

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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NOV 18 2019

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

**SC Court of Appeals**

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case, No. 2016-2339  
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,  
Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,  
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

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**APPELLANT LENNAR CAROLINAS, LLC'S  
RETURN TO RESPONDENTS'  
JOINT MOTION FOR LIMITED REMAND  
AND APPROVAL OF PARTIAL  
SETTLEMENT AND LIMITED CLASS CERTIFICATION**

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*Attorneys for Appellant Lennar Carolinas, LLC*

Appellant Lennar Carolinas, LLC (“Lennar”), by and through undersigned counsel, respectfully submits this Return to the Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification For the Sole Purpose of Settlement Approval filed by Respondents Patricia Damico, Joshua and Brettany Beutow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively, the “Owners”), Manale Landscaping, LLC (“Manale”) and Décor Corporation (“Décor”) (collectively, “Respondents”).

### **FACTUAL BACKGROUND**

The Owners purchased homes in a community known as The Abbey at Spring Grove Plantation (“The Abbey”) which is located in Berkeley County, South Carolina.

The Owners filed this lawsuit against Lennar and others alleging the right to proceed as a class action on claims of alleged construction defects. Lennar asserted cross-claims against co-defendants and third-party claims against other subcontractors. Lennar also filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling all of the parties in this action to arbitration pursuant to various applicable documents and agreements.

The circuit court held a hearing on Lennar’s Motion to Compel Arbitration and denied Lennar’s Motion. Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, the Owners attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Lennar was forced to submit a Motion to Enforce the Automatic Stay pursuant to Rule 205 to the Court of Appeals. On December 19, 2016, the Court of Appeals issued the first order enforcing the automatic stay of proceedings in the circuit court.

On February, 27, 2018, Patricia Damico and Lenna Lucas filed a Motion to Lift the Automatic Stay. On April 11, 2018, the circuit court held a hearing on the Motion to Lift the Automatic Stay. On May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

On June 5, 2018, Lennar filed a Petition pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules requesting the Court reverse the circuit court's order and reinstate the stay of the entire action during the pendency of the appeal. On July 30, 2018, the Court issued the second order granting Lennar's Petition and reinstating the automatic stay for the duration of the appeal. On August 14, 2018, the Owners filed a Petition for Full Appellate Court Review, and the Court issued an order denying the Petition for Full Appellate Court Review on November 13, 2018.

At this time, the appeal has been fully briefed to the Court of Appeals, and oral argument is scheduled for December 10, 2019.

On November 8, 2019, Respondents filed a Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification For the Sole Purpose of Settlement Approval (the "Motion"). Lennar submits this Return to the Motion and requests the Court deny the Motion.

### **ARGUMENT**

- I. Respondents' Motion does not comply with Rule 241, SCACR, and is improper.**
  - A. Respondents' Motion fails to meet the basic requirements of Rule 241(d)(1), SCACR, and should be denied.**

Respondents' Motion is merely a veiled request for the Court to issue an order lifting the stay of the case so that the circuit court may rule on class certification issues while Lennar's appeal of the order denying its Motion to Compel Arbitration is pending before the Court.

Rule 241(d)(1), SCACR, states that only in extraordinary circumstances may a party file a motion to lift the stay without first making the motion to lift the stay to the lower court.

Respondents failed to meet the requirements of Rule 241(d)(1) because:

1. Respondents did not file a motion to lift the stay with the circuit court<sup>1</sup>; and
2. Respondents' Motion sets for no basis for the Court to find that extraordinary circumstances exist for the Court to lift the stay prior to the Respondents' filing a motion with the circuit court.

Respondents clearly failed to comply with the basic requirements of Rule 241(d)(1), SCACR. Respondents' Motion contains no argument through which the Court may find that it is appropriate for the stay to be lifted without Respondents first satisfying the plain and unambiguous requirements of Rule 241(d)(1), SCACR. Accordingly, the Court should deny Respondents' Motion.

**B. Respondents' Motion does not comply with the requirements for obtaining a lift of a stay as set forth in Rule 241(d)(3), SCACR.**

Rule 241(d)(3) of the South Carolina Appellate Court Rules requires:

A person seeking an order lifting an automatic stay or granting a writ of supersedeas must file a written petition verified by the client. The petition shall be captioned the same as the appeal. In addition to the petition and verification, the moving party must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court or administrative tribunal and a copy of the notice of appeal with its proof of service.

Respondents' Motion is not verified by any of the Respondents. Additionally, Respondents did not contemporaneously file a certified copy of the order, judgment, decree or decision of the circuit court or a copy of the notice of appeal with its proof of service with the

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<sup>1</sup> Respondents previously filed a Motion for Partial Settlement Approval with the circuit court; however, that motion did not request the circuit court lift the automatic stay of the case. The circuit court has not issued a ruling on the Respondents' prior Motion for Partial Settlement Approval and, in fact, cannot issue a ruling on the Motion for Partial Settlement Approval until the stay of the entire case is lifted.

Motion. Therefore, the Motion fails to satisfy the Rule 241(d)(3) requirements for obtaining a lift of the stay of the case. Accordingly, Respondents' failure to comply with the plain and unambiguous requirements of Rule 241(d)(3), SCACR, necessitates that the Court deny the Motion.

**II. Respondents' Motion should be denied because it seeks to have the Court partially remand the matter to the circuit court so that the circuit court may rule on issues—including certain class certification issues—that are directly affected by Lennar's appeal.**

The Court should not lift the stay of the case for the circuit court to consider the Respondents' Motion for Approval of Partial Settlement and Limited Class Certification because the Court's ruling on Lennar's pending appeal will directly affect whether this matter may proceed as a class action.

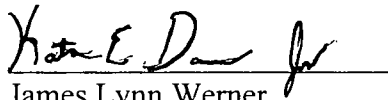
At no point in this litigation has the circuit court considered a motion for class certification. Through the Motion pending before the Court, the Owners are attempting to circumvent the procedural process for certification of a putative class while an appeal that may render the entire issue moot is pending before the Court. If on appeal the Court finds that this matter must be compelled to arbitration, then there is no possibility of a certifiable class because the arbitration agreements at issue do not permit or contemplate classwide arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) (finding classwide arbitration is improper when an arbitration agreement is silent on the issue); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.").

Oral argument on the pending appeal is currently scheduled for December 10, 2019, and to remand the case to the circuit court and permit the circuit court to make premature findings related to class certification would be inappropriate prior to a ruling by this Court. Furthermore, it is unnecessary to permit the circuit court to make findings related to class certification issues

when the appeal may render all class certification issues moot. *See* Rule 241(c)(2), SCACR (stating that the Court should consider whether an order lifting the stay is necessary to prevent a contested issue from becoming moot).

Additionally, Lennar has cross-claims pending against Manale and third-party claims pending against Décor, and the approval of a settlement agreement between Manale, Décor, and the Owners would not end the litigation for either Manale or Décor. Therefore, The approval of a settlement between the Manale, Décor, and the Owners does not favor judicial economy and only places an extra burden on the circuit court.

Accordingly, the Court should deny the Respondents' Motion because (1) the Respondents have not followed the proper procedure for moving the Court to lift the stay and (2) consideration of any issue directly affected by the appeal—including limited class certification—while the appeal is pending is improper.



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November 18, 2019  
Columbia, South Carolina

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Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,  
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Costal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors,

LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on November 18, 2019, copies of Appellant Lennar Carolinas, LLC's **Appellant Lennar Carolinas, LLC's Return to Respondents' Joint Motion for Limited Remand and Approval of Partial Settlement and Limited Class Certification** were served on all counsel of record by placing a copy in the United States Mail, first class postage prepaid, addressed as follows:

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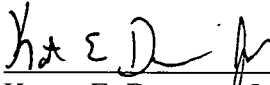
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November 18, 2019  
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November 18, 2019

**Via Hand Delivery**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

**Re: *Patricia Damico, et al. v. Lennar Carolinas, LLC, et al.***  
**Case No. 2014-CP-08-2424; Appellate Case No. 2016-2339**

Dear Mrs. Kitchings:

Enclosed please find the original and six (6) copies of **Appellant Lennar Carolinas, LLC's Return to Respondents' Joint Motion for Limited Remand and Approval of Partial Settlement and Limited Class Certification** regarding the above-referenced matter.

Please return a filed-stamped copy with our courier. As evidenced by the attached Proof of Service and by copy of this letter, we are providing counsel of record with a copy of same.

With kindest regards,

Sincerely,

Katon E. Dawson, Jr.

KED:bg  
Enclosures

cc: Counsel of Record

**RECEIVED**

NOV 18 2019

**SC Court of Appeals**

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