THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Case No. 2014-CP-40-07229

Group III Mgt., Inc. ..... Respondent,

v.

Suncrete of Carolina, Inc. d/b/a Crystal Pools ..... Appellant.

INITIAL BRIEF OF RESPONDENT

HAYNSWORTH SINKLER BOYD, P.A.

John C. Bruton, Jr. (SC Bar No. 975)
P.O. Box 11889 (2911-1889)
Columbia, SC 29201
(803) 779-3080
jbruton@hsblawfirm.com

Sarah P. Spruill (SC Bar No. 68337)
P.O. Box 2048
Greenville, SC 29602
(864) 240-3200
sspruill@hsblawfirm.com

Attorneys for Respondent Group III Mgt., Inc.

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COUNTERSTATEMENT OF THE CASE AND FACTS

This appeal relates solely to an arbitrator's award of attorney's fees in a dispute between Group III Mgt, Inc. ("Group III") and Suncrete of Carolina, Inc. d/b/a Crystal Pools ("Crystal Pools").[1] On September 19, 2013, Group III filed a demand for arbitration with the American Arbitration Association ("AAA") seeking to recover from Crystal Pools for work Crystal Pools failed to complete as required by the Contract. (Demand, R. at ____). On November 11, 2013, Crystal Pools responded and asserted a counterclaim against Group III alleging a balance due under the Contract. (Response, R. at ____). C. Allen Gibson, Jr., Esq. was duly appointed as arbitrator and held arbitration hearings in person on July 8-10, 2014 and a telephone hearing on July 14, 2014. (Award, R. at ____).

At the conclusion of the arbitration hearing, Group III and Crystal Pools submitted to the arbitrator the issue of determining the "prevailing party" and the amount of reasonable attorneys' fees that should be awarded to that party pursuant to the Contract. (Award, R. at ____). Each party submitted an attorney's fee affidavit seeking full recovery of their attorney's fees in this action. (Fee Affidavits, R. at ____). Neither fee submission made any reference to applicable law or any limit on the arbitrator's authority to award attorney's fees. (*Id.*).

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[1] On October 18, 2012, Group III entered into a construction contract with the Army Corps of Engineers, Charleston Division ("Army Corps"), for the construction of repairs, renovations, and upgrades to the Legion Pool Complex located at Fort Jackson. The scope of the contract included removal of an existing swimming pool, the construction of a new swimming pool and deck, and the construction of a building and other improvements. (Gee Order, R. at ____). By contract dated November 8, 2012 ("Contract"), Group III subcontracted with Crystal Pools for the construction of the new swimming pool and deck area. (Contract, R. at ____). The Contract included an arbitration clause for any disputes and a provision providing for the recovery of reasonable attorney's fees by the prevailing party. (*Id.*).

On or about August 18, 2014, the arbitrator entered an award in favor of Group III against Crystal Pools in the total amount of $197,304.09, of which $116,165.86 was for attorney's fees and costs associated with the prosecution of Group III's claim and defense of Crystal Pools's counterclaim. No amount was awarded to Crystal Pools on its counterclaim in the amount of $84,671.98. (Award, R. at ____).

On September 8, 2014, Crystal Pools filed a request with the arbitrator to modify the award to limit or eliminate the attorneys' fees portion of the award upon essentially the same grounds as set forth in this appeal. (Request, R, at ____). The arbitrator denied this motion based on the applicable AAA rules and his finding that "[t]he parties submitted to the arbitrator the issue of determining the 'prevailing party' and the amount of reasonable attorney's fees that should be awarded to that party." (Gibson Order, R. at ____).

Following this ruling, Group III filed a motion to confirm the award (Motion, R. at ____) and Crystal Pools filed a motion to vacate or modify the award (Motion, R. at ____). The motions were scheduled to be heard by the Honorable J. Ernest Kinard, Jr. on February 6, 2015. Judge Kinard indicated to the parties that he was "not versed with the facts" and the parties agreed to submit the motions on the briefs with proposed orders. (Tr. at 18:2-9, R. at ____). By order signed April 23, 2015, Judge Kinard granted Crystal Pools's motion and reduced the award of attorney's fees from $116,165.86 to $0. (Kinard Order, R. at ____). No order was entered with respect to Group III's motion to confirm the arbitration award. The April 23 order was not filed until May 18, 2015 and May 26, 2015 (there are two filing date stamps on the Order) and was not received by

Group III's attorney by mail from the Richland County Clerk of Court until June 3, 2015. (Motion, R. at ____). Judge Kinard died on May 19, 2015.

Upon receipt of the April 23 order, Group III filed a motion to alter or amend pursuant to Rule 59(e), SCRCP on June 12, 2015. (*Id.*). In that motion, Group III urged the Circuit Court to reconsider the April 23 order because it applied the wrong standard to its review of the arbitration award, and in the alternative, included an incorrect application of the law in addressing the merits of the arbitrator's award. The motion further raised that the April 23 order "failed to find as a fact and to take into account that the determination of prevailing party and amount of attorney's fees was expressly submitted to the arbitrator by the parties." (*Id.*). This motion was heard by the Hon. Tanya A. Gee on October 2, 2015. Judge Gee granted the motion by order dated November 12, 2015 and confirmed the arbitrator's award in its entirety. (Gee Order, R. at ____). This appeal followed.

ARGUMENTS

I. The Circuit Court correctly applied the standard of review found in the Federal Arbitration Act ("FAA") and determined that there was no basis to modify or vacate the arbitrator's attorney's fee award in this case.

A. The FAA provides a narrow standard for judicial review.

As provided in the Contract, "this agreement to arbitrate shall be governed by the Federal Arbitration Act." (Contract, R. a ___). In addition to the language of the Contract, the FAA provides,

> [A] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Contract arises in interstate commerce as it is between a North Carolina contractor and a South Carolina subcontractor for a construction project owned by the Army Corps. (Contract at Article 1, R. at ____). *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001) (finding contract provision stating it would be governed by FAA was enforceable and further finding contract implicated interstate commerce).

In cases where the FAA applies and as found by the Circuit Court, "state law is supplanted by federal substantive law. . . ." *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 104, 333 S.E.2d 781, 785 (1985). Thus, the FAA applies to the standard of review that the Court must consider in determining whether to vacate or modify the arbitration award. *See id.* (applying federal precedent under FAA in review of arbitration award). "In order to advance the underlying purposes of arbitration, the scope of judicial review is necessarily restricted." *Id at 105, 785.* (citing 9 U.S.C. §§ 9-11). "Consequently, a court 'may vacate or modify an arbitration award only if one of the grounds specified in 9 U.S.C. §§ 10 and 11 is found to exist." *Id.* (quoting *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980)). Indeed, "the scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." *Henry M. Jackson Found. for the Advancement of Military Med., Inc. v. Norwell, Inc.*, 596 Fed. App'x. 200, 201 (4th Cir. 2015) (internal quotation and citation omitted).

Under the FAA, a party seeking to vacate an arbitration must show one of the following: (1) "the award was procured by corruption, fraud, or undue means;" (2) "evident partiality or corruption in the arbitrators;" (3) "misconduct in refusing to postpone the hearing" or "refusing to hear evidence pertinent and material to the controversy;" or (4) "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a). To justify modification of an arbitration award, a party must show that (1) "there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property;" that (2) "the arbitrators have awarded upon a matter not submitted to them;" or that (3) "the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11.

In limited and strictly circumscribed situations, the Fourth Circuit has said a reviewing court may also consider whether the arbitrator "manifestly disregarded" the law as an additional common law ground for vacating an arbitration award. *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012). However, "[t]he FAA notably does not authorize a district court to overturn an arbitral award just because it believes, however strongly, that the arbitrators misinterpreted the applicable law." *Id.* at 478 n.5.

B. The Circuit Court correctly considered this narrow scope of review in deciding to uphold the arbitrator's award.

As set forth by the United States Supreme Court, "[u]nder the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.'" *Oxford Health Plans, LLC v. Sutter,* 133 S. Ct. 2064, 2068 (2013) (citing *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942 (1995)). "It is not enough to show that the arbitrator committed an error – or even a serious error." *Id.* (internal citation omitted). If parties

could take "full-bore legal and evidentiary appeals" arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial process." *Id.* (internal quotation and citation omitted). Crystal Pools cannot meet this heavy burden as required by the United States Supreme Court to vacate or modify an arbitration award.

To prevail in its appeal, Crystal Pools must point to more than an incorrect application of law because "proving manifest disregard require[s] something beyond showing that the arbitrators misconstrued the law, especially given that arbitrators are not required to explain their reasoning." *Wachovia Sec.*, 671 F.3d at 481; *see also Trident Tech.*, 286 S.C. at 108-09, 333 S.E.2d at 787 ("[T]he nonstatutory ground of 'manifest disregard' of the law as a basis for vacating arbitration awards ... presuppose[s] something beyond and different from a mere error of law or failure on the part of the arbitrators to understand or apply the law.") (internal citations and quotations omitted). The Fourth Circuit has adopted a two-part test that a party must meet in order for a reviewing court to vacate for manifest disregard: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[ ] refused to heed that legal principle." *Id.* at 483 (citing *Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 349-50 (4th Cir. 2008)).

Crystal Pools has argued that the arbitrator misapplied the law in reaching its award and that the Circuit Court should have reversed that determination on "manifest disregard" grounds. As an initial matter, the arbitrator's award merely provides that Group III is the prevailing party and awards "$116,165.86 in reasonable attorneys' fees and costs associated with the prosecution of its claim and defense of the counterclaim." (Award, R. at ____). The amount awarded was less than that claimed by Group III, and

there is no reference to either North or South Carolina law. Given the arbitrator's award and order denying Crystal Pools's request for modification, there is no indication that the award was tainted by manifest disregard or that the arbitrator failed to apply or consider the correct law. As found by the Circuit Court, "the only evidence in the record is that the arbitrator heard all arguments regarding the facts, the appropriate law and its application and thereafter made his decision. It appears that not only did he hear these arguments once, the arbitrator considered the same arguments again in ruling on Crystal Pools' request to modify the arbitration award." (Gee Order, R. at ____). For this reason, the order of the Circuit Court must be affirmed.

II. Even if the Circuit Court had some basis under its narrow standard of review for revisiting the arbitrator's attorney's fee award, the award is consistent with North Carolina law and the parties' agreement.

In addition, the attorney's fee award is appropriate in light of the agreement of the parties and North Carolina law. Although the Circuit Court declined to address the merits of these arguments (Gee Order, R. at ____), this Court may affirm for any reason appearing in the record. Rule 220, SCACR.

A. During the arbitration proceeding, the parties agreed that the arbitrator would determine the prevailing party and make an attorney's fee award.

In addition to the language of the Contract providing for an award of reasonable attorney's fees (Contract, R. at ____), Group III and Crystal Pools agreed at the conclusion of the arbitration hearing, after specific inquiry by the arbitrator, that the determination as to the prevailing party would be made by the arbitrator in his discretion and that the amount of attorneys' fees allowed would also be at the arbitrator's discretion. As the arbitrator stated: "The parties submitted to the Arbitrator the issue of determining

the 'prevailing party' and the amount of reasonable attorney's fees that should be awarded to that party." (Award, R. at ____).

This agreement is further reflected in both parties' attorney's fees submissions to the arbitrator, which do not reference any limits on the arbitrator's power to determine the prevailing party and make a fee award. (Fee Affidavits, R. at ____). Moreover, neither party raised a defense as to the scope of the attorney's fees to be awarded or any limits on that award. Given this history, the arbitrator was within the scope of the parties' agreement in the award he issued, including the attorney's fee award.

B. Crystal Pools misconstrues North Carolina law.

As referenced above, the Contract provides for the application of North Carolina law (with the exception of the agreement to arbitrate, which is governed by the FAA). (Contract, R. at ____). Assuming, arguendo, that there is some basis for assessing the merits of the arbitrator's attorney's fee award under North Carolina law, Crystal Pools's arguments fail.

1. Group III was the prevailing party.

N.C. Gen. Stat. § 44A-35, as cited by Crystal Pools, allows for a "reasonable attorneys' fee" in cases "brought or defended under the provisions of Article 2 or Article 3 of this Chapter." N.C. Gen. Stat. Ann. § 44A-35. Article 2 of Chapter 44A pertains to statutory mechanics' and materialmen's liens on real property and the enforcement thereof. *See* N.C. Gen. Stat. § 44A-7 through -23 ("Article 2. Statutory Liens on Real Property"). Article 3 of Chapter 44A pertains to performance and payment bonds required by Chapter 44A for State of North Carolina building projects and the enforcement thereof. *See* N.C. Gen. Stat. § 44A-26 (setting forth requirement that North Carolina state building contracts be bonded, included in "Article 3. Model Payment and

Performance Bond"). Because neither mechanics' and materialmen's liens nor bond claims with regard to a state project are involved in this arbitration, § 44A-35 does not apply.[2]

In contexts outside the mechanics' or materialmen's lien and state project bond claims statute, North Carolina courts have recognized a "prevailing party" as "one in whose favor the decision or verdict is rendered and judgment entered; ... the one in whose favor the verdict compels a judgment, or who in the end secures the most points." *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195, 412 S.E.2d 893, 896 (1992) (quoting 67A C.J.S. *Parties* § 6 (1979)); *see also H.B.S. Contractors, Inc. v. Cumberland County Bd. of Educ.*, 122 N.C. App. 49, 55-58, 468 S.E.2d 517, 522-23 (1996) (noting that in the merits test to determine prevailing party status as adopted in North Carolina, "a party must *prevail on the merits of at least some of his claims*") (emphasis in original) (quoting *Smith v. Univ. of N.C.*, 632 F.2d 316, 352 (4th Cir. 1980)). North Carolina law thus does not require recovery of any particular portion of the amount claimed (or defended against) in order to be awarded prevailing party status. Therefore, the arbitrator's finding that Group III is the prevailing party is well-supported in North Carolina law given the award to Group III and Gourp III's successful defense of Crystal Pools's counterclaim.

2. The arbitrator's attorney's fee award is not in violation of North Carolina law.

With respect to the ability of an arbitrator to award attorney's fees under North Carolina law, there is a statute providing that "[a]n arbitrator may award reasonable

[2] The cases cited in Crystal Pools's brief are lien cases and have no applicability here. *See Mainline Supply Co. v. Hillcrest Const., Inc.*, 218 N.C. App. 455, 721 S.E.2d 765 (2012); *Brooks Millwork Co. v. Levine*, 2010 N.C. App. LEXIS 959 (2010); *Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 184 N.C. App. 1, 645 S.E.2d 810 (2007); *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co. of Raleigh*, 129 N.C. App. 525, 500 S.E.2d 108 (1998).

attorneys' fees if: (1) The arbitration agreement provides for an award of attorneys' fees; and (2) An award of attorneys' fees is authorized by law in a civil action involving the same claim." N.C. Gen. Stat. § 1-569.21(b). Both prongs are met here.

Paragraph 15.4 of the Contract specifically provides that "the prevailing party shall be entitled to recover reasonable attorneys' fees, costs, charges, and expenses" thus satisfying the first prong of § 1-569.21(b). (Contract, R. at ____). The second prong of § 1-569.21(b) is satisfied by reference to N.C. Gen. Stat. § 6-21.6 (2011-2015), which allows for the recovery of attorneys' fees for business contracts where there is a reciprocal attorneys' fees provision.[3] That should end the analysis under North Carolina law.

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[3] This code section was amended in 2015, after the arbitrator's award in this case. For the Court's ease of reference, portions of the prior version of the statute are quoted below:

> (a) As used in this section, the following definitions apply:
>
> (1) Business contract. -- A contract entered into primarily for business or commercial purposes. The term does not include a consumer contract, an employment contract, or a contract to which a government or a governmental agency of this State is a party.
>
> . . .
>
> (4) Reciprocal attorneys' fees provisions. -- Provisions in any written business contract by which each party to the contract agrees, in the manner set out in subsection (b) of this section, upon the terms and subject to the conditions set forth in the contract that are made applicable to all parties, to pay or reimburse the other parties for attorneys' fees and expenses incurred by reason of any suit, action, proceeding, or arbitration involving the business contract.
>
> (b) Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract. In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the monetary damages awarded.
>
> (c) If a business contract governed by the laws of this State contains a reciprocal attorneys' fees provision, the court or arbitrator in any suit,

Crystal Pools, however, argues that recovery of attorney's fees is limited to the amount of damages recovered, citing § 6-21.6(b). This argument is inconsistent with the language of § 1-569.21(b), which allows an arbitrator to award reasonable attorney's fees.

Moreover, § 6-21.6 is not as clear as argued by Crystal Pools. This section is titled "Reciprocal attorneys' fees provisions in business contracts," and it relates to no other subject. The version of § 6-21.6 in effect at the time of the Contract and the time of the award included both of the following provisions:

> (b) Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract. *In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the monetary damages awarded.*
>
> (f) In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the amount in controversy.

(emphasis added). These provisions are inherently conflicting with respect to awards of attorney's fees based on contractual language, and the North Carolina legislature has since revised the statute to remove the italicized language from subsection (b). N.C. Gen. Stat. § 6-21.6(b) (as amended by 2015 N.C. Sess. Laws 264, § 32.5, effective Oct. 1, 2015). Crystal Pools makes no reference to § 6-21.6(f) in its brief.

> action, proceeding, or arbitration involving the business contract may award reasonable attorneys' fees in accordance with the terms of the business contract. . . .
>
> . . .
>
> (f) In any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees may not exceed the amount in controversy.

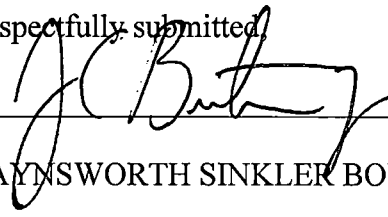
In this case, the underlying arbitration proceeding and award is partially for the recovery of money damages by Group III from Crystal Pools, but is also for Group III's successful defense against the counterclaim asserted by Crystal Pools. The amount in controversy, as set forth in the arbitration award, was $393,058.50 ($308,386.52 for Group III's claim and $84,671.98 for Crystal Pools's counterclaims). Thus, the attorney's fee award is less than the amount in controversy and complies with N.C. Gen. Stat. § 6-21.6(f).

The arbitrator's award is silent as to the legal analysis underlying his attorney's fee award; however, that award is supportable under North Carolina law for the reasons set forth above. Moreover, manifest disregard does not require that the arbitrator be correct in his application of the law. Instead, the party challenging the award must show "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[ ] refused to heed that legal principle." *Wachovia Sec.*, 671 F.3d at 483. There is no indication here that the arbitrator refused to apply any legal principle, much less one that was clearly defined and not subject to reasonable debate.

CONCLUSION

As set forth above, this Court has a narrow standard of review in considering an arbitration award arising under the FAA. The Circuit Court carefully considered that standard in confirming the award, including the arbitrator's award of attorney's fees. Accordingly, the Circuit Court's order should be affirmed in its entirety.

Respectfully submitted,



HAYNSWORTH SINKLER BOYD, P.A.

John C. Bruton, Jr. (SC Bar No. 975)
P.O. Box 11889 (2911-1889)
Columbia, SC 29201
(803) 779-3080
jbruton@hsblawfirm.com

Sarah P. Spruill (SC Bar No. 68337)
P.O. Box 2048
Greenville, SC 29602
(864) 240-3200
sspruill@hsblawfirm.com

Attorneys for Respondent Group III Mgt., Inc.

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PROOF OF SERVICE

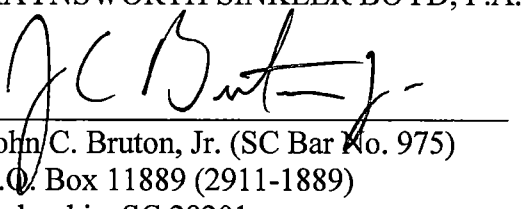
I certify that I have served **Respondent Group III Mgt., Inc.'s Initial Brief and Designation of Matter to be Included in the Record on Appeal** upon Appellant by depositing a copy of the same in the United States Mail, First Class postage prepaid, on July 13, 2016, addressed to Appellant's attorneys of record, addressed as follows:

Alan R. Belcher, Jr., Esquire
Elizabeth Freeman Wieters, Esquire
Hall Booth Smith, P.C.
40 Calhoun Street, Suite 550
Charleston, SC 29401

(Signature appears on succeeding page)

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



John C. Bruton, Jr. (SC Bar No. 975)
P.O. Box 11889 (2911-1889)
Columbia, SC 29201
(803) 779-3080 – telephone
(803) 765-1243 – fax
jbruton@hsblawfirm.com

Sarah P. Spruill (SC Bar No. 68337)
Greenville, SC 29602
(864) 240-3200
(864) 240-3300 (fax)
sspruill@hsblawfirm.com

Attorneys for Respondent Group III Mgt., Inc.

COLUMBIA | CHARLESTON FLORENCE GREENVILLE

Haynsworth Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
POST OFFICE BOX 11889 (29211-1889)
COLUMBIA, SOUTH CAROLINA
TELEPHONE 803.779.3080
FACSIMILE 803.765.1243
WEBSITE www.hsblawfirm.com

JOHN C. BRUTON, JR.
EMAIL jbruton@hsblawfirm.com

July 13, 2016

HAND DELIVERED
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Group III Mgt., Inc. v. Suncrete of Carolina, Inc. d/b/a Crystal Pools
Civil Action No. 2014-CP-40-07229
Appellate Case No. 2015-002584
HSB File No. 32275.0003

Dear Ms. Kitchings:

Enclosed herewith for filing is an original and one (1) copy of the Initial Brief of Respondent Group III Mgt., Inc. and Designation of Matter to be Included in the Record on Appeal regarding the above-referenced case together with a Proof of Service. Please file the originals and return a clocked copy to me via my courier.

Thank you for your assistance.

With kind regards, I remain

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.

John C. Bruton, Jr.

JCBjr/jmb
Enclosures

cc: Alan Ross Belcher, Jr., Esquire (w/encl.)
Elizabeth Freeman Wieters, Esquire (w/encl.)