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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. 2007-CP-07-1396

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SC Court of Appeals

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

v.

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

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

v.

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

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

RECORD ON APPEAL

Everett A. Kendall, II
Christy E. Mahon
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
(803)256-2233
Attorneys for Appellant S.C. State Plastering

W. Jefferson Leath, Jr.
Michael S. Seekings
Leath, Bouch and Seekings, LLP
Post Office Box 59
Charleston, South Carolina 29402
(843) 937-8811
Attorneys for Respondents

Robert L. Widener
A. Victor Rawl, Jr.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
Attorneys for Appellants Del Webb
Communities, Inc.
and Pulte Homes, Inc.

David S. Cobb
Turner, Padgett, Graham & Laney, P.A.
Gateway Center, Suite 200
Post Office Box 22129
Charleston, South Carolina 29413
(843) 576-2800
Attorney for Third-Party Defendant Kephart Architects, Inc.

John T. Chakeris
The Chakeris Law Firm
Post Office Box 397
Charleston, South Carolina 29402
(843)853-5678
Attorney for Respondents

Phillip W. Segui, Jr.
Segui Law Firm, LLC
864 Lowcountry Blvd., Suite A
Mt. Pleasant, South Carolina 29464
(843)884-1865
Attorney for Respondents

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FORM 4

STATE OF SOUTH CAROLINA 12 JUN 18 2013 THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

Case No. 2007-CP-07-1396
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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

Plaintiffs,)

v.)

SOUTH CAROLINA STATE
PLASTERING, LLC,)

Defendant,)

and)

SOUTH CAROLINA STATE
PLASTERING, LLC,)

Third-Party Plaintiff,)

v.)

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

Third-Party Defendants.)

**ORDER DENYING SOUTH CAROLINA
STATE PLASTERING, PULTE, AND
DEL WEBB'S MOTION TO ALTER
OR AMEND ORDER DENYING
INJUNCTIVE RELIEF**

Pursuant to Rules 52, 59, 60, and 65, SCRCP, Third-Party Defendants Pulte and Del Webb requested relief from this Court's Order filed May 18, 2012, entitled "Order Vacating Temporary Injunction, Dismissing as Moot Defendants' Motion to Amend Injunction, and Denying Motion to Renew Injunction." Defendant South Carolina State Plastering (hereafter, SCSP) also joined in this motion. After reviewing the motions submitted by the parties and the relevant law, the Court denies the Motions to Alter or Amend the Order Denying Injunctive Relief.

Pulte, Del Webb, and SCSP have also filed an appeal of this Court's Order preliminarily certifying a class issued December 8, 2011. The appealing parties neglected to advise this Court, which has accepted complex jurisdiction of this case, of the pendency of the appeal. This Court proceeded to review and consider the temporary injunction reconsideration issue, and reached a decision. This Court now issues an Order on that issue in the belief that (1) the reconsideration of the temporary injunction denial is not a "matter decided in the [class certification] Order" as contemplated by Rule 241, SCACR, and (2) because the granting or denial of a temporary injunction is immediately appealable pursuant to S.C. Code Ann. §14-3-330, notions of trial and appellate judicial economy require this Court to rule at this time.

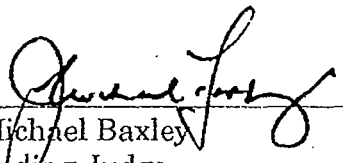
Del Webb, Pulte, and South Carolina State Plastering make two arguments in support of their Motion to Alter or Amend the Order denying an injunction: (1) the Order does not address or rule on all arguments made by Defendant and Third-Party Defendants and (2) the Order denies the motions based on arguments not raised by any party. With respect to the first argument, Defendant and Third-Party Defendants assert that the Order does not address their contention that the named plaintiffs and plaintiffs' counsel have a conflict of interest with the putative class members. It is not necessary for this Court to reach this issue in denying the injunction. Without reaching the merits of this argument, the Court finds that even if this contention is assumed to be true, such would not require the issuance of an extraordinary remedy such as injunction.

With respect to the second argument, the Court finds it wholly without merit, as it is a basic component of American jurisprudence that the Court is not limited to the arguments and proposals set forth by counsel in making any decision pending before the Court, nor in fashioning a remedy as to any issue.

Therefore, for the reasons outlined above, the Court denies the motions of Del Webb, Pulte, and South Carolina State Plastering to Alter or Amend the Order Denying Injunctive Relief.

IT IS SO ORDERED.

Hartsville, SC
June 26, 2012



J. Michael Baxley
Presiding Judge

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

Case No. 2007-CP-07-1396

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

Plaintiffs,)

v.)

SOUTH CAROLINA STATE)
PLASTERING, LLC,)

Defendant,)

and)

SOUTH CAROLINA STATE)
PLASTERING, LLC,)

Third-Party Plaintiff,)

v.)

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

Third-Party Defendants.)

**ORDER VACATING TEMPORARY
INJUNCTION, DISMISSING AS MOOT
DEFENDANTS' MOTION TO AMEND
INJUNCTION, AND DENYING
MOTION TO RENEW INJUNCTION**

2012 MAY 16 PM 1:21
JENNIFER ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This class action concerns allegations of defective stucco on approximately 4000 residences within the Sun City development in Hilton Head, South Carolina. The case has been declared complex and assigned to this Court for disposition. On January 13, 2012, Defendant South Carolina State Plastering ("SCSP") filed a Motion for Temporary Injunction, and on January 18, 2012, Third-Party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. likewise filed a Motion for Injunctive Relief. Both of these motions sought to enjoin Plaintiffs' counsel from communicating with stucco homeowners in Sun City Hilton Head prior to the

expiration of any opt-out period for inclusion in the class. According to Defendants, the motions were filed because Plaintiffs' counsel intended to conduct a "community meeting" with reference to this pending lawsuit, and published notice of such meeting in the local newspaper. Before a hearing could be scheduled on the motions, Plaintiffs' counsel submitted a proposed Order to the Court granting the injunction, presented as a consent Order, and the Court signed Plaintiffs' counsel's proposed order.

After the Court signed and issued the Order, Defendant SCSP and Third-Party Defendants Del Webb and Pulte moved to alter the Order. The Court conducted a hearing on this motion, during which Defendants asserted that the timeframe they had requested for the injunction to remain in place in their motions was different from the one actually outlined in the signed Order presented by Plaintiff's counsel. At that point, the Court learned that Defendants had not in fact consented to the proposed Order submitted by Plaintiffs' counsel.

After considering this issue with the knowledge that there was no true consent among the parties, the Court has determined that the Order was improvidently granted; moreover, after close review, the requested injunction was unilateral in nature and failed to require a bond in the event of Plaintiffs' counsels' failure to abide thereby, which is reversible error. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009); Rule 65, SCRPC. Therefore, the Court hereby vacates the Order Granting Temporary Injunction entered on March 15, 2012. As a result, the Court further now dismisses as moot Defendants' motion to alter or amend that injunction.

After learning that the Court intended to vacate the previous injunction, Defendants have now moved to renew the injunction. A telephone conference was conducted on the record on May 9, 2012 to hear arguments on the issue of whether an injunction should issue. In considering this renewed motion, the Court is aware that class actions serve an important function in our system of civil justice, but they also present opportunities for abuse as well as problems for courts and counsel in the management of cases. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193, 2200 (1981). Therefore, because of the potential for abuse, courts have been given the discretion to "impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." Rule 23, SCRPC; *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). To ensure that these interests are protected, courts may find it necessary to issue orders, like the previous one in this case, that limit communication between the parties and potential members of the class.

But a court's power to issue an order curtailing communication is not unlimited. In fact, one such limitation flows from the framework and general policies contained in Rule 23 itself. As the South Carolina Supreme Court has stated, the specific grant of power to a court under Rule 23(d), SCRCPP, are directed towards notifying the parties of the pending litigation. *Id.* Therefore, while it may be necessary for a court to issue an order limiting communications in certain circumstances, such an order "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in [Rule 23]." *Id.*, citing *Gulf Oil Co.* at 101, 101 S.Ct. at 2200.

Another, and perhaps more important, limitation on a court's authority to enter an order prohibiting communication under Rule 23 emerges from the constitutional rights enshrined in the First Amendment. The impact of Defendants' motion is broad sweeping and effectively constitutes a prior restraint on speech. It enjoins the named Plaintiffs and Plaintiffs' counsel from "communicating with prospective class members regarding" the pending litigation, "publishing any statement" regarding the litigation, and "taking any action intended to advise or inform residents of Sun City Hilton Head of their legal rights." A prior restraint, of course, is subject to a heavy presumption against its constitutionality; in order for the restraint to be valid, it must prevent "direct, immediate, and irreparable damage" and be the least restrictive means of doing so. *New York Times Co. v. U.S.*, 403 U.S. 713, 732-33, 91 S.Ct. 2140, 2150-51 (1971). While the Court is well aware of the constitutional implications of Defendants' motion, this decision is not made upon constitutional grounds.

With regard to the motion for temporary injunction, the Court makes the following specific findings in weighing the need for limitation of communications between Plaintiffs' counsel and putative class members versus a potential interference with the rights of the parties:

1. The Court's ability to control the flow of information within a class action is superimposed upon the foundational democratic principles of the need for a free flow of information within society generally and specifically within the justice system;
2. The motions as filed are unilateral in nature, applying only to Plaintiffs' counsel, raising an immediate question as to the propriety of

disparate treatment of the parties. While Defendants now offer to amend the motion so as to apply to all parties, this does not cure the Court's concerns;

3. This case involves a retirement community where the citizenry is similarly situated as to the construction of their residences by Defendants, and where putative class members have the necessary time, fiscal capability, and level of sophistication to fully participate in this case;

4. This case further involves the most substantial investment that most individuals make in a lifetime, their home, and thus is of core interest. Due to the large number of people involved who live in close proximity to one another, one can anticipate that rumor and misunderstanding will abound. The inability to discuss the issues in this litigation with counsel on either side of the case will result in the potential for confusion and frustration, particularly when individuals are attempting to determine whether or not to opt out of the proposed class;

5. This situation would undermine the confidence of potential litigants in the justice system as the ban on information would be imposed by Court order, as opposed to an agreement between counsel, and the Court finds no reason to impose such a ban;

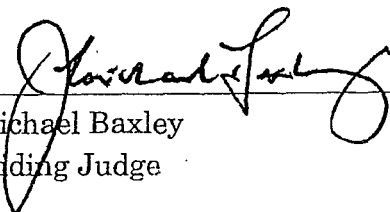
6. The free flow of information, particularly in light of the requirements and directives of the Right to Cure Dwelling Defect Act, S.C. Code Ann. 40-59-810, et. seq., may lead to the settlement of many of these claims without the necessity of joining the class; and,

7. The Defendants have shown no "abuse" by Plaintiffs' counsel in their communications with putative class members, and the mere conjecture that such may occur is insufficient for this Court to impose a ban. *Gulf Oil Co.* at 104, 101 S.Ct. at 2202.

After review and consideration of this issue, the Court does not find that direct, immediate, and irreparable harm will result if Plaintiffs' counsel is allowed to communicate with the residents of Sun City Hilton Head. To the contrary, the Court finds that the interests of justice are better served if all counsel are permitted to discuss this case with prospective and potential members of the class, as the free

flow of information from either side of the case will serve to better inform potential class members as to their rights and the potential to resolve individual claims without the need for litigation prior to the enrollment of the class. For this reason, the Court now declines to issue an injunction, and denies Defendants' motion.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge

Hartsville, South Carolina
May 11, 2012

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McNair Law Firm, PA

RecordonAppeal 0007

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

C/A NO. 07-CP-07-1396

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC.

Defendant.

**ORDER GRANTING
TEMPORARY INJUNCTION**

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

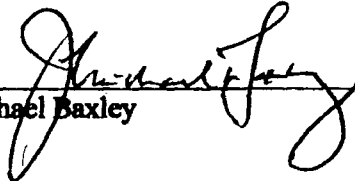
Third-Party Defendants.

Defendant South Carolina State Plastering, LLC, has filed a motion to temporarily enjoin Plaintiffs Grazia, Plaintiff's counsel and their agents and representatives from communicating with prospective Class Members regarding the issues addressed in the Court's Order of December 15, 2011, except as to those persons with whom counsel has an on-going attorney-client relationship.

It is hereby Ordered, Adjudged, and Decreed, that Anthony and Barbara Grazia, their counsel and agents and representatives, are hereby Temporarily Enjoined from the following activities: 1) communicating with prospective class members regarding the contents of or the issues addressed in the Court's Order of December 15, 2011, *except as to those persons with whom counsel has an on-going attorney-client relationship*; 2) publishing any statement interpreting, explaining, or otherwise commenting on the Court's Order of December 15, 2011, to any homeowner in Sun City Hilton head, *except as to those persons with whom counsel has an on-going attorney-client relationship*; 3) taking any action intended to advise or inform residents of Sun City Hilton Head of their legal rights with respect to South Carolina State Plastering, *except as to those persons with whom counsel has an on-going attorney-client relationship*; and 4) taking any action intended to influence the decision of prospective class members whether to opt-out of the putative class, *except as to those persons with whom counsel has an on-going attorney-client relationship*.

This Temporary Injunction shall remain in force until further rulings by the Court concerning issuance of the approved Notice to prospective Class Members, and Exclusion Forms.

AND IT IS SO ORDERED.


J. Michael Baxley

Columbia, South Carolina

Dated: 3/08/12

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 E. JOSEPH
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.

Jan 2
The named Plaintiffs (Anthony and Barbara Grazia) and those they represent as proposed class members are all individuals or legal entities who own stucco-clad residences in the Sun City development of Bluffton, Beaufort County, South Carolina ("Sun City"). There are currently about 140 individual cases already pending in Beaufort County, and Plaintiffs allege there are an approximate additional 4,000 similar housing units that are not yet in litigation. The pending cases have been declared complex and assigned to this Court for disposition. To attempt to individually try the already pending cases and those yet unfiled would be overwhelming to this Court and all judicial resources available within the Fourteenth Judicial Circuit, and has the potential impact of denying meaningful access to the justice system for some of the parties.

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

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

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

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

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

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

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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. Rippl 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

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

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

The Amount in Controversy Meets the Statutory Requirement

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

Responses of the Defendants in Opposition to Class Certification

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

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

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

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

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

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

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

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

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

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

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

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

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

Requirement of Notice to Putative Class Members

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

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

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

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

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

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

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

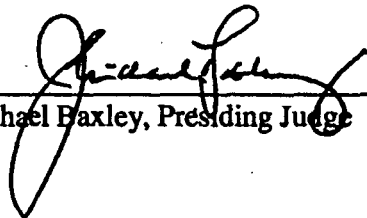
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The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result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

Conclusion

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

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

IT IS SO ORDERED.



J. Michael Baxley, Presiding Judge

Hartsville, South Carolina

December 8, 2011

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

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

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendant.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

JUN -7 2012

3826-6177

DEFENDANT'S MOTION PURSUANT
TO RULES 52, 59, 60, AND 65 OF THE
SOUTH CAROLINA RULES OF CIVIL
PROCEDURE

12 JUN -4 PM 4:10
JENNIFER ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

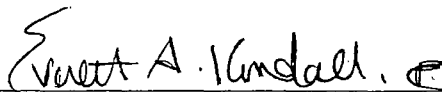
TO: W. JEFFERSON LEATH, JR., ESQUIRE, MIKE SEEKINGS, ESQUIRE, PHILLIP
W. SEGUI, JR., ESQUIRE, JOHN T. CHAKERIS, ESQUIRE, ATTORNEYS FOR
THE PLAINTIFFS AND TO THE PLAINTIFFS ABOVE-NAMED:

YOU WILL PLEASE TAKE NOTICE that the Defendant, South Carolina State
Plastering, LLC, by and through its undersigned attorneys, hereby moves this Court to reconsider,
alter or amend its Order of May 11, 2012, filed May 16, 2012, and received on May 21, 2012
pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The Defendant also moves
pursuant to Rules 52, 60, and 65 of the South Carolina Rules of Civil Procedure. The basis for this

motion is fully set forth in the Motion and Memorandum filed by Third-Party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. and incorporated herein fully by reference. This Motion may further be supported by any Memorandum in Support that may be filed by this Defendant.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



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

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

Columbia, South Carolina
May 31, 2012

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendant.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

**DEL WEBB COMMUNITIES, INC.
AND PULTE HOMES, INC.'S MOTION
TO ALTER OR AMEND ORDER
DENYING INJUNCTIVE RELIEF**

Pursuant to Rules 52, 59, 60, and 65, SCRCP, Third-Party Defendants Pulte and Del Webb respectfully request the following relief from and in connection with this Court's Order, entitled "Order Vacating Temporary Injunction, Dismissing as Moot Defendants' Motion to Amend Injunction, and Denying Motion to Renew Injunction" (the Order), filed May 18, 2012, and received May 21, 2012. The Order (1) does not address or rule on all arguments made by Defendant and Third-Party-Defendants and (2) denies the motions based on arguments not raised by any party. In fact, Plaintiffs never submitted any written opposition to the motions for injunctive relief. Instead, Plaintiffs' counsel sent the court a letter dated March 2, 2012 indicating

that the Plaintiffs consented to the motion and submitted a proposed order granting the motions. See Exhibit A. The court signed the order, but the order did not fully grant the relief requested in the motions for injunctive relief. Accordingly, Defendant and Third-Party Defendants filed motions to amend the order. At the hearing on April 30, 2012, Plaintiffs' counsel again consented to the Defendant's and Third-Party Defendants' motion (and agreed to all relief requested in the original motions for injunctive relief). The court then requested a hearing on the original motions, which was held by telephone on May 9, 2012. At that hearing, Plaintiffs did not repeat their consent to the motions, but they did not raise any of the arguments used as bases in the Order denying the injunction. For the reasons set forth below, it is requested that the court reconsider its order and/or rule on the specific arguments set forth in favor of the injunction.

I. It is respectfully requested that this court specifically reconsider its Order denying the injunction and/or rule upon all grounds raised by Defendant and Third-Party Defendants (if it does not amend its order so as to grant the motion for injunctive relief).

A. The Named Plaintiffs and Plaintiffs' Counsel have a conflict of interest with putative class members.

The primary argument in support of the requested injunction was the conflict of interest caused by the Named Plaintiffs' waiver of claims and causes of action. While every plaintiffs' lawyer has a pecuniary interest in signing up clients, the difference here is that these Plaintiffs' counsel now have a pecuniary interest in the putative class members/ homeowners waiving their rights and claims.¹ The putative class members must waive rights and claims in order to stay in this class. This is not simply a decision about who will represent these homeowners. Rather, the

¹ The Named Plaintiffs and their counsel are not adequate representatives for the class because their interests are adverse to the class. The representatives have waived known claims and damages on behalf of class members in order to certify a class. Specifically, the Named Plaintiffs (1) have waived all claims for known damages related to reimbursement for past expenses for all unnamed putative class members; and (2) have waived the UTPA claims. The class members would be forever barred from raising these waived claims because of the doctrine of *res judicata*. Waiver of known claims is evidence *per se* that the class representatives are inadequate class representatives.

decision is whether to have class counsel represent them and thereby waive claims and causes of action OR have someone else represent them and not waive claims. The conflict of interest is clear, and Plaintiffs' counsel should not be allowed to advise absent class members on their rights in the opt-out process. The South Carolina District Court explains how the waiver of claims and causes of action by class representatives creates a conflict of interest between the class representatives (including class counsel) and the absent class members. *Clark v. Experian Information Sys., Inc.*, 2001 WL 1946329 (D.S.C. March 19, 2001). In the *Grazia* case, it is undisputed that Class Representatives/Counsel are willing to waive claims, damages, and causes of action that belong to class members in order to certify a class. The District of South Carolina found that these types of waivers were evidence that the interests of the class representatives/counsel were antagonistic to those of the absent class members. The District Court stated:

Defendants contend that Plaintiffs cannot satisfy the adequacy of representation requirement since they "have disclaimed and abandoned the other, more substantial claims that proposed class members might have." Defs.' J. Br. in Opp'n to Mot. for Class Certification at 39. These include other potential claims under the FCRA, claims for actual and compensatory damages, claims under state credit-reporting statutes, and state common law claims. *Id.* at 39-40. Defendants argue that, by not bringing these additional claims, absent class members may be forever barred by the doctrine of res judicata. *Id.* at 38.

The Supreme Court and the Fourth Circuit Court of Appeals have long interpreted the adequate representation requirement of Rule 23(a)(4) to preclude certification where a conflict of interest exists between the class representative and class members with respect to the appropriate relief. [*Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (citing cases).] "If the named Plaintiffs have in fact jeopardized the class members' potential claims for [various] damages, they would be deemed to have interests 'antagonistic' to those of the class." *Thompson v. American Tobacco Co.*, 189 P.R.D. 544, 550 (D. Minn. 1999) (citing *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 479-80 (E.D. Pa. 1997)). Such conduct defeats adequate representation since it places absent class members at the risk of having other claims forever barred by res judicata. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (indicating that res judicata may bar a member of a losing class from later filing suit on the same claim).

Plaintiffs concede that "[c]laims for actual damages under the FCRA are not suitable for class treatment. This is because individual factors in proving actual damages and defending against certain defenses would make proving such claims unmanageable." Pls.' Reply to Defs.' J. Br. in Opp'n to Mot. for Class Certification at 27. Plaintiffs attempt to remedy this shortcoming by arguing that "a class member can bring a separate action through an individual suit or decide to opt out of the present litigation." *Id.* The court disagrees. "The ability to opt out of the class is insufficient to protect the rights of putative class members who would want to seek remedies other than those chosen by the [class] representatives." *Small v. Lorillard Tobacco Co.*, 679 N.Y.S. 2d 593, 601-02 (N.Y. App. Div. 1998).

Moreover, the implications of res judicata cannot be ignored. Plaintiffs' efforts to limit their relief to only statutory damages in this case, may, in fact, jeopardize the remaining class members' rights to seek alternative grounds of relief in a subsequent case.

See Clark, 2001 WL 1946329, at *3-*4.

For these reasons, Named Plaintiffs and Plaintiffs' counsel have interests antagonistic to those of the class. This antagonism creates a conflict of interest (where the interests of the class representative and class counsel are antagonistic to those of the class members they seek to represent).

There are many other courts that concur that where causes of action, claims, and/or damages are waived by class representatives (counsel), class representatives (counsel) are deemed to have interests "antagonistic" to those of the class. For example, in *Thompson v. American Tobacco Co.*, 189 F.R.D. 544; 550- 51 (D. Minn. 1999), the court stated:

The Court finds that the named Plaintiffs' efforts to reserve personal injury and damage claims may, in fact, jeopardize the class members' rights to bring such claims in a subsequent case. The governing legal principle is that of res judicata, which precludes subsequent litigation when certain conditions are met. *See Youngstown Mines. Corp. v. Prout*, 266 Minn. 450, 124 N.W. 2d 328, 340 (1963). Under Minnesota law res judicata principles apply to "not only to every matter which was actually litigated, but also as to every matter which might have been litigated, therein." *Id.* (quoting *Bazille v. Murray*, 40 Minn. 48, 41 N.W. 238 (1889); *Swank v. St. Paul City Ry. Co.*, 61 Minn. 423, 63 N.W. 1088 (1895)). Thus, even if the Court permits the reservation of issues in this case, whether a subsequent court would honor such a reservation is, at best, undeterminable at this time. *See Small v. Lorillard Tobacco Co.*, 252 A.D. 2d 1, 679 N.Y.S. 2d 593, 601- 602 (1 Dept., 1998). A subsequent court may very well find that individual injury and damage claims should have been litigated in this lawsuit. Indeed, as

recognized in *Small*, "[R]epresentatives who 'tailored the class claims in an effort to improve the possibility of demonstrating commonality' obtained this 'essentially cosmetic' benefit only by 'presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.'" *Id.* (quoting *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606- 607 (S.D.N.Y.1982)). This possible prejudice to class members is simply too great for the court to conclude that the named Plaintiffs' interests are aligned with those of the class.

Thompson v. American Tobacco Co., 189 F.R.D. 544, 550-51 (D. Minn. 1999).

Likewise, the Southern District of New York denied certification of a class for breach of warranty relating to tires, where certification posed the risk of preclusion of other claims of the putative class:

[A] serious question of adequacy of representation arises when the class representatives profess themselves willing, as they do here, to assert on behalf of the class only such claims as arise from breach of an implied warranty. Plaintiffs' contemplation is that other claims, such as those for death, injury, accident-related property damage, or other consequential damage, may be pursued in other courts. It is fair to say that, during the course of preliminary hearings in this case, plaintiffs so tailored the class claims in an effort to improve the possibility of demonstrating commonality. But that improvement - essentially cosmetic, as the foregoing analysis demonstrates - was pursued at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action. . . .

It is difficult to imagine many courts sanctioning separate actions for property and injury claims arising out of the same incident. Such a claimant would inevitably face the argument that he "had an obligation in these circumstances to consolidate into a single proceeding all of his causes of action and to raise in one complaint all the claims which he could reasonably foresee could arise out of the same transaction ... Courts should not permit the splitting of causes of action when the result of doing so could result in vexatious litigation for the defendant and an undue clogging of the dockets of the court."

See Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606-07 & n.16 (S.D.N.Y. 1982).

Similarly, the Superior Court of Maine has followed suit and denied certification of a class where certification would create a risk of barring certain claims by class members:

Several courts have recognized that a named representative is inadequate to represent a class where that representative's waiver or abandonment of a claim places the class members at risk of being precluded from raising that claim in a subsequent law suit based on the doctrine of *res judicata*. Under plaintiffs'

proposed plan, they have specifically excluded claims for personal injury in this action. Complaint 107. Plaintiffs argue that members of the Contaminated Subclass are given the opportunity to opt out and that this is sufficient to protect their rights regarding their claims for personal injury. This is true with respect to those class members who choose to opt out. However, the right to opt out does nothing to protect the unraised personal injury claims of those class members who decide not to opt out. . . . For these class members, the issue is whether the class representatives' failure to raise claims for personal injury in this action has jeopardized their ability to raise these claims in a subsequent lawsuit. If their claims have been jeopardized, then the Contaminated Subclass representatives would have to be found inadequate.

This court finds that the attempts by the Contaminated Subclass representatives to exclude personal injury claims from this lawsuit may, in fact, jeopardize the subclass members' ability to bring those claims in a later suit. Under Maine law, res judicata applies not only to claims which were litigated in the first action, but also to claims which "might have been litigated in the first action.

See Millett v. Atlantic Richfield Co., 2000 WL 25979, at *9 (Me. Super. Ct. March 2, 2000);

accord Hoyte v. Stauffer Chem. Co., 2002 WL 31892830, at *42 (Fla. Cir. Ct. Nov. 6, 2002)

("[T]he putative class representatives have failed to assert potentially valuable compensatory damage claims of absent class members who presently may have symptoms of latent disease. . . .

A number of courts have recognized that a putative class representative is inadequate to represent a class when that representative fails to assert potentially valuable claims of putative class members").

Under the above-cited case law, Defendant and Third-Party Defendants have argued that class counsel who waive claims on behalf of class members are not adequate representatives of the class because their interests are antagonistic to members of the Putative Plaintiff Class. As class certification is not being denied (based on class counsel interests being antagonistic to those of the class they seek to represent), then class counsel should be enjoined from communicating with absent class members at least until the expiration of the absent class members' final opportunity to opt-out of the class. The argument was not addressed by this court's Order.

B. If the injunction does not issue, Defendant and Third-Party Defendants will be irreparably harmed by the due process violation.

An injunction is warranted because of the irreparable harm that will be suffered by defendants if no injunction is issued. There is no adequate remedy at law for violations of due process rights. There is a conflict of interest between both the Named Plaintiffs and the Putative Class Members AND Plaintiffs' Counsel and the Putative Class Members. Named Plaintiffs and their counsel have a pecuniary interest in having as few putative class members opt out as possible. They have a pecuniary interest in having putative class members waive claims and causes of action in order to stay in the class. On the other hand, it clearly may be in the putative class members' best interest to opt-out of the class. This conflict of interest should bar Plaintiffs' Counsel from giving any advice to putative class members (regardless of whether that advice would be beneficial to the class member or to the Grazias).

Class members have a due process right to adequate representation (including representation by counsel that is free from conflicts of interest). The denial of the injunctive relief and the violation of these due process rights affects a "substantial right," has the practical effect of a final order, is effectively unreviewable in an appeal after final judgment, and is not subject to meaningful relief after final judgment. Here, an order denying the requested injunction threatens the *res judicata* affect of any class action settlement or judgment. See *Nunnery v. Brantley Const. Co., Inc.*, 345 S.E.2d 740, 743 (S.C. App. 1986).

If Plaintiffs' Counsel provide inaccurate or insufficient information regarding the class, the waiver of claims within the class, the claims included in the class, anticipated recovery of funds from the litigation, and etc., then the putative class member's due process right to adequate representation would be violated. If this occurs (and the class member fails to opt out and waives his best claims), then that class member may use such a due process violation as an argument to 1) avoid a defense verdict or settlement in a certified class (thus violating the due process rights of Defendants) and/or 2) bring an additional claim that would have been barred by

res judicata.² The due process violations may allow class members to make claims for prior repairs and replacement caused by any improper installation of stucco against Defendants after final judgment or settlement. It may also allow them to make claims for damages unrelated to the improper installation of stucco against Defendants after final judgment or settlement. These errors cannot be remedied after final judgment in any meaningful way, because it is the final judgment (or settlement) that triggers Defendants' right to *res judicata* and the bar against claim-splitting. In other words, Defendants face the real risk of irreparable harm.

II. It is respectfully requested that this court specifically reconsider its Order denying the injunction because the Order rules on issues not submitted to the trial court:

A. Neither the Defendant nor the Third-Party Defendants offered to amend a motion to have an injunction that applied to themselves. Neither the Defendant nor Third-Party Defendants consented to such. Such a Motion would have to have been made by the Plaintiffs if they deemed it desirable, and they never did. The granting of such a motion would require a separate analysis and findings of fact that were not raised or ruled upon. The factors in such an analysis would not be the same, particularly as it relates to conflict of interest issue raised *supra*.

B. The Plaintiffs did not make any argument in opposition to the injunctive relief requested.

C. The Plaintiffs did not argue that the injunction should be anything other than unilateral and there is not a problem with a "unilateral" injunction. Only the Plaintiffs and their counsel have the conflict of interest problems addressed above. No party argued that the injunction would cause some problem related to "the disparate treatment of the parties."

² See Hospitality Management Associates, Inc. v. Shell Oil Co., 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004) (describing the requirements of class notification vis-à-vis class members' due process rights, specifically noting that notice and adequate representation are due process rights owed to class plaintiffs); see also Civil Service Employees Ins. Co. v. Superior Court, 22 Cal.3d 362, 372, 149 Cal.Rptr. 360, 365 (1978) (quoting People v. Pac. Land Research Co., 20 Cal.3d 10, 16, 569 P.2d 125 (1977)) (noting that California's intermediate appellate court has found that "a defendant in a class action has a due process right to secure a determination of the issues relating to the suitability of the action as a class matter as well as the composition of the class and the form of notice to the members, prior to determination of the merits of the action") (emphasis added). See Manual for Complex Litigation, Fourth, § 21.31 (citing 7B Charles Alan Wright et al., Federal Practice and Procedure: Civil 2d §§ 1789, 1793 (1986 & Supp. 2002) ("Proper notice also lessens the vulnerability of the final judgment to collateral attack by class members").

D. No party argued that there would need to be a bond in place if the injunction issued. Where the relief is consented to, there is no ground for appeal. Thus, in this case, there would be no need for a bond. Even if the injunctive relief was not consented to, no party argued the necessity of a bond. Further if the relief was granted pursuant to the court's authority under Rule 23, then a bond would not be required. Finally, as the issue was never raised, the court does not know whether the parties would have posted a bond to protect their due process rights. It is likely that the parties would agree to post a bond to protect their due process rights.

E. The Defendant and the Third-Party Defendants only moved once for the injunction (no motion to renew an injunction was made). They were under the impression that the court was hearing argument on the original motions for injunctive relief.

F. No party argued for the need "for a free flow of information within society and specifically within the justice system." Even if they had, this argument is overshadowed by the due process violation associated with allowing counsel with a conflict of interest to give advice to absent class members.

G. Plaintiffs did not argue that the injunction motion should be denied because the putative class members "have the necessary time, fiscal capability, and level of sophistication to fully participate in this case." This finding of fact by the court would weigh in favor of enjoining counsel with a conflict of interest from communicating with the class members. This finding of fact also suggests that the class members would be capable of finding their own lawyer (without a conflict) to give them advice.

H. Plaintiffs did not argue that the injunction motion should be denied because the case "involves the substantial investment that most individuals make in a lifetime, their home, and thus is of core interest." This finding of fact by the court would weigh in favor of enjoining

counsel with a conflict of interest from communicating with the class members. It suggests that these homeowners would be interested in pursuing and controlling their own litigation.

I. Plaintiffs did not argue that the injunction motion should be denied because “one can anticipate that rumor and misunderstanding will abound” within the class, and there is no such evidence to support such a finding. This finding of “fact” by the court regarding confusion would weigh in favor of enjoining counsel with a conflict of interest from communicating with the class member.

J. Plaintiffs did not argue that the injunction motion should be denied because of the Right to Cure Act. This finding of fact by the court would weigh in favor of enjoining counsel with a conflict of interest from communicating with the class members.

K. Plaintiffs did not argue that the injunction motion should be denied because there was no showing of “abuse.” Further, Defendants provided evidence and not mere conjecture that Plaintiffs’ Counsel may provide inaccurate information. The Defendants provided a copy of a letter from class counsel to class members providing an inaccurate statement that a class had been certified. This is evidence of abuse. The Court failed to consider these facts of prior abuse and misstatements by Plaintiffs’ counsel.

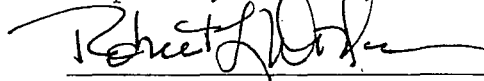
L. There is nothing in the requested injunction that would preclude the homeowners (whom the Court describes as competent, able and interested) from seeking any legal advice they want.

CONCLUSION

For all of the foregoing reasons, and for the reasons and grounds set forth in Defendant and Third-Party-Defendants’ Motions for injunctive relief, the memoranda and letters to the court in support of the requested injunctive relief, and the motion to alter or amend the original “Order Granting Temporary Injunction,” all of which are incorporated herein by reference, it is respectfully requested that this court issue an amended order granting the injunctive relief or, in

the alternative, issue an amended order that rules on all of the above noted and incorporated grounds.

Respectfully Submitted,



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

May 31, 2012

Columbia, SC

ATTORNEYS FOR THIRD PARTY DEFENDANTS
PULTE HOMES AND
DEL-WEBB COMMUNITIES, INC.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendant.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

DEL WEBB COMMUNITIES, INC.'S.
AND PULTE HOMES, INC.'S., MOTION
TO ALTER OR AMEND ORDER
GRANTING TEMPORARY
INJUNCTION

12 MAR 30 PM 3:08
BEAUFORT COUNTY S.C.
CLERK OF COURT

**TO: JEFF LEATH, ESQUIRE, MIKE SEEKINGS, ESQUIRE, JOHN CHAKERIS,
ESQUIRE AND PHILLIP SEGUI, ESQUIRE, attorneys for the plaintiffs:**

YOU WILL PLEASE TAKE NOTICE THAT the undersigned, as attorneys for third-party defendants DEL WEBB COMMUNITIES, INC. and PULTE HOMES, INC., hereby join in SCSP's motion for an order altering or amending the order granting temporary injunction entered on March 15, 2012.¹ Notice of the entry of the order was received on March 19, 2012.

¹ Third-party defendants incorporate by reference Defendant's motion to alter or amend and all arguments set forth in the motions for injunctive relief and the supporting memoranda filed by Defendant and third-party defendants.

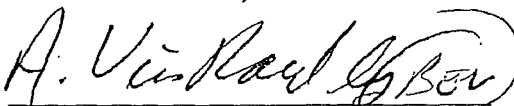
The matter at issue is the timeframe of the injunction. The defendants and third-party defendants requested that the injunction remain in place "until (1) the opt-out period has elapsed, or (2) until the court has denied the motion for class certification in this case." However, the order entered by the court states that "[t]his temporary injunction shall remain in force until further rulings by the court concerning issuance of the approved notice to prospective class members and exclusion forms." As written, the order seems to indicate that the temporary injunction would not apply between the notice and the exclusion periods (should the court go forward with this class certification.)

Third-party defendants request that the court clarify the order by either (a) altering or amending the current order extending the injunction period "until (1) the opt-out period has elapsed, or (2) until the court has denied the motion for class certification in this case," or (b) altering or amending the present order to clarify that all other relief requested by the defendant and the third-party defendants is denied.

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.

January 18, 2012

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

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SCSP and Third-Party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. filed motions seeking to enjoin Plaintiffs and their counsel from communicating with stucco homeowners in Sun City Hilton Head due to the conflict of interest between putative class counsel and putative class members.¹ Before a hearing was held on the motions, Plaintiffs' counsel submitted a proposed order to the Court granting the injunction, and the Court signed Plaintiffs' counsel's proposed order.

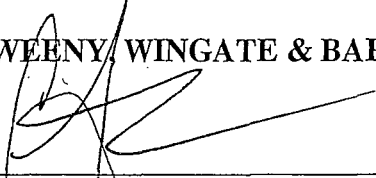
The matter at issue is the timeframe of the injunction. The Defendants requested that the injunction remain in place "until (1) the opt-out period has elapsed, or (2) until the court has denied the motion for class certification in this case." However, the Order entered by the Court states that "[t]his temporary injunction shall remain in force until further rulings by the court concerning issuance of the approved notice to prospective class members and exclusion forms." It is not clear whether the difference in the language was in fact the Court's finding, or whether the Court intended to grant the Defendants' motion in full or to deny part of it. As written, the Order seems to indicate that the temporary injunction would not apply between the notice and the exclusion periods (should the Court go forward with this class certification.)

Accordingly, Defendant requests that the Court clarify the motion by either (a) altering or amending the current Order extending the injunction period "until (1) the opt-out period has elapsed, or (2) until the court has denied the motion for class certification in this case," or (b) altering or amending the present Order to clarify that all other relief

¹ Defendant incorporates by reference all arguments set forth in the motions for injunctive relief and the supporting memoranda filed by Defendant and Third-Party Defendants.

requested by the Defendant and the Third-Party Defendants is denied.

Respectfully submitted,


SWEENEY, WINGATE & BARROW, P.A.

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

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

Columbia, South Carolina
March 28, 2012

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

) FOURTEENTH JUDICIAL CIRCUIT

COUNTY OF BEAUFORT

) CASE NUMBER: 07-CP-07-1396

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendant.

**MEMORANDUM OF LAW IN
SUPPORT OF SOUTH CAROLINA
STATE PLASTERING, LLC'S MOTION
FOR TEMPORARY INJUNCTION**

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

In support of its Motion for Temporary Injunction, South Carolina State Plastering, LLC submits the following Memorandum of Law. South Carolina State Plastering renews its request for an immediate hearing.

FACTS BEARING UPON THE MOTION

As the Court is aware, a significant portion of this complex litigation involves the class status of the homeowners of the Sun City development in Bluffton, South Carolina in their

claims against South Carolina State Plastering, LLC for alleged improper stucco installation and related issues. By Order of this Court dated December 8, 2011, the Court preliminarily certified the class and set forth the procedure by which class members are to be notified of the suit. In spite of this Order, Plaintiffs' counsel advertised an intention to hold a "town hall meeting," open to all residents of Sun City Hilton Head. In addition, Plaintiffs have repeatedly engaged in other forms of inappropriate communications with the putative class members.¹ South Carolina State Plastering describes these inappropriate communications in depth in the Motion for Temporary Injunction and accompanying attachments. South Carolina State Plastering filed this Motion on January 13, 2012 in an effort to prevent irreparable harm to its due process rights.

STANDARD OF REVIEW AND APPLICABLE LAW

Under the law of South Carolina, an injunction is proper when a party demonstrates the following elements: "irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010) (citing Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005)). As further detailed in the Argument section, infra, South Carolina State Plastering stands to suffer irreparable harm to its due process rights if Plaintiffs are allowed to conduct their scheduled town hall meeting and other forms of communication. In light of the law on enjoining improper communications between counsel and putative class members, South Carolina State Plastering asserts that it has a "likelihood of success" on this issue (and in the litigation as a whole). Finally, South Carolina State Plastering contends that there is no adequate remedy at law because, once Plaintiffs' counsel has communicated its side of the case to the putative class

¹ South Carolina State Plastering does not concede that class certification is warranted, and accordingly has filed a Motion to Reconsider/Motion for Clarification. For the purposes of this Motion for Temporary Injunction, South

members, no one will be able to “unring the bell.” See, e.g., State-Record Co., Inc. v. State, 332 S.C. 346, 356, 504 S.E.2d 592, 597 n. 19 (1998) (citing United States v. Davis, 904 F.Supp. 564, 569 (E.D.La. 1995)) (illustrating the principle that, at least in criminal cases, a privileged communication that is improperly disclosed jeopardizes the right to a fair trial, because “it is difficult, if not impossible, to ‘unring a bell’”).

A significant body of law exists on the issue of enjoining communications between parties (and their counsel) and putative class members in class action litigation. Rule 23(d)(2) of the South Carolina Rules of Civil Procedure is as follows:

In the conduct of actions to which this rule applies . . . [t]he court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended. It may order that notice be given in such a manner as it may direct of the pendency of the action by the party seeking to maintain the action on behalf of the class

Rule 23(d)(2), SCRCPP (emphasis added). The South Carolina Supreme Court has recognized the need for orders limiting contact between parties and potential class members and that the Court has this authority under the general grant of power in Rule 23(d)(2).” Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (citing Rule 23(d)(2), SCRCPP). The United States Supreme Court has held that trial courts have authority, in appropriate circumstances, to impose limitations on plaintiffs’ counsel’s contact with prospective clients in a class action context. The Court has held that, “[b]ecause of the potential for abuse [in class actions], a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.” Gulf Oil Co. v. Bernard, 452 U.S. 89, 100, 101 S.Ct. 2193, 2200, 68 L.Ed.2d 693 (1981), as quoted in

Carolina State Plastering contends that it is entitled to have Plaintiffs’ counsel abide by the terms of the Court’s December 15, 2011 Order.

Payne v. Goodyear Tire and Rubber Co., 207 F.R.D. 16, 18 (D. Mass. 2002). The South Carolina Supreme Court has expressly agreed with the Gulf Oil case:

Under certain circumstances, it may be necessary to limit communication between parties and potential members of the class . . . we agree with the United States Supreme Court that “an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.”

Eldridge at 128, 417 S.E.2d at 534 (quoting Gulf Oil at 101).

South Carolina State Plastering asserts that the record in this case is clear: Plaintiffs’ counsel’s attempted communications with putative class members rise to the level—and indeed surpass—the “potential for abuse.” See Argument section, infra. Since the named Plaintiffs have no rights that will be violated by this injunction, and since it is only South Carolina State Plastering and the putative class members who will be harmed if the Court does not issue the injunction, the Court may make the “specific finding” that the need for the proposed injunction outweighs the potential interference with the rights of the named Plaintiffs and their counsel.

ARGUMENT

I. SOUTH CAROLINA STATE PLASTERING’S DUE PROCESS RIGHTS WILL BE IRREPARABLY VIOLATED IF THE INJUNCTION FAILS TO ISSUE, WHILE PLAINTIFFS AND THEIR COUNSEL HAVE NO DUE PROCESS RIGHTS THAT WILL BE VIOLATED BY THE INJUNCTION.

As Judge G. Ross Anderson has recently observed, “class actions, as other cases, are subject to the requirements of due process. . . .” Hege v. Aegon USA, LLC, 780 F. Supp.2d 416, 425 (D.S.C. 2011) (quoting Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1226 (11th Cir. 1998)). Due Process of law is guaranteed by the Constitutions of the United States and South Carolina. See U.S. CONST. AMEND. XIV; S.C. CONST. ART. I § 3. The Supreme Court of South Carolina has recognized that the notice rules in class actions directly implicate the Due Process

Clause. See Hospitality Management Associates, Inc. v. Shell Oil Co., 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004) (describing the requirements of class notification vis-à-vis class members' due process rights, specifically noting that notice and adequate representation are due process rights owed to class plaintiffs); see also Civil Service Employees Ins. Co. v. Superior Court, 22 Cal.3d 362, 372, 149 Cal.Rptr. 360, 365 (1978) (quoting People v. Pac. Land Research Co., 20 Cal.3d 10, 16, 569 P.2d 125 (1977)) (noting that California's intermediate appellate court has found that "a defendant in a class action has a due process right to secure a determination of the issues relating to the suitability of the action as a class matter as well as the composition of the class and the form of notice to the members, prior to determination of the merits of the action") (emphasis added).

Professor Flanagan has described the importance of notification issues to class action litigation:

Notice to class members is one of the central issues in class actions . . . Rule 23(d)(2) provides that the notice is given by the party seeking to maintain the action as a representative suit. This is subject, however, to the power of the court to control all aspects of the notice procedure . . . the court must supervise the content and mechanism of any notice procedure.

James F. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE 196-7 (3d. ed. 2010) (emphasis added); see also MANUAL FOR COMPLEX LITIGATION, Fourth, § 21.31 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997)) ("Notice is a critical part of class action practice. It provides the structural assurance of fairness that permits representative parties to bind absent class members"). The importance, to class action defendants, of proper notice procedures is obvious—it is class action defendants that bear the risk of multiple, inconsistent adjudications. See, e.g., People v. Pac. Land Research Co., 63 Cal. App. 3d 873, 134 Cal. Rptr. 114, 126 (Ct. App. 1976) vacated on other grounds, 20 Cal. 3d 10, 569 P.2d 125 (1977) ("It is also settled that

in a private class action the defendants have a constitutional due process right to have all potential members of the plaintiff class given appropriate notice . . . the rationale for requiring prior notice to members of the class is defendant's right to know the full potential consequences and liability . . . "); see also Thomas A. Dickerson, CLASS ACTIONS: THE LAW OF THE 50 STATES § 7.01 (1992) ("[class action] defendants have a right to know the full potential of their liability") (citation omitted).

In light of these rules, it is clear that Plaintiffs' counsels' efforts to prematurely communicate with putative class members will be injurious to both the due process rights of the putative class and those of South Carolina State Plastering. As explained above and in the text of this Motion, the putative class members have a due process right to adequate representation. See Hospitality Management at 654, 591 S.E.2d at 616. If Plaintiffs' counsel does not correctly inform the putative class members of all relevant information, including information involving waiver of claims within the class, Plaintiffs' counsel may have a conflict of interest with the putative class. See Part III, infra. If such a conflict exists, or even if there is no conflict but a large percentage of proposed class members disagree with the course of action suggested by Plaintiffs' counsel, then Plaintiffs will lose their claim that they are adequate representatives of the would-be class. See Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983) ("the representatives must have common interests with the unnamed members of the class . . . the class representative should not have any . . . conflicting interests to the unnamed members . . . ") (citations omitted). The proposed class members conceivably could avoid any judgment not favorable to them because of a violation of their due process right to adequate representation. South Carolina State Plastering then would be in the unfavorable position of having to re-litigate issues already decided in a costly class action. See MANUAL FOR COMPLEX LITIGATION, Fourth,

§ 21.31 (citing 7B Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d §§ 1789, 1793 (1986 & Supp. 2002) (“Proper notice also lessens the vulnerability of the final judgment to collateral attack by class members”). Such an outcome is precisely what class actions—and the accompanying due process guarantees guaranteed to defendants—are designed to prevent, and yet such an outcome is possible if Plaintiffs’ counsel is allowed to disseminate information to the putative class members in a fashion other than that approved by the Court. See Gunnells v. Healthplan Services, Inc., 348 F.3d 417, 427 (4th Cir. 2003) (quoting 5 Moore’s Federal Practice § 23.02 (1999)) (“class certification ‘provides a single proceeding in which to determine the merits of the plaintiffs’ claims, and therefore protects *the defendant* from inconsistent adjudications”). In other words, South Carolina State Plastering’s right to a proper adjudication of this class action will be jeopardized not through any fault of its own, *but rather by the inappropriate actions of Plaintiffs’ counsel done in violation of South Carolina State Plastering’s and putative class members’ due process rights.*

Plaintiffs and their counsel, on the other hand, will suffer no detriment from being enjoined from communicating with putative class members. Since Plaintiffs’ counsels’ proposed communications with the putative class members are improper under the due process analysis listed above (along with being contrary to this Court’s Order), Plaintiffs can make no claim that their rights are being infringed. Moreover, South Carolina State Plastering’s Motion specifically exempts from the scope of the requested injunction communications between Plaintiffs’ counsel and the named Plaintiffs. South Carolina State Plastering does not claim any right to intrude upon the attorney-client relationship that exists between Plaintiffs’ counsel and the Grazias.

II. SOUTH CAROLINA STATE PLASTERING HAS THE RIGHT TO RELY ON THE TERMS OF THE COURT’S DECEMBER 15, 2011 ORDER, AND IT IS IMPROPER FOR PLAINTIFFS AND THEIR COUNSEL TO CAUSALLY

DISREGARD THE ORDER TO SOUTH CAROLINA STATE PLASTERING'S DETRIMENT.

The Plaintiffs are usurping the Court's Order and directive as to the communication that should be made to the putative class members. On pages 12 and 13 of the Order, the Court sets forth its decision regarding how notice to the class members is to proceed. First, the Court requests proposed opt-out Notices of Class Action and Exclusion Request Forms from both parties. Order, p. 12 (this portion of the Court's Order is currently stayed, pending the outcome of South Carolina State Plastering's 59(e) Motion). The Court set forth in detail what it desires to go in the Notices. Id. Next, the Court states that it will choose either one party's form *in toto*, or combine portions of both forms, to reach a "final format" for the Notice. Id. at 13. Finally, the Court informs the parties that it anticipates a hearing on this matter will be needed before the Notices go out, and that this hearing will address such issues as "the timetable for initiating the notice process" and "the result of failure of cooperation by a particular claimant." Id.

Instead of complying with the Order, Plaintiffs' counsel has chosen to completely circumvent the Court's directives concerning notice to the putative class members. As detailed at length in the Motion, Plaintiffs' counsel has been, and plans to continue, communicating their version of the facts of this case to the putative class members in a manner not contemplated by this Court's rulings. The culmination of these improper communications is the scheduled January 26, 2012 "town hall meeting," wherein Plaintiffs' counsel proposes to address putative class members, as well as persons who likely fall *outside* of the preliminary class definition set forth by the Court (the Court preliminary defines the class as homeowners who have allegedly sustained damage due to one or more of three specific types of installation problems, while Plaintiffs' counsel has invited "all Stucco homeowners" to the meeting). South Carolina State Plastering cannot assume that Plaintiffs' counsel will portray South Carolina State Plastering in a

neutral manner. Further, South Carolina State Plastering has not sought to communicate with putative class members in any manner. Therefore, South Carolina State Plastering requests that the Court use its inherent equitable powers to enjoin this meeting, which will undoubtedly inure to the unfair benefit of Plaintiffs and the unfair detriment of South Carolina State Plastering. See Lowell, et al., SOUTH CAROLINA EQUITY: A PRACTITIONER'S GUIDE 90 (2010) (citing Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006)) ("The court's power to grant an injunction lies in equity").

III. PLAINTIFFS' COMMUNICATIONS, AND PROPOSED COMMUNICATIONS, WITH PUTATIVE CLASS MEMBERS VIOLATE THE SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT AND CREATE A CONFLICT OF INTEREST BETWEEN PLAINTIFFS' COUNSEL AND PUTATIVE CLASS MEMBERS.

According to Professor Flanagan, "[c]ommunication with prospective class members raises problems of solicitation by attorneys or apparent lack of impartiality by the court." Flanagan at 197. South Carolina State Plastering is concerned that the upcoming town hall meeting may constitute improper solicitation of business. Rule 7.3(a) of the Rules of Professional Conduct is as follows:

A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain

Rule 7.3(a), South Carolina Rules of Professional Conduct. Since many of the persons in the Sun City development do not currently have an attorney-client relationship with Plaintiffs' counsel, they are "prospective clients." According to the Rule, such prospective clients should not be contacted in-person by attorneys motivated by pecuniary gain.

Another issue created by the proposed town hall meeting is the conflict of interest between Plaintiffs' counsel and the putative class members. The Rules of Professional Conduct on this issue are as follows:

[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest . . . [such a conflict exists if] the representation of one client will be directly adverse; or . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client

Rule 1.7(a)(1)-(2), South Carolina Rules of Professional Conduct. South Carolina State Plastering does not contest that Plaintiffs' counsel is in a proper attorney-client relationship with the Grazias. Therefore, Plaintiffs' counsel has a fiduciary obligation to the Grazias to maximize the value of their claims. Logically, the total value of a class action such as this one is increased if the size of the class is increased. Plaintiffs' counsel, then, will be motivated by pecuniary gain (for counsel and for the Grazias) at the town hall meeting. Thus, Counsel will be unable to give unbiased advice to the putative class members concerning the import of joining a class action. In order to join this preliminary class, a homeowner in Sun City must surrender many damages claims,² including but not limited to his or her rights under the South Carolina Unfair Trade Practices Act ("SCUTPA").³ In the Order, the Court held that all SCUTPA claims were

² Named Plaintiffs' have already waived the recovery of any funds already expended to repair stucco. Further, at one of the Class certification hearings, Plaintiffs' counsel indicated that named plaintiffs on behalf of class members were only seeking recovery related to damages proximately caused by lack of through wall flashing, lack of control joints at the corners of windows and doors, and/or lack of a "gap" between the stucco and the slab. Thus, Plaintiffs have waived damages proximately caused by any other issue (all installation and application issues), including known damages caused by thin stucco application, bad stucco mix, improper stucco lath lapping, and other issues testified to by plaintiffs' experts. Plaintiffs' Counsel also indicated at the hearing that the damage request was being limited to a finding that the houses needed a full strip and re-clad (and that anything less would result in a zero verdict for plaintiffs and the class). Finally, the court's order did not fully explain all of these issues, and accordingly, Defendant requested that the court clarify exactly what claims remain in that class that may be prosecuted by/for the class, what claims, causes of action and what damages have been/are being waived, what discovery to and from class members will be allowed/required, and what will be the affect of a class member's refusal to cooperate in discovery, allow inspections, or testify.

³ It is noted that South Carolina State Plastering does not concede that any party's SCUTPA claims against it have any merit, but it was a claim raised by the Plaintiffs and their counsel in their Complaint.

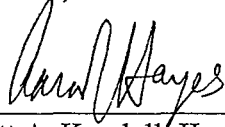
dismissed without prejudice during the period of preliminary class certification, but will be dismissed with prejudice if class certification is finalized. Order, p. 8. At the town hall meeting and/or during any other communication with the putative class members, Plaintiffs' counsel will be motivated to advise prospective clients to participate in the class and thereby waive their SCUTPA claims, even if this is not the best advice for a particular homeowner. Regardless of the merits of that advice, however, Plaintiffs' counsels' opinions on those issues will spring from their obligations to the Grazias and their motivation to maximize the value to the Grazias. This is a conflict of interest, and jeopardizes the status of the Grazias and Plaintiffs' counsel as adequate representatives for the class. See Runion at 317 ("the representatives must have common interests with the unnamed members of the class . . . the class representative should not have any . . . conflicting interests to the unnamed members"). South Carolina State Plastering requests that the Court stop this conflict of interest from occurring, and thereby prevent harm to both the putative class members and South Carolina State Plastering.

CONCLUSION

In conclusion, South Carolina State Plastering asserts that a temporary, preliminary injunction against Plaintiffs and their counsel is warranted—and indeed necessary—in this case to protect South Carolina State Plastering's due process rights from irreparable harm. South Carolina State Plastering is entitled to the process set forth under the law of this State for notification to putative class members, and Plaintiffs' counsel's actions (and proposed actions) violate this process. Thus, South Carolina State Plastering requests that the Court issue the injunction requested by this Motion.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Everett A. Kendall, II

Christy Mahon

Aaron J. Hayes

1515 Lady Street

Post Office Box 12129

Columbia, South Carolina 29211

(803) 256-2233

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

Columbia, South Carolina
February 9, 2012

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

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

Plaintiffs,

VS.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendant.

**DEL WEBB COMMUNITIES, INC.
AND PULTE HOMES, INC.'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' CLASS' RULE TO SHOW
CAUSE AND REQUEST FOR
INJUNCTIVE RELIEF**

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

VS.

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

Third-Party Defendants.

Apparently, in an attempt to deflect their own ethical problems and conflicts of interest, counsel for the Grazias are seeking to stop homeowners at Sun City from being able to request repairs from Pulte/Del Webb.¹ Plaintiffs, through their counsel, are requesting extraordinary relief to which they are not entitled. There is absolutely no legal support for the plaintiffs' request to prohibit

¹ Counsel for the Grazias also represented the Oroses in an almost identical putative class action that was filed against Pulte/Del Webb (not SCSP). The arbitration panel eventually denied class certification because of all of the claims, causes of action, and avenues of recovery that were being waived by the named plaintiffs (fewer waivers in Oros, however, than in Grazia). In the Oros case, where the plaintiffs were actually suing Pulte/Del Webb, counsel moved to 1) enjoin Pulte/Del Webb from having communications with their customers/homeowners, and 2) enjoin Pulte/Del Webb from making repairs that were requested by homeowners. Plaintiffs' motion was denied. Please see attached the affidavits filed by Pulte/Del Webb with its memorandum in opposition to that motion.

Del Webb (a third party not being sued by the plaintiffs) from communicating in the normal course of business with homeowners (with whom it has a contractual relationship). Moreover, plaintiffs offer absolutely no admissible evidence in support of their motion. There are no affidavits or other sworn testimony filed in support of plaintiffs' motion. Plaintiffs are relying solely on a homeowner's unsworn "listserve" (which is hearsay and includes additional hearsay) and argument of counsel (which is not evidence). Extraordinarily, plaintiffs' lawyers are attempting to block homeowners in Sun City Hilton Head from receiving repairs that they specifically requested Del Webb to address. The homeowners are not suing Del Webb in the Grazia case. Yet, remarkably, plaintiffs' lawyers seek to block putative class members (and other homeowners) from getting what they want—repairs. Plaintiffs' lawyers are clearly looking out for their own pecuniary interests, and not the interests of the homeowners. They are concerned that if Del Webb fixes houses that actually have a stucco issue, then they will not be able to recover attorneys' fees from SCSP for those houses. In short, plaintiffs' lawyers are trying to block innocent homeowners from getting repairs so that they might stay in the class (and have their rights waived by these same plaintiffs' lawyers). Plaintiffs' motion further highlights the conflict of interest between plaintiffs' lawyers and putative class members.

This memorandum is supported by the Affidavits of Allison Tucker and Eric Lundblad attached hereto.

Initially, it is important to point out the key differences in the cross motions for injunction that have been filed:

1. Defendant is attempting to restrict plaintiffs' lawyers from communicating with putative class members prior to the expiration of the opt-out period. Plaintiffs' lawyers have no basis for communicating with putative class members that they do not represent individually other

than to try to convince them not to opt-out. While every plaintiffs' lawyer has a pecuniary interest in signing up clients, the difference here is that these plaintiffs' lawyers have a pecuniary interest in the homeowners waiving their rights and claims. The putative class member must waive rights and claims in order to stay in the class. This is not simply a decision about who will represent these homeowners. Rather, the decision is whether to have class counsel represent them and waive claims and causes of action OR have someone else represent them and not waive claims. The conflict of interest is clear, and plaintiffs' counsel should not be allowed to advise absent class members on their rights in the opt-out process. The plaintiffs' counsel have ethical limitations on such communications and solicitation. Instead, only court approved written communication explaining the rights of class members should be allowed from plaintiffs' counsel.

2. On the other hand, plaintiffs are attempting to stop communications in the ordinary course of business between homeowners (who may or may not be putative class members) and Del Webb (a party the Grazias are not suing). There has been no allegation or evidence of harm (much less irreparable harm). There has been no evidence offered that repairs being made are not appropriate. There has been no evidence offered that Pulte/Del Webb is initiating communication with homeowners. There has been no evidence offered that Pulte/Del Webb is soliciting "opt-outs." There has been nothing but wholly unsupported argument of counsel that Pulte/Del Webb has done anything wrong.

As demonstrated below, almost every legal and factual statement made in plaintiffs' motion is inaccurate and unsupported. Plaintiffs' counsel conveniently ignore the following: (1) class counsel does not represent potential class members until a class is finally certified and the "opt-out" period has expired; (2) if/when class counsel does represent class members, the representation is limited to the claims that are actually being made by the class against SCSP (the class counsel would

NOT represent absent class members with regard to claims against Pulte/Del Webb), (3) with the court's new class definition, it is completely unknown who (if anyone) is in the putative class; and (4) regardless of certification, while counsel may not communicate with represented parties, parties in litigation are almost always allowed to communicate with each other. Accordingly, plaintiffs' request for an injunction to stop communication between the plaintiffs and third party defendant Pulte/Del Webb is without merit.

Plaintiffs' counsel asks that Pulte/Del Webb not be allowed to respond to homeowners' requests to have repairs made. This request is without factual and legal support. Plaintiffs have not identified any detriment to the potential class members. How could it be wrong for the homeowners to have a stucco problem repaired? How are the named plaintiffs (Mr. and Mrs. Grazia) harmed by having one fewer potential class member? The only people possibly affected would be class counsel, who would have one less possible client in a certified class. Clearly, this motion is prompted by plaintiffs' counsel's concern that if Pulte/Del Webb makes requested repairs to the few houses with legitimate stucco issues (at those homeowners' request), the putative class will diminish (along with any possible fees).

In reality, the only interests that plaintiffs' counsel are seeking to protect are their own. Plaintiffs' counsel are actually attempting to stop Pulte/Del Webb from responding to Sun City Hilton Head homeowners' requests, from facilitating stucco repairs where needed, and thereby removing certain homeowners from any potential class.

What is in the best interest of any homeowner is to have any problem with his or her stucco repaired. Furthermore, Pulte/Del Webb has issued warranties to homeowners and cannot ignore its contractual duty to inspect and/or repair any appropriate warranty issues when a warranty request is made by the homeowner. Importantly, Pulte/Del Webb representatives only go out to inspect a

home upon request of the homeowner. Plaintiffs' counsel have known this since 2007 (see footnote 1). Accordingly, Pulte/Del Webb is conducting business in the normal course, and the court should not enjoin this action.

Procedural Background

At this point, the court has "preliminarily" certified a class and created a new class definition. It is unknown what the legal meaning of "preliminary" certification is. It is unknown how "preliminary" certification affects the attorney/client relationship between class counsel and absent class members. It is unknown which (if any) houses are in the court's new class definition. These issues have been raised in a 59(e) motion filed by Pulte/Del Webb (which is hereby incorporated herein by reference).

Summary of Relevant Facts

1. Over the past several years Pulte/Del Webb has received and responded to homeowner complaints related to stucco. Many of the cracks being complained of were beyond the Pulte/Del Webb Warranty, and those homeowners were told that repairs will not be made. On some occasions, Pulte/Del Webb and the homeowner have agreed that repairs are warranted. See attached Affidavit of Eric Lundblad.

2. Pulte/ Del Webb has not approached any homeowner with regard to stucco repairs. Pulte/Del Webb only responds to homeowner service/warranty requests with regard to stucco issues. If the homeowner who makes a warranty request is suing Pulte/Del Webb, then he is told that the request needs to come through his counsel. See Affidavit of Eric Lundblad.

3. For the houses that Pulte/Del Webb agrees to repair, the stucco subcontractor (not SCSP) is consulted with regard to the proper repair. There is no benefit to Pulte/Del Webb to not fix

the problem properly the first time, as it would only be called out later to make more repairs. Pulte/Del Webb is not attempting to effect temporary repairs to the houses at issue. See Affidavit of Eric Lundblad.

4. Because of the class allegations at Sun City Hilton Head over the past several years, Pulte/Del Webb has been presenting some version of the form attached to Eric Lundblad's Affidavit to homeowners where 1) the homeowner has requested stucco repairs, and 2) Pulte/Del Webb has agreed to conduct repairs. See Affidavit of Eric Lundblad. The form is not meant to be any type of release of any claim of the homeowner. The form was meant to be very fair to the homeowner and even specifically informs the homeowners that they may still sue Pulte/Del Webb directly if they believe they have a claim. There is nothing improper about the use of the form.

5. Pulte/Del Webb will not conduct stucco repairs to a home unless the above referenced form is signed. Accordingly, any home that is repaired would not be in the Grazia Class (and plaintiffs' spurious spoliation claims would be moot).

6. Pulte/Del Webb has agreed to notify plaintiffs' counsel with regard to any request for inspection/repairs from any homeowner that plaintiffs' counsel identify as being represented directly/individually with regard to claims against Pulte/Del Webb. Plaintiffs' counsel have refused to provide such a list of represented parties. Thus, Pulte/Del Webb is only aware of those homeowners who have sued Pulte/Del Webb directly.

7. Pulte/Del Webb is not making any improper statements regarding this litigation. The hearsay statements referenced in plaintiffs' motion are untrue. See Affidavit of Allison Tucker.

8. If the court stops Pulte/Del Webb from responding to homeowner service/warranty requests, it would be a hardship on the homeowners, since requests are coming *from* homeowners. See Affidavit of Allison Tucker.

Summary of Legal Arguments

1. The Court's Preliminary Certification order of December 8, 2011 does not address third party defendants Pulte/Del Webb's right and duty to make repairs that are/were specifically requested by homeowners, nor does it prohibit Pulte/Del Webb from responding to requests for repair. There is no evidence of any "end run." Plaintiffs have pointed to absolutely no language in that order that is being violated. With regard to the Right to Cure process, plaintiffs are not suing Pulte/Del Webb, and accordingly the right to cure process does not apply to Pulte/Del Webb. The order contemplates staying the case while class members comply with the Act with regard to the party that is actually being sued (SCSP).

2. Plaintiffs' lawyers do not yet have an attorney/client relationship with any absent class members. While we know of the attorney/client relationship with Grazia and the other named plaintiffs in the other 136 pending cases, plaintiffs' counsel would not represent absent class members prior to final certification, and then only after the opt-out period. At this time, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Once the proceeding has been finally certified as a class action, the members of the class are considered clients of the lawyer. See Manual for Complex Litigation (Third) § 30.24, at 257 (1997); see also Restatement (Third) of Law Governing Lawyers, § 99 (2000). (It is unknown what is meant by "preliminary" class certification or how that affects the above law.) Nonetheless, the class makeup is not final until after the "opt-out" period expires. See *Class Plaintiffs v. Standard Mutual Ins. Co. (In Re Chicago Flood)*, 682 N.E.2d 421, 425-26 (Ill. Ct. App. 1997). ("The attorney-client relationship in the class context also differs among plaintiffs. The relationship between the class representative plaintiffs and class counsel is one of private contract, whereas the relationship

between absent class members and class counsel is one of court creation. Accordingly, class counsel will be deemed to fully represent all class members only after a court has certified the class and the opt-out time period has expired, giving putative class members time to decide whether to participate in the class.”(Internal citations omitted.).

3. The majority view, embraced by most courts, the Restatement, and the Manual on Complex Litigation, holds that before final class certification, putative class members are not "represented" by class counsel. "Until the class is certified, opposing counsel may conduct *ex parte* interviews, obtain statements regarding the matter in controversy, and negotiate settlements -- all without the consent of, or even without notifying, class counsel." See Pre-certification Communication Ethics in Class Actions; 36 GA. L. Rev. 353, 356 (2002); *see also* Manual for Complex Litigation. This again raises the question of what "preliminary" class certification means. Also, there is no way for Pulte/Del Webb to know who (if anyone) is encompassed by the new class definition.

4. "Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." Rule 407, SCACR, Rule 4.2, SCRPC, Note 4. Accordingly, regardless of the class status, Pulte/Del Webb has the right to respond to homeowner requests for repairs.

5. "The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction." *Strategic Res. Co. v. BSC Life Ins. Co.*, 367 S.C. 540, 545 (2006). Plaintiffs have offered nothing but argument of counsel in support of their motion.

6. "For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction would

likely succeed in the litigation; and (3) there is an inadequate remedy at law." *Id.* Plaintiffs have not carried their burden on any prong.

Argument

1. **Sun City Hilton Head Homeowners and Pulte/Del Webb May Communicate Whether a Class is Certified or Not.**

Until the class is finally certified, plaintiffs' lawyers do not represent putative class members. Accordingly, Pulte/Del Webb may contact potential class members at any time. *See*, authorities cited above. However, Pulte/Del Webb is not making any such contact regarding stucco repairs. *See* Affidavit of Eric Lundblad. Instead, Pulte/Del Webb is only responding to homeowner requests. While there are numerous restrictions on an attorney communicating with an opposing party who is represented by counsel, there are no such restrictions on direct communication between the parties themselves. *See* Rule 4.2: Communication With Person Represented By Counsel, SCRPC. Further, Pulte/Del Webb are third party defendants that are not being sued by the Grazias or their class, and accordingly they are not "opposing parties" to the absent class members. Accordingly, whether the class has been certified or not, barring some extraordinary circumstance, the Sun City Hilton Head homeowners may communicate with Pulte/Del Webb at any time, and vice versa.

2. **Plaintiffs' Counsel Would Not Have an Attorney/Client Relationship with Absent Class Members Until After the Opt-Out Period Has Expired.**

The time following class certification and prior to the completion of notice to the class and expiration of the time for class members to "opt-out" of the case is sometimes referred to as the "exclusion period." During this exclusion period, the status of class members is particularly amorphous because the putative class may contain members who will reject the class action remedy. 5 *Newberg on Class Actions* § 15:15 (4th ed. 2012).

The attorney/client relationship is a voluntary relationship between an attorney and a client for the pursuit of agreed upon objectives. See SCACR 407, RPC 1.2. Normally, the relationship is initiated by the client and its existence is dependent upon the client's consent. A class action is an exception to this general principle. In a class action, similarly situated persons are made class members without their consent. The relationship between class counsel and absent class member is limited:

In certifying a class action, the court confers the status of litigant upon class plaintiffs and creates an attorney-client relationship between those plaintiffs and a court-designated lawyer. . . . This attorney-client relationship is limited, however, and is different in the class context than it is in a traditional, nonclass situation. . . . *Kleiner v. First National Bank of Atlanta*, 102 F.R.D. 754, 769 (N.D. Ga.1983).

Class Plaintiffs v. Standard Mutual Ins. Co. (In re Chicago Flood Lit.), 289 Ill. App. 3d 937, 942, 682 N.E.2d 421, 425 (1997)(holding that class members who opt out of the class owe no attorneys' fees to class counsel). Even this limited attorney/client relationship is not in place until after the opt-out period expires.

The attorney/client relationship in the class context also differs among plaintiffs. The relationship between the class representative plaintiff and class counsel is one of private contract, whereas the relationship between absent class members and class counsel is one of court creation.

. . . Accordingly, class counsel will be deemed to fully represent all class members only after a court has certified the class and the opt-out time period has expired, giving putative class members time to decide whether to participate in the class. . . . *Kleiner*, 102 F.R.D. at 769. During the opt-out period, the status of class members is amorphous [sic] because the putative class may contain members who will be excluded from the class. Accordingly, the actual scope of the class cannot be determined until after the exclusion period has expired.

Id. at 942, 682 N.E.2d at 425-26 (emphasis added). The court in *Kleiner v. First Nat'l Bank of Atlanta*, 102 F.R.D. 754 (N.D. Ga. 1983), which is cited by plaintiffs in their motion, recognized that:

... discernment of the precise point in time when various aspects of the attorney-client relationship arise in class action proceedings is difficult. Once a class has been certified, some but not all aspects of the relationship are present. A lawyer who represents the named plaintiff in a class which has been certified immediately assumes responsibility to class members for diligent, competent prosecution of the certified claims. **However, it cannot truly be said that he fully “represents” prospective class members until it is determined that they are going to participate in the class action.**

Id. at 769 (emphasis added). In affirming, the Eleventh Circuit considered that the order was narrowly drawn to avoid limiting the bank’s ability to communicate with customers about their routine banking business that was unrelated to the litigation). *Kleiner*, 751 F.2d 1193, 1206-07 (11th Cir. 1985).

This limited attorney/client relationship goes hand in hand with absent class members’ due process right to be represented by (adequate) counsel of their choosing. Unlike cases seeking declaratory or injunctive relief, class members in cases involving claims for money damages have the right to opt out of the class. Our Supreme Court has recognized that “due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an “opt out” or “request for exclusion” form to the court.” *Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644, 662, 591 S.E. 2d 611, 620-621 (2004), quoting *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985). Our Supreme Court reiterated this basic requirement again in *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 457, 661 S.E. 2d 81, 89-90 (2008), again quoting *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985). In *Shutts*, the United States Supreme Court held that the absence of notice and right to opt out violates due process when a class action seeks predominantly money damages. 472 U.S. at 812. More recently, the United States Supreme Court has recognized the “serious possibility” that denial of the right to notice and

opt out may violate due process even when claims for money damages do not predominate. *Wal-Mart Stores, Inc. v. Dukes*, 131 U.S. 2541, 2559 (2011)(unanimous portion of opinion).²

Accordingly, until we know whether the absent class member chooses to opt out, we will not know whether he is actually represented by class counsel. The limited attorney/client relationship between class counsel and members of the class that may arise upon certification is terminated when a class member opts out of the class. Class Plaintiffs, 289 Ill. App. 3d at 943-44, 682 N.E.2d at 426. Therefore, the identity of persons “fully” represented by class counsel is unknown until expiration of the exclusion period.

3. **Plaintiffs’ Counsel Has Not Identified Those Homeowners They Claim to Represent.**

To date, plaintiffs’ counsel has only disclosed that they represent Mr. and Mrs. Grazia (and the other 136 named plaintiffs in the individual suits) directly. As demonstrated by the correspondence between counsel attached to plaintiffs’ motion, Pulte/Del Webb has asked counsel to provide them with a list of clients that they represent with claims against Pulte/ Del Webb. If they provide Pulte/Del Webb with a list of represented homeowners, Pulte/Del Webb would be pleased to copy counsel on any correspondence to those homeowners. However, the homeowner (whether represented or not) is initiating communication with the Pulte/Del Webb. These homeowners are not required to inform Pulte/Del Webb as to whether they are represented by counsel. Accordingly, if counsel does not disclose who they represent, then Pulte/Del Webb has no reason to believe that any homeowner contacting Pulte/Del Webb is represented by counsel.

² See also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), in which the district court had certified a mandatory class under Federal Rule of Civil Procedure 23(b)(2), on the premise that a limited fund was available. That provision of the Federal Rule does not afford an opportunity for class members to opt out of the class. The Court discussed at length the weighty constitutional issues raised by the order on appeal, which forced persons with money damages claims to participate in a suit not of their choosing. These constitutional issues included the implications on the right to trial by jury and the due process implications of binding a person to a judgment when he is not a party and has not been made a party by service of process. The Court found no justification in the record for depriving class members of their right to opt out of the class, and therefore reversed the order certifying the class.

Plaintiffs' lawyers assertion that they represent any class member in the Grazia case (where only SCSP is being sued by plaintiffs) with regard to claims against Pulte/Del Webb or any other third party (named or not) is wholly without merit. The unusual attorney/client relationship that is created by the court after final certification in a class action is limited to the claims being asserted on behalf of the class. It would not stretch to cover unasserted claims against a third party.

4. **Plaintiffs Have Offered Absolutely No Evidence of Any Inappropriate Communication By Pulte/Del Webb to Potential Class Members.**

Plaintiffs have offered absolutely no sworn testimony whatsoever in support of their motion, nor have plaintiffs offered any evidence of any wrongdoing or misrepresentations made by Pulte/Del Webb to potential class members. Plaintiffs have offered no evidence of interference with the rights of either the named plaintiffs or of the potential class members. Plaintiffs have offered no evidence that any communication has harmed the named plaintiffs or the potential class members. Practically speaking, Pulte/Del Webb is only responding to homeowner requests. In fact, the homeowners are the ones initiating the communication. Pulte/Del Webb would have many very unhappy homeowners if it were enjoined from responding to homeowner requests or complaints. Further, such an injunction may force Pulte/Del Webb to breach contractual duties with the homeowners. Such an order may implicate the contract clause and the First Amended to the U. S. Constitution.

As there is no evidence of any deceptive, misrepresentative, or improper communication by Pulte/Del Webb toward potential class members, there is no basis on which to limit communication. However, under extraordinary circumstances, a circuit court does have the authority to impose terms upon the named plaintiffs and a defendant in a putative class situation. Pulte/Del Webb however, are not defendants and are not being sued by these plaintiffs.

While the South Carolina Rule of Civil Procedure 23(d)(2) gives the circuit court the power to "impose such terms as shall fairly and adequately protect the interest of the persons on whose

behalf the action is brought or defended," the South Carolina Supreme Court stated that "[t]he power to issue an order which the court, in its discretion, believes is necessary to curtail the opportunities for abuse of the judicial system in class actions is not without bounds." *Eldridge v. Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992)(citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981)). However, the Court explicitly went on to caution that "[t]he specific grants of power in Rule 23(d), SCRCp, are directed towards notifying the absent parties of the pending litigation." *Id.* In this case, Del Webb is not approaching the homeowners about the litigation.

In *Eldridge*, the Supreme Court reversed an order of the circuit court limiting communication between the named plaintiff and potential class members. The circuit court had allowed the City [defendant] to contact potential members of the plaintiff class for the purpose of obtaining quit claim deeds to the disputed right-of-way. The named plaintiffs, however, were not allowed to contact potential members of the plaintiff class until after the potential class members had been contacted by the defendant [City]. Thus, if the defendant [City] chose not to contact certain potential members of the class, the named plaintiffs would not be allowed to contact those potential class members. The Supreme Court stated: "rather than fostering notification of the pending litigation, the Circuit Court judge's order frustrated one of the stated purposes of Rule 23(d)." *Id.*

The Court in *Eldridge* held as follows:

Under certain circumstances, it may be necessary to limit communication between the parties and potential members of the class. However, we agree with the United States Supreme Court that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering the policies embodied in the [Rules]." *Gulf Oil Co. v. Bernard*, at 101, 101 S. Ct. at 2200, 68 L. Ed. 2d at 703-704. As in *Gulf Oil*, the record here is devoid of any evidence "supporting the need for this sweeping restraint order." *Id.* at 102, 101 S. Ct. 2201, 68 L. Ed. 2d at 704. An order issued without weighing the "need for a limitation and the potential interference with the rights of

the parties" is an abuse of discretion. *Id.* at 101, 101 S. Ct. at 2200, 68 L. Ed. 2d at 703-704.

Id. at 128. In the case at hand, there is absolutely no evidence to suggest a need to limit communication. Accordingly, the plaintiffs' motion should be denied.

5. **Plaintiffs' Spoliation Arguments are Without Merit.**

There are two types of spoliation arguments normally seen in construction litigation: (1) that a defendant has destroyed documents relating to the facts and issues of the case; or (2) that plaintiff has altered the building at issue, thereby making it impossible for defendant to inspect the alleged defect. In both of these situations, the allegation is that the party is altering or destroying evidence in his possession. However, in this case, neither the plaintiffs (Mr. and Mrs. Grazia) nor Pulte/Del Webb are in possession of the evidence that plaintiffs are seeking to preserve. Further, the third-party homeowners have the right to have their stucco repaired by any party they so choose; and the right to do this without giving the Grazias (or their lawyers) any notice. Frankly, the Grazias have no interest whatsoever in what other Sun City Hilton Head homeowners are doing with their stucco. Furthermore, any stucco repairs that are being made at this time are being made by Pulte/Del Webb (a party that plaintiffs are not suing) at the request of homeowners. Accordingly, the Grazias' request that Pulte/Del Webb stop responding to homeowner complaints or that Pulte/Del Webb stop facilitating repairs that the homeowners are requesting is highly irregular.

Additionally, any argument that the Grazias would need to see the condition of the third-party homes prior to any repair for the purposes of gathering evidence for class certification is likewise without merit. There are numerous houses in Sun City Hilton Head that have had repairs performed to the stucco at some point or another over the past several years. The pre-repair state of

the stucco on these houses is irrelevant to any class certification argument. What would be relevant would be the condition of the houses at the time of final class certification. For example, plaintiffs would not argue that a house should be included in a class because it used to have a problem with the stucco even though the stucco problem has already been completely repaired. Or, if plaintiffs claim that the stucco defect on the repaired house has not been remedied, the relevant inquiry would still concern the post-repair status of the house. Accordingly, the Grazias have no need and no right to interfere with the repairs being requested by the third-party homeowners in Sun City Hilton Head.

6. **Plaintiffs' Counsel's Wholly Unsupported Argument that Improper Repairs are Being Made by Pulte/Del Webb is Without Merit.**

As has become routine in motions by the plaintiffs in this case, plaintiffs' counsel are again arguing facts that are not in evidence. Plaintiffs' counsel's argument that Pulte/Del Webb is making "spot patches" or some other incomplete repair to stucco houses is unfounded. Plaintiffs' counsel has not provided an affidavit of any party supporting this allegation, much less an affidavit from an expert. Accordingly, the court should disregard this baseless allegation.

However, should the court be tempted to consider plaintiffs' unsupported argument, Pulte/Del Webb offers the Affidavit of Eric Lundblad which explains that proper repairs are being made and that it is not in Pulte/Del Webb's best interest to do less than a complete repair (as it will just be called to fix it again). Further, Mr. Lundblad explains that a stucco subcontractor is consulted to make sure that the appropriate repair is being made. Accordingly, plaintiffs' assertions are without merit.

7. **Pulte/Del Webb Should Not Be Enjoined From Facilitating the Repair of Houses.**

If the homeowner requests and Pulte/Del Webb agrees to make a stucco repair, such action should not be enjoined. It is black letter law that injunctive relief is a drastic measure to be used with caution. Recently, the South Carolina Supreme Court described injunctive relief as follows:

The court will reserve its equitable powers for situations when there is no adequate remedy at law. The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. The remedy of an injunction is a drastic one and ought to be applied with caution. In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant [non-moving party], and grant an injunction which seems most consistent with justice and equity under the circumstances of the case.

Strategic Res. Co. v. BSC Life Ins. Co., 367 S.C. 540, 545 (2006).

As discussed above, it would be in the best interests of all parties (except plaintiffs' counsel) for any needed stucco repairs to be made without the need for litigation. The homeowner would have his stucco repaired much more quickly, without the need to hire an unfamiliar contractor, and without the need to pay an attorney. The court and the named plaintiffs in the lawsuit would have one less class member to manage. Pulte/Del Webb would again have a happy homeowner.

The elements that the plaintiffs must prove in order to obtain injunctive relief are as follows: "For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law." *Id.* Again, the plaintiffs have offered no evidence in support of their request for injunctive relief.

(a) There has been no showing of irreparable harm.

Plaintiffs are apparently claiming that not having access to the home of a potential class member prior to or during any repair would irreparably harm the Grazias. Such an argument is without merit. If the homeowner wants Pulte to repair or facilitate the repair of their home, then neither the Grazias nor plaintiffs' counsel have a right to interfere. If the homeowner is represented by counsel, it is up to him to choose to give notice to his lawyer. Furthermore, if the alleged stucco issue is repaired, then the homeowner of that house would no longer be party to any class and the condition of the stucco would be irrelevant. Alternatively, as plaintiffs argue, if the repair is

improper and does not completely fix the issue (as defined by one of plaintiffs' experts), then arguably the homeowner would still be included in the class. In that event, the post-repair condition of the home would be what is relevant; not the pre-repair condition. Accordingly, plaintiffs have not, and cannot, offer any evidence that other homeowners requesting that Pulte repair their houses has caused irreparable harm to the Grazias.

Moreover, as discussed above, it is in the best interest of all parties for the homeowners to have their houses repaired when requested and as requested. Plaintiffs (the Grazias) have no right to interfere in the requests of other homeowners or in the requested repairs.

(b) There has been no showing that the Grazias will likely succeed in the litigation.

The success of the Grazias' individual claim is remote. The plaintiffs' lawyers have waived all the actual defect allegations that their experts have stated have actually caused damage to stucco. It appears that claims for damage caused by thinly applied stucco, bad stucco mix, lath lapping issues, and other installation issues have been waived. Instead, only issues relating to control joints, head flashing, and weep screed remain. As demonstrated in Pulte/Del Webb's memorandum in opposition to class certification (which memorandum is incorporated herein), plaintiffs' experts have testified that they have not found any house that has been damaged by one of these remaining claims. Thus, plaintiffs have not demonstrated the likelihood of success on the merits.

(c) Plaintiffs have offered no argument that they have an inadequate remedy at law.

Plaintiffs have not offered and cannot offer, argument that there is an inadequate remedy at law in this matter. This case involves allegations of defective stucco application, involving only money damages. Further, Pulte/Del Webb is not requiring any type of release from the homeowners (just an agreement to bring any claim individually). Thus, if a repair is not made correctly, the homeowner has not given up any right to bring an action/arbitration against Pulte/Del Webb.

8. Plaintiffs would be required to post a substantial bond if any injunctive relief is granted.

Any injunctive relief prohibiting Pulte/Del Webb from responding to Sun City Hilton Head homeowner complaints and/or warranty claims would be tremendously detrimental to Pulte/Del Webb. This court should not enjoin Pulte/Del Webb's activities that are in the normal course of business. There is a high likelihood that such a prohibition upon Pulte/Del Webb would cause homeowners to sue Pulte/Del Webb for failure to respond to warranty claims. Also, there is a high likelihood that it would hurt the reputation of Pulte/Del Webb and have a negative impact on future home sales. Accordingly, if an injunction is entered, Pulte/Del Webb respectfully requests an additional hearing in order to provide evidence on the amount of bond that would need to be posted by the plaintiffs.

CONCLUSION

For the reasons cited above, Pulte/Del Webb respectfully requests that the plaintiffs' motion be denied.

Respectfully submitted,

McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, SC 29211
(803) 799-9800
(803) 753-3278 (facsimile)
vrawl@mcnair.net

By:

A. Victor Rawl, Jr.
A. Victor Rawl, Jr.
Attorneys for the Del Webb and Pulte

January 30, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT) AFFIDAVIT OF ALLISON TUCKER

PERSONALLY APPEARED BEFORE ME, the undersigned, who, being duly sworn,
deposes and states as follows:

1. I am the President of the Board of Directors for the Sun City Hilton Head Community Association, Inc. (SCHHCA).

2. I was appointed to the Board by the developer. I am also an employee of Del Webb Communities, Inc., and my title is Land Entitlement Project Manager.

3. When acting as SCHHCA Board President, I am neither representing nor speaking on behalf of Pulte and/or Del Webb. I specifically reiterate this point when in meetings with Sun City Hilton Head homeowners.

4. As SCHHCA Board President, I meet once a month with the neighborhood Representative Council (NRC). The NRC consists of 44 neighborhood representatives who are all homeowners that have been elected by the homeowners in their neighborhood.

5. On Thursday, January 12, 2012, I attended the NRC meeting as SCHHCA Board President. At this meeting, I received questions from the neighborhood reps regarding stucco and a class action lawsuit. I informed the homeowners that I was not speaking on behalf of Pulte. I also indicated that any question relating to stucco issues needed to be addressed to Eric Lundblad, who is head of the customer service department for Pulte.

6. In response to questions, I shared some of my very limited knowledge about the class action. It is important to note that much of my knowledge was gained by reading the article in The Island Packet newspaper that was published on or about December 8, 2011.

7. In response to questions at the NRC meeting, I told the neighborhood reps the following:

(a) It is my understanding from reading the newspaper that class action status was preliminary and not final.

(b) It was my understanding from reading the newspaper that only homes built between 1998 and 2007 were at issue in the class action lawsuit.

(c) It was my understanding from reading the newspaper that homeowners of stucco houses built in that date range would be included in the class unless they opted out of the class.

(d) It was my understanding from reading the newspaper that Pulte has only been named as a third party.

(e) It was my understanding that this litigation could take years to resolve.

(f) When asked about an opt-out form, I referred any questions to Eric Lundblad, and indicated that I believed that the customer service department had a form that had been used for some time with respect to stucco repairs.

(g) In response to questions about stucco warranty/service inspections and/or repairs, I stated that I believed that the customer service department was still performing requested customer service/warranty inspections and/or repairs to stucco homes.

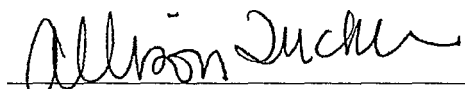
(h) In response to questions about the warranty/service procedure, I reiterated warranty procedure, the customer service email address, and the fact the customer service phone number is in Sunsations (a publication by the SCHHCA).

8. I have reviewed the email/list serve written by Stephen Grossberg dated Friday, January 13, 2012 entitled "Hidden Cypress NRC Meeting Stucco and Over Issues." This email has apparently been attached to a motion seeking to stop Pulte from communicating with

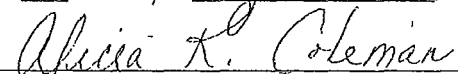
homeowners and/or conducting service request calls/repairs. Mr. Grossberg is not a Pulte employee. Mr. Grossberg is a homeowner in Sun City Hilton Head who has been elected to be a neighborhood representative. Mr. Grossberg attended the NRC meeting on January 12, 2012. Mr. Grossberg's email/list serve apparently includes some information that he gathered from the NRC meeting and some information that he gathered from other sources. Additionally, Mr. Grossberg makes it clear that many of the statements in his email/list serve are his opinions and his recommendations. He specifically states that he was an arbitrator for the American Arbitration Association for design and construction cases for over 25 years. In his email/list serve he apparently gives advice to homeowners based on his experience. While Mr. Grossberg does not attribute the statements in his email/list serve to me, I do want to make it clear that I did not say and/or make all the statements and/or representations that Mr. Grossberg makes in his email/list serve.

9. Based on my experience as SCHHCA Board President, I believe that it would be very bad for Sun City homeowners if a court stopped Pulte from being able to communicate with homeowners and/or stopped responding to service/warranty requests.

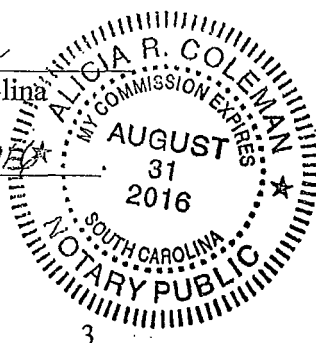
FURTHER AFFIANT SAYETH NOT.


Allison Tucker

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 24 DAY OF Jan, 2012.


Notary Public for the State of South Carolina

My commission expires: 8/31/2016



STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
C/A NO. 07-CP-07-1396

2012 JAN 23 PM 4:03
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC.

Defendant.

**PLAINTIFF CLASS' RULE TO SHOW
CAUSE AND REQUEST FOR
IMMEDIATE INJUNCTIVE RELIEF**

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

INTRODUCTION AND SUMMARY

The Class Certification Order was issued by this Court and filed in Beaufort County on December 19, 2011. Prior to the issuance of that Order, SINCE the issuance of the Order and in direct contravention of the Order, Pulte has engaged and continues to engage in the improper conduct of contacting represented parties and attempting to subvert the Class Action process stated in this Court's Order. The sole objective of this improper contact is to influence these parties to opt-out of the Class before a Class Notice has even been distributed. The only remedy

available which will curb these improper tactics is an injunction, and a further hearing with an Order so that the Court can discover the extent of this conduct and its effects. Additionally, Pulte has been engaged and is engaged in a process of destroying and spoliating evidence by attempting patching of the stucco systems on some houses belonging to putative class members. Again, this practice must be halted.

DISCUSSION

This case has been pending for five years. Plaintiffs believe that Pulte has been engaged in making spot patches of residences, resulting in the destruction of evidence, the entire time. In the Order, the Class is clearly defined as:

All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City Hilton Head to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above 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.

Once this Order took effect, since there is no opt-in Class, ALL homeowners at Sun City meeting this description became Class Members unless and until they exclude themselves, and since Class Counsel represent the Class, they, as putative Class members are represented by Class Counsel.

As a result of information obtained about Pulte's ongoing activities as set forth above, Class Counsel put Pulte's counsel on notice of our representation, and asked Pulte to cease the improper conduct and contacts. The exchange of letters attached documents this notification process, and at no time did Pulte agree to cease in its efforts to contact or influence Class members, indeed it refused to do so. (Attached see Exhibit "A").

On January 18, Class Counsel was informed that agents representing at least one and possibly both Defendants were making contact with Class members seeking to induce them to opt-out of the Class in exchange for what is believed to be spot repairs, in derogation of the Court's Order and the process outlined therein. Counsel was able to obtain a copy of the document furnished to the Class Member which it is believed is routinely being furnished to other Class Members as well as part of an ongoing scheme to influence Sun City homeowners to opt out of the Class Action before receiving any Notice or explanation of their rights from the Court or Class Counsel. The contents of this document, attached as Exhibit "B," are startling.

First, is the acknowledgement in paragraph two that the homeowner with whom the Defendants are meeting is represented by counsel - thereby acknowledging an improper contact up front;

Second, is the notification of the Class Action - not the Notification which this Court has yet to approve;

Third, is the implicit and incorrect assertion that Pulte, after making its patch repairs, would be subject to a "double recovery" if the Class Member exercised their rights to pursue full recovery pursuant to the Class mechanism;

Fourth, is the General Release, that the Class Member agrees not only not to participate in "any way" (refusing to testify as a subpoenaed witness?) in the present Class Action;

Fifth, a General Release not to participate in "any future class action" (no matter what the subject);

Sixth, the confusing misrepresentation regarding the notion of an "opt-in" Class; and, especially;

Seventh, the General Release of any inclusion in the existing Class with no notification of the alternatives, or any explanation of the options available to the homeowner.

This is no more than an intentional end-run around the Order of this Court by sophisticated corporate Defendants, seeking, and indeed gaining, improper advantage in this litigation. As such it cannot be tolerated.

On Monday, January 16, 2012, almost four weeks after the Class Certification Order had been filed, Class Counsel received the attached e-mail from a client (attached as Exhibit "C") indicating that a Pulte representative, Allison Tucker, had addressed a group of putative Class members (with no prior notification to Class Counsel), at a meeting of the NRC at Sun City. At this meeting, the Pulte representative made representations about this litigation, made representations about counsel, and additionally, sought to influence this group of Class members to opt out of the litigation.

**REMEDIAL ACTION IS WARRANTED AND NECESSARY TO PRESERVE THE
RIGHTS OF THE PARTIES AND SUBSTANTIAL JUSTICE**

**ONCE A CLASS IS CERTIFIED, CLASS COUNSEL IS DEEMED TO HAVE AN
ATTORNEY-CLIENT RELATIONSHIP WITH EACH CLASS MEMBER.
ACCORDINGLY, COMMUNICATIONS BY THE OPPOSING PARTY ARE GOVERNED BY
THE APPLICABLE ETHICAL RULES, WHICH INVARIABLY REQUIRE THAT SUCH
COMMUNICATIONS GO THROUGH CLASS COUNSEL.**

(Greer: A Practitioner's Guide to Class Actions ABA 2010 at p. 37)

Attached are copies of the U.S. District Court's decision in the matter of *Kleiner v. First National Bank of Atlanta*, 102 F.R.D. 754 (USDC ND Georgia 1983) and its affirmance by the 11th U.S. Court of Appeals (751 F.2d 1193) in 1985 (Attached as Exhibits "D" and "E"). In *Kleiner*, a class of bank customers had been certified, but the Notices had not yet been sent out. In that interim, the bank, with advice of counsel, embarked on a campaign to seek opt-outs from the putative Class Members. After -apparently - full discovery on the facts surrounding what

happened, and who caused it, the Court ultimately issued sanctions fining the Bank, and disqualifying both outside counsel and the bank's general counsel. On Appeal, the Court's actions were affirmed by the 11th Circuit, with the exception of disqualification of the bank's general counsel who had not acted as lead counsel.

The Defendants' Appeal of these sanctions involved First Amendment challenges to the lower Court's previously issued orders which had directed the Defendants not to communicate with the putative Class. This was rejected. At the time of these decisions, Rule 23 was only 17 years old, having been introduced in 1966. A First Amendment challenge was therefore at least a colorable argument. Forty-six years later, however, there is no excuse for advising a client that it is permissible - and indeed a good idea - to solicit opt-outs from putative Class Members once Class Certification has taken place and before a Notice has even been issued.

On December 22, 2011, after the Court's Certification Order was filed, Plaintiffs' counsel wrote Pulte's counsel, advising it of the Order and consequences, and demanding: "Please confirm that no further stucco work will be done by Pulte AND NO ADDITIONAL DIRECT CONTACT WILL BE MADE WITH OUR CLIENTS BY PULTE" (emphasis supplied). (Exhibit "A").

The response to this demand by Pulte was in the letter from Attorney Rawl of January 12, 2012, in the next to last paragraph, "Accordingly Pulte and/or Webb will not ignore their customers' service requests or warranty requests. If a homeowner contacts Pulte and/or Del Webb regarding an actual or perceived problem, Pulte and/or Del Webb will address the service if they can." (Exhibit "A").

Remarkably absent from this response was any mention that in connection with these contacts would be the solicitation of opt-outs, and a notification campaign by Pulte employees

such as Allison Tucker at the NRC meeting on January 12, 2012, effectively soliciting opt-outs in exchange for patch repairs. After this January 12 letter, both the Tucker meeting and the opt-out document attached as Exhibit "B," took place. Whether or not counsel advised Pulte that this conduct was permissible is a matter of which Plaintiffs have no knowledge, but which clearly should form the basis of an inquiry by the Court.

Sun City is a tight-knit community of retirees, and Pulte's campaign to seek opt-outs is obviously designed to have the word spread around the community that if any relief is forthcoming, it will be through Pulte and its patching work in exchange for an opt-out of the Class. Imagine the appeal of such a campaign to 80 year-old homeowners who simply want their houses fixed in some fashion - whether correctly or not - and who have waited out the processes of the Court System through five years of delay. The impact of such a one-sided campaign will be - and is designed to be - huge. It has already tainted the judicial process, and promises to do much more damage if not curtailed immediately and sanctioned.

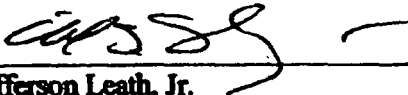
This Court's Order Certifying the Class contemplates an arms-length process whereby homeowners can understand just what potential problems they have, and can have a free and unpolluted decision making process regarding their biggest investment. Pulte's actions are designed to deliberately subvert this process and must be stopped. The process envisioned is one of inspection, and compliance with the Right to Cure Statute so that following inspections if repairs are offered, such offers can be transmitted THROUGH CLASS COUNSEL, with the opportunity for advice and understanding of the options available. The destruction and alteration of evidence by Pulte and its subcontractors cannot be countenanced if an orderly and fair administration of justice is indeed the goal.

This Court has not in the past hesitated to issue appropriate sanctions where merited. (*Wieters v. Bon Secours-St. Francis Xavier, et al*, Case No.: 2006-CP-10-1397). Case law cited in the Court's Order of June 21, 2010, in awarding sanctions against the hospital are equally applicable here, although the Class submits that the conduct at issue here is far more egregious, intentional, and aimed at the subversion of the rights of a large group of homeowners than was the case in *Wieters*.

Therefore at a minimum, the Class, through counsel, urges this Court to take the following action to protect the status quo prior to trial, and to prevent improper conduct and destruction of evidence in the future:

- 1. Issuing an Injunction preventing any contact by the Defendants with any putative Class Members until further Court Order;**
- 2. Holding a hearing compelling testimony as a precursor to sanctions;**
- 3. Issuing an Order compelling the Defendants to identify all houses on which they or their subcontractors have effected stucco work since original construction and to produce its (and its subcontractors) entire file on each house, and to further identify the author of Exhibit "B" and produce that individual together with Allison Tucker, a Pulte employee, for testimony at the hearing.**

LEATH, BOUCH & SEEKINGS, LLP

By: 

W. Jefferson Leath, Jr.

Michael S. Seekings

92 Broad Street

P.O. Box 59

Charleston, SC 29402

(843) 937-8811

(843) 937-0606 facsimile

e-mail: jl@leathbouchlaw.com

THE CHAKERIS LAW FIRM

John T. Chakeris

231 Calhoun Street

P.O. Box 397

Charleston, SC 29402

(843) 853-5678

SEGUI LAW FIRM, LLC

Phillip W. Segui, Jr.

864 Lowcountry Blvd., Suite A

Mt. Pleasant, SC 29465

(843) 884-1865

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: January 20, 2012

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 20th day of

January, 2012.

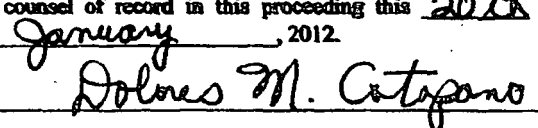


EXHIBIT A



LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

December 22, 2011

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBC No.: 1351.0001

Vic:

It has come to our attention that Pulte has embarked on a course stucco patchwork on a number of homes in Sun City. The effect of the work, and the presumed objective, is to cover over the originally and incorrectly installed stucco. In addition, we believe this work is inconsistent with Judge Baxley's recently entered Order that specifically outlines the procedure for any curative work that might be proposed on any of the 4300 houses that are subject to the Court's directive. Please confirm that no further stucco work will be done by Pulte and no additional direct contact will be made with our clients by Pulte. Thank you for your immediate attention to this correspondence.

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP

Michael S. Seekings

Michael S. Seekings

MSS/sas

cc: John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.

MCNAIR
ATTORNEYS

December 22, 2011

A. Victor Rawl, Jr.

vrawl@mcnair.net
T (803) 798-8800
F (803) 753-3278

Michael Seekings
Leath, Bouch & Seekings
P.O. Box 159
Charleston, SC 29402

Re: Grazia, et al. v. South Carolina State Plastering, et al.;
Case No. 2007-CP-07-1396

Dear Mike:

I just received your letter dated December 22, 2011 requesting that Pulte cease all communications with and repairs for its homeowners. I would just like to clarify a few issues with you:

1. Are the lawyers for the Grazias and the putative class in the *Grazia* case requesting that Pulte or Del Webb not return (or ignore) service request calls from Sun City Homeowners with stucco on their houses?
2. Are the lawyers for the Grazias and the putative class in the *Grazia* case requesting that Pulte or Del Webb not conduct any repairs requested by Sun City Homeowners with stucco on their houses?
3. Are you requesting that Pulte or Del Webb tell homeowners that you (the lawyers in the *Grazia* case) have asked Pulte or Del Webb not to talk with them, not to respond to service calls, not to conduct inspections of their house when asked, and not to perform requested repairs?
4. Please specifically describe what you think Pulte and/or Del Webb can/should or can't/shouldn't do with regard to "your clients."
5. How do you claim Judge Baxley's Order in the *Grazia* case affects Pulte or Del Webb with regard to service requests and repairs?
6. Please provide the list of those who you claim to be "your clients" that have claims against Del Webb or Pulte so that I may provide that list to my client and discuss your request with them.

McNair Law Firm, P. A.
1221 Main Street
Suite 1600
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

Thank you for your immediate attention to this correspondence.

COLUMBIA 1063782v1

ANDERSON BLUFFTON CHARLESTON CHARLOTTE COLUMBIA GREENVILLE HILTON HEAD MYRTLE BEACH PAWLEYS ISLAND

RecordonAppeal 0088

Michael Seekings
December 22, 2011
Page 2

MENAIR
ATTORNEYS

Very truly yours,

A. Victor Rawl, Jr.

A. Victor Rawl, Jr.

AVR,jr/plj



LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

January 3, 2012

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBC No.: 1351.0001

Dear Vic:

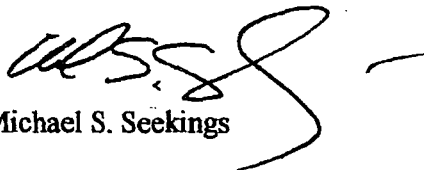
In response to your letter of December 22, 2011, the short answer to your first three (3) questions is yes. Any work done by Pulte on stucco exteriors at Sun City is nothing more than spoliation of evidence and an attempt to bypass the Court's Right to Cure directive and the residents' ability to get complete repair for their stucco problems. Should Pulte be contacted by any Sun City Owner about stucco problems, it is incumbent on you and Pulte to tell us immediately.

To date, we have not advised the residents of Sun City about their rights and obligations as class members because to do so before the issuance of an Order by the court would have been improper. It is certain that many are unaware of their substantial rights. We assume that Pulte has specifically adopted a policy of not informing homeowners of the pending litigation in an effort to bypass their obligation of full repair. This must now stop. Before any repairs are made, you are to contact us with all relevant information about the owner, address and plan of repair and await a response before doing any work.

Thank you for your compliance.

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP


Michael S. Seekings

MSS/sas

cc: W. Jefferson Leath, Esq.
John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.
Everett A. Kendall, II, Esq.
Christy E. Mahon, Esq.
David S. Cobb, Esq.

M C N A I R
ATTORNEYS

January 12, 2012

A. Victor Rawl, Jr.

vrawl@mcnair.net
T (803) 799-9800
F (803) 753-3278

Michael Seekings
Leath, Bouch & Seekings
P.O. Box 159
Charleston, SC 29402

Re: Grazia, et al. v. South Carolina State Plastering, et al.;
Case No. 2007-CP-07-1396

Dear Mike:

I received your letter dated January 3, 2011 requesting that Pulte cease all communications with and repairs for its homeowners/customers.

In that letter you indicated that:

1. The lawyers for the Grazias and the putative class in the *Grazia* case are requesting that Pulte or Del Webb ignore service request calls from any Sun City Homeowners with stucco on their houses.
2. The lawyers for the Grazias and the putative class in the *Grazia* case are requesting that Pulte or Del Webb not conduct any repairs requested by Sun City Homeowners with stucco on their houses.
3. The lawyers for the Grazias and the putative class in the *Grazia* case are requesting that Pulte or Del Webb tell homeowners that you (the lawyers in the *Grazia* case) have asked Pulte or Del Webb not to talk with them, not to respond to service calls, not to conduct inspections of their houses when asked, and not to perform requested warranty repairs.

However, you have not answered the following questions that were addressed to you:

1. Please provide the list of those who you claim to be "your clients" that you represent with regard to their claims against Del Webb or Pulte.
2. How do you claim Judge Baxley's Order in the *Grazia* case (in which your clients are not suing Pulte) affects Pulte or Del Webb with regard to responding to homeowners' service requests and requests for repairs?

At this point, you have less than 140 clients that are directly suing Pulte or Del Webb. When those plaintiffs request repairs from Del Webb, they are informed

McNair Law Firm, P.A.
1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

COLUMBIA 1065439v1

ANDERSON BLUFFTON CHARLESTON CHARLOTTE COLUMBIA GREENVILLE HILTON HEAD MYRTLE BEACH PAWLEYS ISLAND

RecordonAppeal 0091

that any such request needs to come from counsel (you or your co-counsel). Then, normally, I receive an e-mail from one of your co-counsel requesting that Pulte go inspect and make requested repairs. However, you have not provided to us a list of anyone who you claim to represent that has a claim against Pulte or Del Webb other than those who you have filed a complaint on behalf of (the 140). With regard to the Order in Grazia regarding "preliminary certification", it is unclear as to whether you are class counsel or not. Even if you are deemed to be class counsel, your representation would be limited to the claims alleged by your client against SCSP. You would not represent any of the class members with regard to any of their claims (if they have any) against Pulte or Del Webb (as no such claims have been asserted). Further, with Judge Baxley's new class definition, it is completely unclear what homeowners (if any) are in your "preliminary" class.

Accordingly, Pulte and/or Del Webb will not ignore their customers' service requests or warranty requests.. If a homeowner contacts Pulte and/or Del Webb regarding an actual or perceived problem, Pulte and/or Del Webb will address the service request if they can.

However, if you represent homeowners with individual claims against Pulte and/or Del Webb (other than the 140), please provide us with a list of their names and addresses. Otherwise, you have no basis to try to stop homeowners from requesting and receiving appropriate attention and/or repairs from Del Webb and/or Pulte.

Thank you for your immediate attention to this correspondence.

Very truly yours,



A. Victor Rawl, Jr.

AVR/jr/pkj



LEATH, BOUCH & SEEKINGS, LLC

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL
January 17, 2012

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBC No.: 1351.0001

Dear Vic:

In response to your self-serving letter of January 12, 2012, I refer you to pages 11 and 12 of Judge Baxley's Order wherein the class in this case is very clearly defined:

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.

These people are our clients and any contact with them by you or Pulte would be and is improper. In my letter of January 3, I make it very clear, and do so again today, that it is incumbent on you to keep us informed about any contact you and your client have with any person or entity that fits within the class definition, regardless of who initiates that contact, and that any repairs be scheduled and completed within the framework of the S.C. Right To Cure Statute and Judge Baxley's Order.

With all due respect, this process should not be too complicated. Those who fall within the class definition have rights that are being circumvented each time you and Pulte make contact with them and do any work that is less than a strip and re-clad.

Pulte is a party to this case and has participated in every hearing and other proceeding leading up to the issuance of the Court's Order. Pulte is now bound by that Order. The homeowners within the defined class are represented by Counsel and are entitled to be fully advised of their rights before any work is done on their homes.

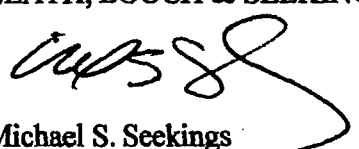
It has been brought to my attention that as recently as last week, a Pulte representative was dispensing legal advice about this case to class members. Included in this advice was the following:

- Judge Baxley has yet to issue an Order on the Class (plainly untrue);
- This matter will take years to resolve (your strategy as exactly stated in the attached excerpt from Oros);
- Lawyers will be first to be compensated (this plainly is an effort to promote opting out);
- Pulte is willing to "fix" (i.e., cover up) problems with stucco if owners "opt-out" (interesting term for a lay person to use in a case where she stated no ruling has been made on the Class issue); and
- All owners will be included in the Class whether they opt-out or not (nonsensical).

I certainly hope that Pulte's legal team did not support or condone this type of contact and dissemination of inaccurate information which is outrageous. While we all applaud zealous advocacy, this activity is beyond the limits of our rules and the Class Order of the Court. We will file a motion promptly.

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP


Michael S. Seekings

MSS/dmc

Enclosure

cc: W. Jefferson Leath, Esq.
John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.
Everett A. Kendall, II, Esq.
Christy E. Mahon, Esq.
David S. Cobb, Esq.

1 putative plaintiffs, the putative class members, the
2 people that the Oroses claim to be prosecuting this case
3 on behalf of, they also have to comply with the statute.

4 The defendant has the right, before they're
5 sued, to have notice of what the claim is and have a
6 right to try to cure the claim.

7 And, so, technically, pursuant to the statute,
8 the case cannot be prosecuted against any other or on
9 behalf of any other homeowners until that homeowner has
10 complied with the statute.

11 Now, what does that realistically mean? That
12 means that the case is stayed until all putative class
13 members comply with the statute. And we just argued this
14 exact same motion on Monday, before Judge Dukes, in
15 another class action, these same gentlemen brought
16 against my client. And the problem is that these
17 gentlemen don't represent all 4,000 homeowners in Sun
18 City/Hilton Head. But they are attempting to in a
19 representative capacity. And, so, by actually staying
20 the case, until all putative homeowners comply with the
21 statute, which they have to do, pursuant to South
22 Carolina law, how long is the case going to be stayed?
23 Most likely indefinitely. These are all homeowners that
24 are have to be over 55 to live there. By the time all
25 4,000 comply, which they probably never will, half of

RAY SWARTZ & ASSOCIATES
Charleston (843)556-2923 1-800-822-8711 FAX (843)821-6756

1 them will be already be dead.

2 And, so, which leads us to the next rational
3 statement, which other courts around the country have all
4 set down, that the right to cure statute in class actions
5 are incompatible. Since a procedural rule cannot abridge
6 a substantive right and substantive law, you know, the most
7 rational decision would be to say, at this point, to
8 strike the class allegation so that the individuals
9 plaintiffs, who actually do have a problem, can go
10 forward with their own litigation.

11 MR. WILLS: You could never have a class
12 action in a construction litigation.

13 MR. RAWLS: In a construction defect case
14 against a contractor.

15 MR. WILLS: Yes.

16 MR. RAWLS: And

17 MR. WILLS: Or developer.

18 MR. ETHERIDGE: Or architect.

19 MR. WILLS: Or architect.

20 MR. RAWLS: You can have one against a
21 manufacturer. For example, if the claim was that the
22 stucco that was developed by MasterWall, that was put on
23 the house out there, was somehow defective, then the
24 plaintiffs could maintain a class action against the
25 manufacturer, and that happens. You know, you may stop

EXHIBIT B

Sun City Hilton Head Homeowner Request for Stucco Repairs
and
Agreement not to Participate in Class Actions

I am a homeowner in Sun City Hilton Head, and I am requesting that repairs be made to the stucco system on my house.

I am either represented by legal counsel with regard to stucco issues, and/or I understand that I have the right to consult with legal counsel of my choosing prior to signing below.

I understand that at least two homeowners have filed lawsuits with class action allegations relating to stucco on homes in Sun City Hilton Head.

I understand that Del Webb and/or Pulte does not want to pay for or make repairs to my home if I chose to stay in a class action lawsuit which is seeking money for stucco repairs. In other words, Del Webb/Pulte is not willing to pay me twice for stucco repairs.

If Del Webb Communities, Inc., Pulte Homes, Inc., or one of their stucco subcontractors makes repairs to my stucco, then I agree not to participate in any way in any present or future class action lawsuit against Del Webb Communities Inc., Pulte Homes, Inc., or any stucco subcontractor that has applied stucco to homes in Sun City Hilton Head (including, but not limited to, South Carolina State Plastering). My agreement not to participate in class actions includes, but is not limited to, the following: 1) I agree not to be a named plaintiff or class representative; 2) I agree not to accept any funds from a class action lawsuit (whether by way of a class settlement or by judgment); 3) I agree that if an "opt in class" is certified, then I will not "opt in" to the class; 4) I agree that if an "opt out class" is certified, then I will "opt out" of the class; and 5) I agree that this document may be provided to any tribunal and/or filed with any court as evidence and notice of my intent not to participate in a/the class action (to either not "opt in" or to "opt out").

I understand that this agreement does not affect my right to file an individual lawsuit or arbitration if I discover construction defects in the future.

Homeowner Address

Print Homeowner Name

Witness

Homeowner Signature

Date

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendant.

**MOTION FOR TEMPORARY
INJUNCTION**

IMMEDIATE HEARING REQUESTED

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

TO: JOHN T. CHAKERIS & PHILLIP W. SEGUI, JR.

YOU WILL PLEASE TAKE NOTICE THAT the undersigned, as attorney for South Carolina State Plastering, hereby moves this Court for a temporary injunction pursuant to Rule 65 of the South Carolina Rules of Civil Procedure. Movant further requests an **IMMEDIATE HEARING**.

Movant seeks and injunction against the following persons:

- Anthony Grazia, Plaintiff
- Barbara Grazia, Plaintiff
- John T. Chakeris, Esquire, attorney for the Plaintiffs
- Phillip W. Segui, Jr., Esquire, attorney for the Plaintiffs
- W. Jefferson Leath, Esquire, attorney for the Plaintiffs
- Michael S. Seekings, Esquire, attorney for the Plaintiffs
- Agents and/or representatives of the above

Movant seeks to enjoin the following activities:

- communicating with prospective class members regarding the contents of or the issues addressed in the Court's Order of December 15, 2011, *except as to those persons with whom counsel has an on-going attorney-client relationship;*
- publishing any statement interpreting, explaining, or otherwise commenting on the Court's Order of December 15, 2011 to any homeowner in Sun City Hilton Head, *except as to those persons with whom counsel has an on-going attorney-client relationship;*
- taking any action intend to advise or inform residents of Sun City Hilton Head of their legal rights with respect to South Carolina State Plastering, *except as to those persons with whom counsel has an on-going attorney-client relationship;*
- taking any action intended to influence the decision of prospective class members whether to opt-out of the putative class, *except as to those persons with whom counsel has an on-going attorney-client relationship;*

The requested injunction should apply to all media and forms of communication, including but not limited to, public meetings, newspaper (or other print media), mailings or other mass-distribution fliers, internet (*eg.*, web-sites, Facebook, Twitter or other social media), email distribution, and robo-calling.

An injunction is warranted because of the irreparable harm that will be suffered by the Movant if no injunction is issued, for which there is no adequate remedy at law. If Plaintiffs' counsel provide inaccurate information regarding the class, the waiver of claims within the class, the claims included in the class, anticipated recovery of funds from the litigation, and etc. then the putative class member's due process right to adequate representation would be violated. If this occurs, then that class member may use such a due process violation as an argument to avoid a defense verdict in a certified class (thus violating the due process rights of Defendant). The issuance of an injunction is the only safeguard that will adequately protect the due process rights of the Defendant in this litigation. The Plaintiffs and their counsel, on the other hand, have no substantial right—constitutional, due process, statutory or otherwise, to engage in these activities. The problem, as noted by other courts, is that once inaccurate information/advice is provided, there is no way to “unring the bell.” That is, the potential class member may make up his mind to waive his rights and not opt-out based on the “advice” of counsel and not on the court approved class notice. At the very least, severe confusion would be the outcome. In fact, as is discussed in brief below and more fully in supporting memorandum, these activities may be in-fact prohibited.

The need for this injunction is exigent because of past actions of the Plaintiffs' counsel, the current efforts to interfere with the contractual relationship between homeowners and Pulte,

misstatements contained in recent press reports, and the advertised "town hall meeting" to be held on January 26, 2012.

Plaintiffs' counsel have advertised their intent to conduct a public meeting "to field questions from Sun City homeowners about the class-action lawsuit." This intent was announced in the January 4, 2012 issue of The Island Packet and on the Internet at islandpacket.com. A copy of the announcement is at Exhibit 1 hereto. In the text of the article, Attorney Chakeris is quoted as saying that "[i]t's an open invitation to all stucco owners in Sun City to basically tell them and inform them about [the court's] order [of Dec. 8] and talk to them about the process."

Plaintiffs' counsel have previously demonstrated a willingness to act prematurely as to the information they provide to the homeowners in Sun City Hilton Head. Attached hereto at Exhibit 2 is a memo that was published which falsely states that the Court had taken action that it had not taken.

Currently Plaintiffs' counsel have embarked on a strategy to sequester the residents of Sun City from Pulte and SCSP. In correspondence from Plaintiffs' counsel, attached hereto at Exhibit 3, Plaintiffs' counsel declare that all residents of Sun City Hilton Head are their "clients" as a result of the December 15, 2011 Order and attempt to prevent Pulte from honoring any warranty claim made by the resident.

In the past, Plaintiffs counsel created and maintained a web-site at <http://www.suncityblufftonhomedefectclaims.com/>. The content of this web-site was recently removed. However, it was used to distribute information about the lawsuit to those who are now potentially members of this class action.

South Carolina State Plastering will be severely prejudiced by such a solicitation, which will foreseeably be an extremely one-sided presentation by people who have a pecuniary interest in encouraging people not to opt-out of the class action, which has only been preliminarily certified. Having such a meeting, moreover, attempts to present the Defendants and the Court with a *fait accompli* regarding the notice procedures to be used regarding the right-to-cure statute.

The Court's Order, pp. 12-13, establishes specific requirements regarding the notice that is to be given to putative class members, and it allows input from Defendants' counsel as well as Plaintiffs'. The final determination of the contents of the notice is reserved for the Court. Plaintiffs' counsel is attempting to subvert the Court's fair, balanced approach to providing opt-out notice to the putative class members. There is no way that the proposed meeting can avoid getting into questions regarding opting-out. It would be naïve to think that a balance of information, fair to both sides, will be provided.

The announcement of the meeting, moreover, expands the putative class preliminarily certified by the Court. The preliminary class as described in the Court's Order is:

"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."

Order, pp. 11-12. As quoted above, Attorney Chakeris has invited "all Stucco homeowners in Sun City" to the meeting. It is a reasonable inference that many of the attendees will not fit into the preliminary class. This will raise more questions and discontent with the Defendants and the judicial system.

The Court's Order, moreover, imposes "a stay of proceedings to permit Plaintiffs and Defendant to comply with the Act " Order, p. 2. A Meeting of the type presently scheduled to be conducted on January 26 does not comply in letter or in spirit with the Court's Order, the intention of which is to allow counsel for both the Plaintiffs and Defendants to proceed in an orderly manner, free from animosity, to work out the procedures of how to integrate the requirements of the Right to Cure statute into the class action format. A pep rally to oppose the Defendants is inconsistent with such a rational, measured process.

Plaintiffs' counsel are trying in other ways to interpose themselves between the homeowners and counsel for the Defendants. As reflected in the correspondence at Exhibit 3, they are attempting to prevent Defendants from responding to homeowners' requests for correction of observed construction defects. It is of note that Plaintiff's counsel refers to all of the homeowners in Sun City as "our [their] clients," disregarding the parameters of the preliminary class recognized by the Court. They threaten that any work on any house in Sun City will constitute "spoliation of evidence."

The process of determining whether the preliminary certification will proceed to final certification of the class requires, under the order, several steps: working out the notice procedures; implementing the right to cure process (which may be expected to take some 240 days); and notices to be filed. It is entirely premature, and likely to raise homeowners' expectations to unreasonable levels, to conduct the described "public meeting" before the process is yet begun.

Moreover, Plaintiffs' counsel have a direct conflict of interest in seeking to influence prospective class members to participate in the class. In its Order of December 15, 2011, the Court has accepted that participation in the class will require residents to waive some claims and

damages that they might otherwise be entitled to recover. Plaintiffs and Plaintiffs' counsel have a vested interest in down-playing the effect that of waiver as relates to the rights of the prospective members. As a result, Plaintiffs' counsel can give no legal advice on this issue.

Finally, the meeting appears to be a violation of the South Carolina Rules of Professional Conduct regarding solicitations, Rule 7.3 provides as follows:

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

Plaintiffs' counsel are, contrary to the implications of preliminary certification and of the parameters of the group preliminarily certified, assuming that all residents of Sun City Hilton Head are their clients. That is incorrect. Many of the people to whom they would be speaking are only "prospective clients." In other words, for those homeowners who do not meet the court's new class definition, they would be subjected to Plaintiffs' counsel presentation that could be used to attempt to sign up (solicit) new clients to sue SCSP and Pulte. It would, therefore, be contrary to Rule 7.3 for them to conduct the proposed meeting

Plaintiffs' counsel have not responded to requests to voluntarily cease and desist from this behavior. Attached at Exhibit 4 is a letter from the undersigned to Attorney Chakeris with copies to all other counsel setting forth the reasons why these behaviors should be stopped. The reasons set forth in that letter are incorporated herein as additional bases.

This Court has the authority and the obligation to issue an injunction as to these behaviors. The South Carolina Supreme Court has recognized the need for orders limiting contact between parties and potential class members: "[o]rders which severely limit

plaintiff/appellant's contact with potential members of the class are authorized only under the general grant of power in Rule 23(d)(2). Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (citing Rule 23(d)(2), SCRCP). The United States Supreme Court has held that trial courts have authority, in appropriate circumstances, to impose limitations on plaintiffs' counsel's contact with prospective clients in a class action context. The Court has held that, "[b]ecause of the potential for abuse [in class actions], a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties," Gulf Oil Co. v. Bernard, 452 U.S. 89, 100, 101 S.Ct. 2193, 2200, 68 L.Ed.2d 693 (1981), *as quoted in* Payne v. Goodyear Tire and Rubber Co., 207 F.R.D. 16, 18 (D.Mass. 2002). The South Carolina Supreme Court has expressly agreed with the Gulf Oil case:

Under certain circumstances, it may be necessary to limit communication between parties and potential members of the class . . . we agree with the United States Supreme Court that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."

Eldridge at 128, 417 S.E.2d at 534 (quoting Gulf Oil at 101). South Carolina State Plastering asserts that the record in this case is clear: Plaintiffs' counsel's attempted communications with putative class members rise to the level—and indeed surpass—the "potential for abuse."

Both Defendant and Pulte have filed 59(e) motions requesting reconsideration and/or clarification of the court's "preliminary" class certification. The Court has stayed the parties requirement to submit proposed class notice until after these motions are resolved. If the court goes forward with "preliminary" class certification, the court would then work out a fair, balanced notice regarding, *inter alia*, the opt-out option, and other information that the court believes the putative class members must have to decide whether to opt-out. Plaintiffs' counsel

should not be allowed to provide information to potential class members that may well end up being contrary to that provided in the court's approved notice. Especially because of the breadth of the waivers and the plaintiffs' counsels' conflicts of interest in advising potential class members whether to opt out, this is an appropriate situation in which to issue an Order enjoining/precluding meetings like that scheduled for January 26, 2012, and other contact between the parties and homeowners in Sun City Hilton Head, until 1) the opt-out period has elapsed, or 2) until the court has denied the the motion for class certification in this case.

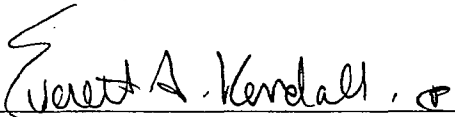
CONCLUSION

The Court should grant Defendant's Motion for TRO or a temporary injunction. At this sensitive time when the parties are trying to assist the Court in developing fair, balanced guidelines about notice and the harmonization of the Right to Cure statute and a Rule 23 class action, a meeting like that intended for January 26 will do far more harm than good. More questions will be raised than correct, unbiased answers given.

This Motion will be further supported by a Memorandum of Law

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



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

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

Columbia, South Carolina
January 13, 2012

CERTIFICATE OF SERVICE

I, the undersigned secretary of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for South Carolina State Plastering, LLC, do hereby certify that I have served a copy of the foregoing **Motion for Temporary Restraining Order or, in the Alternative, for a Temporary Injunction** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

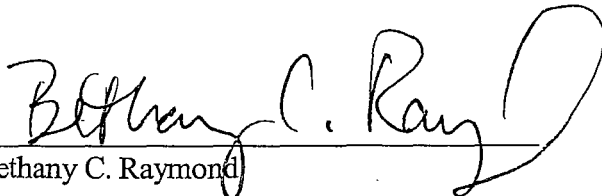
W. Jefferson Leath, Jr.
Michael S. Seekings
Leath, Bouch & Seekings, LLP
92 Broad Street
Post Office Box 59
Charleston, South Carolina 29402

Phillip W. Segui, Jr.
Segui Law Firm, LLC
864 Lowcountry Boulevard, Suite A (29464)
Post Office Box 1450
Mt. Pleasant, South Carolina 29465

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

David S. Cobb
Turner, Padgett, Graham & Laney, P.A.
Gateway Center, Suite 200
40 Calhoun Street
Post Office Box 22129
Charleston, South Carolina 29413-2129

A. Victor Rawl, Jr.
McNair Law Firm, P.A.
5 Belfair Village Drive
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Sun City stucco suit gets class-action status; 4,000 homes could be included

By ALLISON STICE

astice@islandpacket.com

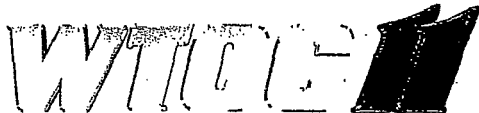
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Meeting set on Sun City stucco class-action lawsuit

A public meeting to field questions from Sun City homeowners about the class-action law suit alleging defective stucco work is set for 6 p.m. Jan. 26 at Bluffton High School, according to John Chakeris of Chakeris Law Firm of Charleston, one of four law firms handling the case.

A lawsuit alleging defective stucco work on Sun City Hilton Head homes has been granted preliminary class-action status by a Circuit Court judge and could include more than 4,000 homes in the gated community.

Judge J. Michael Baxley ruled Dec. 8 that attorneys representing Sun City couple Anthony and Barbara Grazia could also represent thousands of other homeowners possibly affected by stucco problems. The ruling prevents the courts from getting clogged with nearly identical lawsuits, including 140 individual cases alleging defective stucco already pending, he said in the ruling.

The Grazia's suit originally was filed against South Carolina State Plastering LLC. State Plastering filed a third-party complaint against developer Del Webb Communities Inc., builder Pulte Homes Inc. and designer Kephart Architects Inc., making them part of the suit by alleging they were responsible for some or all of the damages.

Improper stucco application can cause water damage, mold and rot.

The state Supreme Court overturned a lower court decision in October 2010, ruling the Grazia's attorneys could apply for class-action status.

The suit originally alleged negligent construction on more than 2,500 homes in the community. However, during months of hearings, the plaintiffs attorneys determined that State Plastering applied

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stucco to about 4,300 homes Sun City homes late 1998 to July 2007, according to John Chakeris Chakeris Law Firm of Charleston, one of four lawyers handling the case.

After wording is determined, a notice will be sent to the thousands of other Sun City homeowners who will become part of the suit unless they opt out, Chakeris said.

Lawyers handling the case also will hold an informational meeting at 6 p.m. Jan. 26 at Bluffton High School.

As an open invitation to all stucco homeowners in Sun City to basically tell them about and inform them about this order and talk to them about the process," Chakeris said.

The class-action order is qualified as "preliminary" to comply with the state's "Right to Cure Act." That law requires a homeowner to give 90 days notice of the intent to file a lawsuit over construction and lays out a timeline for a contractor or subcontractor to assess the situation and offer repairs, money or some another solution.

If a lawsuit is filed without that notice, the court must delay the suit until the contractor gets the opportunity to fix the problem, the law states.

To comply with the act, the defendants have some time to inspect each home in the class-action suit and offer a solution, according to Baxley's order.

Attempts Wednesday to reach lawyers for the defendants — Vic Raul of the McNair Law Firm and Everett Kendall of the Columbia-based firm Sweeny, Wingate & Barrow — were unsuccessful.

James Zeumer, Pulte vice president of investor relations and corporate communications, wrote in an email that the company is reviewing the decision.

"In an earlier ruling, the courts dismissed a similar motion against PulteGroup," Zeumer wrote. "We are in the process of reviewing the decision, but as it applies to South Carolina Plastering, it would not be appropriate for us to comment at this time."

Bob Flaherty, a private home inspector who lives in Sun City, said he encounters water intrusion and mold as a result of defective stucco in more than 30 percent of the homes he has inspected in the community.

"Pulte has been very responsive in getting them fixed," Flaherty said. "My understanding is they're fixing 10 houses a week."



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mebrow65

We are a nation of immigrants. One of our great strengths as a nation has been the diverse contribution of people from all the rest of the world. This construction issue is not them versus us. We are all us. It is simply a decision about who pays how much to whom for what.

01/08/2012 08:24 AM Report Abuse

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Jersey80

It's more about corporate greed. Pulte should be forced to have outside inspectors look at every aspect of each home they build going forward. Plus pay for any stucco and truss repairs on existing homes

01/08/2012 05:10 PM in reply to mebrow65 1 Like Report Abuse

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rukiddinme

doesn't anyone do anything right anymore?

01/05/2012 09:03 PM Report Abuse

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j2p29910

Those dammed Democrat/Liberal/Socialist/evil Trial lawyers suing those poor innocent job creators!

01/05/2012 05:00 PM Report Abuse

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jigger

hey RTB, do you remember those 56 day build schedules? hmmm

01/05/2012 02:53 PM 1 Like Report Abuse

Like Reply



Jersey80

Quick build schedules are ok ONLY when the Pulte managers in charge actually get out of their trucks to inspect the work. These homes are neglected from the time a permit is issued until the day it closes. Don't blame anyone but Pulte.

01/05/2012 04:57 PM in reply to jigger 1 Like Report Abuse

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funinsun

Pulte got into trouble for the very same thing in Indiana, only that time it was brick that was installed improperly. See <http://users.wowway.com/~ssant...>

01/05/2012 02:15 PM Report Abuse

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Jersey80

Quite a shame that Pulte would take advantage of mostly elderly people and basically commit fraud. The County inspectors who passed these homes should be retrained or fired. Pulte should be held accountable financially for every repair needed on these homes and, as a show of

good faith, extend the warranty to every hr built in Sun City.

01/05/2012 01:23 PM 3 Likes Report Abuse

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RandallThomasBagley

hmmmmmm.

01/05/2012 09:49 AM 1 Like Report Abuse

Like Reply



Ray Koenig, husband, father, grandfather, retired civil engineer

and thanks too to the Beaufort County Office of Building Code Enforcement for its excellent work in making sure (prior to issuing occupancy permits) that houses built at Sun City were built to meet the SC Building Code, which requires that all materials be mixed and applied according to manufacturer specifications. not to mention roof truss connections, cracked foundation slabs, lagoons not built according to approved plans, leaking roofs, etc., etc., etc.

Mea culpa, mea culpa, mea maxima culpa for not "doing our homework" and depending upon you and Pulte to do your jobs while we were doing ours (most of us in another state). Next to Pulte, Beaufort County BCE is the pits.

<http://peretired.blogspot.com/>

(Edited by author 6 days ago)

01/05/2012 07:41 AM 6 Likes Report Abuse

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Sun City stucco suit may get class-action status

BY ALLISON STICE
islandpacket.com

Monday, January 9, 2012

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HILTON HEAD ISLAND – A lawsuit alleging defective stucco work on Sun City Hilton Head homes has been granted preliminary class-action status and could include more than 4,000 homes in the gated community.

Circuit Court Judge J. Michael Baxley ruled last month that attorneys representing Sun City couple Anthony and Barbara Grazia could also represent thousands of other homeowners possibly affected by stucco problems. The ruling prevents the courts from getting clogged with nearly identical lawsuits, including 140 individual cases alleging defective stucco already pending, he said.

The Grazia's suit originally was filed against South Carolina State Plastering LLC.

State Plastering filed a third-party complaint against developer Del Webb Communities Inc., builder Pulte Homes Inc. and designer Kephart Architects Inc., making them part of the lawsuit by alleging they were responsible for some or all of the damages.

Improper stucco application can cause water damage, mold and rot.

The S.C. Supreme Court overturned a lower court decision in October 2010, ruling the Grazias could apply for class-action status.

The suit originally alleged negligent construction on more than 2,500 homes in the community. However, during months of hearings, the plaintiffs' attorneys determined that State Plastering applied stucco to about 4,300 Sun City homes from late 1998 to July 2007, according to John Chakeris of Chakeris Law Firm of Charleston, one of four lawyers handling the case.

After wording is determined, a notice will be sent to the thousands of other homeowners who will become part of the suit unless they opt out, Chakeris said.

The class-action order is qualified as "preliminary" to comply with the state's "Right to Cure Act." That law requires a homeowner to give 90 days notice of the intent to file a lawsuit over construction and lays out a timeline for a contractor or subcontractor to assess the situation and offer repairs, money or other solution.

If a lawsuit is filed without that notice, the court must delay the suit until the contractor gets the opportunity to fix the problem.

To comply with the act, the defendants have some time to inspect each home in the class-action suit and offer a solution, according to Baxley's order.

Attempts to reach lawyers for the defendants were unsuccessful.

James Zeumer, Pulte vice president of investor relations and corporate communications, wrote in an email that the company is reviewing the decision.

"In an earlier ruling, the courts dismissed a similar motion against PulteGroup," Zeumer wrote. "We are in the process of reviewing the decision, but as it applies to South Carolina Plastering, it would not be appropriate for us to comment at this time."

Bob Flaherty, a private home inspector who lives in Sun City, said he encounters water

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intrusion and mold as a result of defective stucco in more than 30 percent of the homes he has inspected in the community.

"Pulte has been very responsive in getting them fixed," Flaherty said. "My understanding is they're fixing 10 houses a week."

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COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

December 22, 2011

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBC No.: 1351.0001

Vic:

It has come to our attention that Pulte has embarked on a course stucco patchwork on a number of homes in Sun City. The effect of the work, and the presumed objective, is to cover over the originally and incorrectly installed stucco. In addition, we believe this work is inconsistent with Judge Baxley's recently entered Order that specifically outlines the procedure for any curative work that might be proposed on any of the 4300 houses that are subject to the Court's directive. Please confirm that no further stucco work will be done by Pulte and no additional direct contact will be made with our clients by Pulte. Thank you for your immediate attention to this correspondence.

Yours truly,

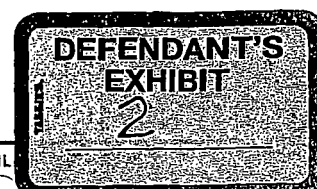
LEATH, BOUCH & SEEKINGS, LLP

Michael S. Seekings

Michael S. Seekings

MSS/sas

cc: John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.



MCNAIR
ATTORNEYS

December 22, 2011

A. Victor Rawl, Jr.

vrawl@mcnair.net
T (803) 799-9800
F (803) 753-3278

Michael Seekings
Leath, Bouch & Seekings
P.O. Box 159
Charleston, SC 29402

Re: Grazia, et al. v. South Carolina State Plastering, et al.;
Case No. 2007-CP-07-1396

Dear Mike:

I just received your letter dated December 22, 2011 requesting that Pulte cease all communications with and repairs for its homeowners. I would just like to clarify a few issues with you:

1. Are the lawyers for the Grazias and the putative class in the *Grazia* case requesting that Pulte or Del Webb not return (or ignore) service request calls from Sun City Homeowners with stucco on their houses?
2. Are the lawyers for the Grazias and the putative class in the *Grazia* case requesting that Pulte or Del Webb not conduct any repairs requested by Sun City Homeowners with stucco on their houses?
3. Are you requesting that Pulte or Del Webb tell homeowners that you (the lawyers in the *Grazia* case) have asked Pulte or Del Webb not to talk with them, not to respond to service calls, not to conduct inspections of their house when asked, and not to perform requested repairs?
4. Please specifically describe what you think Pulte and/or Del Webb can/should or can't/shouldn't do with regard to "your clients."
5. How do you claim Judge Baxley's Order in the *Grazia* case affects Pulte or Del Webb with regard to service requests and repairs?
6. Please provide the list of those who you claim to be "your clients" that have claims against Del Webb or Pulte so that I may provide that list to my client and discuss your request with them.

McNair Law Firm, P. A.
1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

Thank you for your immediate attention to this correspondence.

Michael Seekings
December 22, 2011
Page 2

M C N A I R
ATTORNEYS

Very truly yours,

A. Victor Rawl, Jr.

A. Victor Rawl, Jr.

AVR,jr/pkj



LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

January 3, 2012

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBC No.: 1351.0001

Dear Vic:

In response to your letter of December 22, 2011, the short answer to your first three (3) questions is yes. Any work done by Pulte on stucco exteriors at Sun City is nothing more than spoliation of evidence and an attempt to bypass the Court's Right to Cure directive and the residents' ability to get complete repair for their stucco problems. Should Pulte be contacted by any Sun City Owner about stucco problems, it is incumbent on you and Pulte to tell us immediately.

To date, we have not advised the residents of Sun City about their rights and obligations as class members because to do so before the issuance of an Order by the court would have been improper. It is certain that many are unaware of their substantial rights. We assume that Pulte has specifically adopted a policy of not informing homeowners of the pending litigation in an effort to bypass their obligation of full repair. This must now stop. Before any repairs are made, you are to contact us with all relevant information about the owner, address and plan of repair and await a response before doing any work.

Thank you for your compliance.

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP

Michael S. Seekings

MSS/sas

cc: W. Jefferson Leath, Esq.
John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.
Everett A. Kendall, II, Esq.
Christy E. Mahon, Esq.
David S. Cobb, Esq.

Important Memo

To: Sun City Stucco Litigant
From: John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.
W. Jefferson Leath, Esq.
Michael S. Seokings, Esq.
Date: September 1, 2011
Re: Sun City Individual Stucco Claim

This memo is to notify you that the case against South Carolina State Plastering, LLC (stucco applicator) has been certified as a Class Action by Judge Baxley. We will be sending out Court required notices within the next few weeks. There is nothing you need to do at this time, however we wanted to update you on this status of the class action case. If you have any questions, please contact John Chakeris at (843) 853-5678.

RecordonAppeal 0119

EXHIBIT

3

Rett Kendall

From: Rett Kendall
Sent: Thursday, January 12, 2012 7:56 AM
To: john@chakerislawfirm.com
Cc: jl@leathbouchlaw.com; psegui@seguilawfirm.com; emartin@seguilawfirm.com; vrawl@mcnair.net; dcobb@turnerpadget.com; mseekings@leathbouchlaw.com; Christy E. Mahon; Rett Kendall
Subject: 3826-6177: Anthony and Barbara Grazia, individually and on behalf of all other /
Attachments: 20120112074045696.pdf



Everett A. Kendall, II | *Member*
Sweeny, Wingate & Barrow, P.A.

1515 Lady St. (29201)
PO Box 12129
Columbia, SC 29211

T ■ 803-256-2233
F ■ 803-256-9177

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RecordonAppeal 0120



prior to class notice would allow you to provide information that has not been approved by the Court.

2.) Any putative class member will have to weigh opting out of the class versus staying in the class (and having many of their rights, claims, and causes of action waived). As you and co-counsel have a direct financial interest in this decision, it would be improper for you and co-counsel to influence their decision. You have a financial incentive to encourage the putative class members to waive their right and stay in the class. In other words, you and co-counsel have a blatant conflict of interest. Accordingly, you have an ethical obligation not to provide any non-court approved communication to putative class members. Your advising putative class members not to opt out would cause irreparable harm and confusion to the putative class members.

3.) Judge Baxley's Order is not final and SCSP has requested reconsideration of the "preliminary class certification" and has requested clarification of several issues. Thus without a final order, you do not have sufficient information to share with any putative class members. The potential for you to provide inaccurate information to the putative class members is substantial. Additionally, the new class definition created by the court for the "preliminary class" is unclear. At this time you do not know who (if anyone) is a putative class member.

4.) Until Judge Baxley's order is final, you do not represent the putative class members. Your communications will not be protected by the attorney-client privilege and will be the subject of discovery.

5.) You have an ethical obligation to avoid solicitation of clients. By having a "Town Hall Meeting" and attempting to convince putative class members to not opt out, you would be soliciting clients. Furthermore, for any homeowners who attend that are not putative class members, your actions could be considered improper solicitation of those homeowners as well – especially if you are telling owners of uninspected houses that they have a problem with their stucco. All of your experts have testified that they do not know whether there is a problem with any stucco house that they have not inspected (and that where they have found problems, the problems differ from house to house.)

6) A meeting as described in the paper unfairly prejudices my client by depriving it the due process provided by a court-issued, properly drawn Notice to Class Members.

7) Such communication with prospective class members is highly likely to have a chilling effect on the exercise of rights of the homeowners and SCSP by creating confusion about the nature of the litigation, the obligations of class members, the effect of the waiver of claims, the likely outcome of the litigation, and the effect of a verdict on their future rights.

John T. Chakeris, Esquire
January 12, 2012
Page 3 of 3

Please confirm by the end of the day Thursday, January 12, 2012 that the meeting has been cancelled and that you (and all co-counsel) will refrain from communication with putative class members until after the opt out period has expired (unless otherwise approved by the court). If you do not so confirm, my client will take appropriate legal action.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Everett A. Kendall, II

EAK/eak

cc: Via Email
A. Victor Rawl, Jr., Esquire
David S. Cobb, Esquire
Michael S. Seekings, Esquire
Phillip W. Segui, Jr., Esquire
W. Jefferson Leath, Jr., Esquire

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

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendant.

**DEL WEBB COMMUNITIES, INC.
AND PULTE HOMES, INC.'S
MOTION FOR INJUNCTIVE RELIEF**

IMMEDIATE HEARING REQUESTED

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

**TO: JEFF LEATH, ESQUIRE, MIKE SEEKINGS, ESQUIRE, JOHN
CHAKERIS, ESQUIRE AND PHILLIP SEGUI, ESQUIRE, attorneys for
the plaintiffs:**

YOU WILL PLEASE TAKE NOTICE THAT the undersigned, as attorneys for
DEL WEBB COMMUNITIES, INC., and PULTE HOMES, INC. (hereinafter
collectively Del Webb or Defendant), hereby move this Court for Injunctive Relief
pursuant to Rule 65 and Rule 23 of the South Carolina Rules of Civil Procedure. Del

Webb joins in the Motion For Temporary Injunction filed by Defendant SOUTH CAROLINA STATE PLASTERING, LLC (SCSP) on January 13, 2012.¹

Del Webb agrees that Plaintiffs' counsel should be enjoined from communicating with Putative Class Members² or other homeowners in Sun City Hilton Head prior to the expiration of any opt-out period. If the court denies the motions for reconsideration regarding the grant of "preliminary class certification," then the court will be left with the extraordinary tasks of 1) trying to determine who would be in the class, and 2) crafting notice to the class members that explains all of the rights and claims the class members will be giving up if they do not opt-out of the class.

An injunction is warranted because of the irreparable harm that will be suffered by the Movant if no injunction is issued, for which there is no adequate remedy at law. There is a clear conflict of interest between both the Named Plaintiffs and the Putative Class Members AND Plaintiffs' Counsel and the Putative Class Members. Named Plaintiffs and their counsel have a pecuniary interest in having as few putative class members opt out as possible. On the other hand, it clearly may be in the putative class members' best interest to opt-out of the class. This conflict of interest should bar Plaintiffs' counsel from giving any advice to putative class members (regardless of whether that advice would be beneficial to the class member or to the Grazias).

Further, if Plaintiffs' counsel provide inaccurate information regarding the class, the waiver of claims within the class, the claims included in the class, anticipated recovery of funds from the litigation, and etc. (which is likely in that the Court has not

¹ Del Webb incorporates all arguments made by SCSP in its motion and any memorandum filed in support. Del Webb also incorporates the arguments made in its Motion for Reconsideration (of the order granting preliminary class certification) filed on January 3, 2012.

² With the court's new class definition, no one knows who (if anyone) is in the class of which the court has granted "preliminary" approval. Accordingly, any claim by plaintiffs' counsel that they are only seeking to give advice to putative class members is specious.

yet ruled on the outstanding 59(e) motions), then the putative class member's due process right to adequate representation would be violated. If this occurs (and the class member fails to opt out and waives his best claims), then that class member may use such a due process violation as an argument to avoid a defense verdict in a certified class (thus violating the due process rights of Defendant). The issuance of an injunction is the only safeguard that will adequately protect the due process rights of the Defendant (and of the class members) in this litigation.

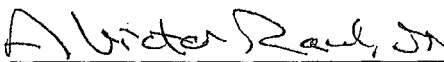
Accordingly, Del Webb requests that the Court rule that Plaintiffs' counsel has a conflict of interest with any putative class member and enjoin all communication between the plaintiffs' counsel and homeowners in Sun City Hilton Head (that they do not represent directly), until 1) the opt-out period has elapsed, or 2) until the court has denied the motion for class certification in this case.

This Motion will be further supported by a Memorandum of Law

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.

January 18, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC.

Defendant.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS

) FOR THE FOURTEENTH CIRCUIT

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

) **NOTICE OF MOTION**
) **AND MOTION TO COMMUNICATE**
) **WITH CLASS MEMBERS**

TO: EVERETT A. KENDALL, III, ESQUIRE AND CHRISTY E. MAHON, ESQUIRE,
ATTORNEYS FOR DEFENDANT, SOUTH CAROLINA STATE PLASTERING,
LLC;

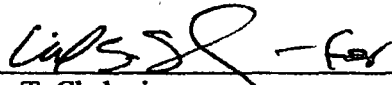
A. VICTOR RAWL, JR., ESQ., ATTORNEY FOR DEFENDANTS DEL WEBB
COMMUNITIES, INC., AND PULTE HOMES, INC.;

DAVID S. COBB, ESQUIRE, ATTORNEY FOR DEFENDANT, KEPHART
ARCHITECTS, INC.;

YOU WILL PLEASE TAKE NOTICE, that the Plaintiffs, by and through their undersigned
attorneys, will move, before The Honorable J. Michael Baxley, at such time and place as the

Court may appoint, for an Order allowing Plaintiffs' counsel to communicate with Class Members. The subject matter that Plaintiffs' counsel generally seeks to be able to communicate with class members is attached hereto as "Exhibit A".

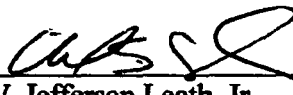
PLEASE BE PRESENT IF SO MINDED.



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



Phillip W. Segui, Jr.
Segui Law Firm, LLC
864 Lowcountry Blvd., Ste. A
Mt. Pleasant, SC 29464
(843) 884-1865



W. Jefferson Leath, Jr.
Michael S. Seekings
Leath, Bouch & Seekings, LLP
P. O. Box 59
Charleston, SC 29402
(843) 937-8811
Attorneys for Plaintiffs

Charleston, South Carolina

Dated: January 17, 2012

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 17th day of January, 2012.



Dolores M. Catapano

"EXHIBIT A"

Question: Who is eligible to be included in the class?

Answer: All Sun City Stucco homeowners who own stucco clad homes in which the stucco was installed in whole or in part by SCSP. SCSP installed stucco on approximately 4300 homes. We have received data from Pulte's counsel identifying these homes and are in the process of compiling this list of homes in the format that has been requested. There are stucco clad homes in Sun City that SCSP did not install the stucco which were constructed prior to late 1998 and also homes which SCSP did install the stucco after July of 2007 which will not be part of the class if the class is certified with finality. If you own a stucco clad home that was constructed either before or after these dates you will not be eligible to participate.

Question: What are the allegations being made in the Grazia class?

Answer: The Grazia's have alleged that the lack head flashing, lack of control joints at windows and doors and the encapsulation of the stucco at the base of the walls preventing water from draining out behind the stucco is an improper design and installation of a stucco system. The Grazia's have made this claim against SCSP as it pertains to approximately 4300 houses. SCSP has brought claims against both Pulte and Kephart Architects who are third party defendants in this case. SCSP, Pulte and Kephart all deny these allegations.

Question: What is going to happen next in the case?

Answer: Both SCSP and Pulte have recently filed Motions for Reconsideration of the Preliminary Class Certification Order. A motion for reconsideration is exactly what it sounds like where SCSP and Pulte will ask that preliminary certification be reconsidered and ask that the preliminary class be denied. If this happens and the preliminary class certification is denied, then there will be no class. If the Motions for Reconsideration are denied, then the case will move forward as set forth in the Order. We do not believe this Order can be appealed, but it is likely the Defendants will try.

Question: If I remain in the class, will Pulte make a claim against me under the SC Frivolous Proceeding Act and tell me that I may be required to pay their attorneys fees of \$30,000 like Pulte has done to some of my neighbors that have filed individual lawsuits against them?

Answer: This is unlikely in this case but we cannot tell you what another party will or will not do. The Grazia's have not sued Pulte directly, just SCSP. There has been no mention of this in the pending Grazia case.

Question: What do I have to do if I either want to be part of the class or do not wish to be a part?

Answer: The Court has asked counsel for the parties to submit proposed Notices for the Court to review and the Court will either choose one of the parties proposed notices or will draft its own. The Court will address this issue of the Notice only after the Motions for Reconsideration are heard and only if the Motion for Reconsideration are denied. The Court approved Notice will be sent out to every owner that is eligible to be in the class and the Notice will contain information concerning the obligations, rights and ramifications of acceptance or rejection of class membership. As part of the Notice, there will be an opt out form. After carefully reviewing the Notice, if you wish to be part of the class, you do not need to do anything. If you wish to exclude yourself from the class, you will need to complete the opt out form and mail it in per the instruction in the Notice.

Question: Will I be deposed if I am a class member?

Answer: Possibly. That has yet to be determined. Pulte has represented to the Court that it may want to depose every member of the class, but we do not believe that would be appropriate. This will ultimately be an issue to be decided by the Court.

Question: Why is the class certification preliminary?

Answer: The Court has indicated in its Order that only after the Right to Cure process is completed will it make a final decision as to whether the class action is practicable. A hearing on this issue following the completion of the Right to Cure process is likely.

Question: What is the Right to Cure and how is this going to be applicable to me?

Answer: Once the opt out period has ended and it is determined exactly who is going to be in the class, the right to cure process will begin. If you do not opt out, we as class counsel will provide written notice to SCSP, Pulte and Kephart per the Preliminary Certification Order. Pulte, SCSP and Kephart will have 60 days to provide a written response. During this 60 day period, SCSP, Pulte and Kephart will have the right to perform an inspection of your home. We intend to have a representative present while the inspections are performed. Any response received from Pulte, SCSP or Kephart will be in writing and sent to Plaintiffs counsel. Within 30 days of receiving the response, you can either accept or reject the offer. Once the response is received by our offices, we will contact you immediately to inform you of the offer if any and notify Pulte, SCSP and Kephart of your intentions of accepting or rejecting the offer if any offer is made. SPSC, Pulte and Kephart are not required to respond to the written notice that we will provide them.

Question: What if my home has already been inspected by Pulte, SCSP or Kephart?

Answer: All owners that are part of the class are required to go through the right to cure process as set out in the Order, so you will be required to allow the inspection to occur.

Question: How long will the right to cure process take for all of the stucco homes in Sun City that are part of the class?

Answer: The Order sets forth a timeframe of 180 days for all stucco homes that are part of the class.

Question: What happens after the right to cure process is completed?

Answer: The parties will have another hearing before Judge Baxley and he will decide if the class will remain certified or not.

Question: If Judge Baxley allows the class to remain certified, what happens next?

Answer: The Court will allow an appropriate discovery period. This issue will be addressed by the Court at the appropriate time.

Question: I see that Pulte is currently performing "repairs" to stucco homes in Sun City Hilton Head; how does this pertain to me?

Answer: We are filing a motion to ask that all stucco repairs to homes that will fall within the class definition to be handled in accordance with the right to cure process set forth in the Order.

Question: Why has this case been taking so long because we are all retirees?

Answer: Class actions are very complex litigation. This case has been up to the SC Supreme Court already on the issue of the right to cure where the Supreme Court ruled that the Right to Cure statute could and should be applied within a class action. More recently this case was assigned to Judge Baxley to see it to conclusion. The Court recognizes the age of the case as it has set out in the Preliminary Class Certification Order and specifically states within the Order "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." Moreover, it is the stated strategy of the Defendants to delay this case as long as possible.

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

Anthony and Barbara Gratia,)
Individually and on Behalf of All)
Other Similarly Situated Plaintiffs)
Plaintiff,)

May 9, 2012

Versus)

2007-CP-07-01396

South Carolina State Plastering, LLC)
Defendant.)

BY TELEPHONE

South Carolina State Plastering, LLC,)

Third-party Plaintiff,)

Versus)

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

Third-party Defendant.)

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

Pamela Ozment-Cartee
Circuit Court Reporter

RecordonAppeal 0132

APPEARANCES

Michael Seekings, Esquire
LEATH, BOUCH & CRAWFORD, LLP
ATTORNEY FOR THE PLAINTIFF

Everett A. Kendall, II, Esquire
SWEENEY, WINGATE & BARROW, PA
South Carolina State Plastering, LLC

A. Victor Rawl, Esquire
MCNAIR LAW FIRM, PA
Del Webb Communities, Inc.
And Pulte Homes, Inc.

David S. Cobb, Esquire
TURNER, PADGET, GRAHAM & LANEY
Kephart Architects, Inc.

Telephone Hearing

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1 (Whereupon, this hearing came to order at 1:45
2 p.m. on Monday, May 9, 2012.)

3 **THE COURT:** Good afternoon. If y'all would, go around
4 please and let's start with Plaintiffs, and everyone who is on
5 the line introduce themselves. We have our court reporter
6 Pamela Cartee, is taking this down. And then the Defendants
7 and third-part Defendants thereafter.

8 **MR. SEEKINGS:** Judge, it is Mike Seekings on behalf of
9 the Plaintiffs.

10 **MR. KENDALL:** Your Honor, this Rhett Kendall on behalf
11 of South Carolina State Plastering.

12 **MR. RAWL:** This is Vic Rawl on behalf of Del Webb and
13 Pulte.

14 **MR. COBB:** And David Cobb on behalf of Kephart
15 Architectures.

16 **THE COURT:** Very good. Welcome, everyone. That would
17 be all; am I correct?

18 **MR. KENDALL:** Yes, sir.

19 **THE COURT:** All right. What caused me to hesitate was
20 they told us I was the --- well, I guess I would be the fifth
21 person joining the conference. I thought there would be
22 additional. I wasn't sure who that would be.

23 All right. What I wanted to do today, is to give the
24 parties an opportunity to go back and argue the merits of
25 whether a Temporary Injunction should issue.

1 My decision with regard to the previous Consent Order, or
2 what I perceived to be Consent Order, is that I intend to
3 vacate that, and then start over again and determine whether
4 or not a temporary injunction should issue. So, the
5 defendants are the moving party. So, I'll be glad to hear
6 from you all as to why you believe it is appropriate.

7 **MR. KENDALL:** Thank you, Your Honor, this is Rhett
8 Kendall on behalf of the moving South Carolina State
9 Plastering. We did move for a Temporary Injunction to prevent
10 the Plaintiffs counsel from having direct or indirect
11 communications with putative members of the class, who they do
12 not already have an attorney client relationship with. And
13 then, that was obviously to account for the fact that we know
14 that they have filed at least a hundred and forty lawsuits,
15 and have some other clients that they have indicated. So, we
16 are obviously not trying to interfere with that.

17 But as to the other members of this potential class, we
18 ask the Court to prevent communications other than the Court
19 issued Notice. This arose, as you will recall, because an
20 article appeared in the Island Packet that announced that you
21 had ruled, and stated that there was going to be a Town Hall
22 Meeting to answer questions about the case, and to provide
23 information to the homeowners as to their rights under this
24 class action.

25 The Order that you entered now that the Motion to

1 Reconsider and Clarify has been resolved, speaks for itself,
2 it seems to me as to what the Court intended to be the Notice
3 that would be communicated or the information that would be
4 communicated to these particular class members. And it is not
5 at all unusual what the Court has stated that it intends to
6 do, and that is have a Notice that goes out that apprises all
7 of the potential class members at the same time, and in the
8 same way, as to what this class is, who qualifies for it, and
9 what their rights and responsibilities thereunder are. And,
10 the Notice aspect of Rule 23, and of the class action device
11 is a very, very critical one. So much so, that the rule
12 itself states that the Court has the authority, and probably
13 the responsibility to oversee that process. The plaintiff
14 issues it, but the Court approves it and directs it. And the
15 reason it is so fundamentally important and rises in the
16 language of many courts to a due process triggering event is,
17 that it is that document that becomes the basis on which the
18 class action accomplishes what the class action is intended to
19 accomplish; particularly from the vantage point of the
20 defendants. And that is, if this class is certified, and if a
21 final adjudication is reached on the class issues; does that
22 in fact for all time, resolve the claims with those who have
23 not opted out of the class. So, the notice itself and the
24 information on which the potential class members make their
25 decision must be carefully drafted and carefully controlled.

1 Because, if that document, or any other information, that
2 comprises a Notice, it goes out and subsequently a person who
3 has not opted out realizes that their rights to pursue some
4 element of a claim, and in this case, not all of their claims
5 are being presented in the class. So, if they realize, wait a
6 minute, I did not understand what I was waiving, or what
7 rights I had, or what duties I had, then they can seek to set
8 aside the *res judicata* effect of the class action adjudication
9 and subject the defendants to multiple and various potential
10 subsequent verdicts. And it is for that reason why this is
11 important. So, we are asking for the Court to not allow
12 communications with these perspective class members other than
13 the Court approved Notice. And we ask that so that the
14 information that goes out has been vetted by the Court, has
15 been contested or approved by the defendants, and is something
16 that we are able to monitor. What I am concerned about,
17 particularly in the one context that we had with the Town
18 Hall, possibility is that there is no ability to control how
19 the information and what information get conveyed. We think
20 if there is a subsequent challenge, there is no way to defend
21 against it, and to say, no, you received adequate notice,
22 because they could receive, in fact contradictory or incorrect
23 statements. And please understand, I do not intend by that to
24 suggest that Plaintiffs' counsel would intentionally do that.
25 That is not my suggestion here. I am suggesting that by

1 virtue of the uncontrolled and somewhat unpredictable nature
2 of those communications, and those types of communications,
3 these kinds of things, these risks arise. So, that is the
4 reason we are requesting it.

5 There are, within that there are a number of grounds that
6 we assert as creating additional reasons why it is important.
7 We have raised the issues of concerns over conflicts of
8 interest. We have maintained this same position throughout
9 the pendency of the Motion to Certify as to the inadequacy of
10 these Plaintiffs to represent the rest. We have lost those
11 arguments for now, and I understand that.

12 But it arises again now in this context of the decision
13 to opt out.

14 **THE COURT:** And, Mr. Kendall, excuse me for breaking
15 in. Let me say that I am physically in the Darlington County
16 Courthouse right now, while we are having this discussion.
17 And we have a criminal case which is in progress, and the jury
18 has just knocked with a verdict. So, what I would ask you to
19 do, if you could limit your comments maybe to two or three
20 more minutes, if that is sufficient, and then we will hear
21 from the other parties. That way I am able to accomplish more
22 than one task at the same time.

23 **MR. KENDALL:** Certain, Your Honor. And, let me then
24 just state on the record that I would incorporate the body of
25 the motion and the briefing that we have submitted, and also

1 the arguments that have been submitted by Del Webb in support
2 of this motion.

3 **THE COURT:** And let me say too --

4 **MR. KENDALL:** And the problem is Your Honor, we are
5 concerned about potential conflict of interest. We are
6 concerned about the due process prejudice that could occur to
7 my clients as a result of multiple and various communications.
8 So, we are just asking that the single piece of information
9 that goes out to these potential class members advising them
10 of their rights and responsibilities in this class be the
11 Notice that the Court issues. And until the opt out period
12 has expired, that Plaintiffs' counsel not be permitted to
13 communicate with those potential class members who they do not
14 currently represent.

15 **THE COURT:** All right. And let me comment to you that
16 I have read not only the Motion that you filed, but you sent
17 us a Memorandum --- a cover letter dated February 9, 2012. I
18 have reviewed these and also have those with me today.

19 Now, let me hear from the third-party Defendants. I am
20 assuming that the arguments made are the same, but is there
21 anything further that you would add Mr. Rawl?

22 **MR. RAWL:** Yes, our arguments are very similar. They
23 are not exactly the same, they are very similar. And I will
24 just make a couple of very quick points.

25 First. While every Plaintiffs' lawyer has a pecuniary

1 interest in defining their clients --- the difference in this
2 case is that these Plaintiffs' lawyers not have a pecuniary
3 interest in the punitive class members or the homeowners
4 waiving their rights and claims. In order to be in this
5 class, the homeowner or the class member has to waive their
6 right to the Unfair Trade Practice Act Claim. They have to
7 waive their right to collect any funds they have already spent
8 on repairing their house. Those claims, it is undisputed,
9 have been waived by the Plaintiff in this case.

10 The U. S. Supreme Court has indicated one of the largest
11 due process rights that a homeowner or a class member has, is
12 the right to adequate counsel and to counsel without a
13 conflict of interest. And I have said numerous times on
14 behalf of my client why that is so important to the defendants
15 in this case, because if the due process rights --- the class
16 members are not protected, then my clients due process rights
17 are not protected, and we may not have *res judicata*
18 protection.

19 Today, and this is a case that we have cited before. It
20 is called Clark versus Experian, it is a 2001 South Carolina
21 District Court Case. I sent a copy of that to the Court
22 today by email, just to make sure that the Court had it. I
23 don't know if the Court has had a chance to read it. But what
24 that court says, and this is a quote from the District Court
25 of South Carolina.

1 Quote. "The Supreme Court and the Fourth Circuit Court
2 of Appeals have long interpreted the adequate representation
3 requirement of Rule 23(a)(4), to preclude certification where
4 a conflict of interest exist between class representatives and
5 class members with respect to the appropriate relief." And
6 this is an additional quote. "If the named Plaintiffs have in
7 fact jeopardized the class members potential claims for
8 various damages, they would be deemed to have interest
9 antagonistic to those of the class." That is exactly what we
10 have here. Where we have Plaintiffs named reps, and for class
11 counsel who are waiving claims on behalf of class members.

12 **THE COURT:** Now, Mr. Rawl excuse me for breaking in,
13 but how is this relevant on the issue of the TRO? It seems to
14 me you are talking about certification.

15 **MR. RAWL:** The reason it is relevant on a TRO, is
16 because this case explains how class counsel has a conflict of
17 interest with the class members. There is a direct conflict
18 of interest between class counsel and the class members. You
19 know, and what the all the cases we have sited, and all the
20 cases I have ever seen say, once you have that conflict of
21 interest, the class can't be certified, because the class
22 can't comply with Rule 23.

23 What we have here is kind of a novel issue where it is
24 undisputed that claims are being waived. You know, the U. S.
25 Supreme Court says, once claims are waived that the Plaintiffs

1 reps, and it included class counsel, have a conflict of
2 interest.

3 **THE COURT:** But, Mr. Rawl -

4 **MR. RAWL:** -- But once you have a conflict of interest,
5 if the class gets to go forward, then we have a situation
6 where we are still trying to protect the due process rights of
7 the class members.

8 And I just have two more points Your Honor, and I am
9 happy to answer your questions or to finish my last point.

10 **THE COURT:** Well, go ahead briefly. I am concerned
11 that you are still contesting the issue of class certification
12 which is long decided now.

13 **MR. RAWL:** And, I apologize, Your Honor. But the
14 issues are so -- the due process issues of class certification
15 and the conflicts of interest, and the injunctive relief
16 sought are all intertwined. And while I am not specifically
17 contesting the class issues today, the issues do overlap.
18 Because what the --- In the Experian Case, what the Court said
19 is that quote, "The Plaintiffs conceded that the claims for
20 actual damages under the FCRA are not suitable for class
21 treatment." And that is exactly what has happened in this
22 case, where the Plaintiffs have conceded that the UTPA claims
23 are not suitable for class treatment. And what the Plaintiffs
24 argued to the Court in Experion, was the same thing that the
25 Plaintiffs argued here. This can be remedied by the opt out,

1 and they can bring other claims later. What the Court said,
2 there is Plaintiffs attempt to remedy the shortcoming by
3 arguing that a class member can bring a separate action
4 through an individual suit, or decide to opt out of the
5 present litigation.

6 **THE COURT:** All right. Mr. Rawl, Mr. Rawl -

7 **MR. RAWL:** -- to opt out of the class is insufficient
8 to protect the rights of the punitive class members who would
9 want to seek remedies other than those chosen by class
10 representatives.

11 **THE COURT:** Mr. Rawl, excuse me. Mr. Rawl. Is he not
12 able to hear me? Mr. Rawl, can you not hear me sir?

13 **MR. RAWL:** No, sir. I am sorry.

14 **THE COURT:** Thank you. I am breaking in on you,
15 because these arguments go to class certification. I am
16 interested today on the Temporary Restraining Order, and that
17 issue only. Please curtail your comments to that only.
18 Again, I have a jury waiting on me, sir.

19 **MR. RAWL:** Yes, sir, Your Honor. My only point is,
20 the U. S. Supreme Court has said that there is a conflict of
21 interest in this situation between the class representative
22 and the absent class members. Because of that conflict of
23 interest, I do not believe that the class counsel should be
24 allowed to communicate with absent class members until after
25 the opt out period has expired. The concern is that whether

1 or not, regardless of what is said by class counsel to an
2 unrepresented class member or punitive class member, that
3 person may then argue and say, my due process rights are
4 violated. It is undisputed --- there is a conflict of
5 interest between myself and this lawyer. Yet, this lawyer
6 still provided me some advice. I relied on that advice, did
7 not opt out of the class, and therefore he can avoid a
8 judgment later. So, I think the only way at this juncture to
9 reduce the due process violations would be to enjoin
10 Plaintiffs counsel, or grant the Motion that has been made by
11 defendants and by third-party defendants.

12 **THE COURT:** All right. Thank you, Mr. Rawl. And from
13 the Plaintiffs briefly, do you have a position you wish to
14 state?

15 **MR. SEEKINGS:** Very briefly, Your Honor. The law is
16 clear that the parties may communicate with potential class
17 members. The Supreme Court has said that after the finding on
18 the record that there is a need to limit the communication.
19 That is now left to you, as you have certified this class, and
20 for us to do it properly, or to Mr. Rawl or Mr. Kendall to do
21 it properly. So, it is a matter of discretion with the
22 Supreme Court saying that the First Amendment does have a
23 place in this deliberation for you in deciding whether or not
24 to issue an injunction or not.

25 **THE COURT:** All right. Counsel, I have had the

1 opportunity to review this. Not only the Memoranda but the
2 case law that is noted in the Memoranda. And the Court is
3 prepared to rule at this time. And these are the rulings.

4 First of all. Rule 23 does give the Court the authority
5 and the ability to control communications that are occurring
6 within the context of a class action. But, that is
7 underpinned though by the general belief and the general
8 holdings of case law that the full and free flow of
9 information is important in society in general, but
10 specifically and particularly in litigation of this type.

11 One of the things that concerns me with the Motion, is
12 that it appears to be unilateral in its application. And
13 while the Defendants have agreed that it would make it apply
14 to all parties, this still causes some concerns to the Court.
15 Specifically with regard to this case, it involves a
16 retirement community where people are all similarly situated
17 as to the construction of their particular residences. And
18 also where people have the time to fully engage and
19 participate in a case of this type, if they wish to do so.

20 Also, this case involves what is probably the most
21 substantial investment most people make in their lives, which
22 is their home, and thus would be of core interest to the
23 members of the Sun City Community.

24 Due to the large number of people involved, this Court
25 can anticipate that there may be rumors or misinformation that

1 abound to take away the parties ability to communicate with
2 interested parties, which may actually have the benefit of
3 reducing the number of parties in the class and resolving some
4 of these claims. I feel like that is probably inappropriate.
5 And to require these potential claimants to have only the opt
6 out notice with no ability to follow up on information from
7 either side of the case, that would be from Plaintiffs or
8 Defendants' counsel, and also to have that imposed by Judicial
9 Order. Because, I anticipate a situation where counsel would
10 say, well, I would love to talk to you, but there is a court
11 order that prohibits it.

12 For these reasons, the Court does not believe that it
13 would be appropriate for this TRO to issue. There is case law
14 directly on point from the United States Supreme Court which
15 is Gulf Oil Company versus Bernard, and that may be found at
16 452 U.S. 89, where it says that the mere possibility of some
17 abuse does not justify the adoption of a communication band
18 that interferes with the process or progress of the
19 litigation. And that is the Court's paraphrase of that
20 comment. But nevertheless, what I have here today is a mere
21 possibility, a concern that there may be a mis-communication.
22 There are other venues and governing bodies that control not
23 only professionalism, but ethical considerations and the
24 conduct of the practice of law, and I have not been shown any
25 concert abuse that is occurring. I don't find that there is

1 something likely to occur, and for all these reasons I am
2 going to deny the Motion to issue a Temporary Restraining
3 Order for the reasons set forth here on the record. And we
4 will issue within the next three to four days, a written Order
5 that will be served upon you through the Clerk of Court's
6 Office in Beaufort County.

7 That is the decision of the Court.

8 **MR. KENDALL:** Thank you, Your Honor.

9 **THE COURT:** All right. Anything further from anyone?

10 **MR. KENDALL:** Your Honor, to third-party defense ask to
11 have a hearing on the issue of the individual discovery, but I
12 am assuming that the Court would like to put that off until
13 another time, since you have a jury waiting.

14 **THE COURT:** I would like to set that for another time.
15 And we will be back in touch with you on that.

16 Everyone have a good day. Thank you for your courtesy in
17 talking with us today. Good bye.

18 (Whereupon, this telephone hearing was
19 concluded at 2:06 p.m. on May 9, 2012.)

20 -- END OF TRANSCRIPT --
21

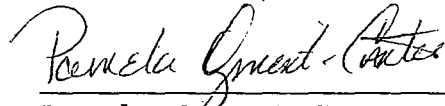
CERTIFICATE OF REPORTER

18

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the above captioned case, relative to appeal, in The Court of Common Pleas in Beaufort County, South Carolina, on the 9th day of May 2012.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

June 19, 2012

A handwritten signature in cursive script, reading "Pamela Ozment-Cartee", is written over a horizontal line.

Pamela Ozment-Cartee
Circuit Court Reporter

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

Anthony and Barbara Grazia,)
Individually and on Behalf of All) April 30, 2012
Other Similarly Situated Plaintiffs)
 Plaintiff,)

Versus) 2007-CP-07-01396
)

South Carolina State Plastering, LLC)
)
 Defendant.)

South Carolina State Plastering, LLC,)

Third-party Plaintiff,)

Versus)

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

Third-party Defendant.)

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

Pamela Ozment-Cartee
Circuit Court Reporter

RecordonAppeal 0150

APPEARANCES

Michael Seekings, Esquire
LEATH, BOUCH & CRAWFORD, LLP

John T. Chakeris, Esquire
THE CHAKERIS LAW FIRM

Philip W. Segui, Jr., Esquire
SEGUI LAW FIRM, PC

ATTORNEYS FOR THE PLAINTIFF

Everett A. Kendall, II, Esquire
Christy E. Mahon, Esquire
SWEENEY, WINGATE & BARROW, PA
South Carolina State Plastering, LLC

A. Victor Rawl, Esquire
MCNAIR LAW FIRM, PA
Del Webb Communities, Inc.
And Pulte Homes, Inc.

David S. Cobb, Esquire
TURNER, PADGET, GRAHAM & LANEY
Kephart Architects, Inc.

Motions Hearing

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1 (Whereupon, this hearing came to order at 2:02
2 p.m. on Monday, April 30, 2011.)

3 **THE COURT:** Good afternoon, everyone. Counsel, thank
4 you for traveling this far today to come back and join us
5 again in Darlington to discuss these issues in the Grazia
6 case. And let's do this, just so we can get a voice check as
7 well as our record will be complete as to whom all is present.
8 Let's come across and let everyone introduce themselves, tell us
9 whom they represent, and Mr. Rawl, we will start with you, and
10 you may proceed.

11 **MR. RAWL:** Thank you, sir, Your Honor. Good afternoon.
12 I am Vic Rawl, R-A-W-L. I represent Del Webb Communities
13 Inc., and Pulte Homes Inc., both are third-party Defendants.

14 **THE COURT:** Thank you.

15 **MR. KENDALL:** Everett Kendall, on behalf of South
16 Carolina State Plastering.

17 **MS. MANN:** Christy Mahon, South Carolina State
18 Plastering.

19 **MR. COBB:** I am David Cobb, C-O-B-B; on behalf of third-
20 party defendant Kephart Architects.

21 **THE COURT:** Welcome.

22 **MR. SEEKINGS:** If it please the Court, Your Honor, I am
23 Mike Seekings, I represent the Plaintiffs.

24 **MR. CHAKERIS:** I am John Chakeris. I represent the
25 Plaintiffs.

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

3 **THE COURT:** All right. Thank you, ladies and
4 gentlemen. We are glad to have this distinguished group of
5 lawyers with us here in Darlington for hearings in, and our
6 record should reflect this is Grazia and others versus South
7 Carolina State Plastering and others. And this is case
8 07CP071396, which is a case that I have under complex
9 jurisdiction out of Beaufort County.

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

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

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

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

1 responses from the Plaintiffs on that. I am assuming that one
2 has just been filed, and not really ready for prime time as
3 they say. Would everyone agree on that?

4 **MR. RAWL:** Your Honor, if I may just briefly. I don't
5 want to go into the arguments. They are overlapping issues of
6 all the rest of the Motions that you are hearing today. The
7 only difference is that it is a specific request for
8 individual discovery should the Court go forward with class
9 certification.

10 **THE COURT:** All right.

11 **MR. RAWL:** That is the only difference.

12 **THE COURT:** Well, when we get to the end of this, we
13 will see first of all whether time permits for us to take it
14 up. And then secondly, we will let others respond as well to
15 see whether they believe that indeed it overlaps and whether
16 it is right for discussion.

17 Let's go first then on that list to the issue of a Rule
18 59(e) Motion, which has been made by both the Defendant and
19 the third-party Defendant in this case to, and I want to make
20 sure I have my wording correct, because it impacts where we
21 find ourselves today. It is a Motion to Reconsider and/or
22 Motions for Clarification. And that has been made by both
23 South Carolina State Plastering and Del Webb. And let me ask
24 first of all, the Plaintiffs want to start this by your
25 argument made in your Motion or in your response that this is

1 not an appropriate vehicle. I will be glad to hear from the
2 Plaintiffs on it.

3 **MR. SEEKINGS:** If it pleases the Court, Your Honor.
4 Thank you, very much.

5 The Motion that is filed is a Motion to Reconsider and to
6 Clarify. It is filed pursuant to Rule 59(e) of the South
7 Carolina Rules of Civil Procedure.

8 As you know, Rule 59 doesn't contemplate specifically or
9 explicitly a Motion to Reconsider. What it does contemplate
10 is Motions at the time of a judgment in a case, or certain
11 things altered and amended. And one of the things that our
12 courts have said is, we believe it is proper and right to ask
13 the judge to reconsider something that may come to us on
14 appeal, because it would be good for the economy, and the
15 scale of justice, and all of those things.

16 What you have issued in this case that we are here
17 talking about today is an Interlocutory Order. It is not the
18 final judgment. It is not a decision on the merits. I would
19 cite to Your Honor among others the case of Elam versus South
20 Carolina Department of Transportation, which is 602 S.E.2d
21 772, and I think this codifies the law fairly clearly. It
22 says, a decision on the merits is a prerequisite to Rule 59
23 Motion. So, this is not a decision on the merits. Rule 59 is
24 not the proper vehicle procedurally to bring this to Court.

25 Now, I will say to you, Your Honor, and given this is a

1 Class Action, it is organic. It is moving forward. You have
2 already issued a Case Management Order. I believe the Court
3 always has the opportunity to look at it and revisit it. But
4 in terms of it being a Rule 59 Motion, which, after Your Honor
5 rules, would then contemplate that this is a reconsideration
6 of a decision on the merits. And we do not believe that is
7 proper, because one of the things clearly that comes from all
8 of this is, and this is not a Rule 59 proceeding that is
9 appealable. We are simply asking you to go back and look at
10 the interlocutory case management order that you have
11 drafted.

12 So, in the first instance, we just don't think The Rules
13 of Civil Procedure allow for what they are asking you to do.
14 Your inherent authority as the judge always allows you in case
15 management to go back and take a look at it. But, for
16 purposes of the record, and where this motion will take us
17 next, a ruling on the Rule 59 would, I believe, would not
18 explicitly imply that you are ruling on something that comes
19 as a final judgment. And we don't believe that you have made
20 any final decisions here. So, Rule 59 as a vehicle for being
21 here today, we believe under The Rules of Civil Procedure does
22 not apply.

23 **THE COURT:** All right. Let me hear from both of the
24 moving parties. And, counsel, I would ask this question of
25 you.

1 First of all, is this Rule 59 Motion, is it to amend, or
2 reconsider, or clarify? And, if it is to clarify, what is it
3 that needs clarification? And I will be glad to hear from
4 you.

5 **MR. KENDALL:** Your Honor, I would respectfully say that
6 it is all of the above in terms of alter, amend, reconsider,
7 clarify. I think 59(e) Motion should not be limited by the
8 caption that was given it, but rather understood in light of
9 the rule under which it was made. The intention was to take a
10 look again at the Order that you issued, and in the very first
11 instance, point out again some things that we felt the Court
12 should reconsider in reaching what we believe was a decision
13 on the merits of the motion that was pending. And that is the
14 Motion to Certify the Class.

15 We believe that within that there were some rulings that
16 have a substantial impact on our behavior going forward, and
17 we ask the Court to reconsider some of that. Particularly,
18 for example, the process by which the Right to Cure Notices
19 and rights were to unfold, and also to clarify some issues
20 that we felt we had to have answers to in order to proceed
21 both with the Notice to the potential class members, and as
22 part of the Right to Cure process, and as part of the
23 potential discovery process to follow. So, we felt like there
24 were a number of things that we simply did not have sufficient
25 information on. We have outlined them throughout the Brief.

1 I will be glad to characterize them, or itemize them, or
2 discuss them in broad strokes, however Your Honor wishes to
3 proceed with that. But, to try to respond to the issue that
4 Mr. Seekings has raised, while this isn't the last judgment
5 this Court will enter in this case. And the Court has
6 qualified its previous ruling as preliminary. The effect of
7 that preliminary finding, or preliminary classification, first
8 of all we felt that in itself was an issue that we wanted to
9 raise to the Court, because, we do not see in South Carolina
10 jurisprudence, or otherwise that particular type of
11 certification, a preliminary certification. So, we pointed
12 that out in the Brief. So, that is part of it. But beyond
13 that, even though it may be considered as preliminary by Your
14 Honor, it had immediate and actual consequences for us in
15 terms of how we conduct ourselves. So, we felt like now is
16 the time to bring those back to Your Honor. And some of them,
17 depending on how they get clarified, and how they get finally
18 resolved, may, in fact, trigger what we believe to be
19 appellate issues. Particularly as they may affect the due
20 process rights of the parties in this case. So, we are not
21 trying to --- We are trying to front-load these issues rather
22 than have them string out over a long period of time. But,
23 Your Honor, we do feel like there are some consequences, if
24 you will, some outcomes from this ruling that are uncertain to
25 us, or that have significant impact on our clients' rights.

1 So, have I answered your question, or have I just talked too
2 much?

3 **THE COURT:** Well, you have, but let me follow, if I
4 may? Of course this was a multifaceted issue filled Order
5 that was hard fought at the time, over a period of time, both
6 in oral argument as well as in follow up Memoranda and other
7 missives. And from all of that we distilled an Order that
8 was, as best as I was capable under the circumstances, to set
9 out what I would call a roadmap for this case.

10 Now, it is one thing to disagree and ask to reconsider
11 it. But, because it is not a final judgment, it is this
12 Court's impression that there is no vehicle unless you can
13 show me precedent that would allow you to reconsider the
14 quote, what is really not a final decision. Now, if there are
15 specific issues that need quote, clarification, as opposed to
16 attempting to reverse it or alter it. If it just needs more
17 explanation, then I think we can take that under Rule 59, or
18 perhaps even under Rule 60. But, I would need some precedent
19 from you before I would go forward and head on into quote,
20 reconsidering, amending the Order on the substance of its
21 parts. So, do you have precedence?

22 **MR. KENDALL:** Your Honor, I do not have it in specific
23 form, and since Your Honor has invited that now, I would like
24 the opportunity, if I can find it in a very very quick window
25 of time to get that to you. It was not Briefed by plaintiffs'

1 counsel, so I was not prepared to respond to what they have
2 given you.

3 But even Your Honor though I recognize, and please
4 understand that your deliberative approach to this has not
5 been lost on us. We do know that you took a great deal of
6 time and thought carefully about the issues. And so, we are
7 trying to assist the Court to reach a good outcome. And
8 recognizing that you have very clearly stated your intention
9 of where to go with class, we have preserved those issues
10 here, because quite frankly, again, not understanding what you
11 have in mind exactly about what preliminary means. Because,
12 everything that seems to follow from that, looks just like a
13 final finding in terms of Class Notice, and then the Right to
14 Cure, and then Discovery. It acts very much like a final
15 finding, final Order, even though Your Honor has made it clear
16 that it is preliminary. I don't disagree with that. But we
17 really don't know what the difference is. So, in order to
18 preserve that here, we have argued for reversal of your
19 previous opinion. I will very respectfully say, if you
20 disagree with us, certainly that is understandable. But I
21 would like the chance, since I don't think it was clear in my
22 mind that that was so present for you. If you would just
23 allow a couple of days to allow me to tell you one way or the
24 other, whether I have clear precedence on that issue. But
25 perhaps, it would guide me through the course of this hearing,

1 that you can help me better understand what you contemplated
2 with the concept of preliminary as it rolls out and goes
3 forward. We were very concerned that if this train gets too
4 far down the tracks, and then we are in a place where the
5 complaint is, well, you didn't speak up when you had the
6 chance. That was a finding on the merits and you should have
7 spoken up on it. So, we put it all in here and we believe it
8 is proper before the Court, and I can support that if Your
9 Honor would give me maybe, forty-eight hours to do so.

10 **THE COURT:** Well, to follow with this discussion, and I
11 am going to take the legalese out of this, and just say it in
12 plain English as I understand what the Order intended was, I
13 used the term preliminary because I believe the Plaintiffs
14 have met the requirements. But, because of the nuances and
15 the requirements of the Right to Cure Dwelling Act, and the
16 Defendants continued, what I am going to respectively call
17 vehement persistence, that there is such disparity in damages,
18 and issues, and liability, even that it was not susceptible to
19 a class vehicle. But the Right to Cure Act is going to
20 require us to delineate with specifics that I would reserve
21 final judgment until we get to the end of the Right to Cure
22 period. When I say preliminary, I mean, I guess you might
23 look at it in terms of law as a rebuttal of presumption. I
24 believe the Plaintiffs have met the burden. But we may get to
25 the end of this Right to Cure process and discover that it is

1 not. And thus, I reserve the right to decertify. That is
2 what I meant in just laymen's terms, when I say, I wasn't
3 trying to confound or confuse, but I was trying to meld the
4 various processes of a class action over here, and a Right to
5 Cure Statute over here, which our Supreme Court has said are
6 not inconsistent with one another. That turned out to be a
7 long explanation, but that is my thinking when I use the term
8 preliminary.

9 **MR. KENDALL:** And in many respects, Your Honor, that is
10 what I understood you to mean, and that itself raised some
11 need for clarification. In case it is not what you meant,
12 then we wanted to address it as a Motion to Reconsider. But
13 if that is what you meant, it does raise for us a number of
14 how do we go forward kind of questions. And also some
15 concerns about whether they --- whether or not, for example,
16 if this in fact preliminary, and Your Honor has indicated in
17 the Order that you might consider subclassification. Well,
18 that is information that must be contained in a Notice to
19 these potential class members. But yet that is sandwiched in
20 between the finding that you have issued, and the Right to
21 Cure process on which the Court has indicated it would rely.

22 And furthermore, ordinarily information exchange in the
23 Right to Cure process is not part of the Court's record. It
24 happens, we believe, and we have argued repeatedly, that it is
25 suppose to happen before there is ever litigation. It is

1 never part of the Court's record. But Your Honor has indicate
2 that you desire to perhaps review that, and on that basis,
3 make some quote subclassification decisions potentially, or
4 consider the merits again. Again raising the issue of well,
5 that's not evidence in the sense that it is sworn. It is not
6 information that we have had an opportunity to challenge. So
7 again, raising these concerns about, even though you
8 characterize as preliminary, it seems that it is either ---
9 because this is sort of a hybrid approach, which again I
10 respect the Court's effort to do that. In some respects it
11 has created more problems than it may have solved. And what
12 we are trying to do in this Motion is too in the first
13 instance say, we can solve all of this with a denial. But, I
14 understanding the Court's impression of that. But, if Your
15 Honor does want to proceed as a class, we need to revisit the
16 process that follows that. And that is what we are seeking to
17 do.

18 **THE COURT:** All right. Mr. Rawl, do you want to be
19 heard on this further?

20 **MR. RAWL:** Very briefly, I think Mr. Kendall stated the
21 issues very clearly. In addition, I agree with most of what
22 Mr. Kendall says, or what Mr. Kendall has stated to the Court.

23 Initially in class action litigation, you know, in the
24 past several years, the Class Cert. Order, or the class
25 certification decision is the most monumental decision in the

1 case. It is larger than often the final judgment in the case.
2 It is a decision as to whether a judgment is against just one
3 party or against numerous parties. So, just from the
4 monumental effect of a ruling on class certification, which
5 whether or not it is preliminary or a final ruling, it is a
6 huge issue in this case. And, on behalf of my client, we do
7 appreciate all of the effort that the Court has put into
8 considering how best to be done if possible.

9 With that said, it may be discretionary for the Court to
10 consider our motion for true reconsideration, which is part of
11 what the --- I think Mr. Seekings said the same thing, that
12 the Court always has the ability to reconsider an Order that
13 it entered into. And, on behalf of my client, we did not want
14 to not very straightforwardly state to the Court some of the
15 issues that we believe may have been a legal error before
16 going and taking the issues to an appellate court. And where
17 there are issues that have been exhaustively briefed, and I
18 apologize for the length of some of our Briefs, Your Honor.
19 But one of the issues, Your Honor, is that we believe that the
20 Court has granted some relief that has not been requested by
21 any party. And I don't know of any other way to bring those
22 issues to the Court without a Motion for Reconsideration,
23 whether it is couched under a 59(e) Motion or a Rule 60
24 Motion, or as we have couched it here as a Motion for
25 Reconsideration. So, of course, I believe the Defendants and

1 I know that the third-party Defendants ask that Your Honor
2 look at these legal issues.~ Some of the issues that we claim
3 --- And the Court is entering into completely new ground. And
4 this is all brand new law. You are the spearhead in a lot of
5 these issues, and I apologize that we have gotten you
6 involved. But respectfully, my client believes that some of
7 the rulings are either --- they are issues that are contrary
8 to existing law, and often that is other jurisdictions, or if
9 you have granted relief that has not been requested by any
10 party. For example, the new class definition that is vastly
11 different than the class definitions that the parties have
12 done discovery on, and argued before the Court.

13 So, the first thing we would ask is if you would agree to
14 reconsider your ruling. You may reconsider it and then not
15 change anything. But we would at least ask that you do look
16 at the legal arguments that were raised now, and to reconsider
17 whether or not you've change your mind or not. And if you do
18 not change your mind, we believe there are numerous issues
19 that need to be clarified. For example, with the Court's
20 class definition, exactly what the sum of the language means?
21 Who is it that is suppose to receive any type of Class Notice
22 in this case? I have tried my best to figure out exactly, and
23 I think I know what you mean, but it can be read so many
24 different ways. The class definition that I think needs to
25 determine who exactly you intend to be in the class, because

1 there are ways to read your class definition that would have
2 nobody in the class.

3 **THE COURT:** Let me ask you about that and if you would
4 help me remember. My recollection is, that you vigorously
5 argued that the class definition of something is wrong with my
6 stucco and my house is in Sun City was just way too broad and
7 lacks sufficient specificity, and then in the course of a
8 hearing the Plaintiffs said, well, it is these three issues
9 which we then took and narrowed the class into the definition
10 which I thought was to accommodate your client as well as the
11 Defendant and the third-party Defendant. So, I perceived that
12 was something that was first of all, in response to your
13 argument, but also in giving you more specificity. But now it
14 seems to be that that is not satisfactory either. But I mean,
15 isn't that what the real problem is, is that you just are
16 opposed to the class certification and there is not really any
17 way to define the class that would be satisfactory to you?

18 **MR. RAWL:** In a nutshell, Your Honor; first of all, we
19 did discuss on the record last time about possibly narrowing
20 the class. And I believe that on behalf of my client I said
21 that would not solve the problem.

22 But to answer your final question. My client, and
23 personally, I do not believe there is anyway to certify a
24 group of houses with different products, with different time
25 periods, with different things claimed to be wrong with them.

1 And what I believe that Your Honor did was, Plaintiffs'
2 counsel made certain arguments, but unfortunately what they
3 argued to the Court was very much contrary to what their
4 experts said. And what I have been trying on behalf of my
5 client, and Mr. Kendall on behalf of his client, has been
6 trying to point out to the Court, is that what the Plaintiffs'
7 expert say is, that at the end of the day, it can't be done,
8 because you have four thousand houses with a myriad of
9 different things alleged to have been wrong. And what they
10 have said is, there is not a single issue --- these are the
11 Plaintiffs' experts, not my expert. The Plaintiffs' expert
12 said, I can't tell you what is wrong with any house, or if
13 there is anything wrong with any house until I do destructive
14 testing on that house. Now, once you get to that one sentence
15 from a Plaintiffs' expert saying that I can't look at this
16 house and tell you what is wrong with it, or any other house
17 in the neighborhood, I believe that makes it impossible to
18 certify a class. But we have gone forward, and we have
19 provided that testimony from the Plaintiffs' experts to Your
20 Honor. Like they say, we can't tell you what product is on
21 the house. So, it is not even --- It is like saying, I'm
22 looking at a brick house, but this house has siding on it, but
23 we are going to include that in the class anyway, even though
24 the brick has to be put on completely different than the
25 siding. The Plaintiffs' experts have said, there is a

1 traditional three code system out there which works on the
2 named plaintiff's house. But that is the lowest number of
3 houses. And then you have most of the houses that have either
4 a proprietary, a completely different product, put on
5 completely different ways according to the Plaintiffs' own
6 expert. Made by Stowe, and then several other houses with a
7 product made by Masterwall. So, before you can even get to
8 the duty of what is suppose to have been done, you have to
9 first determine what product is on the house. What year the
10 house was built. And you have to go either look at the code,
11 if it said generic product. If it is not a generic product,
12 the Plaintiffs' expert say you don't look at the code. You
13 have to look at the manufacture's specification for that exact
14 product. So, that is just one issue. That is just the duty
15 issue. But what the Plaintiffs' expert have also said is, I
16 can't tell you if the house has any damage. Where there is
17 damage, either in cracks of stucco. I can't tell you if there
18 is any damage behind the stucco. I can't tell you. And if I
19 do find damage, I can't tell you whether that damage was based
20 on some design defect. I can't tell you whether that damage
21 was based on some installation defect. I can't tell you if it
22 is related to a mix issue. I can't tell you whether it is
23 related to a thinness of stucco issue. And I can't tell you
24 whether that damage is caused by something completely
25 unrelated to stucco, a roof leak, a window leak, some other

1 damage until --- and this is what each of the Plaintiffs'
2 experts have testified to, until I do destructive testing on
3 that specific house. And so, Your Honor, to answer your
4 question, and this is a very long answer. Yes, I don't
5 believe there is any class definition where the Plaintiffs
6 lump together a bunch of houses that just happen to be
7 geographically, you know, in close proximity, made by the same
8 builder or sets of contractors that could be certified as a
9 class as long as the Plaintiffs' experts are saying, we are
10 gonna have to look at every single house, regardless of
11 whether you certify a class or not. If they bring them as
12 individual cases, you won't see any of the cases where there
13 is no damage. And that is the vast majority of the cases.
14 What you will see is, there have been a hundred and sixty-five
15 individual cases filed with stucco allegations. To date
16 twenty-five of those hundred and sixty-five have been
17 dismissed by the Plaintiffs. So, you are down to a hundred
18 and forty. Those cases, as Your Honor may see, but even in
19 those cases, of course, the experts are saying, we can't tell
20 you anything about these houses until we do destructive
21 testing. So, Your Honor, the short answer is no, I do not
22 believe that a class can be certified. And all the law that
23 we gave you, this is not new to South Carolina. Every case
24 that is looked at, single family construction defect
25 litigation; we are talking about the installation of a

1 product, and have found that there are so many issues, so many
2 differences among the houses, that a class can't be certified.

3 Thank you, Your Honor.

4 **THE COURT:** Thank you. And, is there a reply to what
5 you have heard?

6 **MR. SEEKINGS:** Your Honor, I think the question goes
7 back to my Rule 59 question, in response to the Court.

8 **THE COURT:** Yes, sir, Mr. Kendall, do you want to
9 follow up?

10 **MR. KENDALL:** Just to say something on a different side
11 of that. You asked about why aren't we happy? You tried to
12 help us with the definition, and we complained about it, and
13 why won't we accept that. In addition to what Mr. Rawl said,
14 part of the reason --- also we have a concern about it is that
15 that wasn't the definition we did discovery on. So, it is
16 different enough that I think as a procedural matter that we
17 can't --- there was a definition plead, there was a definition
18 where discovery was done, and there is a different definition
19 is what came out in the Order. So, that is a part of our
20 concern. I just want to raise that to Your Honor as well.

21 **THE COURT:** Thank you. Just a moment, please.

22 (PAUSE.)

23 **THE COURT:** All right. Ladies and gentlemen, we are
24 going to take a brief break. We will just stand down for a
25 moment or two.

1 (PAUSE.)

2 THE COURT: All right. We are ready to go back on the
3 record now. And, again, we are not into the issues yet. But,
4 some slight discussion of the issue is helpful to make a
5 determination on this Rule 59 question.

6 Let me turn first of all to the Plaintiffs, because I
7 continually hear from the Defendants, both in writing and in
8 argument today, that the Plaintiffs' own experts are telling
9 them, the Plaintiffs and telling the Defendants at deposition
10 that a class vehicle is not appropriate in this case. And,
11 will you respond to that? Will you respond to that? What
12 response do you have?

13 MR. SEEKINGS: Your Honor, the record is complete with
14 us responding to that. I am happy to just sort of very
15 briefly respond to that and say this.

16 When we embarked on this case and started looking, what
17 we discovered through discovery is through the third-party
18 Defendants' people as to how these houses were designed and
19 built. And what they told us was, they were the same, and
20 they were wrong. You may remember one of the issues that we
21 had before Your Honor, was an attempt to get back some
22 discovery that was taken during deposition from a
23 representative from Pulte, who talked about that very issue.
24 And we relied heavily on that as we put this case before Your
25 Honor, in that these houses are all the same. With all due

1 respect, putting in all the testimony, I don't believe the
2 testimony is a representation of our expert's testimony is
3 exactly right. What they said is, they are all done the same,
4 and they are all done wrong. And that has been the testimony
5 from day one until day now. And I can't point Your Honor to
6 anything different than that. But I can considerably tell
7 Your Honor, that the testimony elicited from the Defendants
8 and from the architect who has given a sworn Affidavit in this
9 case saying the same thing. And that is the genesis for where
10 this all went. These houses were doomed to fail from the
11 beginning, because of the manner in which they were designed
12 and constructed, and that is what this case is about. We can
13 go as far afield and talk about many things, about the merits,
14 but that is what this case is about. That is the case we are
15 putting before Your Honor, and that is the ruling that you
16 have given to date. So, I would like to stick with that
17 unless Your Honor wants me to go back and give you specific
18 evidence. That is the evidence before Your Honor. And that
19 is where we believe we are today in preparing to move forward.

20 **THE COURT:** All right. One more threshold, and
21 somewhat pivotal question while you are standing, Mr.
22 Seekings. What if we go down the road and it turns out that
23 we need to for efficiency purposes, take the class into
24 subgroups, or subclasses. You have only one named Plaintiff
25 which has been discussed in the Briefing, and the Defendant's

1 position that you cannot have one named Plaintiff and
2 subgroups within the class. What does the Plaintiff say to
3 what you believe would happen in the event we find ourselves
4 there?

5 **MR. SEEKINGS:** And, Your Honor that is a good question
6 and it comes from many different angles. One of which is,
7 Your Honor has contemplated certifying this class, sending out
8 Notice, staying for Right to Cure. And one of the questions
9 then has come up, and this has come up in other tribunals too
10 is, what will happen if the Right to Cure Notice goes out,
11 there is an offer made, and certain members of the class have
12 been certified and want to accept whatever offer is out there.
13 That would be a subclass that would be within the class that
14 you wouldn't have to tend to. There may be some other
15 subclasses. We don't know necessarily going down the road.
16 But it is certainly a management vehicle available for you.
17 But it comes back to, these houses are the same, with the same
18 problems from the Plaintiffs' perspective, and a preliminary
19 matter of what Your Honor says. But, there is no prohibition
20 that we can find in the law, and there are plenty of cases
21 where it has happened with subclasses have come in from this.
22 One thing that I have heard, and the Court may be aware a
23 little bit, is that Your Honor would have to put all of this
24 out in a Notice, and I don't believe that is the case. Once a
25 Notice goes out, and a class is defined, if there are

1 subclasses, and members of the class would be notified of that
2 as they are a member of a subclass. So, the class is focused
3 --- There are plenty of vehicles available to Your Honor, if
4 you find that the evidence is developed, that there is a need
5 for subclasses. And I do think one area is going to be a
6 subject discussed already; what happens if you want to accept
7 a Notice that may be subclass people. So, I hope I have
8 answered your question, and I think I am. But, right now
9 where we are is, you have to define class as they consider
10 from the get go, as has been discovered and as the evidence
11 has been presented. And we now need to get the Notice out
12 there and find out what may be happening, and I think that is
13 typical in class cases. What is behind the box is where we
14 are right now, and that is, where are these people, and what
15 are they going to do.

16 **THE COURT:** All right. Very good. Thank you. Then
17 ladies and gentlemen, I am prepared to rule at this time on
18 the threshold question which is this.

19 Mr. Kendall, you have asked for some additional time.
20 Respectfully, I am not in a position to stand this down for a
21 couple of days. The Plaintiffs filed their response and sent
22 us a copy on February 16, 2012, in which they set out in their
23 first argument that there was no vehicle or 59 was not a
24 permissible vehicle. I am going to decline and dismiss the
25 portion of the Rule 59, which is asking to alter, amend, or

1 reconsider. I will accept, and what I would like to do is to
2 have you tell me issue by issue what needs to be clarified.
3 Now clarification, when I say clarification, what I mean is
4 not a substantive change or an argument against what has been
5 decided in favor of what might be a better idea. When I say
6 clarification, what I mean is, there is something within that
7 ruling that is susceptible of more than one meaning, and thus
8 the Court is required to clarify it for purposes of the
9 parties being able to follow what the dictates actually mean.
10 I decline to *sua sponte*, open back up for reconsideration what
11 was a hard fought, long-standing battle that generated the
12 Order that the Court issued. I am aware that we have delayed
13 certain implementation dates within that order, and now they
14 are going to have to be revisited. But I would intend to do
15 that by just simply saying, it is now six months later, so all
16 these dates go back six months. I just pull that term out of
17 the air. We would have to figure out exactly what it would
18 mean, and where the dates would actually fall. But, I would
19 do that ministerially as opposed to reconsidering each and
20 every deadline that is set in the Order.

21 So, I am going to go back to the Defendants and the
22 third-party Defendants, and just ask you to tell me please, at
23 what page and what line of the Order, what paragraph and what
24 language is in need of clarification.

25 **MR. KENDALL:** Your Honor, I am going to do all that I

1 can to be complete.

2 **THE COURT:** Okay.

3 **MR. KENDALL:** But I do wish to incorporate into my
4 argument everything that we did set forth in the Memorandum to
5 the extent that there may be something that blends together as
6 both a request to reconsider and a request to clarify. But I
7 say that just as a backstop for me, not as a trap for you.

8 **THE COURT:** Right. And, what I will do is, tell you
9 when we get into that specific item, that after I have heard
10 from you, if I believe what you are asking me to do is to
11 reconsider, then I will tell you that. Your position will be
12 preserved for our record, and we will move forward to the next
13 issue.

14 **MR. KENDALL:** All right. Then I want to start with one
15 that we have just spoken about. And if you believe I am
16 asking you to reconsider it, please forgive me, because we did
17 not talk about why we think that the class definition was
18 substantially different from the other. I want to ask it in a
19 sense that perhaps Your Honor doesn't see it that way. So, to
20 express to you why we think it was different, and ask you to
21 clarify that.

22 As part of this, for example, it states in the class
23 definition that those for whom South Carolina SCSP apply the
24 exterior stucco in whole or in part prior to July 31, 2007.

25 **THE COURT:** And where are you in the Order.

1 **MR. KENDALL:** I'm sorry --

2 **MR. SEEKINGS:** -- Eleven and twelve, Your Honor.

3 **THE COURT:** More than one place, I think it is
4 mentioned.

5 **MR. SEEKINGS:** The bottom of eleven and top of twelve,
6 starting at the second to the last line.

7 **MR. KENDALL:** Yes, that is correct.

8 **THE COURT:** I have it. Thank you.

9 **MR. KENDALL:** And then the very first line on page
10 twelve states: "To which SCSP applied the exterior stucco in
11 whole or in part prior to July 31, 2007." That leaves open
12 and unanswered the possibility that stucco has been in fact
13 entirely removed. Once upon a time it was installed, but it
14 is no longer present on the home. Or, has partially been
15 removed from the home. That is a known situation within Sun
16 City, Hilton Head, but it is one that falls within the gap and
17 one of the reasons why we seek clarification of that part of
18 the definition.

19 Is it Your Honor's intention that it only be homes which
20 on the date of the lawsuit, or perhaps the date of the trial,
21 or perhaps the date of the Notice, where the plaster that
22 extant on the home was the work of SCSP? Or where sometime in
23 the past, but yet they have already undertaken repairs, and it
24 is no longer our product that is on the home."

25 **THE COURT:** All right. Just one moment, please.

1 (PAUSE.)

2 THE COURT: All right. Page 4 of the Order says that
3 the Plaintiffs are claiming damages that include, at the top
4 of page four, "according to the complaint, the cost of
5 repairs, loss of use, depreciation, incidental and
6 consequential losses, and sums previously paid for repairs."
7 So, I do not find that needs clarification. Those individuals
8 are in the class. If it turns out that they have no damages,
9 well that is another issue. But, they are part of the class.
10 So, I would not reconsider on that.

11 MR. KENDALL: That's fine. And, if Your Honor sees the
12 damages --- If they have any damages that flowed, whether it
13 is past or repaired, because that is another issue that we
14 have a question about. Is, did you intend --- It appeared to
15 us from argument and from some of the ruling, that perhaps the
16 repairs that may have been already paid for were not part of
17 this class. But Your Honor is saying that you do intend that
18 repairs made before the lawsuit was filed or before the Class
19 Notice goes out would in fact make them eligible for this
20 class.

21 THE COURT: To be in the Class. Now, that doesn't
22 strip you of some new affirmative defense you may have as to
23 those individuals, but they would be included in the class.

24 MR. KENDALL: Very well, Your Honor.

25 THE COURT: So, I would decline to clarify.

1 **MR. KENDALL:** Thank you. Does Your Honor intend that
2 the parts A, B, and C in the definition again be --- the
3 and/or is a concern for us.

4 **THE COURT:** All right.

5 **MR. KENDALL:** First of all, does Your Honor intend that
6 a person only be required to have one of those extent on the
7 home, all three of them, or all three of them?

8 **THE COURT:** Right. Well, the use of the disjunctive or
9 is intended to say any of the three. The term "and" there is
10 superfluous, really not necessary and perhaps could confuse
11 you. I would decline to actually amend the Order, but I would
12 say to you that when I use the disjunctive form "and/or," any
13 one of the three would meet the requirements to be a member of
14 the class.

15 **MR. KENDALL:** And if a member who can qualify by having
16 one of those three, also has other types of damage because of
17 stucco. Now, because what we have heard in the record, is
18 there are other problems with the stucco application. For
19 example, the way that the lap was installed, or the way the
20 stucco mix was mixed in the bucket. And in fact, on the
21 Grazia house that is an issue that the experts talked about.
22 Is that not part of this, and there will not be testimony or
23 claims brought as a result of those types of problems with
24 their stucco? Are they limited to these three?

25 **THE COURT:** Well, it is the Court's intention to have

1 limited. The Plaintiffs have told us these are the problems.
2 Again this discussion occurred on the record. I do not have a
3 copy of the transcript before me. But these were the three
4 areas given to us by the Plaintiffs that consist of which the
5 class consist.

6 So, for example; if there was a tiny ding on the wall
7 that may have occurred because someone bumped it with their
8 car, and maybe the stucco was thin and should not have folded
9 to the bumper, but it did, or something to that nature, that
10 is not a part of this class. And again, I think the Order is
11 fairly clear, and I would decline to clarify or rewrite it in
12 any way. It is what it says, which is, if it has got to be
13 one of those three, but only one of the three.

14 **MR. KENDALL:** And, if the individual also has claims
15 for thin stucco, or improper lapping of the lap, then they
16 cannot pursue that in this class?

17 **THE COURT:** All right. Do you want to join us in this
18 discussion? What say the Plaintiffs to this issue? I am sure
19 you followed that they meet one of the three, but then they
20 have something else that is not in the three as well.

21 **MR. SEEKINGS:** Well, we believe based on your Order, and
22 everything that has been presented to you. All of that would
23 have been encapsulated anyway.

24 **THE COURT:** I'm sorry, you are saying it would be
25 encapsulated which is?

1 **MR. SEEKINGS:** A, B, and C. Well, Your Honor, lack of
2 head flashing above door and windows, failure in stucco
3 control joints. We went through all of that. And as you will
4 recall, we had a long discussion about this with Your Honor.
5 Those are the problems that are throughout the subdivision,
6 and those are the problems that we are pursuing in this Class.

7 **THE COURT:** So --

8 **MR. SEEKINGS:** Mr. Kendall is talking about some other
9 things, if they only had that, they would not be a part of
10 this class. If they had that in addition as a result of these
11 problems, clearly that would be part of the plan.

12 As you will recall Your Honor, one of the things that we
13 told you that our experts is, we believe that the remedy for
14 this problem is to replace the stucco. And, that is our plan.

15 **THE COURT:** All right. Here is my understanding. It
16 is a proximate causation issue that if they fit one of the
17 three, but they have also number four over here that it is
18 proximately caused by one of the three, it is in. If it is
19 not proximately caused by one of the three, those extra
20 damages would be out. And again, I don't believe that
21 requires clarification, because I believe that it is clear
22 under the Order, because they would have one of the three that
23 would bring them into the member of the Class, and we are
24 right now trying to determine who is in the Class and who is
25 not.

1 **MR. KENDALL:** And if the Court will permit, because if
2 I skip something and Mr. Rawl is taking better notes while I
3 talk, and perhaps he can add something that I miss, and I will
4 just adopt it.

5 **THE COURT:** Just go through yours, and we will hear
6 from Mr. Rawl.

7 **MR. KENDALL:** I will go through it as thoroughly as I
8 can, Your Honor.

9 To point to a particular page/line on this next issue I
10 want to raise to the Court would be difficult, because it is
11 an overarching aspect of it, and perhaps what you will tell me
12 is, you will deal with it later. But, in our Brief at page 8,
13 we talk about the issue of the mode of trial and the mode of
14 discovery. Perhaps Your Honor can just pre-amp any questions
15 I might have by telling us what you anticipate. What we found
16 lacking here is, or what we found to have questions about.
17 Does the Court contemplate that there will be the opportunity
18 for full discovery as to each class member on issues like the
19 proximate cause that we just raised, or issues of the
20 affirmative defenses that we will raise, such as, statute of
21 limitations, contractual duties, and waivers, and those types
22 of things. Does the Court contemplate that after the Notice
23 period there will be what appeared as we read it, is that
24 there was --- there may be limitations placed on what we would
25 be able to do. And perhaps this is too far down the road, but

1 that is an issue we are seeking clarification on is. How will
2 the discovery process unfold? And will we in fact have the
3 full discovery on all --- as to each individual member of the
4 Class, as to each of our affirmative defenses?

5 **THE COURT:** All right. Just a moment please.

6 **MR. KENDALL:** And, I do know Your Honor, that is
7 raised, it is touched on in your Order.

8 **THE COURT:** It is. Thank you.

9 (PAUSE.)

10 **MR. KENDALL:** I believe page 10 is the part that I am
11 aware of.

12 **THE COURT:** All right. Mr. Kendall, the best that I
13 can tell you is, we will have to approach that once we see the
14 magnitude of the affirmative defenses that you raise, which is
15 outlined in the Order as to how we will do that, with a list
16 of those individuals against whom you have particular
17 affirmative defenses, and what they are. And I cannot at this
18 point predict how that process will occur, because again, I do
19 not know the magnitude of it. But the Order makes provisions
20 for it, and I would decline to clarify any further at this
21 point in time.

22 **MR. KENDALL:** How does the Court contemplate, and this
23 comes up, I have raised this somewhat on page 27, and I hate
24 to jump backwards, but discovery and class definition, these
25 tie together.

1 We contend, Your Honor, that one of the issues with the
2 class definition is that it requires discovery to know who is
3 in it. After the opt out period has expired, will the Court
4 --- does the Court anticipate that we will fold --- we will
5 address that issue where we believe that somebody is not
6 properly a member of the class? Will we have the opportunity
7 for discovery on those issues as well?

8 **THE COURT:** Well, my intention is that after the Right
9 to Cure process has ended, and after the opt out period has
10 expired, we will look and see where we find ourselves. Again,
11 it is impossible to predict, because both sides have told me
12 through written communications in the past that there have
13 been some cases resolved, and the Defendants has contacted
14 some individuals about repairs, and the Plaintiffs are alleged
15 to want to have a community meeting, and back and forth, and
16 back and forth. I have lost touch as a result of exactly who
17 may actually end up being in, and who may actually end up
18 being out of the class. But, I simply cannot answer the
19 question until we get there. But, I will say this to you. I
20 am not going to push you off into an abyss where we don't know
21 whose is in and what defenses you have for them, those
22 individuals or those groups of individuals. We will just have
23 to wait until we get to that point, and see how to structure
24 it.

25 **MR. KENDALL:** Let me back up in the time frame and

1 consider it from the issuing of the Notice standpoint.
2 Ordinarily we would mail Notices to whom we believe to be in
3 the Class. But because the Class in this case is defined by
4 how specific problems, and we have taken the position and we
5 believe that the Plaintiffs' experts deposition testimony
6 corroborated that not every one of these houses will qualify
7 on one of those three questions. Just as a side, trying to
8 explain that is a little bit like trying to explain in the
9 jury qualification where we tell them, driver's license, voter
10 ID, or -- and all we have to have is one of them. And we
11 believe that in this case there are houses, and we believe the
12 expert testimony has corroborated. There are houses that
13 will not qualify under one of those three. So, to whom will
14 we know to mail Notices? How will we determine who get the
15 Notices?

16 **THE COURT:** All right. Plaintiffs, this is rather than
17 just --

18 **MR. SEEKINGS:** -- I have a very short sweet answer to
19 that, Your Honor, and that we planned on, based on your order,
20 sending a Notice to everybody who has a house in Sun City,
21 built between the dates contemplated by this Order, that South
22 Carolina Plastering did some work on. That is where the
23 Notice should go pursuant to this Order. We have gotten a
24 list from them. They know what houses they worked on. So,
25 that is who we plan on asking, Your Honor.

1 **THE COURT:** Do you want to reply to that?

2 **MR. KENDALL:** That isn't a Notice. That is not the
3 Class definition that we just finished discussing. The Class
4 issue --- we had that group limited to one of three problems.
5 He has just erased those three problems and said that we are
6 going to send it to everybody to whom we built, and that is
7 different.

8 **THE COURT:** Okay. Do you want to --- Let the record
9 reflect what you all discuss; what is your position on that?
10 How do you respond?

11 **MR. SEEKINGS:** Your Honor, we believe that the
12 testimony is that all the houses done by South Carolina State
13 Plastering were done wrong, and have one of these three, if
14 not all of these three problems. And we are going to Notice
15 those people. That is how we pursued this case from the get
16 go. In the very beginning when we took the depositions of the
17 applicator himself, and who knows most about it than any
18 architect. So again, I don't know how far you want me to go
19 back and argue, but the class definition that you have, the
20 way you satisfy Notice to that defined group of people, is to
21 send those people that plastered by South Carolina State
22 Plastering. I think you get Notices, and I get Notices in the
23 mail sometimes of a class action, and perhaps I am not a part
24 of it. We may capture a few that don't fit this Class, but we
25 want to make sure we include everybody who does. And that is

1 the obligation that we have got.

2 **THE COURT:** And, Mr. Kendall, let me get you to respond
3 to that. It is very common in the other class actions that I
4 have been involved in, and every now and then, just personally
5 who has nothing to do with this court system will get a letter
6 that I may be a member of a class, and thus class Notice - opt
7 out Notice is generally aimed to be over-inclusive. What is
8 the harm in that?

9 **MR. KENDALL:** That we are going to end up certifying a
10 Class or having a Class that is much larger than it ought to
11 be, because for the individual to answer the question, they
12 must have some expert evaluation of their home. Remember the
13 definition says that they have damage as a result of one of
14 these three defects. And, so, not simply that the
15 construction detail is a certain way, but that there is damage
16 as a result of that. So, they are going to have to have had
17 something done on their home to know that answer. That is
18 according to their experts.

19 **THE COURT:** But wouldn't the Right to Cure process
20 eliminate those individuals?

21 **MR. KENDALL:** I would say no, but let me qualify this.
22 If the Right to Cure process in fact becomes a court
23 administered site inspection where not only does the Plaintiff
24 gets to tell us what is wrong with their house, but also we
25 get to corroborate or evaluate it, and there is a

1 determination on the merits of that, then it could. But in
2 its statutory way approach that is really not what was suppose
3 to happen, but I understand that we are modifying that here
4 some. So ordinarily, if the Plaintiffs come to you and tell
5 you, I have this in that, in the Right to Cure process, if
6 they put that in and you review it, that is unsmart,
7 unchallenged information that I do not believe will be
8 corroborated or in the class. Procedurally we go out and
9 determine that in fact that condition did not exist. We have
10 that very swearing match Your Honor, in this case at the front
11 end between experts and arguments of counsel. That argument
12 is going to continue. What the difference is antidotal, and
13 it is antidotal. For example, I have been involved in some
14 securities litigation. But if the list arises out of say, a
15 subscription list, or a purchaser's list, and it is just that
16 broad. If you purchase stock, because all of the issues after
17 that are the exact same for everyone, the only question you
18 have to ask is, did you buy? And that is either yes or no.
19 And the list --- the mailing is generated by the subscription
20 list. Well, to go --- to use the definition that we have been
21 given, again requires something far more, it requires -- it
22 requires specific knowledge of probably even expert knowledge
23 in order for the homeowner to know if they qualify. So, we
24 are going to end up litigating a lot of houses to determine
25 whether they have properly opted --- not opted out, or whether

1 they meet the definition. We have spent a lot of time on that
2 one question. So, it is important to get it right up front.

3 **THE COURT:** All right.

4 **MR. KENDALL:** And Mr. Rawl has reminded me that is why
5 the Rule 23 analysis and the definition is the first part that
6 we really --- we have always put up front and that we are
7 struggling with now, is because that everything that flows
8 after it comes out of that definition.

9 **THE COURT:** All right. Do you want to weigh in again,
10 Plaintiff. Anything further?

11 **MR. SEEKINGS:** No, Your Honor. I think we are fine. I
12 do think that the Class definition which Your Honor has
13 declined to reconsider, does not talk about damages to houses,
14 it talks damages to people. People who were damaged. That is
15 the people, the Plaintiffs, and as a result of the problems
16 that they have on their house. That is the class definition.
17 And, I think they are getting into some other issues beyond
18 the definition, and you for reconsideration of your ruling.

19 **THE COURT:** I would agree with that. Mr. Kendall, my
20 response to you would simply be this. At some point the Court
21 is going to have to approve the Notice, and that is the next
22 battle. Well, maybe not the next one, but I say, battle to
23 come. And, we would make provision in the Notice that the
24 language would be such that the Notice is over-inclusive. But
25 in order again, for reasons of judicial economy and resolving

1 these all in a stroke, that in one stroke in one action would
2 be that it would be the Court's intention that everyone who
3 may be in that class, if that is all the houses in Sun City,
4 fit in the definition that State Plastering, within those
5 dates, in whole or in part, which will just one trial on the
6 stucco on the building, then they get a Notice. And if it
7 turns out that it is a over subscription of the Notice, well
8 that is just what is an expected part of the process, and I
9 don't believe that there is any other way to do that. You
10 can't conduct full-blown discovery and figure all that out on
11 the front end before we ever send the Notice.

12 Mr. Rawl, you are standing. Do you want to weigh in on
13 that?

14 **MR. RAWL:** If you wouldn't mind, Your Honor. On this
15 issue that you have just allowed the Plaintiffs and the
16 Defendants to weigh in on.

17 As Mr. Kendall just said, the purpose of Class Notice,
18 Class Notice is the first part of the inquiry. It is the
19 beginning of the inquiry. The Class Notice and the identity
20 of a Class Rep. That is what allows me to start discovery,
21 and to determine how you go through the Rule 23 analysis.
22 And, the reason the Plaintiffs can say, all we know is their
23 houses were stucco, is because nobody has done discovery on
24 exactly how many --- Even Rule 23 discovery does not post Rule
25 23 discovery to determine who can be in the class? But Rule

1 23 discovery to say, how big is this Class? How many people
2 are in this Class? Are the issues in this Class common? Are
3 the issues in this Class typical? What we know is that Mr.
4 Grazia doesn't have these three things. Mr. Grazia would not
5 be in, you know, all these three issues of the Class. And
6 there is black letter law that says that the main plaintiff
7 has to be in his own Class. So, we haven't had the
8 opportunity to go and see how many houses have either A, B, or
9 C, or some multitude on the other. The Plaintiffs haven't
10 provided any expert testimony other than Mr. Seekings standing
11 up and saying what they believe. Plaintiffs have not provided
12 any expert testimony of any individuals that would be in ---
13 that would meet the Court's Class definition. The Defendants
14 have not been allowed to go and say, how many people would
15 have A, B, or C? So, without the ability to go and look at
16 that, we can't answer how many people are in this Class, if
17 anybody. What we have done is based on the original Class
18 definition by the Plaintiffs, just say anybody that has
19 stucco. We have asked their experts, isn't it true that in
20 this group of people, anybody that has stucco --- that has had
21 stucco applied by SCSP, some houses have issues with the
22 control joints, and some houses don't. Yes, we agree with
23 that. Some houses have three issues and some houses don't.
24 Yes, we agree with that. Some houses have head flashing and
25 some houses don't. Yes, we agree with that. So, what we did

1 from the very beginning is to show that the original Class
2 definition, which is all houses that there was not a single
3 common issue in that Class. And we have shown that through
4 the Plaintiffs' own testimony. And I tell you, I do get
5 frustrated. I am a little bit upset when I keep hearing
6 Plaintiffs' counsel say, our experts said this, our experts
7 said that, when the Defendants actually provided the Court
8 with the testimony of the Plaintiffs' expert, which said
9 exactly what I said it said. And a lot of that testimony is
10 actually in the Brief that was filed on Friday, and ask for
11 individual discovery. If the Court would like to look at it,
12 it is summarized there where Plaintiffs' expert say, we can't
13 look at one house and say anything about the other house.
14 But with regard to the Court's Class, it is very difficult for
15 us to argue that there are only twelve people in this Class
16 and therefore it doesn't meet numerosity, because we have not
17 done discovery on it. What we know is the Plaintiffs' expert
18 say that not everybody with stucco will be in this Class.
19 What they have not said is how many people would actually be
20 in the Class. The numerosity requirement of Rule 23 is the
21 Plaintiffs' burden, and the Plaintiffs haven't even made the
22 first step of showing how this new Class will meet any of the
23 Rule 23 requirements. So, we are kind of handcuffed here. We
24 have not done the discovery to demonstrate that this Class
25 shouldn't be certified as drafted. And I am with Mr. Kendall,

1 I have lots of questions about what it means. What we did
2 show is that the original Class definition of the Plaintiffs
3 was incredibly overboard, and there was no way to be certified
4 as a Class. And we really do appreciate the Court's trying to
5 narrow the issues to just the issues of Plaintiffs failure to
6 --- But you know what we know, is that the Plaintiffs' experts
7 have said with the named Plaintiffs, what is wrong with the
8 main Plaintiffs' house, according to their experts, mix issue
9 and thin stucco.

10 **THE COURT:** Okay. All right. Do you want to respond
11 to Mr. Rawl's position that the cart is before the horse, and
12 we don't have specific damages issues as to who is in and who
13 is out of the Class?

14 **MR. SEEKINGS:** Just briefly, Your Honor.

15 **THE COURT:** Please.

16 **MR. SEEKINGS:** Again, going back to the Order and the
17 Class definition. What this class definition imitating from
18 the evidence that we've got, from the very people who know the
19 most about these houses, and that is not our experts. It is
20 them. That is how this all came about. They built them, they
21 were built by the same people. They built them the same way.
22 And the testified that they brought them "X," and we have
23 brought an action saying "X" is wrong. That is how we got to
24 where we are today. And this whole notion of them --- it is
25 our peoples' fault for not knowing every particular about how

1 they built it. We have taken testimony that they have given
2 us, under oath, presented it to the Court, and Your Honor has
3 certified this Class through its definition, which I believe
4 is proper. So, I don't believe the cart is before the horse
5 at all. We need a vehicle to ask this Court with a Notice
6 that you are going to approve the Right to Cure process. That
7 is how we are going to get to that.

8 **THE COURT:** All right. Ladies and gentlemen, I am
9 prepared to rule at this time. And again, I decline to quote,
10 clarify this Order, because I believe it is not ambiguous nor
11 confusing. Ultimately when the opt out Notice, which the
12 Court has to finalize the language of, will be done. It will
13 be done in such a way that it will be clear that individuals
14 who receive this Notice may not be in the Class. But, the
15 Court anticipates that the Notice will go to everyone who has
16 the stucco that the South Carolina State Plastering applied to
17 their house, and then the Right to Cure process and other
18 processes will eliminate those individuals if they wrongfully
19 try to get in the Class. So, I feel like the Right to Cure
20 and other processes are going to give us a failsafe mechanism
21 here, and that is the Court's intention to proceed without
22 amendment or clarification of this Preliminary Order.

23 **MR. KENDALL:** So, if I understand the Court's
24 intention, is that we will have an opportunity to hash out the
25 Notice more completely and that we are not going to be

1 prejudiced in any way if we don't anticipate what all our
2 concerns about the Notice might be.

3 **THE COURT:** Well, I think you understate it, because to
4 get the Notice, I can tell, is going to be a huge knock down
5 drag out fight. We are two years into talking about the
6 Notice. And, I suspect by the time we finish, every word will
7 be disputed and fought over, and we will be at it for quite
8 some time. But, I anticipate coming out with a document that
9 will at least provide to the individuals who live in Sun City,
10 that number one, they may have a claim. And number two, they
11 may not be in the Class, and then a further description. And
12 that is really the best at this juncture that we can do until
13 we finalize the language.

14 **MR. KENDALL:** Your Honor, Mr. Rawl may have some
15 questions about the Notice issue. I am going to, with the
16 understanding that I have from what the Court has just said,
17 is that as we deal with the contents of the Notice we will
18 have full opportunity. We have raised some anticipated
19 questions about the Notice in our Memo, and I do not want to
20 have deemed to have waived them by not arguing them here. I
21 will just, if the Court desires, I will defer them to a later
22 conversation.

23 **THE COURT:** I would, because I believe again, this
24 would not be cognizable under the 59(e) discussion to quote,
25 clarify this particular Order. So, we will defer Notice

1 discussions until we sit down to hammer out the Notice.

2 **MR. KENDALL:** All right. Your Honor, if I might touch
3 on, and again if you feel like this is ahead of where you want
4 to be, let me just know that and we will defer the
5 conversation too.

6 But your Order does set out a structure by which the
7 Right to Cure process is suppose to take place. And that is
8 triggered on the end of the opt out period.

9 Your Honor, again I would ask the Court to reconsider
10 that to the extent that we actually have to abide by it, and
11 it seems awfully final to me and would be proper for this
12 59(e), if we are asked to carry out the exact terms that you
13 have ordered us. We have offered information from an expert -
14 -- a statement from an expert that says it is impossible to do
15 meaningful inspection in the timeframe that the Court has
16 outlined. So, I do want to add that. But as far as
17 clarification of that, there are a couple of points that I did
18 want to raise to Your Honor on that issue, if you would now.

19 **THE COURT:** Right. And I wish you would touch upon
20 that, because I need my own clarification from your arguments.
21 Because one of the arguments was, the Court doesn't have the
22 authority to amend the statute, and I quote, "amended" and
23 close quote, the statute to lengthen the time so that we might
24 possibly have some analysis of all the houses in a particular
25 period, so it is hard for me to grapple with your position

1 that you can't amend the statute. And then the same argument
2 comes right behind it that we don't have enough time to do
3 what you are requiring us to do.

4 **MR. KENDALL:** Well, Your Honor, it goes in part to what
5 --- the position that we have taken all along, and I do not
6 believe I am going to be inconsistent with the Supreme Court
7 Order in Grazia.

8 It is my understanding that the Supreme Court's Order in
9 Grazia was on a very narrow issue, and that is: Does the
10 Right to Cure Statute prevent the ability to assert a class
11 action in residential homeowner context. And the narrow
12 question that they answered was, no it does not. My
13 understanding is they answered no other question in that case.
14 And the question that is still pending is: Can a person
15 participate in a Class who has not already, before the Class
16 is certified issue the Notice. It is our position, and we
17 maintain the position that the Class could only be certified
18 in this context, giving the Supreme Court's ruling; the class
19 action can only be certified if members who have already
20 complied with the Notice. That is our position. So, if you
21 understand that that is our position, then hopefully it shows
22 that we are not really being duplicitous in our subsequent
23 argument. So, that would be a way to resolve it.

24 But to the extent that we are going to do it, and I
25 understand why the Court extended the time, but I will tell

1 you that it is impossible for us to do. And, I've showed you
2 the timeframe for that, the four thousand broken down in
3 thousand house chunks, each with --- It was sixty days that
4 was in this one. It changed from the first one. It just
5 creates a timeframe where we are getting about twenty to
6 thirty minutes, if we work six days a week, ten hours a day.

7 **THE COURT:** It seems like we had four, forty-five day
8 periods, as I recall, from the Order and that is how we did
9 it.

10 **MR. KENDALL:** And, Your Honor, that as Skip Lewis, who
11 has been our expert throughout this entire litigation, offered
12 to the Court by way of Affidavit, that that is an
13 impossibility.

14 But beyond that, we also have the issue and concern Your
15 Honor, that there is an important element of the Right to Cure
16 Statute, which is not contemplated in your Order, which was
17 seeking clarification of the Notice. So, the scenario as I
18 see it unfolding, is that we receive a thousand Notices one
19 day. And in that thousand Notices, and it is not clear to us
20 whether they will be the statements of counsel by way of a
21 letter saying this is it. Whether it be by way of an
22 Affidavit. We have proffered a questionnaire to that. But to
23 the extent that what we do receive is vague, or incomplete, or
24 we believe does not match with what this class action is
25 suppose to cover. The Statute gives us the opportunity to

1 seek clarification. The Order does not discuss what is
2 intended there. So, that is one point.

3 And the final point I touched on before. Ordinarily
4 Notices under the Right to Cure Act are not filed documents
5 and not evidentiary. However, in this case, you have asked
6 for them to be filed, and suggested that you would review them
7 for subclassification. In that event, we believe that it
8 would be only appropriate if we are able to respond to those
9 notices to the Court, and that the Court even perhaps require
10 that those Notices be sworn so that they are admissible type
11 testimony. I don't want to waive whatever arguments we might
12 have. But, at least give them some more credibility,
13 something like an Affidavit rather than simply a statement of
14 counsel letter by a homeowner. They ought to have some weight
15 to them. So, we would seek whether --- how the Court might
16 address those concerns of ours.

17 **THE COURT:** Okay. Do the Plaintiffs want to be heard?

18 **MR. SEEKINGS:** Yes, Your Honor. I will respond to
19 that. Because I think he has asked the question that is most
20 central on this, and that is, we have a statutory scheme for
21 the Right to Cure, and what the Defendants are asking, is to
22 extend that statute in terms of time and all of that. We
23 wouldn't object to it because of the case management. The
24 problem with it --- it is presented as -- Then the one that
25 is brought before Your Honor --- well the statute isn't good

1 enough for us. We want Your Honor to extend it by making the
2 requirements of Notice to be Affidavits. The Statute doesn't
3 speak to that. Your Honor certainly has the ability to manage
4 this case, and make sure that we follow the statute. We then
5 have to follow the Statute, and I don't believe that the
6 Legislature and the judiciary get involved together by
7 amending it. There have been attempts to amend it, even
8 though it hasn't happened. We have a Statute, and the Statute
9 says what it says. We fully intend to comply with what the
10 Statute and your Order, and that is how we will proceed going
11 forward. Once the Notice has gone out, and the opt out period
12 comes, and we comply with the Statute. So, I think Your
13 Honor's question -- the Defendant's are asking you to rewrite
14 the statute, and we ask that you don't do that. Simply
15 clarify the process in which we are going to follow the
16 Statute.

17 **THE COURT:** And what do you say to Mr. Kendall's point,
18 that this order does not have provision when the Defendant ask
19 for clarification?

20 **MR. SEEKINGS:** That is a Statutory question, Your
21 Honor. The Statute is what sets out the requirements of the
22 Right to Cure. As you know, we have spent a lot of time --- a
23 lot of forums talking about that. The Legislature has come up
24 with scheme that says here is what you have to do. Here is
25 what we have to do. And here is how it goes. And you said in

1 your Order, I want you all to comply with the Right to Cure
2 Statute after Notice has gone out. We are going to do that.
3 They haven't complained about the statute. If they do, there
4 is another place and forum for that, but it is not here. You
5 have ordered to comply with the Statute. We have the
6 statutory scheme, we have been through this before. They know
7 how to do it. We are all adults here. We know how to do it.
8 And if in fact, we play this game of we send them a Notice,
9 and they come back a couple of times saying it is not enough,
10 it is not enough, we will never get done with this. We know
11 what the Statute requires, and we are willing to do it.

12 **THE COURT:** And, what do you say to Mr. Kendall's
13 argument that the entire process and schedule is too
14 ambitious? That there is not enough time?

15 **MR. SEEKINGS:** I disagree with it, Your Honor. This
16 isn't rocket science. You can see these houses. You can
17 touch them. You can feel them. Their experts have spent a
18 awful lot of time out there. They have had access to these
19 houses now that we don't even have. They are out there doing
20 things to them. There is plenty of time to do what they need
21 to do to determine whether or not these people are members of
22 this class, or whether or not the problems that are alleged,
23 or whether or not they want to make an offer to repair it or
24 not. Obviously Your Honor has thought about this, and we
25 agree that it is ambitious. It requires us to do a lot in a

1 short period of time too, which we are fully prepared to do.
2 That is individual Notice for every single house. We believe
3 the Supreme Court has said we can do it, but it will be for
4 every single house, and they have to respond. It is a
5 statutory scheme, and within bounds of your Order.

6 **THE COURT:** Very good. All right. Just a moment
7 please, and let me think this though for a moment.

8 **(PAUSE.)**

9 **THE COURT:** All right. Madame Court Reporter, let me
10 just say for our record so that it will be clear to whomever
11 is reviewing this what is the Court's effort to attempt to
12 comply with The Right to Cure Act, realizing that we have as
13 many as four thousand cases all in one lump sum to be complied
14 with.

15 Very specifically in this Order, the Court did not in any
16 way alter the mandate or the requirements of the statute as
17 far as fulfilling its intent and purpose. What I did was
18 allow administratively a delay in the time table, but not in
19 the requirements. And by the same token, I would decline Mr.
20 Kendall, to add to the requirements, because the Legislature
21 had the opportunity to make this a sworn statement. That has
22 a lot of implications. Evidentiary for subsequent
23 litigations. The General Assembly well aware that this whole
24 process is a precursor to litigation, and through the doctrine
25 of *expression unius*, well, by failing to mention it, I believe

1 that was an intentional decision not to require an affidavit
2 or some other form other than what is prescribed by the
3 statute. So, I respectfully decline to amend again the
4 substance of the purpose and intent of the Statute, or the
5 requirements thereunder. The only thing that the Court is
6 willing to do is, just because of necessity, delay the
7 deadlines that are set forth. And again, I would decline to
8 amend at this juncture the process set out by the Court, and
9 we will just have to get into it and decide if it becomes, and
10 this is my term, a complete train wreck, where we will
11 reevaluate at the time. But I would like to think that with
12 everyone working together in a cooperative and positive way,
13 we can make substantial progress, if not meet these ambitious
14 deadlines. This is a 2007 case, and I am sitting here on
15 April 30, 2012, and we are still on ground zero, square one.
16 So, for that reason I would decline to amend the time tables.
17 But, furthermore, the Statute itself is self-executing as to
18 the issue of what happens if you need a clarification. The
19 Order is silent on that, but that certainly doesn't mean that
20 somehow by the silence of the Order I mitigated that portion
21 of the Statute. It is not. It is there. And if you need
22 additional time for clarification, then you ask for it, and
23 you get the period that is authorized in the Statute, and we
24 all move forward.

25 **MR. KENDALL:** Very good. If that is Your Honor's

1 intention, then I understand what your intention on that is.

2 I do want to make one point though so I am not silent on
3 this. It has been said that we have access and we are doing
4 work. The defendant in this case is not doing work at Sun
5 City, and has no access to step on this property. So, the
6 suggestion that somehow during the course of this litigation
7 we have had all this access and opportunity is not correct.
8 He is referring I believe, to Pulte Homes, and I want to make
9 sure the Court understands that. But, that being said, we
10 will make every effort that we can then to comply with The
11 Right to Cure Statute, understanding the ruling the Court has
12 made, I believe, a good faith --- a very good effort to try to
13 accommodate our concerns as well. We still believe that it is
14 going to be difficult, but with the Court's invitation, we
15 will bring that back to you when we get there. Mr. Rawl is --

16 **THE COURT:** Let's do this, Mr. Rawl. Let's just delay
17 what you are getting ready to say one more time, because I am
18 going to stand down and take about a five minute break. We
19 have been at this for about an hour and a half, so we will
20 stand down approximately five to ten minutes. Thank you.

21 (Whereupon, a recess was taken from 3:33 p.m.
22 until 3:45 p.m.)

23 **THE COURT:** Mr. Rawl, you were getting ready to tell us
24 something when we took a break. Now, we are back on the
25 record.

1 **MR. RAWL:** Thank you, Your Honor, Mr. Kendall said he
2 was not finished quite yet.

3 **MR. KENDALL:** I was going to interrupt him for just one
4 more issue, and then he may have several things. He has, as
5 you know, Pulte has filed a separate Motion just so he can
6 have some continuity to his discussion, I thought I would just
7 wrap up what I think is maybe my last thing.

8 **THE COURT:** Go ahead.

9 **MR. KENDALL:** Again, continuing on the Notice issue ---
10 Notice for Right to Cure issue, Your Honor has imposed a stay
11 until those notices have been completed.

12 What the Order does not say is what happens in the event
13 that a person who has not opted out, does not provide notice
14 or does not cooperate in the process, such that notice
15 opportunity is ineffective. Does the entire class remain stay
16 until that person comes around, or does the Court contemplate
17 that it will dismiss with prejudice those claims of people who
18 do not provide required notice? And that is just an open
19 issue within the Order, and I thought that maybe this would be
20 a good time for clarification.

21 **THE COURT:** All right. Do Plaintiffs want to be heard?

22 **MR. SEEKINGS:** I do. Again, that goes back to the
23 Statute, Your Honor. The Statute clearly says what needs to
24 happen. They need to get notice. They have a certain period
25 of time and there has to be clarification. Those are rights.

1 And from there, there are some of those suggestions that the
2 Statute intends, and the Order contemplates complying with the
3 statute. There is no provision in the statute which is, as we
4 go back and forth, they don't know what they do. Dismiss
5 their claim with prejudice. This statute doesn't allow for
6 that. It is not contemplated under this statute. This
7 statute simply says that they ask for a stay, they get it.
8 They have asked for it, and you have given it to them. We
9 need to give them notice. We plan on doing that. And that is
10 what we are going to tell them. They then get to ask us for
11 clarification. There is nothing in the statute Your Honor,
12 that requires us to respond to that. We will. And then we go
13 from there. Once those things happen, we certainly
14 contemplate that Your Honor will lift the stay for the class.
15 And if there are some individual problems that they want to
16 talk about, we have agreed to do that, but one person not
17 doing exactly what they want them to do, should not slow up
18 the class.

19 **THE COURT:** Very good. Anything further on that issue,
20 Mr. Kendall?

21 **MR. KENDALL:** I don't think he had answered the
22 question that was put to the Court. In the first instance is,
23 what if the individual does not give the required Notice. And
24 the reason it is silent is because the Order says that the
25 Notice, while it maybe the filing that goes to the Court is in

1 representative capacity and signed, it appears to me Your
2 Honor intends that the issues addressed in that Notice are
3 individual to the house. That there is no blanket type of
4 Notice that you expect us to receive. And you expect that for
5 the houses that is at 210 Avon Drive, making up a street name,
6 that a list of problems with that house, both the defect and
7 the result, that is what your Order says. Now that would
8 seem, I anticipate, to require some conversation with that
9 person. If that conversation is not --- if they are not able
10 to obtain that conversation, or not be able to get that
11 person's cooperation for that, and they cannot file that
12 Notice, then what happens? A legitimate question.

13 **THE COURT:** Thank you for your question. I would
14 simply say that I would not intend at this juncture to amend
15 or clarify this Order to encompass that problem which will
16 actually come later in the process, and we can deal with it at
17 a later time. But I will just simply say, it would not be my
18 intention to stop the entire process because of the
19 nonfeasance, or error, or defilication of one potential class
20 member, or maybe four, or five. We would simply move forward
21 and make a determination as we progress, how to deal with
22 those who have not complied. Whether it be dismissal, I don't
23 know at this point. And whether that be with or without
24 prejudice. I do not know at this point. But again, just have
25 to see the number of individuals that we believe we are

1 dealing with when we get to that point.

2 **MR. KENDALL:** Then Your Honor, if I will just rest on
3 the Brief we have submitted, and understand that we will deal
4 with a lot of issues in the future.

5 **THE COURT:** There are.

6 **MR. KENDALL:** And we will deal with those as we come to
7 them. And I haven't been deemed to have waived any of those.
8 I thank Your Honor.

9 **THE COURT:** Thank you, Mr. Kendall. Mr. Rawl, did you
10 have a few issues you wish to raise?

11 **MR. RAWL:** Yes, sir, Your Honor. Thank you very much.
12 May it please the Court.

13 With regard to the issue that was just raised by Mr.
14 Kendall and Mr. Seekings, part of the reason we need to know
15 the how a class member who does not comply with the act is to
16 be treated, is because we have to tell them that in the
17 Notice. I don't know if Your Honor intends to just give one
18 Notice, the preliminary Notice from this Order, and then after
19 the Court does what it intends to do, then send out another
20 opt out Notice, but if this is to be the only opt out Notice,
21 this is going to be the only occasion that these homeowners at
22 Sun City, Hilton Head are given any information to allow them
23 to opt out of the Class. After the opt out period has
24 expired, then the only way they get out of the Class is
25 through a dismissal with prejudice. So, it is important to be

1 able to tell these homeowners that this is the Class
2 definition, and if you fall within this Class definition and
3 you are in the Class unless you opt out. If you don't opt
4 out, we are going to have to go through the Right to Cure
5 process. And this is what the Right to Cure process means.
6 If you fail to go through the Right to Cure process, then "X."
7 It can't be dismissal without prejudice, because in that case,
8 you would have just created an opt in class, which the Supreme
9 Court has said we can't do in the Salmonsens case. So, the
10 only possibility would be a dismissal with prejudice. I did
11 not expect that the Court would hold up the entire Class, or
12 stop everything from moving along until one person complies
13 with the Right to Cure Act. But Your Honor has been very
14 clear that you intend to abide with --- you want the parties
15 to abide by the Act, and the Act contemplates meaningful
16 notice to the defendants of what defects may be present, and
17 the result of those defects for each house. Your Order is
18 actually very clear about that issue, Your Honor. The problem
19 is, out of however many people may meet your class definition,
20 and may receive a notice, either they may not understand the
21 notice, or they may not actually receive a notice, they maybe
22 live somewhere other than Sun City. So, they may not give the
23 appropriate notice to the Act. They may choose not to. So, I
24 think we need to tell the people in that situation, if you
25 don't opt out, you have to comply with the action, which is

1 relative basic. I agree with Mr. Seekings. But, a realistic
2 compliance. But if you don't do that, you know, I believe
3 what Mr. Kendall said is true. The only option is a dismissal
4 with prejudice in order to protect the due process rights of
5 the homeowners. I think we have to tell them that in the
6 notice.

7 **THE COURT:** All right. Very good. And, again on page
8 12 of the Order this is anticipated, because what I say is
9 that we had hoped in a perfect world that we could agree on
10 whether or not the opt out notice would look like. We are
11 unable to do so. And, within thirty days of the Order, I had
12 asked that each of you provide me with an opt out notice of
13 how you would do it. And, obviously what we will end up
14 doing, because we have pushed that thirty-day timetable back
15 while we resolve these issues we are discussing today after
16 the Motions to Alter or Amend or clarified were made. So,
17 what I will anticipate is, when we leave here today that
18 within thirty days of today's date, I will get from you all an
19 opt out notice, and you can be as thorough and definitive as
20 you wish or not, and the Plaintiffs may do the same or not.
21 And then as we hash out the notice, we will make these
22 substantive decisions as to what it means if you don't opt
23 out, or do opt out. But all of that respectfully for today's
24 purposes, it is not necessary to reach the next level of
25 decision.

1 **MR. RAWL:** Thank you, Your Honor. Just a couple more
2 issues. I believe Mr. Seekings just said a few minutes ago
3 that the attorneys may, or Plaintiffs' counsel may be the ones
4 to comply with the notice on behalf of the homeowners. You
5 know, it is kind of black letter and class action law in that
6 the Plaintiffs would only represent the claims brought by
7 class members. So, if the Court intends for the Plaintiffs to
8 give some four thousand notices, that would include a lot of
9 notices on behalf of individuals that the Plaintiffs don't
10 represent, because unless they meet the Court's class
11 definition, the Plaintiffs' lawyers can't represent those
12 people. So, we get back to the issue of who is in the class?
13 And simply sending out the class notice to everybody doesn't
14 solve that question. You may get several people who do not
15 opt out, because they don't understand the class notice. So,
16 that is another issue if the defendant is to receive notice on
17 behalf of an individual homeowner from Mr. Seekings, and at
18 that point, we don't know whether or not Mr. Seekings
19 represents that person, because we don't know whether he is in
20 the class or not. It puts the defendant in a very difficult
21 position of knowing what to do.

22 **THE COURT:** All right. This is the same argument we've
23 discussed today earlier, as well as previously.

24 But this is the Court's position. I decline to clarify
25 or amend to that issue in this Order, which we are here on

1 today. What we will have to do is, take that up when we iron
2 out the notice, and implicit in that is to whom the notice
3 goes. And I anticipate a battle on that obviously, which will
4 be not only on the language, but who will be the recipients.
5 Again, the Court's initial impression is that it goes to
6 everybody. And you may or may not be a member of the class.
7 And we will have to work on the language. But I ask you Mr.
8 Rawl and you Mr. Kendall, on behalf of your client, to put
9 together what you believe would be the appropriate notice and
10 to whom to send, and we will cross that bridge when we get
11 there, not today.

12 **MR. RAWL:** Thank you, Your Honor. May I ask a couple
13 of clarifying questions about the Courts' class definition?

14 **THE COURT:** Yes, sir.

15 **MR. RAWL:** I believe the Court just indicated that the
16 Court's class definition would only cover damages that were
17 proximately caused by one of the three A, B, or Cs; correct?

18 **THE COURT:** Right. Either one of those three or
19 something proximately caused by one of those three.

20 **MR. RAWL:** Correct. So, if it is damage that is not
21 proximately caused by one of the three would not be included
22 in this class?

23 **THE COURT:** Well, the way that question arose was,
24 would there be a class member, first of all, if they had one
25 of the three, but had additional damage. Well, yes, there

1 would be. Would the additional damages be in? Well, yes, if
2 they are proximately caused by it. That is my answer to you.

3 **MR. RAWL:** But if somebody is in the class, but the
4 damages were not proximately caused by one of the three, for
5 example, thin stucco, then any damage caused by the thin
6 stucco would not be within the class?

7 **THE COURT:** First of all, rather than have this
8 discussion in a vacuum, Mr. Seekings, or anyone on the
9 plaintiffs' side, do you wish to respond to what you hear?

10 **MR. SEEKINGS:** I do, Your Honor. Because Your Honor
11 has ruled that the language of his definition stands, and the
12 definition says what it says, and that is individuals,
13 corporations, and the like, who have been damaged as a result
14 of the following issues. That would be the people in the
15 class. That will not change. Your Honor has said it is not
16 going to change, and that would be the class going forward.

17 **THE COURT:** So, you agree that thin stucco is out?

18 **MR. SEEKINGS:** Your Honor, I don't agree that thin
19 stucco is out. I agree that it is not part of the class
20 issue. Where we are going with this, and I see where this is
21 going. They are going to come running and go well, there is
22 no control joints, but don't worry about it, it is the thin
23 stucco problem. Our argument is going to be, if they don't
24 have control joints in their stucco, that is a violation of
25 the building code. Whether or not the stucco is falling off.

1 their house or not, they have been damaged as a result of
2 that, because they have to disclose it. That is where --- So,
3 that we all put this out there. That is where they are
4 heading with all of this. They're going to say, forget about
5 the control joints Judge, because they have thin stucco, so we
6 are not going to look at that. You have defined the class.
7 If these people have those problems with their stucco, and are
8 damaged as a result, they are members of the class. And I
9 don't want to evade any questions the Court has, but we have
10 worked very hard to get to this point to make sure that it
11 encompasses all the things that we think are wrong as a result
12 of what they did.

13 **THE COURT:** All right. That is the Plaintiffs'
14 position. Honestly, Mr. Rawl, I can't --- The question you
15 asked me in sort of a vacuum, I just simply decline to respond
16 to it at this time. We will have to see as we approach that
17 issue having such an individual as you say there is. And I
18 don't know that at this point.

19 **MR. RAWL:** And, Judge Baxley, respectfully, the named
20 Plaintiff is in that exact scenario. We provided the Court,
21 and we have discussed this two hearings ago. The situation
22 where the Plaintiffs' own experts say what is wrong with the
23 named Plaintiffs' house has nothing to do with --- there has
24 been no damage from these three issues. The only issue is
25 thin stucco. So, what makes a difference here is when we are

1 drafting the Class Notice, then we say we need to let people
2 know. If you have thin stucco, or you have some damage to
3 your house other than these three issues, you will not be able
4 to collect damages in this case.

5 **THE COURT:** I can't advise you how to draft and
6 recommend your opt out notice. I just leave you to do that in
7 the way you think appropriate, based on this class definition
8 that we have. We will fight about it later. I feel sure we
9 will let the parties fight about whether someone who has just
10 thin stucco and maybe not the other three, whether that is a
11 proximate causation or not. Honestly, at this juncture, we
12 are not far enough into the evidence, or at least I'm not, to
13 know the answer to that question.

14 **MR. RAWL:** So, what Your Honor does perceive is ---
15 What happens is if those claims --- if the individual
16 installation defects, the mistakes of when the stucco was
17 installed that has been testified *ad nauseum* by Plaintiffs'
18 experts, saying that is the real cause of damage. What has
19 happened is, we will have per every single house that remains
20 in the class, a fight over what damage, what has been caused
21 by what. So, the reason I am trying to get clarification here
22 is, you know, as the class definition stage, and before the
23 class notice stage, it is important for the parties to know,
24 and for the lawyers to know to argue class notice to, to say,
25 you know, what are we arguing about? And the Plaintiffs at

1 the last hearing said, no, no, if it is not one of these three
2 things, and it is not a complete strip or re-clad, then we get
3 zero. Okay, now what they are saying is, what your class
4 definition means is, those are the people that are in the
5 class. After we are in the class we can argue any type of
6 damages unrelated to these three issues or not.

7 **THE COURT:** Well, I decline to clarify the Order any
8 further on class definition.

9 **MR. RAWL:** Yes, sir, Your Honor. The next issue with
10 regard to the class definition is, Your Honor says that right
11 before the three items, it says which are alleged damage to.
12 These are houses which are allegedly damaged to one of the
13 three following issues. And I am asking for clarification on
14 allegedly damage to. Is that that the homeowner alleges that
15 they have received damage to their house because of one of
16 these things, or is it because Plaintiffs' counsel have
17 alleged that some house that they have never looked at has
18 been damaged because of one of these three things. Because
19 what we know is, the Plaintiffs' experts have testified that
20 they don't know what is wrong with any house that they have
21 not seen. And they can't say where any house has been
22 damaged, unless they have inspected it. And they have only
23 inspected two hundred of the four thousand houses. So, the
24 question is, when you say which allegedly or damaged due to --
25 - allegedly by whom?

1 **THE COURT:** All right. I decline to respond to that
2 question, because I do not believe it needs to be clarified.
3 If there has been an allegation of damage, then there has been
4 an allegation of damage, Mr. Rawl. I know you oppose the
5 class certification. But, honestly, that question -- We just
6 have to battle that out. I mean, it is damaged or it is not.
7 If it is allegedly damaged and it turns out that it is not,
8 well, you will prove that within the course. Those people
9 will be out of the class at some point, maybe through the opt
10 out process. Maybe through the Right to Cure process. But, I
11 can't answer that question in advance. I am just simply not
12 able to grapple with it at this juncture.

13 **MR. RAWL:** And, I apologize. At this point I'm just
14 trying to ask clarification questions.

15 **THE COURT:** Well, think of it in terms of this. If you
16 had a wreck, and forgive my street lawyer analogy, but its
17 what I came up through. If you have four people in the car,
18 and the Complaint alleges they were damaged, well, there is
19 your allegation. Now you may get over there to the jury and
20 make a determination of well, everyone was hurt, or maybe two
21 were and two weren't. But, that all sifts itself out through
22 the discovery process, and the trial process. But as far as
23 getting it into the Court, allegedly --- the allegation of
24 injury that came through the Complaint. The person didn't
25 sign a piece of paper saying I am hurt. It was in the

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

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

12 **THE COURT:** Right.

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

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

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

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

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

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

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

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

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

7 **THE COURT:** Thank you.

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

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

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

1 people who did not opt out and did not settle through the
2 Right to Cure process, they are not in this class. They don't
3 have these three issues.

4 **THE COURT:** Plaintiffs, do you want to be heard on this?

5 **MR. SEEKINGS:** I do, Your Honor. Luckily for Mr. Rawl
6 the way this is going to work is, Your Honor has issued this
7 Order, we are going to send out our notices, and then we are
8 going to go to the Right to Cure process, and Your Honor has
9 ordered that it be individual. And they get to go in and
10 inspect each one of these houses. So, before we even get to
11 the next stage of discovery, they are going to know whether or
12 not these people on their individual houses have these
13 problems, because you can see them, you can touch them, and
14 they can feel them. If they feel that is not sufficient, then
15 Your Honor can set a discovery schedule in these cases. Let
16 them do more if they think they need more other than the Right
17 to Cure process, which is contemplated, which is the statutory
18 scheme that they have fought so hard for us to comply with.
19 It is to give them the opportunity to look at these houses.
20 And that is what they are going to do. And after that, there
21 is the added protection Your Honor has the ability to manage
22 discovery before we go to trial on the merits to allow them to
23 go and look some more, if that is what they want to do. So,
24 it is laid out so perfectly before them, as a result of the
25 way this has unfolded, the Statute, and their ability to do

1 discovery in the civil arena. We are way ahead of the game
2 here, but I suspect at some point they are going to know the
3 answers to all questions long before we come to Your Honor and
4 ask these questions again.

5 **THE COURT:** All right. Mr. Rawl, if we live to get to
6 that point, where we get into the discovery phase of the
7 specifics of the case, I assure you the defendants are not
8 going to be required to blindly fight a class without having
9 the opportunity to challenge an individual's right to be in
10 that class. I can't tell you as we sit here today how that is
11 going to occur, but I just know there are many safeguards in
12 litigation that will --- and in the class vehicle specifically
13 that will give you that ability. That is the best answer that
14 I can give you at this point.

15 **MR. RAWL:** And that's great. My problem with Mr.
16 Seekings' answer is what he said is, you can do the Right to
17 Cure. The Right to Cure will not be granted to my client,
18 because Mr. Seekings will never represent these people as to
19 my client. So, they won't have the right to send those to my
20 client. So, my client does not get that ability to defend
21 against the third-party Plaintiffs brought against the
22 defendant. Even with that, the class definition for example
23 in C, says, you have to have the presence of moisture
24 encapsulated in the wall. The only way to determine that is
25 through destructive testing. My guess is that SCSP is not

1 going to do destructive testing on all four thousand houses,
2 and that the homeowners would not allow them to do that. So,
3 all I want to make sure is that at some point the Court
4 foresees the ability of my client, a third-party defendant,
5 and/or the defendant himself, as a class to do discovery to
6 say you know, these people are not in the class definition. I
7 mean, if the Court doesn't foresee that, then again, I am just
8 trying to figure out where we are going.

9 **THE COURT:** Well, I feel like -- I am going to ask you
10 a question in the negative. If I failed to do that, if our
11 process failed to do that and failed to give the defendants
12 and the third-party Defendants the opportunity to contest
13 people who are claiming to be in the class who should not be
14 there, then we have just had a huge due process failure. So,
15 I don't anticipate that happening. And I just don't foresee
16 it happening. And, I feel certain that very capable lawyers
17 on the defense side and third-party Defendants side will be
18 ever vigilant to make sure that you take the opportunity to
19 contest those issues. And that opportunity will be there for
20 you. I can't tell you today exactly when and where, but I
21 know that it will be there.

22 **MR. RAWL:** And, in our Brief, I believe SCSP and Pulte
23 asked for the right to conduct that discovery as to this class
24 definition, to determine who is and who is not in the class
25 prior to a class being certified.

1 **THE COURT:** That is individual discovery.

2 **MR. RAWL:** It would be class discovery which would
3 include having to go and do --- it would end up having to be
4 individual discovery, because the class definition is which
5 houses have these specific individual things. But I think I
6 understand Your Honor to be saying that we are not entitled to
7 do more discovery on your class definition prior to class
8 certification; is that right?

9 **THE COURT:** Not at this point, no.

10 **MR. RAWL:** Your Honor, I have several more issues that
11 I have raised in my Brief, but I am happy to rest on my Brief
12 at this point.

13 **THE COURT:** Very good. Then the final point for all of
14 us on the issue of a quote reconsideration of the previous
15 order that preliminarily certified the class is, I define to
16 clarify in any way, as well the Order dated December 8, 2011.

17 And what we will intend to do is this. I am going to
18 issue a Form 4, that will come to our office to the Clerk of
19 Court and then be mailed to you, which is going to deny the
20 Motion to Reconsider, actually dismiss the Motion to
21 Reconsider, deny the Motion to Clarify, and when you receive
22 that document will be the trigger from the thirty days,
23 because down at the bottom of it will be on every Form 4
24 Order, is a statement saying it is mailed this day by the
25 Clerk of Court. And whatever day the Clerk has mailed it,

1 triggers the thirty days, which is the next phase of the
2 order, which is to provide your proposed opt out notice to the
3 Court. And that is where we will leave that issue. Again,
4 thirty days from the date our Form 4 is mailed to you.

5 All right. The next issue that is before us, and really
6 the last one that we will take up today is whether we should
7 amend what I am going to call, consent temporary restraining
8 order, which the Court previously issued. And let me say as a
9 preface to where we find ourselves is, that this document
10 arrived to our office from Plaintiffs' counsel telling us that
11 it was a quote, "consent" -- my mind leaves me. I can't recall
12 whether it was an order of injunction or how we denominated
13 it, but in any event, it was a consent. And my first
14 impression just lawyer to lawyer, was that I would not sign an
15 order that curtails a first amendment right, and thus injects
16 it into this trial of this case. However, because it was
17 presented by consent, the Court upon further reflection, went
18 ahead and signed it. Now, there is a motion to either clarify
19 or amend it, so my first question is, how is this properly
20 before us today?

21 **MR. KENDALL:** Your Honor, I did not consent to the
22 Order. It was sent to you at the same time it was sent to me.
23 And I received it back from you signed, before I had a chance
24 to even turn around.

25 **THE COURT:** Well, okay, let me stop right there. Is

1 that even possible that it was not a consent order? Because
2 I would have never signed it had it not been presented to me
3 as a consent order?

4 **MR. ^{Seekings} KENDALL:** Well, Your Honor, that is a good question.
5 And the answer is, it was an order consenting to their motion
6 for injunction. It was sent to you, and to them. And here is
7 why we did it. Because, under South Carolina Code of Law,
8 under 14-3-330, if we fought it, if we asked you to amend it,
9 or to deny it, or delay in ordering anything, they are going
10 right to the appellate court, because they can do it under the
11 statute. So, we decided as a matter of expedition for our
12 clients to consent to the motion that they drafted. And that
13 is what we sent to Your Honor, and sent to them at the same
14 time.

15 **MR. ^{Kendall} SEEKINGS:** They were consenting to an injunction,
16 not to the injunction that we moved for. And it was contained
17 in the backdoor of what was determination of the injunction.
18 They changed it from what we put in our Motion. And the order
19 that you signed does not match the motion we made on that
20 issue.

21 **THE COURT:** Okay.

22 **MR. SEEKINGS:** So, while they fought the motion, if you
23 will recall the telephone conference we had on that issue, and
24 they objected to my making the motion. When they realized ---
25 We have an injunction, we consent to an injunction, but they

1 failed to tell you that it was a different injunction than
2 what we did seek. So, that is why I then had no choice,
3 because the order was out before I could respond to ask you to
4 --

5 **THE COURT:** Well, I feel that I have apparently failed
6 to have some insight, because my discussions with Mr. King, my
7 law clerk, and his clear impression was that we were presented
8 by the Plaintiffs, because we thought it unusual to come from
9 the Plaintiffs a quote consent order to a temporary
10 injunction. And let me say, while we push these papers around
11 among ourselves, there are real people out there on the other
12 end of these papers that are impacted by that. And the impact
13 of this is, that I am certain there are a lot of folks at Sun
14 City, who now feel like they cannot talk to Plaintiffs'
15 counsel, or haven't heard from Plaintiffs' counsel, they don't
16 know what is going on. It reduces the level of understanding
17 and confidence that they have in the judicial system, and in
18 our litigation system, all to avoid an appeal which could go
19 up on cert anyway. So, I am concerned about where we find
20 ourselves, and whether or not this exercise is a valid one to
21 begin with. So, let me hear from the Plaintiffs first of all,
22 why should this Court, whether you consent to it or not,
23 curtail your first amendment rights? I turn on the
24 television, lawyers are advertising all over the place saying
25 whatever they want to say about whatever drug or whatever

1 cause of action may accrue, and what right do I have to limit
2 that? The U. S. Supreme Court has done it.

3 **MR. SEEKINGS:** Your Honor, I completely agree with you.
4 And if it wasn't for the fact that we consented to it, it
5 shouldn't have happen. The law is very clear that we should
6 be able to talk to these people. The problem is, we believe
7 in the best interest of this case and our clients, that if we
8 go to the Court of Appeals, and then the Supreme Court on this
9 one limited issue, we are going to delay this case for years
10 as opposed to just a few months, when we get the issues that
11 were brought up in this courtroom today.

12 **THE COURT:** And not to argue or fuss about that
13 thinking, but what is the next issue for which you can't
14 afford an appeal, and just manage yourself into a corner?

15 **MR. SEEKINGS:** And, Your Honor, we don't want to do
16 that. What this was is appeal bating. And in this instance,
17 because there is a specific statute on it, we knew that they
18 were going to get there. There could be appeals as to
19 anything. But appeals as to Interlocutory Orders, we can
20 deal with that. We can go to the Court of Appeals and say it
21 is improper. This one statutorily would have gone through the
22 system and put everything that we have done now for the past
23 five years back. And, Your Honor, and I apologize if Your
24 Honor finds it to be improper, I will stand aside and say we
25 will go to the Court of Appeals and talk about it, because

1 this case needs to move forward, not improperly, but properly.

2 That was a decision that we made, we believed in the best
3 interest of our clients long term, because if not, as soon as
4 it is altered, or denied, or anything, this whole thing
5 stayed.

6 **THE COURT:** But you realize of course the appellate
7 process has safety valves in it for a quick determination
8 which may be a relative term, but not one that would go the
9 entire length of the process. And finally, I hope you realize
10 that the Court cannot be constrained by a trial tactic or
11 litigation strategy of one party or the other, is just simply
12 upon the Court to call it as the Court sees fair and justice,
13 and what the statutes say. And I signed that under the
14 impression that it was consented to by everyone, which I
15 should have known immediately, because there has not been one
16 thing in this case that has been consented to by everyone.
17 So, how I had that impression I don't --

18 **MR. SEEKINGS:** -- If I created that impression, I want
19 to apologize to this Court, because I did not mean to do
20 anything improper. I can assure you. What we did mean to do
21 is to stay off yet another march to Columbia or two on behalf
22 of our clients. Recognizing now that Your Honor signed an
23 order certifying a class, and Your Honor controls what goes on
24 now, this is your case that we are apart of. And, if Your
25 Honor believes it to be improper, we stand by that. But

1 recognizing, and we would ask the Court to recognize that that
2 will immediately send this case to Columbia. I am fully
3 confident of that.

4 **THE COURT:** Well, let's move forward. What is your
5 position with regard to what Mr. Kendall now ask, that we
6 amend to put a end date on it, and what if you don't get the
7 end date that the defendants request. That may be appealable
8 as well. I don't know.

9 **MR. SEEKINGS:** Well, Your Honor, what he is asking is
10 for you to issue an order that purports with his motion. If
11 he does that, I can't get an appeal in order to purports to
12 his motion. And if that is what he is asking for, if it is to
13 the Court's pleasing we won't stand in the way. And if it is
14 not, then we will deal with that issue as the procedure comes
15 forward on this. I just hope Your Honor understands the
16 conundrum that it put us in. And we have thought long and
17 hard about this, and we haven't just seen it in this case, we
18 have seen it in another and watched it unfold there too. So,
19 we have worked very hard. Your Honor has worked very hard.
20 It has been a long process. And the whole idea that there has
21 been a motion made to allow us or to disallow us to exercise
22 our first amendment rights, I understand the Court says it is
23 unusual. But, it is bating to get us up to Columbia. And
24 that is what it is. Because, there is no other reason for it.

25 **THE COURT:** All right. Do you want to be heard?

1 **MR. KENDALL:** I take exception to this. I made a
2 motion in the face of a town hall meeting to give notice to
3 members of this community about this, this action and their
4 rights thereunder. Outside of what the Court had already said
5 it was going to do, which was to provide these homeowners
6 court sanction notice, it was advertised in the paper that
7 they were going to have town hall meeting to do this. And the
8 United States Supreme Court has said that that might not be
9 proper under certain circumstances. And I raised that to the
10 Court. I had every right to do that, and it is not an
11 improper action as I believe has been inferred, implied by
12 counsel's argument. Your Honor, the United States Supreme
13 Court has said this in the Shutts case. The South Carolina
14 Supreme Court has adopted that ruling, and the name of that
15 case has just escaped me, but I did include it in my prior
16 brief on the motion. So, Your Honor, my actions in filing the
17 motion, while I have just been accused of appeal bating, is
18 absolutely false. I was in fact protecting another
19 interpretation and I am not going --- it also protects Your
20 Honor's Order, which set how we were going to go about this
21 process. But, the Plaintiffs' counsel advertised in the
22 newspaper that they were going to do something different, and
23 I didn't think that was right. So, I filed the motion. What
24 is not correct is then to have objected to that Motion with
25 Your Honor, and then send you an Order without telling you

1 that the Order is different from what the Motion was. Now,
2 the difference is not tremendous. But I think my Motion was
3 better, and that is what I am asking. If they will agree to
4 my Motion, the terms of the Motion as to what ends the
5 injunction, which is the end of the opt out period, or a
6 denial of the class which we understand that is not the likely
7 outcome. But all I have said is that when the opt out period
8 closes, the injunction ends. They put a very vague statement
9 in the Order that says it is until further rulings by the
10 Court concerning issuance of the approved notice. That is a
11 different point in time. They are seeming to suggest that
12 after the notice goes out, then they can have these meetings
13 before the opt out period ends. We believe, because of the
14 inherent conflict of interest in the opt out process that
15 should not happen. That was the basis of the argument. So,
16 it is not a distinction without a difference. If they will
17 live by what we asked for as he said he would, then our goal
18 of protecting the notice process, protecting the opt out
19 process will have been accomplished, and we will be glad not
20 to go to Columbia. Although I live there and it is --

21 **THE COURT:** Please refresh my memory. Was it a
22 unilateral restraining, or was it as to all parties?

23
24 **MR. SEEKINGS:** It is unilateral, Your Honor.

25 **MR. KENDALL:** Well, we made the motion, we didn't seek

1 to enjoin ourselves. But at the same time have made no such
2 efforts, have not threatened to make any efforts to
3 communicate with the class notice.

4 **THE COURT:** But you have that under the Order that I
5 would sign, you would have that right; would you not? If you
6 just decided to write a letter and exercise your free speech,
7 or have a meeting yourself as one of the contractors who
8 worked on peoples' houses; you could do that as well.

9 **MR. KENDALL:** Well, Your Honor, quite frankly, that is
10 not before the Court. But the Order is silent on it.

11 **THE COURT:** Right.

12 **MR. KENDALL:** The fact is I haven't engaged in that
13 behavior.

14 **THE COURT:** Well, I know you haven't.

15 **MR. KENDALL:** What I am saying to you is hypothetical.

16 **THE COURT:** I am not saying that you will. But, I am
17 saying that under the order you could. In other words, you
18 are not restrained from doing it.

19 **MR. KENDALL:** I am not. But, if Plaintiffs' counsel
20 wished for me to be enjoined, then they should make that
21 motion, but they haven't.

22 **THE COURT:** Okay. Just a moment, please.

23 **(PAUSE.)**

24 **THE COURT:** All right. Gentlemen, ladies, what I need
25 to do is just again end this matter as well, I need to take it

1 under advisement. I want to review the email chain that
2 brought this to us. I also wish to give that some thought,
3 not only about the legal positions that I hear and the reasons
4 for them, but it is only fair to consider this as well in the
5 light of the folks who live at Sun City, the availability of
6 information from one side or the other about what an opt out
7 notice may or may not mean. And I just need to think these
8 things through. It is not something that I can just come off
9 the top of my head like Solomon, say something that would
10 bedazzle everyone. So, I am going to take that under
11 advisement.

12 Anything further with regard to these issues?

13 **MR. KENDALL:** Your Honor, if you will recall how this
14 unfolded, I am not sure whether I filed my Memorandum on the
15 Motion, and the reason I am not sure is because you invited us
16 to an off the record informal telephone conference. Then the
17 next thing that happened was, you got the Order. And what I
18 would like to do is just to make sure I have put before you my
19 full Memorandum.

20 **THE COURT:** Do you have --

21 **MR. KENDALL:** -- I do not. But I can have it done.

22 **THE COURT:** Would you email it to Mason King, that will
23 be fine.

24 **MR. KENDALL:** In the morning, if you don't mind.

25 **THE COURT:** That would be fine.

1 **MR. KENDALL:** Thank you.

2 **THE COURT:** And we will --

3 **MR. KENDALL:** -- It does set out the law I articulated
4 earlier.

5 **THE COURT:** The last thing is we are not going to hold
6 these issues long. We are going to issue that Form 4 probably
7 tomorrow, send it to the Clerk, who will send it to you, and
8 that will trigger the thirty day opt out provision which I
9 anticipate we will have to have another hearing to finalize
10 that. But, in the mean time, in fairly short order, we are
11 going to make a decision on this restraining order.

12 I believe that concludes our agenda for the day. I would
13 decline to take up the individual discovery motion at this
14 point, due to the fact that it is so recently filed.

15 Anything further before we close the record in this case
16 from Plaintiffs or the defendants?

17 **MR. SEEKINGS:** Nothing from the Plaintiffs, Your Honor.

18 **MR. RAWL:** Your Honor, may I have one minute before we
19 go off the record to ask.

20 **THE COURT:** Sure, go ahead.

21 **(PAUSE.)**

22 **MR. KENDALL:** Your Honor, Mr. Rawl has pointed out to
23 me, and I think I understand this. It is just a timing issue
24 of things. The order that you did sign on the injunction says
25 that when --- that the injunction will lapse when, until

1 further ruling by the Court concerning the issue of the
2 approved notice. That your Form 4 will not be that. Is that
3 the Court's understanding?

4 **THE COURT:** It would clearly not --

5 **MR. KENDALL:** -- So, the injunction is in place until
6 you have ruled otherwise?

7 **THE COURT:** It is.

8 **MR. KENDALL:** Thank you.

9 **THE COURT:** Thank you, ladies and gentlemen. And we
10 will close the record in this case for the day.

11 (Whereupon, this hearing was concluded at 4:44
12 p.m. on Monday, April 30, 2012.)

13 -- END OF TRANSCRIPT --
14

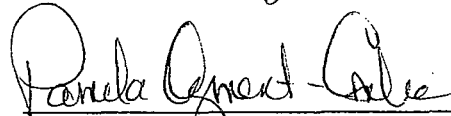
CERTIFICATE OF REPORTER

89

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the above captioned case, relative to appeal, in The Court of Common Pleas in Beaufort County, South Carolina, on the 20th day of April 2012.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

~~May 11, 2012~~ June 19, 2012

A handwritten signature in cursive script, reading "Pamela Ozment-Cartee", written over a horizontal line.

Pamela Ozment-Cartee
Circuit Court Reporter

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF ERIC LUNDBLAD
COUNTY OF BEAUFORT)

PERSONALLY APPEARED BEFORE ME, the undersigned, who, being duly sworn,
deposes and states as follows:

1. I am a Customer Service Manager for the Coastal Carolinas – Hilton Head region
of Del Webb Communities, Inc.

2. I oversee the customer service department of Sun City Hilton Head.

3. All houses in Sun City Hilton Head have been sold by Del Webb Communities,
Inc. Each of those home sales included a transferable written warranty that was part of the Sales
Contract. Pursuant to that warranty, a Sun City Hilton Head homeowner who thinks that he or
she has a problem with their house and wants to make a service/warranty claim would submit a
request to the Customer Service department. Customer Service then schedules a time to go and
inspect the home. If the homeowner and the Customer Service department agree that repairs
need to be made, then Del Webb hires a subcontractor to make the repairs. This process is
utilized for any complaint regarding the construction of a home in Sun City

4. The Customer Service department receives service/warranty requests about a
multitude of different issues (not all stucco related).

5. Neither Pulte nor Del Webb have made any stucco repairs for any homeowner in
Sun City that has not first contacted Pulte or Del Webb to request repairs.

6. Neither Pulte nor Del Webb have initiated contact with any specific homeowner
at Sun City Hilton Head regarding repairing their stucco. While general statements have been
made that homeowners should contact Customer Service if they think they have a problem with

their house, Pulte and/or Del Webb do not normally approach individual homeowners about specific repair, but rather they respond to homeowner requests.

7. If a homeowner that is presently suing Del Webb or Pulte makes a customer service request or warranty claim, he is informed that any such request must be made through the homeowner's lawyer.

8. Responding to homeowner service/warranty requests and making requested repairs is done in the ordinary course of business of Del Webb and Pulte.

9. With regard to stucco service/warranty claims, the normal procedure has been altered slightly. Stucco warranty/service claims are no longer "ordinary" because lawsuits with class allegations are presently pending regarding stucco. Stucco service/warranty requests are treated like all other claims, except that after a homeowner makes a stucco service/warranty claim, he is provided with a form requesting that he opt out of any stucco class litigation before repairs are made to his home. This form is attached hereto as Exhibit A. This type of form has been used in conjunction with stucco service/warranty repairs for a couple of years.

10. Del Webb and Pulte are not attempting to solicit "opt-outs" through the use of Exhibit A. In fact, many of the homeowners who request stucco repairs through the service/warranty request process are turned down (and are therefore not given a copy of Exhibit A.)

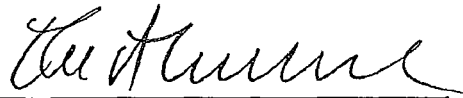
11. When a repair is made to a house in Sun City Hilton Head (whether stucco related or not), Customer Service consults the appropriate trade (subcontractor) about the appropriate scope of the repair to alleviate the problem being repaired to make sure that the correct repair is performed. It is clearly in Del Webb/Pulte's best interest to fix it right the first time because

otherwise they will simply receive another service/warranty request, and they will have to repair the issue again.

12. With regard to stucco repairs that have been made in Sun City Hilton Head, many of the homeowners have hired home inspectors to find stucco problems and/or oversee stucco repairs.

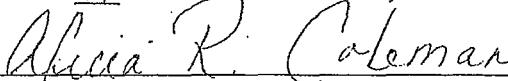
13. If a court prohibited Del Webb/Pulte from communicating with its customers/homeowners, it would be a serious hardship for homeowners who are trying to utilize the warranty process provided in their contract with Del Webb. It would also be a hardship for Del Webb, as it would be at risk of being sued for breach of contract for failing to respond to warranty requests.

FURTHER AFFIANT SAYETH NOT.



Eric Lundblad

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 24th DAY OF JANUARY, 2012.


Notary Public for South Carolina

My commission expires: 8/31/2016

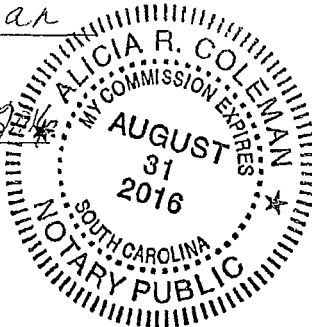


EXHIBIT A

Sun City Hilton Head Homeowner Request for Stucco Repairs
and
Agreement not to Participate in Class Actions

I am a homeowner in Sun City Hilton Head, and I am requesting that repairs be made to the stucco system on my house.

I am either represented by legal counsel with regard to stucco issues, and/or I understand that I have the right to consult with legal counsel of my choosing prior to signing below.

I understand that at least two homeowners have filed lawsuits with class action allegations relating to stucco on homes in Sun City Hilton Head.

I understand that Del Webb and/or Pulte does not want to pay for or make repairs to my home if I chose to stay in a class action lawsuit which is seeking money for stucco repairs. In other words, Del Webb/Pulte is not willing to pay me twice for stucco repairs.

If Del Webb Communities, Inc., Pulte Homes, Inc., or one their stucco subcontractors makes repairs to my stucco, then I agree not to participate in any way in any present or future class action lawsuit against Del Webb Communities Inc., Pulte Homes, Inc., or any stucco subcontractor that has applied stucco to homes in Sun City Hilton Head (including, but not limited to, South Carolina State Plastering). My agreement not to participate in class actions includes, but is not limited to, the following: 1) I agree not to be a named plaintiff or class representative; 2) I agree not to accept any funds from a class action lawsuit (whether by way of a class settlement or by judgment); 3) I agree that if an "opt in class" is certified, then I will not "opt in" to the class; 4) I agree that if an "opt out class" is certified, then I will "opt out" of the class; and 5) I agree that this document may be provided to any tribunal and/or filed with any court as evidence and notice of my intent not to participate in a/the class action (to either not "opt in" or to "opt out").

I understand that this agreement does not affect my right to file an individual lawsuit or arbitration if I discover construction defects in the future.

Homeowner Address

Print Homeowner Name

Witness

Homeowner Signature

Date

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

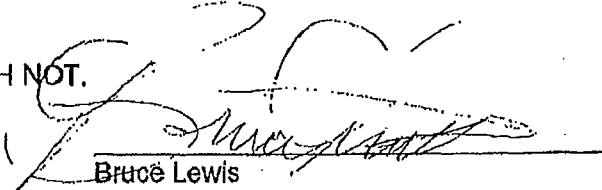
AFFIDAVIT OF BRUCE LEWIS

PERSONALLY APPEARED BEFORE ME, the undersigned, who, being duly sworn,
deposes and states as follows:

1. I am an employee of Pulte Homes, Inc. and a member of Pulte's Customer Relations team.
2. I head the team called "Special Operations" which responds to inquiries and complaints from homeowners whose houses are more than one (1) year old. The purpose of my team is to assist the homeowner, answer questions related to the Del Webb/Pulte Home Warranty, and, on occasion, when there is a problem not covered by the Pulte warranty, we may contact the subcontractor who is responsible for the issued being complained of.
3. Over the past several months, the Special Operations team has received and responded to homeowner complaints related to stucco cracks. Most, if not all, of the cracks being complained of were beyond the Pulte/Del Webb Stucco Warranty. According, my team notified the stucco applicator regarding these cracks, and the applicator went to the houses in question (along with Pulte representatives) to inspect the cracks. On some of these houses, it was determined that destructive testing should be undertaken to determine the cause of the cracking on the house. After the destructive testing, the stucco applicator offered to make repairs on some of the homes, and some of those repairs are underway at this time.

4. The Special Operations team has only inspected and/or conducted testing to houses with stucco cracking after the homeowner contacted Pulte with an inquiry or a complaint regarding stucco cracking.
5. For the houses being repaired by the stucco applicator, it is my understanding that the stucco applicator is performing permanent repairs to the homes that address all confirmed legitimate stucco problems on the house. The stucco applicator is not attempting to effect temporary repairs to the houses at issue.
6. Lastly, with regard to any destructive stucco testing being conducted on any houses whose homeowners are not represented by counsel, I understand that our consultant is retaining stucco samples from cuts made on the houses and is also documenting any testing with photographs.

FURTHER AFFIANT SAYETH NOT.


Bruce Lewis

Sworn to and subscribed before me
this 13 day of April, 2007.


Notary Public

My commission expires: 3/28/13



Columbia #886072-v1

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

AFFIDAVIT OF SUSAN L. THOMAS

PERSONALLY APPEARED BEFORE ME, the undersigned, who, being duly sworn,
deposes and states as follows:

1. I am an employee of Pulte Homes, Inc. and a member of Pulte's Customer Relations team (specifically the "Special Operations Team").
2. On March 21, 2007, I went to the home of Larry B. Little to observe Mr. Oros' expert witnesses conduct destructive testing on the Little home. Upon arrival, I observed Mr. Little explain to Mr. Oros' attorneys that they would not, under any circumstances, be cutting into the stucco on his home. Thereafter, Mr. Little informed me that he was not being represented by an attorney, including the Oros' attorneys. Mr. Little also provided to me a letter addressed to his wife and him from John T. Chakeris dated March 20, 2007, attached hereto as Exhibit A.
3. Additionally, another homeowner informed me that, after talking with Mr. Oros' attorneys or Mr. Oros' attorneys' representatives, she had become scared because they informed her that the stucco on her house was defective and was causing damage to her house.

4. Lastly, while observing the destructive testing by plaintiffs' experts, it was apparent that someone other than Pulte's representatives had already done destructive testing to the homes observed. Specifically, there were holes pre-drilled in the location where plaintiffs' experts cut on each house chosen by the plaintiff for inspection.

FURTHER AFFIANT SAYETH NOT.


Susan L. Thomas

Sworn to and subscribed before me
this 13 day of April, 2007.


Notary Public

My commission expires: 3/28/13



EXHIBIT A

Exhibit A
to Affidavit of
Susan L. Thomas

THE CHAKERIS LAW FIRM
231 CALHOUN STREET
POST OFFICE BOX 397
CHARLESTON, SOUTH CAROLINA 29402

JOHN T. CHAKERIS
TASO H. CHAKERIS

TELEPHONE: 843 853-5678
FACSIMILE: 843 853-5677

March 20, 2007

Larry B. Little
Bobbe C. Little
198 Hampton Circle
Bluffton, SC 29909

Re: Joseph S. Oros and Mary A. Oros on behalf of themselves and
others similarly situated v.
Del Webb Communities, Inc., et al.
Case No.: 2006-CP-07-454

Dear Mr. and Mrs. Little:

I wanted to let you know that the stucco class action is proceeding well. To date approximately 200 homes have been visually evaluated by our engineer, Robert Sisnroy. Mr. Sisnroy has informed us that none of the homes that he evaluated had the stucco applied properly. This week Mr. Sisnroy is performing destructive testing on several homes to further document the improperly applied stucco conditions. Once he completes this destructive testing, I anticipate he will issue a report which I will be providing to you.

I also wanted to let you know that the information that Pulte has recently published on its website regarding this case is inaccurate. Once it became apparent that the stucco installation problems were pervasive, a class action complaint was filed with the Beaufort County Clerk a little more than six months ago. We have agreed to arbitrate the case rather than have it proceed in the court system, and a benefit of this should be a quicker resolution. It is expected that our class will be formerly certified after the ongoing initial discovery is completed, including our engineers remaining forensic work. As far as the stucco problems being isolated or limited as asserted by Pulte, our engineer tells us to date he has seen problems with homes on the following streets:

Whitebark Lane
Pinyon Drive
Landing Lane
Stratford Village Way
Rose Bush Lane
Daffodil Ct.
Sunbeam Drive

Bouquet Lane
Sundance Lane
Sunflower Lane
Lazy Daisy Drive
Nightingale Lane
Doncaster Lane
Falmouth Way

Larry B. Little
Bobbe C. Little
March 19, 2007
Page 2

Seburn Drive
Apple Lane
Pear Ct.
Pomegranate Lane
Murray Hill Drive
Starling Circle
Penny Creek Drive
Lacebark Lane
Cypress Hollow
Baldwin Lane
Hampton Circle
Bailey Lane
Col. T. Heyward Road
Maple Ct.
Tupelo Ct.
Redtail Ct.
Sunbow Lane
Tourquay Lane
Aston Ct.
Pinckney Dr.
Clairborne
Dawn Sky Ct.

Cypress Hills
Duxbury Lane
Doharty Lane
Lake Somerset Drive
Savage Ct.
Cheswell Ct.
Tyler Lane
Seburn Dr.
Willow Brook Dr.
Redtail Dr.
Tallow Dr.
Rainwater Lane
Cypress Run
Southern Red Road
Golden Eagle Drive
Nesting Lane
Biltmore Drive
Murray Hill Drive
Rose Sage Walk
Fairforest Lane
Holly Ribbons Circle

Pulte is performing repairs to a few homes to address one of the multiple installation issues but these limited repairs are not satisfactory to address the underlying and systemic problems that exist. If Pulte approaches you regarding performing a repair, I would appreciate your letting me know.

I expect to be in touch with you in the near future.

With kind regards, I am

Sincerely,


John T. Chakeris

JTC/cmp

cc: Phillip W. Segui, Jr., Esq.
W. Jefferson Leath, Jr., Esq.
Michael S. Seekings, Esq.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

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

v.

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

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

v.

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

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

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Anthony and Barbara Grazia, individually and on behalf of all other similarly situated Plaintiffs, by depositing a copy of it in the United States Mail, postage prepaid, on February 14, 2013, addressed to their attorneys of record and all counsel of record, listed as follows:

RECEIVED

FEB 14 2013

COURT OF APPEALS

W. Jefferson Leath, Jr.
Michael S. Seekings
Leath, Bouch & Seekings, LLP
92 Broad Street
Post Office Box 59
Charleston, South Carolina 29402
Attorneys for Respondents Anthony and Barbara Grazia, individually and on behalf
of all other similarly situated Plaintiffs
(843) 937-8811

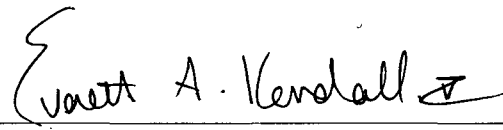
Phillip W. Segui, Jr.
Segui Law Firm, LLC
864 Lowcountry Boulevard, Suite A (29464)
Post Office Box 1450
Mt. Pleasant, South Carolina 29465
Attorney for Respondents Anthony and Barbara Grazia, individually and on behalf
of all other similarly situated Plaintiffs
(843) 884-1865

John T. Chakeris
The Chakeris Law Firm
231 Calhoun Street
Post Office Box 397
Charleston, South Carolina 29402
Attorney for Respondents Anthony and Barbara Grazia, individually and on behalf
of all other similarly situated Plaintiffs
(843) 853-5678

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

Robert L. Widener
A. Victor Rawl, Jr.
McNair Law Firm, P.A.
1221 Main Street
Columbia, South Carolina 29201
Attorney for Third-Party Defendants Del Webb Communities, Inc., and Pulte
Homes, Inc.
(803)799-9800

February 14, 2013

A handwritten signature in black ink, reading "Everett A. Kendall, II". The signature is written in a cursive style with a large initial "E" and a stylized "K".

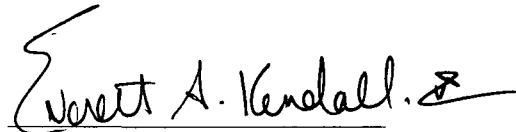
Everett A. Kendall, II
Christy Mahon
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803)256-2233
Attorneys for Appellant South Carolina
State Plastering, LLC

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

February 7, 2013

RECEIVED
MAR 01 2013
SC Court of Appeals



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