

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-97-3166

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

v.

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

OF WHOM Del Webb Communities, Inc.,
an Arizona Corporation is Appellant.

**APPELLANT DEL WEBB'S RETURN TO
RESPONDENTS' MOTION TO DISMISS APPEAL**

Respondents (Plaintiffs) move this Court to dismiss Appellant's (Del Webb's) appeal. Co-Defendant Georgia-Pacific also appealed and Plaintiffs have also moved to dismiss Georgia-Pacific's appeal. Georgia-Pacific and Del Webb have filed separate Returns – Del Webb adopts and incorporates herein the arguments made by Georgia-Pacific in its Return to Plaintiffs' motion to dismiss Georgia-Pacific's appeal. For the Court's convenience, Georgia-Pacific and Del-Webb have filed a separate Joint Appendix in support of their Returns, which is cited herein as "Appx. ____."

SUMMARY OF ARGUMENTS

Plaintiffs contend the appealed orders are interlocutory and do not fall within the classes of interlocutory appeals permitted by S.C. Code Ann. § 14-3-330 (1976 & Supp. 2011). It is true that the appealed orders are interlocutory but, as demonstrated in this Return, the appeals are proper under § 14-3-330 and the doctrine of pendent appellate jurisdiction.

The class notice advocated by Plaintiffs and approved by the trial court denies due process to the class members, because it fails to advise them that: (1) remaining in the class will result in a waiver of claims held by them; and (2) remaining in the class may expose them to personal financial risks, particularly if Del Webb prevails in the class action generally or with respect to their particular home. Thus, the class representatives and class counsel have knowingly and intentionally waived claims held by other class members, and they have knowingly and intentionally hidden this fact from the class members by successfully refusing to disclose it in the class notice. In so doing, the class representatives and class counsel have violated their fiduciary duties to the class members. Since the class notice violates due process, it will not bind the class members and, therefore, Del Webb will lose the substantial right to the *res judicata* effect of any settlement or final judgment and the bar against claim splitting. This error cannot be remedied after final judgment, because Del Webb's substantial right to *res judicata* and the bar against claim splitting is triggered by a final judgment or settlement. Accordingly, the order is immediately appealable under § 14-3-330(2)(a), because it affects a "substantial right" and "in effect determines the action and prevents a judgment from which an appeal might be taken."

Del Webb has asserted numerous defenses that are house-specific and/or homeowner-specific. The trial court denied Del Webb's motion for discovery as to all class members. Thus,

Del Webb cannot pursue or present its individualized defenses. This is a violation of due process as recently announced by the United States Supreme Court and, therefore, the denial of discovery affects a substantial right under § 14-3-330(2). By denying the discovery necessary to pursue and present these individualized defenses, the trial court effectively struck these defenses from Del Webb's answer. Accordingly, the order is immediately appealable under § 14-3-330(2)(c), which provides for an immediate appeal of an order that affects a substantial right and "strikes out an answer or any part thereof."

The trial court denied Del Webb's motion to require compliance with the Right to Cure Act by each homeowner. The trial court also ordered that representative compliance with the Act would be achieved by requiring compliance for only 10% of the homes in the class. Due to the house-specific and homeowner-specific issues presented in this case, representative compliance with the Act is not possible. This error cannot be remedied after final judgment, because the substantial rights granted by the Act are to be exercised before judgment. Accordingly, the orders are immediately appealable under § 14-3-330(2)(a), because they affect a "substantial right" and "in effect determine the action and prevent a judgment from which an appeal might be taken."

The appellate courts have discretion to review an unappealable order in connection with the appeal of an appealable order. Exercising this pendent appellate jurisdiction is appropriate when doing so will promote judicial economy and prevent unnecessary litigation. Here, the issues raised with respect to the orders noted above are inextricably intertwined with the propriety of granting class certification in this case. Thus, resolving those issues will have a direct impact on the order granting class certification. Accordingly, the order granting class certification is immediately reviewable by this Court under its pendent appellate jurisdiction.

BACKGROUND

This is a certified class action. The class members are 800 owners of homes built with exterior trim board called PrimeTrim. Georgia-Pacific manufactured PrimeTrim and Del Webb built the homes with PrimeTrim.¹

Plaintiffs alleged defective product claims against Georgia-Pacific under the following basic theory: (1) PrimeTrim is not appropriate for use in South Carolina as exterior trim board, because the climate is too wet; (2) as a result of exposure to the wet climate, PrimeTrim deteriorated; and (3) as a result of this deterioration, water intruded the house and caused consequential damage to the house. Plaintiffs alleged two construction defect claims against Del Webb – negligence and breach of the implied warranty of workmanlike service – under the following basic theory: (1) Del Webb improperly installed the PrimeTrim in some locations; and (2) as a result, water intruded the house at that location; and (3) as a result, the PrimeTrim was damaged and there was consequential damage to the house at that location. (Appx. 36-38, ¶¶ 21, 24-28 and Appx. 47-48, ¶¶ 71-81). Plaintiffs seek the same basic recovery from Georgia-Pacific and Del Webb, to-wit: damages sufficient to remove and replace the trim board, and to repair any consequential damage to the house. As discussed later, Plaintiffs' experts agree that determining whether any damage to the PrimeTrim or the house was caused by defective PrimeTrim (Georgia-Pacific), improper installation (Del Webb), some combination thereof, or some other cause for which no claim is being made against any defendant will require a house-by-house and board-by-board inspection.

¹ Several defendants are not parties to this appeal or the appeal of Georgia-Pacific. Defendant Grayco supplied the PrimeTrim and is being sued under the same basic theories as Georgia-Pacific. Defendants Razor and DJ Construction installed the PrimeTrim as subcontractors of Del Webb and are being sued under the same basic theories as Del Webb.

Del-Webb denies that the PrimeTrim is improperly installed and further denies that it caused the Plaintiffs to suffer any damages. (Appx. 53-55, ¶¶ 17-22, 25-32). Del Webb also asserts numerous defenses that are house-specific and/or homeowner-specific, including: failure to mitigate damages, statute of limitations, statute of repose, intervening and superseding cause, and comparative negligence (Appx. 56-58, ¶¶ 34, 37, 39, 41).

Plaintiffs have three experts, including Mr. Hodgin, an engineer, and Mr. Carlson, a contractor with over 30 years experience. They have identified seven separate and possible ways in which the PrimeTrim may have been improperly installed on any particular house at some locations: (1) lack of metal flashing over window PrimeTrim, (2) lack of metal flashing over horizontal PrimeTrim at the base of a home, (3) lack of metal flashing over PrimeTrim at a window sill, (4) vertical corner PrimeTrim being installed over lap siding, (5) vertical corner PrimeTrim being installed over lap siding at window jambs, (6) installing PrimeTrim so that is contact with cement or masonry, and (7) installing PrimeTrim within six inches of soil or landscaping. Importantly, Plaintiffs' experts admit that much if not most of the PrimeTrim is installed properly, and that each house will have different types of improper installation at different locations causing different types of damage – thus, each house will require a board-by-board inspection of any improperly installed PrimeTrim to determine whether it caused any damage.

Hodgin and Carlson agree that determining the existence, nature, and extent of any installation defect, as well as the existence, extent, and causation of any damage to the PrimeTrim or the house requires a house-by-house inspection:

1. Determining the existence, nature, extent, and location of any improper PrimeTrim installation requires an inspection of each house in the class, including

a comparison of the installation to the version of the building code and the version of the manufacturer's installation instructions that were in existence at the time the particular house was built during 1994 - 2002.

2. Determining the existence, extent, and causation of any damage, to the PrimeTrim or consequential damage to the house requires an inspection of and destructive testing to each house in the class, including consideration of whether each homeowner properly maintained his or her home and whether any damage was caused by the owner's failure to maintain the house, the inherently defective nature of the PrimeTrim (the claim against Georgia-Pacific), improper installation of the PrimeTrim (the claim against Del Webb), some combination of the three, or some other cause not at issue in this case.
3. Inspection and testing of any house cannot establish the existence, nature, extent, or location of any installation defect at any other house, nor can it establish the existence, extent, and causation of any damage at any other house.

(See Hodgin and Carlson testimony at Appx. 78-170, *passim*). Plaintiffs' experts also agreed that two experts could inspect the same house and have different opinions on the cause of any damage revealed in the inspection, and this was likely to happen in this case. (Appx. 121-122; 146-147, 152-153). Thus, this case will require a house-by-house "battle of experts."

Plaintiffs have a third expert, Dr. Lee. He is a wood scientist and has no opinion on any construction defect issues – he is not familiar with any installation issues. (Appx. 175). His opinion related solely to whether the PrimeTrim itself was inherently defective. He concluded that it was and that, regardless of whether the PrimeTrim had been installed correctly or not, all of it should be replaced because it is inherently defective. (Appx. 172-174). Mr. Hodgin and Mr.

Carlson agreed that the PrimeTrim was inherently defective and needed to be replaced, regardless of whether it was correctly installed or not. (Appx. 79-80; 136, 163). The claim that PrimeTrim is inherently defective is made against co-Defendant Georgia-Pacific only as the manufacturer of PrimeTrim – it is not made against Del Webb. The experts also agreed that improper installation might cause the PrimeTrim to fail more quickly, thereby raising yet another causation issue requiring house-specific inspections and testing as the likely subject of a battle of experts on each house.

ARGUMENTS

- I. The “Order Denying [Del Webb’s] Motion to Conduct Discovery as to Individual Class Members” is immediately appealable under § 14-3-330(2)(c), because it precludes Del Webb from pursuing and proving various defenses, thereby denying Del Webb due process and effectively striking out parts of Del Webb’s answer.

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the United States Supreme Court held that a class action cannot be used to deny a defendant of its due process right to present individualized defenses to the claims of class members, and that testing these defenses against a sampling of class members violates due process. Here, Del Webb has several defenses that are highly individualized but the trial court, in the interest of class action economy through representative claims, has denied Del Webb the opportunity to pursue and present those defenses through discovery of the individual class members. (See Order at Appx. 1-2). In so doing, the trial court effectively struck Del Webb’s individual defenses to the claims of individual class members and thus struck portions of Del Webb’s answer.

In determining appealability, courts look to the effect of an order rather than its label – an order is immediately appealable as striking a portion of a pleading if it has the effect of removing a material issue from the case and preventing the issue from being litigated on the merits See,

e.g., *Thornton v. South Carolina Elec. & Gas Corp.*, 705 S.E.2d 475, 478-479 (S.C. App. 2011) and discussion of other cases therein. Here, the order denying discovery as to all class members removes numerous defenses pled by Del Webb and prevents those material issues from being litigated on the merits. Accordingly, the order is immediately appealable under § 14-3-330(2)(c), which provides for an immediate appeal of an order that affects a substantial right and “strikes out an answer or any part thereof.”²

Defect and Damage: As noted earlier, Del Webb has denied Plaintiffs’ allegations of defective installation and resulting damages. As also demonstrated earlier, Plaintiffs’ experts agree that determining the defect and damage issues related to PrimeTrim installation requires a house-by-house inspection that will likely yield a battle of experts. By denying discovery of individual class members, the trial court has deprived Del Webb of the opportunity to conduct the house-by-house inspection that Plaintiffs’ experts agree is necessary to determine those issues and agree is the likely subject of a battle of experts, particularly on the issue of damage causation. Thus, the trial court effectively struck Del Webb’s defenses on defect and damage, thereby striking portions of Del Webb’s answer. Accordingly, the order is immediately appealable under § 14-3-330(2)(c).

Failure to Mitigate Damages: Every plaintiff is under a duty to mitigate damages. Absent discovery of what each homeowner knew about any defect and damage, the nature and extent of any damage, and what if anything they did to mitigate that damage, Del Webb cannot pursue or prove this defense. Thus, the trial court effectively struck Del Webb’s “failure to

² The order denying individual discovery also states: “The Court further notes that, in accordance with its authority to maintain continual control over class action proceedings, it will address issues pertaining to discovery in this case in due course.” (Appx. 2). In denying reconsideration, the court made it clear that any future discovery would take place after the “representative compliance” with the Right to Cure Act (see Arg. III, *infra*), and it would be limited to the houses selected for a “representative” trial on the merits. (Appx. 64-65, 70-72).

mitigate” defense from Del Webb’s answer. Accordingly, the order is immediately appealable under § 14-3-330(2)(c).

Statute of limitations: The houses in the class were built between 1994 and 2002. Plaintiffs sued Del Webb in April 2009. Thus, the houses were built 7-15 years before Plaintiffs commenced this action. The statutes of limitations for Plaintiffs’ negligence and warranty claims is three years. S.C. Code Ann. § 15-3-530(1) and (5) (Rev. 2005). Discovery of the named plaintiffs has already raised significant statute of limitations issues with respect to their claims. (See Appx. 176-194, *passim*). Without individual discovery on when other homeowners knew or should have known of any purported “installation” claims, Del Webb cannot pursue or prove this defense. Thus, the trial court effectively struck Del Webb’s “statute of limitations” defense from its answer. Accordingly, the order is immediately appealable under § 14-3-330(2)(c).

Statute of Repose: Approximately 100 of the homes in the class were built more than thirteen years before Plaintiffs commenced this action. Thus, all claims are barred by South Carolina’s 13-year statute of repose. S.C. Code Ann. § 15-3-640 (Rev. 2005).³ Defenses to the statute of repose are possible, but Plaintiffs bear the burden of proving them for each house subject to the statute of repose. See S.C. Code Ann. § 15-3-670 (Rev. 2005). Proving the applicability of the statute of repose, and any defense against it by Plaintiffs, will require individualized proof for each house subject to the statute of repose.

Intervening and Superseding Cause: The Plaintiffs’ experts agree that there is and will be a question of whether any damage to the PrimeTrim or the house was caused by the inherently defective nature of the PrimeTrim (the claim against Georgia-Pacific), improper installation of the PrimeTrim (the claim against Del Webb), or some other cause. Without individual discovery

³ Effective 2005, after the homes at issue here were completed, the statute of repose was amended to reduce the 13 year period to eight (8) years. S.C. Code Ann. § 15-3-640 (Supp. 2011).

of the class members and their houses on these questions, Del Webb cannot pursue or prove the defense that any damage was caused by someone or something for which Del Webb is not liable. Thus, the trial court effectively struck Del Webb’s “intervening and superseding cause” defense from its answer. Accordingly, the order is immediately appealable under § 14-3-330(2)(c).

Comparative negligence: Plaintiffs’ experts agree that the failure to properly maintain the houses in the class could be a cause or contributing cause to the damage allegedly suffered by the class members. Without individual discovery on whether and how a homeowner maintained their home, Del Webb cannot pursue or prove this causation defense. Thus, the trial court effectively struck Del Webb’s “comparative negligence” defense from its answer. Accordingly, the order is immediately appealable under § 14-3-330(2)(c).

Other Defenses: Del Webb denies Plaintiffs’ allegation that it represented PrimeTrim to Plaintiffs as saving on painting costs and that it was superior to real cut lumber products for exterior trim board use. (Appx. 34, ¶ 13; 53, ¶ 12). This allegation of a false representation is, by definition, a highly individualized allegation regarding who said or gave what to the homeowner, what the homeowner understood, and whether the homeowner relied on any representation to his or her damage. Without individual discovery of the class members, Del Web cannot pursue or prove its defense that it did not make any such representations to the homeowners in the class. Thus, the trial court effectively struck Del Webb’s “no representation” defense from its answer. Accordingly, the order is immediately appealable under § 14-3-330(2)(c).⁴

⁴ Plaintiff’s correctly note that: “*Generally*, discovery orders are not directly appealable.” (Mot. At 11) (emphasis added). This *general* rule does not apply here. Del Webb has a due process right under the state and federal constitution to present individualized defenses to the claims made by class members. Rule 23, SCRCP, is a joinder mechanism – it cannot deprive a defendant of its right to defend the claims made against it. The trial court denied this “substantial right” when it denied individual discovery and effectively struck Del Webb’s defenses from its answer. Accordingly, the order denying individual discovery is immediately appealable under § 14-3-330(2)(c).

- II. The “Order Approving Notice of Class Action” is immediately appealable under § 14-3-330(2)(a), because the order affects a substantial right of Del Webb, effectively decides the issue with finality, and no meaningful relief can be granted in an appeal after final judgment.

In *Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003), the Vermont Supreme Court held that the settlement of a national class action in Alabama was not binding on Vermont members of the class, because the notice of class settlement violated due process. Thus, the class action defendants were not entitled to a *res judicata* defense against the claims of Vermont class members. In so ruling, the court held that the notice of class settlement violated due process, because it failed to advise the class members that the attorney’s fee requested by class counsel could result in a class member having a liability for fees that exceeded any economic value received by the class member from the settlement. In short, the court found that the notice violated due process, because it failed to advise the class members that there were financial risks involved in staying in the class. The same is true of the class notice in this case and, given that South Carolina courts jealously guard the rights of consumers and homeowners, it is likely that South Carolina will follow the reasoning of the Vermont Supreme Court and refuse to give *res judicata* effect to any settlement, judgment in favor of Del Webb, or judgment against Del Webb. The class notice in the present case fails to advise the class members that the class representatives and class counsel have waived numerous claims that class members may have against Del Webb, and it fails to advise class members that some of them are at risk for paying defense fees and costs incurred by Del Webb if it prevails in this action, as well as other financial risks incurred by remaining in the class.⁵

⁵ Research reveals no case involving a class notice that failed to advise the class members that the class representatives had waived certain claims possibly held by class members. The reason is simple. State and federal courts across the country uniformly deny class certification when class representatives waive potential claims held by other class members in order to achieve class certification. The courts find that this waiver creates a conflict of interest between the class representatives and the class members or otherwise demonstrates the class representatives

- A. The class notice violates the due process rights of the putative class members by failing to give them sufficient information to make an informed decision on whether to remain in the class.

Due process affords class members two fundamental protections: the right to opt out and the right to adequate representation. Here, as demonstrated below, the class notice deprives the class members of any meaningful right to opt out, because it does not disclose the potential adverse financial consequences of not opting out of the class.⁶ The willingness of the class representatives and class counsel to expose the class members to these adverse consequences, particularly when coupled with their refusal to disclose these risks to the class members in the class notice, deprives the class members of their due process right to adequate representation. As a result, there is an undisclosed conflict of interest between the class representatives and class members, and class counsel purports to represent all of them without disclosing the conflict or obtaining any waiver of the conflict. See RPC 1.7 and 1.8, Rule 407, SCACR.

Waiver of Claims: In response to Requests to Admit, the Class Representatives stated that they “are not seeking reimbursement of any past expenses related to repairs or replacement of PrimeTrim . . . [and] are seeking to have a class certified for the cost of the

and/or class counsel are not adequate representatives of the class. A unifying theme in these cases is the concern that *res judicata* and/or the prohibition against claim-splitting will prevent class members from pursuing the waived claims after the class action. The present case involves the flip side of the same coin. Since the class notice does not advise class members that the class representatives have waived potential claims held by the class members, the courts may hold that the class notice violated due process and, therefore, the waivers are not binding on the class members. Thus, Del-Webb will be deprived of the substantial right to assert *res judicata* and/or the prohibition against claim splitting in defense of any subsequent actions by class members based on the claims waived by the class representatives and class counsel. See generally, Arg. 1(A)(2) of Georgia-Pacific’s Return and cases cited therein.

⁶ The South Carolina Supreme Court has expressly stated the class notice must be “the best notice practicable under the circumstances” and—at a minimum—“describe the action and the plaintiffs’ rights in it” so that the absent class member can make an informed decision about whether he or she should remain in the class or opt out. *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 616 (S.C. 2004) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-13 (1985); see also *In re Diet Drugs Prods. Liab. Litig.*, 385 F.3d 386, 395 (3d Cir. 2004) (noting that the purpose of notice is to “provide [class members] with the information ‘needed to decide, intelligently, whether to stay in or opt out’”) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997)).

replacement of any [original construction] PrimeTrim that currently exists on the exterior of the class homes at Sun City.” (Appx. 60, ¶ 13). The Class Representatives also admitted that the only recovery being sought against Del Webb in this action was for damages caused by improper installation of the PrimeTrim. (Appx. 61, ¶ 21). In short, the Class Representatives admit that the class claims do not include any claim for any costs already incurred to repair/replace the PrimeTrim or any damage caused by the PrimeTrim. Accordingly, the Class Representatives and Class Counsel have waived any such claims that class members may have against Del Webb. The Class Notice does not advise the class members that remaining in the class will be a waiver of any claim for past repairs.

The Class Notice does not advise the class members that any claims against Del Webb for damage caused by something other than PrimeTrim installation are being waived if the class members remain in the class. For example, if there is some other construction defect in the class member’s home for which it may have a claim against Del Webb, that claim is waived if the class member remains in the class, but the Class Notice does not disclose this to the class members. For example, Plaintiffs’ expert acknowledged that in one of the several homes that he had inspected, he saw a roofing defect that allowed water intrusion which damaged the PrimeTrim. This known claim has been waived in this class action by the class representatives and class counsel, but they refuse to advise the homeowner of this in the class notice.

In short, the class notice fails to advise the class members that remaining in the class will result in the loss of financial recovery for damages caused by the waived claims. As shown below, the class notice also fails to advise the class members that remaining in the class may expose them to other financial risks.

Other Financial Exposure: As noted earlier, Plaintiffs' experts agree that destructive testing is likely necessary to determine the existence, extent, and causation of damage to any particular home. The Class Notice does not advise the class that destructive testing upon their home may be necessary. Moreover, it does not advise the class members that if destructive testing is performed on their house, and Plaintiffs do not prevail on behalf of the class or the tested house, then the homeowner may have to repair the destructive testing at his or her own expense.

Many of the class members are the original homeowners and bought their home directly from Del Webb under contracts containing a clause for fees and costs incurred in litigation. The Class Notice does not advise the class members that if they remain in the class and have such a contract with Del Webb, and if Del Webb prevails in the class action or with respect to their house, then they may be personally liable for a portion of Del Webb's defense fees and costs.

- B. The due process defects in the class notice will deprive Del Webb of the substantial right to the *res judicata* effect of any settlement or judgment, as well as the bar against claim-splitting, and no meaningful relief can be given for this defect in an appeal after final judgment.

Section 14-3-330(2)(a) provides for the immediate appeal of an order that affects a "substantial right" and "in effect determines the action and prevents a judgment from which an appeal might be taken." This Court and the South Carolina Supreme Court have held that an order is immediately appealable under § 14-3-330(2)(a) if the order has the practical effect of a final order, is effectively unreviewable in an appeal after final judgment, or meaningful relief cannot be granted after final judgment.⁷ Here, the order approving the class notice has these

⁷ *Breland v. Love Chevrolet Olds, Inc.*, 529 S.E.2d 11, 13 (S.C. 2000) ("Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case."); *Widdicombe v. Tucker-Cales*, 620 S.E.2d 333, 338 (S.C. App. 2005) (interlocutory order is immediately appealable when it has the practical effect of a final order affecting a substantial right), *aff'd in relevant part*, 653 S.E.2d 276 (S.C. 2007); *Kocaya v. Kocaya*, 552 S.E.2d 765, 766 n.2 (S.C. App. 2001) (same as *Widdicombe*, *supra*);

effects on Del Webb's due process right to the *res judicata* effect of any class action settlement or judgment, as well as South Carolina's bar against claim-splitting. See *Nunnery v. Brantley Const. Co., Inc.*, 345 S.E.2d 740, 743 (S.C. App. 1986).

The due process defects in the class notice will allow class members to make claims for prior repairs and replacement caused by any improper installation of PrimeTrim against Del Webb after final judgment or settlement. It will also allow them to make claims for damages unrelated to the improper installation of PrimeTrim against Del Webb after final judgment or settlement. These errors cannot be remedied after final judgment in any meaningful way, because it is the final judgment (or settlement) that triggers Del Webb's right to *res judicata* and the bar against claim-splitting.

In addition, if Del Webb prevails in the class action, the due process defects in the class notice will deprive Del Webb of its substantial contract right to recover defense fees and costs from homeowners with a sales contract containing a fees and costs clause. This cannot be meaningfully remedied after final judgment if reversed based on the due process errors, because those fees and costs will have already been incurred and paid.

In short, reversing a final judgment or setting aside a settlement based on the due process errors in the class notice will deprive Del Webb of substantial rights, and no meaningful relief can be granted after final judgment. Accordingly, the "Order Approving Notice of Class Action" is immediately appealable under § 14-3-330(2)(a).⁸

McLaughlin v. Strickland, 309 S.E.2d 787, 789-790 (S.C. App. 1983) (same as *Widdicombe*, *supra*). See also *Hagood v. Sommerville*, 607 S.E.2d 707, 710 (S.C. 2005) (interlocutory order is immediately appealable if effective relief cannot be granted in an appeal after final judgment); *Doe v. Howe*, 607 S.E.2d 354, 356 (S.C. App. 2004) (interlocutory order is immediately appealable under § 14-3-330 if it is effectively unreviewable after final judgment because relief cannot be granted after final judgment).

⁸ In their motion to dismiss, the Plaintiffs correctly note that an order approving a notice of class action is a procedural order and that: "*Generally*, orders under Rule 23 [the class action rule] are interlocutory and not immediately appealable." (Mot. At 10). This *general* rule does not apply here because, as demonstrated above, the failure of the class representatives, class counsel, and the trial court to protect the due process rights of the putative

III. The “Order Denying [Del Webb’s] Motion to Stay Action Pending Compliance with [the Right to Cure Act]” and the “Preliminary Case Management and Scheduling Order,” *i.e.*, the Right to Cure Orders, are immediately appealable under § 14-3-330(2)(a), because the orders affect the substantial rights granted by the Right to Cure Act, effectively decide the issue with finality, and no meaningful relief can be granted in an appeal after final judgment.

A. The “Right to Cure” Orders.

The trial court denied Del Webb’s motion to stay the class action proceedings pending compliance with the Right to Cure Act by the class members. (Appx. 9-10).⁹ Rather than require individual compliance by all class members, the trial court ordered representative compliance with the Act by the class representatives (named plaintiffs) under the following process: (1) the class representatives will choose 10% of the class homes that will be subjected to a right-to-cure inspection, the notice of claim requirements of the Act, and Del Webb’s right to request clarification of that notice – all of this to be accomplished by the class representatives rather than the owners of chosen 10% of homes in the class; and (2) thereafter, any settlement offer under the Act will be made to the class representatives on a class-wide basis rather than to individual homeowners. (Appx. 15-16, ¶¶ 3-5).¹⁰ As demonstrated below, these “Right to Cure” Orders deprive Del Webb of a substantial right, effectively decide the issue with finality, and no meaningful relief can be granted in an appeal after final judgment. Accordingly, the orders are immediately appealable under § 14-3-330(2)(a). To properly discuss this issue, it is first

class members affects Del Webb’s substantial right to the *res judicata* effect of any class settlement or any final judgment on the merits, as well as the bar against claim-splitting. This error cannot be meaningfully remedied in an appeal after final judgment and, therefore, the order is immediately appealable under § 14-3-330(2)(a).

⁹ Plaintiffs argue this order cannot be appealed, because the order provides that the court would address issues pertaining to compliance with the Right to Cure Act “in due course.” (Mot. at 9). This “due course” occurred in the case management order, which Del Webb has also appealed. Thus, Plaintiffs’ argument is without merit.

¹⁰ Plaintiffs argue this order is not immediately appealable because it is “preliminary.” (Mot. at 9). While the order bears that title, it fully and finally sets forth the manner of representative compliance ordered by the court. (Appx. 15-17). The order may be “preliminary” as to other matters addressed therein, but it is not “preliminary” with respect to compliance with the Right to Cure Act. Moreover, whether preliminary or not, representative compliance is not possible in this case as demonstrated herein.

necessary to review the Right to Cure Act and the Supreme Court's decision in *Grazia v. South Carolina State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010).

B. The Right to Cure Act and the *Grazia* Opinion.

The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (the Right to Cure Act) is set forth at S.C. Code Ann. §§ 40-59-810 to -860 (Supp. 2011). The Act includes an express statement of the General Assembly's public policy purposes in enacting the Act: (1) there is a need for an alternative dispute resolution method to promote settlement of construction disputes "*without litigation*"; and (2) the Act is designed to promote this public policy by requiring the would-be plaintiff to file a "notice of claim" with the would-be defendant and provide an opportunity to "resolve the claim *without litigation*." Act No. 82, 2003 S.C. Acts 943 (emphasis added). The Act achieves its purpose of avoiding litigation with a mandatory five-step process that must be completed before a homeowner (such as Plaintiffs here and the class members) may sue a contractor (such as Del Webb here):

1. At least "ninety days before filing" a lawsuit, the homeowner "must" serve the contractor with a "written notice of claim" that "must contain the following" information:
 - (a) statement that the homeowner asserts a construction defect;
 - (b) a description of the claim with sufficient detail to determine the general nature of the construction defect; and
 - (c) a description of any known results of the defect.S.C. Code Ann. § 40-59-840 (emphasis added).
2. Within 15 days after receiving the notice, the contractor may request clarification if the notice does not describe the construction defect sufficiently. *Id.*

3. After receiving a proper notice, the contractor may request and the homeowner “shall give” the contractor access to the home to inspect the construction defect. S.C. Code Ann. § 40-59-850(A).
4. The contractor has 30 days to make a written offer to remedy or settle the claimed construction defect, or the claim is deemed denied. *Id.*
5. If the contractor makes a written offer, the homeowner must respond in writing within 10 days after receiving the offer. § 40-59-850(B).

“If the parties” do not settle under the foregoing process, then the homeowner “may proceed with a civil action.” § 40-59-850(C) (emphasis added). The Act further provides that if a homeowner files a lawsuit before complying with the notice and settlement procedures mandated by the Act, then the action “shall” be stayed upon contractor’s motion “until the claimant [homeowner] has complied with the requirements of [the Act].” § 40-59-830 (emphasis added).

In *Grazia, supra* (copy at Appx. 195-204), the plaintiffs brought a putative class action alleging construction defects regarding the stucco siding on homes owned by the putative class members. The named plaintiffs had not complied with the Act prior to filing the lawsuit and, therefore, the action was stayed until they complied with the Act. The named plaintiffs and the defendants did not settle under the Act’s procedures, so the stay was lifted. Thereafter, the trial court granted the defendants’ motion to strike the class allegations as being incompatible with the Act. The plaintiffs appealed and the Supreme Court reversed.

The Supreme Court held that: (1) the stay provisions of the Act are the proper way to proceed in cases subject to the Act and containing class allegations, 703 S.E.2d at 203; (2) after staying the action, the court can determine whether a class action is feasible in the case, *id.*; and (3) if the class is certified, the court can then determine whether “representative notice” under the

Act, rather than notice from each member of the class, is “appropriate,” *id.* at 203-204. Accordingly, the Supreme Court held that class actions were not inherently and necessarily incompatible with the Right to Cure Act and, therefore, it reversed the trial court’s order striking the class allegations.¹¹

There is a critical difference between *Grazia* and the present case. In *Grazia*, the issue was raised and decided at the pleadings stage under a motion to strike the class allegations. The Supreme Court emphasized that a motion to strike was akin to a motion to dismiss and, therefore, the Court had to: (1) base its decision solely on the allegations of the complaint, which had to be accepted as true; (2) reverse the trial court if the allegations of the complaint and inferences therefrom entitled the plaintiffs to any relief under any theory; and (3) the class allegations could not be struck merely because the court doubted the plaintiffs would prevail. 703 S.E.2d at 199. In reversing the trial court, the Supreme Court held only that class actions and the Right to Cure Act were not so inherently incompatible that, as a matter of law, there could never be a class action involving claims and claimants subject to the requirements of the Right to Cure Act. Rather, this question had to be decided on a case-by-case basis. Importantly, the Supreme Court also emphasized that the question of whether the class could be certified was not before the Court and was not being decided by the Court. 703 S.E.2d at 203, n.5; 204, n.6.

Here, the case has proceeded well beyond the pleadings stage. Class discovery is complete. The trial court has certified the class. The trial court has determined that representative compliance with the Right to Cure Act is possible and appropriate. Thus, the present case presents facts rather than allegations assumed to be true, with every inference and

¹¹ The trial court mis-read *Grazia*. He acknowledged that the Right to Cure Act seemed “irreconcilable” with the present class action, but he felt compelled to try something because he read *Grazia* as telling the trial courts “to figure out how to deal with reconciling the notice of right to cure statute, which seems irreconcilable with class actions, and this is my proposal.” (Appx. 74). He hoped Del Webb could appeal to resolve this matter before wasting a lot of time. (*Id.*).

possibility being viewed in favor of Plaintiffs. Those facts, including the agreed testimony of Plaintiffs' experts on defect and damage, demonstrate that representative compliance with the Right to Cure Act is not possible *in this case*.

- C. The "Right To Cure Orders" affect Del Webb's substantial rights under the Right to Cure Act, effectively decide the issue with finality, and no meaningful relief can be granted in an appeal after final judgment.

The trial court ordered that there be representative compliance with the Act via the class representatives performing the duties imposed by the Act on behalf of 10% of the homeowners in the class. (Appx. 15-16). The trial court specifically acknowledged that this process denied Del Webb any right to compliance with the Act for the remaining 90% of homes in the class. (Appx. 74). The trial court also acknowledged that there was no way of knowing whether the "10%" homes were representative of the other homes in the class – the trial judge stated that Plaintiffs were to choose the homes to be in the "10%" and he assumed Plaintiffs would choose the 80 homes with the most defects and most damage. (Appx. 69).

The trial court's "Right to Cure" orders affect substantial rights of Del Webb and, absent a right to an immediate appeal, effectively prevents a judgment from which an appeal might be taken. Any appeal after final judgment will be meaningless, because any error cannot remedied in any meaningful way. The substantial rights at issue are the rights to receive notice of the alleged defect and resulting damage from the homeowner, to inspect the home of the homeowner based on the information provided in the notice, and to make a settlement offer to the homeowner before litigation commences or during a stay issued soon after the commencement of the litigation, *i.e.*, long before final judgment. If these rights are wrongfully denied, they cannot be resurrected after final judgment, because the fundamental right is to do these things long before judgment.

1. Representative Notice

In *Grazia*, the South Carolina Supreme Court noted that, after a class is certified, the trial court could consider whether “representative notice” under the Act was “appropriate.” 703 S.E.2d at 204. As shown below, representative notice is not “appropriate” in this case – indeed, representative notice is not possible in this case.¹² To satisfy the Act’s notice requirements, the following questions must be answered:

- a. Is there any original-construction PrimeTrim on the house? As noted earlier, all claims for past repairs to the PrimeTrim or consequential damages to the house, as well as any past replacement of PrimeTrim, have been waived by the class representatives and class counsel for the named plaintiffs and all class members.
- b. Is there any defective installation of any original-construction PrimeTrim? If so, what is the nature and location of the defect, *i.e.*, which of the seven possible defects is present at the house and at what location on the house?
- c. If there is any defective installation of any original-construction PrimeTrim, has it caused any damage to the PrimeTrim or any consequential damage to the house? If so, what is the location, nature, and extent of that damage?

It is possible to answer these questions and comply with Act by inspecting a home and answering these questions based on that inspection. The answers for the inspected home, however, cannot and will not be representative of the notice required for any other home. As established by Plaintiffs’ experts, the defect and damage issues presented by Plaintiffs’ claims for improper installation require a house-by-house inspection. In short, it is not possible in this case to give representative notice under the Act. Moreover, as shown below, inspection of the “representative” homes cannot cure the inability to give representative notice.

¹² Contrary to Plaintiffs’ motion, the Supreme Court did not rule in *Grazia* that the rights granted by the Right to Cure Act are not substantive. (Mot. at 8; see also Mot. at 9-10, making same argument with respect to case management order). The Court simply, and only, said that the right to inspect a house was not new, because inspection was also available under the discovery rules. *Grazia*, 703 S.E.2d at 202. That discovery right, however, has been denied by the trial court. Thus, the right to inspect that the Supreme Court recognized in *Grazia* has been reduced by 90% in this case. As demonstrated herein, this reduction of the statutory right to inspection deprives Del Webb of substantial rights and is immediately appealable under § 14-3-330.

2. Representative Inspection

In *Grazia*, the South Carolina Supreme Court recognized that the inspection right granted by the Act was substantial, but it found the right was not new and could be provided through discovery. 703 S.E.2d at 202. The Supreme Court, however, never held that this inspection right could be satisfied by “representative inspection.” Moreover, as shown below, “representative inspection” is not possible *in this case*.

Here, the trial court limited any inspection under the Act to only 10% of the homes in the class, and it has denied any inspection via discovery of the remaining 90% of the homes in the class. Thus, the appealed orders combine to significantly impair the inspection right granted by the Act and, therefore, these orders “affect a substantial right” under § 14-3-330(2). Moreover, the 10% of the homes that can be inspected will not and cannot be representative of the remaining 90% of homes, so inspection of them cannot satisfy the inspection right granted by the Act nor cure the inability to give representative notice under the Act. In addition, the inspection of only 10% of the homes will not allow Del Webb to pursue and present its earlier-noted individualized defenses that are house-specific and/or homeowner-specific. As recently held by the United States Supreme Court, it violates due process to apply these individualized defenses to only a sampling of the class. *Wal-Mart v. Duke*, *supra*.

As noted earlier, Plaintiffs’ experts agree that determining the defect and damage issues presented by Plaintiff’s claims for improper installation require a house-by-house inspection, and the inspection of one house cannot answer the defect and damage questions for any other house. Thus, the “representative inspection” ordered by the trial court cannot satisfy the requirements of the Act for the 90% of homes that cannot be inspected under the trial court’s orders.

3. Representative Settlement

In *Grazia*, the South Carolina Supreme Court expressly acknowledged that the public policy purpose of the Right to Cure Act was to encourage and promote resolution of a homeowner's claim prior to the commencement or continuation of litigation. 703 S.E.2d at 202. The Court, however, never discussed and never held that this public policy could be served through representative settlement.

Here, the trial court has limited any settlement offers under the Act to class-wide offers, and the offers are to be based on notice that is not and cannot be representative of the homes in the class, and upon inspections that are not and cannot be representative of the homes in the class. In other words, the appealed orders require Del Webb to make a class-wide settlement offer when it has no meaningful knowledge about 90% of the homes in the class.

The Act gives a contractor the right to make a settlement offer to individual homeowners before litigation, and it gives the individual homeowner the right to accept or reject that individual offer before litigation. Thus, the appealed orders have affected a substantial right of Del Webb, and they have also affected a substantial granted by the Act to every member of the class. This error, as well as the errors in ordering "representative notice" and "representative inspections," cannot be remedied after final judgment and, therefore, the "Right to Cure" Orders are immediately appealable under § 14-3-330(2)(a).

IV. The "Order Granting Class Certification" is immediately reviewable by this Court under the doctrine of pendent appellate jurisdiction, and the same is true of any orders discussed above that are not immediately appealable under § 14-3-330.

In their motion, Plaintiffs correctly note that orders granting class certification "*generally*" are not immediately appealable. (Mot. At 11-12). The appellate courts, however, have discretion to exercise pendant appellate jurisdiction and review an unappealable order in

connection with an appeal from an order that is immediately appealable. *E.g., Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 390 (S.C. 2005) (court will entertain appeal of unappealable order when doing so will promote judicial economy and avoid need for a future appeal after final judgment), *citing Cox v. Woodmen of World Ins. Co.*, 556 S.E.2d 397(S.C. App.2001); *Morris v. Anderson County*, 564 S.E.2d 649, 651 (S.C. 2002) (court will entertain appeal of unappealable order when doing so will avoid unnecessary litigation), *citing Roberts v. Recovery Bureau, Inc.*, 450 S.E.2d 616 (S.C. App.1994). Here, issues raised in connection with the appealable orders are inextricably intertwined with fundamental issues on the propriety of granting class certification in this case, and judicial economy will be best served by addressing these issues in connection with the appeals from the other orders.

First, as shown earlier in connection with the order denying discovery of individual class members, Plaintiffs' experts agree that a house-by-house inspection and testing is necessary to determine the defect and damage issues related to any improper installation of PrimeTrim. These individualized inquiries are the antithesis of a class action.

Second, as also shown earlier in connection with the order denying discovery of individual class members, Del Webb has asserted defenses that require an individualized inquiry into the claims of individual class members and their houses. These individualized inquiries are also the antithesis of a class action, and it violates due process to apply these individualized defenses to a sampling of the class.

Third, as shown earlier in connection with the order approving the notice of class action, the class representatives and class counsel have waived potential claims held by class members. Their willingness to do so seriously implicates the adequacy of representation afforded to the class. Their refusal and unwillingness to even advise the class members of this waiver in the

class action notice, and their refusal and unwillingness to advise class members of the possibility of liability for defense fees and costs, as well as other expenses, solidifies this implication and demonstrates that their representation of the class members is inadequate.

Fourth, as shown earlier in connection with the “Right to Cure” orders, representative compliance with the Right to Cure Act is not possible in this case. Inspecting only 10% of the homes cannot and will not obviate the need for individual discovery, and any attempt to apply Del Webb’s individualized defenses on a representative basis to only a sampling of the homes and homeowners in the class violates due process. Moreover, limiting the statutory right to cure to class-wide settlement offers deprives Del Webb of its statutory right to settle with claimants (homeowners) on an individual basis.

Finally, assuming any of the orders addressed in Arguments I-III, *supra*, are found to not be immediately appealable but other orders are found to be immediately appealable, this Court should review the unappealable orders under its pendent appellate jurisdiction, because doing so will further judicial economy and best protect the interests of the putative class members.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Motion to Dismiss Appeal should be denied.

Respectfully Submitted,



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May 14, 2012
Columbia, SC

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-97-3166

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

v.

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

OF WHOM Del Webb Communities, Inc.,
an Arizona Corporation is Appellant.

PROOF OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, P.A., certify that I have served the Appellant Del Webb's Return to Respondents' Motion to Dismiss Appeal and Joint Appendix to Appellants' Return to Respondents' Motions to Dismiss Appellants' Appeal on the above-named Respondents and above-named Defendants by depositing a copy of same in the United States Mail, postage prepaid, on May 14, 2012, addressed to their attorneys of record:

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Honorable Jenny Kitchings
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Re: Lancaster, Jim v. Georgia-Pacific
Case No. 2007-CP-07-3166
Ct. App. Case Tracking No. 2012210927

Dear Madam Clerk:

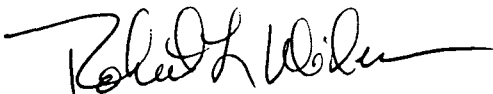
Enclosed for filing, please find the original and seven copies of Appellant Del Webb's Return to Respondents' Motion to Dismiss Appellants' Appeal and one unbound copy and seven bound copies of the Joint Appendix to Appellants' Return to Respondents' Motions to Dismiss Appellants' Appeal, along with the original and one copy of the Certificate of Service for same. Please return the file stamped extra copies to me in the enclosed return envelope.

PLEASE NOTE: Appellant Georgia-Pacific is also filing and serving a Return to the Motion to Dismiss its Appeal. The Joint Appendix filed herewith is for the Return of Georgia-Pacific also. Please advise if you need additional copies.

With kindest regards, I am

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener
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RLW/as
Enclosures

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SC Court of Appeals

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Page 2

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-97-3166

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

v.

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

OF WHOM Del Webb Communities, Inc.,
an Arizona Corporation is Appellant.

AND

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

v.

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

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

JOINT APPENDIX TO APPELLANTS' RETURN TO RESPONDENTS'
MOTIONS TO DISMISS APPELLANTS' APPEAL

SC Court of Appeals
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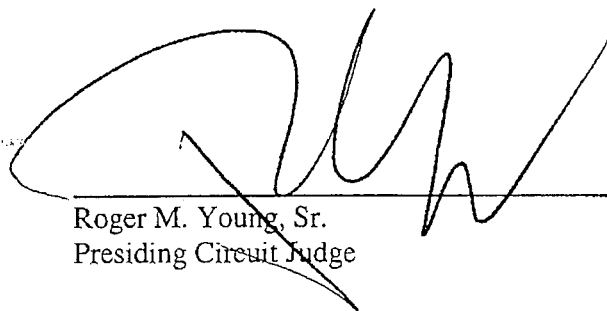
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 2007-CP-07-3166
JIM LANCASTER, NANCY	)	
LANCASTER, ART HOLLAND,	)	
JEANNETTE HOLLAND, WENDELL	)	
TURNER, PHYLLIS TURNER, JACK	)	
BENNETT, JOAN BENNETT, ON	)	
BEHALF OF THEMSELVES AND	)	
OTHERS SIMILARLY SITUATED,	)	
	)	
PLAINTIFFS,	)	ORDER DENYING DEL WEBB
	)	COMMUNITIES, INC.'S MOTION TO
vs.	)	CONDUCT DISCOVERY AS TO
	)	INDIVIDUAL CLASS MEMBERS
	)	
GEORGIA-PACIFIC CORPORATION	)	
AND/OR GEORGIA-PACIFIC LLC,	)	
GRAYCO HOME CENTER, INC., DEL	)	
WEBB COMMUNITIES, INC., AN	)	
ARIZONA CORPORATION, RAZOR	)	
COMPONENT SYSTEMS, INC., A	)	
SOUTH CAROLINA CORPORATION,	)	
RAZOR ENTERPRISES, INC., A	)	
TEXAS CORPORATION, AND DJ	)	
CONSTRUCTION CO., LLC,	)	
	)	
DEFENDANTS.	)	

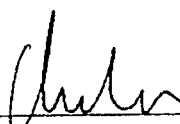
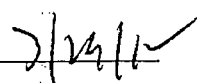
THIS MATTER COMES BEFORE THE COURT on motion of Defendant Del Webb Communities, Inc. captioned as Del Webb Communities, Inc.'s Motion to Conduct Discovery as to Individual Class Members. After due consideration of the subject motion, it is hereby DENIED. The Court further notes that, in accordance with its authority to maintain continual control over class action proceedings, it will address issues pertaining to discovery in this case in due course.

<SIGNED ON THE FOLLOWING PAGE>

AND IT IS SO ORDERED.



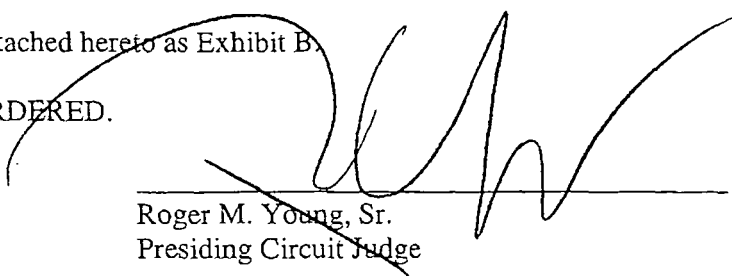
Roger M. Young, Sr.
Presiding Circuit Judge

 South Carolina
Dated: 

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
JIM LANCASTER, NANCY	)	CASE NO. 2007-CP-07-3166
LANCASTER, ART HOLLAND,	)	
JEANNETTE HOLLAND, WENDELL	)	
TURNER, PHYLLIS TURNER, JACK	)	
BENNETT, JOAN BENNETT, ON	)	
BEHALF OF THEMSELVES AND	)	
OTHERS SIMILARLY SITUATED,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
GEORGIA-PACIFIC CORPORATION	)	
AND/OR GEORGIA-PACIFIC LLC,	)	
GRAYCO HOME CENTER, INC., DEL	)	ORDER APPROVING
WEBB COMMUNITIES, INC., AN	)	NOTICE OF CLASS ACTION
ARIZONA CORPORATION, RAZOR	)	
COMPONENT SYSTEMS, INC., A	)	
SOUTH CAROLINA CORPORATION,	)	
RAZOR ENTERPRISES, INC., A	)	
TEXAS CORPORATION AND DJ	)	
CONSTRUCTION CO, LLC,	)	
	)	
DEFENDANTS.	)	

THE COURT HEREBY approves the Notice of Class Action attached hereto as Exhibit A. The notice shall be mailed by Plaintiffs' counsel on or before April 5, 2012 to the list of putative class members attached hereto as Exhibit B.

AND IT IS SO ORDERED.


 Roger M. Young, Sr.
 Presiding Circuit Judge

Charleston, South Carolina

Dated: 4/12/12

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT) CASE NO. 2007-CP-07-3166

JIM LANCASTER, NANCY)
LANCASTER, ART HOLLAND,)
JEANNETTE HOLLAND, WENDELL)
TURNER, PHYLLIS TURNER, JACK)
BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND)
OTHERS SIMILARLY SITUATED,)

PLAINTIFFS,)

vs.)

GEORGIA-PACIFIC CORPORATION)
AND/OR GEORGIA-PACIFIC LLC,)
GRAYCO HOME CENTER, INC., DEL)
WEBB COMMUNITIES, INC., AN)
ARIZONA CORPORATION, RAZOR)
COMPONENT SYSTEMS, INC., A)
SOUTH CAROLINA CORPORATION,)
RAZOR ENTERPRISES, INC., A)
TEXAS CORPORATION, AND DJ)
CONSTRUCTION CO., LLC,)

DEFENDANTS.)

NOTICE OF CLASS ACTION

TO: ALL CURRENT OWNERS OF RESIDENCES IN DEL
WEBB'S SUN CITY HILTON HEAD CLAD WITH FIBER
CEMENT LAP SIDING (HARDIEPLANK®) AND UPON
WHICH THE EXTERIOR TRIM PRODUCT PRIMETRIM®
(A REGISTERED TRADEMARK OF GEORGIA-PACIFIC
CORPORATION AND/OR GEORGIA-PACIFIC LLC) IS
INSTALLED

PLEASE READ THIS NOTICE CAREFULLY

YOUR RIGHTS MAY BE AFFECTED BY THIS PENDING LITIGATION



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

IMPORTANT INFORMATION ABOUT YOUR RIGHTS

You have been identified as a potential member of the 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.

The purpose of this notice is to advise you of the pendency of this class action against Georgia-Pacific LLC ("Georgia-Pacific"); Grayco Home Center, Inc. ("Grayco"); Del Webb Communities, Inc., an Arizona corporation ("Del Webb"); Razor Component Systems, Inc., a South Carolina corporation, and Razor Enterprises, Inc., a Texas corporation (collectively, "Razor"); and DJ Construction Co., LLC ("DJ"), all of whom will hereinafter be collectively referred to as the "Defendants," so that you may make whatever decision you deem appropriate for the protection of your interests. Records indicate that you may be a class member whose rights may be affected by this pending litigation. 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.

DESCRIPTION OF THE LITIGATION

This lawsuit was originally brought against the Defendants by Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, Wendell Turner, Phyllis Turner, Jack Bennett, and Joan Bennett, (collectively, the "Plaintiffs") on behalf of themselves and others similarly situated. Mr. and Mrs. Lancaster are no longer Plaintiffs. The Plaintiffs are homeowners in Del Webb's Sun City Hilton Head community in Bluffton, South Carolina, whose homes contain Georgia-Pacific's exterior trim board product, PrimeTrim[®], which product they allege was distributed by Grayco. The Plaintiffs filed a Complaint and ultimately a Third Amended Complaint alleging that the PrimeTrim[®] installed on their homes is and has been defective since the time of its manufacture in that it allegedly prematurely rots, absorbs water, and deteriorates when subjected to the South Carolina coastal climate, and that the PrimeTrim[®] is allegedly not fit for use as an exterior trim product and did/does not perform as warranted. The Plaintiffs also allege that Del Webb (the developer and general contractor and original seller for all homes involved in the pending litigation) and its subcontractor installers of the PrimeTrim[®], Razor and DJ, installed the PrimeTrim[®] on hundreds of homes in Sun City in a manner contrary to installation instructions, good construction practice, and/or the applicable building code, which has contributed to the deterioration of the PrimeTrim[®]. The Plaintiffs seek to recover the losses allegedly resulting from the defective PrimeTrim[®] and its deficient installation and breach of warranty as set forth in the Plaintiffs' Third Amended Complaint. The Defendants deny that PrimeTrim[®] is defective and deny that the Plaintiffs and the class members are entitled to recover any damages.

At this time, the Court has made no findings as to the validity of the Plaintiffs' allegations and this notice is not intended as an expression by the Court on the merits of the

claims or defenses of any party. The Court has ruled, however, that this lawsuit may be maintained as a class action, with the Plaintiffs being the class representatives, under the following class definition:

All persons and/or entities currently owning, in whole or in part, residences in the Del Webb Communities, Inc. development known as Sun City Hilton Head, located in or about Bluffton, South Carolina, clad with fiber cement lap siding (HardiePlank®) and upon which the exterior trim product PrimeTrim® (a registered trademark of Georgia-Pacific Corporation and/or Georgia-Pacific LLC) is installed thereon as outlined in the Plaintiffs' Third Amended Complaint, excluding any residence owned by any federal, state, or local government, and any residence owned by any of the Defendants herein, their immediate family members, heirs, personal representatives, successors, or assigns, and any of their subsidiaries, affiliates, or employee

Therefore, if you currently own, in whole or in part, a residence in Sun City Hilton Head that meets the above criteria for class membership, you are a class member – you do not have to have purchased your home directly from Del Webb to be a class member. You are being notified of this pending litigation so that you may choose to remain in the class or exclude yourself from it. You will be deemed a member of the class, to have elected to participate in this class action, and be bound by whatever judgment is entered in this case, favorable or unfavorable, unless you affirmatively request to exclude yourself from the class as explained below.

DESCRIPTION OF YOUR RIGHTS AND OBLIGATIONS

I. YOU MAY REMAIN IN THE CLASS

If you would like to remain in the class, you need not take any action. Unless you properly request to exclude yourself from the class (see below), you will remain in the class. If you remain in the class, you will be eligible to participate in whatever settlement or award, if any, the Court ultimately approves. You will, however, also undertake the risk that the Plaintiffs will not prevail in the litigation, and that you will receive nothing for your claims. In addition, you will be barred from asserting any claims against the Defendants based on the matters and claims that were asserted in this lawsuit. If you remain in the class, you will be notified of pertinent developments in the proceedings.

As a class member, you will automatically continue to be represented by the Plaintiffs named above (i.e., the class representatives) and the Plaintiffs' counsel (i.e., class counsel), attorneys Joseph E. DaPore and Edward D. Buckley, Jr. of Young Clement Rivers, LLP, located at 25 Calhoun Street, Suite 400, Charleston, South Carolina. With respect to attorneys fees', class counsel will be paid from any settlement or monetary award that is recovered, with any payment of attorneys' fees to class counsel being subject to review and approval by the Court. A proportionate share of the attorneys' fee award will be deducted from whatever award, if any, is

ultimately made to you. If you choose to do so, you may remain in the class and seek legal representation (at your own expense) separate from that provided by class counsel to enter an appearance in this action on your behalf and represent you.

The Court has determined that certain claims common to the class will be tried in one proceeding. If a judgment is entered against the Plaintiffs, you will be bound by that judgment and will have no further claims against the Defendants. If judgment is entered for the Plaintiffs, you will then have to participate in a subsequent proceeding to determine whether you are entitled to a monetary award, and, if so, the amount of any such award. Class counsel will also represent you in that proceeding and their fees will be paid out of the amount, if any, that you may be awarded.

NOTE: THE CLASS CLAIMS AGAINST DEL WEBB, RAZOR, AND DJ ARE SUBJECT TO THE SOUTH CAROLINA NOTICE AND OPPORTUNITY TO CURE CONSTRUCTION DWELLING DEFECTS ACT.

The class claims against Del Webb, Razor, and DJ are subject to South Carolina legislation called the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (the "Notice and Opportunity to Cure Act"), which provides a statutory procedure for possible out-of-court resolution of certain residential construction claims. It is found and fully set forth in S.C. Code Ann. §§ 40-59-810 to -860, and it must be complied with on behalf of all class members. In this case, the Court has authorized representative notice to comply with the Notice and Opportunity to Cure Act. Under the Notice and Opportunity to Cure Act, a claimant is required to file a notice of claim stating that the claimant asserts a construction defect, providing a description of the claim(s) in reasonable detail sufficient to determine the general nature of the construction defect, and also providing a description of any result of the defect, if known. If you remain in the class, a notice of claim will be filed on your behalf (at no cost to you) by the Plaintiffs above named (i.e., the class representatives) and the Plaintiffs' counsel (i.e., class counsel) who shall follow up with Del Webb, Razor, and/or DJ as may be needed regarding any clarification with respect to the notice of claim. Del Webb, Razor, and/or DJ will have a time period determined by the Court from service of the notice of claim to inspect, offer to remedy, offer to settle, or deny the claim, and Del Webb, Razor, and/or DJ must provide written notice to the class representatives and class counsel of its choice among these options. If you remain in the class, and Del Webb, Razor, and/or DJ may be able to inspect your home. You must allow the inspection, which will take place at a time agreeable to all parties. The inspection will be non-invasive and non-destructive (i.e., visual only), at no cost to you, and conducted in conjunction with the class representatives and class counsel, and under the supervision of the Court. If Del Webb, Razor, and/or DJ makes an offer to remedy the defect(s) stated in the notice of claim or a monetary settlement of the claim, the class representatives and class counsel will respond. If an agreement is reached between Del Webb, Razor, and/or DJ and the class representatives, you will be notified, and, if that agreement is approved by the Court, a settlement may occur. If no agreement or settlement is reached between Del Webb, Razor, and/or DJ and the class representatives, the case will proceed in court. Class counsel's fees will be paid out of the settlement.

II. YOU MAY OPT OUT OF (i.e., EXCLUDE YOURSELF FROM) THE CLASS

Any class member may opt out of (i.e., be excluded from) the class if they would like to **BUT ONLY IF** that member properly requests to be excluded from the class. If a timely and effective request for exclusion is made by any class member, they will be excluded from the class. Class members who are excluded from the class will not be entitled to participate in any award the Plaintiffs may ultimately receive and they will not be bound by any judgment that may ultimately be entered against the Plaintiffs and the class in this action.

You may opt out of the class by clear, written request for such exclusion, POSTMARKED BY May 15, 2012, referring specifically to the case captioned *Lancaster, et al. v. Georgia-Pacific Corporation, et al.*, pending in the Beaufort County, Court of Common Pleas, Civil Action No. 2007-CP-07-3166. **TO BE EFFECTIVE**, exclusion requests **MUST** be mailed to **BOTH** the Beaufort County Clerk of Court and the Plaintiffs'/Class Counsel at the addresses below **POSTMARKED NO LATER THAN MAY 15, 2012**:

THE CLERK OF COURT:

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

PLAINTIFFS'/CLASS COUNSEL:

Joseph E. DaPore, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402

FURTHER INFORMATION

This notice does not provide a complete description of the action. For additional information about the action and the parties, please refer to the pleadings and other documents on file at the Beaufort County Clerk of Court's office at 102 Ribaut Rd., Beaufort, SC 29902, which you may examine in person during normal business hours.

DO NOT TELEPHONE THE COURT OR THE CLERK ABOUT THIS NOTICE, THE MATTERS SET FORTH HEREIN, OR THE LAWSUIT.



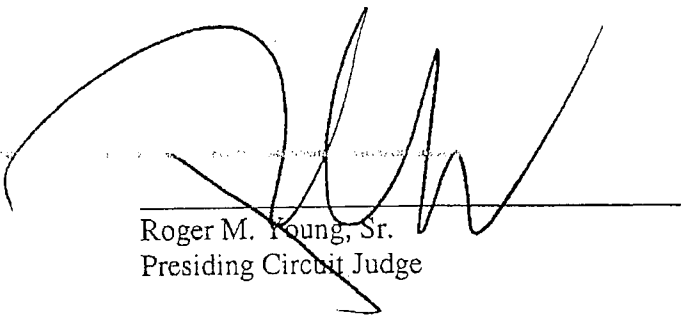
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 2007-CP-07-3166
JIM LANCASTER, NANCY	)	
LANCASTER, ART HOLLAND,	)	
JEANNETTE HOLLAND, WENDELL	)	
TURNER, PHYLLIS TURNER, JACK	)	
BENNETT, JOAN BENNETT, ON	)	
BEHALF OF THEMSELVES AND	)	
OTHERS SIMILARLY SITUATED,	)	
	)	ORDER DENYING DEL WEBB
PLAINTIFFS,	)	COMMUNITIES, INC.'S MOTION TO STAY
	)	ACTION PENDING COMPLIANCE WITH
vs.	)	SC CODE § 40-59-810, <i>ET SEQ.</i>
	)	
GEORGIA-PACIFIC CORPORATION	)	
AND/OR GEORGIA-PACIFIC LLC,	)	
GRAYCO HOME CENTER, INC., DEL	)	
WEBB COMMUNITIES, INC., AN	)	
ARIZONA CORPORATION, RAZOR	)	
COMPONENT SYSTEMS, INC., A	)	
SOUTH CAROLINA CORPORATION,	)	
RAZOR ENTERPRISES, INC., A	)	
TEXAS CORPORATION, AND DJ	)	
CONSTRUCTION CO., LLC,	)	
	)	
DEFENDANTS.	)	

THIS MATTER COMES BEFORE THE COURT on motion of Defendant Del Webb Communities, Inc. captioned as Del Webb Communities, Inc.'s Motion to Stay Action Pending Compliance with SC Code § 40-59-810, *et seq.* After due consideration of the subject motion, it is hereby DENIED. The Court further notes that, in accordance with its authority to maintain continual control over class action proceedings and the Supreme Court's decision in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010), it will address issues pertaining to S.C. Code Ann. §§ 40-59-810 to -860 in this case in due course.

<SIGNED ON THE FOLLOWING PAGE>

AND IT IS SO ORDERED.

Charles, South Carolina
Dated: 7/29/14



Roger M. Young, Sr.
Presiding Circuit Judge

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

JIM LANCASTER, NANCY
LANCASTER, ART HOLLAND,
JEANNETTE HOLLAND, WENDELL
TURNER, PHYLLIS TURNER, JACK
BENNETT, JOAN BENNETT, ON
BEHALF OF THEMSELVES AND
OTHERS SIMILARLY SITUATED,

PLAINTIFFS,

vs.

GEORGIA-PACIFIC CORPORATION
AND/OR GEORGIA-PACIFIC LLC,
GRAYCO HOME CENTER, INC., DEL
WEBB COMMUNITIES, INC., AN
ARIZONA CORPORATION, RAZOR
COMPONENT SYSTEMS, INC., A
SOUTH CAROLINA CORPORATION,
RAZOR ENTERPRISES, INC., A
TEXAS CORPORATION, AND DJ
CONSTRUCTION CO., LLC,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2007-CP-07-3168

RECEIVED

APR 26 2012

SC Court of Appeals

ORDER DENYING GEORGIA-PACIFIC
LLC'S MOTION TO STAY ACTION
PENDING COMPLIANCE WITH SOUTH
CAROLINA CODE § 40-59-810, *ET SEQ.*

THIS MATTER COMES BEFORE THE COURT on motion of Defendant Georgia-Pacific LLC captioned as Georgia-Pacific LLC's Motion to Stay Action Pending Compliance with South Carolina Code § 40-59-810, *et seq.* After due consideration of the subject motion, it is hereby DENIED. The Court further notes that, in accordance with its authority to maintain continual control over class action proceedings and the Supreme Court's decision in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010), it will address issues pertaining to S.C. Code Ann. §§ 40-59-810 to -860 in this case in due course.

<SIGNED ON THE FOLLOWING PAGE>

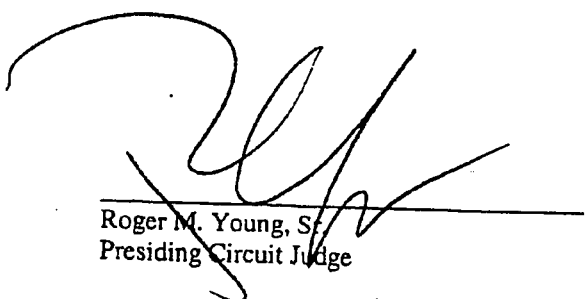
Page 1 of 2

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AND IT IS SO ORDERED.

Charles, South Carolina

Dated: 3/29/12



Roger M. Young, Sr.
Presiding Circuit Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 2007-CP-07-3166
JIM LANCASTER, NANCY	)	
LANCASTER, ART HOLLAND,	)	
JEANNETTE HOLLAND, WENDELL	)	
TURNER, PHYLLIS TURNER, JACK	)	
BENNETT, JOAN BENNETT, ON	)	
BEHALF OF THEMSELVES AND	)	
OTHERS SIMILARLY SITUATED,	)	
	)	
PLAINTIFFS,	)	ORDER DENYING
	)	GEORGIA-PACIFIC'S MOTION TO
vs.	)	STRIKE AFFIDAVITS
	)	OF ANDY W.C. LEE, DEREK HODGIN,
	)	AND THOMAS J. CARLSON
GEORGIA-PACIFIC CORPORATION	)	
AND/OR GEORGIA-PACIFIC LLC,	)	
GRAYCO HOME CENTER, INC., DEL	)	
WEBB COMMUNITIES, INC., AN	)	
ARIZONA CORPORATION, RAZOR	)	
COMPONENT SYSTEMS, INC., A	)	
SOUTH CAROLINA CORPORATION,	)	
RAZOR ENTERPRISES, INC., A	)	
TEXAS CORPORATION, AND DJ	)	
CONSTRUCTION CO., LLC,	)	
	)	
DEFENDANTS.	)	

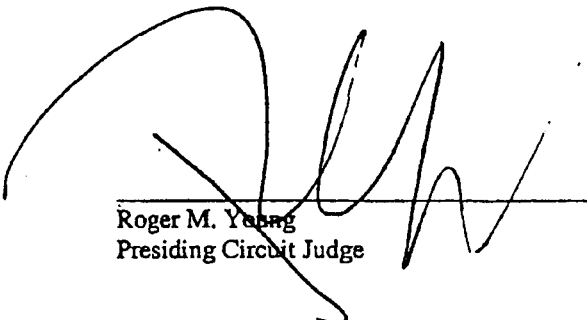
THIS MATTER COMES BEFORE THE COURT on motion of Defendant Georgia-Pacific Corporation and/or Georgia-Pacific, LLC's ("Georgia-Pacific") asking that the Court strike the affidavits of the Plaintiffs' experts Andy W.C. Lee, Derek Hodgin, and Thomas J. Carlson filed in support of the Plaintiffs' motion for class certification. The subject motion was fully briefed and argued in the course of a multi-day hearing in this matter on August 16 and 17, 2011, with counsel for all parties present. After careful consideration of all of the argument and submittals of counsel, the subject motion is hereby DENIED.

<SIGNED ON THE FOLLOWING PAGE>

Page 1 of 2

AND IT IS SO ORDERED.

Charles, South Carolina
Dated: 6/15/17



Roger M. Young
Presiding Circuit Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
JIM LANCASTER, NANCY	)	CASE NO. 2007-CP-07-3166
LANCASTER, ART HOLLAND,	)	
JEANNETTE HOLLAND, WENDELL	)	
TURNER, PHYLLIS TURNER, JACK	)	
BENNETT, JOAN BENNETT, ON	)	
BEHALF OF THEMSELVES AND	)	
OTHERS SIMILARLY SITUATED,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
GEORGIA-PACIFIC CORPORATION	)	
AND/OR GEORGIA-PACIFIC LLC,	)	
GRAYCO HOME CENTER, INC., DEL	)	PRELIMINARY CASE MANAGEMENT
WEBB COMMUNITIES, INC., AN	)	AND SCHEDULING ORDER
ARIZONA CORPORATION, RAZOR	)	
COMPONENT SYSTEMS, INC., A	)	
SOUTH CAROLINA CORPORATION,	)	
RAZOR ENTERPRISES, INC., A	)	
TEXAS CORPORATION AND DJ	)	
CONSTRUCTION CO, LLC ,	)	
	)	
DEFENDANTS.	)	

THE COURT HEREBY enters the following case management and scheduling order:

1. April 5, 2012: Plaintiffs shall mail class notice in form approved by the Court to all putative class members on or before today;
2. May 15, 2012: Opt-out period ends;
3. May 28, 2012: Compliance with the Right-to-Cure Act will be accomplished on a representative basis through the class representatives. By the foregoing date, Plaintiffs must identify ten percent (10%) of the homes remaining in the class after the expiration of the opt-out

period that will be subjected to a right-to-cure process inspection. As to all homes remaining in the class, Plaintiffs must also deliver notice as required by South Carolina Code § 40-59-840.

Notice shall be copied to all parties and the Court. Any requests for clarification under South Carolina Code § 40-59-840 shall be made by **June 1, 2012**, with copies delivered to all parties and the Court;

4. May 28, 2012 – August 28, 2012: Plaintiffs will make available for the inspection all of the homes identified for a right-to-cure process inspection (as set forth above) under South Carolina Code § 40-59-850. All parties noticed or to this litigation will be given the opportunity to participate in the inspections. Based upon the notice required by South Carolina Code § 40-59-840 (as set forth above) and the information obtained from the aforementioned inspections, a class-wide offer to cure may be made by the defendants, which offer will be presented to the class representatives for response;

5. August 28, 2012: Deadline for any offer to cure under South Carolina Code § 40-59-840;

6. September 17, 2012 (or as soon thereafter is practicable): The Court will conduct a hearing to establish a trial plan and a merits discovery plan. The parties will make any submissions and proposals regarding class certification, identity and number of representative homes, a trial and a discovery plan ten (10) days prior to the hearing;

7. Discovery commences upon entry of Court's trial and discovery plan¹;

8. 30 days after entry of trial plan: Plaintiffs identify experts and provide supplemental reports as to previously-identified experts or reports for newly-identified experts;

¹ Discovery schedule and trial date are subject to modification depending on the Court's final ruling on a trial plan and the number of representative homes to be tried.

9. 45 days after entry of trial plan: Plaintiffs' experts will be made available for deposition;

10. 70 days after entry of trial plan: Defendants' identify experts and provide supplemental reports as to previously-identified experts or reports for newly-identified experts;

11. December 31, 2012: Mediation is ordered by the Court to be conducted on or before today. All parties are ordered to bring representatives to the mediation with full settlement authority and mediator is to report back to the Court by **January 24, 2013** with progress made at mediation;

12. 110 days after entry of trial plan: Defendants' experts will be made available for deposition;

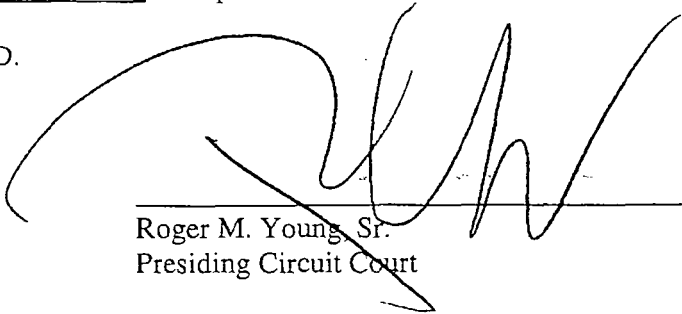
13. 150 days after entry of trial plan: Discovery closes.

14. 175 days after entry of trial plan: Parties shall file all dispositive motions, motions in limine, trial briefs, and objections.

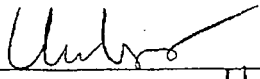
15. As soon as is practicable thereafter, a hearing on dispositive motions and a pretrial conference will be convened; and

16. Trial not before April 29, 2013: The parties estimate three weeks.

AND IT IS SO ORDERED.



Roger M. Young Sr.
Presiding Circuit Court

, South Carolina
Dated 6/14/12

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2007-CP-07-3166

JIM LANCASTER, NANCY)
LANCASTER, ART HOLLAND,)
JEANNETTE HOLLAND, WENDELL)
TURNER, PHYLLIS TURNER, JACK)
BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND)
OTHERS SIMILARLY SITUATED,)

PLAINTIFFS,)

vs.)

GEORGIA-PACIFIC CORPORATION)
AND/OR GEORGIA-PACIFIC LLC,)
GRAYCO HOME CENTER, INC., DEL)
WEBB COMMUNITIES, INC., AN)
ARIZONA CORPORATION, RAZOR)
COMPONENT SYSTEMS, INC., A)
SOUTH CAROLINA CORPORATION,)
RAZOR ENTERPRISES, INC., A)
TEXAS CORPORATION, AND DJ)
CONSTRUCTION CO., LLC,)

DEFENDANTS.)

**ORDER GRANTING
CLASS CERTIFICATION**

2011 OCT 31 PM 4:37
CLERK OF COURT
BEAUFORT COUNTY, S.C.

THIS MATTER COMES BEFORE THE COURT on the Plaintiffs' Motion for class certification. After careful consideration of all of the argument and submittals of counsel, and as set forth more fully below, the subject motion is hereby GRANTED.

I. STATEMENT OF THE CASE

The Plaintiffs are homeowners in Del Webb Communities, Inc.'s ("Del Webb") Sun City Hilton Head ("Sun City") retirement community in Bluffton, South Carolina, whose homes contain Georgia-Pacific Corporation and/or Georgia-Pacific LLC's (collectively, "Georgia-Pacific") exterior trim board product, PrimeTrim® ("PrimeTrim" or the "Product"). On November 6, 2007, the Plaintiffs filed this case as a putative class action in Beaufort County

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against Georgia-Pacific and Grayco Home Center, Inc., a local distributor of PrimeTrim. On April 30, 2009, claims were added against Del Webb – the developer of Sun City and the general contractor for all of the putative class homes – as well as Del Webb’s subcontractor installers of PrimeTrim, Razor Component Systems, Inc. and Razor Enterprises, Inc. (collectively, “Razor”) and DJ Construction Co., LLC (“DJ”). The Plaintiffs claim that, since the time of construction, their homes have experienced, and continue to experience, premature degradation of the PrimeTrim, water intrusion, and other damages.

Following a period of discovery limited to the issue of proposed class certification, the Plaintiffs moved to certify the putative class on March 7, 2011. The subject motion was fully briefed and argued in the course of a two-day hearing in this matter on August 16 and 17, 2011, with counsel for all parties present.

II. FACTUAL BACKGROUND

Sun City is a large development of several thousand retirement homes. Del Webb admits that it was the developer of Sun City as well as the general contractor for all homes in the putative class, which homes were built between the years 1994 and 2002.

The Plaintiffs’ claims relate to PrimeTrim and its installation on their homes. They claim that many hundreds of homes in Sun City, perhaps as many as 800, contain PrimeTrim, which is used extensively on the exterior of the homes for rake boards, trim around windows and doors, and in other exterior locations. The Plaintiffs contend that the Product was defective since the time of its manufacture in that it prematurely rots, absorbs water, and deteriorates when subjected to the South Carolina coastal climate, and that the Product is not fit for use as an exterior trim product and did not perform as warranted.



The Plaintiffs also argue that Del Webb installed the Product on hundreds of homes in Sun City in a manner contrary to installation instructions, good construction practice, and/or the applicable building code, which has contributed to the deterioration of the PrimeTrim. They argue that Del Webb and its subcontractor installers (Razor and DJ) breached the implied warranty of workmanlike service by constructing and placing into the stream of commerce homes that contained defects in workmanship, including deficient installation of the PrimeTrim, and that the Product and its installation constitute latent defects in their homes. The Plaintiffs further contend that documents produced in discovery support their claims that the PrimeTrim installation problems were brought to the attention of Del Webb by its subcontractor installers and Georgia-Pacific as early as 1996 during the initial construction of the putative class homes.

III. DISCUSSION AND FINDINGS

In South Carolina, our Supreme Court has just recently “expressed the viewpoint that class actions are favored in this state” Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). In rejecting the notion that class action lawsuits under South Carolina’s Rule 23 are incompatible with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, the Grazia Court explained (in the particular context of single family construction defect litigation) that “public policy arguments favor the Court finding a way to reconcile the Right to Cure Act and Rule 23 [(SCRCP)],” observing that the class device ““saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion”” Id. Further, the Grazia Court reiterated that our state’s Rule 23 was drafted to “endorse[] a more expansive view of class action availability than its federal counterpart,” by intentionally omitting the additional requirements for class certification found in subsection (b) of Rule 23, FRCP. Id.

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In determining the question of class certification, this Court must look to the prerequisites to a class action in South Carolina's Rule 23(a), which prerequisites are as follows:

- (1) The class is so numerous that joinder of all members is impracticable;
- (2) There are common 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;¹ and
- (5) In cases where the relief sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds \$100 for each member of the class.

The Court is satisfied that these prerequisites are met, and that the class device is the most equitable and efficient method for resolving this large-scale dispute² involving hundreds of neighboring retirees in a single Beaufort County development relating to a single building product and its installation and incorporation into their homes by/at the direction of a single developer/general contractor.³

¹ The Court notes that the first four prerequisites to a class action are commonly known as "numerosity," "commonality," "typicality," and "adequacy of representation."

² The Court is not persuaded by the class opponents' argument that class certification may work undue prejudice upon their rights or present insurmountable manageability problems. This Court has broad powers to manage and control this litigation and believes that, in keeping with the more expansive view of class action availability endorsed by our state, it has the tools at its disposal to see that the rights of all of the litigants are protected and that the efficiencies of the class device are realized. See Rule 23(d); Salmonsens v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008) ("Rules 23(d)(1) and (2) of the South Carolina Rules of Civil Procedure specifically permit the trial court to maintain continual control over class action proceedings . . .").

³ The Court notes that the instant lawsuit is one of four exterior engineered wood trim board class action lawsuits that have occurred in South Carolina and North Carolina in recent years, the others being certified by the federal courts (which, again, apply a more stringent criteria for class certification and endorse a less expansive view of class action availability than of South Carolina), two in the Charleston Division of United States District Court for the District of South Carolina (Thomas v. Louisiana-Pacific Corporation, Civil Action No. 2:05-cv-01515, and Brunson v. Louisiana-Pacific Corporation, Civil Action No. 2:07-cv-3186) and one in the Northern Division of the United States District Court for the Eastern District of North Carolina (Hart v. Louisiana-Pacific Corporation, Civil Action



Numerosity

The Court finds that the Plaintiffs have met their burden to prove that joinder of all class members into one suit is impracticable. Although the exact number of class members is not known, at least hundreds of homeowners, perhaps as many as 800, are class members. It is satisfactory that the record in this case establishes that a reasonable inference can be drawn that the numerosity prerequisite is met. See Bates v. Tenco Servs., Inc., 132 F.R.D. 160, 163 (D.S.C. 1990) (wherein the United States District Court for the District of South Carolina found that because "a lawsuit with potentially one hundred eighty plaintiffs presents logistical problems that make the practicality of permissive joinder dubious," class treatment "would streamline the lawsuit and is a much more practical legal vehicle . . ."). In this regard, the Court particularly notes EXHIBIT 13, which was presented to the Court along with materials presented by the Plaintiff in support of class certification, and which shows (via Georgia-Pacific's intracompany correspondence) that, as of 1996, PrimeTrim had been installed on "several hundred homes" in Sun City.

Commonality and Typicality

The Court finds that the Plaintiffs have shown that commonality exists within the class and that this prerequisite is met. Commonality requires common questions of law or fact. Our Court of Appeals has stated that even one common question is sufficient if it is important enough. McGann v. Mungo, 287 S.C. 561, 568 340 S.E.2d 154, 157-158. (Ct. App. 1986) ("It is important enough to note that the subsection does not demand all questions of law and fact to be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough.").

The Plaintiffs argue, and the Court finds persuasive, that answering any, or a combination thereof, of the following common questions would advance the claims of the entire class: (a) whether PrimeTrim was defective from the time that it was manufactured for use as an exterior trim material in coastal South Carolina; (b) whether express and/or implied warranties were given and/or adopted and breached with respect to PrimeTrim; (c) whether Georgia-Pacific's installation instructions for PrimeTrim were adequate; (d) whether Del Webb breached the implied warranty of workmanlike service in uniformly installing a latent defective product in the class homes in conflict with the application instructions, good construction practices, and/or the applicable building code; and (e) what is the reasonable cost to replace the material if it is found that the product is defective.⁴

Further, the commonality and typicality prerequisites often tend to merge. Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 158, 102 S. Ct. 2364, 2371, 72 L. Ed. 2d 740, 751 n. 13 (1982); City of Ann Arbor Employees' Ret. Sys. v. Sonoco Prods. Co., 270 F.R.D. 247, 250 (D.S.C. 2010) ("The requirements of Rule 23(a) are, 'numerosity, typicality, commonality, and adequacy of representation, with 'the final three requirements . . . tend[ing] to merge.'") (citing Gariety v. Grant Thornton, 368 F.3d 356, 362 (4th Cir. 2004) (citing Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 337 (4th Cir. 1998))). And this Court notes that other courts have found that the typicality requirement does not require that the claims of the representatives

⁴ The Court notes that it finds the class opponents' argument regarding the import of Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003) with respect to the commonality analysis to be overstated, and that Gardner does not compel the denial of class certification, as the class opponents suggest. The circumstances of Gardner, involving a proposed bi-lateral class of plaintiffs and defendants with respect to claims arising out of the operation of the 1995 Setoff Debt Collection Act and 1999 amendments thereto, appear to the Court to be materially different from the present circumstances involving neighboring retirees in a single, planned retirement community with problems relating to a single allegedly defective trim product installed by/at the direction of a single developer/general contractor. Further, the Court again notes the recent expression by the Grazia Court (in the particular context of cases subject to the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, i.e., single family construction defect litigation) that class actions are favored in South Carolina, that

be identical but rather that they be substantially similar to the other members of the class. See Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127 (1993) (“[A] ‘plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.’”) (citing De La Fuente v. Stokley-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)); see H. Lightsey & J. Flanagan, South Carolina Civil Procedure at 180 (2d ed. 1996).

The Court believes that the commonality and typicality prerequisites are met in this case as the class representatives’ homes have alleged similar problems to all other potential class members’ homes, all homes are in the same development, built by the same builder, as part of the same course of conduct, and all are alleged to have the same defective product installed on them.

Adequacy of Representation

Rule 23(a)(4) is designed to insure that the named representatives will adequately represent and protect the interests of the class and consists of two parts. The first part centers on the Plaintiffs’ counsel being competent, dedicated, and qualified to handle complex litigation, and the second part centers on the representatives not having claims or interests antagonistic to the class. This Court finds no serious challenge to the adequacy of the Plaintiffs’ counsel; they have been involved in other class litigation, have numerous years of litigation experience in construction litigation, and are capable of handling the claims through to conclusion. The Court finds them adequate. The Court also has considered the affidavits of the class representatives and finds them to be educated, responsible, and concerned neighboring homeowners, not having

public policy considerations favored reconciliation of the Right to Cure Act and Rule 23, and, of course, that South Carolina has intentionally endorsed a more expansive view of class action availability.



claims materially different from or antagonistic to the other class members. The Court finds that the adequacy prerequisite is met. See Gunnells v. Healthplan Services, 348 F.3d 417, 430 (4th Cir. 2003) (“To defeat the adequacy requirement of Rule 23, a conflict ““must be more than merely speculative or hypothetical.””).

Amount in Controversy

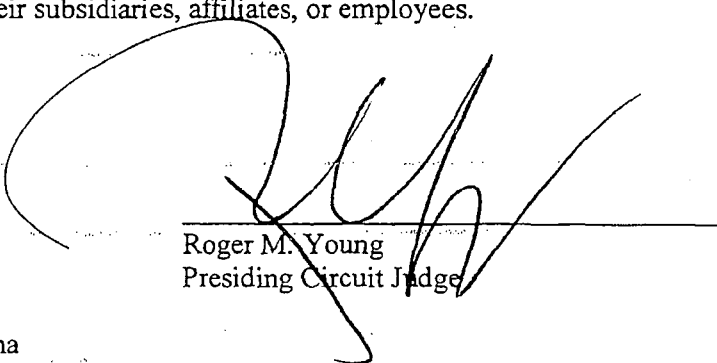
Our state has an additional class action prerequisite not found in Federal Rule 23. “[I]n cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.” The Court finds that this prerequisite (required by Rule 23(a)(5)) is met. The Plaintiffs have claimed and submitted sufficient evidence that the damage each class member has suffered would exceed the requisite dollar amount. In Gardner v. Newsome Chevrolet-Buick, Inc., our Supreme Court examined the phrase “amount in controversy” under Rule 23(a)(5) and found persuasive the definition ascribed to it by the United States Supreme Court when determining “amount in controversy” for purposes of analyzing federal subject matter jurisdiction on the basis of diversity of citizenship. 304 S.C. 328, 330-31, 404 S.E.2d 200, 201 (1991). “The rule governing dismissal for want of jurisdiction, in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.” Id. I find that the sum claimed by the Plaintiffs in this matter, which relates to subject matter of alleged damage to real property, is in apparent good faith and does not appear to a legal certainty to be insufficient. The final prerequisite to a class action in South Carolina, i.e., amount in controversy, has been met.

IV. CONCLUSION

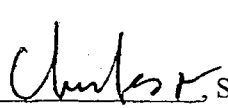
The Plaintiffs' motion for class certification is GRANTED under the following class definition:

All persons and/or entities currently owning, in whole or in part, residences in the Del Webb Communities, Inc. development known as Sun City Hilton Head, located in or about Bluffton, South Carolina, clad with fiber cement lap siding (HardiePlank®) and upon which the exterior trim product PrimeTrim® (a registered trademark of Georgia-Pacific Corporation and/or Georgia-Pacific LLC) is installed thereon as outlined in the Plaintiffs' Third Amended Complaint, excluding any residence owned by any federal, state, or local government, and any residence owned by any of the Defendants herein, their immediate family members, heirs, personal representatives, successors, or assigns, and any of their subsidiaries, affiliates, or employees.

AND IT IS SO ORDERED.



Roger M. Young
Presiding Circuit Judge

 South Carolina

Dated: 10/5/17

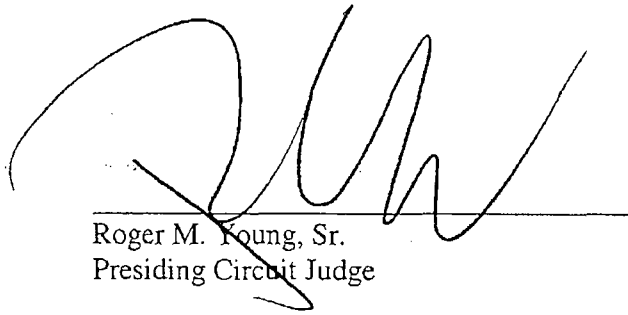
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 2007-CP-07-3166
JIM LANCASTER, NANCY	)	
LANCASTER, ART HOLLAND,	)	
JEANNETTE HOLLAND, WENDELL	)	
TURNER, PHYLLIS TURNER, JACK	)	
BENNETT, JOAN BENNETT, ON	)	
BEHALF OF THEMSELVES AND	)	
OTHERS SIMILARLY SITUATED,	)	
	)	ORDER DENYING DEL WEBB
PLAINTIFFS,	)	COMMUNITIES, INC.'S MOTION FOR
	)	RECONSIDERATION AND/OR
vs.	)	CLARIFICATION
	)	
GEORGIA-PACIFIC CORPORATION	)	
AND/OR GEORGIA-PACIFIC LLC,	)	
GRAYCO HOME CENTER, INC., DEL	)	
WEBB COMMUNITIES, INC., AN	)	
ARIZONA CORPORATION, RAZOR	)	
COMPONENT SYSTEMS, INC., A	)	
SOUTH CAROLINA CORPORATION,	)	
RAZOR ENTERPRISES, INC., A	)	
TEXAS CORPORATION, AND DJ	)	
CONSTRUCTION CO., LLC,	)	
	)	
DEFENDANTS.	)	

THIS MATTER COMES BEFORE THE COURT on motion of Defendant Del Webb Communities, Inc. for reconsideration of and/or clarification with respect to the Court's Order Granting Class Certification. After due consideration of the subject motion, it is hereby DENIED.

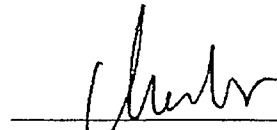
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AND IT IS SO ORDERED.



Roger M. Young, Sr.
Presiding Circuit Judge



_____, South Carolina
Dated: 3/25/12

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2007-CP-07-3166

JIM LANCASTER, NANCY)
LANCASTER, ART HOLLAND,)
JEANNETTE HOLLAND, WENDELL)
TURNER, PHYLLIS TURNER, JACK)
BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND)
OTHERS SIMILARLY SITUATED,)

PLAINTIFFS,)

vs.)

GEORGIA-PACIFIC CORPORATION)
AND/OR GEORGIA-PACIFIC LLC,)
GRAYCO HOME CENTER, INC., DEL)
WEBB COMMUNITIES, INC., AN)
ARIZONA CORPORATION, RAZOR)
COMPONENT SYSTEMS, INC., A)
SOUTH CAROLINA CORPORATION,)
RAZOR ENTERPRISES, INC., A)
TEXAS CORPORATION, AND DJ)
CONSTRUCTION CO., LLC,)

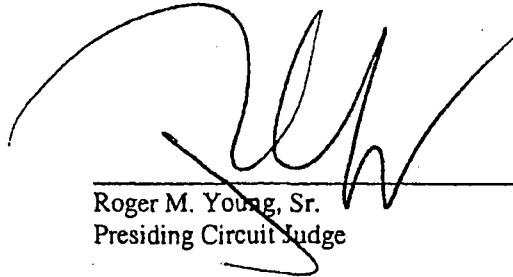
DEFENDANTS.)

**ORDER DENYING DEFENDANT
GEORGIA-PACIFIC'S MOTION TO
RECONSIDER, ALTER OR AMEND THE
JUDGMENT**

THIS MATTER COMES BEFORE THE COURT on motion of Defendant Georgia-Pacific LLC for reconsideration, alteration or amendment of (1) the Court's Order Granting Class Certification and (2) the Court's Order Denying Georgia-Pacific's Motion to Strike Affidavits of Andy W.C. Lee, Derek Hodgkin, and Thomas J. Carlson. After due consideration of the subject motion, it is hereby DENIED.

<SIGNED ON THE FOLLOWING PAGE>

AND IT IS SO ORDERED.



Roger M. Young, Sr.
Presiding Circuit Judge

Charles, South Carolina

Dated: 3/14/12

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
JIM LANCASTER, NANCY	)	CASE NO. 2007-CP-07-3166
LANCASTER, ART HOLLAND,	)	
JEANNETTE HOLLAND, WENDELL	)	
TURNER, PHYLLIS TURNER, JACK	)	
BENNETT, JOAN BENNETT, ON	)	
BEHALF OF THEMSELVES AND	)	
OTHERS SIMILARLY SITUATED,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
GEORGIA-PACIFIC CORPORATION	)	
AND/OR GEORGIA-PACIFIC LLC,	)	
GRAYCO HOME CENTER, INC., DEL	)	THIRD AMENDED COMPLAINT
WEBB COMMUNITIES, INC., AN	)	(JURY TRIAL DEMANDED)
ARIZONA CORPORATION, RAZOR	)	
COMPONENT SYSTEMS, INC., A	)	
SOUTH CAROLINA CORPORATION,	)	
RAZOR ENTERPRISES, INC., A	)	
TEXAS CORPORATION AND DJ	)	
CONSTRUCTION CO, LLC	)	
	)	
Defendants.	)	

The Plaintiffs above-named, on behalf of themselves and all others similarly situated, allege, upon information and belief, as follows:

PARTIES AND JURISDICTION

1. Plaintiffs, Jim Lancaster, Nancy Lancaster (both of 143 Robert E. Lee Lane, Bluffton, SC 29909) (the "Lancasters"), Art Holland, Jeannette Holland (both of 148 Colonel Thomas Heyward Road, Bluffton, SC 29909) (the "Hollands"), Wendell Turner, Phyllis Turner (both of 145 Robert E. Lee Lane, Bluffton, SC 29909) (the "Turners"), and Jack Bennett, Joan Bennett (both of 139 Robert E. Lee Lane) (the "Bennetts"), (collectively "Plaintiffs"), are citizens and residents of the County of Beaufort, State of South Carolina, and are the owners of

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McNair Law Firm, P.A.

the real property and improvements thereon located at the above-referenced addresses, which are within in a development briefly described as Sun City, South Carolina.

2. Upon information and belief, the Lancasters' home was built in 1996, and the homes of the Bennetts, Hollands and the Turners were built in 1997. Upon information and belief, all Plaintiffs' homes were constructed with an exterior of fiber cement siding.

3. These homes contain an exterior trim board product known as PrimeTrim (hereinafter "PrimeTrim" or the "product") that, upon information and belief, was designed, manufactured, marketed, sold and/or distributed by the Defendants Georgia-Pacific Corporation and/or Georgia-Pacific LLC ("Georgia-Pacific") and Grayco Home Center, Inc. ("Grayco"). Defendant Del Webb Communities, Inc., an Arizona Corporation, was the developer, builder and supervisor of the subcontractors who built the Plaintiffs' homes located in Sun City, Beaufort County, South Carolina. Defendant Razor Component Systems, Inc., a South Carolina corporation, Razor Enterprises, Inc., a Texas corporation, hereinafter "Razor", and Defendant DJ Construction Co., LLC, hereinafter "DJ" or "DJ Construction" an entity organized under the laws of the State of Georgia, were the subcontractors who installed the PrimeTrim material on all of the Plaintiffs' homes doing so as subcontractors to Defendant Del Webb Communities, Inc.

4. The Plaintiffs bring this action both individually and as representatives on behalf of a class of homeowners in Sun City, Beaufort County, South Carolina, which have homes that contain the exterior trim product known as PrimeTrim. This class is more specifically defined below.

5. PrimeTrim is a registered trademark of Georgia-Pacific. Defendant Georgia-Pacific is a company organized and existing under the laws of a state other than South Carolina. Upon information and belief, Georgia-Pacific is organized and existing under the laws of the

State of Georgia and/or the State of Delaware. Upon information and belief, Grayco is a South Carolina corporation with locations in Beaufort County and was, during the relevant times, a local distributor of PrimeTrim products. Upon information and belief, Grayco was a distributor of the PrimeTrim product for Sun City, Bluffton, South Carolina, during its initial construction phase in which all of the homes of the Plaintiffs and class are located. Moreover, Grayco has continued to distribute and provide the PrimeTrim product to certain individual Plaintiffs and to other members of the class since the initial construction of the homes. Defendant Georgia Pacific also distributed its product directly to the Sun City project.

6. This Court has subject matter jurisdiction over this action because the real properties are located in Beaufort County, the commercial transactions involving the PrimeTrim product took place in Beaufort County and the damage to the subject residences occurred, and is occurring, in Beaufort County.

7. This Court maintains personal jurisdiction over the parties in this action because Defendants Georgia Pacific and Grayco regularly do transact and have transacted business in Bluffton, South Carolina in the development known as Sun City, Beaufort County, South Carolina and regularly market, sell and/or distribute products for use or consumption in Beaufort County, South Carolina. Further, all Plaintiffs, class members and representatives, have property interests in Beaufort County. Likewise, Defendants Del Webb, Razor and DJ have transacted and do transact business in Beaufort County, South Carolina.

8. Venue is proper in that the homes of the class members are situated in Beaufort County, the Plaintiffs have property interests in Beaufort County, and the sales and installation of the products in question took place in Beaufort County.

9. The Plaintiffs demand a jury trial.

FACTUAL BACKGROUND

10. Defendant Georgia Pacific holds themselves out to both the construction industry and the public at large as being knowledgeable in the design, manufacture, distribution, and sale of exterior building products and as being providers of quality building products, including the exterior wood trim product that is the subject of this litigation, namely, PrimeTrim, designed, manufactured, marketed, sold and/or distributed by Defendants Georgia Pacific and Grayco.

11. Prior to 1994, when the oldest house built in Sun City was constructed, Defendant Georgia Pacific designed, manufactured, tested, marketed, sold and/or distributed a manufactured and engineered wood exterior trim product they refer to as PrimeTrim for use as fascia, soffit, corner board, window trim, door trim and for general exterior use on homes, apartments, multi-family buildings and other structures.

12. This product was marketed, sold and/or distributed by the Defendants in Bluffton (Sun City), Beaufort County, South Carolina for use in the construction of many homes in Sun City.

13. Defendants represented and marketed the PrimeTrim product as being a low maintenance product that would save on painting costs that was superior to real cut lumber wood trim products for exterior use as fascia, soffit, corner board, window trim or door trim.

14. Upon information and belief, a large number of homes in Sun City (exceeding hundreds of homes) were constructed by Defendants Del Webb and its subcontractors Razor and DJ with a fiber cement siding and with the PrimeTrim exterior product designed, manufactured, marketed, sold and/or distributed by Defendants Georgia Pacific and Grayco. While the fiber cement siding on these homes appears to be performing in a satisfactory manner, the trim boards,

the PrimeTrim product used in conjunction with the fiber cement siding, have begun to fail and deteriorate as further described below.

15. PrimeTrim is defective and has failed to perform as intended because it prematurely deteriorates, rots, swells, buckles, splits, checks, cracks, delaminates, absorbs water, warps, and/or bulges under normal weather conditions and exposure; causes consequential water and structural damage; and promotes the growth of health-threatening mold, mildew, fungi, termites and other wood-destroying insects in the structure and substrate on which it is installed.

16. Defendant Georgia Pacific designed, manufactured, marketed, sold and/or distributed PrimeTrim without adequate installation instructions and warnings regarding the product's problems, risks, dangers and suitability of the product for use as an exterior simulated wood trim board. Further upon information and belief, Defendants' product warranted expressly for as long as thirty years, but at least ten years, that "Prime Trim would not crack, chip, split or delaminate in a manner that renders the trim materially unable to perform its function; buckle shrink, or swell in a manner that materially affects its appearance".

17. PrimeTrim is not merchantable, is not of fair average quality, fails to comply with applicable industry standards and building codes, is not fit for the ordinary purposes for which the product was sold and used, and will not pass without objection in the trade.

18. Defendants knew or should have known that the PrimeTrim product they designed, manufactured, marketed, sold and/or distributed was defective, would fail and absorb water, deteriorate, crack, chip, split or delaminate prematurely under normal weather/exterior conditions, and that it was not suitable for use as an exterior trim building product in Bluffton (Sun City), Beaufort County, South Carolina area.

19. Upon information and belief, the majority of Georgia-Pacific's sales of the PrimeTrim product were made through building products distributors to developers, contractors and subcontractors, who in turn sold the PrimeTrim product to the end user of the product, the homeowner. It is also believed that large quantities of the PrimeTrim material used at Sun City was directly shipped to the installers, Defendants Del Webb, Razor and DJ by Defendant Georgia Pacific.

20. Defendant Grayco, despite actual and constructive knowledge that the PrimeTrim product was defective and failed to perform as intended because it prematurely deteriorates, rots, swells, buckles, splits, checks, cracks, delaminates, absorbs water, warps, and/or bulges under normal weather conditions and exposure; causes consequential water and structural damage; and promotes the growth of health-threatening mold, mildew, fungi, termites and other wood-destroying insects in the structure and substrate on which it is installed, continued up until 2006 to distribute and market the PrimeTrim product to residents of Sun City, Beaufort County, South Carolina.

21. As a direct and proximate result of the defects of the product as described hereinabove, the PrimeTrim installed on Plaintiffs' residences in Sun City, which have a fiber cement siding envelope, has prematurely failed and deteriorated, and this is causing consequential property damage to the homes and is causing the value of the homes to be diminished. Upon information and belief, hundreds of homes were clad with a fiber cement siding which siding appears to be performing as an adequate building envelope with the exception of the trim material known as PrimeTrim. Upon information and belief, property damage and water intrusion has occurred as a direct result of the failing Prime Trim in every year since these homes were constructed in Sun City, Bluffton, South Carolina. Upon information

and belief, the first homes were constructed in 1994. Property damage has also occurred in all years since original construction as a direct result of the Defendants Del Webb and its subcontractors, Razor and DJ, failing to install flashing as appropriate over the PrimeTrim material in certain locations on all homes of the class members.

22. That during the course of this litigation and upon information and belief Plaintiffs have become aware that the actual installation of the PrimeTrim material on all class members homes was performed by either Defendant Razor Enterprises, Inc., a Texas corporation, and/or Razor Component systems, Inc., a South Carolina corporation (hereinafter "Razor") or by DJ Construction Co., LLC, an entity organized under Georgia law (hereinafter "DJ" or "DJ Construction").

23. Upon information, between 1994 and 2002, all of the Plaintiffs class homes were constructed which total more than 700 homes utilizing PrimeTrim by Defendant Georgia Pacific which material was installed by either Defendant Razor or Defendant DJ and under the supervision of Defendant Del Webb.

24. That upon information recently learned, the PrimeTrim material manufactured by Defendant Georgia Pacific was installed contrary to Georgia Pacific's installation instructions existing at the time of installation and upon information this improper installation was called to the attention of Defendants Razor, DJ and Del Webb as early as 1995 and 1996 by Defendant Georgia Pacific.

25. Georgia Pacific recently produced documents in this lawsuit indicating that during the construction of these homes it had meetings with Defendant Razor and instructed Razor that they were installing the PrimeTrim incorrectly in that they were not installing flashing nor applying sealant as required in the Georgia Pacific installation instructions.

26. That upon information, and according to the documents, Razor acknowledged to Georgia Pacific officials during 1996 that Razor had in fact passed along "all information" and Georgia Pacific's concerns to Del Webb management and Razor in communicating back to Georgia Pacific indicated that "no remedial action has been taken and no design changes" had been made by Del Webb concerning the lack of appropriate flashing.

27. That Defendants Del Webb, Razor and DJ's actions in applying the PrimeTrim material without proper flashing was not in conformance with the building codes in effect at the time in Beaufort County, South Carolina, and was not in accordance with good and acceptable building practices.

28. That upon information, the above improper installation of the PrimeTrim material in all of the Plaintiff class members homes has caused and will cause the class members to suffer significant additional costs associated with repairing and replacing the PrimeTrim material when repairs are made. Plaintiffs will be required to include flashing and to repair consequential damages which were caused due to the original lack of flashing at the original installation by Defendants Del Webb, Razor and DJ.

CLASS ACTION ALLEGATIONS

29. Plaintiffs bring this action pursuant to Rule 23 of the South Carolina Rules of Civil Procedure on their own behalf and as the representatives of a class of all persons, firms, corporations, and other entities, excluding Defendants, and their respective parents, subsidiaries, and affiliates who own fiber cement siding homes in Bluffton (Sun City), Beaufort County, South Carolina on which Defendants' PrimeTrim product is installed, excluding any structure owned by any federal, state or local government, and any structures owned by Defendants or any of their subsidiaries, affiliates or employees.

30. Members of the class are so numerous, estimated to be the homeowners of hundreds of homes, that joinder of all class members in this action is impracticable.

31. Plaintiffs' claims are typical of the claims of the members of the class because the claims of Plaintiffs and all class members arose out of and were damaged by the same wrongful conduct of the Defendants.

32. There are a number of questions of law and fact common to class members. Questions of law and fact common to members of the class are important and predominate over questions, if any, which may affect only individual members. Among the questions of law and fact common to the class are: (a) whether Prime Trim is a defective product from the time of its manufacture through its normal life when used for its intended purpose and, therefore, unsuitable for use as an exterior building product; (b) the liability of Defendants for the design, development, manufacture, production, marketing, selling, distribution, and installation of the Prime Trim product; (c) whether Defendants breached warranties with respect to PrimeTrim; (d) whether the installation of the PrimeTrim was deficient causing increased costs of repair; (e) whether Plaintiffs and class members are entitled to actual, consequential and punitive damages from Defendants; and (f) whether Plaintiffs and class members are entitled to prejudgment interest, attorneys' fees, and costs from Defendants.

33. Plaintiffs will fairly and adequately protect the interests of the class. The interests of Plaintiffs are coincident with and not antagonistic to those of the class. In addition, Plaintiffs are represented by counsel who are experienced and competent in the handling of complex class actions, products liability and construction litigation.

34. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of the controversy alleged herein. Plaintiffs estimate that there are over

700 property owners in Bluffton (Sun City), Beaufort County who purchased Prime Trim as a part of their fiber-cement-sided house and who were, as a result, injured by the defective product and by its improper installation. Such treatment will permit this large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. Class treatment will also permit the adjudication of claims by many class members who could not afford to individually litigate such a claim against large corporate defendants like Georgia-Pacific, Grayco and the installers/builders, Defendants Del Webb, Razor and DJ. There are no difficulties likely to be encountered in the management of this class action that would preclude its maintenance as a class action and no superior alternative exists for the fair and efficient adjudication of this controversy.

35. The prosecution of separate actions by individual members of the class would create the risk of adjudications with respect to individual members of the class that would establish incompatible standards of conduct for Defendants and, as a practical matter, be dispositive of the interests of other members not parties to the adjudication of this controversy.

36. The amount in controversy exceeds one hundred (\$100.00) dollars for each member of the class.

**FOR A FIRST CAUSE OF ACTION AS TO DEFENDANTS GEORGIA PACIFIC AND
GRAYCO**
(Breach of Express Warranty)

37. The allegations in the previous paragraphs are repeated and incorporated herein by reference as if set forth verbatim.

38. In designing, manufacturing, marketing, selling and/or distributing PrimeTrim, via affirmation(s) of fact, promise(s), description(s), and/or samples/models relating to the

product, Defendants Georgia Pacific and Grayco made or adopted express warranties as to the condition, durability and performance of Prime Trim; including, but not limited to, expressly warranting that the PrimeTrim product would be free from defects and perform as was marketed and represented by Defendant Georgia Pacific and that Prime Trim would not “crack, chip, split or delaminate in a manner that renders the trim materially unable to perform its function; buckle shrink, or swell in a manner that materially affects its appearance” for a period of up to thirty years, but, at least, for a period of ten years.

39. Further, Defendants expressly warranted that PrimeTrim was “perfect for exterior and interior applications such as fascia, rake board, corner board, shingle mould, band board, base board, soffit or anywhere defect-free, non-structural trim lumber is required. Denser than wood, it can be nailed directly to structural members or applied over siding or other materials”.

40. Such express warranties became part of the basis of Defendants’ bargain with Plaintiffs and/or others in the chain of commerce leading to the ultimate installation of the product on Plaintiffs’ homes.

41. As the intended and expected ultimate consumers of PrimeTrim, the Plaintiffs are covered by the express warranties made or adopted by Defendants.

42. Defendants breached such express warranties because Defendants’ PrimeTrim product is defective; fails to perform as intended; prematurely deteriorates, rots, swells, buckles, splits, checks, delaminates, and absorbs water under normal atmosphere conditions; causes consequential water, structural and property damage. It further promotes fungi and termites and other wood destroying organisms in the structures on which it is installed; and does not perform as represented and warranted.

43. Despite no substantial change in the condition in which the product was sold, and reasonable and proper maintenance of the product and the Plaintiffs' homes, the PrimeTrim product installed on the Plaintiffs' homes has failed to perform as warranted.

44. PrimeTrim is not merchantable; is not of fair average quality; fails to comply with applicable industry standards relating to such material and violates building codes applicable in Bluffton, Beaufort County, South Carolina; is not fit for the ordinary and intended purposes for which the product was sold and used; and will not pass without objection in the trade.

45. As a direct and proximate result of the failure of the PrimeTrim to perform as warranted and represented, Plaintiffs and Class members have suffered actual, consequential, and incidental damages; including, but not limited to, damages arising from the need to remove and replace the Prime Trim and damages arising from the cost of repairing water damage and structural damage caused by the defects in, and failure, of the PrimeTrim.

46. To the extent reasonable and practical, Plaintiffs have sufficiently complied with any applicable terms and conditions of the warranties made or adopted by Defendants.

47. Any notice of the above-described breach of warranty that may have been required was provided by Plaintiffs in a legally sufficient manner by, including but not limited to, notifying their immediate sellers of the defects/damages caused by PrimeTrim and in notifying Georgia Pacific directly.

**FOR A SECOND CAUSE OF ACTION AS TO DEFENDANTS GEORGIA PACIFIC
AND GRAYCO**
(Breach of Implied Warranty of Merchantability)

48. The allegations in the previous paragraphs are repeated and incorporated herein by reference as if set forth verbatim.

49. At all times relevant to this matter, Defendants Georgia Pacific and Grayco were merchants of the PrimeTrim product.

50. In designing, manufacturing, marketing, selling and/or distributing PrimeTrim, Defendants impliedly warranted that PrimeTrim was merchantable, including impliedly warranting that PrimeTrim would be free from defects and perform as marketed and represented by Defendants and that it was suitable as being "perfect for exterior and interior applications such as fascia, rake board, corner board, shingle mould, band board, base board, soffit or anywhere defect-free, non-structural trim lumber is required. Denser than wood, it can be nailed directly to structural members or applied over siding or other materials".

51. As the intended and expected ultimate consumers of PrimeTrim, Plaintiffs are covered by the Defendants' warranties and, to the extent reasonable and practical, have sufficiently complied with any applicable terms and conditions of such warranties.

52. Defendants breached such implied warranty because PrimeTrim is defective; fails to perform as intended, prematurely deteriorates, rots, swells, buckles, splits, checks, delaminates, absorbs water, warps, and/or bulges under normal conditions and exposure; causes consequential water and structural damage; promotes the health-threatening growth of mold, mildew, fungi, termites and other insects in the structures on which it is installed; and does not perform as represented and warranted.

53. At the time of sale, PrimeTrim was not merchantable; was not of fair average quality; failed to comply with applicable industry standards and building codes; was not fit for the ordinary and intended purposes for which the product was sold and used; and/or would not pass without objection in the trade.

54. As a direct and proximate result of the above-described breach of the implied warranty of merchantability, Plaintiffs and Class members have suffered actual, consequential, and incidental damages; including, but not limited to, damages arising from the need to remove and replace the Prime Trim, damages arising from the cost of repairing water damage and structural damage caused by the defects in, and failure of, the PrimeTrim.

55. Any notice of the above-described breach of warranty that may have been required was provided by Plaintiffs in a legally sufficient manner by, including but not limited to, notifying their immediate sellers of the defects/damages caused by PrimeTrim and in notifying Georgia Pacific directly.

**FOR A THIRD CAUSE OF ACTION AS TO DEFENDANTS GEORGIA PACIFIC AND
GRAYCO**

(Breach of Implied Warranty of Fitness for a Particular Purpose)

56. The allegations in the previous paragraphs are repeated and incorporated herein by reference as if set forth verbatim.

57. Defendants designed, manufactured, marketed, sold and/or distributed PrimeTrim for use by ultimate consumers as fascia, soffit, corner board, window trim, door trim and for general exterior use on homes, apartments, multi-family buildings and other structures.

58. Defendants designed, manufactured, marketed, sold and/or distributed PrimeTrim that reached Plaintiffs, the ultimate consumers of the product, through the normal and intended/expected chain of commerce, and such product was incorporated into the homes that are the subject of this litigation without any material alteration of the product from its state while in Defendants' control.

59. In causing PrimeTrim to move along the chain of commerce that ultimately led Plaintiffs' homes, Defendants impliedly warranted that PrimeTrim was fit for use as fascia,

soffit, corner board, window trim, door trim and for general exterior use on homes, apartments, multi-family buildings and other structures, the purpose for which it was designed, that it was a safe and suitable product to be used in the construction of the Plaintiffs' homes, and that PrimeTrim was fit and suitable for the particular use of the construction of the Plaintiffs' homes.

60. Defendants' skill and judgment and the implied warranty of fitness for the purpose of using PrimeTrim in the construction of the Plaintiffs' homes was relied upon by those persons/entities to whom Defendants' marketed, sold and/or distributed PrimeTrim for the ultimate installation of the product in the Plaintiffs' homes, and Defendants had, at the time of contracting, reason to know that those persons/entities were relying on Defendants' skill or judgment to furnish suitable goods for said purpose.

61. As the intended and expected ultimate consumers of PrimeTrim, Plaintiffs are covered by the Defendants' warranties and, to the extent reasonable and practical, have sufficiently complied with any applicable terms and conditions of such warranties.

62. PrimeTrim was/is not fit for use for its intended purpose and as a direct and proximate result of Defendants' breach of warranty of fitness of the product for use in the construction of the Plaintiffs' homes, Plaintiffs have suffered actual, consequential, and incidental damages, including but not limited to, damages arising from the need to remove and replace the PrimeTrim and damages arising from the cost of repairing water damage and structural damage caused by the defects in, and failure, of the PrimeTrim.

63. Any notice of the above-described breach of warranty that may have been required was provided by Plaintiffs in a legally sufficient manner by, including but not limited to, notifying their immediate sellers of the defects/damages caused by PrimeTrim and in

notifying Georgia Pacific directly. As a direct result of the breach of this warranty, Plaintiffs have suffered damage.

FOR A FOURTH CAUSE OF ACTION AS TO DEFENDANT GEORGIA PACIFIC
(Strict Liability)

64. The allegations in the previous paragraphs are repeated and incorporated herein by reference as if set forth verbatim.

65. Defendant Georgia Pacific is engaged in the business of designing, manufacturing, marketing, selling and/or distributing PrimeTrim.

66. Defendant Georgia Pacific expected that their PrimeTrim product would reach Plaintiffs, the ultimate consumers of PrimeTrim, without substantial change in the condition in which they sold it.

67. Defendants' PrimeTrim product did, in fact, reach Plaintiffs, the ultimate consumers of the product, without substantial change in the condition in which they sold it.

68. Without substantial change in the condition in which it was sold by Defendant Georgia Pacific, Defendants' PrimeTrim product was installed in/on Plaintiffs' homes and such homes were reasonably and properly maintained thereafter.

69. At the time it left Defendants' control, Defendants' PrimeTrim product was in a defective and/or unfit condition unreasonably dangerous to Plaintiffs and their property in that it, among other things, fails to perform as intended, prematurely deteriorates, rots, swells, buckles, splits, checks, delaminates, absorbs water, warps, and/or bulges under normal conditions and exposure; causes consequential water and structural damage; promotes the health-threatening growth of mold, mildew, fungi, termites and other insects in the structures on which it is installed; and does not perform as represented and warranted.

70. As a direct and proximate result of the defective and unreasonably dangerous condition of PrimeTrim when it left Defendants' control, Plaintiffs and Class members have suffered actual, consequential, and incidental damages; including, but not limited to, damages arising from the need to remove and replace the Prime Trim, damages arising from the cost of repairing water damage and structural damage caused by the defects in, and failure of, the PrimeTrim.

**FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS DEL WEBB, RAZOR
AND DJ CONSTRUCTION**
(Negligent and Grossly Negligent Construction)

71. That all previous allegations of the Complaint are incorporated by reference and made a part of the cause of action.

72. That Defendant Del Webb as general contractor/developer, designer, and seller of the Plaintiffs' homes had a duty to supervise the construction of the Plaintiffs' homes and to properly instruct the installers of the PrimeTrim material, Defendant Razor and Defendant DJ, on the proper application of the PrimeTrim material.

73. That Defendant Del Webb failed in this duty in that in all of the Plaintiffs' homes exterior flashing is missing and was never installed over the PrimeTrim material which failure constitutes a breach of the duty imposed by the building code in effect in Beaufort County at the time. Further, the application of the PrimeTrim material by Defendants Del Webb, builder/developer, and Razor and DJ as installers was not in conformance with good construction practice. Defendant Del Webb failed in its duty to properly supervise the installation of the PrimeTrim material by its subcontractors.

74. Defendant Del Webb failed to adequately communicate with its subcontractors, Defendants Razor and DJ, the proper method of installing flashing at the heads of the exterior

windows and doors after it had been put on notice that its subcontractors were not installing the PrimeTrim material in accordance with the Georgia Pacific installation instructions.

75. As subcontractors, Defendants DJ and Razor had a duty to comply with the building code in effect at the time and with good construction practice which required installing flashing at certain horizontal locations on the exteriors of Plaintiffs' homes above windows and doors and providing adequate sealant to prevent water intrusion into the building envelopes. Further DJ and Razor failed to comply with Defendant Georgia Pacific's installation instructions.

76. That Defendants Del Webb, DJ, and Razor were aware or should have been aware of their improper installation of PrimeTrim and failed to take action to avoid or minimize damage constitutes clear and convincing evidence of negligence, gross negligence, recklessness, willfulness and wantonness.

77. As a direct result of this negligent and grossly negligent breach of duty owed to the Plaintiff Class by Defendants Del Webb, Razor and DJ, the Plaintiff Class has been directly damaged in that property damage occurred and that when repairs and replacement of the PrimeTrim material is accomplished, Plaintiff class members will be required to expend significant additional money to repair consequential damage to areas which were not flashed and to pay for the proper application of flashing material which was never installed.

**FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS DEL WEBB, RAZOR
AND DJ CONSTRUCTION**
(Breach of Implied Warranty of Workmanlike Service)

78. That all previous allegations of the Complaint are incorporated by referenced and made a part of the cause of action.

79. Defendants Del Webb Communities, Inc., Razor and DJ owed a duty and gave an implied warranty to the Plaintiff homeowners that they would install the PrimeTrim material in accordance with good construction practice and the building code applicable in effect.

80. That Defendants Del Webb, Razor and DJ breached the implied warranty of workmanlike service they gave the homeowners in that they failed to properly install the PrimeTrim material in accordance with the building code and in accordance with good construction practice in failing to install flashing and sealants as required.

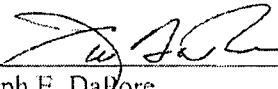
81. That as a direct and proximate result, the Plaintiff Class sustained increased property damage and consequential damages due to the lack of flashing and will incur additional costs in the repairs in that they will be required to place appropriate flashing onto their homes when a replacement of the defective PrimeTrim occurs which will increase the costs and complexity of the repairs.

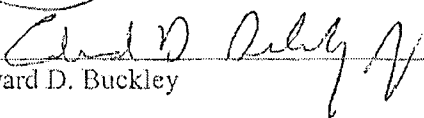
WHEREFORE, Plaintiffs, on behalf of both themselves and all other members of the Class, pray that:

- (1) the Court certify this class of homeowners under Rule 23 of the South Carolina Rules of Civil Procedure;
- (2) the representatives and the class receive a trial by jury;
- (3) the representatives and the class be awarded a judgment for actual, consequential, incidental, and punitive damages against Defendants, jointly and severally;
- (4) they and the class be awarded their attorney's fees, expenses and costs of this action; and

- (5) they and the class be awarded such other and further relief as the Court
deems just and proper.

YOUNG CLEMENT RIVERS, LLP

By: 
Joseph E. Dapore

By: 
Edward D. Buckley

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(843) 720-5446; jdapore@ycrlaw.com
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: April 28th 2009

STATE OF SOUTH CAROLINA)
)
BEAUFORT COUNTY)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,)

v.)

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

Defendants.)

Case No. 2007-CP-07-03166

**ANSWER OF DEFENDANT DEL
WEBB COMMUNITIES, INC. TO
THIRD AMENDED COMPLAINT**

TO: PLAINTIFFS AND THEIR ATTORNEY:

The defendant Del Webb Communities, Inc. (hereinafter "Del Webb") denies all allegations in the third amended complaint that are not specifically admitted below, and specifically states in response to the third amended complaint as follows:

1. Upon information and belief, Del Webb admits the allegations in paragraph 1 of the third amended complaint.

2. Upon information and belief, Del Webb admits the allegations in paragraph 2 of the third amended complaint.

3. In response to the allegations of paragraph 3 of the third amended complaint, Del Webb admits, upon information and belief, that PrimeTrim is an exterior trim board product manufactured by defendant Georgia-Pacific Corporation. Further, upon information and belief,

the PrimeTrim product was utilized on homes in Sun City Hilton Head. The defendant Del Webb admits that it was the developer and general contractor with regard to the homes in Sun City Hilton Head. Del Webb further admits that defendant Razor Enterprises and defendant D.J. Construction Company, LLC were subcontractors for Del Webb who installed PrimeTrim material on houses in Sun City Hilton Head. Upon information and belief, PrimeTrim was utilized on the named plaintiffs houses, however, investigation is ongoing into this issue.

4. No response is required to the allegations of paragraph 4 of the third amended complaint.

5. In response to the allegations of paragraph 5 of the third amended complaint, Del Webb is without sufficient information to either admit or deny these allegations, and accordingly the allegations are denied.

6. The allegations of paragraph 6 of the third amended complaint are allegations of law to which no response is required.

7. In response to the allegations of paragraph 7 of the third amended complaint, Del Webb admits that it did and does transact business in Beaufort County, South Carolina.

8. In response to the allegations of paragraph 8 of the third amended complaint, Del Webb admits that the sale and construction of the houses at issue in this case took place in Beaufort County, South Carolina.

9. No response is required to the allegations of paragraph 9 of the third amended complaint.

10. Paragraphs 10 and 11 of the third amended complaint make no allegations against Del Webb, and accordingly no response is required.

11. In response to the allegations of paragraph 12 of the third amended complaint, defendant Del Webb admits, upon information and belief, that PrimeTrim was utilized in some homes in Sun City Hilton Head.

12. Defendant Del Webb denies that it took any of the actions described in the allegations in paragraph 13 of the third amended complaint.

13. Defendant Del Webb denies the allegations of paragraph 14 of the third amended complaint, except that Del Webb admits that there has been some weathering or deterioration of some trim boards on some houses in Sun City Hilton Head.

14. Del Webb's investigation as to the allegations in paragraphs 15-17 of the third amended complaint are ongoing, but at this time, Del Webb has insufficient information to either admit or deny these allegations.

15. Del Webb denies it took any of the actions alleged in paragraph 18 of the third amended complaint.

16. In response to the allegations of paragraphs 19-20 of the third amended complaint, Del Webb is without sufficient information to either admit or deny these allegations, and accordingly the allegations are denied.

17. Defendant Del Webb denies the allegations in paragraph 21 of the third amended complaint.

18. In response to the allegations of paragraph 22 of the third amended complaint, Del Webb is without sufficient information to either admit or deny these allegations, and accordingly the allegations are denied.

19. Del Webb's investigation into the allegations of paragraphs 23-24 of the third amended complaint is ongoing, but at this time, Del Webb does not have sufficient information to either admit or deny these allegations.

20. Paragraphs 25-26 of the third amended complaint contains no allegations against defendant Del Webb and therefore no response is required.

21. Del Webb's investigation into the allegations of paragraph 27 of the third amended complaint is ongoing, but at this time, Del Webb does not have sufficient information to either admit or deny these allegations.

22. Del Webb denies the allegations of paragraph 28 of the third amended complaint

23. In response to paragraphs 29-36 of the third amended complaint, defendant Del Webb denies the allegations contained therein and states that class certification would be improper in this case.

24. Paragraphs 37-70 of the third amended complaint contain no allegations against Del Webb, and accordingly no response from Del Webb is required.

25. Defendant restates its responses to the allegations contained in Paragraphs 1 through 24 above in response to the allegations of paragraph 71 of the third amended complaint as thoroughly as if repeated herein verbatim.

26. In response to the allegations of paragraph 72 of the third amended complaint, Del Webb admits that it was the general contractor, developer and original seller of the named plaintiffs' houses. The remaining allegations of paragraph 72 are issues of law to which no response from Del Webb is required.

27. In response to the allegations of paragraph 73 of the third amended complaint, Del Webb's investigation into these allegations is ongoing, and at this time Del Webb denies that it breached any duties.

28. In response to the allegations of paragraph 74 of the third amended complaint, Del Webb's investigation into these allegations is ongoing.

29. Paragraph 75 of the third amended complaint contains no allegations against Del Webb, and accordingly no response from Del Webb is required.

30. Defendant Del Webb denies the allegations of paragraph 76-77 of the third amended complaint.

31. Defendant restates its responses to the allegations contained in Paragraphs 1 through 30 above in response to the allegations of paragraph 78 of the third amended complaint as thoroughly as if repeated herein verbatim.

32. Del Webb denies the allegations of paragraphs 79-81 of the third amended complaint as they relate to Del Webb.

FOR A FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

33. Plaintiffs have failed to state facts sufficient to constitute a cause of action against this defendant pursuant to Rule 12(b)(6), SCRCP, and plaintiffs' claims should be dismissed.

FOR A SECOND AFFIRMATIVE DEFENSE
(Failure to Mitigate)

34. Plaintiffs failed to mitigate their damages, as required by law.

FOR A THIRD AFFIRMATIVE DEFENSE
(Waiver, Estoppel, Laches)

35. Plaintiffs' claims may be barred by the doctrines of waiver, estoppel and/or laches.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Statute of Frauds)

36. Plaintiffs' claims are barred by the statute of frauds.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

37. Del Webb asserts that some or all of the claims against it are barred by applicable statutes of limitations or statutes of repose.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Notice to Plaintiffs)

38. Plaintiffs' claims are barred to the extent that they discovered or should have discovered and were aware of any defects, and nevertheless unreasonably proceeded to purchase or make use of the product.

**FOR A SEVENTH AFFIRMATIVE DEFENSE
(Intervening Acts of Third-Parties)**

39. Plaintiffs' damages, if any, are the direct and proximate result of intervening and superseding acts of third parties not affiliated with this defendant and not under its domain or control.

**FOR AN EIGHTH AFFIRMATIVE DEFENSE
(Failure to Join a Necessary Party)**

40. Plaintiffs have failed to join a party necessary to this litigation as required by Rule 19, SCRCP, and plaintiffs' third amended complaint should be dismissed pursuant to Rule 12(b)(7), SCRCP.

**FOR A NINTH AFFIRMATIVE DEFENSE
(Contributory/Comparative Negligence)**

41. Any damage suffered by the plaintiffs is the direct and proximate result of their comparative and contributory negligence and plaintiffs' recovery should be barred or, alternatively, reduced proportionately to plaintiffs' comparative negligence.

**FOR A TENTH AFFIRMATIVE DEFENSE
(Open and Obvious)**

42. Plaintiffs either knew or should have known of any alleged deficiencies in the building and accepted the same with such knowledge. As a result, plaintiffs' recovery should be barred.

**FOR AN ELEVENTH DEFENSE
(Unclean Hands)**

43. The plaintiffs have unclean hands and may not recover in indemnity.

**FOR A TWELFTH DEFENSE
(Arbitration)**

44. This matter may be subject to a contract with a binding arbitration provision, and if so, the court may not have jurisdiction to hear this matter.

**FOR A THIRTEENTH DEFENSE
(SC Notice and Opportunity to Repair Residential Construction Defects Act)**

45. The plaintiffs have not complied with the SC Notice and Opportunity to Repair Residential Construction Defects Act, and accordingly this case should be either dismissed or stayed.

WHEREFORE, having fully answered the third amended complaint herein, defendant Del Webb prays that the complaint be dismissed as to Del Webb, and that Del Webb be awarded the cost of this action, attorneys' fees, and such other and further relief as the court may deem just and proper.

Respectfully submitted,

MCNAIR LAW FIRM, P.A.

By A. Victor RAWL
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vrawl@mcnair.net

By.
BFW

Attorneys for Defendant Del Webb
Communities, Inc.

February 11, 2010
Columbia, South Carolina

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

JIM LANCASTER, NANCY) CASE NO. 2007-CP-07-3166
LANCASTER, ART HOLLAND,)
JEANNETTE HOLLAND, WENDELL)
TURNER, PHYLLIS TURNER, JACK)
BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND)
OTHERS SIMILARLY SITUATED,)

PLAINTIFFS,)

vs.)

GEORGIA-PACIFIC CORPORATION)
AND/OR GEORGIA-PACIFIC LLC,)
GRAYCO HOME CENTER, INC., DEL)
WEBB COMMUNITIES, INC., AN)
ARIZONA CORPORATION, RAZOR)
COMPONENT SYSTEMS, INC., A)
SOUTH CAROLINA CORPORATION,)
RAZOR ENTERPRISES, INC., A)
TEXAS CORPORATION AND DJ)
CONSTRUCTION CO, LLC ,)

DEFENDANTS.)

**PLAINTIFFS' RESPONSES TO DEL
WEBB COMMUNITIES, INC.'S
REQUESTS FOR ADMISSIONS**

TO: A. VICTOR RAWL, JR., ESQUIRE, ATTORNEY FOR DEL WEBB COMMUNITIES,
INC.:

Plaintiffs hereby respond to Del Webb Communities, Inc.'s Requests for Admissions as follows:

1. Admit that the 13-year Statute of Repose is applicable to all putative class plaintiffs in this case.

Response: Deny that the statute S.C. Code §15-3-640 is applicable when the exceptions noted in S.C. Code §15-3-670 are applied to the facts of the case.

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McNair Law Firm, PA.

13. Admit that plaintiffs are not seeking reimbursement for any expense incurred by named plaintiffs or putative class members related to repairs or replacement of PrimeTrim®.

Response: Denied. Plaintiff Representatives are not seeking reimbursement for any past expenses related to repairs or replacement of PrimeTrim®. Plaintiff Representatives are seeking to have a class certified for the cost of replacement of any PrimeTrim® that currently exists on the exterior of the class homes at Sun City.

14. Admit that some of the unnamed putative class members have contracts with Del Webb Communities, Inc., that contain an arbitration provision.

Response: Denied. One of the class representatives had a direct sales contract with Del Webb Communities, Inc., but it does not contain an arbitration clause. An arbitration clause is contained in the Declarations of Covenants and Restrictions. The representatives deny that any arbitration clause has an effect on the representative or class claims against Del Webb Communities, Inc., in the instant case.

15. Admit that named plaintiffs in this case are not seeking to include houses in their proposed class where the homeowner has a contract with Del Webb Communities, Inc. that contains an arbitration provision.

Response: Denied.

16. Admit that named plaintiffs have other possible claims against Del Webb Communities, Inc, that are unrelated to the installation of PrimeTrim® and that are not being brought in the present litigation.

Response: Denied.

17. Admit that named plaintiffs are waiving any claims that they may presently have against Del Webb Communities, Inc, that are unrelated to the installation of PrimeTrim®.

Response: Denied. Plaintiffs' claims are for repair and/or replacement of the defective PrimeTrim® product and the increased cost of replacement and early failure of the PrimeTrim® product due to faulty installation by Del Webb Communities, Inc., and its installer subcontractor, Defendants DJ Construction and Razor.

18. Admit that putative class members have other known possible claims against Del Webb that are unrelated to the installation of PrimeTrim® and that are not being brought in the present litigation.

Response: Denied. Neither the representatives nor class counsel have explored "other possible claims" as they are outside of the scope of the defective PrimeTrim® and its incorrect installation which exists on approximately 800 homes.

19. Admit that named plaintiffs are willing to waive any known claims that unnamed class members may presently have against Del Webb Communities, Inc., that are unrelated to the installation of PrimeTrim® in order to certify the putative class in this case.

Response: Denied. The Plaintiff Representatives, their attorneys, and class counsel do not take any position relative to other claims contemplated in this Request.

20. Admit that all of a plaintiff's known construction defect claims against Del Webb Communities, Inc. must be brought in one action.

Response: Denied.

21. Admit that plaintiffs are only seeking recovery of damages in this case that have been proximately caused by the alleged defective nature of PrimeTrim® or the alleged installation deficiencies of PrimeTrim®.

Response: Admitted.

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF BEAUFORT 2007-CP-07-03166

JIM LANCASTER, NANCY LANCASTER,)
ART HOLLAND, JEANETTE HOLLAND,)
WENDELL TURNER, PHYLLIS TURNER)
and JACK BENNETT, JOAN BENNETT,)
on behalf of themselves and)
all others similarly situated,)

Plaintiffs,)

vs.)

GEORGIA-PACIFIC CORPORATION)
and/or GEORGIA PACIFIC, LLC,)
GRAYCO HOME CENTER, INC., DEL)
WEBB COMMUNITIES, INC., an)
Arizona Corporation; RAZOR)
COMPONENT SYSTEMS, INC., a)
South Carolina Corporation,)
RAZOR ENTERPRISES, INC., a)
Texas Corporation, and DJ)
CONSTRUCTION COMPANY, LLC,)

Defendants.)

February 23, 2012

Charleston, SC

TRANSCRIPT OF PROCEEDINGS

B E F O R E:

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

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 THE COURT: I don't see any reason that we
2 need to hash out any more oral arguments. I know that
3 I'm never going to convince the defendants I'm right, and
4 I don't really see them arguing about it anymore is going
5 to serve any purpose, so I'm going to deny the motions to
6 reconsider. I think you fleshed out every possible
7 argument you could, and if you want to appeal, then no
8 hard feelings on that, so the motion to reconsider is
9 denied.

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

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

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

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

1 would have a class and then have to give -- go through
2 the process of having every single one of those houses
3 inspected kind of defeats the whole purpose, and I have
4 decided we're going to go this route: We got about 800
5 homes. We're going to send out -- after we have got,
6 basically, a number of people left after they have or
7 have not exercised their right to opt out, we're going to
8 take 10 percent of those and give the defendants a right
9 to exercise those right to cure, rights that they have
10 under the statutes. In other words, let's just use a
11 number of 800 because it's an easy number, so if we end
12 up with 800 folks left in the class, we're going to take
13 80 of those and give the defendants the right under the
14 statute to go in, look at those houses, and exercise
15 their right to cure rights in a representative capacity,
16 since this is what class action lawsuits are about, and
17 then, ultimately, if we go to trial, we have to decide
18 how many cases are we -- how many houses are we going to
19 use?

20 And I think a number that I've settled on is
21 going to be 1 percent, which would be 10 percent of the
22 10 percent; in other words, about eight, so we start out
23 with 800, we go down to 80, and once we get the right to
24 cure done, we get things discovered, ready for trial,
25 we're going to try to estimate somewhere around eight,

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

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

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

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

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

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

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

20 MR. DAPORE: We're going to choose 80 and
21 then take 10 percent of that, which means we're going to
22 allow Del Webb to do -- right to cure on the 80 houses as
23 far as the inspection, and then we're going to assume
24 once we get done with the right to cure, we're going to
25 randomly pick, I assume, eight of those houses to try?

1 THE COURT: Right, right.

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

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

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

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

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

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

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

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

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

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

4 THE COURT: We got no way of knowing.

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

7 THE COURT: That's why I told them, they get
8 to choose, and I'm assuming they're going to pick their
9 80 worst.

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

16 These homes were built over a period from
17 1994 to 2006. There are myriad different design
18 features, different installation techniques. There is a
19 whole series of different factors here, and I would
20 submit to you, to Your Honor, that some Courts have taken
21 an approach similar to the one that Your Honor has called
22 the bellwether trial approach, and that is even
23 disfavored, but if you're going to proceed that way, Your
24 Honor, what the Courts say is that in a bellwether trial,
25 a random sample of cases, large enough to yield reliable

1 results, is tried to a jury.

2 Now, we don't believe that can be done in
3 this case, but if the Court is going to proceed that way,
4 I think what Your Honor should do is direct the
5 plaintiffs to come up with a statistically significant,
6 random sample of these homes and then have those be tried
7 in some manner of subclasses, and we do need to know at
8 the beginning of the case, Your Honor, who those
9 representative plaintiffs are going to be and what claims
10 they're going to assert and against who, otherwise we're
11 here in sort of limbo.

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

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

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

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

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

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

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

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

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

13 MR. REMAR: All right. Well --

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

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

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

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

20 The problem comes down to what plaintiffs'
21 experts say, which is they don't know what's wrong with
22 any house they've not inspected. And that brings us to
23 the right to cure process, and what I think Your Honor is
24 ruling is that Del Webb will be entitled to protection in
25 the right to cure process on 10 percent of the houses but

1 denied on the other 20 percent.

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

4 MR. RAWL: Yes.

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

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

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

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

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

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

1 information has to be provided to the plaintiffs to know
2 what their rights are so they can make an educated
3 decision on whether or not they need to opt out or not,
4 but what the Court keeps saying is that the defendants
5 will have the right to do their right to cure. What the
6 act says is the defendants are entitled to notice of what
7 the problem is on each individual homeowner's house,
8 prior to litigation going forward.

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

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

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

1 not staying the case until the notice goes out?

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

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

14 THE COURT: I'm not going to stay the rest of
15 the case because we're moving forward in a representative
16 capacity. So the people that aren't in the 80, the other
17 710, roughly, or 720, I guess, they're -- they're still
18 part and parcel of the lawsuit, they're just not going to
19 be participating in the day-to-day actions of the case,
20 unless they have to be picked as one of the initial ten
21 or the later -- or initial 80 or the later eight.

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

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

7 MR. RAWL: Okay. And one of the reasons I'm
8 trying to get clarification on what you mean, Your Honor,
9 is because, you know, in the notice to the class members,
10 we have to explain to them what's going forward. They
11 only get one option to opt out, so this notice has to say
12 10 percent of you will be able to go through a right to
13 cure process and may be able to settle the claim, your
14 claim before litigation. Those people will be chosen by
15 plaintiff's counsel.

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

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

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

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT) CASE NO. 07-CP-07-3166

JIM LANCASTER, NANCY LANCASTER,
ART HOLLAND, JEANETTE HOLLAND,
WENDELL TURNER, PHYLLIS TURNER,
JACK BENNETT, JOAN BENNETT, ON
BEHALF OF THEMSELVES AND OTHERS
SIMILARLY SITUATED,

Plaintiffs,

vs.

GEORGIA-PACIFIC CORPORATION AND
GRAYCO HOME CENTER, INC.,

Defendants.

GEORGIA-PACIFIC CORPORATION AND
GRAYCO HOME CENTER, INC.,

Third-Party Plaintiffs,

vs.

DEL WEBB COMMUNITIES, INC., an
Arizona Corporation, DEL WEBB
COMMUNITY MANAGEMENT CO., an
Arizona Corporation, DEL WEBB
CORPORATION, an Arizona
Corporation, DEL WEBB
CORPORATION, a Delaware
Corporation, PULTE HOMES, INC., a
Michigan Corporation, RAZOR
ENTERPRISES, INC., a Texas
Corporation, and RAZOR COMPONENT
SYSTEMS, INC., a South Carolina
Corporation,

Third-Party Defendants.

* * * * *

VOLUME III VIDEOTAPED

DEPOSITION OF: DEREK A. HODGIN, P.E.

DATE TAKEN: Friday, November 19, 2010

1 Q. So proximate cause, to your mind, means
2 the root or underlying cause?

3 A. Yes. That would be a good way to
4 explain it.

5 Q. And is it your opinion that the root,
6 underlying or proximate cause of the deterioration
7 of the Georgia-Pacific PrimeTrim at Sun City is
8 that the trim board itself was inherently
9 defective?

10 A. Yes, sir.

11 Q. And the proximate, underlying or root
12 cause was not the way it was actually installed,
13 correct?

14 A. Correct. That would just be a
15 mitigating factor.

16 Q. And in your opinion, the way that the
17 PrimeTrim may have been actually installed may
18 have affected the rate of deterioration but did
19 not affect the underlying defective nature of the
20 product, correct?

21 A. That's correct.

22 Q. And in your opinion, the PrimeTrim that
23 was utilized at Sun City Hilton Head would have
24 failed in a premature manner, whether it was
25 installed correctly or not, correct?

1 A. That's correct.

2 Q. So you were not claiming that the
3 builder or installer did anything that was the
4 underlying, root cause or proximate cause of the
5 PrimeTrim deterioration or ultimate failure in
6 this case?

7 A. No. Just simply that deviations from
8 the code or the manufacturer's instructions would
9 contribute to damage.

10 Q. Contribute to the rate of the
11 deterioration, not to the underlying future
12 failure of the product, correct?

13 A. Correct.

14 Q. Let's make sure I understand what you're
15 saying. So even though you don't agree with some
16 of the installation methods used by the builder or
17 the installer of PrimeTrim in Sun City, you do not
18 think that the installation methods were the
19 underlying root cause or the proximate cause of
20 any of the damage that you observed, correct?

21 A. There might be specific locations where
22 you can point to an improper installation where --
23 I don't want to get into percentages, where there
24 may be just as much cause of damage by the
25 improper installation as there would be the

1 defective nature. You can't take the defective
2 nature of the product away. That's going to exist
3 everywhere. But in certain locations, where the
4 damage may be significant, I don't think it would
5 be fair for me to say -- for me to disconnect the
6 improper installation. I think there is some
7 places where it shows up more significantly than
8 others. But the underlying proximate cause of the
9 deterioration would be the inherent defective
10 nature of the product.

11 Q. So what you're saying is that you've
12 seen areas where the amount of damage may not have
13 been as much had it been installed differently,
14 but you would still have expected to see damage
15 because of the inherent nature -- defective nature
16 of the PrimeTrim product?

17 A. Correct. I guess to put it simply, I
18 see less damage when it's properly installed.

19 Q. Have you done any type of studies to
20 determine the change in the rate of deterioration
21 depending upon the installation method utilized?

22 A. No. I think that would be a very
23 difficult study to control.

24 Q. And it's your opinion that even if all
25 of the installation methods that were utilized at

1 Sun City Hilton Head were proper, that the
2 PrimeTrim would still fail prematurely, correct?

3 A. Yes.

4 Q. And to make sure I understand your
5 opinion, it's your opinion that PrimeTrim was
6 installed incorrectly in only some locations on
7 these houses, correct?

8 A. Yes.

9 Q. And that in other locations on these
10 houses at Sun City Hilton Head, the PrimeTrim was
11 installed correctly?

12 A. Yes.

13 Q. And you would agree that where the
14 PrimeTrim was installed correctly, the
15 builder/installer would have no liability in that
16 -- with regard to those boards, correct?

17 A. Correct.

18 Q. That would be solely the problem or
19 issue of the manufacturer, correct?

20 A. I believe so, yes.

21 Q. Mr. Hodgin, how many houses have you
22 inspected in this case?

23 A. In this case, I believe there's seven.
24 I guess I should say seven where there's
25 observations beyond just visual, where we actually

1 removed boards. Driving through the
2 neighborhoods, you can see other houses, but they
3 weren't more intimately inspected, where you're
4 getting out and doing a physical walk-around and
5 examining all the boards.

6 Q. And on those seven houses, did you do
7 destructive testing on all seven?

8 A. Yes, sir.

9 Q. So it's fair to say that you did an
10 investigation with regard to seven houses, but
11 driving through the neighborhoods, you've seen
12 other houses?

13 A. Right. But I wouldn't be able to
14 comment about the deterioration or the proper and
15 improper installation on those houses.

16 Q. And why is that?

17 A. I would just need -- excuse me. I would
18 just need to look at them closer before I have
19 confidence in my opinions.

20 Q. So is it fair to say that before you can
21 give us an opinion with regard to whether there
22 were defective installation methods or damaged
23 PrimeTrim on any house, you would have to inspect
24 that house?

25 A. I would think so. I will say this: On

1 plan and elevation?

2 A. I don't know. I'd have -- I haven't
3 made that comparison. I know there was at least a
4 couple that looked very -- they looked very
5 similar, but I haven't compared in plan view what
6 their features are and how they're the same or how
7 they're different. I can tell you that the
8 installation of the PrimeTrim appeared to be
9 consistent through all of the houses.

10 Q. You did not look at the house that was
11 located at 102 Honey Hill Road, did you?

12 A. It doesn't look like anybody did. There
13 was 103 Honey Hill Road that was looked at by
14 Martin Phillips.

15 Q. Oh. But to the best of your knowledge,
16 you've never seen 102 Honey Hill Road, correct?

17 A. Well, if Martin Phillips was at 103
18 Honey Hill, he would maybe have some incidental
19 observations of 102, but I don't see anything in
20 his field notes about it.

21 Q. Well, whether it's 102 Honey Hill Road
22 or some other house in Sun City Hilton Head that
23 you've not inspected that has HardiePlank and
24 PrimeTrim trim board on it, okay --

25 A. Okay.

1 Q. -- with regard to that house, can you
2 tell me where the PrimeTrim has deteriorated on
3 that house?

4 A. I wouldn't be able to tell you
5 specifically. I can tell you where I would look
6 to see if it's deteriorated, the typical hot
7 spots.

8 Q. But without looking at that house, you
9 can't tell me right now where the PrimeTrim is
10 deteriorated on that house, correct?

11 A. No, not specifically.

12 Q. And frankly, you can't tell me if
13 there's PrimeTrim on that house at all, can you,
14 because you've not looked at it?

15 A. No, I wouldn't know. I don't know if
16 there's records that would reflect that or not.

17 Q. And you can't tell me on that house how
18 much of the PrimeTrim has already been replaced by
19 the homeowner or some other contractor, correct?

20 A. That's correct.

21 Q. And you can't tell me on that house
22 whether or not it was flashed correctly or not,
23 can you?

24 A. No.

25 Q. And you can't tell me on that house how

1 that PrimeTrim was installed on the house, can
2 you?

3 A. No. I mean, not specifically.

4 Q. On that house that you've not inspected,
5 can you tell me if there's any water damage behind
6 the PrimeTrim?

7 A. No.

8 Q. And if there is water damage behind that
9 PrimeTrim, can you tell me what the root or
10 underlying cause of the water damage is behind the
11 PrimeTrim?

12 A. I would say if it's PrimeTrim, it would
13 likely be related to the defective nature of the
14 PrimeTrim, but I wouldn't know about any
15 contributing factors as to improper installation.

16 Q. So if there was a -- if you removed a
17 piece of PrimeTrim underneath a window of a house
18 and there was some deterioration of the OSB on the
19 bottom corner of a window, without doing any more
20 testing, you can say that the proximate cause of
21 that damage is PrimeTrim and not a leaky window
22 and not some type of flashing issue with the roof
23 or a roof leak that is allowing water to get back
24 behind the window?

25 A. Well, you typically have some mechanism

1 of water intrusion that's getting to the
2 PrimeTrim, and sometimes it's improper
3 installation that allows the water intrusion, and,
4 oftentimes, it's just typical construction details
5 that meet the code and the installation
6 instructions, but, still, water can get to the
7 trim and cause damage. So you'd have to look at
8 it.

9 Q. In this case, you're only here to opine
10 with regard to the PrimeTrim itself, the
11 installation of PrimeTrim and any damage to these
12 houses related to either the PrimeTrim or the
13 installation of PrimeTrim, correct?

14 A. I believe that's correct.

15 Q. And if -- and it's possible that there
16 is damage to OSB behind PrimeTrim that was not
17 caused by either the installation of the PrimeTrim
18 or the defective nature of PrimeTrim itself,
19 correct?

20 A. That's possible.

21 Q. Sure. It could be a leaky window,
22 right?

23 A. Right.

24 Q. It could be some other source of water
25 that you would have to track down to determine the

1 source of water that's causing the OSB to
2 deteriorate, correct?

3 A. That's possible, yes.

4 Q. And you won't know the actual proximate
5 cause or underlying root cause of any water damage
6 until you determine the source of that water,
7 correct?

8 A. Yes.

9 Q. So for any water damage or deterioration
10 that you may find behind PrimeTrim boards in Sun
11 City Hilton Head, you would have to make a further
12 determination that that deterioration is related
13 to PrimeTrim and not some other water source,
14 correct?

15 A. I believe that's correct. There's
16 typically a combination of where the water is
17 coming in and the extent of damage. But I guess
18 specific to the PrimeTrim, when the PrimeTrim gets
19 wet and is in that path of the water, there's
20 typically deterioration of the PrimeTrim. As to
21 the deterioration of the OSB, I agree with you
22 that there could be another cause besides the
23 deterioration of the PrimeTrim that could cause
24 that damage.

25 Q. And just so I make sure that I

1 understand, in this case, you're not going to
2 recommend that any of the OSB or framing members
3 or anything behind the PrimeTrim be repaired,
4 unless it's related to the PrimeTrim or the
5 installation of PrimeTrim, correct?

6 A. From an engineering standpoint, that
7 would be shortsighted and incomplete on my part.
8 It doesn't matter to me who is responsible or who
9 is paying for it. If you're an engineer and
10 you're directing repairs, you don't just fix the
11 PrimeTrim. I would have to recommend the repair
12 of all the elements that are damaged. So I would
13 have to fix the OSB sheathing and, you know --
14 however the chips fall, the chips fall. That's
15 not my role. I would say -- I would have to fix
16 it.

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

21 A. It would depend on the source of the
22 water intrusion. It could be a window issue. It
23 could be an improper installation issue. Not
24 necessarily the PrimeTrim; it could be the
25 improper installation of the window. So there's

1 other construction defects that could have led to
2 the damage of the OSB.

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

7 A. Sure.

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

11 A. Yeah. All of those are possibilities.

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

17 A. I believe that's correct.

18 Q. And on any of the houses involved at Sun
19 City Hilton Head, have you done a sufficient
20 investigation to tell us any of that information
21 that we just discussed?

22 A. I think on these seven homes we should
23 be able to narrow down water intrusion causes.

24 Q. Did you find -- on these seven homes,
25 did you find all of the areas where there was

1 damage behind the PrimeTrim?

2 A. Can you repeat the question?

3 Q. On the seven homes that you actually did
4 destructive testing on --

5 A. Yes.

6 Q. -- in this case --

7 A. Yes.

8 Q. -- did you find all locations where
9 there is water damage located behind the
10 PrimeTrim?

11 A. I would say in -- I'm comfortable saying
12 most, but maybe not all locations, there was at
13 least evidence of water penetration. There's
14 quite a bit of damage. Some places you might just
15 have early signs of, you know, water intrusion and
16 staining. The boards -- the PrimeTrim boards
17 themselves may still be, you know, dimensionally
18 similar to what they were when they were installed
19 and hadn't swollen or deteriorated significantly.
20 So there was evidence in most locations, but I
21 wouldn't say -- I wouldn't classify it as
22 significant damage in all locations.

23 Q. For these seven houses, are you
24 comfortable in testifying, that as to a reasonable
25 degree of engineering certainty, that there is no

1 damage to the OSB behind the PrimeTrim anywhere on
2 those houses that is related to anything other
3 than PrimeTrim and/or PrimeTrim installation?

4 A. No.

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

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

9 Q. And you've not done that yet?

10 A. No.

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

16 A. I believe so, yes.

17 Q. I believe you testified in earlier days
18 of your deposition that, in your opinion, not all
19 of the PrimeTrim boards on the houses that you've
20 looked at need to be replaced, correct?

21 A. I believe that's true. I think we
22 talked about areas that would be protected from
23 water penetration, that I would be comfortable
24 should provide an effective service life.

25 Q. And some of those PrimeTrim boards that

1 same installation method was used on every house?

2 A. You'd have to look at every house.

3 Q. In fact, you've seen, just in the seven
4 houses that you've looked at, you know, some
5 PrimeTrim that was flashed and some PrimeTrim that
6 was not flashed, correct?

7 A. I think that might be true. I think
8 they were generally consistent. In terms of my
9 previous testimony with Mr. Culpepper, at least at
10 the head of the windows I don't remember seeing
11 flashing. I think that was consistent. I think
12 the only place I remember an inconsistency may
13 have been at that band board location.

14 Q. But as we sit here today, you don't know
15 whether in 1998 there was through-wall flashing
16 over all horizontal PrimeTrim members or installed
17 on the houses or not, do you?

18 A. That's correct.

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

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

25 Q. None of the questions I just asked you

1 house is constructed.

2 Q. So what you're telling me is that when
3 you were doing the destructive testing on the
4 seven houses in this case you found other issues
5 that you would consider to be construction defects
6 outside of the PrimeTrim and the installation of
7 PrimeTrim?

8 A. I would say they're one and the same.
9 I'm not introducing new defects. But, for
10 example, if you're at the base of the wall and you
11 don't have a proper lap between your weather
12 barrier and your flashing, you're going to get the
13 PrimeTrim wet, so it's going to cause damage to
14 the PrimeTrim, but you're also going to get the
15 OSB wet and cause damage to the OSB. Same with
16 areas below window openings. So I think there's
17 some shared damage with -- one defect can cause
18 damage to both the PrimeTrim and the OSB. I guess
19 what I'm saying is I'm agreeing with your point
20 earlier. I can't totally blame the PrimeTrim on
21 all the damage.

22 Q. And I just want to make sure that I
23 understand what you're telling me. You're telling
24 me is that -- in the example you just gave me,
25 there was a fault in the weather-lapping on a

1 house that you did destructive testing on,
2 correct?

3 A. Yes, sir.

4 Q. And in your opinion, that has nothing to
5 do with PrimeTrim or PrimeTrim installation; that
6 is the builder or installer's mistake in doing the
7 weather-lapping, correct?

8 A. Yes.

9 Q. And you observed that that
10 weather-lapping error on that one house that you
11 looked at may have caused some damage to the OSB
12 behind the weather-resistive barrier?

13 A. That's true.

14 Q. And while that damage may have actually
15 caused some damage to the PrimeTrim also, the
16 error in the lapping of the weather-resistive
17 barrier was unrelated to PrimeTrim's instructions
18 but would be some other defect, correct?

19 A. Yes. And I guess, just to complete the
20 thought process, when I talked to Mr. Culpepper
21 yesterday and we were talking about my issues with
22 their installation instructions, some of those
23 issues would have been overcome had there been,
24 you know, supplemental details or references to
25 good building practices and so forth. So the

1 just trying to make sure.

2 BY MR. RAWL:

3 Q. Have you looked at -- have you done
4 destructive testing on all of the named
5 Plaintiffs' houses?

6 A. I don't know. As a matter of fact, I've
7 only done destructive tests on these seven
8 addresses that are listed in my report. So to the
9 extent that there's other named Plaintiffs that
10 don't have these addresses, I would say no.

11 Q. Let me ask you in this way, then: From
12 looking at the results of the destructive testing
13 of any of the seven houses that you have done
14 destructive testing to, just by doing destructive
15 testing on that house, you can't tell me -- and
16 this is similar to the line of questioning I just
17 asked you -- you can't tell me where PrimeTrim is
18 damaged on any house that you've not tested,
19 correct?

20 A. No, not specifically.

21 Q. And just by looking at -- or doing
22 destructive testing to one of the named
23 Plaintiffs' houses, you can't tell me whether
24 another house in Sun City Hilton Head even has
25 PrimeTrim, correct?

1 A. That's correct.

2 Q. And you can't tell me if any of the
3 PrimeTrim on that uninspected house has
4 deteriorated, correct?

5 A. Not specifically, no. Not without doing
6 a survey.

7 Q. And you can't tell me whether any
8 PrimeTrim on that house has been flashed, correct?

9 A. Correct.

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

13 A. Correct.

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

17 A. To the OSB or the PrimeTrim?

18 Q. The OSB, damage behind the PrimeTrim.

19 A. No.

20 Q. And you can't tell me the installation
21 methods utilized for the PrimeTrim on that house
22 without inspecting it first, correct?

23 A. That's correct.

24 Q. And you can't tell me by looking at just
25 one of the named Plaintiffs' houses which

1 PrimeTrim boards would need to be replaced
2 specifically on any uninspected house, correct?

3 A. I think the way I answered that before
4 was that there would be -- you know, exposed
5 boards would need to be replaced, the vertical
6 trim, the base of the wall, around the windows and
7 the fascia.

8 Q. Let me change the question a little bit.
9 I apologize. You did explain that earlier. With
10 regard to any trim boards that may need to be
11 replaced because of installation methods and not
12 because of the underlying defective nature of the
13 product, you can't tell me which boards would need
14 to be replaced on any house without inspecting it
15 first, correct?

16 A. That's correct.

17 Q. And just by looking at one of the named
18 Plaintiffs' houses, you can't tell me whether the
19 uninspected house has any type of addition to that
20 house, correct?

21 A. Correct.

22 Q. And you can't tell me whether or how
23 much any of the PrimeTrim has been replaced by
24 either PrimeTrim or some other product, correct?

25 A. Correct.

1 Q. And you can't tell me what installation
2 details, whoever the repair contractor was that
3 replaced PrimeTrim, utilized, whether they flashed
4 the trim correctly, correct?

5 A. Correct.

6 Q. And you can't tell me without -- just by
7 looking at the Lancaster house whether the
8 uninspected house has any other problems related
9 to the installation of PrimeTrim or some other
10 construction defect, correct?

11 A. Correct.

12 Q. And you can't tell me whether the
13 homeowner that owns the uninspected house has any
14 mold issues or health issues that are derived from
15 mold from wet OSB or framing members, correct?

16 A. Correct.

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

21 A. Not specifically, no. We would need to
22 look at the consistency of the seven that we have.
23 Maybe there's some records that would indicate,
24 you know, the PrimeTrim or the extent of
25 maintenance, and you would look at the

1 contractors, if there was a change in
2 subcontractors. But I agree, as far as the
3 installation methods, you wouldn't know
4 specifically without looking at each house.

5 Q. And you brought it up. Homeowner
6 maintenance, you can't tell just by looking at the
7 Lancaster house or one of the other named
8 Plaintiffs' houses what the homeowner maintenance
9 level has been on any other house in Sun City
10 Hilton Head, correct?

11 A. That's correct.

12 Q. And in your opinion, if the homeowners
13 don't maintain the caulk joints between the trim
14 boards around the windows, that can affect the
15 rate of deterioration of the PrimeTrim, correct?

16 A. Yes, sir.

17 Q. And so, in theory, the rate could be
18 affected by the original installation of the
19 PrimeTrim, correct?

20 A. Yes.

21 Q. And it can also be affected by the way
22 the homeowner has maintained the house, meaning
23 whether or not they've kept a good coat of paint
24 on it and/or kept the caulk joints in good
25 condition, correct?

1 A. Correct.

2 Q. And you won't know the condition of any
3 house or the -- or what homeowner maintenance has
4 been done to that house without inspecting the
5 house, correct?

6 A. Correct.

7 Q. Just in general, how often should a
8 caulk joint be replaced on -- between PrimeTrim
9 members on a house at Sun City Hilton Head?

10 A. It's difficult to assign a specific
11 number because of the change of environmental
12 conditions. I mean, obviously, the costal areas
13 of South Carolina are more aggressive than other
14 more arid regions. And even in those areas -- on
15 one house in Sun City, for instance, there may be
16 two of the elevations that are more exposed than
17 the other two or more elevations.

18 So I've generally said, as -- the most
19 frequent is most typically five years. And on the
20 outside would be, you know, seven to ten years.
21 It depends on the exposure. But obviously, I
22 think you had mentioned a minute ago in your
23 question, to the extent that water intrusion is
24 allowed to get into the PrimeTrim prior to -- or
25 during that process, it makes the maintenance

1 destructive tests that we've done, try to help you
2 distinguish in terms of improper location or
3 improper installation and the extent of the
4 damage. I could only look at those seven.

5 Q. And with regard to -- basically what you
6 would do is we could either go through your
7 pictures or go through your report and you could
8 try to pick which boards would be -- might have
9 been affected by the installation and which ones
10 were not?

11 A. Correct. I don't know if it's in the
12 report. It would be more likely in the --

13 Q. In the pictures?

14 A. -- photos for each residence we'd have
15 to go through.

16 Q. And so -- when I say that, you would go
17 through the photos of each residence and look for
18 boards that were -- showed some type of
19 deterioration or damage, and then you'd have to
20 see whether or not you thought that any of the
21 deterioration or damage had to do with the
22 installation methods or not?

23 A. Right.

24 Q. And so at the end of the day,
25 theoretically, we could have a mapping of the

1 house where you can say, This board, you know, may
2 have been affected; this board would -- in my
3 opinion would not be affected, correct?

4 A. Right.

5 Q. And that map on the seven different
6 houses that you've looked at, you would expect to
7 be different, correct, because not all of the
8 boards are damaged, right?

9 A. I believe that's correct. I would have
10 to go through the exercise before I could tell you
11 for sure.

12 Q. Okay. You can't sit here right now and
13 tell me that you can do it to one house and say,
14 That's how it should apply to every single house,
15 without looking at and going through the exercise,
16 right?

17 A. No. And I think what we'd probably look
18 for in -- when we go through the exercise of the
19 seven would be maybe if there is a pattern or a
20 consistency with those, you would have a
21 reasonable degree of certainty as to how the other
22 houses may be. But again, you'd have to do a
23 house-by-house survey.

24 Q. Is it your understanding that some of
25 the boards that you removed from the seven houses

1 With regard to boards that were
2 PrimeTrim boards that were below the fascia or
3 soffit level, there are also some boards that do
4 not show any outward sign of damage or
5 deterioration, that in order to show whether there
6 actually is damage or deterioration, you would
7 have to remove those boards, correct?

8 A. Correct.

9 Q. And from an installation standpoint,
10 from the installer or the builder's standpoint, if
11 a board is not showing any deterioration or
12 damage, there's no reason to replace it, correct?

13 A. I don't know. I mean, we've removed
14 boards that didn't show outward signs of damage
15 and there was significant damage on the back side
16 of the board. So I would feel uncomfortable
17 saying that it doesn't have to be replaced just
18 because you don't see an outward sign. Look at
19 EIFS. How many EIFS houses could you look at from
20 the street and know that there is rotten OSB
21 behind the EIFS? Outwardly, it didn't look like
22 there was damage. But then when you tore into the
23 house, there was significant damage.

24 Q. So you can't tell whether there is
25 damage to the PrimeTrim board that you're

1 referring to itself or damage behind the PrimeTrim
2 board unless you do a destructive testing?

3 A. Correct.

4 Q. Is it possible to pull off a board, look
5 at it, see if there's any damage and put that
6 board back on if there's no damage to it?

7 A. I mean, if you were comfortable that the
8 product would provide an effective service life
9 throughout the rest of the remaining service life
10 of the building and weren't concerned about
11 deterioration in the future. I wouldn't be
12 comfortable with that, but, I mean, someone who
13 was more comfortable with the product could do
14 that.

15 Q. You're not saying that Del Webb, the
16 builder or the installer did anything wrong at Sun
17 City Hilton Head head by deciding to utilize
18 Georgia-Pacific PrimeTrim in Sun City Hilton Head,
19 are you?

20 A. No. I think they relied on the
21 manufacturer information possibly or architect. I
22 don't know who made the recommendation ultimately,
23 but you would have -- in 1994, I don't know that
24 you would have reason to know or understand that
25 there might be a problem with the product.

1 where you got the splash-up problem and there were
2 other issues. But as far as the grade goes, I
3 can't recall damages that were specific to that
4 condition.

5 Q. And from an installation aspect of
6 installing a piece of PrimeTrim along the bottom
7 of a house, at this point, 14 or 16 years into the
8 process, unless that board is showing some type of
9 damage, you would not require the installer to
10 replace the board, would you?

11 A. Are you saying to participate in the
12 replacement cost of that board? It depends on if
13 there's other issues. I don't want to totally
14 take the builder out of the equation. The one
15 that I'm thinking about, there's no damage that I
16 can recall from the ground -- at the base of the
17 board; there is a separate construction issue
18 above the same board that caused damage from
19 above. But if you're looking at one board and
20 it's within 6 inches of grade, there's no other
21 issues, no, I would say it's not a builder issue.
22 There's no damage.

23 Q. So from the builder or installer's
24 standpoint, you're actually looking to see whether
25 the installation method caused damage to the board

1 or otherwise to the house, correct?

2 A. Well, out of completeness of my report,
3 I tried to include that there were places where it
4 was properly installed and improperly installed.
5 And I didn't -- I think that was one of the
6 exercises we talked about earlier, to try to go
7 through each one and do a more specific job
8 delineating, all right, if it was installed
9 improperly, did that result in any of the damages
10 that you observed on the board or not? And that's
11 an exercise we haven't done yet.

12 Q. Just to make sure I understand what
13 you're saying, if the board was installed
14 improperly but shows no damage in your opinion
15 because of that improper installation, you would
16 not fault the builder for the replacement cost of
17 that board?

18 A. I mean, it would still be a technical
19 violation of the code or the application
20 instructions. But if there's no damage, the only
21 reason we would be replacing it is because of
22 another issue, which is the defective trim.

23 Q. In other words, there are several
24 situations if you go and look at a house where
25 there may be some type of installation defect that

1 occurred years ago that didn't ever result in
2 damage and it's not worth repairing that issue 16
3 years later when there's no damage?

4 A. I agree with you. But one thing -- I
5 mean, from an engineering perspective, that's not
6 always the criteria. I mean, structural issues, I
7 mean, you could have a hold-down on a truss that's
8 not attached. There's no damage because it's
9 never been subjected to a code-prescribed mode
10 that sucked the truss off the top of the roof.

11 So there's things that could be code
12 violations and have no damage whatsoever but still
13 require repair. So my only problem with the grade
14 issue is that to the extent that any PrimeTrim is
15 left in place and you've got that technical
16 violation, it still makes it more vulnerable to
17 damage. But if there's no damage right now, I can
18 only tell you there's no damage right now.

19 Q. You would agree that the existence or
20 lack thereof of flashing above window heads and
21 above the base of the houses with regard to the
22 PrimeTrim is obvious whether it was there or not,
23 correct, as --

24 A. Yes, sir.

25 Q. And if it was not there when the house

1 as to MDF trim products specifically?

2 A. I believe that that's correct. I
3 haven't specifically looked, but I'm almost
4 positive that that's true.

5 THE VIDEOGRAPHER: This concludes
6 videotape 3 of Derek A. Hodgin. We are off
7 the record at 1:48 p.m.

8 (The deposition went off the record.)

9 THE VIDEOGRAPHER: This is the beginning
10 of videotape 4 of Derek A. Hodgin. We're back
11 on the record at 1:50 p.m.

12 BY MR. RAWL:

13 Q. Mr. Hodgin, you would agree that the
14 builder and/or installer would not be responsible
15 for any trim board that was installed by someone
16 else after the original construction of the house,
17 correct?

18 A. Well, I agree conceptionally, but I
19 guess it would depend on why it was replaced in
20 the first place. If it was replaced because of an
21 original construction defect and repaired and
22 maybe that construction defect was addressed, it
23 seems like the builder might be on hook for the
24 repair cost. I don't know.

25 Q. I see what you're saying. You would

1 agree that the builder and/or installer would not
2 be responsible for the methods utilized in
3 installing replacement trim on any given house,
4 correct?

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

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

11 A. I agree.

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

16 A. I agree.

17 Q. Is it your understanding that on the
18 houses that you have done destructive testing on,
19 that there have been several trim boards that have
20 already been replaced on those houses?

21 A. I'm not aware of that.

22 Q. Was it your understanding that all of
23 the trim on the seven houses were original to the
24 house?

25 A. That was my understanding. I'm basing

1 that on the fact that when I did the destructive
2 testing, I wasn't told of any replacement -- I
3 would need to know that so that I'm not
4 accidentally taking off boards that have been
5 replaced and looking at somebody else's work. And
6 I don't remember being told of any repairs at that
7 time.

8 Q. You may want to either read the
9 Plaintiffs' depositions or talk to Joe. I'll tell
10 you that several of the Plaintiffs have testified
11 that -- at least a couple of them said that almost
12 the majority of their trim has already been
13 replaced.

14 MR. DaPORE: Object to the form of the
15 question.

16 BY MR. RAWL:

17 Q. I'll let you look at it. I'm not going
18 to make any representations to you.

19 A. Okay.

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

25 A. That's correct.

1 manufactured at a later date than the original.
2 And you may -- I can't recall specifically. I
3 know I've seen stamps on PrimeTrim as to -- you
4 know, there's a computer-generated -- like an ink
5 stamp, and you may get lucky and get a stamp with
6 a date on it. But if it's the reversible, you
7 know, later product, I don't think it was stamped
8 in that fashion.

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

13 A. That's correct.

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

17 A. Correct.

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

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

25 Q. And do you have the ability, just from

1 A. I mean, it doesn't fall into this case,
2 but I have numerous LP cases where I've testified
3 in a similar manner that I have to G-P PrimeTrim.
4 I think I tried to clarify with Mr. Culpepper
5 yesterday that you try to take each product
6 independently. There's a newer LP product that I
7 haven't been asked to evaluate that's called Smart
8 Trim, where they've added -- they've changed the
9 recipe -- I don't know if they changed the recipe
10 but they added zinc borate, so that makes a
11 difference.

12 Q. I'm just making sure that you're
13 limiting your opinions in this case to the
14 PrimeTrim product only?

15 A. Yeah, as far as I know. I have to say
16 it that way because you say there's a bunch of
17 repairs. As far as we know, everything we've
18 looked at to date, whether it's original or
19 repair, was G-P PrimeTrim.

20 Q. For the seven houses you've looked at?

21 A. That's correct.

22 Q. You would agree that any trim product
23 that was used on an addition to a house, an
24 addition that was not built by the original
25 builder or installer, would not be the

1 responsibility of the builder or the installer,
2 correct?

3 A. Correct.

4 Q. With regard to any of the trim that may
5 have been replaced, would you have any way of
6 determining, just by some type of inspection or
7 testing, when that trim board was replaced?

8 A. No. I would only have a few things to
9 go by. One would be if there's records from the
10 homeowner as to when it was replaced. The other
11 would be the physical indicators that I described
12 about the priming or the stamp.

13 Q. In your opinion, the builder or
14 installer was not required to back-prime PrimeTrim
15 boards, correct?

16 A. That's correct.

17 Q. And in your opinion, from the code and
18 the installation instructions, the builder was not
19 required to prime cut ends of the PrimeTrim
20 boards, correct?

21 A. That's correct.

22 Q. If you find some type of water damage
23 behind PrimeTrim on any given house to the OSB or
24 the framing members, what are the possible sources
25 of water that could have caused that damage in any

1 -- as to the product. There may have been another
2 question, but I can't recall at this time.

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

8 A. I think to the extent that there's
9 underlying damage, that would need to be
10 addressed. And I don't know how Mr. Carlson is
11 dealing with that, because it's an unknown issue.
12 What I typically do with contractors in those
13 cases is try to have some estimate, you know, of
14 an allowance for dealing with those types of
15 unknown issues and then a unit cost, so that it
16 could be -- there's two things. It protects the
17 contractor so that he's got a price written down.
18 It also would protect the homeowner. In the event
19 that the damages are worse, you know, the
20 contractor doesn't have you over a barrel and
21 says, Oh, this is much worse; it's going to be
22 \$2,000 more. Instead, you got locked in at a unit
23 price and for you to know how much per square foot
24 an OSB repair is going to cost you. And however
25 many square feet that is, then that's the price.

1 not pulled that board off, that it would not last
2 in its present function for another 16 years?

3 A. Yeah. I would say it would certainly
4 stay on the side of a building for another 16
5 years. What you don't typically see is the damage
6 -- this looks much better on the front side, where
7 it's visible to someone standing on the outside of
8 the house. You don't see this staining or damage
9 until you pull it off. So over the next 14 to 16
10 years, if it got worse, you're not going to see it
11 on the outside of the house.

12 Q. But if it was just the staining that got
13 worse, that would not be an issue with regard to
14 --

15 A. If it didn't get any worse than this, it
16 would likely serve as an effective piece of trim.

17 Q. So just overall, with regard to 137
18 Robert E. Lee, you did several destructive test
19 cuts; is that fair?

20 A. Yes.

21 Q. And some of those cuts showed damage or
22 deterioration to the trim boards, correct?

23 A. Yes, sir.

24 Q. And some of the test locations showed
25 trim that did not manifest any physical compromise

1 at this point?

2 A. That's correct.

3 Q. And did you find any locations on 137
4 Robert E. Lee where there was damage behind the
5 trim, to the OSB or to the framing members?

6 A. I don't see any places where the damage
7 went deeper than the HardiePlank siding. It seems
8 to be at the outboard of the HardiePlank siding.

9 Q. So did you find some locations on 137
10 Robert E. Lee Lane where the deteriorated
11 PrimeTrim and/or the installation of the PrimeTrim
12 caused some deterioration to the HardiePlank that
13 was on the house?

14 A. No. I said the damage is outboard of
15 it. It's discolored, but it's not damaged.

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

20 A. Correct.

21 Q. And that's not to say that there may --
22 if you did additional testing or removed
23 additional trim, that you would not find some type
24 of damage behind the PrimeTrim, meaning to the OSB
25 or the framing members, correct?

1 A. Correct.

2 Q. You just have not done testing. So as
3 we sit here today, you can't testify that there is
4 any damage behind the PrimeTrim at 137 Robert E.
5 Lee, correct?

6 A. Correct.

7 Q. What is the next house?

8 A. 143 Robert E. Lee.

9 Q. That's behind tab 3 in your notebook?

10 A. Yes, sir.

11 Q. If you'll still point out any
12 installation defects you see, even if they're the
13 same type as the ones we saw on the earlier house.
14 We don't have to go through the same discussion
15 again, but just where they are.

16 A. I noticed there is a destructive test on
17 the right elevation of 143 Robert E. Lee, and it's
18 shown through multiple pictures starting with
19 photograph 2. And when I got to photograph 4, 5,
20 13 and 14, I noticed that the back side of the
21 trim is primed. That's a later development in
22 terms of PrimeTrim manufacture. So if your
23 information is accurate about repairs, this could
24 possibly be a repair.

25 Q. And so if this was a repair that was

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CASE NO. 07-CP-07-3166

JIM LANCASTER, NANCY LANCASTER,)
ART HOLLAND, JEANETTE HOLLAND,)
WENDELL TURNER, PHYLLIS TURNER,)
JACK BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND OTHERS)
SIMILARLY SITUATED,)

Plaintiffs,)

vs.)

GEORGIA-PACIFIC CORPORATION AND)
GRAYCO HOME CENTER, INC.,)

Defendants.)

GEORGIA-PACIFIC CORPORATION AND)
GRAYCO HOME CENTER, INC.,)

Third-Party Plaintiffs,)

vs.)

DEL WEBB COMMUNITIES, INC., an)
Arizona Corporation, DEL WEBB)
COMMUNITY MANAGEMENT CO., an)
Arizona Corporation, DEL WEBB)
CORPORATION, an Arizona)
Corporation, DEL WEBB)
CORPORATION, a Delaware)
Corporation, PULTE HOMES, INC., a)
Michigan Corporation, RAZOR)
ENTERPRISES, INC., a Texas)
Corporation, and RAZOR COMPONENT)
SYSTEMS, INC., a South Carolina)
Corporation,)

Third-Party Defendants.)

* * * * *

VOLUME IV VIDEOTAPED

DEPOSITION OF: DEREK A. HODGIN, P.E.

DATE TAKEN: Monday, December 13, 2010

1 and the particular details I would want to have
2 incorporated during the replacement process. Then
3 it would be the contractor to try to make them
4 site specific.

5 Q. Well, isn't part of the problem is that
6 you have to know what is actually wrong with a
7 house before you can do a scope of repair?

8 A. Well, I think on some of the issues that
9 Mr. Culpepper talked about, yes. There's certain
10 things that are going to be unknown until -- even
11 until you do the repair itself. It wouldn't do me
12 any good to even go out to every one of these
13 houses -- even if I went to do a visual survey of
14 every single house, you're still going to have
15 unknowns. It's not like I can predict the amount
16 of framing damage, the amount of sheathing damage,
17 the amount of roof leaks. I'm still going to have
18 some allowances and some guesswork, even if I
19 looked at every single home in Sun City.

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

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

25 Q. Or what other possible construction

1 You did moisture readings; you did destructive
2 testing; you did probing of the sheathing. And
3 there was an allowance for wall sheathing
4 replacement and wall framing replacement.

5 And there was never any further work
6 done to the house prior to a settlement, money
7 received and then going out there -- and sometimes
8 they may have fallen short and didn't get enough
9 to fix the actual damages. Sometimes they might
10 have come out ahead. I don't know.

11 Q. In that situation that you were just
12 discussing, you're talking where a lawsuit has
13 settled before going to a jury and leaving it up
14 to a jury to give a reasonable amount of money to
15 any given homeowner in order to settle --

16 A. I'm sure some of them are jury.
17 Hundreds of them are settled in mediation, where
18 there's just an assumption in terms of what the
19 extent of damage was.

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

25 MS. WATKINS: Objection.

1 A. Did you say cause or cost?

2 Q. Cause.

3 A. Cause. Sure.

4 Q. And as we discussed over the last four
5 days, there's several different possible causes to
6 any damage that could be found behind PrimeTrim,
7 right?

8 A. That's true.

9 MS. WATKINS: Objection.

10 Q. So without actually finding the damage,
11 prior to any type of trial in this case, there's
12 no way for -- well, anybody other than the repair
13 contractor that you're suggesting to go out and
14 determine what the cause of any type of damage is,
15 correct?

16 MS. WATKINS: Objection.

17 A. Again, I'd say even with the repair
18 contractor or even myself going out to the site,
19 in the absence of doing destructive testing --
20 it's unfortunate, but you're not going to have all
21 your questions answered prior to having a repair
22 scope put together. It's not reasonable with 800
23 homes or whatever it is and having, you know, each
24 one looked at individually.

25 Q. Now, with regard to litigation where

1 A. It would be important for the repair
2 scope, yes, and it depends on what it's replaced
3 with too. I don't know if it needs to be replaced
4 again or not.

5 Q. And also, you'd be interested to know
6 what the replacement details are, correct?

7 A. Sure.

8 Q. All of those things that you would need
9 to know in order to do a proper scope of repair,
10 correct?

11 A. I just don't know that my repair scope,
12 no matter how much time I spend on this case, is
13 ever going to be sufficient to satisfy all the
14 details that we've described in this testimony.
15 I'm not going to have a house-by-house, you know,
16 repair scope that's going to say, This repair
17 scope for this house, I only have to do 20 linear
18 feet because the vast majority has been replaced;
19 and then another house I'm going to say, Replace
20 100 percent because none of it's been replaced.
21 It's going to be generic to, replace all the
22 PrimeTrim with HardieTrim. Here is five details
23 that I would recommend for the areas I found to be
24 a problem with these homes. And I would leave it
25 to Mr. Carlson to understand the quantity of the

1 maximum gap width is that still requires caulk
2 and/or flashing.

3 Q. And how is a contractor supposed to know
4 what that maximum gap is, whether it's a half an
5 inch, an inch or 6 inches?

6 MR. CULPEPPER: Object to the form.

7 A. I guess they would need to call
8 Georgia-Pacific.

9 Q. Because based on the review of this
10 document, Exhibit 51 (sic), it's not clear,
11 correct?

12 MR. CULPEPPER: Object to form.

13 A. I would say it could be misinterpreted,
14 yes.

15 Q. To make sure I understand, you agree
16 that this paragraph that we're discussing is
17 unclear, correct?

18 MR. CULPEPPER: Object to form.

19 A. Correct. Just one more time for the
20 record.

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

25 A. I believe so. And again, I didn't see a

1 date on this one. It was actually your questions
2 during the third day that got me thinking about --
3 you were saying, well, if you can't go closer than
4 6 inches, how do you do these doors? And then --
5 I wanted to look into it. And so I came across
6 this, and I thought that would help clarify that
7 issue instead of making it worse. But this is the
8 third set, you're right.

9 Q. So if those are the exhibits -- 55 and
10 then an attachment that's part of Exhibit 54 and
11 now Exhibit No. 151, correct?

12 A. Correct.

13 Q. And you don't know which version of
14 these instructions were available at any given
15 time, correct?

16 A. It was indicated to me in the deposition
17 questions that -- you're going to have to tell me
18 which exhibit it is. The one that's attached to
19 the letter to Del Webb, the 1994 instructions,
20 were actually attached to the letter and mailed to
21 Del Webb. Prior to that indication, during my
22 testimony, I had different years of instructions
23 available to me, and I tried to pick the furthest
24 one back that was closest to the date of
25 construction and I came up with the '93 as the

1 most reasonable, not knowing that there was the
2 '94 that was generated possibly later after the
3 construction started.

4 Q. And how does a contractor, builder or
5 installer receive copies of installation
6 instructions?

7 MR. CULPEPPER: Object to form.

8 Foundation.

9 A. I think I was asked that in a previous
10 day. I don't know specifically. I know we've
11 received them from G-P through litigation. We've
12 also found them -- they used to be available on
13 the Internet. But I don't know specifically when
14 you buy PrimeTrim how the instructions are
15 actually delivered in the field.

16 I think -- and I would have to look to
17 clarify to make sure I'm correct -- I think in the
18 Georgia-Pacific documents I have that they provide
19 copies to the distributors to give to people that
20 are buying the product.

21 Q. Back in 1994 to 1996, you would be
22 surprised if anybody was getting installation
23 instructions from the Internet, right?

24 A. I don't know. I think I was getting
25 stuff from the Internet, but maybe a contractor,

1 it might not be as common.

2 Q. But however a builder or installer would
3 be getting copies of installation instructions,
4 you don't know which of these three instructions
5 were circulated at any given time, correct?

6 A. No. I mean, I don't know specifically.
7 Just what I've been told.

8 Q. So you don't know whether or not, for
9 example, the supplier that was supplying the
10 installer with PrimeTrim was using Exhibit 55,
11 which is the 1993 version, through the year 2000,
12 for example?

13 A. No. I wouldn't know that.

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

18 A. It does.

19 Q. For example, some of the vertical trim
20 members that leave the triangular gap when applied
21 over the siding --

22 A. Right.

23 Q. -- that detail is -- meets the 1993
24 installation instructions without being caulked,
25 correct?

1 A. I don't --

2 Q. That's No. 55. You can look at it, if
3 you need to.

4 A. I don't think so. I think there's a
5 general statement that says -- under the caulking
6 section, I think it says something generic like,
7 you should seal voids where it might allow water
8 to penetrate behind the trim.

9 Q. I'll tell you, I don't think there's
10 anything like that in No. 55, but I'll let you
11 look and see.

12 A. Well, where I thought it was, it's not
13 there. So it must have been in the '94 that we
14 were looking at earlier. Yes, the '94 that was
15 reported to have been attached with the '96 letter
16 to Del Webb includes that generic statement about,
17 "Caulk wherever water may run behind vertically
18 applied trim with long life paintable caulk." I
19 don't see that in the '93 instructions.

20 Q. Just to make sure we're on the same
21 page, with regard to the 1993 instructions which
22 are attached as Exhibit No. 55, that -- those
23 instructions would allow the detail that was
24 utilized at Sun City Hilton Head with the vertical
25 trim members installed over the siding without the

1 little triangular gaps being filled with caulk,
2 correct?

3 A. I don't see anything that requires it,
4 that's correct.

5 Q. So just between Exhibit No. 55, the
6 installation of the vertical trim members meet the
7 installations of 55 but would not meet the
8 installation instructions of 54, correct?

9 A. Correct.

10 Q. And how about 151; would it meet the
11 installation instructions in 151, in your opinion?

12 A. No. 151 has a similar caulk statement
13 that says, "Caulk all gaps where water could enter
14 and cause damage to the building materials or
15 structure." So it's very similar to --

16 Q. Number 54?

17 A. -- Exhibit 54, correct.

18 Q. And with regard to Exhibit No. 151, on
19 the last page of that exhibit, it has a section on
20 flashing, correct?

21 A. Yes, sir.

22 Q. And that statement says, "Flashing: Any
23 horizontal material change on the exterior should
24 be flashed. Flashing is a metal barrier which is
25 applied at intersections between PrimeTrim and

1 siding and over windows, doors, and at roof/siding
2 intersections. Flashing should be installed so
3 that it directs water away from the siding. The
4 proper methods for installing flashing are shown
5 in figure 1."

6 A. Yes.

7 Q. And that's a much better instruction to
8 installers and builders than was provided in
9 Exhibit No. 55 or 54, correct?

10 A. Partly. If you look at figure 1, you
11 might not agree. Figure 1 is an installation of
12 flashing. I think we meant figure 6, and it shows
13 some, I would say, highly undesirable details that
14 omit the presence of any weather barrier or any
15 integration of weather barrier to flashing
16 details.

17 Q. With regard to where to install
18 flashing, Exhibit No. 151 actually states that,
19 "Any horizontal material change on the exterior
20 should be flashed," correct?

21 A. Right.

22 Q. And with regard to 55 and 54, it's just
23 the generic statement that, "Good building
24 practices require flashing at all horizontal
25 material changes," correct?

1 A. Right. To make my point that I was
2 making earlier with Mr. Culpepper, figure 6, not
3 only does it -- not only does it appear to have a
4 very clear detail that has flashing above a window
5 or door head with no weather barrier shown, it's
6 very clear delineation between the metal flashing
7 and the sheathing, and figure 6, the text says,
8 "Caulk where the flashing and siding or other
9 materials meet." So --

10 Q. You disagree with that?

11 A. -- they're damming the flashing from
12 functioning in that direction. So not only was it
13 practice in 1995 to install reverse-lapped head
14 flashing, they're actually telling you to caulk it
15 shut, so it doesn't function in that direction.
16 It would only -- what I was saying earlier, the
17 code intent was to prevent water penetration.
18 That's consistent with what G-P is telling the
19 contractors to do.

20 Q. So while it shows the flashing detail,
21 you think the detail that's shown is a poor detail
22 that should (sic) be used on the houses like the
23 ones at Sun City Hilton Head?

24 A. Say it again.

25 Q. So while the Exhibit 151 actually gives

1 some flashing details, they would not be details
2 that would be good to use on houses such as the
3 ones at Sun City Hilton Head?

4 A. That's correct.

5 Q. And in figure No. 6 in 151 it shows four
6 locations to flash: One is PrimeTrim band board
7 at ground level; one is PrimeTrim band board
8 second story; one is PrimeTrim at openings; and
9 one is fascia flashing. Correct?

10 A. Correct.

11 Q. Now, with regard to Exhibit No. 55, it
12 doesn't give any specific examples of where
13 PrimeTrim should be flashed, correct?

14 MR. CULPEPPER: Which exhibit?

15 MR. RAWL: 55.

16 A. It just has the text statement, "Good
17 building practices require flashing at all
18 horizontal material changes where water may be
19 trapped or run behind the trim or siding." So
20 you could infer from that certain locations, but
21 it doesn't say specifically -- I think in the
22 other exhibit that Mr. Culpepper and I talked
23 about, it actually listed a few places.

24 Q. All right. And Exhibit 151 actually
25 states to use metal flashing at intersections

1 between PrimeTrim and siding over windows and
2 doors and roof/siding intersections, correct?

3 A. Correct.

4 Q. And there are no specific locations in
5 Exhibit 55, correct?

6 A. Correct, other than what I read in the
7 text.

8 Q. And with regard to the attachment to the
9 letter of Exhibit 54, it gives you the same
10 generic statement but then gives -- as No. 55, but
11 then gives you three specific examples of where
12 PrimeTrim should be flashed, correct?

13 A. Correct. You could maybe interpret it
14 as four, windows and door heads; that's two. Or
15 band board separating two stories of building. I
16 guess that would be -- I guess that's right,
17 three.

18 Q. And with regard to the houses at Sun
19 City Hilton Head, there are no band boards that
20 separate two stories of a building, is there?

21 A. Correct. There's not.

22 Q. This does not include what's included in
23 151, which is band board at ground level, correct?

24 A. Correct.

25 Q. And with regard to any house at Sun City

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT) CASE NO. 07-CP-07-3166

JIM LANCASTER, NANCY LANCASTER,
ART HOLLAND, JEANETTE HOLLAND,
WENDELL TURNER, PHYLLIS TURNER,
JACK BENNETT, JOAN BENNETT, ON
BEHALF OF THEMSELVES AND OTHERS
SIMILARLY SITUATED,

Plaintiffs,

vs.

GEORGIA-PACIFIC CORPORATION AND
GRAYCO HOME CENTER, INC.,

Defendants.

GEORGIA-PACIFIC CORPORATION AND
GRAYCO HOME CENTER, INC.,

Third-Party Plaintiffs,

vs.

DEL WEBB COMMUNITIES, INC., an
Arizona Corporation, DEL WEBB
COMMUNITY MANAGEMENT CO., an
Arizona Corporation, DEL WEBB
CORPORATION, an Arizona
Corporation, DEL WEBB
CORPORATION, a Delaware
Corporation, PULTE HOMES, INC., a
Michigan Corporation, RAZOR
ENTERPRISES, INC., a Texas
Corporation, and RAZOR COMPONENT
SYSTEMS, INC., a South Carolina
Corporation,

Third-Party Defendants.

* * * * *

VIDEOTAPED VOLUME III

DEPOSITION OF: THOMAS J. CARLSON

DATE TAKEN: Friday, December 10, 2010

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1 deficiencies of PrimeTrim at Sun City Hilton Head?

2 A. That was brought up in Volume II, and I
3 said that would be a good question for Mr. DaPore.

4 Q. As we sit here today, you are unaware --
5 you have not been asked to do a report, correct?

6 A. On the installation deficiencies, that
7 is correct.

8 Q. Have you been asked to report with
9 regard to what you say is the defective nature of
10 PrimeTrim?

11 A. Not yet.

12 Q. Have you been asked to do any type of
13 report at all?

14 A. No.

15 Q. And until you are asked to do so, you
16 will not, correct?

17 A. Correct.

18 Q. All right.

19 A. I have a hard enough time doing things
20 I'm asked to do.

21 Q. Yes, sir. Is it true that your opinion
22 is that the Georgia-Pacific PrimeTrim product is
23 not suitable for exterior use in South Carolina?

24 A. You paid very good attention the last
25 two volumes of my deposition. Yes.

1 Q. So the answer is yes?

2 A. Yes.

3 Q. And is it your opinion that the
4 Georgia-Pacific PrimeTrim that was utilized at the
5 Sun City Hilton Head location was defective at the
6 time that it left Georgia-Pacific's factory?

7 A. Yes.

8 Q. And is it your opinion that the
9 Georgia-Pacific PrimeTrim product that was
10 utilized at Sun City Hilton Head was defective at
11 the time it reached the builder and/or installer
12 in this case?

13 A. Yes.

14 Q. So prior to installation, it is your
15 opinion that the Georgia-Pacific PrimeTrim product
16 that was utilized at Sun City Hilton Head was
17 defective?

18 A. Correct.

19 Q. And it's also your opinion that the
20 builder and/or installer's handling of the
21 installation of the product did not affect the
22 already underlying defective nature of the
23 Georgia-Pacific PrimeTrim at issue in this case?

24 A. Correct.

25 Q. Within reason, was there something that

1 the builder and/or installer could have done to
2 the PrimeTrim to change the inherently defective
3 nature of the product?

4 A. No.

5 Q. Is it your opinion that the
6 deterioration of the Georgia-Pacific PrimeTrim was
7 caused by its inherently defective nature?

8 A. Your pause kind of threw me for a loop
9 and I lost my train of thought.

10 Q. No problem. I'll repeat the question.

11 A. Thank you.

12 Q. Is it your opinion that the cause of the
13 deterioration of the Georgia-Pacific PrimeTrim
14 product at Sun City Hilton Head is its inherently
15 defective nature?

16 A. Yes.

17 Q. Do you understand what the term
18 "proximate cause" means?

19 A. I do.

20 Q. Can you please explain to me your
21 understanding of that term?

22 A. A proximate cause is an underlying
23 factor that contributes to the end result.

24 Q. Would you agree that the proximate cause
25 means the root or underlying cause of something,

1 determine the cause of any water damage to OSB or
2 framing in a house such as the houses at Sun City
3 Hilton Head, you have to determine the source of
4 the water?

5 A. You lost me on the first part.

6 Q. Isn't it true that in order to determine
7 the cause of any damage -- meaning water damage to
8 either OSB or framing at a house such as the
9 houses at Sun City Hilton Head -- you must
10 determine the source of the water?

11 A. I won't argue with that. I would agree.

12 Q. Yes. Your answer is yes?

13 A. Yes.

14 Q. And why is that?

15 A. Well, you're looking for a cause/effect
16 relationship. So the effect is the damage and
17 you're looking for the cause. The cause -- most
18 probable cause is moisture, so you're looking for
19 the source of the moisture.

20 Q. And is the reason you want to do that so
21 that you actually fix the cause and not just
22 replace the damage without fixing the cause?

23 A. Well, you always need to diagnose before
24 you repair. One of my mottos has been, for
25 decades, diagnose, repair, protect.

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

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

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

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

19 Q. Yes, sir.

20 A. You could have a window leak.
21 Typically, when you have damage to a house like
22 the houses at Sun City, there are multiple causes.
23 It's very rare when you can point to one cause.
24 Typically, there's multiple causes. It could be
25 improper installation of the materials, it could

1 be deficient painting; it could be lack of
2 flashing; it could be a window installation issue;
3 it could be sealant issues, or any combination of
4 those.

5 Q. Can moisture get in at a roof/wall
6 intersection and make it that far down and cause
7 damage?

8 A. Gravity pulls water down. Water will
9 migrate behind HardiePlank because the HardiePlank
10 is mechanically attached to the building. And
11 when it's mechanically attached, where it's
12 attached, the water is not going to flow where the
13 nail is, where the fastener is. It's going to
14 flow in between.

15 Q. So with regard to determining which of
16 the issues that you just stated were possibilities
17 in your answer to the question before last --

18 A. Right.

19 Q. -- how would you determine which was the
20 cause of any given water damage behind PrimeTrim?

21 A. You have to look and see what's there.
22 You have to make a determination. If that's your
23 mission, is to diagnose what's wrong or what
24 resulted in the damage -- I mean, it's not rocket
25 science.

1 the contractor, in your opinion, correct?

2 A. I haven't been asked to form any of
3 those opinions, and I haven't done it. And I
4 haven't done any investigation on installation
5 deficiencies, per se, to date.

6 Q. Have you actually done destructive
7 testing on any of the houses with regard to the
8 PrimeTrim?

9 A. I was there when Mr. Hodgins and Mr.
10 Whitlock and Mr. -- I think Harris, maybe, pulled
11 trim off.

12 Q. So you observed destructive testing?

13 A. Correct.

14 Q. Did you agree with the location where
15 the trim was pulled off on those houses?

16 A. I didn't disagree. Nobody asked me if I
17 agreed. I don't even recall, sitting here today.

18 Q. And as we sit here today, you don't
19 recall whether or not the trim on the houses where
20 you observed destructive testing was installed
21 correctly or not, right?

22 A. No, I don't. I don't recall.

23 Q. Would it be fair to say that before you
24 can give an opinion as to whether the installation
25 methods were proper with regard to PrimeTrim, you

1 would have to inspect the installation on that
2 given house?

3 A. I think that that's fair to say. I --
4 yes, that would be fair to say.

5 Q. When you did or observed the destructive
6 testing on the houses at issue in this case, did
7 you notice any other possible construction defects
8 that are unrelated to PrimeTrim on those houses?

9 A. I don't recall any.

10 Q. When you looked at the Meeder house and
11 you inspected that house, did you notice any
12 problems with that house unrelated to PrimeTrim?

13 A. I don't recall.

14 Q. Are you aware of any other construction
15 defects at any of the several hundred houses that
16 you have either driven by or inspected related to
17 this case that aren't related to PrimeTrim?

18 A. I just keep recalling what Mr. DaPore
19 told me when he first hired me, Just look at the
20 trim. That's what I tried to do.

21 Q. I understand. I just --

22 A. So I tried to put -- as best I could,
23 put blinders on, and only look at the trim issue.

24 Q. In the last deposition, Mr. Culpepper
25 showed you several pictures of some roofing

1 that you don't have pictures of that you've driven
2 by but you have not seen -- done destructive
3 testing at. Okay?

4 A. Sure.

5 Q. Just pick -- how about 102 Honey Hill
6 Road, which is -- can you see where my finger is?
7 I'm going to hand you that back.

8 A. Okay.

9 Q. It's right in here.

10 A. Honey Hill Drive?

11 Q. Yes, sir.

12 A. Okay.

13 Q. And you've not done any type of
14 destructive testing at 102 Honey Hill Drive, have
15 you?

16 A. Correct.

17 Q. And if we assume --

18 A. That's what I recall.

19 Q. And if you assume that that house has
20 HardiePlank and PrimeTrim -- okay?

21 A. Okay.

22 Q. -- can you tell me where on that house
23 the PrimeTrim has deteriorated?

24 A. No.

25 Q. Is it fair to say that you can't tell me

1 where the PrimeTrim has deteriorated on that house
2 until you inspect it?

3 A. That would be fair.

4 Q. And can you tell me on that house where
5 PrimeTrim has been replaced with some other
6 product?

7 A. No.

8 Q. And can you -- is it fair to say that
9 you can't tell me that until you inspect the
10 house?

11 A. That would be fair.

12 Q. And frankly, for that house, but for the
13 assumption, you can't even tell me that there's
14 PrimeTrim on that house, correct?

15 A. Correct.

16 Q. And without inspecting that house, can
17 you tell me that all of the PrimeTrim on that
18 house is original construction?

19 A. Not without inspecting it, no.

20 Q. And do you know whether there are
21 gutters on that house or not?

22 A. That was one thing we did in our survey,
23 but I can't remember if it got expanded from the
24 houses we measured. So I can't tell you that, no.

25 Q. Is it fair to say that there are houses

1 that you drove by, some that had gutters and some
2 that did not, correct?

3 A. I don't recall.

4 Q. And with regard to 102 Honey Hill, you
5 can't tell me the installation methods used with
6 regard to the PrimeTrim on that house without
7 inspecting that house, correct?

8 A. That would be correct.

9 Q. You can't tell me the flashing methods
10 used at 102 Honey Hill with regard to the
11 PrimeTrim without inspecting that house, correct?

12 A. Not at this point in time, no.

13 Q. The answer is, correct, right?

14 A. Or not at this point in time, no.

15 Q. As we sit here right now, you can't tell
16 me the flashing methods that were utilized for the
17 PrimeTrim on 102 Honey Hill, correct?

18 A. Not at this point in time, no, I cannot.

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

22 A. That would be correct.

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

25 A. Correct.

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

4 A. Correct.

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

10 A. Or maybe I could borrow Mr. Williams'
11 magic wand.

12 Q. But you wouldn't do that, would you?

13 A. Probably not.

14 Q. So is the answer to my question yes?

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

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

20 A. I'd have to take it on a case-by-case
21 basis. And I don't recall what 102 Honey Hill
22 looks like.

23 Q. Okay. For any house in Sun City Hilton
24 Head, to determine whether there was damage behind
25 the PrimeTrim, you would actually have to remove

1 the PrimeTrim on that house, correct?

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

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

10 A. I would agree with that.

11 Q. And you would not be able to do that
12 without inspecting that house, correct?

13 A. Correct.

14 Q. Do you know whether or not at 102 Honey
15 Hill the siding was run all the way to the window
16 or not?

17 A. I do not.

18 Q. And you wouldn't be able to know that
19 without inspecting the house, correct?

20 A. What do you mean by the "siding" run all
21 the way to the window? Do you mean the trim board
22 is installed on top of the siding?

23 Q. Let's ask that question. Do you know
24 whether or not the trim board was installed on top
25 of the siding at 102 Honey Hill?

1 A. No.

2 Q. And you wouldn't be able to know that
3 until you inspected the house, correct?

4 A. You might be able to determine that --
5 something short of what you would call an
6 inspection.

7 Q. Well, let me ask you this: You wouldn't
8 know that without actually looking at the house,
9 correct?

10 A. That would be correct.

11 Q. And --

12 A. Unless information were to be furnished.

13 Q. Okay.

14 A. Let's say Mr. Williams' field notes from
15 that house --

16 Q. Okay. Do you --

17 A. -- indicate that, that would be another
18 way of me being able to determine that. Or if Mr.
19 Hodgin made some observations there; or if, by
20 chance -- I don't think -- but if, by chance, Mr.
21 Whitlock or Mr. Byerly went to that house and made
22 some observations. So --

23 Q. So you might be able to --

24 A. Somebody has got to look at it.

25 Q. Right. Okay. With regard to houses at

1 Sun City Hilton Head, isn't it true that you saw
2 some trim locations where the trim was installed
3 over the siding and then some locations where the
4 trim was installed directly to the OSB?

5 A. Both conditions exist. My recollection
6 is the predominant condition is the trim being
7 installed on top of the siding rather than the
8 siding butting to the edge of the trim.

9 Q. Okay. But you've seen both conditions
10 at Sun City Hilton Head?

11 A. I have.

12 Q. And with regard to 102 Honey Hill, you
13 don't know which condition existed at that
14 location without looking at the house, correct?

15 A. Or maybe going back through my field
16 notes and seeing if we made any observations on
17 that.

18 Q. Meaning that whether you noted that or
19 not, when you looked at the house earlier?

20 A. Well, I think that's the first road that
21 Mr. Williams and I looked at. That's what I
22 recall, we -- starting from that end.

23 Q. Well, for any given house at Sun City
24 Hilton Head that has HardiePlank and PrimeTrim,
25 you wouldn't know the installation method until

1 you actually looked at the house, correct?

2 A. Or got notes from somebody else who did.

3 Q. Who looked at the house?

4 A. Right. We certainly know how the trim
5 was installed on the house that Mr. Culpepper
6 showed me that had the gecko. My wife liked that
7 photograph, by the way.

8 MR. CULPEPPER: I aim to please, Mr.

9 Carlson.

10 BY MR. RAWL:

11 Q. So, in general, isn't it true that you
12 can't tell me the proximate cause of the damage
13 behind PrimeTrim on any house at Sun City Hilton
14 Head without doing testing or observations of that
15 house, correct?

16 A. Well, I thought we already established
17 that one of the proximate causes of the damage to
18 the PrimeTrim is inherent deficiencies.

19 Q. Right. I'm asking about damage behind
20 the PrimeTrim.

21 A. Okay. So --

22 Q. I mean damage behind the PrimeTrim as
23 opposed to the PrimeTrim itself deteriorating.

24 A. Can you ask me that question again,
25 please?

1 Q. Yes. I'll be happy to. Isn't it true,
2 Mr. Carlson, that you can't tell me the proximate
3 cause of any damage behind the PrimeTrim on any
4 house at Sun City Hilton Head without doing
5 destructive testing or some other observations
6 with regard to that house, correct?

7 A. That would be correct.

8 Q. Do you know how the window is flashed
9 behind the siding at 102 Honey Hill?

10 A. I do not.

11 Q. And how would you determine that?

12 A. You'd have to take the trim off, or do a
13 visual observation. It depends on how it's put
14 together. You might be able to do it visually.
15 You might have to take a piece of trim off.

16 Q. How would you determine whether that
17 window was a self-flashing window?

18 A. I don't believe that self-flashing
19 windows exist.

20 Q. Are you familiar with the term in the
21 industry, self-flashing window?

22 A. I am.

23 Q. And can you describe to me what your
24 understanding of what a self-flashing window is in
25 the industry?

1 PrimeTrim and/or any damage related to
2 installation deficiencies of PrimeTrim, correct?

3 A. I believe that to be correct. I think
4 in Volume I my task got expanded, but not to that
5 point.

6 Q. With regard to the testing you've
7 observed so far, have you seen any water damage or
8 consequential damage behind PrimeTrim that you
9 believe to be unrelated to the -- or any
10 installation deficiency of the PrimeTrim?

11 A. You'll have to repeat that for me.

12 Q. In this case, have you seen any water
13 damage behind PrimeTrim that you believe to be
14 unrelated to PrimeTrim installation?

15 A. I don't recall any.

16 Q. Have you seen any water damage behind
17 PrimeTrim that you believe to be unrelated to
18 PrimeTrim's installation deficiencies?

19 A. I don't recall.

20 Q. And you don't recall one way or the
21 other?

22 A. That would be true. I don't recall one
23 way or the other.

24 Q. With regard to the cause of any water
25 damage to OSB or framing members that may be

1 located behind PrimeTrim, is it your experience
2 that often experts disagree as to the cause of
3 water damage?

4 A. I totally agree on that.

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

12 A. That would be an anticipated event.

13 Q. Frankly, you would be surprised if that
14 didn't happen, correct?

15 A. That would be correct.

16 Q. With regard to the houses on that list
17 -- on your map, excuse me, that was marked as
18 Exhibit 11 to Derek Morgan's deposition, do you
19 know the -- how many different trim installers
20 were involved in those houses?

21 A. I do not.

22 Q. Do you know the age range, meaning the
23 dates of construction of those houses? Let me
24 just ask you this, is it your understanding that
25 those houses were constructed between 1994 and

1 2002?

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

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

7 A. Give me those dates again.

8 Q. 1994 to 2002.

9 A. There would be different building codes,
10 yes.

11 Q. Do you know which ones they would be?

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

15 Q. So it may or may not include the 2000
16 IRC?

17 A. That's correct.

18 Q. And as we discussed earlier, there's
19 several different house models that were built at
20 Sun City Hilton Head during that time period?

21 A. Correct.

22 Q. And is it your experience that there may
23 be different versions of manufacturers and
24 installation instructions that would be in use for
25 such things as windows, siding, trim board over an

1 A. I can't recall. I think at some point
2 in time the board got pulled off, but I don't
3 think it was the first or second trip that I made
4 to Mr. Meeder's house.

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

7 A. Correct.

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

13 A. I think that's correct.

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

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

22 Q. And to know whether there was any damage
23 at all, you would have to remove all of the
24 PrimeTrim?

25 A. Not to know whether there was any damage

1 deteriorated, correct?

2 A. I'm not sure I understand your question.

3 Q. What I'm asking you is --

4 A. It's another hypothetical, right?

5 Q. I guess it could be considered a
6 hypothetical.

7 A. Because I have looked at other houses
8 besides the class reps'.

9 Q. Well, let's say that there is another
10 house at Sun City Hilton Head that's not on that
11 list or your map that has HardiePlank and
12 PrimeTrim.

13 A. Okay.

14 Q. Okay? And that you've not seen it.

15 A. Okay.

16 Q. Okay? Isn't it true that by just
17 looking at or doing destructive testing on the
18 named Plaintiffs' houses, you can't tell me
19 whether that house has any deteriorated PrimeTrim?

20 A. The house I haven't seen?

21 Q. Correct.

22 A. No. I don't have any magic way of
23 knowing that.

24 Q. Okay. And that house you've not seen,
25 you can't tell me whether that house -- the

1 PrimeTrim on that house has been flashed
2 correctly, just by looking at the named
3 Plaintiffs' houses, correct?

4 A. I think that would be correct.

5 Q. And you also can't tell me whether there
6 is any damage behind the PrimeTrim on that house,
7 correct?

8 A. On a hypothetical house, that would be
9 correct.

10 Q. And if there is any damage behind the
11 trim on that hypothetical house, you can't tell me
12 the proximate cause of that damage, correct?

13 A. On a hypothetical house, that would be
14 correct.

15 Q. And you can't tell me the installation
16 methods that were used on the hypothetical house
17 just by looking at the installation methods that
18 were utilized on the four named Plaintiffs'
19 houses, correct?

20 A. That would be correct.

21 Q. And on the hypothetical house that
22 you've not seen, you would not be able to tell me
23 which PrimeTrim members or boards had been
24 replaced just by looking at the four named
25 Plaintiffs' houses, correct?

1 A. On the hypothetical house, that would be
2 correct.

3 Q. And in general, just by looking at the
4 four named Plaintiffs' houses, you can't tell me
5 anything about the installation or damage related
6 to PrimeTrim on the hypothetical house?

7 A. Let me just make sure I'm on the same
8 page with you.

9 Q. Yes, sir.

10 A. I've only looked at the four houses of
11 the class reps, not looked at any other houses --

12 Q. Correct.

13 A. -- and then we have this hypothetical
14 house at Sun City that I haven't looked at?

15 Q. Right. That has PrimeTrim and
16 HardiePlank.

17 A. I don't think I can tell you anything
18 about that house --

19 Q. Right.

20 A. -- that I haven't seen. The only thing
21 with any high degree of probability I could
22 probably tell you about that hypothetical house
23 was it's one story. I couldn't go a whole lot
24 beyond that.

25 Q. I believe you testified earlier that

1 caulking joints or failed sealant could affect the
2 rate of deterioration of PrimeTrim, correct?

3 A. Correct.

4 Q. And you would agree that maintaining --

5 A. Or lack of caulking.

6 Q. You would agree that maintaining those
7 sealant joints is a part of homeowner maintenance,
8 correct?

9 A. Correct.

10 Q. And if the joints are -- on any given
11 house between PrimeTrim members have not been
12 maintained and water is getting in there, that may
13 accelerate the deterioration of PrimeTrim,
14 correct?

15 A. That possibility exists.

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

19 A. It could be.

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

22 A. That would be one maintenance issue.

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

25 A. Depending on how the joints are

1 configured, that would be correct.

2 Q. Configured like the ones that you've
3 seen in this case at Sun City Hilton Head?

4 A. I didn't really focus on the sealant
5 joint issues.

6 Q. So you do not know where the caulk
7 joints are located with relation to PrimeTrim on
8 any of the houses that you've inspected at Sun
9 City Hilton Head?

10 A. I don't recall, sitting here today.

11 Q. In the Bluffton area, how often do caulk
12 joints normally need to be replaced?

13 A. Or Okatie?

14 Q. How about Sun City area?

15 A. Okay. It depends on what the sealant
16 joint is. Is it an engineered joint, or is it a
17 painter's joint? What type of sealant is it? It
18 could be anywhere from one to two years to in
19 excess of ten years.

20 Q. For these houses that you looked at that
21 were 14 to 16 years old, at this point, you would
22 agree that those caulk joints should have been
23 replaced at least once at this point, correct?

24 A. Maybe.

25 Q. What should a homeowner be looking for

1 projects that I did while they were in litigation
2 where we did the repairs where we gave a fixed
3 price. We gave a fixed fee in a couple. We never
4 gave a fixed price.

5 Q. You mean you did the repairs first?

6 A. Oh, no. We did the repairs during the
7 litigation. That's not first.

8 Q. You did the repairs before the case went
9 to a jury?

10 A. Yes.

11 Q. And you said to the jury, This is how
12 much we actually charge to do this repair?

13 A. Never got to talk to the jury. It
14 always settled. Oh, one did go to the jury on one
15 subcontractor that didn't settle, but we just
16 talked about what it cost to do the repair. We
17 didn't talk about what the cost was -- we didn't
18 have a fixed price on that house either. Well,
19 maybe we did. I think we did, but there were -- a
20 lot more damage than what was anticipated. But
21 that repair was not done until after the
22 litigation was over, except for that one
23 subcontractor. Good ole' Mr. Moore.

24 Q. For the one house that we're talking
25 about, in order to give an accurate price to

1 repair damage behind the PrimeTrim, you would have
2 to know what that damage was first, correct?

3 A. I think that would be correct.

4 Q. We were just talking about the Bennett
5 house a minute ago. Is there any trim on that
6 house that has not been replaced now?

7 A. I don't know. I don't have a clue. I
8 do not recall.

9 Q. How long did it take you to map out the
10 trim estimates that were marked as --

11 MR. CULPEPPER: 143 to 148.

12 BY MR. RAWL:

13 Q. -- yeah, the 143 to 148?

14 A. The lineal footage?

15 Q. Yes, sir.

16 A. I don't know. I could find out.

17 Q. Does it take more than -- if you're
18 on-site, does it take more than four hours per
19 house?

20 A. Oh, no. It's less than that. I think
21 Ted Whitlock and Ted Byerly -- I think they
22 measured all six houses in one day.

23 Q. That's two of them working together?

24 A. Correct.

25 Q. So two people could do about six houses

1 at them from a different angle, but if there's
2 some overlap, forgive me.

3 A. That's okay.

4 Q. Is it your opinion that if PrimeTrim is
5 installed in accordance with the installation
6 instructions, the code and any applicable industry
7 standards, that it will still fail?

8 A. Yes.

9 Q. And it will fail because PrimeTrim, in
10 your opinion, is inherently defective?

11 A. That word has been used a lot. And
12 another phrase that's been used is it's
13 inappropriate for installation in coastal South
14 Carolina.

15 Q. Okay. It's inherently defective in how
16 it was used in this project?

17 A. I think I could agree with that.

18 Q. Would you agree with me that the manner
19 of installation is irrelevant as to the question
20 of whether or not you need to, in your opinion,
21 replace all of the PrimeTrim?

22 A. Correct.

23 MR. CULPEPPER: Object.

24 Q. I was going to ask you some questions
25 about install, but I don't think you could -- in

1 your testimony, you have mentioned some issues
2 concerning installation defects?

3 A. I have.

4 Q. Some.

5 A. Some.

6 Q. But you can't tell me what defect exists
7 on each house and how often that defect occurred,
8 right?

9 A. That's correct. Because I wasn't asked
10 to look at it.

11 Q. Exactly.

12 A. And I'm not trying to be defensive.

13 Q. Right. I understand.

14 A. I'm just trying to remind everybody that
15 my mission -- my mission statement has been
16 modified now two consecutive depositions in a
17 row -- or maybe the first and third.

18 Q. You're not --

19 A. But these events are triggering
20 expansion of my mission statement.

21 Q. And even as to just the four named
22 Plaintiffs' houses, you can't identify today the
23 extent of any consequential damages that have
24 resulted because of any improper installation of
25 the trim, can you?

1 A. That would be true.

2 Q. Tom, a little different variation on the
3 question, I think, isn't it true that based on
4 your experience and training, all you need to know
5 is that PrimeTrim MDF is installed at the site to
6 know that trim needs to be replaced; that's all
7 you need to know?

8 A. I think I would agree with that.

9 Q. And you've been -- asking (sic)
10 questions of Mr. Rawl, you guys went into your
11 estimate to some extent, and I want to make sure
12 that I understand what you were saying. Your
13 linear foot price, it includes some amount of
14 replacement of rotted OSB. How did you come up
15 with that price of, what was it, 25 to \$35 a
16 linear feet?

17 A. I don't recall. And I didn't have a
18 backup sheet to it. I just thought through -- I
19 mean, it basically is intended to be a turnkey
20 price, start to finish. And I went through all of
21 the issues or all of the tasks that would need to
22 be performed, and then I went through a list,
23 probably not as exhaustively as I have now in
24 front of me, of the detail problems that are going
25 to occur. In order to install flashing where

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
)
 COUNTY OF BEAUFORT) CASE NO. 07-CP-07-3166

JIM LANCASTER, NANCY LANCASTER,)
 ART HOLLAND, JEANETTE HOLLAND,)
 WENDELL TURNER, PHYLLIS TURNER,)
 JACK BENNETT, JOAN BENNETT, ON)
 BEHALF OF THEMSELVES AND OTHERS)
 SIMILARLY SITUATED,)

Plaintiffs,)

vs.)

GEORGIA-PACIFIC CORPORATION AND)
 GRAYCO HOME CENTER, INC.,)

Defendants.)

GEORGIA-PACIFIC CORPORATION AND)
 GRAYCO HOME CENTER, INC.,)

Third-Party Plaintiffs,)

vs.)

DEL WEBB COMMUNITIES, INC., an)
 Arizona Corporation, DEL WEBB)
 COMMUNITY MANAGEMENT CO., an)
 Arizona Corporation, DEL WEBB)
 CORPORATION, an Arizona)
 Corporation, DEL WEBB)
 CORPORATION, a Delaware)
 Corporation, PULTE HOMES, INC., a)
 Michigan Corporation, RAZOR)
 ENTERPRISES, INC., a Texas)
 Corporation, and RAZOR COMPONENT)
 SYSTEMS, INC., a South Carolina)
 Corporation,)

Third-Party Defendants.)

* * * * *

VOLUME IV

DEPOSITION OF: THOMAS J. CARLSON

DATE TAKEN: Wednesday, January 26, 2011

1 the three class representative homes.

2 Q. Earlier in the deposition we were
3 talking about a house on Falmouth Court where you
4 said that the siding was abutted to the vertical
5 PrimeTrim members.

6 A. We talked about more than one house in
7 the Falmouth Court area where the corner trim --
8 to use a term we coined, where the corner trim was
9 flush.

10 Q. So as we sit here today, are you aware
11 that there are houses at Sun City Hilton Head
12 where vertical trim is applied over the siding and
13 some where the siding is flush with the vertical
14 trim, correct?

15 A. Where the siding abuts the vertical
16 trim, that is correct.

17 Q. And you can't tell me which houses are
18 which without doing an inspection of the house,
19 correct?

20 A. I think I can. I think Mr. Whitlock
21 filled those sheets out I e-mailed to Catherine
22 two years ago and said, Have Ted take these with
23 him and fill them out. We talked about those
24 earlier this morning. They are part of --

25 Q. In other words, you have to inspect the

1 house or see a house to know whether the trim was
2 installed over the siding or whether the siding
3 abutted the trim, correct?

4 A. At least a drive-by. And those
5 documents are contained in the book -- the
6 three-ring binder that I prepared following the
7 third day of my deposition, when I assembled
8 documents from different three-ring binders into
9 one three-ring binder, to make it easy on you all.

10 Q. And with regard to -- I believe it was
11 the address 28 Fenwick that you looked at, you
12 found at least three construction defects that you
13 believe were related to the roof installation?

14 A. Inadvertently, yes. I picked up the
15 shingle to see if there was damage to the trim
16 when the metal drip edge was omitted. And in
17 fact, I did. And when I picked the shingle up, I
18 wasn't documenting other construction deficiencies
19 intentionally. It was inadvertent.

20 Q. But as we sit here today, those three
21 issues that you found with regard to 28 Fenwick,
22 which are no felt under the shingles --

23 A. At three locations, that's correct.

24 Q. -- no metal drip edge, and that the
25 plywood under the shingles was too short, and you

1 photograph that showed a fracture in the siding,
2 and I couldn't explain why it was there. I didn't
3 take that photograph. And there appeared to be
4 another piece --

5 Q. There appears to be another piece --

6 A. -- behind it.

7 Q. Do you know whether that was original
8 construction of the house?

9 A. I have no idea. That means I don't
10 know.

11 Q. Would you need to do more investigation
12 on that house to determine why that HardiePlank
13 cracked?

14 A. If Mr. DaPore asked me to, I would.

15 Q. But you don't know why it cracked at
16 this point, right?

17 A. That's still true.

18 Q. Is it fair to say that, to your
19 knowledge, there are houses at Sun City Hilton
20 Head that have PrimeTrim trim and HardiePlank
21 siding up that have construction defects that are
22 unrelated to the installation of the PrimeTrim?

23 A. Your question just totally was over my
24 head.

25 Q. I apologize.

1 A. That's okay. It's been a long day.

2 Q. And I know that I'm a little nasally.

3 MR. RAWL: Can you read the question
4 back, please?

5 THE WITNESS: That wasn't what I was
6 hoping for.

7 (The court reporter read back the
8 previous question.)

9 A. Yes.

10 MR. RAWL: I think that I'm finished.
11 Can you give me just a minute?

12 THE WITNESS: Sure.

13 MR. RAWL: If anybody else wants to ask
14 questions while I look at my notes, that's
15 fine.

16 MR. ELLIOTT: I don't. I think I've
17 discovered all I need to cover.

18 MR. BRADLEY: I don't have any questions
19 either.

20 (The deposition went off the record.)

21 MR. DaPORE: The depo is complete for
22 class certification issues. Good night.

23 (The deposition concluded at 5:00 p.m.)

24

25

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CASE NO. 07-CP-07-3166

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ENTERPRISES, INC., a Texas)
Corporation, and RAZOR COMPONENT)
SYSTEMS, INC., a South Carolina)
Corporation,)

Third-Party Defendants.)

* * * * *

VOLUME II VIDEOTAPED
DEPOSITION OF: DR. ANDY W.C. LEE

DATE TAKEN: Wednesday, November 17, 2010

1 First of all, I want to confirm what your general
2 opinion is. Isn't it true that it's your opinion
3 that at the time PrimeTrim left Georgia-Pacific's
4 factory that it was not suitable for use as an
5 exterior building component?

6 A. Yes.

7 Q. And isn't it true, in your opinion, that
8 no matter how PrimeTrim is installed on the
9 exterior of a house, your opinion is that the
10 PrimeTrim will prematurely fail?

11 A. That's correct.

12 Q. And it's your opinion that there's
13 nothing that the builder or installer could do to
14 make PrimeTrim suitable for exterior use?

15 A. That's correct.

16 Q. So in your opinion, even if a builder or
17 installer installs PrimeTrim in the best possible
18 way on the exterior of a house, your opinion is
19 that the trim will still prematurely fail,
20 correct?

21 A. That's correct. Unless -- unless you
22 can make the trim board totally seal with no water
23 coming from the outside to the trim board.

24 Q. And how would you do that?

25 A. You would have to seal all six sides of

1 each piece of trim board.

2 Q. Are you talking about sealing with
3 something other than a normal primer or paint?

4 A. That's correct.

5 Q. Something more than that?

6 A. Right. Like a highway sign is one
7 example, highway signs.

8 Q. Oh, like some kind of very high tech
9 product that would actually be like dropping the
10 PrimeTrim into some sealant, glue or something?

11 A. Right. You can drop it into PVC
12 coating, totally coat it on six sides. And then
13 when you install it, the -- you either use nail or
14 screws and you have to seal that again, to make
15 sure there's no water or humidity goes into the
16 trim board.

17 Q. But using standard installation
18 practices, there would not be a way to make the
19 PrimeTrim product suitable for an exterior use, in
20 your opinion?

21 A. That's correct.

22 Q. So with regard to your opinion that the
23 PrimeTrim is not suitable for exterior use, the
24 installation methods used by the builder/installer
25 are irrelevant, correct?

1 A. That's correct. The standard
2 installation procedure in -- on the job site just
3 could not keep that trim board totally dry.

4 Q. And in order for the trim board to be
5 successful on the exterior of a house, it would
6 have to be kept completely dry, away from water
7 and humidity; is that correct?

8 A. That's correct.

9 Q. Which is part of the reason why the
10 PrimeTrim, in your opinion, is not suitable for
11 exterior use?

12 A. That's correct.

13 Q. Is it true, in your opinion, that
14 Georgia-Pacific should never have marketed
15 PrimeTrim to builders as an exterior product?

16 A. In my opinion, that's the case.

17 Q. And in your opinion, priming and
18 painting all sides and ends of the PrimeTrim is
19 not sufficient to protect it from moisture such as
20 to make the product suitable for exterior use,
21 correct?

22 A. That's correct, unless your prime on all
23 four sides are waterproof.

24 Q. Something more than normal primer and
25 paint?

1 A. It will continue for a few years. If
2 there's no swelling, no crack, no paint peeling,
3 no water get in or get behind the trim board, I
4 think they will be able to sustain for a few more
5 years.

6 Q. So in summary, you would agree that it
7 is reasonable to replace some but not all of the
8 PrimeTrim on these houses, depending on the
9 present condition of the PrimeTrim boards,
10 correct?

11 A. I believe so, for right now.

12 Q. And you don't have any opinion with
13 regard to the proper way to install a PrimeTrim
14 board on a house at Sun City Hilton Head, do you?

15 A. I have no opinion. I'm not familiar
16 with standard installation procedure.

17 MR. RAWL: Thank you very much, Dr. Lee,
18 for answering my questions.

19 MR. PELZER: No questions.

20 MR. PLEXICO: No questions.

21 MR. CULPEPPER: Just a very few.

22 MR. DaPORE: I'm not going to ask any
23 questions.

24 REDIRECT EXAMINATION

25 BY MR. CULPEPPER:

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
)
 COUNTY OF BEAUFORT) CASE NO. 07-CP-07-3166

JIM LANCASTER, NANCY)
 LANCASTER, ART HOLLAND,)
 JEANETTE HOLLAND, WENDELL)
 TURNER, PHYLLIS TURNER, JACK)
 BENNETT, JOAN BENNETT, ON)
 BEHALF OF THEMSELVES AND)
 OTHERS SIMILARLY SITUATED,)

Plaintiffs,)

vs.)

) VIDEO DEPOSITION OF:

GEORGIA-PACIFIC CORPORATION)
 AND GRAYCO HOME CENTER, INC.,)

) JACK BENNETT

Defendants.)

-----)
 GEORGIA-PACIFIC CORPORATION)
 AND GRAYCO HOME CENTER, INC.,)

3rd Party plaintiffs,)

vs.)

DEL WEBB COMMUNITIES, INC., an)
 Arizona Corporation, DEL WEBB)
 COMMUNITY MANAGEMENT CO., an)
 Arizona Corporation, DEL WEBB)
 CORPORATION, an Arizona)
 Corporation, DEL WEBB)
 CORPORATION, a Delaware)
 Corporation, PULTE HOMES,)
 INC., a Michigan Corporation,)
 RAZOR ENTERPRISES, INC., a)
 Texas Corporation, and RAZOR)
 COMPONENT SYSTEMS, INC., a)
 South Carolina Corporation,)

3rd Party Defendants.)

* * * * *

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* * * * *

VIDEO
DEPOSITION OF: JACK BENNETT
DATE TAKEN: April 2, 2009
TIME: 9:13 A.M.
PLACE: Mullen Wylie, LLC
70 Arrow Road
Hilton Head Island, South Carolina

REPORTED BY: CRISTIN M. KELLY
Registered Professional
Reporter and Notary Public

* * * * *

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CHARLESTON, SOUTH CAROLINA 29413-1784

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Carolina-Reporting.
com

1 A. That's correct.

2 Q. How -- how much earlier --

3 A. This is not a bill from the paint company.

4 Q. Okay. Who is -- what is it?

5 A. This is a bill from the painter.

6 Q. Okay. Fair enough. Fair enough. I was not
7 careful with my language.

8 But I think my question for you, Mr. Bennett,
9 is if you received the bill in October of 2005, when do
10 you think the painting actually occurred? That is, how
11 much earlier before the bill do you think the actual
12 painting took place?

13 A. The painting took place just prior to that
14 day. When they finished painting, they gave me this
15 bill and I paid it.

16 Q. Okay. And I think your testimony was that at
17 this point, you knew the problem was spreading even
18 further and you knew you needed to check to see just how
19 far; is that right?

20 A. That's correct.

21 Q. Now, I believe your testimony is that it -- in
22 October of 2005, the trim was failing in multiple places
23 both around windows and the small pieces of trim on the
24 columns, right?

25 A. Yeah.

1 Q. Did you do anything to investigate why this
2 was happening?

3 A. I -- not specifically. Not specific, other
4 than the knowledge that it was failing. I had my house
5 inspected in 2006 and I think you have a copy of that
6 inspection report.

7 Q. Yes, sir.

8 A. And at that time, there were several other
9 areas identified by the inspector as being poor trim
10 material.

11 Q. Okay. And I take it after this inspection in
12 2006, you did take some action to repair and replace it?

13 A. That's right. I paid a person to replace some
14 of the boards.

15 MR. CULPEPPER: Okay. So let's -- are we on 18?

16 (Defendants' Deposition Exhibit No. 18 marked
17 for identification.)

18 BY MR. CULPEPPER:

19 Q. So, Mr. Bennett, have you had a chance to look
20 at that exhibit?

21 A. That's correct.

22 Q. And we were talking about an inspection of
23 your home that you undertook in 2006, right?

24 A. That's correct.

25 Q. Why did you have your home inspected in 2006?

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS)
 14TH JUDICIAL CIRCUIT)
 COUNTY OF BEAUFORT) CASE NO. 07-CP-07-3166

JIM LANCASTER, NANCY LANCASTER,)
 ART HOLLAND, JEANNETTE HOLLAND,) WENDELL TURNER, PHYLLIS TURNER,)
 JACK BENNETT, JOAN BENNETT, ON) BEHALF OF THEMSELVES AND OTHERS)
 SIMILARLY SITUATED,))
 Plaintiffs,))

vs.)
)
 GEORGIA-PACIFIC CORPORATION AND) GRAYCO HOME CENTER, INC.,)
) Defendants.)

_____) GEORGIA-PACIFIC CORPORATION AND/OR)
 GEORGIA-PACIFIC, LLC,))
 3rd Party Plaintiffs,))

vs.)
)
 DEL WEBB COMMUNITIES, INC., an) Arizona Corporation, DEL WEBB)
 COMMUNITY MANAGEMENT CO., an) Arizona Corporation, DEL WEBB)
 CORPORATION, an Arizona Corporation,) DEL WEBB CORPORATION, a Delaware)
 Corporation, PULTE HOMES, INC., a) Michigan Corporation, RAZOR)
 ENTERPRISES, INC., a Texas) Corporation, and RAZOR COMPONENT)
 SYSTEMS, INC., a South Carolina) Corporation,)
) 3rd Party Defendants.)

* * * * *

1 VIDEOTAPED DEPOSITION OF: ART HOLLAND

2 DATE TAKEN: Thursday, February 26, 2009

3 TIME: 9:30 a.m.

4 PLACE: 335 North Kings Highway

5 Charleston, SC

6 REPORTED BY: TERI L. SAMPSON, RPR,
and Certified
7 Live Note Reporter

Notary Public

8 * * * * *

9 POST OFFICE BOX 21784

10 CHARLESTON, SOUTH CAROLINA 29413-1784

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25

1 Q And you don't know what they had to pay to
2 take care of that?

3 A I had no -- no. I had no record of it.

4 Q At the time, was it considered a big deal?

5 A No. It was just -- when an inspector looks
6 at a house to be sold, there's four or five little
7 items that have to be taken care of. It was one of
8 them.

9 (Discussion off the record.)

10 (Exhibit 1 marked.)

11 BY MR. CULPEPPER:

12 Q All right. I've -- Mr. Holland, I've marked
13 the first exhibit in this deposition, which appears to
14 be a customer care department form with Sun City Del
15 Webb marked as Exhibit 1. Do you see that?

16 A Yes.

17 Q Do you recognize that?

18 A Yes.

19 Q Can you tell me what it is?

20 A Well, it's a piece of paper that you go to
21 Pulte for service, customer service, and you fill out
22 and give to them.

23 Q And the -- the writing that I see under Item
24 No. 1, is that yours?

25 A That's mine.

1 Q It says, "The vertical planks around windows
2 is rotting. What is the material they are made from,
3 who sells it, who can fix it?" Did I read that right?

4 A Right.

5 Q Was this the first time you personally
6 noticed problems with the deterioration or rotting of
7 the trim boards in your home?

8 A Yes.

9 Q How long before you filled out this service
10 form had you actually noticed it?

11 A I do not remember.

12 Q Close in time or -- or way before --

13 A Close in time.

14 Q Were you the first to notice it, or was it
15 your wife?

16 A Probably my wife.

17 Q Do you recall any discussions about the first
18 time you noticed --

19 A She told me to get my you know over there and
20 get it taken care of.

21 MRS. HOLLAND: That's right.

22 BY MR. CULPEPPER:

23 Q Which windows, which windows were you
24 experiencing problems with when you filled out this
25 form?

1 which I believe was sometime in May of 2003?

2 A May be. I'm not -- I can't confirm those
3 dates.

4 Q Well, let me see if I can drill down a little
5 bit further on that. You're pretty confident, I take
6 it, that you talked to Grayco only after you made this
7 first complaint in March of 2003 to Sun City Del Webb?

8 A Yes.

9 Q And you're also pretty sure that you spoke to
10 Grayco and had a conversation where they identified
11 your trim as PrimeTrim, Georgia-Pacific's product,
12 before you actually made the warranty claim to
13 Georgia-Pacific?

14 A Yes.

15 Q So we can book end the first time that you
16 were on notice between those two events, your complaint
17 to Sun City in March 2003 and the actual making of a
18 warranty claim with Georgia-Pacific?

19 A Yes.

20 Q Okay. And I think I may have already asked
21 you this, Mr. Holland, but I've already forgotten. As
22 to the board you were complaining about in March of
23 2003, as referenced in Exhibit 1, how many total boards
24 did you think were affected?

25 A There was a vertical board for sure, and I --

1 happened. I had another page that had other later on,
2 but that was the first -- when this came about, I
3 thought I better look up some records, and I went
4 through -- back through the checkbook and found that I
5 paid Don Mack \$140 on the 21st of November. We had the
6 house power washed and caulking done on the 27th of
7 September. And then we had this Dave Rosenbaum, who
8 was our carpenter, replace rotted wood, and he did some
9 more in '08.

10 Q Is this last page of Exhibit 3 intended to be
11 your notes as to all your out-of-pocket expenses that
12 relate to having to repair or replace trim that's
13 rotted or deteriorated in your home?

14 A That I recall at the time that this was put
15 together.

16 Q Well, as you sit here now, is this a
17 comprehensive list, as best you can tell, of all of
18 your out-of-pocket expenses associated with repairing
19 or replacing the rotting or deteriorating trim in your
20 home?

21 A If that includes what was done during the
22 painting, yes, that -- these three statements from the
23 painter. That's what he did.

24 Q And if you'll look at Exhibit 3 that I handed
25 you, I think those statements are on the front of it?

1 A Right.

2 Q And I believe that the \$400 charge from
3 11/15/07 is on there.

4 A Right.

5 Q So having consulted the records available to
6 you, you believe the last page of Exhibit 3 is a
7 complete list of all the out-of-pocket expenses or
8 damages you think that you've suffered as a result of
9 having to repair or replace the deteriorating trim in
10 your home?

11 A To date.

12 Q To date?

13 A Probably.

14 Q Can you think of anything missing as you sit
15 here now?

16 A Not right now.

17 Q Okay. So returning now to the -- to the
18 warranty process in Exhibit 2, do you have Exhibit 2 in
19 front of you, Mr. Holland?

20 A Yes.

21 Q The top page of Exhibit 2 is the letter from
22 Georgia-Pacific regarding your warranty claim, right?

23 A Right.

24 Q And you recall receiving this letter?

25 A Yes.

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CASE NO. 07-CP-07-3166

JIM LANCASTER, NANCY)
LANCASTER, ART HOLLAND,)
JEANETTE HOLLAND, WENDELL)
TURNER, PHYLLIS TURNER, JACK)
BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND)
OTHERS SIMILARLY SITUATED,)

Plaintiffs,)

vs.)

) VIDEO DEPOSITION OF:

GEORGIA-PACIFIC CORPORATION)
AND GRAYCO HOME CENTER, INC.,)

) JAMES LANCASTER

Defendants.)

-----)
GEORGIA-PACIFIC CORPORATION)
AND GRAYCO HOME CENTER, INC.,)

3rd Party plaintiffs,)

vs.)

DEL WEBB COMMUNITIES, INC., an)
Arizona Corporation, DEL WEBB)
COMMUNITY MANAGEMENT CO., an)
Arizona Corporation, DEL WEBB)
CORPORATION, an Arizona)
Corporation, DEL WEBB)
CORPORATION, a Delaware)
Corporation, PULTE HOMES,)
INC., a Michigan Corporation,)
RAZOR ENTERPRISES, INC., a)
Texas Corporation, and RAZOR)
COMPONENT SYSTEMS, INC., a)
South Carolina Corporation,)

3rd Party Defendants.)

* * * * *

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VIDEO
DEPOSITION OF: JAMES LANCASTER
DATE TAKEN: April 2, 2009
TIME: 1:00 P.M.
PLACE: Mullen Wylie, LLC
70 Arrow Road
Hilton Head Island, South Carolina

REPORTED BY: CRISTIN M. KELLY
Registered Professional
Reporter and Notary Public

* * * * *

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1 Mr. Tyminski's -- well, let me strike that.

2 Of the items of rot identified in
3 Mr. Tyminski's report, some were repaired and those
4 repairs were done by who?

5 A. Pulte.

6 Q. Okay. And before you moved in?

7 A. Yes.

8 Q. Okay. And there came a later time -- well,
9 let me ask you this. Strike that.

10 Did you understand they were only going to do
11 part of them before you moved in or did you think --

12 A. No. My understanding was they were going to
13 do the whole --

14 Q. Okay. So you moved in and they only repaired
15 part of what had been identified by Mr. Tyminski?

16 A. Correct.

17 Q. And then you began to complain?

18 A. Not immediately. About 3 months later.

19 Q. Did you notice right when you moved in or did
20 it take a while to notice they had only repaired part of
21 what had been identified?

22 A. No, I knew what they had repaired because I
23 had visited the site.

24 Q. Okay. And how long did it take you before you
25 started complaining?

1 A. I'm guessing probably 4 months.

2 Q. Okay.

3 A. 3 or 4 months.

4 Q. So probably by the end of 2003 or beginning of
5 2004?

6 A. I would say the end of 2003.

7 Q. Okay.

8 A. But I'm guessing again.

9 Q. And how did you make those complaints to Del
10 Webb?

11 A. I went down to the customer relations
12 department for Pulte.

13 Q. In person, mano a mano?

14 A. And asked them why they hadn't completed the
15 repairs that were pointed out in Tyminski's report. And
16 that's when they sent the inspector out and he then sent
17 me a note later saying Pulte was not responsible.

18 Q. Okay. Do you have any documentation of that
19 interaction with Del Webb?

20 A. I don't think so.

21 Q. I haven't seen any. I just wanted to be sure
22 I wasn't missing something.

23 A. I do for a later one.

24 Q. Okay. But the sum totals of your action was a
25 personal visit followed by an inspector visiting; is

1 A. No.

2 Q. Nor has anyone else you've ever spoken to?

3 A. No.

4 Q. Okay. Have you ever had any problems with
5 insect infestation in your home?

6 A. Being from the Northeast and living in South
7 Carolina, it's hard to know what an infestation is
8 because this time of year we get an awful lot of bugs
9 coming out of the -- of the wood -- of the wood. No, no
10 real sign.

11 Q. And is -- you don't detect an increased
12 presence of insects in or around your home that you
13 attribute to the deteriorating trim?

14 A. No, I do not.

15 Q. And no one else has suggested to you ever that
16 that's the case?

17 A. No.

18 Q. Now, would you agree with me that when you
19 bought and moved into the house, you were on notice that
20 there was a problem with the trim and that it had a
21 propensity to deteriorate even if you didn't know just
22 how severe that problem was?

23 A. That's correct.

24 Q. But from the minute you moved in, you knew
25 that?

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

JIM LANCASTER, NANCY LANCASTER, ART
HOLLAND, JEANETTE HOLLAND, WENDELL TURNER,
PHYLLIS TURNER, JACK BENNETT, and JOAN
BENNETT, on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

CASE NO. 2007-CP-07-03166

GEORGIA-PACIFIC CORPORATION AND/OR
GEORGIA-PACIFIC, LLC; GRAYCO HOME CENTER,
INC.; DEL WEBB COMMUNITIES, INC., an
Arizona corporation; RAZOR COMPONENT
SYSTEMS, INC., a South Carolina
corporation; RAZOR ENTERPRISES, INC., a
Texas corporation; and DJ CONSTRUCTION CO.,
LLC,

Defendants,

DEPOSITION OF: WENDELL TURNER, Vol. II

DATE: September 16, 2010

TIME: 1:50 p.m.

LOCATION: Mullen Wylie, LLC
200 Merchant Street
Hilton Head, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: TRISHA M. THOMAS

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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1 a board?

2 A. I'm not an expert in the field myself,
3 so I wouldn't have any idea how they do it, but
4 they seem to be able to.

5 Q. So you don't know; you would ask
6 somebody else --

7 A. Yes.

8 Q. -- that would know more than you --

9 A. Yes, yes.

10 Q. -- if they could do it?

11 A. Yes.

12 Q. And what year, approximately, did you
13 first have a concern that the trim board was -- had
14 a problem on your house?

15 A. I didn't know it was trim board, but
16 when I saw the deterioration, when I could push my
17 thumb into the board there and I knew something was
18 wrong.

19 Q. Now, approximately what year was that?

20 A. I'm going to say five or six years ago.

21 Q. And at that time you knew it was trim
22 board; you just didn't know -- did not know who the
23 manufacturer was, correct?

24 A. I didn't know -- I knew it was a trim,
25 but I didn't know that it was trim board.

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
 COUNTY OF BEAUFORT) Civil Action NO. 07-CP-07-3166

JIM LANCASTER, NANCY LANCASTER, ART HOLLAND,) JEANNETTE HOLLAND, WENDELL
 TURNER, PHYLLIS)
 TURNER, JACK BENNETT, JOAN BENNETT, ON BEHALF) OF THEMSELVES AND OTHERS
 SIMILARLY SITUATED,)
 Plaintiffs,)
)
 vs.)
)
 GEORGIA-PACIFIC CORPORATION and GRAYCO HOME) CENTER, INC.,
)
 Defendants.)
)
 GEORGIA-PACIFIC CORPORATION and/or) GEORGIA-PACIFIC, LLC,
)
 Third-Party Plaintiffs,)
)
 Vs.)
)
 DEL WEBB COMMUNITIES, INC., an Arizona) Corporation, DEL WEBB
 COMMUNITY MANAGEMENT CO.,)
 AN ARIZONA CORPORATION, DEL WEBB CORPORATION,) AN ARIZONA CORPORATION,
 DEL WEBB CORPORATION, A)
 DELAWARE CORPORATION, PULTE HOMES, INC., A) MICHIGAN CORPORATION,
 RAZOR ENTERPRISES, INC.,)
 A TEXAS CORPORATION, AND RAZOR COMPONENT) SYSTEMS, INC., A SOUTH
 CAROLINA CORPORATION,)
 and DJ CONSTRUCTION, LLC.) Third-Party Defendants.
)

* * * * * VIDEOTAPED WENDELL
 TURNER

DEPOSITION OF: DATE TAKEN: April 3, 2009

TIME: 9:18 a.m.

PLACE: Mullen Wylie

70 Arrowhead Road Hilton Head Island, SC 29928

REPORTED BY: DENISE LAUDER

Registered Professional Reporter and Notary Public

* * * * *

1 A P P E A R A N C E S

2 REPRESENTING THE PLAINTIFFS:

3 JOSEPH E. DAPORE, ESQUIRE Young Clement Rivers, LLP

4 28 Broad Street Charleston, SC 29401

5 (843) 577-4000

6 REPRESENTING THE DEFENDANT and THIRD-PARTY

7 PLAINTIFFS GEORGIA-PACIFIC CORPORATION:

8 S. GARDNER CULPEPPER, ESQUIRE Ashe, Rafuse & Hill, LLP

9 1355 Peachtree Street, NE Suite 500

10 Atlanta, GA 30309 (404) 253-6340

11 RYAN A. EARHART, ESQUIRE

12 Nelson Mullins Riley & Scarborough, LLP 151 Meeting Street

13 Suite 500 Charleston, SC 29401

14 (843) 853-5200

15 REPRESENTING THE DEFENDANT GRAYCO HOME CENTER, INC.:

16 L. DARBY PLEXICO, III, ESQUIRE

17 Brown & Brehmer 1720 Main Street

18 Suite 201 & 203 Columbia, SC 29202

19 (803) 771-6600

20

21

22

23

24

25

1 THE VIDEOGRAPHER: On the record at

2 11:01 a.m. Tape number two.

3 BY MR. CULPEPPER:

4 Q. Mr. Turner, it sounds like -- I'll wait

5 until you're done with that. Thank you. It sounds

6 -- it sounds like there are only two instances,

7 before the lawyers got involved, where contractors

8 or anyone came out to your house to work on it.

9 One was to clean the mold off and then the other

10 was to replace the boards by the garage?

11 A. That's all that I remember.

12 Q. Okay. What was the name of the person

13 or the outfit that came to clean the discoloration

14 or what you thought was the mold on the boards?

15 A. I don't recall.

16 Q. Okay. And was it -- was it in

17 connection with that project that the power washing

18 occurred?

19 A. Yes.

20 Q. And who did the power washing?

21 A. I don't recall.

22 Q. Same person?

23 A. I don't recall.

24 Q. Okay. Do you think that your computer

25 will have records of this on there?



Supreme Court of South Carolina.
 Anthony and Barbara **GRAZIA**, individually and
 on behalf of all other similarly situated Plaintiffs,
 Appellants,
 v.
 SOUTH CAROLINA STATE PLASTERING,
 LLC, Respondent,
 and
 South Carolina State Plastering, LLC, Respondent,
 v.
 Del Webb Communities, Inc., Pulte Homes, Inc.
 and Kephart Architects, Inc., Third-Party Defend-
 ants,
 Of Whom Del Webb Communities, Inc. and Pulte
 Homes, Inc., are Respondents.

No. 26882.

Heard June 23, 2010.

Decided Oct. 4, 2010.

Rehearing Denied Jan. 20, 2011.

Background: Homeowners brought class action on behalf of themselves and those similarly situated against company that completed exterior stucco work on residential homes in a subdivision alleging negligent and defective construction. The Circuit Court, Beaufort County, Doyet A. Early, III, J., granted motion to strike class allegations from complaint as incompatible with Right to Cure Construction Dwelling Defect Act. Homeowners appealed.

Holdings: The Supreme Court, Hearn, J., held that:
 (1) stay provision in Act was not limited to mistaken filing situations;
 (2) Act's notice provision and stay provision were able to be harmonized; and
 (3) on issue of first impression, Act and procedures for certifying class action were not incompatible.

Reversed.

Pleicones, Acting C.J., concurred separately

and filed opinion.

Kittredge, J., dissented and filed opinion.

West Headnotes

[1] Pleading 302 354

302 Pleading

302XVI Motions

302k351 Striking Out Pleading or Defense

302k354 k. Insufficient allegations or denials. Most Cited Cases

A motion to strike which challenges a theory of recovery in the complaint is in the nature of a motion to dismiss. Rules Civ.Proc., Rule 12(b)(6), (f).

[2] Appeal and Error 30 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. Most Cited Cases

In reviewing a ruling on a motion to dismiss a claim, the Supreme Court must base its decision solely on the allegations set forth on the face of the complaint. Rules Civ.Proc., Rule 12(b)(6).

[3] Pretrial Procedure 307A 624

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)4 Pleading, Defects In, in General

307Ak623 Clear and Certain Nature of Insufficiency

307Ak624 k. Availability of relief under any state of facts provable. Most Cited Cases

A motion to dismiss cannot be sustained if the

facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Rules Civ.Proc., Rule 12(b)(6).

[4] Pretrial Procedure 307A ⚔ 624

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)4 Pleading, Defects In, in General

307Ak623 Clear and Certain Nature of Insufficiency

307Ak624 k. Availability of relief under any state of facts provable. Most Cited Cases

Pretrial Procedure 307A ⚔ 679

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak679 k. Construction of pleadings. Most Cited Cases

The question when determining whether to grant a motion to dismiss is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief. Rules Civ.Proc., Rule 12(b)(6).

[5] Antitrust and Trade Regulation 29T ⚔ 283

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)1 In General

29Tk281 Exclusive and Concurrent Remedies or Laws

29Tk283 k. Judicial remedies prior to or pending administrative proceedings. Most Cited Cases

Stay provision in Right to Cure Construction Dwelling Defect Act, which allowed for stay in re-

sponse to violation of notice provisions, was not limited to mistaken filing situations; there was not a statutory or case law basis for such a restriction, and there was nothing in the wording of the section which supported such a limitation. Code 1976, § 40-59-830.

[6] Statutes 361 ⚔ 188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In general. Most Cited

The Supreme Court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation.

[7] Statutes 361 ⚔ 181(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In general. Most

Cited Cases

The Supreme Court's primary consideration in interpreting a statute is finding the intent of the legislature.

[8] Statutes 361 ⚔ 205

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k205 k. In general. Most Cited

Statutes 361 ⚔ 206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic
Aids to Construction

361k206 k. Giving effect to entire statute. Most Cited Cases

In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.

[9] Statutes 361 ⚡ 205

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic
Aids to Construction

361k205 k. In general. Most Cited

A statute should not be construed by concentrating on an isolated phrase.

[10] Antitrust and Trade Regulation 29T ⚡ 286

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and
Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)1 In General

29Tk286 k. Notice and demand requirements; opportunity to cure. Most Cited Cases

Notice provision of Right to Cure Construction Dwelling Defect Act, which required mandatory compliance with notice requirements before filing of civil action, and Act's stay provision, which allowed for stay in response to violation of notice provisions, were able to be harmonized; stated public policy was not abridged when a court was required to stay a proceeding in order to require compliance with the notice provision, and the predominant concern was on the contractor/subcontractor's actual exercise of the rights to notice and the opportunity to cure, not when those rights were received. Code 1976, §§ 40-59-830, 40-59-840.

[11] Antitrust and Trade Regulation 29T ⚡ 286

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and
Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)1 In General

29Tk286 k. Notice and demand requirements; opportunity to cure. Most Cited Cases

Parties 287 ⚡ 35.67

287 Parties

287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.67 k. Antitrust or trade regulation cases. Most Cited Cases

Right to Cure Construction Dwelling Defect Act and procedures for certifying class action under rules of civil procedure were not incompatible; purpose of the Act was to encourage resolution of these types of claims without using litigation, by providing an environment that codifies contractor/subcontractor's ability to inspect and offer a remedy or settlement, enforcing a stay provision in the Act did absolutely nothing to restrict the furtherance of that purpose, but, instead, the purpose was better served by allowing use of the Act's stay provision to allow court to determine whether or not a class action was feasible under the circumstances in each individual case, rather than striking the class allegations in toto at the outset, there was no express bar of class actions in Act, and public policy favored allowance of class actions under Act. Code 1976, § 40-59-840; Rules Civ.Proc., Rule 23.

[12] Parties 287 ⚡ 35.35

287 Parties

287III Representative and Class Actions

287III(B) Proceedings

287k35.35 k. Hearing and determination.
Most Cited Cases

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. Rules Civ.Proc., Rule 23.

[13] Parties 287 ↪ 35.1

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.1 k. In general. Most Cited Cases

The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion. Rules Civ.Proc., Rule 23.

***198** John T. Chakeris, of Chakeris Law Firm, of Charleston, Phillip Ward Segui, of Segui Law Firm, of Mt. Pleasant, W. Jefferson Leath, Jr., and Michael S. Seekings, of Leath, Bouch & Crawford, LLP, both of Charleston, for Appellants.

A. Victor Rawl, Jr., and Robert L. Widener, of McNair Law Firm, PA, Everett A. Kendall, II and Christy E. Mahon, both of Sweeny Wingate & Barrow, PA, all of Columbia, for Respondents.

Justice HEARN.

***566** Anthony and Barbara **Grazia** appeal the circuit court's grant of a motion to strike class allegations from their complaint. The **Grazias** contend the circuit court erred in finding the Notice and Opportunity to Cure Construction Dwelling Defect Act is in conflict with the State's class action lawsuit jurisprudence under Rule 23, SCRCP. We agree and reverse.

FACTUAL/PROCEDURAL BACKGROUND

This action involves the alleged negligent and defective construction of residential homes in a subdivision in Bluffton, South Carolina. The **Grazias** brought a class action on behalf of themselves and those similarly situated, asserting defective exterior stucco work by Respondent South Carolina State Plastering, LLC (State Plastering) in the ***199** construction of approximately 2,673 ^{FN1}

homes in a development called Sun City. The complaint maintains the stucco exteriors had common and typical problems inherent to their design and installation that would require identical remediation across the class, namely, stripping the homes of the existing stucco and recladding with a properly installed stucco system.

FN1. The number of homes affected by the alleged defective stucco is uncertain. During the hearing on Respondents' motion to strike class allegations, the number was referenced as "some four thousand homes," while the **Grazias'** own motion for reconsideration refers to 2,673 homes.

State Plaster answered, and brought a third-party complaint against Del Webb Communities, Inc. (Developer), Pulte Homes, Inc. (Builder), and Kephart Architects, Inc. (Architect), (collectively referred to as Respondents). In its answer, State Plaster 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),^{FN2} which entitles a contractor or subcontractor to notice of any qualifying construction defect, and the opportunity to cure, before the action is commenced. At the time this action was filed, the **Grazias** had not complied with the notice requirements; therefore, the parties entered into a consent order staying the action pending subsequent compliance with the Right to Cure ***567** Act. The **Grazias** then personally complied with the Right to Cure provisions, and the consent order was lifted. Thereafter, Respondents moved to dismiss the class allegations contained in the **Grazias'** complaint, or, in the alternative, requested a stay of the proceedings until each of the similarly situated plaintiffs complied with the Right to Cure Act notice requirements.

FN2. S.C.Code Ann. § 40-59-810 et seq. (Supp.2009).

A hearing on Respondents' motions was held, and additional memoranda in support of the parties'

respective positions were submitted to the court following the hearing. Ultimately, the circuit court issued an order striking the Grazias' class allegations as incompatible with the Right to Cure Act. The Grazias filed a motion for reconsideration with the circuit court, but it was denied, and this appeal followed. The following issue is presented to the Court on appeal:

- I. Did the circuit court commit reversible error in granting Respondents' motion to strike class allegations?

STANDARD OF REVIEW

[1][2][3][4] A motion to strike under Rule 12(f), SCRCP, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP. *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997). In reviewing a ruling on a motion to dismiss a claim, this Court must base its decision solely on the allegations set forth on the face of the complaint. *Id.* at 632–33, 494 S.E.2d at 433. “The motion cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.” *Id.* at 633, 494 S.E.2d at 433 (citing *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct.App.1995)). “The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.” *Id.* at 633, 494 S.E.2d at 433–34.

LAW/ANALYSIS

I. Right to Cure Act Incompatible with Rule 23, SCRCP

The Grazias contend the circuit court committed reversible error in striking the class allegations from its complaint based *568 on its conclusion that class action lawsuits under Rule 23, SCRCP, are incompatible with the Right to Cure Act. We agree.

The Right to Cure Act is set forth in sections 40–59–810 to 860 of the South Carolina Code. The pertinent provisions of the legislation are as follows:

§ 40–59–830. Stay of action upon non-compliance with article.

****200** If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article.

§ 40–59–840. Notice of claim; timing; contents; request for clarification.

(A) In an action brought against a contractor or subcontractor arising out of the construction of a dwelling, the claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor. The notice of claim must contain the following:

- (1) a statement that the claimant asserts a construction defect;
- (2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and
- (3) a description of any results of the defect, if known.

The contractor or subcontractor shall advise the claimant within fifteen days of receipt of the claim if the construction defect is not sufficiently stated and shall request clarification.

§ 40–59–850. Contractor's election to inspect, remedy, settle, or deny claim; inspection of construction defect; response to contractor's offer; admissibility.

(A) The contractor or subcontractor has thirty days from service of the notice to inspect, offer to remedy, offer to settle with the claimant, or deny

the claim regarding the defects. The claimant shall receive written notice of the contractor's or subcontractor's, as applicable, election under this section. The claimant shall allow inspection of the construction defect at an agreeable time to both parties, if *569 requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the parties, reasonable access to affect repairs. Failure to respond within thirty days is deemed a denial of the claim.

(B) The claimant shall serve a response to the contractor's offer, if any, within ten days of receipt of the offer.

(C) If the parties cannot settle the dispute pursuant to this article, the claimant may proceed with a civil action or other remedy provided by contract or by law.

(D) Any offers of settlement, repair, or remedy pursuant to this section, are not admissible in an action.

a. Section 40–59–830 Stay Provision

[5] It is first necessary to address the circuit court's holding with respect to the stay provision contained in the Right to Cure Act, as it formed the basis for the court's determination that the Act and Rule 23 are incompatible. The circuit court found section 40–59–830, which allows for the staying of an action, upon motion by any party to the action, applied only to those persons who mistakenly file the action prior to complying with the Right to Cure Act, and could not be used to sanction a knowing violation of the statute. We disagree.

[6] “This Court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation.” *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 273–74, 692 S.E.2d 516, 519 (2010) (citation omitted). Simply stated, there is no statutory or case law basis for the circuit court's holding that section

40–59–830 should only apply in accidental situations. The plain language of section 40–59–830 does not restrict its application beyond “[a] claimant [who] files an action in court before first complying with the requirements of this article....” There is nothing in the wording of section 40–59–830 which supports the circuit court's limitation of this provision to mistaken filing situations; rather, the plain language of the statute dictates a different result. Consequently, the circuit court erred in *570 construing section 40–59–830 in a manner contrary to the plain language of the statute.

b. Harmonization of the Right to Cure Act's Stay Provision and Notice Requirements

The circuit court also found that section 40–59–840 imposes an absolute condition **201 precedent to the filing of lawsuits that qualify under the Right to Cure Act. Subsection 840, as provided above, encompasses civil lawsuits filed against a contractor or subcontractor, and *requires* the claimant to serve written notice no later than ninety days before filing the action. We find no error in the circuit court's analysis regarding the Right to Cure Act's notice provisions; however, in light of this Court's holding with respect to the stay provision, it is necessary to harmonize these seemingly inapposite provisions within the Right to Cure Act.

It is clear to this Court that these two provisions are at odds, as the language used in section 40–59–840 appears to require mandatory compliance with the Act's notice provisions prior to filing an action, while section 40–59–830 provides a contractor/subcontractor with a means of staying an action that is filed without first complying with the same notice provision. *Compare* § 40–59–840 (stating “[a] claimant *must*, no later than ninety days before filing the action, serve a written notice of claim on the contractor”) (emphasis added) *and* § 40–59–830 (providing that “[i]f a claimant files an action [] before first complying with [§ 40–59–840], on a motion of a party to the action, the court *shall* stay the action until the claimant has

complied with the requirements of this article”) (emphasis added). The circuit court found the Right to Cure Act, *as a whole*, incompatible with Rule 23. In so doing, the court emphasized that, because the Right to Cure Act is a statute, and Rule 23 is a court rule, an attempt to harmonize the two would run counter to the general rule that any conflict between a statute and court rule must be resolved in favor of the statute. *See* S.C. Const., art. V, § 4 (2009) (“Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.”). However, in construing these two seemingly conflicting portions of the same Act, the circuit court does not appear to have utilized the *571 same basic precepts of statutory construction, namely harmonization.

[7][8][9] This Court’s primary consideration in interpreting a statute is finding the intent of the legislature. *State v. Squires*, 311 S.C. 11, 14, 426 S.E.2d 738, 739 (1992). “In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)). “A statute should not be construed by concentrating on an isolated phrase.” *Id.* (citing *Laurens County School Districts 55 and 56 v. Cox*, 308 S.C. 171, 417 S.E.2d 560 (1992)); *but see Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991) (citing *Jolly v. Atlantic Greyhound Corp.*, 207 S.C. 1, 35 S.E.2d 42 (1945)) (“Under the ‘last legislative expression’ rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails.”); *Eagle Container Co., LLC v. County of Newberry*, 379 S.C. 564, 572, 666 S.E.2d 892, 896 (2008) (quoting *Feldman v. S.C. Tax Commission*, 203 S.C. 49, 54, 26 S.E.2d 22, 24 (1943)) (“The last legislative expression rule, however, ‘is purely an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict,

and all other means of interpretation have been exhausted.’”).

[10] In arguing that this Court should not, and more strongly cannot, overcome the seemingly mandatory plain language of the notice requirements in sections 40–59–840 and 850, Respondents advocate ignoring the equally plain language of the stay provision contained in section 40–59–830. This Court can no more disregard the stay provision than it can disregard the notice requirements. Instead, it is our duty to attempt to harmonize these two ostensibly at-odd provisions before analyzing whether or not the Right to Cure Act is in conflict with Rule 23. *Ex parte Chase*, 62 S.C. 353, 362–63, 38 S.E. 718, 724 (1901)¹ (discussing the well-settled rule that where two portions of a statute appear on their face to be conflicting, every effort should be made to reconcile these *572 apparently conflicting provisions, and bring them into harmony, if possible).

The language included in section 40–59–840 requires potential claimants to submit **202 notice to a contractor/subcontractor prior to filing a qualifying action. Conversely, the General Assembly also included a stay provision in the Right to Cure Act to specifically address situations where claimants file an action prior to full compliance with the notice provisions. As discussed above, the circuit court erroneously found that the section 40–59–830 stay provision only applied to accidental filing situations. Upon concluding this, the circuit court did not thereafter attempt to harmonize the two provisions. We believe it is possible to construe these two provisions under the Right to Cure Act in a manner that gives each provision its due effect.

Under Respondents’ theory of this case, a contractor/subcontractor’s receipt of *pre-litigation* notice under section 40–59–840 should trump the General Assembly’s equally plain intent to allow actions to be stayed pending compliance with the Right to Cure Act. The folly of this argument can be seen by exploring the public policy behind the

Right to Cure Act, which Respondents, themselves, suggest should control.

The Right to Cure Act has an express public policy intent of: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. *See* 2003 South Carolina Laws Act 82 (S.B. 433). 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.

The circuit court also erroneously found, based on an argument advanced by Respondents, that the Right to Cure Act endowed substantive rights ^{FN3} on the contractor/subcontractor, *573 through the notice provisions, that are inconsistent with class action litigation. However, these “new rights” are consistent with those accorded to *any* defendant in litigation, and are “rights” already available to them under existing discovery and production requirements of Rule 34(a)(2), SCRCP, once a normal civil action is filed. Rule 34(a)(2) provides:

FN3. The alleged rights include: (1) the right to request clarification of the alleged defect (§ 40–59–840); the right to inspect the dwelling (§ 40–59–850); (3) the right to offer to remedy the alleged defect (§ 40–59–850); (4) the right to offer to settle the claims (§ 40–59–850); and (5) the right to deny the claim (§ 40–59–850).

Any party may serve on any other party a request ... (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon,

within the scope of Rule 26(b).

These 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. In other words, the right of entry onto and inspection of the claimant's dwelling is now permitted to occur prior to the filing of the action under the notice provisions of sections 40–59–840 and 850, as opposed to during an action's normal discovery period. As the *Grazias* correctly point out, the Right to Cure Act does not confer any corresponding obligations on the part of the claimant that would not ordinarily be present: the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim.

Respondents thus argue that their *pre-litigation* receipt of notice and the Act's accompanying “rights,” should be the Court's prevailing concern. We believe this is contrary to the public policy of the Right to Cure Act: the 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 **203 the proceedings under *574section 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.

c. Incompatibility with Rule 23, SCRCP

[11] Finally, the circuit court determined that the Right to Cure Act and the procedures for certifying a class action under Rule 23 ^{FN4} were incompatible, and that any conflict between the stat-

ute and the rule must be resolved in favor of the statute. The effect of the circuit court's determination was that no class action lawsuits could be filed for claims falling under the rubric of the Right to Cure Act. We disagree that the Act and class action litigation are incompatible.

FN4. Rule 23 provides:

(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.

The interplay between the Right to Cure Act and Rule 23 is an issue of first impression in this state. The underlying basis for the circuit court's determination that the Right to Cure Act and Rule 23 are incompatible was its view that the section 40–59–830 stay provision cannot be used to knowingly violate the Act's notice provisions, which the court viewed as an absolute condition precedent to filing an action, in the absence of a mistaken filing. As we determined above, the circuit court's analysis of the stay provision was erroneous, and these two provisions may be harmonized in a way that furthers the policy of the Right to Cure Act. Once properly harmonized, we find no fatal conflict between the Right to Cure Act and this State's class action jurisprudence, and further find the stay provision would be a reasonable and logical way for a *575 court to proceed when an action containing

class allegations is filed under the Act.^{FN5}

FN5. As will be discussed below, 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.

The basis for our decision is once again rooted in the public policy behind the Right to Cure Act's notice provisions: the purpose of the Act is to encourage the resolution of these types of claims without using litigation, by providing an environment that codifies a contractor/subcontractor's ability to inspect and offer a remedy or settlement. 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. *See, e.g., Trimble v. Itz*, 898 S.W.2d 370, 373–74 (Tex.App.1995) (considering similar notice provisions included in statutes requiring pre-litigation notice and concluding that the purpose of a statute is better served by abeyance than dismissal).

[12] Respondents maintain that individual claimants under the Right to Cure Act are the sole persons authorized to bring an action for their own homes. Stated differently, Respondents allege the Right to Cure Act does not provide for representative compliance with its notice provisions; therefore, the Act is incompatible with class action litigation. However, this is nothing more than a generalized argument against class action litigation, as the named plaintiff in a class action will never have specific standing for *each* individualized claim that comprises the class. *See **204Califano v. Yama-*

saki, 442 U.S. 682, 700–01, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979) (providing that class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only). 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 *576 prove. See *Gardner v. South Carolina Dep't of Revenue*, 353 S.C. 1, 20–21, 577 S.E.2d 190, 200 (2003) (quoting Rule 23, SCRCP) (internal quotations omitted) (“The prerequisites 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.”). If and when these prerequisites are met, the court may then find that representative notice under the Right to Cure Act is appropriate. Just as Respondents maintain the General Assembly's failure to specifically authorize representative actions under the Right to Cure Act is persuasive, the General Assembly's silence in that regard is equally persuasive, especially when it has chosen to expressly bar class action litigation in other areas. See S.C.Code Ann. § 9–21–40 (Supp.2009) (prohibiting claims prosecuted on behalf of a class); S.C.Code Ann. § 12–60–80(c) (Supp.2009) (barring class actions for refunds of taxes); S.C.Code Ann. § 39–5–140(a) (1985) (preventing an action for actual damages from being brought in a representative capacity).

[13] Finally, public policy arguments favor the Court finding a way to reconcile the Right to Cure Act and Rule 23. “[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.” *Califano*, 442 U.S. at 701,

99 S.Ct. at 2557. This Court has expressed the viewpoint that class actions are favored in this state:

Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

*577 *Littlefield v. South Carolina Forestry Comm'n*, 337 S.C. 348, 354–55, 523 S.E.2d 781, 784 (1999). Consequently, the circuit court erred in striking the *Grazia's* class allegations on the basis that the Right to Cure Act is incompatible with Rule 23.^{FN6}

FN6. We also note that, to the extent the circuit court's order found that a purported proposal for class certification did not meet the statutory mandates of the Right to Cure Act, and that the proposed process for certification would necessarily require an opt-in procedure violating this Court's prohibition of the procedure as set forth in *Salmonsens v. CGD, Incorporated*, the order is vacated. 377 S.C. 442, 661 S.E.2d 81 (2008). This case was before the circuit court on a motion to strike class allegations. A motion to certify this class has not been made; therefore, the circuit court erred in discussing the manner and mode in which the action could be certified. See *Griffin v. Capital Cash*, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct.App.1992) (citing *Friedberg v. Goudeau*, 279 S.C. 561, 562, 309 S.E.2d 758, 759 (1983)) (“It is an error of law for a court to decide a case on a ground not before it.”); see also *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) (“It is elementary that the

courts of this State have no jurisdiction to issue advisory opinions.”); *In re Chance*, 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have “consistently refrained” from issuing purely advisory opinions).

The decision of the circuit court is therefore

REVERSED.

BEATTY, J., and Acting Justice JAMES E. MOORE; concur. PLEICONES, Acting C.J., concurring in a separate opinion. KITTREDGE, J., dissenting in a separate opinion.

***205** Acting Chief Justice PLEICONES, concurring in a separate opinion.

Because I disagree with the reasoning of the circuit court, I concur in the majority opinion. In my view, whether a class action is compatible with the Notice and Opportunity to Cure Construction Dwelling Defects Act (Act) remains an open question.

The circuit court noted that the mandatory language of S.C.Code Ann. § 40–59–840 requires a homeowner to meet notice requirements before filing a lawsuit. The circuit court held that absent compliance with the pre-filing notice requirements, putative class members could not individually bring the claims made in the complaint. Consequently, the circuit court granted the Respondents' motion to strike class allegations ***578** from the complaint, reasoning that “[t]he named-plaintiffs cannot use a class action to avoid the requirements of the Act on behalf of the putative class members.” I disagree with the circuit's court premise, as I believe putative class members could individually bring claims without first meeting the pre-filing requirements of § 40–59–840, though such claims may be stayed pending compliance.

I do not disagree with the circuit court that S.C.Code Ann. § 40–59–840 requires a plaintiff to meet the notice requirements before filing a lawsuit. However, I differ with the circuit court as to

the consequence of failing to do so. The circuit court would hold that the consequence of failing to meet pre-filing notice requirements is that the court will not recognize the suit as “filed.” In my opinion, this position cannot be correct given § 40–59–830, which (1) explicitly recognizes a situation where a party has filed a lawsuit before satisfying the notice requirements and (2) permits the court to allow the case to proceed unless a party makes a motion to stay the case, pending compliance.

In my view, the consequence of filing a lawsuit before meeting the notice requirements is simply that, upon the motion of a party, the plaintiff may not proceed with the lawsuit without first coming into compliance. With this construction, § 40–59–840 and § 40–59–830 can be harmonized.

I disagree with the circuit court's view that § 40–59–830 applies only to those persons who mistakenly filed the action before complying with the Act. I can find nothing in the statute to support this position. Moreover, policy reasons militate against an interpretation that not only excuses, but encourages ignorance of the law and leads to incongruous results. For example, assume two parties are within 80 days of the statute of limitations. One party researches the applicable law and the other party does not. Under the circuit court's rule, if both parties thereafter filed lawsuits, without complying with the notice requirements, the party who failed to familiarize himself with the applicable law is not barred by the statute of limitations while the party who diligently inquired into the law is barred. Such cannot be the intent of the General Assembly.

***579** For these reasons, I disagree with the circuit court's decision to strike the class action allegations due to the putative class members' failure to comply with the notice provisions. I would therefore reverse the order of the circuit court. I express no opinion as to whether a class action is compatible with the Act.^{FN7}

FN7. It appears from the Record that the

circuit court did not rule on the remainder of Respondents' motion, specifically that part of the motion requesting a stay pursuant to § 40-59-830. Consequently, under my view, the court may consider this part of the motion on remand.

Justice KITTREDGE, dissenting in a separate opinion.

I vote to affirm the order of the circuit court. The Court misconstrues a straightforward and unambiguous statutory scheme. Having created a phantom conflict in the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Act), the Court resolves the purported statutory conflict in a manner that I believe is patently at odds with the intent of the South Carolina Legislature. I respectfully dissent.

The Court is called upon to construe the Act. S.C.Code Ann. §§ 40-59-810 to 860 (Supp.2009). The Act mandates that a claimant "must" serve a residential home builder with notice of a claim related to an alleged defect in the construction of a dwelling no **206 later than ninety days "before filing the action:"

(A) In an action brought against a contractor or subcontractor arising out of the construction of a dwelling, *the claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor.* The notice of claim must contain the following:

(1) a statement that the claimant asserts a construction defect;

(2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and

(3) a description of any results of the defect, if known.

The contractor or subcontractor shall advise the claimant within fifteen days of receipt of the

claim if the construction *580 defect is not sufficiently stated and shall request clarification.

S.C.Code Ann. § 40-59-840 (emphasis added).

The Act specifies that within "thirty days from service of the notice," the contractor or subcontractor must notify the claimant of his "election under this section." § 40-59-850(A).^{FN8} "Failure to respond within thirty days is deemed a denial of the claim." *Id.* "If the parties cannot settle the dispute pursuant to this article, the claimant may proceed with a civil action or other remedy provided by contract or by law." § 40-59-850(C).

FN8. The Act grants certain rights to a contractor and subcontractor upon receipt of the pre-filing notice: (1) the right to request clarification of the alleged defect (§ 40-59-840); (2) the right to inspect the dwelling (§ 40-59-850); (3) the right to offer to remedy the alleged defect (§ 40-59-850); (4) the right to offer to settle the claims (§ 40-59-850); and (5) the right to deny the claim (§ 40-59-850). The majority refers to these statutory provisions as "alleged rights."

The legislature further provided for a stay of an action when a "claimant files an action in court before first complying with the requirements of this article." S.C.Code § 40-59-830. ("[T]he court shall stay the action until the claimant has complied with the requirements of this article."). I would construe the stay provision in section 40-59-830 as applying only when the required pre-filing notice is not satisfied. So construed, the stay operates as a failsafe to preserve an action and avoid potential statute of limitations concerns. I part company with the majority's construction, which reads the stay provision as an invitation to willfully ignore the pre-filing notice requirement. The legislature expressed a preference for the pre-filing notice, and I do not believe our rules of statutory construction allow us to hold otherwise.^{FN9}

FN9. As a further expression of legislative intent to ensure the parties' compliance with the Act, the legislature directed Court Administration to "develop a designation on the Civil Action Cover Sheet which indicates whether a stay has been granted for a civil action filed pursuant to the South Carolina Notice and Opportunity to Cure Construction Defects Act." § 40-59-860(B).

I do agree with the proposition posed by the majority that, as a general rule, the Act's stay provision should be invoked when an action is filed in violation of the notice requirements *581 of section 40-59-840, but that is not the issue before us. The precise question before the circuit court and us is whether the legislature intended to grant a court the authority to preemptively sanction the practice of willfully violating the pre-filing notice requirements of the Act. I am convinced, as was the circuit court, that the legislature intended no such result.

The section 40-59-830 stay provision should not be construed to trump or sanction a violation of the statutory preference for the section 40-59-840 pre-filing notice requirement. The legislature clearly mandated pre-litigation efforts to resolve construction defect claims. The majority acknowledges as much—"the purpose of the Act is to encourage the resolution of these types of claims without using litigation, by providing an environment that codifies a contractor/subcontractor's ability to inspect and offer a remedy or settlement." I believe the Court's interpretation of the Act encourages a claimant to intentionally ignore the pre-filing notice requirements and is in direct conflict with legislative**207 intent. I believe the Court's interpretation of the Act renders the statutory requirement for pre-filing notice meaningless.

I make two final points. First, I disagree with the Court's finding that the legislature was not concerned about "when" a contractor or subcontractor actually received notice and exercised its statutory rights. (Emphasis in majority opinion). I believe the

issue of "when" notice is given was important to the legislature. I believe the legislature expressed a clear preference in section 40-59-840 that the claimant "must" serve written notice on a contractor or subcontractor "before filing the action." The argument that a contractor or subcontractor may rely on these statutory rights in normal discovery, as does "any defendant in litigation," misses the mark. (Emphasis in majority opinion). If the legislature was not concerned about the timing issue (the question of "when"), then the Act's stated pre-filing notice requirement serves no purpose and the legislature intended to engage in a meaningless act.

Second, the majority opinion suggests that "[t]he effect of the circuit court's determination was that no class action lawsuits could be filed for claims falling under the rubric of the Right to Cure Act." The circuit court made no such *582 finding, nor is it the "effect" of the circuit court's ruling. The circuit court order forecloses only Appellants' attempt to create a class action lawsuit by purposely thwarting the Act's pre-filing notice mandate.

In dissenting, I would join the trial court in refusing to permit Appellants to willfully violate the pre-filing notice requirements of section 40-59-840 by adding unidentified claimants to the pending action.

S.C.,2010.
Grazia v. South Carolina State Plastering, LLC
390 S.C. 562, 703 S.E.2d 197

END OF DOCUMENT

Jolley, Pam

From: DaPore, Joseph E. (Joe) [jdapore@ycrlaw.com]
Sent: Monday, April 02, 2012 1:48 PM
To: Young, Roger Law Clerk (Mary B. Ramsay); Rawl, Vic; DeMato, Amanda; Brown, Denise
Cc: ryan.earhart@nelsonmullins.com; adisbrow@mullenwylie.com; ameede@mullenwylie.com; atmduke@aol.com; GCulpepper@rh-law.com; mark.phillips@nelsonmullins.com; sdavies@mgclaw.com; sgladden@pritchard-elliott.com; JElliott@pritchard-elliott.com; karl.brehmer@brownandbrehmer.com; christle.turner@brownandbrehmer.com; darby.plexico@brownandbrehmer.com; rmitchell@diamondbaker.com; Buckley, Edward D. (Ed); Hines, Russell; RRemar@rh-law.com
Subject: RE: Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, (13376-20070735)

Thanks , the notices have gone out in today's mail to the class members. Joe

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

From: Young, Roger Law Clerk (Mary B. Ramsay) [mailto:ryounglc@sccourts.org]
Sent: Monday, April 02, 2012 1:36 PM
To: Rawl, Vic; DeMato, Amanda; Brown, Denise
Cc: 'ryan.earhart@nelsonmullins.com'; 'adisbrow@mullenwylie.com'; 'ameede@mullenwylie.com'; 'atmduke@aol.com'; 'GCulpepper@rh-law.com'; 'mark.phillips@nelsonmullins.com'; 'sdavies@mgclaw.com'; 'sgladden@pritchard-elliott.com'; 'JElliott@pritchard-elliott.com'; 'karl.brehmer@brownandbrehmer.com'; 'christle.turner@brownandbrehmer.com'; 'darby.plexico@brownandbrehmer.com'; 'rmitchell@diamondbaker.com'; Buckley, Edward D. (Ed); DaPore, Joseph E. (Joe); Hines, Russell; 'RRemar@rh-law.com'
Subject: RE: Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, (13376-20070735)

Per your request, attached please find signed copies of all the orders.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

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

From: Rawl, Vic [mailto:VRawlJr@mcnair.net]
Sent: Monday, April 02, 2012 11:52 AM
To: Young, Roger Law Clerk (Mary B. Ramsay); 'ADemato@ycrlaw.com'; 'dbrown@ycrlaw.com'
Cc: 'ryan.earhart@nelsonmullins.com'; 'adisbrow@mullenwylie.com'; 'ameede@mullenwylie.com'; 'atmduke@aol.com'; 'GCulpepper@rh-law.com'; 'mark.phillips@nelsonmullins.com'; 'sdavies@mgclaw.com'; 'sgladden@pritchard-elliott.com'; 'JElliott@pritchard-elliott.com'; 'karl.brehmer@brownandbrehmer.com'; 'christle.turner@brownandbrehmer.com'; 'darby.plexico@brownandbrehmer.com'; 'rmitchell@diamondbaker.com'; 'ebuckley@ycrlaw.com'; 'jdapore@ycrlaw.com'; 'RHines@ycrlaw.com'; 'RRemar@rh-law.com'
Subject: Re: Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, (13376-20070735)

Mary,

If you would like to scan or e-mail the sign orders to me, I would be happy to forward signed copies to all counsel by e-mail. My fax is 803-933-1541.

Thanks!

Vic

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

From: Young, Roger Law Clerk (Mary B. Ramsay) [mailto:ryounglc@sccourts.org]
Sent: Monday, April 02, 2012 11:28 AM
To: DeMato, Amanda <ADemato@ycrlaw.com>; Brown, Denise <dbrown@ycrlaw.com>
Cc: ryan.earhart@nelsonmullins.com <ryan.earhart@nelsonmullins.com>; Rawl, Vic;
adisbrow@mullenwylie.com <adisbrow@mullenwylie.com>; ameede@mullenwylie.com
<ameede@mullenwylie.com>; atmduke@aol.com <atmduke@aol.com>; GCulpepper@rh-law.com
<GCulpepper@rh-law.com>; mark.phillips@nelsonmullins.com <mark.phillips@nelsonmullins.com>;
sdavies@mgclaw.com <sdavies@mgclaw.com>; sgladden@pritchard-elliott.com <sgladden@pritchard-elliott.com>; jelliott@pritchard-elliott.com <jelliott@pritchard-elliott.com>;
karl.brehmer@brownandbrehmer.com <karl.brehmer@brownandbrehmer.com>;
christle.turner@brownandbrehmer.com <christle.turner@brownandbrehmer.com>;
darby.plexico@brownandbrehmer.com <darby.plexico@brownandbrehmer.com>;
rmitchell@diamondbaker.com <rmitchell@diamondbaker.com>; Buckley, Edward D. (Ed)
<ebuckley@ycrlaw.com>; DaPore, Joseph E. (Joe) <jdapore@ycrlaw.com>; Hines, Russell
<RHines@ycrlaw.com>; RRemar@rh-law.com <RRemar@rh-law.com>
Subject: RE: Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, (13376-20070735)

Counsel,

These orders have been signed and sent to the Clerk's Office for filing.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

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

From: DeMato, Amanda [mailto:ADemato@ycrlaw.com]
Sent: Monday, April 02, 2012 10:07 AM
To: Young, Roger Law Clerk (Mary B. Ramsay); Brown, Denise
Cc: ryan.earhart@nelsonmullins.com; vrawl@mcnair.net; adisbrow@mullenwylie.com;
ameede@mullenwylie.com; atmduke@aol.com; GCulpepper@rh-law.com;
mark.phillips@nelsonmullins.com; sdavies@mgclaw.com; sgladden@pritchard-elliott.com;
jelliott@pritchard-elliott.com; karl.brehmer@brownandbrehmer.com;
christle.turner@brownandbrehmer.com; darby.plexico@brownandbrehmer.com;
rmitchell@diamondbaker.com; Buckley, Edward D. (Ed); DaPore, Joseph E. (Joe); Hines, Russell
Subject: RE: Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, (13376-20070735)

M <<1916637.doc>> a <<1914615.doc>> r <<1916637.doc>> y,

Attached please find the changes you requested to the Order Approving Class Notice and the Preliminary Case Management and Scheduling Order in Word format in case you need to make any additional changes. On the Case Management and Scheduling Order I pushed all of the dates two

weeks out from the original dates. Also attached is an amended class notice with the only change being the opt-out date to match the Preliminary Case Management and Scheduling Order date.

Please let us know as soon as Judge Young signs the orders. We will be moving forward to get the notices mailed by April 5, 2012, however we will not mail anything until we receive the signed order from Judge Young.

Amanda K. DeMato
Construction Litigation Group
Community Association Law Group
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
(843)720-5418 Direct Office
(843)579-1345 Direct Fax

* * Please note that our law firm has moved to 25 Calhoun Street, Suite 400, Charleston, SC 29401. * *

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

From: Young, Roger Law Clerk (Mary B. Ramsay) [mailto:ryounglc@sccourts.org]

Sent: Monday, April 02, 2012 9:31 AM

To: Brown, Denise

Cc: ryan.earhart@nelsonmullins.com; vrawl@mcnair.net; adisbrow@mullenwylie.com; ameede@mullenwylie.com; atmduke@aol.com; GCulpepper@rh-law.com; mark.phillips@nelsonmullins.com; sdavies@mgclaw.com; sgladden@pritchard-elliott.com; jelliott@pritchard-elliott.com; karl.brehmer@brownandbrehmer.com; christle.turner@brownandbrehmer.com; darby.plexico@brownandbrehmer.com; rmitchell@diamondbaker.com; DeMato, Amanda; Buckley, Edward D. (Ed); DaPore, Joseph E. (Joe); Hines, Russell

Subject: RE: Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, (13376-20070735)

Counsel,

My apologies for the delay. Judge Young has been holding court in Moncks Corner and Hampton the past few weeks. However, he has signed Plaintiffs' proposed orders with the exception of two: 1) The Preliminary Case Management and Scheduling Order and 2) Order Approving Notice of Class Action.

The dates on these order have already passed and therefore the orders need to be edited (since they were submitted as pdf.s, I can't make the necessary changes). Please make the following changes and resubmit the two referenced orders by email as soon as possible:

- Order Approving Notice of Class Action - change "March 19, 2012" to "April 5, 2012".
- Preliminary Case Management and Scheduling Order - change the first date to "April 5, 2012" and adjust the remainder of the dates accordingly.

Please let me know if you have any questions.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

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

From: Brown, Denise [mailto:dbrown@ycrlaw.com]
Sent: Friday, March 02, 2012 1:48 PM
To: Young, Roger; Young, Roger Law Clerk (Mary B. Ramsay)
Cc: ryan.earhart@nelsonmullins.com; vrawl@mcnair.net; adisbrow@mullenwylie.com;
ameeder@mullenwylie.com; atmduke@aol.com; GCulpepper@rh-law.com;
mark.phillips@nelsonmullins.com; sdavies@mgclaw.com; sgladden@pritchard-elliott.com;
jelliott@pritchard-elliott.com; karl.brehmer@brownandbrehmer.com;
christle.turner@brownandbrehmer.com; darby.plexico@brownandbrehmer.com;
rmitchell@diamondbaker.com; DeMato, Amanda; Buckley, Edward D. (Ed); DaPore, Joseph E. (Joe);
Hines, Russell
Subject: Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, (13376-20070735)

Judge Young,

Please see the attached correspondence with Plaintiffs' proposed Orders in connection with the above subject matter.

Thank you,

L. Denise Brown
Young Clement Rivers, LLP
Legal Secretary to Joseph E. DaPore
Direct Dial: 843-720-5446
Direct Fax: 843-579-1360
dbrown@ycrlaw.com

* * Please note that our law firm has moved to 25 Calhoun Street, Suite 400, Charleston, SC 29401. * *

Young Clement Rivers, LLP
<http://www.ycrlaw.com>
Charleston: (843) 577-4000

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