

**BUSINESS COURT DIVISION – WEST VIRGINIA SUPREME COURT OF APPEALS  
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**SOARING EAGLE LODGE MASTER  
ASSOCIATION, INC., a West Virginia non-  
profit corporation; and SOARING EAGLE  
LODGE ASSOCIATION, INC., a West  
Virginia non-profit corporation,**

**Plaintiffs,**

**v.**

**SOARING EAGLE DEVELOPMENT  
COMPANY, LLC, a West Virginia limited  
liability company; GBBN ARCHITECTS,  
INC., an Ohio corporation; and BRANCH  
& ASSOCIATES, INC., a Virginia  
corporation,**

**Defendants,**

**and**

**SOARING EAGLE DEVELOPMENT  
COMPANY, LLC, a West Virginia limited  
liability company; and BRANCH &  
ASSOCIATES, INC., a Virginia  
corporation,**

**Third-Party Plaintiffs,**

**v.**

**TRI-STATE ROOFING & SHEET METAL  
COMPANY OF WEST VIRGINIA, a/k/a  
TRI-STATE ROOFING & SHEET METAL  
CO., a West Virginia corporation;  
APPLIED MECHANICAL SYSTEMS,  
INC., an Ohio corporation; RICHARDSON  
AND MARCH CARPENTRY, LLC, A West  
Virginia limited liability company; and  
EASTCOAST SIDING, INC., a Maryland  
corporation,**

**Third-Party Defendants,**

**And**

**BRANCH & ASSOCIATES, INC., a  
Virginia corporation,**

**Third-Party Plaintiffs,**

**v.**

**O.C. CLUSS LUMBER COMPANY, a**

**FILED  
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**CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT**

**CIVIL ACTION NO.: 15-C-2202**

**Presiding Judge: Tabit**

**Resolution Judge: Matish**

**Pennsylvania corporation, and GAF MATERIALS CORPORATION, a New Jersey corporation; QUALITY STONE VENEER, INC.; MODERN LIGHTNING PROTECTION, INC.; JAMES HARDIE BUILDING PRODUCTS, INC.; and FIBERON, LLC,**

**Third-Party Defendants,**

**and**

**O.C. CLUSS LUMBER COMPANY, a Pennsylvania corporation,**

**Fourth-Party Plaintiff,**

**v.**

**GAF MATERIALS CORPORATION, a New Jersey corporation, and FIBERON, LLC, a North Carolina Limited Liability Company,**

**Fourth-Party Defendants,**

**and**

**SOARING EAGLE DEVELOPMENT COMPANY, LLC, a West Virginia limited liability company,**

**Third-Party Plaintiff,**

**v.**

**THE TRAVELERS-INDEMNITY COMPANY OF AMERICA, a Connecticut corporation and Travelers Property and Casualty Company of America,**

**Third-Party Defendant.**

### **FINAL ORDER ENFORCING SETTLEMENT OF ALL CLAIMS**

On August 9, 2018, the parties appeared by-counsel for a hearing on various pleadings, motions, namely, *“Motion to Enforce Settlement”* (filed by Plaintiffs); *“Plaintiffs’ Supplemental Exhibits Submitted in Support of Plaintiffs’ Motion to Enforce Settlement”*; *“Defendant/Third-Party Plaintiff, Branch & Associates, Inc.’s Motion to Enforce Settlement”* ; *“Defendant/Third-Party Plaintiff, Branch & Associates, Inc.’s Supplement to Its Motion to Enforce Settlement”*; *“Third-Party Defendant Richardson and March Carpentry, LLC’s Joinder to Third-Party Plaintiff Branch &*

*Associates, Inc.'s Motion to Enforce Settlement*"; *"Defendant GBBN Architects, Inc.'s Response to Plaintiffs' Motion to Enforce Settlement and Joinder to Defendant/Third-Party Plaintiff Branch & Associates, Inc.'s Motion to Enforce Settlement"*; *"Third-Party Defendant Quality Stone Veneer, Inc.'s Joinder in Defendant and Third-Party Plaintiff, Branch and Associates, Inc.'s Motion to Enforce Settlement"*; *"Soaring Eagle Development Company's Joinder in Plaintiffs' Motion to Enforce Settlement and Response in Opposition to the Motions of Branch and Others Regarding Settlement"*; and *"Defendant/Third-Party Plaintiff, Branch & Associates, Inc.'s Reply to Soaring Eagle Development Company's Joinder in Plaintiffs' Motion to Enforce Settlement and Response in Opposition to the Motions of Branch and Others Regarding Settlement"* to enforce a settlement reached during a mediation held on June 15, 2018, except for Fourth Party Defendant Fiberon, LLC who waived its right to appear and attend the hearing. Upon consideration of the motions, evidence, argument, Orders, and applicable law, the Court finds and concludes as follows:

#### **FINDINGS OF FACT**

1. In December 2015, Plaintiffs Soaring Eagle Lodge Master Association, Inc., and Soaring Eagle Lodge Association, Inc., (hereinafter "Plaintiffs") filed a *Complaint* against Soaring Eagle Development Company, LLC, (hereinafter "SEDC"), asserting that SEDC caused structural and material defects in the Soaring Eagle Lodge ("Lodge") at Snowshoe Mountain Resort in Snowshoe, Pocahontas County, West Virginia. In February 2016, Plaintiffs filed an *Amended Complaint*, adding Branch & Associates, Inc., and GBBN Architects, Inc., the general contractor and architect for the Soaring Eagle Lodge, respectively. Over the course of the following years, the defendants filed numerous cross-, third-, and fourth-party claims against subcontractors, suppliers, and manufacturers, some of whom filed cross-claims and counterclaims against each other, whose work and/or products were involved in the design and construction of the Lodge.

2. On June 15, 2018, all parties to this action, identified herein in the style of this action above, (hereinafter “settling parties”) participated in mediation pursuant to the agreement of all parties and this Court’s December 11, 2017, *Scheduling Order*. Charles Piccirillo, Esq., served as mediator. After lengthy negotiations, the parties globally settled all claims brought or that could have been brought or pursued by any party to this action related to the facts of this action, herein.

3. The December 11, 2017, *Scheduling Order* is the third scheduling order entered during the pendency of this litigation. Each scheduling order entered herein has required parties to specifically file any third-party complaints by a certain deadline. The current December 11, 2017, *Scheduling Order* required parties to file any third-party pleadings by February 2, 2018. SEDC was a party to all three Scheduling Orders. As a result of the addition of parties and transfer of the case to the Business Court, there was the necessity for the Scheduling Orders.

4. Prior to mediation, the parties discussed waiting to mediate the matter until all relevant parties were joined in the case.

5. During mediation, all parties agreed to settle and release any and all claims among and against each other related to the subject matter of this litigation, with an express agreement that SEDC preserved its right to pursue existing claims against The Travelers Indemnity Company of America and possibly Zurich (a non-party). No other exception was carved out, or preservation of any claim was raised, discussed or agreed upon at mediation.

6. After the June 15, 2018, mediation, the parties began the process of drafting a formal settlement agreement, outlining the terms agreed upon at mediation. During this process, SEDC, for the first time during this litigation, asserted an intention to pursue claims against its agent and contractual designated representative on the Soaring Eagle Lodge project, David Pray and his affiliate companies, David Pray Construction Management, LLC, and Pray Construction Company (hereinafter “Pray” collectively). SEDC, for the first time, sought to include language

in the settlement agreement that would preserve any claims it had against Pray and “any other person, firm, or entity not a party to or released by this Agreement.”

7. In response to SEDC’s request that its claims against Pray (and possibly unnamed others) be preserved, several parties requested that SEDC agree to indemnify and hold harmless the settling parties in the event Pray (or the unnamed other parties) filed third-party claims against them. The parties reasonably believed that any further litigation instigated by SEDC over this litigation’s subject matter would risk exposing the settling parties to further litigation and liability.

8. SEDC insists in their “*Soaring Eagle-Development Company’s Joinder in Plaintiffs’ Motion to Enforce Settlement and Response in Opposition to the Motions of Branch and Others Regarding Settlement*” that any claim brought by Pray or others against the settling parties would be barred by the settlement agreement, yet refuses to indemnify and hold harmless and fully protect the settling parties with respect to any such claims filed in any forthcoming litigation related to or involving the design or construction of the Lodge. SEDC confirms that it intends to file claims against Pray related to the subject matter of this action.

9. No third-party complaints or any other actions were filed against Pray during the pendency of this litigation. Except SEDC, no other settling party has expressed any intention to pursue claims against Pray or any other additional civil actions against any named or unnamed parties, and no other party seeks to preserve any claim related to the subject matter of this action. SEDC offers no reasonable explanation or reason for its failure to file any third-party claims against Pray since this litigation began in December 2015.

10. Accordingly, Plaintiffs filed a *Motion to Enforce Settlement.*, and Branch & Associates, Inc., filed a separate *Motion to Enforce Settlement.* SEDC joined Plaintiffs’ *Motion*; Richardson & March Carpentry, LLC, GBBN Architects, Inc., and Quality Stone Veneer, Inc., joined Branch’s *Motion.*

## CONCLUSIONS OF LAW

11. In West Virginia, “the law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.”<sup>1</sup> The Supreme Court of Appeals of West Virginia has stated “where parties have made a settlement . . . such settlement is conclusive upon the party thereto as to the correctness thereof in the absence of accident, mistake or fraud in making the same.”<sup>2</sup> “A valid agreement of compromise and settlement of a case properly pending in a court of competent jurisdiction, in the absence of any exception or reservation, constitutes a merger and a bar of all claims properly litigable in such case.”<sup>3</sup>

12. The Court finds and concludes that on June 15, 2018, there was a meeting of the minds and the parties fully and completely settled this matter, and all claims brought or that could have been pursued by any party in anyway related to this matter. The Court finds and concludes that, save any claim SEDC currently has against Travelers and possibly against non-party Zurich, the settlement did not include any allowance for SEDC or any other party to initiate or pursue additional litigation related to the subject matter of this litigation. Indeed, the Court finds and concludes that any such allowance would defeat the purpose of the settlement, subvert any peace bought by the settlement, and potentially expose the settling parties to further liability. As such, it is the Court’s opinion that the settlement shall be enforced as contemplated at the June 15, 2018, mediation, and any settling party shall be precluded from pursuing or being exposed to any claims not specifically or expressly preserved at the mediation.

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<sup>1</sup> *Devane v. Kenedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999); Syl. pt. 1, *Sanders v. Roselawn Memorial Gardens*, 152 W. Va. 91, 159 S.E.2d 784 (1968).

<sup>2</sup> Syl. pt. 1, in part, *Calwell v. Caperton’s Adm’rs*, 27 W. Va. 397, 1886 WL 1848 (1886); Syl. pt. 6, *McConaha v. Rust*, 219 W. Va. 112, 114, 632 S.E.2d 52, 54 (2006); *Accord* 15A Am.Jur.2d Compromise and Settlement § 27, at 799-800 (1976); 4A Michie’s Jurisprudence Compromise and Settlement § 10, at 45 (Repl.Vol.1990).

<sup>3</sup> Syl. pt. 3, *State ex rel. Queen v. Sawyers*, 148 W.Va. 130, 133 S.E.2d 257 (1963); syl. pt. 3, *Fortuna v. Queen*, 178 W. Va. 586, 587, 363 S.E.2d 472, 473 (1987).

13. In addition, the Court finds and concludes that equitable estoppel precludes SEDC from pursuing any claim involving the subject matter of this litigation that SEDC did not expressly reserve at mediation. Under West Virginia law,

The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.”<sup>4</sup>

14. The Court finds and concludes that, prior to and during mediation, SEDC concealed its intention to sue Pray or any other unidentified person or entity related to the subject matter of this litigation and SEDC falsely represented that it only sought to preserve current claims against Travelers and possibly non-party Zurich. SEDC was demonstrably aware of any claim it had against Pray (and perhaps other non-parties) inasmuch as Pray was SEDC’s contractual agent during the construction and design of the Soaring Eagle Lodge. Moreover, SEDC does not assert, and no evidence suggests, that SEDC was unaware of any claim against Pray (or others) until after mediation. As several scheduling order deadlines passed without SEDC filing or expressing any intention to file claims against Pray or other non-parties, the other settling parties were without knowledge of SEDC’s intention to preserve and pursue any claims against Pray or others aside from those expressly agreed upon at mediation. The settling parties reasonably relied on SEDC’s limited express “carve-out” of claims *only* against insurers Travelers and possibly Zurich during settlement negotiations when this matter settled on June 15, 2018. SEDC failed to carve-out any other possible future parties against whom it may bring suit related to the subject matter of this litigation. Thus, it is evident that SEDC intended for the

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<sup>4</sup> Syl. pt. 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956); Syl. pt. 2, *Hunter v. Christian*, 191 W. Va. 390, 391, 446 S.E.2d 177, 178 (1994).

settling parties to rely on its misrepresentations and concealment when all parties agreed to settle the matter on June 15, 2018. Thus, the Court finds and concludes that SEDC shall be equitably estopped from preserving and pursuing claims, arising from this case's subject matter, against Pray or any other non-parties.

### DECISION

Accordingly, the Court, based upon the above findings of fact and conclusions of law, does hereby **ENFORCE** the full and complete settlement reached at the June 15, 2018 mediation of this matter, including any and all claims which had been made, could have been made or could have been pursued by any party herein arising from any and all facts developed or learned in this litigation. The Court does **RETAIN** continuing jurisdiction for the purposes of the parties reaching a written settlement agreement which the Court Orders shall be signed by all parties and which shall be **INCORPORATED** into this Order by reference. It is further **ORDERED** that the settling parties are **PRECLUDED** from filing or pursuing additional claims arising from or related to in any way to the subject matter and facts of this litigation unless the such settling party pursuing any such claims fully and completely indemnifies and holds harmless each and every settling party herein from any and all exposure such claims to be pursued may create to said settling parties. Specifically, as a result of the settlement which the Court has determined was reached herein, it is hereby **ORDERED** that Soaring Eagle Development Company, LLC and any of its affiliates is **PRECLUDED** from filing or pursuing any and all claims, arising from or related in any way to the litigation of the subject matter herein, excepting only those specifically reserved, and including those against any other referenced, related or unrelated entity unless and until Soaring Eagle Development Company, LLC, SEDC fully and completely indemnifies and holds harmless each and every one of the other settling parties from any and all potential exposure resulting from its actions in pursuing any additional claim or action it desires to proceed with. The Court does **ORDER** that Civil Action No. 15-C-2202, subject to its

continuing jurisdiction of the execution of a Settlement Agreement, be **DISMISSED** with prejudice, as to all parties except for Travelers Indemnity Company of America and Travelers Property and Casualty Company of America, and possibly non-party Zurich. This action will remain on the Court's docket pending resolution of those claims. The Court notes any objections preserved on the record by SEDC or any party.

The Clerk is **DIRECTED** to send a certified copy of this Final Order Enforcing Settlement to all parties and counsel of record.

J. Michael Benninger  
Benninger Law  
P.O. Box 623  
Morgantown, WV 26507  
***Counsel for Plaintiffs***

John L. MacCorkle  
Carrie Dysart  
MacCorkle Lavender PLLC  
300 Summers Street, Suite 800  
Charleston, WV 25301  
***Co-Counsel for Soaring Eagle  
Development Company, LLC***

Shawn P. George  
George & Lorensen, PLLC  
1526 Kanawha Boulevard, East  
Charleston, WV 25311  
***Co-Counsel for Soaring Eagle  
Development Company, LLC***

Stephen F. Gandee  
Robinson & McElwee  
P.O. Box 128  
140 West Main Street, Suite 300  
Clarksburg, WV 26302-0128  
***Counsel for GBBN Architects, Inc.***

Ronald Hatfield, Jr.  
Litchfield Cavo LLP  
99 Cracker Barrel Drive, Suite 100  
Barboursville, WV 25504  
***Counsel for Third-Party Defendant  
Applied Mechanical Systems, Inc.***

Michael P. Markins  
Elizabeth Moore  
Cipriani & Werner, PC  
Laidley Tower, Suite 900  
500 Lee Street, E.  
Charleston, WV 25301  
***Counsel for Third-Party Defendant,  
Eastcoast Siding, Inc.***

Natalie C. Schaefer  
Kimberly Bandy  
Kayla Reynolds  
Shuman, McCuskey & Slicer, PLLC  
1411 Virginia Street, East, Suite 200  
Charleston, WV 25301  
***Counsel for Third-Party Defendant,  
Richardson and March Carpentry, LLC***

Robert H. Sweeney, Jr.  
Michael A. Frye  
Jenkins, Fenstermaker, PLLC  
P. O. Box 2688  
Huntington, WV 25726  
***Counsel for Third-Party Defendant,  
Tri State Roofing & Sheet Metal  
Company of West Virginia***

Randall L. Trautwein  
Jill Lansden  
Lamp Bartram Levy Trautwein & Perry, PLLC  
P. O. Box 2488  
Huntington, WV 25725  
***Counsel for Third-Party Defendant/Fourth-Party  
Plaintiff, O.C. Cluss Lumber Company***

Michael B. Hissam  
Isaac R. Forman  
Hissam Forman Donovan Ritchie, PLLC  
P. O. Box 3983  
Charleston, WV 25339  
***Counsel for Fourth-Party Defendant  
GAF Materials Corporation***

Webster J. Arceneaux, III  
Spencer Elliott  
Lewis Glasser PLLC  
300 Summers Street, Suite 700  
Charleston, WV 25301  
***Counsel for Third-Party Defendant/  
Fourth-Party Defendant, Fiberon, LLC***

Eric Hulett  
Steptoe & Johnson, PLLC  
Edwin Miller Professional Center  
1250 Edwin Miller Blvd., Suite 300  
Martinsburg, WV 25404  
***Counsel for Quality Stone Veneer, Inc.***

Nicholas R. Stuchell  
Daniels Law Firm  
300 Summers Street, Suite 1270  
P. O. Box 1433  
Charleston, WV 25325  
***Counsel for Modern Lightning Protection, Inc.***

John W. Hays  
Jackson Kelly PLLC  
175 East Main Street  
Suite 500  
Lexington, KY 40507  
***Co-Counsel for James Hardie  
Building Products, Inc.***

Michael Victorson  
Danielle Waltz  
Sarah Phipps  
Jackson Kelly PLLC  
P. O. Box 553  
Charleston, WV 25322  
***Co-Counsel for James Hardie  
Building Products, Inc.***

John A. "Jack" Smith  
Flaherty, Sensabaugh & Bonasso, PLLC  
P. O. Box 3843  
Charleston, WV 25338-3843  
***Counsel for Travelers Casualty & Surety Company  
of America; Travelers Indemnity Company; and  
The Phoenix Insurance Company***

Edgar Allen Poe, Jr.  
Anna F. Ballard  
Evan S. Olds  
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC  
JamesMark Building  
901 Quarrier Street  
Charleston, WV 25301  
*Counsel for Branch & Associates, Inc.*

ENTERED this 19<sup>th</sup> day of September ~~August~~, 2018.

Joanna A. Tabit  
Honorable Joanna Tabit, Judge

Prepared by:

Anna F. Ballard  
Edgar Allen Poe, Jr., WV State Bar No. 2924  
Anna F. Ballard, WV State Bar No. 9511  
Evan S. Olds, WV State Bar No. 12311  
PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC  
JamesMark Building  
901 Quarrier Street  
Charleston, WV 25301  
*Counsel for Branch & Associates, Inc.*

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 19  
DAY OF Sept 2018  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Stephen F. Gandee by permission  
Stephen F. Gandee, WV State Bar No. 5204  
Robinson & McElwee  
P.O. Box 128  
140 West Main Street, Suite 300  
Clarksburg, WV 26302-0128  
*Counsel for GBBN Architects, Inc.*

Natalie C. Schaefer by permission  
Natalie C. Schaefer, WV State Bar No. 9103  
Kimberly Bandy, WV State Bar No. 10081  
Kayla Reynolds, WV State Bar No. 13268  
Shuman, McCuskey & Slicer, PLLC  
1411 Virginia Street, East, Suite 200  
Charleston, WV 25301  
*Counsel for Third-Party Defendant,  
Richardson and March Carpentry, LLC*