

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED

Court of Appeals Case No. 2016-002339
Lower Court Case No. 2014-CP-08-02424

SEP 05 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,

v.

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, Inc. 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, Inc. are Respondents.

And

Lennar Carolinas, LLC..... Appellant,

v.

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 Respondents.

And

Décor Corporation..... Fourth-Party Plaintiff,

v.

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, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4..... Fourth-Party Defendants.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER LENNAR HAS WAIVED AND ABANDONDED THE ISSUE THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO GUARANTEED BY FAILING TO INCLUDE ITS ARGUMENTS AND SUPPORTING CASE LAW ADDRESSING THE ISSUE IN ITS APPEAL BRIEF.**
- II. TO THE EXTENT THE ISSUE HAS NOT BEEN WAIVED, WHETHER THE TRIAL COURT'S DENIAL OF LENNAR'S MOTION TO COMPEL AS TO GUARANTEED SHOULD BE UPHOLD BECAUSE THE ARBITRATION PROVISION IN THE ONLY APPLICABLE CONTRACT IS DERIVATIVE.**

STATEMENT OF THE CASE

This appeal is about whether Plaintiffs must arbitrate their construction defect claims against Lennar Carolinas, LLC ("Lennar") and, by extension, whether Lennar's third-party claims against Guaranteed Framing, LLC ("Guaranteed") must be arbitrated. By failing to raise its substantive arguments in support of its motion to compel arbitration as to Guaranteed and the other subcontractors in its issues on appeal or in the arguments in its brief, Lennar abandoned the issue. Nonetheless, to the extent this Court elects to consider and rule on the matter, Guaranteed may be compelled to arbitrate only: (A) pursuant to the agreement in place at the time of Guaranteed's work on the project, (B) if Plaintiffs and Lennar must also arbitrate the disputes between them, and (C) pursuant to the Federal Arbitration Act.

FACTS AND PROCEDURAL HISTORY

I. Factual Background

Plaintiffs are a putative class of owners of single family residences in a development known as The Abbey at Spring Grove Plantation ("The Abbey"). (R. p. 26, ¶1.) Guaranteed is alleged to have been a framing and roofing subcontractor of the general contractor, Lennar, during the construction (the "Project") of Plaintiffs' residences. (R. p. 138, ¶197.)

On May 15, 2007, Guaranteed entered a Contractor Base Agreement with Lennar (the "2007 Agreement"). (R. pp. 1194-1216.) The 2007 Agreement includes the following arbitration provision contained on page six:

16. 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 THEN 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. 1199, ¶16.)

Operating under the terms of the 2007 Agreement, Guaranteed provided certain framing work at The Abbey from September of 2011 through April 2015. (R. p. 2600, ¶4.) No work was performed on the Project by Guaranteed after April 2015. (R. p. 2600, ¶5.)

On August 6, 2015, several months after Guaranteed's work on the Project was completed, Guaranteed entered into a Master Trade Partner Agreement with Lennar (the "2015 Agreement"). (R. pp. 2600, ¶6; 1218-1259.) The 2015 Agreement serves as the base terms under which Lennar was able to later submit purchase orders to contract for work on future projects.

(R. pp. 1218-1259.) While §1 of Amendment No. 3 to the 2015 Agreement calls in part for binding arbitration of claims or controversies that arise out of or relate to the 2015 Agreement or the dealings between the parties, this provision is not retroactive and does not to apply to prior completed work, (R. pp. 1236-1237, §1.) Therefore, the only applicable arbitration provision as to Guaranteed and Lennar is the clause contained in the 2007 Agreement which states that Guaranteed is required to submit to arbitration only if Lennar is successful in forcing Plaintiffs to arbitrate their claims.

II. Procedural History

Plaintiffs sued Lennar and others alleging various construction deficiencies in their residences. (R. pp. 75-106.) In turn, in Lennar's Answer to Plaintiffs' First Amended Complaint, Lennar asserted third-party claims against Guaranteed and other subcontractors for the Project. (R. pp. 133-154.)

On June 1, 2015, Lennar filed a Motion to Compel Arbitration asserting that Plaintiffs' claims were subject to ADR. (R. pp. 259-261.) On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration ("Lennar's Motion to Compel"), wherein it sought to compel arbitration of its claims against Guaranteed. (R. pp. 263-269.) Attached to Lennar's Motion to Compel Arbitration were both the 2007 and 2015 Agreements. (R. pp. 1194-1216; 1218-1259.)

On April 11, 2016, Guaranteed submitted its Memorandum of Law in Response to Lennar's Motion to Compel. (R. pp. 2810-2816.) That same day, at the hearing on Lennar's Motion to Compel, Guaranteed joined numerous other parties in oral argument. (R. pp. 237-239.) Guaranteed later submitted a Supplemental Memorandum of Law in Response to Lennar's Amended Motion Compel, dated April 25, 2016. (R. pp. 2817-2822.)

On September 19, 2016, the circuit court entered an Order (the "Order") denying Lennar's Motion to Compel. (R. pp. 4-23.) While it contained detailed findings supporting its ruling denying Lennar's motion to compel arbitration as to Plaintiffs, the Order was silent as to the arguments presented between Lennar and Guaranteed, as well as the other subcontractors. (*Id.*) Accordingly, on September 29, 2016, Guaranteed filed a Motion to Alter or Amend, wherein it respectfully requested the Order be amended to add findings proffered by Guaranteed. (R. pp. 2823-2827.) Likewise, on October 3, 2016, Lennar filed its Motion to Reconsider Order Denying its Motion to Compel Arbitration. (R. pp. 2553-2572.) In its Motion to Reconsider, Lennar acknowledged that the trial court's Order encompassed a ruling denying Lennar's motion as to Guaranteed and the other subcontractors, but sought clarification on that point from the trial court. (R. pp. 2571-2572, § XII.)

On October 26, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. p. 3.) This appeal followed.

ARGUMENT

I. LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENTS THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO GUARANTEED.

While it addressed the lower court's ruling denying the motion to compel arbitration as to Guaranteed and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to Guaranteed in its appeal brief. "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citing

Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)).

Guaranteed agrees with Lennar's procedural concern that the Order does not make specific findings based on the arguments presented between Lennar and Guaranteed. In fact, Guaranteed moved the circuit court to amend the Order to address the arguments and offered proposed findings. (R. pp. 2823-2827.) In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to Guaranteed and the subcontractors. (R. pp. 2571-2572, § XII .) These motions were denied in the Form 4 Order. (R. p. 3.)

The filing of the Rule 59(e) motion, although an important first step, is not the only action a party must take in preserving an issue on appeal. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (“The 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.”). Although it could be argued Lennar fulfilled its duty to bring its substantive arguments as to Guaranteed before the circuit court in its Motion to Reconsider by referencing the “the reasons previously articulated in writing and at the hearing on the Motion,” this broad, general statement is not sufficient to preserve the arguments in the appeal. (R. p. 2572, ¶1.) In order to bring the issue before this Court, Lennar was obligated to put forth each of its substantive arguments why its claims against Guaranteed are subject to arbitration along with citations to supporting case law. Lennar's brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration clauses, but it does not specifically set forth any arguments as to Guaranteed nor does it contain applicable references to supporting authority. In fact, Lennar's brief even fails to specify which of the several agreements it mentions form the basis for its assertion that its claims against

Guaranteed must be submitted to arbitration. Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel Guaranteed to arbitrate the claims in this matter.

II. IF THIS COURT ELECTS TO RULE ON WHETHER AND UNDER WHAT TERMS GUARANTEED MUST ARBITRATE, THE COURT SHOULD FIND THAT LENNAR MAY COMPEL GUARANTEED TO ARBITRATE THIS ACTION ONLY: (A) PURSUANT TO THE 2007 AGREEMENT, (B) IF LENNAR AND PLAINTIFFS MUST ALSO ARBITRATE, AND (C) PURSUANT TO THE FEDERAL ARBITRATION ACT.

If the Court finds that Lennar has not abandoned the issue, the Court should find that the circuit court properly denied Lennar's motion to compel Guaranteed to arbitrate the claims when it denied Lennar's motion as to Plaintiffs. "Arbitration agreements are required to meet the basic tenets and requirements of contract law." Towlers v. United Health Care Corp., 338 S.C. 29, 529 S.E.2d 839 (Ct. App. 1999). Additionally, arbitration is a matter of contract, and a court's evaluation of the enforceability of an arbitration agreement is guided by the principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 439 (2009). Under South Carolina common law, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). A party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Aiken v. World Fin. Corp. of SC, 373 S.C. 144, 644 S.E.2d 705 (2007).

With these guiding principles, the Court must examine the Agreements to determine the limited circumstances under which the parties agreed to submit any dispute between them to arbitration.

- A. Lennar may compel Guaranteed to arbitrate only if Plaintiffs are required to arbitrate their claims against Lennar.**

The 2007 Agreement, which, for the reasons set forth below, is the only arbitration provision governing Guaranteed's Project work, unambiguously provides that Lennar may only compel Guaranteed to arbitrate if Lennar and 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 THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY.

(R. p. 1199, ¶16 (emphasis added).) As applied to the circumstances in this case, the foregoing provision unambiguously demonstrates Guaranteed and Lennar agreed to resolve their disputes in the same forum in which the disputes between Lennar and Plaintiffs are resolved. Thus, if Lennar is unable to enforce its arbitration provisions against Plaintiffs, it cannot independently compel Guaranteed to submit to arbitration because the arbitration provision in the applicable contract is derivative and, therefore, does not provide for arbitration without there being a third party claim being adjudicated in the same action. Thus, as it relates to Guaranteed, Lennar's Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

- B. If Lennar may compel Guaranteed to arbitrate, it may do so only pursuant to the terms of the 2007 Agreement, because the Project does not fall within the purview of the 2015 Agreement, which post-dates the Project and is not retroactive.**

Although the parties were operating under the 2007 Agreement at all times that the work on the Project was accomplished, Lennar appears to assert that the 2015 Agreement governs the arbitration obligations in this case. The parties did not enter into the 2015 Agreement until August 6, 2015, several months after Guaranteed's work on the Project was completed. (R. p. 2600, ¶6.) The 2015 Agreement looks to future projects and serves as the base terms under which Lennar is able to later submit purchase orders to contract for additional work. (R. 1218-1259.) While §1 of Amendment No. 3 to the 2015 Agreement calls in part for binding arbitration of claims or controversies that arise out of or relate to the 2015 Agreement or the dealings between the parties, there is no evidence in the record that the provision is retroactive and or that it applies to prior completed work or projects. (R. pp. 1236-1237, §1.)

"A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Zabinski v. Bright Acres Assoc., 346 S.C. 580, 598, 553 S.E.2d 110, 119 (Ct. App, 2008). While South Carolina courts have retroactively applied arbitration clauses to disputes arising under prior contracts, they did so on the basis of the significant relationship between the subject of the prior contract and the new contract. *See Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 588 S.E.2d 136 (Ct. App. 2003).

In the Holy Cross case, the court held that an arbitration clause in a later contract did not apply to claims involving Orkin's treatment of other real property owned by the church, finding no evidence of an intent to apply the clause to prior-completed projects. 356 S.C. at 210, 588 S.E.2d at 141-142. The court noted that, although the arbitration clause in Orkin's new contract did not expressly limit the application to future projects, it also contained no language expanding

its coverage to prior-completed projects. Id. It observed that Orkin could have included such language in the subsequent contract if that truly was the intent of the parties, but did not. In so finding, the court explained that to view the general principle that doubtful interpretations of language are to be resolved in favor of arbitration to allow a party to “insulate itself from pre-existing claims by failing to say so in explicit terms” would be “a fundamental distortion of the principle.” 356 S.C. at 211, 588 S.E.2d at 141 (quoting Hendrick v. Brown & Root, Inc., 50 F. Supp.2d 527, 535 (E.D.Va. 1999)).

Like the contract in Holy Cross, the 2015 Agreement does not evidence an intention to apply the clause to claims concerning projects completed under a prior contract or which were completed prior to the 2015 Agreement. The arbitration clause does not mention any prior projects or work. If it were the intent of Lennar to include earlier projects within the scope of the 2015 Agreement, it could have so stated.

Rather, the arbitration provision looks to future projects and contemplates that there will be actions that Guaranteed would need to undertake going forward that it could not perform retrospectively: “Subcontractor shall incorporate provisions in all agreements with its lower tier subcontractors executed by Subcontractor with respect to the Work requiring any affected lower tier subcontractor to participate in, and be bound by, such arbitration.” (R. p. 1237, ¶1.) Moreover, there is no evidence of any correlation between the subject matter of the 2015 Agreement and the claims in The Abbey.

For these reasons, the Court should find that Lennar cannot compel Guaranteed Framing to arbitrate claims concerning The Abbey based on the arbitration provisions contained in the 2015 Agreement and that the circuit court properly denied Lennar’s motion on that ground.

C. Lennar may compel Guaranteed to arbitration only pursuant to the Federal Arbitration Act, because the arbitration provisions in both the 2007 and the 2015 Agreements do not meet the requirements of the South Carolina Arbitration Act.

Under the South Carolina Uniform Arbitration Act ("SCUAA"), notice that a contract is subject to arbitration "shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a). These requirements are enforced strictly and literally. *See Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 456-58, 476 S.E.2d 149, 150-51 (1996) (finding arbitration provision which was not underlined did not meet the requirements of S.C. Code Ann. § 15-48-10(a)).

Neither the 2017 nor the 2015 Agreements include arbitration provisions on the first page of the agreement as required by § 15-48-10(a). (R. pp. 1194; 1218.) Accordingly, neither agreement contains an arbitration provision enforceable under the SCUAA. Thus, in the event Lennar and Plaintiffs must arbitrate, Lennar may compel Guaranteed to arbitrate only pursuant to the FAA.

CONCLUSION

For the foregoing reasons, Guaranteed respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel Guaranteed to submit this matter to arbitration.

[signatures on following page]

Respectfully submitted,



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This 1st day of September, 2017

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

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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, Inc. are Respondents.

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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 Respondents.

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RESPONDENT GUARANTEED FRAMING, LLC'S CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent Guaranteed Framing, LLC complies with Rule 211(b), SCACR.

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This 1st day of September, 2017

Charleston, South Carolina