THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-07-3166

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

Respondents,

v.

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

Defendants,

Of whom Del Webb Communities, Inc., an Arizona Corporation, is

Appellant.

RESPONDENTS' MEMORANDUM ON APPEALABILITY REGARDING DEL WEBB'S APPEAL NOTICED JANUARY 7, 2013

Case No. 2007-CP-07-3166

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

COME NOW the Respondents above named, by and through their undersigned counsel, as requested by this Honorable Court, and submit this memorandum of law regarding appealability with respect to the (most recent) appeal taken by the Appellant, Del Webb Communities, Inc., an Arizona Corporation ("Del Webb"), i.e., the appeal Del Webb noticed January 7, 2013.

INTRODUCTION

Del Webb has again noticed an appeal from an interlocutory order entered by the circuit court in the conduct of this class action. Like all of the other interlocutory orders that have already been appealed (and dismissed, with rehearing of such dismissal denied) in this case, this one too is not immediately appealable. Respectfully, Del Webb's (most recent) appeal noticed January 7, 2013 should be immediately dismissed.

As the Court is no doubt well aware, this case has already spawned numerous notices of appeal from Del Webb and Georgia-Pacific Corporation and/or Georgia-Pacific, LLC ("Georgia-Pacific") and even a petition for "emergency" relief from Del Webb. This history is amply recounted in the Respondents' previous briefs to the Court addressing the issue of

appealability, all of which the Respondents incorporate by reference herein as may be appropriate.[1]

Not counting Del Webb's most recent notice of appeal on January 7, 2013, Del Webb and Georgia-Pacific have already noticed appeals from eleven (11) interlocutory orders between them. By order filed June 1, 2012, the Court consolidated and dismissed all appeals previously noticed by Del Webb and Georgia-Pacific, determining that "none of the underlying orders are immediately appealable." (A copy of the Court's June 1, 2012 order is attached hereto as **Exhibit 1**, which is incorporated herein by reference.) In light of this determination, the Court also found it unnecessary to address Del Webb's "emergency" petition for relief. (Id.) The Court's June 1, 2012 decision was met with petitions for rehearing by both Del Webb and Georgia-Pacific, which were denied January 15, 2013. (A copy of the Court's January 15, 2013 order is attached hereto as **Exhibit 2**, which is incorporated herein by reference.)

Meanwhile, on or about October 15, 2012, Del Webb filed in the circuit court a "Motion to Compel Plaintiff's Counsel to Deliver Del Webb's Settlement Offers to Homeowners." It is the order of the circuit court

[1] Specifically, these filings include the Respondents' Motion to Dismiss Appellant's Appeal and Supporting Memorandum filed/served April 19, 2012, the Respondents' Motion to Dismiss Georgia-Pacific's Appeal and Supporting Memorandum filed/served

denying this motion from which Del Webb now appeals. (*See* Del Webb's Notice of Appeal dated January 7, 2013.) In Del Webb's transmittal letter to this Court with its January 7, 2013 notice of appeal, it states that "[t]his order relates directly to another appealed order already before this Court, i.e., the order entitled: 'Preliminary Case Management and Scheduling Order.'" (*See* Del Webb's Transmittal Letter to Court of Appeals with Notice of Appeal dated January 7, 2013.)

At the time that Del Webb noticed its most recent appeal, the Court had not yet ruled upon the petitions for rehearing of its dismissal of Del Webb (and Georgia-Pacific's) prior appeals. On January 15, 2013, however, the Court did rule, denying rehearing. (*See* **Exhibit 2**.) The Court having now dismissed all of the previously-taken interlocutory appeals and denied rehearing of such dismissal, the Respondents submit that the lack of immediate appealability of the subject order—which, again, Del Webb concedes is directly related to the already-dismissed appeal of the Preliminary Case Management and Scheduling Order—has already been decided, and that Del Webb's appeal taken January 7, 2013 should be summarily dismissed.

To the extent that the Court may require or appreciate a more

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May 3, 2012, and the Respondents' Return to Appellants' Petitions for Rehearing

substantive analysis of appealability, the Respondents present such analysis below.

ARGUMENT

I. The Court's dismissal of Del Webb's prior interlocutory appeals (which is directly related to Del Webb's most-recent appeal) is dispositive of the issue of appealability with regard to Del Webb's appeal noticed January 7, 2013.

The order that Del Webb now appeals is directly related to the other interlocutory orders that it has already appealed (particularly, the Preliminary Case Management and Scheduling Order) and that this Court has already dismissed with finality. (*See* **Exhibits** 1 and **2**.) Accordingly, Del Webb's most recent appeal should be dismissed too.

II. The interlocutory order identified in Del Webb's January 7, 2013 notice of appeal is not immediately appealable, and Del Webb's appeal from that order should be dismissed.

Again, Del Webb's transmittal letter with the subject notice of appeal advises that the newly-appealed order "relates directly" to the circuit court's prior Preliminary Case Management and Scheduling Order[2] (which order Del Webb previously appealed by notice of appeal dated April 2, 2012,[3] and which appeal has, again, been finally dismissed). The Preliminary Case

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filed/served October 17, 2012.

[2] (A copy of this order is attached hereto as **Exhibit 3**, which is incorporated herein by reference.)

[3] (A copy of this Notice of Appeal is attached hereto as **Exhibit 4**, which is incorporated herein by reference.)

Management and Scheduling Order provides as follows:

> 3. May 28, 2012: Compliance with the Right-to-Cure Act will be accomplished on a representative basis through the class representatives. By the foregoing date, Plaintiffs must identify ten percent (10%) of the homes remaining in the class after the expiration of the opt-out period that will be subjected to a right-to-cure process inspection. As to all homes remaining in the class, Plaintiffs must also deliver notice as required by South Carolina Code § 40-59-840.
>
> Notice shall be copied to all parties and the Court. Any requests for clarification under South Carolina Code § 40-59-840 shall be made by **June 1, 2012**, with copies delivered to all parties and the Court;
>
> 4. May 28, 2012 – August 28, 2012: Plaintiffs will make available for the inspection all of the homes identified for a right-to-cure process inspection (as set forth above) under South Carolina Code § 40-59-850. All parties noticed or to this litigation will be given the opportunity to participate in the inspections. Based upon the notice required by South Carolina Code § 40-59-840 (as set forth above) and the information obtained from the aforementioned inspections, a class-wide offer to cure may be made by the defendants, which offer will be presented to the class representatives for response;
>
> 5. [September[4]] 28, 2012: Deadline for any offer to cure under South Carolina Code § 40-59-840; . . .

[4] The original Preliminary Case Management and Scheduling Order was superseded by an Amended Preliminary Case Management and Scheduling Order. The amendment concerned only dates, not the substantive verbiage. Also, at Del Webb's request, the deadline for any offer to cure was ultimately extended through September 28, 2012.

(Id.)

In plain language, the Preliminary Case Management and Scheduling Order allowed "a class-wide offer to cure [to] be made . . . ," with any such offer "be[ing] presented to the class representatives for response." (Id.) Indeed, in prior filings in this Court, Del Webb expressly recognized that the Preliminary Case Management and Scheduling Order required that "any settlement offer under the Act will be made to the class representatives on a class-wide basis rather than to individual homeowners." (*See* Del Webb's Return to Respondents' Motion to Dismiss Appeal (dated May 14, 2012) p. 16, a copy of this page (along with the cover page) of this document attached hereto as **Exhibit 5**, which is incorporated herein by reference; *see also* Del Webb's Petition for Rehearing (dated June 18, 2012) p. 3 ("[T]he order requires any settlement offer must be class-wide . . . ."), a copy of this page (along with the cover page) of this document is attached hereto as **Exhibit 6**, which is incorporated herein by reference.) Yet, Del Webb did not present any class-wide offer to cure. Instead, on the September 28, 2012 deadline, it delivered to the Respondents' counsel's office 76 separate letters addressed to individual homeowners, each letter "c/o" (i.e., care of) class counsel.

Consistent with the circuit court's order (above quoted) that "[c]ompliance with the Right-to-Cure Act will be accomplished on a

representative basis through the class reprsentatives . . ." with response to any right-to-cure offer being made by the class representatives, the Respondents' counsel wrote Del Webb's counsel advising of the Respondents' position that Del Webb had not complied with the requirement of the (Amended) Preliminary Case Management and Scheduling Order—requiring a class-wide offer to be made, if any by the September 28, 2012 deadline—and that the Right to Cure Act no longer posed any impediment to the adjudication of this very much aged case.

Notwithstanding its prior acknowledgment that the Preliminary Case Management and Scheduling Order called for any offer to cure to be on a class-wide basis, Del Webb moved the circuit court to compel the Respondents' counsel to deliver each of their individual (non-class-wide) 76 letters to the respective addressees. The circuit court denied Del Webb's motion. Del Webb appealed via noticed dated January 7, 2013.

Rule 201(a), SCACR, addresses judgments, orders and decisions subject to appeal, and, in pertinent part, provides that "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision." "As a general rule, only final judgments are appealable." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). "To promote judicial efficiency and orderly adjudication of disputes on appeal, this rule

seeks to prevent multiple appeals of non-final matters." Jean Hoefer Toal et al., Appellate Practice in South Carolina 83 (2002); *cf.* Senter v. Piggly Wiggly Carolina Co., Inc., 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) ("This procedure will advance the salutary consideration of avoiding 'piecemeal litigation' which would occur if immediate review of such pretrial motions were either mandated or permitted.").

"Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Wilson, 367 S.C. at 12, 625 S.E.2d at 208; Mid-State Distribs, Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory."); *see also* Toal, supra at 86 ("'Final judgment' is a term of art denoting the disposition of all issues in the action.").

Here, again, the appealed order is not a final judgment; it is an interlocutory order. In view of the policy in furtherance of judicial efficiency and orderly adjudication of disputes on appeal by preventing multiple appeals of non-final matters,[5] it should be noted that the order was

[5] Toal, supra at 83.

issued in the context of a class action. Even in non-class litigation, "a trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of facts and conclusions of law before entry of judgment or decree;"[6] in the context of a class action, Rule 23(d)(2), SCRCP, expressly provides that "[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." Our Supreme Court has explained that this "specifically permits the trial court to maintain continual control over class action proceedings . . . ." Salmonsen v. CGD, Inc., 377 S.C. 422, 454, 661 S.E.2d 81, 88 (2008). Accordingly, the Respondents submit that it is all the

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[6] *See* PPG Indus., Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988); *see also* Blyth v. Marcus, 335 S.C. 363, 367, 517 S.E.2d 433, 434 (1999) ("A defendant can bring a subsequent summary judgment motion after his first motion had been denied. The rationale behind these cases is that the denial of a motion for summary judgment is an interlocutory decision which the trial judge can reconsider until the end of trial."); City of Wood River v. Geer-Melkus Constr. Co., Inc., 233 Neb. 179, 183, 444 N.W.2d 305, 308 (1989) ("'No court is required to persist in error, and, if [the judge] concludes that a former ruling was wrong, [the judge] may correct it at any time while the case is still in his control.'") (quoting Tady v. Warta, 111 Neb. 521, 526, 196 N.W. 901, 903 (1924)); Dawkins, Inc. v. Huff, 836 So.2d 1062, 1065 (Fla. 5th DCA 2003) ("[W]e observe that a court always has jurisdiction during the progress of a case to set aside or modify an interlocutory order before final judgment. . . . [S]uch orders remain within the inherent power of the court to control the progress of the case prior to final judgment."); Helping Others Maintain Envtl. Standards v. Bos, 406 Ill. App.3d 669, 698, 941 N.E.2d 347, 373 (2d Dist. 2010) ("A trial judge possesses the inherent authority to review, modify or vacate an interlocutory order at any time until it enters a final judgment."). As the Supreme Court of Nebraska noted in City of Wood River, this ruling is "consistent with the inherent power of the court to control its own proceedings and the policy of favoring appeal only at the end of all lower court proceedings." 233 Neb. at 183, 444 N.W.2d at 308.

more appropriate in the context of class litigation for appeal to follow final judgment. *Cf.* Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) ("Orders under Rule 23, SCRCP are interlocutory and thus, immediate appealable only in certain circumstances.").

"Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [S.C. Code Ann.] § 14-3-330." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. In pertinent part, § 14-3-330 provides as follows:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; . . .

Accordingly, "[i]ntermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1)." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. "An order which involves the merits is one that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" Id. (citing Mid-State Distribs., 310 S.C. at 334, 426 S.E.2d at 780). Also, "[i]nterlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2)." Id. "Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." (citing Mid-State Distribs., 301 S.C. at 335, 426 S.E.2d at 780 n. 4).

With more particular respect to subsection (2) of § 14-3-330, "[g]enerally, this subsection has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." Toal, supra at 87. "'[T]he 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury.'" Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (citing Salmonsen v. CGD, Inc., 377 S.C. at 461, 661 S.E.2d at 91 (Pleicones, J., dissenting)). Our Supreme Court has explained that "[u]nder § 14-3-330 . . . an order must affect a substantial right **and** prevent a

judgment from which an appeal may later be taken in order to be immediately appealed." Edwards v. SunCom, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006) (emphasis in original).

The subject order that Del Webb now purports to appeal is not a final judgment. It does not involve the merits. It does not in effect determine this action and prevent a judgment from which an appeal might be taken or discontinue the action, grant or refuse a new trial, or strike out an action or defense. It does not abridge Del Webb's constitutional right to a jury trial. It is not immediately appealable.

The order Del Webb now appeals relates to compliance with the Right to Cure Act in the context of a class action. Throughout this litigation, Del Webb in particular has attempted to wield the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, §§ 40-59-810 to -860 (the "Right to Cure Act"), as a sword to gut this class and delay adjudication of the Respondents' claims as opposed to an olive branch to resolve the class-wide problem it created. This additional premature appellate challenge is more of the same in this regard.

Based upon its transmittal letter to the Court with its January 7, 2013 notice of appeal, it appears that Del Webb contends the subject order is appealable because it unduly abridges its right to make individual settlement

offers under the Right to Cure Act (i.e., that it is immediately appealable under § 14-3-330(2)).[7] As an initial matter, the Respondents' counsel is unaware of any South Carolina authority to support the notion that there is such a "substantial right" to make a settlement offer. Moreover, the relationship between the Right to Cure Act and class actions under Rule 23, SCRCP, was recently addressed by our Supreme Court in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010).

In Grazia, the Supreme Court harmonized the stay and notice provisions within the Right to Cure Act, found the Right to Cure Act to be compatible with Rule 23, and reversed the circuit court's decision to strike the class action allegations from the plaintiffs' complaint. The Court explained that "rights under the Right to Cure Act notice provisions are not new substantive rights . . . ," expressly noting that, under the Right to Cure Act, "the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim." Id. at 573, 703 S.E.2d at 202. Under the Grazia Court's holding, the rights afforded under the Right to Cure Act are not substantive and are akin to discovery rights. And discovery orders are not immediately appealable. Hamm v. S.C. Pub.

[7] It is patent that the subject order does not involve the merits and is not therefore

Serv. Comm'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) ("Discovery orders, however, are interlocutory and are not immediately appealable.").

Moreover, the Grazia Court rejected the notion that the Right to Cure Act did not allow for representative compliance, and explained that, in an action containing class allegations, after the circuit court has determined that the Rule 23(a) prerequisites to a class action are met, the circuit court may then find that representative notice under the Right to Cure Act is appropriate. Id. at 575-76, 703 S.E.2d at 204. Specifically, the Court instructed that, "[u]pon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites proponents of class actions are required to prove." Id. at 576, 703 S.E.2d at 204. The circuit court, of course, made this determination in favor of the Respondents. Having done this, "the court may then find that representative notice under the Right to Cure Act is appropriate." Id. The circuit court has likewise made this finding and outlined this process in the Preliminary Case Management and Scheduling Order. And, again, this Court has already finally dismissed Del Webb's appeal of the Preliminary Case Management and Scheduling Order, so the merits of circuit court's finding that representative compliance is appropriate

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appealable under § 14-3-330(1).

is not now before the Court. Of course, the Respondents contend that the circuit court has acted entirely consistent with the Grazia Court's directive and any challenge in this regard is frivolous.

Further, the enforcement mechanism of the Right to Cure Act is a stay of the action pending compliance with the Right to Cure Act. S.C. Code Ann. § 40-59-830. Accordingly, the most that Del Webb could have been denied on account of alleged noncompliance with Right to Cure Act is a stay, and an immediate appeal does not lie from an order denying a stay. *See* Carolina Water Service, Inc. v. Lexington County Joint Mun. Water and Sewer Comm'n, 373 S.C. 96, 644 S.E.2d 681 (2007) (holding that an order lifting a stay is not immediately appealable); Edwards, 369 S.C. at 94-5, 631 S.E.2d at 530-31 ("The order here does not discontinue the proceeding. It merely temporarily stays the matter pending a ruling by the FCC. Accordingly, we find an order granting a stay is not immediately appealable.").

Further still, the subject order does not prevent a judgment from being rendered in the action from which later appellate review may be sought. *Cf.* Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 809 (1995) (holding that the circuit court's refusal to enforce an alleged settlement agreement was not subject to immediate appeal under § 14-3-330, and

explaining that "[t]he order in this case does not prevent a judgment from being rendered in this action, and appellant can seek review of the current order in any appeal from final judgment."). And, of course, as a general proposition, allowing immediate appeals in conjunction with the Right to Cure Act will invite undue and dilatory interlocutory appeals.

Further still, finding the subject order not to be immediately appealable is consistent with the broad and continuing case management authority granted the circuit court under Rule 23(d), and also with the specific managerial role conferred upon Judge Young by the Order Establishing Complex Case Designation and Appointment of Judge Roger M. Young as Case Manager. (A copy of this order is attached hereto as **Exhibit 7**, which is incorporated herein by reference.)

CONCLUSION

For the foregoing reasons, the Respondents submit that the order appealed via Del Webb's (most recent) appeal noticed January 7, 2013 is not immediately appealable and that Del Webb's (most recent) appeal should be dismissed.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 3/15/13

The South Carolina Court of Appeals

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

v.

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

Of Whom, Del Webb Communities, Inc. an Arizona Corporation is, Appellant.

Appellate Case No. 2012-210927

ORDER

This appeal shall be consolidated with 2012-211920 and with the Notices of Appeal filed May 31, 2012, relating to "Order Regarding Interlocutory Appeals" and the order denying reconsideration of that order.

Appellant in 2012-210927 has appealed six orders, including the order denying a motion to stay the action pending compliance with section 40-59-810 of the South Carolina Code, the preliminary case management and scheduling order, the order approving notice of class action, the order denying a motion to conduct discovery as to individual class members, the order granting class certification, and the order denying a motion to reconsider the order granting class certification.

Exhibit 1

Appellant in 2012-211920 has appealed six orders, including the order denying a motion to stay the action pending compliance with section 40-59-810 of the South Carolina Code, the preliminary case management and scheduling order, the order approving a notice of class action, the order granting class certification, the order denying a motion to strike affidavits filed in support of the motion for class certification, and the order denying a motion to reconsider the orders granting class certification and denying the motion to strike.

Respondents, who are the same in both appeals, have filed a motion to dismiss, contending the underlying orders on appeal are not immediately appealable. After careful consideration, Respondents' motion to dismiss is granted. This consolidated appeal is dismissed because none of the underlying orders are immediately appealable. Additionally, the appeals from the "Order Regarding Interlocutory Appeals" and the order denying reconsideration are dismissed as moot.

Because the underlying orders have all been dismissed, this Court need not act on Appellant's petition for supersedeas.

FOR THE COURT

Columbia, South Carolina

FILED

Carter 6/1/12

cc:
Arthur Thomas Meeder
Edward D. Buckley, Jr.
Robert L. Widener
Joseph Edwin DaPore
A. Victor Rawl, Jr.
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Exhibit 1

received
1/16/13
07-0735

The South Carolina Court of Appeals

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

v.

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

Of Whom Del Webb Communities, Inc. an Arizona Corporation is the Appellant.

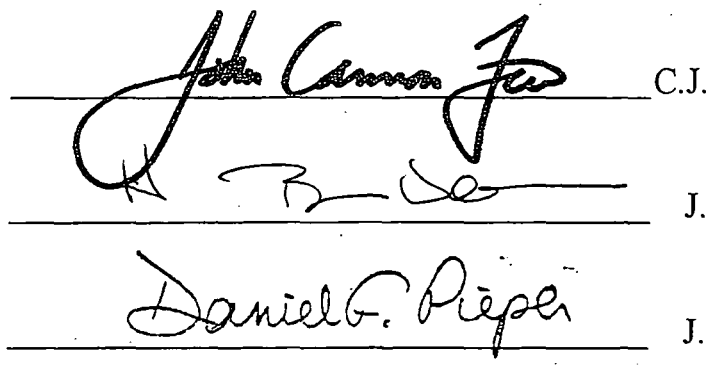
Appellate Case No. 2012-210927

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Exhibit 2

Exhibit 2



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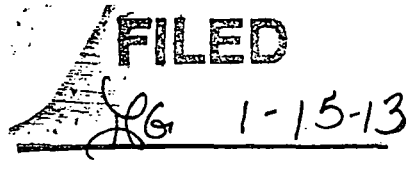
Columbia, South Carolina



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Arthur Cole Pelzer

Exhibit 2

Exhibit 2

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

12 APR -5 PM 1:16

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

1. April 5, 2012: Plaintiffs shall mail class notice in form approved by the Court to all putative class members on or before today;

2. May 15, 2012: Opt-out period ends;

3. May 28, 2012: Compliance with the Right-to-Cure Act will be accomplished on a representative basis through the class representatives. By the foregoing date, Plaintiffs must identify ten percent (10%) of the homes remaining in the class after the expiration of the opt-out

Exhibit 3

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

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

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

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

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

7. Discovery commences upon entry of Court's trial and discovery plan[1];

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

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

Exhibit 3

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

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

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

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

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

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

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

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

AND IT IS SO ORDERED.

Roger M. Young, Sr.
Presiding Circuit Court

_____, South Carolina

Dated 6/11/12

Exhibit 3

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-97-3166

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

v.

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

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

NOTICE OF APPEAL

Del Webb Communities, Inc., an Arizona Corporation, appeals the following orders of the Honorable Roger M. Young, Sr.: Order Denying Del Webb Communities, Inc.'s Motion to Stay Action Pending Compliance with SC Code § 40-59-810, *et seq.*, dated March 29, 2012; Preliminary Case Management and Scheduling Order, dated April 2, 2012; Order Approving Notice of Class Action, dated April 2, 2012; Order Denying Del Webb Communities, Inc.'s Motion to Conduct Discovery as to Individual Class Members, dated March 29, 2012; Order Granting Class Certification, dated October 5, 2011; and Order Denying Del Webb Communities, Inc.'s Motion for Reconsideration and/or Clarification, dated March 29, 2012.

Exhibit 4

April 2, 2012

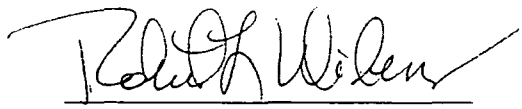

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Exhibit 4

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(Named in complaint as Georgia-Pacific Corporation and/or Georgia Pacific LLC)

Exhibit 4

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2007-CP-97-3166

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

v.

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

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

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

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

Exhibit 5

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

A. The "Right to Cure" Orders.

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

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

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

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

Exhibit 5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2007-CP-97-3166

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

v.

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

OF WHOM Georgia-Pacific Corporation and/or
Georgia Pacific LLC, and Del Webb Communities, Inc.,
an Arizona Corporation, are..... Appellants.

APPELLANT DELL WEBB'S PETITION FOR REHEARING

Appellant Del Webb respectfully submits this Petition for Rehearing regarding this Court's June 1, 2012, Order that granted the Respondents' motion to dismiss the above captioned appeal. This motion is made pursuant to Rule 221, SCACR and is based on the grounds set forth below.[1]

[1] Chief Judge Few signed the Order "FOR THE COURT," which presumably reflects that the Order is a full panel decision. If, however, Chief Judge Few was acting as a single judge, then this Petition is made pursuant to Rule 240(i), (j), SCACR.

Exhibit 6

otherwise avoid the binding effect of any settlement or judgment. Thus, the order is immediately appealable under § 14-3-330(2)(a), because it affects Del Webb's "substantial right" to the defenses of *res judicata* and the bar against claim-splitting after judgment or settlement, as well as its substantial contract right to recover defense fees and costs from some class members upon receiving a favorable judgment, and the order effectively decides the issue with finality, prevents the granting of any no meaningful relief after final judgment, and it will be difficult if not impossible to demonstrate prejudice in an appeal after final judgment.

C. The "Order Denying [Del Webb's] Motion to Stay Action Pending Compliance with [the Right to Cure Act]" and the "Preliminary Case Management and Scheduling Order," *i.e.*, the Right to Cure Orders, are immediately appealable under § 14-3-330(2)(a), because the orders affect the substantial rights granted by the Right to Cure Act to Del Webb, effectively decide the issue with finality, and no meaningful relief can be granted in an appeal after final judgment. The undisputed evidence from the plaintiffs' own experts demonstrates that representative compliance with the Right to Cure Act is not possible in this case in terms of notice or inspection. Moreover, the order requires any settlement offer must be class-wide, but the Right to Cure Act envisions individual settlement offers. The notice, inspection, and settlement offers envisioned by the Right to Cure Act are to occur before proceeding with the trial, and the wrongful denial of these statutory, pre-trial rights cannot be remedied or vindicated in an appeal after final judgment, and it will be difficult if not impossible to demonstrate prejudice in an appeal after final judgment.

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

Exhibit 6

the orders discussed above are inextricably intertwined with dominant and controlling issues on whether class certification is appropriate. Thus, it would be in the best interest of the parties, including all class members, and the courts to review the issue of class certification.

II. If this Court does not amend its order as requested in Ground I, above, this Court should issue an amended order that addresses the matters raised in the Returns of Del Webb and Georgia-Pacific, and that explains the basis for this Court's ruling that the appealed orders are not immediately appealable.

As noted earlier, this Court's Order does not address the matters raised in the Returns of Del Webb or Georgia-Pacific. If this Court does not grant the relief requested in Ground I, then Del Webb respectfully requests an amended order that addresses the matters raised in both Returns and explains the basis for this Court's ruling that the appealed orders are not immediately appealable. Absent such an amended order, Del Webb cannot make a meaningful petition for rehearing except to resubmit all grounds raised in the Returns, which has been done in Ground I.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Georgia-Pacific's petition for rehearing, which are incorporated herein by reference, it is respectfully submitted that this Court should issue an amended order that denies the Respondents' Motion to Dismiss Appeal and grants the relief requested with respect to the trial court's "Order Regarding Interlocutory Appeals." In the alternative, it is respectfully submitted that this Court should issue an amended order that addresses the matters raised in the Returns of Del Webb and Georgia-Pacific, and that explains the basis for this Court's ruling that the appealed orders are not immediately appealable.

Exhibit 6

STATE OF SOUTH CAROLINA 2008 MAY 28 AM 11:44

COUNTY OF BEAUFORT

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2007-CP-07-3166

Jim Lancaster, Nancy Lancaster, Art Holland, Jeannette Holland, Mr. and Mrs. Wendell Turner, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

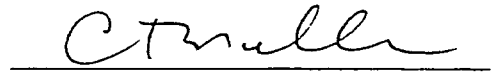
Georgia-Pacific Corporation and Grayco Home Center, Inc.,

Defendants.

ORDER ESTABLISHING COMPLEX CASE DESIGNATION AND APPOINTMENT OF JUDGE ROGER M. YOUNG AS CASE MANAGER

IT IS ORDERED that the above-captioned case be designated as complex and that the trial of the case take place at some point after August 1, 2009.

IT IS FUTHER ORDERED that this case be assigned to S.C. Circuit Judge Roger M. Young and that Judge Young hear and handle all pre-trial motions, scheduling matters, and other matters pertaining to this case.



Judge Carmen T. Mullen
Chief Administrative Judge,
Fourteenth Judicial Circuit

5-28, 2008
Beaufort, South Carolina

Exhibit 7