 367, 131 S.Ct. 2541, 2561 (2011). The Supreme Court stated as follows:

We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); *see Ortiz*, 527 U.S., at 845, a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.

*Id.*

Like the defendant in that case, SCSP is entitled to individual determinations as to each putative plaintiff. Because the elements and facts of both the alleged claim and the affirmative defenses vary widely among the claimants, individual proof is required.

**C. SCSP is entitled to challenge Plaintiffs' proof and establish its affirmative defenses at an individual level.**

In *Wal-Mart v. Dukes*, the U.S. Supreme Court reversed the certification of a class where the District Court would not allow the defendant to present individual proof or individual defenses to every putative class member's claim. 564 U.S. 338, 131 S.Ct. 2541 (2011). Preserving the ability of defendants to challenge the proof of Plaintiffs' claims and to litigate defenses has been critical in the decisions of the courts of other states and in other federal districts.

For example, the Supreme Court of California defended the rights of litigants to present individual defenses in *Granberry v. Islay Investments*, 889 P.2d 970, 976 (1995) ("it is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen.") In *Duran v. U.S. Bank National Association*, the Supreme Court of California reversed the trial court's decision to certify a wage and hour class action because "a trial must allow for the litigation of affirmative defenses, even in a class action where the defense touches upon individual issues." 325 P.3d 916, 934 (2014).

Defenses that raise individual questions about the calculation of damages generally do not defeat certification. However, a defense in which liability itself is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability. This distinction is important. As we observed in *City of San Jose v. Superior Court*, 525 P.2d 701: 'Only in an extraordinary situation would a class action be justified where,

subsequent to the class judgment, the members would be required to individually prove not only damages but also liability.'

*Id.* at 936.

"While class action defendants may not have an unfettered right to present individualized evidence in support of a defense, our precedents make clear that a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." *Duran*, 325 P.3d at 936 (emphasis added).

The California court cited to *Dukes*, holding that the trial court could not abridge defendant's presentation of an exemption defense simply because the defense was cumbersome to litigate in a class action. *Duran*, 325 P.3d at 935.

The Supreme Court of Texas reversed a grant of class certification. *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000). The court concluded that the state's class action procedural rule was not a superior method to other available methods for a fair and efficient adjudication because the defendant was "entitled to a fair opportunity to individual determinations of causation and damages for each of the 904 plaintiffs" *Id.* at 437. The court recognized that

Plaintiffs may indeed be able to present their case in an expeditious manner. Likewise [defendant] may choose to present a timely and efficient defense, making arguments and presenting evidence on only a generalized, class-wide basis. But, while [the defendant] may not be entitled to separate trials, it is entitled to challenge the credibility of and its responsibility for each personal injury claim individually."

*Id.* The Texas court concluded that "[t]he plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. By removing individual considerations from the adversarial process, the tort system is shown of a valuable method for screening out

marginal and unfounded claims. In this way, class certification magnifies and strengthens the number of unmeritorious claims." *Id.* at 438

Here, while Plaintiffs may contend that the presentation of their case in chief will be brief and focus only on the three class-wide issues, SCSP is entitled to present a full-throated defense based on the individualized nature of the claims and the defenses.

**IV. PROTECTING THE DUE PROCESS RIGHTS OF BOTH THE ABSENT CLASS MEMBERS AND THE DEFENDANT WILL RESULT IN AN UNWORKABLE TRIAL.**

**A. The Court's first obligation is to protect the Due Process rights of the litigants.**

The temptation to certify a class based on concerns of expediency must be avoided by this Court. As recognized by other courts facing similar problems, "The systemic urge to aggregate litigation must not be allowed to trump our dedication to justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir.1992). The Texas Supreme Court wisely stated that:

The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort. Although a goal of our system is to resolve lawsuits with "great expedition and dispatch and at the least expense," the supreme objective of the courts is "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." This means that "convenience and economy must yield to a paramount concern for a fair and impartial trial." *In re Ethyl Corp.*, 975 S.W.2d at 613. And basic to the right to a fair trial—indeed, basic to the very essence of the adversarial process—is that each party have the opportunity to adequately and vigorously present any material claims and defenses."

*Southwestern Refining Co., Inc.*, 22 S.W.3d at 438.

Any ruling by this Court that favors the efficiency of trial over the substantive rights of the litigants will run afoul of the purpose of the rule itself and deprive the litigants due process.

**B. SCSP must be permitted to offer all relevant evidence**

Relevant evidence in this case includes all evidence that tends to support or rebut Plaintiffs' claims, the claims of the absent class members, and the defenses asserted by SCSP. For example, the existence of defects and damage at each house has been denied by SCSP and must be proven. Evidence regarding the cause of stucco cracks and the resulting damage to the property is relevant to the claims of each individual homeowner must therefore be proven. SCSP contends that many homeowners were aware of problems with the exteriors of their home prior to June 2004. Evidence that supports contention is relevant to the individual claims. Failure to allow such evidence will be erroneous and substantially prejudice SCSP's defense.

On the other hand, evidence of the condition of the Grazias' home IS NOT relevant to prove the condition of any other house. Evidence that the Grazias have no moisture damage at their house is not relevant to whether others houses do or do not have such damage. Evidence that the Grazias knew or should have know about problems with the construction of their home as early as 2002 is not relevant to whether any other homeowner had similar knowledge. Allowing evidence of facts irrelevant to the claims of individual claimants is also erroneous and is highly prejudicial to claimant, as well as SCSP.

In its essence, this case is a single-family residence construction defect case. Cases like this have been tried scores of times in our court system. The pattern of evidence that is routinely offered and admitted in these cases is predictable. Following is a list of the types of documents and testimony that will be offered as to every house in the class.

**Typical Documents:**

- Contract between SCSP and Pulte
- Purchase Contract between original purchaser and Pulte
- Design drawings
- Manufacturer's details, specifications, and instructions
- Construction/Job files of SCSP and Pulte
- Building Codes
- Building Permit
- Certificate of Occupancy
- Third-Party home inspections
- Sales contracts
- Appraisals
- Repair records and photographs
- Correspondence between owner and Pulte
- Expert inspection data
- Repair estimates
- RTC responses

**Expected Witnesses:**

- Current homeowner (1-2)
- Original homeowners (1-2)
- Other homeowners (1-2)
- SCSP Representatives (1-2)
- Pulte Representatives (3-4)
- Architect (1)
- Stucco Manufacturer representative (1-2)
- Window Manufacturer representative (1)
- Real Estate Agents (1-2)
- Appraisers (1-2)
- Third-Party Inspectors (1-2)
- Repair Contractors (1-2)
- Expert witnesses (4-5)

**C. There is no feasible way to protect the due process rights of all the litigants in an aggregated trial.**

Plaintiffs' are essentially proposing the aggregation of 4300 individual claims. Given the vast number of individualized issues that cannot be avoided, there is no way to present this case to a trier of fact as a single question.

**1. Consider the presentation of issues.**

The presentation of claims and defenses, and the decisions on liability and damages cannot be presented in isolation from each other. Under Rule 42(b), SCRPC, "a trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in injustice." *Fortune v. Gibson*, 304 S.C. 279, 281, 403 S.E.2d 674, 675 (Ct. App. 1991) (emphasis added). To avoid the possibility of inconsistent verdicts, bifurcated trials are not permissible when the issues to be tried in each overlap. *Flagstar Corp. v. Royal Surplus Lines*, 332 S.C. 182, 189, 503 S.E.2d 497, 501 (Ct. App. 1998), *rev'd on other grounds*, 341 S.C. 68, 533 S.E.2d 331 (2000).

In this case, bifurcation is inappropriate because there is substantial overlap between class-wide issues and non-class-wide issues. For example, some of the defendants' key defenses are that the alleged design defects are not defects at all based on the applicable building codes and manufacturers' instructions. These codes and instructions do not apply "class-wide" because the proposed class involves numerous iterations of the building codes and multiple stucco manufacturers. But it would be grossly unfair to conduct a trial on liability in which the defendants were precluding from introducing these defenses because they go to the most basic element of Plaintiffs' negligence claims – whether a duty was breached. Notably, these are not affirmative defenses, as they go to whether Plaintiffs have proved the elements of the causes of action alleged, not whether the defendants are free of liability despite Plaintiffs' proving those

elements. Thus, they cannot fairly be separated from Plaintiffs' presentation of their case on liability.

For another example, the statute of limitations, while an affirmative defense, looms so large in this case that it cannot properly be separated from the merits of Plaintiffs' claims. Many of the houses at issue were built much more than 3 years before this lawsuit was filed. This fact, coupled with Plaintiffs' contention is that the alleged design defects were observable as soon as the houses at issue were completed, creates a serious statute of limitations problem for many, if not all, of the putative class members. In light of the significance of the statute of limitations defense and its universal or near-universal application, it would be unjust and inefficient to conduct an entire trial on so-called "class-wide" issues without reference to the statute of limitations, only to then eliminate or vastly reduce the class on statute of limitations grounds at a subsequent trial.

In the same vein, the Defendant will demonstrate that numerous class houses have no damage to the stucco at all. Because damage is an element of a negligence claim, the lack of damage goes to the heart of whether Plaintiffs can prove their claims. It would be deeply unfair to conduct a trial on "class-wide" damages, as Plaintiffs propose, without allowing the jury to see that there are a vast number of class houses with no damage at all. Indeed, it is difficult to fathom how one jury could award "class-wide" damages, while another jury would adjudicate issues of "individual" damages, as Plaintiffs' propose. Any such process would necessarily involve inconsistent damages results between the two juries, which is the very thing that Rule 42(b), SCRCP prohibits. Indeed, inherent in the constitutional right to a jury trial is the principle that the same issue cannot be re-examined by two juries. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) ("The right to a jury trial . . . is a right to have jurable

issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." (emphasis added)). It would therefore be unconstitutional to have one jury award "class-wide" damages subject to re-examination by a jury awarding "individual" damages.<sup>17</sup> Put simply, since damages are an element of Plaintiffs' causes of action, they must be evaluated *in toto* by the jury determining liability, and damages cannot be "bifurcated" between two juries; any other process guarantees inconsistent results.

2. Consider the length of time required.

By any fair estimate, the presentation of evidence for each claim will take four to five days. There is no possibility of seating a jury that can hear all of the claims.

3. Consider the jury instructions.

As discussed above, there are multiple building codes that must be considered by the jury in determining the standard of care. Because these are embodied in local ordinances, the Court must charge the jury on all applicable provisions and the multiple variations. In addition, the law applicable to the joint and several liability differs among the claimants, so the jury must be instructed as to both.

The length of the jury charge on these two issues, as well as its enormous complexity, will undoubtedly confuse the jury.

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<sup>17</sup> Although *In re Rhone-Poulenc* addresses the right to a jury trial in federal court under the Seventh Amendment to the Constitution of the United States, the same right is guaranteed in state court under the South Carolina Constitution. S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate.").

4. Consider the verdict form

As to every claimant, the jury will have to decide whether the claim has been proven, the measure of damages to be awarded, and whether any of the affirmative defenses have been proven. In addition, because some of the cases are governed by the new joint and several liability statute, the jury will have to consider allocation of fault as to SCSP and all un-named tort feasons. Completing these forms will be a daunting task and require an immense number of hours of deliberation.

CONCLUSION

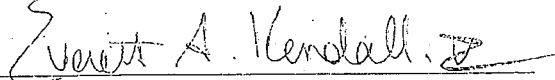
As fully described above, this is not one of the "rare" cases where certification of a class of homeowners in a construction defect case is appropriate or advisable. To the extent not explicitly argued here, SCSP adopts all arguments of Del Webb/Pulte. Plaintiffs cannot satisfy the requisites of Rule 23 and certifying a class on any issue will not promote efficiency or justice. If attempted, class certification will prevent Due Process for the absent class members as well as the defendants because a trial is impossible. Plaintiffs' Motion to Certify a Class should be denied.

[Signatures on following page.]

*Defendant's Supplemental Memorandum of Law in  
Opposition to Class Certification  
2007-CP-07-1396*

Respectfully submitted,

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August 1, 2016

CERTIFICATE OF SERVICE

I, the undersigned Legal Assistant of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for South Carolina State Plastering, LLC, do hereby certify that I have served a copy of the foregoing Memorandum in connection with the above-referenced case by mailing a copy of the same by FedEx, to the following address(es):

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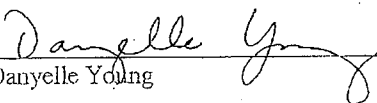
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August 1, 2016



carried their burden of demonstrating that all five requirements of Rule 23(a), SCRPC have been met. As discussed in greater detail below, this Court denies Plaintiffs' Motion for Class Certification as Plaintiffs have failed to establish each prerequisite of Rule 23(a), SCRPC. This Order denying Plaintiffs' Motion for Class Certification is supported by the record in this case, including arguments presented by Defendants through filed pleadings, evidentiary submissions and memoranda, as well as presentations at oral argument.

### FACTS

This case arises out of alleged settlement of homes in two neighborhoods in the Foxbank Subdivision, in Moncks Corner, South Carolina. This Court is presented with a potential class involving an unspecified number of separate single family residences with a number of individual differences including: different sizes and types of homes, different floor plans and foundations, different subcontractors that built the homes, different current conditions of the homes, and different repair scopes and costs.

The proposed class identified by Plaintiffs includes:

All persons and entities that own slab on grade structures constructed by Dan Ryan Builders, Inc. and/or Dan Ryan Builders South Carolina, LLC located on Springbank Ct., Freeland Way, Waccamaw Circle, and/or Pendleton Dr. in the Foxbank subdivision in Moncks Corner, South Carolina.<sup>1</sup>

The potential class actually includes homes in two separate and distinct neighborhoods of the broader Foxbank subdivision in Moncks Corner, South Carolina: the Erwinton neighborhood and the Springbank neighborhood. The Erwinton neighborhood spans 11.22 acres and contains

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<sup>1</sup> Plaintiffs have also proposed to exclude from the proposed class: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and their legal representatives, assigns, and successors of Defendants and Defendants' current or former employees, investors, members, or officers, and (c) all persons who properly execute and file a timely request for exclusion from the class.

*CO #2*

Springbank Court and Freeland Way. The separate Springbank neighborhood, which is adjacent to Lake Foxbank, spans 17.02 acres and contains Waccamaw Circle and Pendleton Drive.

Seven different models or house-types were constructed by Dan Ryan Builders South Carolina, LLC ("DRB SC") in Erwinton and Springbank, which ranged in square footage from 1,453 to 2,535 square feet. While DRB SC served as the general contractor for the homes in the proposed class, DRB SC did not self-perform any work and there was not a common subset of subcontractors that constructed all the homes for DRB SC in Erwinton or Springbank. Rather different subcontractors, including the other named Defendants, performed work on different homes. For instance, there were at least three different engineers that designed the homes, two different geotechnical firms that evaluated the soils and fill material, eight different framers, three different grading contractors, five different foundation/concrete subcontractors, multiple concrete suppliers, and three different drywall installers. None of the homes alleged to be included in the proposed class were constructed by all of the named Defendants. The exact number of homes each subcontractor worked on is still under investigation as discovery is ongoing.

However, evidence to date suggests the following. AC&A Concrete, Inc., a concrete subcontractor, worked on some of the homes within the two (2) different neighborhoods, but it is unclear how many of those homes are alleged to have problems. Firm Foundations, Inc. was a concrete subcontractor that poured slabs and driveways only some of the homes in the neighborhood, one of which has been repaired to the owners' satisfaction in exchange for a full release. Southern Atlantic Construction, LLC was a different concrete subcontractor that provided labor and materials for concrete foundations, driveways, and walkways on only thirteen (13) homes in the two neighborhoods. Southern Atlantic Construction, LLC subcontracted with Better Concrete Contractors, Inc. to lay slabs and other concrete work on those thirteen (13)

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homes. Records produced by Southern Atlantic Construction, LLC show that DRB SC hired Southern Atlantic Construction to provide concrete on only eight (8) homes in the Springbank neighborhood and on only five (5) homes in the Ewinton neighborhood.<sup>2</sup> Moreover, none of the thirteen (13) homes worked on by Southern Atlantic Construction, LLC and Better Concrete Contractors, Inc. are owned by the former proposed class representative Richard Dickerson (hereinafter "Dickerson") or the current proposed class representative Cynthia Page-Richardson (hereinafter "Richardson").

DRB SC began constructing homes in the Erwinton neighborhood of Foxbank in early 2011. DRB SC was first notified of potential damage due to alleged settlement in 2013. DRB SC then sent a letter on September 12, 2013 to every home owner in the two neighborhoods requesting that DRB SC be notified if any owners experienced issues so that any issues could be addressed. In response thereto, approximately nineteen (19) homeowners contacted DRB SC.

DRB SC then engaged Rickborn & Associates, Inc., a structural engineering firm, to assess all homes whose owners notified DRB SC of potential damage. Timothy Rickborn, MS, PE, has concluded that twelve (12) homes had some minor workmanship issues within the interior of each home. DRB SC repaired all workmanship issues noted in Mr. Rickborn's reports for eleven (11) homes, not including the minor workmanship issues observed in Richardson's residence.<sup>3</sup> Mr. Rickborn also concluded that seven (7) homes, including Dickerson's home, appeared to have minor to moderate differential settlement in certain areas. DRB SC performed repair work on six (6) of those seven (7) homes pursuant to Mr. Rickborn's recommendations and obtained releases

<sup>2</sup> The 13 lots for which Southern Atlantic Construction provided labor and materials include: Lot 7.0003 - 509 Pendleton Dr.; Lot 7.0002 - 507 Pendleton Dr.; Lot 7.0019 - 185 Waccamaw Cir.; Lot 7.0021 - 181 Waccamaw Cir.; Lot 7.0023 - 177 Waccamaw Cir.; Lot 7.0016 - 118 Waccamaw Cir.; Lot 7.0015 - 116 Waccamaw Cir.; Lot 2.0028 - 119 Springbank Ct.; Lot 2.0027 - 121 Springbank Ct.; Lot 2.0032 - 111 Springbank Ct.; Lot 2.0034 - 107 Springbank Ct.; Lot 7.0017 - 172 Waccamaw Cir.; and Lot 2.0033 - 109 Springbank Ct.

<sup>3</sup> Richardson did not allow DRB SC to perform repairs to her home.

from those homeowners. Out of the nineteen (19) homeowners who reported issues to DRB SC, seventeen (17) were repaired: Two (2) were not repaired before this action was filed, those two being the named Plaintiffs - Richardson and Dickerson. Plaintiffs have not presented any expert opinions or other investigative findings from their experts related to the alleged damages they claim.

### PROCEDURAL HISTORY

The current action was initially filed on April 23, 2014 against Dan Ryan Builders, Inc. and Dan Ryan Builders South Carolina, LLC. On December 8, 2014, DRB SC filed a third-party complaint against all other current Defendants except Better Concrete Contractors, Inc., who was subsequently brought into the current action by Southern Atlantic Construction, LLC per its third-party Complaint. On February 25, 2015, Plaintiffs amended their Complaint to add claims directly against A.C.&A. Concrete, Inc.; BR's Clearing and Grading, Inc.; Firm Foundations, Inc.; Land/Site Services, Inc.; Southern Atlantic Construction, LLC; and Volkmar Consulting Services, LLC. On June 8, 2015, Plaintiffs filed their Second Amended Complaint to add claims directly against Better Concrete Contractors, Inc. Plaintiffs filed the current Motion for Class Certification on July 11, 2016. All Parties consented to the hearing before the Honorable G. Thomas Cooper, Jr. in the Court of Common Pleas for Charleston County, South Carolina. As represented at hearing and in their Memorandum, Plaintiffs' counsel has moved to appoint only Plaintiff Cynthia Page-Richardson as the class representative.

### LEGAL STANDARD

Parties seeking class certification bear the burden of proving five prerequisites under South Carolina law. Rule 23(a), SCRCF; Waller v. Seabrook Island Property Owner's Ass'n, 300 S.C.

465, 467, 388 S.E.2d 799 (1990). A class may be certified only if all prerequisites under Rule 23(a), SCRPC are satisfied. The court must find:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class; and,
- (5) the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRPC. In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied. Waller at 467 citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed. 2d 740 (1982). The burden in proving the five prerequisites under South Carolina law rests with the plaintiffs. Waller at 467. "The failure of the proponents to satisfy any one of the prerequisites is fatal to class certification." Gardner v. S.C. Dept. Rev., 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). A trial judge's ruling on whether an action is properly maintainable as a class action is within his or her discretion. Waller at 468. The class action was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Califano v. Yamasak, 442 U.S. 682, 700-01, (1979). This exception is not warranted here.

#### ANALYSIS

##### I. Plaintiffs' Fail to Meet the Prerequisites of Rule 23, SCRPC.

##### A. Plaintiffs fail to meet the numerosity prerequisite of Rule 23.

Rule 23(a)(1), SCRPC, requires that the class be so numerous that joinder of all members is impracticable, known as the numerosity requirement. The topic of numerosity has not been overly discussed by South Carolina courts, thus, there has not been a definitive ruling in this state on the requisite number of parties to satisfy the numerosity element of Rule 23. However, the importance of the numerosity requirement should not be overlooked, as all members of the class

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will be bound by the judgment. Ripsey v. Denver U.S. Nat. Bank, 260 F. Supp. 704, 712 (D. Colo. 1966).

"Practicability of joinder depends on the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined in the action, and their geographic dispersion." Lott v. Westinghouse Savannah River Co., 200 F.R.D. 539, 550 (D.S.C. 2000) (quoting Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878, (11<sup>th</sup> Cir. 1986)). "No bright line test exists for determining numerosity; instead, the determination rests on the court's practical judgment in light of the particular facts of the case." Id. However, Plaintiffs do have a burden to demonstrate that the proposed class size makes it impracticable for class members to bring individual actions. The mere speculation of counsel and conclusory assumptions and allegations with respect to the size of the class is insufficient to satisfy the numerosity requirement. Lloyd v. Industrial Bio-Test Labs, Inc., 454 F.Supp. 807 (D.C.N.Y. 1978). The proponent of certification must provide sufficient reliable information from which the approximate number of class members can be ascertained before a court can find joinder impracticable. Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D.C. Del. 1974). Moreover, "[a] small class militates against certification." CL-Alexanders Lain & Cruickshank v. Goldfield, 127 F.R.D. 454, 456 (S.D.N.Y. 1989).

Here, Plaintiffs have not identified by name or address any potential member of the class other than the two named Plaintiffs, but have instead simply stated at the hearing that the class will consist of forty-four (44) homes on four streets in the Erwinton and Springbank neighborhoods.<sup>4</sup> Plaintiffs have not provided sufficient investigative findings or expert reports demonstrating a justification for class certification. Defendants have produced competent evidence that only seven

<sup>4</sup> Plaintiffs had previously stated that the class consisted of 38 homes on four streets in Foxbank. (Pls.'s Answers to Dan Ryan Builders Inc. and Dan Ryan Builders South Carolina, LLC's First Set of Interrogatories; pp.13-14).

(7) homes have suffered minor to moderate settlement damage. Timothy Rickborn, MS, PE has investigated nineteen (19) homes and his findings, unrefuted by Plaintiffs' retained experts, demonstrate that only seven (7) homes have minor to moderate settlement damage, six (6) of which have been repaired and given releases to DRB SC.<sup>5</sup> In addition, Richardson, the proposed class representative, could only name six potential class members other than herself, including Dickerson.

Rather than identifying the number of parties, the identity of those parties, or the specific addresses at issue, Plaintiffs have only provided an estimate of the number of homes that may be involved. Furthermore, Plaintiffs' estimated number of potential class members continues to be a moving target. Plaintiffs' counsel represented at the hearing that the class consists of forty-four (44) homes. However, Plaintiffs' Memorandum in Support of its Motion itself provides inconsistent estimates for the potential number of class members: "Foxbank consists of approximately forty-six homes"; "there are at least seventeen owners, and likely ninety owners, or more ... of Foxbank homes constructed by Dan Ryan, all of whom will qualify as class members" ; and, "[g]iven that the proposed class will likely range from forty-five to ninety class members." Such speculation concerning the number of parties within the proposed class constitutes mere conjecture and does not meet the burden required to satisfy the numerosity requirement.

Moreover, Plaintiffs have failed to set forth evidence that the joinder of the parties would be impracticable. In fact, the proposed class representative, Richardson, admitted in her deposition testimony that it was not difficult to get all of the interested owners in the neighborhood together in one room.

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<sup>5</sup> DRB SC hired Rickborn and Associates, LLC to perform an inspection of all homes whose owners notified DRB SC of potential settlement damage.

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In their Memorandum, Plaintiffs also make an economy of scale argument in favor of class certification, stating that "the Foxbank homeowners do not have the ability to bring their own claims because of the significant efforts and financial resources required to pursue defect-related litigation on a piece-meal basis." However, even if a class were to be certified, a separate structural analysis must be performed on every single home that is a member of the purported class to determine both causation and the scope of repair, if any. The purported class is comprised of separate, unique, and individual properties, proof that one may have suffered settlement damage by no means proves that other homes have suffered settlement damage. The fact that separate structural analyses must be performed on every single member of the purported class contradicts the economy of scale argument and weighs heavily in favor of joinder as opposed to class certification.

Plaintiffs rely on Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, and Philadelphia Elec. Co. v. Anaconda Am. Brass Co., for the proposition that classes as small as 18 and 25 are sufficient for the numerosity requirement. As the U.S. District Court in Goldfield noted, however, those are exceptional cases. The Goldfield Court noted that in almost all cases involving small class sizes, "the courts cited special circumstances warranting certification despite the small class size." Goldfield, 127 F.R.D. at 456. In Cypress, the court noted that the number of applicants to positions (*i.e.* the proposed class), was small because of the hospital's "notorious discriminatory policy" and that individuals feared "possible reprisals should they seek to attain their rights." *Id.* In Philadelphia, relating to antitrust litigation, 25 individuals made "substantial purchases", but there were at least 43 possible members of the class. *Id.* This Court finds that Plaintiffs have presented no evidence of any such exceptional circumstances here.

For these reasons, Plaintiffs do not meet the numerosity prerequisite of Rule 23, SCRC.P.

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**B. Plaintiffs fail to meet the commonality prerequisite of Rule 23.**

To establish commonality, a party must show that "there are questions of law or fact common to the class." Rule 23, SCRCF. In other words, a party must set forth the existence of "significant common, legal, or factual issues" which bind the proposed class together. Gardner, 353 S.C. at 20-22, 577 S.E.2d at 200-01 (quoting Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 64 (S.D. Ohio 1991)). "A court determines the existence of commonality among defendants by examining the plaintiffs' claims and the defendants' anticipated defenses." Gardner, 353 S.C. at 22, 577 S.E.2d at 201. Class certification is not appropriate where factual differences are the crux of a predominant legal issue. Id. For example, "[a] representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominant issues in the case." Id. "[A] representative plaintiff cannot establish commonality . . . if the court must investigate each plaintiff's individual claim." Id. (quoting Peoples v. Wendover Funding Inc., 179 F.R.D. 492, 498 (D. Md. 1998)). Requiring such individualized examination negates the benefits of a class action suit." Gardner, 353 S.C. at 22, 577 S.E.2d at 201. "The very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action." O'Quinn v. Beach Associates, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978).

While not controlling authority, other jurisdictions have noted that due to the variables particular to "unique" parcels of land, "single-family residence construction defect cases will rarely be appropriate for class action treatment." Shuette v. Beazer Homes Holdings Corporation, 124 P.3rd 530, 542-43 (Nev. 2005). "[W]here specific characteristics of different land parcels are concerned, these uniqueness factors weigh heavily in favor of requiring independent litigation of the liability to each parcel and its owner." Id. at 543 (internal quotation marks omitted). In addition, "[e]ven when the uniqueness of the real property is not substantially implicated,

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constructional defect cases relating to several different properties are often very complex, involving allegations between numerous primary parties and third parties concerning different levels or types of property damage." *Id.* "[R]ecovery in such cases often 'implicate[s] a myriad of 'house specific' issues, including . . . the type of repair needed on each house[.]'" *Id.* (quoting *In re Stucco Litigation*, 175 F.R.D. 210, 215 (E.D.N.C. 1997)). Further, individualized proof regarding damages determinations may make proceeding with a class unmanageable, particularly where it would require mini-trials for every single class member. *See id.* "For these reasons, courts in other jurisdictions are seldom able to conclude that common questions predominate over individual questions and that any remaining individual questions would be manageable, and so they have consistently refused to certify class actions premised on construction defects in single-family homes." *Id.*

This Court finds that the case at hand fails to present any predominating dispositive issue within the putative class which satisfies the commonality element of Rule 23. The subject subdivision has seven different home designs. Within those seven designs are different types of foundations, alternative framing configurations, wide ranging square footage options, and numerous other variations exist. In addition, the ownership interests presented by the proposed class also vary. Further, the contracts of sale for the owners that purchased from DRB SC also vary in that several owners are, or may be, subject to arbitration provisions.

Further, this court finds that Plaintiffs have also failed to present evidence of where common conditions exist within the homes of the prospective class. Proposed class representative Richardson admitted that she was not aware of foundation cracks in the homes in any of the specific owners she could remember. Aside from the homes that have been fully repaired by DRB

SC, Richardson has observed only six homes, five of which she said had no foundation cracks and one of which only had a crack in the front patio (not the foundation).

Plaintiffs contend that there are three questions common to the claims of each class member: "(1) whether Foxbank homes contain latent defects; (2) whether defendants contributed to the Foxbank homes' defective condition; and (3) whether the Foxbank homes' defective condition proximately caused the resulting damage." Although couched as "common questions," each of the purported common questions involves the need for individualized proof. For instance, one cannot determine whether Foxbank *homes* contain latent defects without investigating and providing proof as to the condition of each individual home. That question cannot be determined on a class-wide basis and without individual proof. Just because one home has suffered a latent defect does not lead to the conclusion that all homes have suffered latent defects. Particularly where, as here, the homes are situated on individual, separate lots and there are at least six different home designs, alternative framing configurations, and differing square footage options, among other variations.<sup>6</sup>

The second and third "common questions" offered by Plaintiffs, likewise, require individualized proof of causation. One cannot determine whether (or which) defendants contributed to a defective condition in a home or proximately caused damage to that home on a class-wide basis. The very nature of those issues are lot-specific and require an examination and proof from each individual home. Indeed, these are the very reasons that courts in other

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<sup>6</sup> In their Memorandum and at hearing, Plaintiffs' base their position primarily on pleadings filed by Dan Ryan Builders South Carolina, LLC and Dan Ryan Builders, Inc. in a separate declaratory judgment action against their insurer. This Court does not find that positions taken in that action are dispositive in determining whether it is proper to certify a class action in the current lawsuit, and they do not relieve the Plaintiffs of otherwise meeting their burden with respect to all prerequisites under Rule 23, SCRPC. In addition, none of the other defendants in the current lawsuit were parties to that prior declaratory judgment action.

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jurisdictions have consistently refused to certify class actions premised on construction defects in single-family homes.

Plaintiffs also contend that their claims arise from a common nucleus of facts, more particularly, that the homes were commonly constructed, using the same construction plans, the same materials, and the same contractors. Plaintiffs have provided no evidence that the homes were constructed using the same plans, materials, and contractors. In fact, although DRB SC served as the general contractor for the homes at Foxbank, the construction of the homes was not performed by a single subset of the same subcontractors. Instead, different homes had different subcontractors performing the work. This results in each home being uniquely constructed. As a result of these differences, in the instances where construction issues have actually been found, the specific cause has not been determined. One cannot simply assume that a crack in drywall or a nail pop is the result of settlement as opposed to workmanship. That is to say, issues of fault and causation must be decided on an individual basis, and not by a class-wide blanket determination.

Plaintiffs have further argued that the structural settlement issues experienced by some owners were the result of poor civil site engineering and/or soil compaction throughout the development. If this were true, it belies their contention that it is appropriate to include other trades, such as concrete subcontractors that worked on only a handful of homes, in a class action. In other words, if the alleged common thread is the site preparation, it is inequitable for Defendants who were not involved in that aspect of construction to be included in the class action suit. The result of doing so would be that the Court and the jury would bear the burden of deconstructing the class into individual claims for purposes of calculating damages and allocating fault amongst the Defendants. The required complexity of such an anticipated verdict form alone is a signal to this Court that class certification is not appropriate in this case.

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Further, the contracts of sale for the owners that purchased from DRB SC also vary in that several owners are, or may be, subject to arbitration provisions. DRB SC's motion to compel arbitration with respect Dickerson and Richardson were denied on the basis that they did not comply with the South Carolina Arbitration Act. (i.e. they did not have the proper notice on the first page of the agreement.) However, at least sixteen (16) homeowners in the Erwinton and Springbank neighborhoods have arbitration clauses that are different than those in Dickerson and Richardson's contracts and which arguably meet the statutory requirements. For those homeowners, the agreements of sale clearly state, on the first page underlined and in bold and all caps, that "This Agreement is Subject to Binding Arbitration Pursuant to the South Carolina Uniform Arbitration Act (S.C. Code Ann. § 15-48-10 et seq., as amended)", as required by South Carolina's Arbitration Act.

Plaintiffs have not presented questions of law or fact common to the class or identified "significant common, legal, or factual issues" which bind the proposed class together. Instead, Plaintiffs have presented mere allegations, unsupported by evidence, that are insufficient to establish commonality under Rule 23, SCRPC. The essence of a class action is common questions of law and fact, and Rule 23(a)(2) reflects this. McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986) quoting H. Lightsey & J. Flanagan, South Carolina Civil Procedure at 171, 190 (2d ed. 1985). Plaintiffs have not established the common nature of their relationship with Defendants nor have they identified the common legal or factual issues that exist between purported class members sufficiently to support certification of a class. Instead, the nature of the claims Plaintiffs are pursuing include a number of differing legal issues and varying factual circumstances related to their individual claims, which, ultimately, creates disparity among claims

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und defeats the requirement of commonality in this case. In the absence of properly demonstrated "commonality" amongst the purported class members, Plaintiffs' Motion is denied.

**C. Plaintiffs fail to meet the typicality prerequisite of Rule 23.**

According to Rule 23(a)(3), SCRCP, the claims of the representative parties must be typical of the claims of the class. To establish the typicality requirement, the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Cl. App. 2011). "The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." Deiter v. Microsoft Corp., 436 F.3d 461, 466-67 (4th Cir. 2006). "For that essential reason, plaintiff's claims cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." Id.

The typicality requirement focuses on the characteristics of the would-be class representative. Typicality entails consideration of whether the plaintiffs can prove they have been injured by the same conduct as has injured other class members and whether plaintiffs' claims are based upon conduct that is not unique to the named plaintiffs. Osgood v. Harrah's Entertainment, Inc., 202 F.R.D. 115, 124 (D.N.J. 2001). This court finds, as discussed below, Plaintiffs fail to satisfy these requirements.

This Court was provided minimal evidence by Plaintiffs as to who the other potential class member homeowners might be or the condition of their homes. However, a brief review of portions of the testimony of Dickerson and Richardson reveals their claims are dissimilar to each other. In particular, the testimony from former proposed class representative Dickerson made it clear that he believed his home and resulting damage are different than the other putative class members. That is to say, proposed class representative Richardson and former proposed class

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representative Dickerson's claims are themselves not even similar to each other. Plaintiffs do not dispute that Richardson's residence has had no repair work performed on it, while Dickerson claims that attempted efforts to remediate settlement through the installation of helical piers installed under his home by Ram Jack of South Carolina, Inc. has made his house "10 times worse" than before the repair efforts. The scope of and related cost to address the differing conditions of the two different homes will vary. Consequently, so too will Richardson and Dickerson's claims and Defense counsel's defenses to those claims.

Moreover, Plaintiffs have not provided sufficient evidence from which this Court can conclude their claims are "typical" of the claims of the other purported class members. As previously mentioned, no investigative findings or expert reports have been provided by Plaintiffs relating to either the named Plaintiffs' homes or the putative class members' homes. Further, given the individualized nature of the Plaintiffs' claims, the damages sought by each Plaintiff have the potential to vary from the claims for damages of the other Plaintiffs.

Plaintiffs have not carried their burden of showing that their claims for liability and damages will be typical of the claims sought by other putative class members. Likewise, the defenses will vary greatly depending on the claims being asserted. Therefore, this Court finds that the typicality requirement of Rule 23(a)(3) has not been shown and Plaintiffs' Motion is denied.

**D. Plaintiffs meet the adequacy of representation prerequisite of Rule 23.**

The principal factor in determining the adequacy of a class representative is whether the Plaintiff has the ability and commitment to prosecute the action vigorously. *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 325, 329-30 (D.S.C. 1991). There are two criteria courts look to in determining whether the class representative adequately protects the interests of the class: (1) the class representatives should not have any significant antagonistic or conflicting interests to the unnamed class members; and (2) it must appear the class representatives will vigorously prosecute

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the interests of the class through qualified counsel. *Runion v. U.S. Shelter*, 98 F.R.D. 313, 316 (D.S.C. 1983); *Nat'l Ass'n of Regional Med. Programs, Inc. v. Matthews*, 551 F.2d 340, 345 (D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977). In addition, the class representative must voluntarily accept a fiduciary duty towards all the members of the putative class. *Runion*, 98 F.R.D. at 317.

As owner of a Foxbank home, the class representative "possess(es) the same interest and suffer(s) the same injury as the class members." *Gunnells v. Healthcare Services, Inc.*, 348 F.3d 417, 425 (4th Cir. 2003). Indeed, no material conflict exists between the class representative (owner of a Foxbank home) and the class members she seeks to represent (also owners of Foxbank homes). Moreover, the class representative and her counsel are committed to aggressively pursuing this litigation on behalf of the other Foxbank homeowners whose homes contain latent defects. See Richardson Affidavit; Lucey Affidavit.

Notably, Plaintiffs' counsel has practiced before this Court, as well as federal court, in a number of complex commercial and consumer actions, and thus, this Court is aware of counsel's competency in litigating complex actions as further described in Counsel's Affidavit. (See Lucey Affidavit). Accordingly, this Court is satisfied that the class representative and her counsel would fairly and adequately protect the interests of the class.

**E. Plaintiffs fail to meet the amount in controversy prerequisite of Rule 23.**

Plaintiffs have not provided sufficient evidence that all purported class members suffered any individual damages. Rule 23(a)(5), SCRCF, requires that Plaintiffs must demonstrate that they have sustained damages exceeding \$100. As noted above, many homeowners within the subject neighborhood have not complained of or identified any construction issues or damage within their residence. In fact, Plaintiffs have presented no evidence or investigative findings with respect to what homes have allegedly suffered damage and estimated costs to repair the

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same. Because Plaintiffs have not presented any evidence that each purported class member has been damaged, Plaintiffs have failed to meet their burden under Rule 23(a)(5), SCRCPP, and thus Plaintiffs' Motion is hereby denied.

## II. Plaintiffs' Unfair Trade Practices Claim Cannot be Brought in a Representative Capacity

Plaintiffs' third cause of action seeks relief under the South Carolina Unfair Trade Practices Act ("UTPA") found at S.C. Code Ann. § 39-5-20, *et. seq.* The UTPA specifically bars claims in a representative capacity. The Act states as follows: "Any person who suffers any ascertainable loss of money or property . . . as a result of the use or employment ... of the unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages." S.C. Code Ann. § 39-5-140(a) (emphasis added). The South Carolina Supreme Court has held that claims for unfair trade practices may not be brought as class actions. Dema v. Tenet Physician Services-Hilton Head, Inc., 383 S.C. 115, 678 S.E.2d 430 (2009) (emphasis added). Accordingly, class certification is improper as it relates to Plaintiffs' UTPA claims.

## CONCLUSION

The Court in Waller v. Seabrook summarized the significant hurdles and burdens that plaintiffs face in seeking certification of a class and recognized that proponents of class certification have the burden of proving each of the prerequisites for class certification have been met, stating that "[t]he failure of the proponents to satisfy any one of the prerequisites is fatal to class certification." Id. at 300 S.C. 465, 467-8, 388 S.E. 2d 799, 801 (1990). (emphasis added). Given the clarity of the law governing the application and analysis of the Rule 23(a), SCRCPP requirements and for all of the reasons set forth above, this Court finds that Plaintiffs have not

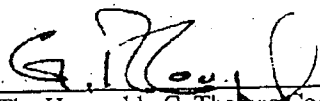
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carried their burden as to any, and certainly not all, of the five prerequisites they must show under Rule 23(a), SCRPC. Therefore, this Court denies Plaintiffs' Motion for Class Certification. This Order denying Plaintiffs' Motion for Class Certification is supported by the record in this case, including arguments presented by parties through filed pleadings, evidentiary submissions and memoranda, as well as presentations at oral argument.

**NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED** that Plaintiffs' Motion to for Class Certification is hereby DENIED.

**AND IT IS SO ORDERED.**

September 21, 2016  
Charleston, South Carolina

  
The Honorable G. Thomas Cooper, Jr.



State of South Carolina  
The Circuit Court of the Fifth Judicial Circuit

G. Thomas Cooper, Jr.  
Judge

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September 28, 2016

The Honorable Mary P. Brown  
Berkeley County Clerk of Court  
Post Office Box 219  
Moncks Corner, South Carolina 29461-0219

*RE: Richard O. Dickerson and Cynthia L. Page-Richardson, on behalf of themselves and others  
similarly situated v Dan Ryan Builders, et al C/A No.: 2014-CP-08-854*

Dear Ms. Brown:

Please find enclosed for filing, a signed Order for the above captioned Berkeley County case Judge Cooper heard while in Charleston County. I have enclosed a copy, and if possible, please timestamp and return to Judge Cooper's chambers for our records.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "George James".

George James  
Law Clerk to the Honorable G. Thomas Cooper, Jr.

GTCJr:gcj

Enclosures

LAW OFFICES

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November 2, 2016

VIA FIRST CLASS MAIL

Jerri Ann Roseneau, Clerk  
Circuit Court of Beaufort County  
Post Office Box 1128  
Beaufort, SC 29901-1128

2016 NOV -7 PM 3:25  
JERRI ANN ROSENEAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

Re: Anthony and Barbara Grazia v. South Carolina State Plastering, LLC.  
CCS File No.: 3526-47645  
CA No.: 2007-CP-07-1396

Dear Ms. Roseneau:

Enclosed herewith for filing in the above-referenced matter please find the original and one copy of Defendant South Carolina State Plastering's Memorandum in Support of its Motion to Reconsider and/or Alter or Amend Order (No Motions Pending) Dated 09.09.2016. By copy of this correspondence, I have served the same upon all counsel of record.

Please file the original and return one clocked-in copy to me in the envelope provided. If you have any questions, please do not hesitate to contact me.

Sincerely yours,



R. MICHAEL ETHRIDGE

RME/amt  
Enclosures  
cc: All Counsel of Record

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF BEAUFORT ) THE FOURTEENTH JUDICIAL CIRCUIT

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

Civil Action No.: 2007-CP-07-1396

Plaintiffs,

SUPPLEMENTAL MEMORANDUM OF  
LAW IN SUPPORT OF MOTION  
TO RECONSIDER THE  
SEPTEMBER 9, 2016 ORDER

v.

South Carolina State Plastering, LLC

Defendant.

South Carolina State Plastering, LLC

Third Party Plaintiff,

v.

Del Webb Communities, Inc., Pulte  
Homes, Inc., and Kephart Architects,  
Inc.

Third Party Defendants

South Carolina State Plastering, LLC (SCSP) filed a Motion to Reconsider, Alter or Amend the Court's Order of September 9, 2016, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. This Supplemental Memorandum is offered in support of that Motion to specifically address Plaintiffs' argument that the Motion was improper and should be dismissed rather than considered by the Court.

Rule 59(e) states that "A Motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Plaintiffs contend that the

September 9, 2016 Order is not a “judgment” for purposes of this Rule because it is interlocutory in nature. Rule 54(a) defines “judgment” to include “any decree or order which dismisses the action as to any party or *finally determines the rights of any party.*”

As currently written, the Court’s Order finally determines that the Grazias have met the requirements to proceed as the Class Representatives of the defined class. The Order finally determines that the Class Members have the right to proceed as a class. Thus, the Order does finally determine the rights of a party—namely the Plaintiffs and the Class Members.

In the alternative, even if the order were to be considered interlocutory, a motion to reconsider still is properly available under the common law as indicated by the Supreme Court’s decision in Johnston v. Bowen, 313 S.C. 61, 63–64, 437 S.E.2d 45, 47 (1993). In that case, the defendant moved for reconsideration after the denial of a motion for summary judgment, which was granted. On appeal, the Supreme Court succinctly stated: “The trial court interlocutory orders are amendable.” Id. at 63, 437 S.E.2d at 47, (citing PPG Industries v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)).

Therefore, the Motion to Reconsider, Alter or Amend filed by the Defendant September 19, 2016 is a proper motion and dismissal of the Motion is unwarranted. The Court should consider the Motion and either grant or deny the Motion on its merits.

[SIGNATURES ON FOLLOWING PAGE]

*Supplemental Memorandum in Support of Motion  
To Reconsider  
C/A 2007-CP-07-1396*

Respectfully submitted,

**SWEENEY, WINGATE & BARROW, P.A.**

/s/ Everett A. Kendall, II

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**ATTORNEYS FOR DEFENDANT SCSP**

Columbia, South Carolina

December 16, 2016

ELECTRONICALLY FILED - 2016 Dec 16 10:25 AM - BEAUFORT - COMMON PLEAS - CASE#2007CP0701396

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
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 Kephait Architects, Inc., Third-Party Defendants,

Of Whom Del Webb Communities, Inc. and  
Pulte Homes, Inc., are Respondents.

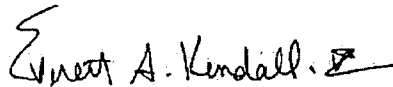
NOTICE OF APPEAL

South Carolina State Plastering, LLC appeals from certain orders, to wit:

- I. The order of the Honorable J. Michael Baxley, "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, dated December 8, 2011 and filed December 19, 2011;

2. The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminarily Certifying Class, dated May 1, 2012 and filed May 7, 2012;
3. The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014, and filed April 18, 2014;
4. The order of the Honorable Edgar W. Dickson, "Order Granting South Carolina State Plastering LLC's Motion for Destructive Testing," dated January 29, 2016, and filed February 12, 2016;
5. The order of the Honorable Edgar W. Dickson, "Scheduling Order," dated May 16, 2016, and filed May 26, 2016;
6. The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)", dated September 7, 2016, and filed September 9, 2016; and
7. The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017.

Counsel for the Appellant received the most recent (January 6, 2017) orders of Judge Dickson, on January 11, 2017.



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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED

FEB 08 2017

SC Court of Appeals

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 Kephait Architects, Inc.,

Third-Party Defendants,

Of Whom Del Webb Communities, Inc. and  
Pulte Homes, Inc., are

Respondents.

MOTION TO DETERMINE APPEALABILITY

South Carolina State Plastering, LLC has filed a Notice of Appeal from certain  
intermediate orders in this action, to wit:

1. The order of the Honorable J. Michael Baxley, "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," dated December 8, 2011 and filed December 19, 2011;

2. The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminarily Certifying Class, dated May 1, 2012 and filed May 7, 2012;
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7. The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017.

The Appellant previously filed a Notice of Appeal from Judge Baxley's Orders of December 19, 2011 and May 7, 2012, which appeal was dismissed on the ground that "these orders are not immediately appealable." [Ex. 1 – Ct. App. Order, filed August 8, 2012.] In an attempt to preempt any assertion that the Appellant is being vexatious or frivolous in filing this Notice of Appeal, the Appellant submits this motion to make a prima facie position on several anticipated appealability issues.

## **I. BACKGROUND**

### **A. Prior Appeals**

The details of the litigation proceedings on the issues of class certification and the Right to Cure Act can be found in reams of documents previously filed in the Appellate Courts.<sup>1</sup> The Appellant provides the following brief summary to provide context and background for the

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<sup>1</sup>Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010) (*Grazia I*). Appellate Case Nos. 2011-212212; 2013-000233.

purposes of this motion. The Plaintiffs, homeowners in a Sun City community in Bluffton, South Carolina, bring this action alleging defective exterior stucco work by South Carolina State Plastering (SCSP) and seeking to pursue claims on behalf of other homeowners as class action.<sup>2</sup>

In its answer<sup>3</sup>, SCSP argued the Grazias had failed to comply with the express provisions of the Notice and Opportunity to Cure Construction Dwelling Defect Act (Right to Cure Act), S.C. Code Ann. §§ 40-59-810 to 860 which entitles a contractor or subcontractor to notice of any qualifying construction defect, and the opportunity to cure, before the action is commenced. After the Grazias complied with the Act on behalf of themselves, SCSP moved to dismiss the class allegations, and, in the alternative, requested a stay of the proceedings until each of the similarly situated claimants complied with the Right to Cure Act notice requirements. The circuit court issued an order striking the Grazias' class allegations as incompatible with the Right to Cure Act, and appeal was taken at that time and heard by the Supreme Court. The Supreme Court held that the circuit court erred in striking the Grazias' class allegations on the basis that the Right to Cure Act is incompatible with Rule 23. Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010) (*Grazia I*).

As noted by the Supreme Court, at that stage of litigation, no motion for class certification had yet been made; however, the Court gave certain instructions for anticipated proceedings on remand, namely:

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<sup>2</sup> At the time of the appeal in *Grazia I*, the number of homes with allegedly defective stucco was uncertain. The Grazias' referred to 2,673, while SCSP referenced "some four thousand homes." The Amended Class List filed with the Clerk of Court on January 27, 2016 contains 4518 addresses.

<sup>3</sup> SCSP answered, and brought a third-party complaint against developer Del Webb Communities, Inc., builder Pulte Homes, Inc., and architect Kephart Architects, Inc.

Upon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove.

\*\*\*\*

If and when these prerequisites are met, the court may then find that representative notice under the Right to Cure Act is appropriate. *Id.* at 204.

On remand, as to be expected, the Plaintiffs made a motion for class certification to which SCSP objected on numerous grounds.<sup>4</sup> The matter came before Judge Baxley, to whom the case had been assigned, and after the submission of extensive memoranda and hearings, he issued his order -- "Order Making *Preliminary* Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCF; 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.) SCSP filed a motion for reconsideration, but Judge Baxley dismissed the motion on the ground that it improper because Rule 59(e) does not allow any challenge to an interlocutory order.

SCSP filed a notice of appeal from Judge Baxley's preliminary order as well as his order dismissing its motion for reconsideration/clarification. This Court found that the preliminary order (and the associated order on the motion to reconsider) were not immediately appealable and dismissed the appeal.

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<sup>4</sup> The preliminary certification order raises issues of law as to each of the five factors under Rule 23, SCRCF, that must -- at some point -- be reviewed by the Appellate Courts. These issues include the propriety of the court-created class definition, the manner in which the trial court has defined and made findings of "typicality" and "commonality," the approval of the class representatives and counsel as adequate under the circumstances of claim splitting and claims waiver, as well as issues of numerosity and the amount of each claim.

**B. Current Status: The "Preliminary" order has now been deemed "Final".**

In the intervening time since the Court of Appeals' dismissal of the earlier appeal of the preliminary class order, the parties have proceeded through four years of processes and procedures established by Judge Baxley, stemming from his preliminary order, that he thought would allow the parties to comply with the Right to Cure Act.<sup>5</sup> As of May 2016, Judge Dickson, who had been assigned to this case in December 2014 after the retirement of Judge Baxley, had set a scheduling order that mandated steps and deadlines regarding Right to Cure Act compliance and Rule 23 class certification,<sup>6</sup> including a hearing date and briefing schedule for final class certification. Thereafter, Judge Dickson reversed himself and opined that Judge Baxley already had made a "final" decision certifying the class, in an "Order (No Motions Pending)," stating that: "The class was certified by Order of Judge Baxley on December 8, 2011," and "the issue of class certification was long-ago settled and reviewed..."<sup>7</sup> [9/9/16 Order (Dickson), pp. 1, 2.] SCSP made a motion for reconsideration which Judge Dickson dismissed on the same reasoning as Judge Baxley – there is no provision in Rule 59(e) to allow reconsideration of a interlocutory order.

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<sup>5</sup> The record will demonstrate that throughout this process, the Appellant has repeatedly raised various objections to preserve issues for a future appeal, but proceeded in good faith to comply with Judge Baxley's order in the face of this Court's dismissal of the prior appeal. Judge Dickson in his 9/9/16 Order (page 2) decreed that he would not entertain any further argument on the issues of class certification.

<sup>6</sup> The stay on discovery was to remain in effect until the court issued its ruling on final certification. ¶ 4.

<sup>7</sup> Contrary to Judge Dickson's pronouncement, there was no "review" of the issue of class certification. The Court of Appeals dismissed the prior appeal as not immediately appealable without reviewing the merits of the Defendant's challenges to class certification or any other of the issues arising from those two orders.

SCSP maintains that Judge Dickson has committed manifest error in his misreading -- or rewriting -- of Judge Baxley's clear designation of his order as preliminary and his intention to make final determination on class certification at a future time, after further discovery, further briefing, and a full consideration of all relevant information.<sup>8</sup> But, beyond the issue of Judge Dickson's misinterpretation of Judge Baxley's order, Judge Dickson's order now has effectively rendered a "final" decision on Plaintiffs' motion for class certification, without conducting a rigorous analysis of all relevant information and making findings of fact regarding the five Rule 23 factors.

## II. APPEALABILITY OF INTERMEDIATE ORDERS UNDER S.C. CODE ANN. § 14-3-330

Section 14-3-330 determines the scope of appellate jurisdiction in law cases:

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

<sup>8</sup> SCSP maintains that such ruling is wholly inconsistent with and directly contravenes Judge Baxley's clear designation of his order as preliminary and his intention to make final determination on class certification at a future time. As denominated in the very title of the order -- Judge Baxley had made only a preliminary finding that the proposed class meets the Requirements of Rule 23(a). His intention is also found in the express language of this order:

- "Thereafter [after compliance with the Right to Cure Act], the Court will make a final decision as to whether a class action is practicable under the specific facts and circumstances disclosed by the notices and response required under the Act." [12/19/11 Order (Baxley), p. 2.]
- "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." [12/19/11 Order (Baxley), p. 10.]
- Other examples include: "[I]n the event a Class is certified with finality in this case," p.8; "should a Class finally be certified," p. 9.]

\*\*\*\* (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; \*\*\*\*

This case presents factual and legal issues that are substantially different from other opinions holding that orders granting class certification are not -- as general rule -- immediately appealable. Salmonsens v. CGD, Inc., 377 S.C. 442, 448-49, 661 S.E.2d 81, 85 (2008), and cases cited therein. In Knowles v. Standard Sav. & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979), the Court dismissed an appeal from a class certification order as interlocutory on the grounds that “[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment.” However, in Salmonsens, the Court found that an order establishing an “opt-in” notification procedure affects a mode of trial and, thus, was immediately appealable. 661 S.E.2d at 87.

While the procedural element of class certification in other cases might not require or justify review prior to final judgment, the Appellant SCSP maintains that Judge Baxley’s orders (12/19/11 preliminary class certification and 4/18/14 approving class notice) as interpreted by Judge Dickson’s 9/9/16 order, together with Judge Dickson’s 2/12/16 order (limiting destructive testing) are immediately appealable pursuant to §14-3-330(2) because, apart from the issues of improper class certification under Rule 23, SCRCF, these orders deprive the Appellant of substantial, legal rights under the Right to Cure Act and they also effectively strike defenses by not allowing discovery or providing a reasonable means to assert defenses. In addition, the orders of Judge Baxley and Judge Dickson dismissing of SCSP’s motions for reconsideration also involve the merits and affect substantial rights. Judge Baxley’s preliminary order certifying the class (as “finalized” by Judge Dickson’s order) and his order approving the class notice are

immediately appealable because they create an impermissible opt-in class that affects the mode of trial under the ruling in *Salmonsens*.

A. The Class Certification/Right to Cure orders

1. *Orders affecting SCSP's Substantial Rights under the Right to Cure Act*

The Right to Cure Act mandates a presuit process for resolution of homeowner construction complaints. The Act requires claimants to give notice to a contractor ninety days before filing an action against the contractor arising out of the construction of a dwelling; upon receiving a notice, the contractor has fifteen days to request clarification of the alleged defects if the defect is not sufficiently stated. § 40-59-840. The contractor has thirty days after receipt of a notice to "inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects;" and then the claimant has 10 days to respond to the offer. § 40-59-850. If a claimant files an action in court without first complying with the Act, the court must (on motion) stay the action until the claimant has complied with the Act. § 40-59-830.

As noted above, on remand in *Grazia I*, the Supreme Court gave instructions to the trial court that when presented with a motion for class certification -- FIRST to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove and THEN, IF these prerequisites are met, to determine whether the Act could be properly harmonized with Rule 23 such that representative notice under the Right to Cure Act might be appropriate.<sup>9</sup> *Grazia I*, 703 S.E.2d at 202-03. On remand, Judge Baxley made only a

<sup>9</sup> With all due respect to the Supreme Court's decision, SCSP maintains that the instructions do not comport with the Legislative intent to comply FIRST with the Act before moving forward with the legal action, and that certifying a class first is improper and inefficient because any members that do not comply with the Act cannot proceed to participate in the class in any event.

preliminary finding that the Plaintiffs met the five Rule 23 requirements, and created his own process for compliance with the Right to Cure Act. In his 2011 order Judge Baxley articulated the compliance process in a broad concept, and later, in his 4/18/14 order, Judge Baxley set forth additional details, including approval of the notice. In his 2/12/16 order, Judge Dickson limited SCSP to certain necessary testing to only 47 houses; and in his 5/26/16 scheduling order, Judge Dickson allows for the stay to be lifted upon final class certification prior to compliance with the Right to Cure Act.<sup>10</sup>

As of the filing of this appeal, SCSP is still attempting to complete necessary testing before it can make offers to the claimants, then the claimants must respond before this stay can be lifted to allow the parties to proceed with conducting discovery necessary to allow them to ultimately try the case on the merits. Thus, a presuit process that is supposed to take 90 days has already consumed almost three years, and, the end of the presuit process may only be seen in a crystal ball because there is an unresolved disagreement between SCSP and class counsel over the process of making the offers.<sup>11</sup> Meanwhile, the stay of discovery has been prematurely lifted.<sup>12</sup>

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They also incur an extraordinary expense of dealing with as many as 4500 claims as opposed to just one.

<sup>10</sup>The scheduling order did contemplate that the Right to Cure process would be completed by September before the scheduled hearing set on final class certification; however, compliance has not yet been completed and the Plaintiffs are pursuing discovery on the presumption that the stay has been lifted with Judge Dickson's 9/9/16 order declaring class certification already was final.

<sup>11</sup> SCSP intends to make individual offers to each claimant/putative class member; however, SCSP counsel contemplate that Plaintiffs' counsel will object and insist on a global "class" offer.

<sup>12</sup> See Grazia I, 703 S.E.2d at 202 ("The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to require compliance with the Right to Cure Act's notice provisions.")

SCSP maintains that this process does not meet the purpose or express provisions of the Act or the instructions in *Grazia I*, and deprives SCSP of its rights under the Act. As such, these orders are appealable now under §14-3-330(2).

**2. *Opt-in Class Notice Orders affecting the Mode of Trial***

The denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2). Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005), and cases cited therein. As noted above, the Court has previously reviewed a class certification order under this principle in *Salmonsens*, supra. In that case, the Supreme Court was presented with an appeal from orders of Judge Dennis certifying the class/denying decertification and an order of Judge Young establishing an "opt-in" notification procedure. The Court held that the certification orders of Judge Dennis were not immediately appealable, but the Court held that Judge Young's opt-in order was immediately appealable because it affected a mode of trial inasmuch as class members would be excluded and denied a right to trial. Reaching the merits, the Court rejected any opt-in procedure for class notification because it undermines due process, and adopted "the 'opt-out' class action and notification procedure as the exclusive method of class action litigation in this state." 661 S.E.2d at 91.

Judge Baxley, in his "preliminary" certification order of 12/19/11, speaks of an opt-out class notice, but in actuality, he was creating an opt-in process:

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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In his 4/18/14 order Judge Baxley approved a class notice that also expressly purports to give the claimants/putative class members the opportunity to opt-out. However, Judge Baxley also approved a RTC Questionnaire to be mailed to all putative class members and allowed 60 days for the return of the Questionnaires, stating: "Plaintiff's Counsel shall have additional time to contact class members that do not timely return the Questionnaire, but at some point, to be determined in the future, class members who fail to return the RTC Questionnaire shall have their claims dismissed with prejudice."<sup>13</sup> The Questionnaire also warns claimants that their claim may be dismissed.<sup>14</sup> Ultimately, the process for preliminary class certification and RTC compliance, as created by Judge Baxley, creates a de facto opt-in process because a claimant cannot participate in the class UNLESS they affirmatively choose to return the Questionnaire. Under *Salmonsén*, these orders are immediately appealable.

**B. The Orders Dismissing the Motions for Reconsideration**

In a separate, but parallel view, the orders dismissing the motions for reconsideration are appealable under §14-3-330(2) because the trial court's refusal to allow the opportunity for reconsideration affects SCSP's substantial rights that could prevent them from raising certain issues on appeal. As the Court is well aware, the "absolute necessity" of issue preservation and the importance of making motions for reconsideration to preserve issues for appellate review can be found in a myriad of opinions with references to the consequences of failure to meet mandatory preservation requirements. *See generally, Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004); Trial Handbook for South Carolina Lawyers § 36:5. In

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<sup>13</sup> The final date was set by the May 26, 2016 order.

<sup>14</sup> There is currently pending before the trial court a motion to dismiss the claims of those who did not return the Questionnaire.

Elam, the Supreme Court discusses the proper use of a Rule 59(e) motion to seek “reconsideration” of issues and arguments:

[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court “alter or amend the judgment,” but also as a vehicle to seek “reconsideration” of issues and arguments. A motion under Rule 59(e) long has been viewed as “motion for reconsideration” despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. *It is inherently unfair to disallow such an opportunity.*

602 S.E.2d 772, 778–79 (2004) (citations omitted/emphasis added). The consequences of failing to make a motion for reconsideration of an intermediate/pretrial order can be seen in Ness v. Eckerd Corp., 350 S.C. 399, 403, 566 S.E.2d 193, 196 (Ct. App. 2002), where on appeal from an order of a trial judge vacating his prior order denying the defendant relief from entry of default and recusing himself, the Court of Appeals held that issues related to recusal were not preserved for appellate review because the party did not make a Rule 59(e) motion.

In view of the decades of precedent on issue preservation, SCSP made a motion for reconsideration as to Judge Baxley’s preliminary order and Judge Dickson’s order declaring that preliminary class certification order as a final ruling. Notwithstanding the well-settled principle that trial court intermediate orders are amendable on motions for reconsideration, *see Johnston v. Bowen*, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993), both Judge Baxley and Judge Dickson have dismissed the Appellant’s motions for reconsideration as “improper” on the ground that no such motion is permitted by Rule 59 to challenge an interlocutory order, and as noted above, Judge Dickson has decreed that he will not allow any further argument on the class certification matters.

To the extent that the Judges did not deny the motions, but instead dismissed the motions on a purely legal ground, those dismissal orders are immediately appealable. See Salinas v. C. Aultman & Co., 49 S.C. 325, 27 S.E. 385, 387 (1897) (“While the granting or refusing of an interlocutory order of injunction, upon the merits, is not, as a rule, appealable, it is appealable when granted or refused upon a ‘purely’ legal ground, and especially a jurisdictional ground.”) Appellant also maintains that the dismissal orders are appealable because the trial court’s refusal to allow the opportunity for reconsideration is “inherently unfair” and thus affects their substantial rights to reconsideration that could prevent them from raising certain issues on appeal. See Elam, 602 S.E.2d at 779 (“It is inherently unfair to disallow such an opportunity [for reconsideration.]”)

### III. Interlocutory Appeals in the Interest of Judicial Economy

“An order that is not directly appealable may be considered if there is an appealable issue before the court.” Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005). The Court will allow such appeals “in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy).” *Id.* Similarly, in Salmonsens, the Court chose to address an issue in an interlocutory appeal because it was “in the interest of judicial economy and guidance to the bench and bar.” 661 S.E.2d at 87.

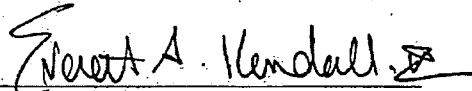
In Knowles, the Court spoke of the “debilitating effect on judicial administration caused by piecemeal appeals.” 261 S.E.2d at 49. However, in this case, the postponement of appellate review of orders affecting substantial rights and affecting the mode of trial on multiple points is producing a far more debilitating effect on resources of the circuit court. This case was filed in May 2007, it has already been up on appellate review once, and after remand from the Supreme Court, the case has required incalculable hours of court time and produced court filings that fill

up the Clerk's office, not to mention the hours of attorney time and litigation expenses incurred by the parties. Still, the Right to Cure process has not yet been completed, which must be accomplished before the stay can be lifted to allow the parties to begin discovery and eventually move toward trial on the merits.

### CONCLUSION

The statute allows immediate appeal of these orders and the interests of justice and the administration of the judicial system are best served by proceeding with review of all the issues raised in regards to these orders at this stage, rather than years from now.

Respectfully submitted,



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February 8, 2017

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED

FEB 08 2017

SC Court of Appeals

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

Respondents.

**PROOF OF SERVICE**

I certify that I have served the Motion to Determine Appealability on Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs and on Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc. by depositing a copy of the same in the United States Mail, postage prepaid, on February 8, 2017 to all attorneys of record. The addresses for the attorneys of record are as follows:

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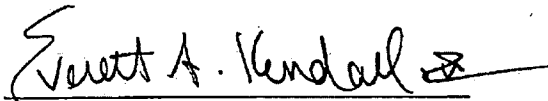
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**ATTORNEYS FOR APPELLANT SOUTH  
CAROLINA STATE PLASTERING, LLC**

February 8, 2017

# S·W·B

SWEENEY WINGATE & BARROW P.A.

RECEIVED

FEB 08 2017

SC Court of Appeals

2/8/2017

Per telephone conversation with Monica, the filing fee for this Motion has already been received. When the Notice of Appeal was filed on Monday, the check was written for \$125, instead of \$100.

Please call if there are any questions.

Danyelle Young 803-256-2233 x7131.

# EXHIBIT 1

13 DEC 16 PM 3:51  
SOUTH CAROLINA COURT OF APPEALS

## The South Carolina Court of Appeals

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

v.

South Carolina State Plastering, LLC, Appellant.

South Carolina State Plastering, Appellant,

v.

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

Appellate Case No. 2012-212212

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### ORDER

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Appellant has filed a Notice of Appeal from an "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCPP; 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" and an order denying reconsideration and clarification. Respondents have filed a motion to dismiss contending the underlying orders are not immediately appealable and Appellant has filed a "Motion to Determine Appealability." After careful consideration, Respondents' motion to dismiss is granted because these orders are not immediately appealable. Because this appeal is dismissed, this Court need not act on Appellant's "Motion to Determine Appealability."

*Stephanie Curseton AT*  
FOR THE COURT

Columbia, South Carolina

cc:  
Everett Augustus Kendall, II  
Christy Elizabeth Mahon  
Phillip Ward Segui, Jr.  
John T. Chakeris  
W. Jefferson Leath, Jr.  
Michael S. Seekings

FILED  
8-31-12 *SLY*

The South Carolina Court of Appeals

13 DEC 16 PM 3:52  
CLERK OF COURT

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

v.

South Carolina State Plastering, LLC, Appellant.

South Carolina State Plastering, Appellant,

v.

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

Appellate Case No. 2012-212212

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon, Jr. C.J.  
[Signature] J.  
Daniel G. Pieper J.

FILED  
1-16-13

Columbia, South Carolina

cc:

Everett Augustus Kendall, II

Christy Elizabeth Mahon

Phillip Ward Segui, Jr.

John T. Chakeris

W. Jefferson Leath, Jr.

Michael S. Seekings

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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FEB 16 2017

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

SC Court of Appeals

J. Michael Baxley, Circuit Court Judge  
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.....Respondents.

Appellate Case No. 2017-000218

RESPONDENTS' MOTION TO DISMISS APPELLANT  
SOUTH CAROLINA STATE PLASTERING, LLC'S APPEAL

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*Attorneys for the Respondents*

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

This Motion is brought by the Plaintiffs/Respondents in this Class Action seeking dismissal of an Appeal taken by South Carolina State Plastering, LLC (hereinafter "SCSP") of seven (7) interlocutory Orders issued by the Circuit Court over the past five (5) years. SCSP has already appealed from two (2) of these Orders and that appeal was dismissed. Three (3) of the orders were issued years ago and by any measure are out of time, and the final order which is appealed was issued with no SCSP motions pending and therefore there is no basis procedurally or substantively for an appeal. In support of this Motion, Plaintiffs/Respondents would show as follows

1. This matter is a class action and as of the date of this appeal (February 6, 2017) has been pending before the trial court for 3,539 days.
2. Trial is scheduled on a date certain in April, 70 days forward. The deposition of SCSP's expert was scheduled to be taken February 7, 2017.
3. This appeal is taken for no other purpose, improper as it is, than to avoid discovery and to avoid a date certain trial. It is another in a long series of delay tactics engaged by SCSP. A short procedural history of this long pending case is instructive.
4. The class was certified by Judge Baxley on December 8, 2011 (1,876 days ago) following a hearing on October 5, 2011 (attached hereto as Exhibit A).
5. Prior to Certification, the South Carolina Supreme Court remanded the matter to the trial court emphasizing 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*, 390 S.C. 562, 703 S.E.2d 197 (S.C. 2010)).

6. SCSP sought to have Judge Baxley reconsider class certification, which motion was denied by order dated May 7, 2012 (1,736 days ago) (attached hereto as Exhibit B).
7. An appeal was taken by SCSP challenging class certification, and, upon motion of the Plaintiff/Respondents, the appeal was dismissed. According to this Court the orders of Judge Baxley were "not immediately appealable" (attached hereto as Exhibit C).
8. There are currently 4,557 houses included in the *Grazia* class. Notice of the class has long ago been sent and the opt-out period closed years ago. The Notice of Appeal (attached hereto as Exhibit D) filed by SCSP separately lists seven (7) interlocutory orders which it now asks this Court to review to wit:

- 1) The order of the Honorable J. Michael Baxley, "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements 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, dated December 8, 2011 and filed December 19, 2011 (1,876 days);
- 2) The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminarily Certifying Class, dated May 1, 2012 and filed May 7, 2012 (1,736 days);
- 3) The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014, and filed April 18, 2014 (825 days);
- 4) The order of the Honorable Edgar W. Dickson, "Order Granting South Carolina State Plastering LLC's Motion for Destructive Testing," dated January 29, 2016, and filed February 12, 2016 (360 days);
- 5) The order of the Honorable Edgar W. Dickson, "Scheduling Order," dated May 16, 2016, and filed May 26, 2016 (256 days);

- 6) The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)", dated September 7, 2016, and filed September 9, 2016 (150 days); and
  - 7) The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017 (31 days).
9. Not one of the orders is independently appealable; they are not appealable as a group or bundle of orders, nor has this notice of appeal been filed within any time contemplated by any rule of civil procedure, appellate procedure or statutory provision. SCSP rests its entire argument for appealability on the following statement "The statute S.C. Code Ann. § 14-3-330 allows immediate appeal of these orders..."
10. The law addressing the propriety of interlocutory appeals in this state is well settled. "[A]ny judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Wilson*, 367 S.C. at 12, 625 S.E.2d at 208; *Mid-State Distribs, Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory."); *see also* Toal, *supra* at 86 (" 'Final judgment' is a term of art denoting the disposition of *all* issues in the action." (emphasis supplied)).
11. Further, "absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [S.C. Code Ann.] § 14-3-330." *Wilson*, 367 S.C. at 13, 625 S.E.2d at 208.
12. There is no "specialized statute" that guides the procedure or substance of this case.
13. In pertinent part, § 14-3-330 provides 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;...

14. This Court uses the same standards as the Supreme Court to determine if an Order or Judgment is appealable in the case it hears.
15. The Supreme Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.
16. The "mode of trial" exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (S.C. 2008).
17. Notwithstanding the clear rule of law in this state, this Court's prior dismissal of SCSP's interlocutory appeal, and the fact that class certification was long ago decided, on February 6, 2017, SCSP filed an appeal seeking review of the previously noted seven (7) interlocutory Orders, including two (2) Orders from which it has already taken an appeal and which appeal was dismissed.

18. It appears that SCSP now seeks review by this Court on two (2) grounds. The first is that the trial court has somehow created an "opt-in class" and that impermissibly and negatively impacts SCSP and the "mode of trial." The second is that, notwithstanding a long line of jurisprudence to the contrary, this court should review the trial court's class certification process.

19. 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." This plain language shows it is a well-defined class requiring no action on the part of a member to participate.

20. Notice was sent to all homeowners that meet the class definition (attached hereto as Exhibit E) as was an opt-out form (attached hereto as Exhibit F). The opt-out period closed on December 23, 2015, some 411 days ago. The mode of trial is by jury. The fact that class members were asked to fill out a questionnaire (drafted by SCSP) does not alter the mode of trial nor does it (or could it possibly) have any adverse impact on SCSP.

21. As for the class itself, it was long ago certified as SCSP is well aware and as the following statement from Judge Baxley during a motion hearing four (4) years ago shows, "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*) (attached hereto as Exhibit G).

22. On February 1, 2013, Judge Baxley again addressed 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*) (attached hereto as Exhibit H).

23. Judge Baxley's observations are consistent with all of his rulings and continued rejections of challenges to the class "The Court specifically rejects the 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*) (see Exhibit A).

24. 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).

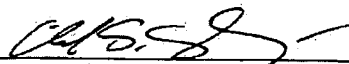
25. Lastly, in his Order Approving Class Notice (that Judge Baxley himself wrote), he once again declined to refer to the class as "preliminary," for the reason that it was not and is not preliminary. Judge Baxley's failure to do so even further evidences his intention that the class was, indeed, already certified.
26. The years of rulings by the trial court could not be clearer, nor could the procedural history of this case. All of the orders that SCSP now seeks this Court to review are interlocutory and none are immediately appealable under § 14-3-330. And, by observation, even if there was some mechanism that would allow for appeal, none of them were "immediately appealed". The collective number of days that has elapsed between the issuance of the appealed Orders and the date of this appeal totals 5,234.

#### CONCLUSION

This appeal is nothing more than another attempt at reconsideration of an order long ago issued, and it is an extreme and desperate attempt at that. The appeal should be immediately dismissed by this Court.

SO MOVED.

Respectfully Submitted,

  
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*Attorneys for the Respondents*

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
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..... Respondents.

Appellate Case No. 2017-000218

PROOF OF SERVICE

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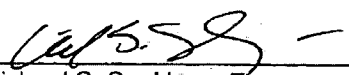
*Attorneys for the Respondents*

I, Michael S. Seekings, Esq., do hereby certify that on February 15, 2017, I served opposing counsel with a copy of the Respondents' Motion to Dismiss Appellant South Carolina State Plastering, LLC's Appeal via regular first class United States mail, postage prepaid, addressed as follows:

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RECEIVED

FEB 16 2017

SC Court of Appeals

# 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),  
 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.

11 DEC 19 PM 3:31  
 JENNIFER STEAU  
 BEAUFORT COUNTY, S.C.  
 CLERK OF COURT

*Jeb*

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.

*Job 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), 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.” 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 (7<sup>th</sup> 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 (6<sup>th</sup> 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

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Rule 23(a) also requires that "the representative parties will fairly and adequately protect the interests of the class." SCRC, 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.

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**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), SCRC, 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

Jan 10

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, SCRCF, 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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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), SCRPC, 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

Jan 13

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*  
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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.

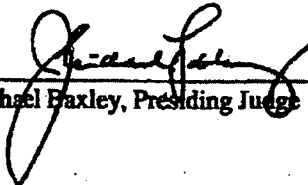
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel 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 Haxley, Presiding Judge

Hartsville, South Carolina

December 8, 2011

# EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT )

Case 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, )

and )

SOUTH CAROLINA STATE )  
PLASTERING, LLC, )

Third-Party Plaintiff, )

v. )

DEL WEBB COMMUNITIES, INC., )  
PULTE HOMES, INC. and )  
KEPHART ARCHITECTS, INC., )

Third-Party Defendants. )

**ORDER DISMISSING DEFENDANTS'  
MOTIONS TO RECONSIDER AND  
DENYING DEFENDANTS' MOTIONS  
FOR CLARIFICATION  
OF ORDER PRELIMINARILY  
CERTIFYING CLASS**

2012 MAY -7 PM 3:49  
JERRI ANN ROSENEAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT

*Jub.*

This civil litigation involves allegations of defective construction relating to stucco application on approximately 4,000 homes located at the Sun City Development in Beaufort County, South Carolina. The case has been declared complex and assigned to this Court for disposition. On December 8, 2011, this Court issued an Order making a preliminary finding that Plaintiffs' proposed class meets the requirements of Rule 23(a), SCRCP, and this Order was filed with the Clerk of Court on December 15, 2011. Subsequently, on January 3, 2012, Defendant South Carolina State Plastering, LLC and Third-Party Defendants Del

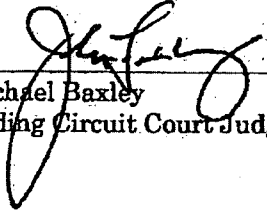
Webb Communities, Inc. and Pulte Homes, Inc. filed Motions to Reconsider and/or Motions for Clarification, pursuant to Rule 59(e), the matter that is presently before the Court. The Court heard arguments on these motions on April 30, 2012, and after hearing these arguments and reviewing the memoranda submitted by the parties, the Court dismisses the Motion to Reconsider and denies the Motion for Clarification.

The Court's Order dated December 8, 2011 was interlocutory in nature, and thus Defendants' Motions to Reconsider were improvidently filed. 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, the Court hereby dismisses Defendants' Motions to Reconsider as improper.

During the April 30 hearing, Defendants were also permitted to address the various portions of the Court's Order for which they sought clarification. After carefully considering on the record each of the concerns raised by Defendants, the Court determined that the Order was clear and complete as originally issued and thus no further clarification was necessary. Therefore, the Court hereby denies Defendants' motions for clarification.

Accordingly, the parties have thirty (30) days from the date this Order denying clarification is served upon them to submit a proposed opt-out notice to putative class members as outlined in the initial Order.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
J. Michael Baxley  
Presiding Circuit Court Judge

May 1, 2012  
Hartsville, SC



State of South Carolina  
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL  
BAXLEY  
JUDGE

531 EAST CAROLINA AVENUE  
HARTSVILLE, SOUTH CAROLINA 29550  
TELEPHONE: (843) 393-4114  
FAX: (843) 393-4116  
E-MAIL: jbxleyj@sccourts.org

May 3, 2012

The Honorable Jerri Ann Roseneau  
Beaufort County Clerk of Court  
Attention: Jamie  
Post Office Box 1128  
Beaufort, SC 29901

Re: Grazia, et al v. SC State Plastering, LLC, et al  
Case Number: 07-CP-07-1396

Dear Jamie:

Enclosed is a Form 4 Order that has been prepared in the above matter. Please file this order and serve it on the parties. Thank you for your assistance in this matter.

Sincerely yours,

*J. Michael Baxley*  
J. Michael Baxley

JMB(jlc)  
Enclosure

12 MAY - 7 PM 3:54  
JERRI ANN ROSENEAU  
BEAUFORT COUNTY, S.C.  
CLERK OF COURT



# EXHIBIT C

## The South Carolina Court of Appeals

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

v.

South Carolina State Plastering, LLC, Appellant.

South Carolina State Plastering, Appellant,

v.

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

Appellate Case No. 2012-212212

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### ORDER

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Appellant has filed a Notice of Appeal from an "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCF; 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" and an order denying reconsideration and clarification. Respondents have filed a motion to dismiss contending the underlying orders are not immediately appealable and Appellant has filed a "Motion to Determine Appealability." After careful consideration, Respondents' motion to dismiss is granted because these orders are not immediately appealable. Because this appeal is dismissed, this Court need not act on Appellant's "Motion to Determine Appealability."

*Joseph M. Curran A.J.*  
FOR THE COURT

Columbia, South Carolina

cc:

Everett Augustus Kendall, II  
Christy Elizabeth Mahon  
Phillip Ward Segui, Jr.  
John T. Chakeris  
W. Jefferson Leath, Jr.  
Michael S. Seekings

FILED  
8-31-12 JLT

# EXHIBIT D

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED

FEB 06 2017

SC Court of Appeals

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 Kephait Architects, Inc.,

Third-Party Defendants,

Of Whom Del Webb Communities, Inc. and  
Pulte Homes, Inc., are

Respondents.

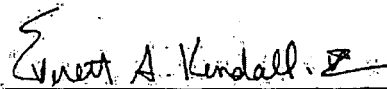
NOTICE OF APPEAL

South Carolina State Plastering, LLC appeals from certain orders, to wit:

1. The order of the Honorable J. Michael Baxley, "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, dated December 8, 2011 and filed December 19, 2011;

2. The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminarily Certifying Class, dated May 1, 2012 and filed May 7, 2012;
3. The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014, and filed April 18, 2014;
4. The order of the Honorable Edgar W. Dickson, "Order Granting South Carolina State Plastering LLC's Motion for Destructive Testing," dated January 29, 2016, and filed February 12, 2016;
5. The order of the Honorable Edgar W. Dickson, "Scheduling Order," dated May 16, 2016, and filed May 26, 2016;
6. The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)," dated September 7, 2016, and filed September 9, 2016; and
7. The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017.

Counsel for the Appellant received the most recent (January 6, 2017) orders of Judge Dickson, on January 11, 2017.



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Other Counsel of Record:

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Michael S. Seekings  
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Robert L. Widener  
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1221 Main Street  
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Attorney for Third-Party Defendants Del Webb Communities, Inc., and Pulte Homes, Inc.  
(803) 799-9800

# EXHIBIT E

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, )

NOTICE OF CLASS ACTION

vs. )

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. )

TO: ALL OWNERS OF RESIDENCES AT SUN CITY, HILTON HEAD, HAVING  
STUCCO EXTERIORS INSTALLED BY SOUTH CAROLINA STATE  
PLASTERING, LLC, PRIOR TO JULY 31, 2007:

THIS NOTICE MAY AFFECT YOUR RIGHTS.  
PLEASE READ IT CAREFULLY.

**\*\*\*YOU ARE NOT BEING SUED\*\*\***  
**\*\*\*THIS IS NOT A SOLICITATION FROM A LAWYER\*\*\***  
**\*\*\*A SOUTH CAROLINA COURT AUTHORIZED THIS NOTICE\*\*\***

**\*\*\*YOU MUST RETURN THE ENCLOSED FORM BY DECEMBER 23, 2015,  
IF YOU DO NOT WANT TO PARTICIPATE IN THIS CASE**

**1. WHY SHOULD I READ THIS NOTICE?**

The Court has approved this Notice to you and has included information that it believes you need to know to decide whether to remain in the Class or to exclude yourself/opt-out of the Class. You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of the Class, and whether to opt-out of the Class. You should carefully read below to decide whether it is in your best interest to opt-out or stay in the Class.

You have been identified as one of 4,300 potential members of a Class on whose behalf certain claims are being asserted in the above-captioned civil action pending in the Beaufort County Court of Common Pleas (the "Court"). The Court certified this civil action to proceed as a class action on behalf of the Class defined below.

If you own a residence in Sun City having a stucco exterior installed by South Carolina State Plastering, LLC prior to July 31, 2007, your rights may be affected by this action. You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of the Class, and whether to opt-out of the proposed Class. In a Class Action, one or more people, called named Plaintiffs (in this case Anthony and Barbara Grazia), sue on behalf of people who have similar claims. All these similarly situated people are a Class or Class members. One court resolves the issues for all Class members, except for those who exclude themselves from the Class.

This action is pending in the Court of Common Pleas for Beaufort County, South Carolina, in a lawsuit known as Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs vs. South Carolina State Plastering, LLC. While the Plaintiffs (and Class) are only suing (and may only recover against) South Carolina State Plastering, LLC in this case, South Carolina State Plastering (SCSP) has brought a third-party action entitled: South Carolina State Plastering, LLC v. Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc., Civil Action No. 07-CP-07-1396. If you are a member of the Class, and do not exclude yourself from the Class (i.e., opt out of the Class); the result of this pending litigation will permanently affect your rights against the Defendants.

**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.**

## **2. WHAT IS THE LAWSUIT ABOUT?**

The Plaintiffs have alleged that South Carolina State Plastering has improperly installed stucco on some houses in Sun City Hilton Head. Plaintiffs are requesting that South Carolina State Plastering pay money to the Plaintiffs and Class members to cover the cost to repair alleged damage caused by the alleged improper stucco installation. South Carolina State Plastering denies the allegations made by Plaintiffs and denies that there are any widespread stucco installation problems in Sun City Hilton Head.

### **2.1. WHAT CLAIMS ARE INCLUDED IN THIS LAWSUIT?**

The suit alleges negligence and breach of implied warranty of good and workmanlike services. Plaintiffs are only pursuing three (3) alleged stucco installation issues in this lawsuit. This lawsuit is limited to recovering damages caused by one or more of the following three (3) alleged stucco installation defects:

- (1) The lack of head flashing above doors and windows,
- (2) The failure to install stucco control joints, and/or
- (3) The presence of moisture encapsulation by the failure to leave a gap between the bottom of the stucco exterior and the structure slab.

The Class is seeking to recover money for damages caused by one or more of the above three (3) alleged defects.

### **2.2. WHAT CLAIMS ARE NOT INCLUDED IN THIS LAWSUIT?**

#### **A. Stucco Application Issues Not Included in This Case.**

Any issues other than the three (3) issues in Section 2.1 above will not be included in this lawsuit. If you have damage to your house solely related to a stucco issue not included in Section 2.1, then you will not be able to recover for those damages (in this lawsuit or any other lawsuit) if you remain in this Class.

There may be stucco homeowners in Sun City Hilton Head that have other stucco problems (such as thin application, improper mix, or improper installation) which are not included in Section 2.1 above, and also do not include one of the three (3) conditions listed in Section 2.1 above.

If you have one of these other stucco problems, you will not be able to recover funds for damage caused by those issues if you stay in the Class. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

B. Past Repairs Not Included:

The Named Plaintiffs have agreed not to request the recovery of any funds already expended by Class members or to recover funds already paid for repairs to stucco or behind stucco. If you have paid money for stucco related repairs, you will not be able to recover those funds if you stay in the Class. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

C. Legal Causes of Action Not Included:

The Named Plaintiffs will not pursue claims brought under the South Carolina Unfair Trade Practices Act (SCUTPA). Under SCUTPA, if a Defendant is found to have acted unfairly, the Plaintiffs and Class members could recover treble (triple) damages, costs, and attorneys' fees. If you stay in the Class, you will not be able to bring a SCUTPA claim against Defendant for stucco related issues, and you will be barred from recovery of treble damages, costs, and attorneys' fees. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

**3. WHAT DO I NEED TO DO TO JOIN THE CLASS?**

If you wish to join the Class, you do not need to take any further action and your interest as a member of the Class will be represented by Class Counsel without individual charge to you. (See Paragraph 8 for Class Counsel's fees and costs.) You are not required to hire your own attorney but may do so at your own expense. You will be bound by the result in the case.

**4. HOW DO I EXCLUDE MYSELF FROM THE CLASS?**

To opt-out of the Class, you must complete, sign and submit the Exclusion Request Form which is included with this Notice. Please send your completed form to:

Sun City Administrator  
Leath, Bouch & Seekings, LLP  
P. O. Box 59  
Charleston, SC 29402  
Telephone: (843) 730-5369

You should submit a separate Exclusion Request Form for each property you own. If you do not receive a form or if you desire additional copies, you may obtain such copies by writing or calling the address above.

**AN OWNER OR OWNERS OF A HOME WHO FAIL TO SUBMIT AN EXCLUSION REQUEST FORM BY MIDNIGHT ON MAY 10, 2015, WILL AUTOMATICALLY BE INCLUDED IN THE CLASS. IF YOU DO NOT OPT-OUT OF THE CLASS, YOU WILL BE BOUND BY ALL ORDERS AND JUDGMENTS ENTERED BY THE COURT. THIS IS YOUR**

**ONLY OPPORTUNITY TO OPT-OUT OF THE CLASS.**

IF YOU ARE A PUTATIVE CLASS MEMBER AND PROPERLY AND TIMELY REQUEST EXCLUSION FROM THE CLASS, YOU WILL NOT RECEIVE ANY BENEFITS OF THIS ACTION AND YOU WILL NOT BE BOUND BY ANY FURTHER ORDERS OR JUDGMENTS ENTERED FOR OR AGAINST THE CLASS. YOU MAY PURSUE AT YOUR OWN EXPENSE WHATEVER RIGHTS YOU MAY HAVE AGAINST THE DEFENDANT, IF ANY.

**5. IF I STAY IN THE CLASS, MAY I BRING ANOTHER LAWSUIT LATER AGAINST SOUTH CAROLINA STATE PLASTERING?**

Not related to stucco claims. If you stay in the Class, you will be bound by the result of this lawsuit – win or lose. If you do not submit a timely Exclusion Request Form, you will not be allowed to bring an individual lawsuit against South Carolina State Plastering for stucco claims.

**6. IF I DO NOT EXCLUDE MYSELF FROM THE CLASS, WILL I HAVE ANY RESPONSIBILITIES?**

**YES. SEE BELOW.**

Under South Carolina's Opportunity to Cure Construction Defects statute, the Defendant in this case is granted the opportunity to inspect allegedly defective stucco if it requests to do so. Once the opt-out period in this case has expired, the action will be stayed so that the requirements of the Opportunity To Cure Act can be met. If you remain in the Class, an Opportunity to Cure notice of individual claim will be mailed to you to be completed and returned by mail to Plaintiff's counsel. The notice will ask you to describe any stucco-related problems you are currently experiencing with your home.

After the Notice is issued, the Defendant will be permitted to inspect your home, offer to remedy the defects, and offer to settle or deny the Claim. If you remain in the Class, and the Defendant chooses to do so, you must allow a home inspection which will take place at a time agreed on by Counsel. The inspection, if any, will be non-invasive and non-destructive, and will be done at no cost to you. The inspection, if any, will be conducted by Class Counsel, under the supervision of the Court.

If the Defendant offers to remedy the defect(s) stated in the Notice or if a monetary offer is made to you, Class Counsel will communicate with you and respond on your behalf. Should you choose to accept the offer, the Court will be advised and a settlement of your Claim may occur.

If you and the Defendant cannot settle the dispute regarding your house pursuant to the Opportunity to Cure Act, then the class action will proceed, and you will be bound by the decision of the court with regard to judgments and rulings in this class action.

**6.1. PARTICIPATION IN THE LITIGATION.**

If you do not opt-out of the Class pursuant to Section 4 above, and if you do not settle/resolve your claim pursuant to Section 6 above, then you will be required to take part in the litigation. The claims brought on behalf of the Class and/or the defenses asserted by Defendant may require one or more of the following: 1) you may be required to provide documents and/or information related to you, your house, your house purchase, and any house repairs; 2) you may be required to testify at a deposition about these same issues; 3) your house may be inspected, 4) testing may be conducted on your house, and/or 5) you may be required to testify at the trial of the case.

As a Class member, you will not have any right to control the litigation. In the event that a settlement is reached, you will have the right to submit an objection to the Court. If trial results in an unfavorable outcome, you will not have an individual right to appeal your claim, or to direct that the class representative pursue an appeal.

**7. WHO REPRESENTS THE PARTIES:**

Class Counsel for the Plaintiffs is as follows:

John T. Chakeris, Esq.  
The Chakeris Law Firm  
231 Calhoun Street  
P.O. Box 397  
Charleston, SC 29402

W. Jefferson Leath, Jr., Esq.  
Michael S. Seekings, Esq.  
Leath, Bouch & Seekings, LLP  
92 Broad Street  
P.O. Box 59  
Charleston, SC 29402  
Telephone: (843) 730-5369

Phillip W. Segui, Jr., Esq.  
Segui Law Firm, PC  
864 Lowcountry Blvd, Suite A  
Mt. Pleasant, SC 29465

Counsel for Defendant and Third-Party Defendants is as follows:

Attorney for Defendant South Carolina State Plastering, LLC:

Everett A. Kendall, II, Esq.  
Christy E. Mahon, Esq.  
Sweeny Wingate & Barrow, P.A.  
1515 Lady Street  
P.O. Box 12129  
Columbia, SC 29211

R. Michael Ethridge, Esq.  
Laura Paris Paton, Esq.  
Carlock, Copeland & Stair, LLP  
40 Calhoun St., Suite 400  
Charleston, SC 29401

Attorney for Third-Party Defendants Del Webb Communities, Inc., and Pulte Homes, Inc.:

A. Victor Rawl, Jr., Esq.  
McNair Law Firm  
P.O. Box 1431  
Charleston, SC 29402

Attorney for Third-Party Defendant Kephart Architects, Inc.:

David S. Cobb, Esq.  
Turner, Padgett, Graham & Laney, P.A.  
40 Calhoun Street, Suite 200  
P. O. Box 22129  
Charleston, SC 29413

**8. HOW WILL CLASS COUNSELS' FEES AND EXPENSES BE PAID?**

If any funds are generated for any class member(s) (either through settlement or judgment), then Class Counsel will request that the Court award to Class Counsel a portion of the funds generated as attorneys' fees for all services rendered to the Class, plus their costs and expenses. **THE ATTORNEYS' FEES AND COSTS AWARDED BY THE COURT SHALL BE PAID ONLY FROM ANY FUNDS GENERATED AS A RESULT OF THE CLASS AND NO INDIVIDUALS WILL BE RESPONSIBLE FOR ANY FEES, COSTS, OR EXPENSES OUT OF POCKET.** All payments to Class Counsel must be approved by the Court, and will be considered at a Fairness Hearing or at other hearings to be scheduled by the Court. Any Attorneys' Fees and Costs that may be awarded as part of the settlement of any claims resolved through the South Carolina Right To Cure process will be addressed similarly.

**9. WHERE DO I GET ADDITIONAL INFORMATION?**

This Notice provides only a summary of matters regarding the case. You may seek the advice and guidance of your own private attorney, at your own expense, if you wish. For more

details about matters discussed in this Notice, you may desire to review certain documents related to the litigation such as the Complaint, the Answer of the Defendant, and the Court's Order certifying the Class. If you wish to obtain additional information, you may do so by writing or calling Plaintiffs' Counsel at one of the addresses listed above. DO NOT CONTACT THE COURT.

AN OWNER OF A RESIDENCE IN SUN CITY WHO FAILS TO SUBMIT A COMPLETE, VALID AND TIMELY EXCLUSION REQUEST PURSUANT TO THIS COURT-APPROVED NOTICE WILL BE AUTOMATICALLY INCLUDED IN THE CLASS. IF YOU DO NOT OPT-OUT OF THE CLASS BY TIMELY RETURNING A VALID EXCLUSION REQUEST AS REFERENCED IN PARAGRAPH 4 ABOVE, YOU WILL BE A MEMBER OF THE CLASS AND BOUND BY ALL ORDERS AND JUDGMENTS OF THE COURT.

# EXHIBIT F

**EXCLUSION REQUEST**

This is a request to be excluded from a class action.

READ THE ATTACHED LEGAL NOTICE CAREFULLY BEFORE  
FILLING OUT THIS FORM

To: Sun City Administrator  
Leath, Bouch & Seekings, LLP  
P. O. Box 59  
Charleston, SC 29402

Re: Anthony and Barbara Grazia, individually and on behalf of all other similarly situated  
Plaintiffs vs. South Carolina State Plastering, LLC

**THIS FORM IS TO BE FILLED OUT ONLY IF YOU DESIRE TO BE  
EXCLUDED FROM THE CLASS**

**DO NOT** fill out this form if you wish to be included in the class. If you wish to be excluded,  
this form must be mailed no later than **December 23, 2015**.

I acknowledge receipt of the Notice of Class Certification in this case, describing the class and my rights therein. **Please exclude me from membership in the class and from this lawsuit.** I understand that by signing below that I may be able to pursue my own claim separately. I also understand that if I wish to pursue a claim, I must do so separately using my own attorney at my own expense. I understand that I will not be bound by any ruling in this lawsuit and that I will not receive any funds that may be generated by this lawsuit.

I certify by signing below that I own the below referenced house in Sun City Hilton Head. **This form must be signed by ALL owners of the house.**

Sun City Hilton Head House Address: \_\_\_\_\_

\_\_\_\_\_  
Owner Signature

\_\_\_\_\_  
Co-Owner Signature

\_\_\_\_\_  
Owner Name (Print)

\_\_\_\_\_  
Co- Owner Name (Print)

# EXHIBIT G

THE STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF BEAUFORT ) FOURTEENTH JUDICIAL CIRCUIT

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

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

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

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

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

# EXHIBIT H

STATE OF SOUTH CAROLINA )

COUNTY OF BEAUFORT )

) COURT OF COMMON PLEAS  
) CASE NO.: 2007-CP-07-01396

ANTHONY GRAZIA AND BARBARA )  
GRAZIA, INDIVIDUALLY AND ON )  
BEHALF OF ALL OTHERS SIMILARLY )  
SITUATED, )

PLAINTIFFS, )

vs. )

SOUTH CAROLINA STATE )  
PLASTERING, LLC., )

DEFENDANT. )

TRANSCRIPT OF RECORD

---

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

1 that the Court certified this civil action to proceed as a  
2 Class action. Your order made very clear that this was in  
3 all respects to indicate that this was a preliminary  
4 certification and there would be subsequent discussions  
5 and refinements and/or un-certifications down the road.  
6 That's -- that's a problem with me throughout this order,  
7 ---

8 THE COURT: Right.

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

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

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

THE STATE OF SOUTH CAROLINA  
In The Court of Appeal

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396  
Appellate Case No. 2017-000218

---

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, ..... Respondents.

---

RETURN TO MOTION TO DETERMINE APPEALABILITY

---

Robert L. Widener  
McNAIR LAW FIRM, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

A. Victor Rawl, Jr.  
Henry W. Frampton, IV  
McNAIR LAW FIRM, P.A.  
Post Office Box 1431  
Charleston, South Carolina 29402  
(843) 723-7831

ATTORNEYS FOR RESPONDENTS  
Del Webb Communities, Inc., and Pulte Homes, Inc.

Other Counsel of Record

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Michael S. Seekings  
Leath, Bouch & Seekings, LLP  
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Charleston, South Carolina 29402  
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Phillip W. Segui, Jr.  
Segui Law Firm, LLC  
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Post Office Box 1450  
Mt. Pleasant, South Carolina 9465  
(843) 884-1865

John T. Chakeris  
The Chakeris Law Firm  
231 Calhoun Street Post Office Box 397  
Charleston, South Carolina 29402  
(843) 853-5678

ATTORNEYS FOR RESPONDENTS (PLAINTIFFS)

Everett A. Kendall, II,  
Sweeny, Wingate & Barrow, P.A.  
Post Office Box 12129  
Columbia, South Carolina 29211  
(803) 256-2233

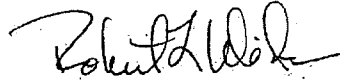
R. Michael Ethridge  
Ethridge Law Group, LLC  
Post Office Box 20969  
Charleston, South Carolina 29413  
(843) 614-0007

ATTORNEYS FOR APPELLANT South Carolina State Plastering, LLC

David S. Cobb  
Turner, Padgett, Graham & Laney, P.A. Gateway Center, Suite 200  
40 Calhoun Street  
Post Office Box 22129  
Charleston, South Carolina 29413-2129  
(843) 576-2800  
Attorneys for Kephart Architects, Inc.

Del Webb and Pulte respectfully submit this Return to South Carolina State Plastering's "Motion to Determine Appealability." State Plastering has appealed from several circuit orders, and asserts in its motion that this Court should accept the appeal thereof. Del Webb and Pulte have appealed from two of these orders, and have filed a separate "Motion to Determine Appealability" as to those two orders. As to those two orders, Del Webb and Pulte join State Plastering's request that this Court determine the orders are immediately appealable. Also as to these two orders, Del Webb and Pulte incorporate herein by reference the grounds and arguments presented in support of their "Motion to Determine Appealability" filed separately with this Court. As to the remaining orders appealed by State Plastering, Del Webb and Pulte agree that this Court should accept the appeal thereof.

Respectfully Submitted,



Robert L. Widener  
MCNAIR LAW FIRM, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

A. Victor Rawl, Jr.  
Henry W. Frampton, IV  
MCNAIR LAW FIRM, P.A.  
Post Office Box 1431  
Charleston, South Carolina 29402  
(843) 723-7831

ATTORNEYS FOR RESPONDENTS  
Del Webb Communities, Inc., and  
Pulte Homes, Inc.

February 21, 2017  
Columbia, SC

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  
Appellate Case No. 2017-000218

---

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, ..... Respondents.

---

CERTIFICATE OF SERVICE

---

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Respondents Del Webb Communities, Inc. and Pulte Homes, Inc.'s *RETURN TO MOTION TO DETERMINE APPEALABILITY* by depositing a copy in the United States Mail, postage prepaid, on February 21, 2017, addressed to all attorneys of record, as follows:

Everett A. Kendall, II, Esq.  
Christy E. Mahon, Esq.  
Sweeny, Wingate & Barrow, P.A.  
Post Office Box 12129  
Columbia, South Carolina 29211

W. Jefferson Leath, Jr., Esq.  
Michael S. Seekings, Esq.  
Leath, Bouch, Crawford & von Keller, LLP  
Post Office Box 59  
Charleston, South Carolina 29402

John T. Chakeris, Esq.  
The Chakeris Law Firm  
Post Office Box 397  
Charleston, South Carolina 29402

Phillip W. Segui, Jr., Esq.  
Segui Law Firm, LLC  
864 Lowcountry Blvd., Suite A  
Mt. Pleasant, South Carolina 29464

David S. Cobb, Esq.  
Turner Padget Graham & Laney, P.A.  
Post Office Box 22129  
Charleston, South Carolina 29413-2129

R. Michael Ethridge, Esq.  
Ethridge Law Group, LLC  
Post Office Box 20969  
Charleston, South Carolina 29413

  
Ann Shuler

82614

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED

FEB 24 2017

SC Court of Appeals

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 Kephait Architects, Inc., ..... Third-Party Defendants,

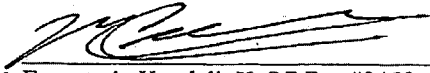
Of Whom Del Webb Communities, Inc. and Pulte Homes, Inc., are ..... Respondents.

MOTION FOR EXTENSION TO SERVE AND FILE RETURN TO MOTION TO  
DISMISS APPEAL

Appellant's Return to Respondents' Motion to Dismiss Appeal is due February 27, 2017.

Due to the case load and recent transition of firms by co-counsel, Appellant requests a ten (10)  
day extension to serve and file its Return on or before March 9, 2017.

Respectfully submitted,

  
FOR

Everett A. Kendall, II, SC Bar #8450  
Sweeny, Wingate & Barrow, P.A.  
1515 Lady Street  
Post Office Box 12129  
Columbia, South Carolina 29211  
(803) 256-2233  
[eak@swblaw.com](mailto:eak@swblaw.com)

R. Michael Ethridge, SC Bar #016892  
Ethridge Law Group, LLC  
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Charleston, SC 29413  
843-614-2253  
[methridge@ethridgelawgroup.com](mailto:methridge@ethridgelawgroup.com)

*Attorneys for Appellant*  
*South Carolina State Plastering, LLC*

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED

FEB 24 2017

SC Court of Appeals

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 Kephait Architects, Inc., ..... Third-Party Defendants,

Of Whom Del Webb Communities, Inc. and Pulte Homes, Inc., are ..... Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of foregoing, *Motion for Extension to Serve and File Return to Motion to Dismiss Appeal* upon the following counsel of record via U.S. mail and/or Electronic Mail:

W. Jefferson Leath, Jr.  
Michael S. Seeking  
Leath, Bouch & Seekings, LLP  
92 Broad Street  
Post Office Box 59  
Charleston, SC 29402

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

John T. Chakeris  
The Chakeris Law Firm  
231 Calhoun Street  
Post Office Box 397  
Charleston, SC 29402

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

Phillip W. Segui, Jr.  
Segui Law Firm, LLC  
864 Lowcountry Boulevard, Suite A (29464)  
Post Office Box 1450  
Mt. Pleasant, South Carolina 29465

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

David S. Cobb, Esq.  
Turner, Padgett, Graham & Laney, P.A.  
Gateway Center, Suite 200  
40 Calhoun Street  
Post Office Box 22129  
Charleston, South Carolina 29413  
Attorney for Third-Party Defendant Kephart Architects, Inc.

A. Victor Rawl, Jr.  
Robert L. Widener  
McNair Law Firm, PA  
1221 Main Street  
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Attorneys for Third-Party Defendants Del Webb Communities, Inc., and Pulte Homes, Inc.

This 24<sup>th</sup> day of February, 2017.

*Dagella Y*  
Sweeny, Wingate & Barrow, P.A.

## The South Carolina Court of Appeals

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

v.

South Carolina State Plastering, LLC,  
Appellant/Respondent.

And

South Carolina State Plastering, LLC,  
Appellant/Respondent,

v.

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

Of which Del Webb Communities, Inc. and Pulte Homes,  
Inc. are Respondents/Appellants.

Appellate Case No. 2017-000218

The Honorable J. Michael Baxley,  
The Honorable Edgar W. Dickson  
Beaufort County  
Trial Court Case No. 2007CP0701396

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ORDER

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The time for serving and filing the Appellant/Respondent South Carolina State Plastering's return to Respondents/Appellants Del Webb Communities and Pulte Homes' motion to dismiss is hereby extended until March 9, 2017.

FOR THE COURT

BY V. Claire Allen, Deputy  
CLERK

Columbia, South Carolina

cc:  
Everett Augustus Kendall, II, Esquire  
W. Jefferson Leath, Jr., Esquire  
Michael S. Seekings, Esquire  
Phillip Ward Segui, Jr., Esquire  
John T. Chakeris, Esquire  
A. Victor Rawl, Jr., Esquire  
Robert L. Widener, Esquire

**FILED**

February 27, 2017

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## The South Carolina Court of Appeals

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

v.

South Carolina State Plastering, LLC,  
Appellant/Respondent.

And

South Carolina State Plastering, LLC,  
Appellant/Respondent,

v.

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

Of which Del Webb Communities, Inc. and Pulte Homes,  
Inc. are Respondents/Appellants.

Appellate Case No. 2017-000218

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### AMENDED ORDER

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The time for serving and filing the Appellant/Respondent South Carolina State  
Plastering's return to Respondents' motion to dismiss is hereby extended until  
March 9, 2017.

---

FOR THE COURT

BY

*guy a. eddy*  
CLERK

Columbia, South Carolina

**FILED**

March 1, 2017

cc:

Everett Augustus Kendall, II, Esquire  
W. Jefferson Leath, Jr., Esquire  
Michael S. Seekings, Esquire  
Phillip Ward Segui, Jr., Esquire  
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2017-000218

Case No. 2007-CP-07-1396

RECEIVED

MAR 09 2017

SC Court of Appeals

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

Respondents.

Return to Motion to Dismiss  
South Carolina State Plastering, LLC's Appeal

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The Appellant South Carolina State Plastering, LLC submits this Return to the motion to dismiss filed by Respondents Anthony and Barbara Grazia seeking dismissal of SCSP's appeal from certain intermediate orders in this action, to wit:

1. The order of the Honorable J. Michael Baxley, "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," dated December 8, 2011 and filed December 19, 2011;
2. The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminarily Certifying Class, dated May 1, 2012 and filed May 7, 2012;
3. The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014, and filed April 18, 2014;
4. The order of the Honorable Edgar W. Dickson, "Order Granting South Carolina State Plastering LLC's Motion for Destructive Testing," dated January 29, 2016, and filed February 12, 2016;
5. The order of the Honorable Edgar W. Dickson, "Scheduling Order," dated May 16, 2016, and filed May 26, 2016;
6. The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)", dated September 7, 2016, and filed September 9, 2016; and
7. The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017.

First, Appellant SCSP would direct the Court's attention to the fact that it has, from the onset of this appeal, acknowledged potential appealability issues, and in fact, SCSP has already filed a Motion to Determine Appealability addressing virtually all the points raised by the Grazia

Respondents in their motion. The Appellant SCSP craves reference to and incorporates those arguments without belaboring the Court with a full restatement herein.<sup>1</sup> The Appellant does take this opportunity to specifically address certain key points to each of the numbered arguments as raised by the Respondents in their motion.

1. The number of days that this action has been pending has no relevance to the legal issues of whether the intermediate orders are reviewable at this time under S.C. Code Ann. §14-3-330 and applicable case law. Moreover, it should be noted that the years long delays have not been the fault of this Appellant, and in fact, much of that time lapse was derived from the Plaintiffs' prior to appeal. The Plaintiffs Grazias could have long ago achieved resolution of their complaints about the construction and application of stucco on their home if they were not determined to certify a class action to resolve claims by over 4,500 other home owners in the Sun City community. Moreover, the time involved in the Plaintiffs' efforts to certify the class and the Appellant's assertion of its rights under the Right to Cure Act<sup>2</sup> is largely a product of the nature of class actions and the enormity of the process of complying with the Right to Cure Act for so many homes.

2. While the most current scheduling order has set a trial date of April 17, 2017, this appeal is taken because, as a matter of law, this action cannot be tried that soon because:

(a) the trial court has not yet made a proper analysis of the five requirements of Rule 23 necessary for class for certification, and in fact, the trial court has not yet made a final ruling on the Plaintiffs' motion to certify the class;

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<sup>1</sup> SCSP also would note that a Motion to Transfer this appeal has been filed with the Supreme Court on February 9, 2017.

<sup>2</sup> The Notice and Opportunity to Cure Construction Dwelling Defect Act (Right to Cure Act), S.C. Code Ann. §§40-59-810 to 860.

(b) the Right to Cure process has not yet been completed and the statutory-based stay cannot be lifted until there has been full compliance with the RTC; and

(c) the Appellant/Defendant has not been afforded the opportunity to conduct discovery on the merits of the claims inasmuch as heretofore, the parties have been dealing with class certification issues and the negotiating and navigating a process attempting RTC compliance in the context of a preliminary class of 4,500 claims, and full discovery on the merits of the claims has been stayed since June 17, 2008 until September 9, 2016. Moreover, since the stay was lifted, Plaintiffs have prevented SCSP from engaging in discovery by refusing to allow depositions of the homeowners, refusing to allow destructive testing on the Grazia residence, and refusing to provide information to substantiate the claims of the class members. At the time the Notice of Appeal was filed, motions to compel had been filed and were yet unresolved.<sup>3</sup>

3. This appeal is taken for the purpose of asserting the Appellant's substantial statutory and due process rights, namely:

(a) the trial court has never required the Plaintiffs to meet their burden of establishing each and all of the five requirements for class certification under Rule 23, S.C.R.Civ.P., and the Appellant has never been afforded a full and fair opportunity to submit evidentiary matters to challenge/rebut whatever evidence the Plaintiffs might produce to substantiate their motion to certify the class;

(b) the Appellant SCSP has not been fully afforded its rights under the RTC Act; and

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<sup>3</sup> The following motions are pending: Motion to Compel Depositions of Class Member (9/30/16); Motion to Compel Plaintiffs' Discovery Responses (10/24/16); Motion for Destructive Testing on Grazia residence (10/26/16).

(c) the trial court has refused to rule on the motions for reconsideration filed by Appellant SCSP.

4. The class was NOT certified by Judge Baxley on December 8, 2011. This is one of the key issues to be raised on this appeal. The fact is that neither Judge Baxley nor Judge Dickson have yet made a final decision on whether the Plaintiffs have proven all these factors to warrant class certification. By his own express terms, Judge Baxley only made a preliminary decision in his December 29, 2011 "Order Making *Preliminary* Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCP...." (emphasis added.) By his September 9, 2016 "Order (No Motions Pending)", Judge Dickson simply ruled that Judge Baxley's decision was final – without any pending motion and without making any independent finding on the Rule 23 factors. The critical – reversible – error being that neither trial judge has ever conducted a full evidentiary inquiry or the rigorous analysis necessary to make any final decision on Rule 23 class certification.

5. In regards to the Supreme Court's prior opinion in this case, the Appellant again takes issue with the term "prior to certification" because Judge Baxley only made a preliminary certification. The prior action previously came before the Supreme Court on appeal from Judge Early's order dismissing the class action allegations. Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010). In that opinion, the Supreme Court specifically noted that no motion for class certification had yet been made at that point in the litigation. While the Court did note that class actions are, as a general matter, favored, the Court did NOT make any anticipatory ruling on whether a class should be certified in this case as Judge Baxley and Judge Dickson seem to believe. [See Baxley 12/19/11 order p. 11; Dickson 9/9/16 Order p. 2.]

6. SCSP has NOT made a motion to decertify the class because the class has never been fully certified. SCSP did make a motion asking Judge Baxley to reconsider his 11/19/11 "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a),..." Judge Baxley did NOT deny the motion; rather, he dismissed the motion on the ground that it was improper because Rule 59(e) does not allow any challenge to an interlocutory order. This is one of the issues raised on appeal because it is well settled that trial court intermediate orders are amendable on motions for reconsideration. See Johnston v. Bowen, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993). Concomitantly, the dismissal of that motion on a purely legal ground is immediately appealable. See Salinas v. C. Aultman & Co., 49 S.C. 325, 27 S.E. 385, 387 (1897).

7. YES, as SCSP explicitly noted and acknowledged in its Motion to Determine Appealability, it DID file an appeal attempting to challenge Judge Baxley's preliminary order and his dismissal of its motion for reconsideration, and the Court of Appeals did dismiss the appeal on the ground that "these orders are not immediately appealable."

8. Class Notice was initially sent April 21, 2014 and the "so-called" opt-out period supposedly closed 60 days later. Subsequently, the Mailing List was amended and additional Notices were sent on two separate occasions.<sup>4</sup> However, that notice was sent under a preliminary class determination and it was contemplated that a second notice would – and still does – need to be sent after the RTC compliance is complete and the trial court conducts a full Rule 23 analysis.

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<sup>4</sup> The Amended Class List was filed with Court on January 25, 2016.

Further, the final roster of class members still has not been settled because potential claimants may be excluded through the RTC compliance and other pending motions.<sup>5</sup>

9. While each of the seven orders – standing alone -- might not be immediately appealable, they all are reviewable at this time based on Judge Dickson's last two orders which triggered the appealability of all earlier related orders. The Court of Appeals held that Judge Baxley's order of December 19, 2011, and May 7, 2012, were not immediately appealable, and by the same reasoning, Judge Baxley's 5/7/12 order approving the class notice was not immediately appealable when issued. However, arguably, those orders are no longer *preliminary* since Judge Dickson has decreed that Judge Baxley's preliminary class certification was a final ruling.

Of the seven orders noted for appeal, # 6 -- the order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)", filed September 9, 2016 -- is the order that triggered the appealability of all the orders by "finalizing" Judge Baxley's *preliminary* class certification. Until this order, the matter was proceeding on the understanding that the class certification was preliminary. Beyond the explicit language of Judge Baxley's orders, it is apparent that Judge Dickson also had been treating the certification as preliminary as evidenced by his scheduling order of May 26, 2016, wherein he was referring to the preliminary nature of the class certification. For example, Judge Dickson refers to the "preliminary class list," and he schedules a hearing and sets a briefing schedule for "the parties positions on class certification." Most significantly, Judge Dickson stated: "The stay on discovery in this case shall remain in effect until the Court issues

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<sup>5</sup> In his April 18, 2014 Order, Judge Baxley specifically left the class open for revisions by virtue of giving SCSP permission "during the RTC process, to eliminate errors in the mailing list and/or remove homeowners that do not meet the class criteria." And, in fact, SCSP has made several motions which are currently pending: Motion to Remove Class Members who have Failed to Return the RTC Questionnaire (9/27/16); Motion to Remove Members who Entered Into an Agreement not to Participate in any Class Litigation (10/31/16); Motion to Remove Members who do not Meet the Class Definition (9/29/16).

its ruling on final certification.” (Emphasis added). The 30-day time period to appeal the 9/9/16 Order was stayed when a timely motion for reconsideration was filed on September 23, 2016.

The most recent order # 7 -- The order of the Honorable Edgar W. Dickson, “Order Dismissing Defendants’ Motions to Reconsider Pursuant to Rule 59(e),” filed January 6, 2017 -- is the order that set the 30-day appeal time period in motion. Thus, the Notice of Appeal served on Monday, February 6, 2017, was timely<sup>6</sup>. With this timely appeal, all the prior intermediate orders are subject to review under the authority of Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005): “An order that is not directly appealable may be considered if there is an appealable issue before the court.” The Appellate Court may allow such interlocutory review of an intermediate order “in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy).” Id. Similarly, in Salmonsens v. CGD, Inc., the Court chose to address an issue in an interlocutory appeal because it was “in the interest of judicial economy and guidance to the bench and bar.” 377 S.C. 442, 661 S.E.2d 81, 87 (2008).

11-14. *S.C. Code Ann. § 14-3-330*. SCSP has fully addressed the appealability of intermediate orders under § 14-3-330 in its Motion to Determine Appealability. As fully discussed in that motion, the Appellant SCSP maintains that Judge Baxley’s 12/19/11 preliminary class certification order and his 4/18/14 order approving class notice (as finalized by Judge Dickson’s 9/9/16 order), together with Judge Dickson’s 2/12/16 order limiting destructive testing are immediately appealable pursuant to §14-3-330(2) because, apart from the issues of improper class certification under Rule 23, SCRCP, these orders deprive the Appellant of substantial, legal rights under the

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<sup>6</sup> The notice of appeal time runs from receipt of the notice of entry (i.e. the clocked copy); thus, SCSP’s notice of appeal is “early” in that it was served within 30 days of filing.

Right to Cure Act and they also effectively strike defenses by not allowing discovery or providing a reasonable means to assert defenses. In addition, the orders of Judge Baxley and Judge Dickson dismissing (as opposed to denying) SCSP's motions for reconsideration also involve the merits and affect substantial rights because they deny SCSP the right to seek reconsideration and to adequately preserve issues for appeal. Judge Baxley's preliminary order certifying the class (as "finalized" by Judge Dickson's order) and his order approving the class notice are immediately appealable because they create an impermissible opt-in class that affects the mode of trial under the ruling in Salmonsen, supra.

15-20. *Mode of Trial*. Again, SCSP has addressed the point regarding appealability of orders affecting the mode of trial point in its Motion to Determine Appealability. The current precedent cited by the Grazias is not definitive of all possible circumstances under which a court order may affect the mode of trial. As SCSP discussed, these orders are immediately appealable under the reasoning of Salmonsen, supra, because regardless of the "opt-out" label, the unique process for preliminary class certification and RTC compliance, as created by Judge Baxley in this case, creates a de facto opt-in process. Notwithstanding the Grazias' insistence (¶19-20), the interplay of the RTC compliance process does require claimants to take affirmative action to "opt-in," namely, they have to return the Questionnaire. A claimant's failure to timely return the questionnaire amounts to noncompliance that bars the claimant from proceeding with any legal action, thereby disqualifying them from participating in this class action and depriving them of a right to trial by jury, e.g. Salmonson, supra.

21-23. The Respondents Grazias repeatedly state that the class was long ago certified – as if saying it often enough will make it true. However, as discussed above and in the Motion to Determine Appealability, Judge Baxley's 2011 certification order was **PRELIMINARY** until September

2016 when Judge Dickson said differently. The Grazias cite to Judge Baxley's comments from the bench during certain hearings as "proof" that Judge Baxley had already made a "final" certification – irrespective of the express language of his written, filed order. Ultimately, however, the written order controls over any comments from the bench in the absence of any formal amendment to the 12/19/11 order or any new order explicitly clarifying his decision or making a new "final" ruling on class certification. See Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties.")

24. Again, as discussed above and in SCSP's Motion to Determine Appealability, the Supreme Court did NOT have the opportunity to deny class status in this case because that issue was not before the Court in the *Grazia I* appeal. The Supreme Court did NOT "affirmatively" make a choice on this issue as asserted by the Grazias. (¶ 24.) The Supreme Court's discussion of the general underlying purpose of class actions did not constitute an advisory opinion; particularly, where the Court very clearly stated that no motion for class certification had yet be made.

25. There is nothing in Judge Baxley's order approving the class notice that expressly altered his 12/19/11 order making a preliminary ruling on the class certification. Notably, the order on the class notice included directions regarding the RTC compliance process which has to be completed before a final ruling can be made. For, as Judge Baxley expressly stated in his 12/19/11 order, no final decision would be made on certification until after compliance is complete: "Thereafter [after compliance with the Right to Cure Act], the Court will make a final decision as to whether a class action is practicable under the specific facts and circumstances disclosed by the notices and response required under the Act." [12/19/11 Order (Baxley), p. 2.] This would appear

to be consistent with the Supreme Court's opinion in *Grazia I* regarding the use of the RTC process in the Rule 23 determination: "Enforcing a stay provision [RTC §40-59-830] does absolutely nothing to restrict the furtherance of that purpose; instead, the purpose is better served by allowing the use of the Right to Cure Act's stay provision to allow a court to determine whether or not a class action is feasible under the circumstances in each individual case, rather than striking the class allegations in toto at the outset." 703 S.E.2d at 203.

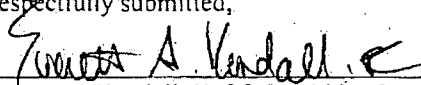
26. Judge Baxley's 12/19/11 order is clear that he was only making a preliminary ruling on class certification subject to later evaluation after RTC compliance is complete, and it is clear that the class certification and RTC compliance process was proceeding along pursuant to that preliminary ruling until Judge Dickson's 9/9/16 order. As discussed above, it is Judge Dickson's order that triggers the provisions of §14-33-330, and the timely appeal from that order provides review for all the earlier orders.

### CONCLUSION

Section 14-3-330 allows immediate appeal of these orders and the interests of justice and the administration of the judicial system are best served by proceeding with review of all the issues raised in regards to these orders at this stage, rather than years from now.

WHEREFORE, the Appellant SCSP requests that the motion to dismiss be denied.

Respectfully submitted,

  
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**Attorneys for Appellant  
South Carolina State Plastering, LLC**

March 9, 2017

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

RECEIVED

MAR 09 2017

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
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

Respondents.

**Proof of Service**

I, the undersigned legal assistant, of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for the Appellant South Carolina State Plastering, do hereby certify that I have served a copy of the foregoing **Return to Motion to Dismiss, South Carolina State Plastering, LLC's Appeal** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

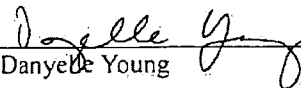
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Danyelle Young

Columbia, South Carolina  
March 9, 2017

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
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 ..... Respondents.

Appellate Case No. 2017-000245

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**ANTHONY AND BARBARA GRAZIA, INDIVIDUALLY AND ON BEHALF OF ALL  
OTHER SIMILARLY SITUATED PLAINTIFFS, RETURN IN OPPOSITION TO MOTION  
TO TRANSFER AND CERTIFY THE CASE FOR REVIEW OF APPELLANT SOUTH  
CAROLINA STATE PLASTERING, LLC**

---

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*Attorneys for the Respondents*

Respondents Anthony and Barbara Grazia, individually and on behalf of all other similarly situated plaintiffs (hereinafter referred to as "Respondents") oppose the Rule 204(b) Motion to Certify Appeal for review filed by Appellant South Carolina State Plastering, LLC (hereinafter "SCSP"). The Respondents would rely on their arguments filed in their Return in Opposition to Petitions for Extraordinary Relief and Motions to Transfer filed by SCSP.

In addition, Respondents would note that the Orders which SCSP seeks to transfer/certify from the South Carolina Court of Appeals are either wholly out of time and/or are non-appealable case management directives, which are interlocutory. This filing is made exclusively for the purpose of delaying a date certain trial in this Class Action which has been set for April 17, 2017.

[SIGNATURE ON NEXT PAGE]

Respectfully Submitted,

Jefferson Leath

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**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

**APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas**

J. Michael Baxley, Circuit Court Judge  
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.....Respondents.

Appellate Case No. 2017-000245

**PROOF OF SERVICE**

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*Attorneys for the Respondents*

I, W. Jefferson Leath, Jr., do hereby certify that on March 9, 2017, I served opposing counsel with a copy of the Respondents' Return in Opposition to Motion to Transfer and Certify the Case for Review of Appellant South Carolina State Plastering, LLC via regular first class United States mail, postage prepaid, addressed as follows:

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

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, ..... Respondents.

---

RETURN TO MOTION TO TRANSFER AND CERTIFY THE CASE FOR REVIEW

---

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Attorneys for Kephart Architects, Inc.

Del Webb and Pulte respectfully submit this Return to South Carolina State Plastering's "Motion to Transfer and Certify the Case for Review." State Plastering has filed an appeal in the Court of Appeals from several circuit court orders. Del Webb and Pulte have filed a separate appeal in the Court of Appeals from two of those orders. As to those two orders, Del Webb and Pulte are filing a separate "Motion to Certify Appeal for Review" in this Court, and they incorporate herein by reference the grounds and arguments made in support of their motion. As to the remaining orders, Del Webb and Pulte agree and consent that this Court should also certify the appeal from those orders for review and transfer jurisdiction of the case from the Court of Appeals to this Court.

Respectfully Submitted,



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February 21, 2017  
Columbia, SC

ATTORNEYS FOR RESPONDENTS  
Del Webb Communities, Inc., and  
Pulte Homes, Inc.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

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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, ..... Respondents.

---

CERTIFICATE OF SERVICE

---

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Respondents Del Webb Communities, Inc. and Pulte Homes, Inc.'s *RETURN TO MOTION TO TRANSFER AND CERTIFY THE CASE FOR REVIEW* by depositing a copy in the United States Mail, postage prepaid, on February 21, 2017, addressed to all attorneys of record, as follows:

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

**RECEIVED**

FEB 23 2017

SC Court of Appeals

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 CERTIFY APPEAL FOR REVIEW

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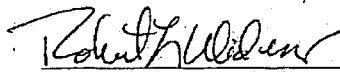
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Attorneys for Kephart Architects, Inc.

Pursuant to Rule 204(b), SCACR, Del Webb and Pulte (Appellants) respectfully request this Court to certify this appeal for review by this Court and transfer jurisdiction over this appeal from the Court of Appeals to this Court, in which Appellants have filed an appeal from two orders by the Honorable Edgar W. Dickson. This motion is one of three original filings by Appellants in this Court that relate to this case, the other filings being a Petition for a Writ of Certiorari to the Circuit Court and a Petition for a Writ of Mandamus to the Circuit Court.

For the convenience of the Court and to avoid repetitious reading, the grounds and arguments in support of all original filings by Appellants have been compiled into a single, combined memorandum in support of the filings, together with a supporting appendix. For the reasons set forth in that combined memorandum in support, which are incorporated herein by reference, Appellants respectfully submit that this Court should certify this case for review by this Court and transfer the jurisdiction over this appeal from the Court of Appeals to this Court.<sup>1</sup>

Respectfully Submitted,



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ATTORNEYS FOR APPELLANTS  
Del Webb Communities, Inc., and  
Pulte Homes, Inc.

February 22, 2017  
Columbia, SC

<sup>1</sup> Appellant South Carolina State Plastering has made similar filings in this Court regarding the same orders and others. Appellants Del Webb and Pulte have filed separate responses to those filings.

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

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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' Motion to Certify Appeal for Review together with the Combined Memorandum in Support of Motion to Certify Review for Appeal, Petition for a Writ of Certiorari to the Circuit Court, and Petition for a Writ of Mandamus to the Circuit Court and the Appendix to Combined Memorandum in Support of Motion to Certify Review for Appeal, Petition for a Writ of Certiorari to the Circuit Court, and Petition for a Writ of Mandamus to the Circuit Court by depositing same in the United States Mail, postage prepaid, on February 22, 2017, addressed to the persons listed below:

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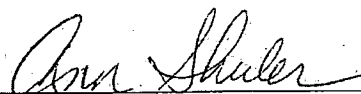
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
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  
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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..... Respondents.

Appellate Case No. 2017-000218

**RESPONDENTS', ANTOHNY AND BARBARA GRAZIA, INDIVIDUALLY AND ON  
BEHALF OF ALL OTHER SIMILARLY SITUATED PLAINTIFFS, REPLY TO  
APPELLANT SOUTH CAROLINA STATE PLASTERING, LLC'S RETURN TO  
MOTION TO DISMISS APPEAL**

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*Attorneys for the Respondents*

Respondents, Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs, (hereinafter referred to as "Respondents") hereby Reply to Appellant's, South Carolina State Plastering, LLC's (hereinafter referred to as "SCSP") Return to Motion to Dismiss Appeal, as follows:

#### **INTRODUCTION**

By its filing, with this court, SCSP is attempting to appeal from interlocutory orders and case management directives that it knows are not appealable in an effort to further delay the ultimate resolution of a case that has now been pending for a decade. In support of its effort to get this Court to review the unreviewable, SCSP focuses on four (4) incorrect assertions: (1) that interlocutory case management directives are immediately appealable (and that by filing this appeal, SCSP somehow has revived the time to appeal long out-of-time orders of the court, some of which have already been rejected by this Court); (2) that Judge Baxley did not certify a Class Action (when the record below is directly to the contrary); (3) that the Class is an "opt-in" Class (when the record directly contradicts this notion); and, (4) that SCSP has been unable to conduct sufficient discovery (when the record reveals that a) SCSP has inspected every house, b) one-half (1/2) of all the houses in Sun City have been tested by Pulte, the results of which are available to SCSP, c) SCSP has been provided answers to more than 3,500 questionnaires, and d) depositions of individual class members have been taken.) This Court should dismiss this Appeal, as it has previously done when SCSP attempted the same strategy of appealing that which was not appealable.

**THE ORDERS SOUGHT TO BE APPEALED ARE INTERLOCUTORY, AND ARE SIMILAR IF NOT IDENTICAL TO THOSE ALREADY DISMISSED BY THIS COURT**

As has been pointed out to this Court in numerous filings, and as stated in Judge Dickson's Order of September 9, 2016, SCSP previously asked Judge Baxley to reconsider his Class Certification Order. Judge Baxley declined, and SCSP appealed to this Court. The appeal was dismissed in August of 2012. This Appeal is identical to that effort. SCSP failed to file any Motions before Judge Dickson, but sought instead to have Judge Dickson reconsider Class Certification. He declined to do so, citing the record. Notwithstanding its numerous attempts at collaterally attacking the Court's interlocutory orders, SCSP again filed a Motion to Reconsider and Amend dated September 19, 2016. Judge Dickson dismissed these Motions, noting, "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), South Carolina Rules of Civil Procedure (hereinafter referred to as "SCRCP"), allowing a party to challenge an interlocutory order." (Order of Jan. 6, 2017 – the subject of this Appeal). There is nothing to Appeal here – no underlying Motion to Reconsider Class Certification, only an attempt to appeal a *dismissal* of an improvidently filed Rule 59(e) Motion to Reconsider, an interlocutory case management directive. Here, unlike the 2012 attempt at an appeal, there is not even an underlying Motion, nor a denial of such a motion – the entire matter being interlocutory. The Class Certification at issue was made nearly five (5) years ago by Judge Baxley, and SCSP then-attempted appeal of that Certification which was rejected by this Court in August of 2012.

Now, SCSP propounds an even farther-fetched theory which goes something like this: Since Judge Dickson's Order Dismissing the Rule 59(e) Motion was arguably timely

appealed (although not in-fact appealable), then somehow, this Appellate filing resurrects SCSP's ability to appeal all of the Courts' previous interlocutory orders, including those already rejected by this Court in 2012. There is no precedent for such a theory, and SCSP does not provide any. Instead, it cites *Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 366 S.C. 511 (S.C. 2005). *Edge*, and its predecessors do not stand for this proposition. To the contrary, *Edge* holds that an Appellate Court may consider some orders which may not have been directly appealable for reasons of judicial economy "if there is an appealable issue before the Court." *Cox v. Woodmen of the World Insurance Company*, 556 S.E.2d 397, 402, 347 S.C. 460 (S.C.App. 2001). Here, there is no appealable issue before the Court, and even if there were, these decisions do not revive SCSP's ability to appeal time-barred orders.

**THE RECORD DEMONSTRATES THAT JUDGE BAXLEY  
CERTIFIED THIS CLASS IN 2012**

As noted above, Judge Baxley did not, as SCSP continues to urge, certify a "preliminary" class. SCSP attempted to appeal his Class Certification in 2012. This Class was certified, and the Notice to the putative class members was approved by Judge Baxley after hours of exhaustive hearings. Judge Dickson in his September 9, 2016 Order, cited the record, and the hearing transcript wherein Judge Baxley stated his certification was not preliminary. Judge Baxley also approved the very detailed and specific Notice and Exclusion forms which went out to all Class members. Nowhere in the Notice is there any mention of "preliminary" certification. Judge Dickson is careful to cite Judge Baxley's Order Approving Class Notice – an order Judge Baxley himself composed – in which he "declined to refer to the class as 'preliminary', for the reason that it was not and is not preliminary." (Order of 9/09/16 at pp. 3-4). SCSP does not have any evidence

to challenge these orders. Instead, SCSP simply continues to argue that the orders and transcripts somehow do not mean what they say.

**THE RECORD DEMONSTRATES THAT THIS CERTIFIED CLASS IS AN OPT-OUT CLASS, THERE IS NO EVIDENCE TO THE CONTRARY**

The certification of the Class here is no more nor less than the classic opt-out class permitted in this state, and elsewhere, as is clear when reading the Notice and Exclusion (Opt-Out) forms sent to all members of the class (attached hereto as Exhibits A and B, respectively).

Orders granting class certification are not appealable. *Salmonsens v. CGD, Inc.* 661 S.E.2d 81, 87, 377 S.C. 442 (S.C. 2008). ("Because a decision by this Court to grant immediate appellate review of a class certification order would represent a significant departure from this states [sic] established appealability jurisprudence, we decline to do so.")<sup>1</sup> There is nothing here to appeal. There was no timely notice of appeal made. There is no opt-in class. There is nothing for this Court to do but to dismiss this improvidently filed appeal, taken for the sole purpose of delay, and remand this case back to the Circuit Court with directions to move it expeditiously to a trial on the merits.

**EVEN THOUGH DISCOVERY FROM INDIVIDUAL CLASS MEMBERS IS GENERALLY NOT PERMITTED, SCSP HAS ENGAGED IN MASSIVE INDIVIDUAL DISCOVERY**

This is a group of some 4,500 single family homes, involving more than 8,000 individuals. Apparently SCSP wants to depose each of these people, contemplating a discovery period exceeding the class members' life expectancy, and/or the careers of all

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<sup>1</sup> *Salmonsens* permitted an appeal only because the improper "opt-in" class would have barred some of the claims of the putative class members due to the statute of limitations, and this was agreed to by all parties, so that those persons might have been denied a trial at all, thus "affecting a mode of trial." Nothing like that situation exists here.

counsel involved. This notion strikes at the very concept of judicial economy envisioned by Rules 1 and 23, SCRPC, and the decisional law favoring class actions in this State.

The General Rule regarding discovery of individual class members is as follows, "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

While some courts have permitted discovery of absent class members, they have done so only where the proponent of the discovery establishes that (1) the discovery is not designed to take undue advantage of class members or to reduce the size of the class, (2) the discovery is necessary, (3) responding to the discovery requests would not require the assistance of counsel, and (4) the discovery seeks information that is not already known by the proponent. *McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 517 (S.D. Cal. 2008) (citing *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340-42 (7th Cir. 1974)).

There are superior and more efficient ways for individual issues to be handled in this case in a manner more consistent with Rule 23, SCRPC. For example, inquiry into individual issues can take place during a second phase of trial or during the claims administration process:

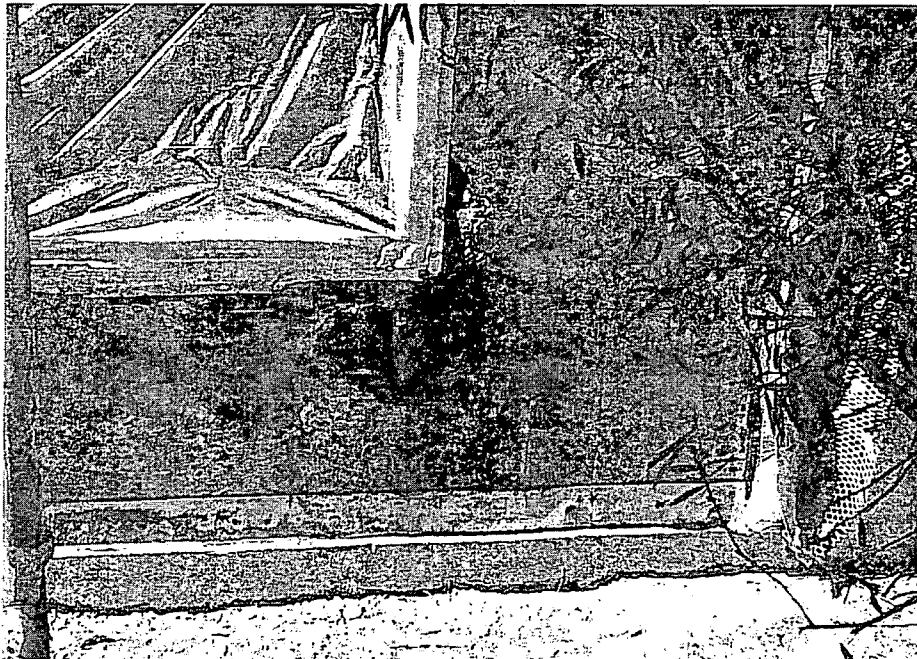
"Class members are sometimes called upon to provide the court with information regarding their individual claims. This may be appropriate in connection with preparation for the second stage of a bifurcated trial (with adequate time allowed for discovery) or the determination of entitlement to individual relief under a judgment or settlement... Class members should not, however, be required to submit proofs of claim as a condition of membership in the class, which would be equivalent to establishing an opt-in procedure. Nor should such claim forms or questionnaires be used to evade the general limitation on discovery from absent class members."

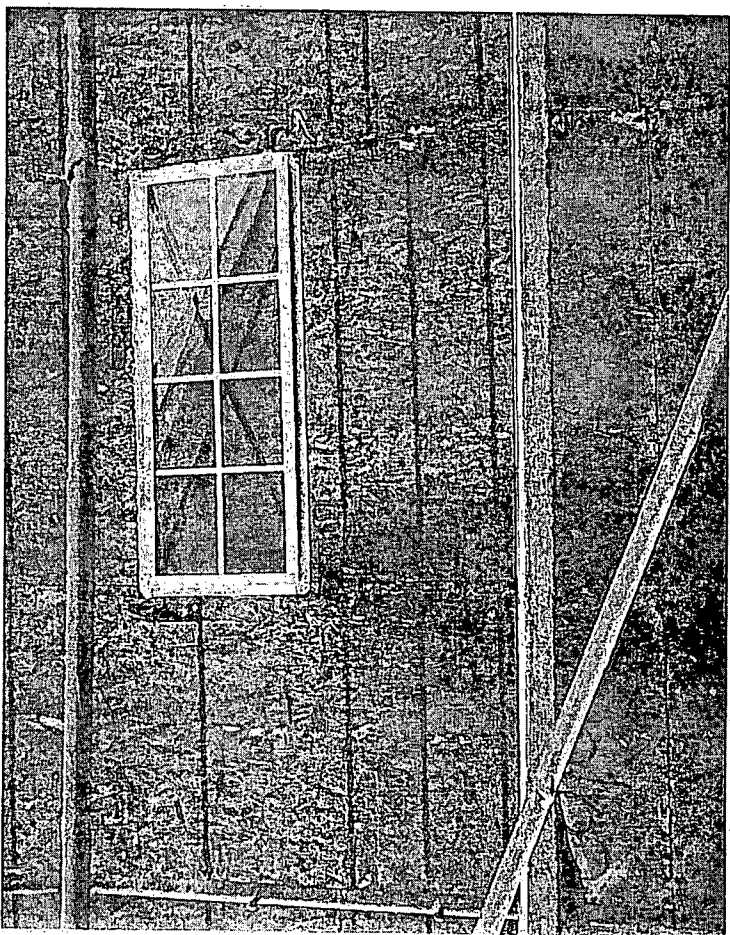
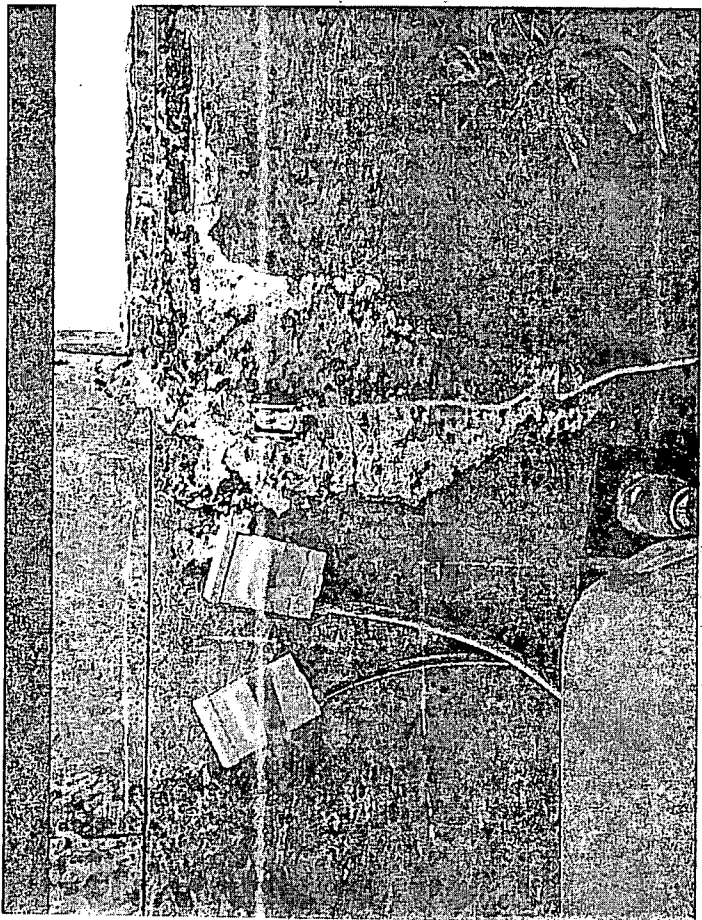
*McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 519-520 (S.D. Cal. 2008) (quoting Federal Judicial Center, Manual for Complex Litigation Sec. 30.232 (3d Ed. 1995)).

"[T]he most appropriate time to gather any necessary information from individual class members is generally after a determination of liability and before payment of individual claims." *On the House Syndication, Inc. v. Fed. Exp. Corp.*, 203 F.R.D. 452, 458 (S.D. Cal. 2001).

In spite of this concept, it is useful to examine the extent to which SCSP has in fact been permitted to conduct discovery.

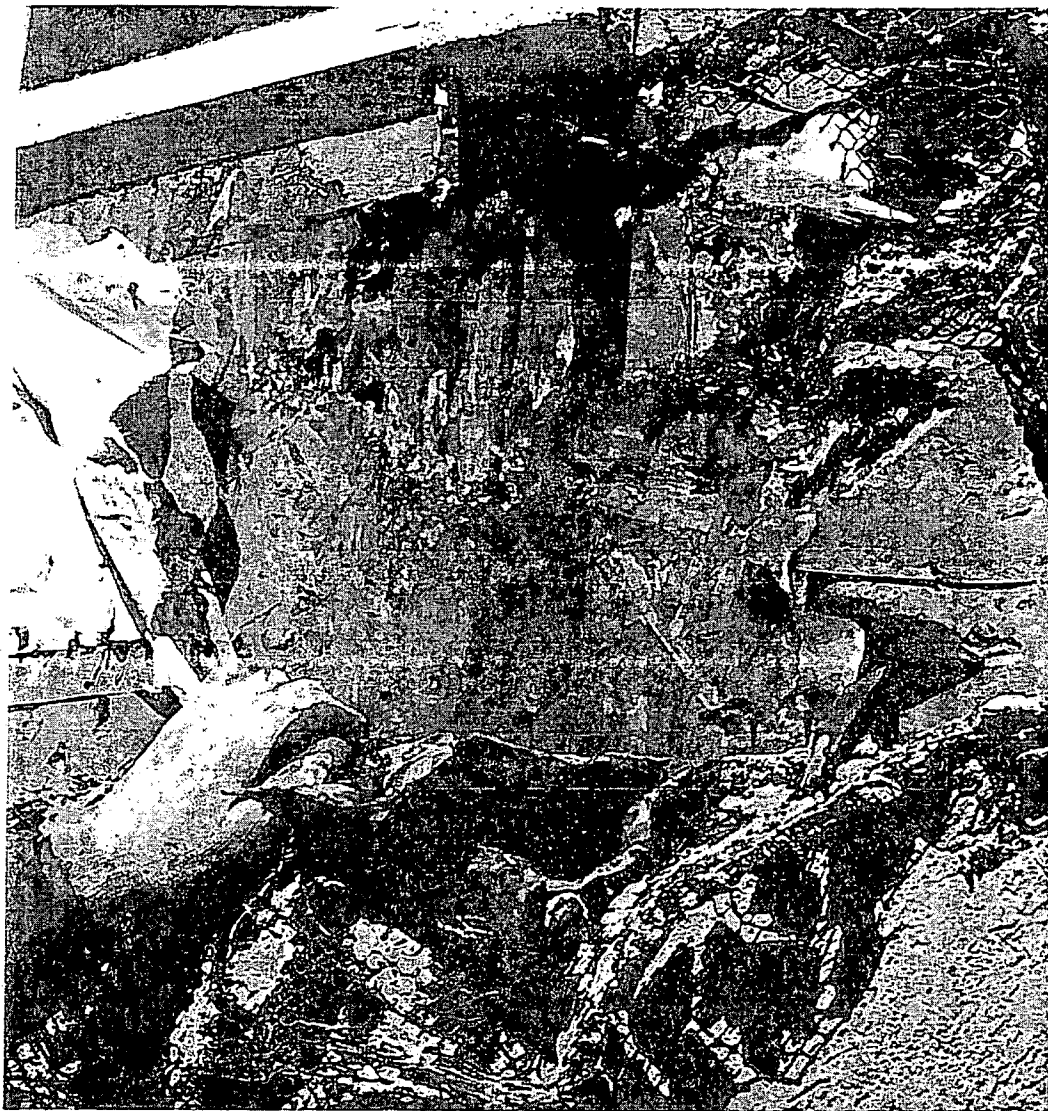
1. Respondents Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter referred to as "Webb/Pulte") has conducted moisture meter testing and/or infrared testing, and has destructively tested and partially repaired some 2,000+ houses at a cost of \$23 million, and has shared the test results, repairs, and extensive photographic evidence (see examples attached below).





2. SCSP has physically inspected more than 4,000 homes.
3. SCSP has, with its own experts, destructively tested, photographed, and documented, some 47 houses (see examples attached below).





4. All parties have received responses to extensive questionnaires from more than 3,500 homeowners (see example attached hereto as Exhibit C), and
5. Depositions of eighteen (18) individual homeowners have been taken.

**CONCLUSION**

This appeal must be dismissed. There is no Appellate jurisdiction, and this Appeal is taken only for the purpose of delaying the trial currently set for April 17, 2017.

Respectfully Submitted,

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Appellate Case No. 2017-000218

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(843) 884-1865

*Attorneys for the Respondents*

I, W. Jefferson Leath, Jr., Esq., do hereby certify that on March 15, 2017, I served opposing counsel with a copy of the Respondents' Reply to Appellant South Carolina State Plastering, LLC's Return to Motion to Dismiss Appeal via regular first class United States mail, postage prepaid, addressed as follows:

Everett A. Kendall, II, Esq.  
Marshall C. Crane, Esq.  
Sweeny, Wingate & Barrow, P.A.  
P.O. Box 12129  
Columbia, SC 29211  
*Attorneys for Appellate South Carolina State Plastering, LLC*

A. Victor Rawl, Jr., Esq.  
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*Attorneys for Third-Party Defendants Del Webb Communities, Inc., and Pulte Homes, Inc.*

David S. Cobb, Esq.  
Turner Padgett, Graham & Laney, P.A.  
P.O. Box 22129  
Charleston, SC 29413-2129  
*Attorney for Third-Party Defendant Kephart Architects, Inc.*

R. Michael Ethridge, Esq.  
Ethridge Law Group, LLC  
P.O. Box 20969  
Charleston, SC 29413  
*Attorney for Appellant South Carolina State Plastering, LLC*

Jefferson Leath  
W. Jefferson Leath, Jr., Esq.  
Michael S. Seekings, Esq.  
Leath, Bouch & Seekings, LLP  
92 Broad Street  
P.O. Box 59  
Charleston, SC 29402  
(843) 937-8811

**EXHIBIT A**

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF BEAUFORT ) FOURTEENTH JUDICIAL CIRCUIT  
 ) 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,

Defendant.

---

SOUTH CAROLINA STATE PLASTERING,  
LLC,

Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC., PULTE  
HOMES, INC., and KEPHART  
ARCHITECTS, INC.,

Third-Party Defendants.

NOTICE OF CLASS ACTION

TO: ALL OWNERS OF RESIDENCES AT SUN CITY, HILTON HEAD, HAVING  
STUCCO EXTERIORS INSTALLED BY SOUTH CAROLINA STATE  
PLASTERING, LLC, PRIOR TO JULY 31, 2007:

THIS NOTICE MAY AFFECT YOUR RIGHTS.  
PLEASE READ IT CAREFULLY.

**\*\*\*YOU ARE NOT BEING SUED\*\*\***  
**\*\*\*THIS IS NOT A SOLICITATION FROM A LAWYER\*\*\***  
**\*\*\*A SOUTH CAROLINA COURT AUTHORIZED THIS NOTICE\*\*\***

**\*\*\*YOU MUST RETURN THE ENCLOSED FORM BY DECEMBER 23, 2015,  
IF YOU DO NOT WANT TO PARTICIPATE IN THIS CASE**

**1. WHY SHOULD I READ THIS NOTICE?**

The Court has approved this Notice to you and has included information that it believes you need to know to decide whether to remain in the Class or to exclude yourself/opt-out of the Class. You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of the Class, and whether to opt-out of the Class. You should carefully read below to decide whether it is in your best interest to opt-out or stay in the Class.

You have been identified as one of 4,300 potential members of a Class on whose behalf certain claims are being asserted in the above-captioned civil action pending in the Beaufort County Court of Common Pleas (the "Court"). The Court certified this civil action to proceed as a class action on behalf of the Class defined below.

If you own a residence in Sun City having a stucco exterior installed by South Carolina State Plastering, LLC prior to July 31, 2007, your rights may be affected by this action. You should read this Notice to determine whether your rights are affected, the steps necessary to pursue your rights as a member of the Class, and whether to opt-out of the proposed Class. In a Class Action, one or more people, called named Plaintiffs (in this case Anthony and Barbara Grazia), sue on behalf of people who have similar claims. All these similarly situated people are a Class or Class members. One court resolves the issues for all Class members, except for those who exclude themselves from the Class.

This action is pending in the Court of Common Pleas for Beaufort County, South Carolina, in a lawsuit known as Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs vs. South Carolina State Plastering, LLC. While the Plaintiffs (and Class) are only suing (and may only recover against) South Carolina State Plastering, LLC in this case, South Carolina State Plastering (SCSP) has brought a third-party action entitled: South Carolina State Plastering, LLC v. Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc., Civil Action No. 07-CP-07-1396. If you are a member of the Class, and do not exclude yourself from the Class (i.e., opt out of the Class), the result of this pending litigation will permanently affect your rights against the Defendants.

**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.**

## 2. WHAT IS THE LAWSUIT ABOUT?

The Plaintiffs have alleged that South Carolina State Plastering has improperly installed stucco on some houses in Sun City Hilton Head. Plaintiffs are requesting that South Carolina State Plastering pay money to the Plaintiffs and Class members to cover the cost to repair alleged damage caused by the alleged improper stucco installation. South Carolina State Plastering denies the allegations made by Plaintiffs and denies that there are any widespread stucco installation problems in Sun City Hilton Head.

### 2.1. WHAT CLAIMS ARE INCLUDED IN THIS LAWSUIT?

The suit alleges negligence and breach of implied warranty of good and workmanlike services. Plaintiffs are only pursuing three (3) alleged stucco installation issues in this lawsuit. This lawsuit is limited to recovering damages caused by one or more of the following three (3) alleged stucco installation defects:

- (1) The lack of head flashing above doors and windows,
- (2) The failure to install stucco control joints, and/or
- (3) The presence of moisture encapsulation by the failure to leave a gap between the bottom of the stucco exterior and the structure slab.

The Class is seeking to recover money for damages caused by one or more of the above three (3) alleged defects.

### 2.2. WHAT CLAIMS ARE NOT INCLUDED IN THIS LAWSUIT?

#### A. Stucco Application Issues Not Included in This Case.

Any issues other than the three (3) issues in Section 2.1 above will not be included in this lawsuit. If you have damage to your house solely related to a stucco issue not included in Section 2.1, then you will not be able to recover for those damages (in this lawsuit or any other lawsuit) if you remain in this Class.

There may be stucco homeowners in Sun City Hilton Head that have other stucco problems (such as thin application, improper mix, or improper installation) which are not included in Section 2.1 above, and also do not include one of the three (3) conditions listed in Section 2.1 above.

If you have one of these other stucco problems, you will not be able to recover funds for damage caused by those issues if you stay in the Class. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

**B. Past Repairs Not Included:**

The Named Plaintiffs have agreed not to request the recovery of any funds already expended by Class members or to recover funds already paid for repairs to stucco or behind stucco. If you have paid money for stucco related repairs, you will not be able to recover those funds if you stay in the Class. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

**C. Legal Causes of Action Not Included:**

The Named Plaintiffs will not pursue claims brought under the South Carolina Unfair Trade Practices Act (SCUTPA). Under SCUTPA, if a Defendant is found to have acted unfairly, the Plaintiffs and Class members could recover treble (triple) damages, costs, and attorneys' fees. If you stay in the Class, you will not be able to bring a SCUTPA claim against Defendant for stucco related issues, and you will be barred from recovery of treble damages, costs, and attorneys' fees. You may be able to bring such a claim individually, but only if you opt-out of the Class in accordance with Paragraph 4.

**3. WHAT DO I NEED TO DO TO JOIN THE CLASS?**

If you wish to join the Class, you do not need to take any further action and your interest as a member of the Class will be represented by Class Counsel without individual charge to you. (See Paragraph 8 for Class Counsel's fees and costs.) You are not required to hire your own attorney but may do so at your own expense. You will be bound by the result in the case.

**4. HOW DO I EXCLUDE MYSELF FROM THE CLASS?**

To opt-out of the Class, you must complete, sign and submit the Exclusion Request Form which is included with this Notice. Please send your completed form to:

Sun City Administrator  
Leath, Bouch & Seekings, LLP  
P. O. Box 59  
Charleston, SC 29402  
Telephone: (843) 730-5369

You should submit a separate Exclusion Request Form for each property you own. If you do not receive a form or if you desire additional copies, you may obtain such copies by writing or calling the address above.

**AN OWNER OR OWNERS OF A HOME WHO FAIL TO SUBMIT AN EXCLUSION REQUEST FORM BY MIDNIGHT ON MAY 10, 2015, WILL AUTOMATICALLY BE INCLUDED IN THE CLASS. IF YOU DO NOT OPT-OUT OF THE CLASS, YOU WILL BE BOUND BY ALL ORDERS AND JUDGMENTS ENTERED BY THE COURT. THIS IS YOUR**

**ONLY OPPORTUNITY TO OPT-OUT OF THE CLASS.**

IF YOU ARE A PUTATIVE CLASS MEMBER AND PROPERLY AND TIMELY REQUEST EXCLUSION FROM THE CLASS, YOU WILL NOT RECEIVE ANY BENEFITS OF THIS ACTION AND YOU WILL NOT BE BOUND BY ANY FURTHER ORDERS OR JUDGMENTS ENTERED FOR OR AGAINST THE CLASS. YOU MAY PURSUE AT YOUR OWN EXPENSE WHATEVER RIGHTS YOU MAY HAVE AGAINST THE DEFENDANT, IF ANY.

**5. IF I STAY IN THE CLASS, MAY I BRING ANOTHER LAWSUIT LATER AGAINST SOUTH CAROLINA STATE PLASTERING?**

Not related to stucco claims. If you stay in the Class, you will be bound by the result of this lawsuit – win or lose. If you do not submit a timely Exclusion Request Form, you will not be allowed to bring an individual lawsuit against South Carolina State Plastering for stucco claims.

**6. IF I DO NOT EXCLUDE MYSELF FROM THE CLASS, WILL I HAVE ANY RESPONSIBILITIES?**

**YES. SEE BELOW.**

Under South Carolina's Opportunity to Cure Construction Defects statute, the Defendant in this case is granted the opportunity to inspect allegedly defective stucco if it requests to do so. Once the opt-out period in this case has expired, the action will be stayed so that the requirements of the Opportunity To Cure Act can be met. If you remain in the Class, an Opportunity to Cure notice of individual claim will be mailed to you to be completed and returned by mail to Plaintiff's counsel. The notice will ask you to describe any stucco-related problems you are currently experiencing with your home.

After the Notice is issued, the Defendant will be permitted to inspect your home, offer to remedy the defects, and offer to settle or deny the Claim. If you remain in the Class, and the Defendant chooses to do so, you must allow a home inspection which will take place at a time agreed on by Counsel. The inspection, if any, will be non-invasive and non-destructive, and will be done at no cost to you. The inspection, if any, will be conducted by Class Counsel, under the supervision of the Court.

If the Defendant offers to remedy the defect(s) stated in the Notice or if a monetary offer is made to you, Class Counsel will communicate with you and respond on your behalf. Should you choose to accept the offer, the Court will be advised and a settlement of your Claim may occur.

If you and the Defendant cannot settle the dispute regarding your house pursuant to the Opportunity to Cure Act, then the class action will proceed, and you will be bound by the decision of the court with regard to judgments and rulings in this class action.

**6.1. PARTICIPATION IN THE LITIGATION.**

If you do not opt-out of the Class pursuant to Section 4 above, and if you do not settle/resolve your claim pursuant to Section 6 above, then you will be required to take part in the litigation. The claims brought on behalf of the Class and/or the defenses asserted by Defendant may require one or more of the following: 1) you may be required to provide documents and/or information related to you, your house, your house purchase, and any house repairs; 2) you may be required to testify at a deposition about these same issues; 3) your house may be inspected, 4) testing may be conducted on your house, and/or 5) you may be required to testify at the trial of the case.

As a Class member, you will not have any right to control the litigation. In the event that a settlement is reached, you will have the right to submit an objection to the Court. If trial results in an unfavorable outcome, you will not have an individual right to appeal your claim, or to direct that the class representative pursue an appeal.

**7. WHO REPRESENTS THE PARTIES:**

Class Counsel for the Plaintiffs is as follows:

John T. Chakeris, Esq.  
The Chakeris Law Firm  
231 Calhoun Street  
P.O. Box 397  
Charleston, SC 29402

W. Jefferson Leath, Jr., Esq.  
Michael S. Seekings, Esq.  
Leath, Bouch & Seekings, LLP  
92 Broad Street  
P.O. Box 59  
Charleston, SC 29402  
Telephone: (843) 730-5369

Phillip W. Segui, Jr., Esq.  
Segui Law Firm, PC  
864 Lowcountry Blvd, Suite A  
Mt. Pleasant, SC 29465

Counsel for Defendant and Third-Party Defendants is as follows:

Attorney for Defendant South Carolina State Plastering, LLC:

Everett A. Kendall, II, Esq.  
Christy E. Mahon, Esq.  
Sweeny Wingate & Barrow, P.A.  
1515 Lady Street  
P.O. Box 12129  
Columbia, SC 29211

R. Michael Ethridge, Esq.  
Laura Paris Paton, Esq.  
Carlock, Copeland & Stair, LLP  
40 Calhoun St., Suite 400  
Charleston, SC 29401

Attorney for Third-Party Defendants Del Webb Communities, Inc., and Pulte Homes, Inc.:

A. Victor Rawl, Jr., Esq.  
McNair Law Firm  
P.O. Box 1431  
Charleston, SC 29402

Attorney for Third-Party Defendant Kephart Architects, Inc.:

David S. Cobb, Esq.  
Turner, Padgett, Graham & Laney, P.A.  
40 Calhoun Street, Suite 200  
P. O. Box 22129  
Charleston, SC 29413

**8. HOW WILL CLASS COUNSELS' FEES AND EXPENSES BE PAID?**

If any funds are generated for any class member(s) (either through settlement or judgment), then Class Counsel will request that the Court award to Class Counsel a portion of the funds generated as attorneys' fees for all services rendered to the Class, plus their costs and expenses. **THE ATTORNEYS' FEES AND COSTS AWARDED BY THE COURT SHALL BE PAID ONLY FROM ANY FUNDS GENERATED AS A RESULT OF THE CLASS AND NO INDIVIDUALS WILL BE RESPONSIBLE FOR ANY FEES, COSTS, OR EXPENSES OUT OF POCKET.** All payments to Class Counsel must be approved by the Court, and will be considered at a Fairness Hearing or at other hearings to be scheduled by the Court. Any Attorneys' Fees and Costs that may be awarded as part of the settlement of any claims resolved through the South Carolina Right To Cure process will be addressed similarly.

**9. WHERE DO I GET ADDITIONAL INFORMATION?**

This Notice provides only a summary of matters regarding the case. You may seek the advice and guidance of your own private attorney, at your own expense, if you wish. For more

details about matters discussed in this Notice, you may desire to review certain documents related to the litigation such as the Complaint, the Answer of the Defendant, and the Court's Order certifying the Class. If you wish to obtain additional information, you may do so by writing or calling Plaintiffs' Counsel at one of the addresses listed above. DO NOT CONTACT THE COURT.

AN OWNER OF A RESIDENCE IN SUN CITY WHO FAILS TO SUBMIT A COMPLETE, VALID AND TIMELY EXCLUSION REQUEST PURSUANT TO THIS COURT-APPROVED NOTICE WILL BE AUTOMATICALLY INCLUDED IN THE CLASS. IF YOU DO NOT OPT-OUT OF THE CLASS BY TIMELY RETURNING A VALID EXCLUSION REQUEST AS REFERENCED IN PARAGRAPH 4 ABOVE, YOU WILL BE A MEMBER OF THE CLASS AND BOUND BY ALL ORDERS AND JUDGMENTS OF THE COURT.

**EXHIBIT B**

**EXCLUSION REQUEST**

This is a request to be excluded from a class action.

READ THE ATTACHED LEGAL NOTICE CAREFULLY BEFORE  
FILLING OUT THIS FORM

To: Sun City Administrator  
Leath, Bouch & Seekings, LLP  
P. O. Box 59  
Charleston, SC 29402

Re: Anthony and Barbara Grazia, individually and on behalf of all other similarly situated  
Plaintiffs vs. South Carolina State Plastering, LLC

**THIS FORM IS TO BE FILLED OUT ONLY IF YOU DESIRE TO BE  
EXCLUDED FROM THE CLASS**

**DO NOT fill out this form if you wish to be included in the class. If you wish to be excluded,  
this form must be mailed no later than **December 23, 2015.****

I acknowledge receipt of the Notice of Class Certification in this case, describing the class and my rights therein. **Please exclude me from membership in the class and from this lawsuit.** I understand that by signing below that I may be able to pursue my own claim separately. I also understand that if I wish to pursue a claim, I must do so separately using my own attorney at my own expense. I understand that I will not be bound by any ruling in this lawsuit and that I will not receive any funds that may be generated by this lawsuit.

I certify by signing below that I own the below referenced house in Sun City Hilton Head. **This form must be signed by ALL owners of the house.**

Sun City Hilton Head House Address: \_\_\_\_\_

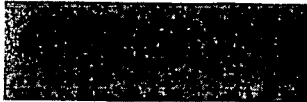
\_\_\_\_\_  
Owner Signature

\_\_\_\_\_  
Co-Owner Signature

\_\_\_\_\_  
Owner Name (Print)

\_\_\_\_\_  
Co- Owner Name (Print)

**EXHIBIT C**



**QUESTIONNAIRE**  
**PLEASE COMPLETE BOTH SIDES**

Name of Claimant: 

Address of property: 88 Redtail Drive, Sou City, Bluffton, SC 29909

**SOUTH CAROLINA NOTICE AND OPPORTUNITY TO CURE DWELLING DEFECTS ACT**

**INDIVIDUAL NOTICE OF STUCCO CLAIM TO SOUTH CAROLINA STATE PLASTERING, LLC**

1. Do you have stucco on the exterior of your home?

Yes  No  I don't know

2. Does the stucco on your home lack head flashing above any windows or doors?

Yes  No  I don't know

3. Does the stucco on your home lack control joints?

Yes  No  I don't know

4. Does the stucco on your home lack control joints specifically at corners of windows and doors?

Yes  No  I don't know

5. Does the stucco on your home have a gap between the bottom of the exterior stucco and the structure slab?

Yes  No  I don't know

6. Are there visible cracks in the exterior stucco on your home?

Yes  No  I don't know

7. Are there cracks in your exterior stucco greater than 1/16 of an Inch wide (you can fit a quarter sideways into the crack)?

Yes  No  I don't know

8. Are there places on your home where the exterior stucco is falling off?

Yes  No  I don't know

9. Is there any noticeable damage to the exterior stucco on your home?

Yes  No  I don't know

If yes, please describe:

Noticeable cracks which have since been repaired

See other side →

10. Is there any damage to the interior of your home resulting from defective exterior stucco installation or design?

\_\_\_\_\_ Yes \_\_\_\_\_ No P I don't know

If yes, please describe:

\_\_\_\_\_  
\_\_\_\_\_

11. What year was your home built? Year: 2004 or \_\_\_\_\_ I don't know

12. Have any repairs been made to the exterior stucco of your home since the time that it was built?

P Yes \_\_\_\_\_ No \_\_\_\_\_ I don't know

If yes, when were the repairs made, by whom were they made, and what was the nature of the repair:

September 2013 - Affordable Stucco Repair  
Seal and paint cracks in stucco

13. Please describe any stucco-related problems you are currently experiencing with your home, if any:

Have not been to house since March 2014.  
At that time repairs to stucco appeared effective.

14. Do you have any comments, photographs, inspection reports or other information that you would like for South Carolina State Plastering to consider in evaluating your claim? If so, please attach.

Attached Professional Home Inspections report -  
Polite Inspection/Conclusion  
Affordable Stucco Repair work record

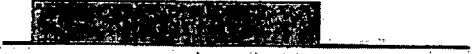
I certify that the above answers are true to the best of my knowledge.



Homeowner's signature



Printed Name



Phone number and email address

8/17/14

Date

Return to:  
Attn: Sun City Administrator  
Leath, Bouch & Seekings, LLP  
P.O. Box 59  
Charleston, SC 29402

**PROFESSIONAL HOME INSPECTIONS, INC.**  
**TONY KUNICH**

SCRBI# 2474 / SCRB #19230 / SCDHEC EPSCI #2858 / SC Safe Home Cert. Wind Inspector

Date: 10/30/12

To: [REDACTED]

RE: #88 Redtail Drive

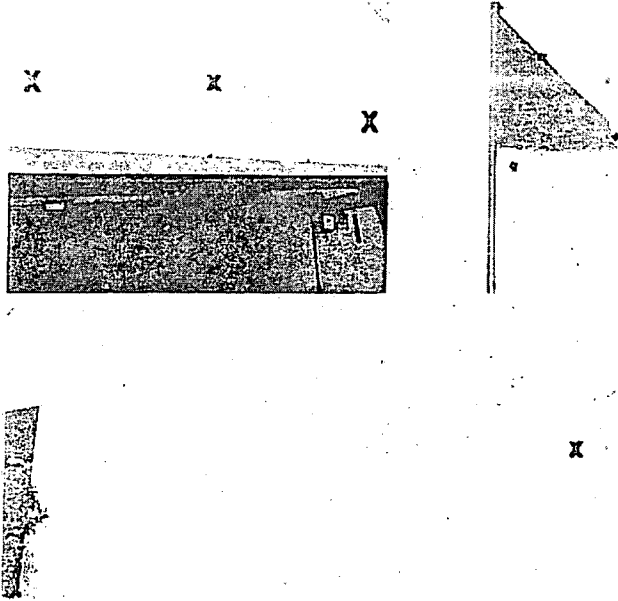
Sun City, Bluffton, S.C. 29909

**STUCCO INSPECTION dated 10/30/12: SUMMARY**

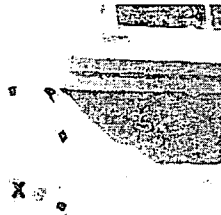


- 1) There are **insufficient weep holes visible in the bottom stucco weep screed strip (INCLUSION)**. It is VERY important the weep screed vent holes be exposed and not covered with stucco or elastomeric finish for proper ventilation and draining of any moisture. If moisture does not drain from the weep screed it can be trapped behind the stucco; possibly causing damage to the interior walls. We recommend the stucco product manufacturer be contacted regarding proper repairs to any stucco.

2) There are **several cracks in the stucco walls on the front, right, and left sides of the home.** The source of the cracking may be due to improper installation, moisture accumulation, and/ or the failure to control stress build-up (i.e. control joints). The existing cracks should be repaired and sealed to prevent water intrusion into the walls.



3) There are **cracks in the stucco walls beneath (5) of the windows: (3) at the right and (2) at the left side of the house.** There may be water intrusion at the base of the windows or at the shutter bracket bolts that has caused water to seep behind the stucco below, or the lack of control joints may have caused the stucco to crack in random places. The windows and bolts should be properly sealed. The stucco walls should be examined by the contractor for repair recommendations.



**RE #2 & 3: We recommend that the builder conduct a bore test to determine the existence/ condition of moisture beneath the stucco.** All affected wood/ stucco/ walls should be replaced or repaired as needed to prevent further damage to the home. **We have marked the areas that should be bore tested with green tape.**

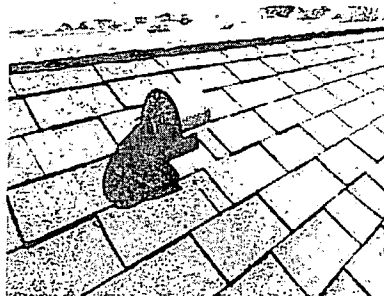
4) There are cracks in the stucco at the garage trim; possibly caused by stress or movement in this area or by water intrusion from the wall cracks above. The cracks should be sealed after wall repairs have been made.



**NOTE: The stucco control joints were not properly installed. According to the manufacturer's specifications (INCLUSION), control joints should be installed at dissimilar materials such as windows and at regular intervals. No control joints are installed at dissimilar materials, or at the front or rear of this home.**

5) There are (2) fogged thermo-pane windows; (1) at the right and (1) at the left side of the house. The thermo-pane seals have failed. The manufacturer should be contacted for replacements. We have marked the fogged windows with blue tape.

6) There is NO damper in BOTH of the roof mounted goose-neck vent housings. The dampers are needed to open when the vents are operating and to close when not operating; preventing insects or rodents from entering the ducts (INCLUSION).



7) There are **(2) damaged roof cap shingles** on the roof above the front entry porch. The damaged shingles should be removed and properly replaced with new shingles to prevent rain water from leaking into the attic or wall.



**NOTE: This was not a complete home inspection. Only the stucco and roof were inspected.**

**NOTE: It is important to properly repair and seal ALL damage; bulges, gaps, cracks, holes, and chipped or peeling areas in stucco to prevent water intrusion or insects into the wall behind the stucco. If further cracks, bulges, or other problems are found, or if moisture develops behind the stucco, the problem should be evaluated for cause and severity, and then proper repairs should be performed.**

**NOTE: Please refer to the builder's repair recommendations if bore test moisture levels are not excessive.**



November 12 2012

██████████  
88 Redtail Drive  
Bluffton, SC 29909

Dear ██████████.

Thank you for the opportunity to review the Professional Home Inspections report you received on your home. Enclosed please find the results of our onsite testing done in 11/14/2012. We have included the moisture readings taken at the locations specified on the Professional Home Inspections report as well as some helpful information we have compiled to assist you in understanding the testing method and results. Additionally, we have included reference materials regarding the stucco cladding installed on your home.

The final section of our report includes the conclusions of our testing and a list of items that you should monitor in the future.

Please do not hesitate to contact us with any further questions or concerns.

Sincerely,

Michael Thomas  
Customer Service Manager  
PulteGroup  
Coastal Carolinas Division – Hilton Head

PulteFinds.txt

Moisture readings from Pulte Report of 11/14/2012

Left side of house under right corner of 2nd window. 12.3% moisture reading.

Left side of house under left corner of 2nd window. 8.7%

Left side of house middle panel. 7.9%

Front side of house above garage header. 10.9%

Right side of house below right corner of 4th window. 6.6%

Right side of house below left corner of 4th window. 7.6%

Right side of house to the right of 3rd window. 8.2%

Right side of house below right corner of 2nd window. 7.7%

Right side of house below left corner of 2nd window. 6%

Normal cladding cracks on gable walls and other areas.

## CONCLUSIONS 88 Redtail Drive

11/14/2012

Test holes and moisture readings were taken at the locations indicated by Professional Home Inspections as having the potential for elevated moisture levels in the wall. The moisture content of the underlying wood sheathing at these test locations indicated moisture levels lower than the 15% threshold that would signify excessive moisture behind the stucco cladding and drainage plane. These results indicate that no elevated moisture levels are currently present in the wood framing of the home and adjacent wall cavities in these locations.

At this time further destructive testing or removal of stucco cladding is not needed or warranted in the other areas of the home. We would recommend monitoring the exterior of the home by looking for any changes in the exterior appearance of the stucco cladding. Additionally, please monitor the interior areas adjacent to these locations for signs of elevated moisture. Things to look for in these areas include:

Discolored or wet drywall

Discolored or wet baseboards or other millwork

Inside backs of cabinets rough or delaminating

Marble shower surrounds are showing signs of separating from wall

Please monitor exterior stucco areas for signs of tannins coming out of cracks in the stucco cladding. These tannins would show up as brown or tan drips at the cracks in the cladding. This would indicate moisture breaching the weather resistant barrier that forms the drain plane behind the stucco cladding and causing the wetting of wood fibers in the sheathing and framing behind.

Affordable Stucco Proposal.txt

September 4, 2013

[REDACTED]  
88 Redtail Drive  
SunCity Bluffton,  
SC 29909

[REDACTED] Home Phone [REDACTED]

Before any work can be done your house needs to be power washed. Stucco soft wash on your house at 88 Redtail Drive the cost is \$100.00

Front of house

Seal all window sills and garage door sill. Seal all cracks in front of the home over garage door and repair 1 set of stucco test holes then paint to match the color or the stucco as close as possible.

Right side of house

Seal all window sills. Seal all cracks on the side of the house and repair 5 set of stucco test holes and then remove 11 screws from the side of the stucco from where the old owner of the house had dish TV then repair the 11 other screw holes with stucco then paint to match the color or the stucco as close as possible.

Rear (back of house)

Seal all window sills. Seal all and repair 1 set of stucco test holes then paint to match the color or the stucco as close as possible.

Left side of house

Seal all window sills. Seal all cracks and repair 3 set of stucco test holes then paint to match the color or the stucco as close as possible.

Affordable Stucco Proposal.txt

Seal all expansion joints around the house from top to bottom  
and side to side.

(Stucco sealing  
carries a 5 year manufacturer's warranty and  
I give 5 years on the labor on stucco  
sealing.)

Stucco crack sealing.....\$350.00

Stucco repair and paint to match as close as possible.....\$350.00

Total amount due for job \$700.00 plus \$100.00 for power wash.

Thank you for the opportunity of working with  
you.

Michael Caracappa

Affordable Stucco  
Crack Repair and Sealing LLC

S.C. Residential  
Builders Commission to#54940

Local County  
License #14331

Hilton Head Town  
License #15223

Bluffton Town  
License # LIC-3-13-10069

Liability  
Coverage-The Main Street America Group Insurance  
Company #1451505-01

Affordable Stucco Crack Repair and Sealing  
LLC. [www.affordablestuccorepair.com](http://www.affordablestuccorepair.com)  
Call for  
appointment (843) 321-8882  
or (843) 771-7521mike@affordablestuccorepair.com

## The South Carolina Court of Appeals

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

v.

South Carolina State Plastering, LLC,  
Appellant/Respondent.

And

South Carolina State Plastering, LLC,  
Appellant/Respondent,

v.

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

Of which Del Webb Communities, Inc. and Pulte Homes,  
Inc. are Respondents/Appellants.

Appellate Case No. 2017-000218

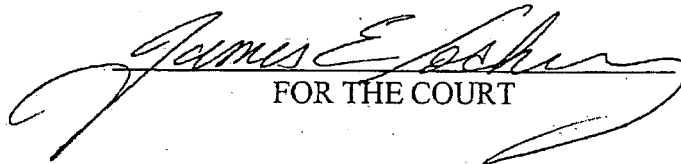
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### ORDER

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Appellant/Respondent and Respondents/Appellants have filed separate motions to determine the appealability of the orders on appeal. Respondents have also filed a motion to dismiss, arguing the orders on appeal are not immediately appealable. We find the orders on appeal are interlocutory and not appealable pursuant to section 14-3-330 of the South Carolina Code (2017); accordingly, we grant Respondents' motion and dismiss the instant appeals. *See Knowles v. Standard Sav. & Loan Ass'n*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) ("Class certification, essentially procedural in nature, does not involve substantial or essential legal

rights which require attention prior to final judgment. . . . Neither does certification reach the 'merits' of the underlying cause of action . . . ."); *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 573, 703 S.E.2d 197, 202 (2010) ("[The] rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights."). The remittitur will be sent as provided by Rule 221(b), SCACR.<sup>1</sup>

  
FOR THE COURT

Columbia, South Carolina

cc: Everett Augustus Kendall, II, Esquire  
W. Jefferson Leath, Jr., Esquire  
Michael S. Seekings, Esquire  
Phillip Ward Segui, Jr., Esquire  
John T. Chakeris, Esquire  
A. Victor Rawl, Jr., Esquire  
Robert L. Widener, Esquire  
Robert Michael Ethridge, Esquire  
The Honorable Edgar W. Dickson

**FILED**

March 17, 2017

---

<sup>1</sup> Because we dismiss these appeals, we need not entertain Respondents motion to lift the automatic stay.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

Appeal No. 2017-000218

RECEIVED

MAR 31 2017

SC Court of Appeals

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

Respondents.

**Petition for Rehearing**

South Carolina State Plastering, LLC filed a Notice of Appeal from certain intermediate orders in this action, to wit:

1. The order of the Honorable J. Michael Baxley, "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements 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," dated December 8, 2011 and filed December 19, 2011;

2. The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminarily Certifying Class, dated May 1, 2012 and filed May 7, 2012;
3. The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014, and filed April 18, 2014;
4. The order of the Honorable Edgar W. Dickson, "Order Granting South Carolina State Plastering LLC's Motion for Destructive Testing," dated January 29, 2016, and filed February 12, 2016;
5. The order of the Honorable Edgar W. Dickson, "Scheduling Order," dated May 16, 2016, and filed May 26, 2016;
6. The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)", dated September 7, 2016, and filed September 9, 2016; and
7. The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017.

The Court of Appeals has issued an order dismissing the appeal stating:

We find the orders on appeal are interlocutory and not appealable pursuant to section 14-3-330 of the South Carolina Code (2017); accordingly, we grant Respondents' motion and dismiss the instant appeals. See Knowles v. Standard Sav. & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) ("Class certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment.... Neither does certification reach the 'merits' of the underlying cause of action ... "); Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 573, 703 S.E.2d 197, 202 (2010) ("[The] rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights.").

Pursuant to Rule 221, S.C.R.A.P., the Appellant South Carolina State Plastering petitions the Court for rehearing on the ground that the Court overlooked or misapprehended the following points as

noted below and as more fully discussed in SCSP's prior Motion to Determine Appealability and return to Plaintiffs' Motion to Dismiss, which are incorporated herein as if fully restated<sup>1</sup>:

1. The Court misapprehended that the general rule as stated in Knowles v. Standard Sav. & Loan does not apply to this appeal and overlooked the point that the Trial Court has never made a deliberative ruling on whether the Plaintiffs have proven all the Rule 23 factors to warrant class certification. By his own express terms, Judge Baxley only made a preliminary decision and specifically stated that he would make a final decision after the Right to Cure compliance process is completed:

- "Thereafter [after compliance with the Right to Cure Act], the Court will make a final decision as to whether a class action is practicable under the specific facts and circumstances disclosed by the notices and response required under the Act." [Baxley Order, p. 2.]
- "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." [Baxley Order, p. 10.]
- "[F]or 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." [Baxley Order, p. 11.]

---

<sup>1</sup> Appellant SCSP also adopts and incorporates each and all those points and arguments raised by the Respondents/Appellants Pulte Homes and Del Webb on the appealability issues.

"Order Making **Preliminary** Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRPC...", filed December 19, 2011. (Emphasis added.)

Judge Dickson acknowledged the *preliminary* nature of Judge Baxley's ruling on the Plaintiffs' class certification motion when he scheduled a hearing and set a briefing schedule for "the parties positions on class certification," stating: "The stay on discovery in this case shall remain in effect until the Court issues its ruling on final certification." [Dickson Scheduling Order, filed May 26, 2016.] Judge Dickson never made a deliberative ruling on final certification. Rather, he just declared that Judge Baxley had already made a final decision -- without making any independent finding on the Rule 23 factors. [Dickson "Order (No Motions Pending)", filed September 9, 2016.] The RTC process has not yet been completed as contemplated by Judge Baxley, and neither Trial Judge has ever conducted the rigorous analysis necessary to make any final decision on class certification. This is what sets these class certification orders apart from the general rule referenced in the Knowles opinion.

In the prior appeal of this case, Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 575-76, 703 S.E.2d 197, 204 (2010), the Supreme Court stated that: "Upon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove." The failure/refusal to conduct the proper analysis and put the Plaintiffs to their burden of proving the five Rule 23 factors presents serious fundamental due process questions and affects the Defendant's substantial rights such that these orders are appealable now under S.C. Code Ann. §14-3-330(2).

2. The Court has also overlooked or misapprehended that these orders deprive the Appellant of substantial, legal rights under the Right to Cure Act and they also effectively strike defenses

by not allowing discovery or providing a reasonable means to assert defenses. In dismissing the appeal, this Court quotes from the Grazia I opinion: "[The] rights under the Right to Cure Act notice provisions are not new substantive rights, but instead represent an effort by the General Assembly to provide the contractors/subcontractors a new procedural timeline for asserting existing litigation rights." 703 S.E.2d at 202. However, the Court overlooks or misapprehends the Supreme Court's further discussion on this point regarding staying the merits of the litigation pending compliance with the RTC:

[T]he predominant concern should be on the contractor/subcontractor's actual exercise of the rights to notice and the opportunity to cure, not when those rights are received. As discussed extensively above, we fail to discern how the rights to a pre-litigation opportunity to inspect and remedy/settle are substantially abridged when a court stays the proceedings under section 40-59-830, thereby granting the contractor/subcontractor the ability to explore those rights in full. As a result, we believe once properly harmonized, the Right to Cure Act's stay and notice provisions may be construed together to give each one its due effect, within the parameters of the Act's public policy.

Grazia I, 703 S.E.2d at 202-03. In harmonizing the statutory provisions, the Supreme Court discussed the critical importance of the stay in accomplishing the legislative purpose of the RTC Act:

The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to require compliance with the Right to Cure Act's notice provisions.... Enforcing a stay provision does absolutely nothing to restrict the furtherance of that purpose; instead, the purpose is better served by allowing the use of the Right to Cure Act's stay provision to allow a court to determine whether or not a class action is feasible under the circumstances in each individual case, rather than striking the class allegations in toto at the outset.

Id. at 203. Thus, while the Supreme Court did not read the Act to require RTC compliance before allowing the plaintiff to file a complaint seeking class status, it is clear that the class certification should not be dispositively ruled upon prior to RTC compliance (as originally intended by Judge Baxley), and most certainly, the litigation cannot proceed on the merits until RTC compliance is complete.

As of the filing of this appeal, SCSP was still attempting to complete necessary testing before it could make offers to the claimants under the Act. That process has since been completed, but SCSP still is in the process of extending offers to which the claimants must respond before the statutorily-mandated stay can be lifted. Meanwhile, the stay of discovery has been prematurely lifted, and Judge Dickson has declared that he will call this case for trial within 30 days from the issuance of the remittitur back to the Circuit Court seemingly without regard to whether the RTC compliance is complete or SCSP has been allowed full discovery necessary to defend the case on the merits and present its defenses:

[H]ere is what you can expect from Judge Dickson: on the day the remittitur is received, if at all, from the Court of Appeals, Judge Dickson will issue an order setting the trial date for thirty (30) days after the date of the remittitur; in addition, you should expect Judge Dickson to require you all to submit your pretrial briefs, voir dire, and proposed jury instructions to the court five (5) days after the date the court receives the remittitur, if at all, from the Court of Appeals.

See Email from Judge Dickson's Law Clerk John Dodds, to Vic Rawl (March 21, 2017, 10:59 AM) (Attached hereto as Petition for Rehearing Exhibit 1).<sup>2</sup>

SCSP maintains that this process does not meet the purpose or express provisions of the RTC Act or the instructions in *Grazia I*, and deprives SCSP of its fundamental due process rights as well as its substantial rights under the RTC Act. As such, these orders are appealable now under §14-3-330(2).

---

<sup>2</sup> Of note, the Trial Court is overlooking or disregarding the fact that there are multiple motions still outstanding, which go to the merits of the claimants' claims and SCSP's right to discovery on key issues affecting the affirmative defenses, such as: Motion to Compel Depositions of the Class Members, Motion to Compel Plaintiff's Discovery Responses, Motion to Reconvene Depositions, Motion for Destructive Testing on *Grazia Home*, Motion to Remove Members of the Class Who have Failed to Return the Right to Cure Questionnaire, Motion to Remove Members Who Entered Into an Agreement to Not Participate in any Class Litigation, and Motion to Remove Members of the Class Who Do Not Meet the Class Definition.

3. The Court has overlooked or misapprehended that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under §14-3-330(2). Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005), and cases cited therein. The Supreme Court reviewed a class certification order under this principle in Salmonsens v. CGD, Inc., 377 S.C. 442, 448-49, 661 S.E.2d 81, 85 (2008). Despite his use of the term "opt-out," Judge Baxley effectively created a de facto opt-in process by cobbling together the RTC questionnaires with the class notice process. Accordingly, under Salmonsens, these orders are immediately appealable.

4. The Court has overlooked or misapprehended that the orders of Judge Baxley and Judge Dickson dismissing SCSP's motions for reconsideration are appealable under §14-3-330(2) because the Trial Court's refusal to allow the opportunity for reconsideration affects SCSP's substantial rights that could prevent them from raising certain issues on appeal. In Johnston v. Bowen, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993), the Supreme Court held that that trial court intermediate orders are amendable on motions for reconsideration, and in Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 778-79 (2004), the Supreme Court states that: "It is inherently unfair to disallow such an opportunity." By denying SCSP's motions as "improper" without ruling of the merits of the motions, Judge Baxley and Judge Dickson have improperly and unfairly deprived SCSP to its substantial, due process rights.

On this point, the Court has also overlooked or misapprehended the Supreme Court's holding in Salinas v. C. Aultman & Co., 49 S.C. 325, 27 S.E. 385, 387 (1897) that: "While the granting or refusing of an interlocutory order of injunction, upon the merits, is not, as a rule, appealable, it is appealable when granted or refused upon a 'purely' legal ground, and especially

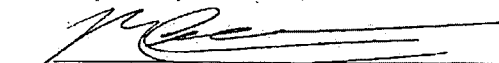
a jurisdictional ground." Accordingly, the orders dismissing the motions for reconsideration on purely legal grounds are appealable.

5. Finally, the Court has overlooked or misapprehended that: "An order that is not directly appealable may be considered if there is an appealable issue before the court." Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005). The Court will allow such appeals "in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)." *Id.* Similarly, in *Salmonsén*, the Court chose to address an issue in an interlocutory appeal because it was "in the interest of judicial economy and guidance to the bench and bar." 661 S.E.2d at 87. In *Knowles*, the Court spoke of the "debilitating effect on judicial administration caused by piecemeal appeals." 261 S.E.2d at 49. However, in this case, the postponement of appellate review of orders affecting substantial rights and affecting the mode of trial on multiple points is producing a far more debilitating effect on resources of the circuit court.

#### CONCLUSION

The statute allows immediate appeal of these orders and the interests of justice and the administration of the judicial system are best served by proceeding with review of all the issues raised in regards to these orders at this stage, rather than years from now. WHEREFORE, the Appellant SCSP respectfully requests that the Court reconsider its order of dismissal and allow this appeal to proceed.

Respectfully submitted,



For Everett A. Kendall, II, SC Bar #08450  
Sweeny, Wingate & Barrow, P.A.  
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**Attorneys for Appellant**  
**South Carolina State Plastering, LLC**

March 31, 2017

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED

MAR 31 2017

SC Court of Appeals

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

Respondents.

**Proof of Service:**

I, the undersigned legal assistant, of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for the Appellant South Carolina State Plastering, do hereby certify that I have served a copy of the foregoing **Petition for Rehearing** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

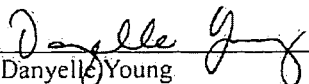
W. Jefferson Leath, Jr.  
Michael S. Seekings  
Leath, Bouch & Seekings, LLP  
92 Broad Street  
Post Office Box 59  
Charleston, South Carolina 29402  
**Attorneys for Respondents Anthony and Barbara Grazia, individually and on behalf  
of all other similarly situated Plaintiffs**

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**Attorney for Third-Party Defendant Kephart Architects, Inc.**

A. Victor Rawl, Jr.  
Robert L. Widener  
McNair Law Firm, P.A.  
1221 Main Street  
Columbia, South Carolina 29201  
**Attorney for Third-Party Defendants Del Webb Communities, Inc., and Pulte  
Homes, Inc.**

  
Danyelle Young

Columbia, South Carolina  
March 31, 2017

**THE STATE OF SOUTH CAROLINA**  
**In the Court of Appeals**

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and  
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and

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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

Respondents.

**Exhibit 1**

**Marshall C. Crane**

---

**From:** Dickson, Edgar W. Law Clerk (John Dodds) <edicksonlc@sccourts.org>  
**Sent:** Tuesday, March 21, 2017 10:59 AM  
**To:** Rawl, Vic  
**Cc:** Mike Seekings; Jefferson Leath; john@chakerislawfirm.com; psegui@seguilawfirm.com; Rett Kendall; dcobb; Ellie Martin; Christi Daniels; Alicia Petit; Stephen M. Bowden (stephen@chakerislawfirm.com); Brittany Johnson; Frampton, Hal; Mike Ethridge; Widener, Robert; Miller, Dana  
**Subject:** RE: Grazia, et al. v. SCSP, et al.

Mr. Rawl,

Thank you for voicing your concerns. The Lancaster case you cited reads as follows: "Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court." Judge Dickson is of the opinion that a status conference, wherein the parties will simply discuss matters pertinent to this case and in which Judge Dickson will not make any binding rulings, is not a matter "affected by the appeal." A status conference in this context would simply be a device used to keep everyone on the same page and to avoid further delay. However, Judge Dickson will defer to the good judgment of the attorneys in this case.

Since we will not have a status conference, here is what you can expect from Judge Dickson: on the day the remittitur is received, if at all, from the Court of Appeals, Judge Dickson will issue an order setting the trial date for thirty (30) days after the date of the remittitur; in addition, you should expect Judge Dickson to require you all to submit your pretrial briefs, voir dire, and proposed jury instructions to the court five (5) days after the date the court receives the remittitur, if at all, from the Court of Appeals. Thank you, and please let me know if you have any questions or concerns.

Best,  
John Dodds

-----Original Message-----

**From:** Rawl, Vic [mailto:VRawlJr@mcnair.net]  
**Sent:** Monday, March 20, 2017 6:17 PM  
**To:** Dickson, Edgar W. Law Clerk (John Dodds) <edicksonlc@sccourts.org>  
**Cc:** Mike Seekings <mseekings@leathbouchlaw.com>; Jefferson Leath <jl@leathbouchlaw.com>; john@chakerislawfirm.com; psegui@seguilawfirm.com; eak@swblaw.com; dcobb <dcobb@turnerpadget.com>; Ellie Martin <emartin@seguilawfirm.com>; Christi Daniels <christi@chakerislawfirm.com>; Alicia Petit <alicia@chakerislawfirm.com>; Stephen M. Bowden (stephen@chakerislawfirm.com) <stephen@chakerislawfirm.com>; Brittany Johnson <bjohnson@leathbouchlaw.com>; Frampton, Hal <HFrampton@mcnair.net>; Mike Ethridge <methridge@ethridgelawgroup.com>; Widener, Robert <RWidener@MCNAIR.NET>; Miller, Dana <DLMiller@mcnair.net>  
**Subject:** RE: Grazia, et al. v. SCSP, et al.

Dear Judge Dickson and John,

Respectfully, we believe that it would be improper for the Circuit Court to have a status conference or take any other action at this time.

As expressly set forth in the Court of Appeals' order (attached), the Court of Appeals has not yet returned the remittitur to the Circuit Court. The Court of Appeals states that it will return the remittitur in accordance with Rule 221(b), SCACR, which requires the Court of Appeals to hold the remittitur for at least 15 days following its order to give the losing party time to petition for rehearing. Under Rules 221(b) and 242(c), SCACR, if a party petitions for rehearing and the petition is denied, the Court of Appeals must wait a further 30 days to allow time to file a Petition for Certiorari with the Supreme Court before returning the remittitur to the Circuit Court. The South Carolina Supreme Court has recently clarified this issue for the trial bench. The Court specifically ruled that until the remittitur is sent by the Court of Appeals to the Circuit Court, the Court of Appeals retains exclusive jurisdiction of the matter. See *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 137, 742 S.E.2d 867, 868 (2013) ("The appellate court retains jurisdiction until the remittitur is sent to the lower court."). In the attached order, the Court of Appeal specifically states that remittitur has not yet been returned.

Del Webb intends to file a petition for rehearing and, if unsuccessful, a petition for certiorari. Thus, we do not expect the remittitur to be returned for at least 45 days. Moreover, Del Webb's petitions for writs of certiorari and mandamus remain pending in the Supreme Court. Because this Court does not possess the remittitur, we believe it would be improper for the Court to take any action with respect to this matter. We would therefore request that the Court hold off on scheduling any status conferences or other matters until the remittitur is returned and this Court can properly act in this case.

Respectfully submitted,

Vic

A. Victor Rawl Jr.  
Shareholder and Chair of Class Action Practice Group vrawl@mcnair.net

McNair Law Firm, P.A.  
Charleston Office 100 Calhoun Street | Suite 400 | Charleston, SC 29401  
843 723 7831 Main | 843 805 6577 Fax  
Mailing Post Office Box 1431 | Charleston, SC 29402 VCard | Bio URL | Website

-----Original Message-----

From: Dickson, Edgar W. Law Clerk (John Dodds) [mailto:edicksonlc@sccourts.org]  
Sent: Monday, March 20, 2017 5:51 PM  
To: Mike Ethridge <methridge@ethridgelawgroup.com>  
Cc: Mike Seekings <mseekings@leathbouchlaw.com>; Jefferson Leath <jl@leathbouchlaw.com>; john@chakerislawfirm.com; psegui@seguilawfirm.com; Rawl, Vic <VRawlJr@mcnair.net>; eak@swblaw.com; dcobb <dcobb@turnerpadget.com>; Ellie Martin <emartin@seguilawfirm.com>; Christi Daniels <christi@chakerislawfirm.com>; Alicia Petit <alicia@chakerislawfirm.com>; Stephen M. Bowden <stephen@chakerislawfirm.com> <stephen@chakerislawfirm.com>; Brittany Johnson <bjohnson@leathbouchlaw.com>  
Subject: Re: Grazia, et al. v. SCSP, et al.

Judge Dickson can do Wednesday any time after 10am.

> On Mar 20, 2017, at 5:01 PM, Mike Ethridge <methridge@ethridgelawgroup.com> wrote:

>  
> John,  
> I am available tomorrow morning before 9:30. After that I'm in back to back meetings all day. I am available add day on Wednesday.

>  
> Thanks,  
> Mike

>  
> -----Original Message-----

> From: Dickson, Edgar W. Law Clerk (John Dodds)  
> [mailto:edicksonlc@sccourts.org]  
> Sent: Monday, March 20, 2017 4:55 PM  
> To: Mike Seekings <mseekings@leathbouchlaw.com>  
> Cc: Jefferson Leath <jl@leathbouchlaw.com>; john@chakerislawfirm.com;  
> psegui@seguilawfirm.com; Vic Rawl <VRawlJr@mcnair.net>;  
> eak@swblaw.com; dcobb <dcobb@turnerpadget.com>; Mike Ethridge  
> <methridge@ethridgelawgroup.com>; Ellie Martin  
> <emartin@seguilawfirm.com>; Christi Daniels  
> <christi@chakerislawfirm.com>; Alicia Petit  
> <alicia@chakerislawfirm.com>; Stephen M. Bowden  
> (stephen@chakerislawfirm.com) <stephen@chakerislawfirm.com>; Brittany  
> Johnson <bjohnson@leathbouchlaw.com>  
> Subject: Re: Grazia, et al. v. SCSP, et al.

>  
> I just sent Judge Dickson a text, and he asked if the attorneys would be available tomorrow via telephone. He can do whatever time is best for everyone. Please let me know at your earliest convenience. If tomorrow doesn't work, he is available Wednesday as well.

>  
>> On Mar 20, 2017, at 4:44 PM, Dickson, Edgar W. Law Clerk (John Dodds) <edicksonlc@sccourts.org> wrote:

>>  
>> Mr. Seekings,

>>  
>> I will speak with Judge Dickson first thing tomorrow and let you know. Thank you for the heads up, and please let me know if I can be of any assistance in the meantime.

>>  
>> Best,  
>> John

>>  
>>> On Mar 20, 2017, at 3:39 PM, Mike Seekings <mseekings@leathbouchlaw.com> wrote:

>>>  
>>> John,

>>> As you know, the Court of Appeals has dismissed all filings of the Defendants and has returned the case to the Circuit Court for trial. I am writing today to inquire about Judge Dickson's availability to meet with counsel and hold a status conference given that trial is now just a few weeks away. I thought it might be helpful for us to get together to discuss pretrial matters and the process of jury selection. While I believe you have been provided with all of the filings and the Order of the Court of Appeals, please let me know if you or Judge Dickson need anything further from us.

>>>  
>>> By copy of this email, I am advising all counsel of my communication with the Court. Thank you in advance for your assistance.

>>>  
>>> Mike

>>>

>>> Michael S. Seekings  
>>> Leath, Bouch & Seekings, LLP  
>>> 92 Broad Street  
>>> Post Office Box 59  
>>> Charleston, South Carolina 29402  
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>>>

> ~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
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.....Respondents/Appellants.

Appellate Case No. 2017-000218

**RESPONDENTS', ANTOHNY AND BARBARA GRAZIA, INDIVIDUALLY AND ON  
BEHALF OF ALL OTHER SIMILARLY SITUATED PLAINTIFFS, RETURN IN  
OPPOSITION TO PETITIONS FOR REHEARING OF APPELLANTS SOUTH  
CAROLINA STATE PLASTERING, LLC AND RESPONDENTS/APPELLANTS DEL  
WEBB COMMUNITIES, INC., AND PULTE HOMES, INC.**

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*Attorneys for the Respondents*

### INTRODUCTION AND SUMMARY

The petitions for rehearing filed by Appellant South Carolina State Plastering, LLC (hereinafter "SCSP") and Respondents/Appellants Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter collectively "Webb/Pulte") are nothing more than a restatement of the identical arguments originally made to this Court in an effort to justify their appeal of interlocutory orders. These arguments have been made over and over – first in 2012, then with this Appeal, and now on motion for rehearing. This Court has twice rejected these improper appeals, and it should reject the arguments now made in what is a fourth attempt to bring an interlocutory appeal. These parties continue to advance the notion that a Class has not been finally certified, when they know, absolutely, that such an assertion is incorrect, and they continue to invent appellate issues, when none exist. In fact, a reading of the exhibits attached to the latest petitions will demonstrate to this Court that the filings here have but one purpose: delay in an attempt to avoid a trial on the merits.

### SCSP AND WEBB PULTE HAVE FAILED TO IDENTIFY ANY ERRORS MADE BY THIS COURT IN ITS DISMISSAL OF THESE APPEALS

This Court has dismissed these Appeals as being interlocutory and not appealable. This is the second dismissal of the identical appeals, the first having taken place in 2012. Rather than point out any errors in this Court's rulings, these parties simply rehash two rejected propositions: 1) that interlocutory case management directives are somehow immediately appealable, and, 2) that Judge Baxley did not finally certify this matter as a Class Action.

These instant Petitions are a further attempt to have this Court reject its two previous opinions in this case, with no new reason advanced in support. In 2012, when this Court

originally rejected these interlocutory appeals, both SCSP and Webb/Pulte petitioned for rehearing. The Respondent's Reply and Return are attached hereto and made a part of this memorandum to demonstrate that these identical arguments have already been rejected (Exhibits A and B).

Perhaps the most egregious position continually advanced before this Court is that Judge Baxley did not certify a Class. In fact, as previously briefed, this is incorrect, and directly contrary to documents authored by Judge Baxley, as these parties know. Judge Baxley's letter to counsel of August 22, 2011, sent to the Court for filing, and part of the record below (attached hereto as Exhibit C), demonstrates that not only did Judge Baxley find all of the necessary Rule 23 elements had been proved for Certification, but also, no reference can be found as to any "preliminary" Class.

As to the remainder of the same arguments, Respondents will incorporate by reference their Reply to SCSP's Return to Motion to Dismiss Appeal attached hereto as Exhibit D.

**THESE PETITIONS AND THE INSTANT APPEALS ARE ONLY FILED FOR THE  
PURPOSE OF DELAY**

Trial in the Beaufort County Common Pleas Court was originally set for a two-week term in December of 2016. After the numerous protestations of SCSP and Webb/Pulte, additional time was given in this ten (10) year old case, setting trial for April 17, 2017. These Appeals followed. Respondents promptly filed their Motion to Dismiss the Appeal, and the Motion was granted. What occurred next is instructive.

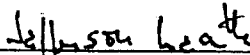
Examining the exhibits attached to SCSP's Petition for Rehearing, this Court will see copies of e-mail exchanges with the trial court subsequent to this Court's dismissal of these Appeals. When the plaintiffs asked the Circuit Court for a status conference in

preparation for a trial (now that the automatic stay had been lifted) Webb/Pulte objected, stating that the Circuit Court, even in light of the Dismissal of the Appeal, lacked jurisdiction to do anything, and stating its intention to continue to file petitions to appellate courts. Again, to delay a trial on the merits. This tactic has been the hallmark of the defendants in this class action – to avoid a trial at any cost and by any means.

### CONCLUSION

The Petitions for Rehearing filed by SCSP and Webb/Pulte, having demonstrated no errors committed by this Court in its dismissal of the Appeals, should, and must, be denied.

Respectfully Submitted,



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**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

**APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas**

J. Michael Baxley, Circuit Court Judge  
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..... Respondents/Appellants.

Appellate Case No. 2017-000218

**PROOF OF SERVICE**

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*Attorneys for the Respondents*

I, W. Jefferson Leath, Jr., Esq., do hereby certify that on April 5<sup>th</sup>, 2017, I served opposing counsel with a copy of the Respondents' Motion to Dismiss Appellant South Carolina State Plastering, LLC's Appeal via regular first class United States mail, postage prepaid, addressed as follows:

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# **EXHIBIT A**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396  
Case Tracking No.: 2012-212364

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

v.

South Carolina State Plastering, LLC, ..... Defendant.

South Carolina State Plastering, LLC, ..... Defendant,

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.

RESPONDENTS' RETURN TO DEL WEBB/PULTE'S  
PETITION FOR REHEARING AND  
MEMORANDUM IN SUPPORT OF RULE 269 SCRAP MOTION

RECEIVED

SEP 27 2012

SC Court of Appeals

### INTRODUCTION AND SUMMARY

This brief is filed in opposition to Pulte's Petition for Rehearing. For the reasons stated below, not only should Pulte's Petition be denied but this Court should issue an Order pursuant to SCRAP 269 finding that this Appeal and Petition is frivolous and filed solely for the purpose of delay and fashion an appropriate remedy. After receiving notice of this Court's dismissal of its Appeal of the Court's Class Certification Order, Del Webb/Pulte has now petitioned for a rehearing. In so doing, it cites nothing new but rather relies on arguments which were fully briefed by both sides prior to the Dismissal. In their Motion to Dismiss the Appeal filed on June 21, 2012, Respondents also moved this Court to conduct a Rule 269 SCRAP inquiry into the issue of whether, instead of filing legitimate Appeals, Webb/Pulte's actual motive was delay in violation of that Rule. As is shown below, Pulte's entire strategy in this case is centered on delay, not only in this Appeal, but also in a companion Class Appeal in the matter of *Lancaster, et al vs. Del Webb, et al*, Appellate Case No. 2012-210927. Del Webb/Pulte's conduct in filing Notices of Appeal of orders which it knows do not constitute final adjudications and therefore are not appealable, and its continual pursuit of these improper Appeals will reveal to this Court a pattern of behavior which must be dealt with in accordance with the requirements of Rule 269.

### THE SUN CITY STUCCO AND TRIM CLASS CASES

As this Court is fully aware, there exist two Class cases involving the Del Webb/Pulte Sun City development. The instant *Grazia* case involving 4,300 homes with

allegations of defectively designed and installed stucco exteriors, and the *Lancaster* case, involving fewer homes with allegations of defective trim manufactured by Georgia Pacific Corporation and sold by Del Webb. Lower Courts have certified classes in both cases, and Del Webb has filed Appeals of these orders. Additionally, there are approximately 140 cases on the Beaufort County docket filed by individual homeowners against Del Webb/Pulte, Del Webb filed an Appeal in one of them (*Carlson, et al v. South Carolina State Plastering, LLC, et al*, Case No. 2008-CP-07-3386) following the Lower Court's Order that Pulte had waived any right to arbitration contained in its sales contract by waiting to seek enforcement of arbitration and instead utilizing the Court system.

#### **DEL WEBB/PULTE'S APPELLATE ACTIVITIES IN THE STUCCO CASES**

As noted above, Del Webb/Pulte has appealed virtually every Order issued by the Lower Court, whether or not appealable. In the instant Appeal, Pulte filed an Appeal of a Class Certification and case management order. When Pulte filed its Appeal, it had actual notice that the Lower Court's Order was not appealable, but filed the Appeal in spite of that knowledge. By this Petition Pulte now seeks to perpetuate that conduct. Its Appeal was filed on June 7, 2012. Prior to that date, it had received the Order from this Court in *Lancaster, et al v. Georgia-Pacific Corporation, et al*, Case No.: 2007-CP-07-3166, in which this Court reiterated that Class Certification Orders are not immediately appealable. As further evidence of this knowledge of non-appealability, Pulte also filed a document entitled, "Motion to Determine Appealability" - presumably attempting to

excuse its conduct in filing this patently improper Appeal, having just been told in a companion case that such an Appeal was subject to dismissal.

Respondents filed their Motion to Dismiss this Appeal, both sides fully briefed the issues raised by Appellant, and this Court issued its Order Dismissing this Appeal having considered those arguments. Now once again, Del Webb/Pulte attempts to keep the stucco class in the Appellate Courts and out of the Lower Court, where Class Notices will issue, discovery will be conducted, and a trial can take place. In its Petition for Rehearing, Pulte raises nothing new, nothing not already considered by this Court, and advances no reasoning entitling it to a rehearing. What it appears to be seeking is to require this Court to issue specific rulings on each of its complaints regarding the Class procedure as embodied in the case management section of the Order presumably for use either in the Lower Court or for further Appellate attempts. This procedure has never been the practice of this Court.

Concurrently, in Appeal No. 2012-212364 in the *Grazia* case, Pulte filed another Appeal from the Lower Court's dissolving an injunction prohibiting Class Counsel from discussing the Class case with class members. A review of this Appeal will demonstrate it lacks merit, and represents, at best, a minor, collateral issue, having little or no bearing on the ultimate decision to be made at the trial of the Class case.

In Appeal No. 2012-202907 in the *Carlson* case, this Appellant asserted a right to arbitrate rather than litigate, pursuant to language in its sales contract. It has appealed the Lower Court's finding of waiver, and again, an examination of that Appeal will demonstrate a highly questionable position.

**DEL WEBB/PULTE'S APPELLATE ACTIVITIES**  
**IN THE LANCASTER TRIM CASE**

Following its pattern of seeking delay at all costs, in the *Lancaster* case, Pulte has appealed essentially every Order of the Lower Court, from Class Certification orders, to case management Orders - none of which are appealable, as this Court has found. Now it has, as here, petitioned for Reconsideration of the Dismissal of that Appeal. In *Lancaster*, Judge Roger Young certified the Class, then issued case management orders. Significantly, below, this Appellant asked the Lower Court to conduct discovery of each Class Member and asked for a stay which, if granted would have prolonged almost indefinitely, any ultimate Class trial. The Lower Court declined. Thereafter, Del Webb appealed from six Orders. After the Appeal of the six interlocutory Orders, Del Webb then requested a conference call to ask the Lower Court to confirm Del Webb's position that all of its six Orders issued were stayed because of these Appeals. The Lower Court declined to so rule, stating, "I find that a legitimate question exists as to whether any of the interlocutory orders appealed by Del Webb and Georgia-Pacific is immediately appealable, and I am concerned that they are not. If the appeals are improperly taken, they should have no rightful impact upon the continued progress of this now four-plus-year old case." (See attached Exhibit "A").

Del Webb's response to this Order? Appeal it, after asking the Lower Court to reconsider it. This Court dismissed the latter two Appeals as moot on June 1, 2012.

Del Webb's true motive - delay - can be seen in its activities in the Lower Court prior to its Appeal of the eight Orders of the Lower Court, especially, its Appeal of the preliminary case management and scheduling order. It did not like the Court's Scheduling Order, as such Order puts the case on track for a trial on the merits, which

Pulte hopes to indefinitely postpone. Indeed reference to the Proposed Discovery Scheduling Order it submitted to the Lower Court in the *Lancaster* case presents an accurate picture of its strategy (attached as Exhibit "B"). Therein, Pulte proposes a ten (10) year Discovery schedule and a trial which will take place in 2024, setting trial 16 years after initiation of the claims. Presumably, by that time, most of the claimants in this retirement community -and even counsel - will no longer be able to prosecute these claims.

**DELAY SIGNIFICANTLY HARMS THE GRAZIA CLASS**

The Lower Court's Order, the subject of this Appeal, sets up a procedure wherein the Defendants have the right to Notice of Defects, and an opportunity to settle these claims pursuant to the Right to Cure Construction Dwelling Defect Act. For six years, Pulte has vigorously asserted the importance of that Act. The Order at issue envisions a procedure wherein after a Class is formed after Notice and opt-outs, Del Webb/Pulte can inspect, and make offers. The homeowners will be aware of their rights by then, having been represented by Class Counsel and oversight provided by the Court.

With this Appeal, and the delay it causes at the trial level, Del Webb/Pulte has felt free to ignore and contravene the procedure the Lower Court has ordered. Instead, it has embarked upon a course of conduct designed to eliminate as many Class members as possible by unilaterally soliciting "opt-out agreements" in advance of Class Notice publication where homeowners are not represented by counsel and do not know their rights under the Class Order. They cannot know of their rights, as the stay caused by these frivolous appellate proceedings has prevented the notice forms from being

approved and issued. Having learned of these activities, Respondents filed a Rule to Show Cause on Jan 23, 2012, (attached as Exhibit "C," caselaw exhibits D and E omitted) and this Appeal has effectively stayed a hearing on this Motion.

The document which Del Webb/Pulte requires an unrepresented homeowner to sign, in exchange for patch repairs to their residence (attached as Exhibit "D") is entitled: "Sun City Hilton Head Homeowner Request for Stucco Repairs and Agreement Not to Participate in Class Actions." This document is designed as a release and is designed to reduce or eliminate the Class. Upon information and belief, this partial repair/Class Exclusion outside of the judicial framework, and in total derogation of the Lower Court's Class Order is ongoing, and has become a large operation, the true scale and effect of which will not be revealed until the Lower Court conducts a hearing on this Rule to Show Cause and issues a Class Notice.

#### CONCLUSION

If, by means of continued Appeals, a defendant can avoid discovery and trial while divesting the Lower Court of jurisdiction, it maintains a huge litigation advantage. If, during this time of delay, it is able to implement a plan to reduce or eliminate the size of the potential Class claims it is facing, it not only has an advantage, it has also scored a large partial victory, never having to face justice in a courtroom.

Very respectfully, Respondents ask this Court to examine the overall situation here and decide, as Rule 269, SCRAP, indeed requires, what is the proper role of an Appellate Court. Is it to correct errors of law in matters requiring judicial oversight, or is it to serve - by means of delay - as an adjunct to litigation strategy?

One of the key phrases in Rule 269 is the following: "and discouragement of like conduct in the future may require." Without the inquiry by this Court that the Rule requires, it is probable that the strategy outlined above will continue, and every case management order - or indeed, any other pre-trial order - will end up before this Court within 30 days of its issuance. The drafters of Rule 269 understood the pernicious effects of delay in litigation. This is especially true here, where the population of the Class is made up of aging retirees, who, quite, understandably, are hoping for a speedy resolution to the problems with their homes. This Court should accordingly grant the Respondent's Rule 269, SCRAP Motion.

# EXHIBIT B

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

---

Case No. 2007-CP-07-1396  
Case Tracking No.: 2012-212212

---

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.

---

**RESPONDENTS' REPLY TO SCSP'S  
PETITION FOR REHEARING**

---

**RECEIVED**  
SEP 28 2012  
SC Court of Appeals

Respondents, Anthony and Barbara Grazia, as Class Representatives, oppose the Petition for Rehearing filed by South Carolina State Plastering. The Petition seeks a rehearing of this Court's dismissal of SCSP's attempted Appeal of the Lower Court's Class Certification and other interlocutory case management orders.

In its Petition, SCSP advances nothing not already briefed and argued by both sides prior to the dismissal. Rather, it restates previous positions considered and rejected by this Court. Respondents incorporate their arguments against these positions previously stated in their Reply to SCSP's Return to Respondents' Motion to Dismiss Appeal (attached as Exhibit "A").

Interestingly, SCSP seems to be asking this Court for an advisory opinion. It asks this Court, "to issue an amended order that rules specifically upon the grounds raised in the returns to the motions to dismiss so that they may file a more informed petition for rehearing." The purpose of such a request is not readily understandable to the Respondents, although several possibilities present themselves. First, if this Court were to agree to this procedure, presumably then SCSP would file another Petition for Rehearing, thus serving the purpose of delay. Secondly, SCSP may be looking to gain some collateral advantage in the Lower Court's case management by a pronouncement by this Court. Third, SCSP may wish to flesh out a record for further delaying Appeals.

None of these reasons, nor indeed any others, present this Court with any reason to grant SCSP's Petition, and such Petition should be denied, so that the Lower Court can move forward with the management of the Class in this six year old case.

Respectfully Submitted,



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*Attorneys for the Respondents*

Dated: Sept 25, 2012

Charleston, South Carolina

# EXHIBIT C



State of South Carolina  
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL BAXLEY  
JUDGE

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TELEPHONE: (843) 383-4114  
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August 22, 2011

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RE: Grazia, et al. v. SC State Plastering, LLC, et al. (07-CP-07-1396)  
Plaintiffs' Motion for Class Certification

Counsel:

Thank you for your patience while the Plaintiffs' motion for class certification in this case has been under advisement. You may accept this letter as notice of the decision in this matter. This letter is being sent only to counsel who argued the motion in Court, please forward the letter to other named counsel representing your party.

Upon review of the South Carolina Rules of Civil Procedure, relevant case law, as well as extensive memoranda of law and oral arguments presented to the Court by all parties, the Court finds certification appropriate under the statutes and caselaw governing class actions. According to evidence presented, the Court finds that the Plaintiffs have met the five part test set forth under SCRCP 23(a). The Court finds that the putative members of this class, currently about 140 with pending cases but totaling a potential 3500, are far too numerous for joinder. Moreover, to try these cases individually would be overwhelming for the judicial resources within the Fourteenth Judicial Circuit. In addition, the Plaintiffs' complaint focuses only on exterior wall stucco installation and, thus, the predominant questions at issue are common in both fact and law. Next, the Court finds that the claims made by Plaintiffs and that the subsequent defenses available to Defendants are typical and not of a nature that would require individual investigation on the part of this Court. The Court also finds that the representative parties will adequately protect the interests of the class, and that the representative parties' interests are neither adverse nor antagonistic to the interests, economic or otherwise, of the putative class. Lastly, as to the prerequisites set forth under Rule 23(a), the Court finds that the Plaintiffs meet the amount in

controversy requirement and notes that historically this requirement was intended to limit class actions where the costs of litigation would exceed the amount in controversy, which based on the limited evidence already presented to the Court, litigation costs will not exceed actual damages claimed by each member of this class.

In making this ruling, the Court is aware of the Defendants' position that differences within the stucco application process, lack of uniformity in alleged resulting damages, and variances within the facts of the specific cases negate the utility of a class vehicle in resolving these claims. While the Court accepts Defendants' argument that not all of the pending stucco cases are exactly the same, it is the firm belief of the Court that common issues predominate all the cases, and that a class approach is the best method available to enhance judicial economy, speedy disposition, and reduction of litigation costs. Moreover, the Supreme Court had a clear opportunity to prohibit a class action in this very case, and affirmatively chose not to do so, extolling in their decision the utility of the class action device to save the resources of the Courts and the parties. Grazia v. SC State Plastering, et al, Sup. Ct. Op. 26882, filed October 4, 2010.

Attorney Seekings is requested to prepare a proposed Order of this Court's decision and forward the same to both Attorney Kendall and Attorney Rawl for review. Neither Attorney Kendall nor Attorney Rawl are asked to agree or consent to the Order, but are requested to review it for mistake of fact or misstatement of his party's position. Should further clarification or ruling on specific points not mentioned herein be necessary, counsel should send an email to the Court, with all parties included, requesting same. Thereafter, Attorney Seekings is asked to forward the finalized Order to this office ([jbaxleylc@sccourts.org](mailto:jbaxleylc@sccourts.org)), this will come to law clerk Mason King) in Word format for review and signature. The finalized, signed Order will be returned to Attorney Seekings for filing and formal service on the parties.

As you are also aware, this office has pending under advisement the Defendant Pulte/Del Webb's motion to compel arbitration in the Carlson case. This signed Order will be simultaneously provided to Mr. Seekings for filing and service, along with the finalized class certification order.

I have enjoyed working with you in these rather complex issues, and appreciate the professional way in which these matters have been briefed and argued. Thank you for the courtesy and the level of professionalism you and your co-counsel have each brought to the Court.

Sincerely,

  
J. Michael Baxley  
JMB/eio

Honorable Jerri Ann Roseneau (for filing)

# **EXHIBIT D**

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

**APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas**

J. Michael Baxley, Circuit Court Judge  
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..... Respondents.

Appellate Case No. 2017-000218

**RESPONDENTS', ANTOHNY AND BARBARA GRAZIA, INDIVIDUALLY AND ON  
BEHALF OF ALL OTHER SIMILARLY SITUATED PLAINTIFFS, REPLY TO  
APPELLANT SOUTH CAROLINA STATE PLASTERING, LLC'S RETURN TO  
MOTION TO DISMISS APPEAL**

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Respondents, Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs, (hereinafter referred to as "Respondents") hereby Reply to Appellant's, South Carolina State Plastering, LLC's (hereinafter referred to as "SCSP") Return to Motion to Dismiss Appeal, as follows:

#### **INTRODUCTION**

By its filing, with this court, SCSP is attempting to appeal from interlocutory orders and case management directives that it knows are not appealable in an effort to further delay the ultimate resolution of a case that has now been pending for a decade. In support of its effort to get this Court to review the unreviewable, SCSP focuses on four (4) incorrect assertions: (1) that interlocutory case management directives are immediately appealable (and that by filing this appeal, SCSP somehow has revived the time to appeal long out-of-time orders of the court, some of which have already been rejected by this Court); (2) that Judge Baxley did not certify a Class Action (when the record below is directly to the contrary); (3) that the Class is an "opt-in" Class (when the record directly contradicts this notion); and, (4) that SCSP has been unable to conduct sufficient discovery (when the record reveals that a) SCSP has inspected every house, b) one-half (1/2) of all the houses in Sun City have been tested by Pulte, the results of which are available to SCSP, c) SCSP has been provided answers to more than 3,500 questionnaires, and d) depositions of individual class members have been taken.) This Court should dismiss this Appeal, as it has previously done when SCSP attempted the same strategy of appealing that which was not appealable.

**THE ORDERS SOUGHT TO BE APPEALED ARE INTERLOCUTORY, AND ARE SIMILAR IF NOT IDENTICAL TO THOSE ALREADY DISMISSED BY THIS COURT**

As has been pointed out to this Court in numerous filings, and as stated in Judge Dickson's Order of September 9, 2016, SCSP previously asked Judge Baxley to reconsider his Class Certification Order. Judge Baxley declined, and SCSP appealed to this Court. The appeal was dismissed in August of 2012. This Appeal is identical to that effort. SCSP failed to file any Motions before Judge Dickson, but sought instead to have Judge Dickson reconsider Class Certification. He declined to do so, citing the record. Notwithstanding its numerous attempts at collaterally attacking the Court's interlocutory orders, SCSP again filed a Motion to Reconsider and Amend dated September 19, 2016. Judge Dickson dismissed these Motions, noting, "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), South Carolina Rules of Civil Procedure (hereinafter referred to as "SCRCP"), allowing a party to challenge an interlocutory order." (Order of Jan. 6, 2017 – the subject of this Appeal). There is nothing to Appeal here – no underlying Motion to Reconsider Class Certification, only an attempt to appeal a *dismissal* of an improvidently filed Rule 59(e) Motion to Reconsider, an interlocutory case management directive. Here, unlike the 2012 attempt at an appeal, there is not even an underlying Motion, nor a denial of such a motion – the entire matter being interlocutory. The Class Certification at issue was made nearly five (5) years ago by Judge Baxley, and SCSP then-attempted appeal of that Certification which was rejected by this Court in August of 2012.

Now, SCSP propounds an even farther-fetched theory which goes something like this: Since Judge Dickson's Order Dismissing the Rule 59(e) Motion was arguably timely

appealed (although not in-fact appealable), then somehow, this Appellate filing resurrects SCSP's ability to appeal all of the Courts' previous interlocutory orders, including those already rejected by this Court in 2012. There is no precedent for such a theory, and SCSP does not provide any. Instead, it cites *Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 366 S.C. 511 (S.C. 2005). *Edge*, and its predecessors do not stand for this proposition. To the contrary, *Edge* holds that an Appellate Court may consider some orders which may not have been directly appealable for reasons of judicial economy "if there is an appealable issue before the Court." *Cox v. Woodmen of the World Insurance Company*, 556 S.E.2d 397, 402, 347 S.C. 460 (S.C.App. 2001). Here, there is no appealable issue before the Court, and even if there were, these decisions do not revive SCSP's ability to appeal time-barred orders.

**THE RECORD DEMONSTRATES THAT JUDGE BAXLEY  
CERTIFIED THIS CLASS IN 2012**

As noted above, Judge Baxley did not, as SCSP continues to urge, certify a "preliminary" class. SCSP attempted to appeal his Class Certification in 2012. This Class was certified, and the Notice to the putative class members was approved by Judge Baxley after hours of exhaustive hearings. Judge Dickson in his September 9, 2016 Order, cited the record, and the hearing transcript wherein Judge Baxley stated his certification was not preliminary. Judge Baxley also approved the very detailed and specific Notice and Exclusion forms which went out to all Class members. Nowhere in the Notice is there any mention of "preliminary" certification. Judge Dickson is careful to cite Judge Baxley's Order Approving Class Notice -- an order Judge Baxley himself composed -- in which he "declined to refer to the class as 'preliminary', for the reason that it was not and is not preliminary." (Order of 9/09/16 at pp. 3-4). SCSP does not have any evidence

to challenge these orders. Instead, SCSP simply continues to argue that the orders and transcripts somehow do not mean what they say.

**THE RECORD DEMONSTRATES THAT THIS CERTIFIED CLASS IS AN OPT-OUT CLASS, THERE IS NO EVIDENCE TO THE CONTRARY**

The certification of the Class here is no more nor less than the classic opt-out class permitted in this state, and elsewhere, as is clear when reading the Notice and Exclusion (Opt-Out) forms sent to all members of the class (attached hereto as Exhibits A and B, respectively).

Orders granting class certification are not appealable. *Salmonsens v. CGD, Inc.* 661 S.E.2d 81, 87, 377 S.C. 442 (S.C. 2008). ("Because a decision by this Court to grant immediate appellate review of a class certification order would represent a significant departure from this states [sic] established appealability jurisprudence, we decline to do so.")<sup>1</sup> There is nothing here to appeal. There was no timely notice of appeal made. There is no opt-in class. There is nothing for this Court to do but to dismiss this improvidently filed appeal, taken for the sole purpose of delay, and remand this case back to the Circuit Court with directions to move it expeditiously to a trial on the merits.

**EVEN THOUGH DISCOVERY FROM INDIVIDUAL CLASS MEMBERS IS GENERALLY NOT PERMITTED, SCSP HAS ENGAGED IN MASSIVE INDIVIDUAL DISCOVERY**

This is a group of some 4,500 single family homes, involving more than 8,000 individuals. Apparently SCSP wants to depose each of these people, contemplating a discovery period exceeding the class members' life expectancy, and/or the careers of all

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<sup>1</sup> *Salmonsens* permitted an appeal only because the improper "opt-in" class would have barred some of the claims of the putative class members due to the statute of limitations, and this was agreed to by all parties, so that those persons might have been denied a trial at all, thus "affecting a mode of trial." Nothing like that situation exists here.

counsel involved. This notion strikes at the very concept of judicial economy envisioned by Rules 1 and 23, SCRCP, and the decisional law favoring class actions in this State.

The General Rule regarding discovery of individual class members is as follows, "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

While some courts have permitted discovery of absent class members, they have done so only where the proponent of the discovery establishes that (1) the discovery is not designed to take undue advantage of class members or to reduce the size of the class, (2) the discovery is necessary, (3) responding to the discovery requests would not require the assistance of counsel, and (4) the discovery seeks information that is not already known by the proponent. *McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 517 (S.D. Cal. 2008) (citing *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340-42 (7th Cir. 1974)).

There are superior and more efficient ways for individual issues to be handled in this case in a manner more consistent with Rule 23, SCRCP. For example, inquiry into individual issues can take place during a second phase of trial or during the claims administration process:

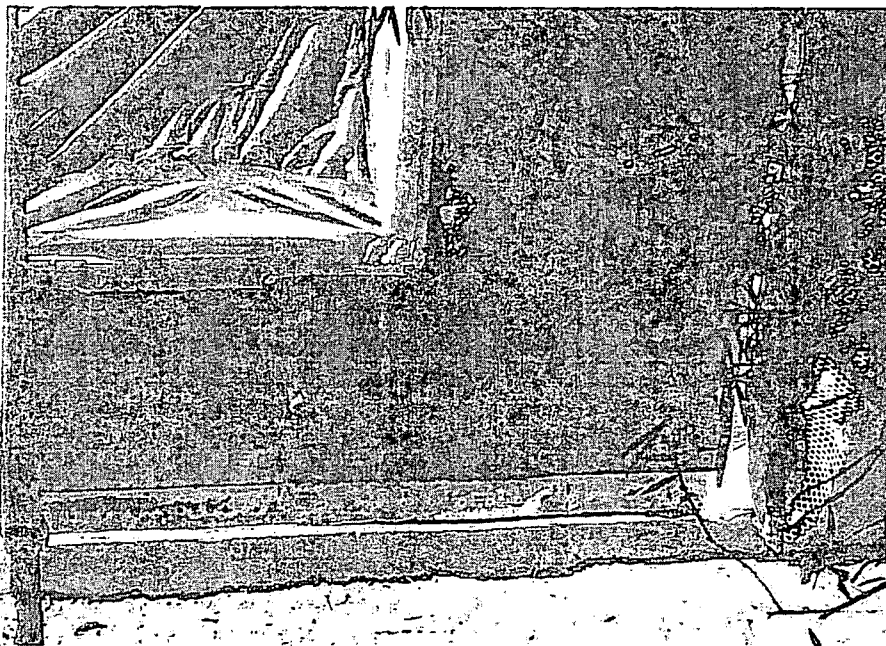
"Class members are sometimes called upon to provide the court with information regarding their individual claims. This may be appropriate in connection with preparation for the second stage of a bifurcated trial (with adequate time allowed for discovery) or the determination of entitlement to individual relief under a judgment or settlement... Class members should not, however, be required to submit proofs of claim as a condition of membership in the class, which would be equivalent to establishing an opt-in procedure. Nor should such claim forms or questionnaires be used to evade the general limitation on discovery from absent class members."

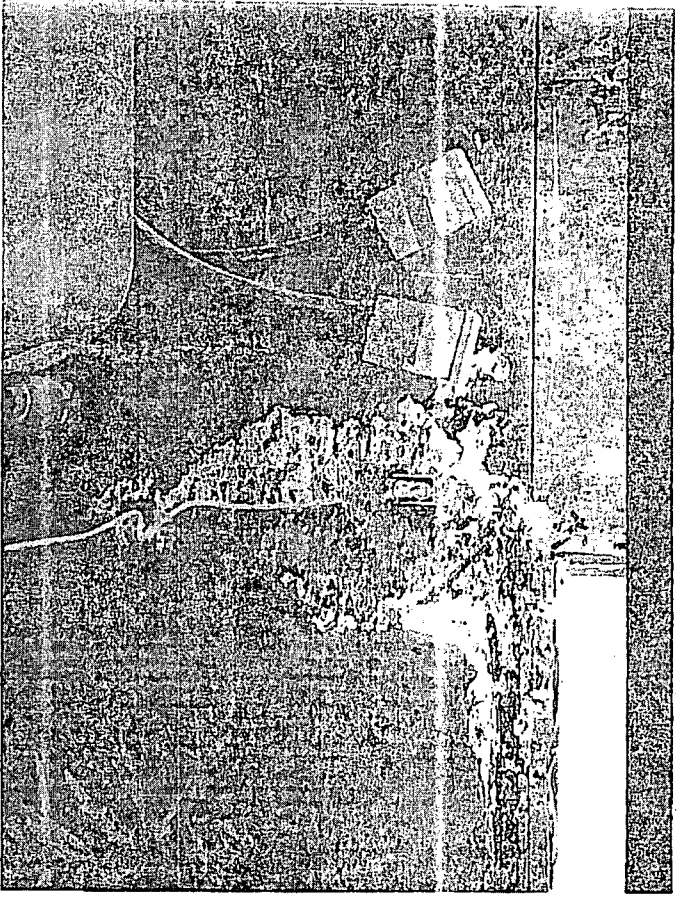
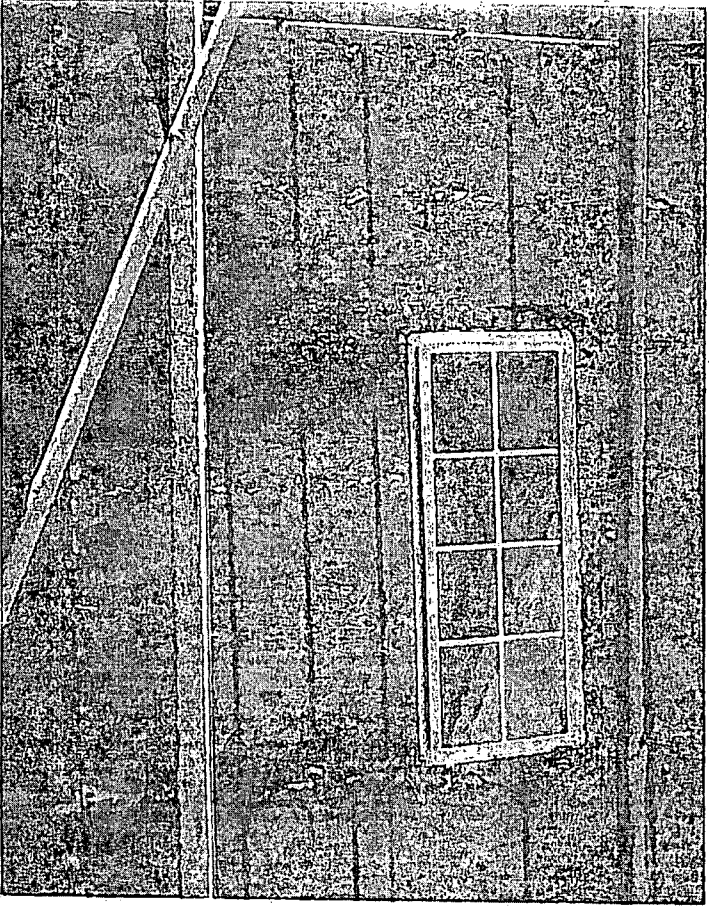
*McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 519-520 (S.D. Cal. 2008) (quoting Federal Judicial Center, Manual for Complex Litigation Sec. 30.232 (3d Ed. 1995)).

"[T]he most appropriate time to gather any necessary information from individual class members is generally after a determination of liability and before payment of individual claims." *On the House Syndication, Inc. v. Fed. Exp. Corp.*, 203 F.R.D. 452, 458 (S.D. Cal. 2001).

In spite of this concept, it is useful to examine the extent to which SCSP has in fact been permitted to conduct discovery.

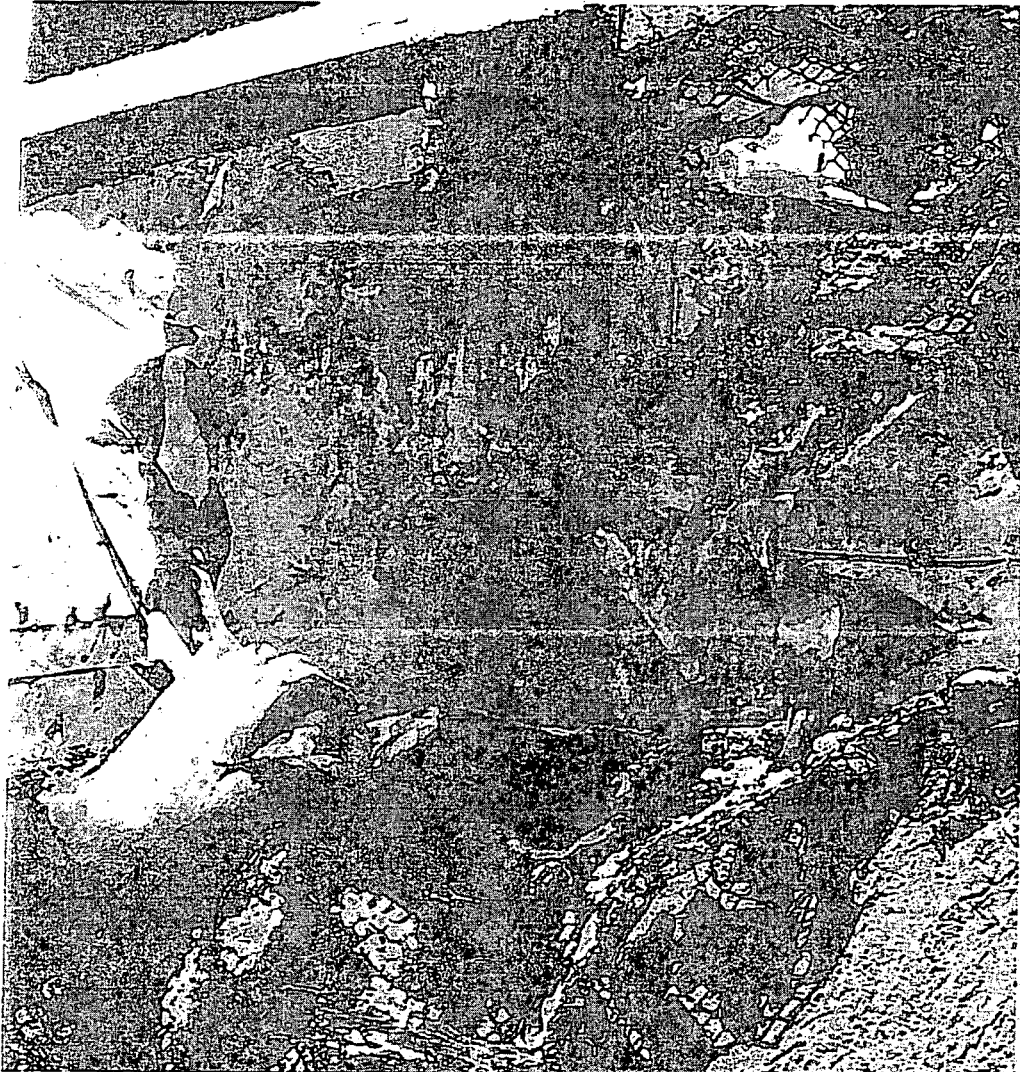
1. Respondents Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter referred to as "Webb/Pulte") has conducted moisture meter testing and/or infrared testing, and has destructively tested and partially repaired some 2,000+ houses at a cost of \$23 million, and has shared the test results, repairs, and extensive photographic evidence (see examples attached below).





2. SCSP has physically inspected more than 4,000 homes.
3. SCSP has, with its own experts, destructively tested, photographed, and documented, some 47 houses (see examples attached below).





4. All parties have received responses to extensive questionnaires from more than 3,500 homeowners (see example attached hereto as Exhibit C), and
5. Depositions of eighteen (18) individual homeowners have been taken.

**CONCLUSION**

This appeal must be dismissed. There is no Appellate jurisdiction, and this Appeal is taken only for the purpose of delaying the trial currently set for April 17, 2017.

Respectfully Submitted,

Jefferson Leath

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-07-1396

Appeal No. 2017-000218

RECEIVED

APR 19 2017

SC Court of Appeals

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

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v.

South Carolina State Plastering, LLC,

Appellant.

and

South Carolina State Plastering, LLC,

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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

Respondents.

**Appellant South Carolina State Plastering, LLC's Reply to Respondents'  
Anthony and Barbara Grazia, individually and on behalf of all other similarly  
situated Plaintiffs Return in Opposition to Petitions for Rehearing of  
Appellants South Carolina State Plastering, LLC and  
Respondents/Appellants Del Webb Communities, Inc., Pulte Homes, Inc.**

South Carolina State Plastering, LLC filed a Notice of Appeal from certain intermediate  
orders in this action, to wit:

overlooked or misapprehended the following points as noted below and as more fully discussed in SCSP's Petition for Rehearing, Motion to Determine Appealability and Return to Plaintiffs' Motion to Dismiss, which are incorporated herein as if fully restated<sup>1</sup>:

1. The Court misapprehended that the general rule as stated in Knowles v. Standard Sav. & Loan does not apply to this appeal and overlooked the point that the Trial Court has never made a deliberative ruling on whether the Respondent Plaintiffs have proven all the Rule 23 factors to warrant class certification.
2. The Court has also overlooked or misapprehended that the Orders that are the subject of this appeal deprive the Appellant of substantial, legal rights under the Right to Cure Act and they also effectively strike defenses by not allowing discovery or providing a reasonable means to assert defenses.
3. The Court has overlooked or misapprehended that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under §14-3-330(2). Hagood v. Sommerville, 362 S.C. 191, 196; 607 S.E.2d 707, 709 (2005), and cases cited therein.
4. The Court has overlooked or misapprehended that the orders of Judge Baxley and Judge Dickson dismissing Appellant SCSP's motions for reconsideration are appealable under §14-3-330(2) to the extent the Trial Court's refusal to allow the opportunity for reconsideration affects SCSP's substantial rights that could prevent them from raising certain issues on appeal.
5. Finally, the Court has overlooked or misapprehended that: "An order that is not directly appealable may be considered if there is an appealable issue before the court." Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005).

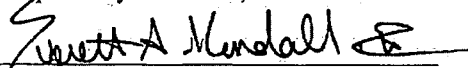
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<sup>1</sup> Appellant SCSP also adopts and incorporates each and all those points and arguments raised by the Respondents/Appellants Pulte Homes and Del Webb on the appealability issues.

Respondents argue that no errors have been made by this Court in its dismissal of the Appeals and that the Petitions for Rehearing are filed for purposes of delay and in an attempt to avoid a trial on the merits. To the contrary, this Petition has been filed in an effort to protect Appellant's rights under the statutes and laws of this State -- as cited and discussed more fully in Appellant's Briefs filed relative to this Appeal. Far from seeking to avoid a trial, this Appellant has filed this appeal in an effort to address whether any trial on the merits can and should take place as a class action in light of the Trial Court's failure to make a deliberative ruling on whether the Respondents have proven all of the Rule 23 factors to warrant class certification.

WHEREFORE, the Appellant SCSP respectfully requests that the Court reconsider its order of dismissal and allow this appeal to proceed.

Respectfully submitted,

  
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
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SC Court of Appeals

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

AND

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v.

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

Of Whom Del Webb Communities, Inc. and Pulte Homes, Inc., are ..... Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of foregoing, **Reply to Respondents' Return to Petition for Rehearing** upon the following counsel of record via U.S. mail and/or Electronic Mail:

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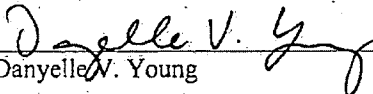
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This 19th day of April, 2017.

  
Danyelle V. Young

# The South Carolina Court of Appeals

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

v.

South Carolina State Plastering, LLC,  
Appellant/Respondent.

And

South Carolina State Plastering, LLC,  
Appellant/Respondent,

v.

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

Of which Del Webb Communities, Inc. and Pulte Homes,  
Inc. are Respondents/Appellants.

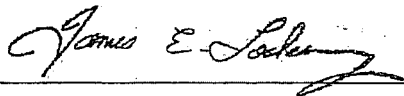
Appellate Case No. 2017-000218

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## ORDER

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After careful consideration of Appellant/Respondent's and  
Respondents/Appellants' petitions for rehearing, the Court is unable to discover  
that any material fact or principle of law has been either overlooked or disregarded,  
and hence, there is no basis for granting a rehearing. Accordingly, the petitions for  
rehearing are denied.



C.J.

RECEIVED  
MAY 15 2017  
BY:.....

*Thomas C. Hoff*

J.

*Paul W. Thomas*

J.

Columbia, South Carolina

**FILED**

May 11, 2017

cc: The Honorable J. Michael Baxley  
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W. Jefferson Leath, Jr., Esquire  
Michael S. Seekings, Esquire  
Phillip Ward Segui, Jr., Esquire  
John T. Chakeris, Esquire  
A. Victor Rawl, Jr., Esquire  
Robert L. Widener, Esquire  
Robert Michael Ethridge, Esquire

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

**APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas**

J. Michael Baxley, Circuit Court Judge  
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,		Petitioner.
	and	
South Carolina State Plastering, LLC,		Petitioner,
	v.	
Del Webb Communities, Inc., Pulte Homes, Inc., and Kephait Architects, Inc.,		Third-Party Defendants,
Of Whom Del Webb Communities, Inc. and Pulte Homes, Inc., are		Respondents.

**PETITION FOR EXTRAORDINARY RELIEF**

South Carolina State Plastering, LLC (SCSP) submits this petition pursuant to S.C. Const. art. V, § 5 and S.C. Code Ann. 14-3-310, seeking a writ of certiorari to review intermediate orders of the trial court and/or a writ of mandamus to compel the trial court to rule on motions for reconsideration.

The Plaintiffs filed this class action in 2007 against South Carolina State Plastering asserting claims of negligent and defective construction in regards to exterior stucco work on

residential homes in a Sun City subdivision in Beaufort County. This case has already been before this Court on a prior appeal from an order striking the class action allegations as incompatible with the Notice and Opportunity to Cure Construction Dwelling Defect Act (Right to Cure Act). The Court issued an opinion reversing and remanding the case to proceed with class certification and compliance with the Act. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010) (*Grazia I*). However, six years later, the class has not been properly certified; the putative class has not been given proper notice; the parties have not yet completed the process created by the trial court to comply with the Right to Cure Act; and the trial judges have refused to rule on timely filed motions for reconsideration. Yet the trial court has lifted the stay without motion and set the case for trial on April 17, 2017.

The trial orders at issue include<sup>1</sup>:

1. The order of the Honorable J. Michael Baxley, "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," dated December 8, 2011 and filed December 19, 2011;
2. The order of the Honorable J. Michael Baxley, "Order Dismissing Defendants' Motions to Reconsider and Denying Defendants' Motions for Clarification of Order Preliminarily Certifying Class, dated May 1, 2012 and filed May 7, 2012;
3. The order of the Honorable J. Michael Baxley, "Order Approving Class Notice, Mailing List, and Procedures for Right to Cure Process," dated April 9, 2014, and filed April 18, 2014;
4. The order of the Honorable Edgar W. Dickson, "Order Granting South Carolina State Plastering LLC's Motion for Destructive Testing," dated January 29, 2016, and filed February 12, 2016;

<sup>1</sup> SCSP has filed a notice of appeal in the Court of Appeals from the subject intermediate orders together with a Motion to Determine Appealability. SCSP also has filed a Motion to Transfer the appeal in this Court for consideration of all the issues raised by these orders. This petition is submitted in the alternative, seeking immediate review of these orders.

5. The order of the Honorable Edgar W. Dickson, "Scheduling Order," dated May 16, 2016, and filed May 26, 2016;
6. The order of the Honorable Edgar W. Dickson, "Order (No Motions Pending)", dated September 7, 2016, and filed September 9, 2016; and
7. The order of the Honorable Edgar W. Dickson, "Order Dismissing Defendants' Motions to Reconsider Pursuant to Rule 59(e)," dated December 29, 2016 and filed January 6, 2017.

South Carolina State Plastering respectfully submits this petition for extraordinary relief in this action asking the Court to issue a writ of mandamus directing the trial court to rule on motions for reconsideration, and, for a writ of certiorari to review the trial court orders and correct the many errors at this stage of the litigation so that this case can move forward towards a proper determination of the Rule 23 class certification factors, compliance with the Right to Cure Act as intended by the Legislature, and ultimately, to trial on the merits.

#### INTRODUCTION – EXTRAORDINARY WRITS

"The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." S.C. Const. art. V, § 5; S.C. Code Ann. 14-3-310.

SCSP petitions the Court for a Writ of Certiorari to review a series of trial court orders involving class certification and the Right to Cure compliance process because exceptional circumstances exist such that it would best serve the interests of judicial economy to address the important issues at this stage rather than proceeding through more years of extensive litigation that would be wasted were the Court to reverse on appeal from a final judgment. This case has already been before this Court on a prior appeal and has been remanded with instructions. However, the trial court has not followed those directions and conflicting orders from different trial judges have left the case in a state of disarray and confusion.

In *Grazia I*, the Supreme Court instructed the lower court to first determine whether class certification was appropriate and then create a process to provide the rights afforded by the Right to Cure Act. The instructions implied a sequential process with discreet steps. Instead, these steps have been conflated, both confusing the legal and factual issues and confounding the rights of the parties.

Judge Baxley initially made only a preliminary finding that the Plaintiffs had met the five elements of Rule 23 for class certification and set a plan for compliance with the Right to Cure Act. Then before the parties had completed that plan, Judge Dickson proclaimed that Judge Baxley's preliminary findings were actually "final" without completing the fact-finding process, as contemplated by the Court in *Grazia I* and required by Rule 23. Meanwhile, Judge Baxley and Judge Dickson were creating an *ad hoc* Right to Cure process that does not provide SCSP with its rights under the Act and does not comport with the legislative purpose to allow residential contractors an opportunity to resolve alleged construction defects prior to litigation.

At this point, the Rule 23 class certification and notice process and the Right to Cure compliance process (which have been revised on multiple occasions) are consuming incalculable time and expenses for the parties and the circuit court in Beaufort County, and overshadowing and postponing discovery and litigation on the merits of claims. Very important questions of law need to be answered, including but not limited to, whether the class notice and the Right to Cure questionnaire effectively have created a prohibited opt-in class. These exceptional circumstances warrant a writ of certiorari because the confluence of attempting to manage class certification at the same time as Right to Cure compliance along with the reassignment of the case to three different circuit judges has left the case in a serious muddle. Only this Court can clear up the

confusion and provide the necessary direction so that the case can proceed forward on the correct path to discovery and a final resolution on the merits.

SCSP also petitions the Court for a Writ of Mandamus to compel the trial court to rule on its motions for reconsideration of intermediate orders which were improperly dismissed on the flawed reasoning that Rule 59(e) does not allow any challenge to an interlocutory order. SCSP maintains that well-settled law allows for reconsideration of any intermediate order prior to final judgment, and thus, the trial court has the duty to rule on the timely filed motions for reconsideration.

#### I. BACKGROUND – CLASS CERTIFICATION AND RIGHT TO CURE COMPLIANCE

The Plaintiffs, homeowners in a Sun City community in Bluffton, South Carolina, bring this action alleging defective exterior stucco work by SCSP and seeking to pursue claims on behalf of other homeowners as class action.<sup>2</sup> The details of the litigation proceedings on the issues of class certification and the Right to Cure Act can be found in reams of documents previously filed in the Appellate Courts.<sup>3</sup> The Petitioner provides the following brief summary to provide context and background for the purposes of this motion.

In its answer<sup>4</sup>, SCSP denied the allegations, disputed the propriety of the class action, and argued the Grazias had failed to comply with the express provisions of the Right to Cure Act, which entitles a contractor or subcontractor to notice of any qualifying construction defect,

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<sup>2</sup> At the time of the appeal in *Grazia I*, the number of homes with allegedly defective stucco was uncertain. The Grazias' referred to 2,673, while SCSP referenced "some four thousand homes." The Amended Class List filed with the Clerk of Court on January 27, 2016 contains 4518 addresses.

<sup>3</sup> *Grazia I* briefing; and Appellate Case Nos. 2011-212212; 2013-000233.

<sup>4</sup> SCSP answered, and brought a third-party complaint against developer Del. Webb Communities, Inc., builder Pulte Homes, Inc., and architect Kephart Architects, Inc.

and the opportunity to cure, before the action is commenced. After the Grazias complied with the Act on behalf of themselves, SCSP moved to dismiss the class allegations, and, in the alternative, requested a stay of the proceedings until each of the similarly situated claimants complied with the Right to Cure Act notice requirements. The circuit court issued an order striking the Grazias' class allegations as incompatible with the Right to Cure Act, and appeal was taken at that time and heard by the Supreme Court. The Supreme Court held that the circuit court erred in striking the Grazias' class allegations on the basis that the Right to Cure Act is incompatible with Rule 23. Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010) (*Grazia I*).

As noted by the Supreme Court, at that stage of litigation, no motion for class certification had yet been made; however, the Court gave certain instructions for anticipated proceedings on remand, namely:

Upon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove.

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If and when these prerequisites are met, the court may then find that representative notice under the Right to Cure Act is appropriate. *Id.* at 204.

On remand, as to be expected, the Plaintiffs made a motion for class certification to which SCSP objected on numerous grounds.<sup>5</sup> The matter came before Judge Baxley, to whom the case had been assigned, and after the submission of extensive memoranda and hearings, he issued his order -- "Order Making *Preliminary* Finding that Plaintiffs' Proposed Class Meets the

<sup>5</sup> The preliminary certification order raises issues of law as to each of the five factors under Rule 23, SCRCP, that must -- at some point -- be reviewed by the Appellate Courts. These issues include the propriety of the court-created class definition, the manner in which the trial court has defined and made findings of "typicality" and "commonality," the approval of the class representatives and counsel as adequate under the circumstances of claim splitting and claims waiver, as well as issues of numerosity and the amount of each claim.

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.) SCSP filed a motion for reconsideration, but Judge Baxley dismissed the motion on the ground that it improper because Rule 59(e) does not allow any challenge to an interlocutory order. SCSP filed a notice of appeal from Judge Baxley's preliminary order as well as his order dismissing its motion for reconsideration/clarification. This Court found that the preliminary order (and the associated order on the motion to reconsider) were not immediately appealable and dismissed the appeal.

In the intervening time since the Court of Appeals' dismissal of that appeal, the parties have proceeded through four years of processes and procedures established by Judge Baxley, stemming from his preliminary order, that he thought would allow the parties to comply with the Right to Cure Act.<sup>6</sup> As of May 2016, Judge Dickson, who had been assigned to this case in December 2014 after the retirement of Judge Baxley, had set a scheduling order that mandated steps and deadlines regarding Right to Cure Act compliance and Rule 23 class certification,<sup>7</sup> including a hearing date and briefing schedule for final class certification. Thereafter, Judge Dickson reversed himself and opined that Judge Baxley already had made a "final" decision certifying the class, in an "Order (No Motions Pending)," stating that: "The class was certified

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<sup>6</sup> The record will demonstrate that throughout this process, the Appellant has repeatedly raised various objections to preserve issues for a future appeal, but proceeded in good faith to comply with Judge Baxley's order in the face of this Court's dismissal of the prior appeal. Judge Dickson in his 9/9/16 Order (page 2) decreed that he would not entertain any further argument on the issues of class certification.

<sup>7</sup> The stay on discovery was to remain in effect until the court issued its ruling on final certification. ¶ 4.

by Order of Judge Baxley on December 8, 2011." [9/9/16 Order (Dickson), pp. 1, 2.] SCSP made a motion for reconsideration which Judge Dickson dismissed on the same reasoning as Judge Baxley – there is no provision in Rule 59(e) to allow reconsideration of an interlocutory order.

**II. PETITION FOR A WRIT OF CERTIORARI—EXCEPTIONAL CIRCUMSTANCES EXIST IN THIS CASE TO WARRANT THE COURT’S IMMEDIATE REVIEW OF THE IMPORTANT ISSUES PRESENTED IN THESE ORDERS.**

The exceptional nature, scope and potential precedential impact of this case compel immediate review. The Supreme Court may issue a writ of certiorari to review an intermediate order, not otherwise appealable under § 14-3-330, where exceptional circumstances exist. Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Env'tl. Control, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010); Laffitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009); In re Breast Implant Product Liability Litigation, 331 S.C. 540, 503 S.E.2d 445 (1998).

From time to time, the Court has issued a writ of certiorari to review discovery orders where delaying decision until appeal might moot the issue, such as orders for disclosure of information. E.g. Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009). In Oncology & Hematology Associates, the Court voiced reticence to micromanage discovery orders but also chose to grant review of a discovery order by way of certiorari because of concern that discovery practice was overshadowing litigation of the merits of claims. 692 S.E.2d at 924 (vacating five discovery orders.) The Court found exceptional circumstances to grant a writ of certiorari in In re Breast Implant Prod. Liab. Litig. where very important questions of law needed to be answered regarding the applicability of strict liability and warranty causes of action to Healthcare defendants:

Although we will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist. This matter presents such a case. Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter. A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues.

503 S.E.2d at 447 n. 2. Similarly, in Binney v. State, 384 S.C. 539, 542, 683 S.E.2d 478, 479 (2009), the Court granted a writ of certiorari because the issue was novel and capable of arising in every PCR proceeding. As in those cases, this case presents exceptional circumstances and involves important issues that need this Court's review of these intermediate orders now.<sup>8</sup>

**A. The trial court has ostensibly certified the class without conducting a rigorous analysis requiring the Plaintiffs to establish the five Rule 23 factors.**

As noted by this Court in *Grazia I*, the prerequisites for class action under Rule 23, SCRCF, are: "1) the class must be so numerous that joinder of all members is impracticable; 2) there must be questions of law or fact common to the class; 3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; 4) the representative parties must fairly and adequately protect the interests of the class; and 5) the amount in controversy must exceed one hundred dollars for each member of the class." 703 S.E.2d at 203.

The Plaintiffs "bear the burden of proving [the] five prerequisites under South Carolina law." Gardner v. South Carolina Dep't. of Revenue, 353 S.C. 1, 20, 577 S.E. 2d 190, 200 (2003) (citing Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E. 2d 799 (1990)). "Failure to satisfy even one prerequisite is fatal to class certification." Gardner, 577 S.E. 2d at 200. In deciding whether class certification is proper, the court must apply a rigorous analysis to determine whether each prerequisite is satisfied. Waller, 388 S.E.2d at 801. Neither

<sup>8</sup> The discussion of the issues below is not intended to be comprehensive, but only to identify and highlight the most critical errors in the trial court orders that need immediate review. If the Court grants the Petition, SCSP will fully address all issues in its brief(s).

Judge Baxley nor Judge Dickson have yet made findings as to whether the Plaintiffs have proven all these factors to warrant class certification; moreover, neither has conducted the rigorous analysis necessary to make any such findings. On the other hand, both Trial Judges have seemingly misunderstood this Court's rulings in *Grazia I*.

Judge Baxley made only a preliminary finding that the Plaintiffs had met the five elements of Rule 23 for class certification and set a plan for compliance with the Right to Cure Act. Then before the parties had completed that plan, Judge Dickson deemed Judge Baxley's preliminary findings were "final" without completing the fact-finding process, as contemplated by the Court in *Grazia I* and required by Rule 23. In making their rulings, both Judge Baxley and Judge Dickson fundamentally misunderstand the Court's decisions in *Grazia I*.

In his order making a preliminary class certification, Judge Baxley gave only a cursory consideration of the five (5) factors under Rule 23, stating: "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." [12/19/11 order p. 11.] Similarly, Judge Dickson perpetuates that misconception of this Court's opinion in his statement that "the issue of class certification was long ago decided and reviewed."<sup>9</sup> [9/9/16 Order p. 2.] However, this Court did not have the opportunity to deny class status in that first appeal. To the contrary, the Court specifically discussed the fact that a motion to certify this class had not been made, rather, the case was before the court on a motion to strike. 703 S.E.2d at 204. "[T]he question of whether

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<sup>9</sup> Judge Dickson also appears to believe that Judge Baxley's order was reviewed on the prior appeal: "[T]his Court will not allow Defendants to seek reconsideration of Judge Baxley's Order when reconsideration was already denied and that decision was appealed." [9/6/16 Order, p. 4.] The record shows that Judge Baxley, in fact, refused to even rule on the motion for reconsideration and the appeal was dismissed as interlocutory.

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 Court. Consequently, the issue is not whether these claims could be properly certified, .... Upon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove." *Id.* As discussed below, Judge Baxley and Judge Dickson failed to make the Plaintiffs prove each of the Rule 23 requirements and failed to give due – rigorous -- consideration to that determination.

In light of the minimal record before him, and having not performed the required rigorous analysis, Judge Baxley acknowledged the merits of SCSP's objections, particularly on the typicality and commonality factors, and expressly stated his intent to make a final determination only after further developing the facts during the Right to Cure compliance process he created:

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. This 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. [Baxley 12/19/11 Order, p. 10.]

Judge Dickson ignored the clear intent of Judge Baxley's order and deemed his preliminary determination "final" which has rendered the class certification fatally defective. SCSP does not contend that Judge Dickson lacked any power to deviate from Judge Baxley's class certification order(s). In *Salmonsens*, the Court discussed the provisions of Rule 23 that allow a subsequently assigned judge to maintain continual control over class action proceedings, including the method of class notification and even, allows that class certification may be altered at any time prior to a decision on the merits. 661 S.E.2d at 88. However, Judge Dickson did not make a new decision of his own.

As contemplated by Judge Baxley, information received through the Right to Cure process and certain limited discovery now make it crystal clear that the requirements for class certification are not met and that this case cannot be tried in as a class action as a practical matter.<sup>10</sup> Judge Dickson did not consider any of the new information and he did not make his own determination on the Rule 23 factors; instead, he effectively rewrote Judge Baxley's order and converted a preliminary ruling made on a *prima facie* showing into a final determination that the Plaintiffs had established all five (5) Rule 23 factors without engaging in a full, rigorous evaluation to ensure that the Plaintiffs met their burden of proving up each of the five factors.

From one perspective, the Court could remand the case with directions to the trial court to fully consider the Rule 23 issues prior to making a determination of whether class certification is appropriate in this case. In the alternative, the Court may consider Judge Baxley's preliminary determination to be final, in which case, SCSP seeks the Court's review of that decision now by a writ of certiorari.

A writ is proper in this case because the issues posed are novel in that there is no South Carolina appellate precedent for class certification under similar circumstances, nor is there any authority in other jurisdictions approving certification of a comparable class for such claims as presented by these Plaintiffs. Even with the dearth of applicable precedent, SCSP has consistently, and repeatedly, maintained that the Plaintiffs have not, and cannot, prove commonality, typicality, or fair and adequate protection of all the class members under existing Rule 23 precedent. SCSP has extensively briefed its objections and would direct the Court's attention to the memoranda found in the Appendix filed herewith as if fully restated herein. For

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<sup>10</sup>Data has been obtained from approximately 3800 responses to the Right to Cure Questionnaires, "walk around" inspections of approximately 4100 houses, interior inspections of 21 houses, and destructive examination of twenty-one houses. In addition, limited depositions have been taken of 33 homeowners, and 5 experts/inspectors/etc.

the purposes of this Petition, SCSP would offer this condensed summary of these points to highlight the factual and procedural developments of the last five years that demonstrate unequivocally that a class of homeowners cannot and should not be certified.

In his 12/19/11 order, Judge Baxley preliminarily recognized a class defined as: "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 the 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." As of 1/27/16, the Plaintiffs filed an amended class list of 4518 addresses. Contrary to the Plaintiffs' overly simplistic description that "the common defect is defective stucco, installed alike on all potential class houses,"<sup>11</sup> these houses were built over a period of 13 years, pursuant to a variety of contracts using a variety of design plans and specifications, and a variety of stucco products with different manufacturer instructions. In addition, the applicable law<sup>12</sup>, building codes<sup>13</sup>, industry standards have changed over time<sup>14</sup>, and there are at least thirteen different building code/stucco material/window/stucco standards combinations at issue.<sup>15</sup>

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<sup>11</sup> *Grazia I* Appellants' Brief p. 12.

<sup>12</sup> The law applicable to class members whose houses were completed after July 1, 2005 is different from those built before. *See* S.C. Code Ann. § 15-38-15. As a result, Defendants are entitled to request that the jury apportion fault to other potential tortfeasors for all houses completed within the 25 months prior to July 31, 2007.

<sup>13</sup> Five sets of building codes apply.

<sup>14</sup> Three different plasters types and five different window styles.

<sup>15</sup> Of significance, is the fact that depending on the date of the home's construction, the type of windows utilized, and the specific issues at each home, a significant portion of the homes at the

There also are various affirmative defenses that apply on an individualized basis and must be proven on an individualized basis, including the statute of limitations, which would completely bar the recovery of some homeowners; comparative negligence and failure to mitigate, which would reduce the ability of some homeowners to recover proven damages; and intervening/superseding negligence, which would cast liability on third-parties and bar recovery against SCSP.

Just as this Court found in *Gardner*, “[t]his is not a typical class action where minor factual differences exist among the individualized cases of class members.” 577 S.E.2d at 201. Rather, the factual and legal differences – of which there are many -- including legal issues of duty, negligence, causation, damages and multiple defenses, overwhelmingly outnumber and outweigh any articulated common issues and typical claims. “A representative class cannot exist where the court must investigate each plaintiff’s prejudice claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates the benefits of a class action suit.” *Id.* From just this bare summary, it should be readily apparent that the facts as to the claims and defenses are not common because they are unique to each house and its owner, and the same uniqueness defeats the requirement of typicality as well.

The trial court also has not considered as part of its class certification determination how the trial of this case will proceed at a trial on the merits. As one court has expressed, the court should consider how a class action will unfold—a “mental dress rehearsal of anticipated proof, the jury instructions, the verdict sheet, and the burdens imposed on the jury.” *Noel v. Hudd Distribution Services, Inc.*, 274 F.R.D. 187 (D.S.C. 2011). SCSP is entitled to challenge

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development may have already been litigated in a different class action involving one of the window styles. *In re MI Windows and Doors, Inc.*, MDL No. 2333; Case No. 2:12-cv-01297-DCN (D.S.C. Filed Mar. 11, 2013).

Plaintiffs' proof and establish its affirmative defenses at an individual level and because the elements and facts of both the alleged claim and the affirmative defenses vary widely among the claimants, the reality that will play out will be aggregation of thousands of individual claims. Each and every claimant will be required to testify as to their damages claims and the relevant defenses. By any fair estimate, the presentation of evidence for each claim will take four to five days, which means that this trial will last years, and thus, there is no possibility of seating a jury that can hear all of the claims. The complexity of jury instructions and verdict forms can only be imagined, but the inevitable prospect is that the variations of the factual scenarios that will be developed by the individualized facts are legion and far exceed the quantity and weight of the few purported common issues. Particularly, where the only common facts -- in the broadest terms -- are that SCSP applied stucco products to some of the homes built in Sun City

"The very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action." O'Quinn v. Beach Associates, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978). But, the laudatory purpose of trial efficiency cannot justify depriving litigants of their substantive rights and must always comport with due process.<sup>16</sup> Affording due process requirements that effectively results in the joint trial of as many as 4000+ claims will not serve the purposes of Rule 23 and impose a huge burden on the parties, their counsel, and the circuit court of Beaufort County.<sup>17</sup> To highlight this prospect, it is worth noting

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<sup>16</sup> Judge Baxley has already rejected objections and limited discovery on the class list because the case was, at that time, six years old. [4/18/14 Order, p. 3.] The length of the process does not justify depriving SCSP of its due process rights to insist on a rigorous analysis that forces the Plaintiffs to meet their burden under Rule 23 and allows the Defendants to challenge class certification.

<sup>17</sup> With due respect to this Court's decision in *Grazia I*, SCSP maintains that the facts, as developed by information gathered in the Right to Cure process, demonstrate that class certification simply is not compatible with Right to Cure compliance in this case. As intended

that as of December 2010, there were approximately 150 individual cases pending that have been stayed awaiting the class action determination in this case. Under any reasonable scenario, those cases could have already been disposed of by this time.

**B. The trial court approved an opt-in class notice that is not permitted under Rule 23.**

In Salmonsens v. CGD, Inc., 377 S.C. 442, 452, 661 S.E.2d 81, 87 (2008), this Court squarely held that Rule 23 does not allow an "opt-in" notice procedure. The Court discussed that the "opt-in" procedure adopted by the trial court in that case had far reaching consequences of determining and even redefining the class. The Court also expressed concern that the elimination of the putative class members undermined due process and effectively denied those individuals a trial by jury.

Judge Baxley, in his "preliminary" certification order of 12/19/11, speaks of an opt-out class notice, but in actuality, he was creating an opt-in process:

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.

In his 4/18/14 order Judge Baxley approved a class notice that also expressly purports to give the claimants/putative class members the opportunity to opt-out. However, Judge Baxley also

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by the Legislature, the plaintiff must comply with the Right to Court Act in a presuit process for identifying and assessing any defects and attempting resolution (through repairs or monetary settlement) without litigation, and where suit is filed before compliance, a stay must be filed of the litigation. In this case, the class certification process has been proceeding concurrently along with the Right to Cure process which has created confusion and complications contrary to the purposes of both Rule 23 and the Act.

approved a RTC Questionnaire to be mailed to all putative class members and allowed 60 days for the return of the Questionnaires, stating: "Plaintiff's Counsel shall have additional time to contact class members that do not timely return the Questionnaire, but at some point, to be determined in the future, class members who fail to return the RTC Questionnaire shall have their claims dismissed with prejudice." The Questionnaire also warns claimants that their claim may be dismissed. Thus, regardless of Judge Baxley labeling it as an opt-out notice, the reality is that, as a practical matter, the notice of a preliminary class certification together with the Right to Cure Questionnaire constitutes an opt-in notice. See Salmonsens, 661 S.E.2d at 87 ("The "opt-in" class action and the "opt-in" notice procedure are a distinction in name only, the practical effect is the same.) And, also just as in Salmonsens, "the adoption of this notification procedure essentially created a class action anomaly," *id.*, to the extent that claimants cannot participate in the class UNLESS they affirmatively choose to return the Questionnaire.

The use of an opt-in class notice contravenes the clear holding of this Court and should be reviewed and corrected at this point before the case proceeds any further because of the effect on the due process rights of the class members as well in the interest of judicial economy in assuring that the class is properly noticed before the case proceeds any further.

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As a final point, the SCSP would note that in Salmonsens, this Court accepted an interlocutory appeal based, in part, on the concern that the opt-in issue "presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar." 661 S.E.2d at 87. The Court also referenced the availability of a writ of certiorari as an alternative option for immediate review of an interlocutory order:

"Although we will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when

exceptional circumstances exist.” *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543 n. 2, 503 S.E.2d 445, 447 n. 2 (1998).

*Id.* at 87 n.5. SCSP respectfully submits that similar exceptional circumstances also exist in this case to review the Rule 23 class certification and opt-in notice issues.

**C. The trial court has created a Right to Cure process that does not serve the purpose of the Act.**

The Right to Cure Act mandates a presuit process for resolution of homeowner construction complaints. The Act requires claimants to give notice to a contractor ninety days before filing an action against the contractor arising out of the construction of a dwelling; upon receiving a notice, the contractor has fifteen days to request clarification of the alleged defects if the defect is not sufficiently stated. § 40-59-840. The contractor has thirty days after receipt of a notice to “inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects;” and then the claimant has 10 days to respond to the offer. § 40-59-850. If a claimant files an action in court without first complying Act, the court must (on motion) stay the action until the claimant has complied with the Act. § 40-59-830.

As noted above, on remand in *Grazia I*, the Supreme Court gave instructions to the trial court that when presented with a motion for class certification -- FIRST to determine whether or not the action meets each of the five prerequisites proponents of class certification are required to prove and THEN, IF these prerequisites are met, to determine whether the Act could be properly harmonized with Rule 23 such that representative notice under the Right to Cure Act might be appropriate.<sup>18</sup> *Grazia I*, 703 S.E.2d at 202-03. On remand, Judge Baxley made only a

<sup>18</sup> With all due respect to the Supreme Court’s decision, SCPC maintains that the instructions do not comport with the Legislative intent to FIRST comply with the Act before moving forward with the legal action, and that certifying a class first is improper and inefficient because any members that do not comply with the Act cannot proceed to participate in the class in any event.

preliminary finding that the Plaintiffs met the five Rule 23 requirements, and created his own process for compliance with the Right to Cure Act. In his 2011 order Judge Baxley articulated the compliance process in a broad concept, and later, in his 4/18/14 order, Judge Baxley set forth additional details, including guidelines for inspections and testing. In his 2/12/16 order, Judge Dickson limited SCSP to certain necessary testing to only 47 houses; and in his 5/26/16 scheduling order, Judge Dickson allows for the stay to be lifted upon final class certification prior to compliance with the Right to Cure Act.<sup>19</sup>

As of the filing of this Petition, SCSP is still attempting to complete testing necessary before it can make offers to the claimants, then the claimants must respond before this stay can be lifted to allow the parties to proceed with conducting discovery necessary to allow them to ultimately try the case on the merits. Thus, a presuit process that is supposed to take 90 days has already consumed almost three years, and, the end of the presuit process may only be seen in a crystal ball because there is an unresolved disagreement between SCSP and class counsel over the process of making the offers.<sup>20</sup> Meanwhile, the stay of discovery has been prematurely lifted.<sup>21</sup>

SCSP maintains that this process does not meet the purpose or express provisions of the Act or the instructions in *Grazia I*, and deprives SCSP of its rights under the Act. Given all the

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<sup>19</sup>The scheduling order did contemplate that the Right to Cure process would be completed by September before the scheduled hearing set on final class certification; however, compliance has not yet been completed and the Plaintiffs are pursuing discovery on the presumption that the stay has been lifted with Judge Dickson's 9/9/16 order declaring class certification already was final.

<sup>20</sup> SCSP intends to make individual offers to each claimant/putative class member; however, SCSP contemplates that Plaintiffs' counsel will object and insist on a global "class" offer.

<sup>21</sup> See *Grazia I*, 703 S.E.2d at 202 ("The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to require compliance with the Right to Cure Act's notice provisions.")

exceptional circumstances and the important issues raised, the Court would best serve the interests of the parties and the judicial system by accepting immediate review to set this case back on the correct course to maintain due process while also serving the purposes of the Right to Cure Act.

**III. PETITION FOR A WRIT OF MANDAMUS – THE TRIAL COURT HAS THE DUTY TO RULE ON A TIMELY FILED MOTION FOR RECONSIDERATION.**

As noted above, this Court is endowed, by the Constitution and state statute, with the power to issue writs of mandamus. S.C. CONST. art. V, § 5; S.C. Code Ann. § 14–3–310 (1976).

Mandamus is the highest judicial writ known to the law. It is a coercive writ which orders a public official to perform a ministerial duty. For a writ of mandamus to issue, the following must be shown: (1) a duty of the Respondent to perform the act; (2) the ministerial nature of the act; (3) the Petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. A ministerial act or duty is one which a person performs because of a legal mandate which is defined with such precision as to leave nothing to the exercise of discretion.

Edwards v. State, 383 S.C. 82, 95–96, 678 S.E.2d 412, 419 (2009) (citations omitted).

“Mandamus will lie to compel a judicial officer to perform a plain, ministerial duty.” Linton v.

Gaillard, 203 S.C. 19, 25 S.E.2d 896, 898 (1943).

Issuance of a particular decision by a judge is typically a matter of discretion and, therefore, not proper for mandamus. See 55 C.J.S. Mandamus § 83 (1998) (while mandamus may be employed to compel an inferior tribunal to exercise its discretion, ordinarily it may not be used to direct or compel the exercise of the discretion in a particular way).

City of Rock Hill v. Thompson, 349 S.C. 197, 201–02, 563 S.E.2d 101, 103 (2002).

In this case, SCSP has twice made motions for reconsideration of certain orders which motions the trial court has dismissed as improper on the reasoning that Rule 59(e) does not allow reconsideration of intermediate orders. Moreover, Judge Dickson has decreed that he will not allow any further argument on the class certification matters. From one perspective, SCSP is

required to seek reconsideration to preserve issues for appeal, and in addition, SCSP is entitled to seek the trial court's reconsideration on any interlocutory order prior to final judgment. The trial court may have discretion to deny the motions, but it does not have the discretion to dismiss a proper motion. Mandamus is appropriate to compel the trial court to rule on the motions because the motions are proper.

As the Court is well aware, the "absolute necessity" of issue preservation and the importance of making motions for reconsideration to preserve issues for appellate review can be found in a myriad of opinions with references to the consequences of failure to meet mandatory preservation requirements. *See generally, Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004); Trial Handbook for South Carolina Lawyers § 36:5. In *Elam*, the Supreme Court discusses the proper use of a Rule 59(e) motion to seek "reconsideration" of issues and arguments:

[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. *It is inherently unfair to disallow such an opportunity.*

602 S.E.2d 772, 778-79 (2004) (citations omitted/emphasis added). The Court has clearly established that trial court intermediate orders are amendable on motions for reconsideration. *See Johnston v. Bowen*, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993); *see also* Rule 54(b), SCRCF ("the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."). The consequences of failing to make a motion for reconsideration of an intermediate/pretrial order

are evidenced in Ness v. Eckerd Corp., 350 S.C. 399, 403, 566 S.E.2d 193, 196 (Ct. App. 2002), where on appeal from an order of a trial judge vacating his prior order denying the defendant relief from entry of default and recusing himself, the Court of Appeals held that issues related to recusal were not preserved for appellate review because the party did not make a Rule 59(e) motion.

In the Motion to Determine Appealability filed in the Court of Appeals, SCSP argues that to the extent that the Judges did not deny the motions, but instead dismissed the motions on a purely legal ground, those dismissal orders are immediately appealable. See Salinas v. C. Aultman & Co., 49 S.C. 325, 27 S.E. 385, 387 (1897) (“While the granting or refusing of an interlocutory order of injunction, upon the merits, is not, as a rule, appealable, it is appealable when granted or refused upon a ‘purely’ legal ground, and especially a jurisdictional ground.”) Appellant also maintains that the dismissal orders are appealable because the trial court refusal to allow the opportunity for reconsideration is “inherently unfair” and thus affects their substantial rights to reconsideration that could prevent them from raising certain issues on appeal. See Elam, 602 S.E.2d at 779 (“It is inherently unfair to disallow such an opportunity [for reconsideration.]”)

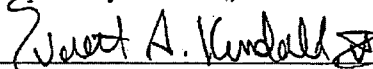
The Court could issue the writ and compel the trial court to address the merits of the Rule 59(e) motions for reconsideration – both as to Judge Baxley’s preliminary order and Judge Dickson’s 9/9/16 order. E.g. Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC, 404 S.C. 385, 391, 745 S.E.2d 105, 108 (2013) (where trial court erred in ruling that lacked jurisdiction over motion for reconsideration; ordered to address the merits of the Rule 59(e) motion on remand). However, in view of Judge Dickson’s abject refusal to hear any other arguments on class certification and the number of years of extensive, expensive litigation and

the corresponding burden on court staff and docket in Beaufort County – without yet even moving forward on the merits of the defect allegations, the Appellant asks the Court to retain jurisdiction of this appeal and review the class certification issues so this case can get back on track and move toward a final resolution.

#### CONCLUSION

South Carolina State Plastering respectfully petitions this Court to issue a writ of mandamus directing the trial court to rule on motions for reconsideration, or in the alternative, for a writ of certiorari to review the trial court orders and correct the many errors at this stage of the litigation so that this case can move forward towards a proper determination of the Rule 23 class certification factors, compliance with the Right to Cure Act as intended by the Legislature, and ultimately, to trial on the merits.

Respectfully submitted,

  
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February 9, 2017

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge  
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	Respondents.

**PROOF OF SERVICE**

I certify that I have served the Petition for Extraordinary Relief on The Honorable Edgar W. Dickson, Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs and on Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on February 9, 2017 to all attorneys of record. The addresses for the attorneys of record are as follows:

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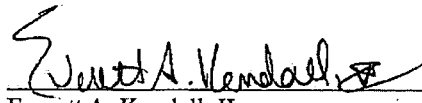
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[SIGNATURE PAGE TO FOLLOW]



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February 9, 2017.

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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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,..... Petitioner,

And

South Carolina State Plastering, LLC,..... Petitioner,

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,..... Respondents.

---

RETURN TO PETITION FOR EXTRAORDINARY RELIEF

---

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Del Webb and Pulte respectfully submit this Return to South Carolina State Plastering's "Petition for Extraordinary Relief," in which State Plastering seeks a petition for a writ of certiorari to the circuit court and a petition for a writ of mandamus to the circuit court.

**Petition for a Writ of Certiorari**

Del Webb and Pulte are filing with this Court a separate petition for a writ of certiorari to the circuit court with respect to two orders. They incorporate herein by reference the grounds and arguments made in their certiorari petition.

As to the specifics of State Plastering's certiorari petition, Del Webb and Pulte agree that the global review sought by State Plastering is warranted and would greatly advance the orderly disposition of this putative class action. Most notably, it would return this case to proper procedural posture so that any appeal after a trial on the merits would afford the appellate court the opportunity to rule definitively on any and all issues without needing to reverse and remand for further proceeding, which would likely generate another appeal.

**Petition for a Writ of Mandamus**

Del Webb and Pulte agree that Judge Dickson and Judge Baxley have mistakenly ruled that a motion to reconsider, alter, or amend is not available for any order that is not immediately appealable. As a result, both judges erroneously dismissed the motions rather than rule on the merits of the motion. In addition to the errors argued by State Plastering, Del Webb and Pulte would show that both judges also erred for the reasons set forth below.

Judges Baxley and Dickson dismissed the motions to reconsider under the following analysis: (1) the underlying 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, both judges dismissed the motions without considering them. The dismissals were based on a flawed view of South Carolina law.

First, a circuit court judge does not have subject matter jurisdiction to determine the appellate jurisdiction of the appellate courts, *i.e.*, to determine whether the underlying order is immediately appealable. Second, and more importantly, the dismissals of the motions to reconsider were based on an erroneous understanding of such motions.

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. This 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 the circuit court judges' 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 the circuit court judges' view

of motions to reconsider, a party could never preserve issues for eventual appellate review of an interlocutory order in an appeal after final judgment, because it cannot make a timely motion to reconsider the interlocutory order. Nothing in the SCRCF, the SCACR, or South Carolina case law supports the rulings that a motion to reconsider cannot be made except for orders that are immediately appealable.

Del Webb and Pulte agree that the orders dismissing the motions to reconsider represent a refusal to exercise discretion under a mistaken view of the law and, therefore, a writ of mandamus directing the circuit court to consider the merits of the motions is warranted. There is, however, a potential difficulty with this relief. If the circuit court denies the motions, then the numerous other issues raised by the parties will remain unresolved, e.g., whether the underlying orders (and others) are immediately appealable and, if not, whether the issues related to those orders warrant immediate review by this Court by writ of certiorari to the circuit court. Because of this, Del Webb and Pulte submit that the interests of the parties (including the absent members of the putative class) and judicial economy are better served by entertaining an immediate appeal of the various orders or, if not immediately appealable, by granting the certiorari petitions so that the issues can be resolved now rather than later, and thereby avoid the danger of a series of appeals, remands, and further appeals after a trial on the merits. Alternatively, if this Court grants mandamus, it is respectfully submitted that this Court should remand for the limited purpose of compliance with the writ, and the Court should otherwise retain jurisdiction of this matter, pending a report on the result of the remand.

Finally, if the writ is to be granted, Del Webb and Pulte respectfully submit that this Court should include several provisions in the order. First, both Judge Baxley and Judge Dickson appear to read this Court's prior opinion in *Grazia v. S.C. State Plastering, LLC*, 703 S.E.2d 197 (S.C.

2010) as approving or foreshadowing approval of the certification of the putative class in this case, apparently under the mistaken belief that class certification was an issue in *Grazia, supra*. This Court's ruling, however, was the exact opposite, because no motion for class certification had even been made at the time of the *Grazia* opinion:

[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 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). This Court also stated that 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. Accordingly, it is respectfully submitted that any mandamus order should specifically reiterate that this Court has not considered or ruled upon the propriety of certifying a class in this case, and that its opinion in *Grazia, supra*, has no bearing on the issue of class certification.

Second, both judges have emphasized the adverse impact on the judicial system that would result if class certification is denied and the 4,000 putative class members were to bring individual claims. There is no evidentiary support for this specter and, in any event, it is irrelevant to the question of a whether a class should be certified for a trial on the merits. Rather, that question is controlled by this Court's rulings in *Gardner v. South Carolina Dep't of Rev.*, 577 S.E.2d 190 (S.C. 2003). First, the "[p]roponents of class certification *bear the burden of proving* [the] five prerequisites" imposed by Rule 23(a), SCRPC. *Id.* at 200 (emphasis added). Second, "[i]n deciding whether class certification is proper, the court must apply a *rigorous analysis* to determine *each prerequisite is satisfied.*" *Id.* (emphasis added). Third, the "failure to satisfy *even one* prerequisite is *fatal* to class certification." *Id.* (emphasis added). Respectfully, the circuit court has

lost sight of and softened these requirements due to the unproven and nevertheless irrelevant specter of 4,000 individual cases being filed if class certification is denied. Accordingly, it is respectfully submitted that any mandamus order should specifically reiterate the law as stated in *Gardner*, and note that the specter of 4,000 individually filed cases is irrelevant to the law and analytical structure set forth in *Gardner*.

Third, as summarized in the certiorari petition, the individual homes in the putative class present a wide variety of home-specific issues that require individual consideration at a trial on the merits. As this Court stated in *Gardner*, a class action is improper if the factual differences between the class members requires an investigation into each class member's claim. 577 S.E.2d at 201. The need for "such individualized examination negates the benefits of a class action suit," and this includes defenses that require a focus on "the individual facts of each case." *Id.*

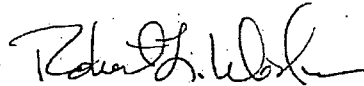
The Right to Cure process developed by Judge Baxley yielded a tremendous amount of information from questionnaire answers by thousands of homeowners, walk around inspections of thousands of homes, depositions of some homeowners, and destructive testing on some homes. This "Right to Cure" evidence provides substantial support for the conclusion that the wide variety of home-specific issues in this case precludes class certification. Judge Baxley clearly intended to hear this "Right to Cure" evidence before certifying the class for a trial on the merits, but he retired before it could be presented to him. Judge Dickson later declared that Judge Baxley had already certified the class for a trial on the merits, and he refused to entertain any further argument on the issue of class certification. As a result, no judge in this case has considered any of the "Right to Cure" evidence on the question of whether a class should be certified for a trial on the merits. Respectfully, any remand under mandamus or otherwise should correct this manifest error and direct the circuit court to consider this evidence, and all other relevant evidence, and then apply

the "rigorous analysis" required by *Gardner* to decide whether the class should be certified for a trial on the merits.

**Conclusion**

For all of the foregoing reasons, Del Webb and Pulte respectfully submit that this Court should grant the petition for a writ of certiorari to the circuit court.

Respectfully Submitted,



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February 21, 2017  
Columbia, SC

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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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,..... Respondents.

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CERTIFICATE OF SERVICE

---

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Respondents Del Webb Communities, Inc. and Pulte Homes, Inc.'s *RETURN TO PETITION FOR EXTRAORDINARY RELIEF* by depositing a copy in the United States Mail, postage prepaid, on February 21, 2017, addressed to all attorneys of record, as follows:

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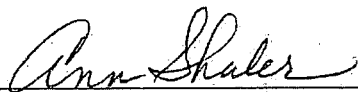
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