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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2023-001178
Case No. 2018-CP-23-04740

Flatiron-Zachry, a Joint Venture, Appellant

v.

Civil Engineering Consulting Services, Inc. c/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International, Defendants,

Of which Stantec Consulting Services, Inc. is the Respondent.

STANTEC CONSULTING SERVICES, INC.'S MOTION TO DISMISS APPELLANT FLATIRON-ZACHRY, A JOINT VENTURE'S APPEAL

Pursuant to Rule 260, SCAR, Respondent Stantec Consulting Services, Inc. ("**Stantec**"), moves this Court for an order dismissing Appellant Flatiron-Zachry, a Joint Venture's ("**FZJV**") appeal because the Court does not have subject matter jurisdiction. Specifically, FZJV failed to timely file a Notice of Appeal within 30 days after entry of the applicable Order denying FZJV's Motion to Vacate as required by Rule 203(b), SCAR.

INTRODUCTION

FZJV's appeal is untimely and must be dismissed. FZJV's appeal follows a series of procedural irregularities all aimed at renewing appellate rights that had long since expired. The

jurisprudence of this Court and case law under the Federal Arbitration Act ("**FAA**") uniformly reject attempts to revive appellate rights that have expired.

The arbitration award at issue in this appeal was issued on November 5, 2021. Under the FAA, an application to vacate must be filed within three months of the date of the award. FZJV filed a Motion to Vacate on February 3, 2022. The Court of Common Pleas denied this motion on March 14, 2022 giving FZJV until April 13, 2022 to file a Notice of Appeal. Rule 203(b), SCAR. FZJV did not appeal, thereby terminating this Court's jurisdiction. *USAA Property & Casualty Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (appellate court loses subject matter jurisdiction once the 30-day appeal period passes without a notice of appeal having been filed).

Months later, on June 22, 2022, FZJV filed another Motion to Vacate. This motion was brought later than three months after the date of award and was untimely. The second motion to vacate was denied in open court on October 6, 2022. FZJV moved for reconsideration of the denial of the second motion to vacate on October 18, 2022. The Court of Common Pleas denied the motion to reconsider on June 21, 2023. This appeal followed.

Stantec's Motion to Dismiss presents the question of whether a party who fails to timely appeal the denial of a Motion to Vacate can revive its appellate rights by filing a second, untimely Motion to Vacate the arbitration award. The answer is "no." The Court should dismiss the appeal.

BACKGROUND

FZJV sued Stantec in the Greenville County Court of Common Pleas alleging that Stantec negligently performed engineering services in connection with improvements to the Interstate 85/385 Interchange located in Greenville County, South Carolina (the "**Project**"). By agreement

of the parties, the action in the Court of Common Pleas was stayed in favor of arbitration. The arbitration panel entered its award in favor of Stantec on November 5, 2021.

On February 3, 2022, FZJV filed its Notice of Motion and Motion to Lift the Stay for Application to Vacate ("**First Motion to Vacate**") in the Court of Common Pleas. (*See* FZJV's First Motion to Vacate attached hereto as Exhibit "**A**").[1] The Court denied FZJV's First Motion to Vacate on March 15, 2022. (*See* Court's Order Denying FZJV's First Motion to Vacate attached hereto as Exhibit "**B**"). FZJV never appealed the denial of the Motion to Vacate.

On March 22, 2022, after the Court of Common Pleas denied the Motion to Vacate, thereby confirming the arbitrator's award, FZJV filed a Motion for Clarification or, in the Alternative, Motion for Reconsideration with the arbitrators. In other words, FZJV sought reconsideration of the award that had by then been confirmed.[2] On March 24, 2022, still within the period for FZJV to timely appeal the denial of the First Motion to Vacate, the arbitrators denied FZJV's Motion for Reconsideration. Nevertheless, FZJV did not appeal to this Court.

On June 22, 2022, long after the time for appealing the denial of the First Motion to Vacate had passed, FZJV filed a second Notice of Motion to Lift the Stay for Application to Vacate ("**Second Motion to Vacate**") in the Court of Common Pleas. (*See* FZJV's Second Motion to Vacate attached hereto as Exhibit "**C**"). FZJV's Second Motion to Vacate was based on the same

[1] The Record on Appeal has not yet been filed. Therefore, pursuant to Rule 240(c)(3), SCAR, Stantec has attached the relevant documents to support its position.

[2] The substance of the award could not have been changed by the arbitration panel. The doctrine of *functus officio* prevented the arbitration panel's consideration of the merits of the award. *Sodexo Management, Inc. v. Detroit Public Schools*, 200 F. Supp. 3d 679, 696 (E.D. Mich. 2016) ("Commercial Rule of Arbitration permits an arbitrator to 'correct any clerical, typographical, or computational errors in the award,' however he or she is not empowered to redetermine the merits of any claim already decided.' '[T]he *functus officio* doctrine . . . holds that an arbitrator's duties are generally discharged upon the rendering of a final award, when the arbitral authority is terminated.'"). The arbitration panel's order did not alter its prior merits determination.

grounds as the First Motion to Vacate.[3] The Court of Common Pleas denied FZJV's Second Motion to Vacate from the bench at the hearing on or about October 6, 2022. (*See* Court's Order Denying FZJV's Second Motion to Vacate attached hereto as Exhibit "**D**").

Finally, on October 18, 2022, FZJV filed Plaintiff's Motion to Reconsider the Court of Common Pleas' order denying FZJV's Second Motion to Vacate. The Court of Common Pleas denied FZJV's Motion for Reconsideration on or about June 21, 2023. FZJV's current appeal relates to the denial of the Second Motion to Vacate.

ARGUMENT

I. FZJV's Second Motion to Vacate was Untimely.

FZJV's Second Motion to Vacate is a legal nullity. The applicable statute does not contemplate serial Motions to Vacate the same award and certainly does not permit late-filed Motions to Vacate. As FZJV acknowledged in the proceedings below, the FAA governs these proceedings. Under 9 U.S.C. § 12, an Application to Vacate must be filed within three months after the award. The statute provides in pertinent part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months ***after the award is filed or delivered*** . . .

Id. (emphasis added). The award in this action was issued on November 5, 2021, rendering untimely any application to vacate filed after February 5, 2022.

[3] As this Court knows, there are limited enumerated grounds for vacatur of an arbitration award. In both motions to vacate, FZJV acknowledged that the grounds for vacatur are set forth in 9 U.S.C. § 10. In both motions, FZJV relied on subsections (3) and (4) contending that the arbitrators refused to hear evidence and that the arbitrators exceeded their powers. In both motions, FZJV also cited manifest disregard of the law as a ground for overturning the award. In short, same award, same grounds for vacatur, same result. The only difference is that FZJV failed to appeal the denial of the first Motion to Vacate, so FZJV filed a second one in an attempt to revive appellate rights that had long-ago expired.

The plain language of the FAA and caselaw interpreting it provides that timeliness is measured from the date of the award. This very issue was articulately addressed last year by the United States District Court for the Eastern District of Texas in *Gonzalez v. Mayhill Behavioral Health, LLC*, No. 4:21-MC-00188, 2022 WL 1185889 (E.D. Tex. 2022) where the Court rejected the argument that timeliness should be measured from the date of the arbitrator's denial of a motion to reconsider instead of the date of the award.

In *Gonzalez*, the arbitrators issued an award adverse to the claimant on March 29, 2021. The claimant filed a timely motion to reconsider with the arbitrator on April 9, 2021, which the arbitrator denied on May 3, 2021. Three months after the denial of the motion to reconsider, the claimant filed an application to vacate the arbitration award pursuant to 9 U.S.C. § 12. Despite having timely filed a motion to reconsider, the claimant's application to vacate was deemed untimely because it was not filed within three months of the date of the award. The Court rejected the claimant's argument that the application to vacate was timely because it was filed within three months of the denial of the reconsideration motion, articulately describing the reasons as follows:

> Under the FAA's applicable limitations provision, 'notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.' 9 U.S.C. § 12. This three-month time limit is strictly construed by the courts. *See e.g., Am. Income Life Ins. V. Alkurdi*, No. 6:19-CV-00016, 2019 WL 2022220, at *2 (W.D. Tex., Apr. 25, 2019) (***stating that even one day late 'alone would be sufficient to bar' the plaintiff's motion to vacate 'as untimely'***). Simply put, 'a party may not raise a motion to [modify] . . . an arbitration award after the three-month period has run.' [citations omitted] . . .
>
> The Court finds that in this case, the filing of delivery of the initial March 29 Award triggered the limitations period, not the arbitrator's subsequent denial of reconsideration. First, as previously noted, arbitration is intended to be a final and binding determination of the parties' claims. And here, the parties agreed to arbitrate their claims pursuant to the FAA and in accordance with the rules of the American Arbitration Association ("AAA"). Under both, a party's ability to modify an award is extremely limited.

> For example, the AAA Rules permit a party to request reconsideration or modification up to 20 days after an award is filed. *See* AM. ARB. ACCOC. R. 40 (2007). However, a request for reconsideration or modification is limited to the 'clerical, typographical, technical, or computational errors in the award.' *Id.* The initial award is considered 'final and binding' in all other aspects. AM. ARB. ASSOC. R. 39(g) (2007). Similarly, the time period under § 12 in which a party may request a court intervene with an arbitrator's decision is intentionally short. *See* 9 U.S.C. § 12. ***The purpose of these expedited timelines would be thwarted 'if the limitations period . . . were tolled every time a losing party filed the functional equivalent of a motion for reconsideration.***' *Halliburton Energy Servs. v. NL Indus.*, 618 F. Supp. 2d 614, 627 (S.D. Tex. Mar. 31, 2009) (internal citations omitted); *see also Russ v. United Servs. Auto. Ass'n*, No. CV-18-042222, 2019 WL 3083015, at *5 (D. Ariz. July 15, 2019) ('***[p]arties should not be able to delay the intentionally short limitations period for challenging an award merely by filing for a post award decision***'); *Olson v. Wexford Clearing Servs. Corp.*, 397 F.3d 488, 492 (7th Cir. 2005) (comparing reconsideration under § 12 to reconsideration under Fed. R. Civ. P. 60(b) where the filing of a 'motion to reconsider outside the ten-day window after the judgment does not toll the time for filing an appeal'). ***From the plain language of these provisions, the operative date relates to the arbitrator's award – not the denial of a reconsideration of the award***.

Id. at *3-4 (emphasis added). Accordingly, even where the claimant timely files a motion to reconsider, the application to vacate must be filed within three months of the award, or the application is barred. As the *Gonzalez* court and other authorities cited by it explained, if the rule was different, then disappointed litigants could unilaterally extend the statutory deadline simply by filing a motion to reconsider. This is not the law.

Therefore, FZJV's Second Motion to Vacate filed more than 7 months after award was untimely and an improper attempt to revive its appellate rights that were lost when FZJV failed to appeal the denial of the First Motion to Vacate.

II. Successive Motions Do Not Preserve a Disappointed Party's Right to Appeal.

This Court's jurisprudence is perfectly aligned with case law developed under the FAA rejecting a litigant's attempt to revive expired appellate rights through relentless requests for reconsideration and the like. The South Carolina Supreme Court has articulated the following rule regarding successive post-judgment motions:

> An appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. An appeal may also be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical written Rule 59(e) motion.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004) (internal citations omitted)[4]; *see also, Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999). Here, rather than appeal the denial of the First Motion to Vacate, FZJV filed a series of procedurally improper motions; to wit, the motion to reconsider filed with the arbitration panel whose award had already been confirmed, the second nearly-identical and late motion to vacate, and the motion to reconsider the denial of the second motion to vacate.

The fact is that, even after the arbitrators denied FZJV's request for reconsideration, FZJV had time to appeal the denial of the First Motion to Vacate. Yet, FZJV did not timely appeal.

[4] The *Elam* Court reviewed the law of other jurisdictions and included the following string cite in its decision: "*Sears v. Sears,* 85 Ill.2d 253, 52 Ill.Dec. 608, 422 N.E.2d 610 (1981) (successive written post-trial motion which repeats what was raised or could have been raised in first written motion is not authorized by rules and does not extend time for appeal; losing litigant is not entitled to return to trial court indefinitely hoping for change of heart or a more sympathetic judge, or string out arguments one at a time over months because '[t]here must be finality, a time when the case in the trial court is really over and the loser must appeal or give up'); *State ex rel. Douglas v. Bible Baptist Church of Lincoln,* 218 Neb. 307, 353 N.W.2d 20 (1984) (in case involving successive written motions, appeal was untimely because second motion for new trial, based in part on events which occurred after denial of first motion for new trial, was not proper and did not toll time for appeal); *Kaufman v. Oregonian Pub. Co.,* 195 Or. 164, 245 P.2d 237 (1952) (in case involving successive written motions, a party may not extend time for appeal from an order denying a motion for reinstatement of action by filing a second, substantively identical motion with a different judge); *Gassaway v. Patty,* 604 S.W.2d 60 (Tenn.Ct.App.1980) (in case involving successive written motions, appeal was untimely where a party filed second post-judgment motion seeking reconsideration of order denying first post-judgment motion; rules are meant to prevent filing of repetitive post-trial motions and avoid undue delays); 5 Am. Jur. 2d *Appellate Review* 303–310 (1995)."

Recycled old arguments in successive filings cannot resurrect appellate jurisdiction that was lost due to FZJV's own failure to appeal. Accordingly, FZJV's appeal must be dismissed.

CONCLUSION

For the reasons set forth above, Stantec respectfully requests this Honorable Court dismiss FZJV's appeal and award Stantec such other further relief that the Court deems appropriate.

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July 27, 2023
Atlanta, Georgia

EXHIBIT A

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GREENVILLE	)	**C.A. No. 2018-CP-23-04740**
Flatiron-Zachry, a Joint Venture,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**NOTICE OF MOTION AND MOTION TO LIFT THE STAY FOR APPLICATION TO VACATE**
Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International,	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE THAT Plaintiff Flatiron-Zachry, a Joint Venture (FZJV), under the Federal Arbitration Act,[1] and non-statutory grounds, hereby files this, its Notice of Motion and Motion to lift the Stay for Application to Vacate, showing that vacatur is warranted where the parties' private arbitration panel issued an award in which the panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law. This Motion will be heard at such time as this Court may direct. In support thereof, FZJV relies on the following grounds as set forth in the attached Memorandum of Law:

INTRODUCTION

In the absence of meaningful discovery, permission to submit a dispositive motion, and permission to rule on such motion, the arbitration panel (the Panel) issued an Order disposing of all but one of FZJV's claims against Defendant-Respondent Stantec Consulting Services, Inc.

[1] Plaintiff does not believe the South Carolina Uniform Arbitration Act (SCUAA), S.C. Code Ann. §§ 15-48-130(a)(3)–(4), is applicable, but should the Court find it is, this motion would also be brought pursuant to the corresponding section.

(Stantec). In issuing its award, the Panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law. For these reasons, discussed more fully below, FZJV respectfully requests that this Honorable Court enter an Order vacating the Panel's November 5, 2021 Order on Stantec's Motions for Summary Judgment.

FACTUAL BACKGROUND

The dispute that forms the basis for the parties' underlying arbitration arises out of the design and construction of part of the 85/385 Gateway Project in Greenville, South Carolina. FZJV seeks to recover nearly $60 million dollars in damages that were caused directly by the Designers', including Stantec's, negligent and deficient performance of its work.

PROCEDURAL HISTORY

1. On or about September 14, 2018, FZJV filed its original complaint in this Court, as required under S.C. Ann. § 15-36-100.

2. On or about November 18, 2019, the parties filed a Joint Motion to Stay Proceedings and Compel Arbitration, which included in the filing a copy of the parties' arbitration agreement (the "Arbitration Agreement").

3. On November 19, 2019, the Court issued an Order granting the parties' Joint Motion to Stay Proceedings and Compel Arbitration, compelling the parties to arbitrate the matter as set forth in the Arbitration Agreement.

4. On January 11, 2021, without making prior written application to submit a dispositive motion as required under AAA Rule R-34 (Rule 34), Stantec filed its first motion for summary judgment. The Panel denied Stantec's first motion for summary judgment as "premature" based on the "current status of on-going discovery." At that time, discovery had just begun—months of discovery remained, multiple defendants, including Stantec, had not completed their document productions, no depositions had occurred, there had been no opportunity for the parties

to present final evidentiary support for their positions, and there had been no opportunity for the parties to present expert testimony. For those reasons, the Panel indicated that Stantec could pursue summary judgment only "at the close of discovery."

5. Undeterred, and prior to the close of discovery, Stantec filed a second motion for summary judgment on September 13, 2021. The circumstances surrounding this second motion were essentially the same as the first: Stantec filed its motion without making prior written application as required under Rule 34, the Panel again violated Rule 34 by entertaining Stantec's motion, and discovery remained incomplete, having advanced no further than the "premature" status of discovery at the time of Stantec's first motion.

6. The Panel granted Stantec's second motion on November 5, 2021, notwithstanding the following facts: Stantec had no authority to file its motion, the Panel had no authority to rule on the motion, discovery was ongoing and depositions of corporate representatives had just begun, the discovery period had not closed, the Panel manifestly disregarded the rules governing submission of dispositive motions, the Panel had no authority to undermine the discovery process, and the Panel had no more information available to it than it did at the time it denied Stantec's first motion as premature.

7. An arbitrator or panel receives their authority only through the agreement of the parties to the arbitration. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (citation omitted) ("When, as here, the award does not draw its essence from the governing agreement, and the arbitrator has exceeded his authority under the agreement, 'courts have no choice but to refuse enforcement of the award.'"). In this case, the parties to this action agreed to arbitrate their claims pursuant to the Arbitration Agreement. Under those terms, the Panel received certain authority, including the authority to arbitrate the parties'

claims in accordance with the Federal Arbitration Act (FAA) and the American Arbitration Association's Construction Industry Rules (AAA). One such rule applicable to the parties' arbitration is AAA Rule R-48(b), which allowed the Panel to make interim, interlocutory, or partial rulings, orders, and awards, as it did here. It is the Panel's interim, interlocutory, or partial rulings, orders, and award that is the subject of the instant application to vacate.

8. Plaintiff moves to lift the Stay for the purpose of filing this Application of Vacation, which would be final as to these claims, if not lifted.

9. Under 9 U.S.C. § 10(a)(3), vacatur is appropriate where an arbitrator or panel refused "to hear evidence pertinent and material to the controversy[.]"

10. Under 9 U.S.C. § 10(a)(4), vacatur is appropriate where an arbitrator or panel "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

11. The Panel exceeded its powers and refused to hear evidence pertinent and material to the controversy when it granted Stantec's motion for summary judgment.

12. Under 9 U.S.C. § 10(b), "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

13. The arbitration as to certain remaining claims is still underway, and thus this Motion and Application are timely.

ARGUMENT

The Federal Arbitration Act (FAA), which applies to this matter pursuant to the Arbitration Agreement, provides the statutory grounds for vacating an arbitrator's award. *See* 9 U.S.C. § 10. There are four such statutory grounds under the FAA, two of which are relevant to this application:

> (3) where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; 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).

In addition to the four statutory grounds established by the FAA, South Carolina case law provides for an additional, non-statutory ground of "manifest disregard or perverse misconstruction of the law." *See Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). This non-statutory "basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

Among the various grounds for arbitral vacatur, three are present here—the Panel refused to hear evidence material to the controversy under 9 U.S.C. § 10(a)(3),[2] the Panel exceeded its power under 9 U.S.C. § 10(a)(4),[3] and the Panel manifestly disregarded the law.

I. The Panel refused to hear evidence material to the controversy by issuing an award before the parties conducted meaningful discovery.

Vacatur under the FAA is appropriate when an arbitrator or panel refuses to hear evidence pertinent and material to the controversy. *See* 9 U.S.C. § 10(a)(3). Such a refusal to hear evidence material to the controversy is what happened here.

The FAA required the Panel to hear all evidence pertinent and material to the controversy. The Panel was similarly required by the rules governing the underlying arbitration to ensure a fair hearing, specifically when managing discovery. *See* AAA Rule R-24(a) ("The arbitrator shall

[2] Or S.C. Code Ann. § 15-48-130(a)(4), should the Court determine that the SCUAA is applicable.
[3] Or S.C. Code Ann. § 15-48-130(a)(3), should the Court determine that the SCUAA is applicable.

manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and *safeguarding each party's opportunity to fairly present its claims and defenses*." (emphasis added)); *see also* AAA Rule R-33(a) ("The arbitrator has the discretion to vary [the proceedings], *provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case*."). If, however, an arbitrator does not provide for a full and fair hearing as the AAA rules require, then "courts owe no deference to an arbitrator who has failed to provide the parties with a full and fair hearing." *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 388 (4th Cir. 2000) (citation omitted) (concluding arbitrator committed misconduct by failing to provide parties with full and fair hearing); *see also Hoteles Condado Beach v. Union De Tronquistas*, 763 F.2d 34, 38 (1st Cir. 1985) (holding that arbitrator's refusal to consider a trial transcript submitted by one of the parties denied them "adequate opportunity to present its evidence and arguments"); *Prudential Securities, Inc. v. Dalton*, 929 F.Supp. 1411, 1417 (N.D. Okla. 1996) (finding arbitrator guilty of misconduct in making a final decision without hearing "evidence pertinent and material to the controversy").

In *International Union*, for example, the arbitrator told the parties to meet, gather information, negotiate further, and, if not resolved, present evidence and argument at an arbitration hearing. *See Int'l Union*, 232 F.3d at 390. The arbitrator then "issued his award without ever holding that hearing or affording the Union the opportunity to present the evidence it had been prepared to offer[.]" *Id.* The United States Court of Appeals for the Fourth Circuit, in holding that the arbitrator had engaged in misconduct, noted that the arbitrator had made no findings that the Union's evidence was "cumulative," "irrelevant," or "immaterial," nor did the record show "that [the] evidence was, in fact, cumulative or anything less than highly material and relevant." *Id.*

The facts here are analogous. The Panel denied Stantec's first motion for summary judgment as premature based on the status of the evidence, saying that summary judgment could not be pursued again until "the close of discovery"—like the *International Union* arbitrator instructing the parties to meet, gather information, and negotiate further before there could be a hearing. Then, before the parties could move past the "premature" status of discovery that warranted denying Stantec's first motion, and before "the close of discovery," the Panel issued its award based on Stantec's second motion for summary judgment—like the *International Union* arbitrator issuing his award before the parties could meet, gather information, and negotiate further. In granting Stantec's motion, the Panel made no findings that the discovery it had cut short would be "cumulative," "irrelevant," or "immaterial"—like the *International Union* arbitrator who failed to do the same. And like *International Union*, where "the Union claimed that [the additional] evidence would demonstrate [certain] facts," the additional discovery that FZJV was deprived of the opportunity to conduct and present would have demonstrated—at the absolute very least—a genuine issue of material fact.[4]

Had it been given the opportunity, FZJV would have conducted the following material discovery: (i) the conclusion of Defendant Civil Engineering Consulting Services, Inc. corporate representative deposition; (ii) the conclusion of FZJV's corporate representative deposition; (iii) the deposition of expert witness Dr. O'Connell; (iv) the deposition of Stantec's expert witness, Dr. Amoroso; (v) the deposition of Stantec's corporate representative; (vi) the deposition of Stantec's engineer, Betsy Watson; and (vii) the deposition of ECS's corporate representative.

[4] In fact, the existence of a genuine issue of material fact is something that the Panel has since acknowledged in its January 13, 2022 Order. In that Order, the Panel denied additional motions for summary judgment, finding there was a genuine issue of material fact on *the very same issue* it had determined was undisputed in the award that is the subject of this application.

Based on that discovery, and if it had been given the opportunity to fairly present its case, FZJV would have presented pertinent and material evidence showing: (i) Stantec's involvement in, and responsibility for, the temporary shoring and design of the MSE Walls; (ii) that Stantec breached the standard of care by deviating from the Pre-Award design and is liable for such negligence; (iii) that FZJV did not know and should not have known an issue with the geomembrane would give rise to a cause of action against Stantec; and (iv) that Stantec's failure to timely provide the Post-Award temporary drainage design caused the inefficiencies and related damages suffered by FZJV.[5] But FZJV did not have the opportunity to present any of this pertinent and material evidence. Instead, the Panel based its decision on the same record it had previously found premature and insufficient to allow for an award.

Because FZJV was denied the opportunity to fairly present its case, because the Panel refused to hear material evidence that it had not found to be "cumulative," "irrelevant," or "immaterial," and because the Panel denied FZJV the right to be heard, this Court should, under 9 U.S.C. § 10(a)(3), vacate the Panel's award.

II. The Panel exceeded its power.

A. The Panel exceeded its power by disregarding the parties' agreement to conduct discovery.

The parties agreed "that discovery will be conducted in the arbitration, with the scope and process subject to further agreement or by direction of the arbitration panel." *See* Joint Motion to Stay Proceedings and Compel Arbitration at 5, ¶ 9. By disregarding the parties' agreement to

[5] *Cf. e.spire Commc'ns, Inc. v. CNS Commc'ns*, 39 F. App'x 905, 910 (4th Cir. 2002) ("At the outset, we note that CNS has not identified, either to the arbitral panel or this court, any evidence that it would have presented at the hearing but for the panel's limitation on its right to present evidence. Consequently, it is impossible to determine whether any evidence that was excluded was 'pertinent and material' to the controversy.").

conduct discovery, the Panel exceeded its power, providing additional statutory grounds for vacatur.

As an initial matter, the agreement states that discovery "will" be conducted. The parties did not agree that discovery *may* be conducted, nor did they agree that discovery will be conducted only in part. Instead, the parties' agreement reflects an intent to conduct meaningful discovery—something that did not take place. And although the parties carved out two caveats within their agreement, neither is applicable here. First, the parties agreed that discovery would be subject to further agreement between the parties. There was no further agreement between the parties, and there certainly was no further agreement to cut off discovery just as it was beginning. Second, the parties' agreement provides that the scope and process of discovery may be subject to the direction of the Panel. Here, the Panel did not direct the discovery scope or process (for example, by setting a deadline within which to complete discovery or by expanding the scope of document discovery to include text messages). Instead, the Panel constructively terminated it by issuing an award just as meaningful discovery was beginning. If, however, there was any direction by the panel regarding discovery, it was an implied direction to conduct *more* discovery. Indeed, at the time the Panel granted Stantec's second motion for summary judgment, (1) discovery had not meaningfully progressed further than when the Panel denied Stantec's first motion as premature, and (2) discovery had not closed, despite the Panel expressly stating that summary judgment could not be sought again until the close of discovery.

Because the parties agreed to conduct discovery, and because neither carveout in that agreement applies here (except for the implied direction to conduct more discovery), the Panel exceeded its authority when it disregarded the parties' discovery agreement, effectively terminating the same discovery process that the Panel, itself, had stated was insufficient to support

a grant of summary judgment. The Court should find that the Panel exceeded its authority and vacate the award accordingly.

B. The Panel exceeded its power by disregarding AAA Rule R-34.

AAA Rule R-34, which applies to the underlying arbitration, states in full: "*Upon prior written application*, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case." (emphasis added).

This is a rule with which Arbitrator Gray, who signed the Order granting summary judgment, is familiar. *See, e.g.*, Herbert H. Gray, III, E. Tyron Brown, R. Daniel Douglass, *Motion Practice in Arbitration* (2019). In that article, Arbitrator Gray recognized four things: First, Arbitrator Gray recognized that Rule 34 was a change from the former rule, which had previously allowed arbitrators to entertain dispositive motions *without* written application. *See id.* at 10. Second, Arbitrator Gray recognized that there "are several reasons for this cautious approach," including the fact that, "[i]n arbitration, the grounds for appeal are limited and an award is given deference by the courts to the point of allowing an arbitrator to make errors of law and still be affirmed. [And for that reason], an arbitrator is properly hesitant to cut the process short and deprive a party of the chance to present its case in an evidentiary hearing." *Id.* at 11. Third, Arbitrator Gray recognized that depriving a party of the opportunity to fully develop the facts of the case can leave an award vulnerable to challenge, including vacatur where the arbitrator or panel refused to hear evidence pertinent and material to the controversy. *See id.* Finally, Arbitrator Gray recognized that, because "limited discovery and an expedited hearing are hallmarks of the arbitration process[,] [s]ummary disposition is less necessary and to some extent inconsistent with the nature of arbitration." *Id.* Arbitrator Gray is thus intimately familiar with Rule 34 as well as the history and reasoning behind it. Yet in this case, the Panel completely disregarded and failed to enforce Rule 34.

An arbitrator or panel receives their authority only through the agreement of the parties to the arbitration. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (citation omitted) ("When, as here, the award does not draw its essence from the governing agreement, and the arbitrator has exceeded his authority under the agreement, 'courts have no choice but to refuse enforcement of the award.'"). The parties agreed that the AAA rules would apply to and govern the arbitration proceeding. *See* Joint Motion to Stay Proceedings and Compel Arbitration at 4, ¶ 2. By failing to adhere to the AAA rules (i.e., AAA Rule R-34), the Panel stepped outside the scope of its authority and entertained a motion that it had no authority to entertain and issued an award that it had no authority to issue. The effect of this misconduct was the Panel's impermissible resolution of an issue beyond the scope of the parties' agreement. *See, e.g.*, *Lybrand v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 321 S.C. 70, 73, 467 S.E.2d 745, 747 (Ct. App. 1996) (citing *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 106, 333 S.E.2d 781, 786 (1985)) ("Arbitrators exceed their powers within the meaning of § 10(a)(4) of the FAA where their award resolves an issue that is not arbitrable because it is outside the scope of the arbitration agreement.").

AAA Rule R-34 is black or white—a party either makes prior written application or it does not. Here, Stantec did not, thus the Panel had no authority to entertain its motion for summary judgment. In doing so, and in issuing an award pursuant thereto, the Panel plainly and categorically exceeded its authority. And where an arbitrator or panel exceeds their authority by acting beyond the scope of the parties' arbitration agreement, vacatur is appropriate under the FAA. *See* 9 U.S.C. § 10(a)(4); *see also Lybrand v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 321 S.C. 70, 467 S.E.2d 745 (Ct.App.1996), *cert. denied* (S.C.1996) (applying 9 U.S.C. § 10(a)(4) to find that

arbitrators exceeded their authority by disregarding law that they were bound to follow under the terms of the parties' agreement).

For these reasons, the Court should find that the Panel exceeded its authority by disregarding AAA Rule R-34, causing foreseeable and substantial prejudice to FZJV (the same prejudice that Arbitrator Gray recognized in his article, *Motion Practice in Arbitration*), and vacate the Panel's November 5, 2021 award accordingly.

III. The Panel manifestly disregarded the law.

In addition to the five statutory grounds for vacatur, South Carolina recognizes an additional, non-statutory ground of manifest disregard or perverse misconstruction of the law.

"[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." *Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005) (quoting *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), *vacated and remanded on other grounds*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003)); *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985). The focus is thus on whether the arbitrator refused to apply a legal principle of which he or she was aware. *See Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

In this case, the Panel knew of two well-defined, explicit, and clearly applicable legal principles, yet refused to apply them.

A. The Panel manifestly disregarded the summary judgment standard.

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *D.R. Horton, Inc. v. Builders FirstSource-*

Se. Grp., LLC, 422 S.C. 144, 150, 810 S.E.2d 41, 45 (Ct. App. 2018) (quoting *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012)). The Panel, like any lawyer, knew of this well-defined, explicit, and clearly applicable legal principle, yet refused to apply it.

Six times throughout the Panel's award it referenced this standard of "genuine issue of material fact." The Panel was thus aware of the legal principle governing summary judgment. Nonetheless, the Panel manifestly disregarded and refused to apply it, as evidenced by a separate Order issued on January 13, 2022. In that Order, the Panel denied yet another round of unauthorized motions for summary judgment, finding that a genuine issue of material fact precluded summary judgment on *the very same issue* that the Panel found undisputed in the award that is the subject of this application. In other words, the Panel (1) knew the summary judgment standard; (2) recognized a genuine issue of material fact, as demonstrated by its January 13, 2022 Order; and (3) granted summary judgment notwithstanding that genuine issue of material fact.

For these reasons, FZJV respectfully requests that this Court find that the Panel manifestly disregarded the law when it granted summary judgment despite the Panel's acknowledging a genuine issue of material fact.

B. The Panel manifestly disregarded AAA Rule R-34.

The second well-defined, explicit, and clearly applicable legal principle that the Panel refused to apply is Rule 34, which requires a party seeking to file a dispositive motion to first make written application. *See* AAA Rule R-34 ("Upon prior written application, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case."). The Panel knew of this rule, as evidenced by an article authored by Arbitrator Gray. *See* Herbert H. Gray, III, E. Tyron Brown, R. Daniel Douglass, *Motion Practice in Arbitration* (2019) (devoting two pages to Rule 34, its history, and its purpose). Despite its familiarity with Rule 34, and despite the clarity,

explicitness, and applicability of the principle, the Panel nonetheless refused to apply it, instead allowing for unauthorized motion practice outside the scope of the parties' Arbitration Agreement.

The effect of the Panel's manifest disregard of Rule 34 was to substantially prejudice FZJV, just as Arbitrator Gray warned in his article. In that article, Arbitrator Gray described the importance of Rule 34:

> There are several reasons for this cautious approach and why arbitrators tend to proceed cautiously on dispositive motions. First, a summary judgment ruling by a trial judge in a court case can be appealed as a matter of right and is subject to *de novo* review by the appellate court. In arbitration, the grounds for appeal are limited and an award is given deference by the courts to the point of allowing an arbitrator to make errors of law and still be affirmed. Thus, an arbitrator is properly hesitant to cut the process short and deprive a party of the chance to present its case in an evidentiary hearing.

Id. at 11 (internal citation omitted). This is the prejudice that FZJV now faces.

The Panel entertained a dispositive motion that it did not have the authority to entertain. It then issued an award that it did not have the authority to issue. And the Panel based that award on an undeveloped record and discovery process, as evidenced by the blatant flaws contained within an award that is now extraordinarily difficult to vacate.[6] *See id.* ("[A]n award is given deference by the courts to the point of allowing an arbitrator to make errors of law and still be affirmed.").

Because the Panel knew that Rule 34 was designed to prevent the kind of prejudice that FZJV is now experiencing, and because the Panel disregarded and refused to apply Rule 34, the Court should find that the non-statutory ground of manifest disregard has been satisfied and vacate the Panel's award accordingly.

[6] For example, one such blatant flaw that may now be solidified in the Panel's unauthorized award is the Panel finding in one paragraph that Stantec had some design responsibility for certain walls and then, in the very next paragraph, finding that Stantec had *no* design responsibility for the same walls. FZJV sought clarification on this glaring contradiction, which the Panel refused to provide.

CONCLUSION

For the foregoing reasons, this Honorable Court should enter an Order vacating the Panel's November 5, 2021, award, where the Panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law.

Respectfully submitted,

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February 3, 2022

Charlotte, North Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 3, 2022, a true and correct copy of the foregoing Application to Vacate was served in accordance with South Carolina Electronic Filing Policies and Guidelines Section 4(e)(2) and (3) on the following counsel:

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s/ Matthew E. Cox
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EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2304740

Flatiron Zachry A Joint Venture
PLAINTIFF(S)

Civil Engineering Consultant Services Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

See Page 2

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☑ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/14/2022 .

Ross D Ginsberg for Stantec Consulting Services Inc
Adrianne Chillemi for ECS Southeast LLP,ECS Carolinas LLP

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

This matter was before the Court on March 11, 2022 for Plaintiff Zachary A Joint Venture's ("Plaintiff's") Motion to Vacate the decision of the arbitrator who previously heard this case, as well as Defendant T Y Lin International's ("Defendant's") Motion to Show Cause. The Court has carefully considered Plaintiff's argument regarding the arbitration and finds that the Plaintiff has not met its burden in showing why that decision should be vacated. Therefore, Plaintiff's Motion to Vacate is DENIED.

Defendant's Motion to Show Cause is related to a subpoena issued to one of Plaintiff's witnesses. Counsel for that witness made a special appearance to challenge the validity of the service upon the witness. The Court urges all parties to work together in the future to avoid the Court having to hear these types of disputes. However, the Court finds that service was technically incorrect and Defendant may serve witness' company in order to properly subpoena the documents sought. Defendant's Motion to Show Cause is DENIED.

Greenville Common Pleas

Case Caption: Flatiron Zachry A Joint Venture vs. Civil Engineering Consultant Services Inc , defendant, et al

Case Number: 2018CP2304740

Type: Order/Electronic Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

EXHIBIT C

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GREENVILLE	)	**C.A. No. 2018-CP-23-04740**
Flatiron-Zachry, a Joint Venture,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**NOTICE OF MOTION AND MOTION TO LIFT THE STAY FOR APPLICATION TO VACATE**
Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International,	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE THAT Plaintiff Flatiron-Zachry, a Joint Venture (FZJV), under the Federal Arbitration Act,[1] and non-statutory grounds, hereby files this, its Notice of Motion and Motion to lift the Stay for Application to Vacate, showing that vacatur is warranted where the parties' private arbitration panel issued an order attempting to clarify a prior award in which the panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law. This Motion will be heard at such time as this Court may direct. In support thereof, FZJV relies on the following:

INTRODUCTION

FZJV previously sought vacatur of an arbitration panel's (the Panel) November 5, 2021, award granting summary judgment in favor or Defendant-Respondent Stantec Consulting Services, Inc. (Stantec) (the November Award). This Court denied FZJV's prior application to

[1] Plaintiff does not believe the South Carolina Uniform Arbitration Act (SCUAA), S.C. Code Ann. §§ 15-48-130(a)(3)–(4), is applicable, but should the Court find it is, this motion would also be brought pursuant to the corresponding section.

vacate on March 15, 2022. Subsequent to the denial, the Panel issued an order on March 24, 2022, attempting to clarify its prior award; however, the "clarification" provided by the Panel undermined the basis upon which summary judgment was originally granted, yet the Panel denied FZJV's motion to reconsider, confirming the award of summary judgment in Stantec's favor (the March Award).

In the November Award, the Panel identified the six parts of Stantec's second motion for summary judgment – the pertinent parts being numbers 1 (Pre-award storm drainage design), 2 (Pre-award temporary storm drainage design), and 4 (Pre-award MSE wall design). In its argument supporting summary judgment on number 4, Stantec contends it included *both* of FZJV's MSE wall design issues, temporary shoring and excavation and backfill. The Panel's November Award granted summary judgment in Stantec's favor on several of these parts based on what it believed at the time was the undisputed evidence, specifically stating "[o]n items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items." *See* **Exhibit A**.

The Panel issued its March Award after FZJV's second motion to clarify or, in the alternative, reconsider, the basis for the above-cited statement. In that March Award, the Panel stated:

> "The sentence "*On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items*" in the original award should have read "*On items 1 and 2, it is undisputed that Stantec did not provide pre-award services for these items.*"

See **Exhibit B**. Given the clarification (or correction) now provided by the Panel, it is *not* undisputed that Stantec did not provide pre-award services for item 4 (MSE wall design). Rather, the Panel's March Award acknowledges that it is, in fact, disputed as to the pre-award services

Stantec provided for item 4, which is supported by the evidence repeatedly provided by FZJV, and, thus, summary judgment is not appropriate as originally held by the Panel.

For these reasons, FZJV respectfully requests that this Honorable Court enter an Order vacating the Panel's November 21, 2021, and March 24, 2022 awards regarding Stantec's Motions for Summary Judgment.

FACTUAL BACKGROUND

The dispute that forms the basis for the parties' underlying arbitration arises out of the design and construction of part of the 85/385 Gateway Project in Greenville, South Carolina. FZJV seeks to recover nearly $60 million dollars in damages that were caused directly by the Designers', including Stantec's, negligent and deficient performance of its work.

PROCEDURAL HISTORY

1. On or about September 14, 2018, FZJV filed its original complaint in this Court, as required under S.C. Ann. § 15-36-100.

2. On or about November 18, 2019, the parties filed a Joint Motion to Stay Proceedings and Compel Arbitration, which included in the filing a copy of the parties' arbitration agreement (the "Arbitration Agreement").

3. On November 19, 2019, the Court issued an Order granting the parties' Joint Motion to Stay Proceedings and Compel Arbitration, compelling the parties to arbitrate the matter as set forth in the Arbitration Agreement.

4. On January 11, 2021, without making prior written application to submit a dispositive motion as required under AAA Rule R-34 (Rule 34), Stantec filed its first motion for summary judgment. The Panel denied Stantec's first motion for summary judgment as "premature" based on the "current status of on-going discovery." At that time, discovery had just begun - months of discovery remained, multiple defendants, including Stantec, had not completed their

document productions, no depositions had occurred, there had been no opportunity for the parties to present final evidentiary support for their positions, and there had been no opportunity for the parties to present expert testimony. For those reasons, the Panel indicated that Stantec could pursue summary judgment only "at the close of discovery."

5. Undeterred, and prior to the close of discovery, Stantec filed a second motion for summary judgment on September 13, 2021. The circumstances surrounding this second motion were essentially the same as the first: Stantec filed its motion without making prior written application as required under Rule 34, the Panel again violated Rule 34 by entertaining Stantec's motion, and discovery remained incomplete, having advanced no further than the "premature" status of discovery at the time of Stantec's first motion.

6. The Panel granted Stantec's second motion on November 5, 2021, notwithstanding the following facts: Stantec had no authority to file its motion, the Panel had no authority to rule on the motion, discovery was ongoing and depositions of corporate representatives had just begun, the discovery period had not closed, the Panel manifestly disregarded the rules governing submission of dispositive motions, the Panel had no authority to undermine the discovery process, and the Panel had no more information available to it than it did at the time it denied Stantec's first motion as premature.

7. An arbitrator or panel receives their authority only through the agreement of the parties to the arbitration. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (citation omitted) ("When, as here, the award does not draw its essence from the governing agreement, and the arbitrator has exceeded his authority under the agreement, 'courts have no choice but to refuse enforcement of the award.'"). In this case, the parties to this action agreed to arbitrate their claims pursuant to the Arbitration Agreement. Under

those terms, the Panel received certain authority, including the authority to arbitrate the parties' claims in accordance with the Federal Arbitration Act (FAA) and the American Arbitration Association's Construction Industry Rules (AAA). One such rule applicable to the parties' arbitration is AAA Rule R-48(b), which allowed the Panel to make interim, interlocutory, or partial rulings, orders, and awards, as it did here. It is the Panel's interim, interlocutory, or partial rulings, orders, and award that is the subject of the instant application to vacate.

8. Plaintiff moves to lift the Stay for the purpose of filing this Application of Vacation, which would be final as to these claims, if not lifted.

9. Under 9 U.S.C. § 10(a)(3), vacatur is appropriate where an arbitrator or panel refused "to hear evidence pertinent and material to the controversy[.]"

10. Under 9 U.S.C. § 10(a)(4), vacatur is appropriate where an arbitrator or panel "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

11. The Panel exceeded its powers and refused to hear evidence pertinent and material to the controversy when it granted Stantec's motion for summary judgment.

12. Under 9 U.S.C. § 10(b), "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

13. The arbitration as to certain remaining claims is still underway, and thus this Motion and Application are timely.

ARGUMENT

The legal basis for vacatur of the Panel's March Award is nearly identical to that previously provided by FZJV for vacatur of the Panel's November Award. The factual basis for vacatur of the Panel's March Award is further supported by the language of the March Award itself, removing

the very basis upon which summary judgment was granted to Stantec (i.e. that there was no dispute of material fact as to pre-award MSE wall design services). The Federal Arbitration Act (FAA), which applies to this matter pursuant to the Arbitration Agreement, provides the statutory grounds for vacating an arbitrator's award. *See* 9 U.S.C. § 10. There are four such statutory grounds under the FAA, two of which are relevant to this application:

> (3) where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; 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).

In addition to the four statutory grounds established by the FAA, South Carolina case law provides for an additional, non-statutory ground of "manifest disregard or perverse misconstruction of the law." *See Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). This non-statutory "basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

Among the various grounds for arbitral vacatur, three are present here—the Panel refused to hear evidence material to the controversy under 9 U.S.C. § 10(a)(3),[2] the Panel exceeded its power under 9 U.S.C. § 10(a)(4),[3] and the Panel manifestly disregarded the law.

[2] Or S.C. Code Ann. § 15-48-130(a)(4), should the Court determine that the SCUAA is applicable.
[3] Or S.C. Code Ann. § 15-48-130(a)(3), should the Court determine that the SCUAA is applicable.

I. The Panel refused to hear evidence material to the controversy by issuing an award before the parties conducted meaningful discovery.

Vacatur under the FAA is appropriate when an arbitrator or panel refuses to hear evidence pertinent and material to the controversy. *See* 9 U.S.C. § 10(a)(3). Such a refusal to hear evidence material to the controversy is what happened here.

The FAA required the Panel to hear all evidence pertinent and material to the controversy. The Panel was similarly required by the rules governing the underlying arbitration to ensure a fair hearing, specifically when managing discovery. *See* AAA Rule R-24(a) ("The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and *safeguarding each party's opportunity to fairly present its claims and defenses*." (emphasis added)); *see also* AAA Rule R-33(a) ("The arbitrator has the discretion to vary [the proceedings], *provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case*."). If, however, an arbitrator does not provide for a full and fair hearing as the AAA rules require, then "courts owe no deference to an arbitrator who has failed to provide the parties with a full and fair hearing." *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 388 (4th Cir. 2000) (citation omitted) (concluding arbitrator committed misconduct by failing to provide parties with full and fair hearing); *see also Hoteles Condado Beach v. Union De Tronquistas*, 763 F.2d 34, 38 (1st Cir. 1985) (holding that arbitrator's refusal to consider a trial transcript submitted by one of the parties denied them "adequate opportunity to present its evidence and arguments"); *Prudential Securities, Inc. v. Dalton*, 929 F.Supp. 1411, 1417 (N.D. Okla. 1996) (finding arbitrator guilty of misconduct in making a final decision without hearing "evidence pertinent and material to the controversy").

In *International Union*, for example, the arbitrator told the parties to meet, gather information, negotiate further, and, if not resolved, present evidence and argument at an arbitration hearing. *See Int'l Union*, 232 F.3d at 390. The arbitrator then "issued his award without ever holding that hearing or affording the Union the opportunity to present the evidence it had been prepared to offer[.]" *Id.* The United States Court of Appeals for the Fourth Circuit, in holding that the arbitrator had engaged in misconduct, noted that the arbitrator had made no findings that the Union's evidence was "cumulative," "irrelevant," or "immaterial," nor did the record show "that [the] evidence was, in fact, cumulative or anything less than highly material and relevant." *Id.*

The facts here are analogous. The Panel denied Stantec's first motion for summary judgment as premature based on the status of the evidence, saying that summary judgment could not be pursued again until "the close of discovery"—like the *International Union* arbitrator instructing the parties to meet, gather information, and negotiate further before there could be a hearing. Then, before the parties could move past the "premature" status of discovery that warranted denying Stantec's first motion, and before "the close of discovery," the Panel issued its award based on Stantec's second motion for summary judgment—like the *International Union* arbitrator issuing his award before the parties could meet, gather information, and negotiate further. In granting Stantec's motion, the Panel made no findings that the discovery it had cut short would be "cumulative," "irrelevant," or "immaterial"—like the *International Union* arbitrator who failed to do the same. And like *International Union*, where "the Union claimed that [the additional] evidence would demonstrate [certain] facts," the additional discovery that FZJV was deprived of the opportunity to conduct and present would have demonstrated - at the absolute very least - a

genuine issue of material fact.[4]

Had it been given the opportunity, FZJV would have conducted the following material discovery: (i) the conclusion of Defendant Civil Engineering Consulting Services, Inc. corporate representative deposition; (ii) the conclusion of FZJV's corporate representative deposition; (iii) the deposition of expert witness Dr. O'Connell; (iv) the deposition of Stantec's expert witness, Dr. Amoroso; (v) the deposition of Stantec's corporate representative; (vi) the deposition of Stantec's engineer, Betsy Watson; and (vii) the deposition of ECS's corporate representative.

Based on that discovery, and if it had been given the opportunity to fairly present its case, FZJV would have presented pertinent and material evidence showing: (i) Stantec's involvement in, and responsibility for, the temporary shoring and design of the MSE Walls; (ii) that Stantec breached the standard of care by deviating from the Pre-Award design and is liable for such negligence; (iii) that FZJV did not know and should not have known an issue with the geomembrane would give rise to a cause of action against Stantec; and (iv) that Stantec's failure to timely provide the Post-Award temporary drainage design caused the inefficiencies and related damages suffered by FZJV.[5] But FZJV did not have the opportunity to present any of this pertinent and material evidence. Instead, the Panel based its decision on the same record it had previously found premature and insufficient to allow for an award. In fact, the Panel's March Award further

[4] In fact, the existence of a genuine issue of material fact is something that the Panel has since acknowledged in its January 13, 2022 Order. In that Order, the Panel denied additional motions for summary judgment, finding there was a genuine issue of material fact on *the very same issue* it had determined was undisputed in the award that is the subject of this application.

[5] *Cf. e.spire Commc'ns, Inc. v. CNS Commc'ns*, 39 F. App'x 905, 910 (4th Cir. 2002) ("At the outset, we note that CNS has not identified, either to the arbitral panel or this court, any evidence that it would have presented at the hearing but for the panel's limitation on its right to present evidence. Consequently, it is impossible to determine whether any evidence that was excluded was 'pertinent and material' to the controversy.").

clarifies that the evidence presented in support and opposition to summary judgment on the pre-award MSE Wall design issues is not undisputed. Further, the Panel denied other summary judgment motions on similar grounds – that the specific contractual scope of services is not dispositive of whether or not the standard of care was satisfied.

Because FZJV was denied the opportunity to fairly present its case, because the Panel refused to hear material evidence that it had not found to be "cumulative," "irrelevant," or "immaterial," and because the Panel subsequently acknowledged in its March Award that FZJV's basis for opposition was warranted, this Court should, under 9 U.S.C. § 10(a)(3), vacate the Panel's November Award and March Award granting summary judgment in Stantec's favor on the pre-award MSE Wall design services.

II. The Panel exceeded its power by disregarding the parties' agreement to conduct discovery.

The parties agreed "that discovery will be conducted in the arbitration, with the scope and process subject to further agreement or by direction of the arbitration panel." *See* Joint Motion to Stay Proceedings and Compel Arbitration at 5, ¶ 9. By disregarding the parties' agreement to conduct discovery, the Panel exceeded its power, providing additional statutory grounds for vacatur.

As an initial matter, the agreement states that discovery "will" be conducted. The parties did not agree that discovery *may* be conducted, nor did they agree that discovery will be conducted only in part. Instead, the parties' agreement reflects an intent to conduct meaningful discovery—something that did not take place. And although the parties carved out two caveats within their agreement, neither is applicable here. First, the parties agreed that discovery would be subject to further agreement between the parties. There was no further agreement between the parties, and there certainly was no further agreement to cut off discovery just as it was beginning. Second, the

parties' agreement provides that the scope and process of discovery may be subject to the direction of the Panel. Here, the Panel did not direct the discovery scope or process (for example, by setting a deadline within which to complete discovery or by expanding the scope of document discovery to include text messages). Instead, the Panel constructively terminated it by issuing an award just as meaningful discovery was beginning. If, however, there was any direction by the panel regarding discovery, it was an implied direction to conduct *more* discovery. Indeed, at the time the Panel granted Stantec's second motion for summary judgment, (1) discovery had not meaningfully progressed further than when the Panel denied Stantec's first motion as premature, and (2) discovery had not closed, despite the Panel expressly stating that summary judgment could not be sought again until the close of discovery.

Because the parties agreed to conduct discovery, and because neither carveout in that agreement applies here (except for the implied direction to conduct more discovery), the Panel exceeded its authority when it disregarded the parties' discovery agreement, effectively terminating the same discovery process that the Panel, itself, had stated was insufficient to support a grant of summary judgment. The Court should find that the Panel exceeded its authority and vacate the award accordingly.

III. The Panel manifestly disregarded the law.

In addition to the five statutory grounds for vacatur, South Carolina recognizes an additional, non-statutory ground of manifest disregard or perverse misconstruction of the law.

"[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." *Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005) (quoting *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), *vacated*

and remanded on other grounds, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003)); *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985). The focus is thus on whether the arbitrator refused to apply a legal principle of which he or she was aware. *See Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

In this case, the Panel knew of two well-defined, explicit, and clearly applicable legal principles, yet refused to apply them until *after* FZJV's prior application to vacate the November Award and only after two attempts by FZJV to seek clarification or reconsideration. "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp.*, LLC, 422 S.C. 144, 150, 810 S.E.2d 41, 45 (Ct. App. 2018) (quoting *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012)). The Panel, like any lawyer, knew of this well-defined, explicit, and clearly applicable legal principle, yet refused to initially apply it.

Six times throughout the Panel's award it referenced this standard of "genuine issue of material fact." The Panel was thus aware of the legal principle governing summary judgment. Nonetheless, the Panel manifestly disregarded and refused to apply it, as evidenced by a separate Order issued on January 13, 2022. *See* **Exhibit C**. In that Order, the Panel denied yet another round of unauthorized motions for summary judgment, finding that a genuine issue of material fact precluded summary judgment on *the very same issue* that the Panel found undisputed in the award that is the subject of this application. In other words, and with respect to the Stantec motion for summary judgment on same underlying basis, the Panel (1) knew the summary judgment standard; (2) recognized a genuine issue of material fact, as demonstrated by its January 13, 2022 Order; and (3) granted summary judgment notwithstanding that genuine issue of material fact.

Not until FZJV submitted its second request for clarification or reconsideration of the basis for the November Award on pre-award MSE Wall design services did the Panel acknowledge that there were disputed material facts on this particular claim item, such that summary judgment was improper; however, the Panel denied FZJV's motion in spite of the about-face on the basis for summary judgment.

For these reasons, FZJV respectfully requests that this Court find that the Panel manifestly disregarded the law when it granted and confirmed summary judgment on the pre-award MSE Wall design issue in the November Award despite the Panel acknowledging a genuine issue of material fact on that issue in its March Award.

CONCLUSION

For the foregoing reasons, this Honorable Court should enter an Order vacating the Panel's November 5, 2021 and March 22, 2022 awards, where the Panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law in granting summary judgment in Stantec's favor on the pre-award MSE Wall design issue.

Respectfully submitted,

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June 22, 2022

Charlotte, North Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 22, 2022, a true and correct copy of the foregoing Application to Vacate was served in accordance with South Carolina Electronic Filing Policies and Guidelines Section 4(e)(2) and (3) on the following counsel:

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s/ Matthew E. Cox
Matthew E. Cox

IN THE MATTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents.

ORDER ON STANTEC'S MOTIONS FOR SUMMARY JUDGMENT

The Panel having read and considered Respondent Stantec Consulting Services, Inc.'s ("Stantec") Motions for Summary Judgment and the documentation provided in support thereof, Claimant's Flatiron-Zachry JV ("FZJV") Response thereto and the documentation in support thereof and Stantec's Reply, finds as follows: Stantec's Motions for Summary Judgment on items 1-4 and 6 are GRANTED and item 5 is DENIED.

STANTEC'S MOTIONS

Stantec filed its first motion for summary judgment on January 11, 2021, shortly after the Claimant's submission of its expert's report on December 15, 2020. On February 9, 2021, the Panel denied the motion without prejudice based on the status of discovery. Stantec served its expert's report on May 28, 2021 and FZJV served its expert's sur-rebuttal report on July 27, 2021.

Stantec renewed its motion for summary judgment on September 13, 2021. The motion was divided into six parts, covering all claim items that FZJV contends were related in some part to services provided by Stantec. The six parts are:

1. Pre-award storm drainage design

2. Pre-award temporary storm drainage design

3. Pre-award roadway design including guardrails and impact attenuators

4. Pre-award MSE wall design

5. Design details relating to bridge barrier conduit and geomembrane at bridge abutments.

6. Post-award temporary drainage design

DISCUSSION

FZJV objects to Stantec's motion on the grounds that it is premature because discovery has not been completed. While the Panel is mindful that completing discovery is often necessary to determine whether there are genuine issues of material fact that would prevent issuing summary judgment, we find that based on the claims asserted against Stantec, the evidence presented Stantec, FZJV's responses to the summary judgment and progress of discovery to date there is sufficient evidence to conclude that there are no genuine issues of material fact relating to claims against Stantec on items 1-4 and 6.

Items 1-4 relate to pre-award services provided by Stantec. FZJV has withdrawn its claim for item 3. On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items. For items 1 and 2 relating to final and temporary storm water drainage design, FZJV's claim is based on deficiencies in the pre-award plans. Stantec's motion is based on the fact that Stantec did not perform any pre-award design services on these items. After receiving Stantec's expert's report which confirmed that Stantec did not perform pre-award drainage design of any kind, FZJV's expert issued a rebuttal report opining that Stantec was under an obligation to follow the pre-award design and its failure to do so was a breach of the standard of care. This position is illogical in that it suggests that Stantec was bound by the preliminary design and could not deviate from it. As FZJV's expert noted, the preliminary drainage design was inadequate and Stantec's post-award drainage design corrected some of these inadequacies. Further, FZJV's expert's interpretation that the contract required Stantec to follow the pre-award design is not

accurate. The provision requires the Designer "to the extent reasonably possible" to avoid deviation from the preliminary design. This does not require the Designer to follow the preliminary design when it is deficient or inaccurate. Therefore, FZJV has not shown that there is a genuine issue of material fact relating to Stantec's breach of the standard of care relating to the drainage design.

Regarding item 4, the MSE walls, while Stantec performed some pre-award services relating to the MSE walls, it is undisputed by the evidence provided that Stantec was not retained by CECS to provide input on the strap lengths needed for the MSE walls. Testimony from Stantec and CECS personnel confirmed that CECS was not relying on Stantec to provide input on the strap lengths. While FZJV's expert contends that the "design team" should have provided input on this issue, that does not create an issue of material fact relating to Stantec's services since there is no evidence to suggest that Stantec was required to provide this input for the "design team".

Stantec's motion for summary judgment on items 1, 2 and 4 is granted and item 3 was withdrawn by FZJV.

Regarding item 5, design details relating to the bridge barrier conduit and geomembrane at the bridge abutments, Stantec asserts that it is entitled to summary judgment on these items based on the statute of limitations. FZJV withdrew its claim on the bridge barrier conduit, so the only issue relates to the geomembrane at the bridge abutments.

South Carolina law requires a party to commence an action within three years of the discovery of its cause of action. S.C. Code Ann. § 15-3-530. The complaint in this action was filed on September 14, 2018. Therefore, claims that arose prior to September 14, 2015 are barred. It is undisputed that Stantec's pre-award Bridge 11 drawings did not include bridge barrier conduit or geomembrane at the abutments. Stantec delivered post-award final Bridge 11 plans depicting bridge barrier conduit and geomembrane at least by May 2015 and at least 4 revised sets of plans showing the geomembrane before September 8, 2015. Stantec contends that FZJV had adequate opportunity to note that the pre-award plans did not contain a geomembrane at the abutments and the post-award plans did contain a geomembrane. FZJV submitted an affidavit stating that FZJV did not discover that the geomembrane was not included in the final plans until September 2016 during the RFI process. Based on the affidavit, there is a genuine issue of material fact on when a reasonable design builder should have discovered the claim relating to the geomembrane in the bridge abutment.

Stantec's motion for summary judgment on item 5 is denied.

Regarding item 6, while Stantec was retained to provide some post-award temporary drainage services and there may be some dispute over the impact of the timing of providing these services, there is no dispute that FZJV did not sustain any damages due to the flooding that may or may not have been caused by the temporary drainage. It is undisputed that FZJV's damages expert concluded that this flooding event did not cause any damages. FZJV's contention that the flooding event could have caused "inefficiencies" that are "interwoven" among various cost codes is mere speculation and does not raise a genuine issue of material fact as to Stantec's liability for damages relating to the flooding event.

Stantec's motion for summary judgment on item 6 is granted.

Accordingly, Stantec's Motions for Summary Judgment are GRANTED for items 1-4 and 6. Stantec's Motion for Summary Judgment on item 5 is DENIED.

AND IT IS SO ORDERED, this 5th day of November, 2021.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

IN THE MATTTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents

ORDER ON FZJV's 2nd MOTION FOR CLARIFICATION or in the alternative MOTION FOR RECONSIDERATION

The Panel having read and considered Claimant Flatiron-Zachry JV's (FZJV) 2nd Motion for Clarification or in the alternative Motion for Reconsideration of Panel's Order on Respondent Stantec Consulting Services, Inc.'s ("Stantec") Motion for Summary Judgment and Stantec's Response thereto finds as follows:

The sentence *"On items 1, 2 and 4, it is undisputed that Stantec did not provide pre-award services for these items"* in the original order should have read *"On items 1 and 2, it is undisputed that Stantec did not provide pre-award services for these items."* Additionally, the original order granting summary judgment for Stantec on Wall 32 issues was intended to include the shoring issues along with the strap length issues. The original order is amended accordingly.

Respondent FZJV's motion for reconsideration of the Stantec summary judgment order is DENIED.

AND IT IS SO ORDERED, this 24th day of March, 2022.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

IN THE MATTER OF THE ARBITRATION BETWEEN:

FLATIRON-ZACHRY, A Joint Venture,

Claimant,

-and-

CIVIL ENGINEERING CONSULTING SERVICES. INC., dba CIVIL ENGINEERING CONSULTANT SERVICES, INC., ECS SOUTHEAST, LLP fka ECS CAROLINAS, LLP, STANTEC CONSULTING SERVICES, INC. and T.Y. LIN INTERNATIONAL,

Respondents.

ORDER ON STANTEC'S, CECS's AND ECS'S MOTIONS FOR SUMMARY JUDGMENT

The Panel having read and considered Respondent Stantec Consulting Services, Inc.'s ("Stantec"), Civil Engineering Consultant Services, Inc.'s ("CECS") and ECS Southeast, Inc.'s ("ECS") Motions for Summary Judgment and the documentation provided in support thereof, and Claimant's Flatiron-Zachry JV ("FZJV") Responses thereto and the documentation in support thereof, hereby denies all three Motions.

STANTEC'S MOTION

The Stantec Motion is predicated upon two arguments. First, Stantec argues that its motion should be granted because it performed work that CECS requested and nothing more. This does not address the factual issues of whether that work was performed or whether that work was performed with the proper standard of care. The Tribunal therefore finds that these issues involve questions of material fact that are in dispute and holds that the Motion for Summary Judgment on this argument should be and hereby is denied.

Second, Stantec again asks the Tribunal to dismiss the FZJV claims on the basis that they are barred by the applicable South Carolina statute of limitations. This argument has been earlier rejected by the Panel, and nothing new or different has been raised by Stantec.

As previously held by the Panel:

> South Carolina law requires a party to commence an action within three years of the discovery of its cause of action. S.C. Code Ann. § 15-3-530. The complaint in this action was filed on September 14, 2018. Therefore, claims that arose prior to September 14, 2015 are barred.
>
> It is undisputed that Stantec's pre-award Bridge 11 drawings did not include bridge barrier conduit or geomembrane at the abutments. Stantec delivered post-award final Bridge 11 plans depicting bridge barrier conduit and geomembrane at least by May 2015 and at least 4 revised sets of plans showing the geomembrane before September 8, 2015. Stantec contends that FZJV had adequate opportunity to note that the pre-award plans did not contain a geomembrane at the abutments and the post-award plans did contain a geomembrane. FZJV submitted an affidavit stating that FZJV did not discover that the geomembrane was not included in the final plans until September 2016 during the RFI process. Based on the affidavit, there is a genuine issue of material fact on when a reasonable design/builder should have discovered the claim relating to the geomembrane in the bridge abutment.

The facts behind that finding remain unchanged, therefore Stantec's Motion for Summary Judgment is therefore denied.

CECS'S MOTION AND ECS'S MOTION

CECS's and ECS's Motions for Summary Judgment are predicated upon their arguments that FZJV's claims are barred by the statute of limitations.

In summary, CECS argues that the statute of limitations on the claims raised against it commenced not later than March 5, 2015, during the pursuit phase services portion of the design of the Project. At that point in time, the design of the Project was not complete, and therefore FZJV could not have reasonably discovered whether CECS's design was negligently performed and did not meet the proper standard of care. Accordingly, the Panel finds that there remains a genuine issue of material fact as to when FZJV should have discovered the claims against relating

to the alleged negligence of CECS and CECS's Motion for Summary Judgment is hereby denied.

ECS's Motion is similarly based. ECS argues that all claims of FZJV and in particular the claims related to the MSE and SMSE walls should be dismissed. With regard to the latter claims, ECS argues that FZJV had actual knowledge that reinforcement ratios in excess of .7H would be required for the MSE walls before September 14, 2015, that FZJV's claims were filed more than three years from that date and are therefore time-barred.. For the reasons set forth above, the Panel again finds that as of that date FZJV could not have reasonably discovered whether ECS's work was negligently performed and did not meet the proper standard of care. Therefore, ECS's Motion for Summary Judgment is denied.

Accordingly, the Panel denies Stantec's Motion for Summary Judgment, CECS's Motion for Summary Judgment and ECS's Motion for Summary Judgment.

AND IT IS SO ORDERED, this 13th day of January, 2022.

/s/ Herbert H. Gray, III
Herbert H. Gray, III, Arbitrator
For The Panel

EXHIBIT D

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GREENVILLE	)	**13TH JUDICIAL CIRCUIT**
	)	
Flatiron-Zachry, a Joint Venture,	)	
	)	
Plaintiff,	)	**C.A. NO. 2018-CP-23-04740**
	)	
v.	)	**ORDER**
	)	
Civil Engineering Consulting Services, Inc. d/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International,	)	
	)	
Defendants.	)	
	)	

This matter was before the Court on September 22, 2022 for Plaintiff Flatiron-Zachry, A Joint Venture's ("Plaintiff") Motion to Vacate the decision of the arbitrators who previously rendered an arbitration award in favor of Defendant, Stantec Consulting Services Inc. The Court has carefully considered the submissions of the parties, including the legal memoranda and exhibits, as well as the argument of counsel. Based on the foregoing, the Court finds that the Plaintiff's Motion to Vacate should be and is **DENIED**.

IT IS SO ORDERED this 4th day of October 2022.

CIRCUIT JUDGE

Greenville Common Pleas

Case Caption: Flatiron Zachry A Joint Venture vs. Civil Engineering Consultant Services Inc , defendant, et al

Case Number: 2018CP2304740

Type: Order/Vacate Judgment

So Ordered

s/Letitia H. Verdin, SC Judge 2162

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2023-001178
Case No. 2018-CP-23-04740

Flatiron-Zachry, a Joint Venture, Appellant

v.

Civil Engineering Consulting Services, Inc. c/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International, Defendants,

Of which Stantec Consulting Services, Inc. is the Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2023, I electronically filed the foregoing **Stantec Consulting Services, Inc.'s Motion to Dismiss Appellant Flatiron-Zachry, a Joint Venture's Appeal** using the Court's electronic filing system and served a true and correct copy of the foregoing via electronic mail to:

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Attorney for Appellant

/s/ Brannon J. Arnold
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Stantec Consulting Services, Inc.