

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM BERKELEY COUNTY  
COURT OF COMMON PLEAS  
THE HONORABLE J.C. NICHOLSON, JR.  
CIRCUIT COURT JUDGE

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APPELLATE CASE NO. 2016-002339  
CIVIL ACTION NO. 2014-CP-08-2424

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**RECEIVED**

JUN 12 2017

**SC Court of Appeals**

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,

**RESPONDENTS,**

versus

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,

**DEFENDANTS,**

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are the

**RESPONDENTS.**

And

Lennar Carolinas, LLC,

**APPELLANT,**

versus

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators, Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP,

**THIRD-PARTY DEFENDANTS,**

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc. A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators, Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC are also the

**RESPONDENTS.**

And

Décor Corporation,

**FOURTH PARTY PLAINTIFF,**

versus

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Richardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4,

**FOURTH-PARTY DEFENDANTS.**

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**INITIAL BRIEF OF RESPONDENT DÉCOR CORPORATION**

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Carmen V. Ganjehsani  
RICHARDSON, PLOWDEN & ROBINSON, PA  
1900 Barnwell Street (29201)  
Post Office Drawer 7788  
Columbia, South Carolina 29202  
(803) 771-4400

and

Samia H. Nettles  
RICHARDSON, PLOWDEN & ROBINSON, PA  
Post Office Box 21203  
Charleston, South Carolina 29413  
(843) 805-6550  
**ATTORNEYS FOR RESPONDENT  
DÉCOR CORPORATION**

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## COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Appellant Lennar failed to preserve for appellate review any argument that the Trial Court erred in denying its motion to compel arbitration as to Respondent Décor.
- II. Appellant Lennar waived and abandoned its argument that the Trial Court erred in denying its motion to compel arbitration as to Respondent Décor.
- III. The Trial Court did not err in failing to address Appellant Lennar's motion to compel arbitration as to Respondent Décor in light of the Trial Court's findings that the Plaintiff Homeowners were not required to arbitrate their claims against Lennar.
- IV. Even if the Plaintiff Homeowners are required to submit to arbitration, Appellant Lennar cannot compel Respondent Décor to submit to arbitration because there is no arbitration agreement between Lennar and Décor with respect to the project at issue.

## COUNTERSTATEMENT OF THE CASE

This appeal arises out of a construction defect lawsuit in which the general contractor, Appellant Lennar Carolinas, LLC (“Lennar”), moved to compel the Plaintiff Homeowners as well as the Co-Defendants and Third-Party Defendant subcontractors to arbitrate the claims arising in the suit. The Trial Court denied Lennar’s motion to compel arbitration, and Lennar has appealed the Trial Court’s denial to this Court. Respondent Décor Corporation (“Décor”), one of the Third-Party Defendant subcontractors, hereby files this brief in opposition to Lennar’s appeal and argues that the Trial Court correctly denied Lennar’s motion to compel arbitration with respect to its claims against Décor.

The Plaintiff Homeowners commenced this action on October 30, 2014 in the Berkeley County Court of Common Pleas against Lennar, Spring Grove Plantation Development, Inc., Volkmar Consulting Services, LLC, and Manale Landscaping, LLC, alleging various construction defects in their homes. [R.pp. \_\_\_; Compl.] The homeowners each reside in a residential community known as The Abbey at Spring Grove Plantation located in Berkeley County, South Carolina. [R.p. \_\_\_; *Id.* at ¶ 1.] The Abbey consists of approximately sixty-nine (69) homes, and the homes were constructed from 2010 to the present. [R.p. \_\_\_; Order, p. 1.]

On February 17, 2015, Lennar filed its Answer to the Plaintiffs’ Complaint, as well as Cross-Claims against the Co-Defendants and a Third-Party Complaint against certain subcontractors [which did not include Décor at this time]. [R.pp. \_\_\_; Answer, Cross-Claim, Third-Party Compl.] On June 1, 2015, Lennar filed a Motion to Compel Arbitration. [R.pp. \_\_\_; Mtn.]

On November 23, 2015, the Plaintiff Homeowners filed an Amended Complaint. [R.pp. \_\_\_; Am. Compl.] Lennar thereafter responded to the Amended Complaint on November 25, 2015, answering the Plaintiffs' amended allegations and asserting its Cross-Claims against the Co-Defendants and a Third-Party Complaint against certain subcontractors, including Décor. This was the first allegations by Lennar against Décor since the commencement of the suit. Lennar alleged that Décor provided work, services, and materials for the development and construction of The Abbey and the residences therein which included finish flooring materials and installation of finish floors including all associated and related components. [R.pp. \_\_\_; Answer to Am. Compl., Cross-Claim, Third-Party Compl., ¶¶ 204-205, 218-242, 269-280.]

On February 1, 2016, Décor filed its Answer to Lennar's Third-Party Complaint. Décor additionally filed a Fourth-Party Complaint against certain flooring subcontractors. [R.pp. \_\_\_; Answer and Fourth-Party Compl.]

Lennar filed an Amended Motion to Compel Arbitration on March 30, 2016 which sought to compel the Plaintiffs, the Defendants, and the Third-Party Defendants, including Décor, to submit to mandatory, binding arbitration. [R.pp. \_\_\_; Am. Mtn.] With respect to Décor, Lennar submitted to the Trial Court a Contractor Base Agreement entered into on June 26, 2007 by Lennar and Décor (the "Contractor Base Agreement"). [R.pp. \_\_\_; Agreement (Ex. 39 to Robert Mauch Aff.)] The Contractor Base Agreement provided that Décor would provide labor, materials, equipment, and other services in such locations and under such terms and conditions as Lennar would deem necessary upon receipt of a Purchase Order from Lennar. Any issued Purchase Order for a

particular project would become a part of the Contractor Base Agreement. [R.p. \_\_\_\_; Id.]

The Contractor Base Agreement also included the following arbitration provision:

**15. WAIVER OF JURY TRIAL/ARBITRATION: TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, AND AFTER CONSULTING WITH LEGAL COUNSEL OF THEIR OWN CHOOSING, CONTRACTOR AND LENNAR, ON BEHALF OF THEMSELVES AND ANY PERSON OR ENTITY ACTING BY, THROUGH OR UNDER THEM, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY AGREE TO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION OR JUDICIAL PROCEEDING RELATING TO OR CONCERNING, DIRECTLY OR INDIRECTLY, THIS AGREEMENT OR ANY OTHER RIGHTS OR OBLIGATIONS BETWEEN LENNAR, CONTRACTOR AND ALL PERSONS ACTING BY, THROUGH OR UNDER LENNAR OR CONTRACTOR . . .**

**NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY. LENNAR AND CONTRACTOR SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.**

[R.p. \_\_\_\_; Id.]

With respect to alleged work performed by Décor at The Abbey, Lennar has not produced any Purchase Order issued in accordance with the Contractor Base Agreement.

A hearing on the Amended Motion to Compel Arbitration was held before the Honorable J.C. Nicholson, Jr. on April 11, 2016. [R.pp. \_\_\_; Hearing Tr.]

On September 19, 2016, the Trial Court issued its Order denying Lennar's Amended Motion to Compel Arbitration in its entirety. [R.pp. \_\_\_; Order.] On October 3, 2016, Lennar filed a Motion to Reconsider the Order Denying Its Motion to Compel Arbitration, seeking, with respect to the Third-Party Defendants, including Décor, "clarification and confirmation that the Order denies the Motion as to these Defendants and Third-Party Defendants and the basis for the denial." [R.p. \_\_\_; Mtn., p. 20.] Lennar also argued that it was requesting reconsideration of the Order's denial of its motion to compel arbitration as to the Third-Party Defendants, including Décor, because "for the reasons previously articulated in writing and at the hearing on the Motion, the claims by and against the Defendants and Third-Party Defendants are subject to mandatory and binding arbitration pursuant to valid and enforceable arbitration provisions." [R.p. \_\_\_; Id.] On October 26, 2016, the Trial Court issued a Form 4 Order denying Lennar's Motion to Reconsider. [R.p. \_\_\_; Order.]

On or about November 16, 2016, Lennar appealed the Trial Court's Orders denying its Motion to Compel Arbitration and its Motion to Reconsider.

## ARGUMENT

### **I. Appellant Lennar Failed to Preserve for Appellate Review Any Argument That the Trial Court Erred in Denying Its Motion to Compel Arbitration as to Respondent Décor.**

The Trial Court denied Lennar's motion to compel arbitration in its entirety, which included its motion as to all subcontractors, including Décor. [R.pp. \_\_\_; Order.] Thereafter, Lennar filed a motion to reconsider which merely requested the Trial Court to clarify whether its order denied the motion to compel arbitration as to the subcontractors, including Décor, and noted it was seeking reconsideration of the Trial Court's denial of the motion to compel with respect to the subcontractors, including Décor, for reasons "previously articulated." [R.p. \_\_\_; Mtn., p. 20.] Lennar set forth no substantive argument in its motion for reconsideration to the Trial Court as to why the court erred in denying the motion to compel arbitration as to Décor and offered no basis for the Trial Court to reconsider its ruling. [R.p. \_\_\_; Id.]

To preserve an issue for appeal, "[t]he losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." Id. The imposition of this preservation requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all the relevant facts, law, and arguments." Id.

Here, once the Trial Court denied Lennar's motion to compel arbitration in its entirety, Lennar did not make any specific arguments to the Trial Court as to why it erred in denying the motion to compel arbitration as to the subcontractors, including Décor. Lennar's motion for reconsideration failed to provide the Trial Court with any relevant facts, law, or arguments as to why the Trial Court may have erred in denying the motion to compel arbitration as to Décor. The broad assertions made by Lennar in its motion for reconsideration failed to preserve for appellate review any argument that the Trial Court erred in denying the motion to compel arbitration as to Décor. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54-55 (Ct. App. 2006) (holding where wife failed to specifically raise any issues regarding the valuation of the marital property in her Rule 59(e) motion and instead only generally asserted that the divorce degree was unsupported by the evidence, these broad assertions failed to preserve her arguments for appellate review).

In this appeal, Lennar broadly argues that the Trial Court erred in denying the motion to compel arbitration as to the subcontractors without providing any analysis for the denial, and Lennar seeks a remand to the Trial Court. However, Lennar never argued below to the Trial Court with any particularity as to why the court's denial of the motion to compel arbitration as to the subcontractors was in error. Accordingly, the Trial Court's order denying Lennar's motion to compel arbitration as to Décor should be affirmed where Lennar failed to preserve for appellate review any argument that the Trial Court erred in denying its motion to compel arbitration as to Décor.

**II. Appellant Lennar Waived and Abandoned Its Argument that the Trial Court Erred in Denying Its Motion to Compel Arbitration as to Respondent Décor.**

In its appeal against the subcontractors, including Décor, Lennar broadly argues that the Trial Court erred in denying the motion to compel arbitration because the Trial Court did not perform any analysis. The appellate brief of Lennar contains no specific argument as to Décor or any argument that Lennar has an enforceable arbitration agreement with Décor. Lennar's appellate brief as to Décor is also not supported by any authority.

An issue is deemed abandoned on appeal "if the argument in the brief is not supported by authority or is only conclusory." Jones v. Builders Inv. Group, LLC, 415 S.C. 321, 331, 781 S.E.2d 737, 742-43 (Ct. App. 2015) (internal citation omitted). Because Lennar has cited no authority in the section of its appellate brief against Décor and its argument against Décor is largely conclusory, Lennar has abandoned on appeal any argument that the Trial Court erred in denying its motion to compel Décor to arbitrate.

**III. The Trial Court Did Not Err in Failing to Address Appellant Lennar's Motion to Compel Arbitration as to Respondent Décor in Light of the Trial Court's Findings that the Plaintiff Homeowners Were Not Required to Arbitrate Their Claims Against Lennar.**

On appeal, Lennar argues that the Trial Court erred in failing to provide any analysis or basis for denying Lennar's motion to compel the subcontractors, including Décor, to arbitration. The Trial Court did not err in denying the motion to compel arbitration as to the subcontractors, including Décor, without providing a detailed analysis of the reason for the denial. A cursory review of the Contractor Base Agreement between Lennar and Décor easily demonstrates why Lennar's motion to

compel Décor to arbitration was denied by the Trial Court in light of the Trial Court's ruling that the Plaintiff Homeowners were not required to submit to arbitration.

To the extent the Contractor Base Agreement is applicable to any work performed by Décor at The Abbey, which Décor denies, the Agreement unambiguously provides that Lennar may only compel Décor to arbitrate if Lennar and the Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

**NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY.**

[R.p. \_\_\_; Agreement (underline emphasis added).]

The Plaintiff Homeowners have thus far successfully defeated Lennar's attempt to have their disputes with Lennar submitted to arbitration. Lennar is therefore required to litigate the Plaintiffs' claims against it before a jury. Lennar cannot independently compel Décor to submit to arbitration because the above arbitration provision is derivative and does not provide for arbitration without there being a third party claim being adjudicated in the same action. See Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) (observing arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she

has not agreed to submit). Once the Trial Court denied Lennar's motion to compel arbitration as to the Plaintiffs, there was no need for it to have undergone an extensive analysis of whether Décor was required to submit to arbitration when it was clear that the above provision had not been triggered. If the Plaintiffs continue to prevail in this appeal and their claims against Lennar are tried before a jury, Décor's disputes with Lennar, per the terms of the above provision, will also be heard before a jury and Décor will not be required to submit its disputes with Lennar to arbitration.

**IV. Even if the Plaintiff Homeowners are Required to Submit to Arbitration, Appellant Lennar Cannot Compel Respondent Décor to Submit to Arbitration Because There is No Arbitration Agreement Between Lennar and Décor With Respect to the Project at Issue.**

If this Court determines that Lennar is entitled to compel the Plaintiff Homeowners to submit to arbitration, Lennar is still nevertheless not entitled to require Décor to submit to arbitration because there is no arbitration agreement between Lennar and Décor with respect to any work performed by Décor at The Abbey.

Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001)). "In determining whether an agreement to arbitrate exists, the court should apply ordinary state-law principles that govern the formation of contracts." Towles v. United Health Care Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (internal citations omitted).

In the present case, the Contractor Base Agreement produced by Lennar that allegedly binds Décor to arbitration is dated June 26, 2007. The work at The Abbey, however, did not begin until at least 2010. [R.p. \_\_\_; Order, p. 1.] The Contractor Base Agreement relied upon by Lennar does not specifically reference The Abbey or any other construction project in either the arbitration provision at issue or in any other section of the contract. Rather, the Contractor Base Agreement is a general contract which by its terms only becomes binding on a particular project when the requisite project-specific “Purchase Order” referenced and attached as “Schedule A” to the Contractor Base Agreement is executed. [R.pp. \_\_\_; Agreement.]

The “Purchase Order” cited and attached as “Schedule A” to the Contractor Base Agreement is a separate one-page contract which provides the project name, project address, project scope of work and price/payment to the contractor. [R.p. \_\_\_; Id.] It is clear from the scope of work provision in the Contractor Base Agreement that the Agreement only becomes binding on a particular project when a “Purchase Order” is issued:

1. **SCOPE OF WORK:** Contractor shall provide labor, material, equipment or other services in such location(s) and under such terms and conditions as Lennar shall deem necessary (the “Work”) upon receipt of a Purchase Order from Lennar. When issued, the Purchase Order (see Schedule A) shall become part of this Agreement. The location(s) where the Work is to be performed shall be known as the job site or Project site and may be more fully described in Exhibit “A” to the Purchase Order. . . .

[R.p. \_\_\_; Id.]

The Contractor Base Agreement contains all the basic material terms desired by Lennar for all of its projects; however, only when a Purchase Order is executed is Décor bound to the terms of the Contractor Base Agreement with respect to a particular project.

Lennar has not produced any such Purchase Order relating to Décor's work at The Abbey. Therefore, there is no contractual document binding Décor to the terms of the Contractor Base Agreement with respect to The Abbey project in particular. The terms of the Contractor Base Agreement were never triggered for the performance of Décor's work at The Abbey. Accordingly, Décor is not bound to the arbitration provision contained within the Contractor Base Agreement for any disputes with Lennar for any work performed at The Abbey project site. The Trial Court's Order denying Lennar's motion to compel Décor to submit to arbitration should be denied even if this Court determines that the claims of the Plaintiff Homeowners are arbitrable.

**CONCLUSION**

For the reasons set forth herein, Respondent Décor Corporation respectfully submits that the Trial Court properly denied Appellant Lennar Carolinas, LLC's motion to compel arbitration with respect to its disputes with Décor.

Respectfully submitted,



---

Carmen V. Ganjehsani  
RICHARDSON, PLOWDEN & ROBINSON, PA  
1900 Barnwell Street (29201)  
Post Office Drawer 7788  
Columbia, South Carolina 29202  
(803) 771-4400

and

Samia H. Nettles  
RICHARDSON, PLOWDEN & ROBINSON, PA  
Post Office Box 21203  
Charleston, South Carolina 29413  
(843) 805-6550  
**ATTORNEYS FOR RESPONDENT  
DÉCOR CORPORATION**

June 9, 2017.

**CERTIFICATE OF SERVICE**

I, the undersigned, attorney for Respondent Décor Corporation, do hereby certify that I have this date served the foregoing Initial Respondent's Brief, dated June 9, 2017, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

James Lynn Werner, Esquire  
Jenna K. McGee, Esquire  
F. Elliotte Quinn IV, Esquire  
Parker Poe Adams & Bernstein, LLP  
200 Meeting Street, Suite 301  
Charleston, SC 29401  
[jimwerner@parkerpoe.com](mailto:jimwerner@parkerpoe.com)  
[jennamcgee@parkerpoe.com](mailto:jennamcgee@parkerpoe.com)  
[elliottequinn@parkerpoe.com](mailto:elliottequinn@parkerpoe.com)  
*Attorneys for Appellant*

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\_\_\_\_\_  
Carmen V. Ganjehsani  
RICHARDSON, PLOWDEN & ROBINSON, PA  
1900 Barnwell Street (29201)  
Post Office Drawer 7788  
Columbia, South Carolina 29202  
(803) 771-4400  
**ATTORNEYS FOR RESPONDENT  
DÉCOR CORPORATION**

Dated: June 9, 2017.

June 9, 2017

The Honorable Jenny Abbott Kitchings  
Clerk of Court, S.C. Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**Re: *Patricia Damico, et al. v. Lennar Carolinas, LLC***  
**Appellate Case No. 2016-002339**  
**Our File No.: 5563-0030**

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing are the original Initial Brief of Respondent Décor Corporation and the Respondent's Designation of Matter to be Included in the Record on Appeal in the above referenced matter, along with our original Certificates of Service.

By copy of this letter, we are serving a copy of the Initial Brief and the Designations on counsel for the Appellant with a courtesy copy being e-mailed to all counsel for Respondents.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

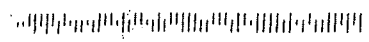


Carmen V. Ganjehsani

CVG

Enclosures

cc: James Lynn Werner, Esquire  
Jenna K. McGee, Esquire  
F. Elliotte Quinn IV, Esquire  
Counsel for Co-Respondents (via e-mail)



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RICHARDSON  
RICHARDSON FLOWDEN ROBINSON, P.A.  
PLOWDEN  
ATTORNEYS AT LAW

COLUMBIA P.O. Drawer 7788 - Columbia, SC 29202

The Honorable Jenny Abbott Kitchings  
Clerk of Court, S.C. Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211