

**THE STATE OF SOUTH CAROLINA**

**In The Court of Appeals**

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Appellate Case No. 2017-001943

Circuit Court Case No. 2016-CP-42-04147

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**RECEIVED**

AUG 15 2018

SC Court of Appeals

ABB, Inc., and BFP, LP, a/k/a  
Bullington Family Partnership,..... Respondents,

v.

Integrated Recycling Group of SC,  
LLC, John Murphy Armstrong, Jr.,  
and Michael T. Armstrong,..... Appellants.

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**REPLY IN SUPPORT OF  
MOTION TO DISMISS BY RESPONDENTS**

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Respondents ABB, Inc., and BFP, LP, a/k/a Bullington Family Partnership (collectively, “Creditors”) hereby reply to the Return of Appellants, Integrated Recycling Group of SC, LLC’s (the “Debtor”) and John Murphy Armstrong, Jr., and Michael T. Armstrong, the members of Debtor (collectively, the “Armstrongs”).

Creditors properly received summary judgment in this debt collection action. Appellants’ sole ground for appeal -- that Debtor’s landlord’s lender has priority to one piece of collateral

securing the debt – is invalid. Specifically, Appellants’ Return is legally and factually wrong in at least three ways.

**1. Creditors have properly raised Appellants’ lack of standing in the motion to dismiss.**

Appellants argue that the Court cannot consider their lack of standing because the issue was not raised to the Circuit Court below. That argument is wrong legally. Lack of standing deprives the court of subject matter jurisdiction. *Anders v. South Carolina Parole and Community Corrections Bd.*, 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983) (“Having found that the plaintiffs lacked standing to bring this action, we hold that the trial judge did not have subject-matter jurisdiction . . .”). Lack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal. *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 471 S.E.2d 718 (Ct. App. 1996).

Appellants’ argument is also wrong factually because Creditors did raise this issue below. R. 257, lines 19-23 (“That’s [the mortgage taking precedence over the financing statement] really irrelevant because he’s trying to create an issue of priority between my client and the landlord’s mortgagor. As between the debtor, we [Creditors] have a financing statement and security agreement.”).

**2. Creditors filed a timely financing statement in 2006, which did not lapse but was continued.**

Appellants make the contradictory arguments that (a) Creditors did not file a financing statement until 2011, and (b) Creditors’ financing statement lapsed in 2011. They are factually wrong on both counts. As shown by the Record, Creditors did file a UCC-1 financing statement on July 31, 2006. Reply Affidavit ¶ 7, Exhibit C (R. 239); UCC-1 filed July 31, 2006 (R. 248).

Appellants argue for the first time on appeal, which they may not do, that Creditors' financing statement lapsed. Appellants previously agreed, however, the UCC-1 did not lapse but was subsequently renewed in 2009, 2011 and 2016. Bullington Affidavit ¶ 7, Exhibit D ("Continuing Pelletizer Security Agreement"), pp. 6-7 ("The Secured Party has a valid and perfected Security Interest in the Collateral, as evidenced by that certain UCC-1 Financing Statement attached hereto as **Exhibit B**, and that certain UCC-1 Financing Statement, as continued and assigned to the Secured Party, attached hereto as **Exhibit C** (together, the "UCC Statements").") (R. p. 175-176), sub-Exhibit B (UCC-3 Continuation Statement filed January 14, 2009) (R. p. 189), and Exhibit E (UCC-3 Continuation Statements filed November 2011 and November 2016) (R. pp. 203-212); Reply Affidavit ¶ 7 (R. pp. 239, 247-248).

**3. Because Debtor is a tenant of the subject real estate – not the owner – the equipment is presumed not to be a fixture.**

Appellants correctly note the rule that "it is considered more probable that an improvement, placed on the premises by one who did not own the fee [i.e., a tenant], was place there for his personal convenience and during the limited term of his estate," Return at 5, and therefore is not a fixture. Appellants then falsely claim that Debtor held "an ownership interest" in the real estate. Return at 5.

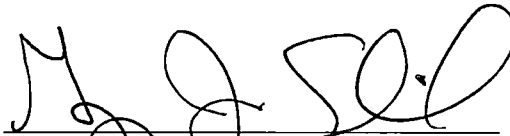
That is not true. The real estate was owned by Armstrong-Cowpens, LLC, which gave a mortgage to BLC Capital Corporation. (R. 221). Debtor is the tenant of Armstrong-Cowpens, LLC, not the owner of the realty. (R. pp. 219, 221, 230).

## CONCLUSION

Appellants do not dispute the fact and the amount of Debtor's liability to Creditors or the validity of Creditors' security interest in the Collateral or the Pelletizer. Their appeal solely concerns their landlord's third-party lender's alleged priority to the Pelletizer, which they have no standing to raise. Moreover, Appellants raise new arguments that were not preserved for review and are wrong both factually and legally, because there was no failure to file or renew financing statements and the Pelletizer was not a fixture.

For the foregoing reasons, Respondents request that the Court dismiss the appeal and affirm the Circuit Court's Final Order and Judgment.

Respectfully submitted,



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Attorneys for Respondents

August 13, 2018

ABB, Inc., and BFP, LP, a/k/a  
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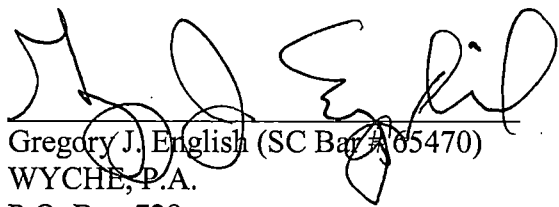
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**CERTIFICATE OF SERVICE**

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I hereby certify that I have this date caused to be served by U.S. Mail, first class postage prepaid, the **REPLY IN SUPPORT OF MOTION TO DISMISS BY RESPONDENTS** upon counsel for Appellants, addressed as follows:

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Attorneys at Law

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BY FIRST CLASS MAIL

Hon. Jenny Abbott Kitchings, Clerk  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

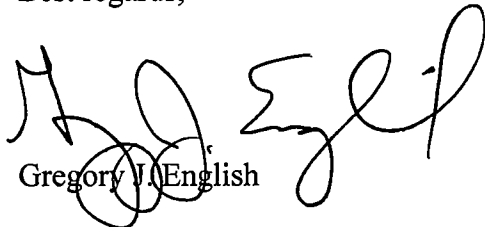
Re: ABB, Inc., et al. v. Integrated Recycling Group of SC, et al.,  
Appellate Case No. 2017-001943

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of the Reply in Support of the Motion to Dismiss of Respondents, along with a Certificate of Service for same. Please return a file-stamped copy of these documents to us in the self-addressed, stamped envelope provided.

Thank you for your assistance.

Best regards,



Gregory J. English

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Enclosures

cc: J. Falkner Wilkes, Esq. (by mail)

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SC Court of Appeals

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