

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE DORCHESTER COUNTY  
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

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Appellate Case No. 2024-000698

AJP Solutions, LLC

Respondent,

v.

Clark Construction, Inc., of Mississippi

Appellant.

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RESPONDENT'S MOTION TO DISMISS

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COMES NOW the Respondent AJP Solutions, LLC, pursuant to Rule 240(a), SCACR, and moving this honorable Court for an Order dismissing the instant appeal for lack of appellate jurisdiction because the order on appeal is interlocutory, and not appealable.

INTRODUCTION

Respondent commenced this action by filing suit against Clarke Construction Inc., of Mississippi (Appellant). Appellant has now taken appeal from an order of the Circuit Court which denied Appellant's request to dismiss Respondent's claims and further directed the parties' dispute be remanded to arbitration for resolution on the merits. *See (Appx. I)* (Order on Appeal). However, because an order denying dismissal and an order compelling parties to arbitration are both interlocutory, this matter is not immediately appealable. Therefore, this Court lacks appellate

jurisdiction and should dismiss this appeal, allowing the parties to proceed to arbitration as directed by the Circuit Court.<sup>1</sup>

### BACKGROUND

- *Respondent Commences a Mechanic's Lien Suit*

This action concerns a payment dispute over a construction project on which Clark Construction Inc., of Mississippi (“Appellant”) was the general contractor, and Respondent its subcontractor. (Resp. Br. p. 2). After Appellant failed to pay, Respondent recorded a mechanic’s lien and subsequently filed suit in the Dorchester County Court of Common Pleas to foreclose this lien (the “mechanic’s lien suit”). (Resp. Br. p. 2).

- *Arbitration of the Mechanic's Lien Suit*

Appellant filed a motion to compel the mechanic’s lien suit to arbitration. (Resp. Br. p. 2). While this motion was pending Appellant attempted to make a claim against a performance bond that had been issued by Arch Insurance Company (herein “Arch”).<sup>2</sup> This bond claim became the subject of a separate lawsuit between Appellant and Arch which was filed with the U.S. District Court for the Southern District of Mississippi—Case No. 5:22-cv-100-ks-bwr. (the “Bond Suit”). (Resp. Br. 8). Respondent was not a party to the Bond Suit between Arch and Appellant. Likewise, Arch (the bonding company) was not a party to the Respondent’s mechanic’s lien suit against Appellant that was pending in South Carolina.

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<sup>1</sup> In support of this Motion to Dismiss, Respondent attaches: Appendix I, which is the Order on Appeal; Appendix II, which is Appellant’s “Motion to Confirm Arbitration Order” which was filed with Exhibits A – F; and Appendix III, which is Respondent’s Memo and exhibits in opposition to Appellant’s motion to confirm. These appendices being incorporated herein by reference.

<sup>2</sup> Arch is not a party to the underlying action to foreclose the mechanic’s lien, nor is Arch a party to this appeal.

On June 22, 2023, the Circuit Court issued an order granting Appellant’s motion to stay the mechanic’s lien suit and compel arbitration. (Resp. Br. p. 8). Shortly thereafter, a mediation was held by Arch and Appellant concerning the Bond Suit. At that mediation Arch reached a settlement which they reduced to a written settlement agreement. This settlement agreement was only between Appellant and Arch. *See* (Resp. Br. p. 9) (acknowledging the “settlement agreement [was] between Arch and [Appellant]”). **Respondent was not a signatory to the settlement agreement.** Nonetheless, the terms of the settlement agreement purport to provide that Respondent will dismiss and release the claims it made against Appellant in the mechanic’s lien case. (Appx. II, Exhibit A).

Because Respondent did not agree to these terms it refused to sign the settlement agreement. Instead, Arch signed the agreement on behalf of Respondent, claiming to have a power-of-attorney to do so. Respondent did not agree that Arch had the authority to bind it to the settlement between Arch and Appellant.

Appellant thereafter sought to enforce the settlement agreement against Respondent by filing a motion to dismiss with the arbitrator in the mechanic’s lien case. (Appx. II, Exhibit B). Respondent opposed dismissal of the arbitration asserting, *inter alia*, that the settlement agreement was unenforceable against Respondent because it did not sign it, and that Arch did not have the authority to bind Respondent to the settlement agreement. (Appx. II, Exhibit C). Although it was not disputed that Respondent did not voluntarily enter into the settlement agreement, the arbitrator nonetheless dismissed the arbitration based on the terms of the settlement agreement. (Appx. II, Exhibit D).

## PROCEDURAL POSTURE

Relying on the arbitrator's order dismissing the arbitration, on August 14, 2023, Appellant filed a motion with the South Carolina Circuit Court seeking to dismiss the mechanic's lien suit (that had been stayed for the purpose of arbitration<sup>3</sup>). (Appx. I). Respondent filed a memorandum opposing the dismissal and asserting the matter should be remanded back to arbitration. (Appx. III). After a hearing was held, the Circuit Court issued an order denying Appellant's request to dismiss the mechanic's lien case and "order[ed] the parties back to arbitration to resolve [Respondent]'s claims against [Appellant]." (Appx. I, p. 1). This appeal followed.

## ARGUMENT

- I. This appeal should be dismissed for lack of appellate jurisdiction because despite its caption the motion before the Circuit Court was a motion to dismiss, and it is well-settled that neither an order denying a request to dismiss, nor an order compelling parties to arbitration is appealable.**

Appellant asserts this to be an appeal from the trial court's decision to "(1) deny [Appellant's] Motion to Confirm Arbitration Award; and (2) ordering this matter back to arbitration." (App. Br. p. 2); *see also* (App. Br. pp 12-13) (Appellants asserting the motion "before the trial court was a Motion to Confirm an Arbitration Award" pursuant to S.C. Code Ann. §15-48-120)<sup>4</sup>.

This Court does not have appellate jurisdiction to review either of these findings of the Circuit Court because both findings are interlocutory, and an appeal from an interlocutory order should be dismissed for lack of appellate jurisdiction. *See e.g., Brown v. Greenwood Sch. Dist. 50*

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<sup>3</sup> An arbitration which never occurred.

<sup>4</sup> Although the title of a motion is not determinative, it bears mention that Appellant's motion was entitled Motion to Confirm Arbitration *Order*," and not a motion to confirm an arbitration *award*. *See* (Appx. II) (italics for distinction). Moreover, S.C. Code Ann. §15-48-120 which concerns a motion to confirm an arbitration award is referenced nowhere in Appellant's motion. *See (Id.)*.

*Bd. of Trs.*, 344 S.C. 522, 524-25, 544 S.E.2d 642, 643 (Ct. App. 2001) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to the [appellate] court . . .”) citing, *South Carolina Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986).

As a threshold matter, an order directing parties to participate in arbitration is interlocutory, and not immediately appealable. See *Heffner v. Destiny, Inc.*, 321 S.C. 536, 538, 471 S.E.2d 135, 136 (1995) (finding that an order “compelling arbitration is not immediately appealable under the federal statute.”); *Johnson v. Paraplane Corp.*, 321 S.C. 316, 317 n.1, 468 S.E.2d 620 (1996) (finding “an order compelling arbitration is not immediately appealable.”); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 610 n.3, 586 S.E.2d 581, 584 (2003) (holding “a South Carolina court's order compelling arbitration is not immediately appealable”).

Accordingly, appellate jurisdiction in this case depends upon whether Appellant can appeal the trial court’s denial to their motion to confirm the arbitrator’s dismissal. It cannot.

The Arbitration Act contemplates the ability to file a motion with the circuit court to certify an arbitration “award” after it is issued. S.C. Code Ann. § 15-48-120. Although the denial of a motion to confirm an arbitration award may ordinarily be appealable, this case is neither ordinary, nor does it concern a motion to certify an arbitration award. See S.C. Code Ann, § 15-48-200(a)(3) (providing for appealability of an “order confirming or denying confirmation of an award”). Regardless of what Appellant might suggest, the motion it made to the trial court was *not* a motion to confirm an arbitration award. It was a motion to dismiss.

It is well-settled that the nature of a motion is determined by its substance, not its title; and “[o]ur courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability.” *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303

n.6, 705 S.E.2d 475, 478 (Ct. App. 2011); *see e.g., Collins Music Co. v. Igt*, 353 S.C. 559, 564, 579 S.E.2d 524, 526 (Ct. App. 2002) (finding that for the purpose of determining whether an appeal was properly taken, the appellate court should treat the motion “based on its substance and effect rather than how it is captioned by [the] movant”) (internal quotations omitted); *Mickle v. Blackmon*, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (finding that “although plaintiff styled her motion as one for ‘Partial Summary Judgment’ it was, in substance and effect, a [different] motion” and treated it accordingly).

Turning to the substance of the motion Appellant filed with the Circuit Court, two things are apparent. First, this was not a motion to confirm an arbitration award because there was no arbitration “award” to confirm; and second, this was a motion to dismiss because that was plainly the relief requested. Appellant conceded each of these points in the body of its motion when it stated: “Because the claims by and among [Appellant] and [Respondent] have been resolved through settlement and because the underlying arbitration has been dismissed **without issuance of an award** to either of the Parties, [Appellant] **does not seek civil judgment** against [Respondent] **but instead seeks a dismissal** of this lawsuit with prejudice.” (Appx II, p. 3) (emphasis added).

Appellant’s own acknowledgment notwithstanding, the arbitrator’s order cannot be considered an “award” where it rests upon a purported settlement rather than resolving the merits of the dispute between the parties. The Supreme Court of South Carolina has recognized that “[a]n arbitration award is **distinguishable from a settlement**, as an arbitrator’s award constitutes a third-party finding of fault on the claims asserted by the plaintiff.” *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 451 n.5, 748 S.E.2d 221, 227 (2013); *see also Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 495, 593 S.E.2d 480, 485 (Ct. App. 2004) (explaining generally that an arbitration award presumes a resolution on the merits of the disputed

issues that the parties agreed to submit to arbitration); *accord*, S.C. Code Ann. § 15-48-50(b) (the Arbitration Act providing that when a matter is compelled to arbitration, “the parties are entitled to be heard, to present evidence material to the controversy and to cross examine witnesses”).

Naturally, Appellant cannot request, and the trial court cannot issue an order which “confirms *an award*” if there was no award. Therefore, the relief Appellant requested was something else entirely—*i.e.*, dismissal. And there is no uncertainty on that point. *See* (Appx II, p. 3) (conceding that because the arbitration ended “without an award” that Appellant was “**seek[ing] a dismissal**”) (emphasis added). Further, in its prayer for relief, Appellant did not seek an order confirming an arbitration award. Instead, Appellant “prays that [the Circuit] Court **enter an Order dismissing** Plaintiff’s Complaint WITH PREJUDICE.” (*Id.* at p. 4) (emphasis added, capitalization original). Therefore, it is plain from the relief Appellant sought, that the motion before the trial court was for dismissal, not to confirm an arbitration award. *See e.g., Standard Fed. Sav. & Loan Ass’n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (explaining that it is the substance of the relief sought that matters regardless of the form in which the request for relief was framed).

The fact that the relief sought was dismissal rather than for a judgment is significant to the issue of appealability because the denial of a motion to dismiss is not appealable. *See generally, S.C. Lottery Comm’n v. Glassmeyer*, 428 S.C. 423, 439 n.8, 835 S.E.2d 524, 532 (Ct. App. 2019) (recognizing “the denial of a motion to dismiss is not directly appealable”); *see also, McLendon v. S.C. Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994) (recognizing that “the denial of a motion to dismiss is not directly appealable for the same reasons” that denial of a motion for summary judgment is not directly appealable); *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003) (“This Court has repeatedly held

that the denial of summary judgment is not directly appealable”); *Watson v. Underwood*, 407 S.C. 443, 456, 756 S.E.2d 155, 162 (Ct. App. 2014) (orders which do not resolve the merits of the case are not immediately appealable); *accord Keels v. Powell*, 213 S.C. 570, 573, 50 S.E.2d 704, 705 (1948) (“An order refusing a nonsuit, or the direction of a verdict, is not appealable”).

Ultimately, resolution of the merits of a dispute is the touchstone of appealability. *Supra*; *accord* S.C. Code Ann. § 15-48-50(b) (the Arbitration Act plainly providing that when a matter is compelled to arbitration, “the parties are entitled to be heard, to present evidence material to the controversy and to cross examine witnesses”). Plainly the arbitrator’s order has not resolved the merits of the claims between Appellant and Respondent. It follows that the Order on Appeal which directs the parties back to arbitration cannot have resolved the merits of the claims between the parties either. Thus, the matter is not yet appealable. If Appellant is permitted to proceed with this appeal, as if some final decision has been made when it has not, Respondent could be forever deprived of both the opportunity and the means to have the merits of its claims against Appellant heard.

It bears mention that Appellant seems to acknowledge that it is not claiming victory on the merits, but instead attempting to enforce the settlement agreement against Respondent. Appellant’s position is that rather than permitting Respondent the opportunity to address the merits of its claims against Appellant, Respondent’s recourse is to pursue claims against Arch to assert that Arch did not have the authority to bind Respondent to the settlement agreement. (App. Br. pp. 20-21). Apparently, Appellant’s position is that it should be entitled to claim the benefit of the settlement agreement regardless of whether it is valid or not.

Consider how Appellant’s position would play out. According to Appellant, the trial court should have dismissed the merits of Respondent’s mechanic’s lien suit against Appellant *with*

*prejudice* and left the issues concerning enforceability of the settlement agreement to be litigated in a separate action between Arch and Respondent. But this begs the question: what if the settlement agreement were later found unenforceable? In that scenario, the dismissal with prejudice would forever bar Respondent from litigating the merits of its claims against Appellant, but Appellant would have received the benefit of an unenforceable settlement agreement. This is precisely why appeals are not permitted until there has been a final ruling affecting the merits.

This leads to a final point. The substantive effect of the trial court's order demonstrates that this is not an appealable order from the denial of the motion to confirm an award. Instead, by refusing to accept the arbitrator's dismissal, the trial court's order had the effect of "vacating" or "voiding" the arbitrator's order. Even Appellant acknowledges this. *See* (App. Br. p. 16) (suggesting the effect of the trial court's ruling was to vacate the arbitration order).

An order "vacating" an arbitration award (assuming there was an arbitration award) is not appealable if it directs the parties *back* to arbitration—which is precisely what happened here. (Appx. I, p. 6) *compare* S.C. Code Ann. § 15-48-200 (a)(5) (listing the orders that can be appealed and including only "an order vacating an award without directing rehearing"). An order vacating an award is only appealable if it does not direct the parties back to arbitration. *See Heffner v. Destiny, Inc.*, 321 S.C. 536, 537-38, 471 S.E.2d 135, 136 (1995) (applying the doctrine of "expressio unius est exclusio alterius (the mention of one is the exclusion of another)" to hold "all other orders [not explicitly listed in S.C. Code Ann. § 15-48-200] that relate to arbitration are not immediately appealable."); *see also Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004) (holding an order relating to arbitration is not appealable where "Section 15-48-200 does not expressly permit an appeal from [the] order"). This serves to

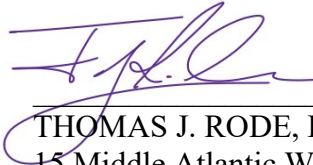
further demonstrate that this matter is not immediately appealable, and why this appeal should be dismissed.

CONCLUSION

For the reasons stated herein, this Court should find that it does not have appellate jurisdiction because the appeal of this matter is premature and should therefore issue an order dismissing the instant appeal. The parties should be permitted to proceed with arbitration as ordered by the Circuit Court.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
	)	
AJP SOLUTIONS, LLC	)	CASE NO. 2022-CP-18-01997
	)	
	)	
	)	
vs.	)	
	)	
	)	<b>ORDER</b>
CLARK CONSTRUCTION, INC. OF	)	
MISSISSIPPI ET AL.	)	
	)	
	)	
	)	
	)	

THIS MATTER comes before the Court on the Motion of Defendant Clark Construction, Inc. of Mississippi (“Clark”) for an Order: (1) confirming an arbitration order of dismissal; and (2) dismissing this action with prejudice. The Court hereby denies the Defendant’s Motion for the reasons set forth herein and orders the parties back to arbitration to resolve AJP’s claims against Clark.

**FACTUAL BACKGROUND**

This matter arises from a payment dispute involving construction services rendered by AJP at a multi-family project located at 112 Grandview Drive Summerville, SC 29483. AJP provided painting and drywall services on the project; however, during the course of construction a payment dispute arose with Clark Construction, Inc. of Mississippi (Clark Construction), the general contractor on the project. AJP ultimately filed a mechanic’s lien against the project in September of 2022.

Subsequently, AJP filed a foreclosure action regarding the mechanic’s lien in December of 2022, and Clark, in turn, made an appearance by counsel and filed a motion to dismiss and/or to compel arbitration pursuant Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the South Carolina Rules of

Civil Procedure, for an order dismissing Plaintiff's Complaint for lack of subject matter jurisdiction, improper venue and failure to state a claim upon which relief may be granted, and alternatively, for an order, pursuant to 9 U.S.C.A. § 3 staying the South Carolina action as to all parties and compelling AJP and Clark to arbitration.

Arch filed a related action against Clark in the United States District Court for the Southern District of Mississippi, Western Division concerning its bond styled *Arch Insurance Company v. Clark Construction, Inc. of Mississippi*, Case No. 5:22-cv-100-ks-bwr, wherein curtailed counterclaims were filed in response by Clark against Arch.

Clark instituted an arbitration against AJP in January of 2023 through the AAA before the South Carolina court ruled upon its pending motion asserting claims for damages against AJP. AJP objected to participation in the arbitration until the South Carolina court heard the pending motion.

On May 22, 2023, counsel for Arch reached out to counsel for AJP and Clark to coordinate a global mediation. Clark's counsel informed the parties that Clark would not participate in the mediation if Clark was expected to pay any money to AJP or let AJP walk away.

On June 5, 2023, counsel for Arch asked if AJP would be ok with this arrangement for the mediation, and indicated that he had not "studied AJP's claim to know how strong it is." AJP indicated that it was not interested in that arrangement and would not be contributing to any settlement funds for Clark's claims.

In turn, Arch moved forward in coordinating the mediation with the parties and offered AJP to attend by zoom in order to help with the factual allegations concerning Clark's claims against AJP and Arch. On June 20, 2023, AJP agreed to participate in the mediation by zoom to help Arch.

On June 22, 2023, the South Carolina court ordered AJP and Clark to arbitration despite AJP's opposition to Clark's motion to compel the arbitration on several grounds.

On June 23, 2023, AJP filed an Answer and Counterclaim in the AAA arbitration.

On July 6, AJP and its counsel participated in the mediation by zoom, but AJP did not authorize Arch to resolve its arbitration claims against Clark. The discovery phase of the arbitration was ongoing, as only limited documents had been exchanged and no depositions had been taken yet. Arch misrepresented its settlement authority to Clark and the mediator despite knowing that AJP had not authorized it to resolve its claims against Clark.

Clark, in turn, moved to dismiss the arbitration via the unauthorized settlement agreement. On July 28, the arbitrator dismissed the proceeding based upon this misrepresentation by Clark and Arch that all claims were amicably settled during the mediation.

In reviewing an arbitration award for the purpose of confirmation or vacating of the same, this Court must determine whether the arbitrator's award demonstrates a manifest disregard for the law. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 742 S.E.2d 359 (2013). "An arbitrator's 'manifest disregard of the law,' as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Id.*, 403 S.C. at 56, 742 S.E.2d at 360.

AJP argues that the Defendant's motion should be denied because the arbitrator dismissed the arbitration proceeding despite AJP's objection to the purported settlement based upon the invalidity of the settlement agreement. In the arbitrator's order, he specifically states he does not believe that he has the "authority or jurisdiction" to consider whether the power of attorney provision of the indemnity agreement is enforceable under South Carolina law giving effect to the settlement agreement; yet, he accepts the settlement agreement, which is based upon the indemnity agreement, as the basis for his dismissal of the arbitration.

AJP contends that this was a manifest disregard of the law. AJP argues that its claims asserted in the arbitration against Clark were separate and distinct from the claims made by Clark

against AJP, which were subject to the indemnity agreement, and that Arch did not have the legal authority to negotiate and/or settle those claims.

The Court agrees that Arch overstepped its authority by attempting to negotiate AJP's claims against Clark for the following reasons:

**I. Arch did not have standing or proper authority from the purported power of attorney to participate in the arbitration.**

Arch was not a party to the arbitration and had no standing to participate in the arbitration and no rights within the arbitration forum or otherwise to settle and/or release AJP's claims and/or liens. Arch did not file a motion to intervene in the arbitration proceeding, and it cannot interpose itself into the arbitration proceeding in such a manner as creating an unauthorized and unenforceable settlement agreement with Clark in order to extinguish its own liability being litigated in a separate action and forum (*Arch Insurance Company v. Clark Construction, Inc. of Mississippi*, Case No. 5:22-cv-100-ks-bwr). The power to do so far exceeds the scope of the general indemnity agreement.

The Court finds that AJP's claims against Clark are separate and distinct from any claims Clark has filed against AJP, which would be included in the bond/declaratory judgment action against Arch. AJP's Complaint asserts claims which arise not only from the breach of the contractual agreement between Clark and AJP and quantum meruit but also from the South Carolina Mechanic's Lien Statute, S.C. Code section 29-5-10 *et seq.* and the bond claim against Travelers Insurance Company. In its Complaint, AJP claims it is owed and has filed claims for \$626,429.28, plus interest at the legal rate, cost, and attorneys' fees. On the other hand, Clark alleged damages in the arbitration of \$443,781.41 arising from AJP's departure from the project.

Clark and Arch argue that Arch's authority to reach a settlement of AJP's counterclaim derives from a general indemnity agreement between Arch and AJP. Ex. B. However, the power of attorney provisions contained in paragraph 7 of the general indemnity agreement do not comply with the South Carolina Uniform Power of Attorney Act, South Carolina Code section 62-8-101 *et seq.*, which was established in 2017, prior to the execution of the indemnity agreement. South Carolina Code section 62-8-107 provides that the meaning and effect all power of attorneys shall be determined by the law of the jurisdiction in which the power of attorney was executed (South Carolina), when it does not specifically indicate that the law of another state applies. South Carolina requires that all power of attorneys be signed by two disinterested witnesses. *See* S.C. Code section 62-8-105 (2) & S.C. Code section 62-2-502.

The general indemnity agreement in question did not have any witnesses sign it, and it is therefore invalid. Thus, the power of attorney provision contained in the indemnity agreement is in violation of South Carolina law, and Arch has no authority to act on behalf of AJP in this arbitration. Without actual standing to participate in this arbitration or authorization from a duly executed power of attorney, Arch cannot manipulate a settlement of the entirety of the claims and counterclaims in this arbitration as set forth by the parties, even if Clark has agreed to do so.

## **II. The purported settlement violates Rule 43(k) of the South Carolina Rules of Civil Procedure**

AJP and its personal indemnitors did not authorize the settlement agreement between Clark and Arch. The plain language of the agreement sets forth the assignment of certain interests to the surety with respect to claims asserted by Clark against AJP or Arch as a means of recovery for any payment made on its behalf; however, it does not give Arch specific and complete authority over any and all claims that AJP may have against Clark.

In South Carolina, Rule 43(k), SCRCP, states that “[n]o agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record or reduced to writing and signed by the parties and their counsel.” *See also Ashfort Corp. v. Palmetto Constr. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534.

From a review of the record, it is clear that AJP and its personal indemnitors have objected to any settlement resolving its claims against Clark. Without the consent of AJP any purported agreement to settle its claims is invalid. Therefore, the Defendants motion is denied and the parties are ordered back to arbitration in order to resolve the claims that AJP asserted against Clark.



Dorchester Common Pleas

**Case Caption:** Ajp Solutions Llc VS Clark Construction Inc Of Mississippi ,  
defendant, et al  
**Case Number:** 2022CP1801997  
**Type:** Order/Dismissal

It is so Ordered!

s/Diane S. Goodstein

Electronically signed on 2024-01-10 15:19:23 page 7 of 7

<b>STATE OF SOUTH CAROLINA</b>	)	<b>IN THE COURT OF COMMON PLEAS</b>
	)	
<b>COUNTY OF DORCHESTER</b>	)	<b>C.A. No. 2022-CP-18-01997</b>
	)	
AJP Solutions, LLC,	)	
	)	<b>CLARK CONSTRUCTION, INC. OF</b>
Plaintiff,	)	<b>MISSISSIPPI'S MOTION TO CONFIRM</b>
	)	<b>ARBITRATION ORDER</b>
v.	)	
	)	
Clark Construction, Inc. of Mississippi,	)	
TCABC Real Estate Holdings, LLC, and	)	
Travelers Casualty and Surety Company of	)	
America,	)	
	)	
Defendants.	)	
	)	

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COMES NOW Defendant Clark Construction, Inc. of Mississippi (“Clark”) by and through its undersigned counsel and hereby moves before this Court for an Order confirming the order of the Arbitrator issued in the underlying arbitration in this matter, and dismissing all claims asserted in this lawsuit WITH PREJUDICE.

In support of this Motion, Clark would show the Court the following:

1. This litigation is a mechanic’s lien foreclosure action brought by AJP Solutions, LLC (“AJP”) as a subcontractor to Clark, who was the general contractor for a construction project owned by TCABC Real Estate Holdings, LLC (“TCABC”).
2. In furtherance of its contractual obligations to Clark on the subject construction Project, AJP furnished payment and performance bonds naming Arch Insurance Company (“Arch”) as surety, AJP as principal, and Clark as obligee (the “P&P Bonds”).
3. By Order dated June 22, 2023, this Court stayed this litigation pending the outcome of arbitration between Clark and AJP pursuant to an arbitration agreement included in the subcontract agreement between those parties.

4. Clark's initiation of arbitration proceedings against AJP pre-dates the Court's Order. Clark filed its Demand for Arbitration with the American Arbitration Association on January 9, 2023.

5. On July 6, 2023, the underlying disputes between Clark and AJP were resolved by settlement between Clark and Arch as AJP's attorney-in-fact. A formal settlement agreement was executed by the parties on or about July 25, 2023, a copy of which is attached hereto as **Exhibit A** (the "Settlement Agreement").

6. The Settlement Agreement provided that Clark and AJP (through Arch as its attorney-in-fact) would release their respective claims against one another and dismiss the arbitration.

7. Following the settlement, Clark moved to dismiss the arbitration proceedings with prejudice. A copy of Clark's Motion is attached hereto as **Exhibit B**.

8. AJP objected to Clark's Motion, and specifically objected to Arch's authority to dismiss its claims against Clark in the arbitration. A copy of AJP's Response to Clark's Motion to Dismiss is attached hereto as **Exhibit C**.

9. The arbitrator granted Clark's Motion to Dismiss in spite of AJP's objection. A copy of the Arbitrator's Order is attached hereto as **Exhibit D**.

10. AJP moved that the arbitrator reconsider the dismissal, and the arbitrator denied AJP's motion. AJP's Motion and the Arbitrator's order are attached hereto as **Exhibits E** and **F**, respectively.

11. On August 1, 2023, Arch filed a civil action against AJP and other defendants in the United States District Court for the District of South Carolina bearing Civil Action No. 2:23-cv-3735-RMG captioned as *Arch Insurance Company v. AJP Solutions, LLC; Antonio Pino; Airett*

*Pino; Michael Methington; Brandee Wethington; Matthew Shirkman; Jennifer Shierman; and ABC Entities* (the “Arch Indemnity Action”) in which Arch alleged, *inter alia*, that it was owed indemnification from the defendants (including but not limited to AJP) for losses it incurred by virtue of its issuance of the P&P Bonds. Arch’s alleged damages in the Arch Indemnity Action include but are not limited to those funds it has paid to Clark as a condition of the Settlement Agreement.

12. To the extent AJP continues to contest Arch’s authority to release AJP’s claims in the underlying arbitration, Clark is informed and believes that the Arch Indemnity Action is the appropriate forum to assert such contentions.

13. Because the claims by and among Clark and AJP have been resolved through settlement and because the underlying arbitration has been dismissed without issuance of an award to either of the Parties, Clark does not seek a civil judgment against AJP by way of this Motion and instead seeks a dismissal of this lawsuit with prejudice.

14. Plaintiff’s claims against TCABC are derivative of any liability Clark has to AJP. Although Plaintiff’s allegations against TCABC are somewhat vague, Plaintiff essentially contends that TCABC is liable to AJP by virtue of its ownership of the subject construction project.

15. Because AJP’s claims against Clark have been released and dismissed in arbitration, AJP’s claims against TCABC are moot and should be dismissed with prejudice.

16. Plaintiff’s claims against Travelers Casualty and Surety Company of America (“Travelers”) are derivative of any liability Clark has to AJP. Travelers is named as a defendant by virtue of a mechanic’s lien discharge bond naming Travelers as surety which was filed following AJP’s assertion of the mechanic’s lien that is the subject of this litigation. (Compl. ¶¶ 24-25.)

17. Because AJP's claims against Clark have been released and dismissed in arbitration, AJP's claims against Travelers are moot and should be dismissed with prejudice.

WHEREFORE, based on the foregoing, Clark Construction, Inc. of Mississippi prays that this Court enter an Order dismissing Plaintiff's Complaint WITH PREJUDICE.

Respectfully submitted,

s/Bryan P. Kelley  
Bryan P. Kelley (SC Bar No. 76062)  
Katherine M. Sieber (SC Bar No. 102826)  
Elmore Goldsmith Kelley and deHoll, P.A.  
19 Blair Street (29607)  
Post Office Box 1887  
Greenville, South Carolina 29602  
Telephone: (864) 255-9500  
Facsimile: (864) 255-9505  
bkelley@elmoregoldsmith.com  
ksieber@elmoregoldsmith.com

August 14, 2023  
Greenville, South Carolina

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## RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement (the "Agreement") is entered into by and between Clark Construction Company, Inc. of Mississippi ("Clark"); AJP Solutions, LLC ("AJP") and Arch Insurance Company ("Arch" or the "Surety"). Clark, AJP, and the Surety shall collectively be referred to as the "Parties." Now therefore, in consideration of the following good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in consideration of the mutual promises and agreements herein contained, the Parties agree as follows:

1. The Project. On or about December 16, 2020, Clark entered into a subcontract (the "Subcontract") with AJP Solutions, LLC ("AJP") for work to be performed at an assisted living facility identified as the Claiborne at Brickyard Crossing and located in Summerville, South Carolina (the "Project").

2. The Bond. On or about January 6, 2021, Arch issued a performance bond, Bond No. SU1169548 (the "Performance Bond"), and a payment bond (the "Payment Bond") bearing the same bond number, naming AJP as the Principal and Clark as owner/obligee.

3. The Lawsuits. On December 28, 2022, AJP filed a complaint against Clark, TCABC Real Estate Holdings, LLC, ("TCABC") and Travelers Casualty and Surety Company of America ("Travelers") in the Court of Common Pleas for the State of South Carolina, County of Dorchester, bearing the Case Number 2022CP1801997 (the "SC Action"). On December 20, 2022, Arch filed a Complaint for Declaratory Judgment against Clark in the Southern District of Mississippi in a case styled Cause No.: 5:22-cv-100, *Arch Insurance Company v. Clark Construction, Inc. of Mississippi* (the "MS Action"). On or about January 6, 2023, Clark filed a demand against AJP before the American Arbitration Association, bearing the Case Number 01-23-0000-0984 (the "Arbitration"). These lawsuits involved (1) claims by Clark against AJP alleging AJP's default and damages Clark allegedly suffered due to the untimeliness and quality of AJP's work on the Project; (2) claims by Clark against Arch for damages it allegedly suffered due to Arch's failure to pay alleged claims under the Payment Bond and Performance Bond; and (3) claims by AJP against Clark for alleged damages it incurred due to Clark's alleged failure to pay AJP under the terms of the Subcontract.

4. The Lien. On September 28, 2022, AJP filed a Notice and Certificate of Mechanics Lien with the Dorchester County Register of Deeds bearing the Instrument Number 2022025002 and recorded in the lien book at "Lien 2022: 2442-2445." (the "Mechanic's Lien"). Pursuant to S.C. Code Ann. § 29-5-110, Clark caused to be filed in the Dorchester County Register of Deeds a mechanic's lien discharge bond bearing Bond No. 107680227 naming Travelers as surety, Clark as principal and AJP as obligee (the "Discharge Bond") in Book 2022 at Page 2512 which discharged the Mechanic's Lien from

the Project.

5. A Settlement Has Been Reached. Without admitting fault or liability on any outstanding claims, the Parties enter into this Agreement to avoid litigating the issues between them.

6. Settlement Consideration. The Surety agrees to pay THREE HUNDRED TWENTY-FIVE THOUSAND and 00/100 US DOLLARS (**\$325,000.00**) (the "Settlement Consideration") to Clark. The Settlement Consideration is due to Clark no later than July 27, 2023. The Settlement Consideration shall be made payable to Clark Construction Inc., of Mississippi and mailed to counsel for Clark: Christopher Solop, BIGGS, INGRAM & SOLOP, PLLC, Paragon Two, 578 Highland Colony Parkway, Suite 100, Ridgeland, MS 39157.

7. Dismissals. Clark agrees to dismiss its counterclaim against Arch in the MS Action, with prejudice. Clark agrees to dismiss its claims against AJP in the Arbitration, with prejudice. AJP, through its attorney-in-fact, Arch, agrees to release its claims, with prejudice, against Clark, TCABC and Travelers in the SC Action and the Arbitration. Arch agrees to dismiss the MS Action, with prejudice. Clark, AJP, and Arch will cooperate in drafting documents necessary to achieve the dismissals of the SC Action, the MS Action, and the Arbitration.

8. Surety Reservation Against AJP and Individual Indemnitors. The Surety expressly reserves any and all claims against AJP and any individual indemnitors arising under a certain General Indemnity Agreement executed by AJP and others dated December 31, 2020 (the "Indemnity Agreement"), for the benefit of the Surety, which shall not be modified by this Agreement and remain in full force and effect as to all parties thereto.

9. Warranty Claims. Clark releases AJP and, to the extent necessary, the Surety, from any warranty obligations under the Subcontract, the Performance Bond, and/or the Project.

10. Releases by Clark.

- a. Clark, for itself, its affiliates, officers (present and former), directors (present and former), agents, attorneys, employees, legal representatives, successors and permitted assigns, releases, acquits, and discharges the Surety and its affiliates, reinsurers, officers (present and former), directors (present and former), agents, attorneys, employees, representatives, successors and permitted assigns from any and all claims, demands, and causes of action of whatever nature or character, whether in contract or in tort, but not limited thereto, known or unknown, that relate to the Performance Bond, the Payment

- Bond, the MS Action, the Subcontract, and/or the Project.
- b. Clark, for itself, its affiliates, officers (present and former), directors (present and former), owners (present and former), agents, attorneys, employees, legal representatives, successors and permitted assigns, releases, acquits, and discharges AJP and its affiliates, officers (present and former), directors (present and former), agents, attorneys, employees, representatives, successors and permitted assigns from any and all claims, demands, and causes of action of whatever nature or character, whether in contract or in tort, but not limited thereto, known or unknown, that relate to the Arbitration, the SC Action, the Subcontract, and/or the Project.

11. Releases by AJP. AJP, through its attorney-in fact, Arch, for itself, its affiliates, officers (present and former), directors (present and former), owners (present and former) agents, attorneys, employees, legal representatives, successors and permitted assigns, releases, acquits, and discharges Clark, TCABC and Travelers, along with their affiliates, officers (present and former), directors (present and former), agents, attorneys, employees, representatives, successors and permitted assigns from any and all claims, demands, and causes of action of whatever nature or character, whether in contract or in tort, but not limited thereto, known or unknown, that relate to the Arbitration, the SC Action, the Subcontract, the Mechanic's Lien, the Discharge Bond, and/or the Project.

12. Representations. Each party hereby represents and warrants that it is authorized and has full capacity to enter into this Agreement, that the Agreement is enforceable against it, upon execution hereof and according to the terms hereof and that no party hereto has assigned any claims or rights intended to be addressed and released hereunder except to the extent AJP made certain assignments to Arch under the express terms of the Indemnity Agreement. The Parties further represent and warrant that they have read each page of this Agreement and fully understand them, agree to them, and voluntarily sign them.

13. Costs. Clark and AJP agree to bear any and all remaining costs with regard to the Arbitration, the SC Action, and/or any costs or expenses in effectuating the terms of this agreement.

14. Entire Consideration. It is agreed and understood that this Agreement sets forth the entire consideration for the agreements and understandings of the Parties and that all agreements and understandings among the Parties are embodied and expressed in this Agreement.

15. Venue. The Parties hereby stipulate and agree that if it becomes necessary for any Party to file any action in connection with this Agreement including, without limitation, to enforce any breach of this Agreement, that such action shall be brought in the

United States District Court for the Southern District of Mississippi. The Parties hereto do expressly waive any right to a trial by jury and understand and agree this waiver is valid, enforceable, and is supported by valuable consideration between the Parties, it being a material inducement to the Parties in entering into this Agreement.

16. No Third-Party Rights. This Agreement is solely among the Parties, and this Agreement may not be assigned in whole or in part by any party without the prior written approval of each of the Parties to this Agreement except to the extent AJP made certain assignments to Arch under the express terms of the Indemnity Agreement. Other than those third parties expressly released under this Agreement, no group, individual, or third party have any rights under this Agreement.

17. Binding Effect. This Agreement shall be binding upon the Parties hereto, their heirs, successors, and assigns, and to the extent any provision in this Agreement shall be deemed unenforceable for whatever reason, the balance of the terms and conditions herein shall be enforceable.

18. Drafting. Each of the Parties hereto agree that this Agreement was jointly negotiated and drafted by the Parties and should not be construed by a court of law against any party as the drafter thereof.

19. Construction. In giving meaning to this Agreement, the singular shall be held to include the plural, the plural shall be held to include the singular, and the use of any gender shall be held to include every other and all genders.


20. Headings. Each of the Parties hereto agree that the section headings contained herein are included for convenience only and are not to be deemed part of this Agreement.

21. Counterparts. This Agreement may be executed by the Parties in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute one and the same instrument. A facsimile signature shall constitute an original signature. Each counterpart may consist of a number of copies each signed by less than all, but together signed by all of the Parties.

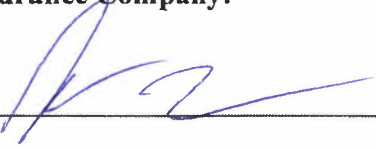
22. Date of Execution. This Agreement shall be in effect on the date of execution of the last party hereto.

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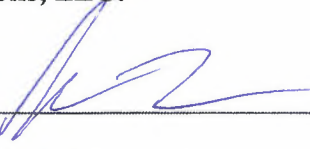
**Clark Construction, Inc. of Mississippi**

By:   
Name: Brad Clark \_\_\_\_\_  
Title: President \_\_\_\_\_  
Date: \_\_\_\_\_

**Arch Insurance Company:**

By:   
Name: Jonathon Panico  
Title: Senior Claims Examiner  
Date: July 25, 2023

**AJP Solutions, LLC:**

By:   
Name: Jonathon Panico  
Title: Attorney-In-Fact  
Date: July 25, 2023

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**BEFORE THE AMERICAN ARBITRATION ASSOCIATION**

**CLARK CONSTRUCTION, INC.  
Of MISSISSIPPI**

**V.**

**CASE NO. 01-23-0000-0984**

**AJP SOLUTIONS, LLC**

**CLAIMANT CLARK CONSTRUCTION, INC. OF MISSISSIPPI'S  
MOTION TO DISMISS ARBITRATION PROCEEDING WITH PREJUDICE**

**COMES NOW** Claimant Clark Construction, Inc. of Mississippi ("Clark") and files this Motion to Dismiss Arbitration Proceedings with Prejudice ("Motion"). In support of this Motion, Clark would respectfully submit the following:

1. On July 6, 2023, by mutual agreement of Clark, AJP Solutions, LLC ("AJP") and AJP's surety Arch Insurance Company ("Arch"), a mediation was conducted.
2. Representatives for Clark, AJP and Arch along with counsel were present and participated in the mediation.
3. A settlement agreement was ultimately reached with Arch signing the settlement agreement as attorney-in-fact for AJP and its indemnitors. A copy of the settlement agreement is attached as Exhibit "A".
4. Under the terms of the Indemnity Agreement between Arch and AJP, a copy of which has been provided to the arbitrator and AAA, and is attached as Exhibit "B", Arch had the right as attorney-in-fact to settle this arbitration on behalf of AJP and its indemnitors.
5. Any dispute regarding whether the settlement agreement should or should not have been entered into by AJP is a matter to be resolved between AJP and Arch.

**WHEREFORE**, Clark Construction, Inc. of Mississippi, respectfully submits that this arbitration proceeding should and must be dismissed with prejudice in accordance with the terms of the attached settlement agreement, notwithstanding any objection from Respondent AJP Solutions, LLC. In the alternative, pursuant to Rule 48(a), the arbitrator should consider issuing a “consent award” with the settlement agreement attached and allocating arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses equally between the parties.

THIS the 7<sup>th</sup> day of July, 2023.

Respectfully submitted,

**CLARK CONSTRUCTION, INC.  
OF MISSISSIPPI**

By:     /S/ Christopher Solop      
Christopher Solop, MSB No. 7687  
One of the attorneys for Clark  
Construction, Inc. of Mississippi

**OF COUNSEL:**

**Christopher Solop, MSB No. 7687**  
**Lynn P. Thompson, MSB No. 10256**  
Biggs, Ingram & Solop, PLLC  
Paragon Two  
578 Highland Colony Parkway, Suite 100  
Ridgeland, MS 39157  
P.O. Box 14028  
Jackson, MS 39236-4028  
Telephone: (601) 987-4822  
Facsimile: (601) 987-4822  
Email: [csolop@bislawyers.com](mailto:csolop@bislawyers.com)  
[lthompson@bislawyers.com](mailto:lthompson@bislawyers.com)

**CERTIFICATE OF SERVICE**

I, Christopher Solop, one of the attorneys for Clark Construction, Inc. of Mississippi, do hereby certify I electronically filed the foregoing pleading with the AAA and served all counsel of record via electronic mail.

This the 7<sup>th</sup> day of July, 2023.


/s/ Christopher Solop  
Christopher Solop

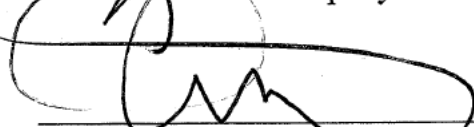
Mediation / Arch Insurance Company v. Clark Construction, Inc. of Mississippi  
AJP Solutions, Inc. – Bond Principal

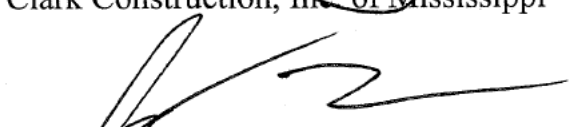
**SETTLEMENT TERMS OUTLINE**

1. Arch will pay \_\_\_\_\_ to Clark by no later than July 27, 2023;
2. Arch, as attorney-in-fact for AJP, will release AJP's claims and any liens which it has against Clark relating to the bonded project;
3. Clark releases its claim against AJP;
4. Clark releases its claim against Arch;
5. Arch will dismiss DJ action;
6. Clark and Arch, as attorney-in-fact for AJP, will dismiss the AAA arbitration;
7. Arch will pay no AAA fees or expenses in pending arbitration;
8. Indemnity obligations from AJP and AJP indemnitors to Arch remain intact;
9. No indemnity from Arch to Clark;
10. If any clause is found to be unenforceable, the other clauses remain in full force and effect; and
11. Clark will release AJP from its warranty obligations under the bonded project.

THIS, the 6<sup>th</sup> day of July, 2023.

  
\_\_\_\_\_  
Arch Insurance Company

  
\_\_\_\_\_  
Clark Construction, Inc. of Mississippi

  
\_\_\_\_\_  
Jonathan Panico, on behalf of Arch  
Insurance Company, Attorney-in-fact  
for AJP Solutions, Inc.

ARCH INSURANCE COMPANY INDEMNITY AGREEMENT

ELECTRONICALLY FILED - 2023 Aug 14 2:03 PM - DORCHESTER - COMMON PLEAS - CASE#2022CP1801997

Indemnitor represents that all statements made in the Application are true and made without reservation to induce Surety to extend surety credit on its behalf in reliance upon the Agreement; confirms that it has a material and beneficial interest in the provision of each Bond requested including Bonds requested in other Applications or as otherwise permitted; and hereby agrees with Surety as follows:

1. Definitions applicable to the Indemnity Agreement:

Agreement: This Indemnity Agreement, and any other agreement between Indemnitor and Surety executed for Surety's benefit.

Bonds: Any and all bonds or other obligations, renewals, extensions, replacements and substitutions thereof, issued prior to or after the execution of this Agreement, and issued for or at the request of Indemnitor.

Indemnitor: Each and all of the undersigned, their current and future subsidiaries and affiliates, and any person or business entity added by written amendment (to which amendment Indemnitors hereby agree may be executed solely by that new Indemnitor), joint and severally, whether acting alone or in joint venture with others, and, as to all of them, their successors, assigns, and heirs. Where used in the Agreement, the term applies to Indemnitors individually and collectively.

Loss: Claims, losses, liability, damages of any type (including punitive), costs, fees, expenses, suits, orders, judgments, or adjudications whatsoever, and interest thereupon from the date upon which Surety incurs a Loss or posts reserves in anticipation of Loss, which Surety may incur in any manner relating to the extension of surety credit, including the enforcement of the Agreement.

Surety: Arch Insurance Company and/or Arch Reinsurance Company or any other entity for which Arch Insurance underwrites surety bonds, severally not jointly; their respective successors and assigns; any co-surety, reinsurer, or surety that issues a Bond at the request of Surety.

2. Premiums: To pay premiums when due, and to deliver evidence satisfactory to Surety, of the release of all liability;

3. Indemnity: To exonerate, indemnify and hold harmless Surety from and against all and all Loss;

4. Place in Funds: To place Surety in funds immediately upon demand in the amount Surety deems necessary to protect itself from any Loss or potential Loss, Surety having the right to use all or part of the funds in payment, settlement, or reimbursement to itself of any Loss;

5. Assignment: (I) Scope: Indemnitor assigns and pledges to Surety as security, a lien and security interest in its interest, title, and rights in and growing out of the following: (a) any bonded contract, any agreement related to a bonded contract including any labor or supply subcontract and any bond in support thereof, and any action, claim or demand which Indemnitor may acquire against any party to these contracts or otherwise related to a bonded contract; (b) all machinery, supplies, equipment, plant, tools and materials which are or may be on the site of the bonded contract, including materials purchased, being constructed, in storage, or in transit; (c) to the extent Surety determines necessary to fulfill or complete bonded obligations: licenses, patents, copyrights, trade secrets, limited partnership and general partnership interests; (d) any funds that are due or may become due on a bonded contract or other contract, including retention and recovery from claims. (II) Exercise of Rights by Surety: The assignment is effective upon the date of this Indemnity Agreement, but the Surety may exercise its rights only if Indemnitor: (i) breaches a bonded contract, Bond, or the Agreement; (ii) is declared in default by a Bond obligee or a payment bond claim is made; (iii) makes an assignment for the benefit of creditors; an application for the appointment of a trustee or receiver is made; or files an application under the Bankruptcy Code or similar laws of any state; (iv) is subject to any proceeding which deprives it of the use of the materials referred to in (b), above; (v) is debarred or otherwise declared ineligible for public work; and (vi) if an individual, an Indemnitor's death, disappearance, incompetence, insolvency, conviction of a felony or imprisonment.

6. Security Agreement: This Agreement shall constitute a Security Agreement to the Surety and a Financing Statement, both in accordance with the Uniform Commercial Code of every jurisdiction in which such Code is in effect, but the filing or recording of the Agreement shall be solely at Surety's option, and the failure to file shall not release or impair any Indemnitor's obligations under the Agreement or otherwise, nor shall it be in any manner in derogation of any of the Surety's rights.

7. Power of Attorney: Indemnitor irrevocably appoints Surety as Attorney-in-fact with the full right and authority, but not the obligation, to exercise the rights of Indemnitor assigned to Surety above, and to execute on behalf of and sign Indemnitor's name to any document deemed necessary by Surety to give full effect to the purposes of the Agreement. Indemnitor hereby ratifies all acts taken by Surety as attorney-in fact, acknowledges that this power of attorney is a power coupled with an interest, and agrees to hold harmless Surety from any claims, damages, loss or expense incurred by its use.

8. Surety's Rights: (a) Loss: Surety has the right at its sole discretion to pay or settle any Loss and the sworn voucher of payment signed by Surety shall be prima facie evidence of Indemnitor's liability; (b) Suits: Surety may bring separate lawsuits to recover under the Agreement, and doing so or recovering by way of judgment upon a cause of action shall not prejudice or bar the bringing of suits upon other causes of action, whenever they may arise; (c) Other Agreements: Any rights Surety may have or acquire against Indemnitor under the Agreement are in addition to and not in lieu of any rights afforded Surety under any other agreement related to surety credit; and, if Surety executes any Bond with a co-surety or reinsures all or part of a Bond, all the terms of the Agreement shall apply and operate for the benefit of the co-surety and reinsurer, as their interests may appear; (d) Decline or Cancel Bonds: Surety shall have the right to decline or cancel a Bond at any time, free of claim for loss or damage by Indemnitor, and Surety shall be under no obligation to disclose its reasons therefore, the provisions of any law to the contrary being hereby waived; (e) Non-waiver: the exercise, delay or failure by Surety to exercise any right, remedy or power whatsoever shall not preclude any subsequent exercise or waiver of these or any other rights, remedies by the Surety.

9. This Application may be executed in multiple counterparts, each being deemed an original but all of which constitute one and the same agreement.

10. This Document: If the execution of this Agreement shall be defective for any reason, such defect or invalidity shall not affect the validity of the Agreement as to any other Indemnitor. If any provision is held invalid, the remaining provisions shall retain their full force and effect. A facsimile, photocopy, or electronic reproduction shall be considered an original and shall be admissible in a court of law to the same extent as an original.

11. Termination: Indemnitor may terminate its indemnity obligations under this Indemnity Agreement for future bonds upon twenty (20) days written notice to Surety, sent by registered or certified mail, to Three Parkway, Suite 1500, Philadelphia, PA 19102, Attn: Surety Department.

Such notice shall not modify or discharge Indemnitor's obligations for Bonds authorized, executed, or committed to by Surety prior to the discharge date (including renewals, extensions, modifications and substitutions), or for final Bonds issued for bid bonds issued prior to the discharge date.

12. Effective Date: This document shall be effective on the date it is executed by one or more Indemnitors.

This Indemnity Agreement is dated: December 31, 2020

By signing below, each individual signing on behalf of a business entity represents and warrants that he or she is duly authorized by the business entity to bind it to this Indemnity Agreement:

Indemnitor (Business):
Company Name: AJP Solutions LLC
Authorized Signature: [Signature]
Printed Name: Michael Wethington

Indemnitor (Individual):
Signature: [Signature]
Printed Name: Michael Wethington

Indemnitor (Individual):
Signature: [Signature]
Printed Name: Antonio Pino

Indemnitor (Individual):
Signature: [Signature]
Printed Name: Matthew Shirkman

Indemnitor (Spouse):
Signature: [Signature]
Printed Name: Brandee Wethington

Indemnitor (Spouse):
Signature: [Signature]
Printed Name: Airett Pino

Indemnitor (Spouse):
Signature: [Signature]
Printed Name: Jennifer Shirkman

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Clark's claims or AJP's counterclaims until the occurrence of conditions precedent set forth therein.

- I. Arch does not have standing or proper authority from the purported power of attorney to participate in the arbitration.

Arch is not a party to this arbitration and has no standing to participate in the arbitration and no rights within the arbitration forum or otherwise to settle and/or release AJP's claims and/or liens. Arch has not filed a motion to intervene in this arbitration proceeding, and it cannot interpose itself into this proceeding in such a manner as creating an unauthorized and unenforceable settlement agreement with Clark in order to extinguish its own liability being litigated in a separate action and forum (the MS federal court declaratory judgment action).

AJP's claims against Clark are separate and distinct from any claims Clark has filed against AJP and any claims Clark has filed in regard to the bond/declaratory judgment action against Arch. AJP's claims arise not only from the breach of the contractual agreement between Clark and AJP and quantum meruit but also from the South Carolina Mechanic's Lien Statute, S.C. Code section 29-5-10 *et seq.* and the bond claim against Travelers Insurance Company. Ex. A. AJP is owed and has filed claims for \$626,429.28, plus interest at the legal rate, cost, and attorneys' fees. On the other hand, Clark alleges damages of \$443,781.41 in this arbitration and additionally in the bond claim against Arch.

Clark and Arch argue that Arch's authority to reach a settlement of AJP's counterclaim derives from a general indemnity agreement between Arch and AJP. Ex. B. However, the power of attorney provisions contained in paragraph 7 of the general indemnity agreement do not comply with the South Carolina Uniform Power of Attorney Act, South Carolina Code section 62-8-101 *et seq.*, which was established in 2017, prior to the execution of the indemnity agreement. South

Carolina Code section 62-8-107 provides that the meaning and effect all power of attorneys shall be determined by the law of the jurisdiction in which the power of attorney was executed (South Carolina), when it does not specifically indicate that the law of another state applies. South Carolina requires that all power of attorneys be signed by two disinterested witnesses. *See* S.C. Code section 62-8-105 (2) & S.C. Code section 62-2-502. The general indemnity agreement did not have any witnesses sign it, and it is therefore invalid. Thus, the power of attorney provision contained in the indemnity agreement is in violation of South Carolina law, and Arch has no authority to act on behalf of AJP in this arbitration. Without actual standing to participate in this arbitration or authorization from a duly executed power of attorney, Arch cannot manipulate a settlement of the entirety of the claims and counterclaims in this arbitration as set forth by the parties, even if Clark has agreed to do so.

## II. AJP and the personal indemnitors object to the settlement

AJP and its personal indemnitors did not authorize the settlement agreement between Clark and Arch. While Clark and Arch may argue that Arch had the right to settle some or all of the claims involved in the dispute amongst the parties, the parties provide no legal justification or caselaw which would support such a broad interpretation of Arch's general indemnity agreement. The plain language of the agreement sets forth the assignment of certain interests to the surety with respect to claims asserted by Clark against AJP or Arch as a means of recovery for any payment made on its behalf; however, it does not give Arch specific and complete authority over any and all claims that AJP may have against Clark.

In South Carolina, Rule 43(k), SCRCF, states that “[n]o agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open

court and noted upon the record or reduced to writing and signed by the parties and their counsel.” *See also Ashfort Corp. v. Palmetto Constr. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534.

As they did during the mediation, AJP and its personal indemnitors object to any settlement between Clark and Arch whereby Arch agrees to make any payment to Clark to resolve any of the claims in this arbitration. AJP contends that Clark’s claims are fabricated in response to the fact that AJP asserted a mechanic’s lien against the project, and Clark’s damages are inflated as can be shown by the mere 13 days of labor Clark contends cost it over \$400,000.00, when compared to the months and months that AJP actually spent performing the work on the jobsite. As such, without the consent of AJP any purported agreement to settle its claims is invalid.

### III. Arch has acted in bad faith.

There exists in every contract an implied covenant of good faith and fair dealing. *Adams v. G.J. Creel & Sons, Inc.*, 465 S.E.2d 84, 85 (S.C. 1995). Arch has acted in bad faith by failing to properly investigate Clark’s claim and AJP’s defenses to its claims, failing to exercise reasonable judgment, and tortiously interfering with AJP’s claims in the arbitration by using AJP’s counterclaims as a bargaining chip to protect Arch’s own interest.

A surety is not allowed to pay a disputed claim prematurely without a thorough investigation and determination that a claim is meritorious. A surety has a simultaneous obligation of good faith to the obligee and intended beneficiaries of its bonds as well as to the principal and indemnitors of its indemnity agreements.

In general, payment by the surety creates immediate indemnity liability on the part of the principal, so it is improper for a surety to negotiate a purported settlement of all claims prior to an evaluation of the evidence supporting said claims. In this action, the parties have exchanged

documents; however, they have not yet even conducted any depositions of fact witnesses. Arch has not deposed any witnesses or conducted any interviews of AJP representatives regarding the claims at issue in the case.

The mediation amongst the parties was nothing more than a bad faith setup between Arch and Clark to negotiate a settlement extinguishing all liability of Arch at AJP's sole expense. AJP was ready, willing and able to defend against the claims asserted against it by Clark, having representatives from the company present and counsel for both the company and one of its personal indemnitors. In doing so, Arch's attempt to settle both parties' claims amounts to bad faith and its agreement is not enforceable against AJP. *See generally* Ch. 2 Liability to Indemnify and Reimburse the Surety in THE SURETY'S INDEMNITY AGREEMENT – LAW & PRACTICE 66-67 (Marilyn Klinger, Gary Judd & George J. Bachrach eds., ABA 2002) (*citing Hartford v. Tanner*, 910 P.2d 872, 881, Ct. App. An. 1996) (Holding the surety's reimbursement may be reduced or eliminated if its failure to mitigate damages constituted unreasonable conduct and practically eliminated the principal's ability to raise defenses to obligee claims).

IV. Arch has failed to notify AJP and its personal indemnitors of a breach of any agreement.

Under South Carolina law, an indemnity contract is construed in accordance with the rules of contract construction in general. *Campbell v. Beacon Mfg. Co., Inc.*, 438 S.E.2d 271, 272 (S.C. Ct. App. 1993). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 672 S.E.2d 571, 574 (S.C. 2009).

For Arch to take any actions with respect to the indemnity agreement at issue and purported rights therein, Arch is required to notify AJP and each of its personal indemnitors of a breach of the agreement or bond. To date, this has not been done, as these issues are certainly disputed

amongst the parties and there has been no determination with respect to who breached the parties' agreement and when that breach first occurred.

At no time prior to mediation did Arch notify AJP or its indemnitors that their acts or omissions were a breach of a bonded contract, the Bond, or the Agreement, and it wasn't until Arch reach its purported agreement with Clark at the end of mediation that it first informed AJP and its indemnitor's counsel of Arch's intention to "settle" AJP's counterclaims as well. If Clark's and Arch's unfair behavior is permitted, AJP will potentially lose its ability to pursue its \$600K + claim that started this dispute where South Carolina law only allows bad faith to be used as a shield from indemnity claims by a surety and will not permit AJP to recover extra contractual damages directly from Arch. Moreover, a dismissal will deprive AJP of its due process rights and unjustly shield Clark and Travelers (Clark's surety) from having to defend against AJP's claims. Clark's self-serving assertion that "*any dispute regarding whether the settlement agreement should or should not have been entered into by AJP is a matter to be resolved between AJP and Arch*" fails to appreciate that controlling South Carolina law only allows bad faith to be used as a shield from indemnity claims by a surety and will not permit AJP to recover extra contractual damages from Arch despite its abhorrent behavior.

Furthermore, to the extent Arch/Clark attempts to argue that AJP's failure to post collateral triggered an automatic breach under the general indemnity agreement, Clark's argument fails because Arch waived and/or is estopped from arguing the same. Specifically, after Arch's demand for collateral it requested that AJP join forces with Arch at mediation to resist Clark's claims without providing AJP or its indemnitors notice of default, its ulterior intentions, or a real opportunity to post collateral. In fact, Arch did not "renew" a demand for collateral until the day of mediation and disingenuously conditioned receipt of such collateral on that same day. In short,

Arch's initial demand for collateral went stale and it therefore waived or is estopped from attempting to enforce its purported rights under the agreement.

V. Arch does not have the right to exercise any purported assigned rights until conditions precedent occur as stated in the indemnity agreement.

Similarly, to the lack of notice of breach of any agreement, additional conditions are required prior to Arch being able to summon the powers of its agreement. The indemnity agreement at issue provides the following:

(II) Exercise of Rights by Surety: The assignment is effective upon the date of this Indemnity Agreement, but the **Surety may exercise its rights only if** Indemnitor: (i) breaches a bonded contract, Bond, or the Agreement; (ii) is declared in default by a Bond obligee or a payment bond claim is made; (iii) makes an assignment for the benefit of creditors; an application for the appointment of a trustee or receiver is made; or files an application under the Bankruptcy Code or similar laws of any state; (iv) is subject to any proceeding which deprives it of the use of the materials referred to in (b), above; (v) is debarred or otherwise declared ineligible for public work; **and** (vi) if an individual, an Indemnitor's death, disappearance, incompetence, insolvency, conviction of a felony or imprisonment.

The aforementioned have not occurred at this point in time, and therefore, Arch does not have any rights with respect to exercising any powers over the claims in this arbitration.

### **CONCLUSION**

For the foregoing reasons, AJP respectfully requests that Clark's Motion to Dismiss be denied.

CANTWELL LAW FIRM, LLC

s/Joshua P. Cantwell

Joshua P. Cantwell, Esq.

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Phone: 843-801-4104

josh@cantwelllawfirm.org

*Attorney for AJP Solutions, LLC*

Charleston, South Carolina

Dated: 07/14/2023

South Carolina Uniform Power of Attorney Act

Part 1

General Provisions

**SECTION 62-8-101.** Short title.

This article may be cited as the "South Carolina Uniform Power of Attorney Act".

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

**SECTION 62-8-102.** Definitions.

For purposes of this article:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to whom an agent's authority is delegated. An agent is a fiduciary.

(2) "Durable," with respect to a power of attorney, means not terminated by the principal's incapacity.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Good faith" means honesty in fact.

(5) "Incapacity" means inability of an individual to manage property or business affairs because the individual:

(A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or

(B) is:

(i) missing;

(ii) detained, including incarcerated in a penal system; or

(iii) outside the United States and unable to return.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited-liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or another legal or commercial entity.

(7) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term "power of attorney" is used.

(8) "Presently exercisable general power of appointment", with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual with contractual capacity who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right in the property.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or a territory or insular possession subject to the jurisdiction of the United States.

(13) "Stocks and bonds" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in another manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

**SECTION 62-8-105.** Execution of power of attorney.

A power of attorney must be:

(1) signed by the principal or in the principal's presence by another individual directed by the principal to sign the principal's name on the power of attorney;

(2) attested with the same formality and with the same requirements as to witnesses as a will in South Carolina; and

(3) acknowledged or proved pursuant to Section 30-5-30.

HISTORY: 2016 Act No. 279 (S.778), Section 1, eff January 1, 2017.

SC Will Execution Requirements referenced in 62-8-105 (2)

**SECTION 62-2-502.** Execution.

Except as provided for writings within Section 62-2-512 and wills within Section 62-2-505, every will shall be:

(1) in writing;

(2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction; and

(3) signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

HISTORY: 1986 Act No. 539, Section 1; 1990 Act No. 521, Section 22; 2013 Act No. 100, Section 1, eff January 1, 2014.

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**AMERICAN ARBITRATION ASSOCIATION  
Construction Industry Arbitration Tribunal**

In the Matter of the Arbitration between

Case Number: 01-23-0000-0984

Clark Construction, Inc. of Mississippi  
-vs-  
AJP Solutions, LLC

**ORDER OF ARBITRATOR**

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having fully reviewed and considered the written documents submitted to me, do hereby ORDER as follows:

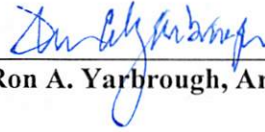
Attached to this Order as Exhibit A are terms of a settlement agreement reached between Clark Construction, Inc. of Mississippi (“Clark”) and Arch Insurance Company (“Arch”), as surety for AJP Solutions, Inc. (“AJP”). While AJP vigorously disputes Arch’s right to settle AJP’s counterclaim filed in this proceeding, AJP’s positions, as urged in its Response to Clark’s Motion to Dismiss rely upon (1) South Carolina law as that law may be applicable to the enforceability of Arch’s Indemnity Agreement; (2) other arguments principally directed to Arch’s rights under the Indemnity Agreement; and (3) Arch’s actions in entering into the settlement agreement with Clark. Those are not matters over which I have either authority or jurisdiction.

Inasmuch as the Settlement Agreement appears to be binding upon AJP and Clark, with Clark releasing its claims against AJP and Arch releasing AJP’s claims against Clark, I have no reasonable alternative but to enter this Order finding that this proceeding is now concluded. I hereby allocate all arbitration costs, including administrative fees and expenses, arbitrator fees and expenses and attorneys’ fees and expenses among Clark and AJP equally.

Based off of the above allocation Ruling, the administrative fees and expenses of the American Arbitration Association totaling \$9,900.00, and the compensation and expenses of the arbitrator totaling \$3,850.00 shall be borne equally. Therefore, AJP shall reimburse Clark the sum of \$1,375.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Clark.

Nothing in this Order is intended to affect any claim that AJP may decide to pursue against Arch.

This is the 28<sup>th</sup> day of July, 2023.


  
\_\_\_\_\_  
Ron A. Yarbrough, Arbitrator

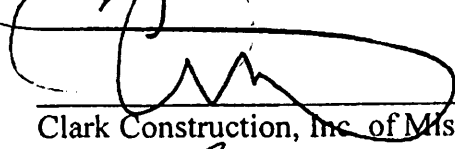
Mediation / Arch Insurance Company v. Clark Construction, Inc. of Mississippi  
AJP Solutions, Inc. – Bond Principal

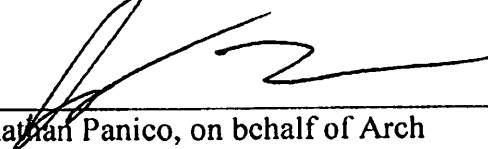
**SETTLEMENT TERMS OUTLINE**

1. Arch will pay \_\_\_\_\_ to Clark by no later than July 27, 2023;
2. Arch, as attorney-in-fact for AJP, will release AJP’s claims and any liens which it has against Clark relating to the bonded project;
3. Clark releases its claim against AJP;
4. Clark releases its claim against Arch;
5. Arch will dismiss DJ action;
6. Clark and Arch, as attorney-in-fact for AJP, will dismiss the AAA arbitration;
7. Arch will pay no AAA fees or expenses in pending arbitration;
8. Indemnity obligations from AJP and AJP indemnitors to Arch remain intact;
9. No indemnity from Arch to Clark;
10. If any clause is found to be unenforceable, the other clauses remain in full force and effect; and
11. Clark will release AJP from its warranty obligations under the bonded project.

THIS, the 6<sup>th</sup> day of July, 2023.

  
\_\_\_\_\_  
Arch Insurance Company

  
\_\_\_\_\_  
Clark Construction, Inc. of Mississippi

  
\_\_\_\_\_  
Jonathan Panico, on behalf of Arch  
Insurance Company, Attorney-in-fact  
for AJP Solutions, Inc.

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BEFORE THE AMERICAN ARBITRATION ASSOCIATION (AAA)

CLARK CONSTRUCTION, INC. OF MISSISSIPPI	)	CASE NO. 01-23-0000-0984
	)	
	)	
	)	
vs.	)	<b>AJP SOLUTIONS, LLC’S MOTION TO RECONSIDER THE ARBTRATOR’S ORDER ON CLARK CONSTRUCTION, INC. OF MISSISSIPPI’S MOTION TO DISMISS</b>
AJP SOLUTIONS, LLC	)	
	)	
	)	
	)	
	)	
	)	

AJP Solutions, LLC (AJP) hereby files this Motion to Reconsider the Arbitrator’s Order on Clark Construction, Inc. of Mississippi’s (Clark) Motion to Dismiss. The grounds for this Motion are that the Arbitrator’s refusal to consider pertinent and material evidence unfairly prejudiced AJP and amounts to a gross and imperfect execution of your duties as arbitrator.

Specifically, as implied in the Order, the Arbitrator’s authority and jurisdiction over AJP and Clark was solely based upon the subcontract between them dated December 16, 2020. Clark did not and could not argue that the subcontract provided Arch any rights or control over AJP’s claims. Rather, Clark, at Paragraphs 3 and 4 of its Motion To Dismiss, asserted that Arch under the terms of the indemnity agreement between Arch and AJP had the right as attorney-in-fact to settle this arbitration on behalf of AJP and its indemnitors. Therefore, the only reasonable way for the Arbitrator to support his ruling that *[i]n as much as the Settlement Agreement appears to be binding upon AJP and Clark, with Clark releasing its claims against AJP and Arch releasing AJP’s claims against Clark* [emphasis added], is for the Arbitrator to have determined that the general indemnity agreement provided Arch with power of attorney to act on behalf of AJP and

to settle its claims. In short, the Arbitrator's ruling necessarily relied upon matters upon which he states he has no authority or jurisdiction to consider and reliance upon the general indemnity agreement makes it incumbent upon the Arbitrator to consider whether the power of attorney terms therein are valid under South Carolina law. The Arbitrator's refusal to do so, is prejudicial to AJP, gross error and an imperfect execution of your duties as arbitrator.

For the above-stated reasons and those clearly set forth in AJP's Motion in Opposition to Clark's Motion to Dismiss, AJP moves for the Arbitrator to reconsider and revoke his Order dismissing the subject Arbitration.

CANTWELL LAW FIRM, LLC

s/Joshua P. Cantwell

Joshua P. Cantwell, Esq.

P.O. Box 600

Charleston, SC 29402

Phone: 843-801-4104

josh@cantwelllawfirm.org

*Attorney for AJP Solutions, LLC*

Charleston, South Carolina

Dated: 08/04/2023

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BEFORE THE AMERICAN ARBITRATION ASSOCIATION

CLARK CONSTRUCTION, INC.  
OF MISSISSIPPI

V.

CASE NO. 01-23-0000-0984

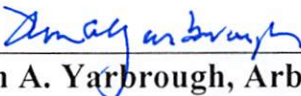
AJP SOLUTIONS, LLC

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**ORDER ON AJP SOLUTIONS, LLC'S MOTION TO RECONSIDER**

The undersigned Arbitrator, having received and reviewed AJP Solutions, LLC's Motion to Reconsider the Arbitrator's Order on Clark Construction, Inc. of Mississippi's Motion to Dismiss, hereby denies that Motion. Pursuant to Construction Industry Arbitration Rule R-51(a), I am empowered only to "correct any clerical, typographical, technical or computational errors in the Award". I am "not empowered to re-determine the merits of any claim already decided", which is what AJP Solutions, LLC's Motion seeks. Accordingly, I deny that Motion.

This is the 7<sup>th</sup> day of August, 2023.

  
\_\_\_\_\_  
Ron A. Yarbrough, Arbitrator

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
	)	
AJP SOLUTIONS, LLC	)	CASE NO. 2022-CP-18-01997
	)	
	)	
	)	
vs.	)	<b>AJP SOLUTIONS, LLC’S RESPONSE TO</b>
	)	<b>CLARK CONSTRUCTION, INC. OF</b>
CLARK CONSTRUCTION, INC. OF	)	<b>MISSISSIPPI’S MOTION TO CONFIRM</b>
MISSISSIPPI ET AL.	)	<b>ARBIRATION ORDER / MOTION TO</b>
	)	<b>DISMISS</b>
	)	
	)	
	)	
	)	

AJP Solutions, LLC (AJP) hereby files this response to Clark Construction, Inc. of Mississippi’s (Clark) Motion to Confirm Arbitration Order / Motion to Dismiss.

**LIST OF RELATED ACTIONS**

- AJP Solutions, LLC v. Clark Construction, Inc. of Mississippi et al.*, Case No. 2022-CP-18-01997  
(original action compelled to arbitration)
- Arch Insurance Company v. Clark Construction, Inc. of Mississippi*, Case No. 5:22-cv-100-ks-bwr
- Arch Insurance Company v. AJP Solutions, LLC et al*, Case No. 2:23-CV-03735-RMG

**FACTUAL BACKGROUND**

This matter arises from a payment dispute involving construction services rendered by AJP at a multi-family project located at 112 Grandview Drive Summerville, SC 29483. AJP provided painting and drywall services on the project; however, during the course of construction a payment dispute arose with Clark Construction, Inc. of Mississippi (Clark Construction), the general contractor on the project. AJP ultimately filed a mechanic’s lien against the project in September of 2022.

Subsequently, AJP filed a foreclosure action regarding the mechanic's lien in December of 2022, and Clark, in turn, made an appearance by counsel and filed a motion to dismiss and/or to compel arbitration pursuant Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the South Carolina Rules of Civil Procedure, for an order dismissing Plaintiff's Complaint for lack of subject matter jurisdiction, improper venue and failure to state a claim upon which relief may be granted, and alternatively, for an order, pursuant to 9 U.S.C.A. § 3 staying the South Carolina action as to all parties and compelling AJP and Clark to arbitration.

Arch filed a related action against Clark in the United States District Court for the Southern District of Mississippi, Western Division concerning its bond styled *Arch Insurance Company v. Clark Construction, Inc. of Mississippi*, Case No. 5:22-cv-100-ks-bwr, wherein curtailed counterclaims were filed in response by Clark against Arch.

Clark instituted an arbitration against AJP in January of 2023 through the AAA before the South Carolina court ruled upon its pending motion. AJP objected to participation in the arbitration until the South Carolina court heard the pending motion.

On May 22, 2023, counsel for Arch reached out to counsel for AJP and Clark to coordinate a global mediation. Clark's counsel informed the parties that Clark would not participate in the mediation if Clark was expected to pay any money to AJP or let AJP walk away.

On June 5, 2023, counsel for Arch asked if AJP would be ok with this arrangement for the mediation, and indicated that he had not "studied AJP's claim to know how strong it is." AJP indicated that it was not interested in that arrangement and would not be contributing to any settlement funds for Clark's claims.

In turn, Arch moved forward in coordinating the mediation with the parties and offered AJP to attend by zoom in order to help with the factual allegations concerning Clark's claims against AJP and Arch. On June 20, 2023, AJP agreed to participate in the mediation by zoom to help Arch.

On June 22, 2023, the South Carolina court ordered AJP and Clark to arbitration despite AJP's opposition to Clark's motion to compel the arbitration on several grounds.

On June 23, 2023, AJP filed an Answer and Counterclaim in the AAA arbitration.

On July 6, AJP and its counsel participated in the mediation by zoom, but AJP did not authorize Arch to resolve its arbitration claims against Clark. The discovery phase of the arbitration was ongoing, as only limited documents had been exchanged and no depositions had been taken yet. Arch misrepresented its settlement authority to Clark and the mediator despite knowing that AJP had not authorized it to resolve its claims against Clark. Clark, in turn, moved to dismiss the arbitration via the unauthorized settlement agreement. The arbitrator dismissed the proceeding based upon this misrepresentation that all claims were settled during the mediation.

### **SUMMARY OF ARGUMENT**

Clark's Motion to Dismiss should be denied because 1) Arch Insurance Company (Arch) was not a party to the arbitration and has no standing to participate in the arbitration and no rights within the arbitration forum or otherwise to settle and/or release AJP's claims and/or liens; 2) Arch has purported to take such settlement actions without authorization from AJP and in spite of the express opposition from AJP, its counsel, as well as counsel for one of the personal indemnitors at the mediation; 3) Arch has acted in bad faith by failing to properly investigate Clark's claim and AJP's defenses to its claims, failing to exercise reasonable judgment, and attempting to use AJP's counterclaims as a bargaining chip to protect Arch's own interest; 4) Arch failed to notify AJP, as well as all of the personal indemnitors, of any breach or default of its obligations under the bond or its intent to settle AJP's claims pursuant to its indemnity agreement with legal justification for such actions; and 5) Arch does not have the authority under

the indemnity agreement to exercise any purported rights in either settlement of Clark's claims or AJP's counterclaims until the occurrence of conditions precedent set forth therein.

**I. Arch did not have standing or proper authority from the purported power of attorney to participate in the arbitration.**

Arch was not a party to the arbitration and had no standing to participate in the arbitration and no rights within the arbitration forum or otherwise to settle and/or release AJP's claims and/or liens. Arch did not file a motion to intervene in the arbitration proceeding, and it cannot interpose itself into the arbitration proceeding in such a manner as creating an unauthorized and unenforceable settlement agreement with Clark in order to extinguish its own liability being litigated in a separate action and forum (*Arch Insurance Company v. Clark Construction, Inc. of Mississippi*, Case No. 5:22-cv-100-ks-bwr).

AJP's claims against Clark are separate and distinct from any claims Clark has filed against AJP and any claims Clark has filed in regard to the bond/declaratory judgment action against Arch. AJP's claims arise not only from the breach of the contractual agreement between Clark and AJP and quantum meruit but also from the South Carolina Mechanic's Lien Statute, S.C. Code section 29-5-10 *et seq.* and the bond claim against Travelers Insurance Company. Ex. A. AJP is owed and has filed claims for \$626,429.28, plus interest at the legal rate, cost, and attorneys' fees. On the other hand, Clark alleges damages of \$443,781.41 in the arbitration and additionally in the bond claim against Arch.

Clark and Arch argue that Arch's authority to reach a settlement of AJP's counterclaim derives from a general indemnity agreement between Arch and AJP. Ex. B. However, the power of attorney provisions contained in paragraph 7 of the general indemnity agreement do not comply with the South Carolina Uniform Power of Attorney Act, South Carolina Code section

62-8-101 *et seq.*, which was established in 2017, prior to the execution of the indemnity agreement. South Carolina Code section 62-8-107 provides that the meaning and effect all power of attorneys shall be determined by the law of the jurisdiction in which the power of attorney was executed (South Carolina), when it does not specifically indicate that the law of another state applies. South Carolina requires that all power of attorneys be signed by two disinterested witnesses. *See* S.C. Code section 62-8-105 (2) & S.C. Code section 62-2-502.

The general indemnity agreement did not have any witnesses sign it, and it is therefore invalid. Thus, the power of attorney provision contained in the indemnity agreement is in violation of South Carolina law, and Arch has no authority to act on behalf of AJP in this arbitration. Without actual standing to participate in this arbitration or authorization from a duly executed power of attorney, Arch cannot manipulate a settlement of the entirety of the claims and counterclaims in this arbitration as set forth by the parties, even if Clark has agreed to do so.

## **II. AJP and the personal indemnitors object to the settlement**

AJP and its personal indemnitors did not authorize the settlement agreement between Clark and Arch. While Clark and Arch may argue that Arch had the right to settle some or all of the claims involved in the dispute amongst the parties, the parties provide no legal justification or caselaw which would support such a broad interpretation of Arch's general indemnity agreement. The plain language of the agreement sets forth the assignment of certain interests to the surety with respect to claims asserted by Clark against AJP or Arch as a means of recovery for any payment made on its behalf; however, it does not give Arch specific and complete authority over any and all claims that AJP may have against Clark.

In South Carolina, Rule 43(k), SCRCF, states that “[n]o agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent

order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record or reduced to writing and signed by the parties and their counsel.” See also *Ashfort Corp. v. Palmetto Constr. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534.

As they did during the mediation, AJP and its personal indemnitors object to any settlement between Clark and Arch whereby Arch agrees to make any payment to Clark to resolve any of the claims in this arbitration. AJP contends that Clark’s claims are fabricated in response to the fact that AJP asserted a mechanic’s lien against the project, and Clark’s damages are inflated as can be shown by the mere 13 days of labor Clark contends cost it over \$400,000.00, when compared to the months and months that AJP actually spent performing the work on the jobsite. As such, without the consent of AJP any purported agreement to settle its claims is invalid.

### **III. Arch has acted in bad faith.**

There exists in every contract an implied covenant of good faith and fair dealing. *Adams v. G.J. Creel & Sons, Inc.*, 465 S.E.2d 84, 85 (S.C. 1995). Arch has acted in bad faith by failing to properly investigate Clark’s claim and AJP’s defenses to its claims, failing to exercise reasonable judgment, and tortiously interfering with AJP’s claims in the arbitration by using AJP’s counterclaims as a bargaining chip to protect Arch’s own interest.

A surety is not allowed to pay a disputed claim prematurely without a thorough investigation and determination that a claim is meritorious. A surety has a simultaneous obligation of good faith to the obligee and intended beneficiaries of its bonds as well as to the principal and indemnitors of its indemnity agreements.

In general, payment by the surety creates immediate indemnity liability on the part of the principal, so it is improper for a surety to negotiate a purported settlement of all claims prior to an evaluation of the evidence supporting said claims. In this action, the parties have exchanged documents; however, they have not yet even conducted any depositions of fact witnesses. Arch has not deposed any witnesses or conducted any interviews of AJP representatives regarding the claims at issue in the case.

The mediation amongst the parties was nothing more than a bad faith setup between Arch and Clark to negotiate a settlement extinguishing all liability of Arch at AJP's sole expense. AJP was ready, willing and able to defend against the claims asserted against it by Clark, having representatives from the company present and counsel for both the company and one of its personal indemnitors. In doing so, Arch's attempt to settle both parties' claims amounts to bad faith and its agreement is not enforceable against AJP. *See generally* Ch. 2 Liability to Indemnify and Reimburse the Surety in THE SURETY'S INDEMNITY AGREEMENT – LAW & PRACTICE 66-67 (Marilyn Klinger, Gary Judd & George J. Bachrach eds., ABA 2002) (*citing Hartford v. Tanner*, 910 P.2d 872, 881, Ct. App. An. 1996) (Holding the surety's reimbursement may be reduced or eliminated if its failure to mitigate damages constituted unreasonable conduct and practically eliminated the principal's ability to raise defenses to obligee claims).

**IV. Arch has failed to notify AJP and its personal indemnitors of a breach of any agreement.**

Under South Carolina law, an indemnity contract is construed in accordance with the rules of contract construction in general. *Campbell v. Beacon Mfg. Co., Inc.*, 438 S.E.2d 271, 272 (S.C. Ct. App. 1993). "Where the contract's language is clear and unambiguous, the language

alone determines the contract's force and effect." *McGill v. Moore*, 672 S.E.2d 571, 574 (S.C. 2009).

For Arch to take any actions with respect to the indemnity agreement at issue and purported rights therein, Arch is required to notify AJP and each of its personal indemnitors of a breach of the agreement or bond. To date, this has not been done, as these issues are certainly disputed amongst the parties and there has been no determination with respect to who breached the parties' agreement and when that breach first occurred.

At no time prior to mediation did Arch notify AJP or its indemnitors that their acts or omissions were a breach of a bonded contract, the Bond, or the Agreement, and it wasn't until Arch reach its purported agreement with Clark at the end of mediation that it first informed AJP and its indemnitor's counsel of Arch's intention to "settle" AJP's counterclaims as well. If Clark's and Arch's unfair behavior is permitted, AJP will potentially lose its ability to pursue its \$600K + claim that started this dispute where South Carolina law only allows bad faith to be used as a shield from indemnity claims by a surety and will not permit AJP to recover extra contractual damages directly from Arch. Moreover, a dismissal will deprive AJP of its due process rights and unjustly shield Clark and Travelers (Clark's surety) from having to defend against AJP's claims. Clark's self-serving assertion that any dispute regarding whether the settlement agreement should or should not have been entered into by AJP is a matter to be resolved between AJP and Arch fails to appreciate that controlling South Carolina law only allows bad faith to be used as a shield from indemnity claims by a surety and will not permit AJP to recover extra contractual damages from Arch despite its abhorrent behavior.

Furthermore, to the extent Arch/Clark attempts to argue that AJP's failure to post collateral triggered an automatic breach under the general indemnity agreement, Clark's

argument fails because Arch waived and/or is estopped from arguing the same. Specifically, after Arch's demand for collateral it requested that AJP join forces with Arch at mediation to resist Clark's claims without providing AJP or its indemnitors notice of default, its ulterior intentions, or a real opportunity to post collateral. In fact, Arch did not "renew" a demand for collateral until the day of mediation and disingenuously conditioned receipt of such collateral on that same day. In short, Arch's initial demand for collateral went stale and it therefore waived or is estopped from attempting to enforce its purported rights under the agreement.

**V. Arch does not have the right to exercise any purported assigned rights until conditions precedent occur as stated in the indemnity agreement.**

Similarly, to the lack of notice of breach of any agreement, additional conditions are required prior to Arch being able to summon the powers of its agreement. The indemnity agreement at issue provides the following:

(II) Exercise of Rights by Surety: The assignment is effective upon the date of this Indemnity Agreement, but the **Surety may exercise its rights only if** Indemnitor: (i) breaches a bonded contract, Bond, or the Agreement; (ii) is declared in default by a Bond obligee or a payment bond claim is made; (iii) makes an assignment for the benefit of creditors; an application for the appointment of a trustee or receiver is made; or files an application under the Bankruptcy Code or similar laws of any state; (iv) is subject to any proceeding which deprives it of the use of the materials referred to in (b), above; (v) is debarred or otherwise declared ineligible for public work; **and** (vi) if an individual, an Indemnitor's death, disappearance, incompetence, insolvency, conviction of a felony or imprisonment.

The aforementioned have not occurred at this point in time as the arbitration was interrupted by Arch's bad faith behavior, and therefore, Arch did not have any rights with respect to exercising any powers over the claims being pursued in the arbitration.

## CONCLUSION

For the foregoing reasons, AJP respectfully requests that Clark's Motion to Confirm the Arbitration Order / Motion to Dismiss be denied with an Order from the Court that the unauthorized settlement agreement between Clark and Arch is deemed unenforceable.

CANTWELL LAW FIRM, LLC

s/ Eliza H. Cantwell

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*Attorney for the Plaintiff*

Charleston, South Carolina

Dated: 11/27/2023



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*Attorneys for the Plaintiff*

Charleston, South Carolina

Dated: 12/28/2022



3. Upon information and belief, TCABC Real Estate Holdings, LLC, is a company organized and existing under the laws of the State of South Carolina, and is owner of record of the Subject Property located in the Town of Summerville, County of Charleston, State of South Carolina in Charleston (the "Property") described and designated as follows:

ALL that certain piece, parcel, or lot of land, together with the improvements thereon, if any, situate, lying and being in the in the Town of Summerville, County of Dorchester, State of South Carolina, known and designated as "NEW LOT 7: 253,131.63 SQ 5.8 I 1 AC," as shown on that certain plat entitled "SUBDIVISION AND PROPERTY LINE ABANDONMENT PLAT OF IMS NO. 137-04-08-017 & 13 7- 04-08-018 GRANDVIEW DRIVE TOWN OF SUMMERVILLE, DORCHESTER COUNTY, SOUTH CAROLINA," prepared by William H. Gray, Jr., SCPLS No. 22744 of Atlas Surveying, Inc., which plat is dated August 19, 2019 and was recorded in the ROD Office for Dorchester County in Plat Book N, at Page 4-4. Said lot having such size, shape, dimensions, buttings, and boundings as will by reference to said plat more fully appear.

4. Upon information and belief, Travelers Casualty and Surety Company of America ("Travelers") is organized and existing under the laws of a state other than South Carolina, and has provided Clark Construction a Bond to Release Mechanic's Lien concerning the Subject Property, a copy of which is attached as an exhibit to this Complaint.

5. This Court has personal and over the parties, in rem jurisdiction over Property, subject matter jurisdiction, and venue is proper for this Court.

#### FACTUAL ALLEGATIONS

6. This Complaint arises out of a subcontract agreement ("Agreement") between Plaintiff and Clark Construction wherein Plaintiff provided labor and materials to Defendants for project located at the Subject Property.

7. Plaintiff performed all conditions precedent to the Agreement which it had with Defendants Clark Construction; however, during the court of the work and payment dispute has arisen as a result of the work performed and monies owed.

8. After being unable to resolve the payment dispute with Clark Construction, Plaintiff filed a Mechanic's Lien against the Subject Property on September 28, 2022, attached as an exhibit to this Complaint.

9. As stated in the related Mechanic's Lien, Plaintiff is owed the sum of Six Hundred Twenty-Six Thousand Four Hundred Twenty-Nine and 28/100 Dollars (\$626,429.28), plus interest at the legal rate, the costs of this action and a reasonable sum for attorneys' fees.

10. On October 6, 2022, Clark Construction bonded off the Mechanic's Lien providing the bond issued by Travelers as security to release the mechanic's lien on the Subject Property.

FOR A FIRST CAUSE OF ACTION  
(Quantum Meruit)

11. Plaintiff incorporates by reference its previous allegations above.

12. Plaintiff conferred a benefit upon Defendants, which Defendants realized, accepted, and retained said benefit and has refused to remit full payment to Plaintiff for the benefit received.

13. The Defendants have been enriched by the labor and materials and are unjustly retaining the benefit of these labor and materials without paying Plaintiff the reasonable value thereof.

14. Under these circumstances, it would be inequitable to allow Defendants to retain said benefits without remitting full payment to Plaintiff.

FOR A SECOND CAUSE OF ACTION  
(Breach of Contract)

15. Plaintiff incorporates by reference its previous allegations above.

16. Plaintiff and Defendants entered into a binding contract whereby Plaintiff, in return for compensation, would supply labor and materials needed to complete the project under the Agreement.

17. Plaintiff fulfilled its obligations under the Agreement.

18. Defendants breached its contract with the Plaintiff and are therefore liable to the Plaintiff for the reasonable value of labor and materials, plus prejudgment interest from the date said labor and materials were supplied, for costs rendered herein, and for attorney's fees incurred as a result of this action.

19. Plaintiff has been damaged as a direct proximate result of Defendants' breach.

FOR A THIRD CAUSE OF ACTION  
(Violation of S.C. Code Ann. § 27-1-15)

20. Plaintiff incorporates by reference its previous allegations above.

21. Plaintiff made a due and just demand for payment for its services.

22. Pursuant to S.C. Code Ann. §27-1-15, Defendants had a duty to conduct a reasonable and fair investigation into the merits of the claim and to pay that portion of the claim which is valid.

23. Defendants have not conducted a reasonable and fair investigation into the merits of the Plaintiff's claim.

FOR A FOURTH CAUSE OF ACTION  
(Foreclosure of Mechanic's Lien against Bond)

24. Plaintiff incorporates by reference its previous allegations above.

After numerous attempts to collect the amounts owed to Plaintiff, Plaintiff filed a Notice and Certificate of Mechanic's Lien with an Affidavit of Account with the Dorchester County Register of Deed's Office.

25. The Plaintiff's Mechanic's Lien has been bonded off the Subject Property by Clark Construction and therefore Plaintiff seeks all available damages against the bond, as set forth herein, including the sum stated on the Statement of Account, the costs of this action, interest

from the date of the delivery of the materials and labor, a reasonable sum as attorney's fees for this action, and such other and further relief as is appropriate.

WHEREFORE, having fully set forth the basis for the claims for relief set forth herein, Plaintiff prays for a judgment granting:

- a. Actual and consequential damages against the Defendants;
- b. Attorney's fees, costs, and prejudgment interest;
- c. An order of judgment/payment due against the bond; and
- d. Such other such relief as this Court finds appropriate.

CANTWELL LAW FIRM, LLC

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*Attorneys for the Plaintiff*

Charleston, South Carolina

Dated: 12/28/2022

ARCH INSURANCE COMPANY INDEMNITY AGREEMENT

ELECTRONICALLY FILED - 2023 Nov 27 9:04 AM - DORCHESTER - COMMON PLEAS - CASE#2022CP1801997

Indemnitor represents that all statements made in the Application are true and made without reservation to induce Surety to extend surety credit on its behalf in reliance upon the Agreement; confirms that it has a material and beneficial interest in the provision of each Bond requested including Bonds requested in other Applications or as otherwise permitted; and hereby agrees with Surety as follows:

1. Definitions applicable to the Indemnity Agreement:

Agreement: This Indemnity Agreement, and any other agreement between Indemnitor and Surety executed for Surety's benefit.

Bonds: Any and all bonds or other obligations, renewals, extensions, replacements and substitutions thereof, issued prior to or after the execution of this Agreement, and issued for or at the request of Indemnitor.

Indemnitor: Each and all of the undersigned, their current and future subsidiaries and affiliates, and any person or business entity added by written amendment (to which amendment Indemnitors hereby agree may be executed solely by that new Indemnitor), joint and severally, whether acting alone or in joint venture with others, and, as to all of them, their successors, assigns, and heirs. Where used in the Agreement, the term applies to Indemnitors individually and collectively.

Loss: Claims, losses, liability, damages of any type (including punitive), costs, fees, expenses, suits, orders, judgments, or adjudications whatsoever, and interest thereupon from the date upon which Surety incurs a Loss or posts reserves in anticipation of Loss, which Surety may incur in any manner relating to the extension of surety credit, including the enforcement of the Agreement.

Surety: Arch Insurance Company and/or Arch Reinsurance Company or any other entity for which Arch Insurance underwrites surety bonds, severally not jointly; their respective successors and assigns; any co-surety, reinsurer, or surety that issues a Bond at the request of Surety.

2. Premiums: To pay premiums when due, and to deliver evidence satisfactory to Surety, of the release of all liability;

3. Indemnity: To exonerate, indemnify and hold harmless Surety from and against all and all Loss;

4. Place in Funds: To place Surety in funds immediately upon demand in the amount Surety deems necessary to protect itself from any Loss or potential Loss, Surety having the right to use all or part of the funds in payment, settlement, or reimbursement to itself of any Loss;

5. Assignment: (I) Scope: Indemnitor assigns and pledges to Surety as security, a lien and security interest in its interest, title, and rights in and growing out of the following: (a) any bonded contract, any agreement related to a bonded contract including any labor or supply subcontract and any bond in support thereof, and any action, claim or demand which Indemnitor may acquire against any party to these contracts or otherwise related to a bonded contract; (b) all machinery, supplies, equipment, plant, tools and materials which are or may be on the site of the bonded contract, including materials purchased, being constructed, in storage, or in transit; (c) to the extent Surety determines necessary to fulfill or complete bonded obligations: licenses, patents, copyrights, trade secrets, limited partnership and general partnership interests; (d) any funds that are due or may become due on a bonded contract or other contract, including retention and recovery from claims. (II) Exercise of Rights by Surety: The assignment is effective upon the date of this Indemnity Agreement, but the Surety may exercise its rights only if Indemnitor: (i) breaches a bonded contract, Bond, or the Agreement; (ii) is declared in default by a Bond obligee or a payment bond claim is made; (iii) makes an assignment for the benefit of creditors; an application for the appointment of a trustee or receiver is made; or files an application under the Bankruptcy Code or similar laws of any state; (iv) is subject to any proceeding which deprives it of the use of the materials referred to in (b), above; (v) is debarred or otherwise declared ineligible for public work; and (vi) if an individual, an Indemnitor's death, disappearance, incompetence, insolvency, conviction of a felony or imprisonment.

6. Security Agreement: This Agreement shall constitute a Security Agreement to the Surety and a Financing Statement, both in accordance with the Uniform Commercial Code of every jurisdiction in which such Code is in effect, but the filing or recording of the Agreement shall be solely at Surety's option, and the failure to file shall not release or impair any Indemnitor's obligations under the Agreement or otherwise, nor shall it be in any manner in derogation of any of the Surety's rights.

7. Power of Attorney: Indemnitor irrevocably appoints Surety as Attorney-in-fact with the full right and authority, but not the obligation, to exercise the rights of Indemnitor assigned to Surety above, and to execute on behalf of and sign Indemnitor's name to any document deemed necessary by Surety to give full effect to the purposes of the Agreement. Indemnitor hereby ratifies all acts taken by Surety as attorney-in fact, acknowledges that this power of attorney is a power coupled with an interest, and agrees to hold harmless Surety from any claims, damages, loss or expense incurred by its use.

8. Surety's Rights: (a) Loss: Surety has the right at its sole discretion to pay or settle any Loss and the sworn voucher of payment signed by Surety shall be prima facie evidence of Indemnitor's liability; (b) Suits: Surety may bring separate lawsuits to recover under the Agreement, and doing so or recovering by way of judgment upon a cause of action shall not prejudice or bar the bringing of suits upon other causes of action, whenever they may arise; (c) Other Agreements: Any rights Surety may have or acquire against Indemnitor under the Agreement are in addition to and not in lieu of any rights afforded Surety under any other agreement related to surety credit; and, if Surety executes any Bond with a co-surety or reinsures all or part of a Bond, all the terms of the Agreement shall apply and operate for the benefit of the co-surety and reinsurer, as their interests may appear; (d) Decline or Cancel Bonds: Surety shall have the right to decline or cancel a Bond at any time, free of claim for loss or damage by Indemnitor, and Surety shall be under no obligation to disclose its reasons therefore, the provisions of any law to the contrary being hereby waived; (e) Non-waiver: the exercise, delay or failure by Surety to exercise any right, remedy or power whatsoever shall not preclude any subsequent exercise or waiver of these or any other rights, remedies by the Surety.

9. This Application may be executed in multiple counterparts, each being deemed an original but all of which constitute one and the same agreement.

10. This Document: If the execution of this Agreement shall be defective for any reason, such defect or invalidity shall not affect the validity of the Agreement as to any other Indemnitor. If any provision is held invalid, the remaining provisions shall retain their full force and effect. A facsimile, photocopy, or electronic reproduction shall be considered an original and shall be admissible in a court of law to the same extent as an original.

11. Termination: Indemnitor may terminate its indemnity obligations under this Indemnity Agreement for future bonds upon twenty (20) days written notice to Surety, sent by registered or certified mail, to Three Parkway, Suite 1500, Philadelphia, PA 19102, Attn: Surety Department.

Such notice shall not modify or discharge Indemnitor's obligations for Bonds authorized, executed, or committed to by Surety prior to the discharge date (including renewals, extensions, modifications and substitutions), or for final Bonds issued for bid bonds issued prior to the discharge date.

12. Effective Date: This document shall be effective on the date it is executed by one or more Indemnitors.

This Indemnity Agreement is dated: December 31, 2020

By signing below, each individual signing on behalf of a business entity represents and warrants that he or she is duly authorized by the business entity to bind it to this Indemnity Agreement:

Indemnitor (Business):
Company Name: AJP Solutions LLC
Authorized Signature: [Signature]
Printed Name: Michael Wethington

Indemnitor (Individual):
Signature: [Signature]
Printed Name: Michael Wethington

Indemnitor (Individual):
Signature: [Signature]
Printed Name: Antonio Pino

Indemnitor (Individual):
Signature: [Signature]
Printed Name: Matthew Shirkman

Indemnitor (Spouse):
Signature: [Signature]
Printed Name: Brandee Wethington

Indemnitor (Spouse):
Signature: [Signature]
Printed Name: Airett Pino

Indemnitor (Spouse):
Signature: [Signature]
Printed Name: Jennifer Shirkman

RECEIVED

Sep 06 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE DORCHESTER COUNTY  
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2024-000698

AJP Solutions, LLC

Respondent,

v.

Clark Construction, Inc., of Mississippi

Appellant.

PROOF OF SERVICE

I, hereby certify that the enclosed was served on the parties stated below by emailing a copy of the enclosed document(s) to opposing counsel:

Bryan Kelley, Esq  
Elmore Goldsmith Kelley and DeHoll, PA  
[bkelly@elmoregoldsmith.com](mailto:bkelly@elmoregoldsmith.com)

September 6, 2024.

THURMOND KIRCHNER & TIMBES, P.A.

BY: *Kaitlyn Nobles*  
KAITLYN NOBLES