THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

The Honorable Roger M. Young, Sr.
Charleston County
Presiding Judge, Circuit Court

Case No. 10-CP-10-8911

Ellington Woods I Homeowners Association, Inc; Ellington Woods II Homeowners Association, Inc; Ellington Woods III Homeowners Association, Inc.; Ellington Woods IV Homeowners Association, Inc.; Ellington Woods V Homeowners Association, Inc.; Alan Arthur, individually and as class representative; and John Doe,.....Respondents

v.

Dunes West Property Owners Association, Inc.,.....Appellant

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT IMPROPERLY GRANTED THE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AS THE TRIAL COURT'S ORDER DOES NOT ADEQUATELY ADDRESS THE REQUIREMENTS NECESSARY FOR CLASS CERTIFICATION WHERE THE PLAINTIFFS HAVE NOT AND CANNOT SATISFY THE REQUIREMENTS FOR CLASS CERTIFICATION PURSUANT TO RULE 23(a) SCRCP.....11

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STATEMENT OF THE CASE

This matter began as a petition for records under the South Carolina Non-Profit Corporation Act, S.C. Code Ann. §33-31-1604, et seq. (1976, as amended). The Plaintiffs sought information regarding homeowners' association dues paid by homeowners living outside of the security gate at the Dunes West subdivision in Mt. Pleasant. (Petition dated July 25, 2006). The Plaintiffs moved to amend their Complaint to allege a derivative action pursuant to Rule 23(b) SCRCP and to seek a permanent injunction which amendment was granted by Order of the Honorable Kristi Harrington on September 18, 2008. (Order dated September 18, 2008). The Defendants moved to have the derivative action dismissed based upon the failure of the Plaintiff, Alan Arthur, to comply with the requirements of Rule 23(b) SCRCP for a derivative action. (Motion, November 10, 2010). The case was referred to The Honorable Mikell R.Scarborough by consent. (Consent Order dated March 11, 2009). Judge Scarborough heard the motion to dismiss the derivative action. At the hearing on August 12, 2011, the Plaintiff withdrew the derivative action and sought to amend the Complaint to bring this matter, instead, as a class action and asserting causes of action for negligence and for an injunction regarding the payment of dues for property owners living outside the security gate at Dunes West. The Second Amended Complaint was filed on August 22, 2011. (Second Amended Complaint, 8/22/11).

The Plaintiffs filed a Motion for Class Certification on March 22, 2012. (Motion, March 22, 2012). In response, the Defendant filed a Memorandum in Opposition to the Plaintiffs' Motion for Class Certification. (Dunes' Memo, June 25, 2012). The Honorable Roger M. Young, Sr. heard oral arguments on the Plaintiffs' Motion for Class

Certification on June 26, 2012. Judge Young granted the Plaintiffs' Motion for Class Certification by Order dated October 22, 2012 and filed October 26, 2012. (Order dated October 22, 2012).

The Defendant filed a Motion to Reconsider the Order granting Class Certification to the Plaintiffs asserting that the Order did not adequately address the requirements necessary for class certification under South Carolina case law and reasserting the Plaintiffs' failure to meet the requirements for class certification. (Motion, November 13, 2012). Judge Young denied the Defendant's Motion to Reconsider by an Order dated December 31, 2012, and filed January 2, 2013. (Order dated December 31, 2012).

The Defendant, by its counsel, received the Order Denying Motion to Reconsider on January 3, 2013. The Defendant filed its Notice of Appeal on January 31, 2013. (Notice, January 31, 2013).

STATEMENT OF FACTS

The Defendant Dunes West Property Owners Association, Inc. ("Dunes West POA") is a neighborhood association with approximately 2,200 lots that are part of the Dunes West subdivision in Mount Pleasant. (Transcript of Hearing, pg. 3). There are several sub-association subdivisions at Dunes West located both inside and outside of the security gate of Dunes West located on the main entry into Dunes West. (*Id.*) There are approximately 671 lot owners outside of the security gate in the entire Dunes West subdivision. (*Id.*) The Dunes West Covenants, Conditions and Restrictions govern all the neighborhoods in Dunes West, both outside and inside the security gate. (Dunes Covenants). Dunes West currently owns and maintains 672.93 acres of real property. (Dunes Answers to First Interrogatories, 4/7/09, pgs. 7-8). Of that, there are 366.02 acres outside the gate at Dunes West. (*Id.*) A property owner in Dunes West receives management of the property, management of dues paid, facilitation of the organization of the community, rules to live by for the whole subdivision, covenants, architectural review, and other services provided by the Dunes West POA. (Depo. of Kearley, pg. 74).

The Plaintiffs, Ellington Woods I Homeowners Association, Inc., Ellington Woods II Homeowners Association, Inc.; Ellington Woods III Homeowners Association, Inc.; Ellington Woods IV Homeowners Association, Inc.; and Ellington Woods V Homeowners Association, Inc. are neighborhoods located outside of the security gate. (Transcript of Hearing, pgs. 2-3). The Plaintiff, Alan Arthur, is a homeowner and member of the Ellington Woods III Homeowners Association who is the named so-called class representative. (Transcript of Hearing, pg. 2).

Mr. Arthur was a Board member of Ellington Woods III Homeowners Association from 2005 until the beginning of 2009. (Depo. of Arthur, Vol. 1, pgs. 22-23). He served as the President of the Board from approximately 2007 until the beginning of 2009. (*Id.*) While serving as President of the Board, Mr. Arthur also participated in the "CSA" Board. (Depo. of Arthur, Vol. 1, pgs. 22-25). The CSA, Community Services Association, is an "umbrella group board that oversees the common areas of Ellington Woods" and manages these sub-associations. (Depo. of Marian Jones, pg. 17).

At some point prior to his service on the Board of Ellington Woods, Mr. Arthur was designated by the members of the CSA Board to meet with the Dunes West Board regarding the assessments charged by the Dunes West POA to the Ellington Woods residents. (Depo. of Arthur, Vol. 1, pgs. 25-27). The Dunes West POA Board of Directors has two meetings a month. (Depo. of Kearley, pg. 13). The first Board meeting of each month is focused on the financial items of the Dunes West POA. (*Id.*). Mr. Arthur initially met with the Dunes West Board in March 2006 to discuss the details of the annual charge by the Dunes West POA to the Ellington Woods residents, requesting an explanation of the charges. (Depo. of Arthur, Vol. 1, pgs. 38-39). Mr. Arthur testified that the Dunes West Board did not provide an explanation of the charges to the Ellington Woods residents at that March meeting to his satisfaction. (*Id.*)

Mr. Arthur created his own "breakdown" of the figures, with what he believed affected the residents inside and outside of the security gate. (Depo. of Arthur, Vol. 1, pgs. 39-40). Mr. Arthur, along with his counsel, attended another meeting in 2007 with the Dunes West Board at which time he presented his "breakdown figures". (*Id.*) Mr.

Arthur alleged that the Dunes West POA was overcharging residents outside of the gate based on his assessing the payments. (*Id.*)

Not satisfied with his discussions at the two prior meetings, Mr. Arthur met with the Dunes West Board for a third time in the first half of 2008. (Depo. of Arthur, Vol. 1, pg. 40). Mr. Arthur insinuated that items such as street lights, more of which are installed inside the gate versus outside the gate, should be proportionately charged to the residents of Ellington Woods. (*Id.*) The Dunes West Board explained that costs for the street lights are a "common expense", e.g. one that all members of the Dunes West POA share in equally. (*Id.*)

The common expenses are funded by the Annual Assessment as outlined in the Declaration of Covenants, Conditions and Restrictions for Dunes West as recorded in the RMC Office for Charleston County in Book W188 at Page 167. (Dunes Covenants, §12.3, et seq.). The "common expenses" include those fees, services, and expenses that serve the Common Areas and Open Space areas that are part of the Association. (*Id.*) It is within the discretion of the Board of Directors of the Dunes West POA to designate certain fees and expenses as common expenses. (*Id.*)

Mr. Arthur and a few other residents filed a petition for records from the Dunes West POA in 2006. (Transcript of Hearing, pgs. 4, 15). That petition was then amended to assert a derivative action on behalf of the Plaintiffs. (Transcript of Hearing, pg. 15). That was withdrawn. (Transcript of Hearing, pg. 6).

The Plaintiffs' lawsuit alleges that the Dunes West Board incorrectly calculated the dues for residents outside of the gate. (Depo. of Kearley, pg. 45, First Amended Complaint). The Defendants have alleged the Plaintiffs have failed to make their

assessment payments to the Dunes West POA, in breach of the Covenants. (Answer and Counterclaim to First Amended Complaint, 12/30/08) Mr. Arthur testified that he brought this lawsuit on behalf of some of the residents in Ellington Woods who feel their assessments have never been adequately explained, but not all of the residents. (Transcript of Hearing, pg. 18). Yet, numerous residents outside of the security gate have paid and continue to pay the assessments to the Dunes West POA without issue and without protest. (*Id.*) Mr. Arthur has also made his payments and supported the Dunes West POA. (Proxy Ballot of Alan Arthur, 12/10/11).

The Dunes West POA Board manages the landscaping, irrigation, utilities, maintenance, taxes, management fees, insurance, decals, staff, architectural review, and any other related issues for all of the Dunes West community, including these issues for residents residing outside of the security gate. (Dunes Answers to First Interrogatories, 4/7/09). For example, the Dunes West POA Board provided review and approval of a new entrance sign for Ellington Woods, including the "revamping of the lighting situation for that sign." (Depo. of Marian Jones, pg. 26). The Dunes West POA Board, pursuant to the Dunes West Covenants and amendments, governs the CSA and Ellington Woods related to any substantive changes, such as the replacement of the subdivision's sign. (*Id.*)

The Dunes West POA's relationship with the Ellington Woods subdivision is outlined specifically in the Sixteenth Supplemental Declaration of Covenants, Conditions and Restrictions for the Dunes West POA. (16th Supplemental Covenants of Dunes West, 11/4/97, Book A293, page 147). The residents in Ellington Woods

> shall pay an annual assessment less than that paid by other owners of property subject to the Declaration...reflecting only assessments for

> the use and benefit of owners of dwellings within Ellington Woods from the common areas of Dunes West Boulevard, landscaping along Dunes West Boulevard, and entry facilities and landscaping along Dunes West Boulevard, those being expenses and reserves attributable to the ownership and maintenance of said areas as well as insurance, taxes, and management expenses associated with managing such areas and said owners' memberships in the Association, each such owner and member shall be prohibited or restricted in the use of or access to common areas of the Association north of the intersection of Dunes West Boulevard and Wando Plantation Way.

(16th Supp. Covenants of Dunes West, 11/4/97, Book A293, page 147).

The Dunes West POA Board of Directors calculate the assessments for residents outside of the gate upon what it deems to be a fair assessment for the owners in the Dunes West community, including any sub-association, horizontal property regime, or property owners' association. (Dunes' Answers to First Interrogatories, 4/7/09, pg. 6). The Board does not utilize a set formula for assessments, as it is granted discretion through the Covenants. (*Id.*) Other than a crab dock and the security gate, the residents inside the gate at Dunes West do not receive any other significant benefits over those residents who live outside of the gate. (Depo. of Kearley, pg. 73). The staff of the Dunes West POA dedicates more time to issues relating to properties outside of the gate because of the disproportionate incidents of covenant violations occurring in subdivisions outside of the gate. (Depo. of Kearley, pg. 58). The gate is not the sole delineation of assessment allocations for homes in the Dunes West community. (Depo. of Kearley, pgs. 73-74).

The dispute centers on Alan Arthur's contention that he has been unfairly assessed. He feels slighted. (Depo. of Arthur, Vol. 1, pgs. 30-31). He feels he was treated rudely at prior Board meetings. (*Id.*) He now seeks to bring a class action where he cannot meet the requirements of Rule 23(a) SCRCP. Mr. Arthur testified as follows:

Mr. O'Kelley: You are aware that in the lawsuit we are here about today, you are basically challenging the management or the way that Dunes West is managed, correct? Let me ask it this way. You have brought what is called a derivative suit?
Mr. Arthur: Yes
Mr. O'Kelley: What is your understanding of what a derivative suit is?
Mr. Arthur: I do not understand a derivative suit. My lawyer recommended a derivative suit. I'm not conversant with the ins and outs of South Carolina law regarding this kind of thing.
Mr. O'Kelley: You are aware that you brought a derivative action, though, correct? Is that a yes?
Mr. Arthur: Yes.
Mr. O'Kelley: And you are aware that that derivative action would be on behalf of the Dunes West Property Owners Association?
Mr. Arthur: ...I don't understand how that could be but...
Mr. O'Kelley: I think your testimony was that you are not conversant with South Carolina law, so you don't really understand the way that a derivative action works; is that correct?
Mr. Arthur: My lawyer recommended that this was the way to go. My feeling is that I trust my lawyer.

(Depo. of Arthur, Vol. 2, pgs. 108-111).

STANDARD OF REVIEW

The Trial Court's ruling to either certify or deny a class under Rule 23(a) SCRCP, "...will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. School Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) citing *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.*

ARGUMENT

I. THE TRIAL COURT IMPROPERLY GRANTED THE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AS THE TRIAL COURT'S ORDER DOES NOT ADEQUATELY ADDRESS THE REQUIREMENTS NECESSARY FOR CLASS CERTIFICATION WHERE THE PLAINTIFFS HAVE NOT AND CANNOT SATISFY THE REQUIREMENTS FOR CLASS CERTIFICATION PURSUANT TO RULE 23(a) SCRCP

The Trial Court improperly granted the Plaintiffs' Class Certification, as it did not adequately address the requirements necessary for class certification under South Carolina case law and which the Plaintiffs cannot satisfy. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990). The Trial Court failed to apply the necessary "...rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied." *Id.* The grant of class certification is improper because of the Trial Court's failure to apply this standard and this is an abuse of discretion.

The Trial Court does have discretion in determining whether a matter is "...properly maintainable as a class action..." but "the failure of the proponents to satisfy any ***one*** of the prerequisites is ***fatal*** to class certification." *Id.* (emphasis added). The basis of Mr. Arthur's dispute with the Dunes West POA relates to his contention that he has been unfairly assessed by the Dunes West Association and has been slighted by the Board of Directors for Dunes West. (Depo. of Arthur, Vol. 2). Mr. Arthur's issue is personal. (Depo. of Arthur, Vol. 1, pgs. 28, 30). He cannot meet the prerequisites of a class action as an adequate class representative. (Id.)

The Trial Court did not thoroughly consider the adequacy of the representation by Mr. Arthur. Mr. Arthur's own testimony shows he cannot satisfy this requirement:

> Mr. O'Kelley: You are aware that you brought a derivative action, though, correct? Is that a yes?

Mr. Arthur: Yes.
Mr. O'Kelley: And you are aware that that derivative action would be on behalf of the Dunes West Property Owners Association?
Mr. Arthur: ...I don't understand how that could be but...
Mr. O'Kelley: I think your testimony was that you are not conversant with South Carolina law, so you don't really understand the way that a derivative action works; is that correct?
Mr. Arthur: My lawyer recommended that this was the way to go. My feeling is that I trust my lawyer.
Mr. O'Kelley: ...Are you aware that it has been stated that you will adequately and fairly represent the interest of the members, of the folks on whose behalf you have brought this derivative action?
Mr. Arthur: Uh-huh, yes, sir.
Mr. O'Kelley: But yet you don't understand derivative actions or the way they work?
Mr. Arthur: I understand what a derivative action is at a theoretical level. I cannot quote you chapter and verse about the law regarding derivative actions.
Mr. O'Kelley: Dunes West is not a plaintiff. Dunes West Property Owners Association is not a plaintiff in this case, are they?
Mr. Arthur: I don't see how they could be.

(Depo. of Arthur, Vol. 2, pgs. 110-112).

Mr. Arthur is unable to adequately represent the proposed class because he does not understand the meaning of a derivative action and in turn, is unable to understand the purpose of the proposed class action suit. The grant of class certification in this matter is an abuse of discretion because the class certification fails if ***any*** factor is not met. The case law clearly establishes requirements for an adequate class representative by looking at two factors. *See Runion v. U.S. Shelter*, 98 F.R.D. 313 (D.S.C. 1983). The representative must have common interests with the unnamed members of the class, and

it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel.

"The fact that a proposed class representative is a property owner in a large or highly populated development does not, in and of itself, qualify him to bring a class action on behalf of the remaining property owners." *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990) citing *Graham v. Dev. Specialists, Inc.*, 350 S.E.2d 294 (1986). The record before the Trial Court proved that Mr. Arthur's concerns regarding the allocation of his assessments paid to the Dunes West POA are a personal matter and do not extend to all residents outside of the gate. (Transcript of Hearing, pg. 18). Mr. Arthur is unable to adequately represent the proposed members of the class because he does not understand derivative actions or class actions. (Depo. of Arthur, Vol. 2, pgs. 110-112, 115-116).

In addition to Mr. Arthur's inability to understand a derivative action or class action, his interests in pursuing the Dunes West POA are antagonistic and adverse to the members of the proposed class. *See Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) citing *Runion v. U.S. Shelter*, 98 F.R.D. 313 (D.S.C. 1983). The residents of the Ellington Woods subdivision are part of the Dunes West POA and are not isolated from the results of this litigation, including the financial impact on the Dunes West POA. Mr. Arthur does not understand the potential harm to the Dunes West POA as a result of the class certification. (Depo. of Arthur, Vol. 2, pgs. 112-113). Mr. Arthur repeatedly states that he wants to fairly and adequately represent the people outside of the security gate. (Depo. of Arthur, Vol. 2, pg. 112). Yet, it is well established that "the class representative must voluntarily accept a fiduciary

obligation towards all members of the putative class." *Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983) citing *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978). Mr. Arthur cannot fulfill his fiduciary duty to the proposed members of the class due to his lack of understanding and cannot provide adequate representation.

Mr. Arthur does not understand the budget and fee structure of the Dunes West POA and continues to focus his analysis only on his personal experience. (Depo. of Arthur, Vol. 2, pgs. 94-95). Mr. Arthur fails to recognize the income derived solely from decals issued to homeowners inside the security gate that benefits those homeowners outside of the security gate. (*Id.* at 100). The Plaintiffs should not have been granted class certification when the record clearly revealed that the named class representative does not adequately represent the so-called class. (Transcript of Hearing, pg. 18).

Pursuant to Rule 217 SCRCP (2009), permission of the appellate court shall not be required to argue against precedent in the brief. The South Carolina Supreme Court has held that class certification is procedural in nature and does not affect a substantial or legal right. *Knowles v. Standards Sav. and Loan Assoc.*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979). In certain circumstances, such interlocutory judgments are immediately appealable when the Court believes its examination is necessary to protect the interest of the parties. *See Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). In the case at hand, the abuse of discretion by the Trial Court in granting class certification warrants special circumstances to be examined on appeal.

A. THE TRIAL COURT'S GRANT OF CLASS CERTIFICATION TO THE PLAINTIFFS AFFECTS THE DEFENDANT'S MODE OF TRIAL SO THAT THE GRANT OF CLASS CERTIFICATION SHOULD BE REVIEWED BY THIS COURT

Although orders under Rule 23, SCRCP are interlocutory, they are immediately appealable in certain circumstances. *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). "Pursuant to S.C. Code Ann. §14-3-330(2), this Court held on numerous occasions that when a trial courts' order deprives a party of a mode of trial to which it is entitled to as a matter of right, such order is immediately appealable." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 452, 661 S.E.2d 81, 87, (2008), citing *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Although the *Salmonsen* case asserts that a certification of class is not immediately appealable on its own, it does recognize that if the issuance of the order deprives a party of a mode of trial, then that order is immediately appealable. *Id.* This matter should not move forward as a class action because of the Plaintiffs' failure to meet all of the necessary requirements of a class action pursuant to Rule 23(a) SCRCP. The Defendant will be denied the opportunity to try the singular and personal issue brought by Mr. Arthur, instead thrust into the complexity of an unnecessary class action suit.

Pursuant to S.C. Code Ann. §14-3-330, the Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: (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. The trial court's grant of class certification to the Plaintiffs does determine the action and mode of trial going forward in the instant case, including the

way the matter will be tried, notice to class members, opt-out provisions, publications, and, ultimately, the call of witnesses and experts.

In *Salmonsen*, this Court examined the discretion upheld in *Lienhart v. Dryvit Systems, Inc.*, in that the review of an appeal of a class certification is discretionary to the court. 255 F.3d 138, 142 (4th Cir. 2001), *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, (2008). In *Lienhart*, the Fourth Circuit Court of Appeals held that a grant of class certification may be appropriately reviewed under a five factor test. *Lienhart, et al. v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001). The factors are: "...(1) whether the certification ruling is likely dispositive of the litigation; (2) whether the district court's certification decision contains a substantial weakness; (3) whether the appeal will permit the resolution of an unsettled legal question of general importance; (4) the nature and status of the litigation before the district court (such as the presence of outstanding dispositive motions and the status of discovery); and (5) the likelihood that future events will make appellate review more or less appropriate." *Lienhart, et al. v. Dryvit Systems, Inc.*, 255 F.3d at 144 (4th Cir. 2001).

Reexamining the analysis in *Salmonsen*, the Defendant, *CGD*, established that the "...modern trend in state and federal jurisdictions is to allow review of class certification orders under certain circumstances." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 449, 661 S.E.2d 81, 85 (2008). As outlined in *Lienhart*, the appellate courts are granted discretion in "...the resolution of legal questions of general importance...[when] promot[ing] judicial economy by enabling the correction of certain manifestly flawed class certifications prior to trial and final judgment." *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 145 (4th Cir. 2001).

"The weakness of the district court's certification, viewed in terms of the likelihood of reversal under an abuse of discretion standard, operates on a 'sliding scale' in conjunction with the other factors enumerated by the Eleventh Circuit in *Prado-Steiman*." *Id.* In the instant case, the record of the trial court clearly evidences an abuse of discretion in the grant of class certification when all of the factors for class certification were not met by the Plaintiffs. (Motion to Reconsider, 11/13/12).

> Mr. Tecklenburg: With respect to Mr. Arthur, please look carefully at the deposition testimony cited in the Defendant's brief. Because one of the things [Defendant's counsel] asks: Are you aware that it has been stated that you will adequately and fairly represent the interests of the members, of the folks on whose behalf you have brought this derivative action. Mr. Arthur said "Uh-hum. Yes, sir." He's testified...that he wants to fairly and adequately represent the people outside the gate. Sure, he may not be a lawyer. He may not understand the definitions of a derivative action. He may not understand everything that is required in Rule 23. That's not his obligation. His obligation is whether he will be fair, and will he take them on impartially, and he has agreed to do that.
>
> Judge Young: I have got seven of them assigned to me, and there are days that I'm not clear on it. So, I'm not going to hold it against a layman.

(Transcript of Hearing, 6/26/12, pgs.21-22)

The trial court did not thoroughly consider the adequacy of the representation by Mr. Arthur, in that Mr. Arthur's dispute with Dunes West remains personal and lacking in common interests with the unnamed members of the class as stated by Judge Young. (Transcript of Hearing, 6/26/12, pgs. 21-22).

In the instant case, if the class certification is not overturned, the Defendant is then expected to bear the burden of excessive costs and fees associated with proceeding under the class action. If applied by this Court in the instant case, it is evident that the

burden on the Defendant pursuant to the class certification far exceeds the impact on the Plaintiffs if the class is decertified. The class proposed by the Plaintiffs is defective, and it "...would waste, rather than conserve, judicial resources...[to] proceed through trial to final judgment, only to face certain decertification on appeal and a requirement that the process being again from square one" especially where this is ultimately a personal dispute. *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).

Although this Court recognizes the challenge to grant review of similar appealed orders, it does so where a later appeal does not limit the parties' recovery. *See Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81, (2008). The certification of the class in the case at hand significantly affects the mode of trial for the Defendant and limits the Defendant's recovery in that it "...effectively ends the litigation because it produces irresistible pressure on the defendant to settle..." *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 143 (4th Cir. 2001). "Some plaintiffs or even some district judges may be tempted to use the class device to wring settlements from defendants whose legal positions are justified but unpopular...[thus] the interaction of procedure with the merits justifies an earlier appellate look." *Id.* citing *Blair v. Equifax Check Serv., Inc.*, 181 F.3d 832 (7th Cir. 1999). Property owners' association assessments are necessary to continue the management and maintenance of the neighborhood but no one enjoys paying them. Regardless of their appeal, the assessments ensure the safety and continued success of the community, of which the Board is responsible for by election of the homeowners. Mr. Arthur, as an individual homeowner, may disagree with the assessment costs but that does not justify the need for class certification in this matter, especially where there is not an outcry from the folks living outside the security gate regarding the assessments.

B. THE TRIAL COURT SHOULD NOT HAVE GRANTED CLASS CERTIFICATION TO THE PLAINTIFFS WHERE THE PLAINTIFFS FAILED TO MEET THE BURDEN OF PROVING THAT ALL PREREQUISITES HAVE BEEN MET

The Trial Court abused its discretion in awarding class certification to the Plaintiffs where the Plaintiffs failed to meet all of the necessary requirements under Rule 23(a) SCRCP. (Dunes' Motion to Reconsider, 11/13/12). The Trial Court's grant of class certification in light of Mr. Arthur's inadequacy as a class representative is an abuse of discretion because the class certification fails if **any** factor is not met.

The turning phrase in *Runion* is "common interests" in that the representative "...should not have any significant antagonistic or conflicting interests to the unnamed members of the class." *Runion v. U.S. Shelter*, 98 F.R.D. 313 (D.S.C. 1983). Mr. Arthur's personal interests conflict with unnamed members of the proposed class because he continues to pursue a claim that he and only a handful of other residents find of concern, in complete contravention to the remaining property owners who have no issue with the allocation of assessments. These unnamed members of the proposed class pay their annual assessments to the Dunes West POA without issue as to the allocation. (Transcript of Hearing, pg. 18). Any class award or settlement will have to be funded by an assessment of those living outside and inside the security gate, creating inherent conflict.

The distinction of conflicting interests is necessary to meet the adequacy prerequisite under this Rule. In *Waller*, the interests of the marshfront property owners were adverse to those interests of the beachfront property owners. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990). Because of the distinction in *Waller*, the appellants failed to meet the adequacy prerequisite under the

Rule. *Id.* In *Waller*, the interests of the proposed class representatives as marshfront property owners were adverse and antagonistic to the beachfront property owners who were part of the proposed putative class of all property owners. *Id.* at 469. The appellants in *Waller* could not adequately represent all property owners because of their adverse and antagonistic interests to a portion of the proposed class members. *Id.* The class certification was not granted in *Waller* for the failure of **one** prerequisite. *Id.*

In the present case, the Trial Court failed to recognize the distinction in granting the class certification. Mr. Arthur's alleged issue with the Defendant is not maintained by all unnamed members of the proposed class. The majority of homeowners in Dunes West pay their assessments and do not dispute the allocation of the assessments by the Dunes West POA. (Transcript of Hearing, pg. 18). The Trial Court's Order Granting Class Certification and the Order Denying the Defendant's Motion to Reconsider do not address this important distinction. (Order Granting Class Certification, 10/22/12, Order Denying Motion to Reconsider, 12/31/12). In *Waller*, the appellants alleged that they, as marshfront property owners, did not benefit from the beach renourishment assessment and asserting that the assessment was the responsibility of the beachfront property owners. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 466, 388 S.E.2d 799, 800 (1990). The beach renourishment assessment was intended for the mutual benefit of all of the property owners in the association, including those marshfront property owners. (*Id.* at 469). The Plaintiffs in the present case benefit from the assessments paid by those homeowners living inside and outside the security gate at Dunes West, as they are all part of the Dunes West POA utilizing the same services. (Depo. of Kearley, pgs. 73-74).

In addition to Mr. Arthur's failure to meet the adequate representation prerequisite, there is also no commonality as to the issue presented by Mr. Arthur and the other unnamed members of the class. *Gardner v. S.C. Dept. of Revenue, et al.*, 353 S.C. 1, 577 S.E.2d 190 (2003). The Order indicates that the commonality is established by the Covenants of Dunes affecting all property owners. (Order Granting Class Certification, 10/26/12). However, the commonality issue requires more than just a mere commonality such as general covenants and restrictions. *See Gardner v. S.C. Dept. of Revenue, et al.*, 353 S.C. 1, 577 S.E.2d 190 (2003). Instead the Court must look for commonality ***and*** an issue that warrants class certification for proper resolution. *See Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539 (D.S.C. 2000) (emphasis added).

Although the Covenants of Dunes West govern the residents of Ellington Woods, there is no sweeping issue related to the Dunes West Covenants that affects all or even a majority of the Ellington Woods residents and for which there is a demand that some individual lawsuit cannot handle. There are more than minor factual differences between individual cases of proposed class members. *Gardner v. S.C. Dept. of Revenue, et al.*, 353 S.C. 1, 22, 577 S.E.2d 190, 201 (2003). Mr. Arthur's personal issues during his meetings with the Board do not translate to all of the homeowners in the Ellington Woods subdivision. (Depo. of Arthur, Vol. 1, pgs. 30-31). Mr. Arthur's primary residency at Ellington Woods does not translate to all of the homeowners in Ellington Woods. (Depo. of Arthur, Vol. 1, pg. 12). The common element of home ownership does not equal commonality among the proposed members of the class because each homeowner has a different set of facts related to his ownership of property in Ellington Woods and his

relationship with the Dunes West POA. *Gardner v. S.C. Dept. of Revenue, et al.*, 353 S.C. 1, 22-23, 577 S.E.2d 190, 201 (2003).

The Trial Court's Order Granting Class Certification does not address the fact that most property owners do not object to the allocation of their assessments and are not privy to the ongoing personal dispute with Mr. Arthur and Dunes West. (Order Granting Class Certification, 10/22/12). It is ***imperative*** the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied. *Waller v. Seabrook Island Property Owners Ass'n*, 388 S.E.2d 799, 300 S.C. 465 (1990) citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (emphasis added). The failure of the proponents to satisfy ***any one*** of the prerequisites is fatal to class certification. *Id.* citing *Tolbert v. Daniel Const. Co.*, 332 F.Supp. 772 (D.S.C. 1971) (emphasis added). Proponents of the class certification have the burden of proving these prerequisites of class certification have been met. *Waller v. Seabrook Island Property Owners Ass'n*, 388 S.E.2d 799, 300 S.C. 465 (1990) citing *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977). Much like *Waller*, living in a highly populated development does not qualify Mr. Arthur. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). *Waller* related to assessments, too, and was determined to not warrant class treatment. *Id.* Rarely is a case so directly on point.

The Trial Court Order Granting Class Certification also indicates that the claim by Mr. Arthur is "typical of the claims of the class." (Rule 23(a) SCRCP). The Trial Court relied on the allegations by Mr. Arthur that all unnamed members of the class have been harmed. Only Mr. Arthur and a few other residents of Ellington Woods dispute the allocation of their assessments. (Transcript of Hearing, pg. 18). There is no evidence of

complaints from a majority of homeowners and no evidence of any consistent issue with the dues structure. (Transcript of Hearing, pg. 19). Further, Mr. Arthur consented to the Dunes West POA Board's 2012 discretionary budget change for properties inside and outside of the gate in contravention to his prior complaints. (Proxy of Alan Arthur, 12/10/11).

(i) THE PLAINTIFFS' JOINDER OF ALL MEMBERS IS NOT IMPRACTICABLE

It would be practicable to join all potential class members as they are identifiable and within Dunes West as current or former property owners. "To establish numerosity, the class must be of such a size that joinder of all members is impracticable." *Lott, et al. v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539 (D.S.C. 2000) citing *Holsey v. Armour Co.*, 743 F.2d 199, 217 (4th Cir. 1984). The practicability of class certification depends on the class size, ease of identification and contact information, as well as the ability to serve individuals if included in the action. *Id.* at 550. **"No bright line test exists for determining numerosity, however, and the determination rests on the court's practical judgment in light of the particular facts of the case."** *Id.* citing *Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 348 (S.D.Ga. 1996) (emphasis added). The proposed class members in this case are known and identifiable. The contact information for the proposed class members was provided in the Owners' Directory produced by the Defendants and made available to the Plaintiffs as well. (Dunes' Memo in Opposition to the Plaintiffs' Motion for Class Certification, 6/25/12).

The property owners who are the intended members of the class are and continue to be easily identified and known to the Parties. The list of owners from 2004 to the

present is available. (Dunes' Memo in Opposition to the Plaintiffs' Motion for Class Certification, 6/25/12). The owners' addresses are readily available on the list, and the ability to serve the owners would not be impracticable. The problem for the Plaintiffs is that most of these owners pay dues without any problems or protest.

Much like in *Waller v. Seabrook Island Property Owners Association*, this case arises from disputes over assessments. 300 S.C. 465, 388 S.E.2d 799 (1990). The Supreme Court in *Waller* determined that class certification was not appropriate. The case *sub judice* is truly on all fours with the dispute in *Waller*. In *Waller*, the named Plaintiff claimed to be injured due to the way in which the Seabrook Island Property Owners Association assessed owners living in different parts of Seabrook Island. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990). The dispute was not properly a class action. *Id.* Neither is this matter because Mr. Arthur also claims to be injured due to the way in which the Dunes West POA assesses owners living outside the security gate versus inside the security gate. (Second Amended Complaint, 8/22/11). It is a dispute by one property owner who has since consented to the assessments paid and whose fellow class members are not in dispute.

Mr. Arthur failed to show that his role as class representative is more than just another property owner in Dunes West, in that he shares the same issues with other members of the class. In *Waller*, the appellants owned marshfront property while challenging the purpose of the special assessment intended to benefit beach properties. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990). The distinction between the marshfront property owners and the beachfront property owners translates to the present case because the disapproval of assessment allocations by

Mr. Arthur and a few other property owners does not equate to an issue across the board necessitating a class action suit. Mr. Arthur's grievance with the allocation of assessments is personal and not representative of the property owners as most property owners have paid their dues without protest and without any injury.

Residents of Dunes West POA living inside the security gate pay a larger assessment annually than those homeowners living outside the security gate. (Depo. of McAlhaney, 7/20/10, pgs. 29-30). The Board has complied with the requirements of the Sixteenth Supplemental Covenants regarding the Ellington Woods subdivision by charging a reduced assessment to those residents living outside of the security gate while exercising its discretion to adjust the assessment amounts pursuant to the Dunes West Covenants. (Dunes Covenants, §12.3, et seq.).

Mr. Arthur testified that he is serving on behalf of the residents of Ellington Woods who feel that the charges that are imposed on them have never been adequately explained are in excess of the costs attributable to them. (Depo. of Arthur, Volume 2, pg. 112). It is only these few residents of Ellington Woods whom Mr. Arthur claims to represent. Not the entire group of residents outside of the gate at Dunes West as he now seeks to have a class created. In addition to the list of owners outside of the gate, Mr. Arthur absolutely knows these residents of his own property owners' association who feel that the charges against them are not adequately explained or fairly assessed. There is no need to make a class of these few people.

(ii) THERE ARE NO QUESTIONS OF LAW OR FACT COMMON TO THE CLASS DESIGNATED BY THE PLAINTIFFS

There is no commonality as to the issue presented by Mr. Arthur and the other proposed members of the class because Mr. Arthur's disagreement with the allocation of the Dunes West assessments is and always has been personal. "A representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the ...issues in the case. Requiring such individualized examination negates the benefits of a class action suit." *Gardner v. S.C. Dept. of Revenue, et al.*, 353 S.C. 1, 577 S.E.2d 190 (2003). Not each member of the class seeks to challenge the dues paid. Mr. Arthur's testimony that the "...dues are inequitably assessed" to the property owners does not significantly advance the litigation to justify class certification because Mr. Arthur could continue his suit individually against the Defendant. (Depo. of Arthur, Vol. 2, pg. 113), *See also Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539 (D.S.C. 2000) (where the Court looks for more than just mere commonality but instead commonality and an issue that warrant class action litigation for resolution). Mr. Arthur's personal disagreements with the Dunes West POA Board of Directors do not translate into universal issues for all of the homeowners in Ellington Woods. (Depo. of Arthur, Vol. 2, pgs. 94-95).

There is no question of law or fact as to those numerous property owners who have paid and continue to pay their dues without protest. Most property owners do not object and are not privy to the dispute with Mr. Arthur and Dunes West.

Mr. Arthur himself executed a proxy ballot approving the 2012 budget which included rate increases for properties inside and outside the gate. (Proxy Ballot of Alan Arthur, 12/10/11). Mr. Arthur's basis for his suit fails because he consented to rate

changes that are the subject of issues he raises in this litigation, and he continues to pay assessments to the association.

(iii) THE CLAIMS OF THE REPRESENTATIVE PARTY ARE NOT TYPICAL OF THE CLAIMS OF THE CLASS

Mr. Arthur's claims that the dues allocation is inequitable is not typical of the proposed members of the class. "To establish the typicality requirement, the 'claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.' " *Pope v. Heritage Communities, Inc., et al.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). In *Pope*, all unit owners were excluded from use of their property for an extended period of time. *Id.* at 775. The *Pope* case involved construction damages and access to the condominium units. *Id.* Each unit owner was deprived of his property for some time. *Id.*

Unlike *Pope*, there is no deprivation, no loss, no dispute by most, if not all, of the paying residents outside of the security gate at Dunes West. There is no loud hue and cry from the residents outside the security gate claiming unfairness in the assessments. Only Mr. Arthur and a couple of other residents of Ellington Woods dispute the matter. There is no widespread complaint outside of the gate at Dunes West.

In the case at hand, there is no element of typicality as evidenced by Mr. Arthur's testimony that the complaint is based on the "...way the dues structure has been implemented or laid out." (Depo. of Arthur, Vol. 2, pgs. 118-119). There is no evidence of a consistent issue with the dues structure by all or even the majority of the members because members of the proposed class continue to pay the assessment in accordance with the Covenants.

(iv) THE CLAIMS OF THE REPRESENTATIVE PARTY ARE NOT TYPICAL OF THE CLAIMS OF THE CLASS

Mr. Arthur will not fairly and adequately protect the interests of the proposed class because he does not understand the process of the lawsuit. "It is well established that a class representative has much more at stake than simply his own well-being and own self-interest. The class representative must voluntarily accept a fiduciary obligation towards all the members of the putative class." *Pope v. Heritage Communities, Inc., et al.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011) citing *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978).

Mr. Arthur testified that he "...do[es] not understand a derivative suit." (Depo. of Arthur, Vol. 2, pg. 108). If he did not understand a derivative action, there is no way he can understand a class action as relates to his fiduciary obligation towards all the members of the class, he must adequately and fairly represent the interest of the members. "In determining whether a particular named plaintiff will adequately represent a proposed class pursuant to Rule 23(a)(4), one factor we must consider is whether the named plaintiff has interests that are antagonistic or adverse to those of the rest of the class." *Waller v. Seabrook Island Property Owners Ass'n*, 388 S.E.2d at 801 (1990) citing *Runion v. U.S. Shelter*, 98 F.R.D. 313 (D.S.C. 1983).

Mr. Arthur's interests are adverse to those of the majority of proposed class members as those homeowners outside the gate continue to pay their assessments without issue. Mr. Arthur demonstrated by his own vote that he actually approves the actions of the Dunes West Board and cannot adequately represent a class he claims to protect while

also approving the budgets. (Transcript of Hearing, pg. 20). Any award will trigger an assessment against those whom the class seeks to protect.

Mr. Arthur testified that he did not understand a derivative action. (Depo. of Arthur, Vol. 2, pgs. 111-112). Once the Plaintiffs filed the 40(j) motion for the derivative action and filed a new complaint on behalf of the proposed class, Mr. Arthur provided an affidavit indicating that he now understood the requirements of a class action. (Transcript of Hearing, pg. 20). Based on Mr. Arthur's prior testimony and the complex nature of a class action, it is unreasonable to presume that Mr. Arthur now understands the impact of a class action. (*Id.*) Mr. Arthur was unable to explain how he would adequately represent owners in a derivative capacity. Therefore, he could not possibly adequately represent the owners in a class action.

CONCLUSION

The trial court improperly granted class certification in this case. For the foregoing reasons, the trial court improperly denied the Defendant's Motion to Reconsider the Order Granting Class Certification in that all prerequisites for class certification were not met. For the foregoing reasons, the Defendant Dunes West Property Owners Association, Inc. requests that this Court reverse the Order Denying the Defendant's Motion to Reconsider the Order Granting Class Certification, decertify the class and allow the case to proceed on its merits.

Mt. Pleasant, South Carolina
April 10, 2013

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

The Honorable Roger M. Young, Sr.
Charleston County
Presiding Judge, Circuit Court

Case No. 10-CP-10-8911

Ellington Woods I Homeowners Association, Inc; Ellington Woods II Homeowners Association, Inc; Ellington Woods III Homeowners Association, Inc.; Ellington Woods IV Homeowners Association, Inc.; Ellington Woods V Homeowners Association, Inc.; Alan Arthur, individually and as class representative; and John Doe,.....Respondents

v.

Dunes West Property Owners Association, Inc.,.....Appellant

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief by depositing a copy of same in the U.S. Mail, postage prepaid, on April 10, 2013, addressed to its attorney of record Paul F. Tecklenburg, Esq. at Tecklenburg & Jenkins, LLC, P.O. Box 20667, Charleston, South Carolina 29413.

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