

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

CASE No. 20-12743

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MICHELLE IRIZARRY; VALERIE WILLIAMS; JOANN NIXON; JOANN  
ROBINSON; and BRANDON LITT,

*Plaintiffs/Appellees,*

v.

ORLANDO UTILITIES COMMISSION,

*Defendant/Appellant.*

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**UNOPPOSED MOTION TO VACATE THE DISTRICT COURT'S ORDER  
AND DISMISS APPEAL AS MOOT BY DEFENDANT-APPELLANT  
ORLANDO UTILITIES COMMISSION**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA

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David B. Weinstein  
Ryan T. Hopper  
Jillian M. Askren  
GREENBERG TRAURIG, P.A.  
101 East Kennedy Boulevard  
Suite 1900  
Tampa, Florida 33602  
Telephone: 813.318.5700  
Facsimile: 813.318.5900

Elliot H. Scherker  
GREENBERG TRAURIG, P.A.  
333 Southeast Second Avenue  
Suite 4400  
Miami, Florida 33131  
Telephone: 305.579.0500  
Facsimile: 305.579.0717

*Counsel for Appellant, Orlando Utilities Commission*

***Irizarry v. Orlando Utilities Commission***  
**Case No. 20-12743**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1, Appellant, Orlando Utilities Commission, discloses the following trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

**I. Corporate Disclosure**

OUC is a public entity, is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held corporation holds 10% or more of its stock.

**II. Interested Persons**

1. Alston & Bird, LLP, *Counsel for Boral Resources, LLC*
2. Askren, Jillian, *Counsel for OUC*
3. Avalon Park Group Management, Inc., *Defendant*
4. Baker, Donelson, Bearman, Caldwell, Berkowitz, PC, *Counsel for Avalon Park Group Management, Inc.*
5. Baker Botts, LLP, *Counsel for OUC*
6. Barnes, Robert, *Counsel for Boral Resources, LLC*
7. Berge, Megan, *Counsel for OUC*
8. Bhatia, Vineet, *Counsel for Plaintiffs/Appellees*
9. Boral Resources, LLC, *Defendant*

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT  
(Continued)**

10. Branton, Christopher, *Counsel for Preferred Materials, Inc.*
11. Brightman, Michael, *Counsel for Plaintiffs/Appellees*
12. Brooks, Lauren, *Counsel for Avalon Park Group Management, Inc. and  
Beat Kahli*
13. Cansler, Sarah, *Counsel for Boral Resources, LLC*
14. Carpenter, David, *Counsel for Boral Resources, LLC*
15. Cohen Milstein Sellers & Toll, PLLC, *Counsel for Plaintiffs/Appellees*
16. Cole, Scott & Kissane, PA *Counsel for Avalon Park Group  
Management, Inc.*
17. Dalton, Hon. Roy B., Jr., *U.S. District Court Judge*
18. de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP, *Counsel for  
Boral Resources, LLC*
19. DeMeo, Ralph, *Counsel for Avalon Park Group Management, Inc. and  
Beat Kahli*
20. Diffley, Daniel, *Counsel for Boral Resources, LLC*
21. Gerber, Daniel, *Counsel for Lennar Corporation, U.S. Home  
Corporation, and Lennar Homes, LLC*
22. Gierke, Christina, *Counsel for Avalon Park Group Management, Inc.  
and Beat Kahli*
23. GrayRobinson, PA, *Counsel for OUC*

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT  
(Continued)**

24. Greenberg Traurig, PA *Counsel for OUC*
25. Halstead, Travis, *Counsel for Avalon Park Group Management, Inc.  
and Beat Kahli*
26. Hill, Suzanne Barto, *Counsel for Lennar Corporation, U.S. Home  
Corporation, and Lennar Homes, LLC*
27. Hill Ward Henderson, PA, *Counsel for Preferred Materials, Inc.*
28. Hopper, Ryan, *Counsel for OUC*
29. Irizarry, Michelle, *Plaintiff/Appellee*
30. Kahli, Beat, *Defendant*
31. Kidd, Hon. Embry J., *U.S. Magistrate Judge*
32. Klorfein, Kathryn, *Counsel for Boral Resources, LLC*
33. Kroeger, Leslie, *Counsel for Plaintiffs/Appellees*
34. Lennar Corporation, *Defendant*
35. Lennar Homes, LLC, *Defendant*
36. Leopold, Theodore, *Counsel for Plaintiffs/Appellees*
37. Lindquist, Dara, *Counsel for Lennar Corporation and U.S. Home  
Corporation*
38. Litt, Brandon, *Plaintiff/Appellee*
39. Marchand, Sterling, *Counsel for OUC*
40. Martin, Diana, *Counsel for Plaintiffs/Appellees*

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT  
(Continued)**

41. Mayo, Kent, *Counsel for OUC*
42. Mitchell, Richard, *Counsel for OUC*
43. Morrissey, Stephen, *Counsel for Plaintiffs/Appellees*
44. Murnaghan Ferguson & Schmidt, PA, *Counsel for Preferred Materials,  
Inc.*
45. Murnaghan, Peter, *Counsel for Preferred Materials, Inc.*
46. Nixon, Joanne, *Plaintiff/Appellee*
47. O'Malley, Daniel, *Counsel for Boral Resources, LLC*
48. Orlando Utilities Commission, *Defendant/Appellant*
49. Preferred Materials, Inc., *Defendant*
50. Robinson, Joann, *Plaintiff/Appellee*
51. Rogers Townsend & Thomas, PC, *Counsel for Boral Resources, LLC*
52. Rumberger, Kirk & Caldwell, PA *Counsel for Lennar Corporation*
53. Scherker, Elliot, *Counsel for OUC*
54. Schmidt, Jill, *Counsel for Preferred Materials, Inc.*
55. Simmons, David, *Counsel for Boral Resources, LLC*
56. Simmons, Tori, *Counsel for Preferred Materials, Inc.*
57. Spain, Steven, *Counsel for Avalon Park Group Management, Inc. and  
Beat Kahli*
58. Susman Godfrey, LLP, *Counsel for Plaintiffs/Appellees*

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT  
(Continued)**

59. Theriaque & Spain, *Counsel for Avalon Park Group Management, Inc.*
60. Tiblier, Christian, *Counsel for Lennar Corporation and U.S. Home Corporation*
61. Torres, Christopher, *Counsel for OUC*
62. U.S. Home Corporation, *Defendant*
63. Waggoner, Dennis, *Counsel for Preferred Materials, Inc.*
64. Weinstein, David, *Counsel for OUC*
65. Williams, Valeria, *Plaintiff/Appellee*
66. Wilson, Daniel, *Counsel for Plaintiffs/Appellees*

/s/ David B. Weinstein  
David B. Weinstein

**UNOPPOSED MOTION TO VACATE THE DISTRICT COURT'S  
ORDER AND DISMISS THE APPEAL AS MOOT**

Defendant-Appellant Orlando Utilities Commission (“OUC”) appealed the District Court’s Order denying its Motion for Partial Judgment on the Pleadings. After the filing of the appeal, Plaintiffs-Appellees (“Plaintiffs”) decided not to pursue the case below and filed a motion requesting the District Court dismiss the claims against OUC. (Doc. 150). The District Court granted that motion and closed the case. (Doc. 152). For the reasons discussed below, OUC respectfully requests this Court first vacate the District Court’s Order denying its Motion for Partial Judgment on the Pleadings (Doc. 131) and then dismiss this appeal as moot.

**BACKGROUND**

OUC is a legislatively created public utility that operates a power plant located near Orlando, Florida. Plaintiffs are nearby residents who, prior to the dismissal of the case below, alleged that dust and coal-combustion residuals escaped from the plant and diminished their property values. Plaintiffs sought to hold OUC strictly liable for that alleged diminution pursuant to Florida’s Water Quality and Assurance Act (“WQAA”).

OUC moved for a judgment on the pleadings as to Plaintiffs’ WQAA claim, arguing that the Florida Legislature had not clearly and unequivocally waived its sovereign immunity from the WQAA’s private cause of action. (Doc. 89.) The District Court denied OUC’s motion, citing two reasons. (Doc. 131.) First, it applied

the “functional test” and determined that OUC is not even presumptively entitled to immunity from “proprietary” acts, which include power-plant operations. (*Id.* at 5-8.) Second, the Court inferred from two provisions of the WQAA that the Legislature had waived sovereign immunity from claims brought under the WQAA’s private cause of action. (*Id.* at 8-11.)

Since the filing of the appeal, Plaintiffs have unilaterally chosen to dismiss the entire action. Plaintiffs filed stipulations of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) as to all Defendants *except* OUC.

Plaintiffs and OUC did not enter into a settlement or any other type of agreement. Consequently, Plaintiffs filed a Motion for Voluntary Dismissal pursuant to Federal Rule of Civil Procedure 41(a)(2), by which they requested the District Court to dismiss Plaintiffs’ claims against OUC. (Doc. 150.) A copy of that Motion is attached as Exhibit A.

OUC then filed a response in which it informed the District Court that it did “not oppose dismissal, provided that it is with prejudice and that the record reflects Plaintiffs’ voluntary and unilateral decision to dismiss.” (Doc. 151 at 1.) A copy of the response is attached as Exhibit B. On November 18, 2020, the District Court granted Plaintiffs’ Motion for Voluntary Dismissal and dismissed OUC, recognizing that, “OUC declined to stipulate to dismissal because of its pending appeal.”



(Doc. 152 at 2.) The District Court also directed the Clerk “to terminate all pending motions and close the case.” *Id.* A copy of the Order is attached as Exhibit C.

With the dismissal of OUC and the other former Defendants there is no longer a “live” case or controversy in the District Court, thus mooting this appeal. Accordingly, OUC respectfully requests this Court to first vacate the District Court’s Order denying OUC sovereign immunity (Doc. 131) pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and then to dismiss this appeal.

### **ANALYSIS**

This appeal concerns whether OUC is presumptively entitled to sovereign immunity for “proprietary” functions, and if so, whether the Florida Legislature waived sovereign immunity for WQAA claims. The importance of this issue to OUC extends beyond the action below because future litigants may argue that OUC is not entitled to sovereign immunity based on the application of the functional test relied on by the District Court in the Order that is the subject of this appeal. (Doc. 131.) Due to Plaintiffs’ unilateral decision to dismiss their case below, OUC no longer has an opportunity to challenge the District Court’s Order.

**A. When a case becomes moot on appeal, the appellate court should vacate the district court’s order and dismiss the appeal.**

“A prerequisite to Article III standing is the existence of a live ‘case or controversy,’” which must not only “exist at the time the complaint is filed, but at all stages of appellate review.” *IAL Aircraft Holding, Inc. v. FAA*, 216 F.3d 1304,

1305 (11th Cir. 2000). When the issues presented “are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome,” the case is moot. *BankWest, Inc. v. Baker*, 446 F.3d 1358, 1364 (11th Cir. 2006) (quoting *De La Teja v. United States*, 321 F.3d 1357, 1361 (11th Cir. 2003)). And once a case is moot, a federal court no longer has jurisdiction over the matter. *Id.* at 1363-64. As relevant to this case, granting a motion for voluntary dismissal moots the appellate proceedings. *See Whitfield v. Radian Guar., Inc.*, 539 F.3d 165, 166 (3d Cir. 2008) (dismissing case as moot pursuant to instructions from U.S. Supreme Court following Rule 41(a)(2) dismissal with prejudice).

Moreover, the Supreme Court has explained that the “established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). This Court has repeatedly followed the principle set forth in *Munsingwear*. “[W]hen an issue in a case becomes moot on appeal, the court not only must dismiss as to the mooted issue, but also vacate the portion of the district court’s order that addresses it.” *De La Teja*, 321 F.3d at 1364; *see also Soliman v. United States ex rel. INS*, 296 F.3d 1237, 1243 (11th Cir. 2002) (“Under our precedent, when a case becomes moot on appeal, the

Court of Appeals must not only dismiss the case, but also vacate the district court's order.”).

This practice prevents a party from being subject to the preclusive effect of an adverse judgment, “review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40. That is, “[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.” *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 (1994). “The same is true when mootness results from unilateral action of the party who prevailed below.” *Id.* Accordingly, to avoid such unfair results, the appellate court has a duty to vacate the lower court’s decision when a case becomes moot on appeal. *Munsingwear*, 340 U.S. at 40.

**B. Because the case is moot due to Plaintiffs’ unilateral decision to dismiss, this Court should vacate the District Court’s Order and dismiss the appeal.**

This Court should vacate the District Court’s decisions for the reasons set forth in *Munsingwear*. OUC disagreed with the District Court’s Order denying it the protections of sovereign immunity and it therefore commenced this appeal. Subsequently, Plaintiffs alone chose to dismiss their claims against OUC and the other Defendants. OUC did not enter into a settlement or other agreement with Plaintiffs and it did not stipulate to the dismissal below. Nevertheless, because of Plaintiff’s decision, the case is moot, and the appeal must be dismissed.

OUC should not “be forced to acquiesce in the judgment” because it is unable to continue its challenge of the Order due to the “unilateral action of the party who prevailed below.” In particular, OUC is concerned that the effect of the Order could extend beyond this case because the District Court’s ruling may be argued against it in future litigation. And because of Plaintiffs’ decision to dismiss the case, OUC will be exposed to such arguments if the Order is not vacated. Accordingly, OUC respectfully requests that this Court vacate the District Court’s Order pursuant to *Munsingwear*.

Additionally, OUC recognizes that vacatur pursuant to a *settlement agreement* is contingent on “exceptional circumstances.” *Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1332 (11th Cir. 2016). However, the exceptional-circumstances inquiry is unnecessary here given Plaintiff’s decision to unilaterally request a voluntary dismissal without a settlement or even a stipulation with OUC. Regardless, if this Court chooses to evaluate exceptional circumstances, OUC believes they exist. Dismissal of the case and vacatur of the District Court’s Order allows for the efficient use of resources by freeing “previously committed judicial resources . . . to deal with other matters, advancing the efficiency of the federal courts.” *Id.* at 1337. Additionally, there is limited precedential value in a federal court decision on a purely state law issue.

Accordingly, for the reasons described above, OUC respectfully requests that this Court vacate the District Court's Order on OUC's Motion for Partial Judgment on the Pleadings and dismiss this appeal as moot.

Counsel for OUC has conferred with counsel for Plaintiffs who has confirmed they do not oppose the requested relief.

Date: November 19, 2020

Respectfully submitted,

/s/ David Weinstein

David B. Weinstein (FBN 604410)

E-mail: [weinsteind@gtlaw.com](mailto:weinsteind@gtlaw.com)

Ryan T. Hopper (FBN 0107347)

E-mail: [hopperr@gtlaw.com](mailto:hopperr@gtlaw.com)

Jillian M. Askren (FBN 121773)

E-mail: [askrenj@gtlaw.com](mailto:askrenj@gtlaw.com)

**GREENBERG TRAURIG, P.A.**

101 E. Kennedy Blvd., Suite 1900

Tampa, FL 33602

Telephone: (813) 318-5700

Facsimile: (813) 318-5900

Secondary Email: [thomasm@gtlaw.com](mailto:thomasm@gtlaw.com);

[FLService@gtlaw.com](mailto:FLService@gtlaw.com)

Elliot H. Scherker (FBN 202304)

Email: [scherkere@gtlaw.com](mailto:scherkere@gtlaw.com)

**GREENBERG TRAURIG, P.A.**

333 S.E. 2nd Avenue, Suite 4400

Miami, Florida 33131

Telephone: (305) 579-0500

Facsimile: (305) 579-0717

Secondary Email: [FLService@gtlaw.com](mailto:FLService@gtlaw.com)

*Counsel for Orlando Utilities Commission*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,  
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because this document contains 1,494 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft® Word 365, version 1808, in Times New Roman 14-point typeface.

/s/ David B. Weinstein  
David B. Weinstein

**CERTIFICATE OF SERVICE**

I certify that on November 19, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ David B. Weinstein  
David B. Weinstein

# EXHIBIT A

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

MICHELLE IRIZARRY, VALERIE WILLIAMS, and  
JOANNE NIXON, JOANN ROBINSON and  
BRANDON LITT,

Plaintiffs,

CASE NO: 6:19-cv-00268-RBD-TBS

v.

ORLANDO UTILITIES COMMISSION, LENNAR  
CORPORATION, U.S. HOME CORPORATION,  
AVALON PARK GROUP MANAGEMENT, INC.,  
BEAT KAHLI, LENNAR HOMES, LLC, BORAL  
RESOURCES, LLC

Defendants.

\_\_\_\_\_ /

**MOTION FOR VOLUNTARY DISMISSAL UNDER FED. R. CIV. P. 41(a)(2)**

Plaintiffs move this Honorable Court to dismiss its claims against the only remaining defendant, Orlando Utilities Commission (“OUC”), with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(2).

Plaintiffs request voluntary dismissal because plaintiffs have reached settlements with the other defendants or dismissed those defendants, thereby resolving all matters at issue in this case and leaving nothing further to litigate.

This Court has broad discretion in determining whether to allow a voluntary dismissal under Rule 41(a)(2). *McCants v. Ford Motor Co. Inc.*, 781 F.2d 855, 857 (11th Cir.1986). Voluntary dismissal should be granted, unless the defendant will suffer clear legal prejudice, other than the mere prospect of a subsequent lawsuit. *Versa Prod., Inc. v. Home Depot. USA, Inc.*, 387



F.3d 1325, 1328 (11th Cir. 2004); *Pontenberg v. Bos. Sci. Corp.*, 252 F.3d 1253, 1259 (11th Cir. 2001).

Here, OUC, the only remaining defendant, will not suffer any clear legal prejudice as they will not lose any substantial right as a result of the dismissal. *Id.* Because Plaintiffs move to dismiss their claims with prejudice, no risk to OUC of abuse in a refiled lawsuit exists. *See id.*

Plaintiffs' purpose in dismissing the lawsuit is not improper or in bad faith.

Based on the foregoing, Plaintiffs respectfully request that the Court enter an order dismissing the above-styled action, with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(2).

DATED this 16th day of November, 2020.

Respectfully submitted,

/s/ Stephen Morrissey  
Stephen Morrissey, Esq.  
[smorrissey@susmangodfrey.com](mailto:smorrissey@susmangodfrey.com)

Admitted *Pro Hac Vice*  
SUSMAN GODFREY L.L.P.  
1201 Third Ave., Suite 3800  
Seattle, WA 98101  
T: (206) 516-3880 Telephone  
F: (206) 516-3883 Facsimile

Vineet Bhatia  
[vhatia@susmangodfrey.com](mailto:vhatia@susmangodfrey.com)  
Admitted *Pro Hac Vice*  
Michael Brightman  
[mbrightman@susmangodfrey.com](mailto:mbrightman@susmangodfrey.com)

Admitted *Pro Hac Vice*  
Daniel Wilson  
[dwilson@susmangodfrey.com](mailto:dwilson@susmangodfrey.com)  
Admitted *Pro Hac Vice*  
SUSMAN GODFREY L.L.P.  
1000 Louisiana, Suite 5100  
Houston, TX 77002-5096  
T: (713) 651-9366  
F: (713) 654-6666

*Attorneys for Plaintiffs*

Theodore J. Leopold, Esq.  
Florida Bar No: 705608  
[tleopold@cohenmilstein.com](mailto:tleopold@cohenmilstein.com)

Leslie M. Kroeger, Esq.  
Florida Bar No: 989762  
[lkroeger@cohenmilstein.com](mailto:lkroeger@cohenmilstein.com)

Diana L. Martin, Esq.  
Florida Bar No.: 624489  
[dmartin@cohenmilstein.com](mailto:dmartin@cohenmilstein.com)

Cohen Milstein Sellers & Toll, PLLC  
2925 PGA Boulevard, Suite 200  
Palm Beach Gardens, FL 33410  
T: (561) 515-1400  
F: (561) 515-1401

*Local Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Daniel Wilson\_\_\_\_\_

**SERVICE LIST**

*Attorneys for Orlando Utilities Commission*

**Kent Mayo**

Kent.mayo@bakerbotts.com

**Megan H. Berge**

megan.berge@bakerbotts.com

**Sterling A. Marchand**

sterling.marchand@bakerbotts.com

**Baker Botts LLP**

1299 Pennsylvania Ave. NW

Washington, DC 20004

Phone: 202.639.1122

**Ryan T. Hopper**

hopperr@gtlaw.com

**Christopher Torres**

torresch@gtlaw.com

**David B. Weinstein**

[weinsteind@gtlaw.com](mailto:weinsteind@gtlaw.com)

**Jillian M. Askren**

askrenj@gtlaw.com

**Greenberg Traurig, P.A.**

101 E. Kennedy Blvd, Suite 1900

Tampa, FL 33602

Phone: 813.318.5700

**Richard E. Mitchell**

rmitchell@gray-robinson.com

**GrayRobinson, PA**

301 E Pine St Ste 1400

Orlando, FL 32801

Phone: 407.843.8880 Ext 6274

*Attorneys for Lennar Corporation & U.S. Home Corporation*

**Suzanne Barto Hill**

shill@rumberger.com

**Daniel Jay Gerber**

dgerber@rumberger.com

**Christian H. Tiblier**

ctiblier@rumberger.com

**Rumberger, Kirk & Caldwell, P.A.**

300 South Orange Avenue

Lincoln Plaza, Suite 1400

Orlando, FL 32802-1873

Phone: 407.872.7300

*Attorneys for Avalon Park Group Management, Inc. d/b/a Avalon Park Group & Beat Kahli*

**Lauren D. Brooks**

lbrooks@bakerdonelson.com

**Ralph A. DeMeo**

rdemeo@bakerdonelson.com

**David A. Theriaque**

dat@theriaquelaw.com

**Steven Brent Spain**

sbs@theriaquelaw.com

**Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.**

101 N. Monroe Street, Suite 925  
Tallahassee, FL 32301  
Phone: 850.425.7507

**Theriaque & Spain**

9100 Conroy Windermere Rd., Ste 200  
Windermere, FL 34786  
Phone: 407.258.3733

**Christina Bredahl Gierke**

[Christina.gierke@csklegal.com](mailto:Christina.gierke@csklegal.com)

**Travis J. Halstead**

[Travis.halstead@csklegal.com](mailto:Travis.halstead@csklegal.com)

**Victoria McFarland**

[Victoria.mcfarland@csklegal.com](mailto:Victoria.mcfarland@csklegal.com)

**Cole, Scott & Kissane**

1900 Summit Tower Blvd.  
Tower Place, Suite 400  
Orlando, FL 32810  
Phone: 321-972-0000  
Fax: 321-972-0099

*Attorneys for Boral Resources, LLC*

**Daniel F. Diffley**

[dan.diffley@alston.com](mailto:dan.diffley@alston.com)

**David Carpenter**

[David.carpenter@alston.com](mailto:David.carpenter@alston.com)

**Kathryn C. Klorfein**

[Kathryn.klorfein@alston.com](mailto:Kathryn.klorfein@alston.com)

**Alston & Bird, LLP**

One Atlantic Center Suite 4900  
1201 W. Peachtree St.  
Atlanta, GA 30309-3424  
Phone: 404.881.7000

**Sarah R. Cansler**

[Sarah.cansler@alston.com](mailto:Sarah.cansler@alston.com)

**Alston & Bird, LLP**

555 Fayetteville St., Suite 600  
Raleigh, NC 27601  
Phone: 919.862.2200

**David H. Simmons**

[dsimmons@dsklawgroup.com](mailto:dsimmons@dsklawgroup.com)

**Daniel J. O'Malley**

[domalley@dsklawgroup.com](mailto:domalley@dsklawgroup.com)

**de Beaubien, Simmons, Knight, Mantzaris & Neal, LLP**

3999 N. Harbor City Blvd.  
Melbourne, FL 32935  
Phone: 407.422.2454

**Robert Bryan Barnes**

[Bryan.barnes@rtt-law.com](mailto:Bryan.barnes@rtt-law.com)

**Rogers Townsend & Thomas, PC**

1221 Main St., 14th Floor  
Columbia, SC 29202-3200  
Phone: 803.744.1273

# EXHIBIT B

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

MICHELLE IRIZARRY; VALERIE  
WILLIAMS; JOANNE NIXON; JOANN  
ROBINSON; and BRANDON LITT,

Plaintiffs,

v.

ORLANDO UTILITIES COMMISSION;  
LENNAR CORPORATION; LENNAR  
HOMES, LLC; U.S. HOME  
CORPORATION; AVALON PARK GROUP  
MANAGEMENT, INC., d/b/a/ AVALON  
PARK GROUP; BEAT KAHLI; BORAL  
RESOURCES, LLC; and PREFERRED  
MATERIALS, INC.,

Defendants.

Case No. 6:19-cv-00268-RBD-TBS

**OUC'S RESPONSE TO PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL  
UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(a)(2)**

Pursuant to Local Rule 3.01(b), Defendant Orlando Utilities Commission ("OUC") responds as follows to Plaintiffs' Motion for Voluntary Dismissal Under Federal Rule of Civil Procedure 41(a)(2) (Doc. 150). As a threshold matter, OUC did not stipulate to a voluntary dismissal by Plaintiffs because of the pending interlocutory appeal of this Court's order on sovereign immunity (Doc. 139). However, OUC does not oppose dismissal, provided that it is with prejudice and that the record reflects Plaintiffs' voluntary and unilateral decision to dismiss.

In short, since Plaintiffs declined to pursue class certification (Doc. 137), OUC's primary goal in this action has been to secure appellate review or vacatur of this Court's order

denying OUC sovereign immunity (Doc. 131). OUC respectfully disagrees with this Court's decision. In particular, this Court's application of the functional test to determine a municipal agency's sovereign immunity could be cited against OUC in other contexts. (*See id.* at 3–8.) Largely for that reason, OUC filed an interlocutory appeal of this Court's sovereign immunity order last July (Doc. 139), and the appellate proceedings are ongoing in the Eleventh Circuit.

Granting Plaintiffs' motion for voluntary dismissal would moot the appellate proceedings. *See Whitfield v. Radian Guar., Inc.*, 539 F.3d 165, 166 (3d Cir. 2008) (dismissing case as moot pursuant to instructions from U.S. Supreme Court following Rule 41(a)(2) dismissal with prejudice). In that event, the Eleventh Circuit would be required to dismiss the appeal and vacate this Court's sovereign immunity order pursuant to the *Munsingwear* doctrine, under which "vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (discussing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950)).

That outcome would serve the interests of the parties, the Court, and the public. Plaintiffs' interests will be served by permitting "the voluntary disposition of this case," OUC's interests will be served through vacatur of the sovereign immunity order, and the interests of this Court and the public will be served by freeing "previously committed judicial resources . . . to deal with other matters, advancing the efficiency of the federal courts." *Cf. Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1337 (11th Cir. 2016) (vacating an underlying summary-judgment order pursuant to a settlement by the parties).

Although voluntary dismissal would serve everyone's interests, it is important to note that Plaintiffs unilaterally chose to cease pursuing their claims. Plaintiffs and OUC have not

entered into a settlement or any other type of agreement. That fact has procedural consequences, as vacatur of an order pursuant to a settlement requires a showing of “exceptional circumstances.” *Id.* at 1332. While such circumstances exist here for the reasons expressed above, *see id.* at 1336–37, the exceptional-circumstances inquiry is unnecessary given Plaintiffs’ unilateral decision to request a voluntary dismissal.

Accordingly, OUC does not oppose dismissal, provided that it is with prejudice and that the record reflects Plaintiffs’ voluntary and unilateral decision.

November 16, 2020

Respectfully submitted,

/s/ David Weinstein

David B. Weinstein (FBN 604410)

E-mail: [weinsteind@gtlaw.com](mailto:weinsteind@gtlaw.com)

Christopher Torres (FBN 0716731)

E-mail: [torresch@gtlaw.com](mailto:torresch@gtlaw.com)

Ryan T. Hopper (FBN 0107347)

E-mail: [hopperr@gtlaw.com](mailto:hopperr@gtlaw.com)

Jillian Askren (FBN 121773)

E-mail: [askrenj@gtlaw.com](mailto:askrenj@gtlaw.com)

GREENBERG TRAURIG, P.A.

101 E. Kennedy Blvd., Suite 1900

Tampa, FL 33602

Telephone: (813) 318-5700

Facsimile: (813) 318-5900

Secondary Email: [thomasm@gtlaw.com](mailto:thomasm@gtlaw.com);

[FLService@gtlaw.com](mailto:FLService@gtlaw.com)

Richard E. Mitchell (FBN 0168092)

E-mail: [rick.mitchell@gray-robinson.com](mailto:rick.mitchell@gray-robinson.com)

GRAYROBINSON, P.A.

301 East Pine Street, Suite 1400

Post Office Box 3068 (32802-3068)

Orlando, Florida 32801

Telephone: (407) 843-8880

Facsimile: (407) 244-5690

Secondary Email:

[maryann.hamby@grayrobinson.com](mailto:maryann.hamby@grayrobinson.com)



Kent Mayo  
E-mail: kent.mayo@bakerbotts.com  
Megan H. Berge  
E-mail: megan.berge@bakerbotts.com  
Sterling A. Marchand  
E-mail: sterling.marchand@bakerbotts.com  
BAKER BOTTS L.L.P.  
700 K Street, NW  
Washington, DC 20001  
Telephone: (202) 639-7700  
Facsimile: (202) 639-7890

*Counsel for Defendant  
Orlando Utilities Commission*

**CERTIFICATE OF SERVICE**

I certify that on November 16, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ David Weinstein  
Attorney

ACTIVE 53789941

# EXHIBIT C

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

MICHELLE IRIZARRY; VALERIE  
WILLIAMS; JOANNE NIXON; JOANN  
ROBINSON; and BRANDON LITT,

Plaintiffs,

v.

Case No. 6:19-cv-268-Orl-37EJK

ORLANDO UTILITIES COMMISSION;  
and BORAL RESOURCES, LLC,

Defendant.

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**ORDER**

This cause is before the Court on the parties' Stipulation of Voluntary Dismissal of Boral Resources, LLC (Doc. 149 ("**Stipulation**")) and Plaintiffs' Motion for Voluntary Dismissal Under Fed. R. Civ. P. 41(a)(2) (Doc. 150 ("**Motion**")). For the Stipulation, the parties stipulate to the voluntary dismissal with prejudice of Defendant Boral Resources, LLC. (Doc. 149.) The Stipulation is effective without an order. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii); *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1278 (11th Cir. 2012). As to the Motion, Plaintiffs move to voluntarily dismiss their claims against Defendant Orlando Utilities Commission ("**OUC**") with prejudice under Federal Rule of Civil Procedure 41(a)(2). OUC does not oppose.<sup>1</sup> (Doc. 151.) So the Court grants the Motion.

Accordingly, it is **ORDERED AND ADJUDGED:**

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<sup>1</sup> OUC declined to stipulate to dismissal because of its pending appeal. (Doc. 151.)

1. Plaintiffs' Motion for Voluntary Dismissal (Doc. 150) is **GRANTED**.
2. Plaintiffs' claims against Defendants Orlando Utilities Commission and Boral Resources, LLC (Doc. 43, ¶¶ 267-311, 344-54) are **DISMISSED WITH PREJUDICE**.
3. The Clerk is **DIRECTED** to terminate all pending motions and close the case.

**DONE AND ORDERED** in Chambers in Orlando, Florida, on November 17, 2020.



  
ROY B. DALTON JR.  
United States District Judge

Copies to:  
Counsel of Record