IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

SHANE BOUCHARD, SAMUEL and CANDICE DAVIS; JANE and PATRICK DePASS; KEVIN and KELLY HIPPS; MICHAEL and ANH NGA HOUDTZAGERS; NICHOLAS and TEASHA ISASI; GABRIELA DeCASTRO MARTINS; MELISSA and KIMBERLY MOORE-LeFAUVE; NAVJOT and DARSHNA SALH; ELIZABETH SASS; PATRICK and CAROL SCOTT; RICHARD and CHIEKO SMITH; THOMAS & JULIE SOOST; TIMOTHY and KATHRYN STEWART; RICHARD and ALLISON STRICKLAND; DOUGLAS S. THEIN; CARLOS & ANA VILA, on behalf of themselves and all others similarly situated

Plaintiffs,

vs.

THE RYLAND GROUP, INC., a Maryland Corporation; and LARRY NICHOLSON, an individual residing in Florida,

Defendants.
_____/

CASE NO.: 2005 - CA - 01930 - O

ORDER DENYING PLAINTIFFS' MOTION TO CERTIFY CLASS

This matter is before the Court on the motion of the plaintiffs to certify this case as a class action. A hearing was conducted on August 1, 2006. The Court has read all the papers submitted in connection with this motion and has reviewed all of the documents and submissions in support of and in opposition to this application and finds as follows.

I. INTRODUCTION

"The purpose of the class action is to provide litigants who share common questions of

law and fact with an economically viable means of addressing their needs in court." *Johnson v. Plantation Gen. Hosp. Ltd. P'ship*, 641 So. 2d 58, 60 (Fla. 1994). In this case, resolution of the class certification issues presents a tension between ancient doctrine and modern reality. "[A]ll land is considered unique." *Henry v. Ecker*, 415 So. 2d 137, 140 (Fla. 5th DCA 1982). The unique treatment of real estate derives from English common law and is still a staple of our jurisprudence. Jonathan Levy, *Against Supercompensation: A Proposed Limitation on the Land Buyer's Right to Elect Between Damages and Specific Performance as a Remedy for Breach of Contract*, 35 Loy. U. Chi. L. J. 555, 558-59 (2004). Given this presumption that every real estate parcel is unique, real property cases would seem ill-suited for class-action treatment. At the same time, a view of recently constructed subdivisions in Central Florida discloses little unique as row upon row of homes stand in homeowner association enforced uniformity. This apparent similarity of the structures would seem to commend claims of defective construction to handling as a class-action. Thus, ancient principles of equity clash with modern means of mass production and yield what, reduced to its simplest terms, is the defining issue here: Are plaintiffs' claims for relief marked by the same similarity as their Ryland homes ? The question is factually and legally complex and the Court has been greatly assisted by the superior presentations of counsel all of whom are commended.

II. FACTS

The Ryland Group, Inc. ("Ryland") builds and sells new homes nationwide, with four divisions in Florida - Orlando, Tampa, Jacksonville and Ft. Myers.[1] Decisions about materials

[1] The Ft. Myers region was created in 2003. Prior to that time, the operations of Ryland's current Ft. Myers office were included in the Tampa division.

and vendors are made at the division level. Since 2000, Ryland has built over 9000 homes in Florida. Almost all of these are detached single family homes constructed on poured slabs on top of which are placed concrete masonry unit ("CMU") blocks. The first course of these hollow blocks is placed directly on top of the slab. After the concrete block walls are completed, they are covered with a thin layer of textured cementitious finish ("TCF") which resembles what is commonly known as stucco. When a person closes on a Ryland home, he or she receives a book entitled "Your Ryland Home." Among other things, this publication informs the new homeowner that "the final exterior finish to be applied will be one or a combination of vinyl siding, wood siding, brick, stone veneer or stucco finish." (2d Am. Compl. ¶ 40(a); App to Pl. Mem. Supp. Mot. Certify Class, vol. 1, Ex. 7.) This booklet also states that "stucco requires very little maintenance other than painting and caulking" (2d Am. Compl. ¶ 40(b); App., vol. 1, Ex. 7) and that "to reduce infiltration at the masonry walls Ryland implemented important precautions during the construction process of your home." (2d Am. Compl. ¶ 40(c); App., vol. 1, Ex. 7.) *Your Ryland Home* explains that "[s]ome areas have a vapor barrier installed on masonry walls after the installation is put into place. This prevents moisture absorbed through masonry walls from entering the home." (2d Am. Compl. ¶ 40(d); App., vol. 1, Ex. 7.)

Moisture entered the plaintiffs' homes and the second amended complaint alleges that this occurred as a result of defective construction. In the so-called "mass wall system" utilized by Ryland in building plaintiffs' houses, moisture is absorbed into the concrete blocks and later released during dry weather to the outside of the home through the CMU and paint as well as through the air conditioning system.

Prior to August 1, 2004, Ryland received few reports of water intrusion problems. In August and September 2004, four hurricanes buffeted Florida. Three of these hit the Orlando

area which is generally spared then brunt of Florida's numerous hurricanes.[2] During and after this period of hurricane activity, water intrusion complaints against Ryland skyrocketed to approximately 1,000 of which about 700 originated in the Orlando area.

The plaintiffs contend that the water infiltration is a result of several construction defects found in all Ryland homes.[3] As noted, it was anticipated that some moisture would enter the CMU blocks. According to plaintiffs' proofs, the amount of water infiltration was excessive due to inadequate outside protection. As a result, the block cavities absorbed too much water. This problem was compounded by several factors. In constructing its homes, Ryland set the first level of cement blocks directly on top of the foundation, without any offset which would have allowed water to run out from the blocks and beyond the foundational slab. Also, Ryland's homes lacked weep holes for drainage of water which exceeded the capacity of the porous CMU blocks to absorb. Water which collected in the hollow blocks, having nowhere else to go, would drain to the inside of the house at various locations, most commonly at the baseboards. In two story Ryland homes, plaintiffs indicate that drainage is inadequate because the upper story wood frames lack any weep holes and the second story windows do not have the necessary flashing. Water which drains from the second floor travels into the wall cavity of the lower story. As with water which enters at the first floor level from outside, there is no place for excess moisture to

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[2] Ryland refers to the Central Florida Heritage Foundation website, http:/www.cfhf.net/Orlando/hurricane/htm. which chronicles Orlando's "charmed life" with respect to hurricanes. The very first sentence on this Web page, however, states that "Orlando is obviously a target for hurricanes and tropical storms." The Web page also makes clear that while Orlando has had very few "direct hits" from hurricanes, these storms can be very large and dump significant amounts of rain even in areas not affected by the highest winds.

[3] Unless otherwise noted, the word "homes" as used in this Order refers to single family residences.

escape outside the home.

In a supplemental submission, plaintiffs put forth a uniform "fix" for all Ryland homes. To remedy the defective design, plaintiffs propose that a "high quality coating" be applied to the outer walls of the homes; that cracks be sealed; that weep screeds and weep holes be inserted; and that the back of the masonry blocks be waterproofed. (Pl.'s Post-Hearing Submission, tab 1 at box 172.) In addition, the plaintiffs seek unspecified monetary damages.

Ryland contends that its homes are not improperly constructed and performed well, but were sometimes overwhelmed during the unprecedented 2004 hurricane season.

III. PLAINTIFFS' SECOND AMENDED COMPLAINT

The plaintiffs allege that the TCF/mass wall system of construction is, in itself, defective and that Ryland concealed this defect from them. Their second amended complaint contains five counts. The first count sounds in contract and alleges that the homes Ryland built designed and delivered did not have a "true stucco exterior" (2d Am. Compl. ¶ 35), were not built in a workmanlike manner and did not comply with applicable building codes.

The second and third counts of the second amended complaint are for breach of express and implied warranties, respectively. Plaintiffs point to seven representations which they claim constituted express warranties and which were not honored. These are: 1) Ryland did not deliver a "true stucco house" (*Id.* at ¶¶ 40a, 41a); 2) the TCF exterior does not require "little maintenance" (*Id.* at ¶¶ 40b, 41b); 3) Ryland did not take proper precautions to minimize water infiltration (*Id.* at ¶¶ 40c, 41c); 4) Ryland did not provide a moisture-preventing "vapor barrier" (*Id.* at ¶ 40d, 41d); 5) the homes were not free from defects in materials and workmanship. (*Id.* at ¶¶ 40e, 41e); 6) Ryland did not repair cracks in the block or veneer walls (*Id.* at ¶¶ 40f, 41f); and

7) Ryland did not repair cracks to the "stucco." (*Id.* at ¶¶ 40g, 41g.) The construction defects are also alleged to have rendered the homes unfit and constituted breaches of implied warranties of habitability, fitness for a particular purpose and merchantability.

In the fourth count of the second amended complaint, plaintiffs list eight items including thin cement plaster, insufficient control joints, insufficient and improperly sealed expansion joints, lack of flashing, and a building envelope which does not prevent moisture intrusion under normal conditions as violative of the applicable building code. These alleged violations form the basis for a claim pursuant to section 553.84, Florida Statutes, against Ryland and defendant, Larry Nicholson, whom plaintiffs describe as the person "who qualifies Ryland as a Florida general contractor." (*Id.* at ¶ 5.)

Count five asserts that Ryland was negligent in that it breached "its duty to deliver quality homes with a stucco interior which would not leak." (*Id.* at ¶ 57.) Finally, in the sixth count of the second amended complaint, plaintiffs claim that Ryland violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). The bases for this claim are seven statements alleged to be "false and/or misleading to the consumers of Ryland's homes." (*Id.* at ¶ 67.) These promises are also several of the same predicates for plaintiffs' claims premised upon breach of contract and breach of express warranty.

The plaintiffs seek damages consisting of costs to repair their homes, repair or replacement of damaged personal property, the decreased value of their homes and insurance deductibles as well as counsel fees and costs.[4] In terms of procedural relief, plaintiffs ask that this action be certified as a class action and that the court employ subclasses "as necessary to

[4] Plaintiffs seeks fees and costs against Ryland only.

align class interests." (*Id.* at 18.)

IV. THE PROPOSED CLASS

Plaintiffs ask the court to certify the following class:

> All persons who, as of March 1, 2005, owned a single family dwelling in the State of Florida constructed by Ryland and completed after December 341, 1999 whose construction includes: (a) monolithic slab on grade foundation; (b) at least one story of concrete masonry units as exterior wall; (c) lacking either a weather resistant exterior wall envelope or a means of draining to the exterior any water that enters the wall assembly; and all persons who previously owned a single family dwelling in the State of Florida constructed by Ryland and completed after December 31, 1999 whose construction included (a) monolithic slab on grade foundation; (b) at least one story of concrete masonry units as exterior wall; (c) lacking either a weather resistant exterior wall envelope or a means of draining to the exterior any water that enters the wall assembly; and who incurred any costs or expenses to inspect, repair or replace the exterior wall envelope or other property damaged by the lack of either a weather resistant wall envelope or a means of draining to the exterior any water that enters the wall assembly, including insurance deductibles paid for repairs.

(Pl.'s Mem. Support Mot. Class Cert. 3-4.)

V. STANDARDS

The elements which must exist before a case can be certified as a class action are set forth in Florida Rule of Civil Procedure 1.220. "It is well settled that parties seeking class certification must plead and prove each element required by Rule 1.220." *Seminole County v. Tivoli Orlando Assoc., LED.*, 920 So. 2d 818, 822 (Fla. 5th DCA 2006). A plaintiff cannot obtain class certification simply by relying upon the allegations of the complaint where the defendant contests those allegations. *Id.* at 822-24. The court must determine whether the facts actually support the allegations of the complaint. *Id.* at 824. Plaintiffs need not prove their case at the class

certification stage but rather they must demonstrate "a sound basis in fact, not supposition, that the requirements of the class action rule have been satisfied." *Earnest v. Amoco Oil Co.*, 859 So. 2d 1255, 1260 (Fla. 1st DCA 2003) (*quoting Baptist Hosp. of Miami, Inc. v. Demario,* 661 So. 2d 319, 321 (Fla. 3d DCA 1995)). Whether to certify a class action is "committed to the broad discretion of the circuit court." *Chase Manhattan Mortg. Corp. v. Porcher*, 898 So. 2d 153, 156 (Fla. 4th DCA 2005). In exercising this discretion, the court always must be mindful that "the granting of class certification considerably expands the dimensions of the lawsuit and commits the court and the parties to much additional labor, over and above that entailed in an ordinary private lawsuit." *Seminole County v. Tivoli Orlando Assoc., LED.*, 920 So. 2d at 824. Any doubts about class certification should be resolved in favor of certification. *Id.*

Rule 1.220(a) provides that :

> Before any claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class, the court shall first conclude that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

Fla. R. Civ. P. 1.220(a).

In the nomenclature of class action litigation, these prerequisites are known as numerosity, commonality, typicality and adequacy. In addition to these requirements, a party seeking class certification must also demonstrate "that the action meets the criteria for one of the three types of class actions as defined in rule 1.220(b)." *Estate of Bobinger v. Deltona*

Corp., 563 So. 2d 739, 742 (Fla. 2d DCA 1990). Plaintiffs contend that their case is of the type described in Rule 1.220(b)(3) which provides that:

> A claim or defense may be maintained on behalf of a class if the court concludes that the prerequisites of subdivision (a) are satisfied, and that:
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> . . . .
>
> (3) the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy. The conclusions shall be derived from consideration of all relevant facts and circumstances, including (A) the respective interests of each member of the class in individually controlling the prosecution of separate claims or defenses, (B) the nature and extent of any pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (C) the desirability or undesirability of concentrating the litigation in the forum where the subject action is instituted, and (D) the difficulties likely to be encountered in the management of the claim or defense on behalf of a class.

Fla. R. Civ. P. 1.220(b)(3).[5]

When ruling on a class certification motion, the court is required to enter a comprehensive written order, including findings of fact and conclusions of law, on each element of the Rule 1.220. *Cheatwood v. Barry Univ., Inc.*, 2001 WL 1769914, at *1 n. 2 (Fla. Cir. Ct. December 26, 2001). The elements of a class action are now addressed in turn followed by the type of class actions under which plaintiffs seek to proceed.

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[5] In the second amended complaint, plaintiffs also allege that the proposed class action also meets the requirements of Rule 1.220(b)(1)(A) and (B). These subsections are not discussed in plaintiffs' motion papers and plaintiffs do not meet their burden of proving this case should be certified pursuant to those subsections.

VI. ELEMENTS OF A CLASS ACTION

A. Rule 1.220(a)

1. Numerosity

"Parties seeking class certification must demonstrate that the members of the class are so numerous that separate joinder of each member is impracticable." *Bruan v. Campbell*, 827 So. 2d 261, 266 (Fla. 5th DCA 2002). Impracticability is not synonymous with impossibility. *Novell v. Westchester County*, 443 F. Supp. 540, 546 (S.D.N.Y. 2006).[6] The plaintiffs' burden is to establish that "the difficulty or inconvenience of joining all members of the class makes class litigation desirable." *Id. (quoting Nw. Nat. Bank v. Fox & Co.*, 102 F.R.D. 507, 510 (S.D.N.Y. 1984)). "Numerosity does not rest on any magic number." *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 164 F.R.D. 659, 663 (N.D. Ill. 1996). "The crux of the numerosity requirement is not the number of interested persons, per se, but the practicability of their joinder into a single suit." *Small v. Sullivan*, 820 F. Supp. 1098, 1109 (S.D. Ill. 1992). Here, plaintiffs contend that the number of buyers of defective Ryland homes exceeds 8,000. This number alone, as plaintiffs correctly recognize, does not satisfy the numerosity requirement for maintaining a class action.[7] "As part of the Rule 1.220(a)(1) numerosity requirement, courts evaluate whether a class is 'adequately defined and clearly ascertainable.'" *Rink v. Cheminova, Inc.*, 203 F.R.D.

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[6] "The Florida class action rule is patterned after the federal class action rule and thus federal precedent interpreting the federal rule is persuasive authority." *Fung v. Fla. Auto. Joint Underwriting Ass'n*, 905 So.2d 193, 194 n.1 (Fla. 3d DCA 2005).

[7] In terms of sheer numbers, the Court finds that would be impracticable to join the 8,000 putative plaintiffs here. Class of as few as twenty-five people have been certified. *See Estate of Bobinger v. Deltona Corp.*, 563 So. 2d at 743.

648, 659 (M.D. Fla. 2001) (*quoting DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir.1970)).[8] This means that the "class description must be sufficiently definite to enable the court to ascertain member status." *Rink v. Cheminova, Inc.*, 203 F.R.D. at 659.

The class which plaintiffs now submit for certification includes all persons who, as of March 1, 2005, owned Ryland homes built with the mass wall/TCF construction method. This group numbers in the thousands and, as plaintiffs point out, the names of these putative class members can be learned through Ryland's records and public records. While these documents may be sources of the names of class members who purchased Ryland homes since March 2005, an examination of the proposed class, as defined, leads the Court to conclude that the entire class cannot be so readily identified.

The proposed class also includes former Ryland home owners. Not all prior owners of Ryland homes having a mass block and TCF design are included in the class definition however. Only those former Ryland home owners who have "incurred any costs or expenses to inspect, repair or replace the exterior wall envelope or other property damaged by the lack of either a weather resistant wall envelope or a means of draining to the exterior any water that enters the wall assembly, including insurance deductibles paid for repairs" come within the ambit of the class definition. (Pl.'s Mem. Supp. Class Certification 3.) This definition delimits the class of former Ryland homeowners to those who have suffered property damage from specific causes - inadequate drainage and the absence of a water resistant envelope. Plaintiffs have not identified

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[8] Some courts have considered class definition and ascertainability as independent, implied elements of the class action rule and analyze them separately from numerosity. The end result is the same. The Court chooses to treat these requirements as part of its numerosity analysis. *Hoyte v. Stauffer Chem. Co.*, No. 98-3024-CI-7, 2002 WL 31892830, at * 39 n. 53 (Fla. Cir. Ct. Nov. 6, 2002).

any records which will identify these individuals. In order to determine which former owners were damaged by the construction defects of which plaintiffs complain, thus meeting the definition of the proposed class, "the Court must engage in fact-finding on the ultimate issues in the case to determine who qualifies as a class member." *Lipinski v. Beazer East, Inc.*, No. 04-10300, 2005 WL 3955773, at *16 (Pa. Com. Pl. Oct. 18, 2005). The proposed class does not include all former owners of Ryland homes who have experienced water intrusion. Instead, membership for former owners is defined in terms of the cause of a putative member's property damage. Causation is a matter of proof in the liability case and the need for an unknown number of such determinations at the class certification stage frustrates any effort to readily ascertain the former owners who are class members.

To the extent it consists of current owners of Ryland homes, the proposed class is readily ascertainable and its membership is far too large to practicably join in one action. This aspect of the proposed class satisfies the numerosity requirement.

With respect to former owners of Ryland homes, membership in the proposed class cannot be determined without individualized determinations of who is in the class. Those determinations would implicate ultimate issues of causation. Therefore, putative members who are former owners cannot be easily ascertained and the Court has no way to know how many former owners would be class members. Plaintiffs have failed to meet their burden of establishing the numerosity factor with regard to former Ryland home owners.

2. <u>Commonality</u>

"The primary concern in determining commonality is whether the representative members' claims arise from the same course of conduct that gave rise to the other claims, and

whether the claims are based on the same legal theory." *Terry L. Braun, P.A. v. Campbell*, 827 So. 2d 261, 267 (Fla. 5th DCA 2002). If both liability and damages hinge on individual determinations, the requisite commonality is not present. *Id.* Thus, there must be a common right of recovery based upon the same essential facts. *State Farm Mut. Auto. Ins. Co. v. Kendrick*, 822 So. 2d 516, 517 (Fla. 3d DCA 2002) (*quoting Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I, LED.*, 694 So. 2d 852, 853 (Fla. 3d DCA 1997)). "Simply because [named plaintiffs] and any other proposed class plaintiffs allege the same theory of recovery . . . does not mean that legal or factual commonality exists among the proposed class members." *Liberty Lincoln Mercury v. Ford Marketing Corp.*, 149 F.R.D. 65, 75 (D.N.J. 1993).

Here, the plaintiffs claim that all of the putative class members have potentially been damaged by Ryland's failure to properly design, manufacture and deliver its homes, as well as Ryland's misrepresentations about those houses. Plaintiffs argue that regardless of the legal theory applied to Ryland's conduct, all the named plaintiffs and potential class members are affected in the same way because they have all suffered or will suffer physical damage to their homes.

a. Breach of Contract Claims

To prevail on a claim for breach of contract, a plaintiff must prove: 1) the existence of a contract; 2) a breach of the contract; and 3) damages resulting from the breach. *Rollins, Inc. v. Butland*, 2006 WL 3686484, at * 12 (Fla. 2d DCA Dec 15, 2006). Here, the first of these elements may be demonstrated through common proofs. The record evidence supports plaintiffs' allegation that Ryland utilized the same or very similar contracts in transactions throughout Florida. There is also proof that Ryland homes were built in the same or substantially similar

manner and that Ryland's representations were likewise uniform.

It is to be recalled that "Florida law generally frowns on class action in contract matters." *Ford Motor Co. v. Magill*, 698 So.2d 1244, 1245 (Fla. 3d DCA 1997). *See also Rollins, Inc. v. Butland*, 2006 WL 3686484, at * 8 (noting Florida's "aversion" to class action treatment for breach of contract claims.)

According to the plaintiffs, Ryland breached its contracts with home buyers "by among other things failing to design, build, and deliver to plaintiffs homes which were built with a true stucco exterior in a workmanlike manner, which satisfied applicable express and implied warranties and conformed to the applicable building codes." (Am. Compl. ¶ 35.) This statement subsumes the allegations of the breach of warranty and statutory building code violation claims. The breach of express warranty count of the second amended complaint details seven ways in which plaintiffs claim Ryland breached seven separate warranties. Similarly, the building code action sets forth eight alleged violations. Thus, plaintiffs' contract claim alleges no less than fifteen discrete breaches - "among other things." The breach or combination of breaches which caused one putative class member to incur damages may differ from the possible causative factors and combinations thereof affecting the next class member. *Rollins, Inc. v. Butland*, 2006 WL 3686484, at * 8. Multiplied by some 8,000 potential class members, common causation will be impossible to demonstrate. *Id.*

While the *Rollins* case dealt only with the so-called predominance element of Rule 1.220(b)(3), predominance and commonality are parallel requirements. *Id.* at * 4. The Court, therefore, finds *Rollins* of assistance in analyzing commonality. The importance of *Rollins* lies in its recognition that where a claim asserts multiple allegations of wrongdoing (including the

catchall "among others"), that claim may splinter in multitudinous permutations across a class of thousands. This, *Rollins* held, defeats predominance. *Id.* at * 8. The Court is cognizant that the predominance requirement is more stringent than commonality. *Wyeth v. Gottlieb*, 930 So. 2d 635, 639 (Fla. 3d DCA 2006). Still, the large number of possible combinations of allegations of wrongdoing which defeated predominance in *Rollins* will certainly affect commonality. Whether commonality will be destroyed by it is a question of degree. In *Rollins,* which involved a class of about 65,000, the district court of appeal found individual issues to be "*overwhelmingly* predominant." *Rollins, Inc. v. Butland*, 2006 WL 3686484, at * 8 (emphasis added). The Court finds such to be the case here as well where the contract cases of some 8,000 individual members will be based upon any number of combinations of more than fifteen breaches.

In addition to the varied and dissimilar makeup of the contract claims of each member of the proposed class, plaintiffs claim among their damages the cost to repair their homes, the cost to repair and replace personal property, diminution of value of their homes and reimbursement of insurance deductibles. These claims for economic losses go well beyond plaintiffs' proposed "fixes" as contained in their post-hearing submission. Damages for loss of personal property, diminution of value and recoupment of deductibles are highly individualized. In the first place, not every potential class member has sustained any damage. Some have not sustained damage to personal property. Some have not made insurance claims. Even aside from these differences, and most important in this respect, is that depreciation in the value of a home "is dependent on a variety of house-specific factors and would require separate appraisals of each class member's house." *Welcome v. Arvida Cmty. Sales, Inc.*, No. 02-01279-CA, 2004 WL 2340249, at 7 (Fla.

Cir. Ct. Sept. 13, 2004).[9]

Plaintiffs contend that the fact that the individual class members may have sustained damages in different measures or degrees is not fatal to the maintenance of a class action. The Court agrees. The difficulty with treating the contract claim as a class action is not the admeasurement of damages but rather their cause and very existence.

In sum, the motion record does not support a finding of commonality in regard to plaintiffs' breach of contract claim. The proofs necessary to establish liability and causation are too varied and an untold number of would-be class members have sustained no losses attributable to any contractual breach.

b. Breach of Warranty Claims

Plaintiffs also advance causes of action based upon breaches of warranty - express and implied. "The commonality requirement is satisfied when the alleged misrepresentations constitute a 'common course of conduct' even if the statements made to each Plaintiff are not identical." *Allapath Serv., Inc. v. Exxon Corp.*, 188 F.R.D. 667, 674 (S.D. Fla. 1999). Here, there were similar communications made to Ryland home buyers, most made through the booklet distributed by Ryland titled "*Your Ryland Home.*" The common actionable statements involved the use of stucco, the amount of required maintenance, workmanship of the homes and repairs.

A warranty, whether express or implied, is contractual in nature. *Whitehead v. Rizon East Ass'n*, 425 So. 2d 627, 629 n.5 (Fla. 4th DCA 1983). Previously in this order, the Court noted Florida's aversion to class actions in contract actions.

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[9] Although *Arvida* involved a statutory building code action, its observations concerning the individualized nature of proof of depreciation of value are applicable here.

i. Implied Warranty

The implied warranties of merchantability and fitness for purpose, in the context of residences concern "whether the premises met ordinary normal standards reasonably to be expected of living quarters of comparable kind and quality." *Putnam v. Roudebush*, 532 So. 2d 908, 910 (Fla. 2d DCA 1977). The focus of the implied warranty of habitability is the same. *Hesson v. Walmsley Constr. Co.*, 422 So. 2d 943, 945 (Fla. 2d DCA 1982) *(citing Putnam v. Roudebush)*. Thus, claims against a builder based upon the implied warranties of habitability and fitness for a particular purpose have been treated as a single action for breach of the implied warranty of habitability. *Marcus v. Anderson/Gore Homes, Inc.*, 498 So. 2d 1051, 1052 (Fla. 4th DCA 1986). In a breach of implied warranty case, the plaintiff must prove the existence of a defect, that the defect caused the injuries complained of, and that the defect existed at the time the builder parted with possession of the house. *Id.*

For purposes of this motion, the Court finds that plaintiffs have presented adequate evidence of a construction defect which existed when Ryland sold its homes.[10] Plaintiffs have failed, however, to show that their damages and those of the members of the proposed class were caused by the construction defect which is at the heart of this case. In their breach of implied warranty claim, plaintiffs complain of the presence of mold and mildew in their homes. There is no indication of how many homeowners have experienced this problem or, of those who have, how many can attribute it to a construction defect for which Ryland is responsible. Also, as with the contract claim, plaintiffs seek damages for decrease in property value, damage to personal

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[10] While the Court finds evidence of a construction defect, it emphasizes that it does not decide nor even evaluate whether this has been proven.

property and repayment of insurance deductibles. As discussed in connection with plaintiffs' contract claim, the existence and causation of these damages is ascertainable only by way of individualized proofs among thousand of potential class members. The implied warranty claim has not been shown to meet the requirement of commonality and therefore will not be certified as a class action.

In reaching this conclusion, the Court distinguishes the case of *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908 (Cal. Ct. App. 2001), a construction defect case in which a class action was permitted to proceed based upon a breach of express and implied warranties. *Id.* at 913. Specifically, the California Court of Appeal found that the requisite commonality was present in a breach of warranty case based upon an allegation that similarly constructed homes had defective foundations. The *Hicks* panel further held that it was not necessary for each homeowner to prove that his foundation had already cracked or that he had suffered property damage as a result of the cracking. *Id.* at 923. In *Hicks*, "the defect did not *cause* the plaintiffs' injury; the defect *was* the injury." *Id.* at 922. By contrast, in the case *sub judice*, the plaintiffs' implied warranty claim seeks far more than the remediation of defective construction. Monetary damages are sought for a variety of losses suffered by some class members in varying degrees. In terms of a commonality analysis, however, the implied warranty claim fails for the same basic reason as the contract claim. The stumbling block is not the different sums to which class members might be entitled but the divergence of proofs necessary to prove causation of their damages resulting from the construction defect. Thus, in the present case, unlike *Hicks*, the defect *qua* defect is not the injury but depending upon the individual property involved, *may* have been the trigger of a variety of property damages or *may* have

contributed to a decrease in value of the home.

ii. Express Warranties

The same reasoning which led the Court to hold that the contract claim did not possess the requisite commonality leads to the same conclusion with respect to the express warranty action. Plaintiffs' second amended complaint alleges seven distinct statements which form the basis of the express warranty claim. In a class of over 8,000 people, this represents an extremely large combinations of possible claims. Some class members may claim that their damages flow from one promise being broken. Others may claim all seven. Others various combinations in between. This gives rise to a need for overwhelmingly individualized proofs.

As with the implied warranty claim, plaintiffs fail to demonstrate the existence, extent and cause of damages (if any) sustained by the class members can be demonstrated through class-wide proofs.

Further, the Court again notes Florida's distaste for class action treatment of contract matters. *Ford Motor Co. v. Magill*, 698 So.2d at 1245; *Rollins, Inc. v. Butland*, 2006 WL 3686484, at * 8

c. Negligence Claim

Plaintiffs have also pled a negligence cause of action in terms of a breach by Ryland of its duty to provide homes which do not leak. In the negligence count of the second amended complaint, plaintiffs allege that Ryland had a duty to deliver to them a "quality home" with a leak-free "true stucco exterior." (Am. Compl. ¶¶ 57, 58). As the result of a breach of this duty, plaintiffs assert that they have been damaged, using language to describe these damages identical to the breach of contract claim. Again, in addition to generally improving both the water

resistance and the ability to release moisture of their homes, plaintiffs seek monetary damages which include payment for diminution of value, removal of mold and mildew, compensation for injury to personal property and reimbursement of insurance deductibles paid.

Each class member must come forward with proof demonstrating what damages, if any, he or she has sustained and that those damages were caused by Ryland's negligence and not some other causative agent. *Hicks v. Kaufman & Broad Homes Corp.*, 89 Cal. App. 4th at 923-24. As a result, plaintiffs' negligence claim lacks the commonality needed to be certified as a class action.

d. Statutory Building Code Claim

The next claim advanced by the plaintiffs in the second amended complaint is the private statutory right of action for violation of the Florida building code. *See* § 553.84, Fla. Stat. (2005). They allege that as a result of building code violations, some of them have suffered and others "will suffer" damage to their homes or have been "potentially damaged." (Pl.'s Mem Supp. Mot. Class Certification 23, 24.) In an action under section 553. 84, "resulting damage is an essential element to a claim under the statute." *Welcome v. Arvida Cmty. Sales*, 2004 WL 2340249, at *4. According to plaintiffs' motion papers, not all of them satisfy this essential element. Their claims, therefore, lack commonality with the plaintiffs who have been damaged. Indeed these non-damaged plaintiffs have no cognizable claims under section 553.84. It is insufficient for plaintiffs to claim that some class members "will suffer" physical damage to their homes. "Section 553.84 provides a private right of action to enforce the Florida Building Code or its predecessor, but only where a person has been damaged as a result of the violation of the code." *Welcome v. Arvada Cmty. Sales, Inc.*, 2004 WL 2340249, at *4. Put otherwise, "resulting

damage is an essential element to a claim under the statute." *Id.* The fact that some putative class members have not suffered any "resulting damage" renders their claims dissimilar to the other members in a way that is legally significant, viz. these class members have no claim under section 553.84. This claim lacks commonality, therefore, and will not be certified.

While not binding on this Court, the *Welcome* opinion is informative. In denying class certification, the circuit court in *Welcome* held, among other things, that "all of Plaintiff's code violation theories suffer from a lack of commonality regarding damages." *Id.* at *6. This Court finds the same to be true here. In addition, plaintiffs plead the same type of damages in their statutory building code claim as in their breach of contact, breach of warranty and negligence claims. This Court has previously indicated that there was an insufficient showing of commonality in all these claims. Even among those plaintiffs who might be able to demonstrate some damages from building code violations, the nature and causes of those damages vary so widely throughout the potential class as to undermine commonality. The statutory building code claim shares one further infirmity with the express warranty and contract actions. All of these theories of recovery are based upon numerous separate acts of wrongdoing. The second amended complaint recites nine specific building code violations. To the extent that any class member may be shown to have actually sustained damage recoverable under section 553.84, those damages could be the result of any single violation or combination of violations. As the second district court of appeal recently indicated in the context of a statutory consumer fraud claim, such a plethora of possible proofs renders a case "overwhelmingly" individualized. *Rollins, Inc. v. Butland*, 2006 WL 3686484, at * 8.

e. FDUTPA Claims

The sixth and final count of the second amended complaint is based upon the FDUTPA. Although plaintiffs address this claim in their motion papers, Ryland asserts that it has been abandoned. In the interest of completeness, the Court addresses this cause of action.

Earlier in this Order, the Court found a lack of commonality in plaintiffs' breach of contract claim because the damages of individual class members may have been caused by any one or number of combinations of discrete wrongful acts. The Court relied upon *Rollins v. Butland*, 2006 WL 3686484 at * 8, for the proposition that an excessive number of possible combinations of alleged wrongdoing and causative factors spread over a large class will destroy commonality. Inasmuch as this aspect of the holding in *Rollins* was announced in the context of a FDUTPA claim, it provides an even more compelling reason for finding that plaintiffs' unfair trade practices action lacks commonality than was the case with the contract action.

In addition, *Rollins* also held that the "members of the putative class who experienced no actual loss have no claim for damages under FDUTPA." *Id.* at * 9. The plaintiffs have failed to meet their burden of showing commonality with respect to the FDUTPA claim because an unknown number of potential class members have no such claim to begin with.

In sum, the Court concludes that plaintiffs have not met their burden of proving commonality with respect to any of the claims they advance.

3. TYPICALITY

The third prerequisite enumerated in Rule 1.220(a) is "typicality." An analysis of this element requires as assessment of whether "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's

liability." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001). The factual background of a cause of action does not have to be identical for all class members. *In re WorldCom, Inc. Sec. Litigation*, 219 F.R.D. 267, 280 (S.D.N.Y. 2003). Typicality is present when "the disputed issue of law or fact occupies essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d 283, 293 (2d Cir. 1999). The commonality and typicality requirements "tend to merge intro one another as both 'serve as guideposts for determining whether the named plaintiff's claim and the class claim are so interrelated that the requirements of the class members will be adequately protected in their absence." *In re WorldCom Sec. Litigation,* 219 F.R.D. at 280 (*quoting Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d at 291)).

Inasmuch as the Court has already determined that the commonality requirement has not been shown to be present, it also concludes, for similar reasons, that typicality is not present. The same inadequacies which evinced themselves in the commonality analysis also, on this record, preclude a finding of typicality. The contract, warranty, building code and FDUTPA claims are based upon myriad allegations of wrongdoing. There is no indication that all or any group of them apply to some or all of the putative class members. Thus, the claims of the proposed class consist of an untold number of dissimilar combinations of elements of causation. Just as this disharmony among claims of putative class members defeated commonality, so too, plaintiffs' motion does not demonstrate typicality.

In a similar way, plaintiffs' negligence action rests upon proofs of causation which are individualized.

Therefore, the Court finds that plaintiffs have failed to shoulder their burden of demonstrating that their claims are typical of other class members.

4. ADEQUACY

The adequacy element of a class action requires the Court to look to whether the representative plaintiffs "have interests in common with the proposed class members and the representatives and their qualified attorneys will properly prosecute the class action." *Turner Greenberg Assoc., Inc. v. Pathman*, 885 So. 2d 1004, 1008 (Fla. 4th DCA 2004) (*quoting Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I, LED.*, 694 So. 2d 852, 854 (Fla. 3d DCA 1997)). Thus, the question of whether the class will be adequately represented focuses on both the class representatives and class counsel. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 626 n. 20 (1997). In this case, Ryland does not object to plaintiffs' counsel and the Court finds them knowledgeable, experienced and highly qualified. Ryland does, however, contend that the named plaintiffs are not adequate representatives of the missing members of the proposed class. The Court agrees. This finding is not a denigration of the intelligence, knowledge, integrity or dedication of the named plaintiffs. Rather, the Court concludes that plaintiffs' inadequacy is a product of the divergence of claims and proofs previously examined.

We have seen that the commonality and typicality requirements are intertwined. These requirements "tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of counsel and conflicts of interest." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 142, 157 n.13 (1982). As noted, the competence of plaintiffs' counsel is not in question. Thus, the Court's inquiry involves whether the named class representatives will "fairly and adequately protect and represent the interests of each member of

the class. This inquiry serves to uncover conflicts of interest between the named parties and ten class they seek to represent." *Terry L. Braun, P.A. v. Campbell*, 827 So. 2d at 268. In conducting its evaluation of the adequacy of class representation a court must be mindful of the importance of this factor. Any judgment in a class action will forever bar absent class members from maintaining individual claims. *Hansberry v. Lee*, 311 U.S. 32, 42-45 (1940). Further, "basic due process requires that the named plaintiffs possess undivided loyalties to the absent class members." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F. 3d 331, 338 (4th Cir. 1998). Viewed from this prospective, the requirement that a class be adequately represented has been termed "the quintessence of due process in class actions," 2 Alba Conte & Herbert B. Newburg *On Class Actions* § 4:47 (4th ed. 2002), and the "most important" of all the prerequisites to class litigation. *Colby v. J.C. Penney Co., Inc.*, 705 F. Supp. 425, 429 (N.D. Ill. 1989).

Having already found that plaintiffs have not sufficiently demonstrated commonality and typicality, it follows that their showing on adequacy is also lacking. This conclusion is a product of the interrelationship of these three prerequisites. In order to be "adequate," "[a] class representative must be part of the same class and possess the same interest and suffer the same injury as class members," *Amchem Prod. Inc. v. Windsor*, 521 U.S. at 625-26. Here, plaintiffs fail to demonstrate a sufficient identity of interest among themselves and the class members.

Enormous difficulties present themselves where, as here, multiple theories based upon an unknown number of possible factual predicates are advanced on behalf of thousands of people. The statutory building code claim provides one example. This cause of action has been given considerable attention by plaintiffs' counsel and experts. Yet some class members do not even

have such a claim. Those who have not suffered any damages - and some have not - have no statutory building code or consumer unfair trade practice claim. It was previously observed that a cause of action under section 553.84 may proceed "only where a person has been damaged as a result of the violation of the code." *Welcome v. Arvida Cmty. Sales, Inc.*, 2004 WL 2340249, at *4. Plaintiffs and counsel will therefore be expending time, energy and resources litigating a claim which some class members do not even possess. This effort will not be insubstantial as a building code claim will be supported by proofs from at least one and perhaps multiple experts. Defense experts would have to be deposed and their reports reviewed, analyzed and critiqued by their counterparts in plaintiff's employ. All of this, of course, will require a substantial investment of resources by plaintiffs and class counsel - all for a claim which some putative class members do not even have. Certainly, some class members will have divergent interests from those pursuing building code claims. This same diversity of interests exists throughout the entire case as demonstrated in the prior treatment of the other class action prerequisites.

The Court observes that plaintiffs' post-hearing submission emphasizes the existence of an allegedly uniform remedy should plaintiffs prevail. For at least some homeowners, however, this remedy is inadequate. The second amended complaint alleges various types of damage, including personal property damage, for which compensation is sought. For those who have yet to sustain any damage, the plaintiffs will seek to prove too much in pursuing a private action for violation of the building code. For some, however, the limited common repair remedy fails to compensate potential personal injury and de-emphasizes personal property damage and diminution damages. "A plaintiff seeking to represent a class has no authority to waive class claims or jettison entire segments of a putative class." *Cheatwood v. Barry Univ., Inc.*, 2002 WL

1769914, at * 11.

In the end, while the court does not doubt the competence, good faith and good intentions of plaintiffs and their counsel, the class, as proposed, has too many inconsistent interests to be adequately represented in this action.

B. RULE 1.220(b)

In addition to the elements of numerosity, commonality, typicality and adequacy set forth in Rule 1.220(a), "a plaintiff mut also satisfy one of the three subdivisions of rule 1.220(b)." *Rollins v. Butland*, 2006 WL 3686484 at * 4. The second amended complaint alleges that plaintiffs have met the requirements of sections b(1)(A), b(1)(B) and b(3). In their motion papers, however, plaintiffs discuss only section b(3). It appears, therefore, that plaintiffs no longer rely upon any provision of section (b)(1).[11] As the Court has already found that this class does not meet the prerequisites of Rule 1.220(a), this motion must be denied. However, because plaintiffs may at a later date seek certification of an alternative class, the Court will examine plaintiffs' claims relative to section (b)(3).

Rule 1.220(b)(3) allows certification of a class where the requirements of Rule 1.220(a) have been met and

> the claim or defense is not maintainable under either subdivision (b)(1) or (b)(2), but the questions of law or fact common to the

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[11] Plaintiffs do not meet the requirements of any provision of section (b)(1), in any event. Inasmuch as the proposed class seeks monetary damages, it cannot be certified as a (b)(1)(A) class. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1078 n. 7 (11th Cir. 2000). Section (b)(1)(B) is most commonly used in limited fund cases. 2 Alba Conte & Herbert B. Newburg, *Newberg on Class Actions* § 4.9 (4th ed. 2002). The case *sub judice* does not involve a limited fund. Also, the mere possibility that a case may have precedential effect on later cases does not satisfy section (b)(1)(B). *In re Dennis Greenman Securities Litigation*, 829 F. 2d 1539, 1545-46 (11th Cir. 1987).

> claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy. The conclusions shall be derived from consideration of all relevant facts and circumstances, including (A) the respective interests of each member of the class in individually controlling the prosecution of separate claims or defenses, (B) the nature and extent of any pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (C) the desirability or undesirability of concentrating the litigation in the forum where the subject action is instituted, and (D) the difficulties likely to be encountered in the management of the claim or defense on behalf of a class.

Fla. R. Civ. P. 1.220(b)(3).

Thus, to be certified under Rule 1.220(b)(3), an action must meet two requirements. The first is the predominance of common questions of law or fact over individual questions. *Welcome v. Arvida Comm. Sales, Inc.*, 2004 WL 2340249, at * 7.

1. <u>Predominance</u>

As noted earlier in this Order, the requirement that common legal and factual issues predominate "parallels the commonality requirement under rule 1.220(a) because both require that common questions exist, but the predominance requirement in subsection (b)(3) 'is more stringent since common questions must pervade.'" *Rollins, Inc. v. Butland*, 2006 WL 3686484, at *4 *(quoting Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635, 639 (Fla. 3d DCA 2006)). As the Court has previously concluded that plaintiffs do not satisfy the commonality prerequisite of section (a) of rule 1.220, *a fortiori* they have not established the "more stringent" predominance requirement of section (b). *Hall v. Burger King Corp.*, Civ. A. No. 89-0260-Civ-Kehoe, 1992 WL 372354 at *12 (S.D. Fla. Oct. 26, 1992). In its analysis of the commonalty requirement, the Court analyzed

the elements of each of plaintiffs' causes of action, including the types of damages claimed, and concluded that in order to prevail on their claims, plaintiffs wold have to prove more than the alleged defect they claim exists in all Ryland homes. Commonality breaks down because plaintiffs assert claims which some class members may possess and others do not. They claim monetary damages which some class members have sustained and some have not. Those damages may or may not be attributable, in one degree or another, to a construction defect. As a result, there is a need for individualized proofs which would require hundreds and perhaps thousands of mini-trials, both as to liability and the fact, nature, extent and cause of damages. The diminution claims provide an example of this absence of commonality and concomitant lack of predominance of common issues. Ryland has built homes throughout Florida. One community may experience a drop in real estate values due to factors unrelated to anything Ryland has done or not done, and therefore individual proximate cause issues permeate a diminution in value analysis. *O'Connor v. Boeing N. Am., Inc.*, 180 F.R.D. 359, 383 (C.D. Cal. 1997). The numerous individual issues which this case presents destroy the cohesiveness necessary to satisfy the predominance criterion.

2. <u>Superiority</u>

In addition to a predominance of common factual and legal issues, Rule 1.220(b)(3) also requires a showing that "class representation be superior to other available methods of fairly and efficiently adjudicating the claims presented." In *Ligget Group v. Engle*, 853 So. 2d 434 (Fla. 3d DCA 2003), the Third District Court of Appeal explained that:

> Rule 1.220 also requires that class representation be superior to other available methods of fairly and efficiently adjudicating the claims presented. *See Castano v. American Tobacco Co.*, 84 F.3d at 734; *Emig v. American Tobacco Co.*, 184 F.R.D. at 379;

> *Humana, Inc. v. Castillo,* 728 So. 2d 261 (Fla. 2d DCA 1999). If significant individual issues exist, little value is gained by proceeding as a class action. Not only would the lawsuit become unmanageable, it would further be unjust to bind absent class members to a negative decision where the class representative's claims present different individual issues than those of the absent members. Under these circumstances, class representation would not be "superior" to individual suits for the fair and efficient adjudication of the controversy.

Id. at 445.

Here, the amount of individualized proof necessary to establish the claims set forth in the second amended complaint is enormous. *See Welcome v. Arvida Community Sales, Inc.*, 2004 WL 2340249 at * 8. The Court sees nothing "superior" in certifying a class and then having to conduct numerous mini-trials on liability and damages. Such a procedure defeats the very purpose of the class action rule. *Volkswagen of Am., Inc. v. Sugarman* , 909 So. 2d 923, 924 (Fla. 3d DCA 2005).

VII. CONCLUSION

The Court agrees with the plaintiffs and concludes that the caselaw does not support the broad conclusion that construction defect cases are never appropriate for certification as a class action. This particular case, however, is "far too complicated and individualized to permit class treatment." *Welcome v. Arvida Community Sales, Inc.*, 2004 WL 2340249, at * 9.

Therefore, it is hereby **ORDERED** and **ADJUDGED** that the plaintiffs' motion to certify class be and hereby is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 16 day of January, 2007.

REGINALD K. WHITEHEAD
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail on this 16 day of January, 2007, to:

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