THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-97-3166

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

v.

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

OF WHOM Georgia-Pacific Corporation and/or Georgia Pacific, LLC is..... Petitioner.

GEORGIA-PACIFIC LLC'S PETITION FOR WRIT OF CERTIORARI

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Introduction

Appellant Georgia Pacific LLC[1] ("Georgia-Pacific") appealed from six orders entered by the circuit court in this construction defect class action. (App. 153.) Co-defendant Del Webb Communities, Inc. ("Del Webb") also filed a notice of appeal. (App. 1.) The appeals arise out of the circuit court's failure to adhere to basic notice and due process principles. Hence, the grant of certiorari would be consistent with Rule 242(b)(4), SCACR. The errors of the circuit court must be fixed now to avoid a multiplicity of appeals and later suits due to the inadequacies contained in the orders and class notice appealed from.

Respondents moved to dismiss both appeals on the grounds that the orders are interlocutory and not subject to immediate appellate review. (App. 4, 188.) On June 1, 2012, Chief Judge Few issued an order dismissing Del Webb's and Georgia-Pacific's appeals. Georgia-Pacific and Del Webb both filed petitions for rehearing. (App. 683, 691, 699.) The Court of Appeals denied the requests for rehearing. (App. 959.). This petition follows, and it should be granted for the special and important reasons set forth herein.

The appeals arising out of this matter should be reinstated on the basis that the orders in this case affect substantial rights that cannot later be vindicated after this matter is tried to final judgment. Remaining rulings should be reviewed on the basis that the issues involved therein are necessarily intertwined with the immediately appealable orders. Hence, the appellate courts should consider all issues at one time to avoid subsequent, piecemeal appellate proceedings.

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[1] As of December 31, 2006, Georgia-Pacific Corporation ceased its existence and converted to a limited liability company, Georgia-Pacific LLC.

Certification of Counsel

The undersigned hereby certifies that Georgia-Pacific filed a petition for rehearing with the Court of Appeals and the Court of Appeals ruled upon the petition with finality on January 15, 2013. (App. 959.)

Questions Presented for Review

1. Is the circuit court's Class Notice Order immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) as affecting a substantial right belonging to Georgia-Pacific because the notice fails to adequately describe the litigation and the absent class members' rights, thereby potentially depriving Georgia-Pacific of the *res judicata* effect of a favorable judgment in this class action?
2. Are the circuit court's Right to Cure Order and Scheduling Order immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) because the orders affect the substantial rights contained in the South Carolina Right to Cure Act and because no meaningful relief can be granted in an appeal after the matter is tried to final judgment?
3. Are the circuit court's Class Certification Order and Order Denying the Motion to Strike the Affidavits of Respondents' Experts reviewable on immediate appeal under the intertwined orders doctrine?

Statement of the Case

This is a class action brought on behalf of approximately 800 homeowners in a Del Webb community located in Beaufort County, South Carolina. (App. 446, 453-54; Compl. at ¶ 4, 34.) Respondents' Complaint alleges that Georgia-Pacific's PrimeTrim®

engineered wood product is defective and that Del Webb and two of its contractors negligently installed the PrimeTrim® on the exteriors of the 800 homes in the Del Webb community. (App. 451; Compl. at ¶ 22, 23.) Respondents assert various claims against the four defendants, including strict liability, breach of implied warranties, and breach of express warranty. (App. 454-461; Compl. at ¶ 37-70.)

This case is atypical in a number of ways. Respondents allege in their Complaint that the allegedly defective trim material and the alleged negligent installation combined and concurred to cause an indivisible harm to members of the class. (App. 449-460.) On October 15, 2011, the circuit court entered an order certifying the class ("Class Certification Order") but the order did not specify what claims were being certified. (App. 432; Appx. p. 18, Class Certification Order.) The Class Certification Order was also entered prior to the Respondents presenting any trial plan demonstrating how common questions could be tried together in a single proceeding.

On March 29, 2012 and April 2, 2012, the circuit court entered a series of orders aimed at effectuating the Class Certification Order, including an order approving the Notice of Class of Action ("Class Notice") to be sent to each of the 800 putative class members ("Class Notice Order"). (App. 417, 418-22; Appx. p. 3, Class Notice Order; Appx. pp. 4-8, Class Notice.) The approved notice does not inform the putative class members: 1) what claims are being asserted on a class-wide basis; 2) what damages are being sought on their behalf; and 3) that by not opting out of the class, some class members will waive other unasserted claims. Based on the class notice, with respect to Georgia-Pacific, the class representatives waived all claims for damages based on PrimeTrim® that had already been repaired and replaced. In the class notice, the putative

class members are not provided notice that if they fail to opt out of the class, they will *also* be deemed to have waived any such claims.

The circuit court also entered an order denying Georgia-Pacific's Motion to Strike the affidavits of Respondent' experts ("Order Denying the Motion to Strike"), which Respondents had tendered in support of their Motion for Class Certification. Georgia-Pacific argued in its motion to strike that Respondents' purported expert opinions, which were the sole evidence of some of the alleged common questions under Rule 23, did not comply with the standards governing the admissibility of expert evidence in South Carolina state court. (App. 427; Appx. p. 13, Order Denying the Motion to Strike).

On March 29, 2012, the circuit court denied Georgia-Pacific and Del Webb's motions to stay the class action pending compliance with the South Carolina Right to Cure Act, S.C. Code Ann. § 40-59-810 *et seq.* ("Right to Cure Order"). (App. 423; Appx. p. 9, Right to Cure Order). At the same time, the circuit court also entered a Preliminary Case Management and Scheduling Order ("Scheduling Order") directing Respondents to identify 10% of the 800 class member homes that would be subject to the statutory Right to Cure provisions and then finding that a class-wide offer for the statutory right to cure may be made by the Defendants only through the class representatives—not to 800 putative individual class members. (App. 429; Appx. p. 15, Scheduling Order).

The appeals to the Court of Appeals followed the above series of orders. (App. 1, 153, 635, 641.) The Court of Appeals dismissed the appeals and denied rehearing. (App. 683.)

Summary of Argument in Support of the Petition for Writ of Certiorari

Georgia-Pacific requests that this Court grant certiorari in order to reverse the decision of the Court of Appeals dismissing this appeal and to reinstate the appeal. In their motion to dismiss before the Court of Appeals, Respondents cited to several general common law rules on the nature of interlocutory orders. Georgia-Pacific does not dispute that these general rules exist. These general rules, however, do have limited exceptions. For example, a "discovery" order, may be *generally* not immediately appealable, but our courts look beyond the mere labels on the face of orders to discern their actual effect for purposes of determining appealability issues. *See e.g., Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (holding on certain facts that an order granting a motion to set aside default was immediately appealable because it had "the effect of . . . granting a motion to dismiss under Rule 12(b)(5), SCRCP, since it ends the action as to [one party]").

This case is unusual in several respects which necessitates immediate review of at least two of the Orders— the order approving the class notice and the order denying a stay under the South Carolina Right to Cure Act. These orders must be immediately appealed because they deprive Georgia-Pacific of substantial rights which cannot be remedied in a direct appeal after final judgment and a failure to appeal now might be construed as a waiver of the affected rights. *See Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) (noting failure to immediately appeal issues affecting substantial mode of trial right constituted a waiver of that right). Further, the remaining Orders—the order granting class certification and the order denying the motion to strike Respondents' experts—are so necessarily intertwined with the class notice and stay orders that these

orders are also immediately reviewable under the intertwined orders doctrine. Review of those intertwined orders now will avoid unnecessary litigation in the circuit court and will serve the interests of judicial economy and avoid piecemeal appeals in connection with this matter.

Concise Arguments in Support of the Petition for Writ of Certiorari

I. The Class Notice Order is immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) because the defects in the Class Notice (A) affect a substantial right and (B) the substantial right cannot be vindicated on appeal after the case is tried to judgment and the substantial right is subject to being deemed waived if not appealed now.

An order is immediately appealable under S.C. Code Ann. § 14-3-330(2) when the order affects a substantial right and "the substantial right could not be vindicated on appeal after the case." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). Issues not immediately appealed which affect substantial rights are at risk for being deemed waived. *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240. Here, the Class Notice Order must be reviewed now because the errors in the Class Notice (A) affect a substantial right and (B) cannot be reviewed after final judgment in this case. This Court should thus grant this petition and reinstate the appeal.

A. The Class Notice Order is immediately appealable because (1) the notice fails to satisfy Due Process requirements and (2) the notice affects the substantial right of finality associated with a class action.

The Class Notice approved by the circuit court fails to adequately inform class members of their rights in this litigation and therefore violates due process. Because of this defect, the notice is potentially subject to later collateral attack and *res judicata* might not attach to a final judgment in Georgia-Pacific's favor, thereby depriving

Georgia-Pacific of the substantial right[2] of finality encompassed in a matter certified as a class action. A substantial right of Georgia-Pacific is therefore denied by the Class Notice Order, which must be corrected on appeal now.

1. The Class Notice does not satisfy Due Process requirements because it fails to adequately describe the action and absent class members' rights in the litigation.

In order to ensure that due process is satisfied, South Carolina law requires that each class member receive clear notice and an opportunity to "opt out" of a class action. *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 654, 591 S.E.2d 611, 616 (2004); *see also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 457, 661 S.E.2d 81, 89-90 (2008). This Court has declared that the class notice must be "the best notice practicable under the circumstances" and—*at a minimum*—"describe the action and the plaintiffs' rights in it" so that the putative class member can make an informed decision about whether he or she should remain in the class or opt out. *Hospitality*, 356 S.C. at 654, 591 S.E.2d at 616 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-13 (1985); *see*

[2] Over the years, our courts have identified a variety of rights that are sufficiently substantial to support an immediate appeal. *See, e.g., Neeltec Enters, Inc. v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) (order requiring the plaintiff to substitute two different defendants affected a substantial right); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 457, 661 S.E.2d 81, 89-90 (2008) (order establishing an "opt in" procedure for a class action affected a substantial right of class members); *Eldridge v. City of Greenwood*, 308 S.C. 125, 126, 417 S.E.2d 532, 533 (1992) (order prohibiting landowners who were contemplating filing a class action from communicating with potential class members affected a substantial right); *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 847 (Ct. App. 2007) (a pre-trial order suppressing evidence that significantly impairs the prosecution of the case affects a substantial right); *Lakes v. State*, 333 S.C. 382, 385, 510 S.E.2d 228, 230 (Ct. App. 1998). When analyzing this question, the courts consider (1) the importance of the right at issue and (2) the unique factual circumstances of the case. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (an order disqualifying counsel affected a substantial right; a litigant's right to choose its own counsel is a substantial right because it is "closely related to the right to a particular mode of trial, a well-established substantial right" and "[d]eprivation of the right to one's preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system.").

also In re Diet Drugs Prods. Liab. Litig., 385 F.3d 386, 395 (3d Cir. 2004) (noting that the purpose of notice is to "provide [class members] with the information 'needed to decide, intelligently, whether to stay in or opt out'") (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997)).

The necessity that the notice be sufficiently descriptive to meet these minimum standards is fundamental, because the class member who fails to opt out after receiving the notice is supposed to be bound by the ultimate result in the case. *Salmonsen*, 377 S.C. at 457-58, 661 S.E.2d at 89-90; *see also Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) ("Surely the best notice practicable under the circumstances cannot stop with . . . generalities. It must also contain an adequate description of the proceedings written in objective, neutral terms, that, insofar as possible, may be understood by the average absentee class member . . . ."); *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980) ("Notice to class members is crucial to the entire scheme of Rule 23(b)(3). It sets forth an impartial recital of the subject matter of the suit, informs members that their rights are in litigation, and alerts them to take appropriate steps to make certain their individual interest are protected. It also preserves the right of class members to 'opt out' if they believe their interests are antagonistic to the other class members, or if they wish to proceed by separate suit").

The Class Notice approved by the circuit court is glaringly deficient in several respects. For example, the notice fails to inform class members of the damage claims that are being waived and the damage claims being asserted on their behalf. The notice also fails to contain even a general description of the evidence that may or may not be

admissible as to various groups of class members, fails to describe potential conflicts between class members, and fails to describe the representative nature of the trial.

a) Failure to disclose waiver of damage claims.

Although the named class representatives allege that all PrimeTrim® is defective, they are not seeking recovery for the costs already incurred for repairing and replacing their PrimeTrim®. (App. 474; Appx. p.60, Pls' Resp. to Del Webb's RTA ¶ 13.) The evidence offered at the class certification stage establishes that certain putative class members, as well as the named class representatives, have already repaired and replaced significant portions of the trim on their homes. (App. 590-93; 610; 594, 599, 600; Appx. pp. 176-179, Bennett Dep. Vol. I, 30:11-14; Appx. p. 191C, Turner Dep. Vol. I, 61:4-11; Appx. pp. 180, 184A, 184B, A. Holland Dep., Vol. I, 35:10-36:16.) The class notice approved by the circuit court, however, fails to inform putative class members that if they remain in the class they waive all claims for recovery of repair and replacement costs already incurred. For some class members this may mean they will obtain little, if any, benefit in connection with any class-wide relief that might be obtained, while simultaneously waiving their rights to possibly meaningful claims. Without adequate notice, class members cannot make a fair and intelligent decision as to whether it is in their individual interest to remain in the class or to opt-out.

b) Failure to describe the class claims.

Prior to issuing the class certification order, the circuit court did not require the Respondents to specifically identify which of the causes of action raised in the Complaint they are asserting on a representative basis against the four respective defendants. For example, the claim for breach of the implied warranty of fitness for a particular purpose, while subject to the general allegations about the class, is missing a statement regarding

whether the claim is raised in an attempt to gain relief on behalf of the class. (App. 458-; Compl. at ¶¶ 56-63.) However, in other portions of the Complaint, the named plaintiffs state they and the "class members have suffered" damage. (App. 461; Compl. ¶ 70.) In other places, the Complaint only states damages were incurred by the "Plaintiff Class" without an averment that the named Plaintiff suffered the same alleged harm. (App. 462; ¶ 77.) For that reason, the Class Certification Order also fails to articulate which claims have been certified with respect to each defendant. (App. 432; Appx. p. 18, Certification Order.) The Class Notice, in turn, also does not explain which claims each class member is pursuing against each defendant. The Class Notice merely refers class members to the Complaint to ascertain the claims that Respondents purport to assert.

This omission is substantial in this case because the existence of each putative class member's individual claims—which span a period of eight years—vary depending on a number of factors, including when the home was built, who built the home, and what evidence is available. Each putative class member should be informed which claims are being asserted on his or her behalf by the class representatives and class counsel, and against which defendant(s), so that the putative class member can make an informed decision about class membership. The Class Notice approved by the circuit court fails to provide the basic and minimal information necessary for a class member to make this important decision, which may affect potential, future liability for Georgia-Pacific. In light of these defects, the Class Notice is insufficiently descriptive and could be found to violate the due process rights of putative class members.

2. If it is subsequently found that the Class Notice violates due process, Georgia-Pacific will be deprived of its substantial right to the *res judicata* benefit of a final judgment.

Any judgment entered in a properly maintained class action (*i.e.*, one that complies with due process by providing adequate notice) binds all class members under principles of *res judicata*. *Hospitality*, 356 S.C. at 653, 591 S.E.2d at 616; *see also Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation."). There can be little doubt that the finality and preclusive effect of *res judicata* is a substantial right. *See, e.g.*, *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005) (holding that claim alleging that custody order violated due process affected a substantial right), *aff'd in relevant part*, 653 S.E.2d 276 (S.C. 2007); *Duckett v. Goforth*, 374 S.C. 446, 464, 649 S.E.2d 72, 81-82 (Ct. App. 2007) (holding that *res judicata* supports an important public interest and "ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.") (citation omitted). Without the protections afforded by *res judicata* in a class setting, Georgia-Pacific could be subject to multiple individual lawsuits after having successfully defended a lengthy and expensive class action.

One of the principal purposes of any litigation is to obtain a final and binding judgment. A judgment would be a hollow victory if it were continually subject to attack. Following this reasoning, South Carolina courts have repeatedly held that the principle of *res judicata* serves several important public interests:

> *Res judicata* precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action. *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 249, 551 S.E.2d 274, 278 (Ct. App. 2001) (citation omitted). The doctrine flows from the principle that public interest requires an end to litigation and no one

> should be sued twice for the same cause of action. *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). "*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. *Res judicata* ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Nelson v. QHG of S. C., Inc.*, 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct. App. 2003) (quoting James F. Flanagan, South Carolina Civil Procedure 642 (2d ed.1996)), *rev'd in part on other grounds,* 362 S.C. 421, 608 S.E.2d 855 (2005).

Depriving Georgia-Pacific of its right to *res judicata* from a final judgment as to class members in this case would undermine this principle of finality in litigation, which is critical to the operation of our adversary system.[3]

Were Georgia-Pacific to prevail in the class action, and were a collateral attack brought by a disappointed class member, this Court has held that the reviewing court "must determine: (1) whether there were safeguards in place to guarantee sufficient notice and adequate representation; and (2) whether such safeguards were, in fact, applied." *Hospitality*, 356 S.C. at 660, 591 S.E.2d at 619 (quoting from the prior court orders).

Other courts have permitted absent class members to avoid prior class judgments—and sue the same defendants again—where it can be shown that the class action did not satisfy due process, including because of inadequate class notice. *See e.g.*, *Hege v. Aegon, Inc.*, 780 F. Supp. 2d 416, 427-31 (D. S.C. 2011) (prior class judgment would not be given preclusive effect; class notice was materially misleading because it

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[3] Before the Court of Appeals, Respondents mischaracterized Georgia-Pacific's position as asking the court to ensure that "any future judgment in this case is invulnerable to collateral attack." (App. 725, 742; Respondents' Return to Appellants' to Petitions for Rehearing at p. 16.) Georgia-Pacific is asking the appellate courts to ensure that the Class Notice Order complies with due process ***now*** so that *res judicata* can, as it should, attach to the final judgment in this case.

failed to disclose that South Carolina's statutory definition of "actual charges" in insurance policies did not apply to plaintiffs' policies, or that a South Carolina court had awarded damages in a similar "actual charges" lawsuit); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222 (11th Cir. 1998) ("Even if the elements of claim preclusion [were] present, deficiencies in the notices preclude our allowing the judgment in the prior action to bar Twigg's claims because invocation of the bar would not be consistent with due process."); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1011–20 (Vt. 2003). (prior class settlement was constitutionally infirm and would not be enforced because the notice failed to advise class members that the attorney's fees agreed to in the settlement could result in class members actually sustaining a net loss); *Hesse v. Sprint Corp.*, 598 F.3d 581, 587-89 (9th Cir. 2010) (prior nationwide class action settlement did not bar plaintiffs' claims because the settlement purported to release broader claims than what were actually alleged and because the representatives could not be adequate because they did not share the same claims as plaintiffs).

As detailed above, the Class Notice here violates due process because it fails, among other things, to inform absent class members of the damage claims ***being waived*** and the damage claims ***being asserted*** on their behalf and against which defendants the claims are made. A class member who received this Class Notice, failed to opt out, and then brought a subsequent suit against Georgia-Pacific after the entry of a judgment in favor of Georgia-Pacific would have a potentially powerful argument that the judgment in this action has no preclusive effect whatsoever due to the defects in the notice. Accordingly, the lack of due process afforded by the Class Notice affects a substantial

right of Georgia-Pacific and the Class Notice Order must be reviewed and corrected now. The Court should thus grant the petition and reinstate the appeals.

B. The Class Notice Order is immediately appealable because the errors in the Class Notice cannot be vindicated on appeal after final judgment.

The Class Notice Order is also appealable under S.C. Code Ann. § 14-3-330(2) because the errors in the Class Notice cannot be reviewed after the conclusion of this case. The Class Notice has been approved by the circuit court and sent out to all putative class members on or about April 2, 2012. (App. 624-628; Appx. pp. 205-209, 04/02/12 Dapore E-mail.) Under the terms of the Class Notice, and by operation of Rule 23 of the South Carolina Rules of Civil Procedure, any class member who does not return a written request to opt-out by May 15, 2012 is automatically included within the class.

The due process defects in the Class Notice cannot be reviewed on direct appeal after the entry of a final judgment. *Res judicata* only attaches after a final judgment has been entered in favor of Georgia-Pacific and, by definition, applies to subsequent litigation between the same parties. *Mead v. Jessex, Inc.*, 382 S.C. 525, 532, 676 S.E.2d 722, 726 (Ct. App. 2009); *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

As this Court has explained, the relevant inquiry under Section 14-3-330(2) is whether the order "prevent[s] a judgment from which an appeal may later be taken . . . ." *Edwards*, 369 S.C. at 94, 631 S.E.2d at 531. Stated otherwise, "[i]mmediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304 n.7, 705 S.E.2d 475, 479 (Ct. App. 2011) (quoting *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000)). Thus, the test turns on whether

the order can be meaningfully reviewed on direct appeal after the entry of a final judgment, not on whether the trial judge has some hypothetical ability to change his mind. If the order affects a substantial right and cannot be effectively reviewed and corrected after the conclusion of the case, then an immediate appeal under Section 14-3-330(2) is warranted.

Here, the Class Notice Order cannot be reviewed and corrected after judgment on appeal. Georgia-Pacific's *res judicata* protection should attach upon a final judgment in Georgia-Pacific's favor. Because of the flaws in the notice, however, strong arguments would exist that the protection would not exist. The circuit court completely failed to appreciate a scenario where a judgment is rendered in favor of Georgia-Pacific. Georgia-Pacific obviously cannot appeal a judgment in its own favor. Hence, the only appellate avenue that will allow for the review and correction of the defects in the Class Notice Order and the restoration of Georgia-Pacific's substantial right to finality is through an immediate appeal. There is no other option.

II. The Right to Cure Order and Scheduling Order are immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) because the Orders affect the substantial rights contained in the South Carolina Right to Cure Act and no meaningful relief can be granted in an appeal after final judgment.

As to the appealability of the Right to Cure Orders, Georgia-Pacific is entitled to the substantial right of a stay without litigation as afforded by the South Carolina Right to Cure Act codified at S.C. Code § 40-59-830 once a contractor invokes the stay, as Del Webb has done in this case. Georgia-Pacific also has the right, alongside Del Webb, to participate in the efforts to remedy or settle the claim under the terms of the Scheduling Order entered by the circuit court.

Respondents have previously argued that the Right to Cure Order is not appealable because a stay is not a substantial right. The cases relied upon by Respondents below, however, are inapposite. In *Carolina Water Serv., Inc. v. Lexington County Joint Mut. Water & Sewer Comm'n*, the court held that an order lifting a discretionary stay was not appealable. 373 S.C. 96, 644 S.E.2d 681 (2007). And in *Edwards v. SunCom*, 369 S.C. at 95-95, 631 S.E.2d at 530-31 the court held that an order granting a discretionary stay was not appealable. 369 S.C. at 95-95, 631 S.E.2d at 530-31. Neither of these decisions involves, as this case does, a trial court refusing to impose a ***mandatory*** stay that is guaranteed by statute. *See* S.C. Code Ann. § 40-59-830.

Similarly, the circuit court and Respondents' reliance on *Grazia v. S.C. State Plastering, LLC* decision is misplaced. While it is true that this Court, in *Grazia*, held that the Right to Cure Act and Rule 23 of the South Carolina Rules of Civil Procedure are not hopelessly incompatible, this Court left it to the trial courts to devise a method, based on the facts before them, to comply with both statutes in the class action setting. *Grazia*, 390 S.C. 562, 575, 703 S.E.2d 197, 203 (2010) (holding that the trial court must use the Right to Cure Act "to determine whether or not a class action is feasible under the circumstances in each individual case" and then devise a way to comply with the Act's notice, investigation and settlement provisions). Georgia-Pacific's argument on appeal is that the method chosen by the lower court here improperly deprives Georgia-Pacific of its statutory right to a stay. Indeed, the trial judge indicated that he was unsure whether his chosen method was correct and encouraged an appeal on this very issue:

> THE COURT: Our state Supreme Court has said we can have class action construction cases. It's up to the trial Court to figure out how to deal with reconciling this notice of right to cure statute, which seems irreconcilable with

> class actions, and this is my proposal. ***I may be right, I may be wrong*** ....
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> * * *
>
> ... ***I know why you think I'm wrong. I may be. But, you know, I'm just moving the ball forward, and this is the way we go, and if you want to appeal on this issue, I encourage you to do it sooner rather than later*** because this is the plan that we're going to go forward to get this case ready for a trial early next year.

(App. 839, 857, 858-59; 02/23/12 Hearing Tr. at 21, 23-24, attached as Exhibit B to Reply in Support of Petition for rehearing) (emphasis added).)

The undisputed evidence adduced below (from Respondents' experts), demonstrated that representative compliance with the Right to Cure Act is not possible in this case with respect to notice or inspection. The Right to Cure Orders also require that any settlement offer under the Act must be class-wide, whereas the Right to Cure act is designed for individual cure measures. The notice, inspection, and settlement mechanisms adopted by the General Assembly are to occur before proceeding with any trial, and the denial of these rights by the circuit court on an individual basis cannot be vindicated in any later appeal. Hence, without immediate review Georgia-Pacific will have lost the rights afforded by the Right to Cure Act with respect to the individuals that make up the putative class.

III. The Class Certification Order and Order Denying the Motion to Strike are capable of immediate review by the appellate courts under the intertwined orders doctrine.

When an appealable interlocutory order is before an appellate court, related, and necessarily intertwined orders should be reviewed at the same time as the review of the immediately appealable issues. *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 636, 670 S.E.2d 680, 688 n.14 (Ct. App. 2008) (reviewing unappealable, intertwined

order in conjunction with immediately appealable order in the interests of judicial economy); a*ccord Edge v. State Farm Mut. Aut. Ins Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005); *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001); *Morris v. Anderson County*, 349 S.C. 607, 610-11, 564 S.E.2d 649, 651 (2002); *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 511-12 (Ct. App. 2002) *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 495, 450 S.E.2d 616, 618 (Ct. App. 1994); *Briggs v. Richardson*, 273 S.C. 376, 379, 256 S.E.2d 544, 546 n.1 (1979). An underlying basis for South Carolina appellate courts deciding such issues is the desire of the appellate courts to avoid piecemeal litigation and multiple appeals. Specifically, in *Edge v. State Farm Mut. Auto. Ins. Co*[4]., this Court held:

> An order that is not directly appealable may be considered if there is an appealable issue before the court. *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001). Here, an order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider State Farm's cross-appeal.

366 S.C. 511, 623 S.E.2d 387 (2005).

Here, judicial economy would be served by appellate review of the intertwined Class Certification Order and related Order Denying the Motion to Strike. These orders gave rise to the subsequent Class Notice Order and Scheduling Order.

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[4] In *Bowers v. Robinson*, this Court undertook consideration of an appeal from the trial court's granting a motion for a temporary injunction against the appellant/defendant. 311 S.C. 412, 429 S.E.2d 799 (1993). At the same time, the appellant/defendant appealed the trial court's entry of default and its denial of its motion to set aside the default. *Id.* In issuing its Opinion, this Court rendered a decision on the non-immediately appealable issue of whether the trial court erred in denying the motion to set aside the default despite avoiding a ruling on the immediately appealable issue. *Id.*

Respondents' prior filings seeking certification and expedited consideration of their motion to dismiss by this Court demonstrate their recognition of judicial economy principles. (App. 283, 287; Supp. Mot. to Certify Appeal for Immediate and Expedited Supreme Court Review at 3.) The Respondents filed two motions with this Court seeking to certify this appeal, and to have an expedited adjudication of the appeal, on the grounds that "this case concerns an aging plaintiff class of retirees whose members have a particularly keen interest in prompt adjudication of their claims in this litigation . . . ." (*Id.*) If the intertwined orders are not reviewed now *in toto*, they will be ultimately reviewed on appeal in piecemeal fashion, making adjudication of this matter anything but "prompt." The same reasons support this Court granting certiorari and reinstating the appeal.

Conclusion

Based on the above, Georgia-Pacific respectfully requests that this Court grant certiorari and reverse the decision of the Court of Appeals in order to reinstate this appeal. An immediate appeal in these circumstances will not disturb any of the general rules regarding appealability that this Court has developed, and dealing with the issues raised in Georgia-Pacific's appeal will serve the causes of justice and judicial economy for the reasons stated herein.

[Signatures Attached]

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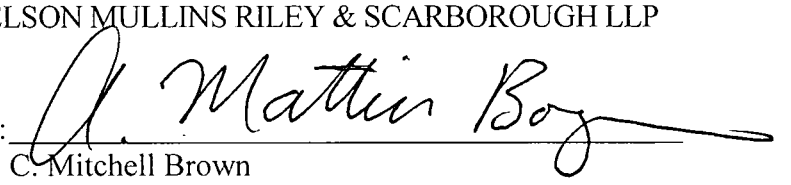
By: 

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March 22, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-07-03166

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

v.

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

OF WHOM Georgia-Pacific Corporation and/or Georgia Pacific, LLC is ..... Petitioner.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Georgia-Pacific Corporation and/or Georgia Pacific LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Georgia-Pacific Corporation and/or Georgia Pacific LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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Appendix Volumes One, Two, and Three

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