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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-07-03386

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SC Court of Appeals

Roger F. Carlson and Mary Jo Carlson,..... Respondents,

v.

South Carolina State Plastering, LLC,
Peter Conley, Individually, Del Webb
Communities, Inc., and Pulte Homes, Inc., ... Defendants,

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

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

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendants.

**ORDER MAKING PRELIMINARY
FINDING THAT PLAINTIFFS'
PROPOSED CLASS MEETS THE
REQUIREMENTS OF RULE 23(a),
SCRCP; SETTING PARAMETERS FOR
PUTATIVE CLASS; DISMISSING
PLAINTIFFS'
UNFAIR TRADE PRACTICES CLAIM
WITHOUT PREJUDICE; IMPOSING A
STAY OF PROCEEDINGS; AND,
SETTING FORTH PROCEDURES FOR
COMPLIANCE WITH THE RIGHT TO
CURE CONSTRUCTION DWELLING
DEFECT ACT**

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

11 DEC 19 PM 3:31
JEROME D. SEANEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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

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

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

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

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

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

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

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

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

7-4 The numerosity requirement of 23(a)(1) is often referred to as the impracticability of joinder requirement. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d, § 1762. No arbitrary measure of impracticability or numerosity has been established, and this issue is determined by the facts of each case. The objective of this requirement is to prevent members of a class from being unnecessarily deprived of their rights and a day in court by either the opposing party or by a few members of the proposed class. Ripley v. Denver U.S. National Bank, 260 F. Supp. 704, 712 (D. Colo. 1966). In this case, the Court finds that the numerosity requirement is met. The Plaintiffs have presented credible evidence, including testimony of Pulte representatives, that the number of houses clad with stucco in a similar manner as the Plaintiffs' house is over 4,000. There is no possibility that each case could be tried individually or joined as individual cases. Because the volume of cases presented here would certainly overwhelm the Beaufort County docket, and because joinder is impractical, this Court finds that the Rule 23 requirement of numerosity has been met.

Questions of Law and Fact Common to the Class

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

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

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

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

- 1) That there is a common determinative issue of fact or law that overshadows all other issues; namely, the structures in question have problems with (a) head flashing above doors and windows, (b) stucco control joints, and/or (c) moisture encapsulation by failing to leave a gap between the stucco exterior and the structure slab.
- 2) That the Court will not have to investigate each class member’s individual claim for purposes of establishing or failing to establish liability; and,
- 3) That the damages determination, should Plaintiffs prevail on liability, will be comprised of a core set of similar inquiries for each structure.

The “Typicality” Requirements of Rule 23(a)(3)

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

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

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

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

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

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

Adequacy of Class Representatives and Counsel

7-8
7 Rule 23(a) also requires that “the representative parties will fairly and adequately protect the interests of the class.” SCRC, Rule 23(a)(4). Adequacy of representation consists of two components: (1) there must be no disabling conflicts of interest between the class representative and the class and (2) the class representative must be represented by counsel competent and experienced in the kind of litigation to be undertaken. See Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983), *cited with approval in Waller v. Seabrook Island Property Owners Ass’n.*, 300 S.C. 465, 388 S.E. 2d 799 (1990). In this case, the Court finds that the proposed class representatives and the class members’ interests are identically aligned. They seek to have their homes repaired and hold liable those responsible for the damages. This Court notes that the Grazia complaint was filed in 2007 and that the Grazias have pursued this claim in a representative capacity for four (4) years, including a trip to the Supreme Court and back, as have their counsel. Plaintiffs’ counsel are qualified, experienced, and able to conduct class

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

The Amount in Controversy Meets the Statutory Requirement

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

Responses of the Defendants in Opposition to Class Certification

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

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

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

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

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

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

The Court is cognizant of Defendant's and third-party Defendants' arguments, and recognizes that factual and legal differences may exist within the putative class. For these reasons, this Order makes only a preliminary finding that the requirements of Rule 23 have been met by Plaintiffs. The Court intends to employ the Right to Cure process as outlined below to further analyze and perhaps organize the various claims that exist in these cases. The Court opines that there may be certain sub-groups formed within the class action to facilitate the determination of liability and damages issues, if such procedure is found to be fair and efficient.

Jms
10 See McGann v. Mungo, 287 S.C. at 570-71, 340 S.E.2d at 159 ("In any case, the problem of determining initial membership in the class affords no basis for dismissal of the action since the circuit court can either require the plaintiffs to replead, redefine the alleged class itself, or designate subclasses."). Moreover, should a Class be finally certified, after the passage of an appropriate period for discovery as to the applicability of affirmative defenses, the Court will require the Defendants to provide a listing of claimants for whom Defendants allege a specific affirmative defense is applicable, and the Court may thereafter form additional sub-groups within the Class to accommodate these defenses. The specifics of these procedures, if necessary, will be deferred until further development of the evidence through the discovery process. The Court specifically rejects Defendant's and third-party Defendants' contention, however, that the factual and legal components within the cases automatically defeat a class action approach to resolution

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

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

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

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

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

Requirement of Notice to Putative Class Members

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

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

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

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

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

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

Jan 14
Because there is no specific exclusion in either case law or the language of the Act, the notice to the contractor required under the Act must be filed in a representative capacity by proposed class counsel, and must be signed by counsel and dated as to the date of service to contractor. For purposes of record keeping and administration, Contractor SCSP shall receive service of the notices in a representative capacity through counsel. The date of service on each individual notice shall trigger the response dates as set forth herein. Because of the magnitude of the number of claims, the amount of work required in the initial investigation of the claims by contractor, and the fact that Plaintiffs have chosen to proceed by class action, the Court will grant a period of sixty (60) days to contractor to provide the individual claim response required by Section 40-59-850, and failure to respond within sixty (60) days shall be deemed a denial of the

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

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

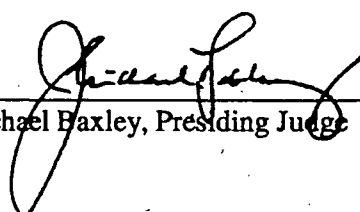
Job 15
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel specifically excluded. However, an inspection may not be cancelled or postponed because one or more of the attorneys for any party cannot be present. The contact information is provided on the alphabetical list of potential class members so that the parties may engage in the inspection process directly between themselves without need of counsel, if such is determined to be practicable by all concerned.

Conclusion

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

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

IT IS SO ORDERED.



J. Michael Baxley, Presiding Judge

Hartsville, South Carolina

December 8, 2011

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

ROGER F. CARLSON AND
MARY JO CARLSON,

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC, PETER CONLEY,
INDIVIDUALLY, DEL WEBB
COMMUNITIES, INC., AND PULTE
HOMES, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS

2008 - CP - 07 - 3386

ORDER DENYING
THE MOTION OF DEFENDANTS DEL
WEBB AND PULTE TO COMPEL
ARBITRATION

DOCT 20 PM 1:57
CLERK OF COURT
JOSENEAU
BEAUFORT COUNTY, S.C.

Joe
This matter came before the Court on February 23, 2011, on a Motion to Dismiss this case and/or Compel Arbitration filed by Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. (Webb/Pulte). Plaintiffs opposed this Motion and filed a brief with exhibits. Thereafter, Webb/Pulte filed a reply brief in support of their original motion.

The basis for the motion is the arbitration language found in Section 4.3 of a Sales Agreement signed by the Carlsons and by Webb's broker and sales manager on March 8, 2002, for the purchase of the Carlsons' home at 229 Hampton Circle, Bluffton, South Carolina. Subsequent to the execution of this sales agreement, a real estate closing took place and Webb issued a warranty deed to the Carlsons on March 15, 2002.

The Carlsons advanced four theories in opposition to Webb/Pulte's Motion to Compel Arbitration: (1) unconscionability of the sales contract; (2) elimination of the contract arbitration provision pursuant to the Doctrine of Merger; (3) waiver of the arbitration provision; and (4) the limited scope of the arbitration clause, compelling breach of contract claims only, not tort claims.

After examination of the various provisions of the sales agreement, the Court does not reach and issues no opinion on Plaintiffs first, second, and fourth arguments stated above. After review and analysis of prevailing substantive law, as well as the arguments and memoranda of counsel, the Court is persuaded by Plaintiffs' argument that Defendants have waived their opportunity for arbitration in this case, as discussed below.

Plaintiffs' argue that Webb/Pulte, by their conduct in availing itself of the Court system for a lengthy time prior to moving to arbitrate, have waived arbitration. The information submitted to the Court indicates that the Carlson complaint was filed on August 25, 2008, with service acknowledged on October 20, 2008. This Motion to dismiss the case or compel arbitration was filed on February 14, 2011. The Carlson case is one of approximately 140 cases involving similar claims for stucco-clad homes at the Sun City development, and these cases remain on the docket and are presently active pending resolution. These cases were declared complex by Fourteenth Judicial Circuit Chief Administrative Judge for Common Pleas J. Ernest Kinard, and assigned to this Court for disposition.

The sales agreement in question contained the following language with regard to arbitration:

Any controversy or claim arising out of or relating to this Agreement or your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall take place in Beaufort County, South Carolina or at a place mutually agreed upon by both parties.

After closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act. The Act is found at South Carolina Code Section 15-48-10 et seq. The rules of the American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding and the method of appointment of the arbitrator. The arbitration shall take place in Beaufort County or at a place mutually agreed upon by the parties.

Judgment upon any award rendered by arbitration may be entered in any court having jurisdiction over the matter. The cost of the arbitrator(s) shall be borne equally by the Purchaser and Seller. Any party to this Agreement may bring action, including a

summary or expedited proceeding, to compel arbitration of any court having jurisdiction over such action and in any arbitration shall be entitled to recover attorney fees and costs which shall be determined and awarded by the arbitrators.

93 In moving to compel arbitration, Defendants argue that the plain language of the document is not ambiguous; that the Court should not alter the uncontroverted terms of an agreement reached between the parties; that our courts have consistently upheld arbitration provisions for reasons of judicial economy and the speedy disposition of cases; and, that the "trial-oriented activity" undertaken by Defendants in the actual Carlson case has been minimal. In response, Plaintiffs presented a chronological list of specific actions already undertaken by counsel for Webb/Pulte in the course of the pending stucco cases litigation. Each of these actions were taken with the intent of furthering the litigation in Carlson as well as the similarly-situated 140 other stucco cases, all connected with Court filings and judicial administration of these construction claims. This list comprises more than forty entries, culminating in the instant motion to compel arbitration made in this specific case almost two and one-half (2½) years after suit was filed in this case. The list of actions undertaken by counsel for Del Webb/Pulte include, *inter-alia*, submission of a proposed case management order that encompassed discovery deadlines and the trial of all Sun City cases on the docket; participating in the development of and consenting to an Order of Stay to allow inspections of alleged construction defects on various premises in multiple cases; requesting an extension of time to answer discovery and answering discovery in other cases; filing a motion in opposition to Plaintiffs' requests to amend the complaint in other cases; scheduling and attending status conferences with various judges; drafting consent Orders for continuances in other cases; and, participating in conferences with opposing counsel and this Court during the transition for this Court to accept complex jurisdiction of this case and all those similarly-situated. The complete list of Defendant Webb Pulte's activities compiled by Plaintiffs' counsel and

presented to the Court is attached to and incorporated into this Order. It is impossible for this Court to parse this list in such a way as to say that each particular action listed was taken in the Carlson case alone; however, as the complex jurisdiction judge assigned to preside over all of the 140 pending stucco cases, this Court finds the pendency of the Carlson case was either directly or indirectly impacted by each and every one of Webb/Pulte's counsels' actions depicted on the list.

In considering whether Webb/Pulte waived its arbitration right under the sales agreement, this Court is persuaded by the reasoning of the Court of Appeals in the decisions of *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 647 S.E.2d 249 (Ct. App. 2007), and *Liberty Builders, Inc. v. Horton*, 521 S.E.2d 749 (Ct. App. 1999).

 In *Liberty Builders*, the Court of Appeals affirmed a finding by the trial court denying a motion to compel arbitration. The trial court found, and the Court of Appeals agreed, that the homeowner had been prejudiced by Liberty's failure to seek arbitration for approximately two and one half years while utilizing the Court system during that time on approximately forty occasions. Under those facts, the Court found that Liberty waived whatever arbitration rights it might otherwise have.

This case presents facts very similar to those reported in *Liberty Builders*. This Court factually finds that the Plaintiffs have been prejudiced by Webb/Pulte's use of the court system and the significantly enhanced discovery opportunities thereunder, as well as causing a two and one-half year delay in attempting to trigger its arbitration rights. The filings in the record establish that Webb/Pulte was fully aware of these arbitration rights early on, and indeed pled arbitration as an affirmative issue in its answer, and actually arbitrated a similar case in the fall of 2008.

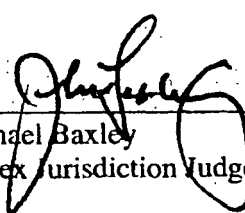
The Court factually finds both delay and prejudice as a result of the resort to the Court System, and pursuant to the controlling authority of *Liberty Builders, Inc., supra*, the Court is required to deny Webb/Pulte's motion.

This Court further finds that this ruling is consistent with the reasoning and outcome in the most recent case of *Davis v. KB Home of South Carolina*, Ct. App. Op. 4851, issued July 13, 2011, after oral arguments were conducted in the case at Bar; thus, counsel did not have the formal opportunity to brief or argue the impact of this decision herein.

Accordingly, the Motion to Dismiss and/or Compel Arbitration of Webb/Pulte is **DENIED.**

IT IS SO ORDERED.

October 17, 2011



J. Michael Baxley
Complex Jurisdiction Judge

August 25, 2008	Complaint filed
October 20, 2008	AOS
December 18, 2008	Answer
January 8, 2009	Scheduling of SCSP depositions (never scheduled)
January 9, 2009	Notice of Deposition for Carlson served by SCSP (deposition never went forward)
February 13, 2009	Phillip Segui ltr. to Vic Rawl enclosing Consent Order of Stay to allow inspections and enclosing Notice of defects pursuant to SC Code §40-59-840
February 20, 2009	Del Webb would like to stay pending compliance with statute-Lepore, McManus & Wilcox
February 20, 2009	Plaintiffs understand Defendants will consent to language for consent order.
March 11, 2009	Judge Mullen would like to hold a status conference on March 19, 2009. Vic Rawl out of country cannot attend.
April 9, 2009	Vic Rawl preparing language for 99 cases.
April 28, 2009	Vic Rawl transmitting proposed Orders staying the cases pursuant to Notice and Opportunity to Cure Statute discussed on telephone conference to Judge Mullen.
May 6, 2009	Phillip's office contacts Vic Rawl re: discovery -Vic Rawl's understanding is that the cases are stayed at this time per the right to cure statute, and can agree that the service by email of discovery requests is effective as of the date the stay is lifted.
September 8, 2009	Vic Rawl requests an extension to answer discovery until October 31, 2009.
October 7, 2009	John Chakeris requests a limited 30(b)(6) of the Corporate Representative regarding the pending stucco claims on the Sun City internal television station. (within next 20 days)
October 8, 2009	Vic Rawl wants a better explanation for the 30(b)(6) request.
October 19, 2009	Vic Rawl requesting counsel attend status conference regarding cases on November 2 roster that are not ready for trial. Status conference confirmed with Judge Kinard on October 29, 2009. (Don't believe this ever went forward with Judge Kinard)
October 20, 2009	Phillip emails regarding needing a Scheduling Order instead of status conference. Vic Rawl agrees to take a look at one or even consider an Order simply continuing the case for 5 months. Cake, Dalziel

October 21, 2009	Vic Rawl drafts Consent Orders for Continuance for review and transmits to Judge Kinard.
October 29, 2009	Vic Rawl requests extension on discovery until December 4.
November 9, 2009	Vic Rawl emails Heather re:23 motion hearings that Del Webb and Pulte have moved to dismiss or stay. Parties have reached an agreement as to a stay this morning and submit a consent order to Judge Dukes.
December 3, 2009	Vic Rawl answers Plaintiffs' discovery requests.
December 4, 2009	Per Vic Rawl, responses in individual stucco cases that are not stayed are being served today. Before defendants can produce or allow inspection of documents, they need to have a confidentiality order in place. If counsel cannot agree defendants will move the Court to enter a confidentiality order.
December 7, 2009	Per Vic Rawl, in court on December 18. 4 cases on the December 30 roster 1)King 2) Davidson 3) Dalziel 4)Cake. Will email clerk to remove from December 30 roster.
January 8, 2010	Phillip emails Vic Rawl re:10 cases on January 12, 2010 roster and ask if mediation set for January 12 are cancelled. Vic responds that he will inform the court that motions are resolved and send Judge Dukes the proposed Orders.
February 24, 2010	Phillip Segui request a 45 day extension to respond to all outstanding Requests to Admit.
March 1, 2010	Vic Rawl grants a 30 day extension and ask that Phillip let him know if he needs more time.
March 8, 2010	Vic Rawl emails Erin to let her know that he will be out of state the weeks of March 15 and March 22 for wife's birthday and kids' spring break but will be back the week of March 29 and request a status conference.
March 9, 2010	Per Vic Rawl, Dalziel and Cake are on trial roster April 5. When will clients be available for depositions?
March 10, 2010	Vic Rawl emails Erin to let her know he can be available for status conference the week of April 5, 2010.
March 17, 2010	Vi Rawl emails that he thinks he has an obligation to notify Judge Mullen that her husband's law firm is suing Pulte and Del Webb. Spoke with Rett Kendall and Jeff Leath about the possibility of having these cases assigned to Judge Young. Ask for Plaintiffs consent to having these cases

	assigned to Judge Young. Vic notifies Erin via email. Judge Mullen is recusing herself and will not hear status conference tomorrow morning.
March 18, 2010	Vic Rawl emails Judge Young to request a conference call with him and Judge Young, and gives him a short history of the cases. Also, emails Erin to let her know that all counsel have consented to these cases being assigned to Judge Young.
March 25, 2010	Vic Rawl emails Erin or Carlie to inquire about an Order being issued assigning these cases to Judge Baxley, requesting dates for a status conference.
March 31, 2010	Ellie at Phillip's office has a phone conversation with Vic Rawl requesting an extension until April 15, 2010 to respond to all outstanding Requests to Admit. Vic Rawl grants extension.
May 11, 2010	Vic Rawl emails Judge Baxley thanking him for meeting with counsel re: 138 stucco cases-and transmitting a consent order that counsel has agreed to sign to transmit to Justice Toal. Offers to set up a conference call when the Judge Baxley is available.
May 28, 2010	Vic Rawl transmits a draft CMO for review.
July 6, 2010	Law Clerk for Judge Baxley emails counsel requesting a status conference via telephone Tuesday, July 13 at 30pm w/Judge Baxley. Vic Rawl is available.
September 9, 2010	Vic Rawl emails law clerk requesting a hearing on the outstanding matters in the following range-September 20-24-27-28.
September 14, 2010	Filed Motion in Opposition to Amend Complaint.
November 10, 2010	Dolores emails 2 scheduling orders for review to Ms. O'Neal. Vic Rawl responds that he is in Texas for the rest of the week and wants the court to know that Defendants do not agree to the scheduling order submitted. Only addresses 1 out of 140 cases , does not include basic deadlines. Defendants requests a status conference to address the CMO submitted, scheduling issues and deadline, and other procedural matters.
December 27, 2010	Ellie at Phillip's office emails correspondence along with previously served supplemental discovery request to Vic Rawl. re: Grazia
January 7, 2011	Vic Rawl requests an extension until Wednesday, January 12, 2011.

January 13, 2011	Judge Baxley's secretary is trying to set up phone conference to address CMO and is available January 14 and will address Vic's request for protection. Vic provides call in number.
January 25, 2011	Vic Rawl emails Judge Baxley responding to Mike Seekings' email and sees no reason not to go forward with the hearing on the arbitration issues during the week of February 21, 2011.
February 14, 2011	Vic Rawl files Motion to Dismiss and/or to Compel Arbitration

- Vic Rawl filed numerous Consent Orders with the Court re: Right to Cure and also filed Motion that Plaintiffs didn't comply with Right to Cure and was heard by Judge Baxley.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

2008 - CP - 07 - 3386

ROGER F. CARLSON AND)
MARY JO CARLSON,)

Plaintiff(s))

vs.)

**ORDER ALLOWING
PLAINTIFFS TO AMEND
COMPLAINT TO ASSERT
CLASS ALLEGATIONS**

SOUTH CAROLINA STATE)
PLASTERING, LLC, PETER CONLEY,)
INDIVIDUALLY, DEL WEBB)
COMMUNITIES, INC., and PULTE)
HOMES, INC.,)

Defendant(s))

This matter came before the Court for hearing on November 9, 2010, pursuant to Plaintiffs' April 23, 2010 Motion to Amend Complaint to add Class allegations. The Defendants opposed the amendment, citing as one of their grounds, Rule 12(b)(8), SCRPC.

 Rule 15, SCRPC, requires this Court to freely grant leave to amend pleadings unless the party opposing the amendment can demonstrate prejudice. The burden is on the party opposing the amendment to demonstrate prejudice. The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Duncan v. CRS Serrine Engineers, Inc.*, 524 SE 2d, 115, 117-18 (Ct.App.1999).

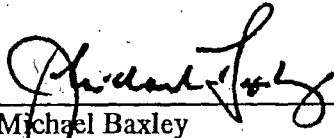
The Defendants have not alleged or established any such potential prejudice. Indeed, they have been on notice for a considerable time that Plaintiffs sought to amend to add the Class Action mechanism of trial, which is not a new issue, but rather a different procedural method.

Rule 12(b)(8), SCRPC, also has no applicability to the instant Amendment. This Rule would permit a Motion to Dismiss where another action is pending between the same parties for the same claim, and thus is directed towards eliminating two or more lawsuits between the same parties for the same claims, a situation not present here. The Carlson Plaintiffs do not seek to bring entirely new identical claims, rather they seek the Class Action mechanism to consolidate the presently pending claims listed in their proposed amended pleading, for a trial in one proceeding. This procedural mechanism has nothing to do with the multiplicity of actions sought to be corrected by Rule 12(b)(8).

The balance of the Defendants' arguments are ones which, if Defendants wish to raise them, are more properly presented at a hearing on Class Certification and not at the request for Amendment stage.

Accordingly, the Motion of the Plaintiffs to Amend their pleading to assert Class Allegations is GRANTED.

IT IS SO ORDERED.



J. Michael Baxley
Judge, Fourteenth Judicial Circuit

Hartsville, South Carolina

December 10, 2010

RECEIVED

DEC 20 2010

McNair Law Firm, P.A.

20701-69

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF BEAUFORT

CASE NO: 2008CP0703289

IN THE COURT OF COMMON PLEAS

10 MAY 26 AM 11:02
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Donald M Avedon vs. South Carolina State Plastering LLC

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed;	☐ Reversed;	☐ Remanded;	☐ Other;
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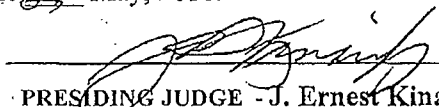
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (Formal order to follow) ☐ Statement of Judgment by the Court:

The attached list of cases are being handled by Judge Mike Baxley.

Dated at Beaufort, South Carolina, this 25 May, 2010.

Court Reporter:


PRESIDING JUDGE - J. Ernest Kinard, Jr.
Chief Administrative Judge

This judgment was entered on the ^{May} ~~April~~, 2010, and a copy mailed first class this ^{May} ~~April~~, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

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Box 11390 Columbia, SC 29211
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& Barrow, PA P.O. Box 12129 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Jamie Thompson

SCRPC APP-24/FORM 4

Jerri Ann Roseneau - Clerk of Court

Plaintiff's Name	Case Number	Date Filed
Avedon, Donald	08-CP-07-3289	9/3/2008
Crowe, Richard & Carole (3290)	08-CP-07-3290	9/3/2008
Constantelo, Virginia	08-CP-07-3291	9/3/2008
Antonacio, Donald & Sandra	08-CP-07-3292	9/3/2008
Crowe, Richard & Carole (3293)	08-CP-07-3293	9/3/2008
Hassett, Edward & Frances	08-CP-07-3299	9/3/2008
Desjardins, Phillip & Anna Marie	08-CP-07-3301	9/3/2008
Maloney, Charles & Margret	08-CP-07-3302	9/3/2008
Martin, Edmond & Patricia	08-CP-07-3303	9/3/2008
Abel, William & Martha	08-CP-07-3305	9/3/2008
Balcer, Joseph & Patricia	08-CP-07-3306	9/3/2008
Boone, Daniel & Rose	08-CP-07-3307	9/3/2008
Bongiorno, Joseph & Jean	08-CP-07-3308	9/3/2008
Eigenmann, Kurt & Dawn	08-CP-07-3309	9/3/2008
Foard, Arthur & Aileen	08-CP-07-3310	9/3/2008
Kaminowitz, Charles & Phyllis	08-CP-07-3312	9/3/2008
Lehrer, Thomas & Eileen	08-CP-07-3313	9/3/2008
Rodman, Richard & Rosalie	08-CP-07-3314	9/3/2008
Mullins, Samuel C.	08-CP-07-3316	9/3/2008
Mcelfresh, Robert & Gisela	08-CP-07-3317	9/3/2008
Ankney, Robert and Cinda	08-CP-07-3318	9/3/2008
Wolfe, Michael & Marianne	08-CP-07-3320	9/3/2008
Leinberger, Edwin & Patricia	08-CP-07-3321	9/3/2008
Mak, Martin & Alberta	08-CP-07-3322	9/3/2008
Jarrett, Beverly	08-CP-07-3323	9/3/2008
Wessell, Robert & Judith	08-CP-07-3324	9/3/2008
Swank, George & Patricia	08-CP-07-3325	9/3/2008
Dunn, Dorothea	08-CP-07-3326	9/3/2008
Stief, Bernard & Margaret	08-CP-07-3327	9/3/2008
Michaud, M. Elaine	08-CP-07-3328	9/3/2008
O'Donnell, Martin & Catherine	08-CP-07-3329	9/3/2008
Kaponer, Edwin & Lourdes	08-CP-07-3330	9/3/2008
Sbrocco, Donald & Ann	08-CP-07-3331	9/3/2008
McNamara, John & Kathleen	08-CP-07-3339	9/3/2008
Carpitella, Vito & Iris	08-CP-07-3341	9/3/2008
Kashine, Ruth	08-CP-07-3342	9/3/2008
Tarih, Marsha Fay	08-CP-07-3343	9/3/2008
Johnson, John & Shirley	08-CP-07-3344	9/3/2008
Connors, Helen & Elizabeth Ford	08-CP-07-3345	9/3/2008
Fillion, A. James	08-CP-07-3346	9/3/2008
Jadown, Roger & Diane	08-CP-07-3347	9/3/2008
Smith, James & Patricia (Dismissed)	08-CP-07-3348	9/3/2008
Perkins, Ralph & Linda	08-CP-07-3350	9/3/2008
Dalziel, Jan & Vera	08-CP-07-3351	9/3/2008
Burns, Robert & Mary	08-CP-07-3352	9/3/2008
Washington, Wallis Y.	08-CP-07-3355	9/3/2008
Carlin, Thomas & Patricia	08-CP-07-3361	9/3/2008

Scheuerman, Gary & Helen	08-CP-07-3365	9/3/2008
Propfe, Heinrich & Florika	08-CP-07-3366	9/3/2008
Curtis, William & Lynne	08-CP-07-3367	9/3/2008
Rump, Ronnie & Hillary Walla	08-CP-07-3368	9/3/2008
Cake, James & Gayle	08-CP-07-3370	9/3/2008
Craft, Jacqueline	08-CP-07-3372	9/3/2008
Delaney, John & Eleanor	08-CP-07-3373	9/3/2008
Ferguson, Rose Marie	08-CP-07-3374	9/3/2008
Grady, Linda	08-CP-07-3376	9/3/2008
Greger, Tom S.	08-CP-07-3378	9/3/2008
Fleischhauer, David	08-CP-07-3382	9/3/2008
Combes, Susan M.	08-CP-07-3383	9/3/2008
Crowley, Patrick	08-CP-07-3384	9/3/2008
Abruzzo, Thomas & Pauline	08-CP-07-3385	9/3/2008
Carlson, Roger & Mary Jo	08-CP-07-3386	9/3/2008
Kammerer, Fred & Grace	08-CP-07-3387	9/3/2008
Stewart, Barbara Montgomery	08-CP-07-3388	9/3/2008
Sadowsky, Howard & Janet	08-CP-07-3389	9/3/2008
Matile, Robert & Madelon	08-CP-07-3390	9/3/2008
Myers, Roger & Linda	08-CP-07-3391	9/3/2008
Weber, Anthony & Joan	08-CP-07-3392	9/3/2008
Clark, William & Vickie	08-CP-07-3393	9/3/2008
Block, Terry & Michelle	08-CP-07-3394	9/3/2008
Forrest, J. Craig & Margaret	08-CP-07-3395	9/3/2008
Brackett, Janice Ann	08-CP-07-3396	9/3/2008
Dexnis, David & Linda	08-CP-07-3397	9/3/2008
Porter, John & Edith	08-CP-07-3398	9/3/2008
Yuhasz, John	08-CP-07-3399	9/3/2008
Thompson, Moses & Sara	08-CP-07-3400	9/3/2008
Greiner, Ronald & Rosann	08-CP-07-3401	9/3/2008
McGowan, Donald & Dolores	08-CP-07-3402	9/3/2008
O'Donnell, James & Grace	08-CP-07-3403	9/3/2008
Madison, Scott & Joann	08-CP-07-3404	9/3/2008
Lieberman, Benjamin & Sheila	08-CP-07-3405	9/3/2008
Natale, Daniel & Doris	08-CP-07-3406	9/3/2008
Natale, Daniel & Doris	08-CP-07-3407	9/3/2008
Stein, Phillip & Thelma	08-CP-07-3408	9/3/2008
Ott, Thelma L. (dismissed)	08-CP-07-3409	9/3/2008
Ewing, Manford & Mollie	08-CP-07-3410	9/3/2008
Dreyer, William & Bonnie	08-CP-07-5106	12/22/2008
McManus, Bernard & Loretta	08-CP-07-5111	12/22/2008
Wilcox, Carson & Mary	08-CP-07-5113	12/22/2008
Lepore, Samuel & Brenda	08-CP-07-5115	12/22/2008
Stoops, Edward & Wanda	08-CP-07-5114	12/22/2008
Southworth, Ronald & Patricia	08-CP-07-5116	12/22/2008
Hoffman, Robert & Nancy	08-CP-07-5117	12/22/2008
Green, Leslie & Judith	08-CP-07-5118	12/22/2008
Lunn, James L	09-CP-07-0021	1/5/2009
Ott, John & Maryann	09-CP-07-0022	1/5/2009

Capossela, James S	09-CP-07-0023	1/5/2009
Battista, Catherine A.	09-CP-07-1066	3/9/2009
Hansen, Lois	09-CP-07-2026	4/29/2009
Gibb, James & Patricia	09-CP-07-2027	4/29/2009
Serkes, Joel & Janet	09-CP-07-2028	4/29/2009
Sotire, Bonnie & Charles	09-CP-07-2029	4/29/2009
Vence, Sharon L.	09-CP-07-2030	4/29/2009
Weisslitz, Paul & Selma	09-CP-07-2031	4/29/2009
Westerfield, Martha	09-CP-07-2032	4/29/2009
Wigg, Christine & Ann Clark	09-CP-07-2033	4/29/2009
Mullins, Carole and Orn Tobey	09-CP-07-2351	5/18/2009
Poulin, Nancy	09-CP-07-2352	5/18/2009
Rusin, James R. and Sharon	09-CP-07-2354	5/18/2009
Hoag, James & Veronica	09-CP-07-2355	5/18/2009
Yaworski, Joseph & Lorraine	09-CP-07-2364	5/18/2009
Jenkins, Alexandria	09-CP-07-2365	5/18/2009
Roberts, Lynn	09-CP-07-2366	5/18/2009
Stone, Robert & Suzanne	09-CP-07-2375	5/18/2009
Dempsey, Henry & Mary	09-CP-07-2376	5/18/2009
Krusky, Anthony & Dorothea	09-CP-07-2377	5/18/2009
Box, William and Gail	09-CP-07-2378	5/18/2009
Plank, Leroy & V.L.	09-CP-07-2379	5/18/2009
Parks, Nathan & Theda	09-CP-07-2380	5/18/2009
Fenske, Charles & Marianne	09-CP-07-2381	5/18/2009
Lamdin, Joseph & Virginia	09-CP-07-2383	5/18/2009
Friedman, George & Susan	09-CP-07-2384	5/18/2009
McCulloch, Stephen & Dorothy	09-CP-07-2385	5/18/2009
Sommerfeld, Darrel and Brenda	09-CP-07-2562	5/29/2009
Valente, Louis & Jean	09-CP-07-2563	5/29/2008
Leonard, William and Judith	09-CP-07-2564	5/29/2008
Woods, Frank and Chloe	09-CP-07-2565	5/29/2009
Dunn, Thomas and Mary	09-CP-07-2566	5/29/2009
Strohl, Harlan and Mary	09-CP-07-2567	5/29/2009
Watkins, David R.	09-CP-07-2568	5/29/2009
Biagi, Grace	09-CP-07-2569	5/29/2009
Holub, Steve & Roxanne	09-CP-07-2902	6/7/2009
Shields, Robert & Norma Lea	09-CP-07-2903	6/17/2009
Amadeo, Anthony & Madeline	09-CP-07-2904	6/17/2009
Lewis, Frederick & Judith	09-CP-07-2905	6/17/2009
Mullins, Carole A.	09-CP-07-2906	6/17/2009
Lehmann, Carl & Nancy	09-CP-07-3318	7/13/2009
Lunsford, Darla Sue	09-CP-07-3328	7/13/2009
Haaker, Arthur & Louise	09-CP-07-4924	10/15/2009
Kirschner, Ira & Cynthia	09-CP-07-4979	10/15/2009
Dunne, Robert J.	09-CP-07-5185	10/30/2009
MacNeil, Alexander	09-CP-07-5195	10/30/2009

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Roger F. Carlson and Mary Jo Carlson,
Plaintiffs,

vs.

South Carolina State Plastering, LLC,
Peter Conley, Individually, Del Webb
Communities, Inc., and Pulte Homes, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2008-CP-07-03386

CONSENT ORDER

2009 MAY 27 PM 2:02

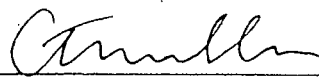
1. Plaintiff(s) in the above referenced case filed their action before first complying with the requirements of South Carolina Code § 40-59-810, et seq.

2. The above referenced action is hereby stayed pursuant to § 40-59-830 until the plaintiff(s) in that case has/have complied with the requirements of § 40-59-810, et seq., or until all defendants serve upon the plaintiff(s) in the specific action express written waiver of compliance with § 40-59-810, et seq. regarding the house at issue.

3. The stay in the above referenced case shall be lifted upon the earlier of the following: 1) consent of all parties; 2) order of this Court; 3) service of the written waiver of compliance described above; or 4) 90 days from the date of this order (any defendant may thereafter file a motion to continue or extend the stay on the basis that the Plaintiff has not complied with the statutory requirement).

IT IS SO ORDERED

May 15, 2009
April 15, 2009


Chief Administrative Judge

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ROGER F. CARLSON AND)
MARY JO CARLSON,)

Plaintiff(s))

vs.)

SOUTH CAROLINA STATE)
PLASTERING, LLC, AND PETER)
CONLEY, INDIVIDUALLY, DEL)
WEBB COMMUNITIES, INC., and)
PULTE HOMES, INC.,)

Defendant(s))

IN THE COURT OF COMMON PLEAS

2008 - CP - 07 - _____

SUMMONS

(Jury Trial Demanded)

ELIZABETH M. SMITH
BEAUFORT COUNTY S.C.
CLERK OF COURT

2008 SEP -3 PM 4:12

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and are required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscriber, at 864 Lowcountry Blvd., Ste. A, Mt. Pleasant, South Carolina 29465, within thirty (30) days after the service thereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

SEGUI LAW FIRM, LLC

By: _____

Phillip W. Segui, Jr.
PS

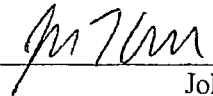
Phillip W. Segui, Jr.

864 Lowcountry Blvd., Suite A

Mt. Pleasant, SC 29465

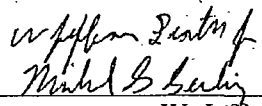
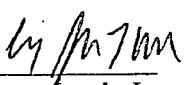
(843) 884-1865

THE CHAKERIS LAW FIRM

By: 

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P.O. Box 397
Charleston, SC 29402
(843) 853-5678

LEATH, BOUCH & CRAWFORD, VON KELLER, LLP

By:  

W. Jefferson Leath, Jr.
Michael S. Seekings
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P.O. Box 59
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(843) 937-8811
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 8/25, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ROGER F. CARLSON AND)
MARY JO CARLSON,)

Plaintiff(s))

vs.)

SOUTH CAROLINA STATE)
PLASTERING, LLC, PETER CONLEY,)
INDIVIDUALLY, DEL WEBB)
COMMUNITIES, INC., and PULTE)
HOMES, INC.,)

Defendant(s))

IN THE COURT OF COMMON PLEAS

2008 - CP - 07 - _____

COMPLAINT

(Jury Trial Demanded)

ELIZABETH M. SMITH
BEAUFORT COUNTY S.C.
CLERK OF COURT

2008 SEP - 3 PM 4:12

The Plaintiffs above named, complaining of the Defendants above named, would allege and show as follows:

PARTIES

1. The Plaintiffs are citizens and residents of the County of Beaufort, State of South Carolina, and at all times hereinafter mentioned, own the residence, located at 229 Hampton Circle, Bluffton South Carolina.

2. That, upon information and belief, the Defendant, South Carolina State Plastering, LLC is a limited liability company organized and existing under the laws of the State of South Carolina, and conducted business in Beaufort County at all relevant times herein and was engaged in the design, building, construction, repair and in particular the application and/or installation of stucco to the Plaintiffs' residence located at 229 Hampton Circle, Bluffton, South Carolina.

3. That, upon information and belief, the Defendant, Peter Conley, is a citizen and resident of Beaufort County and conducts business in Beaufort County and is the alter-ego of and South Carolina residential specialty subcontractor license holder

for South Carolina State Plastering, LLC, and he was engaged in the supervision, oversight, design, construction and/or repair of the residence at 229 Hampton Circle, Beaufort, South Carolina.

4. That, upon information and belief, Defendant, Del Webb Communities, Inc., an Arizona Corporation, is a corporation organized in another state, and is a brand, subsidiary, division or other device of Defendant, Pulte Homes, Inc. Del Webb Communities, Inc., conducts business and is authorized to conduct business in Beaufort County, State of South Carolina, and at all times relevant hereto was engaged in the design, construction, development and/or repair of residential housing and specifically was engaged in the design, development, building, construction and/or the repair of the Plaintiffs' residence located in Del Webb's Sun City Hilton Head Bluffton Township residential development (hereinafter "Sun City").

5. That, upon information and belief, Defendant, Pulte Homes, Inc., is a corporation organized under the laws of another state, and is the parent corporation and/or successor corporation of Del Webb Communities, Inc., and at all times relevant hereto was authorized to conduct business in Beaufort County, South Carolina and was engaged in the design, development, building, construction and/or the repair of residential housing and specifically was engaged in the design, development, building, construction and/or the repair of the Plaintiffs' residence located in Sun City.

JURISDICTION

6. That this Court has jurisdiction over the parties and subject matters hereto and that the allegations out of which this action arises all involve the residence of the Plaintiffs located in the County of Beaufort, State of South Carolina.

FACTUAL BACKGROUND

7. That the exterior of the subject residence is constructed with stucco (commonly referred to as hard coat stucco) that was, upon information and belief, installed as part of the original construction of the Plaintiffs' home in 2002.

8. That the stucco exterior wall system, was not properly installed and contain various defects, problems and deficiencies that are in violation of applicable building codes, not in conformity with specifications and accepted construction industry standards and practices.

FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

(AS TO DEL WEBB COMMUNITIES, INC., and PULTE HOMES, INC.,)

9. Each and every allegation contained in Paragraphs 1 through 8 above are incorporated herein by express reference as though fully set forth.

10. That at all times herein, the Plaintiffs, entered into a contract with the Defendants for the construction and/or repair of their residence located in Sun City.

11. That at all relevant times herein, the Defendants, by and through their agents, servants and employees had an obligation and duty to construct, develop, sell and/or repair the residence and to provide materials and services in accordance with the terms and conditions of the contract, applicable building codes, in conformance with

accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications.

12. That the Defendants breached the contract with the Plaintiffs by failing to construct said residence with a stucco exterior that was installed in accordance with the terms and conditions of the contract, applicable building codes, in conformance with accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications, all of which have directly and proximately caused defects and deficiencies in the residence which will need to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contract. Such breaches include but are not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair and remodeling of the subject residence;
- b. In failing to adequately supervise the construction, repair and remodeling of the subject residence;
- c. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- d. In constructing, developing, designing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- e. In improperly installing the stucco cladding in violation of the building code, standard building practices and accepted construction industry standards and practices and not in conformity with component product manufacturer installation instructions and specifications;
- f. In installing a home exterior which fails to provide a sufficient barrier against the intrusion of water into the system and adequate avenue for exit of water that gets into the system;
- g. In failing to properly install control joints;
- h. In failing to exercise due care;
- i. In such other deficiencies or failures as will be proven at trial.

13. That as a direct and proximate result of the Defendants' breach of contract with the Plaintiffs, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated

with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject residence causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A SECOND CAUSE OF ACTION

(Negligence)

**(AS TO SOUTH CAROLINA STATE PLASTERING, LLC,
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC., and
PULTE HOMES, INC.,)**

14. Plaintiffs repeats and realleges its allegations set forth in Paragraphs 1 through 13 above as if set forth herein verbatim.

15. At all times material hereto, the Defendants, through their agents, servants and employees, undertook and were under a duty to the Plaintiffs to construct the home and/or provide the materials and services in accordance with the manufacturer's installation instructions and the building code applicable in Beaufort County, State of South Carolina, and to construct the home in accordance with construction industry practices and with due care.

16. The Defendants were negligent, grossly negligent, careless, reckless, willful, and wanton in constructing, supervising, designing and inspecting the construction of the home and failing to comply with the requirements of the

manufacturer's installation instructions, building codes and industry standards and practices, and in failing to employ good supervisory and construction practices, and as a direct and proximate result of which the residence has been constructed and ultimately sold to the Plaintiffs with the defects and deficiencies as now exist therein.

17. The Plaintiffs have has sustained damages as a direct and proximate cause of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants in one or more of the following particulars, to wit:

- a. In failing to use due care in the construction, repair and remodeling of the subject residence;
- b. In installing an improper stucco exterior system on the home,
- c. In failing and omitting to meet industry standards in stucco installation and sealant application;
- d. In applying an exterior stucco finish system so as to result in or will result in cracks and sealant failure.
- e. In failing and omitting to properly install wall termination weep flashing and/or a proper weep mechanism;
- f. In failing and omitting to properly install control joints;
- g. In failing and omitting to properly install proper head flashing;
- h. In failing to properly supervise work forces and to properly inspect the work;
- i. In failing to construct the residence according to the applicable building codes and industry standards;
- j. In failing and omitting to use due care on the stucco exterior systems on the residence;
- k. In failing and omitting to install stucco systems which would provide a sufficient barrier against intrusion of water into the system and an adequate avenue for exit of water that gets into the system;
- l. In construction the stucco cladding in violation of standard building practices, accepted construction industry standards, and in conformity with component product manufacturer installation instructions and specifications;

18. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness and wantonness of the Defendants, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but

not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject residence causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A THIRD CAUSE OF ACTION

**(Breach of Warranty of Habitability, Breach of Warranty Against Latent Defects,
Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a
Particular Purpose and Breach of Warranty of Merchantability and Serviceability)
(AS TO SOUTH CAROLINA STATE PLASTERING, LLC,
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC., and
PULTE HOMES, INC.,)**

19. Each and every allegation contained in Paragraphs 1 through 18 above are incorporated herein by express reference as though fully set forth.

20. That the Defendants implicitly and/or expressly warranted that the subject residence would be habitable and fit for its intended uses as single family residence and that said residence would be designed, developed, manufactured, constructed and repaired in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, accepted building component manufacturing standards and specifications and accepted construction industry standards applicable thereto and that the subject residence would be merchantable, free from latent defects and fit for the particular purpose for which it was built.

21. That Defendants breached said warranties by designing, constructing, and/or repairing the stucco exterior of the subject residence in such manner as to be in violation of applicable building codes, not in conformance with accepted construction and industry standards and not in conformity with component product manufacturer installation instructions. As a direct and proximate result of the Defendants' breach of these warranties, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices)
(AS TO SOUTH CAROLINA STATE PLASTERING, LLC AND
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC., and
PULTE HOMES, INC.,)**

22. Each and every allegation contained in Paragraphs 1 through 21 above are incorporated herein by express reference as though fully set forth.

23. The Defendants are "persons" within the meaning of South Carolina Code § 39-5-10(a).

24. The Defendants, by their actions in developing, designing, constructing, supervising and overseeing construction activities are engaged in commerce within the meaning of South Carolina Code §39-5-10(b).

25. The Defendants, by their action(s) described hereinabove, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

26. The Defendants' act(s) are capable of repetition and, upon information and belief and in accord with the allegations herein, have been repeated.

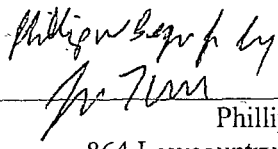
27. The Defendants' conduct affects the public interest of the people of South Carolina.

28. The Defendants knew or should have reasonably known, that their conduct violated the Unfair Trade Practices Act.

29. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

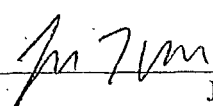
WHEREFORE, the Plaintiffs pray for judgment against the Defendants, South Carolina State Plastering, LLC, Peter Conley, Individually, Del Webb Communities, Inc., and Pulte Homes, Inc., jointly and severally, in a reasonable amount of actual, punitive and treble damages to be determined by the jury; for the attorneys fees and cost of this action; for a prejudgment or post-judgment interest on Plaintiffs damages; and for such other and further relief as this Court may deem just and proper.

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By: 

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THE CHAKERIS LAW FIRM

By: 

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P.O. Box 397
Charleston, SC 29402
(843) 853-5678

LEATH, BOUCH & CRAWFORD, VON KELLER, LLP

By: *W. Jefferson Leath, Jr.*
Michael S. Seekings

W. Jefferson Leath, Jr.

Michael S. Seekings

92 Broad Street

P.O. Box 59

Charleston, SC 29402

(843) 937-8811

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 8/25, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ROGER F. CARLSON AND)
MARY JO CARLSON, on behalf of)
themselves and others similarly situated,)
Plaintiff(s))

vs.)

SOUTH CAROLINA STATE)
PLASTERING, LLC, PETER CONLEY,)
INDIVIDUALLY, DEL WEBB)
COMMUNITIES, INC., and PULTE)
HOMES, INC.,)
Defendant(s))

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 08 - CP - 07 - 3386

AMENDED COMPLAINT
(CLASS ACTION)

(Jury Trial Demanded)

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JAN 05 2011
CLERK OF COURT

The Plaintiffs above named, hereby amending their Complaint, would allege and show as follows:

PARTIES

1. The Plaintiffs are citizens and residents of the County of Beaufort, State of South Carolina, and at all times hereinafter mentioned, own the residence, located at 229 Hampton Circle, Bluffton South Carolina.

2. That, upon information and belief, the Defendant, South Carolina State Plastering, LLC is a limited liability company organized and existing under the laws of the State of South Carolina, and conducted business in Beaufort County at all relevant times herein and was engaged in the design, building, construction, repair and in particular the application and/or installation of stucco to the Plaintiffs' residence located at 229 Hampton Circle, Bluffton, South Carolina.

3. That, upon information and belief, the Defendant, Peter Conley, is a citizen and resident of Beaufort County and conducts business in Beaufort County and

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JAN 05 2011

McNair Law Firm, P.A.

is the alter-ego of and South Carolina residential specialty subcontractor license holder for South Carolina State Plastering, LLC, and he was engaged in the supervision, oversight, design, construction and/or repair of the residence at 229 Hampton Circle, Beaufort, South Carolina.

4. That, upon information and belief, Defendant, Del Webb Communities, Inc., an Arizona Corporation, is a corporation organized in another state, and is a brand, subsidiary, division or other device of Defendant, Pulte Homes, Inc. Del Webb Communities, Inc., conducts business and is authorized to conduct business in Beaufort County, State of South Carolina, and at all times relevant hereto was engaged in the design, construction, development and/or repair of residential housing and specifically was engaged in the design, development, building, construction and/or the repair of the Plaintiffs' residence located in Del Webb's Sun City Hilton Head Bluffton Township residential development (hereinafter "Sun City").

5. That, upon information and belief, Defendant, Pulte Homes, Inc., is a corporation organized under the laws of another state, and is the parent corporation and/or successor corporation of Del Webb Communities, Inc., and at all times relevant hereto was authorized to conduct business in Beaufort County, South Carolina and was engaged in the design, development, building, construction and/or the repair of residential housing and specifically was engaged in the design, development, building, construction and/or the repair of the Plaintiffs' residence located in Sun City.

JURISDICTION

6. That this Court has jurisdiction over the parties and subject matters hereto and that the allegations out of which this action arises all involve the residence of the Plaintiffs located in the County of Beaufort, State of South Carolina.

FACTUAL BACKGROUND

7. That the exterior of the subject residence is constructed with stucco (commonly referred to as hard coat stucco) that was, upon information and belief, installed as part of the original construction of the Plaintiffs' home in 2002.

8. That the stucco exterior wall system, was not properly installed and contain various defects, problems and deficiencies that are in violation of applicable building codes, not in conformity with specifications and accepted construction industry standards and practices.

CLASS ACTION ALLEGATIONS

9. Plaintiffs, as representatives of the Class defined herein pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure, seek to recover monetary damages from the Defendants for breaches of fiduciary duties, negligence, breach of implied warranties, unfair trade practices, with respect to their duties as a developer in the development, sale of administration, care, and maintenance and/or repair of the buildings and units at issue.

10. As described in Paragraph 9 above, the class of Plaintiffs consists of individuals, corporations, partnerships, unincorporated associates or other entities that currently own stucco clad homes in Sun City, Bluffton, and are parties to currently pending litigation, the civil actions of which are attached hereto as Exhibit "A."

11. The Class does not include any former owner of a home in Sun City.

12. The Class is sufficiently numerous that joinder of all members is impractical, and unnecessary in light of indivisible common ownership of the common elements.

13. Plaintiffs will fairly and adequately protect the interests of the Class as Class representatives. The interests of the Class representatives are coincident with, and not antagonistic to, those of the other Class members and Plaintiffs are represented by experienced and able counsel.

14. There are questions of law and fact common to the Class. Common questions of law include the liability of Defendants for, among other things as more particularly described below, negligence, breach of warranties, unfair trade practices and whether these wrongful acts or omissions of all of the Defendants caused or will cause the Class to suffer damages.

15. Plaintiffs' claims are typical of the Class members' claims and derive from a common nucleus of operative facts in that the Defendants, at all times relevant, are or were either charged with duties as a developer and/or in the sale and disclosure of conditions and/or repair of the buildings and units at issue. Each Class member has been or will be similarly injured by the Defendants' wrongful acts or omissions in the development, construction and sale of the houses at issue and the interests and rights of the members, such that the interest of the Plaintiffs, as Class representatives, are consistent with those of the members of the Class.

16. Plaintiffs, for the class claim pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure as Class members, envision no unusual difficulty in the management of this action as a class action.

17. Certification of this action as a class action under Rule 23(a) of the South Carolina Rules of Civil Procedure is appropriate.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)
(AS TO DEL WEBB COMMUNITIES, INC., and PULTE HOMES, INC.)

18. Each and every allegation contained in Paragraphs 1 through 17 above are incorporated herein by express reference as though fully set forth.

19. That at all times herein, the Plaintiffs, entered into a contract with the Defendants for the construction and/or repair of their residence located in Sun City.

20. That at all relevant times herein, the Defendants, by and through their agents, servants and employees had an obligation and duty to construct, develop, sell and/or repair the residence and to provide materials and services in accordance with the terms and conditions of the contract, applicable building codes, in conformance with accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications.

21. That the Defendants breached the contract with the Plaintiffs by failing to construct said residence with a stucco exterior that was installed in accordance with the terms and conditions of the contract, applicable building codes, in conformance with accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications, all of which have directly and proximately caused defects and deficiencies in the residence which will need

to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contract. Such breaches include but are not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair and remodeling of the subject residence;
- b. In failing to adequately supervise the construction, repair and remodeling of the subject residence;
- c. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- d. In constructing, developing, designing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- e. In improperly installing the stucco cladding in violation of the building code, standard building practices and accepted construction industry standards and practices and not in conformity with component product manufacturer installation instructions and specifications;
- f. In installing a home exterior which fails to provide a sufficient barrier against the intrusion of water into the system and adequate avenue for exit of water that gets into the system;
- g. In failing to properly install control joints;
- h. In failing to exercise due care;
- i. In such other deficiencies or failures as will be proven at trial.

22. That as a direct and proximate result of the Defendants' breach of contract with the Plaintiffs, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject residence causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct

and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A SECOND CAUSE OF ACTION

(Negligence)

(AS TO SOUTH CAROLINA STATE PLASTERING, LLC,
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)

23. Plaintiffs repeats and realleges its allegations set forth in Paragraphs 1 through 22 above as if set forth herein verbatim.

24. At all times material hereto, the Defendants, through their agents, servants and employees, undertook and were under a duty to the Plaintiffs to construct the home and/or provide the materials and services in accordance with the manufacturer's installation instructions and the building code applicable in Beaufort County, State of South Carolina, and to construct the home in accordance with construction industry practices and with due care.

25. The Defendants were negligent, grossly negligent, careless, reckless, willful, and wanton in constructing, supervising, designing and inspecting the construction of the home and failing to comply with the requirements of the manufacturer's installation instructions, building codes and industry standards and practices, and in failing to employ good supervisory and construction practices, and as a direct and proximate result of which the residence has been constructed and ultimately sold to the Plaintiffs with the defects and deficiencies as now exist therein.

26. The Plaintiffs have sustained damages as a direct and proximate cause of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants in one or more of the following particulars, to wit:

- a. In failing to use due care in the construction, repair and remodeling of the subject residence;
- b. In installing an improper stucco exterior system on the home,
- c. In failing and omitting to meet industry standards in stucco installation and sealant application;
- d. In applying an exterior stucco finish system so as to result in or will result in cracks and sealant failure.
- e. In failing and omitting to properly install wall termination weep flashing and/or a proper weep mechanism;
- f. In failing and omitting to properly install control joints;
- g. In failing and omitting to properly install proper head flashing;
- h. In failing to properly supervise work forces and to properly inspect the work;
- i. In failing to construct the residence according to the applicable building codes and industry standards;
- j. In failing and omitting to use due care on the stucco exterior systems on the residence;
- k. In failing and omitting to install stucco systems which would provide a sufficient barrier against intrusion of water into the system and an adequate avenue for exit of water that gets into the system;
- l. In construction the stucco cladding in violation of standard building practices, accepted construction industry standards, and in conformity with component product manufacturer installation instructions and specifications;

27. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness and wantonness of the Defendants, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject residence causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the

Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A THIRD CAUSE OF ACTION

(Breach of Warranty of Habitability, Breach of Warranty Against Latent Defects, Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a Particular Purpose and Breach of Warranty of Merchantability and Serviceability)

**(AS TO SOUTH CAROLINA STATE PLASTERING, LLC,
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)**

28. Each and every allegation contained in Paragraphs 1 through 27 above are incorporated herein by express reference as though fully set forth.

29. That the Defendants implicitly and/or expressly warranted that the subject residence would be habitable and fit for its intended uses as single family residence and that said residence would be designed, developed, manufactured, constructed and repaired in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, accepted building component manufacturing standards and specifications and accepted construction industry standards applicable thereto and that the subject residence would be merchantable, free from latent defects and fit for the particular purpose for which it was built.

30. That Defendants breached said warranties by designing, constructing, and/or repairing the stucco exterior of the subject residence in such manner as to be in violation of applicable building codes, not in conformance with accepted construction and industry standards and not in conformity with component product manufacturer installation instructions. As a direct and proximate result of the Defendants' breach of these warranties, the Plaintiffs have suffered actual, direct, incidental, consequential and

special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A FOURTH CAUSE OF ACTION

(Unfair Trade Practices)

**(AS TO SOUTH CAROLINA STATE PLASTERING, LLC AND
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)**

31. Each and every allegation contained in Paragraphs 1 through 30 above are incorporated herein by express reference as though fully set forth....

32. The Defendants are "persons" within the meaning of South Carolina Code § 39-5-10(a).

33. The Defendants, by their actions in developing, designing, constructing, supervising and overseeing construction activities are engaged in commerce within the meaning of South Carolina Code §39-5-10(b).

34. The Defendants, by their action(s) described hereinabove, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

35. The Defendants' act(s) are capable of repetition and, upon information and belief and in accord with the allegations herein, have been repeated.

36. The Defendants' conduct affects the public interest of the people of South Carolina.

37. The Defendants knew or should have reasonably known, that their conduct violated the Unfair Trade Practices Act.

38. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, South Carolina State Plastering, LLC, Peter Conley, Individually, Del Webb Communities, Inc., and Pulte Homes, Inc., jointly and severally, in a reasonable amount of actual, punitive and treble damages to be determined by the jury; for the attorneys fees and cost of this action; for a prejudgment or post-judgment interest on Plaintiffs' damages; and for such other and further relief as this Court may deem just and proper.

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SEGUI LAW FIRM, LLC

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(843) 884-1865
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: Dec. 17, 2010

EXHIBIT A

1.	William A. Abel Martha L. Abel	2008-CP-07-3305
2.	Thomas Abruzzo Pauline G. Abruzzo	2008-CP-07-3385
3.	Anthony D. Amadeo Madeline Amadeo	2009-CP-07-2904
4.	Robert F. Ankney Cinda S. Ankney	2008-CP-07-3318
5.	Donald R. Antonacio Sandra A. Antonacio	2008-CP-07-3292
6.	Donald M. Avedon Edith Avedon	2008-CP-07-3289
7.	Joseph W. Balcer Patricia A. Balcer	2008-CP-07-3306
8.	Grace M. Biagi	2009-CP-07-2569
9.	Terry J. Block Michelle D. Block	2008-CP-07-3394
10.	Joseph A. Bongiorno Jean Bongiorno	2008-CP-07-3308
11.	Daniel J. Boone Rose Ann Boone	2008-CP-07-3307
12.	William H Box Gail E. Box	2009-CP-07-2378
13.	Robert Burns Mary K. Burns	2008-CP-07-3352
14.	Janice Brackett	2008-CP-07-3396
15.	James G. Cake Gayle M. Cake	2008-CP-07-3370
16.	James S. Capossela	2008-CP-07-00023

17.	Thomas Carlin Patricia Carlin	2008-CP-07-3361
18.	Roger F. Carlson Mary Jo Carlson	2008-CP-07-3386
19.	Vito J. Carpitella	2008-CP-07-3341
20.	William L. Clark Vicki C. Clark	2008-CP-07-3393
21.	Susan M. Combes	2008-CP-07-3383
22.	Helen Connors Elizabeth A. Ford	2008-CP-07-3345
23.	Virginia Constantelo	2008-CP-07-3291
24.	George Craft Jacqueline L. Craft	2008-CP-07-3372
25.	Richard D. Crowe Carole J. Crowe	2008-CP-07-3293 2008-CP-07-3290
26.	Patrick Crowley Kim Halvorsen	2008-CP-07-3384
27.	Allan A. Crystal	Not filed yet.
28.	William K. Curtis Lynne L. Curtis	2008-CP-07-3367
29.	Jan L. Dalziel Vera M. Dalziel	2008-CP-07-3351
30.	John P. Delaney Eleanor F. Delaney	2008-CP-07-3373
31.	Henry Dempsey	2009-CP-07-2376

	Mary G. Dempsey	
32.	Philip A. Desjardins Anna Marie Desjardins	2008-CP-07-3301
33.	David Dexnis Linda T. Dexnis	2008-CP-07-3397
34.	William J. Dreyer Bonnie J. Dreyer	2008-CP-07-5106
35.	Dorothea E. Dunn	2008-CP-07-3326
36.	Thomas E. Dunn Mary T. Dunn	2009-CP-07-2566
37.	Robert J. Dunne Catherine R. Dunne	2009-CP-07-5185
38.	Kurt Eigenmann Dawn Eigenmann	2008-CP-07-3309
39.	Manford R. Ewing, Jr., Mollie M. Ewing	2008-CP-07-3410
40.	Charles E. Fenske Marianne L. Fenske	2009-CP-07-2381
41.	Rose Marie Ferguson	2008-CP-07-3374
42.	A. James Fillion	2008-CP-07-3346
43.	David Fleischhauer	2008-CP-07-3382
44.	Arthur V. Foard Aileen D. Foard	2008-CP-07-3310

45.	Craig J. Forrest Margaret C. Forrest	2008-CP-07-3395
46.	George R. Friedman Susan Friedman	2009-CP-07-2384
47.	Linda A. Grady	GRADY V. SCSP 2008-CP-07-3376
48.	Leslie Richard Green Judith Nancy Green	2008-CP-07-5118
49.	Tom S. Greger Tonia A. Greger	2008-CP-07-3378
50.	Ronald P. Greiner Rosann M. Greiner	2008-CP-07-3401
51.	Arthur C. Haaker Louise K. Haaker	2009-CP-07-4924
52.	Edward J. Hassett Frances Hassett	2008-CP-07-3299
53.	James Hoag Veronica Hoag	2009-CP-07-2355
54.	Robert J. Hoffman	2008-CP-07-5117
55.	Steven Holub	2009-CP-07-2902
56.	Roger W. Jadown Diane M. Jadown	2008-CP-07-3347
57.	Beverly Jarrett	2008-CP-07-3323
58.	Alexandria Jenkins	2009-CP-07-2365

59.	John Johnson Shirley Johnson	2008-CP-07-3344
60.	Charles K. Kaminowitz Phyllis Kaminowitz	2008-CP-07-3312
61.	Fred J. Kammerer Grace A. Kammerer	2008-CP-07-3387
62.	Edwin Kaponer Lourdes Kaponer	2008-CP-07-3330
63.	Ruth Kashine	2008-CP-07-3342
64.	Ira Kirschner Cynthia Kirschner	2009-CP-07-4979
65.	Anthony M. Krusky Dorothea J. Krusky	2009-CP-07-2377
66.	Joseph J. Lambdin Virginia M. Lambdin	2009-CP-07-2383
67.	Carl F. Lehmann Nancye M. Lehmann	2009-CP-07-3318
68.	Thomas B. Lehrer Eileen S. Lehrer	2008-CP-07-3313
69.	Edwin D. Leinberger	2008-CP-07-3321
70.	William F. Leonard, Jr. Judith P. Leonard	2009-CP-07-2564
71.	Benjamin Liberman Sheila F. Libermann	2008-CP-07-3405
72.	Darla Sue Lunsford	2009-CP-07-3328
73.	Alexander W. MacNeil Elizabeth A. MacNeil	2009-CP-07-5195
74.	Martin J. Mak	2008-CP-07-3322

	Alberta F. Mak	
75.	Charles E. Maloney Margaret V. Maloney	2008-CP-07-3302
76.	Edmond P. Martin Patricia L. Martin	2008-CP-07-3303
77.	Robert W. Matile Madelon E. Matile	2008-CP-07-3390
78.	Stephen J. McCulloch Dorothy H. McCulloch	2009-CP-07-2385
79.	Robert H. McElfresh Gisela L. McElfresh	2008-CP-07-3317
80.	Donald R. McGowan Dolores A. McGowan	2008-CP-07-3402
81.	John J. McNamara Kathleen M. McNamara	2008-CP-07-3339
82.	M. Elaine Michaud	2008-CP-07-3328
83.	Samuel C. Mullins	2008-CP-07-3316
84.	Carole Mullins Orn Tobey	2990-CP-07-2351
85.	Carole A. Mullins	2009-CP-07-2906
86.	Roger Lee Myers Linda H. Myers	2008-CP-07-3391
87.	Daniel R. Natale Doris W. Natale	2008-CP-07-3406 2008-CP-07-3407
88.	James J. O'Donnell Grace L. O'Donnell	2008-CP-07-3403
89.	Martin D. O'Donnell Catherine M. O'Donnell	2008-CP-07-3329
90.	John S. Ott MaryAnn H. Ott	2009-CP-07-00022

91.	Nathan A. Parks Theda Harris Parks	2009-CP-07-2380
92.	Ralph E. Perkins Linda J. Perkins	2008-CP-07-3350
93.	Leroy S. Plank V.L. Plank	2009-CO-07-2379
94.	John S. Porter Edith M. Porter	2008-CP-07-3398
95.	Nancy Poulin	2009-CP-07-2352
96.	Heinrich J. Propfe Florika H. Propfe	2008-CP-07-3366
97	Richard A. Rodman Rosalie M. Rodman	2008-CP-07-3314
98.	Ronnie Beth Rump Hillary K. Walla	2008-CP-07-3368
99.	James R. Rusin Sharon Rusin	2009-CP-07-2354
100.	Howard C. Sadowsky Janet Sadowsky	2008-CP-07-3389
101.	Donald Sbrocco Ann Sbrocco	2008-CP-07-3331
102.	Gary L. Scheuerman Helen Scheuerman	2008-CP-07-3365
103.	Joel L. Serkes Janet N. Serkes	2009-CP-07-2028
104.	Robert Prather Shields Norma Lea Shields	2009-CP-07-2903
105.	Darrel Sommerfeld Brenda Sommerfeld	2009-CP-07-2562
106.	Charles K. Sotire Bonnie K. Sotire	2009-CP-07-2029
107.	Ronald G. Southworth	2008-CP-07-5116

	Patricia W. Southworth	
108.	Phillip Stein Thelma Stein	2008-CP-07-3408
109.	Barbara Montgomery Stewart	2008-CP-07-3388
110.	Bernard Stief Margaret Stief	2008-CP-07-3327
111.	Robert Stone Suzanne D. Stone	2009-CP-07-2375
112.	Edward H. Stoops Wanda M. Stoops,	2008-CP-07-5114
113.	Harlan T. Strohl Mary M. Strohl	2009-CP-07-2567
114.	George R. Swank Patricia Swank	2008-CP-07-3325
115.	Marsha Fay Tarih	2008-CP-07-3343
116.	Moses W. Thompson Sara Thompson	2008-CP-07-3400
117.	Louis J. Valente Jean M. Valente	2009-CP-07-2563
118.	George W. Vence Sharon L. Vence	2008-CP-07-2030
119.	WallisY. Washington	2008-CP-07-3355
120.	David R. Watkins	2009-CP-07-2568
121.	Anthony J. Weber Joan Weber	2008-CP-07-3392
122.	Robert C. Wessel, Sr., Judith R. Wessel	2008-CP-07-3324
123.	Paul Weisslitz Selma Weisslitz,	2009-CP-07-2031
124.	Christine H. Wigg Ann Clark	2009-CP-07-2033
125.	Michael Wolfe	2008-CP-07-3320

	Marianne Wolffe	
126.	Frank E. Woods Chloe J. Woods	2009-CP-07-2565
127.	Joseph P. Yaworski Lorraine T. Yaworski	2009-CP-07-2364
128.	John J. Yuhasz	2008-CP-07-2351

0067

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Roger F. Carlson and Mary Jo Carlson,

Plaintiffs,

vs.

South Carolina State Plastering, LLC,
Peter Conley, Individually, Del Webb
Communities, Inc., and Pulte Homes, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2008-CP-07-03386

**ANSWER OF DEL WEBB
COMMUNITIES, INC. AND
PULTE HOMES, INC.**

9/22/08 2:20 PM

Defendants Del Webb Communities, Inc. ("Del Webb") and Pulte Homes, Inc. ("Pulte") (hereinafter collectively "Defendants") respond generally that any and all allegations of the Complaint which are not expressly admitted herein are denied, and specifically respond as follows:

1. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint, and therefore deny the same.

2. Defendants, upon information and belief, admit that South Carolina State Plastering, LLC is a South Carolina entity that was engaged in the design, building, construction, repair, application, and/or installation of stucco to the exterior of the plaintiffs' residence.

3. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint, and therefore deny the same.

4. Defendants admit the allegations in paragraph 4 of the Complaint.

5. In response to paragraph 5 of the Complaint, Defendants admit that Pulte Homes, Inc. is a corporation organized under the laws of another state. Defendants deny the remaining allegations in paragraph 5.

6. The allegations contained in paragraph 6 of the Complaint are allegations of law to which no response is required.

7. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint, and therefore deny the same.

8. Upon information and belief, Defendants deny the allegations of paragraph 8 of the complaint.

9. Defendants restate their responses to the allegations contained in Paragraphs 1 through 8 of the Complaint.

10. Defendants admit that Del Webb entered into a contract with Plaintiffs regarding the construction of the Plaintiffs' residence in Sun City.

11. In response to paragraph 11 of the complaint, Defendants state that the entire agreement between Del Webb and Plaintiffs was contained in the written contract between them.

12. Defendants deny the allegations contained in paragraph 12 of the Complaint.

13. Defendants deny the allegations contained in paragraph 13 of the Complaint.

14. Defendants restate their responses to the allegations contained in Paragraphs 1 through 13 of the Complaint.

15. The allegations contained in paragraph 15 of the Complaint are allegations of law to which no response is required.

16. Defendants deny the allegations contained in paragraph 16 of the Complaint.

17. Defendants deny the allegations contained in paragraph 17 of the Complaint.

18. Defendants deny the allegations contained in paragraph 18 of the Complaint.

19. Defendants restate their responses to the allegations contained in Paragraphs 1 through 18 of the Complaint.

20. As to Defendant Pulte, Defendants deny the allegations contained in paragraph 20 of the Complaint. As to Defendant Del Webb, Del Webb warranted the home pursuant to the terms of the contract with the original purchaser of the home.

21. Defendants deny the allegations contained in paragraph 21 of the Complaint.

22. Defendants restate their responses to the allegations contained in Paragraphs 1 through 21 of the Complaint.

23. The allegations contained in paragraph 23 of the Complaint are allegations of law to which no response is required.

24. The allegations contained in paragraph 24 of the Complaint are allegations of law to which no response is required.

25. Defendants deny the allegations contained in paragraph 25 of the Complaint.

26. Defendants deny the allegations contained in paragraph 26 of the Complaint.

27. Defendants deny the allegations contained in paragraph 27 of the Complaint.

28. Defendants deny the allegations contained in paragraph 28 of the Complaint.

29. Defendants deny the allegations contained in paragraph 29 of the Complaint.

**FOR A FIRST AFFIRMATIVE DEFENSE
(12(b)(6))**

30. Plaintiffs' claims are barred, in whole or in part, because the complaint fails to state a cause of action for which relief can be granted.

**FOR A SECOND AFFIRMATIVE DEFENSE
(12(b)(1))**

31. Plaintiffs' claims are barred, in whole or in part, because this court may not have subject matter jurisdiction.

**FOR A THIRD AFFIRMATIVE DEFENSE
(Failure to Comply with Right to Cure Statute)**

32. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs have not satisfied conditions precedent to bring this action pursuant to SC Code 40-59-810, *et seq.* This action should be dismissed and/or stayed pursuant to the statute.

**FOR A FOURTH AFFIRMATIVE DEFENSE
(Failure to Add Necessary Party)**

33. Plaintiffs' claims are barred, in whole or in part, because all parties necessary for adjudication of this matter may not have been added to this action.

**FOR A FIFTH AFFIRMATIVE DEFENSE
(Statute of Limitations)**

34. Plaintiffs have failed to commence this action within the time required by the applicable statute of limitations, and the failure to timely commence the action constitutes a bar and complete defense to all claims.

**FOR A SIXTH AFFIRMATIVE DEFENSE
(Comparative Negligence)**

35. Any injuries or losses sustained by the Plaintiffs were due to and caused by the sole negligence, gross negligence, willfulness, wantonness, carelessness and

recklessness of the Plaintiffs. Alternatively, any injuries or losses sustained by the Plaintiffs, were caused in part by the Plaintiffs in combination with and contributing to the negligence, if any, on the part of Defendants such that Plaintiffs' recovery is barred by the doctrine of comparative negligence.

**FOR A SEVENTH AFFIRMATIVE DEFENSE
(Third Party Negligence)**

36. Any injuries or losses sustained by the Plaintiffs were caused by an act or omission of a third party, over which Defendants had no control.

**FOR AN EIGHTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)**

37. Plaintiffs have failed to take prompt and reasonable action under the circumstances to avoid the occurrence of the alleged damage to the structure and such failure to mitigate damages constitutes a complete defense as to that portion of damages which could have been otherwise avoided by reasonable and prompt action.

**FOR A NINTH AFFIRMATIVE DEFENSE
(Dispute Subject to Agreement to Arbitrate)**

38. This matter may be subject to an agreement to arbitrate, and if so, Defendants are entitled to arbitrate all claims herein. The present action should therefore be either dismissed or stayed.

**FOR A TENTH AFFIRMATIVE DEFENSE
(Intervening and Superseding Cause)**

39. Any injury or damage suffered by Plaintiffs, if any, was due to and caused by and was the direct and proximate result of an intervening and superseding act of Plaintiffs or of others over whom Defendants had no control.

**FOR AN ELEVENTH AFFIRMATIVE DEFENSE
(Contractual Limitations and Waiver of Warranties)**

40. The original purchaser of the home at issue contractually waived all implied warranties, and accordingly such claims should be barred in this case.

41. The original purchaser of the home at issue contractually agreed to look solely to the written express warranty as the sole remedy for any construction issue/claim, and accordingly all claims other than those relating to the express warranty should be barred in this case.

42. The original purchaser of the home at issue contractually agreed that as a condition precedent to bringing action, that he/she would give written notice and an opportunity to repair any claimed defect. As this has not occurred, this claim should be barred.

**FOR A TWELFTH AFFIRMATIVE DEFENSE
(UCC Not Applicable -- No Sale of Goods)**

43. Plaintiffs and Defendants did not enter into any agreement for the sale of goods as defined by the Uniform Commercial Code and such constitutes a complete defense to all claims for implied warranty.

**FOR A THIRTEENTH AFFIRMATIVE DEFENSE
(Punitive and Multiple Damages Not Allowed)**

44. The various claims set forth seek both punitive damages and multiple damages on different theories for the same loss, and Plaintiffs are not entitled to recover both punitive damages and multiple damages for the same loss as such constitutes a double recovery.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE
(Punitive Damages Unconstitutional -- Procedural Due Process)

45. To the extent that Plaintiffs seek punitive or exemplary damages, such claims violate the right of the Defendants to procedural due process under the Fourteenth Amendment of the United States Constitution and the Constitution of the State of South Carolina.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE
(Punitive Damages Unconstitutional -- Substantive Due Process)

46. To the extent that Plaintiffs seek punitive or exemplary damages, such claims violate the right of the Defendants to substantive due process as provided in the Fifth and Fourteenth Amendments of the United States Constitution and the Constitution of the State of South Carolina.

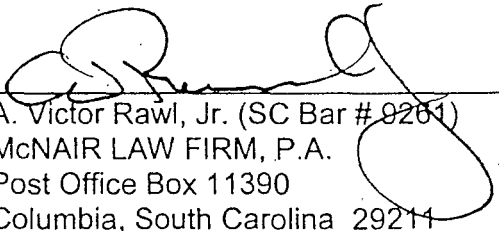
FOR A SIXTEENTH AFFIRMATIVE DEFENSE
(Economic Waste)

47. Some of Plaintiffs' alleged damages may be barred by the economic waste doctrine.

48. Defendants reserve the right to amend this answer to add additional affirmative defenses as discovery progresses.

WHEREFORE, having fully responded to the allegations set forth in Plaintiffs' Complaint, Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. pray that the Complaint be dismissed with prejudice as to the Defendants; that the Defendants be

awarded fees and costs; and that the Court order such other and further relief as the Court may deem just and proper.



A. Victor Rawl, Jr. (SC Bar # 9264)
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Post Office Box 11390
Columbia, South Carolina 29211
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Fax (803) 753-3278

Attorneys for the Defendants Del Webb
Communities, Inc., and Pulte Homes,
Inc.

December 18, 2008

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 08-CP-07-3386

ROGER F. CARLSON and MARY JO
CARLSON,

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC, PETER CONLEY,
INDIVIDUALLY, DEL WEBB
COMMUNITIES, INC., and PULTE
HOMES, INC.,

Defendants.

**PLAINTIFFS' MOTION TO AMEND
COMPLAINT TO ADD CLASS
ALLEGATIONS**

PLEASE TAKE NOTICE that the Plaintiffs, pursuant to Rule 15, South Carolina Rules of Civil Procedure, hereby move this Court for leave to file the attached Amended Complaint (attached as Exhibit "A") to add Class Action allegations under Rule 23(a), SCRPC. This matter will be heard within ten (10) days after the service hereof, or at such other time and place as may be set by the Court.

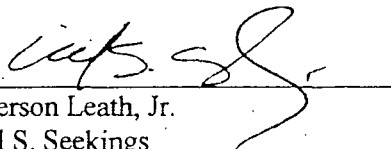
Counsel for Plaintiffs affirms that prior to the filing of this Motion, he consulted with opposing counsel and attempted in good faith to resolve the matters contained in the Motion.

RECEIVED

APR 23 2010

McNair Law Firm, P.A.

LEATH, BOUCH & SEEKINGS, LLP

By: 

W. Jefferson Leath, Jr.
Michael S. Seekings
92 Broad Street
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(843) 937-8811

THE CHAKERIS LAW FIRM

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

SEGUI LAW FIRM, LLC

Phillip W. Segui, Jr.
864 Lowcountry Blvd., Suite A
Mt. Pleasant, South Carolina 29465
(843) 884-1865

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: April 22, 2010

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was e-mailed to all counsel of record in this proceeding this 22nd day of April, 2010.

Dolores M. Cotroneo

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ROGER F. CARLSON AND)
MARY JO CARLSON,)

Plaintiff(s))

vs.)

SOUTH CAROLINA STATE)
PLASTERING, LLC, PETER CONLEY,)
INDIVIDUALLY, DEL WEBB)
COMMUNITIES, INC., and PULTE)
HOMES, INC.,)

Defendant(s))

IN THE COURT OF COMMON PLEAS

2008 - CP - 07 - 3386

AMENDED COMPLAINT
(Jury Trial Demanded)

The Plaintiffs above named, hereby amending their Complaint, would allege and show as follows:

PARTIES

1. The Plaintiffs are citizens and residents of the County of Beaufort, State of South Carolina, and at all times hereinafter mentioned, own the residence, located at 229 Hampton Circle, Bluffton South Carolina.

2. That, upon information and belief, the Defendant, South Carolina State Plastering, LLC is a limited liability company organized and existing under the laws of the State of South Carolina, and conducted business in Beaufort County at all relevant times herein and was engaged in the design, building, construction, repair and in particular the application and/or installation of stucco to the Plaintiffs' residence located at 229 Hampton Circle, Bluffton, South Carolina.

3. That, upon information and belief, the Defendant, Peter Conley, is a citizen and resident of Beaufort County and conducts business in Beaufort County and is the alter-ego of and South Carolina residential specialty subcontractor license holder

for South Carolina State Plastering, LLC, and he was engaged in the supervision, oversight, design, construction and/or repair of the residence at 229 Hampton Circle, Beaufort, South Carolina.

4. That, upon information and belief, Defendant, Del Webb Communities, Inc., an Arizona Corporation, is a corporation organized in another state, and is a brand, subsidiary, division or other device of Defendant, Pulte Homes, Inc. Del Webb Communities, Inc., conducts business and is authorized to conduct business in Beaufort County, State of South Carolina, and at all times relevant hereto was engaged in the design, construction, development and/or repair of residential housing and specifically was engaged in the design, development, building, construction and/or the repair of the Plaintiffs' residence located in Del Webb's Sun City Hilton Head Bluffton Township residential development (hereinafter "Sun City").

5. That, upon information and belief, Defendant, Pulte Homes, Inc., is a corporation organized under the laws of another state, and is the parent corporation and/or successor corporation of Del Webb Communities, Inc., and at all times relevant hereto was authorized to conduct business in Beaufort County, South Carolina and was engaged in the design, development, building, construction and/or the repair of residential housing and specifically was engaged in the design, development, building, construction and/or the repair of the Plaintiffs' residence located in Sun City.

JURISDICTION

6. That this Court has jurisdiction over the parties and subject matters hereto and that the allegations out of which this action arises all involve the residence of the Plaintiffs located in the County of Beaufort, State of South Carolina.

FACTUAL BACKGROUND

7. That the exterior of the subject residence is constructed with stucco (commonly referred to as hard coat stucco) that was, upon information and belief, installed as part of the original construction of the Plaintiffs' home in 2002.

8. That the stucco exterior wall system, was not properly installed and contain various defects, problems and deficiencies that are in violation of applicable building codes, not in conformity with specifications and accepted construction industry standards and practices.

CLASS ACTION ALLEGATIONS

9. Plaintiffs, as representatives of the Class defined herein pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure, seek to recover monetary damages from the Defendants for breaches of fiduciary duties, negligence, breach of implied warranties, unfair trade practices, with respect to their duties as a developer in the development, sale of administration, care, and maintenance and/or repair of the buildings and units at issue.

10. As described in Paragraph 9 above, the class of Plaintiffs consists of individuals, corporations, partnerships, unincorporated associates or other entities that currently own stucco clad homes in Sun City, Bluffton, and are parties to currently pending litigation, the civil actions of which are attached hereto as Exhibit "A."

11. The Class does not include any former owner of a home in Sun City.

12. The Class is sufficiently numerous that joinder of all members is impractical, and unnecessary in light of indivisible common ownership of the common elements.

13. Plaintiffs will fairly and adequately protect the interests of the Class as Class representatives. The interests of the Class representatives are coincident with, and not antagonistic to, those of the other Class members and Plaintiffs are represented by experienced and able counsel.

14. There are questions of law and fact common to the Class. Common questions of law include the liability of Defendants for, among other things as more particularly described below, negligence, breach of warranties, unfair trade practices and whether these wrongful acts or omissions of all of the Defendants caused or will cause the Class to suffer damages.

15. Plaintiffs' claims are typical of the Class members' claims and derive from a common nucleus of operative facts in that the Defendants, at all times relevant, are or were either charged with duties as a developer and/or in the sale and disclosure of conditions and/or repair of the buildings and units at issue. Each Class member has been or will be similarly injured by the Defendants' wrongful acts or omissions in the development, construction and sale of the houses at issue and the interests and rights of the members, such that the interest of the Plaintiffs, as Class representatives, are consistent with those of the members of the Class.

16. Plaintiffs, for the class claim pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure as Class members, envision no unusual difficulty in the management of this action as a class action.

17. Certification of this action as a class action under Rule 23(a) of the South Carolina Rules of Civil Procedure is appropriate.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)
(AS TO DEL WEBB COMMUNITIES, INC., and PULTE HOMES, INC.)

18. Each and every allegation contained in Paragraphs 1 through 17 above are incorporated herein by express reference as though fully set forth.

19. That at all times herein, the Plaintiffs, entered into a contract with the Defendants for the construction and/or repair of their residence located in Sun City.

20. That at all relevant times herein, the Defendants, by and through their agents, servants and employees had an obligation and duty to construct, develop, sell and/or repair the residence and to provide materials and services in accordance with the terms and conditions of the contract, applicable building codes, in conformance with accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications.

21. That the Defendants breached the contract with the Plaintiffs by failing to construct said residence with a stucco exterior that was installed in accordance with the terms and conditions of the contract, applicable building codes, in conformance with accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications, all of which have directly and proximately caused defects and deficiencies in the residence which will need

to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contract. Such breaches include but are not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair and remodeling of the subject residence;
- b. In failing to adequately supervise the construction, repair and remodeling of the subject residence;
- c. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- d. In constructing, developing, designing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- e. In improperly installing the stucco cladding in violation of the building code, standard building practices and accepted construction industry standards and practices and not in conformity with component product manufacturer installation instructions and specifications;
- f. In installing a home exterior which fails to provide a sufficient barrier against the intrusion of water into the system and adequate avenue for exit of water that gets into the system;
- g. In failing to properly install control joints;
- h. In failing to exercise due care;
- i. In such other deficiencies or failures as will be proven at trial.

22. That as a direct and proximate result of the Defendants' breach of contract with the Plaintiffs, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject residence causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct

and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A SECOND CAUSE OF ACTION

(Negligence)

**(AS TO SOUTH CAROLINA STATE PLASTERING, LLC,
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)**

23. Plaintiffs repeats and realleges its allegations set forth in Paragraphs 1 through 22 above as if set forth herein verbatim.

24. At all times material hereto, the Defendants, through their agents, servants and employees, undertook and were under a duty to the Plaintiffs to construct the home and/or provide the materials and services in accordance with the manufacturer's installation instructions and the building code applicable in Beaufort County, State of South Carolina, and to construct the home in accordance with construction industry practices and with due care.

25. The Defendants were negligent, grossly negligent, careless, reckless, willful, and wanton in constructing, supervising, designing and inspecting the construction of the home and failing to comply with the requirements of the manufacturer's installation instructions, building codes and industry standards and practices, and in failing to employ good supervisory and construction practices; and as a direct and proximate result of which the residence has been constructed and ultimately sold to the Plaintiffs with the defects and deficiencies as now exist therein.

26. The Plaintiffs have has sustained damages as a direct and proximate cause of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants in one or more of the following particulars, to wit:

- a. In failing to use due care in the construction, repair and remodeling of the subject residence;
- b. In installing an improper stucco exterior system on the home,
- c. In failing and omitting to meet industry standards in stucco installation and sealant application;
- d. In applying an exterior stucco finish system so as to result in or will result in cracks and sealant failure.
- e. In failing and omitting to properly install wall termination weep flashing and/or a proper weep mechanism;
- f. In failing and omitting to properly install control joints;
- g. In failing and omitting to properly install proper head flashing;
- h. In failing to properly supervise work forces and to properly inspect the work;
- i. In failing to construct the residence according to the applicable building codes and industry standards;
- j. In failing and omitting to use due care on the stucco exterior systems on the residence;
- k. In failing and omitting to install stucco systems which would provide a sufficient barrier against intrusion of water into the system and an adequate avenue for exit of water that gets into the system;
- l. In construction the stucco cladding in violation of standard building practices, accepted construction industry standards, and in conformity with component product manufacturer installation instructions and specifications;

27. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness and wantonness of the Defendants, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject residence causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the

Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A THIRD CAUSE OF ACTION

**(Breach of Warranty of Habitability, Breach of Warranty Against Latent Defects,
Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a
Particular Purpose and Breach of Warranty of Merchantability and Serviceability)
(AS TO SOUTH CAROLINA STATE PLASTERING, LLC,
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)**

28. Each and every allegation contained in Paragraphs 1 through 27 above are incorporated herein by express reference as though fully set forth.

29. That the Defendants implicitly and/or expressly warranted that the subject residence would be habitable and fit for its intended uses as single family residence and that said residence would be designed, developed, manufactured, constructed and repaired in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, accepted building component manufacturing standards and specifications and accepted construction industry standards applicable thereto and that the subject residence would be merchantable, free from latent defects and fit for the particular-purpose for which it was built.

30. That Defendants breached said warranties by designing, constructing, and/or repairing the stucco exterior of the subject residence in such manner as to be in violation of applicable building codes, not in conformance with accepted construction and industry standards and not in conformity with component product manufacturer installation instructions. As a direct and proximate result of the Defendants' breach of these warranties, the Plaintiffs have suffered actual, direct, incidental, consequential and

special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices)
(AS TO SOUTH CAROLINA STATE PLASTERING, LLC AND
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)

31. Each and every allegation contained in Paragraphs 1 through 30 above are incorporated herein by express reference as though fully set forth.

32. The Defendants are "persons" within the meaning of South Carolina Code § 39-5-10(a).

33. The Defendants, by their actions in developing, designing, constructing, supervising and overseeing construction activities are engaged in commerce within the meaning of South Carolina Code §39-5-10(b).

34. The Defendants, by their action(s) described hereinabove, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

35. The Defendants' act(s) are capable of repetition and, upon information and belief and in accord with the allegations herein, have been repeated.

36. The Defendants' conduct affects the public interest of the people of South Carolina.

37. The Defendants knew or should have reasonably known, that their conduct violated the Unfair Trade Practices Act.

38. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, South Carolina State Plastering, LLC, Peter Conley, Individually, Del Webb Communities, Inc., and Pulte Homes, Inc., jointly and severally, in a reasonable amount of actual, punitive and treble damages to be determined by the jury; for the attorneys fees and cost of this action; for a prejudgment or post-judgment interest on Plaintiffs' damages; and for such other and further relief as this Court may deem just and proper.

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(843) 884-1865
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

C/A NOS. 08-CP-07-2030, 08-CP-07-2031,
08-CP-07-2351, 08-CP-07-3289,
08-CP-07-3290, 08-CP-07-3291,
08-CP-07-3292, 08-CP-07-3293,
08-CP-07-3299, 08-CP-07-3301,
08-CP-07-3302, 08-CP-07-3303,
08-CP-07-3305, 08-CP-07-3306,
08-CP-07-3307, 08-CP-07-3308,
08-CP-07-3309, 08-CP-07-3310,
08-CP-07-3312, 08-CP-07-3313,
08-CP-07-3314, 08-CP-07-3316,
08-CP-07-3317, 08-CP-07-3318,
08-CP-07-3320, 08-CP-07-3321,
08-CP-07-3322, 08-CP-07-3323,
08-CP-07-3324, 08-CP-07-3325,
08-CP-07-3326, 08-CP-07-3327,
08-CP-07-3328, 08-CP-07-3329,
08-CP-07-3330, 08-CP-07-3331,
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08-CP-07-3344, 08-CP-07-3345,
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08-CP-07-3401, 08-CP-07-3402,
08-CP-07-3403, 08-CP-07-3404,
08-CP-07-3405, 08-CP-07-3406,
08-CP-07-3407, 08-CP-07-3408,
08-CP-07-3410, 08-CP-07-5106,

08-CP-07-5114, 08-CP-07-5116,
08-CP-07-5117, 08-CP-07-5118,
09-CP-07-0022, 09-CP-07-0023,
09-CP-07-2028, 09-CP-07-2029,
09-CP-07-2030, 09-CP-07-2031,
09-CP-07-2033, 09-CP-07-2351,
09-CP-07-2352, 09-CP-07-2354,
09-CP-07-2355, 09-CP-07-2364,
09-CP-07-2365, 09-CP-07-2366,
09-CP-07-2375, 09-CP-07-2376,
09-CP-07-2377, 09-CP-07-2378,
09-CP-07-2379, 09-CP-07-2380,
09-CP-07-2381, 09-CP-07-2383,
09-CP-07-2384, 09-CP-07-2385,
09-CP-07-2562, 09-CP-07-2563,
09-CP-07-2564, 09-CP-07-2565,
09-CP-07-2566, 09-CP-07-2567,
09-CP-07-2568, 09-CP-07-2569,
09-CP-07-2902, 09-CP-07-2903,
09-CP-07-2904, 09-CP-07-2905,
09-CP-07-2906, 09-CP-07-3318,
09-CP-07-3328, 09-CP-07-4924,
09-CP-07-4979, 09-CP-07-5185,
09-CP-07-5195.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO. 2008-CP-07-03386

Roger F. Carlson and Mary Jo Carlson,

Plaintiffs,

vs.

South Carolina State Plastering, LLC, Peter
Conley, Individually, Del Webb Communities,
Inc., and Pulte Homes, Inc.

Defendants.

**MOTION TO DISMISS AND/OR TO
COMPEL ARBITRATION
(and Incorporated Memorandum)**

2008 FEB 17 PM 12:10
CLERK OF COURT
BEAUFORT COUNTY, S.C.
ROSENEAU

TO: PHILLIP W. SEGUI, JR., ESQUIRE, JOHN T. CHAKERIS, ESQUIRE, MICHAEL
SEEKINGS, ESQUIRE and W. JEFFERSON LEATH, JR., ESQUIRE, Attorneys for the
Plaintiffs;

Defendants, Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter collectively
"Defendants"), by and through their undersigned attorneys, hereby move for an order dismissing this
action or for an order compelling arbitration and staying this action pending arbitration pursuant to
S.C. Ann. § 15-48-10, *et seq.*, and pursuant to the provisions of the South Carolina Rules of Civil
Procedure 12(b)(1) and 12(b)(6).

Plaintiffs have sued the Defendants in contract and tort alleging that Defendants were
negligent in the construction of Plaintiffs' home located in Del Webb's Sun City Hilton Head
Community located in Beaufort County, South Carolina.

Plaintiffs allege in their Amended Complaint that they "entered into a contract with
Defendants for the construction ... of their residence located in Sun City...." See Amended
Complaint Paragraph 19. Plaintiffs further allege as their first cause of action, that "... Defendants
breached the contract with the Plaintiffs by failing to construct said residence with a stucco exterior

that was installed in accordance with the terms and conditions of the contract. . .” See Amended Complaint Paragraph 21. The referenced contract is attached hereto as **Exhibit A**, and contains the following arbitration provision:

4.3 Arbitration.

Any controversy or claim arising out of or relating to this Agreement or Your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall take place in Beaufort County, South Carolina or at a place mutually agreed upon by both parties.

After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act. The Act is found at South Carolina Code Section 15-48-10 et seq. The rules of the American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding and the method of appointment of the arbitrator. The arbitration shall take place in Beaufort County or at a place mutually agreed upon by the parties.

Judgment upon any award rendered by arbitration may be entered in any court having jurisdiction over the matter. The cost of the arbitrator(s) shall be borne equally by the Purchaser and Seller. Any party to this Agreement may bring action, including a summary or expedited proceeding, to compel arbitration of any court having jurisdiction over such action, and the prevailing party in any such action and in any arbitration shall be entitled to recover attorney fees and costs which shall be determined and awarded by the arbitrators.

ARGUMENT

I. Plaintiffs Agreed to Arbitration.

South Carolina precedent is clear that in determining whether an agreement to arbitrate exists, “the court should apply ‘ordinary state law principles that govern the formation of contracts.’” *Towles v. United Healthcare Corp.*, 328 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). In the present case, the Sales Agreement containing the arbitration provision which the Defendants seek to enforce was signed by Plaintiffs. Further, Plaintiffs allege in the Amended Complaint, that they “entered into a contract with Defendants for the construction ... of their residence located in Sun

City” See Amended Complaint Paragraph 19. Plaintiffs further allege as their first cause of action, that “. . . Defendants breached the contract with the Plaintiffs by failing to construct said residence with a stucco exterior that was installed in accordance with the terms and conditions of the contract” See Amended Complaint Paragraph 21. As Plaintiffs have claimed the benefit of the contract, and are seeking a remedy for the breach of it, they are estopped from now attempting to avoid application of the contract. “[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision contained therein.” *U.S. v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001) (citing *Int’l Paper Co. v. Schwadedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (holding that it would “disregard equity” to allow a plaintiff “to claim the benefit of the contract and simultaneously avoid its burdens”); also citing *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 527 (5th Cir. 2000)). Accordingly, the arbitration provision contained within the Sales Agreement is enforceable.

Additionally, Plaintiffs would be barred from denying that they entered into the contract by the doctrine of judicial estoppel. In *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997), the Supreme Court of South Carolina expressly adopted the doctrine of judicial estoppel. In South Carolina, “[t]he doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation.” *Quinn v. The Sharon Corp.*, 343 S.C. 411 (Ct. App. 2000). The *Quinn* court explained judicial estoppel as follows:

Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formerly asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

Id. Accordingly, as Plaintiffs have alleged that they entered into the contract, Plaintiffs are now estopped from denying the validity of the contract.

Therefore, as Plaintiffs have alleged, they entered into a valid and enforceable contract, and that contract includes an enforceable arbitration agreement.

II. The Scope of the Arbitration Agreement Covers the Asserted Dispute.

Any doubts as to the scope of arbitrable issues should be resolved in favor of arbitration. The South Carolina Supreme Court recently stated as follows:

We observe at the outset that it is the policy of this state to favor the arbitration of disputes. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. *Id.* at 597, 553 S.E.2d at 118-119.

Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 129, 678 S.E.2d 435, 437 - 438 (2009).

The scope of the present arbitration agreement covers the claims alleged by the Plaintiffs. The arbitration agreement specifically states that it applies to: "every controversy or claim arising out of or relating to this Agreement, or the breach thereof...." Plaintiffs have alleged that the contract was for the "for the construction ... of their residence." See Amended Complaint Paragraph 19.¹ Plaintiffs' first cause of action, alleges that "... Defendants breached the contract with the Plaintiffs by failing to construct said residence with a stucco exterior that was installed in accordance with the terms and conditions of the contract. ..." See Amended Complaint Paragraph 21. As all allegations in the Amended Complaint are related to the construction of the residence, they are all covered by the scope of the arbitration provision, and as such, this action should be dismissed and compelled to arbitration.

¹ Plaintiffs also specifically state that the allegations in paragraphs 18-22 of the Amended Complaint are breaches of the contract at issue in this case. Also, for the same reasons set forth in Section I above, plaintiffs would be estopped from claiming that the contract does not cover these allegations in the complaint.

CONCLUSION

Pursuant to Rule 12(b)(1), 12(b)(2), 12(b)(3), 12(b)(6), and 12(h)(3) of the South Carolina Rules of Civil Procedure, this Court does not have jurisdiction over the controversy since all disputes are subject to arbitration as set forth in the Agreements. This matter should be dismissed since there is a valid and enforceable arbitration clause which specifically requires arbitration of any and all disputes referenced in the Plaintiffs' Amended Complaint. In the alternative, Defendants request that this matter be stayed pending the conclusion of arbitration.

This Motion is based upon the South Carolina Rules of Civil Procedure, the pleadings filed herein, applicable statutory and common law, the supporting memorandum which may be filed prior to or at the hearing on this motion, and such other arguments as may be submitted at the hearing.

A. Victor Rawl, Jr.

A. Victor Rawl, Jr. (SC Bar # 9261)
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vrawl@mcnair.net

Attorneys for the Defendants Pulte Homes Inc., and
Del Webb Communities, Inc.

February 14, 2011
Columbia, South Carolina

NOTICE: THE SETTLEMENT OF CONTROVERSIES ARISING UNDER THIS CONTRACT
SHALL BE SUBJECT TO ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF
THE SOUTH CAROLINA ARBITRATION ACT, SOUTH CAROLINA 15-48-10, ET SEQ.

SALES AGREEMENT

SUN CITY HILTON HEAD

Contract No: 4862904

1.0 Summary of Terms

Date of Printing of Sales Agreement: March 8, 2002

1.1 The parties to this "Agreement":

SALES AGREEMENT/HOME

CONSTRUCTION NO.: 4862904
DATE: 3/08/2002
SELLER: Del Webb Communities, Inc.,
an Arizona corporation
127 Sun City Lane
Bluffton, South Carolina 29910

UNIT NO.: ALEX
LOT NO.: 402
MODEL: P8233
ELEVATION: C
ORIENTATION: L
ADDRESS OF HOME: 229 Hampton Circle
Sun City Hilton Head
Bluffton, South Carolina 29910

ESTIMATED CONSTRUCTION START DATE:

PURCHASER NAME AND CURRENT ADDRESS:

As Joint Tenants with Right of Survivorship
Husband and Wife
Mr. Roger F. Carlson
Mrs. Mary Jo Carlson
5 Sunset Hill Rd
Simsbury, CT 06070

PURCHASER PHONE NO.: 8606519991

Home is a Field Model.

Earnest Money Deposit and Construction Deposit: (Please check one):

CHECK ☒

CREDIT CARD ☐

WIRE TRANSFER ☐

Co-brokerage Agreement: NO

Terms

Contingent upon financing YES NO ☒

If no is marked above, Purchaser understands that the Earnest Money Deposit, Construction Deposit and other funds on deposit with Seller will not be returned to Purchaser, even if Purchaser fails to qualify for financing.

Base Sales Price	224,500.00
Total Price of Options *	29,270.00
Lot Type PWET	8,000.00
Promotional Incentive	31,770.00
Promotional Incentive	-
Total Purchase Price	230,000.00
Escrow Deposit	500.00
Due 03/08/2002	
Construction Deposit	4,500.00
Due 03/08/2002	
Balance Due	225,000.00
AT CLOSING	

**** Plus Closing Costs. ****

Amounts not paid by the scheduled dates are subject to a penalty of one and one-half percent (1.5%) per month.

Optional Features

AO ATTIC	ATTIC STORAGE IN GARAGE INCLUDES PLYWOOD DECKING, WITH SWITCH, AND PULL DOWN STAIRS. AREA SIZE PER PLA ROOF ELEVATION.	1,483.00
AO GARGX	4' GARAGE EXTENSION (LENG	3,502.00
AO PBLB	LUXURY BATH IN PLACE OF S	6,605.00

	BATH	
	RECONFIGURES MASTER BATH.	
	ADDITIONAL MARBLE LAVATOR	
	STANDARD PLUMBING FIXTURE	
	TUB AND SHOWER PAN PER PL	
	***CHOOSE CABINET STYLE**	
AO PB15	ROUGH-IN FOR LAUNDRY TUB	255.00
AO SEER	INCREASE A/C SEER RATING	1,233.00
CO AP000	STANDARD HOOD/MICRO JVM16	
CO AP003	ELECTRIC RANGE-JSP40WW,JS	279.00
	GE PROFILE SLIDE-IN ELECT	
	GLASS COOKTOP AND SELF-CL	
	**WHITE/WHITE, BLACK/BLAC	
	ALMOND/ALMOND**	
	**SPECIFY COLOR SELECTION	
CO AP011	DISHWASHER - GSD3630FWW	28.00
	GE 6 CYCLE/31 OPTION WITH	
	START	
	WHITE/WHITE	
CO CBT01	UPGRADE CABINETS PRESTON	3,168.00
	SQUARE IN PLACE OF STAND	
	PAPRIKA OR CIDER	
	MAKE COLOR SELECTION	
CO CBT04	36" KITCHEN CABINET PREST	381.00
	SQUARE IN PLACE OF STAND	
	MUST DELETE 3010 WINDOWS	
	8211,8212,8231,8232,8233,	
	PAPRIKA OR CIDER	
	MAKE COLOR SELECTION	
	PAPRIKA	
CO CBT30	35" BATH #2 VANITY	56.00
	SUTTON CLIFFS CHERRY SQUA	
CO CBT31	35" MASTER BATH VANITIES	56.00
	SUTTON CLIFFS CHERRY SQUA	
	PAPRIKA OR CIDER	
	MAKE COLOR SELECTION	
CO CBT60	DEEP CABINET OVER REFRIGE	408.00
	**INCLUDES SIDE PANELS PE	
	SPECIFY CABINET STYLE	
	PRESTON CHERRY: PAPRIKA	
CO CBT66	2 3/4" CROWN MOLDING @ KI	560.00
	SPECIFY CABINET STYLE AND	
	PRESTON CHERRY: PAPRIKA	
CO CTP07	KITCHEN COUNTERTOP UPGRAD	335.00
	TO BEVELED	
	925-58 CHAMPAGNE	
CO EL05	ADDITIONAL TELEPHONE OUTL	202.00
	@ DEN LOCATE ON WALL COMM	
	UTILITY	
	@ BEDROOM2 LOCATE ON WALL	
	GARAGE	

CO EL05	*****SEE PER SHEET # 3*** ADDITIONAL TV OUTLET-WITH @ DEN LOCATE ON WALL COMM HALL @ BEDROOM 2 LOCATE ON WAL LEFT EXTERIOR	94.00
CO EL10	*****SEE PER SHEET #3**** J-BOX WITH 2 WIRES @ GARAGE FRONT EXTERIOR L STANDARD J-BOX @ SAME HEI TO SAME	39.00
CO EL10	*****SEE PER SHEET #3**** J-BOX WITH 2 WIRES @ CENTER OVER VANITY @ CO SWITCHES @ MBATH BATH2	78.00
CO EL10	*****SEE PER SHEET #3**** SINGLE POLE SWITCH CONNECT TO ADDED J-BOXES MBATH BATH2	94.00
CO EL11	*****SEE PER SHEET #3**** J-BOX WITH 3 WIRES CENTER AND CONNECT TO ADD DEN BEDROOM2 REAR PORCH	141.00
CO EL11	*****SEE PER SHEET # 3*** CEILING FAN SPEED CONTROL (QUORUM #7-1191-6 WHITE) CONNECT TO ADDED J-BOXES DEN BEDROOM2 REAR PORCH	210.00
CO EL11	*****SEE PER SHEET #3**** CEILING FAN SPEED CONTROL (QUORUM #7-1191-6 WHITE) STANDARD SINGLE POLE SWIT CONNECT TO STANDARD J-BOX MASTERBEDROOM GREATROOM	78.00
CO EL50	*****SEE PER SHEET #3*** ADDITIONAL 20 AMP DEDICAT 110 VOLTS @ GARAGE LOCATE ON WALL C EXTERIOR WALL	78.00
CO FLC	*****SEE PER SHEET #3**** CARPET - GRADE 10 INSTALL MOHAWK BP58 CRYST COLOR: 812 CASHMERE @	

	GREATROOM	
	MASTERBEDROOM	
	BEDROOM2	
	DEN	
	*****SEE PER SHEET #1****	
CO FLC	UPGRADE 6LB PAD	
	INSTALL 6LB UPGRADE PADDI	
	GREATROOM	
	MASTERBEDROOM	
	BEDROOM2	
	DEN	
	*****SEE PER SHEET #1****	
CO FLG21	TEC SERIES GROUT COLORS	
	PREMIERS, ESTATES AND RVR	
CO FLT	TILE - GRADE 05	
	INSTALL TILE # MT12059 17	
	STONE 12X12 POMPEI W/GROU	
	FOYER/EXT FOYER	
	KITCHEN/BREAKFAST	
	UTILITY/ HALL @ UTILITY	
	MBATH & BATH2	
	HALL @ MBR	
	*****SEE PER SHEET#1*****	
CO FLUP	UPGRADE FLOORING	7,015.00
CO GA05	KEYPAD OPERATOR FOR GARAG	85.00
	LOCATE @ STANDARD LOCATIO	
CO LTF00	STD BREAKFAST NOOK SEAGUL	
CO LTF00	STD EXTERIOR GARAGE SEAGU	
	WHITE FIXTURE	
CO LTF00	STD DINING ROOM SEAGULL 3	
CO LTF15	EXTERIOR SEAGULL 8824-15	111.00
CO MA00	STANDARD MASTER BATH MARB	
	****AVAILABLE FOR COTTAGE	
	PREMIERS, ESTATES, RVRB	
	****#605 PEARL****	
	605 PEARL	
CO PBG01	MOEN 8" SPREAD MONTICELLO	434.00
	POLISHED BRASS FIXTURES W	
	CHROME POLISH BRASS ACCES	
	MASTE BATH IN PLACE OF ST	
CO PBG02	MOEN 8" SPREAD MONTICELLO	389.00
	POLISHED BRASS FIXTURES W	
	CHROME/POLISHED BRASS ACC	
	BATH 2	
	SHOWER TRIM:	
CO PB40	KOHLER WELLWORTH 2 PIECE	280.00
	K-3422-WHITE	
	MBATH & BATH2	
CO PNT00	STANDARD INTERIOR PAINT C	
	THROUGHOUT HOME (SPECIFY	
	#1648, WHITE CLIFFS #1024	

#1004 NOTE: ONE COLOR PER
DOVERWHITE #1648

CO SPCR	Special Credit (Specify b	7,200.00
CO SP05	PREWIRE FOR ONE SURROUND	641.00
	ROOM AND UP TO THREE ROOM OF STEREO INSTALL @ MASTERBEDROOM, LIVING/DINING ***TERMINATION POINT @ LI *****SEE PER SHEET #2****	
CO STDEX	EXTERIOR COLOR SCHEME SEL SCHEME 1/ESTATE GREY	
CO WR01	TIGHT MESH WIRE RACK SHEL PANTRY AND LINEN CLOSET(S (16" OR 12" DEPENDING ON	31.00
LS LS020	LANDSCAPE PACKAGE MAGNOLI **SEE PER SHEET #90**	8,012.00
LS LS070	LANDSCAPE UTILITY SCREENI ADDS THE FOLLOWING MATERI 5 - 3 GALLON SHRUBS **SEE PER SHEET #90**	109.00

Attorney: Vaux

A certificate for a standard EZ-GO golf
cart will be issued at closing.

A \$31770 Design Studio credit has been
applied above.

Receiving all incentives offered is
contingent upon the Purchaser closing
on or before 3/15/02 and closing with
cash or Del Webb Mortgage.

PLEASE BE REMINDED WHEN PURCHASING A FIELD MODEL THAT CERTAIN CHOICES
ARE BEYOND DEADLINES AND ARE NOT AVAILABLE FOR CHANGE OR PURCHASE.
YOUR DESIGN CENTER CONSULTANT WILL BE ABLE TO CONFIRM IF ANY OPTIONS
ARE APPLICABLE.

Approximately 45 days in advance of your Closing Date, you will
receive written confirmation of the Closing Date by certified mail.
Please do not make any final arrangements with regard to your
relocation prior to such confirmation.

Deposit Check No.

All Design Center selections must be completed by 3/07/2002. Fifty
percent (50%) of all Non-Standard selections are due thirty (30) days
prior to the construction start of the house. The balance is payable
at Closing.

A final statement of account will be prepared thirty (30) days prior to Closing. After that date, all monetary transactions involving approved purchases, deletions, and/or changes will be processed by a separate accounting outside of the Closing.

RAC
Initials

WSP
Initials

All options selected by Purchaser will be included in a written addendum (the "Addendum") to this Sales/Home Construction Agreement ("Sales Agreement"). At the time an Addendum is issued, a Sales Agreement Summary indicating the revised Total Purchase Price will be delivered to Purchaser, and Purchaser acknowledges and agrees that construction cannot proceed, and all selections may not be available, until Purchaser has signed and returned the Addendum to Seller, if applicable.

1.2 Agreement to Purchase and Sell the Property.

This Agreement sets forth the terms and conditions under which we (sometimes referred to as "Seller", "We", "Us", or "Our") agree to sell, and you (sometimes referred to as "Purchaser", "You", or "Your") agree to purchase, a single family home or duplex home (the "Home") on a Lot located in the community of Sun City Hilton Head (the "Lot"), all as indicated in Section 1.1. All terms set forth in the Summary of Terms are an enforceable part of this Agreement.

1.3 Age Restriction.

Sun City Hilton Head, an age restricted community, is intended to provide housing primarily for persons fifty-five (55) years of age or older. Subject to the rights of the Seller described below, each residence, if occupied, must be occupied by at least one (1) person fifty-five (55) years of age or older. The restrictions on occupancy, which are in compliance with the Federal Fair Housing Act and Amendments, are contained in the Declaration of Covenants, Conditions and Restrictions (the "Declaration") recorded in the official records of Beaufort County. As set forth in the Declaration, a limited number of homes may be sold by Seller and Seller only for occupancy by persons between fifty and fifty-five years of age.

RAC
Initials

WSP
Initials

1.4 Description of the Property.

The Property to be purchased by You includes the Home, the Lot, and all easements, rights-of-way and other rights owned by Us and benefitting the Lot (excluding, however, any such easements, rights-of-way, common areas, or other rights which are conveyed to the

Sun City Hilton Head Community Association). The term "Property," when used in this Agreement, shall refer to the property described in Section 1.2.

1.5 The Purchase Price.

You agree to pay the Purchase Price to Us at the time and place specified in this Agreement.

1.5.1 Net Purchase Price and Purchase Price.

The Net Purchase Price for the Property is the amount set forth in the Summary of Terms. The actual price You pay for the Property may be higher than the Net Purchase Price and is subject to change pursuant to the terms of this Agreement and any addenda thereto. The Net Purchase Price calculated as of the date of the Closing, shall include any adjustments, additions, modifications or discounts specified by this Agreement, or any amendment to this Agreement, including the cost of all architectural options and change orders selected by You, and shall be referred to in this Agreement as the "Purchase Price."

1.5.2 Change Orders.

Whenever You select any approved options, change orders or Non-Standard features for Your Home or Lot pursuant to Section 2 of this Agreement, the Purchase Price will be adjusted according to the price of Your selections and the revised Purchase Price will be reflected in an Addendum to this Agreement executed by both parties.

1.5.3 Earnest Money Deposit, Construction Deposit and Down Payment.

Simultaneously with Your execution of this Agreement, You are to deposit with Us the Earnest Money Deposit of Five Hundred and No/100 Dollars (\$500.00) and the Construction Deposit of Four Thousand Five Hundred and No/100 Dollars (\$4,500.00) specified in the Summary of Terms (defined in Section 1).

On or before thirty (30) days prior to the start of construction, You are to deposit with Us a Construction Down Payment (the "Down Payment") in the amount equal to ten percent (10%) of the Base Price, Lot Premium, and Architectural Options as referenced in Section 1.1, less the \$5,000.00 combined Earnest Money and Construction Deposits. If purchasing a Field Model, the Down Payment is due within thirty (30) days after the signing of this Agreement unless otherwise noted in Section 1.1.

1.5.3.1 The Earnest Money Deposit, Construction Deposit and the Down Payment will be applied to the Purchase Price at the Closing.

1.5.3.2 The Earnest Money Deposit, Construction Deposit, Down Payment, and any sums deposited with Us for Change Orders or

Options shall be referred to in this Agreement as the "Deposited Purchase Money."

1.5.3.3 The Deposited Purchase Money will not be refunded to You unless We are required to refund the Deposited Purchase Money pursuant to Section 4.2.2 of this Agreement following Our default and failure to remedy Our default.

1.5.4 Purchaser's Deposits.

All Deposited Purchase Money is payable directly to Del Webb Communities, Inc. All Deposited Purchase Money, except the Earnest Money Deposit, will be maintained by Us in Our general accounts for the purpose of advancing funds for the construction of improvements and production housing Property and will not be segregated into a separate account for You. The Earnest Money Deposit will be held by the Broker-In-Charge, in a trust account in accordance with applicable state law.

1.5.5 Cash Discount.

The Purchase Price (as defined in Section 1.5.1) will be reduced by a "cash discount" equal to two and one-half percent (2.5%) of the base price of the home and lot premium if You pay the total Outstanding Balance including the base price of the home, lot premium and all Architectural Options, Change Orders and Non-Standard features selected by You, thirty (30) days prior to the date of the Start of Construction, as defined in Section 2.2.1.

If the payment is made at the Start of Construction, the "cash discount" will equal two percent (2%) of the Purchase Price; thirty days after the Start of Construction, the "cash discount" will equal one and one-half percent (1 1/2%) of the Purchase Price; sixty days after the Start of Construction, the "cash discount" will equal one percent (1%) of the Purchase Price; ninety days after the Start of Construction, the cash discount will equal one-half of a percent (1/2%) of the Purchase Price.

1.5.5.1 No "cash discount" is available if You are obtaining financing for any portion of the Purchase Price, whether or not this transaction is contingent upon Your ability to obtain financing.

1.5.5.2 If You do not pay the Purchase Price in advance in order to obtain a "cash discount", You will be required to pay the Purchase Price, less any Deposited Purchase Money, at the Closing. All sums payable by You at the Closing must be paid in cash, certified check, cashier's check or by wire transfer confirmation.

1.5.5.3 If Your obligation to buy the Property is not contingent upon Your ability to obtain financing You shall, from time-to-time upon request by Us, provide Us with evidence satisfactory

to Us that You have ample funds to consummate the purchase of the Property, which evidence shall be provided within ten (10) days of each request by Us. Failure to provide such satisfactory evidence within said ten (10) days of each request shall constitute a default by You and entitles Us to exercise the remedies contained in Section 4.2 of this Agreement.

2.0 Selecting Options For and the Construction of Purchaser's New Home

2.1 Design Center Consultation.

No later than fourteen (14) days following the date of this Agreement, a Sun City Hilton Head Design representative will contact You to schedule a Consultation Appointment in order to select the Change Orders available to You. Your Consultation Appointment must be scheduled and take place no later than thirty (30) days before the estimated Construction Start Date, or if Construction of the Home has commenced, as soon as possible but no later than fourteen (14) days from the date of this Agreement. PLEASE BE REMINDED WHEN PURCHASING A FIELD MODEL THAT CERTAIN CHOICES ARE BEYOND DEADLINES AND ARE NOT AVAILABLE FOR CHANGE OR PURCHASE.

During the Consultation Appointment You will be given the opportunity to select the following Change Orders: counter tops, floor coverings, cabinets and exterior colors. Your final selections must be delivered to Seller in writing within thirty (30) days after Your Consultation Appointment (but no later than thirty (30) days prior to Start of Construction) and, if You fail to do so, We may select the Change Orders for Your Home for You. If construction of the Home has commenced, some options may no longer be available and You must communicate Your final selections to Us on the date of Your Consultation Appointment.

Be advised that Del Webb's Sun City Hilton Head uses different exterior building materials and finishes based on the preference of the individual buyer.

2.1.1 Prices for Change Orders.

The prices for Change Orders will be those in effect on the date of Your final selection and addendum creation. All prices are subject to change prior to Your selection. Change Orders may not be available if You deliver Your final selection to Us later than thirty (30) days before the Start of Construction. All deposits or other payments made by You for Non-Standard features are non-refundable.

2.1.2 Replacement Change Orders.

If any Change Orders selected by You are unavailable at the time of construction, or We otherwise determine in Our sole discretion, that it is necessary for You to select replacement Change Orders, You agree to select replacement items from Our then current inventory within

fifteen (15) days after You receive notice from Us. Should You select a higher grade product, the additional charge will appear on Your statement of account. If You fail to timely select replacement Change Orders, We may make a replacement selection for You. The selection shall be as similar, as reasonably possible, to the items originally selected by You.

2.1.3 Field Models.

Despite any conflicting terms in this Agreement, if You are purchasing an existing Field Model, the above schedule is not applicable to You. Please confer with the Design Center and, if there are any choices available at the time of Your purchase, You must make Your final selection of all Change Orders within the time frame designated by Our construction schedule or at an alternative time designated by Our Design Center. If You fail to do so, We may select the Change Orders for Your Home for You.

2.1.4 Extra Options.

Our model homes and promotional materials contain optional and extra design features such as floor coverings, decorator light fixtures, wall coverings, window treatments, furniture, built-ins, and landscaping. These items will not be included in Your Home or on Your Property unless You purchase and pay for the installation of these extra items pursuant to the above provisions.

2.1.5 Construction of Options and Change Orders.

You acknowledge that We will not be obligated to construct, and that We will not commence construction of, any Change Orders or Non-Standard features until both parties have signed an Addendum to this Agreement and You have paid Us the Change Order Deposit.

2.1.6 Payments.

Amounts not paid by the scheduled dates, as indicated above, are subject to an interest charge of one and one-half percent (1.5%) of the unpaid amount per month, and Your failure to pay such amounts by the scheduled dates shall constitute a breach of this Agreement.

2.2 Construction of the Home.

We agree to construct the Home on the Lot, including any options, change orders and any Non-Standard features described in this Agreement or any Addendum executed by both parties, in substantial conformity with Our standard Plans and Specifications as of the time of Start of Construction. All changes to Our Plans and Specifications requested by You shall be evidenced by a written change order signed by You and shall not be effective until accepted in writing by Us.

2.2.1 Start of Construction.

For purposes of this Agreement, the term "Start of Construction" for the Home shall be understood to mean the date on which We issue a "Notice to Proceed" to Our contractors for the Home; the Notice to

Proceed will typically include a group of homes that is being constructed by Us in a single sequence. We will use reasonable efforts to send You a written notice stating the date on which Start of Construction has occurred. Based on Our most recent construction schedule and plans, Seller initially estimates Start of Construction of the Home shall occur within two (2) weeks (earlier or later) of the date specified in the Summary of Terms. We agree to use reasonable efforts to Start Construction on or near that date. However, We stress that many factors, including changes in Our construction plans, weather or other acts of God and factors inherent in the construction trade may prevent Us from doing so. Moreover, You are responsible for performing certain obligations that may affect the timing of construction, such as scheduling a Consultation Appointment, selecting the Change Orders, paying the Down Payment and timely applying for and obtaining approval of any loan. Your failure to timely perform these obligations will constitute a breach of this Agreement and will entitle Us to terminate this Agreement and exercise any remedies for such breach provided for herein.

2.2.2 Completion of Construction.

For purposes of this Agreement, Completion of Construction of the Home shall be deemed to have occurred on the date on which a final certificate of inspection for the Home was issued by the applicable governmental authority. We agree to proceed with reasonable diligence to complete the Home in accordance with Our building schedule in effect at the Start of Construction of the Home, which typically calls for completion of construction within five (5) months following Start of Construction. You understand, however, that scheduling of construction is difficult and that delays in completion are common. We will use reasonable efforts to keep You informed of the progress in the construction of Your Home and any revised estimated completion dates. You understand and agree that We make no guarantee as to the actual date of completion and that in no event will We be responsible in any manner for any inconvenience, loss, damage, or expense to You, including Your loss of a loan commitment or interest rate lock, resulting from delays in construction, except as expressly provided in Section 2.2.3 below.

Approximately forty-five (45) days in advance of Your Closing Date, You will receive written confirmation of the Closing Date by certified mail. Please do not make any final arrangements with regard to Your relocation prior to such confirmation.

RFL Initials

MJR Initials

2.2.2.1 Completion of Construction may occur prior to the installation of any landscaping, whether installed by Us or an independent third party company, and prior to the construction of the pool (if any), if installed by an independent third party company. Accordingly, You will nevertheless be obligated to continue with the Closing upon the scheduled date and You will be solely responsible for

any hold backs or escrowed funds required by Your lender (if applicable) in connection with such incomplete improvements.

2.2.3 Deadline for Completion of Construction.

If We fail to deliver the Home within two (2) years from the date You sign this Agreement, due to reasons other than Your failure to comply with the terms of this Agreement, or any reason that would excuse Us from performance under South Carolina law, then You, upon written notice to Us, and in addition to other remedies legally available to You, may rescind this Agreement. Upon such written notification, We shall refund to You all Deposited Purchase Money and all other sums paid by You to Us. Upon Your rescission of this Agreement, this Agreement shall be terminated and neither party shall have any further obligation under this Agreement, except for Our obligation to refund the monies specified above. The refund of all Deposited Purchase Money and all other sums paid by You to Us shall constitute Your sole and exclusive remedy for rescission.

2.3 No Custom Home Sales.

Although You are entitled to select, and We will endeavor to provide, the Change Orders described above, the Home will not be constructed as a Custom Home or pursuant to Your plans and specifications. The Home is being constructed as a single structure within Our production housing development and shall be built according to the requirements of Our overall development and construction program. Accordingly, We reserve the right to make changes in the plans, specifications, and materials for the Home as and when We deem necessary or appropriate, so long as such changes do not violate applicable federal, state, or local law, and the Home has substantially equivalent or greater value with the changes. For example, due to Our on-going program of home building research and enhancement, as well as the possibility of material shortages and discontinuations, We may make changes in the building products, materials, methods, and designs employed in the construction of the Home that are not reflected in the models You have seen or in Our current plans and specifications. These changes may also include variations in dimensions or measurements, e.g., distances between counter tops and cabinets in Your kitchen may differ from those in the model You selected in order to accommodate required clearance standards. By signing this Agreement, You authorize Us to make these modifications and/or changes without further notice to You, and You agree to accept the Home with such changes and/or modifications, without modification to the Purchase Price.

2.4 Final Inspection.

Approximately 45 days before Closing, You will receive a certified letter notifying You of the approximate date of Closing. You are requested to schedule a Final Inspection of the Home to give You or Your representative the opportunity to have a Pre-Closing "walk through" inspection of the Home. We will make every reasonable effort

to schedule the Final Inspection at a mutually convenient time, which is usually the day of Closing, but the Closing will not be delayed if You or Your representative are unable to participate in the Final Inspection. If You or Your representative is unable to participate in the Final Inspection, You authorize Us to perform the final inspection on Your behalf.

DO NOT MAKE ANY FINAL ARRANGEMENTS UNTIL YOUR CLOSING DATE HAS BEEN CONFIRMED BY OUR SETTLEMENT DEPARTMENT.

2.4.1 Punch List.

The inspection will determine the remaining items to complete, repair or replace, which are commonly known as "punch list items." The existence of punch list items shall not entitle You to delay Closing, request a reduction in the Purchase Price or terminate this Agreement. We agree to correct the Punch List items within a reasonable period of time either before or after the Closing and You agree to allow Our personnel to enter onto the Property (after giving You reasonable notice) to repair punch list items after the Closing. Once the punch list is prepared, but before the correction of punch list items, the Home will be deemed ready for occupancy.

2.5 Visits to the Construction Site; Assumption of Liability and Risk.

A construction site is a dangerous place, especially for persons who are unaccustomed to the building industry or the risks associated with the construction of a house in progress. We, therefore, cannot permit You to visit the Property during construction or prior to the Closing or otherwise enter any construction site within Sun City Hilton Head unless You are accompanied by one of Our representatives. By signing this Agreement, You agree to assume all risk and responsibility for You or anyone else accompanying You with respect to any damage, injury, or loss of life occurring while visiting the Property during construction or prior to Closing or entering one of Our construction sites. You further agree to indemnify and hold Us harmless against any loss or damage We may incur because of Your visit to the Property during construction or prior to Closing, or Your entrance into one of Our construction sites, including matters arising out of Our or Our contractors', negligence or matters involving strict liability.

2.6 Termite Treatment and Insulation.

We warrant to You that the Home will be treated for termites with certain chemicals as permitted by law prior to Completion of Construction.

The Home's insulation shall be installed in accordance with the following specifications:

Area	Type	Average R-Value
------	------	--------------------

Exterior walls	Fiberglass batts	R-13
Ceiling above heated or cooled space	Blown with Insulation	R-30

3.0 Sun City Hilton Head and The Community Documents

3.1 Development Plans.

Sun City Hilton Head is currently being developed by Us in accordance with a Concept Plan for the entire community. A map generally depicting the current status of the Concept Plan is available to be reviewed by You. In addition, You may be shown models, pictorial representations or other maps, representing current or various stages or portions of the Concept Plan (collectively, the "Development Plans").

3.1.1 Changes in the Development Plans.

The Concept Plan, as well as any other development plans prepared by Us, may be amended or changed from time-to-time to provide for, among other things, changes in land use, improvement plans, street patterns, setbacks, the type, number, style, or price of residences, lot sizes and configurations, densities, recreational amenities, or other improvements. In addition, We may annex into Sun City Hilton Head additional lands that are not currently described in the Master Declaration (defined below). This annexation may or may not require the consent of certain owners of lots in Sun City Hilton Head. As Our plans are periodically updated and remain subject to change, You understand that no statement by one of Our representatives or any Sales Associate regarding the planned use of property in or adjacent to Sun City Hilton Head should be understood by You or anyone as a warranty or promise regarding Our future development plans and such statements should not be construed to limit or affect Our right to make changes to the Concept Plan, or any other zoning ordinance or development plan applicable to Sun City Hilton Head in the future. By execution of this Agreement, and as a material inducement to Us to accept Your offer to purchase the Property, You waive any right to claim any damages, costs, liabilities, expenses or obligations against Us, Our officers, directors, shareholders, employees, agents and subsidiaries for any changes to the Concept Plan, and/or any other zoning ordinance or development plan for Sun City Hilton Head or for adjacent properties, or for the annexation of additional land or other development plan changes in Sun City Hilton Head.

3.2 Community Documents.

All lots within Sun City Hilton Head are subject to private use restrictions and other covenants to assure the successful and orderly

operation and maintenance of Sun City Hilton Head. These use restrictions and covenants are established by a series of documents that will affect Your Property. Accordingly, You understand that, by purchasing property in Sun City Hilton Head, Your Property will be subject to various restrictions on the use of the Property and that various easements for utilities, access or other purposes may be located on Your Lot. Specifically, You are purchasing Your Property subject to the terms of the following documents relating to the Sun City Hilton Head Community (collectively, the "Community Documents"):

The Declaration of Covenants, Conditions and Restrictions for Sun City Hilton Head (the "Master Declaration");

Any Supplemental Parcel Declaration affecting Your Lot;

The Sun City Design Guidelines;

The Articles of Incorporation and Bylaws for Sun City Hilton Head Community Association, Inc., a South Carolina non-profit corporation (the "Community Association");

Current Community Disclosure Booklet; and

Out-of-state Public Offering Statement for Sun City Hilton Head, if applicable.

We have previously delivered copies of the Community Documents (placed in Your "Next Steps" book) to You and by signing this Agreement You acknowledge that You have received and reviewed to Your satisfaction all of the Community Documents. As soon as You accept Your deed and become the owner of the Property, Your use of the Property will be subject to the Community Documents and You will automatically become a member of the Community Association. Your acceptance of Your deed will represent Your agreement to be bound by the terms and conditions of the Community Documents and all other documents and instruments in the chain of title to the Property.

3.2.1 Assessments and Dues.

The Master Declaration requires You to pay assessments for the operation of the Community Association as provided in the Community Documents.

3.3 Architectural and Design Standards/Future Improvements.

After You purchase the Property, any improvements You make to the Lot, including alterations of existing improvements or vegetation on the Lot, and any alterations You make to the Home that are visible from the outside (including repainting the exterior) or to the landscaping must be done in accordance with the Design Guidelines and will require the prior approval of the appropriate committee of the Community Association. The guidelines and standards for the architecture,

design, development, and appearance of homes and lots within Sun City Hilton Head, and any modifications or repairs to homes and lots, are set forth in the Master Declaration and Design Guidelines. These documents also specify the procedures and rules for obtaining approval from the Community Association, or its applicable committees, for any improvements or modifications planned by You.

3.3.1 Landscaping.

Landscaping of Your Lot must be completed in compliance with the Design Guidelines within thirty (30) days following the Close of Escrow, regardless of Your move-in date. You acknowledge that the thirty (30) day requirement does not apply to Seller-owned lots.

4.0 Warranties, Disclaimers, Remedies and Disclosures

4.1 Warranties.

We warrant to You that, as of the Closing, the Home will be free from defective materials and workmanship, as determined by construction industry standards in Beaufort County, South Carolina for a period of two (2) years from the date of the Closing. In order to enforce this limited warranty, You must deliver to Us written notice of the defect before the end of the two (2) year period and provide Us with reasonable opportunity to correct or repair the defect.

DEL WEBB WARRANTS THE HOME IN ACCORDANCE WITH THE DEL WEBB HOME WARRANTY, 2ND EDITION, WHICH IS INCORPORATED HEREIN BY THIS REFERENCE (THE "WARRANTY"). THE WARRANTY IS BEING PROVIDED BASED ON AGREEMENT THAT PURCHASER WILL LOOK TO THE WARRANTY AS THE SOLE MEANS OF RECOURSE IN THE EVENT OF ANY DEFECT CLAIM RELATED TO THE HOME OR PROPERTY. TO THE EXTENT PERMITTED BY LAW, PURCHASER WAIVES (1) ANY AND ALL ADDITIONAL WARRANTIES, EXPRESS OR IMPLIED, TO WHICH PURCHASER MAY BE ENTITLED, INCLUDING WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, HABITABILITY, OR WORKMANLIKE CONSTRUCTION, AND (2) ANY CLAIM FOR INCIDENTAL, SECONDARY, OR CONSEQUENTIAL DAMAGES INCURRED AS A RESULT OF ANY DEFECTIVE MATERIAL OR WORKMANSHIP IN THE HOME OR PROPERTY.

4.1.1 Seller's Limited Warranty Obligation.

Our warranty obligation is limited to the obligation, at Our option, to either: i) repair or replace the defective materials or workmanship; or ii) pay You the difference between the value of Your Property without the defect and the value of Your Property with the defect. You acknowledge that normal warranty service may require multiple service calls to complete effective corrective actions.

4.1.2 No Warranty for Certain Products.

Our warranty shall in no event extend to any products with manufacturers' warranties or other "consumer products" installed on the Property or in the Home. We agree to transfer to You all

warranties for such products received by Us from the manufacturers of such products, but We reserve the right to retain any rebates or manufacturer/supplier incentives offered in connection with materials and equipment purchased by Us for the Home.

4.1.3 Warranties of Independent Contractors.

You understand that We are using third party contractors, in certain construction and service areas within Sun City Hilton Head, and that these companies are independent contractors and not affiliated with Us, or any of Our affiliates. Any warranties or representations for such products are warranties and representations given by the independent contractors only, and not by Us or any of Our affiliates, and Our warranty shall in no event extend to such products.

4.2 Cancellation; Remedies.

4.2.1 Purchaser's Default.

If You fail to comply with the terms of this Agreement, You will be in default and the following provisions will be applicable:

4.2.1.1 If You fail to timely perform any of Your obligations under this Agreement, or if at any time You notify Us, in writing, that You do not wish to complete the purchase contemplated by this Agreement, We shall have the right to cancel this Agreement.

4.2.1.2 In the event that We elect to cancel this Agreement pursuant to a designated section of this Agreement, We shall deliver written notice of cancellation to You and thereupon:

a) You shall be in default and We shall be entitled to treat this Agreement as having been breached or anticipatorily breached (as the case may be);

b) We shall be discharged from any further obligation to You under this Agreement and We shall be entitled to release the Property for sale to another party, it being expressly understood and agreed that You shall have no further right, title, or interest in the Property; and

c) We shall be entitled to retain all Earnest Money and any Deposited Purchase Money, deposited by You, up to a maximum amount equal to fifteen percent (15%) of the Purchase Price, plus all sums deposited by You in payment of cash extras and construction changes for the Home, as liquidated damages to Us for the breach of the Agreement by You. The amount of liquidated damages is intended as a reasonable estimation of Our actual damages resulting from a breach by You in light of the difficulty and uncertainty in ascertaining as of the date of this Agreement the actual damages We may suffer from such a breach, which damages will include the cost of administering this

Agreement and the cost to take the Property off the market while this Agreement remains in effect.

1. Notwithstanding anything contained herein to the contrary, refunds of monies received from You may be considered by Us in the case of diagnosed terminal illness of a purchasing party, or death of a purchasing party.

4.2.2 Seller's Default.

If We fail to timely perform Our obligations under this Agreement and You have complied with all of Your obligations, then You agree, before exercising any other remedies, to deliver to Us a written notice setting forth in detail the alleged failure of performance by Us. We shall have thirty (30) days from the receipt of Your notice to cure such failure of performance, except that if the required performance cannot reasonably be completed by Us within thirty (30) days, then We shall have a reasonable time within which to complete the remedial action, but in no event longer than sixty (60) days. If, at the expiration of the cure period, We have not cured the failure of performance, You may, by further written notice to Us, in addition to other rights or remedies available to You at law or in equity, terminate this Agreement and receive a refund of the Deposited Purchase Money and all other sums paid by You to Us to date, whereupon this Agreement shall be terminated without further liability to either party. In no event shall We be responsible for special or consequential damages.

4.3 Arbitration.

Any controversy or claim arising out of or relating to this Agreement or Your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall take place in Beaufort County, South Carolina or at a place mutually agreed upon by both parties.

After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act. The Act is found at South Carolina Code Section 15-48-10 et seq. The rules of the American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding and the method of appointment of the arbitrator. The arbitration shall take place in Beaufort County or at a place mutually agreed upon by the parties.

Judgment upon any award rendered by arbitration may be entered in any court having jurisdiction over the matter. The cost of the arbitrator(s) shall be borne equally by the Purchaser and Seller. Any

party to this Agreement may bring action, including a summary or expedited proceeding, to compel arbitration of any court having jurisdiction over such action, and the prevailing party in any such action and in any arbitration shall be entitled to recover attorney fees and costs which shall be determined and awarded by the arbitrators.

4.4 Flood Zone Disclosure.

Portions of Sun City Hilton Head, which may include the lot You are purchasing, are shown on current Federal Emergency Management ("FEMA") flood maps as being in an "A" Zone, which may mandate that an owner carry flood insurance under most mortgage lender documents. The current FEMA maps are based upon pre-development grades. Del Webb adds sufficient fill to raise lot elevations above the "A" Zone elevations, and Del Webb submits this information to FEMA authorities, so the flood zone maps for the area may be redesignated from the "A" Zone to a "B" or "C" Zone. Because of processing backlogs, however, the official FEMA map designations may not change for a substantial period of time. Please be aware that Your mortgage company may require You to carry flood insurance for as long as the official maps show Your lot to be in an "A" Zone. Del Webb has no control over the timing of these map changes, and Del Webb cannot guarantee when, or if, the Federal Government will make these changes. Specific lenders and insurance companies may deal with this situation differently, and You are encouraged to obtain more specific information about Your insurance requirements directly from Your lender and/or insurance company.

5.0 Closing of the Transaction; Miscellaneous; Purchaser's Right to Cancel.

5.1 Closing:

The Closing of the sale and purchase of the Property will be conducted in the following manner:

5.1.1 Date.

The Closing will be scheduled on a date (the "Closing Date") and at a time designated by Us in a written notice which will be delivered to You approximately forty-five (45) days prior to the Completion of Construction as defined in Section 2.2.2. When purchasing a field model, notice will be given within an appropriate time frame in relation to the signing of the contract and the anticipated completion date of the Home as defined in Section 2.2.2.

5.1.2 Place.

The Closing will occur at the Sales Office of Sun City Hilton Head, 127 Sun City Lane, Bluffton, South Carolina, 800-978-9781 or at such other place in Beaufort County, South Carolina as We may designate in the notice sent to You regarding the Closing Date.

5.1.3 Documents.

Upon Close of Escrow and recordation of the Deed (the "Deed") conveying good and indefeasible title in the Property to You, We will deliver to You a copy of the Deed, subject only to current taxes (not yet due and payable as of Closing), assessments, the Community Documents and other restrictions, rights-of-way, easements, and other matters of record not materially adversely affecting Your use of the Property. We will also sign and deliver such other documents as are customarily signed in the State of South Carolina in connection with the conveyance of real property, including all required closing statements, releases, and evidence of authority to execute the documents. You will likewise be required to sign and deliver various documents that are customarily signed in South Carolina in connection with the purchase of real property, including all required closing statements, notices, affidavits, evidence of authority to execute documents, and all documents evidencing and securing any Loan Purchaser may obtain to pay the Purchase Price.

5.1.4 Closing Costs.

Property taxes and assessments will be pro-rated using the latest rate information currently available at the time of Closing, based on a 360-day year. Any discrepancies between actual and pro-rated taxes will be settled between Seller and Purchaser after Closing when the actual tax bills for the year in which Closing occurs are available. Association assessments are collected at Closing for a full calendar year, including any Neighborhood Assessments (as defined in the Declaration) which may be applicable. If Purchaser is financing the purchase, Purchaser shall pay all impounds for taxes, insurances, prepaid interest, private mortgage insurance premium (if applicable), origination fees, and all other fees or costs imposed or required by Purchaser's lender. Purchaser shall also pay any applicable fees required by Beaufort County: Boat Ramp and Library fees (presently totaling \$87.50) and the Impact Fee of \$300. Also included are recording fees for the Deed and Mortgage. If Purchaser elects to utilize an attorney provided by Seller for Closing services, Seller shall pay fifty percent (50%) of the cost of such attorney's fees and Purchaser shall be obligated to pay the remaining fifty percent (50%) of such attorney's fees. If Purchaser chooses to select and utilize a different attorney to represent Purchaser at Closing, Purchaser will be responsible for payment of all of Purchaser's attorney's fees. Any other fees and costs associated with Closing, which are not specifically mentioned above, will be allocated between Seller and Purchaser according to usual custom of practice of Beaufort, South Carolina.

5.1.4.1 So long as We timely complete construction as required under this Agreement, We will not be liable to You for any costs, expenses, liabilities, losses or damages incurred by You as a result of a delay in the Closing, including without limitation, any increase in commitment fees, points or interest rates assessed or charged by any lender.

5.1.5 Pro Rations.

All real estate taxes relating to the Property for the year of the Closing will be prorated between Us as of the date of the Closing. If the amount of taxes for such year are not known at the time of Closing, the prorations will be based on the latest information available at the time of Closing concerning assessed values and tax rates. We agree to use the best available estimate to prorate taxes and that such estimate will be final as between both parties. You will be responsible for paying Your annual assessment for Your membership in the Community Association. The assessment is due each year on the anniversary date of Your Closing.

5.1.6 Payment.

At the Closing, You must pay or cause Your lender to pay the Purchase Price by cash, certified check, cashier's check, or wire transfer confirmation, less the amount of the Deposited Purchase Money and any other amounts already paid by You as part of the Purchase Price. You must also pay the Closing Costs and Pro Rations due from You as described above.

5.1.7 Possession.

Upon receipt of all duly signed documents and the applicable monies, We shall deliver to You two (2) sets of keys for the Home and possession of the Property.

5.1.8 Vesting.

The way in which You take title to the Property ("vesting") is a legal decision which may have important tax and/or other consequences. You are advised to consult with Your attorney or Certified Public Accountant to determine the proper vesting for You. You agree to be responsible for advising Us and Closing Attorney, no later than thirty (30) days before the scheduled Closing, of the exact manner of vesting selected by You.

5.2 Closing Attorney.

An attorney to be selected by You or Us, who may or may not be affiliated with Us, shall act as the closing attorney ("Closing Attorney") for this transaction. As described above, if You elect to utilize an attorney selected by Us as Closing Attorney, We shall pay fifty percent (50%) of the cost of such attorney's fees and You shall be obligated to pay the remaining fifty percent (50%) of such attorney's fees. If you choose to select and utilize a different Closing Attorney to represent You at Closing, You will be responsible

for payment of all of Your attorney's fees. Delivery to and acceptance by Closing Attorney of a fully executed copy of this Agreement shall constitute the Closing Attorney's acceptance of this employment. Following the Closing, the Closing Attorney shall record in the Official Records of the Beaufort County Recorder the Deed and any other documents necessary to reflect the conveyance of the Property or any lien secured by the lender. Subject to Your approval, the Closing Attorney will also: i) issue to lender, at Your cost, a lender's standard title insurance policy insuring lender's interest in the Property in the amount of the loan; and ii) issue to You, at Your cost, an owner's standard title insurance policy insuring Your title in the Property in the amount of the Purchase Price.

5.2.1 Tax Reporting.

The Closing Attorney agrees to accept all the responsibilities for the information reporting required in relation to the purchase and sale of the Property, as set forth in Section 6045(e) of the Internal Revenue Code of 1986, as amended (the "Code"). Both parties agree to provide the Closing Attorney with all information and certifications reasonably requested by the Closing Attorney or otherwise required to be provided by a party to a transaction under Section 6045 of the Code.

5.3 Brokers.

If You have engaged any real estate agent, broker or other party to represent You in this transaction, who is not actively registered in accordance with the Del Webb Sun City Hilton Head Broker Referral Program, You will be solely responsible for paying the fee or other compensation such party may claim to be owed.

5.4 Miscellaneous.

The following provisions shall be applicable in all respects to this Agreement:

5.4.1 Survival.

The covenants, disclaimers and agreements contained in this Agreement shall not be deemed to be merged into or waived by the instruments executed at Closing, but shall expressly survive the Closing and continue to be binding upon both parties.

5.4.2 Complete Agreement; No Verbal Modifications.

This Agreement contains the complete agreement of the parties with respect to the subject matter of this Agreement, and it cannot be amended or modified except by written agreement signed by both parties. There are no collateral understandings, representations, or agreements other than those contained in this Agreement or added (or deleted) by written change order or other amendments duly executed by both parties, which shall constitute a part of this Agreement when properly executed. By signing this Agreement, You affirm to Us that You have not relied upon any verbal representation or warranty of Ours.

or any employee, agent or representative of Ours in entering into this transaction. No salesperson, broker, employee, or agent of Ours has any authority to verbally modify the terms of this Agreement, or to make any verbal agreements, representations or promises which might postpone, limit, modify, or extinguish the terms of this Agreement.

5.4.3 Construction of Agreement.

The paragraph headings in this Agreement are for reference purposes only and are not intended in any way to describe, interpret, define or limit the scope, extent or intent of this Agreement. If any portion of this Agreement is held invalid or inoperative, then so far as is reasonable and possible, the remainder of this Agreement shall be deemed valid and operative, and effect shall be given to the intent manifested by the portion held invalid or inoperative. This Agreement shall be construed in accordance with its plain meaning, and no presumption against the drafter hereof shall be employed.

5.4.4 Governing Law.

This Agreement and the obligations under this Agreement shall be construed in accordance with and governed by the laws of the State of South Carolina.

5.4.5 No Sale of Unimproved Lot.

This Agreement is for an improved Lot and does not represent the sale of an unimproved lot for purposes of any state law or federal law granting rescission rights to purchasers of unimproved lots.

5.4.6 No Investment Representations.

None of Our employees, agents or representatives are authorized to make any representations regarding economic benefits to be derived from this transaction. You are advised that economic benefits to be derived from this transaction may vary with individual circumstances and You are required to rely upon Your own attorney, accountant, or other counsel to the extent that You desire guidance in regard to such matters.

5.4.7 Binding Effect; Joint and Several Obligations.

This Agreement shall bind the heirs, executors, administrators, and successors of the parties hereto. If Purchaser consists of more than one person or entity, Purchasers' obligations hereunder shall be the joint and several obligations of all persons and/or entities comprising Purchaser.

5.4.8 No Waiver.

The waiver by Us of any terms, conditions, or provisions of this Agreement shall not be construed as a waiver of any other or subsequent term, condition, or provision of this Agreement, and if any term or provision is declared unenforceable, the remainder shall continue in full force and effect.

5.4.9 Assignment Prohibited.

You may not assign this Agreement to another person without Our prior written consent.

5.4.10 Notices.

All notices, unless otherwise specified in this Agreement, must be in writing and will be effective when mailed or hand delivered to the addresses shown on the Summary of Terms.

5.4.11 Time of Essence.

Time is of the essence of this Agreement.

5.4.12 Attorneys' Fees.

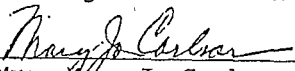
In the event of any arbitration or mediation between Seller and Purchaser, before or after the Closing, the prevailing party shall be entitled to an award of all attorneys' fees and costs (including, if We prevail, the cost of Our in-house counsel based on an equitable apportionment of the salary and overhead attributable to the work of such in-house counsel), in an amount to be determined by the arbitrator or mediator hearing the matter. Any court or arbitrator hearing any matter on appeal may also award such fees to the prevailing party in and for any prior mediation or arbitration.

You confirm and agree as follows:

I HAVE READ THIS AGREEMENT IN ITS ENTIRETY AND UNDERSTAND THE TERMS AND PROVISIONS OF THIS AGREEMENT. I OFFER TO PURCHASE THE PROPERTY SUBJECT TO THE TERMS AND CONDITIONS CONTAINED HEREIN. I UNDERSTAND THIS DOCUMENT IS NOT A BINDING AGREEMENT AND SELLER HAS NO OBLIGATION UNTIL THIS DOCUMENT IS SIGNED AND ACCEPTED BY THE SELLER. THE EFFECTIVE DATE OF THIS AGREEMENT SHALL BE THE DATE IT IS ACCEPTED AND APPROVED BY SELLER AS NOTED BELOW. THE SALES ASSOCIATE IS NOT THE SELLER AND IS NOT AUTHORIZED TO ACCEPT THIS DOCUMENT ON BEHALF OF THE SELLER.

PURCHASER(S)


Mr. Roger F. Carlson


Mrs. Mary Jo Carlson

Social Security No. .

Social Security No.

DATE: 3-8-02

RECEIPT OF THE DEPOSITS SPECIFIED ABOVE ARE HEREBY ACKNOWLEDGED AND
PRESENTATION OF THIS OFFER TO SELLER IS BEING MADE BY:

DEL WEBB COMMUNITIES, INC.,
an Arizona corporation

BY: Carole Richardson
Carole Richardson

TITLE: Sales Associate

DATE: 3/8/02

THIS OFFER IS NOT BINDING ON SELLER UNTIL AN AUTHORIZED OFFICER/AGENT
SIGNS BELOW.

SELLER

DEL WEBB COMMUNITIES, INC.,
an Arizona corporation

BY: Glenda W. Morgan Melba B. Wendtman

TITLE: Asst. Sales Manager Broker in Charge

DATE: 3-8-02 3/8/02

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ROGER F. CARLSON AND)

MARY JO CARLSON, on behalf of)
themselves and others similarly situated,)

Plaintiff(s))

vs.)

SOUTH CAROLINA STATE)

PLASTERING, LLC, PETER CONLEY,)

INDIVIDUALLY, DEL WEBB)

COMMUNITIES, INC., and PULTE)

HOMES, INC.,)

Defendant(s))

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 08-CP-07-3386

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO PULTE'S MOTION
TO COMPEL ARBITRATION**

INTRODUCTION

Plaintiffs oppose Pulte's Motion to Compel Arbitration for the following reasons:

1) the Arbitration Clause is part of a purchase contract, the terms of which are unconscionable, and therefore unenforceable; 2) the sales contract and its arbitration clause are extinguished by the subsequent deed between the parties under the Merger Doctrine; 3) Pulte has waived any claim to arbitration by delaying years to file the motion, meanwhile utilizing the court system so as to prejudice the Plaintiffs; and, finally, 4) the plain language of the sales contract arbitration clause only requires arbitration of contract claims - not tort claims.

**I. THE TERMS OF THE SALES CONTRACT ARE UNCONSCIONABLE,
SO AS TO MAKE IT UNENFORCEABLE, INCLUDING ITS
ARBITRATION CLAUSE**

It has been held that: "arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate." Accordingly, a party may

seek revocation of the contract under "such grounds as exist at law or in equity" S.C. Code Ann. §15-48-10(a). *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (2007).

In furtherance of this concept is the additional statement by the Court, "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson, supra*, at 671, citing *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, at 555, 606 S.E.2d 752 at 758 (2004).

In refusing to enforce an arbitration clause inserted in an automobile purchase contract, the Supreme Court in *Simpson* first looked to the concept of whether the contract in question was a contract of adhesion, in other words, whether the contract was "tainted by an absence of meaningful choice." *Carlson v. General Motors Corp.*, 883 F.2d 287, at 295 (4th Cir. 1989).

Here, there is no question this purchase contract is so tainted. It is a form contract, prepared by Pulte, with no room for negotiation. Indeed, all of the sales contracts in the many separate cases before the Court are identical.

Courts here look to the elements of the nature of the injuries suffered by the Plaintiff; whether the Plaintiff is or is not a substantial business concern; the relative disparity of the parties' bargaining power; the parties' relative sophistication; and the conspicuousness of the clause. *Simpson, supra*, at 669. Here, with form contracts prepared by the nation's largest homebuilder, the purchasers being retirement-age individuals, the Plaintiffs' damages being the entire exterior of their residence, clearly, the contract is "tainted."

The next subject for examination in determining the enforceability of the instant contract is whether it violates public policy, statutory law, or provisions of the Constitution. Rather than being a question of one of these violations, the contract at issue violates all of the above.

Section 4.0 at p.17 of the contract is illustrative. This contract provision attempts to illegally reduce the South Carolina Statute of Limitations, and to deprive the consumer of protections granted by the Supreme Court in case law without the requirements granted by the Court. Essentially, Pulte seeks unilaterally to impose a two year "discovery rule" on its customers, instead of the three year rule in this State in violation of S.C. Code Ann. § 15-3-140. Additionally, Pulte seeks here to deprive the customer of the remedy for Breach of the Implied Warranty of Habitability - a Court-granted remedy. This disclaimer of the Implied Warranty of Habitability can only be accomplished where it is 1) conspicuous, 2) known to the buyer, and 3) specifically bargained for. None of these factors exist here, and all must exist if this Implied Warranty is to be disclaimed. Interestingly, this disclaimer can only be successfully met, "only in rare circumstances" *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854, at 858 (2006). Additionally, and worse, this contract provision attempts to prohibit consumers from pursuing against Pulte, "any claim for incidental, secondary, or consequential damages incurred as a result of any defective material or workmanship in the home or property." Taken to its logical conclusion if enforced, a homeowner who is injured or killed when a defectively installed roof collapses, has no remedy. This provision on its face violates South Carolina public policy and decisional law.

At common law, prevailing parties in litigation are not entitled to awards of attorneys fees against their adversaries, and this has been termed the "American" versus the "English" system, which does routinely impose "loser-pays" provisions. Here, again, Pulte seeks to violate this tradition and public policy, as its arbitration clause at pp. 4.3 seeks to impose this system. Indeed, Pulte with its legions of attorneys effectively utilizes the contract provision and its attendant risks to the homeowner as a shield against claims.

In examining general contract principles with regard to arbitration clauses, one necessarily looks to the elements of contract. One of the basic tenets here, is there offer, acceptance, and consideration? The right to a jury trial in this State is Constitutionally guaranteed. The arbitration clause here is a relinquishment of a Constitutional right. Did the homeowner at issue receive any consideration for giving up this right? The answer is no, thus again demonstrating contract invalidity.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan Inc., v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752,757 (2004).

This is what exists here without any doubt. Pulte seeks to enforce a "tainted" contract the terms of which violate this State's public policy, decisional law, statutory law, and Constitutional guarantees.

Obviously, if the entire contract at issue here is unenforceable due to the violations listed above, the Arbitration Clause with its attendant penal attorney fee

awards and suffering from a total lack of contractual consideration, should not be enforced. Indeed, as set forth above, the South Carolina Arbitration Act contemplates in its language that if grounds for contract revocation or unenforceability exist, the Arbitration provision may be rejected. SC Code. §15-48-10(a).

II. THE DOCTRINE OF MERGER-WHERE A SUBSEQUENT DEED WAS ISSUED AFTER THE PURCHASE CONTRACT CONTAINING NO ARBITRATION CLAUSE NOR CLAIM LIMITATIONS-PREVENTS ARBITRATION OF THE PURCHASE CONTRACT TERMS

South Carolina law has long stated that the provisions in a contract for sale of real property are merged in a subsequently-executed deed. As noted: "The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates and amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed." *Wilson v. Landstrom*, 315 S.E.2d 130, 132-133 (Ct.App.1984).

It is a long-standing rule in this State's jurisprudence that, once the parties execute the deed, "the written or oral agreement to convey is discharged....the deed regulates the rights and liabilities of the parties, and evidence of contemporaneous or antecedent agreements between the parties is inadmissible to vary or contradict the terms of the deed." *Charleston & Western Carolina Railway Co. v. Joyce*, 99 S.E.2d 187, at 193 (1957).

While not binding on this Court as precedent being an unpublished opinion, a review of the 4th Circuit Court of Appeals reasoning in *Tower South Property Owners*

Association v. Summey Building Systems, Inc., is illustrative. There, Judges Donald Russell, Widener, and Hall, affirmed a jury verdict against Summey Building for defective condominium construction. At trial, Summey had sought to introduce individual sales contracts which limited warranties, the District Court refused to permit this evidence in light of subsequent deeds which did not contain warranty limitations. The Fourth Circuit agreed, and authored a summary of the South Carolina doctrine of merger as it relates to real estate sales contracts and subsequent deeds. *Tower South Property Owners Association v. Summey Building Systems, Inc.*, 47 F.3d 1165 (1995).

Here, the Merger Doctrine is exactly on point. Subsequent to the sales contract dated March 8, 2002, which contains the Arbitration provision, a deed was executed, delivered, accepted, and recorded. (See deed attached as Exhibit "A"). It contains no claim limitation language nor does it contain an arbitration clause. Thus, those antecedent provisions - even if they had any validity - are merged into the deed and those provisions are extinguished and of no effect.

III. EVEN WERE AN ENFORCEABLE ARBITRATION CLAUSE TO EXIST, PULTE HAS WAIVED IT

A party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

Generally the factors considered by our courts to determine if a party waived its right to compel arbitration are: 1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel

arbitration; 2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and, 3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Rhodes, supra*, at 250.

The Rhodes Court reviewed the prior decisions of time delay and discovery where waiver was found. One decision reviewed is *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct.App. 1999). There the Circuit Court found Liberty had waived its right to arbitrate by delaying two years in filing its motion to compel. During that period, Liberty had recourse to the court system many times, and waited until the litigation was nearly complete prior to filing its motion to compel arbitration. Thus, Liberty was attempting to "test the water before taking the swim." *Liberty Builders* at p.753.

Interestingly, in *Liberty Builders*, the focus was not on discovery undertaken but rather on whether the delaying party had utilized the resources of the Court System during the period of delay, as Liberty had done, having primarily used the Courts to file various motions over the two year period.

The actions of Webb/Pulte in the Sun City Stucco Litigation in general, and in this case in particular, demonstrate a clear and intentional waiver of any claim to arbitration, as this Defendant has delayed for two and one-half years before filing their motion, all the while utilizing the Court System.

Webb/Pulte has known that it had arbitration clauses in its sales contracts since at least the filing of its answer in the Oros case (CA 2006-CP-07-454), which answer was filed on July 13, 2006. Indeed, the Oros case went to arbitration, and arbitration award in favor of the Oros, and against Webb/Pulte on November 12, 2008. (See Exhibit "B").

During 2008, and up until the present, Webb/Pulte has utilized the Court System to argue its Right To Cure alleged defenses in the *Grazia* matter, filing Motions to Strike Class Allegations, participating in Court hearings, appealing to the South Carolina Supreme Court and participating in oral argument in an attempt to prevent Class Certification of any of the Sun City cases - including Carlson.

As to Webb/Pulte's activities in the Carlson case, the attached timeline demonstrates not only the long delay in filing a Motion to Compel Arbitration, but its participation in and use of the Court System for all of this time. (See Exhibit "C"). These activities include participating in discovery, obtaining stays of the litigation, enforcing the Right to Cure Act, inspecting the house, in other words utilizing all of the discovery of the Court System which would have been unavailable in the Arbitration process.

In fact, Webb/Pulte has never had any intention of compelling arbitration in any of these cases. Only when a Motion to Certify a Class is looming in this matter and *Grazia*, does Webb/Pulte come up with the arbitration concept - apparently in an effort to exempt some cases from the Class, or to create some appellate issue. The proposed Case Management Order Webb/Pulte sent to this Court in May 2010, consisting of nine pages, is wholly silent as to any arbitration of any of these cases. (See Exhibit "D").

In conclusion, this factual pattern and timeline presents perhaps a more compelling argument for waiver than any of the reported decisions. Had Webb/Pulte wished to arbitrate this case, the arbitration process could have been concluded years ago. Instead - delay and use of discovery are the hallmarks of Webb/Pulte's actions. This Defendant by its proposed Case Management Order has

indicated a desire for a trial rather than arbitration, and the Court should deny this late and prejudicial motion.

IV. THE PLAIN LANGUAGE OF THE ARBITRATION CLAUSE DOES NOT REQUIRE ARBITRATION OF TORT CLAIMS

South Carolina has long permitted both breach of contract and tort claims to be brought by homeowners against builder-developers. *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 345-46, 384 S.E.2d 730, 737 (1989); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 163 (4th Cir. 2004). Indeed, standard pleadings as here, normally allege claims in breach of contract, negligence, and breach of the Implied Warranty of Habitability. The Arbitration Clause at issue here makes no attempt to require arbitration of tort as opposed to contract claims.

The Arbitration provision here found in section 4.3 of the purchase contract consists of three paragraphs. The first paragraph deals with arbitration of disputes before the closing of the sale contract. The second paragraph - the one at issue here - deals with post-closing arbitration. An analysis of the different language is instructive.

First Paragraph: "Any controversy or claim arising out of or relating to this Agreement or Your purchase of the property shall be finally settled by arbitration...."

Second (post-closing) Paragraph: "After closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration...."

Thus, the differences in the language and intent are obvious. Pre-closing, anything having to do with the property in question is required to be arbitrated. Post-closing, as here, only claims arising out of the contract or the breach of the contract, are required to be arbitrated.

Pulte, as the drafter of this document, could have made the post-closing language inclusive of tort claims - it didn't. The general rule is that the terms of a contract are strictly construed against the drafter *S. Atl. Fin. Services, Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), and should be construed according to the plain language of the document if there is no ambiguity *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). Only where there is an ambiguity, is there the necessity for judicial construction, again, against the drafter and in favor of the non-moving party.

Here, the plain language of the post-closing clause limits itself to arbitrating only contract claims. Under any construction, if there is an ambiguity, the Court must construe that ambiguity against Pulte, and not graft requirements onto the contract which the drafter failed to specify.

Accordingly, should this Court find: 1) The contract at issue is enforceable, 2) That Pulte has not waived its arbitration provision, then, 3) The Plaintiffs are free to pursue their tort claims at common law with a jury trial.

CONCLUSION

The sales contract language at issue here with its arbitration clause did not survive the subsequent merger by deed. The terms of that sales contract are so unconscionable as to be unenforceable, and Pulte, by its resort to the Courts, has waived any claims to arbitration. Accordingly, this motion must be denied.

LEATH, BOUCH & SEEKINGS, LLP

By: Jefferson Leath
W. Jefferson Leath, Jr.
Michael S. Seekings
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(843) 937-8811

THE CHAKERIS LAW FIRM

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SEGUI LAW FIRM, LLC

Phillip W. Segui, Jr.
864 Lowcountry Blvd., Suite A
Mt. Pleasant, South Carolina 29465
(843) 884-1865
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: Feb. 16, 2011

EXHIBIT
A

3/10/02
Vaux 9783

BEAUFORT COUNTY SC - ROD
BK 01556 PG 1634
FILE NUM 2002018471
RECORDING FEES 10.00
County Tax 253.00
State Tax 598.00
RECORDED BY S SMITH RCPT# 37563
RECORDED 03/19/2002 03:56:49 PM

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
WARRANTY DEED

RECORDED
2002 Mar-22 03:50 PM
Sharon O. Burns
BEAUFORT COUNTY AUDITOR

KNOW ALL MEN BY THESE PRESENTS:

THAT DEL WEBB COMMUNITIES, INC., an Arizona Corporation (the "Grantor"), in the state aforesaid, for and in consideration of the sum of Ten and 00/100 (\$10.00) Dollars and other valuable consideration to it paid at and before the sealing of these presents by Roger F. Carlson and Mary Jo Carlson, of 5 Sunset Hill Road, Simsbury, Connecticut 06070 (the "Grantees") the receipt whereof is hereby acknowledged, has granted, bargained, sold and released and by these presents does grant, bargain, sell and release unto the said Roger F. Carlson and Mary Jo Carlson, as joint tenants with right of survivorship and not as tenants in common, their heirs and assigns, forever, the following described property, to-wit:

All that certain piece, parcel or lot of land, with residential improvements thereon, situate, lying and being in Del Webb's Sun City Hilton Head, Bluffton Township, Beaufort County, South Carolina, shown and described as Lot Number 402 that certain plat entitled "ALEXANDRIA VILLAGE BLOCK 25 LOTS (375-460)" prepared by Thomas & Hutton Engineering Co., Octavio Arango, SCRLS #12066, dated November 4, 1998, last revised on December 15, 2000 and recorded on December 21, 2000 in the Register of Deeds office for Beaufort County, South Carolina in Plat Book 77 at Page 69. For a more detailed description as to location, metes, bounds, distances, direction, etc., reference may be had to said plat of record.

This conveyance is made by the Grantor and accepted by the Grantees subject to all covenants, conditions and restrictions of record in the Office of the Register of Deeds, including but not limited to the Declaration of Covenants, Conditions and Restrictions for Sun City Hilton Head dated August 23, 1994 and recorded in said ROD Office in 729 at Page 1497.

This being a portion of the same property conveyed to the Grantor by deeds of Union Camp Corporation recorded May 2, 1994, in Book 701 at Page 1435 and June 1, 1994, in Book 709 at Page 150 in said ROD Office.

This deed was prepared with benefit of title examination by Paula M. Kilgore, Esquire, of Vaux & Marscher, PA, 16 William Pope Drive, Suite 204, Okatie, SC 29910.

Beaufort County Tax Reference : 600 - 020 - 000 - 1331 - 0000

ADD DMP Record 3/22/2002 10:08:57 AM
BEAUFORT COUNTY TAX MAP REFERENCE
Dist Map SMap Parcel Block Week
R600 020 000 1331 0000 00

WFLM/Black Deal and Address

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said **Grantees**, as joint tenants with right of survivorship and not as tenants in common, their heirs and assigns forever.

And **Grantor** does hereby bind itself and its successors and assigns, to warrant and forever defend all and singular the said premises unto the **Grantees**, their heirs and assigns against it and its successors and assigns, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

Witness the Hand and Seal of the **Grantor** this 15th day of March, 2002.

WITNESSES:

DEL WEBB COMMUNITIES, INC.
An Arizona Corporation

[Signature]
Witness
[Signature]
Witness

BY: [Signature] (L.S.)
Authorized Signatory

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

ACKNOWLEDGMENT

I, the undersigned Notary Public, do certify that Glenda Morgan of Del Webb Communities, Inc., an Arizona corporation, on behalf of the corporation, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal the 15th day of March, 2002
[Signature]
Notary Public for South Carolina
My commission expires: 02/28/2003

**AFFIDAVIT OF CONSIDERATION
FOR REAL ESTATE TRANSFER FEE, PURSUANT TO
BEAUFORT COUNTY ORDINANCE 93/19,
SOUTH CAROLINA**

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

PERSONALLY appeared before me, Paula M. Kilgore, Esquire, who is duly sworn, deposes and says that the following is a true and correct statement concerning the consideration for the conveyance set forth below:

GRANTOR: DEL WEBB COMMUNITIES, INC.

GRANTEE (PAYOR): Roger F. Carlson and Mary Jo Carlson

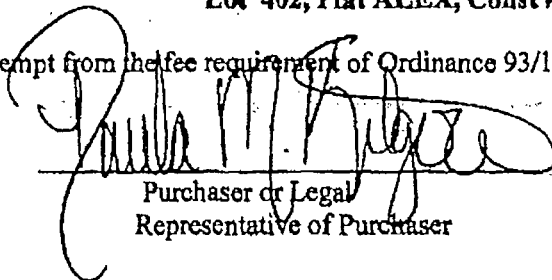
GRANTEE MAILING ADDRESS: 229 Hampton Circle, Sun City Hilton Head, Bluffton, South Carolina 29910

DATE OF DEED: March 15, 2002

CONSIDERATION: \$ 230,000.00

PROPERTY DESCRIPTION (TAX MAP/PARCEL NO.): 600 - 020 - 000 - 1331 - 0000
Lot 402, Plat ALEX, Const #4862904

EXEMPTION (if applicable): This transfer is exempt from the fee requirement of Ordinance 93/19 based on Section 5, subparagraph ____.


Purchaser or Legal
Representative of Purchaser

SWORN TO BEFORE ME
This 15th day of March, 2002


Notary Public for South Carolina
My Commission Expires: April 29, 2009

ROD OFFICE AND COUNTY USE ONLY

Transfer Fee Collected: \$ _____ Date: _____ Deed Book _____ Page _____

EXHIBIT
B

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
JOSEPH S. OROS and MARY A. OROS,)
Plaintiffs,)
vs.)
DEL WEBB COMMUNITIES, INC.,)
and PULTE HOMES, INC.,)
Defendants.)

IN ARBITRATION
IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO.: 2006-CP-07-454

ARBITRATION ORDER

This matter is before me pursuant to Order of the Honorable Perry Buckner dated August 4, 2006. An arbitration hearing regarding the Oros' claims against Del Webb Communities, Inc. and Pulte Homes Inc. was held on October 16, 2008.

The plaintiffs' brought this action against the defendants as developers, contractors and sellers of their residence located in Sun City, Bluffton at 218 Stratford Village Way in Beaufort County (hereinafter "Residence"). The plaintiffs allege that the stucco exterior of the Residence, built in 2001, is defective and will require significant funds to repair.

The complaint alleges causes of action for breach of contract, negligence, breach of warranty, negligent misrepresentation and violation of the South Carolina Unfair Trade Practices Act.

At the arbitration hearing, the plaintiffs presented the testimony of three witnesses: Robert Sisnroy, P.E., an expert witness ("Sisnroy"); Robert Gallagher of Procon, Inc., a general contractor ("Gallagher"); and Joseph Oros ("Oros").

Plaintiffs also introduced deposition testimony of Martin Guenther ("Guenther"), John Cherry ("Cherry") and Peter Conley ("Conley").

The defendants called as witnesses: Susan Thomas, Senior Customer Relations Officer with Pulte Homes ("Thomas"); Larry Elkins, an expert witness and engineer who investigated the problems at the Oros' home ("Elkins"); and Ted Leon, a stucco contractor who testified concerning his estimate for certain repairs to the Oros' home ("Leon").

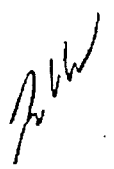
In addition to the testimony of Sisroy and Elkins, the plaintiffs' and defense counsel submitted reports prepared by both of these witnesses.

Sisroy testified regarding a number of areas of concern with respect to the stucco installation, including wall termination drainage, control joint installation and layout, sealant joint installation at dissimilar materials and head flashing installation and cracking. He testified that the failure to place control joints at door and window openings, the failure to install through wall head flashing and the covering of the weep screed were all violations of the standard of care. Taken as a whole, his testimony was not convincing as to specific code violations and frankly was unclear as to whether he believed there was a breach of some industry or manufacturer's standard of care. He was also unable to testify as to the proximate cause of any of the cracks he observed. However, his testimony, along with other evidence, was persuasive that the defendants did not make decisions as to the placement of expansion joints consistent with the best



practices in the industry. In fact, it is very murky as to how such decisions were made. The testimony of Mark Guenther, defendant's representative, indicated that there was no design professional involved in the decision as to the location of vertical control joints. Peter Conley, the representative of South Carolina Plastering who performed the stucco work, testified that Pulte made the decision as to the number and location of control joints. Defendant's expert, Elkins, stated that the decision as to the placement of control joints should be made by a design professional.

Elkins stated that, based on his observations, the stucco on the left and right exterior walls of the Oros' home had significant cracking. His conclusion, based on petrographic studies he had performed on the content of the stucco mix, was that the primary contributor to the cracking was the improperly mixed and worked stucco product that was applied to the home (Elkins report). Elkins testified that the cracks he observed on the exterior walls of the Oros' home were inconsistent with cracks one would expect from stress-related fractures caused by failure to place vertical control joints at the windows and doors. The logical inference from his testimony is that the cracks he observed were the result of an improper stucco mixture.

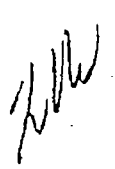


Findings of Fact and Conclusions of Law

Based on the testimony of both the plaintiffs' and defendants' experts, I find that an improper mixture of stucco has resulted in significant cracking on the

exterior walls of the Oros' home requiring complete removal and replacement of the stucco. The estimate of Procon Associates, testified to by Bob Gallagher, is a reasonable and accurate statement of the cost for the repair. The repair cost stated by Procon is \$66,458.12.

I find that the defendants have breached the warranty stated in paragraph 4.1 of the sales agreement between Del Webb Communities, Inc. and Joseph and Mary Oros dated 8/17/2000 (plaintiffs' arbitration exhibit 1). The contract requires the seller to convey the home "free from defective materials and workmanship" for a period of two years from the date of closing (see contract paragraph 4.1). On the day of closing, the exterior stucco system contained an improper mixture which ultimately resulted in significant cracking. Therefore, the home was not free of defective materials and workmanship for a period of two years from the date of closing. In fact, it was not free of defective materials and workmanship for any period of time. The contract under paragraph 4.1 requires that in order to enforce this limited warranty the homeowner must deliver to Del Webb written notice of the defect before the end of the two year period, and provide Del Webb with a "reasonable opportunity to correct or repair the defect."



In this case, the testimony of Mr. Oros indicates that at the end of 11 months he reported cracking in the exterior walls of his home. This was the first opportunity for Del Webb to investigate and repair the problem. Whatever investigation they engaged in did not include an analysis of the stucco material

and therefore they were unable to discover the defect even though evidence of the defect had been reported. Then, again, at two years, Mr. Oros hired a home inspector, who reported on March 11, 2003, additional cracks in the stucco.

(Report by Professional Home Inspections - defendants' ex. 2). The defendants did not discover at that time that there was an improper mixture and therefore did not cure the defect. I find that the defendants were given reasonable notice of a defect and were given a reasonable opportunity to investigate and cure the problem. In 2005, when the defects became more pronounced, the defendants refused to make repairs based on their reading of the sales contract. I find that the Oros' had fully complied with the terms of the warranty provision of the sales contract, and that Del Webb Communities, Inc. is in breach of the contract.

The damage, resulting from the breach of contract, is that the entire stucco exterior must be removed and replaced at a cost of \$66,458.12.

With respect to the plaintiffs' cause of action for negligent misrepresentation, I find that based on Mr. Oros' testimony and all of the evidence presented, there was no misrepresentation to the Oros'. I find in favor of the defendants as to the cause of action for negligent representation.

With respect to the plaintiffs' cause of action for breach of the South Carolina Unfair Trade Practices Act, I find no evidence to support any act on the part of defendants which would support this cause of action and therefore find in

favor of the defendants with respect to the cause of action for violation of the South Carolina Unfair Trade Practices Act.

With respect to the plaintiffs' negligence cause of action, I find that the improper mixture of the stucco that caused significant cracking in the exterior wall system was the act of South Carolina Plastering. There was no evidence presented to support an agency relationship between the defendants and South Carolina Plastering that would impute the conduct of South Carolina Plastering to the defendants. South Carolina Plastering, according to the testimony, was an independent contractor hired by defendants to perform the stucco application. Therefore, with respect to the cause of action for negligence, I find in favor of the defendants.

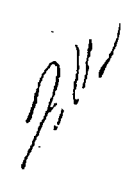
As to the plaintiffs' causes of action for breach of contract and breach of warranty, I find in favor of the plaintiffs. The defendants have breached the warranty under paragraph 4.1 of the contract. I also find that the plaintiffs' implied warranties are not waived. Defendants argue that the simple act of signing a contract that contains waiver language in its provisions is enough to support dismissal of all implied warranties. I have reviewed the contract between the parties and I disagree. In order for a buyer to waive implied warranties that arise by operation of law, South Carolina requires strict conditions to be satisfied. A waiver must be: 1. conspicuous; 2. known to the buyer; and 3. specifically bargained for. This standard is to be strictly applied and can be met only in rare



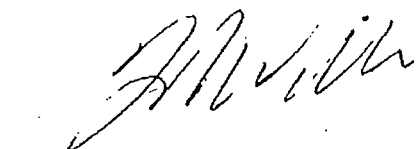
circumstances. Cookman vs. Parex, 632 S.E.2d 854, 858 (S.C. 2006). This case does not present that rare circumstance. The waiver upon which the defendants rely is not conspicuous, and there is nothing in this record to suggest that the plaintiffs knowingly waived any rights against defendants or that they specifically bargained for such waiver. In fact, Mr. Oros testified that the waiver provision was not even discussed, much less specifically bargained for.

Therefore, it is ordered, adjudged and decreed that the plaintiffs, Joseph S. Oros and Mary A. Oros, have judgment against defendants in the amount of \$66,458.12.

According to the contract, the prevailing party is entitled to attorneys' fees and costs. No information has been submitted in the record as to the attorneys' fees and costs attributable to the prosecution of the Oros matter, separate and apart from the class action litigation. Also, there was no testimony presented during the course of the arbitration hearing regarding the relationship between Del Webb Communities, Inc. and Pulte Homes, Inc. on the issue of whether one or both are proper defendants. During the course of the class action litigation the parties did address the issue; however, the issue was not addressed at the arbitration hearing. The contracting party, according to the contract of August 17, 2000, was Del Webb Communities, Inc. as seller. At this point, the judgment Order is only directed to Del Webb Communities, Inc., leaving the record open for further testimony and evidence on whether Pulte Homes, Inc. should be included



as a defendant against whom this Order should be enforced. Therefore, a subsequent hearing will be set to determine the amount of attorneys fees and costs and to determine the status of Pulte Homes, Inc. with respect to the effect of this Order.



Thomas J. Wills
Arbitrator

Dated: November 12, 2008

EXHIBIT C

August 25, 2008	Complaint filed
October 20, 2008	AOS
December 18, 2008	Answer
January 8, 2009	Scheduling of SCSP depositions (never scheduled)
January 9, 2009	Notice of Deposition for Carlson served by SCSP (deposition never went forward)
February 13, 2009	Phillip Segui ltr. to Vic Rawl enclosing Consent Order of Stay to allow inspections and enclosing Notice of defects pursuant to SC Code §40-59-840
February 20, 2009	Del Webb would like to stay pending compliance with statute-Lepore, McManus & Wilcox
February 20, 2009	Plaintiffs understand Defendants will consent to language for consent order.
March 11, 2009	Judge Mullen would like to hold a status conference on March 19, 2009. Vic Rawl out of country cannot attend.
April 9, 2009	Vic Rawl preparing language for 99 cases.
April 28, 2009	Vic Rawl transmitting proposed Orders staying the cases pursuant to Notice and Opportunity to Cure Statute discussed on telephone conference to Judge Mullen.
May 6, 2009	Phillip's office contacts Vic Rawl re: discovery -Vic Rawl's understanding is that the cases are stayed at this time per the right to cure statute, and can agree that the service by email of discovery requests is effective as of the date the stay is lifted.
September 8, 2009	Vic Rawl requests an extension to answer discovery until October 31, 2009.
October 7, 2009	John Chakeris requests a limited 30(b)(6) of the Corporate Representative regarding the pending stucco claims on the Sun City internal television station. (within next 20 days)
October 8, 2009	Vic Rawl wants a better explanation for the 30(b)(6) request.
October 19, 2009	Vic Rawl requesting counsel attend status conference regarding cases on November 2 roster that are not ready for trial. Status conference confirmed with Judge Kinard on October 29, 2009. (Don't believe this ever went forward with Judge Kinard)
October 20, 2009	Phillip emails regarding needing a Scheduling Order instead of status conference. Vic Rawl agrees to take a look at one or even consider an Order simply continuing the case for 5 months. Cake, Dalziel

October 21, 2009	Vic Rawl drafts Consent Orders for Continuance for review and transmits to Judge Klnard.
October 29, 2009	Vic Rawl requests extension on discovery until December 4.
November 9, 2009	Vic Rawl emails Heather re:23 motion hearings that Del Webb and Pulte have moved to dismiss or stay. Parties have reached an agreement as to a stay this morning and submit a consent order to Judge Dukes.
December 3, 2009	Vic Rawl answers Plaintiffs' discovery requests.
December 4, 2009	Per Vic Rawl, responses in individual stucco cases that are not stayed are being served today. Before defendants can produce or allow inspection of documents, they need to have a confidentiality order in place. If counsel cannot agree defendants will move the Court to enter a confidentiality order.
December 7, 2009	Per Vic Rawl, in court on December 18. 4 cases on the December 30 roster 1)King 2) Davidson 3) Dalziel 4)Cake. Will email clerk to remove from December 30 roster.
January 8, 2010	Phillip emails Vic Rawl re:10 cases on January 12, 2010 roster and ask if mediation set for January 12 are cancelled. Vic responds that he will inform the court that motions are resolved and send Judge Dukes the proposed Orders.
February 24, 2010	Phillip Segui request a 45 day extension to respond to all outstanding Requests to Admit.
March 1, 2010	Vic Rawl grants a 30 day extension and ask that Phillip let him know if he needs more time.
March 8, 2010	Vic Rawl emails Erin to let her know that he will be out of state the weeks of March 15 and March 22 for wife's birthday and kids' spring break but will be back the week of March 29 and request a status conference.
March 9, 2010	Per Vic Rawl, Dalziel and Cake are on trial roster April 5. When will clients be available for depositions?
March 10, 2010	Vic Rawl emails Erin to let her know he can be available for status conference the week of April 5, 2010.
March 17, 2010	Vi Rawl emails that he thinks he has an obligation to notify Judge Mullen that her husband's law firm is suing Pulte and Del Webb. Spoke with Rett Kendall and Jeff Leath about the possibility of having these cases assigned to Judge Young. Ask for Plaintiffs consent to having these cases

	assigned to Judge Young. Vic notifies Erin via email. Judge Mullen is recusing herself and will not hear status conference tomorrow morning.
March 18, 2010	Vic Rawl emails Judge Young to request a conference call with him and Judge Young, and gives him a short history of the cases. Also, emails Erin to let her know that all counsel have consented to these cases being assigned to Judge Young.
March 25, 2010	Vic Rawl emails Erin or Carlie to inquire about an Order being issued assigning these cases to Judge Baxley, requesting dates for a status conference.
March 31, 2010	Ellie at Phillip's office has a phone conversation with Vic Rawl requesting an extension until April 15, 2010 to respond to all outstanding Requests to Admit. Vic Rawl grants extension.
May 11, 2010	Vic Rawl emails Judge Baxley thanking him for meeting with counsel re: 138 stucco cases and transmitting a consent order that counsel has agreed to sign to transmit to Justice Toal. Offers to set up a conference call when the Judge Baxley is available.
May 28, 2010	Vic Rawl transmits a draft CMO for review.
July 6, 2010	Law Clerk for Judge Baxley emails counsel requesting a status conference via telephone Tuesday, July 13 at 30pm w/Judge Baxley. Vic Rawl is available.
September 9, 2010	Vic Rawl emails law clerk requesting a hearing on the outstanding matters in the following range- September 20-24-27-28.
September 14, 2010	Filed Motion in Opposition to Amend Complaint.
November 10, 2010	Dolores emails 2 scheduling orders for review to Ms. O'Neal. Vic Rawl responds that he is in Texas for the rest of the week and wants the court to know that Defendants do not agree to the scheduling order submitted. Only addresses 1 out of 140 cases, does not include basic deadlines. Defendants requests a status conference to address the CMO submitted, scheduling issues and deadline, and other procedural matters.
December 27, 2010	Ellie at Phillip's office emails correspondence along with previously served supplemental discovery request to Vic Rawl. re: Grazia
January 7, 2011	Vic Rawl requests an extension until Wednesday, January 12, 2011.

January 13, 2011	Judge Baxley's secretary is trying to set up phone conference to address CMO and is available January 14 and will address Vic's request for protection. Vic provides call in number.
January 25, 2011	Vic Rawl emails Judge Baxley responding to Mike Seekings' email and sees no reason not to go forward with the hearing on the arbitration issues during the week of February 21, 2011.
February 14, 2011	Vic Rawl files Motion to Dismiss and/or to Compel Arbitration

- Vic Rawl filed numerous Consent Orders with the Court re: Right to Cure and also filed Motion that Plaintiffs didn't comply with Right to Cure and was heard by Judge Baxley.

EXHIBIT D

CASE MANAGEMENT ORDER

I. APPLICABILITY OF THIS ORDER AND DEFINITIONS

A. Applicability of This Order

This Case Management Order ("CMO") applies only to the pretrial proceedings for all the cases listed on Exhibit A attached hereto, hereinafter referred to as "Sun City Hilton Head Stucco Litigation." The individual cases making up the Sun City Hilton Head Stucco Litigation are hereby consolidated for discovery pre-trial purposes only.

B. Definitions

For purposes of this CMO, and any subsequent orders applicable to the Sun City Hilton Head Stucco Litigation, the following definitions shall apply:

(1) "Plaintiffs" shall mean all Plaintiffs in the Sun City Hilton Head Stucco Litigation.

II. ORGANIZATION AND ADMINISTRATION

The Clerk of Court for Beaufort County shall maintain a Master Docket, to be known as the Sun City Hilton Head Stucco Litigation Master File (the "Master File"). Individual case files, to the extent not already established, shall also be established for each individual Sun City Hilton Head Stucco action in the Office of the Clerk of Court for Beaufort County. The Master Docket shall have a case number which identifies the Master File. The Master Docket shall also have a listing of the case numbers which identify each individual case file.

The first pleading in the Master File shall be a copy of this CMO. Orders, pleadings, motions, briefs, and other documents that are of general application which are filed or served in the Sun City Hilton Head Stucco Litigation shall bear a caption as shown by Exhibit B, and shall, when docketed and filed in the Master File, be deemed docketed and filed in each individual case

to the extent applicable and will not ordinarily be separately docketed or physically filed in such individual cases. All pleadings in the Master File shall also be deemed a part of each individual case file.

Orders, pleadings, motions, briefs, and any other documents filed or served in the Sun City Hilton Head Stucco Litigation, which relate only to a specific case and which would not be of interest except to the parties to a specific case (for example, an amended complaint adding a party or a motion to dismiss a party) should bear the caption and case number of that specific case in addition to the Master File number, as shown by Exhibit C. Any such document shall be docketed and filed in that specific case and not in the Master File.

(1) Filing of Papers

When a document has general application to all files, Counsel for the propounding party shall file such document with the Beaufort County Clerk of Court for inclusion in the Master File, and shall serve such document on all Counsel.

When a document has application to a specific case or cases, the propounding party shall file such document with the Beaufort County Clerk of Court for inclusion in the individual case file so indicated, and the propounding party shall serve all parties who might be impacted by any matter raised in such document.

(2) Correspondence

Send all materials which are not due to be docketed (i.e., correspondence and other similar materials) directly to the chambers of the Honorable Michael Baxley.

(3) Facsimile Copies

Master File documents may be transmitted by facsimile to the Beaufort County Clerk of Court and/or Judge Baxley only if advance approval is obtained from Judge Baxley. This

approval should be requested only under circumstances where immediate transmission is needed. Copies of Motions, Memoranda, or Correspondence may be e-mailed to Judge Baxley and copied to his law clerk.

B. Rules and Procedures

The South Carolina Rules of Civil Procedure shall govern all proceedings of the Sun City Hilton Head Stucco Litigation, except as otherwise provided herein.

C. Stay of Proceedings

To allow all parties and attorneys a respite from the rigors of litigation and to schedule vacation or quiet time, the Court finds it appropriate that all proceedings in the South Carolina Circuit Courts relating to the Sun City Hilton Head Stucco Litigation and subject to this CMO shall be stayed during the following annual periods of time:

- (1) from the day preceding the 4th of July for fourteen (14) days hence; and,
- (2) for the last fourteen (14) days of December each year.

During these periods no trials or hearings shall be scheduled or requested. Also, all discovery proceedings shall be stayed and any discovery responses that come due during that period do not have to be filed or served until the second business day following the end of the stay period. It shall be expected by the Court that all parties and attorneys shall grant appropriate extensions to comply with the spirit of this Order in matters not specifically addressed. Nothing herein should be deemed to toll or extend the statute of limitations except as provided hereinafter. Counsel may request protection for any additional days for good cause.

III. INITIAL PLEADINGS

A. Adding Parties

Any Plaintiff wishing to add a Defendant to an action must so move within sixty (60) days of the entry date of this CMO for cases pending at the date of entry of this CMO. Absent good cause shown, failure to move within this time shall constitute an irrevocable waiver of Plaintiff's right to move for such relief. The time to add new parties may be extended by a special order approved by the Judge Baxley.

B. Cross Claims

To the extent provided by rule or law, cross claims between defendants not filed are preserved and may be asserted at any time.

IV. CONFERENCES

The Court will periodically hold general conferences at which time counsel for all parties may attend and participate. A conference will be held at least every ten weeks. An agenda of anticipated topics of discussion will be agreed upon by the respective parties and will be distributed by the Counsel to all parties at least five business days before the conference.

V. MOTION PRACTICE

A. Motion practice in the Sun City Hilton Head Stucco Litigation shall proceed according to the rules and procedures provided for by the South Carolina Rules of Civil Procedure and rules implemented by the undersigned.

(1) Service of Motions and Responses

All motions made other than oral motions made in open court or to compel discovery shall be filed with an accompanying supporting memorandum. Except as provided pursuant to Paragraph V.E, responses to motions shall be filed within Twenty (20) days of the service of the previously filed motion and memorandum. Replies shall be served within five (5)

days after service of the response, but no later than two (2) days before the hearing date for that motion.

(2) Applicability of Motions; Orders

The caption on each motion, brief, or response that has potential effect on multiple parties shall list by Plaintiff's name and case number each case to which the motion applies. All orders entered in actions the Sun City Hilton Head Stucco Litigation shall contain a statement, on the face of the order, indicating that the order applies to all cases or only to specific cases which shall be listed along with the case number for each such case.

B. Filing of Motions

A motion, brief, or response that has potential effect on multiple parties (e.g., documents submitted in connection with a motion for partial summary judgment) will be deemed made in all similar cases on behalf of, and against, all parties similarly situated except to the extent that such other parties timely disavow such a position. Additional motions, briefs, or responses addressed to such issues shall not be filed except to the extent needed because of inadequacy of the original papers, unique facts or a difference in positions. Orders resolving such motions will likewise be deemed as entered with respect to all parties similarly situated unless the order indicates otherwise, and shall be sent to Counsel.

C. Discovery Disputes

Any motion relating to discovery or any other subject on which accord of affected parties might reasonably be expected, other than those excepted by South Carolina Rule of Civil Procedure 11(a), shall contain a statement that the movant has conferred with other affected adversary parties, and has made a good faith effort to resolve the dispute without need for court intervention.

D. Dispositive Motions

A motion made pursuant to this CMO, motion to dismiss, motion for summary judgment, or motion for partial summary Judgment, may be filed at any time.

VI. DISCOVERY

A. Discovery Between Plaintiffs and Defendants

Each party may file a master set of interrogatories (not to exceed fifty (50)) and requests to produce and it shall be deemed served in each case upon the Plaintiffs by each Defendant and upon these Defendants by Plaintiffs. These shall be answered in accordance with the South Carolina Rules of Civil Procedure. A party in an individual action may, with either consent of the parties or for good cause shown, propound additional interrogatories or requests for production of documents if that good cause showing is that the information elicited by the Master Interrogatories and Requests to Produce does not adequately address specific factual issues in the individual case.

Parties may utilize the above "master set" procedure for requests to admit to admit and may serve individual requests to admit in each case pursuant to the SCRCPP.

B. Use of Depositions at Trial

(a) A deposition taken in these proceedings may be used in the Sun City Hilton Head Stucco Litigation as if taken in that litigation, subject to any objections filed or available under the laws of the State of South Carolina.

(b) Depositions of the Defendants (including their present and former employees, agents and representatives) shall be limited to those reasonably needed to prosecute the litigation and shall not be duplicative. Any deposition noticed by Plaintiffs shall go forward unless objected to by a Defendant. If a Defendant objects to a deposition noticed, Plaintiffs must

demonstrate a specific need for such depositions based on circumstances or issues present in these actions.

(c) Nothing in this CMO shall be construed to limit the Defendants' rights to conduct depositions and to seek the production of documents from the Plaintiffs, and any other witnesses who may possess information reasonably calculated to lead to the discovery of admissible evidence concerning the Plaintiffs' claims.

(d) No later than ninety (30) days prior to trial, the parties to each action in the Sun City Hilton Head Stucco Litigation shall designate the depositions, and relevant portions of each deposition they intend to use at trial, except for portions of any deposition which might be used solely for impeachment purposes.

(e) All parties shall have the right to object to any deposition or any portion thereof for any reason which would require exclusion of the evidence if the witnesses were then present and testifying.

C. Videotaped Depositions

The testimony of any party or witness may be videotaped in accordance with the South Carolina Rule of Civil Procedure 30, or as provided by a further order of this Court. Participation in or appearance at any examination which is videotaped shall not be deemed a waiver of any party's right to object to the videotaping and/or subsequent use of the videotaped deposition in any manner whatsoever.

D. Depositions of Defendant Representatives, Expert Witnesses and Other Witnesses

If a Defendant Representative, Expert Witness and Other Witness is to be a witness in more than one case, the following procedures shall apply:

(1) The Defendant Representative, Expert Witness and Other Witness may be deposed only one time regarding qualifications, education, training, general information and general opinions, unless a subsequent deposition is necessary based on good cause shown. It is acknowledged that this initial deposition may take multiple days.

(2) The Defendant Representative, Expert Witness and Other Witness may be deposed only one time in each case concerning his or her case-specific opinions, unless a subsequent deposition is necessary based on good cause shown.

VII. PROCEDURAL ORDERS

A. Scheduling Order

There shall be a scheduling order that shall set dates for Plaintiffs, Defendants, Other Witnesses:

- depositions
- venue motions
- dispositive motions
- fact witness lists
- expert witness lists
- final expert opinions/reports
- settlement conferences
- pre-trial conferences
- trial motions
- trial date
- trial exhibits
- other relevant deadlines

The parties are ordered to attempt to agree on the above deadlines and submit as much of a scheduling order as can be agreed upon within 30 days of the entry of this Order..

B. Privileges

The Court recognizes that cooperation among counsel and the parties is essential for the orderly and expeditious resolution of the Sun City Hilton Head Stucco Litigation. The

communication, transmission, or dissemination of information among Plaintiffs' counsel, or among Defendants' and/or their counsel shall not be deemed a waiver of the attorney-client privilege, the protection afforded by the attorney work product doctrine, the protection afforded to material prepared for litigation, or any other privilege to which a party may be entitled. Any cooperative efforts as described above shall not in any way be used against any of the parties, be cited as purported evidence of conspiracy, wrongful action or wrongful conduct, and shall not be communicated to the jury. However, the mere exchange of information or documents between counsel shall not in itself render such information or documents privileged.

VIII. EX PARTE COMMUNICATIONS

All parties and their attorneys shall comply with South Carolina Rule of Professional Conduct Rule 3.5 and Rule 407 of the South Carolina Appellate Court rules and with respect to communications with the Court and/or Court staff. The Court will not consider any ex parte communications not made in strict compliance with these provisions. Any correspondence with the court must simultaneously be served on all Counsel by the same means as it is transmitted to the Court (e.g., facsimile, first class mail, e-mail, Federal Express, etc.).

IX. Amendments or Supplements to CMO

The Court may on its own motion upon fifteen (15) days notice to Counsel conduct a hearing to consider necessary and reasonable amendments to the CMO. Likewise, Counsel may upon motion with fifteen (15) days notice to all other Counsel propose amendments to the CMO which the Court shall grant or deny upon a hearing.

IT IS SO ORDERED.

The Honorable Michael Baxley

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Roger F. Carlson and Mary Jo Carlson,

Plaintiffs,

vs.

South Carolina State Plastering, LLC, Peter
Conley, Individually, Del Webb Communities,
Inc., and Pulte Homes, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2008-CP-07-03386

**DEFENDANTS' REPLY IN FAVOR OF
THE MOTION TO DISMISS AND/OR TO
COMPEL ARBITRATION**

TO: PHILLIP W. SEGUI, JR., ESQUIRE, JOHN T. CHAKERIS, ESQUIRE, MICHAEL
SEEKINGS, ESQUIRE and W. JEFFERSON LEATH, JR., ESQUIRE, Attorneys for the
Plaintiffs:

Plaintiffs have sued to enforce the contract that they entered relating to the construction and purchase of their home at Sun City Hilton Head. Nevertheless, while they are suing to enforce the contract, they are concomitantly claiming that the very same contract is unenforceable. Plaintiffs cannot have it both ways. As plaintiffs have claimed the benefit of the contract, they are estopped from now attempting to avoid the contract. "[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision contained therein." *United States v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001) (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (holding that it would "disregard equity" to allow a plaintiff "to claim the benefit of the contract and simultaneously avoid its burdens"); also citing *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 527 (5th Cir. 2000)).

Plaintiffs make four arguments in opposition to Defendants' Motion to Compel Arbitration. Each arguments is addressed below. Each arguments is in direct contradiction of South Carolina Law and South Carolina public policy. Each arguments is misleading and completely lacks merit.

I. THE ARBITRATION PROVISION IS VALID, ENFORCEABLE AND NOT UNCONSCIONABLE

Plaintiffs first argue that "the terms of the Sales Agreement are unconscionable, so as to make it unenforceable." Plaintiffs attack several provisions of the contract as unconscionable, and argue that these provisions are so bad that the whole contract is unenforceable. However, PLAINTIFFS NEVER CLAIM THAT THE ARBITRATION CLAUSE ITSELF IS UNCONSCIONABLE. In order to defend arbitration, Plaintiffs must prove that the arbitration clause itself is unconscionable. The South Carolina Court of Appeals recently stated:

Common sense implies that if a party challenged the validity of a contract which contained an arbitration clause, the validity of the arbitration clause is also challenged. The courts have found otherwise. "Arbitration clauses are separable from the contracts in which they are imbedded." *Jackson Mills*, 312 S.C. at 403, 440 S.E.2d at 879 (citing *Prima Paint*, 388 U.S. at 402, 87 S.Ct. 1801). An arbitration clause's validity is distinct from the substantive validity of the contract as a whole. *Cornerstone Hous.*, 356 S.C. at 338, 588 S.E.2d at 622 (citing *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623.

New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629-630, 667 S.E.2d 1, 5-6 (S.C.App.,2008). Plaintiffs do not argue that the Arbitration Clause itself at issue in this case is unconscionable.

In the main case cited by plaintiffs in support of their argument, *Simpson v. MSA of Myrtle Beach*, the Court held that

In this case, we find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire [arbitration] clause. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.

Simpson v. MSA of Myrtle Beach, Inc. 373 S.C. 14, 34-35, 644 S.E.2d 663, 674 (2007). The court went on to state:

we note that there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. Therefore, in holding today that the arbitration clause in the vehicle trade-in contract between Addy and Simpson is unconscionable due to a multitude of one-sided terms, we do not overrule our decision in *Munoz* where we held that an adhesion contract between a consumer and a lender was not unconscionable because it lacked mutuality of remedy. Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.

Id. 373 S.C. at 36, 644 S.E.2d at 674.

In *Simpson*, the Court found the arbitration clause itself had three cumulative problems that created the unconscionable nature of the arbitration clause: 1) the arbitration clause stated that the arbitrator could not "award punitive, exemplary, double, or treble damages," and thus limited statutory remedies; 2) the arbitration clause not only lacked mutuality (which on its own does not make the arbitration agreement unconscionable); but further stated that the dealer's judicial remedies would not be stayed pending the arbitrator's determination of the consumer's rights for the same vehicle; and 3) the arbitration clause stated that it applied to certain consumer protection statutes which have been deemed to supersede the FAA. The arbitration clause at issue in this case suffers from none of these defects.

In this case, the arbitration clause has complete mutuality, has no limitation language regarding damage awards, and does not limit the type of claim that is subject to arbitration. Accordingly, Plaintiffs' reliance on Simpson is unavailing.

Plaintiffs further argue that the arbitration clause should be deemed unconscionable because the Sales Contract was a contract of adhesion. Adhesion contracts are not improper or illegal. To the contrary, they serve a useful commercial purpose. [cite] Plaintiffs have offered no evidence that the contract terms were not subject to negotiation. Plaintiffs have offered no affidavit from the Plaintiffs setting forth any evidence supporting their claim of unconscionability. Plaintiff has offered no evidence that they requested a change to the contract that was not agreed to by Defendants. However, even if it was a contract of adhesion, that does not make the arbitration clause unconscionable. In the Simpson case, the court stated:

we first note that under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Neither party disputes that the contract entered into by Simpson and Addy was an adhesion contract as such contracts are standard in the automobile retail industry. Adhesion contracts, however, are not per se unconscionable.

Simpson, 373 S.C. at 26-27, 644 S.E.2d at 669.

Next, plaintiffs state that the court should consider whether there was an absence of meaningful choice. The Simpson Court described this issue as follows:

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See *Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," *id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at

293. See also *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

Simpson, 373 S.C. at 25, 644 S.E.2d at 669.

Again, plaintiffs have not offered any evidence as to any of these issues. Accordingly, there is no reason to believe that there was unequal bargaining power or sophistication between the parties. With regard to whether there was an element of surprise to the challenged arbitration clause and as to the conspicuousness of the clause, it should be noted that the Sales Contract has the statutory bold, underlined language at the top of the first page that states : "NOTICE: THE SETTLEMENT OF CONTROVERSIES ARISING UNDER THIS CONTRACT SHALL BE SUBJECT TO ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THE SOUTH CAROLINA ARBITRATION ACT, SOUTH CAROLINA 15-48-10, ET SEQ."

Accordingly, there is no evidence of unconscionability relating to the arbitration clause.

Plaintiffs next challenge certain provisions in the Sales Agreement that are separate from the Arbitration Clause. Even if these provisions were unconscionable, it would not affect the arbitrability of this case. However, none of the clauses are unconscionable. As stated in *Simpson*, "... this Court acknowledges that parties are always free to contract away their rights...." 373 S.C. at 28, 644 S.E.2d at 670. The three complaints that plaintiffs make about the Sales Agreement are as follows: 1) the contract provides a written limited warranty that the home will be free from defective materials and workmanship for a period of two years from closing, and to enforce that warranty provision notice must be provided within the 2 year period; 2) the Sales Agreement states that in exchange for the provision of and protections provided in the "Del Webb Home Warranty, 2ND Edition", the purchaser agrees to waive implied warranties (which has been ruled to be acceptable by the South Carolina Supreme Court in *Kirkman v. Parex*); and 3) the contract has an attorneys' fee

provision that awards fees to the prevailing party in an arbitration. Clearly none of these provisions is unconscionable (and plaintiffs have provided no evidence nor cited any law to suggest that they are unconscionable).

In a nutshell, in order to avoid the arbitration agreement in this case, the plaintiffs would have to prove that the arbitration clause itself in the Sales Agreement contained "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." See *Fanning v. Fitz's Pontiac-Cadillac -Buick, Inc.*, 322 S.C. 399 (1996). The straight forward AAA arbitration agreement found in this case does not meet the above definition.

II. THE DOCTRINE OF MERGER DOES NOT "EXTINGUISH" THE CONTRACT

Plaintiffs cite the South Carolina Court of Appeals decision in *Wilson v. Landstrom*, 281 S.C. 260 (Ct. App. 1984), in support of their position that the merger doctrine "extinguishes" the contract between the parties. The South Carolina Court of Appeals stated as follows:

The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.

Wilson at 264. Plaintiffs' contention that the merger doctrine "extinguishes" all provision in the contract at issue in this case is meritless. The merger doctrine refers to the following theory of law:

The promises contained in the contract are enforceable up to the time of closing. The closing represents a settlement of the parties of all contractual obligations. The seller's continuing obligations arise through warranties or representations made in the deed presented by the seller and accepted by the purchaser at the closing. Generally, no contractual promises survive the closing under the common law doctrine of merger. Certain collateral promises may survive despite the generally applicable doctrine of merger. Parties should be aware of the merger doctrine, as summarized in the Boston form: "The acceptance of a deed by the Buyer ... shall be deemed to be a full

performance and discharge of every agreement and obligation herein contained or expressed, except such as are, by the terms hereof, to be performed after the delivery of said deed." Occasionally, a provision expressly states that a specific representation or obligation of the seller will survive the closing of the contract. Use of this statement negates the usual effect of the doctrine of merger on that particular seller responsibility.

14-81 Powell on Real Property § 81.05 (internal citations (including *Wilson v. Landstrom*) omitted).

The merger doctrine does not apply to this case for three independent reasons: 1) the sales contract contains agreements distinct from and to be performed after delivery of the deed; 2) the sales contract specifically states that the agreement "shall expressly survive the Closing and continue to be binding upon the parties."; and 3) the plaintiffs have sued to enforce the sales agreement, and may not now disclaim its burdens.

1) the sales contract contains agreements distinct from and to be performed after delivery of the deed.

In 1993, the South Carolina Supreme Court made it clear that the merger doctrine does not apply to portions of a sales contract that are not satisfied by delivery of a deed. The Court held:

the doctrine of merger does not apply in this case. Where a deed constitutes only part performance of a preceding contract, other distinct and unperformed provisions of the contract are not merged in the deed.

New Prospect Area Fire Dist. v. New Prospect Ruritan Club, 311 S.C. 402, 405 (1993). The sales agreement in this case contains several provisions that are clearly intended to be performed after closing. Most importantly for purposes of this Motion to Compel Arbitration, the Arbitration Provision specifically states: "After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration..." Contract Section 4.3. See also Sales Agreement provisions 3.3 (guidelines for future improvements to home), 3.3.1 (purchaser must complete landscaping within 30 days after closing), 4.1 (warranty for a period of 2 years after closing), 4.3 (arbitration provision for controversies arising after closing). Accordingly,

as a matter of law, the merger doctrine does not "extinguish" the parties' agreement as to what would happen "after closing."

2) The sales contract specifically states that the agreement "shall expressly survive the Closing and continue to be binding upon the parties."

The plaintiffs specifically agreed in the contract that:

5.4.1 Survival. The covenants, disclaimers and agreements contained in this Agreement shall not be deemed to be merged into or waived by the instruments executed at Closing, but shall expressly survive the Closing and continue to be binding upon the parties.

Accordingly, as the parties agreed that the provisions survive closing, the merger doctrine is inapplicable to this case.

3) The plaintiffs' have sued to enforce the sales agreement, and may not now disclaim its burdens.

Plaintiffs have alleged that they entered into the Sales Agreement and have sued to enforce the agreement. Plaintiffs may not now attempt to deny the agreements they are trying to enforce. As plaintiffs have already claimed the benefit of the contract, they are estopped from now contesting that they agreed to the terms of the same contract. "[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the [other] provision[s] contained therein." *U.S. v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001) (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (holding that it would "disregard equity" to allow a plaintiff "to claim the benefit of the contract and simultaneously avoid its burdens").

In this case, plaintiffs have taken the position that it is proper to enforce the contract after closing. Accordingly, plaintiffs are now estopped from disclaiming any provision of that same contract.

III. DEFENDANTS HAVE NOT WAIVED THEIR ARBITRATION RIGHTS

All of Plaintiffs arguments as to why Defendants have waived their right to arbitration fail.

Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App., 2007)

A. Defendants have not delayed in Filing the Motion to Compel Arbitration

As was discussed at the initial status conference on the individual stucco cases with Judge Baxley in Beaufort on April 14, 2010, there were two threshold issues that needed to be decided with regard to the individual stucco cases: issues related to 1) The Notice and Opportunity to Repair Residential Construction Defects Act ("the Act") and 2) Arbitration. Defendants explained to the court that it was their position that the plaintiffs had not complied with the right to cure provision of the Act in any of the cases, and therefore all of the cases were or should be stayed pursuant to the Act. The Defendants also disclosed that approximately half of the cases were subject to arbitration provisions.

As to the Right to Cure notice issue, the parties disagreed as to whether the notice provisions under the Act had been complied with, and requested that the court rule on that issue. That issues was fully briefed, argument was heard, and the Court recently ruled on that issue in the Amadeo case. As was discussed in a status conference, the Defendants' Motion to Dismiss and/or Stay pursuant to the Act was filed in only one of the approximately 140 case (the Amadeo case), but all 140 cases were cited in the motion. The Court ruled in January 2011 that the notice provision had

been complied with and allowed Defendants 30 days to make offers to settle the cases pursuant to the Act.

As to the arbitration issue, Defendants plead in both the original answer and in the answer to the recently filed amended complaint that the case is subject to arbitration.¹ This issue was premature, however, until the right to cure issue was resolved. Accordingly, as the Court has just given the defendants indication that the notice provided by the plaintiffs as to the Right to Cure Act was sufficient and that the Court would not dismiss the case or stay the case further because of the Right to Cure Act, now is the appropriate time for the Defendants to raise the arbitration issue.

Plaintiffs point out that the complaint was filed in September 2008. However, service was not accepted until later, and the Answer was not served until December 2008. The case was stayed pursuant to the Act, and plaintiffs did not attempt to comply with the notice provisions of the Act until February 13, 2009. Defendants timely gave notice to the plaintiffs that the notice was not sufficient and requested clarification. Plaintiffs have never responded to Defendants request for clarification. On May 15, 2009 Plaintiffs entered into a Consent Order staying the case pending compliance with the Act. Thereafter Plaintiffs took no additional action to comply with the Act. It is still Defendants' position that plaintiffs have not complied with the Act. However, Defendants understand the Court's ruling in Amadeo, and accordingly are moving forward with the next threshold issue that was discussed, arbitration.

Also, Plaintiffs point out that Vic Rawl circulated a Case Management Order for the individual stucco cases which would consolidate the cases for pretrial matters and discovery. Plaintiffs argue that by submitting a case management order, Defendants waived their right to arbitration. Defendants disagree. The point of the proposed case management order was to facilitate

¹ Defendants objected to the Court hearing the Plaintiffs' motion to amend the complaint in this case as the issue as to compliance with the Act had not been decided, and it was Defendants' position that this case should have been either dismissed or stayed pending compliance with the Act.

the efficient handling of the individual stucco cases in two ways: 1) the order would consolidate the matter for pretrial argument on the threshold issues (both the Right to Cure Act and Arbitration) and would allow the issues to be decided for all affected cases without the parties having to make 140 individual motions; and 2) it would consolidate the cases that survived these motions for discovery purposes so that the parties would not be forced to serve numerous sets of identical discovery. Such an order was discussed at the initial status conference with Judge Baxley on April 14, 2010. Vic Rawl agreed to draft and circulate a case management order at that status conference. On May 28, 2010 (two days after the order was signed by Judge Kinard assigning the individual cases to Judge Baxley), Vic Rawl e-mailed the draft Case Management Order to all parties. See Exhibit A attached hereto. Nothing about the submission of this proposed order should waive Defendants' right to Arbitration.

Furthermore, Plaintiffs rejected Defendants' attempt to facilitate the efficient handling of the individual cases. In fact, Plaintiffs responded and made it clear that they were not interested in moving any of the individual cases forward, but rather only wanted to prosecute cases with class allegations. See Exhibit A attached hereto (Email from Plaintiffs' counsel dated August 8, 2010, stating: "We aren't going to agree to a case-by-case management order until the class status has been determined."). Plaintiffs have still not agreed to a Case Management Order, and have insisted on going forward with only class issues and not the individual cases. Accordingly, plaintiffs present complaints of delay are disingenuous.

Again, as the Court has just recently indicated in Amadeo that these cases should not be stayed pursuant to the Act, the Court has essentially just determined that commencement of the case is now proper. Accordingly, Defendants contend that they have not unduly delayed in filing their motion to compel arbitration.

B. Defendants have not engaged in extensive discovery before moving to compel arbitration.

In *Rhodes*, the Court determined that the Defendant had waived arbitration because the party seeking arbitration had conducted extensive discovery, including serving: "...written interrogatories and requests for production. Benson also noticed and took five depositions. Benson sought the circuit court's assistance in executing out-of-state subpoenas, which the circuit court granted. The circuit court heard two motions for protective orders." *Rhodes* at 123. However, in this case, it is undisputed that Defendants have not served any discovery requests, noticed any depositions, taken part in any depositions, or served any subpoenas.²

As set forth in the Motion to Dismiss and/or Stay pursuant to the Act filed in the Amadeo case (which is incorporated herein by reference), Defendants have been trying from the beginning of this case to get Plaintiffs to comply with the Act and give Defendants notice of what injury and or damage they claim to have suffered so that there would be a chance of resolving the matter without litigation (as contemplated by the Act.) This case was or should have been stayed from filing until just recently when Judge Baxley indicated that the notice given was sufficient.³ Now that it is apparent that this case will commence, Defendants believe they are entitled to compel arbitration pursuant to the terms of the contract.

C. Plaintiffs Have Offered No Evidence of Prejudice

² Defendants object to Exhibit C attached to plaintiffs' memorandum in opposition. The list is inaccurate and unsworn testimony. The list purports to be activity in only the Carlson case. However, the list cites activity in some of the others of the 140 individual cases and in the Grazia putative class action. The list should be disregarded. Further, plaintiffs offer no evidence that Defendants have served any discovery request or noticed any depositions in this case.

³ Technically, the case should not have even been filed until 90 days after the plaintiffs complied with the Act. S.C. Code Ann. §40-59-840.

Plaintiffs do not even argue that they have been prejudiced. No affidavit has been submitted explaining any prejudice. Prejudice cannot be presumed. Accordingly, it is clear that Mr. and Mrs. Carlson have suffered no prejudice.

Additionally, as to the argument that Defendants have known about the arbitration agreement, the same argument can be made as to plaintiffs. Plaintiffs' counsel are the same counsel that represented Oros, where the plaintiffs consented to Defendants' Motion to Compel Arbitration. The arbitration clause in this case is identical to Oros', and accordingly, plaintiffs knew that the case should have been brought in arbitration (and never filed with this court). Any claim of prejudice from delay would be specious in that plaintiffs were aware that the proper forum for their case was arbitration.

For the reasons cited above, defendants maintain that they have not waived their right to arbitration.

IV. THE SCOPE OF THE ARBITRATION AGREEMENT COVERS THE ASSERTED CLAIMS.

Plaintiffs argue that the arbitration clause would not cover any causes of action other than breach of contract. Specifically, plaintiffs claim that their tort actions would not be covered by the arbitration agreement. This argument is without merit. The court in *Zabinsky* specifically rejected this same argument:

The arbitration agreement in the instant cases states that "any controversy or claim arising out of the partnership agreement" should be settled by arbitration if it cannot be settled by the partnership. Therefore, any claim pursuant to the partnership agreement is arbitrable. Further, any tort claims between the partners that relate to the partnership agreement are arbitrable. Finally, the winding up of the partnership is covered by the arbitration agreement because it concerns issues that are the direct result of the partnership agreement.

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

Further, any doubts as to the scope of arbitrable issues should be resolved in favor of arbitration. The South Carolina Supreme Court recently stated as follows:

We observe at the outset that it is the policy of this state to favor the arbitration of disputes. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. *Id.* at 597, 553 S.E.2d at 118-119.

Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 129, 678 S.E.2d 435, 437 - 438 (2009).

The scope of the present arbitration agreement covers the claims alleged by the plaintiffs. The arbitration agreement specifically states that it applies to: "every controversy or claim arising out of or relating to this Agreement, or the breach thereof...." Plaintiffs have alleged that the contract was for the "for the construction ... of their residence." See Amended Complaint Paragraph 19.⁴ Additionally, Paragraph 21 of the Amended Complaint indicates the breadth of allegations that plaintiffs allege are covered by the contract, and states as follows:

That the Defendants breached the contract with the Plaintiffs by failing to construct said residence with a stucco exterior that was installed in accordance with the terms and conditions of the contract, applicable building codes, in conformance with accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications, all of which have directly and proximately caused defects and deficiencies in the residence which will need to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contract. Such breaches include but are not limited to the following particulars, to-wit:

- a: In failing to use due care in the construction, repair and remodeling of the subject residence;

⁴ Plaintiffs also specifically state that the allegations in paragraphs 18-22 of the Amended Complaint are breaches of the contract at issue in this case. Plaintiffs are estopped from claiming that the contract does not include/relate to/cover these allegations in the complaint.

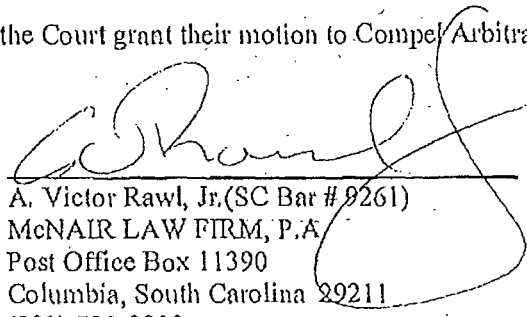
- b. In failing to adequately supervise the construction, repair and remodeling of the subject residence;
- c. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- d. In constructing, developing, designing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- e. In improperly installing the stucco cladding in violation of the building code, standard building practices and accepted construction industry standards and practices and not in conformity with component product manufacturer installation instructions and specifications;
- f. In installing a home exterior which fails to provide a sufficient barrier against the intrusion of water into the system and adequate avenue for exit of water that gets into the system;
- g. In failing to properly install control joints;
- h. In failing to exercise due care;
- i. In such other deficiencies or failures as will be proven at trial.

All allegations in the amended complaint are related to the construction of the residence and therefore arise or relate to the contract. Accordingly, all allegations in the complaint should be dismissed and compelled to arbitration.

CONCLUSION

Defendants respectfully request that the Court grant their motion to Compel Arbitration.

Respectfully submitted,



A. Victor Rawl, Jr. (SC Bar # 9261)
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Post Office Box 11390
Columbia, South Carolina 29211
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Fax (803) 753-3278
vrawl@mcnair.net

Attorneys for the Defendants Pulte Homes Inc., and
Del Webb Communities, Inc.

February 22, 2011
Columbia, South Carolina

EXHIBIT

20100812

A

Rawl, Vic

From: W. Jefferson Leath [jl@leathbouchlaw.com]
Sent: Thursday, August 12, 2010 11:43 AM
To: Rawl, Vic; John Chakeris; Phillip W. Segui, Jr.; Rett Kendall; Christy E. Mahon
Cc: Jolley, Pam; Buonforte, Mary Ann
Subject: RE: Sun_City_Hilton_Head_Case_Management_Order

I certainly do not agree with it. We aren't going to agree to a case-by-case management order until the class status has been determined.

From: Rawl, Vic [mailto:VRawl@MCNAIR.NET]
Sent: Thu 8/12/2010 10:45 AM
To: W. Jefferson Leath; John Chakeris; 'Phillip W. Segui, Jr.'; Rett Kendall; 'Christy E. Mahon'
Cc: Jolley, Pam; Buonforte, Mary Ann
Subject: Sun_City_Hilton_Head_Case_Management_Order

Hello All:

I have not heard back from you on the attached Case Management Order. Are you ok with me providing this to Judge Baxley as a consent order?

Thanks!

Vic

MCNAIR
ATTORNEYS

A. Victor Rawl Jr.
Shareholder
vrawl@mcnair.net

McNair Law Firm, P.A.
Columbia Office 1221 Main Street | Suite 1800 | Columbia, SC 29201
803 799 9800 Main | 803 753 3278 Fax
Mailing Post Office Box 11390 | Columbia, SC 29211
VCard | Bio URL | Web site
Effective July 6, 2010 our physical address is:
1221 Main Street, Suite 1800, Columbia, SC 29201

From: Rawl, Vic
Sent: Friday, May 28, 2010 1:24 PM
To: phillip segui (phillip segui); John Chakeris; 'W. Jefferson Leath'; Mike Seekings; Rett Kendall; 'Christy E. Mahon'; 'Brent M. Boyd'
Cc: Jolley, Pam; Buonforte, Mary Ann
Subject: Sun_City_Hilton_Head_Case_Management_Order

Gentlemen,

Please see the attached draft Case Management Order. Please let me know if you agree with the document as drafted or if you have any changes.

Thanks!

Vic

0176

MENAIR

A. Victor Rawl, Jr.

Shareholder

vrawl@mcnair.net

McNair Law Firm, P.A.

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CIRCULAR 230 DISCLOSURE: To ensure compliance with requirements imposed by the IRS, we inform you that any US Federal Tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. This advice may not be forwarded (other than within the taxpayer to which it has been sent) without our express written consent. To read more about this disclosure, please see <http://www.mcnair.net/230.pdf>

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

ROGER F. CARLSON and MARY JO
CARLSON, on behalf of themselves
and others similarly situated,

Plaintiffs,

v.

SOUTH CAROLINA STATE
PLASTERING, LLC, PETER CONLEY,
INDIVIDUALLY, DEL WEBB
COMMUNITIES, INC., and PULTE
HOMES, INC.,

Defendants.

Case No. 2008-CP-07-3386

DEFENDANTS DEL WEBB
COMMUNITIES, INC. AND PULTE
HOMES, INC. SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL
ARBITRATION

11 OCT 14 PM 2:08
CLERK OF COURT
BEAUFORT COUNTY, S.C.

The court heard argument on Defendants Motion to Compel Arbitration on April 20, 2011. The court has since indicated that it has taken the motion under advisement, but that it intends to deny the motion based on a waiver theory. After the Motion was heard, the plaintiffs filed a second motion to amend the complaint on September 14, 2011 to add over 2000 plaintiffs to the putative class action. The filing of this second motion to amend the complaint should be deemed an admission by the plaintiffs that there has been no prejudice or undue burden caused by any delay in demanding arbitration. Without prejudice, the court may not find that the arbitration rights have been waived.

The latest South Carolina Case to examine waiver of the right to enforce an arbitration clause was *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (S.C. Ct. App. 2011). The South Carolina Court of Appeals stated:

The right to enforce an arbitration clause may be waived. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Id.* "There is no

set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* (internal quotation marks and citation omitted).

In *Rhodes v. Benson Chrysler-Plymouth, Inc.*, this court set out three factors a court generally considers when determining whether a party has waived its right to compel arbitration: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "To establish prejudice, the non-moving party must show something more than mere inconvenience." *Id.* at 127, 647 S.E.2d at 251 (internal citations and quotation marks omitted).

Id. at ___, 713 S.E.2d at 807.

Defendants have already argued that plaintiffs cannot demonstrate any prejudice from any delay in filing the motion to compel arbitration, and that mere inconvenience is insufficient to demonstrate prejudice. The defendants made these arguments based in part on the fact that the motion to compel arbitration was filed within 1.5 months of the court granting plaintiffs' motion to amend the complaint adding class allegations and adding the possibility of 140 additional plaintiffs. The defendants argued that pursuant to SCRPC Rule 15(a), the court had to find that the amendment "does not prejudice any other party." Thus, the court had just found that plaintiffs' delay in adding class allegations did not prejudice defendants, and allowed the plaintiffs to completely change the character of the case (from single case to class action). Defendants further argued that the amended complaint constituted several new claims and new parties that were only in existence for 1.5 months at the time the motion to compel arbitration was filed. In sum, defendants argued that there was no delay, and that if there was, it did not prejudice the Carlsons or any of the newly added putative parties.

The first amended complaint greatly expanded the case from a single family construction defect case to a putative class action with 140 putative class members,

bringing the requirement of substantial class discovery, class briefing and class argument before discovery is conducted with regard to the merits of the case. For all practical purposes, this case was in its infancy (newly commenced) at the time the motion to compel litigation was filed (1.5 months after the amended complaint was served).

Plaintiffs have now filed another (second) motion to amend the complaint to expand the putative class by thousands of putative class members, again greatly changing the character of this case. While plaintiffs' motion to amend cannot be heard until and unless the court denies defendants' motion to compel arbitration, the mere fact that the plaintiffs' filed the motion to amend is critical evidence that they have not been prejudiced by the timing of defendants' motion to compel arbitration. By filing the latest motion to amend the complaint pursuant to SCRPC Rule 15(a), the plaintiffs must be arguing that amending the claims in this case at this time "does not prejudice any other party."

For these reasons, defendants request that the motion to compel arbitration be granted.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

By: 

A. Victor Rawl, Jr., SC Bar #9261
Andrew G. Melling, SC Bar #9521
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
(803) 753-3278 (facsimile)

Attorneys for Defendants Del Webb
Communities, Inc. and Pulte Homes, Inc.

October 12, 2011

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Anthony D. Amadeo and Madeline
Amadeo,

Plaintiffs,

vs.

South Carolina State Plastering, LLC, and
Peter Conley, Individually, Del Webb
Communities, Inc., and Pulte Homes, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

MAY 24 PM 4:38 CASE NO. 2009-CP-07-02904

**DEFENDANTS' DEL WEBB
COMMUNITES, INC. AND PULTE
HOMES, INC.'S SECOND MOTION TO
DISMISS AND/OR STAY ACTION
PENDING PLAINTIFFS' COMPLIANCE
WITH SC CODE § 40-59-810, ET SEQ.**

Pursuant to South Carolina Code Ann. § 40-59-810, et seq. (hereinafter "the Statute" or "the Act"), defendants Del Webb Communities, Inc. and Pulte Homes, Inc. (hereinafter, collectively "Del Webb") are entitled to notice of any alleged construction dwelling defects and the opportunity to offer to remedy any alleged dwelling defects before any lawsuit may be initiated. Plaintiffs did not comply with the Statute prior to filing this case.

As Plaintiffs had not complied with the Statute, on January 20, 2010, the parties entered into a Consent Order For Stay ("Order"), staying the case until the occurrence of one of the following: (1) consent of all parties; (2) order of this Court; (3) service of a written waiver of compliance with the requirements of § 40-59-810, et seq.; or (4) 90 days from the date of this order. Paragraph 1 of the Order states that Plaintiffs "filed their action before first complying with the requirements of South Carolina Code § 40-59-810, et seq." During the stay, Plaintiffs have taken no further action to comply with the Statute. On April 20, 2010 the stay was lifted as 90 days had passed from the date of the Order.

As Plaintiffs have still not complied with the Statute, this action must once again be stayed and/or dismissed pending compliance with the Statute.

THE RIGHT TO CURE STATUTE

The legislature enacted the "Notice and Opportunity to Cure Construction Dwelling Defects Act" for the following stated reasons:

WHEREAS, the General Assembly finds that South Carolina needs an alternative method to resolve legitimate construction disputes that would reduce the need for litigation, while adequately protecting the rights of homeowners; and

WHEREAS, the General Assembly declares that an effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the construction professional that the claimant asserts is responsible for the defect and providing the construction professional with the opportunity to resolve the claim without litigation. . . .

Act 82, 2003 S.C. Acts and Jt. Resolutions, p. 943.

The Statute applies to this case because it is an "action," the plaintiffs are "claimants," and they are alleging "construction defects" regarding a "dwelling."¹

¹ § 40-59-820 defines terms used in The Statute as follows:

(1) "Action" means any civil lawsuit or action or arbitration proceeding for damages or indemnity asserting a claim for injury or loss to a dwelling or personal property caused by an alleged defect arising out of or related to the design, construction, condition, or sale of the dwelling or a remodel of a dwelling.

(2) "Claimant" means a homeowner, including a subsequent purchaser, who asserts a claim against a contractor, subcontractor, supplier, or design professional concerning a defect in the design, construction, condition, or sale of a dwelling or in the remodel of a dwelling.

(3) "Construction defect" means a deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements that results from any of the following:

(a) defective material, products, or components used in the construction of residential improvements;

(b) violation of the applicable codes in effect at the time of construction of residential improvements;

(c) failure of the design of residential improvements to meet the applicable professional standards of care at the time of governmental approval of the design of residential improvements; or

(d) failure to construct residential improvements in accordance with accepted trade standards for good and workmanlike construction at the time of construction. Compliance with the applicable codes in effect at the time of construction conclusively establishes construction in accordance with accepted trade standards for good and workmanlike construction, with respect to all matters specified in those codes.

Before a homeowner may be party to an action, he must comply with the following requirements of SC Code Ann. § 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.

SC Code Ann. § 40-59-840.

Thereafter, the Statute grants the contractor the right to:

- (1) request clarification of the alleged defect (SC Code § 40-59-840 (3));
- (2) inspect the dwelling;
- (3) offer to remedy;
- (4) offer to settle; and/or
- (5) deny the claim regarding the defects.

If a homeowner does not comply with the Statute, the court must stay the action pending full compliance with the Statute. SC Code Ann. § 40-59-830 states as follows:

(4) "Dwelling" means a single-family house or duplex or a multifamily unit not to exceed sixteen units and not to exceed three stories in height, and which is intended for residential use. A dwelling includes the systems and other components and improvements that are part of a single or multifamily unit at the time of construction.

(5) "Serve" or "service" means personal service or delivery by certified mail to the last known address of the addressee.

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.

Accordingly, full compliance with the Statute is a condition precedent to proceeding to litigation.

ARGUMENT

The South Carolina General Assembly passed the right to cure statute as a form of tort reform. The purpose of the Act is to protect contractors from suits by homeowners prior to the contractor having an opportunity to see the claimed defect and having an opportunity to cure the defect. The purpose of the Statute is to give the homeowner and his contractor the ability to settle the defect allegations prior to resorting to litigation. Compliance with the Statute is a mandatory prerequisite to filing suit. The Statute applies to each individual dwelling.

I. **Named Plaintiffs' Cases Must Be Stayed Pending Compliance With The Right to Cure Statute.**

In this action, plaintiffs have failed to comply with the Statute prior to filing this action. Plaintiffs served defendants with the letter attached hereto as Exhibit 1. That letter was insufficient notice, as explained in the response letter sent by defendants, attached hereto as Exhibit 2. Defendants have received no response to Exhibit 2. SC Code Ann. § 40-59-830 states as follows:

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.

On January 20, 2010, the parties entered into the Order staying the case. During the stay, Plaintiffs have taken no further action to comply with the Statute. On April 20, 2010, the stay was lifted, as 90 days had passed from the date of the Order.

As Plaintiffs have still not complied with the Statute, this action must again be stayed and/or dismissed pending compliance with the Statute.

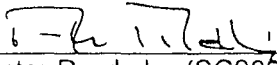
II. This Action Should be Dismissed.

South Carolina Code Ann. § 40-59-840 states that "[i]n 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." As plaintiffs have not complied with a condition precedent to filing suit, this action should be dismissed pursuant to SCRCP 12(b)(6) and 12 (b)(1).

CONCLUSION

The contractor's right to attempt to cure or settle prior to the initiation of litigation is statutorily mandated. Failure to require that each homeowner comply with the Statute prior to filing suit would completely strip defendants of the protection granted to them by the General Assembly and would frustrate the public policy underlying the Statute. For the reasons stated above, the plaintiffs' case must be dismissed and/or stayed until they fully comply with the Statute.

MCNAIR LAW FIRM, P.A.

By, 

A. Victor Rawl, Jr., (SC009261)

Andrew G. Melling (SC009521)

The Tower at 1301 Gervais

Post Office Box 11390

Columbia, South Carolina 29201

(803) 799-9800

vrawl@mcnair.net

Attorneys for Defendant Del Webb

Communities, Inc.

Dated: May 19, 2010
Columbia, South Carolina

SEGUI LAW FIRM, LLC

ATTORNEY AT LAW
864 LOWCOUNTRY BLVD., SUITE A
MT. PLEASANT, SOUTH CAROLINA 29464

PHILLIP W. SEGUI, JR.

Tel: (843) 884-1865
Email: psegui@segulawfirm.com

February 13, 2009

Via U.S. Mail and Electronic Mail

Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 122129
Columbia, SC 29211

RECEIVED

FEB 18 2009

McNair Law Firm, PA.

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

RE: South Carolina State Plastering, LLC and Peter Conley, individually, Del Webb Communities, Inc., and Pulte Homes, Inc.

Dear Counsel:

Please be advised that you are hereby served with NOTICE Pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied at the properties on the attached list is defective. To satisfy the requirements of this statute, you are notified that:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

The results of these defects are cracking, water penetration, corrosion over time, necessity for the replacement of the entire exterior skin of the houses, depreciation and loss of use.

Should you require any additional information regarding this matter, please feel free to give me a call.

Sincerely,



Phillip W. Segui, Jr.



PWS/lwc

Enclosure

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure) - via electronic mail only
Michael S. Seekings, Esquire (w/enclosure) - via electronic mail only
John T. Chakeris, Esquire (w/enclosure) - via electronic mail only

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Allan A. Crystal	40 Concession Oak Drive Bluffton, SC 29909
Thomas E. Dunn Mary T. Dunn	98 Doncaster Lane Bluffton, SC 29909
James F. Gibb	32 Bailey Lane Bluffton, SC 29909
Lois W. Hansen	37 Bailey Lane Bluffton, SC 29909
Noah Rosenstein Mary Helen Rosenstein	16 Biltmore Drive Bluffton, SC 29909
Joel L. Serkes Janet N. Serkes	58 Falmouth Way Bluffton, SC 29909
Charles K. Sotire Bonnie K. Sotire	17 Baldwin Lane Bluffton, SC 29909
George W. Vence Sharon L. Vence	27 Coronado Ct. Bluffton, SC 29909
Paul Weisslitz Selma Weisslitz,	63 Tallow Drive Bluffton, SC 29909
Martha G. Westerfield	38 Bailey Lane Bluffton, SC 29909
Christine H. Wigg Ann Clark	44 Lazy Daisy Drive Bluffton, SC 29909
Carole Tobey Mullins	44 Rose Bush Lane Bluffton, SC 29909
Nathan A. Parks Theda Harris Parks	10 Stovell Lane Bluffton, SC 29909
Louis J. Valente Jean M. Valente	157 Hampton Circle Bluffton, SC 29909
Joseph P. Yaworski Lorraine T. Yaworski	61 Sunbeam Drive Bluffton, SC 29909
James Hoag Veronica Hoag	26 Sunbeam Drive Bluffton, SC 29909
Alexandria Blackman Jenkins	9 Twilight Place Bluffton, SC 29909
Stephen J. McCulloch Dorothy H. McCulloch	61 Thomas Bee Drive Bluffton, SC 29909
Carole Mullins	44 Rose Bush Lane

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Orn Tobey	Bluffton, SC 29909
Nathan A. Parks	10 Stovell Lane
Theda Harris Parks	Bluffton, SC 29909
Robert Stone	47 Star Flower Drive
Suzanne D. Stone	Bluffton, SC 29909
Harlan T. Strohl	119 Stratford Village Way
Mary Strohl	Bluffton, SC 29909
Charles E. Fenske	1 Plymouth Lane
Marianne L. Fenske	Bluffton, SC 29909
Frank E. Woods	35 Rose Bush Lane
Chloe J. Woods	Bluffton, SC 29909
Frederick E. Lewis	120 Thomas Bee Drive
Judith H. Lewis	Bluffton, SC 29909
Anthony D. Amadeo	6 Doncaster Lane
Madeline Amadeo	Bluffton, SC 29909

MENAIR

A. Victor Rawl, Jr.

via@menair.net
T (803) 799-9800
F (803) 753-3278

February 27, 2009

Phillip W. Segui, Jr., Esquire
Sequi Law Firm, LLC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, SC 29465

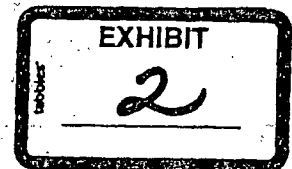
John T. Chakeris, Esquire
The Chakeris Law Firm
Post Office Box 397
Charleston, SC 29402

W. Jefferson Leath, Jr., Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, SC 29402

RE: Purported "NOTICE pursuant to SC Code § 40-59-840"

Gentlemen:

I have received letters signed by you that purport to be "Notice Pursuant to SC Code § 40-59-840 of a Claim" One letter appears to reference the 99 cases that you have filed. The other references approximately 26 addresses for which we have not received complaints.



S.C. Code § 40-59-840 (Notice of claim; timing; contents; request for clarification) states as follows:

(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

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ANDERSON BLUFFTON CHARLESTON CHARLOTTE COLUMBIA GEORGETOWN GREENVILLE HILTON HEAD MYRTLE BEACH

COLUMBIA 94686211

(3) a description of any results of the defect, if known.

Initially, your letters do not contain "a statement that the *claimant* asserts a construction defect." Moreover, the letter regarding the 26 homes does not indicate whether you represent all of the owners of the houses listed. Accordingly, the first prong of S.C. Code § 40-59-840 has not been satisfied.

To the extent that your letters do constitute proper notice pursuant to SC Code § 40-59-840, the homeowners that you represent are hereby advised that the construction defects alleged in your letters are not sufficiently stated, and that the following clarifications are hereby requested for each individual house¹:

1. What specific defects are alleged for each specific house. (Specifically what are the defects the homeowner claims with regard to his/her specific house, including, but not limited to, (a) where "through-wall flashing" is missing, (b) where "adequate control joints" are missing, (c) any other alleged problem with the stucco, and (d) any alleged non-stucco defects.
2. For each defect alleged in #1 above, please specifically describe any and all known resulting damage and the specific location of the damage.
3. Please state whether the home has any stucco cracks.
4. Please specifically state the exact location of any cracks on the home which the homeowner is alleging to be evidence of a construction defect (including, but not limited to, the number, approximate length, approximate width, and side of the house upon which the crack is located).
5. For each specific house, please state whether the homeowner alleges that there was improperly mixed stucco on the home. Please indicate the basis for this allegation, and specifically state the type and location of any damage caused by this alleged defect.
6. For each house, please specifically describe any evidence of water penetration or corrosion (and the specific location of each).

¹ The engineer that you hired, Bob Sisnroy, testified under oath in the Oros matter that he looked at over 200 houses in Sun City Hilton Head and for "several of the houses [he] looked at with regard to [his] Sun City preliminary field observations, ... [he] did not observe any cracks in the stucco on those houses ...". Further, on the houses on which Mr. Sisnroy did not observe cracks in the stucco, he testified that he was unaware of any damage at those houses to either the stucco or to the underlying substrate. Lastly, Mr. Sisnroy testified that he "could not discern the cause of the cracking on any of the houses at Sun City Hilton Head." See Sisnroy Depo., Vol. IV, p. 79, and Vol. III, p. 137. Accordingly, as Mr. Sisnroy agrees that all of the houses are different at Sun City Hilton Head, each homeowner's alleged defects and damages must be stated with specificity in order to give proper notice under § 40-59-840.

John T. Chakeris Esquire, et al.
February 27, 2009
Page 3

MENAIR
ATTORNEYS

After you provide the clarification requested, please provide available times for each homeowner/address when the contractor may have reasonable access to the dwelling for inspection.

Very truly yours,



A. Victor Rawl, Jr.

AVR,jr./pkj

cc: Michael Seekings, Esquire
Michael J. Laramie, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-07-02904

Anthony D. Amadeo and Madeline
Amadeo,

Plaintiffs,

vs.

South Carolina State Plastering, LLC, and
Peter Conley, Individually, Del Webb
Communities, Inc., and Pulte Homes, Inc.,

Defendants.

**DEFENDANTS DEL WEBB
COMMUNITIES, INC. AND PULTE
HOMES, INC.'S MEMORANDUM IN
SUPPORT OF SECOND MOTION TO
DISMISS AND/OR STAY ACTION
PENDING PLAINTIFFS' COMPLIANCE
WITH SC CODE § 40-59-810, ET SEQ.**

This memorandum is submitted by Defendant Del Webb Communities, Inc., and Pulte Homes, Inc. (hereinafter and collectively, Del Webb) in support of **DEFENDANTS DEL WEBB COMMUNITIES, INC. AND PULTE HOMES, INC.'S SECOND MOTION TO DISMISS AND/OR STAY ACTION PENDING PLAINTIFFS' COMPLIANCE WITH SC CODE § 40-59-810, ET SEQ.**, which is presently pending in the above captioned case, and in support of a global resolution of the issues raised herein with regard to all the Sun City Stucco Cases recently assigned to Judge Baxley. Del Webb hereby requests this Honorable Court to enforce the provisions of S.C. Code Ann. §§ 40-59-810, *et seq.* (2003) (hereinafter the "Right to Cure Act" or the "Act"). As will be discussed below, plaintiffs have failed to comply with the notice requirements of the Right to Cure Act. Consequently, this Honorable Court should issue an Order dismissing these lawsuits, or in the alternative, staying these lawsuits until such time as the plaintiffs comply with the Act.

I.

BACKGROUND -- SUN CITY STUCCO LITIGATION

In Beaufort County, South Carolina, there is a large neighborhood of residential homes called Sun City Hilton Head (hereinafter "Sun City"). Del Webb Communities Inc. is the developer of that neighborhood. Many of the homes in Sun City have a stucco exterior finish.

For over five years, Del Webb has been involved in litigation involving the application of the hard coat stucco finish of these homes. The first two cases were putative class actions (of which these plaintiffs would have been unnamed class members.) The first case with class allegations — *Oros v. Del Webb* — was compelled to arbitration, and the arbitration panel denied plaintiffs' motion for class certification. (Please see Order Denying Class Certification attached hereto as Exhibit A.) In the *Oros* case, Del Webb and Pulte were the only defendants.

The second case with class allegations — *Grazia v. South Carolina State Plastering* — was filed in state court in Beaufort County. The allegations in the *Grazia* case are identical to those in the *Oros* case. The difference is that plaintiffs did not name Del Webb and Pulte as parties, but rather chose to sue only the subcontractor, South Carolina State Plastering. In the *Grazia* case, Judge Early struck/dismissed the class allegations from the complaint because of a conflict between the Act and SCRCF 23. (Attached hereto as Exhibit B.) (That decision has been appealed, and we are awaiting an opinion from the South Carolina Supreme Court.)

After the Motion for Class Certification in the *Oros* case was denied (and after the *Grazia* case was filed, but before the class allegations were struck) plaintiffs' counsel

filed approximately 100 individual lawsuits with the same basic stucco allegations.¹ After the class allegations in *Grazia* were struck, plaintiffs' counsel filed several more cases. These individual cases (filed both before and after the class allegations were struck in *Grazia*), herein referred to generally as Sun City Stucco Cases, have all recently been assigned to Judge Baxley.

At issue in all of the Sun City Stucco Cases is the amount and detail of information that must be provided by the homeowner to the contractor in order to satisfy the notice requirements of the Right to Cure Act. It is undisputed that plaintiffs' counsel have sent letters to defense counsel which each purport to be "Notice Pursuant to S.C. Code § 40-59-840" listing each address for which plaintiffs have filed an action. For some cases the letter was sent prior to the filing of the litigation and for others the letter was sent after. In EVERY CASE, plaintiffs have entered into a consent order stating that: "Plaintiff(s) in the above referenced case filed their action before first complying with the requirements of South Carolina Code § 40-59-810, *et seq.*" and agreed that the case should be stayed. However, plaintiffs in various cases apparently claim that the notice requirements of the Act have been satisfied, while defendants disagree. Defendants request that the Court rule that plaintiffs have not satisfied the notice requirements of the Act and dismiss or stay the individual actions pending compliance with the Act.

¹ The common denominator in all of this stucco litigation is plaintiffs' counsel. The same four lawyers that represented the plaintiffs in *Oros* and *Grazia* have filed numerous individual stucco cases (single house cases without class allegations.) These lawyers will be referred to herein as "plaintiffs' counsel."

II.

OVERVIEW OF THE RIGHT TO CURE ACT

A. LEGISLATIVE INTENT OF THE RIGHT TO CURE ACT.

In 2003, the General Assembly passed Act 82—The Right to Cure Act. The Act was prefaced with the following specific legislative intent:

Whereas, the General Assembly finds that South Carolina needs an alternative method to resolve legitimate construction disputes that would reduce the need for litigation, while adequately protecting the rights of homeowners; and

Whereas, the General Assembly declares that an effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the construction professional that the claimant asserts is responsible for the defect and providing the construction professional with the opportunity to resolve the claim without litigation. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina: Procedures to resolve dwelling construction defects.

Act 82, 2003 Acts and Jt. Resolutions, p. 943.

B. THE WORKINGS OF THE RIGHT TO CURE ACT.

The provisions of the Act are straightforward. Sections 40-59-840 and -850 provide the substance of the Act. Together these two statutes set forth the process whereby the pre-litigation "alternative dispute resolution" is to occur. Section 40-59-840 sets the stage for the alternative dispute resolution. It begins by requiring the homeowner to place the contractor on notice, at least ninety days **before** commencing legal action, that the homeowner believes a construction defect exists in his home: "[T]he claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor." Section 40-59-840.

Section 40-59-840 then sets forth what the notice of claim must include. The notice must contain: (1) the assertion that the homeowner claims a construction defect;

(2) "a description of the claim . . . in reasonable detail"; and (3) "a description of any results of the defect, if known."²

Section 40-59-840 also provides the contractor with the option of seeking clarification if it believes the notice is not sufficiently detailed. The contractor must submit a request for clarification within fifteen days of receiving the claim. After the homeowner responds to the clarification request (or if no clarification is sought), the remaining steps of the alternative dispute resolution may begin.

Section 40-59-850 provides four options for the contractor, and the contractor has thirty days from the point when it and the homeowner reach consensus on the nature of the construction defect, to select one of these options. The contractor may: (1) "inspect;" (2) "offer to remedy;" (3) "offer to settle;" and/or (4) "deny the claim."

If the contractor decides to inspect the house, then the statute requires the homeowner to make open his house for a reasonable amount of time in order for the inspection to occur. If the contractor offers to remedy, or settle, then § 40-59-850(B) requires the homeowner to respond to the offer within ten days. Finally, if the contractor denies the claim, or if settlement fails, § 40-59-850(C) provides that the homeowner may then commence legal action against the contractor.

² Section 40-59-840 states as follows:

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.

As stated by the General Assembly, the entire purpose of the Act is to avoid litigation. By forcing the homeowner to give reasonably detailed notice of the alleged construction defect to the contractor prior to litigation, the Act allows the parties the opportunity and ability to settle the claim prior to a lawsuit being filed.

III.

PROCEDURAL HISTORY – AMADEO CASE

On February 13, 2009, plaintiffs' counsel sent a letter to undersigned defense counsel. (Attached hereto as Exhibit C). Appended to the notice of claim was a list of houses located in Sun City, including the Amadeo house.

On February 27, 2009, Del Webb counsel responded to plaintiffs' counsel's letter indicating that it was insufficient notice and requesting clarification. (Attached Exhibit D).

Plaintiffs never responded to the letter.

On June 17, 2009, plaintiffs filed the Amadeo lawsuit.

On August 26, 2009 Defendants filed their first motion to dismiss or stay in Amadeo.

On January 20, 2010, the Court signed the parties' Consent Order Staying Case. The order indicated that the plaintiffs had not complied with the Act. (See Order attached hereto as Exhibit E.)

Plaintiffs never again attempted to comply with the Act.

On April 20, 2010, the stay lifted upon its own terms.

On May 20, 2010, Del Webb made the present second motion to dismiss or stay this lawsuit pending compliance with the Right to Cure Act.

IV.

PLAINTIFFS HAVE NOT COMPLIED WITH THE NOTICE PROVISIONS OF THE ACT

A. PLAINTIFFS HAVE ADMITTED THAT THE FEBRUARY 13, 2009 LETTER DID NOT COMPLY WITH THE ACT.

The February 13, 2009 letter was sent 90 days prior to plaintiffs filing this action. However, the substance of the letter does not comply with the Act. In the Consent Order entered into (Exhibit E), plaintiffs agreed that they had not complied with the Act prior to filing the Action. Thus, it is undisputed that the February 13, 2009 letter is insufficient. Thereafter, within the 90 days provided by the order for plaintiffs to comply with the Act, plaintiffs did not provide any additional notice or information to defendants. Accordingly, the plaintiffs have still not complied with the Act.

B. PLAINTIFFS FAILED TO REASONABLY DESCRIBE THEIR ALLEGED CONSTRUCTION DEFECTS AND THE RESULTING DAMAGE.

Initially, plaintiffs' description of the alleged construction defect was so broad as to not give defendants an understanding of their claim. Plaintiffs' counsel, presumably intentionally being extremely broad as the "notice" refers to numerous houses on the attached list, merely states that "the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints ...[and] the stucco was improperly mixed" Without some indication of where, why or how, defendants have no way of evaluating such a broad claim. Accordingly, defendants wrote to plaintiffs to indicate that the notice was insufficient. (See Exhibit D.)

Further, § 40-59-840 sets forth that the notice must contain "a description of any results of the defect, if known." Again, plaintiffs' letter referred to a list of numerous houses and thus was very general. Additionally, experts utilized by plaintiffs' counsel in the *Oros* case admitted that many houses do not have any cracks in the stucco (or any

other known damage). Presumably for such no damage cases, the Act specifically allows a homeowner to indicate that he is not aware of any results from the alleged defects. However, plaintiffs' letter did not include either 1) a reasonably detailed statement describing the results of any alleged defect; or 2) a statement that the homeowner does not know of any results of the alleged defects on the house. Without one of the above, a notice letter would not comply with the Act.

C. PLAINTIFFS FAILED TO ANSWER DEL WEBB'S REQUEST FOR CLARIFICATION.

After the defendants received the February 13, 2009, letter sent by plaintiffs' counsel, they responded with a letter seeking clarification from any homeowners that were represented by plaintiffs' counsel. (See Exhibit D.) As the letter makes clear, Del Webb does not believe that proper notice was provided under the Act. However, if the notice was proper, the letter requested clarification from the homeowners.

The homeowners failed to respond to the request for clarification. As noted above in Part III.B., § 40-59-840 gives the contractor the right to seek clarification but mandates that the contractor request the clarification within fifteen days of receiving the notice of claim letter. The undersigned requested clarification within 15 days.

Section 40-59-840 is silent respecting the responsibilities of the homeowner when presented with a request for clarification. Fortunately, the inquiry is straightforward. Since plaintiffs never responded to the request, the only question is whether the Act requires a homeowner to answer a request for clarification. The General Assembly does not place language in a statute that has no meaning. Accordingly, it follows that if the General Assembly gave a contractor the right to request clarification, then it must have meant for the homeowner to reply. Otherwise, how would the process of settling construction disputes out of court ever occur if the

homeowner never clarified what was wrong with the home. Because there was no reply, plaintiffs have not complied with the Act.

V.

THIS LAWSUIT SHOULD BE DISMISSED OR STAYED PENDING COMPLIANCE WITH THE ACT

Plaintiffs were aware of the Act prior to filing this lawsuit, but nonetheless have pursued this lawsuit in a manner contrary to the requirements of the Act. Plaintiffs have made a decision not to comply with the Act—possibly for some strategic reason unknown to Del Webb. What is clear is that it is undisputed that the letter of February 13, 2009 did not comply with the Act. This case and the other Sun City Stucco Cases should be either dismissed or stayed pending proper compliance with the Act. This compliance should include specific defect allegations and specific resulting damage allegations for each specific house (as requested in the letter from Del Webb requesting clarification). This specific information is needed so that 1) Del Webb may properly evaluate plaintiffs' claims, and 2) Del Webb may then inspect the house to determine whether an offer to repair/settle should be made.

VI.

CONCLUSION

Del Webb respectfully requests that this Court strictly enforce the provisions of the Act as to all Sun City Stucco Litigation plaintiffs. Del Webb wants to try to resolve any legitimate claims through this pre-litigation resolution process. But, in order to make the procedure work, Del Webb needs the information required by the Act. Del Webb has a hard time believing that none of the 130-plus plaintiffs want to resolve their claim without litigation. Accordingly, Del Webb requests that the Court enforce the Act as to the plaintiffs so that Del Webb may have the opportunity to try to resolve the

dispute outside of litigation. Del Webb requests that this case be either dismissed for failure to satisfy a condition precedent or stayed pursuant to the terms of the Act.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

By



A. Victor Rawl, Jr., (SC009261)

Andrew G. Melling (SC009521)

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Attorneys for Defendant Del Webb

Communities, Inc.

Dated: August 13, 2010
Columbia, South Carolina

SEGUI LAW FIRM, LLC

ATTORNEY AT LAW
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PHILLIP W. SEGUI, JR.

Tel. (843) 884-1865
Email: psegui@segulawfirm.com

February 13, 2009

Via U.S. Mail and Electronic Mail

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Christy E. Mahon, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 122129
Columbia, SC 29211

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McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

RECEIVED

FEB. 18 2009

McNair Law Firm, PA.

cc: MR
1742

RE: South Carolina State Plastering, LLC and Peter Conley, individually, Del Webb Communities, Inc., and Pulte Homes, Inc.

Dear Counsel:

Please be advised that you are hereby served with NOTICE Pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied at the properties on the attached list is defective. To satisfy the requirements of this statute, you are notified that:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

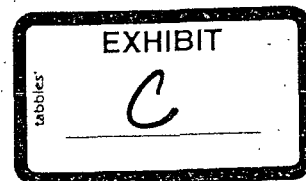
The results of these defects are cracking, water penetration, corrosion over time, necessity for the replacement of the entire exterior skin of the houses, depreciation and loss of use.

Should you require any additional information regarding this matter, please feel free to give me a call.

Sincerely,



Phillip W. Segui, Jr.



PWS/lwc

Enclosure

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure) – via electronic mail only
Michael S. Seekings, Esquire (w/enclosure) – via electronic mail only
) John T. Chakeris, Esquire (w/enclosure) – via electronic mail only

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Allan A. Crystal	40 Concession Oak Drive Bluffton, SC 29909
Thomas E. Dunn Mary T. Dunn	98 Doncaster Lane Bluffton, SC 29909
James F. Gibb	32 Bailey Lane Bluffton, SC 29909
Lois W. Hansen	37 Bailey Lane Bluffton, SC 29909
Noah Rosenstein Mary Helen Rosenstein	16 Biltmore Drive Bluffton, SC 29909
Joel L. Serkes Janet N. Serkes	58 Falmouth Way Bluffton, SC 29909
Charles K. Sotire Bonnie K. Sotire	17 Baldwin Lane Bluffton, SC 29909
George W. Vence Sharon L. Vence	27 Coronado Ct. Bluffton, SC 29909
Paul Weisslitz Selma Weisslitz,	63 Tallow Drive Bluffton, SC 29909
Martha G. Westerfield	38 Bailey Lane Bluffton, SC 29909
Christine H. Wigg Ann Clark	44 Lazy Daisy Drive Bluffton, SC 29909
Carole Tobey Mullins	44 Rose Bush Lane Bluffton, SC 29909
Nathan A. Parks Theda Harris Parks	10 Stovell Lane Bluffton, SC 29909
Louis J. Valente Jean M. Valente	157 Hampton Circle Bluffton, SC 29909
Joseph P. Yaworski Lorraine T. Yaworski	61 Sunbeam Drive Bluffton, SC 29909
James Hoag Veronica Hoag	26 Sunbeam Drive Bluffton, SC 29909
Alexandria Blackman Jenkins	9 Twilight Place Bluffton, SC 29909
Stephen J. McCulloch Dorothy H. McCulloch	61 Thomas Bee Drive Bluffton, SC 29909
Carole Mullins	44 Rose Bush Lane

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Orn Tobey	Bluffton, SC 29909
Nathan A. Parks	10 Stovell Lane
Theda Harris Parks	Bluffton, SC 29909
Robert Stone	47 Star Flower Drive
Suzanne D. Stone	Bluffton, SC 29909
Harlan T. Strohl	119 Stratford Village Way
Mary Strohl	Bluffton, SC 29909
Charles E. Fenske	1 Plymouth Lane
Marianne L. Fenske	Bluffton, SC 29909
Frank E. Woods	35 Rose Bush Lane
Chloe J. Woods	Bluffton, SC 29909
Frederick E. Lewis	120 Thomas Bee Drive
Judith H. Lewis	Bluffton, SC 29909
Anthony D. Amadeo	6 Doncaster Lane
Madeline Amadeo	Bluffton, SC 29909

MENAIR
ATTORNEYS

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February 27, 2009

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W. Jefferson Leath, Jr., Esquire
Leath, Bouch & Crawford, LLP
Post Office Box 59
Charleston, SC 29402

RE: Purported "NOTICE pursuant to SC Code § 40-59-840"

Gentlemen:

I have received letters signed by you that purport to be "Notice Pursuant to SC Code § 40-59-840 of a Claim". . . . One letter appears to reference the 99 cases that you have filed. The other references approximately 26 addresses for which we have not received complaints.

S.C. Code § 40-59-840 (Notice of claim; timing; contents; request for clarification) states as follows:

(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

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mcnair.net

ANDERSON

BLUFFTON

CHARLESTON

CHARLOTTE

COLUMBIA

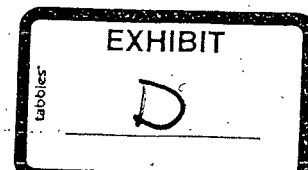
GEORGETOWN

GREENVILLE

HILTON HEAD

MYRTLE BEACH

COLUMBIA 946862v1



0208

(3) a description of any results of the defect, if known.

Initially, your letters do not contain "a statement that the *claimant* asserts a construction defect." Moreover, the letter regarding the 26 homes does not indicate whether you represent all of the owners of the houses listed. Accordingly, the first prong of S.C. Code § 40-59-840 has not been satisfied.

To the extent that your letters do constitute proper notice pursuant to SC Code § 40-59-840, the homeowners that you represent are hereby advised that the construction defects alleged in your letters are not sufficiently stated, and that the following clarifications are hereby requested for each individual house¹:

1. What specific defects are alleged for each specific house. (Specifically what are the defects the homeowner claims with regard to his/her specific house, including, but not limited to, (a) where "through-wall flashing" is missing, (b) where "adequate control joints" are missing, (c) any other alleged problem with the stucco, and (d) any alleged non-stucco defects.
2. For each defect alleged in #1 above, please specifically describe any and all known resulting damage and the specific location of the damage.
3. Please state whether the home has any stucco cracks.
4. Please specifically state the exact location of any cracks on the home which the homeowner is alleging to be evidence of a construction defect (including, but not limited to, the number, approximate length, approximate width, and side of the house upon which the crack is located).
5. For each specific house, please state whether the homeowner alleges that there was improperly mixed stucco on the home. Please indicate the basis for this allegation, and specifically state the type and location of any damage caused by this alleged defect.
6. For each house, please specifically describe any evidence of water penetration or corrosion (and the specific location of each):

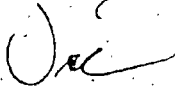
¹ The engineer that you hired, Bob Sisnroy, testified under oath in the Oros matter that he looked at over 200 houses in Sun City Hilton Head and for "several of the houses [he] looked at with regard to [his] Sun City preliminary field observations, ... [he] did not observe any cracks in the stucco on those houses" Further, on the houses on which Mr. Sisnroy did not observe cracks in the stucco, he testified that he was unaware of any damage at those houses to either the stucco or to the underlying substrate. Lastly, Mr. Sisnroy testified that he "could not discern the cause of the cracking on any of the houses at Sun City Hilton Head." See Sisnroy Depo., Vol. IV, p. 79, and Vol. III, p.137. Accordingly, as Mr. Sisnroy agrees that all of the houses are different at Sun City Hilton Head, each homeowner's alleged defects and damages must be stated with specificity in order to give proper notice under § 40-59-840.

John T. Chakeris, Esquire, *et al.*
February 27, 2009
Page 3

M C N A I R
ATTORNEYS

After you provide the clarification requested, please provide available times for each homeowner/address when the contractor may have reasonable access to the dwelling for inspection.

Very truly yours,



A. Victor Rawl, Jr.

AVR,jr./pkj

cc: Michael Seekings, Esquire
Michael J. Laramie, Esquire

Pleading
193

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 09-CP-07-2904

ANTHONY D. AMADEO and MADELINE
AMADEO,

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC, PETER CONLEY,
INDIVIDUALLY, DEL WEBB
COMMUNITIES, INC., and PULTE
HOMES, INC.,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM
TO DEFENDANTS' MEMORANDUM
IN SUPPORT OF SECOND MOTION
TO DISMISS AND/OR STAY ACTION
PENDING PLAINTIFFS'
COMPLIANCE WITH S.C. CODE
§ 40-59-810, *et al*

INTRODUCTION

The Amadeo Plaintiffs are one family among 145 homeowners who currently have suits on the Beaufort County docket against Pulte/Webb for the identical problem with their homes- defectively designed and installed stucco exteriors. This present Motion to Stay or Dismiss is only the latest procedural ploy Pulte/Webb seeks to employ to try to stave off coming to grips with the merits of these cases. In all of these filed cases, the Plaintiffs have fully complied with the requirements of S.C. Code § 40-59-810, *et. seq.*, the "Notice and Right to Cure Act," which grants Pulte/Webb a reasonable time to inspect the homes and make a settlement offer. In fact, Pulte/Webb has inspected all of these homes, made no settlement offers, and now, again in an effort totally directed to delaying tactics, seeks a stay. The Court will have no problem in seeing this Motion for what in fact it is.

ARGUMENT

As stated in Pulte's papers, the applicable Code section is § 40-59-840, which requires the homeowner to 1) assert that he/she claims a construction defect, and to include, (2) "a description of the claim in reasonable detail," and (3) "a description of any results of the defect, if known." This has been accomplished in each individual case filed. The exhibits attached as Exhibit "A" demonstrate this has been done. Not only has this been accomplished, but also, Pulte/Webb in fact has inspected all of these properties with its expert witness, Larry Elkins, of Applied Building Sciences. Not only is Pulte aware of the defect claimed from the Notice and from Mr. Elkins inspection, but also, Pulte has had the opportunity to litigate these identical claims in the Arbitration regarding the case of Joseph and Mary Oros - (C.A. No. 06-CP-07-0454). There Pulte/Webb examined the house in great detail, had its experts testify, and unfortunately lost the claim for the full amount of the repair costs asked for by the Plaintiffs together with an award of Attorneys Fees.

Pulte's Motion here is nothing more than a delay tactic. It wants some kind of written "clarification" of claims of which it is already fully aware and which its experts have studied. Nowhere in the Statute can such a requirement be found, and to Pulte's credit, it doesn't even attempt to advance such a position. It just wants, purely and simple, an indefinite delay of ever having to deal with the merits of these cases, and this is fully understandable if one considers the disaster to Pulte in the one stucco case it has actually litigated. Who can blame it? This, however, is not the purpose of Courts - on the contrary - that purpose is best fulfilled when citizens are allowed to have their day in Court to address the merits of their claims.

CONCLUSION

Pulte/Webb's Motion to Stay has no merit, is simply a delay tactic, and must be denied.

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(843) 884-1865
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: Sept 22, 2010

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was e-mailed to all counsel of record in this proceeding, this 22nd day of September, 2010.

Dolores M. Costasone

SEGUI LAW FIRM, LLC

ATTORNEY AT LAW
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February 13, 2009

Via U.S. Mail and Electronic Mail

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RE: South Carolina State Plastering, LLC and Peter Conley, individually, Del Webb Communities, Inc., and Pulte Homes, Inc.

Dear Counsel:

Please find attached a joint Consent Order of Stay Pursuant to S.C. Code § 40-59-830 so as to allow any inspections and/or offers that your clients would like to make. We expect that you will avail yourselves of this procedure. Please let us know if your clients do not wish these matters stayed in order to inspect/offer, and if not, we will consider the statutory provisions to have been waived.

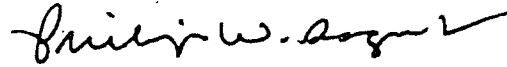
Further, you are hereby served with NOTICE pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied at the properties on the attached list is defective. To satisfy the requirements of this statute, you are notified that:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

The results of these defects are cracking, water penetration, corrosion over time, necessity for the replacement of the entire exterior skin of the houses, depreciation and loss of use.

Should you require any additional information regarding this matter, please feel free to give me a call.

Sincerely,



Phillip W. Segui, Jr.

PWS/lwc

Enclosure

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure) – via electronic mail only
Michael S. Seekings, Esquire (w/enclosure) – via electronic mail only
John T. Chakeris, Esquire (w/enclosure) – via electronic mail only

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

)
) **CONSENT ORDER OF STAY PURSUANT TO**
) **S.C. CODE § 40-59-830**

IN RE:

William A. Abel Martha L. Abel	12 Bishop Street Bluffton, SC 29909	2008-CP-07-3305
Thomas Abruzzo Pauline G. Abruzzo	7 Redtail Lane Bluffton, SC 29909	2008-CP-07-3385
Robert F. Ankney Cinda S. Ankney	6 Sunflower Lane Bluffton, SC 29909	2008-CP-07-3318
Donald R. Antonacio Sandra A. Antonacio	230 Hampton Circle Bluffton, SC 29909	2008-CP-07-3292
Donald M. Avedon Edith Avedon	10 Tyler Lane Bluffton, SC 29909	2008-CP-07-3289
Joseph W. Balcer Patricia A. Balcer	6 Pomegranate Lane Bluffton, SC 29909	2008-CP-07-3306
Terry J. Block Michelle D. Block	61 Murray Hill Drive Bluffton, SC 29909	2008-CP-07-3394
Joseph A. Bongiorno Jean Bongiorno	15 Alston Bay Road Bluffton, SC 29909	2008-CP-07-3308
Daniel J. Boone Rose Ann Boone	43 Sunbeam Drive Bluffton, SC 29909	2008-CP-07-3307
Robert Burns Mary K. Burns	1 Rose Sage Walk Bluffton, SC 29909	2008-CP-07-3352
Janice Brackett	6 Spring Vista Lane Bluffton, SC 29909	2008-CP-07-3396
James G. Cake Gayle M. Cake	1 Sunflower Lane Bluffton, SC 29909	2008-CP-07-3370
James S. Capossela	8 Pomegranate Lane Bluffton, SC 29909	2009-CP-07-00023
Thomas Carlin Patricia Carlin	18 Star Flower Drive Bluffton, SC 29909	2008-CP-07-3361
Roger F. Carlson Mary Jo Carlson	229 Hampton Circle Bluffton, SC 29909	2008-CP-07-3386
Vito J. Carpitella	6 Orchid Lane Bluffton, SC 29909	2008-CP-07-3341
William L. Clark Vicki C. Clark	1 Pinyon Drive Bluffton, SC 29909	2008-CP-07-3393
Susan M. Combes	220 Col. Thomas Heyward Road	2008-CP-07-3383

Consent Order Pursuant to S.C. Code § 40-59-830

	Bluffton, SC 29909	
Helen Connors Elizabeth A. Ford	2 Rose Sage Walk Bluffton, SC 29909	2008-CP-07-3345
Virginia Constantelo	134 Cypress Hollow Bluffton, SC 29909	2008-CP-07-3291
George Craft Jacqueline L. Craft	12 Sunflower Lane Bluffton, SC 29909	2008-CP-07-3372
Richard D. Crowe Carole J. Crowe	307 Col. Thomas Heyward AND 106 Stratford Village Way Bluffton, SC 29909	2008-CP-07-3290 2008-CP-07-3293
Patrick Crowley Kim Halvorsen	3 Aston Court Bluffton, SC 29909	2008-CP-07-3384
William K. Curtis Lynne L. Curtis	8 Sunflower Lane Bluffton, SC 29909	2008-CP-07-3367
Jan L. Dalziel Vera M. Dalziel	7 Twilight Place Bluffton, SC 29909	2008-CP-07-3351
John P. Delaney Eleanor F. Delaney	37 Rose Bush Lane Bluffton, SC 29909	2008-CP-07-3373
Philip A. Desjardins Anna Marie Desjardins	4 Pomegranate Lane Bluffton, SC 29909	2008-CP-07-3301
David Dexas Linda T. Dexas	43 Star Flower Drive Bluffton, SC 29909	2008-CP-07-3397
William J. Dreyer Bonnie J. Dreyer	23 Sundance Lane Bluffton, SC 29909	2008-CP-07-5106
Dorothea E. Dunn	21 Daffodil Ct. Bluffton, SC 29909	2008-CP-07-3326
Kurt Eigenmann Dawn Eigenmann	5 Baldwin Lane Bluffton, SC 29909	2008-CP-07-3309
Manford R. Ewing, Jr., Mollie M. Ewing	19 Daffodil Ct. Bluffton, SC 29909	2008-CP-07-3410
Rose Marie Ferguson	5 Bristol Bay Bluffton, SC 29909	2008-CP-07-3374
A. James Fillion	23 French Garden Lane Bluffton, SC 29909	2008-CP-07-3346
David Fleischhauer	25 Willow Brook Drive Bluffton, SC 29909	2008-CP-07-3382
Arthur V. Foard	26 Stratford Village Way	2008-CP-07-3310

Consent Order Pursuant to S.C. Code § 40-59-830

Aileen D. Foard	Bluffton, SC 29909	
Craig J. Forrest	25 Wandering Daisy Drive	2008-CP-07-3395
Margaret C. Forrest	Bluffton, SC 29909	
Linda A. Grady	56 Tallow Drive	2008-CP-07-3376
	Bluffton, SC 29909	
Leslie Richard Green	37 Lacebark Lane	2008-CP-07-5118
Judith Nancy Green	Bluffton, SC 29909	
Tom S. Greger	1 Tourquay Lane	2008-CP-07-3378
Tonia A. Greger	Bluffton, SC 29909	
Ronald P. Greiner	10 Southern Red Road	2008-CP-07-3401
Rosann M. Greiner	Bluffton, SC 2909	
Edward J. Hassett	2 Pear Ct.	2008-CP-07-3299
Frances Hassett	Bluffton, SC 29909	
Robert J. Hoffman	25 Basket Walk Drive	2008-CP-07-5117
	Bluffton, SC 29909	
Roger W. Jadown	7 Orchid Lane	2008-CP-07-3347
Diane M. Jadown	Bluffton, SC 29909	
Beverly Jarrett	23 Daffodil Ct.	2008-CP-07-3323
	Bluffton, SC 29909	
John Johnson	14 Fairforest Lane	2008-CP-07-3344
Shirley Johnson		
Charles K. Kaminowitz	646 Cypress Hills Drive	2008-CP-07-3312
Phyllis Kaminowitz	Bluffton, SC 29909	
Fred J. Kammerer	74 Stratford Village Way	2008-CP-07-3387
Grace A. Kammerer	Bluffton, SC 29909	
Edwin Kaponer	166 Stratford Village Way	2008-CP-07-3330
Lourdes Kaponer	Bluffton, SC 29909	
Ruth Kashine	24 Basket Walk	2008-CP-07-3342
	Bluffton, SC 29909	
Thomas B. Lehrer	76 Stratford Village Way	2008-CP-07-3313
Eileen S. Lehrer	Bluffton, SC 29909	
Edwin D. Leinberger	13 Seburn Drive	2008-CP-07-3321
	Bluffton, SC 29909	
Benjamin Liberman	30 Wandering Daisy Drive	2008-CP-07-3405
Sheila F. Libermann	Bluffton, SC 29909	
James L. Lunn	46 Biltmore Drive	2009CP-07-00021
Patricia A. Lunn	Bluffton, SC	
Scott K. Madison	7 Spring Vista Lane	2008-CP-07-3404

Consent Order Pursuant to S.C. Code § 40-59-830

JoAnn M. Madison	Bluffton, SC 29909	
Martin J. Mak	15 Cheswell Ct.	2008-CP-07-3322
Alberta F. Mak	Bluffton, SC 29909	
Charles E. Maloney	30 Sundance Lane	2008-CP-07-3302
Margaret V. Maloney	Bluffton, SC 29909	
Edmond P. Martin	216 Col. Thomas Heyward	2008-CP-07-3303
Patricia L. Martin	Bluffton, SC 29909	
Robert W. Matile	26 Sundance Lane	2008-CP-07-3390
Madelon E. Matile	Bluffton, SC 29909	
Robert H. McElfresh	53 Stratford Village Way	2008-CP-07-3317
Gisela L. McElfresh	Bluffton, SC 29909	
Donald R. McGowan	5 Pomegranate Lane	2008-CP-07-3402
Dolores A. McGowan	Bluffton, SC 29909	
John J. McNamara	38 Sunbeam Drive	2008-CP-07-3339
Kathleen M. McNamara	Bluffton, SC 29909	
M. Elaine Michaud	3 Orchid Lane	2008-CP-07-3328
	Bluffton, SC 29909	
Samuel C. Mullins	15 Tourquay Lane	2008-CP-07-3316
	Bluffton, SC 29909	
Roger Lee Myers	48 Murray Hill Drive	2008-CP-07-3391
Linda H. Myers	Bluffton, SC 29909	
Daniel R. Natale	24 Vespers Way	2008-CP-07-3407
Doris W. Natale	Bluffton, SC 29909	2008-CP-07-3406
	AND	
	30 Fenwick Drive	
	Bluffton, SC 29909	
James J. O'Donnell	50 Bishop Street	2008-CP-07-3403
Grace L. O'Donnell	Bluffton, SC 29909	
Martin D. O'Donnell	21 Seburn Drive	2008-CP-07-3329
Catherine M. O'Donnell	Bluffton, SC 29909	
John S. Ott	7 Amaryllis Lane	2009-CP-07-00022
MaryAnn H. Ott	Bluffton, SC 29909	
Ralph E. Perkins	14 Crescent Creek Drive	2008-CP-07-3350
Linda J. Perkins	Bluffton, SC 29909	
John S. Porter	8 Milkmaid Lane	2008-CP-07-3398
Edith M. Porter	Bluffton, SC 29909	

Consent Order Pursuant to S.C. Code § 40-59-830

Heinrich J. Propfe Florika H. Propfe	46 Concession Oak Drive Bluffton, SC 29909	2008-CP-07-3366
Richard A. Rodman Rosalie M. Rodman	17 Willow Brook Bluffton, SC 29909	2008-CP-07-3314
Ronnie Beth Rump Hillary K. Walla	15 Rainwater Lane Bluffton, SC 29909	2008-CP-07-3368
Howard C. Sadowsky Janet Sadowsky	19 French Garden Lane Bluffton, SC 29909	2008-CP-07-3389
Donald Sbrocco Ann Sbrocco	80 Nightingale Lane	2008-CP-07-3331
Gary L. Scheuerman Helen Scheuerman	131 Lazy Daisy Drive Bluffton, SC 29909	2008-CP-07-3365
James F. Smith, Jr. Patricia A. Smith	23 Seburn Drive Bluffton, SC 29909	2008-CP-07-3348
Ronald G. Southworth Patricia W. Southworth	510 Col. Thomas Heyward Road	2008-CP-07-5116
Phillip Stein Thelma Stein	52 Basket Walk Drive Bluffton, SC 29909	2008-CP-07-3408
Barbara Montgomery Stewart	59 Hampton Circle Bluffton, SC 29909	2008-CP-07-3388
Bernard Stief Margaret Stief	226 Col. Thomas Heyward Bluffton, SC 29909	2008-CP-07-3327
Edward H. Stoops Wanda M. Stoops,	8 Tyler Lane	2008-CP-07-5114
George R. Swank Patricia Swank	19 Rainwater Lane Bluffton, SC 29909	2008-CP-07-3325
Marsha Fay Tarih	14 Duxbury Lane Bluffton, SC 29909	2008-CP-07-3343
Moses W. Thompson Sara Thompson	8 Wandering Daisy Drive Bluffton, SC 29909	2008-CP-07-3400

Consent Order Pursuant to S.C. Code § 40-59-830

Wallis Y. Washington	21 Basket Walk Drive Bluffton, SC 29909	2008-CP-07-3355
Anthony J. Weber Joan Weber	51 Biltmore Drive Bluffton, SC 29909	2008-CP-07-3392
Robert C. Wessel, Sr., Judith R. Wessel	26 Sunflower Court Bluffton, SC 29909	2008-CP-07-3324
Michael Wolffe Marianne Wolffe	39 Rose Bush Lane Bluffton, SC 29909	2008-CP-07-3320
John J. Yuhasz	10 Raindrop Lane Bluffton, SC 29909	2008-CP-07-3399

Consent Order Pursuant to S.C. Code § 40-59-830

Upon joint Motion of the Parties, pursuant to S.C. Code § 40-59-830, the parties agree that the above cases are stayed for a period of 90 days to permit the Defendants to exercise any and all of the matters enumerated in S.C. Code § 40-59-850.

AND IT IS SO ORDERED

Chief Administrative Judge
Fourteenth Judicial Circuit

Charleston, South Carolina

_____, 2009

Consent Order Pursuant to S.C. Code § 40-59-830

SEGUI LAW FIRM, LLC

PHILLIP W. SEGUI, JR.
864 Lowcountry Blvd., Suite A
Mt. Pleasant, SC 29464
(843) 884-1865
pseguilawfirm.com

LEATH, BOUCH, CRAWFORD & von KELLER, LLP

W. JEFFERSON LEATH, JR.
MICHAEL S. SEEKINGS
P.O. Box 59
Charleston, SC 29402
(843) 937-8811
jl@leathbouchlaw.com
mseekings@leathbouchlaw.com

And

THE CHAKERIS LAW FIRM

JOHN T. CHAKERIS
231 Calhoun Street
Post Office Box 397
Charleston, SC 29402
(843) 853-5678
john@chakerislawfirm.com

Attorneys for Plaintiffs

Consent Order Pursuant to S.C. Code § 40-59-830

Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 122129
Columbia, SC 29211
(803) 256-2233
eak@swblaw.com
cem@swblaw.com

Attorneys for Defendants South Carolina State
Plastering, LLC and Peter Conley, individually

Consent Order Pursuant to S.C. Code § 40-59-830

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211
(803) 799-9800

Attorney for Defendants Del Webb Communities, Inc.
and Pulte Homes, Inc.

SEGUI LAW FIRM, LLC

ATTORNEY AT LAW
864 LOWCOUNTRY BLVD., SUITE A
MT. PLEASANT, SOUTH CAROLINA 29464

PHILLIP W. SEGUI, JR.

Tel. (843) 884-1865

Email: psegui@seguilawfirm.com

February 13, 2009

Via U.S. Mail and Electronic Mail

Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 122129
Columbia, SC 29211

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

RE: South Carolina State Plastering, LLC and Peter Conley, individually, Del Webb Communities, Inc., and Pulte Homes, Inc.

Dear Counsel:

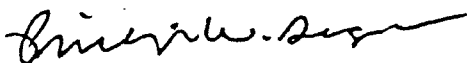
Please be advised that you are hereby served with NOTICE Pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied at the properties on the attached list is defective. To satisfy the requirements of this statute, you are notified that:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

The results of these defects are cracking, water penetration, corrosion over time, necessity for the replacement of the entire exterior skin of the houses, depreciation and loss of use.

Should you require any additional information regarding this matter, please feel free to give me a call.

Sincerely,



Phillip W. Segui, Jr.

PWS/lwc
Enclosure

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure) – via electronic mail only
Michael S. Seekings, Esquire (w/enclosure) – via electronic mail only
John T. Chakeris, Esquire (w/enclosure) – via electronic mail only

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Allan A. Crystal	40 Concession Oak Drive Bluffton, SC 29909
Thomas E. Dunn Mary T. Dunn	98 Doncaster Lane Bluffton, SC 29909
James F. Gibb	32 Bailey Lane Bluffton, SC 29909
Lois W. Hansen	37 Bailey Lane Bluffton, SC 29909
Noah Rosenstein Mary Helen Rosenstein	16 Biltmore Drive Bluffton, SC 29909
Joel L. Serkes Janet N. Serkes	58 Falmouth Way Bluffton, SC 29909
Charles K. Sotire Bonnie K. Sotire	17 Baldwin Lane Bluffton, SC 29909
George W. Vence Sharon L. Vence	27 Coronado Ct. Bluffton, SC 29909
Paul Weisslitz Selma Weisslitz	63 Tallow Drive Bluffton, SC 29909
Martha G. Westerfield	38 Bailey Lane Bluffton, SC 29909
Christine H. Wigg Ann Clark	44 Lazy Daisy Drive Bluffton, SC 29909
Carole Tobey Mullins	44 Rose Bush Lane Bluffton, SC 29909
Nathan A. Parks Theda Harris Parks	10 Stovell Lane Bluffton, SC 29909
Louis J. Valente Jean M. Valente	157 Hampton Circle Bluffton, SC 29909
Joseph P. Yaworski Lorraine T. Yaworski	61 Sunbeam Drive Bluffton, SC 29909
James Hoag Veronica Hoag	26 Sunbeam Drive Bluffton, SC 29909
Alexandria Blackman Jenkins	9 Twilight Place Bluffton, SC 29909
Stephen J. McCulloch Dorothy H. McCulloch	61 Thomas Bee Drive Bluffton, SC 29909
Carole Mullins	44 Rose Bush Lane

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Om Tobey	Bluffton, SC 29909
Nathan A. Parks	10 Stovell Lane
Theda Harris Parks	Bluffton, SC 29909
Robert Stone	47 Star Flower Drive
Suzanne D. Stone	Bluffton, SC 29909
Harlan T. Strohl	119 Stratford Village Way
Mary Strohl	Bluffton, SC 29909
Charles E. Fenske	1 Plymouth Lane
Marianne L. Fenske	Bluffton, SC 29909
Frank E. Woods	35 Rose Bush Lane
Chloe J. Woods	Bluffton, SC 29909
Frederick E. Lewis	120 Thomas Bee Drive
Judith H. Lewis	Bluffton, SC 29909
Anthony D. Amadeo	6 Doncaster Lane
Madeline Amadeo	Bluffton, SC 29909

SEGUI LAW FIRM, LLC

ATTORNEY AT LAW
864 LOWCOUNTRY BLVD., SUITE A
MT. PLEASANT, SOUTH CAROLINA 29464

PHILLIP W. SEGUI, JR.

Tel. (843) 884-1865
Email: psegui@segulawfirm.com

February 13, 2009

Via U.S. Mail

Del Webb Communities
Registered Agent for Superior Stucco, Inc.
15 Sgt. William Jasper Blvd.
Bluffton, SC 29910

Via U.S. Mail and Electronic Mail

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

RE: Samuel J. Lepore and Brenda F. Lepore v. Superior Stucco, Inc., Del Webb
Communities, Inc., and Pulte Homes, Inc.
Case No: 2008-CP-07-05115
SLF File: 904

Bernard F. McManus and Loretta A. McManus v. Superior Stucco, Inc., Del
Webb Communities, Inc., and Pulte Homes, Inc.
Case No: 2008-CP-07-05111
SLF File: 903

Carson J. Wilcox, Jr. and Mary B. Wilcox v. Superior Stucco, Inc., Del Webb
Communities, Inc., and Pulte Homes, Inc.
Case No: 2008-CP-07-05113
SLF File: 902

Dear Mr. Rawl and the Registered Agent for Superior Stucco, Inc.:

Please find attached a joint Consent Order of Stay Pursuant to S.C. Code § 40-59-830 so as to allow any inspections and/or offers that your clients would like to make. We expect that you will avail yourselves of this procedure. Please let us know if your clients do not wish these matters stayed in order to inspect/offer, and if not, we will consider the statutory provisions to have been waived.

Further, you are hereby served with NOTICE pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied at the properties on the attached list is defective. To satisfy the requirements of this statute, you are notified that:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

The results of these defects are cracking, water penetration, corrosion over time, necessity for the replacement of the entire exterior skin of the houses, depreciation and loss of use.

Should you require any additional information regarding this matter, please feel free to give me a call.

Sincerely,



Phillip W. Segui, Jr.

PWS/lwc
Enclosure

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure) – via electronic mail only
Michael S. Seekings, Esquire (w/enclosure) – via electronic mail only
John T. Chakeris, Esquire (w/enclosure) – via electronic mail only

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
)
)
)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

**CONSENT ORDER OF STAY PURSUANT TO
S.C. CODE § 40-59-830**

IN RE:

Carson J. Wilcox Mary B. Wilcox	8 Pinckney Drive Bluffton, SC 29909	2008-CP-07-05113
Bernard F. McManus Loretta A. McManus	132 Lake Somerset Circle Bluffton, SC 29909	2008-CP-07-05111
Samuel J. Lepore Brenda F. Lepore	5 Doharty Lane Bluffton, SC 29909	2008-CP-07-05115

Upon joint Motion of the Parties, pursuant to S.C. Code § 40-59-830, the parties agree that the above cases are stayed for a period of 90 days to permit the Defendants to exercise any and all of the matters enumerated in S.C. Code § 40-59-850.

AND IT IS SO ORDERED

Chief Administrative Judge
Fourteenth Judicial Circuit

Charleston, South Carolina

_____, 2009

Consent Order Pursuant to S.C. Code § 40-59-830

SEGUI LAW FIRM, LLC

PHILLIP W. SEGUI, JR.
864 Lowcountry Blvd., Suite A
Mt. Pleasant, SC 29464
(843) 884-1865
psegui@segulawfirm.com

LEATH, BOUCH, CRAWFORD & von KELLER, LLP

W. JEFFERSON LEATH, JR.
MICHAEL S. SEEKINGS
P.O. Box 59
Charleston, SC 29402
(843) 937-8811
jl@leathbouchlaw.com
mseekings@leathbouchlaw.com

And

THE CHAKERIS LAW FIRM

JOHN T. CHAKERIS
231 Calhoun Street
Post Office Box 397
Charleston, SC 29402
(843) 853-5678
john@chakerislawfirm.com

Attorneys for Plaintiffs

Consent Order Pursuant to S.C. Code § 40-59-830

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211
(803) 799-9800

Attorney for Defendants Superior Stucco, Inc., Del
Webb Communities, Inc. and Pulte Homes, Inc.

SEGUI LAW FIRM, LLC

ATTORNEY AT LAW
864 LOWCOUNTRY BLVD., SUITE A
MT. PLEASANT, SOUTH CAROLINA 29464

PHILLIP W. SEGUI, JR.

Tel. (843) 884-1865

Email: psegui@segulawfirm.com

April 30, 2009

Via U.S. Mail and Electronic Mail

Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 122129
Columbia, SC 29211

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

RE: South Carolina State Plastering, LLC and Peter Conley, individually, Del Webb Communities, Inc., and Pulte Homes, Inc.

Dear Counsel:

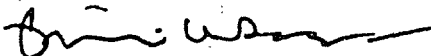
Please be advised that you are hereby served with NOTICE Pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied on behalf of the homeowners of the properties in the attached list is defective. To satisfy the requirements of this statute, you are notified that:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

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Sincerely,



Phillip W. Segui, Jr.

PWS/lwc
Enclosure

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure) – via electronic mail only
Michael S. Seekings, Esquire (w/enclosure) – via electronic mail only
John T. Chakeris, Esquire (w/enclosure) – via electronic mail only

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Darrel Sommerfeld Brenda Sommerfeld	3 Raindrop Lane
William Box Gail Box	4 Sundome Ct.
Henry Dempsey Mary Dempsey	20 Marigold Drive
LeRoy Plank V.L. Plank	40 Rose Bush Lane
Robert Shields Norma Shields	212 Stratford Village Way
William F. Leonard Judith P. Leonard	11 Moonglow Ct.
George Friedman Susan Friedman	30 Star Flower Drive
Lynn Roberts	42 Vespers Way
James Rusin Sharon Rusin	37 Holly Ribbons Circle
Anthony Krusky Dorothea Krusky	39 Vespers Way
Nancy Poulin	27 Basket Walk Drive
Phyllis Wilson	16 Pomegranate Lane
Steven Holub	18 Pomegranate Lane
Joseph J. Lambdin	33 Fallow Drive

SEGUI LAW FIRM LLC

864 Lowcountry Boulevard
Suite A
Mount Pleasant, SC 29464

T 843-884-1865
psegui@segulawfirm.com

October 27, 2009

Via U.S. Mail and Electronic Mail

Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 122129
Columbia, SC 29211

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

RE: South Carolina State Plastering, LLC and Peter Conley, individually, Del Webb Communities, Inc., and Pulte Homes, Inc.

Dear Counsel:

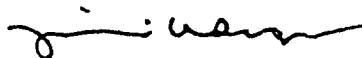
Please be advised that you are hereby served with NOTICE Pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied on behalf of the homeowners of the properties in the attached list is defective. To satisfy the requirements of this statute, you are notified that:

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Should you require any additional information regarding this matter, please feel free to give me a call.

Sincerely,



Phillip W. Segui, Jr.

PWS/esm
Enclosure

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure) – via electronic mail only
Michael S. Seekings, Esquire (w/enclosure) – via electronic mail only
John T. Chakeris, Esquire (w/enclosure) – via electronic mail only

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Grace M. Biagi	36 Whitebark Lane
Arthur C. Haaker	15 Landmark Lane
Louise K. Haaker	
Carl F. Lehmann	139 Stratford Village Way
Nancye M. Lehmann	
Darla Sue Lunsford	16 Bailey Lane
Carole A. Mullins	52 Pineapple Drive
David R. Watkins	34 Whitebark Lane

SEGUI LAW FIRM LLC

864 Lowcountry Boulevard
Suite A
Mount Pleasant, SC 29464

T 843-884-1865
psegui@segulawfirm.com

December 29, 2009

Via U.S. Mail and Electronic Mail

Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 122129
Columbia, SC 29211

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

RE: South Carolina State Plastering, LLC and Peter Conley, individually, Del Webb Communities, Inc., and Pulte Homes, Inc.

Dear Counsel:

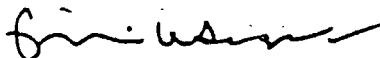
Please be advised that you are hereby served with NOTICE Pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied on behalf of the homeowners of the properties in the attached list is defective. To satisfy the requirements of this statute, you are notified that:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

The results of these defects are cracking, water penetration, corrosion over time, necessity for the replacement of the entire exterior skin of the houses, depreciation and loss of use.

Should you require any additional information regarding this matter, please feel free to give me a call.

Sincerely,



Phillip W. Segui, Jr.

PWS/esm
Enclosure

cc: W. Jefferson Leath, Jr., Esquire (w/enclosure) – via electronic mail only
Michael S. Seekings, Esquire (w/enclosure) – via electronic mail only
John T. Chakeris, Esquire (w/enclosure) – via electronic mail only

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

Alexander W. MacNeil Elizabeth A. MacNeil	154 Cypress Hollow
Ira Kirschner Cynthia Kirschner	146 Stratford Village Way.
Robert J. Dunne Catherine R. Dunne	24 Marigold Drive

SEGUI LAW FIRM PC

864 Lowcountry Boulevard
Suite A
Mount Pleasant, SC 29464

T 843-884-1865
psegui@segulawfirm.com

March 22, 2010

Via U.S. Mail and Electronic Mail

Brent M. Boyd, Esquire
Chris A. Majure, Esquire
Murphy & Grantland, PA
P.O. Box 6648
Columbia, SC 29260

A. Victor Rawl, Jr., Esquire
McNair Law Firm, PA
P.O. Box 11390
Columbia, SC 29211

RE: Superior Stucco, Inc., Del Webb Communities, Inc., and Pulte Homes, Inc.

Dear Counsel:

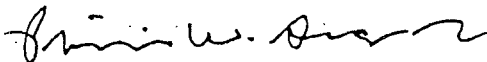
Please be advised that you are hereby served with NOTICE Pursuant to S.C. Code § 40-59-840 of a claim that the stucco applied on behalf of the homeowners of the properties in the attached list is defective. To satisfy the requirements of this statute, you are notified that:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

The results of these defects are cracking, water penetration, corrosion over time, necessity for the replacement of the entire exterior skin of the houses, depreciation and loss of use.

Should you require any additional information regarding this matter, please feel free to give me a call.

Sincerely,



Phillip W. Segui, Jr.

PWS/esm
Enclosure

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Michael S. Seekings, Esquire (w/enclosure) – via electronic mail only
John T. Chakeris, Esquire (w/enclosure) – via electronic mail only

PROPERTY LIST FOR S.C. CODE § 40-59-840 NOTICE

James F. Gibb	32 Bailey Lane Bluffton, SC 29909
Lois W. Hansen	37 Bailey Lane Bluffton, SC 29909
Samuel J. Lepore Brenda F. Lepore	5 Doharty Lane Bluffton, SC 29909
Loretta A. McManus	132 Lake Somerset Circle Bluffton, SC 29909
Martha G. Westerfield	38 Bailey Lane Bluffton, SC 29909
Carson J. Wilcox, Jr. Mary Wilcox	8 Pinckney Drive Bluffton, SC 29909

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 09-CP-07-2904

ANTHONY D. AMADEO and MADELINE
AMADEO,

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC, PETER CONLEY,
INDIVIDUALLY, DEL WEBB
COMMUNITIES, INC., and PULTE
HOMES, INC.,

Defendants.

ORDER DENYING DEFENDANTS'
SECOND MOTION FOR DISMISSAL
AND/OR A STAY OF PROCEEDINGS

11 JAN 11 PM 1:05
J. ERNEST KINARD, JR.
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Just
This case is one of approximately 140 similar construction defect cases presently pending on the Beaufort County docket arising from allegedly defective stucco exterior of homes within the Del Webb development. These cases have been pending for some time, the delay in part occasioned while the parties awaited an appellate decision in a similarly situated case over the issue of whether a class action is permissible under the requirements of S. C. Code Ann. 40-59-810, et seq., the Notice and Right to Cure Dwelling Construction Defect statute¹. In the interim, these cases have been designated as complex by the Hon. J. Ernest Kinard, Jr., Chief Administrative Judge of the Fourteenth Circuit, and assigned to this Court for discovery and trial.

This Court conducted status conferences with and heard arguments from counsel for all parties on the issue of whether Plaintiffs have adequately complied with the Right to Cure statute. The parties were given the opportunity to brief this issue and provide documentation and

¹ *Grazia v. S.C. State Plastering, LLC, et al.*, --- S.E.2d ---, 2010 WL 4008527 (S.C.) (Opinion No. 26882 - heard June 23, 2010 - filed October 4, 2010).

submissions to the Court. Having heard the oral arguments and reviewed the parties' submissions and memoranda, the Court denies the motion for a stay of proceedings for the reasons cited herein.

At the outset in considering this issue, it should be noted that the multiple pending cases have not been consolidated, nor has class status been granted to the Plaintiffs. By Order dated December 10, 2010, this Court has permitted Plaintiffs to amend pleadings to request class status, but no hearings have been held nor decision made on this pending motion. Thus, the decision presently at bar technically controls only Amadeo; however, all parties are aware that there are multiple pending similarly situated civil claims.

The procedural history with regard to the sufficiency of the statutory right to cure notice is as follows:

 On February 13, 2009, Plaintiffs' counsel forwarded a letter to defense counsel purporting to be notice under the Act for all pending cases. The correspondence contained the following language:

The general nature of the construction defects claimed are that the exterior stucco cladding is improperly applied due to lack of through-wall flashing and lack of adequate control joints; that the stucco was improperly mixed so as to cause corrosion of metal components over time; and the concealed barrier wall stucco applied to these houses is inappropriate for the environment and climate.

The results of these defects are cracking, water penetration, corrosion over time, necessity for the replacement of the entire exterior skin of the houses, depreciation and loss of use.

On February 27, 2009, within fifteen days as prescribed within the statute, Defendants' counsel responded in writing to Plaintiffs' counsel's letter indicating that the notice of defect was insufficient and requested clarification. Plaintiffs never responded to this letter.

During the ensuing months, many of the homes in question were inspected by Defendant SC State Plastering, and some by Defendant Del Webb/Pulte. Following inspection, Webb/Pulte's counsel wrote Plaintiffs' counsel again asserting that Plaintiffs had failed to satisfy the notice requirements of §840, and demanding additional house-specific information in approximately six categories with sub-parts. Plaintiffs did not respond to this letter.

On June 17, 2009, Plaintiffs filed the Amadeo lawsuit.

On August 26, 2009 Defendants filed the first motion to dismiss or stay in Amadeo.

On January 19, 2010, the Honorable Marvin Dukes, sitting as a special Circuit Judge, signed a consent Order that had been agreed between the parties entitled "Consent Order To Stay."

On April 20, 2010, the Stay automatically lifted upon the terms of the 1/19/10 Order.

On May 20, 2010, Del Webb filed the present second motion to dismiss or stay pending compliance with the Right to Cure Act.

Defendants in their filed materials now assert that the Plaintiffs failed to provide the amount and detail of information that must be provided by the homeowner to the contractor in order to satisfy the notice requirements of the Right to Cure Act. Plaintiffs respond that they have complied with the Act's notice requirements and are not required to comply with Defendants' additional demands in order to satisfy the Act and to move forward with this litigation. After review, the Court agrees with the Plaintiffs.

§ 40-59-840 of the Act states as follows:

(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 defects; 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.

A literal reading of this statute indicates that all that is required in the Notice is reasonable detail sufficient to determine the general nature of the construction defect, and a description of the results of the defect, if known.

The Notice letters in all cases comply with statutory requirements. The contractor/developer is put on notice of a construction defect, and the details of the defects provide reasonable information sufficient for a contractor to understand the defect(s) being claimed. Additionally, the results of the defects are described.

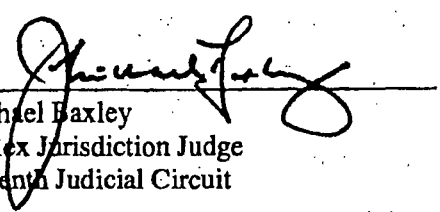
Joel 4
To the extent that the Defendants assert that each homeowner is required to submit a singular, unique, responsive notice, and that the Defendants have the right to another stay in order to satisfy their additional inquiries, the Court disagrees, as no such requirement can be found in the statute. Indeed, while the statute at issue does permit the contractor to request clarification, the statute imposes no requirement on the homeowner to reply, and clearly there is no penalty of stay or dismissal found in the statute if the homeowner does not reply. Stated differently, this Court holds that the statutory notice is not to be used as a discovery device, nor is a claimant required to provide any information beyond what is specified in the language of the statute. Once the notice is provided, and the information required by the statute transmitted, the claimant has discharged his statutory responsibility, and it is then incumbent upon the home builder to undertake an inspection with due diligence to ascertain what is necessary to correct or respond to the alleged defect.

Defendants further assert that in agreeing to a Stay by way of the previous Consent Order before Judge Dukes, Plaintiffs have admitted they are not in compliance with the notice statute, and are now estopped from asserting they are in compliance before this Court. Plaintiffs vigorously dispute this interpretation of the previous Order. This Court finds no such admission by Plaintiffs in the plain language of the previous Order, and is aware that to accept Defendants' reasoning on this issue, the Defendants would now be automatically entitled to a Stay and/or Dismissal, and this case would essentially be over. Clearly, Plaintiffs would not have agreed to such a result, nor does the Court find this instant ruling to be "reversing" the Order of a previous circuit judge.

 Based on the foregoing, this Court finds that Plaintiffs' notice in this case sent pursuant to SC Code 40-59-10, et. seq. represents compliance with statutory mandates. Because the interpretation of the notice statute appears to be a case of first impression in South Carolina, and so that the ultimate purpose of the notice statute might be fulfilled, this Court shall now allow the Defendants the opportunity to remedy and/or settle this case and/or all other similarly situated cases within thirty (30) days of the date of this Order, pursuant to S. C. Code Ann. 40-59-850(A). Because the opportunity for inspections has already been provided, and those inspections which Defendants intend to do should have been completed, each of the Defendants shall have thirty (30) days from the date of service of this Order to offer a remedy, settle with claimant, or deny the claim. Failure to respond shall be deemed a denial of the claim per the terms of the statute, and thereafter, the parties are free to move forward with discovery and trial.

Accordingly, the Defendants' second Motion to Dismiss or Stay is Denied.

IT IS SO ORDERED.



J. Michael Baxley
Complex Jurisdiction Judge
Fourteenth Judicial Circuit

Hartsville, South Carolina

January 6, 2011

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

ROGER F. CARLSON AND
MARY JO CARLSON, on behalf of
themselves and others similarly situated,
Plaintiff(s)

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC, PETER CONLEY,
INDIVIDUALLY, DEL WEBB
COMMUNITIES, INC., and PULTE
HOMES, INC.,
Defendant(s)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 08-CP-07-3386

PLAINTIFFS'
MOTION TO AMEND COMPLAINT

PLEASE TAKE NOTICE that the Plaintiffs hereby move this Honorable Court to issue its Order pursuant to Rule 15, South Carolina Rules of Civil Procedure, permitting them to amend the definition of the proposed Class in the manner set forth in the proposed Second Amended Complaint attached hereto as Exhibit "A."

LEATH, BOUCH & SEEKINGS, LLP

By: Jefferson Leath
W. Jefferson Leath, Jr.
Michael S. Seekings
92 Broad Street
Post Office Box 59
Charleston, South Carolina 29402
(843) 937-8811

THE CHAKERIS LAW FIRM

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

SEGUI LAW FIRM, LLC

Phillip W. Segui, Jr.
864 Lowcountry Blvd., Suite A
Mt. Pleasant, South Carolina 29465
(843) 884-1865
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: Sept. 14, 2011

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was e-mailed to all counsel of record in this proceeding this 14th day of September, 2011.

Dolores M. Catipano

EXHIBIT A

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

ROGER F. CARLSON AND)
MARY JO CARLSON, on behalf of)
themselves and others similarly situated,)
Plaintiff(s))

vs.)

SOUTH CAROLINA STATE)
PLASTERING, LLC, PETER CONLEY,)
INDIVIDUALLY, DEL WEBB)
COMMUNITIES, INC., and PULTE)
HOMES, INC.,)
Defendant(s))

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 08 - CP - 07 - 3386

SECOND AMENDED COMPLAINT
(CLASS ACTION)

(Jury Trial Demanded)

The Plaintiffs above named, hereby amending their Amended Complaint, would
allege and show as follows:

PARTIES

1. The Plaintiffs are citizens and residents of the County of Beaufort,
State of South Carolina, and at all times hereinafter mentioned, own the residence,
located at 229 Hampton Circle, Bluffton South Carolina.

2. That, upon information and belief, the Defendant, South Carolina
State Plastering, LLC is a limited liability company organized and existing under the laws
of the State of South Carolina, and conducted business in Beaufort County at all relevant
times herein and was engaged in the design, building, construction, repair and in
particular the application and/or installation of stucco to the Plaintiffs' residence located
at 229 Hampton Circle, Bluffton, South Carolina.

3. That, upon information and belief, the Defendant, Peter Conley, is
a citizen and resident of Beaufort County and conducts business in Beaufort County and

is the alter-ego of and South Carolina residential specialty subcontractor license holder for South Carolina State Plastering, LLC, and he was engaged in the supervision, oversight, design, construction and/or repair of the residence at 229 Hampton Circle, Beaufort, South Carolina.

4. That, upon information and belief, Defendant, Del Webb Communities, Inc., an Arizona Corporation, is a corporation organized in another state, and is a brand, subsidiary, division or other device of Defendant, Pulte Homes, Inc. Del Webb Communities, Inc., conducts business and is authorized to conduct business in Beaufort County, State of South Carolina, and at all times relevant hereto was engaged in the design, construction, development and/or repair of residential housing and specifically was engaged in the design, development, building, construction and/or the repair of the Plaintiffs' residence located in Del Webb's Sun City Hilton Head Bluffton Township residential development (hereinafter "Sun City").

5. That, upon information and belief, Defendant, Pulte Homes, Inc., is a corporation organized under the laws of another state, and is the parent corporation and/or successor corporation of Del Webb Communities, Inc., and at all times relevant hereto was authorized to conduct business in Beaufort County, South Carolina and was engaged in the design, development, building, construction and/or the repair of residential housing and specifically was engaged in the design, development, building, construction and/or the repair of the Plaintiffs' residence located in Sun City.

JURISDICTION

6. That this Court has jurisdiction over the parties and subject matters hereto and that the allegations out of which this action arises all involve the residence of the Plaintiffs located in the County of Beaufort, State of South Carolina.

FACTUAL BACKGROUND

7. That the exterior of the subject residence is constructed with stucco (commonly referred to as hard coat stucco) that was, upon information and belief, installed as part of the original construction of the Plaintiffs' home in 2002.

8. That the stucco exterior wall system, was not properly installed and contain various defects, problems and deficiencies that are in violation of applicable building codes, not in conformity with specifications and accepted construction industry standards and practices.

CLASS ACTION ALLEGATIONS

9. Plaintiffs, as representatives of the Class defined herein pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure, seek to recover monetary damages from the Defendants for breaches of fiduciary duties, negligence, breach of implied warranties, unfair trade practices, with respect to their duties as a developer in the development, sale of administration, care, and maintenance and/or repair of the buildings and units at issue.

10. The class of Plaintiffs consists of individuals, corporations, partnerships, unincorporated associations or other entities that currently own stucco clad homes in Sun City, Bluffton, constructed between October of 1998 and July of 2007.

11. The Class does not include any former owner of a home in Sun City.

12. The Class is sufficiently numerous that joinder of all members is impractical, and unnecessary in light of indivisible common ownership of the common elements.

13. Plaintiffs will fairly and adequately protect the interests of the Class as Class representatives. The interests of the Class representatives are coincident with, and not antagonistic to, those of the other Class members and Plaintiffs are represented by experienced and able counsel.

14. There are questions of law and fact common to the Class. Common questions of law include the liability of Defendants for, among other things as more particularly described below, negligence, breach of warranties, unfair trade practices and whether these wrongful acts or omissions of all of the Defendants caused or will cause the Class to suffer damages.

15. Plaintiffs' claims are typical of the Class members' claims and derive from a common nucleus of operative facts in that the Defendants, at all times relevant, are or were either charged with duties as a developer and/or in the sale and disclosure of conditions and/or repair of the buildings and units at issue. Each Class member has been or will be similarly injured by the Defendants' wrongful acts or omissions in the development, construction and sale of the houses at issue and the interests and rights of the members, such that the interest of the Plaintiffs, as Class representatives, are consistent with those of the members of the Class.

16. Plaintiffs, for the class claim pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure as Class members; envision no unusual difficulty in the management of this action as a class action.

17. Certification of this action as a class action under Rule 23(a) of the South Carolina Rules of Civil Procedure is appropriate.

FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

(AS TO DEL WEBB COMMUNITIES, INC., and PULTE HOMES, INC.)

18. Each and every allegation contained in Paragraphs 1 through 17 above are incorporated herein by express reference as though fully set forth.

19. That at all times herein, the Plaintiffs, entered into a contract with the Defendants for the construction and/or repair of their residence located in Sun City.

20. That at all relevant times herein, the Defendants, by and through their agents, servants and employees had an obligation and duty to construct, develop, sell and/or repair the residence and to provide materials and services in accordance with the terms and conditions of the contract, applicable building codes, in conformance with accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications.

21. That the Defendants breached the contract with the Plaintiffs by failing to construct said residence with a stucco exterior that was installed in accordance with the terms and conditions of the contract, applicable building codes, in conformance with accepted construction and industry standards and in conformity with component product manufacturer installation instructions and specifications, all of which have directly and proximately caused defects and deficiencies in the residence which will need

to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contract. Such breaches include but are not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair and remodeling of the subject residence;
- b. In failing to adequately supervise the construction, repair and remodeling of the subject residence;
- c. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- d. In constructing, developing, designing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- e. In improperly installing the stucco cladding in violation of the building code, standard building practices and accepted construction industry standards and practices and not in conformity with component product manufacturer installation instructions and specifications;
- f. In installing a home exterior which fails to provide a sufficient barrier against the intrusion of water into the system and adequate avenue for exit of water that gets into the system;
- g. In failing to properly install control joints;
- h. In failing to exercise due care;
- i. In such other deficiencies or failures as will be proven at trial.

22. That as a direct and proximate result of the Defendants' breach of contract with the Plaintiffs, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject residence causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct

and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A SECOND CAUSE OF ACTION

(Negligence)

**(AS TO SOUTH CAROLINA STATE PLASTERING, LLC,
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)**

23. Plaintiffs repeats and realleges its allegations set forth in Paragraphs 1 through 22 above as if set forth herein verbatim.

24. At all times material hereto, the Defendants, through their agents, servants and employees, undertook and were under a duty to the Plaintiffs to construct the home and/or provide the materials and services in accordance with the manufacturer's installation instructions and the building code applicable in Beaufort County, State of South Carolina, and to construct the home in accordance with construction industry practices and with due care.

25. The Defendants were negligent, grossly negligent, careless, reckless, willful, and wanton in constructing, supervising, designing and inspecting the construction of the home and failing to comply with the requirements of the manufacturer's installation instructions, building codes and industry standards and practices, and in failing to employ good supervisory and construction practices, and as a direct and proximate result of which the residence has been constructed and ultimately sold to the Plaintiffs with the defects and deficiencies as now exist therein.

26. The Plaintiffs have sustained damages as a direct and proximate cause of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants in one or more of the following particulars, to wit:

- a. In failing to use due care in the construction, repair and remodeling of the subject residence;
- b. In installing an improper stucco exterior system on the home,
- c. In failing and omitting to meet industry standards in stucco installation and sealant application;
- d. In applying an exterior stucco finish system so as to result in or will result in cracks and sealant failure.
- e. In failing and omitting to properly install wall termination weep flashing and/or a proper weep mechanism;
- f. In failing and omitting to properly install control joints;
- g. In failing and omitting to properly install proper head flashing;
- h. In failing to properly supervise work forces and to properly inspect the work;
- i. In failing to construct the residence according to the applicable building codes and industry standards;
- j. In failing and omitting to use due care on the stucco exterior systems on the residence;
- k. In failing and omitting to install stucco systems which would provide a sufficient barrier against intrusion of water into the system and an adequate avenue for exit of water that gets into the system;
- l. In construction the stucco cladding in violation of standard building practices, accepted construction industry standards, and in conformity with component product manufacturer installation instructions and specifications;

27. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness and wantonness of the Defendants, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded into the subject residence causing and resulting in damage to walls, rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the

Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A THIRD CAUSE OF ACTION

(Breach of Warranty of Habitability, Breach of Warranty Against Latent Defects, Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a Particular Purpose and Breach of Warranty of Merchantability and Serviceability)

**(AS TO SOUTH CAROLINA STATE PLASTERING, LLC,
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)**

28. Each and every allegation contained in Paragraphs 1 through 27 above are incorporated herein by express reference as though fully set forth.

29. That the Defendants implicitly and/or expressly warranted that the subject residence would be habitable and fit for its intended uses as single family residence and that said residence would be designed, developed, manufactured, constructed and repaired in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, accepted building component manufacturing standards and specifications and accepted construction industry standards applicable thereto and that the subject residence would be merchantable, free from latent defects and fit for the particular purpose for which it was built.

30. That Defendants breached said warranties by designing, constructing, and/or repairing the stucco exterior of the subject residence in such manner as to be in violation of applicable building codes, not in conformance with accepted construction and industry standards and not in conformity with component product manufacturer installation instructions. As a direct and proximate result of the Defendants' breach of these warranties, the Plaintiffs have suffered actual, direct, incidental, consequential and

special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make them safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A FOURTH CAUSE OF ACTION

(Unfair Trade Practices)

**(AS TO SOUTH CAROLINA STATE PLASTERING, LLC AND
PETER CONLEY, INDIVIDUALLY, DEL WEBB COMMUNITIES, INC.,
and PULTE HOMES, INC.)**

31. Each and every allegation contained in Paragraphs 1 through 30 above are incorporated herein by express reference as though fully set forth.

32. The Defendants are "persons" within the meaning of South Carolina Code § 39-5-10(a).

33. The Defendants, by their actions in developing, designing, constructing, supervising and overseeing construction activities are engaged in commerce within the meaning of South Carolina Code §39-5-10(b):

34. The Defendants, by their action(s) described hereinabove, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

35. The Defendants' act(s) are capable of repetition and, upon information and belief and in accord with the allegations herein, have been repeated.

36. The Defendants' conduct affects the public interest of the people of South Carolina.

37. The Defendants knew or should have reasonably known, that their conduct violated the Unfair Trade Practices Act.

38. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that moisture has intruded into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

WHEREFORE, the Plaintiffs pray for judgment against the Defendants, South Carolina State Plastering, LLC, Peter Conley, Individually, Del Webb Communities, Inc., and Pulte Homes, Inc., jointly and severally, in a reasonable amount of actual, punitive and treble damages to be determined by the jury; for the attorneys fees and cost of this action; for a prejudgment or post-judgment interest on Plaintiffs' damages; and for such other and further relief as this Court may deem just and proper.

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Charleston, South Carolina

Dated: _____

From: Baxley, J. Michael Law Clerk (Carlie Wilcox) [JBaxleyLC@sccourts.org]
Sent: Wednesday, March 31, 2010 1:59 PM
To: Rawl, Vic; Mullen, Carmen T. Law Clerk (Erin Gentry); 'Rett Kendall'; Jolley, Pam; 'christi petit'
Cc: 'johnny (johnny)'; 'Mike Seekings'; 'W. Jefferson Leath Jr.'; 'Christy E. Mahon'; 'phillip segui' (phillip segui); Buonforte, Mary Ann
Subject: RE: Sun City Cases

Judge Baxley will hold a status conference for all of these cases on Wednesday April 14th at 10:30 am in Beaufort.

-Carli

From: Baxley, J. Michael Law Clerk (Erin O'Neal) [JBaxleyLC@sccourts.org]
Sent: Tuesday, September 14, 2010 11:44 AM
To: Rawl, Vic; 'Rett Kendall'; Mike Seekings
Cc: jl@leathbouchlaw.com; Dolores Catapano; Chakeris, John; Segui, Phillip; Jolley, Pam; Buonforte, Mary Ann; 'Christy E. Mahon'
Subject: RE: Stucco Cases (130+ Cases against Del Webb, Pulte, and SCSP) \

Counsel,

According to our records, during the conference call on 7-13-10, Judge Baxley gave defendants 30 days to brief the right to cure issue (due 8-13-10); the plaintiffs 30 days thereafter to respond (due 9-13-10), and the defendants 10 days thereafter to reply. In addition, Mr. Rawl was to circulate a case management order to consolidate cases (due 8-13-10).

I do not find any of the above documents in our file or database. Could you please re-submit the above, with the exception of the defendants' last reply, of course.

Many thanks for your attention to this matter.

Erin

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Law Clerk to the Honorable J. Michael Baxley
Circuit Court of the Fourth Judicial Circuit
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From: Rawl, Vic [mailto:VRawl@MCNAIR.NET]
Sent: Thursday, September 09, 2010 3:20 PM
To: Baxley, J. Michael Law Clerk (Erin O'Neal); 'Rett Kendall'; Mike Seekings
Cc: jl@leathbouchlaw.com; Dolores Catapano; Chakeris, John; Segui, Phillip; Jolley, Pam; Buonforte, Mary Ann; 'Christy E. Mahon'
Subject: Stucco Cases (130+ Cases against Del Webb, Pulte, and SCSP)

Carli,

Pursuant to our conference call on 7/13/2010, all of the requested briefing should be filed by 9/15/2010. May we schedule a hearing on the outstanding matters in the following date range -- September 20-24; 27-28?

Many thanks!

Vic

MCNAIR
ATTORNEYS

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Shareholder
vrawl@mcnair.net

McNair Law Firm, P.A.
Columbia Office 1221 Main Street | Suite 1800 | Columbia, SC 29201

From: Rawl, Vic

Sent: Sunday, July 24, 2011 4:46 PM

To: 'Baxley, J. Michael Law Clerk (Erin O'Neal)'; W. Jefferson Leath

Cc: EAK@swblaw.com; John Chakeris; Phillip W. Segui Jr.; Mike Seekings; Jolley, Pam; Miller, Dana; Melling, Andrew

Subject: RE: arbitration caselaw - Carlson Case

Erin,

Thank you very much for the opportunity to respond. The KB Homes case supports Pulte's position, not the plaintiffs.

First, the Court states: "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." "To establish prejudice, the non-moving party must show something more than mere inconvenience." Plaintiffs have not demonstrated any undue burden caused by delay. On the contrary, Defendants' moved to compel arbitration 1.5 months after the court allowed the plaintiff to amend the complaint to add class allegations (and possibly 140 additional parties). The Defendants did not consent to the motion to amend, and the court granted plaintiffs' motion. Pursuant to Rule 15(a), the court had to find that the amendment "does not prejudice any other party." Thus, the court just found that plaintiffs delay of time did not prejudice defendants, and allowed the plaintiffs to completely change the character of the case (from single family to class action.) For the plaintiffs to argue that the same amount of time that they waited to amend their complaint would cause prejudice to plaintiffs is disingenuous. Further, the amended complaint constitutes several new claims that were only in existence for 1.5 months at the time the motion to compel arbitration was filed.

Second, the Court states: "Regarding the second factor, we further conclude the parties have engaged in extensive discovery." It is undisputed that Pulte has served no discovery requests, taken no depositions, or otherwise sought any discovery from plaintiffs whatsoever.

Third, Pulte has not sought assistance from the court. Instead, only one consent order was filed in this case on May 15, 2009, wherein the Plaintiffs consented that they filed the action without first complying with the right to cure act and therefore agreed to stay the case. Thereafter, no "litigation" transpired because Plaintiffs never took any further action to comply with the right to cure act. The next time the court was involved in this case was to decide plaintiffs' motion to amend the complaint (at which time Pulte argued that the case was still stayed and the motion was not proper).

Fourth, the Court stated "We conclude a substantial length of time has passed in the instant matter. Appellants waited eighteen months after Davis filed his complaint to file their motion to compel arbitration and stay proceedings. No other South Carolina case has found that a party did not waive their rights to compel arbitration after a year and a half of litigation." While several months passed since the plaintiff served the complaint in this case, the case was stayed for much of the time. Further, the motion was filed only 1.5 months after the court allowed plaintiff to amend the complaint. Lastly, the KB homes court relied heavily on the fact that the defendant had conducted substantial discovery. Pulte is aware of no appellate decision finding waiver where the moving party did not engage in any discovery (as is the case here).

Finally, as indicated above, the newly amended complaint greatly expands the case. Now there will be the requirement of substantial class discovery, class briefing and class argument before discovery is conducted with regard to the merits of the case. For all practical purposes, the case was in its infancy at the time the motion to compel litigation was filed (1.5 months after the amended complaint was served.)

For these reasons, Pulte contends that the KB Homes case supports its argument that the case should be compelled to arbitration.

Respectfully submitted!

Vic

From: Baxley, J. Michael Law Clerk (Erin O'Neal) [mailto:JBaxleyLC@sccourts.org]
Sent: Friday, July 22, 2011 3:09 PM
To: W. Jefferson Leath
Cc: Rawl, Vic; EAK@swblaw.com; John Chakeris; Phillip W. Segui Jr.; Mike Seekings
Subject: RE: arbitration caselaw

Mr. Rawl:

I've offered this case to Judge Baxley. If you would like to distinguish, I want to give you that opportunity. As a practical matter, the Order is done and in a final editing stage. The case did not "influence" Judge Baxley's decision, but you are welcome to respond if you would like. Thank you.

Best,
Erin

From: W. Jefferson Leath [mailto:jl@leathbouchlaw.com]
Sent: Thursday, July 21, 2011 2:48 PM
To: Baxley, J. Michael Law Clerk (Erin O'Neal)
Cc: Rawl, Vic; EAK@swblaw.com; John Chakeris; Phillip W. Segui Jr.; Mike Seekings
Subject: FW: arbitration caselaw

Hi, Erin. Mike's out of town, and I wasn't on the confr. call last week, but did hear that the arbitration order was in the works, and just on the off chance you had not seen it, I'm passing along an excerpt from a just out Ct.App. opinion dealing with arbitration waiver. Best, Jeff Leath



Save a tree. Please don't print this e-mail unless necessary.

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) 2008-CP-07-3386
2008-CP-07-1396

ROGER F. CARLSON AND MARY JOE)

CARLSON)
PLAINTIFFS)
vs.) TRANSCRIPT OF RECORD
)
SOUTH CAROLINA STATE)
PLASTERING, ET AL.)
DEFENDANTS)

and

ANTHONY AND BARBARA GRAZIA)

PLAINTIFFS)
vs.)

)
SOUTH CAROLINA STATE)
PLASTERING, E

ET AL.)
DEFENDANTS)

February 23, 2011
Bennettville, South Carolina

B E F O R E:

THE HONORABLE J. MICHAEL BAXLEY, JUDGE.

APPEARANCE S:

JOHN T. CHAKERIS, ESQUIRE
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W. JEFFERSON LEATH, ESQUIRE
Attorney for the Plaintiff
MICHAEL SEEKINGS, ESQUIRE
Attorney for the Plaintiff

PHILLIP W. SEGUI, JR., ESQUIRE
Attorney for the Plaintiff

CHRISTY E. MAHON, ESQUIRE
Attorney for the Defendant, SC State Plastering

EVERETT KENDALL, II, ESQUIRE
Attorney for the Defendant, SC State Plastering

A. VICTOR RAWL, JR., ESQUIRE
Attorney for the Defendant, Del Web & Polk Homes

DAVID S. COBB, ESQUIRE
Attorney for the Defendant, Kephart Architects

HATTIE O. GORDON
Circuit Court Reporter

1 important. So it's of no offense at all.

2 My understanding of what happened, and perhaps we

3 should put this on the record, when we get to the

4 arbitration. In fact let's do it that way. Let's go

5 ahead and end arbitration and when we get to class

6 certification we will take up that issue first. Let you

7 fully protect your position on the record.

8 MR. KENDALL: Thank you, Your Honor.

9 THE COURT: Fair enough? All right. So let's leave

10 into arbitration. And let's see, the moving party I

11 believe, Mr. Rawl.

12 MR. RAWL: Yes, sir. On behalf of the defendant,

13 Your Honor, I'm Victor Rawl, and I represent Del Webb and

14 Polk Homes. And the defendant made a motion to compel

15 arbitration. For the Court's convenience the defendants

16 have been fully briefed on the issues. We filed the

17 motion for arbitration and incorporated in the memorandum

18 of law attached to the contract. And then we -19

19 unfortunately, it was yesterday, and I apologize for the
20 lateness of it. But we filed a reply brief to it

21 addressing the plaintiff's defenses. I have copies of all

22 of those briefs if you would like extra copies?

23 THE COURT: No, actually, I have your reply brief and

24 I have reviewed it.

MR. RAWL: On behalf of Del Webb, Your Honor, it's

1 language. This particular quote is from Grants v.
2 Magnolia Manor Greenwood. It is a 2009 Supreme Court
3 case. The Supreme Court states, "We observe at the outset
4 the policy of this state to favor the arbitration of
5 disputes. Accordingly, any doubt concerning the scope of
6 arbitrational issues should be resolved in favor of
7 arbitration.

8 In motions to compel arbitration made pursuant to an
9 arbitration clause in a written contract should only be
10 denied where the clause is not successful to any
11 interpretation which covers the asserted dispute." And,
12 again, the plaintiffs in the complaint allege that the
13 contract was for the construction of a residence, and
14 again, all the issues that I just listed in the complaint
15 as it relates to all the issues raised in the complaint.
16 Accordingly, the defendants believe that arbitration
17 should be compelled. Your Honor, I can address the, at
18 this point, the plaintiff's objection for arbitration or I
19 can allow the plaintiff's to raise their objection and
20 after that raise them.

21 THE COURT: Well, we've -- let's do this. You've
22 stated your position. Let me hear from the plaintiffs.
23 I've had the benefit of reading their response and let's
24 let them up their arguments up and then we'll come back to
25 you. But let me ask the other defendants what position do

1 and numerous individual cases. And their argument -- I'm
2 referencing, Your Honor, for the Court's determination
3 just the Carlson case right now.

4 THE COURT: All right.

5 MR. RAWL: With regards to the standard of review for
6 appeals on arbitrations the Supreme Court says that it is
7 no argument, and it is -- and I agree that a denial of
8 arbitration would be immediately appealable.

9 With regards to the discovery Del Webb and Polk have
10 issued absolutely no discovery in the case. They have
11 taken no depositions. They have taken part in no
12 depositions. They have not done any subpoenas. Del Webb
13 has in no way taken advantage of any discovery tools what
14 would be allowed by the Court at this point.
15 You know with regard to the scope of the arbitration
16 provision ---

17 THE COURT: Well, excuse me. Let me break in. You
18 talk about discovery, but what about the contest the right
19 to cure statute that plaintiff says you could never have
20 done in an arbitration setting?

21 MR. RAWL: Well, with regard to testing the right to
22 cure statute, first of all, you know that talks about the
23 case went up to the Supreme Court and back, and that's the
24 Grazia case. Not the Carlson case. What the plaintiffs
25 said is that we've been trying to get a determination on

1 the right to cure, basically, since these cases were filed
2 with regard to the notice provision.

3 The stay in the case was done by consent order where
4 the plaintiffs consented that they had not complied with
5 the Right to Cure Act. The Right to Cure Act says that
6 the plaintiffs are supposed to comply with the provisions
7 of the Right to Cure Act 90 days before even filing suit.
8 And so it's been the defendant's position for this entire
9 case that if they want to enforce their rights under the
10 Right to Cure Act then this case was improperly brought or
11 should be stayed until the defendants get an answer from
12 the plaintiffs as to what's wrong with your house, what is
13 it you're asking us to do.

14 And it's still the defendant's position that that
15 notice and the procedures with regards to the
16 clarification of what claims they are actually making has
17 not been complied with. I understand Your Honor's ruling.
18 That's why we're going forward. As we discussed at the
19 first status conference back in April of 2010, I disclosed
20 to the Court that there were two threshold issues.

21 One regards the notice provision of the right to cure
22 statute and I indicated to the Court that the defendant
23 did not believe that these cases should be even be in
24 Court at this point. And the other arbitration if the
25 case were going to go forward. But I do not believe that

1 by asking the Court to say, "Plaintiff, pursuant to this
2 statute that is meant to avoid litigation" and then to
3 foster a settlement before litigation is filed you need to
4 give the defendant the information required under the
5 statute such as the pre-litigation settlement discussions
6 and go forward.

7 And that is what my client is trying to have the
8 Court to stay the case and dismiss the case so the
9 settlement pre-litigation discussions can go forward. As
10 soon as that issue was determined, you know, my client
11 went forward with this arbitration motion.

12 So, One, we don't believe it's been a delay because
13 after that issue. And Two, it was a threshold issue that
14 we needed the Court's assistance on in order to move any
15 of those cases along. So at this point defendants take
16 the position that, you know, seek the Court's assistance
17 and right to cure act and not arbitration.

18 THE COURT: All right. Thank you.

19 MR. RAWL: I'm also -- with regards to the
20 plaintiff's statement that the Grazia case, if Your Honor
21 does determine jurisdiction to hear it, would not be
22 affected by the arbitration clause. The defendant
23 disagrees with that arbitration clause states that there
24 was such arbitration. Every controversy or claim arising
25 out of or relating to this agreement. The agreement has

1 MR. RAWL: Your Honor, with regard to that same
2 argument about whether or not, you know, certain claims in
3 the complaint would be arbitratable or not and the Supreme
4 Court in Grand v. Magnolia Manner, motion for arbitration.
5 Basically, the scope, unless it is -- unless there is no
6 way that a claim to be acceptable to interpretation
7 covered by clause the burden is left to the Court to -8
the entire case to arbitration.
9 I think that I've covered everything that the
10 plaintiffs have raised. The only other issue they have in
11 my notes is that I don't understand the plaintiff's
12 position that they say the Grazia case certifies that
13 their not going to proceed at all on individual cases that
14 have been filed on behalf of purchasers. I don't know
15 what that means. Does the plaintiff intend to dismiss all
16 the individual claims that are certified or are they are
17 just going to leave them sitting.
18 You know, that I didn't understand the plaintiff's
19 point in saying that if a case, the Grazia class is
20 certified then all of these cases go away. That would be
21 the only other point that I have, Your Honor. I think
22 I've addressed any other points that were raised/
23 THE COURT: All right. Then, ladies and gentlemen,
24 I'm going to take that matter under advisement and rule
25 after further review of these documents in light of the

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material. I also certify that this Record is in compliance with the August 13, 2007 order of the South Carolina Supreme Court.



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ATTORNEYS FOR APPELLANTS

December 12, 2012

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DEC 13 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-07-03386

Roger F. Carlson and Mary Jo Carlson,..... Respondents,

v.

South Carolina State Plastering, LLC,
Peter Conley, Individually, Del Webb
Communities, Inc., and Pulte Homes, Inc., ... Defendants,

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

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served a copy of the Record on Appeal, by depositing a copy in the United States Mail, postage prepaid, on December 13, 2012, and addressed to the attorneys of record, as follows:

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SC Court of Appeals

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