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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Court of Common Pleas Case No. 2022-CP-18-01997
Appellate Court Case No. 2024-000698

AJP Solutions, LLC, ...Respondent,

v.

Clark Construction, Inc. of Mississippi, TCABC Real Estate Holdings, LLC,
and Travelers Casualty and Surety Company of America, Defendants,

of which

Clark Construction, Inc. of Mississippi is the Appellant.

APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS

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TABLE OF AUTHORITIES.....	ii
INTRODUCTION	1
PROCEDURAL BACKGROUND	1
LEGAL STANDARD	3
ARGUMENT.....	4
I. An “award” has been issued by the arbitrator.	4
II. The Trial Court’s Order was an Order denying confirmation of the Award and is thus immediately appealable.	7
A. <i>The substance of relief requested by Clark was one for confirmation of an arbitration award and dismissal of the state court action despite the prayer in Clark’s Motion to Confirm asking for only dismissal.</i>	7
B. <i>The substance of the relief requested for confirmation of the Arbitration Award is clearly evidenced in the record.</i>	9
III. The Trial Court’s Order directing the parties to go back and participate in further arbitration proceedings has no effect on this Court’s jurisdiction.....	11
A. <i>Confirmation and/or vacation of the Award is governed by South Carolina’s procedural rules set forth in the South Carolina Uniform Arbitration Act.</i>	12
B. <i>The Trial Court’s Order affects a procedural right of Clark and is thus subject to immediate appeal.</i>	14
IV. Clark acknowledges that an “award” is distinguishable from a “settlement.”	15
V. AJP is not permitted to attempt to relitigate the merits of the Arbitrator’s resolution of this dispute in asserting lack of appellate jurisdiction under the guise of questioning the arbitrator’s powers where the arbitration agreement delegated all decision regarding arbitrability arising out of or relating to the Parties’ dispute to the arbitrator.	16
CONCLSUION.....	19

TABLE OF AUTHORITIES

Cases

<i>Beaty v. Mass. Protective Ass'n</i> , 160 S.C. 205, 158 S.E. 206 (1931).....	9
<i>Bollmann v. Bollmann</i> (1875) 6 S.C. 29	18
<i>CFRE, LLC v. Greenville Cnty. Assessor</i> , 395 S.C. 67, 716 S.E.2d 877 (2011).....	5
<i>Fountain v. Fred's, Inc.</i> , 429 S.C. 533, 839 S.E.2d 475 (Ct. App. 2020).....	8, 9
<i>Gissel v. Hart</i> , 382 S.C. 235, 676 S.E.2d 320 (2009).....	17
<i>Hall St. Assocs. v. Mattel, Inc.</i> , 552 U.S. 576 (2008)	12
<i>Henderson v. Summerville Ford-Mercury Inc.</i> , 405 S.C. 440, 748 S.E.2d 221 (2013).....	12, 15, 16
<i>Henry Schein, Inc. v. Archer & White Sales, Inc.</i> , 139 S. Ct. 524 (2019)	16
<i>Jones v. Dancel</i> , 792 F.3d 395 (4th Cir. 2015).....	17
<i>Miller v. Prudential Bache Securities, Inc.</i> , 884 F.2d 128 (4th Cir. 1989)	6
<i>Mitchell v. De Schamps</i> (1866) 34 S.C. Eq. (13 Rich.)	18
<i>Mulder v. Cravat</i> (1802) 2 S.C.L. (2 Bay) 370.....	18
<i>Patten v. Signator Ins. Agency, Inc.</i> , 441 F.3d 230 (4th Cir. 2006)	16
<i>Russell v. City of Columbia</i> , 305 S.C. 86, 406 S.E.2d 338 (1991)	8
<i>Sentry Engineering and Const., Inc. v. Mariner's Cay Development Corp.</i> , 287 S.C. 346, 338 S.E.2d 631 (1985).....	13

Statutes

S.C. Code Ann. § 14-3-330	14
S.C. Code Ann. § 15-48-120	7, 12
S.C. Code Ann. § 15-48-130	12, 13, 14
S.C. Code Ann. § 15-48-140	12
S.C. Code Ann. § 15-48-170	12
S.C. Code Ann. § 15-48-20	13
S.C. Code Ann. § 15-48-200	3, 14
S.C. Code Ann. § 15-48-90	4

Rules

Rule 201, SCACR.....	3
Rule 54, SCRCPP	6
Rule 8, SCRCPP	8

Treatises

2 S.C. JUR. <i>Arbitration</i> § 9	3
4 AM. JUR. 2D <i>Alternative Dispute Resolution</i> § 172	5, 14
4 AM. JUR. 2D <i>Alternative Dispute Resolution</i> § 179.....	6
4 AM. JUR. 2D <i>Alternative Dispute Resolution</i> § 195.....	6
6 C.J.S. <i>Arbitration</i> § 162.....	11
6 C.J.S. <i>Arbitration</i> § 178	15

Dictionary

BLACK'S LAW DICTIONARY (12th ed. 2024) 4, 6

Other Authorities

Rule 49, American Arbitration Association Construction Industry Rules 5

INTRODUCTION

Appellant Clark Construction, Inc. of Mississippi (“Clark”) herein submits its Return to Respondent AJP Solutions, LLC’s (“AJP”) Motion to Dismiss. For the reasons set forth below, AJP’s motion should be denied because this Court has appellate jurisdiction over this appeal as it involves the Trial Court’s denial of a motion to confirm an arbitration “award” despite AJP’s colorful assertion that such no such “award” exists.

PROCEDURAL BACKGROUND

This appeal arises out of an Order of the Dorchester County Court of Common Pleas (the “Trial Court”) denying Clark’s Motion to Confirm an Arbitration Award (hereinafter “Clark’s Motion to Confirm”) and ordering this matter back to arbitration. The procedural history of the appeal involves an intertwined arbitration before the American Arbitration Association (the “AAA”) and the underlying lawsuit before the Trial Court. A brief summary of the procedural history is set forth below.

This dispute arose out of the construction of an assisted living facility in Dorchester County (the “Project”), in which Clark served as general contractor and AJP served as a subcontractor. On December 28, 2022, AJP filed a mechanic’s lien foreclosure action against Clark and other interested parties. On March 6, 2023, Clark filed a Motion to Dismiss or in the Alternative to Stay and Compel Arbitration. (*See* Clark’s Motion to Dismiss or in the Alternative to Stay and Compel Arbitration, attached hereto as **Appendix I**). The Trial Court stayed the instant action and referred the disputes between Clark and AJP to arbitration before the AAA by Order dated June 22, 2023. (*See* Order to Stay and Compel Arbitration, issued June 22, 2023, attached hereto as **Appx. II**). In its order, the Honorable George M. McFaddin determined that the arbitration agreement between the parties delegated all decisions regarding arbitrability to the arbitrator. *Id.*

The matter accordingly proceeded to arbitration before the AAA, which included both AJP's lien-related claims and counterclaims asserted by Clark seeking excess completion costs after its termination of AJP from the Project for cause. However, soon thereafter the AAA Arbitrator dismissed the arbitration based on a settlement agreement entered between Clark and Arch Insurance Company ("Arch"), which the Arbitrator deemed to resolve all claims referred to arbitration. (*See* Clark's Motion to Confirm, Ex. D, attached hereto in **Appx. III**). In dismissing the arbitration proceedings, the arbitrator issued an order on July 28, 2023 (the "Arbitration Award") which provides in pertinent part:

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.

Id. (emphasis added).

Upon issuance of the Arbitration Award, AJP filed a motion asking the arbitrator to reconsider. (*See* Clark's Motion to Confirm, Ex. E, attached hereto in **Appx. III**). The arbitrator denied AJP's motion to reconsider by order dated August 9, 2023, which provides in pertinent part: "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." (*See* Clark's Motion to Confirm, Ex. F, attached hereto in **Appx. III**).

On August 14, 2023, Clark filed a Motion to Confirm the Arbitration Order ("Clark's Motion to Confirm") with the Trial Court. (*See* Clark's Motion to Confirm, attached hereto as **Appx. III**). Importantly, AJP declined to file a Motion to Vacate the Arbitrator's Order which Clark's underlying Motion sought to confirm. The Honorable Diane Schafer Goodstein heard oral arguments on Clark's Motion to Confirm in a virtual proceeding on November 27, 2023. (*See*

generally Clark’s Motion to Confirm, Hearing Transcript, attached hereto as **Appx. IV**). On the day of the hearing, AJP for the first time objected to Clark’s Motion to Confirm, one hundred twenty-two days after the Arbitration Award was issued.

On January 10, 2024, the Trial Court entered an Order denying Clark’s Motion to Confirm and ordering the parties back to arbitration. (*See* Order denying Clark’s Motion to Confirm issued January 10, 2024, attached hereto as **Appx. V**). On January 19, 2023, Clark filed a Motion to Alter or Amend (“Motion to Reconsider”) the Trial Court’s Order. (*See* Clark’s Motion to Reconsider, filed January 19, 2023, attached hereto as **Appx. VI**). On April 1, 2024, the Trial Court issued an Order Denying Clark’s Motion to Reconsider. (*See* Order denying Clark’s Motion to Reconsider, attached hereto as **Appx. VII**).

Clark served its Notice of Appeal on counsel for AJP on April 26, 2024, and filed same with this Court on April 26, 2024.

On September 6, 2024, and for the very first time, AJP has raised the issue of appellate jurisdiction in its Motion to Dismiss this appeal (“AJP’s Motion to Dismiss”) by arguing that no “award” was issued by the arbitrator and Clark’s Motion to Confirm was in fact a motion to dismiss. AJP has incorrectly asserted that this appeal is interlocutory, and therefore this Court lacks jurisdiction.

LEGAL STANDARD

“Appeal may be taken, as provided by law, from any final judgment or appealable order or decision...” Rule 201, SCACR. “Orders affecting arbitration proceedings are subject to interlocutory appeal.” 2 S.C. JUR. *Arbitration* § 9. An appeal may be taken from an order denying confirmation of an arbitration award. S.C. Code Ann. § 15-48-200 (a)(3).

ARGUMENT

Appellate jurisdiction is properly exercised over this appeal because this appeal is taken directly from an order by the Trial Court denying confirmation of an arbitration award. As such, AJP's Motion to Dismiss should be denied.

I. An “award” has been issued by the arbitrator.

In its Motion to Dismiss this appeal, AJP asserts that “there was no arbitration ‘award’ to confirm.” (AJP's Motion to Dismiss, at p. 6). This assertion is flawed. While we concede that the arbitrator did not hand out any trophies or issue any payment or compensation, that does not mean that arbitrator's order stating that the arbitration is now concluded is not an “award.” The Arbitration Award clearly states that, “*this [arbitration] proceeding is now concluded.*” (Appx. III, at Ex. D) (emphasis added).

Black's Law Dictionary defines an “arbitration award” as “[a] *final decision by an arbitrator* or panel of arbitrators; specif., a written decision by an arbitration tribunal setting forth the *final and binding determination of the merits of a claim, defense, or issue...*” *Arbitration Award*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added). Black's Law Dictionary further defines an “award” as “*a final judgment or decision*, esp. one by an arbitrator or by a jury assessing damages. – Also termed arbitrament.” *Award*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added). Arbitrament is defined as “1. The power to decide *finally* and *absolutely* for oneself or others. 2. The act of *deciding* or settling *a dispute that has been referred to arbitration...*” *Arbitrament*, BLACK'S LAW DICTIONARY (12th ed. 2024) (emphasis added).

The South Carolina Arbitration Act provides that, “the award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement...” S.C. Code Ann. § 15-48-90(a). Here,

the Arbitrator's order was in writing, signed by the arbitrator, and delivered to the parties. That the arbitrator's order concluding the arbitration between AJP and Clark is an "Award" cannot be subject to reasonable debate, despite AJP's attempt to force a limiting reading of the term's operation. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. In doing so, [courts] must give the words found in a statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Thus if the words are unambiguous, we must apply their literal meaning." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citations and quotations omitted).

"An arbitrator's "award" is a statement of the outcome. The decision of the Arbitrator determining the disputed matters submitted to them is the award." 4 AM. JUR. 2D *Alternative Dispute Resolution* § 172. AJP's argument rests on the premise that *no* arbitration award exists without a monetary component or some affirmative relief. This suggests that any arbitrator's dismissal of claims determined to be baseless does not constitute an award, and that by extension, the arbitrator does not have the power to adjudicate claims by dismissing them. Simply put, AJP's position is not based on logic or well-settled jurisprudence.

The Arbitration Award at issue in this appeal was a decision, made and entered by the arbitrator that finally and absolutely decided the dispute between Clark and AJP that was submitted to it. That is to say, it ended either party's pursuit of claims against the other, whether in arbitration or elsewhere. In fact, the American Arbitration Association Rules clearly provide that "[t]he arbitrator may grant ***any remedy or relief*** that the arbitrator deems just and equitable and within the scope of the agreement of the parties." Rule 49, American Arbitration Association Construction Industry Rules (emphasis added). The power to award a remedy—including

dismissal—is part and parcel of the arbitration process, and an arbitrator has broad authority to fashion a remedy.¹ 4 AM. JUR. 2D *Alternative Dispute Resolution* § 179. Undoubtedly, dismissal of the arbitration proceedings is a remedy or relief which the arbitrator was permitted to issue. The Circuit Court’s denial of Clark’s Motion to Confirm this award is immediately appealable – a notion conceded by AJP in its Motion to Dismiss this appeal.

Analogous to this authority is Rule 54 of the South Carolina Rules of Civil Procedure, which defines “judgment” as “any decree or order which dismisses the action as to any party or finally determines the rights of any party...” Rule 54, SCRPC. Likewise, Black’s Law Dictionary defines “judgment” as “[a] court or other tribunal’s *final determination of the rights and obligations of the parties in a case*; also, the act or action of making such a determination.” *Judgment*, BLACK’S LAW DICTIONARY (12th ed. 2024) (emphasis added). Just as any judicial order dismissing a cause or causes of action, whether made under Rule 12 or Rule 55 or otherwise, is considered a “judgment,” logic can only infer that an arbitrator’s order dismissing causes of action or, as is the case in the present dispute, concluding arbitration proceedings in its entirety is a “judgment.” “An arbitrator’s judgment has the same effect as a judgment of a court of last resort.” 4 AM. JUR. 2D *Alternative Dispute Resolution* § 195.

Here, the award is certain, explicit, and definite. To agree with AJP’s cursory conclusion that no “award” exists would flout the entire purpose of arbitration by sending parties back and forth on a never-ending adventure between arbitral and judicial tribunals at the whim of the losing

¹ For example, the Fourth Circuit has recognized the obvious fact that an arbitrator’s dismissal of a claimant’s claim is in fact an award. *Miller v. Prudential Bache Securities, Inc.*, 884 F.2d 128, 129 (4th Cir. 1989) (deciding a motion to vacate an arbitration award when “the arbitration panel unanimously granted appellees’ motion to dismiss the claims” based on the applicable statute of limitations.)

party. To allow AJP's argument to prevail would be to grant it a second bite at the apple. Certainly, such notion cannot withstand an inquiry into reason.

II. The Trial Court's Order was an Order denying confirmation of the Award and is thus immediately appealable.

Whether one views Clark's Motion in light in which Clark plainly stated it or through AJP's convoluted looking glass, the fact remains that the relief Clark sought was relief by confirmation of an Arbitration "Award." Given the arbitrator's Order dismissing the arbitration, Clark's Motion for confirmation of that award and dismissal of the underlying state court action was appropriate. Crucial to Clark filing its Motion to Confirm and Dismiss the judicial action, was the fact that a final award had been issued by the arbitrator which concluded the arbitration proceedings. There remained no justiciable issues nor any arbitrable issues between Clark and AJP after the Arbitrator issued its final Order.

Furthermore, and fatal to the underlying basis for AJP's counterarguments, the record is absent of any timely motion raised by AJP to vacate, confirm, or modify the Arbitrator's Order. *See* S.C. Code Ann. § 15-48-120 ("Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140."). AJP cannot now come to this Court to complain that it lacks appellate jurisdiction merely because it disagrees with the legal effect of the Award due to the results of the arbitration turning out to be adverse to it.

A. The substance of relief requested by Clark was one for confirmation of an arbitration award and dismissal of the state court action despite the prayer in Clark's Motion to Confirm asking for only dismissal.

AJP now raises issue to the substance of the relief requested in Clark's Motion to Confirm, by looking to the express language in the prayer for relief. AJP is correct in that the explicit

language used in its Prayer within Clark’s Motion to Confirm provides that Clark “prays that the Court enter an Order dismissing Plaintiff’s Complaint WITH PREJUDICE.” (See **Appx. III**, at p. 4). AJP’s argument rests on the premise that, had the trial court ruled differently, its claims against Clark would indeed have been dismissed. But the fact that such a result is shared by a successful motion to dismiss does not make the two one and the same.

Rule 8 of the South Carolina Rules of Civil Procedure governs the general rules of pleading procedures in state court. While Rule 8(a) provides that, “a pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain...(3) a prayer or demand for judgment for the relief to which he deems himself entitled,” respectfully, Clark’s Motion to Confirm is not a pleading setting forth a cause of action mandating that an *ad damnum* clause is required to provide notice to the opposing party of the remedy sought against it. Rule 8(a)(3), SCRCP. Clark’s Motion to Confirm is rather an application to the Trial Court to issue a specific ruling or order. Regardless it is clear from the record that Clark requested confirmation of the Arbitration Award and AJP was well aware that was the relief sought by Clark from the Trial Court.

Rule 8 continues on to provide that “[a]ll pleadings shall be construed as to do substantial justice to all parties.” Rule 8(f), SCRCP. “In order to achieve substantial justice for all parties, our courts have determined that pleadings should be construed *liberally*.” *Fountain v. Fred's, Inc.*, 429 S.C. 533, 554, 839 S.E.2d 475, 486 (Ct. App. 2020), *rev’d on other grounds*, 436 S.C. 40, 871 S.E.2d 166 (2022) (citing *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (emphasis added)). The South Carolina Supreme Court, “has repeatedly held that the plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence, without regard to the form of the prayer for relief; that is, he will be given such relief as he may be entitled to

notwithstanding that the prayer for relief is defective.” *Beaty v. Mass. Protective Ass’n*, 160 S.C. 205, 207, 158 S.E. 206, 207 (1931); *Fountain v. Fred’s, Inc.*, 429 S.C. 533, 554, 839 S.E.2d 475, 487 (Ct. App. 2020), *rev’d on other grounds*, 436 S.C. 40, 871 S.E.2d 166 (2022).

Contrary to AJP’s contention in AJP’s Motion to Dismiss, AJP has focused only on the form of the prayer rather than the substance of the relief requested in Clark’s Motion to Confirm. Clark should not be confined to the one sentence in its Prayer for Relief, such that this Court is divested of appellate jurisdiction, because the trial court was constrained by statute only to confirm the award on Clark’s Motion.

B. The substance of the relief requested for confirmation of the Arbitration Award is clearly evidenced in the record.

In Clark’s Motion to Confirm, Clark asked the Trial 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.” (Appx. III, at p. 1) (emphasis added). The Trial Court’s January 10, 2024 Order denying confirmation acknowledges Clark’s Motion was a motion to confirm an arbitration Award:

THIS MATTER comes before the Court on 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.

(Appx. V, at p. 1) (emphasis added).

To further cement the fact that this was a motion to Confirm, in the Trial Court’s April 1, 2024 Order Denying Clark’s Motion to Reconsider, the Trial Court stated:

This matter came before the Court on the motion of Defendant Clark Construction, Inc. of Mississippi (“Clark”) to ***confirm the arbitration order*** issued in this matter and dismissing this action with prejudice.

....

The primary issue before the Court on November 27, 2023, was whether the arbitration order should be confirmed given the circumstances as described. Upon review of the materials filed by the parties and the arguments presented by counsel, *the Court denied Defendant Clark's motion to confirm the arbitration order* and ordered the parties back to arbitration to resolve the claims asserted.

(Appx. VII, at p. 2) (emphasis added).

In fact, the transcript of the November 27, 2023 hearing confirms that the motion before the Trial Court was a Motion to Confirm the Arbitration Award:

MR. KELLEY: Good afternoon, Your Honor. I'm Bryan Kelley. I represent the defendants. *It is my motion to confirm an arbitration order* -- orders, to be more accurate.

....

(Appx. IV, 1:7-10) (emphasis added).

[MR. KELLEY:] And so, I guess, to summarize our position, it is that the arguments that Mr. Cantwell is making before the Court today have been considered by the arbitrator. There is no indication that there was any manifest disregard when the arbitrator rejected those arguments. Mr. Cantwell has filed a motion within the arbitration to reconsider, which the arbitrator also denied. The last point I'll make, Your Honor, is that *we're asking the Court in confirming the arbitration reward* [sic], which ended the arbitration based on the settlement, that the -- the claims against the owners and the discharge bond surety should be dismissed, in addition to the claims brought against Clark, because the only liability that the owner or the discharge bond surety would have would be derivative of any liability that Clark would have to AJP.

....

(Appx. IV, 13:1-10) (emphasis added).

[MR. CANTWELL:] Now, even if Arch were able to have some sort of interest in whatever arbitration award was settled at the end of the arbitration, that's just a lien or security interest. There was no assignment of an entire claim. And so, Your Honor, because of this, and the reasons that we've cited in our brief, *we are asking the Court to deny the defendants' motion to confirm the order* of the court [sic], and ask the Court to deem the settlement agreement unenforceable, *and send the case back to arbitration* so that the parties can decide the facts on the merits and not by some bad faith action of an insurance company jumping in to save its own neck and putting its insured out to lose everything.

....

(Appx. IV, 21:13-25; 22:1-2) (emphasis added).

[MR. KELLEY] *All we're asking the Court to do is to confirm that award*, and Mr. Cantwell is asking you to determine whether or not the entry of that order is a manifest disregard of the law. We certainly, obviously, contend that it is not. But everything else that we're talking about today is really between AJP and Arch. And they have -- they have a court case where they can fight that out. We don't take a position as to whether or not AJP has a claim against Arch or a defense against AJP. *We are simply asking the Court to look at the arbitrator's order*, look at the settlement agreement where the claims were released, *and confirm it and dismiss the case*.

....

(Appx. IV, 30:4-17) (emphasis added).

Because an award had been issued by the arbitrator, the Trial Court's Order denying confirmation is immediately appealable, despite the fact that the Trial Court ordered the parties back to arbitration. As AJP sets forth in its Motion to Dismiss, "resolution of the merits of a dispute is the touchstone of appealability." (AJP's Motion to Dismiss, p. 8). A determination that a party has released its claims is a decision on the merits. The merits have been resolved. There is nothing further to be done. The Arbitration Award concluded the arbitration proceedings in their entirety. Just because AJP disagrees with the legal effect of the Arbitration Award, does not make such award lack finality. *See* 6 C.J.S. *Arbitration* § 162 (discussing arbitration awards as final where it conclusively determined the matters submitted to the arbitrator, leaving nothing left to be done but execute and carry out the award's terms).

III. The Trial Court's Order directing the parties to go back and participate in further arbitration proceedings has no effect on this Court's jurisdiction.

Clark appeals the Trial Court's Order because it grossly exceeded its statutory authority, not because it denied an ordinary motion to dismiss. This Court is not divested of appellate jurisdiction even though the Trial Court sent the matter back to arbitration, where it exceeded the scope of the severely limited judicial review afforded to it by the South Carolina Uniform Arbitration Act, because AJP raised no motion to vacate, modify or confirm the Arbitration Award.

A. Confirmation and/or vacation of the Award is governed by South Carolina's procedural rules set forth in the South Carolina Uniform Arbitration Act.

South Carolina law prescribes four statutory procedural grounds for a court's extremely narrow judicial review of an arbitration award. The South Carolina Uniform Arbitration Act provides that a court can confirm, vacate, modify, or correct an "Award," save upon the extra-statutory ground of applying a "judicial gloss" in determining whether an arbitrator "manifestly disregarded the law." *See* S.C. Code Ann. §§ 15-48-120; 15-48-130; and 15-48-140. There is a limit upon which a court can impose its severely limited judicial review of an arbitration award upon these grounds as the law sets forth certain requirements before a court can review an Award.² *See* S.C. Code Ann. §§ 15-48-120, 15-48-130, and 15-48-140.

The Trial Court's January 10th Order was one in which it denied confirmation of an award, while at the same time granted relief to AJP that was neither asked for nor allowed under the South Carolina Uniform Arbitration Act in sending this matter back to arbitration. *See* S.C. Code Ann. § 15-48-120 ("Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140). The only 'prescribed' exception which allows a court to direct a rehearing before the arbitrator who made the award is through vacation. Yet, in order for a trial court to consider vacating an Award, the party opposing confirmation is required to raise a motion³ to vacate "within ninety days of delivery

² "[T]he provision for judicial confirmation carries no hint of flexibility and the statement the court must grant the application unless the award is vacated, modified, or corrected is one which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exception applies." *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 453 n. 7, 748 S.E.2d 221, 228 n. 7 (2013) (quoting *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (internal quotations omitted).

³ *See* S.C. Code Ann. § 15-48-170 ("Except as otherwise provided, *an application to the court under [the South Carolina Uniform Arbitration Act] shall be by motion and shall be heard in the*

of a copy of the award.” *See* S.C. Code Ann. § 15-48-130(b) and (c). Because the Arbitration Award had been issued, in order for the Trial Court to be permitted to vacate the Arbitration Award and send this matter back for rehearing, AJP was required within ninety (90) days after delivery of a copy of the award to file a motion with the Trial Court. *See* S.C. Code Ann. § 15-48-130. AJP never filed such a motion.

The South Carolina Supreme Court has expressly prohibited a Trial Court from vacating an award, even when the arbitrator potentially decided issues that were not subject to arbitration, because the aggrieved party failed to file a motion to vacate or modify within 90 days, stating:

S.C. Code Ann. Sections 15–48–130 (Supp.1984) and 15–48–140 (Supp.1984) provide the exclusive procedures for vacating or modifying awards where arbitrators exceed their powers or award upon a matter not properly submitted to them. [Appellant] filed no motion to vacate or modify within 90 days of delivery of a copy of the award. Consequently, the award became the law of the case.

Sentry Engineering and Const., Inc. v. Mariner's Cay Development Corp., 287 S.C. 346, 350–51, 338 S.E.2d 631, 634 (1985).

Therefore, the Trial Court had no authority to direct rehearing because the Award became the law of the case. “The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.” S.C. Code Ann. § 15-48-130. As such, this Court is not divested in appellate jurisdiction.

Furthermore, AJP attempts to conflate the direction for rehearing as a Court Order to compel arbitration.⁴ In fact, Judge McFaddin has previously compelled arbitration, in concluding

manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.”) (emphasis added).

⁴ *See* S.C. Code Ann. § 15-48-20(a) (“On application of a party showing an agreement described in Section 15-48-10, and the opposing party’s refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to

in his June 22, 2023 Order that the subject matter of this dispute was subject to binding and mandatory arbitration. The resulting award is the law of the case, and the Trial Court's refusal to recognize it is immediately appealable. As discussed in the following sections, the issues in which AJP objected to confirmation of the Arbitration Award were properly before the arbitrator not the judiciary, despite AJP's attempts to relitigate the merits.

B. The Trial Court's Order affects a procedural right of Clark and is thus subject to immediate appeal.

Notwithstanding S.C. Code Ann. § 15-48-200(a)(3), allowing for direct appeal of an order denying confirmation of an arbitration award, the Trial Court's Order denying Confirmation is directly appealable because it also deprives Clark of a statutory right. Specifically, the Trial Court's refusal to apply the South Carolina Uniform Arbitration Act deprived Clark of its procedural right to have the Arbitration Award become official record. *See* S.C. Code Ann. § 14-3-330(2) (interlocutory order is appealable if it is "an order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents judgment from which an appeal might be taken...") Instead, the Trial Court exceeded its limited statutory authority by entertaining and ultimately ruling upon an untimely argument raised by AJP.

All that was at issue before the Trial Court was the mere conclusion of the arbitration proceeding as contemplated by the Arbitration Act.⁵ The Arbitration Act bars AJP's attempt to relitigate issues conclusively decided at arbitration by questioning the arbitration proceedings before a judicial tribunal without following the statutory mandates set forth in S.C. Code Ann. §

arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.")

⁵ *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 172 ("Arbitration awards are interpretations of the arbitration agreement and are treated as part of the agreement itself.")

15-48-130, such that the Trial Court’s Order directing the parties back to arbitration divests this Court of appellate jurisdiction.

IV. Clark acknowledges that an “award” is distinguishable from a “settlement.”

To address AJP’s point that an “award” is distinguishable from a “settlement,” Clark does not dispute this notion. Clark is not attempting to enforce a settlement. Instead, Clark is asking the trial court to confirm the Arbitration Award.

Here, AJP is attempting to conflate the Settlement Agreement and the Order dismissing the arbitration proceedings issued by the arbitrator as one in the same. AJP, cites *Henderson v. Summerville Ford-Mercury, Inc.*, to argue that an arbitration award is distinguishable from a settlement. 405 S.C. 440, 451 n. 5, 748 S.E.2d 221, 227 n. 5 (2013). Conveniently, AJP overlooks certain language in the *Henderson* decision adverse to its position.

In *Henderson*, the Dealer argued that dismissal and vacatur of the underlying trial court case after arbitration concluded was appropriate because the Dealer had already paid the judgment set forth in the arbitration award. However, like AJP, “Dealer omits the language we emphasize from the treatise [it cited], which indicates confirmation can serve multiple purposes.” *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 452, 748 S.E.2d 221, 227 (2013) (quoting 6 C.J.S. *Arbitration* § 178 (2004)) (“[T]he proceeding ordinarily is not initiated unless one of the parties refuses to abide by the award or unless it be the desire of a party that an official record of the confirmation and judgment be made.”). “Confirmation is a ministerial act of recording the results of the arbitration.” *Id.* at 454, 748 S.E.2d at 228. “[O]nce arbitration is completed, a court has no jurisdiction except to confirm and enter judgment or to vacate, modify, correct, or enforce the judgment.” *Id.* at 453 n.7, 748 S.E.2d at 228 n.7. “Confirmation is appropriate because by law a court must confirm an award upon application of a party unless the defendant moves to vacate,

modify, or correct the award.” *Id.* at 451, 748 S.E.2d at 227. “Confirmation is not a separate judicial process; it is merely a continuation of the arbitration procedure.” *Id.* at 452, 748 S.E.2d at 227. Thus, *Henderson* holds that the trial court’s role upon a motion to confirm an arbitration award is a statutory—ministerial—act; thus, the trial court cannot inquire into the propriety of that award except on separate motion (which AJP did not make).

AJP refuses to come to terms with the fact that the arbitrator issued an award that is both final and binding in the underlying arbitration proceedings because the rulings were adverse to AJP.

V. AJP is not permitted to attempt to relitigate the merits of the Arbitrator’s resolution of this dispute in asserting lack of appellate jurisdiction under the guise of questioning the arbitrator’s powers where the arbitration agreement delegated all decision regarding arbitrability arising out of or relating to the Parties’ dispute to the arbitrator.

The trial court previously determined that the subject matter of AJP and Clark’s dispute is subject to arbitration. (*See Appx. II*). As such, any claim, defense, or dispute, whether stemming from the arbitration agreement, the American Arbitration Association Rules, or a South Carolina statute, is an issue to be addressed by the arbitrator. *Id.* at p. 4 (“the AAA rules incorporated into the arbitration agreement *delegates all decisions regarding arbitrability* to the arbitrator). “When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.” *Id.* (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019)). The arbitration agreement itself dictates what and what not the arbitrator can decide. If the arbitration award draws in essence from the contract, then the Court cannot impose its own judgment upon such award. *See Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir. 2006) (an arbitration award draws in essence from the contract, if it is rationally supported by, derived or inferable from the agreement).

Section 20 of the Subcontract provides in pertinent part: “All *claims, disputes, and other matter in controversy* between the [Clark] [and] [AJP]...*arising out of or relating* to this Subcontract *shall be decided by mandatory and binding arbitration* in accordance with the current applicable Construction Industry Rules and procedures of the American Arbitration Association, except as specifically provided below...” (Appx. I, at ¶ 4) (emphasis added). This arbitration provision is a general submission that dictates that the arbitrator, not the court, has the power to pass upon and determine everything incidental to the matters submitted or connected with the matters in this dispute. “When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact.” *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). Here, the arbitrator did just that.

The simple fact that AJP cannot come to terms with the effect of this judgment does not provide it with an avenue in which it can now come to the courts to complain of issues of arbitrability in order to restart the entire arbitration process. Nor can AJP’s contentions justify permitting the Trial Court, as it in fact did, to revisit the arbitrator’s decision dismissing the arbitration proceedings upon Clark’s Motion to Confirm the Award absent a motion to vacate. Furthermore, the fact that the Arbitration Agreement did not explicitly contemplate procedural issues or defenses, such as the binding effect of the Settlement Agreement, does not overcome this presumption that such issues are left to the Arbitrator. It was improper to apply or consider the “manifest disregard” standard in light of the Settlement agreement as the “the manifest disregard standard is not an invitation to review the merits of the underlying arbitration, [] or to establish that the arbitrator misconstrued or misinterpreted the applicable law.” *Jones v. Dancel*, 792 F.3d 395, 402 (4th Cir. 2015) (internal citations and quotations omitted).

AJP, by its own conduct in entering into the underlying Arbitration Agreement with Clark agreed that the arbitrator would decide these very issues. AJP, through its Motion to Dismiss this appeal is attempting, as it did before the Trial Court, to misclassify the Arbitration Award and the nature and effect of the Arbitration Award in a self-serving and mischaracterized manner. It is a tale as old as time.⁶ In doing so, AJP has effectively argued issues of arbitrability with respects to the Settlement Agreement before a judicial tribunal in an attempt to gain a more favorable outcome.

The issue of whether or not the dispute had been resolved by virtue of the Settlement Agreement was an arbitrable question because it arose out of the underlying dispute that proceeded to arbitration. As such it was properly before the arbitrator to consider, not the Trial Court. Here, the arbitrator considered the Settlement Agreement and AJP's argument against dismissal. After

⁶ See *Mulder v. Cravat* (1802) 2 S.C.L. (2 Bay) 370, 372 ("almost every man who was dissatisfied with an award, seemed to endeavour to get rid of it by some means or other, if possible. It therefore became the duty of the court, not to lend too easy an ear to complaints of this kind, or to set afloat decision which had been made by judges of the parties' own choosing. Every man who goes into a court of justice in the prosecution or defense of a right must know that his case will there be governed by the strict rules of law, but whenever he consents to withdraw it from such court, and submit it to one of those domestic tribunals composed of private individuals, who are not law characters, he consents that his case shall be no longer bound by the rigid rules of law and evidence which prevail in a court of justice"); See also *Mitchell v. De Schamps* (1866) 34 S.C. Eq. (13 Rich.) (Where there was no dispute about the facts, but only as to the legal consequences of those facts, and the parties, by a general submission "of all matters in dispute in relation," etc., referred the matter to arbitration:--Held, that the losing party was bound by the award, even though the arbitrators had plainly mistaken the law of the case); *Bollmann v. Bollmann* (1875) 6 S.C. 29 ("[arbitration] contemplates an adjustment of the controversy by a forum not bound by the strict rules of law, but permitted, under certain limits, to substitute its own mode of investigation in the place of that through which alone courts of justice are allowed to exercise their functions. A ready ear is not given to objections raised by the disappointed party, who, being dissatisfied with the result by the tribunal of his own selection, applies for the interposition of that which he had before renounced.")

review, the arbitrator dismissed the arbitration proceedings. Specifically, the Arbitrator determined that “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.” (**Appx. III**, at Ex. D.). What is left to resolve by sending this matter back to arbitration?

There is no doubt that appellate jurisdiction is properly exercised over this appeal from the trial court’s denial of a motion to confirm a final arbitration award.

CONCLSUION

Based upon the foregoing, Appellant Clark Construction, Inc. of Mississippi respectfully requests that this Court deny Respondent AJP Solutions, LLC’s Motion to Dismiss and allow the parties to proceed with briefing the merits of this appeal.

Respectfully submitted,

/s/ Bryan P. Kelley

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*Counsel for Appellant Clark Construction, Inc. of
Mississippi*

September 16, 2024
Greenville, South Carolina

APPENDIX I

(Clark's Motion to Dismiss or in the Alternative to Stay and Compel Arbitration,
filed March 6, 2023)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	C/A # 2022-CP-18-01997
	)	
AJP Solutions, LLC,	)	
	)	
Plaintiff,	)	
	)	CLARK CONSTRUCTION, INC. OF
v.	)	MISSISSIPPI'S MOTION TO DISMISS
	)	OR IN THE ALTERNATIVE TO STAY
	)	AND COMPEL ARBITRATION
Clark Construction Inc. of Mississippi,	)	
TCABC Real Estate Holdings, LLC, and	)	
Travelers Casualty and Surety Company of	)	
America,	)	
	)	
Defendants.	)	

COMES NOW Defendant Clark Construction, Inc. of Mississippi ("Clark") by and through its undersigned counsel and pursuant to Rule 12(b)(1), Rule 12(b)(3), and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, hereby moves before this Court 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. Alternatively, Clark moves for an Order, pursuant to 9 U.S.C.A. § 3 staying this action as to all parties and compelling Plaintiff and Clark to arbitrate their disputes.

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

1. On or about November 9, 2020, Clark entered into a contract with TCABC Real Estate Holdings, LLC ("TCABC") for the construction of The Claiborne at Brickyard Crossing Project (the "Project") in Summerville, South Carolina.
2. On or about December 16, 2020, Clark entered into a subcontract agreement with AJP Solutions, LLC ("AJP") wherein AJP was to provide certain drywall and painting work to Clark for the Project based upon a lump sum firm fixed-price of \$732,330.00 (the "Subcontract"). A copy of the Subcontract is attached hereto as **Exhibit A** and incorporated herein by reference.

3. The Subcontract was executed by representatives of AJP and Clark (see Page 15 of **Exhibit A**).

4. Section 20 of the Subcontract provides in pertinent part as follows:

Contractor and Subcontractor acknowledge and agree that this Subcontract affects Interstate Commerce and the Federal Arbitration [Act], 9 U.S.C.A. Section 1 et seq. applies. The foregoing agreement to arbitrate shall be specifically enforceable under the Federal Arbitration Act and any other applicable law in any court having jurisdiction thereof.

All claims, disputes, and other matter in controversy between the Contractor, Subcontractor, and all individual signatories hereto, arising out of or relating to this Subcontract shall be decided by mandatory and binding arbitration in accordance with the current and applicable Construction Industry Rules and procedures of the American Arbitration Association, except as specifically provided below . . .

5. Arbitration clauses are enforceable under South Carolina and applicable federal law. The Federal Arbitration Act (“FAA”) applies to the arbitration clause at issue and pre-empts any applicable state law because the dispute resolution clause pertains to a transaction involving interstate commerce. Interstate commerce is implicated through the interstate sale and transport of goods and services across state lines for a construction project located in South Carolina. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) (holding that a dispute involving the construction of new homes manifestly involved interstate commerce, implicating federal arbitration law); *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (“It would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.”); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013) (holding that subcontractor’s work on marina construction project implicated interstate commerce and triggered the FAA because both instrumentalities and channels of interstate commerce were utilized by subcontractor); *Citizens*

Bank v. Alafabco, Inc., 539 U.S. 52, 56-57 (2003) (“Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.”) (internal citation omitted)

6. Clark utilized subcontractors and suppliers from numerous states outside of South Carolina including Mississippi, Texas, North Carolina, Tennessee, Oregon, Louisiana, Indiana, New Hampshire, Georgia, Massachusetts, New Jersey, and Virginia, thereby implicating interstate commerce. (Aff. of George Goza, Mar. 6, 2023, ¶ 9.)

7. Clark incorporated materials from states other than South Carolina in the construction of the Project. (Goza Aff. ¶ 10.)

8. Interstate commerce is further implicated by the fact AJP itself contends that Clark is organized and existing in a state other than South Carolina, while the parties’ contract involved a construction project located in South Carolina. (Compl. ¶¶ 2, 6.)

9. The claims alleged in AJP’s Complaint are all disputes arising out of and related to alleged breaches of the Subcontract and are therefore within the scope of the arbitration provision agreed to by AJP and Clark.

10. Because the Plaintiff’s claims are subject to binding arbitration, this Court lacks subject matter jurisdiction and, consequently, the Complaint should be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure.

11. Because the Plaintiff’s claims are subject to binding arbitration, venue for this matter is not proper in Court of Common Pleas for the First Judicial District and, consequently, the Complaint should be dismissed pursuant to Rule 12(b)(3) of the South Carolina Rules of Civil Procedure.

12. Because the Plaintiff's claims are subject to binding arbitration, Plaintiff has failed to state a claim for which this Court may grant relief and, consequently, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

13. In the alternative to the dismissals requested herein, Clark moves the Court, pursuant to 9 U.S.C.A. § 3 for an Order staying this action as to all defendants and compelling arbitration of all claims and disputes between Clark and AJP in accordance with the applicable arbitration provisions.

WHEREFORE, based on the foregoing, Clark Construction, Inc. of Mississippi prays that this Court enter an Order dismissing Plaintiff's Complaint for lack of subject matter jurisdiction, or in the alternative, that this Court enter an Order staying this matter and compelling the parties to arbitration pursuant to the terms of the parties' Subcontract.

Respectfully submitted,

s/Bryan P. Kelley

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March 6, 2023
Greenville, South Carolina

EXHIBIT A

**STANDARD SUBCONTRACT OF
CLARK CONSTRUCTION, INC. OF MISSISSIPPI
General Contractor
P.O. Box 828
McComb, Mississippi 39649
(601) 684-4710**

This Subcontract is made this the 16th day of December 2020, by and between Clark Construction, Inc. of Mississippi hereinafter called the Contractor, and AJP Solutions LLC 4044 Ashley Phosphate Road North Charleston, SC 29418, hereafter called the Subcontractor.

For the consideration stated hereafter and in exchange for the mutual covenants herein made, the Subcontractor and Contractor hereby agree as follows.

Section 1.

The Subcontractor shall furnish all labor, materials, tools, equipment, facilities, supervision, management, financing, services, shop drawings, submittals, testing, and every other thing of whatever nature necessary to fully perform and in every respect complete the Work generally described in Exhibit A as follows ("Work"):

Scope:

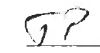
Labor, materials, & equipment to complete per plans & specifications:

- | | |
|--|---------------------|
| • Drywall : Gypsum board including surface preparation, tape, float, & | |
| • finish to a level 4 smooth finish | \$398,000.00 |
| • Interior and Exterior Painting | \$221,000.00 |
| • Acoustic Ceilings & Grid | \$ 92,000.00 |
| • Payment & Performance Bond | \$ 21,330.00 |
| • Total Subcontract | \$732,330.00 |

for the Project known as: The Claiborne At Brickyard Crossing Project #744-09-100 (drywall)
112 Grandview Drive, Summerville, SC 29483 #744-09-150 (painting)

according to plans and specifications, as prepared by Arrive Architecture Group, 2344 Highway 121, Suite 100, Bedford, TX 76021, hereafter referred to as the Architect. The Subcontractor's Work as generally described above shall be performed wherever required on the Project. Applicable specification sections include but are not necessarily limited to: Division(s) 09. It is understood and agreed that any reference herein to the Subcontractor's bid or proposal to perform the Work is solely and exclusively for the purpose of further technically describing the Work to be performed, and that any terms, conditions, exclusions or other qualifications in such bid or proposal are excluded and not a part of this Subcontract.

The Subcontractor shall perform Work in strict accordance with this Subcontract and with the Prime Contract, which is made a part hereof. Anything pertaining to the Subcontractor's Work that is mentioned in the specifications but not shown in the drawings, or shown in the drawings but not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. All Work of the Subcontractor shall be subject to the approval of the Contractor, Architect-Owner, and any authorities having jurisdiction over the Subcontractor's Work. The Subcontractor's Work includes all Work specifically set forth in this

 Subcontractor
 Contractor

-1-

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Subcontract and covered by parts of the Prime Contract applicable thereto, and it further includes everything reasonably necessary or customary for the proper execution, functioning, connection, and completion of all Work referred to by this Subcontract.

Section 2.

In exchange for the Subcontractor's full and timely performance of the Subcontract Work in strict accordance with the terms and conditions of this Subcontract, the Contractor agrees to pay the Subcontractor the sum of Seven Hundred Thirty-two Thousand Three Hundred Thirty Dollars (732,330.00), subject to any increase or decrease that may be mutually agreed upon in writing and further subject to the Standard Terms and Conditions, specifically including but not limited to the payment provisions of Section 8 below and all other requirements set forth in or incorporated by reference into this Subcontract.

STANDARD TERMS AND CONDITIONS

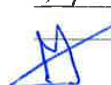
Section 3.

The Subcontractor shall be bound to the Contractor by all terms and conditions of this Subcontract and, except as otherwise provided herein, by all terms and conditions of the Prime Contract between the Owner and Contractor, which are incorporated by reference into this Subcontract and is an integral part of this Subcontract. The Prime Contract includes, but is not limited to, the Agreement between the Contractor and the Owner; all general, supplementary, special conditions; all drawings, specifications, details, and standards; all addenda, exhibits, modifications, and revisions to any of the foregoing; and all other documents or requirements incorporated into or referenced by the foregoing. The Subcontractor shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Prime Contract, assumes toward the Owner and Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, under the Prime Contract, has against the Contractor. In no event shall the Subcontractor be entitled to greater rights, higher entitlements, or more relief against the Contractor than the Contractor actually obtains from the Owner on Subcontractor's behalf with respect to the Subcontractor's Work. In the event of an ambiguity or conflict in payment or other provisions between the Prime Contract and the Subcontract, this Subcontract shall govern.

Section 4.

Time is of the essence of this Subcontract. The Subcontractor shall begin and proceed with its Work when and as directed by the Contractor. The Subcontractor shall coordinate and continuously perform its Work competently, efficiently, and at a speed so as to facilitate the general progress of the Project. The Subcontractor shall not delay, disrupt, damage, or render more expensive the Work of the Contractor or any other subcontractor. If so ordered by the Contractor, the Subcontractor shall prosecute certain portions of the Subcontract Work in preference to other portions, at no increase in Subcontract price. The Subcontractor shall reimburse the Contractor for any damages assessed by the Owner or which Contractor incurs as a result of delays, inefficiencies, disruptions or difficulties caused by or attributable to the Subcontractor. Furthermore, the Subcontractor shall pay the Contractor's acceleration costs, extended job site overhead, unabsorbed home office overhead, and all other direct and indirect expenses of whatever nature, including attorneys' fees, caused in whole or in part by delays, inefficiencies, disruptions, difficulties or other reasons attributable to the Subcontractor.

In the event the Subcontractor's Work is delayed, disrupted, damaged, or rendered inefficient or more expensive by the Owner or by Architect or others for whom the Owner may be liable, the Subcontractor as its sole and exclusive remedy may upon written request properly made to the Contractor obtain time extensions for delays to the critical path and an increase in the Subcontract price but only to the extent of any amounts and time extensions that the Contractor, on behalf of the Subcontractor, actually receives from the Owner for such delays, disruptions, inefficiencies, damages, and added expense. If the Subcontractor's Work is impermissibly delayed or disrupted by the Contractor or by others for whom the Contractor may be liable, the Subcontractor as its sole and exclusive remedy may upon written request properly made to the

 Subcontractor
 Contractor

Contractor obtain only time extensions, but no monetary damages, for proven critical path delays to the Subcontractor's Work. As a condition precedent to any relief, the Subcontractor must give the Contractor written notice of any event alleged to cause delay, disruption, inefficiency, damage, and/or added expense to the Subcontractor's Work within five calendar (5) days after the Subcontractor first knew or should have known of such event, with such notice stating the specific relief sought by the Subcontractor with respect to such event.

Section 5.

At Subcontractor's sole and entire expense, Subcontractor shall submit to Contractor by the date(s) specified by Contractor, and, if not specified, promptly and so as to facilitate the Work and progress of the Project and so as not to delay the Project, all required shop drawings, product data, samples and other information ("Submittals") related to Subcontractor's Work or as may be otherwise requested by Contractor.

Submittals shall be subject to the approval of the Owner, Architect and/or Engineer and Contractor and must be approved in writing by Contractor before any fabrication or on-site Work commences. Subcontractor shall, with and within the Submittals, call to the specific attention of Contractor, Owner, Architect and/or Engineer, in writing, all suggested, proposed, or intended deviations from any requirements of the Prime Contract and of this Subcontract, including proposed "equal" substitutions. Approval of Submittals shall not constitute approval of deviations, unless there is express and specific approval of the deviation itself given in writing by Contractor and the Owner or Owner's representative before performance of the deviation. Any changes, deviations, or substitution of materials or any other proposal of Subcontractor, which has not been approved, shall be at Subcontractor's sole and entire risk and full responsibility. All damages of any and all nature, losses, delays, additional costs, any other impact to Contractor's progress of the Project, costs of performance, and any increased liability whatsoever caused Contractor or others as a result of such changes, deviations, or substitutions shall be the liability solely of and borne by Subcontractor.

The Work included in this Subcontract shall be performed under the supervision of the Contractor, whose decision as to the true intent, proper construction, and correct meaning of the drawings and specifications shall be final. Subcontractor shall conform to and abide by any additional specifications, drawings and/or explanations furnished by the Contractor to detail and illustrate the Work to be done.

Before proceeding with any Work, the Subcontractor shall lay out and field measure all Work, and the Subcontractor shall verify all previous and surrounding Work done by others to ensure that all Work fits and functions properly. The Subcontractor shall assume all expense in connection with engineering services required in the layout of its Work and assumes responsibility for accuracy of the same. The Subcontractor shall detect and, prior to commencement of Work, report in writing to the Contractor any defect, interference, or nonconformity in the Work of others or in the plans and specifications; and if the Subcontractor fails to do so, the Subcontractor shall be solely responsible for and bear all costs of any cutting, patching, rerouting, replacement, correcting or overcoming such conditions or problems, including, at no additional cost whatsoever to the Contractor, all measures which the Contractor directs Subcontractor to perform to overcome or correct such problems.

The Subcontractor recognizes that it may be Working concurrently with the Contractor, separate subcontractors, and others. The Contractor has the right to require the Subcontractor, without cost or liability to the Contractor, to schedule Work hereunder in such a manner as will minimize interference, delay and expense of Work of others or for the best interests of the Project as the Contractor may determine. Subcontractor acknowledges and agrees that it must prosecute its Work in accordance with the Schedule, as it may be adjusted and revised by the Contractor, and that adherence to the Contractor's schedule, including the timely submission of Submittals, as it may be revised, is required at no additional cost or liability to the Contractor.

If a question or dispute arises as to which subcontractor is responsible for any item of Work, the Contractor shall determine the responsible subcontractor and that subcontractor shall proceed immediately to perform the Work at no additional cost to the Contractor. The Contractor shall have no liability for its

 Subcontractor
Contractor

decision if exercised in good faith. If the Contractor's decision is not acceptable to all parties, any aggrieved subcontractor shall be entitled to resolve the matter through arbitration with other affected subcontractors in accordance with the Construction Industry Rules of the American Arbitration Association. Contractor and Subcontractor acknowledge and agree that this Subcontract affects Interstate Commerce and the Federal Arbitration, 9 U.S.C.A. Section 1 et seq. applies. The foregoing agreement to arbitrate shall be specifically enforceable under the Federal Arbitration Act and any other applicable law in any court having jurisdiction thereof.

Subcontractor acknowledges and agrees that progress meetings will be held at the jobsite as called for by the Contractor. Attendance by Subcontractor is required at the meeting held immediately prior to commencement of its Work and each meeting thereafter until this Subcontract Work is complete and accepted by the Owner, and at other times when deemed necessary by the Contractor. The Subcontractor shall have a representative present who shall have the authority to act for the Subcontractor. Subcontractor acknowledges and agrees that it is deemed to have actual notice of all facts, scheduling, directives, notices, and all such other information discussed, distributed, and or exchanged, whether orally or in writing, at any and all progress meetings Subcontractor is required to attend, whether or not Subcontractor attends the meeting(s).

Emergency Warranty Work. If, during the warranty period defined above, the HVAC and/or plumbing or electrical systems are found to be not in accordance with the requirements of the Contract Documents, the Contractor shall take action to address correction of the non-conforming work within 24 hours for HVAC and within three (3) working days for plumbing and/or electrical non-conforming work after receipt of written notice from the Contractor, per Section 00800 Supplemental Conditions Article 12.2.2.1.2 in the Prime Contract.

Section 6.

The Subcontractor represents and warrants that it is fully qualified, experienced and licensed in every respect to perform the Work and has satisfied itself regarding all general and local conditions that may affect the cost or timeliness of the Subcontractor's performance. The Subcontractor guarantees and warrants the Subcontractor's Work shall comply strictly with this Subcontract and with all parts of the Prime Contract applicable thereto. The Subcontractor further warrants and guarantees that the Subcontractor's Work and all materials and equipment furnished in connection therewith are new, of good material and Workmanship, free from defects, fit, safe, merchantable, and sufficient for the purposes intended. These warranties and guarantees shall extend for the same period as the Contractor's warranty under the Prime Contract or for one year after final payment to the Subcontractor, whichever is longer. The warranties and guarantees set forth herein are in addition to any other warranties or guarantees required by the Prime Contract, provided by law, or set forth by separate agreement. Any of Subcontractor's Work not conforming to the requirements of this Subcontract, including substitutions not properly authorized, shall be considered defective and shall be promptly replaced or corrected as directed by the Contractor.

Section 7.

By execution of this Subcontract, all of Subcontractor's owners agree and acknowledge that they are, jointly and severally, personal guarantors of Subcontractor's faithful performance of Work and Subcontractor's full and prompt payment for all labor, material, equipment, services and any other items furnished to or used by the Subcontractor with respect to the Project.

If required by the Contractor prior to or during performance of this Subcontract, the Subcontractor shall furnish to the Contractor, as obligee, a performance bond and a payment bond with a responsible surety, acceptable to the Contractor, each for the amount of this Subcontract covering the Subcontractor's faithful performance of this Subcontract and prompt payment for all labor, material, equipment, services and any other items furnished to or used by the Subcontractor with respect to the Project. The Subcontractor's failure to deliver satisfactory bonds within ten (10) days after demand shall be a material breach of this

TP Subcontractor
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Subcontract

Section 8.

At times and intervals directed by the Contractor, the Subcontractor shall present to the Contractor an application for payment with such form and content as requested by Contractor and subject to Contractor's approval. Subcontractor's application must include an itemized statement of the work properly performed by the Subcontractor during the period for which payment is being requested.

Both progress payments and final payment to the Subcontractor shall be made only out of funds actually received by the Contractor from the Owner for progress payments or for final payment of the Prime Contract and only to the extent said progress payments or final payment reflect Subcontractor's Work which has been satisfactorily performed by Subcontractor in strict accordance with this Subcontract and which has been approved and paid by Owner. Subcontractor hereby expressly warrants and agrees that Subcontractor is relying on the credit and solvency of the Owner and not the Contractor for payment of Work performed under this Subcontract.

Contractor may withhold in whole or in part any application and / or certification for payment because of the following: unsatisfactory job progress, defective construction not remedied, disputed work, third party claims filed or reasonable evidence that claim will be filed, failure of contractor or subcontractor to make timely payments for labor, equipment, and materials, damage to owner, contractor, or another subcontractor, reasonable evidence that the Subcontract cannot be completed for the unpaid balance of the Subcontract sum, or a reasonable amount for retainage.

Subject to the above provisions and all other terms and conditions of this Subcontract, the Contractor agrees to pay the Subcontractor's application for payment within five (5) Working days after the Contractor's actual receipt of payment from the Owner for the Contractor's application in which the Subcontractor's application is incorporated. If the amount paid by the Owner with respect to the Subcontract Work is less than the amount billed by the Subcontractor, the Contractor shall be obligated to pay the Subcontractor only the amount actually paid by the Owner and received by the Contractor for the Subcontractor's Work.

Subcontractor specifically waives the requirements of and any rights afforded Subcontractor by South Carolina Code Section 29-6-10, et seq.

Subcontractor acknowledges and agrees that its sole and exclusive remedy for pursuit of any claim of payment from Contractor shall be Contractor and any payment bond obtained by Contractor for the Project.

The Contractor may, at its option, withhold up to ten percent (10%) retainage from payments otherwise due the Subcontractor hereunder until final payment. Final payment and release of retainage shall be made at the completion of the Work covered by this Subcontract, but only: (1) upon written acceptance thereof by the Contractor, Architect, and Owner; (2) after Subcontractor has provided documentation specified by the Prime Contract, by this Subcontract, and as otherwise reasonably required by the Contractor; and (3), the Owner has made final payment and has released retainage to the Contractor.

Acceptance of final payment by the Subcontractor constitutes a general release of the Contractor, the payment bond, the Contractor's surety and Owner from any and all claims, liens, and liability of whatever nature. No payment, including final payment, shall be construed as acceptance of defective or incomplete Work, and the Subcontractor shall remain responsible and liable for performance in strict compliance with this Subcontract.

Section 9.

Before submitting any application for payment, the Subcontractor shall have paid all material, labor, equipment, and other bills and obligations that relate to this Subcontract, through the period covered by previous payments received from the Contractor, and the Subcontractor shall furnish for itself and from its suppliers and its sub-subcontractors, at Contractor's request, affidavits, lien releases, and other such evidence as Contractor may require to verify compliance with this requirement. As a condition precedent to final payment to the Subcontractor, and in addition to the conditions precedent to final payment to the Subcontractor set forth in Section 8 above, the Subcontractor shall furnish Contractor an affidavit of payment

 Subcontractor
 Contractor

of all bills and obligations, a release of liens for itself and its suppliers and its sub-subcontractors or other encumbrances respecting the Project, and a general release of claims, together with such affidavits and other documents as may be required by the Contractor, with the understanding that such releases shall be effective as to owed but unpaid contract balances and retainage upon receipt of payment for same.

If requested by the Contractor, the Subcontractor shall, at any and all times so requested, furnish a list of all suppliers and sub-subcontractors the Subcontractor intends to use or is using, including the name of the contact person of each such supplier and/or sub-subcontractor and a copy of any agreement entered into with the suppliers and sub-subcontractors.

Subcontractor shall pay promptly when due all labor, materials and other expenses incurred hereunder and protect the Owner, Contractor and the property comprising the Project from all claims, liens, judgments, court costs, attorneys' fees and expenses resulting from Subcontractor's failure to pay or otherwise comply with this Subcontract. The Contractor reserves the right (but Contractor assumes no liability or obligation), to pay any outstanding past due obligations of the Subcontractor arising out of the performance of the Work, by checks made payable jointly to the Subcontractor and the Subcontractor's suppliers, subcontractors, or employees or payable directly to the Subcontractor's suppliers, subcontractors or employees. Any such payments shall apply as a payment on this Subcontract.

If anyone asserts any claim or lien for materials, labor, services or other items furnished or fabricated under the Subcontract which if established could create a liability on the part of Contractor and/or Owner or a lien on the property comprising the Project, the Subcontractor shall obtain and file a cancellation, satisfaction, or a lien discharge bond releasing the lien. Upon Contractor's failure to do so, Contractor may retain any payment otherwise due Subcontractor sufficient to protect and indemnify Contractor, Owner and such property from such claim or lien. Subcontractor and/or its surety shall also pay Contractor all attorneys' fees and expenses incurred by Contractor in discharging such lien or claim. Subcontractor shall bond, release, or otherwise discharge any liens of its subcontractor, materialmen, suppliers or laborers sustained in connection with the Project at its sole costs and expense, within five (5) calendar day of the receipt of a written or oral demand from Contractor.

The Subcontractor agrees that in the event Contractor desires to furnish the equipment, materials and supplies, or portion thereof, necessary to effect performance of all or any portion of the Project described herein, the Subcontractor agrees to allow the Contractor, at the Contractor's option, to make payment directly to the manufacturer or vendor for some or all of the material required by the Subcontractor and to credit the value of the material so paid for against the Subcontract sum.

Section 10.

The Subcontractor shall, at all times, furnish and maintain: adequate tools, facilities and equipment; sufficient numbers of qualified Workmen; at least one competent, non-working superintendent who speaks English present at the Project site at all times of Subcontractor performance; proper materials and supplies which must comply strictly with the Prime Contract; and any other thing necessary or desirable so as to enable the Subcontractor to prosecute its Work efficiently and properly. The Subcontractor shall promptly pay for all materials purchased, labor employed, independent contractors engaged, equipment rented, and bills incurred, and at Contractor's request, Subcontractor shall furnish Contractor with a duly executed affidavit showing that all Subcontractor's obligations with respect to this Project have been fully satisfied.

Subcontractor warrants that, prior to commencement of work by any of Subcontractor's employees or workers on the Project, such employee's or worker's employment eligibility to work in the United States has been properly verified. Upon request by Owner or Contractor, Subcontractor agrees that it shall, prior to permitting any of its employees or workers to perform work on the Project, submit to Contractor accurate and complete I-9 forms for each employee or worker. It is solely and entirely the duty of Subcontractor to obtain accurate and complete information on its employee's or worker's I-9 forms and to provide such forms to Contractor. Subcontractor shall immediately remove from the Project any employee or worker for whom it has failed to provide an accurate and complete I-9 form.

 Subcontractor
 Contractor

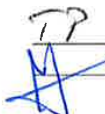
The Subcontractor hereby agrees that the Contractor has the right to pay any bills or past due obligations of the Subcontractor arising on this Project, including backcharges owed to the Contractor. Such payments may be made by the Contractor, by joint check, direct payment, offset or otherwise, and shall apply as a payment of earned proceeds (exclusive of retainage) on this Subcontract. The Contractor shall further have the option, but not the obligation, to use funds otherwise earned by the Subcontractor on this Project or other projects to pay the Subcontractor's past due bills and obligations, including backcharges owed to the Contractor or past due bills of Subcontractor whether on this Project or any other project. If there is a default or performance failure of any nature, including the Subcontractor's failure to pay bills or discharge obligations as they become due on any other project involving the Contractor, the Contractor may use funds otherwise owed on this Project to pay bills and discharge obligations on other projects. Any decision made by the Contractor pursuant to this paragraph shall be final and binding.

Section 11.

Should the Subcontractor, at any time, refuse, neglect, or fail: to furnish and maintain sufficient labor, material, equipment, services, or supervision; or to pay for labor, equipment or material furnished to or used by the Subcontractor; or to comply with all applicable governmental regulations and authorities; or to prosecute the Work covered by this Subcontract in strict accordance with the plans and specifications and other requirements and/or with promptness and diligence so as not to delay either Work of others or the Project as a whole; or to perform any term or condition of this Subcontract, all of which are considered material; then upon any one of these events, the Contractor may, at its option, after 24-hours notice to Subcontractor, do one or more of the following: (1) supplement the Subcontractor with labor, material, and equipment to overcome, correct, and otherwise remedy any and all such refusal, neglect, and failure of the Subcontractor; or (2) terminate this Subcontract in whole or in part and complete the Subcontract with the Contractor's own forces or with others; or (3) issue a deductive change to eliminate portions of the Subcontract Work; or (4) take any other action which the Contractor in good faith deems reasonable under the circumstances. In the event of any failure or inadequacy of performance by the Subcontractor, the Subcontractor shall be liable to the Contractor for all expenditures made, costs and expenses incurred, and all damages of any and every nature, including any and all damages or assessments asserted by the Owner or other Subcontractors against Contractor, losses, expenses, attorneys' fees, and costs of whatever nature, incurred by the Contractor in supplementing the Subcontractor, in completing the Subcontract, or otherwise as a result of Subcontractor's performance delays or failures.

The Subcontractor hereby acknowledges and agrees that the Contractor's records will be the sole basis for computing the cost of Contractor's expenditures and Work to remedy any performance failure by Subcontractor, and, in as much the injury, damage, or loss of all or a portion of Contractor's overhead and profit by reason of any default by the Subcontractor is difficult to determine with any degree of certainty, it is agreed that in addition to the cost and expense to the Contractor of remedying any default by the Subcontractor, there shall be added to such cost and expense incurred a sum equal to fifteen percent (15%) of the actual costs incurred for Contractor's overhead and profit.

In the event of termination of this Subcontract, in whole or in part, the Contractor may, at its option and without prejudice to or waiver of any other right or remedy, take possession of materials, tools, equipment, facilities, and other property belonging to Subcontractor at the Project site and assume complete control of the Subcontract Work. In case of partial or total termination of this Subcontract, Subcontractor shall not be entitled to receive any further payment under this Subcontract until the Subcontractor's entire Work has been completed and accepted by the Contractor, Architect and Owner, all obligations of the Subcontractor have been satisfied, and final payment for the Subcontractor's performance has been made by the Owner and received by the Contractor. If the charges, losses, expenses, attorneys' fees, and damages sustained by the Contractor in completing the Subcontractor's Work or otherwise attributable to Subcontractor's performance delays or failures exceed the unpaid portion of the Subcontract amount, the Subcontractor shall pay the difference to Contractor within five days after demand for same by Contractor.

 Subcontractor
 Contractor

Notwithstanding anything to the contrary in this Subcontract and in addition to the Contractor's right to terminate this Subcontract for breach or default, the Contractor may terminate all or any part of this Subcontract for convenience and regardless of fault or the lack thereof by any party. Upon such no-fault termination, the Subcontractor shall only be entitled to payment for Subcontract Work satisfactorily performed and accepted by the Owner, Architect, and Contractor in the amount of the lesser of either (1) the reasonable value of such Work or (2) the reasonable, actual direct costs for such Work plus a single allowance, not to exceed ten percent (10%), for overhead (both job site and home office) and profit on such costs. The Subcontractor shall not be entitled to any additional payment, compensation, or damages, including but not limited to lost profits or other theory of recovery, with respect to Subcontract Work not performed or not accepted. If the Contractor terminates the Subcontract for default or breach but it is determined, for any reason, that sufficient grounds did not exist for terminating the Subcontract, the Subcontractor, as its sole and exclusive remedy, shall be entitled only to the amount due under the Subcontract as if the termination were for no fault as provided in this paragraph. In no event shall the Subcontractor be entitled to be paid or recover from the Contractor any special, consequential, or exemplary damages, anticipated profit, or any other recovery pertaining to Subcontractor's Work not actually performed by the Subcontractor.

Regardless of whether termination of the Subcontract is for default or no-default, the Subcontractor shall not be entitled to any payment in excess of the reasonable value or actual cost of Work actually performed by the Subcontractor in strict accordance with the Subcontract, less offsets and other amounts due the Contractor under this Subcontract, and the Subcontractor shall, in no event, be entitled to special, consequential, exemplary, or punitive damages because of the Contractor's termination of this Subcontract, the Contractor's alleged breach or default under this Subcontract, or any other act or omission of the Contractor.

Section 12.

If the Subcontractor institutes or has instituted against it a case under the United States Bankruptcy Code, such event is presumed to impair or frustrate the Subcontractor's ability to perform its obligations under the Subcontract. Within ten days after Contractor's request, the Subcontractor (or its trustee, successor, or other party acting for the Subcontractor) shall deliver to Contractor adequate assurance of Subcontractor's ability to perform all material obligations under the Subcontract. Additionally, the Subcontractor shall file, at the earliest time permitted by law, an appropriate action for assumption or rejection of the Subcontract and the Subcontractor shall diligently pursue such action. If the Subcontractor fails to comply strictly with the foregoing obligations, the Contractor shall be entitled and is hereby authorized to request the bankruptcy court to reject the Subcontract, to declare the Subcontract terminated, and to permit the Contractor to pursue any other recourse or remedies available.

The rights and remedies under Section 12 are not intended and shall not be construed to limit any other rights and remedies of the Contractor under this Subcontract or as otherwise afforded by law, including the Contractor's entitlement to seek relief from any automatic stays under the Bankruptcy Code and from any order of a court of competent jurisdiction. In particular, the Contractor shall be entitled to assert all rights and remedies against any bond or policy of insurance furnished by the Subcontractor, notwithstanding any case instituted by or against the Subcontract under the Bankruptcy Code.

Section 13.

Subcontractor is at all times and in all respects an independent contractor. No personnel employed by Subcontractor shall be deemed under any circumstances to be agents, representatives or employees of Contractor. The Subcontractor shall have no authority to bind the Contractor by any representation, promise, or statement of any kind without first obtaining the Contractor's specific written consent and authorization. The Subcontractor shall not interfere with the Contractor's relationship with the Owner or with other subcontractors. The Subcontractor shall not deal directly with either the Owner or the Architect without prior written authorization in each instance from the Contractor. The Subcontractor agrees not to enter into

TP Subcontractor
 Contractor

any other contract relating to this Project without the Contractor's prior written consent.

The Subcontractor has exclusive liability for all contributions, taxes, deposits, and payments required of employers by federal, state, or local governments, with respect to wages, salaries, remuneration, or benefits paid or owed by the Subcontractor to any of Subcontractor's employees or others who perform Work or render services for Subcontractor in connection with this Subcontract. The Subcontractor has exclusive liability for all income, gross receipts, sales, use, or other taxes applicable to materials, equipment, labor, or performance of Work pursuant to this Subcontract.

The Subcontractor shall comply with all laws, ordinances, building codes, safety and licensing requirements, and regulations of all governmental agencies and authorities, including OSHA, and of whatever nature that apply to this Subcontract and that are otherwise effective when and where the Work under this Subcontract is to be performed. In addition, the Subcontractor agrees to follow, without any additional compensation or claim to right of compensation all the Contractor's rules, policies and procedures regarding safety, quality control, and other matters affecting performance of the Subcontractor's Work, and the Subcontractor is responsible for all inspection requirements and regulations of all governmental agencies and authorities, with respect to the Subcontractor's Work and shall pay any fine(s) assessed against the Contractor which may be attributable to the Subcontractor's failure to comply with any regulation.

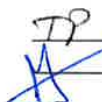
The Subcontractor shall report in writing to the Contractor within twenty-four (24) hours any injury to any employee or agent of the Subcontractor or any other liability claim whatsoever that occurred at the site or connection with the Subcontractor's Work.

Section 14.

The Subcontractor shall obtain, before commencement of Work, and maintain until final acceptance of the Prime Contract, full insurance coverage, including as a minimum the same types of insurance at the same policy limits which are specified by the Prime Contract or which the Contractor actually obtains for this Project, whichever are greater. The Subcontractor is hereby made responsible for determining the types and extent of such additional insurance as may be necessary to give adequate and complete protection to the Subcontractor, the Contractor, Owner and their agents, directors and employees from claims for property damage and from claims for bodily injury, including death, which may arise from or be connected with this Subcontract, whether such claims relate to acts of omissions of Subcontractor, of any of its subcontractors or suppliers, or of anyone directly or indirectly employed by any of them.

Commercial General Liability (CGL)

- a) CGL with limits of insurance of not less than \$1,000,000 Each Occurrence, \$2,000,000 Products/Completed Operations Aggregate, \$1,000,000 Personal & Advertising Injury, \$100,000 Fire Damage Limit (any one fire), \$5,000 Medical Expense (any one person) and \$2,000,000 General Annual Aggregate. If the CGL coverage contains a General Aggregate Limit, such General Aggregate shall apply separately to each project.
- b) CGL coverage shall be written on ISO Occurrence form CG 00 01 1093 or a substitute form providing equivalent coverage and shall cover liability arising from premises, operations, independent contractors, products-completed operations, and personal and advertising injury.
- c) General Contractor, Owner and all other parties required of the General Contractor, shall be included as insureds on the CGL, using ISO Additional Insured Endorsement CG 20 10 11 85 or CG 20 10 10 01 AND CG 20 37 10 01 or CG 20 33 10 01 AND CG 20 37 10 01 or an endorsement providing equivalent coverage to the additional insureds. This insurance for the additional insureds shall be as broad as the coverage provided for the named insured subcontractor. It shall apply as primary and non-contributory insurance before any other insurance or self-insurance, including any deductible, maintained by, or provided to, the additional insured.
- d) Subcontractor shall maintain CGL coverage for itself and all additional insureds for the duration of the project and maintain Completed Operations coverage for itself and each additional insured for at least 3 years after completion of the Work.

 Subcontractor
Contractor

Automobile Liability

- a) Business Auto Liability with limits of at least \$1,000,000 each accident.
- b) Business Auto coverage must include coverage for liability arising out of all owned, leased, hired and non-owned automobiles.
- c) General Contractor, Owner and all other parties required of the General Contractor, shall be included as insureds on the auto policy.

Commercial Umbrella

- a) Umbrella limits must be at least \$1,000,000.
- b) Umbrella coverage must include as insureds all entities that are additional insureds on the CGL.
- c) Umbrella coverage for such additional insureds shall apply as primary and non-contributory insurance before any other insurance or self-insurance, including any deductible, maintained by, or provided to, the additional insured other than the CGL, Auto Liability and Employers Liability coverages maintained by the Subcontractor.

Workers Compensation and Employers Liability

- a) Employers Liability Insurance limits of at least \$500,000 each accident for bodily injury by accident and \$500,000 each employee for injury by disease.
- b) Where applicable, U.S. Longshore and Harbor Workers Compensation Act Endorsement shall be attached to the policy.
- c) Where applicable, the Maritime Coverage Endorsement shall be attached to the policy.

The Subcontractor's insurance shall contain a standard cross-liability endorsement and a waiver of all rights of subrogation against the Contractor, Contractor's surety, and Contractor's insurers. The insurance protection and coverage provided hereunder by the Subcontractor for the Contractor's benefit shall not be restricted to the Subcontractor's indemnity obligations but are intended to extend to all claims, liability, or loss of whatever nature arising from or relating to the Subcontractor, to the Subcontract Work, or to Subcontract obligations, regardless of the alleged liability or fault of any party indemnified under this Subcontract.

Simultaneously with execution of this Subcontract, the Subcontractor shall deliver Certificates of Insurance to the Contractor, certifying the types and the amounts of coverage, certifying that said insurance will be in force before Subcontractor starts Work and continually thereafter until completion, and certifying that said insurance applies to all activities and liability of the Subcontractor pursuant to this Subcontract. Subcontractor acknowledges and agrees that it is not entitled to payment under this Subcontract until the foregoing Certificates of Insurance, that names the Contractor as additional insured, have been delivered to Contractor. No policy of insurance may be cancelled nor coverage reduced during the period of construction, and the Subcontractor shall obtain an endorsement to its policies and insurance certificates prohibiting the insurer's cancellation or coverage reduction for a period of no less than thirty (30) days after the Contractor has acknowledged receipt of written notice of the insurer's intention to cancel or reduce the coverage.

The insurance and indemnity obligations of this Subcontract are non-delegable. The Subcontractor shall not sublet nor subcontract any part of this Subcontract without retaining absolute responsibility for requiring similar insurance from its subcontractors and suppliers. The Subcontractor's failure to maintain complete insurance shall be a material breach authorizing the Contractor, at the Contractor's sole election, either to terminate this Subcontract for default or to provide full insurance coverage at the Subcontractor's sole expense; however, in neither case shall the Subcontractor's liability be lessened. The Subcontractor's liability insurance policies shall each contain contractual insurance coverage (including but not limited to products liability and completed operations) so as to protect fully the Subcontractor, Contractor, and Owner.

With respect to builder's risk or any other type of insurance carried by the Contractor, the Owner, or other party which may inure to the benefit of the Subcontractor, the Subcontractor shall accept full responsibility for all deductibles and for any inadequacy or absence of coverage, and the Subcontractor shall have no claim or other recourse against the Contractor or against any other party for any costs or losses

 Subcontractor
Contractor

within insurance deductibles or otherwise uninsured because of coverage limitations, exclusions, or unavailability.

Section 15.

The Subcontractor covenants to defend, indemnify, save harmless, protect, and exonerate both the Contractor (its agents, employees, representatives, and sureties) and the Owner, jointly and severally, from any and all liability, claims, losses, suits, actions, demands, arbitrations, administrative proceedings, awards, judgments, expenses, attorneys' fees, and costs of whatever nature pertaining to economic loss or damages, labor disputes, safety requirements, performance or nonperformance of obligations, certifications, property rights of third parties, personal injury, bodily injury, death, or damage to or destruction of property (including the loss of use thereof) which are caused in whole or in part by the Subcontractor (herein defined to include but not be limited to the Subcontractor's owners, employees, agents, representatives, subcontractors, suppliers, contractees, and invitees), which arise from or are connected with Work undertaken or to be performed by the Subcontractor, or which arise from or are connected with any other act or omission relating to the Subcontractor or to this Subcontract or to the Subcontract Work.

The foregoing covenants and indemnity obligation shall apply even if the Contractor or Owner is partially or contributorily negligent to the fullest extent permitted by law. The Subcontractor's indemnity obligations under this Subcontract shall not be restricted to amounts available under insurance, whether actually obtained or which should have been obtained.

Section 16.

The Subcontractor shall not subcontract nor assign any part of this Subcontract without first obtaining the written consent and approval of the Contractor.

Assignments of Subcontract proceeds are permissible but only if written notice of same is received and acknowledged in writing by a corporate officer of the Contractor at least thirty (30) days before the assigned proceeds are due and payable to the Subcontractor. Any Assignment of Subcontract proceeds shall be subject to the payment provisions of this Subcontract. The Subcontractor and the Subcontractor's assignee shall ensure that the assignment of Subcontract proceeds does not adversely affect the performance of this Subcontract, including the full and timely payment of all bills and obligations owed by the Subcontractor. To the extent Subcontract proceeds paid to the Subcontractor's assignee exceed funds made available by the assignee that are actually used to pay for Subcontract Work and materials, the Subcontractor and the Subcontractor's assignee hereby agree to indemnify, defend, save harmless, and exonerate the Contractor from any loss, liability, or expense (including attorneys' fees) which the Contractor incurs or which is claimed against either the Contractor or the Contractor's surety as a result of the Subcontractor's failure to perform Work in accordance with the Subcontract or as a result of the Subcontractor's failure to pay its bills and discharge its obligations relating to this Subcontract. Any assignments of Subcontract proceeds and any payments made pursuant to assignments shall be subject to and conditioned upon the Subcontractor's compliance with all terms and conditions of this Subcontract, and any such assignments are expressly restricted to the amount actually collected by the Contractor from the Owner for Work performed by the Subcontractor and accepted by the Owner, less retainage, backcharges, or other offsets which are chargeable by the Contractor against the Subcontractor, whether on this Project or otherwise. Acknowledgment, acceptance, or approval of an assignment by the Contractor does not constitute any representation or agreement by the Contractor that the Subcontractor is owed the amount assigned or any specific amount whatsoever.

Section 17.

The Subcontractor shall have at least one competent, non-working, English-speaking superintendent present at the Project at all times Work of Subcontractor is being performed or is scheduled to be performed.

Said superintendent shall have absolute authority, in all respects, to act for and on behalf of the Subcontractor and to bind the Subcontractor. The Subcontractor shall replace said superintendent or any other employee, without additional charge, if so demanded by the Contractor. The Subcontractor shall do,

 Subcontractor
Contractor

without additional charge, whatever is necessary in the performance of this Subcontract or as the Contractor otherwise directs to assure harmonious labor relations at the Project and to prevent strikes or other labor disputes.

Section 18.

The Contractor may issue written change orders to this Subcontract, without notice to Subcontractor's sureties. Changes may be additive or deductive. The Subcontractor shall be obligated to perform in accordance with such change orders, and the Subcontract sum shall be adjusted as specified by such change order. No alterations or changes shall be made except upon the Contractor's written order; oral changes to the Subcontract Work are not valid and will not be recognized.

The Subcontractor shall have no claim nor entitlement to payment for any addition to Work or change in Work unless, prior to commencement of performance, the Subcontractor receives a written change order for such Work at an agreed price from an authorized representative of the Contractor. Where changed Work involves items shown on the Subcontractor's unit price schedule, the unit prices shall govern, unless mutually agreed in writing to the contrary.

The Subcontractor shall submit proposals for changes or alterations in the manner and time provided by the Prime Contract or as instructed by the Contractor. The Subcontractor shall provide such additional backup or breakdowns as may be requested by the Contractor. If the Subcontractor requests a written change order as provided herein but there is a dispute as to whether the item of work constitutes a change or the value of such change or any other matter in controversy, the Contractor shall be entitled to issue a directive to the Subcontractor to perform the disputed work and the Subcontractor shall be obligated to proceed with and complete performance of the disputed work, without either party admitting to liability for the issues in dispute or waiving rights under this Subcontract. If the dispute is limited to the value of an admitted change, the Contractor agrees to pay, subject to all conditions precedent to payment to the Subcontractor contained in Section 8 above, the Subcontractor's actual, documented direct costs of labor and material plus a reasonable allowance for overhead and profit; provided, however, that the Contractor shall not be obligated to pay any amount in excess of the amount the Contractor receives from the Owner on account of the Subcontractor's work. The Subcontractor shall keep and present, in such form as the Contractor may prescribe, an itemized accounting together with appropriate supporting data of direct labor and material costs actually incurred in performing such change order.

The Subcontractor shall give written notice of any claims for extra compensation, of whatever nature, at least five (5) working days prior to the time the Prime Contract requires the Contractor to give notice of same to the Owner. The Subcontractor shall be entitled to an increase in the Subcontract price and/or extension of the Subcontract time for changes in its Work but only to the extent of any amounts and time extensions that the Contractor, on behalf of the Subcontractor, receives from the Owner for such changes. Subcontractor shall not be entitled to any time extensions or price adjustments or additional compensation in excess of that granted by the Owner to the Contractor.

Section 19.

The Subcontractor shall keep its areas of operation on the Project in a neat and clean condition. The Subcontractor shall perform whatever cleanup is directed by the Contractor at no additional cost to the Contractor. Should the Subcontractor fail to do so promptly upon notice, the Contractor may, at its option, perform such cleanup at the Subcontractor's expense. Upon completion of various portions of its Work, the Subcontractor shall broom clean its Work areas and do whatever else is necessary to put its Work in proper condition either for application or performance of follow-on Work or for acceptance of the Subcontract Work.

The Subcontractor shall provide sufficient, safe and proper facilities, equipment, and working conditions, which shall at all times be subject to inspection by Contractor, the Owner, or their authorized representatives. The Subcontractor shall, within twenty-four hours after written notice from the Contractor, proceed to take down and remove from the premises of the Project all portions of the Work and all material,

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which the Contractor shall deem as unsound or improper or which fails to conform in any way to Prime Contract requirements. The Subcontractor shall make good all such disapproved Work, equipment, and facilities and restore all other Work damaged or destroyed in removing or making good such disapproved items, all at Subcontractor's sole risk and expense. However, Subcontractor shall not remove any other materials from the Project site without Contractor's written permission. Subcontractor agrees to abide by Contractor's decisions as to allotment of all storage and Working space at the Project site and as to all other matters respecting the organization, flow, coordination, and sequencing of Work. The Subcontractor shall not place signs of any kind upon the Project site without prior written approval of the Contractor.

The Subcontractor shall assume and bear all expense and responsibility for the protection of its Work, including stored materials, against damage or loss from weather or other causes.

Section 20.

Contractor and Subcontractor acknowledge and agree that this Subcontract affects Interstate Commerce and the Federal Arbitration, 9 U.S.C.A. Section 1 et seq. applies. The foregoing agreement to arbitrate shall be specifically enforceable under the Federal Arbitration Act and any other applicable law in any court having jurisdiction thereof.

All claims, disputes, and other matters in controversy between the Contractor, Subcontractor, and all individual signatories hereto, arising out of or relating to this Subcontract shall be decided by mandatory and binding arbitration in accordance with the current and applicable Construction Industry Rules and procedures of the American Arbitration Association, except as specifically provided below:

(a) If the Contractor in good faith believes that any claim, dispute, or matter in controversy with the Subcontractor and signatories hereto also involves rights or liabilities of the Owner, Architect, or other third party, then, at the Contractor's sole election, Subcontractor agrees to resolve such issues in the same forum or proceeding, including arbitration, court, or administrative authority, which has jurisdiction over some or all claims, disputes, and matters in controversy involving the Owner, Architect, or other third party so as to promote economy and avoid inconsistent results.

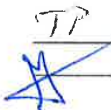
(b) At the Contractor's sole election, the agreement herein to arbitrate shall not apply and cannot be enforced as to any claim, dispute, or matter in controversy or in question between the Contractor and the Subcontractor which the Contractor elects to litigate in a court of competent jurisdiction.

(c) The Contractor and Subcontractor agree that each shall be entitled to know whether the other party(ies) have paid their apportioned share of arbitration fees and expenses ("Arbitration Assessment"). In the event any party to the arbitration does not timely pay its Arbitration Assessment, then the arbitrator(s) shall dismiss with prejudice all claims of the non-paying party. The parties agree that such dismissal for non-payment shall not be grounds for vacating the arbitrator(s)' rulings and/or awards and the parties waive all rights which may exist to contest the arbitrator(s)' dismissal of the claims of the non-paying party.

Contractor and Subcontractor intend and agree that the foregoing dispute resolution provisions and rights of election given to the Contractor are not independent of or severable from the remainder of the Subcontract and that such provisions and election rights are supported by the consideration and mutuality of the Subcontract as a whole.

Should the Contractor through litigation, arbitration, or other means seek to recover on any surety bond given by the Subcontractor under this Subcontract, the Subcontractor and its surety, jointly and severally, agree to pay Contractor any judgment or arbitration award, together with all costs, expenses, and attorneys' fees incurred in the investigation, preparation, and trial or hearing of such matters and otherwise reasonably related thereto.

If the parties litigate or arbitrate a monetary claim, not otherwise prohibited by this Subcontract, the party found liable in such proceedings will pay the other party's reasonable and necessary attorneys' fees. If less than the full amount of such monetary claim is awarded, the party asserting such claim ("claimant") shall recover reasonable and necessary attorneys' fees (but no contingent fees) equal to the proportion of the

 Subcontractor
Contractor

amount awarded to the amount claimed, and the claimant shall pay the other party's reasonable and necessary attorneys' fees (but no contingent fees) equal to the proportion of the amount denied to the amount claimed.

No claim, dispute, or matter in controversy or question shall interfere with the progress of construction or Subcontractor's Work, and the Subcontractor shall proceed diligently with performance of this Subcontract, notwithstanding the existence of any claim, dispute, or matter in controversy or question.

Section 21.

All proposals, negotiations, and representations with respect to this Subcontract, whether oral or written, are hereby superseded and merged into this Subcontract. This Subcontract cannot be changed, modified, altered, suspended, waived or terminated, except in writing signed by an authorized representative of the Contractor. No delay, waiver, forbearance, or failure by the Contractor to exercise rights or remedies under this Subcontract or to insist upon strict compliance by the Subcontractor shall prevent the Contractor from strictly enforcing any of the provisions of this Subcontract, nor shall it relieve the Subcontractor from strict compliance with all terms and conditions hereof nor shall it waive, restrict, or adversely affect any of the Contractor's rights and remedies as to any subsequent or continuing failure of the Subcontractor to comply strictly with all terms and conditions of this Subcontract. The invalidity or unenforceability of any term or condition of this Subcontract shall not invalidate, render unenforceable, or adversely affect the remaining terms and conditions. The laws of Mississippi shall govern the interpretation and enforceability of this Subcontract. Notwithstanding any provision of this Subcontract to the contrary, the Parties agree that the arbitration agreement contained in this Subcontract affects interstate commerce and shall be enforceable under the Federal Arbitration Act. The Subcontractor shall be liable for all damages, costs, and expenses, including attorneys' fees, and costs, fees and expenses of any nature incurred by the Contractor in enforcing the terms and conditions of this Subcontract. This Subcontract shall be binding upon the successors in interest of the parties hereto, but nothing in this Subcontract is intended nor shall be construed to create any rights for or to benefit any third parties.

In the event of any mistake, ambiguity, or conflict with this Subcontract, neither party shall be considered the author of the Subcontract, and no mistake, ambiguity, or conflict shall be construed more strongly against or more favorably toward either party hereto.

Section 22.

The Contractor and Subcontractor agree that the Standard Terms and Conditions of this Subcontract, Sections 3-22, establish a course of dealing between them and shall apply to this and all other projects, unless before commencement of the Subcontractor's Work on such project, either the Contractor or the Subcontractor gives written notice of objection to these Standard Terms and Conditions or the parties enter into a different written agreement with respect to such project. Otherwise, the Subcontractor's commencement of any performance of Work on any project, including but not limited to the preparation of shop drawings and other submittals, shall constitute the agreement of both the Contractor and the Subcontractor that these Standard Terms and Conditions apply to such project and constitute a waiver by both parties of all objections to any of the Standard Terms and Conditions even if a Subcontract has not been fully executed at the time such Work commences. Either the Contractor or Subcontractor will be entitled to specific performance of this provision with respect to future projects.

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TP Subcontractor
M Contractor

IN WITNESS WHEREOF, authorized representatives of the parties hereto execute this Subcontract to be effective on the date first written above.

AJP SOLUTIONS, LLC
(Subcontractor)

CLARK CONSTRUCTION, INC. OF MISSISSIPPI
(Contractor)

By: Tony Pino
Title: owner

By: Heon A. Hoyle
Title: V.P.

OWNERS OF SUBCONTRACTOR

Tony Pino
Signature

Tony Pino
Printed Name

Signature

Printed Name

Signature

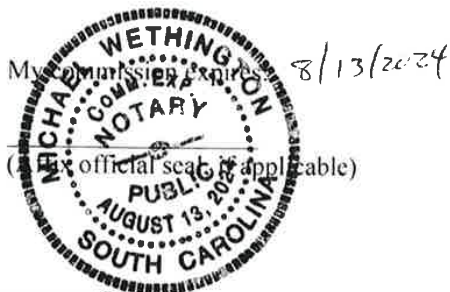
Printed Name

TP Subcontractor
CH Contractor

STATE OF South Carolina
COUNTY OF Dorchester

Personally appeared before me, the undersigned authority in and for the said county and state, on this
28th day of December, 2020, within my jurisdiction, the within named Tony Pinc, who
acknowledged that (he)(she)(they) executed the above and foregoing instrument.


(NOTARY PUBLIC)



STATE OF _____
COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this
____ day of _____, 20____, within my jurisdiction, the within named _____, who
acknowledged that (he)(she)(they) executed the above and foregoing instrument.

(NOTARY PUBLIC)

My commission expires:

(Affix official seal, if applicable)

 Subcontractor
 Contractor

STATE OF _____

COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this
____ day of _____, 20____, within my jurisdiction, the within named _____, who
acknowledged that (he)(she)(they) executed the above and foregoing instrument.

(NOTARY PUBLIC)

My commission expires:

(Affix official seal, if applicable)

 Subcontractor
 Contractor

APPENDIX II

(Order to Stay and Compel Arbitration, issued June 22, 2023)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	C/A # 2022-CP-18-01997
	)	
AJP Solutions, LLC,	)	
	)	
Plaintiff,	)	
	)	ORDER TO STAY AND COMPEL
v.	)	ARBITRATION
	)	
Clark Construction Inc. of Mississippi,	)	
TCABC Real Estate Holdings, LLC, and	)	
Travelers Casualty and Surety Company of	)	
America,	)	
	)	
Defendants.	)	

THIS MATTER comes before the Court on the Motion of Defendant Clark Construction, Inc. of Mississippi (“Clark”) for an Order to dismiss this matter pursuant to S.C.R. Civ. P. Rules 12(b)(1), Rule 12(b)(3), and Rule 12(b)(6) or in the alternative to stay this litigation and compel arbitration pursuant to 9 U.S.C.A. § 1 *et seq.* A hearing was held before me on May 18, 2023. Bryan P. Kelley appeared on behalf of Clark; Joshua P. Cantwell appeared on behalf of the Plaintiff, AJP Solutions, LLC (“AJP”).

After consideration of the pleadings of record, the respective submissions by the parties, the applicable statutory and case law, and the arguments of counsel at the hearing, this Court finds that the alternative relief sought by Clark should be and therefore is GRANTED, and that this matter is stayed pending the outcome of arbitration between the parties.

The parties do not dispute the existence of an arbitration agreement among them – only the enforceability of said agreement. The operative language in the contract between Clark and AJP provides:

Contractor and Subcontractor acknowledge and agree that this Subcontract affects Interstate Commerce and the Federal Arbitration [Act], 9 U.S.C.A. Section 1 *et seq.* applies. The foregoing agreement to arbitrate shall be specifically enforceable

under the Federal Arbitration Act and any other applicable law in any court having jurisdiction thereof.

All claims, disputes, and other matter in controversy between the Contractor, Subcontractor, and all individual signatories hereto, arising out of or relating to this Subcontract shall be decided by mandatory and binding arbitration in accordance with the current and applicable Construction Industry Rules and procedures of the American Arbitration Association, except as specifically provided below . . .

AJP contends that the agreement is unenforceable on two grounds: (1) the agreement's failure to comply with certain requirements set forth in the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 *et seq.* (the "South Carolina Act"); and (2) principles of unconscionability render the agreement unenforceable pursuant to *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C 14, 644 S.E.2d 663 (2007).

The Federal Arbitration Act ("FAA"), rather than the South Carolina Act, applies to the arbitration clause at issue and pre-empts any applicable state law because the agreement pertains to a transaction involving interstate commerce. Interstate commerce is implicated through the interstate sale and transport of goods and services across state lines for a construction project located in South Carolina. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) (holding that a dispute involving the construction of new homes manifestly involved interstate commerce, implicating federal arbitration law); *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) ("It would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013) (holding that subcontractor's work on marina construction project implicated interstate commerce and triggered the FAA because both instrumentalities and channels of interstate commerce were utilized by subcontractor); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) ("Congress' Commerce

Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.”) (internal citation omitted)

AJP contends that because it did not work with out-of-state subcontractors or vendors, the FAA should not apply and the South Carolina Act controls. However, the arbitration agreement itself provides that it is to be governed by the FAA. A party can compel arbitration under the FAA when the transaction is related to interstate commerce, as evidenced by the arbitration agreement. *See Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005). In addition, Clark submitted the Affidavit of George Goza, Clark’s project manager for the subject construction project, which identified certain specific subcontractors and suppliers of Clark that provided labor and/or materials to the project from states other than South Carolina. Finally, Clark submitted documentation at the hearing indicating that AJP partnered with an entity from a state other than South Carolina for payroll processing and related services for the subject project. Because interstate commerce is implicated by the transaction between Clark and AJP, the FAA governs the enforceability of the arbitration agreement.

The FAA provides that, with limited exceptions, written arbitration agreements “shall be valid, irrevocable, and enforceable.” 9. U.S.C. § 2. Federal courts have long followed a “liberal federal policy favoring arbitration,” and the court is to resolve doubts regarding arbitrability in favor of arbitration. *American General Life, supra*, 429 F.3d at 87 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)).

Having established the existence of an arbitration agreement subject to the FAA, we now turn to the question of whether Clark can compel arbitration under the agreement. In so doing, we employ a two-step process: “First, [the courts] determine *who* decides whether a particular dispute

is arbitrable; the arbitrator or the court. Second, if [the courts] conclude that the court is the proper forum in which to adjudicate arbitrability, we then decide *whether* the dispute is, in fact, arbitrable.” *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 526 (4th Cir. 2017), *abrogated in part by Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (*quoting Peabody Holding Co. v. United Mine Workers of Am., Int’l Union*, 665 F.3d 96 (4th Cir. 2012)).

The parties’ arbitration agreement incorporates by reference the Construction Industry Rules and procedures of the American Arbitration Association (the “AAA”). Rule 9 of the AAA Rules provides that “the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.” Thus, the AAA rules incorporated into the arbitration agreement delegates all decisions regarding arbitrability to the arbitrator.

“When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). “In the context of a commercial contract between sophisticated parties, the explicit incorporation of [an arbitration forum’s rules] serves as ‘clear and unmistakable’ evidence of the parties intent to arbitrate arbitrability.” *Simply Wireless, supra*, 877 F.3d at 528. Having determined that the arbitration agreement delegates all decisions regarding arbitrability to the arbitrator, this Court’s analysis need go no further and an analysis of unconscionability under *Simpson* is unnecessary.

WHEREFORE, based on the foregoing, Clark’s Motion should be and therefore is GRANTED. The Clerk of Court is hereby directed to stay this action pending the outcome of arbitration between Clark and AJP pursuant to the parties’ contract.

IT IS SO ORDERED.



Dorchester Common Pleas

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

So Ordered

S/George M. McFaddin, Jr., #2759

Electronically signed on 2023-06-22 11:08:33 page 6 of 6

APPENDIX III

(Clark's Motion to Confirm Arbitration Order, filed August 14, 2023)

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

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

EXHIBIT A

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: Brad Clark

Name: Brad Clark _____

Title: President _____

Date: _____

Arch Insurance Company:

By: Jonathon Panico

Name: Jonathon Panico

Title: Senior Claims Examiner

Date: July 25, 2023

AJP Solutions, LLC:

By: Jonathon Panico

Name: Jonathon Panico

Title: Attorney-In-Fact

Date: July 25, 2023

EXHIBIT B

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 7th 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
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 7th day of July, 2023.

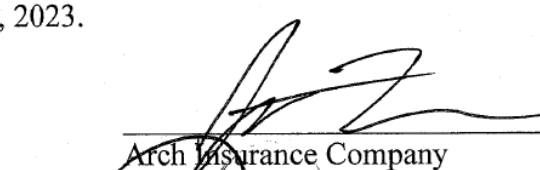
/s/ Christopher Solop
Christopher Solop

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

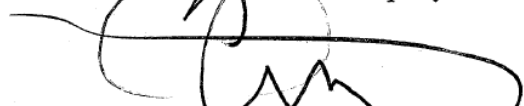
SETTLEMENT TERMS OUTLINE

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.

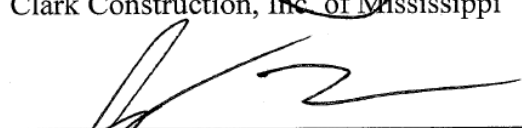
THIS, the 6th day of July, 2023.



Arch Insurance Company



Clark Construction, Inc. of Mississippi



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

EXHIBIT "A"

ARCH INSURANCE COMPANY INDEMNITY AGREEMENT

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

EXHIBIT C

BEFORE THE AMERICAN ARBITRATION ASSOCIATION (AAA)

CLARK CONSTRUCTION, INC. OF
MISSISSIPPI

CASE NO. 01-23-0000-0984

VS.

AJP SOLUTIONS, LLC

**AJP SOLUTIONS, LLC’S RESPONSE TO
CLARK CONSTRUCTION, INC. OF
MISSISSIPPI’S MOTION TO DISMISS**

AJP Solutions, LLC (AJP) hereby files this response to Clark Construction, Inc. of Mississippi's (Clark) Motion to Dismiss. Clark's Motion to Dismiss should be denied because 1) Arch Insurance Company (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; 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 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), SCRCPP, 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.

P.O. Box 600

Charleston, SC 29402

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.

EXHIBIT D

**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:

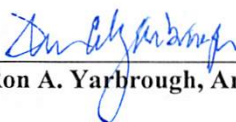
Attached to this Order as Exhibit A are terms of a settlement agreement reached between Clark Construction, Inc. of Mississippi ("Clark") and Arch Insurance Company ("Arch"), as surety for AJP Solutions, Inc. ("AJP"). While AJP vigorously disputes Arch's right to settle AJP's counterclaim filed in this 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 26th day of July, 2023.



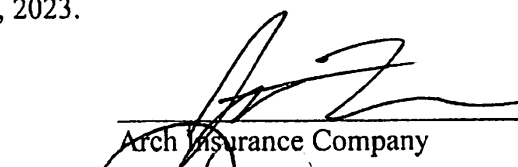
Ron A. Yarbrough, Arbitrator

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

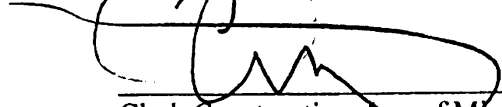
SETTLEMENT TERMS OUTLINE

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.

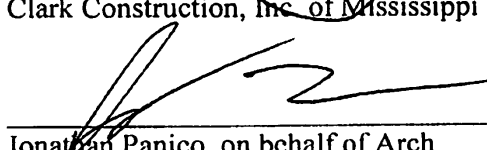
THIS, the 6th day of July, 2023.



Arch Insurance Company



Clark Construction, Inc. of Mississippi



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

EXHIBIT "A"

EXHIBIT E

BEFORE THE AMERICAN ARBITRATION ASSOCIATION (AAA)

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

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

EXHIBIT F

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

CLARK CONSTRUCTION, INC.
OF MISSISSIPPI

V.

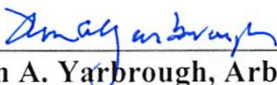
CASE NO. 01-23-0000-0984

AJP SOLUTIONS, LLC

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 9th day of August, 2023.



Ron A. Yarbrough, Arbitrator

APPENDIX IV

(November 27, 2023 Hearing Transcript)

STATE OF SOUTH CAROLINA **TRANSCRIPT OF RECORD**

COUNTY OF DORCHESTER CASE NO.:2022-CP-18-01997

November 27, 2023

BEFORE: The Honorable Diane Schafer Goodstein

AJP SOLUTIONS, LLC,

Plaintiff,

vs.

CLARK CONSTRUCTION, INC., OF MISSISSIPPI, et. al,

Defendants.

APPEARANCES:

Joshua Cantwell, Esq.
 Appearing for the Plaintiff.

Bryan Kelley, Esq.
 Appearing for the Defendants.

Recorded by: WebEx Video Courtroom

Transcriber: Natalie Dahl, RPR
 SC Official Court Reporter

NOTE: Pursuant to Rule 607 (H)(1)(B), SCACR "A Court REPORTER SHALL RECEIVE THE FEE OF \$1.00 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." All requests for a copy of the enclosed transcript shall be sent to: Natalie Dahl, RPR, P.O. Box 762, Conway, SC 29526

INDEX

Description	Page
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(None)

EXHIBITS

(None)

Transcript Legend

Dash(--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
Phonetic (ph)	Indicates a phonetic word
(Inaudible)	Indicates word(s) are not discernable due to audio recording quality

1 **P R O C E E D I N G S**

2 THE CLERK: 2022-CP-18-01997, AJP Solutions,
3 LLC, v. Clark Construction, Inc., of Mississippi.
4 This is a motion to approve arbitration award filed
5 by the defendant.

6 THE COURT: All right. Yes.

7 MR. KELLEY: Good afternoon, Your Honor. I'm
8 Bryan Kelley. I represent the defendants. It is
9 my motion to confirm an arbitration order --
10 orders, to be more accurate.

11 I would like to begin just by talking briefly
12 about the standard of review that the Court is to
13 employ when reviewing or taking up either a motion
14 to confirm an arbitration award or vacate an
15 arbitration award. A seminal case on that topic is
16 *C-Sculptures, LLC, v. Brown, 403 S.C. 53*, and it is
17 a South Carolina Supreme Court case from 2013.

18 Essentially, what we have is a manifest
19 disregard standard. In other words, an
20 arbitrator's decision will not be disturbed by the
21 court unless a party can show that the arbitrator
22 manifestly disregarded clearly applicable law.

23 There is another case from the South Carolina
24 Court of Appeals from 2018 called *Group III*
25 *Management, Inc., v. Suncrete of Carolina, 425 S.C.*

1 141, and that opinion expands on this manifest
2 disregard standard a bit. To sort of boil down
3 what the Group III Management opinion says, it is
4 basically that manifest disregard is not the same
5 as making a mistake. The arbitrator can mistakenly
6 interpret the law, but if they do that, that does
7 not necessarily amount to a manifest disregard.

8 Manifest disregard is when the arbitrator
9 knows of governing legal principle and refuses to
10 apply it. I'm not taking the position today that
11 the arbitrator in this case did make any errors or
12 misinterpretations of the law -- quite the
13 contrary, for reasons that I'll explain -- and that
14 the arbitrator ruled correctly in this case, and
15 we're asking the Court to enforce that decision.
16 However, I think that the standard is relevant for
17 the issues that were taken up in this hearing. So,
18 with that, I'll sort of pivot to the background of
19 what this case is actually about.

20 One of my clients is Clark Construction of
21 Mississippi, and they were a general contractor for
22 an assisted living facility in Dorchester County
23 called The Claiborne at the Brickyard. One of
24 their subcontractors on that project was the
25 plaintiff AJP. AJP performed -- or had a

1 subcontract agreement, rather, with Clark to
2 perform certain drywall work at the project.

3 Disputes arose between Clark and AJP during
4 the course of that project, and that led to this
5 lawsuit and other lawsuits that I'll talk about
6 briefly. To, again, boil down this -- this
7 dispute, this underlying dispute is about AJP
8 contends that they are owed an unpaid contract
9 balance from Clark. Clark has asserted
10 counterclaims in arbitration against AJP contending
11 that they incurred excess completion costs after
12 terminating AJP from the project. AJP filed a
13 mechanic's lien on the project naming Clark and an
14 entity called TCABC Real Estate Holdings as the
15 owner of the real property on which the project was
16 located.

17 Clark filed a mechanic's lien discharge bond.
18 Travelers Insurance Company was the surety for that
19 discharge bond. When AJP filed its lien
20 foreclosure action, it named Clark, TCABC, and
21 Travelers as defendants. We moved to compel
22 arbitration based the subcontract agreement between
23 Clark and AJP and under -- we contended that under
24 the Federal Arbitration Act, we have a valid
25 enforceable arbitration agreement; that the

1 disputes between Clark and AJP should be referred
2 arbitration; and that the claims -- the plaintiff's
3 claims against the other defendants, Travelers and
4 TCABC, should be stayed pending the outcome of that
5 arbitration.

6 There is another party that is not a party to
7 this litigation, but I expect you'll hear a lot
8 about them during my argument and during
9 Mr. Cantwell's rebuttal, and that is Arch Insurance
10 Company. Arch Insurance Company wrote the payment
11 and performance bonds for AJP on this project. And
12 so when Clark got into its dispute with AJP, we
13 asserted a claim against AJP's performance bond,
14 which, again, Arch was the surety of. Arch, in
15 turn, filed a declaratory judgment action in the
16 district court in Mississippi contending that --
17 well, seeking -- I should say a declaratory
18 judgment, that Clark had failed to satisfy
19 conditions precedent to a claim under the
20 (inaudible), and that based on that failure,
21 basically we didn't have a valid claim against the
22 Arch bond.

23 While this litigation was stayed pending
24 arbitration, a mediation took place which was
25 attended by Clark and Arch. AJP was made aware

1 that the mediation was going forward. It's not
2 clear to me what level of participation AJP had in
3 that mediation. Mr. Cantwell can certainly speak
4 to that. But what we do know is that as a result
5 of that mediation, a settlement agreement was
6 entered between Clark and Arch.

7 Arch took the position that it had authority
8 to enter into that settlement agreement on AJP's
9 behalf based on a power of attorney within an
10 indemnity agreement between Arch and AJP. The
11 indemnity agreement is common in the surety
12 industry. It is something that induces the surety
13 to issue payment and performance bonds to the
14 bonded principals.

15 In the indemnity agreement -- and I'm
16 simplifying this for the purpose of this motion --
17 the indemnity agreement provides that the principal
18 and the individual indemnitors who signed that
19 agreement are agreeing to defend and indemnify the
20 surety, and reimburse them for any losses that they
21 incur by virtual of the issuance of a payment of
22 performance bonds.

23 Again, that indemnity agreement includes
24 power of attorney, and Arch relied on that power of
25 attorney when they entered into the settlement

1 agreement with Clark. The settlement agreement
2 provided that Arch was going to pay to Clark
3 \$325,000, and that they were dismissing their
4 claims both in the declaratory judgment action in
5 district court, and in the arbitration that we're
6 here on today, based on the authority given to them
7 by the power of attorney.

8 And if I may, Your Honor, briefly share my
9 screen. So if you can see this, Your Honor, this
10 is the indemnity agreement. It is attached both to
11 my motion and to Mr. Cantwell's memorandum and
12 objection, which was filed earlier today. There is
13 just a little bit of language that I wanted to
14 bring to the Court's attention, which I've
15 highlighted here. It says that the indemnitor --
16 and the indemnitor is AJP -- and their individual
17 principals and spouses, they represented that all
18 statements made in the application, which is the
19 application for the bonds, are true and made
20 without reservation to induce surety to extend
21 surety credit on its behalf.

22 The power of attorney is here in Paragraph 7.
23 And the operative language that I would like to
24 bring to the Court's attention is this highlighted
25 portion, which says that the indemnitors are

1 acknowledging that the power of attorney is a power
2 coupled with an interest. When I first read that,
3 I wasn't exactly sure what that meant. But the
4 reason why it is important is -- and I'm going to
5 try to share another screen with you -- is that one
6 of the arguments that Mr. Cantwell has made is that
7 the power of attorney does not comply with the
8 South Carolina Uniform Power of Attorney Act.

9 I'm looking for that screen to share with
10 you. Here we go. And this is Section 62-8-103,
11 which is to what powers of attorney does the South
12 Carolina Uniform Power of Attorney Act apply. The
13 very first one is that it says that it does not
14 apply, or if it applies to all powers of attorney
15 except: Number one, power to the extent that it is
16 coupled with an interest and the subject of the
17 power, including a power given to or for the
18 benefit of a creditor in connection with a credit
19 transaction.

20 And so being slightly confused about what
21 that means, I come down to the reporter's comments.
22 Here it says that an example of a power given to or
23 for the benefit of a creditor in connection with a
24 credit transaction is highlighted in Section A-1.
25 It is not meant to exclude the identification of

1 Subsection A-1 to other context in which a power
2 may be coupled with an interest; such as, a power
3 held by an insurer to settle or confess judgment on
4 behalf of an insured.

5 I'll come back to that in a minute, but I
6 want to finish briefing you on the procedural
7 history of this. After the settlement agreement
8 was entered into between Arch and Clark, Clark
9 filed a motion to dismiss the arbitration. AJP
10 objected to that motion. In that objection, AJP
11 set forth the same five arguments as to why the
12 arbitrator should not dismiss the arbitration that
13 it has set forth in its motion and objection --
14 excuse me, its memorandum in objection to our
15 motion today. So, again, they set forth five
16 arguments, and those are one through five.

17 Number one, with the indemnity agreement --
18 which is where the power of attorney is -- does not
19 comply with South Carolina Uniform Power of
20 Attorney Act.

21 Number two, that AJP and the indemnitors
22 objection to the settlement, and Arch entered into
23 the settlement over that objection.

24 Number three, that Arch acted in bad faith in
25 entering into the settlement with Clark.

1 Number four, that Arch failed to notify its
2 principal, AJP, and the indemnitors of any breach
3 of the agreement between AJP and Clark.

4 Number five, that Arch failed to satisfy
5 conditions precedent within the bond and the
6 indemnity agreement to exercise its rights under
7 that indemnity agreement.

8 Now, there is a third piece of litigation
9 that ties in with this case and the Arch DJ action,
10 which is Arch has filed a lawsuit against AJP and
11 its individual indemnitors where they are seeking
12 reimbursement for the settlement monies that they
13 have paid to Clark.

14 Now, I submit to you, to the Court, that
15 arguments two through five not only have been
16 considered by the arbitrator and rejected, but AJP
17 has a venue to advance those arguments. In other
18 words, that Arch somehow breached the indemnity
19 agreement, acted outside of the scope of the
20 authority of the power of attorney, and that is the
21 lawsuit that Arch has brought against them.

22 As to argument number one, again, that deals
23 with whether or not the South Carolina Uniform
24 Power of Attorney Act applies to the indemnity
25 agreement. What Mr. Cantwell will tell you is the

1 reason that is important is because the Act
2 requires that any power of attorney has to be
3 witnessed under the same standards that a will is
4 witnessed. And he'll tell you that we don't have
5 the uninterested witnesses' signatures on that
6 indemnity agreement which we need in order to make
7 the power of attorney comply with the South
8 Carolina Act. There is no clear authority to
9 suggest that he's right. With respect to
10 Mr. Cantwell, I don't think that he can direct this
11 to any clear principle of law that that statute
12 should apply to the indemnity agreement that the
13 arbitrator manifestly disregarded it. In fact, I
14 think the opposite is the case, which is that the
15 statute makes it clear that the power of attorney
16 and the indemnity agreement are not subject to that
17 statute.

18 And so, I guess, to summarize our position,
19 it is that the arguments that Mr. Cantwell is
20 making before the Court today have been considered
21 by the arbitrator. There is no indication that
22 there was any manifest disregard when the
23 arbitrator rejected those arguments. Mr. Cantwell
24 has filed a motion within the arbitration to
25 reconsider, which the arbitrator also denied.

1 The last point I'll make, Your Honor, is that
2 we're asking the Court in confirming the
3 arbitration reward, which ended the arbitration
4 based on the settlement, that the -- the claims
5 against the owners and the discharge bond surety
6 should be dismissed, in addition to the claims
7 brought against Clark, because the only liability
8 that the owner or the discharge bond surety would
9 have would be derivative of any liability that
10 Clark would have to AJP.

11 The arbitration has determined there is no
12 reliability based on the settlement and release.
13 So what we're asking the Court to do is to dismiss
14 this case with finality as to all of the
15 defendants. Thank you.

16 THE COURT: Thank you very much.

17 Mr. Cantwell?

18 MR. CANTWELL: Good afternoon. May it please
19 the Court?

20 THE COURT: Yes, sir. I'm going to ask you
21 to hold on for one second. I'm going to shut the
22 door and make it a little quieter for me. Hold on
23 for one second. I'm just going to step away for
24 just a moment.

25 (A brief pause in the proceedings.)

1 THE COURT: Thank you. Thank you very much.

2 MR. CANTWELL: May I proceed, Your Honor?

3 THE COURT: Please.

4 MR. CANTWELL: Okay. Great. Your Honor, may
5 it please the Court? Josh Cantwell here for the
6 plaintiff, AJP.

7 I want to first share my screen with Your
8 Honor to take up a point about the manifest
9 disregard by the arbitrator.

10 Your Honor, can you see my screen?

11 THE COURT: I can.

12 MR. CANTWELL: This was the final order from
13 the arbitrator. Now, there was no award ever
14 issued in the case. It was literally just an order
15 that the arbitrator filed due to the purported
16 settlement between Arch and Clark Construction.

17 If you look at the second paragraph, Your
18 Honor, it states that the arbitrator, while AJP
19 vigorously disputes Arch's right to settle, AJP's
20 (inaudible) claim filed in this proceeding. AJP's
21 position as (inaudible) response to Clark's motion
22 to dismiss rely upon: One, South Carolina law as
23 that law may be applicable to the enforceability of
24 Arch's indemnity agreement. Two, other arguments
25 principally directed to Arch's rights under the

1 indemnity agreement. And, three, Arch's actions in
2 entering into the settlement agreement with Clark.

3 And then it goes on to state, "Those are not
4 matters over which I have either authority or
5 jurisdiction." So that, to me, right there is a
6 manifest disregard of law that has been presented
7 to the arbitrator, which he ignores. So then he
8 relies upon the purported settlement agreement, and
9 dismisses the case.

10 Now, going back to the -- kind of the
11 beginning of it all, Your Honor. Counsel did,
12 essentially, state this started because of a
13 payment dispute involving construction services
14 performed by AJP. Clark was the general
15 contractor. There was a payment dispute. Amounts
16 weren't paid, and ultimately AJP filed a mechanic's
17 lien in September of 2022. A foreclosure action
18 was filed in December, and in response to that,
19 Clark filed its motion to compel arbitration. Now,
20 that was pending for several months.

21 At the same time Clark filed the motion to
22 compel arbitration, it actually instituted the
23 arbitration against AJP in January of 2023. AJP,
24 during that time, objected to the arbitration
25 because they wanted to stay in state court where

1 they filed the original action.

2 During this time, before the Court had ruled
3 on the motion to compel the arbitration, Arch
4 approached AJP because it was trying to put
5 together a mediation amongst the parties. So Arch
6 and its representatives contacted Clark and AJP and
7 said, Would you be interested in resolving all of
8 these three different cases right now?

9 The response to that was that Clark was never
10 going to pay AJP anything, and so AJP said, Well,
11 we're not going to be involved in the mediation.
12 That being said, Arch continued to try to set up a
13 mediation to resolve the claims that Clark had
14 issued against the surety, directly against Arch.
15 And so Arch's counsel reached out to AJP and asked
16 AJP to attend in order to help with the factual
17 disputes in regards to Clark's claims against AJP.

18 Now, counsel for AJP, as well as personal
19 counsel for the indemnitors, did participate in the
20 mediation in an attempt to help Arch with factual
21 issues concerning Clark's claims against Arch, but
22 the claims in reference to AJP's claims against --
23 back against Clark were never addressed in that.

24 Ultimately, the mediation ended with Arch
25 stating that because of the indemnity agreement, it

1 had the authority of not only to settle the claims
2 against -- the surety claims against Arch that were
3 at issue in the mediation, but also the ones that
4 AJP had filed.

5 So, essentially, what Arch did was they stole
6 the claims of AJP that they had issued in the state
7 court action, and attempted to settle those and use
8 those as leverage to reach a settlement with Clark
9 on everything. That purported settlement agreement
10 was presented to the arbitrator, and that's why he
11 ruled the way he did, and we saw that he did so by
12 disregarding the law as far as South Carolina, as
13 far as the power of attorney.

14 Counsel was right, these arguments were made
15 previously, but they weren't addressed by the
16 arbitrator. The power of attorney provisions
17 contained within the indemnity agreement clearly
18 violate the Uniform Power of Attorney Act. Section
19 5 and 7 state that there has to be witnesses --
20 disinterested witness requirements, and if we look
21 at the indemnity agreement that both parties put as
22 exhibits in this case, there is no witnesses on it.

23 In addition to that, AJP argues that Arch was
24 not a party to the arbitration. They did not file
25 a motion to intervene, so they have no right to

1 come into the arbitration and try and sell out
2 AJP's claims.

3 All in all, AJP had filed claims in excess of
4 \$600,000 against Clark. Now, Clark, on the other
5 hand, had roughly \$440,000 in claims going the
6 other way, but these were two very separate and
7 distinct claims. This wasn't just talking about
8 the payment of the contract. The \$600,000, plus
9 attorney's fees and costs, that was money that was
10 not paid to AJP.

11 In turn, Clark's damages were as a result of
12 the cost that they had to go to hire new trades to
13 come in and finish the job. Interestingly enough,
14 the new trades that came in only worked 13 days on
15 the project and somehow racked up a \$400,000 bill,
16 despite AJP's claim of being months and months on
17 the project and not being paid for 600.

18 That being said, the power of attorney
19 provision in the general indemnity agreement does
20 not give Arch the right in order to negotiate both
21 the claims against Arch, and as well as the claims
22 that AJP maintains against Clark. AJP never had an
23 assignment of those claims against Clark, and never
24 gave that to Arch.

25 At the mediation, it was specifically

1 communicated to both Arch and its counsel that AJP
2 was not going to negotiate, was not going to assign
3 any claims, and was only there to help factually
4 with what happened in regards to the claims that
5 were made against Clark in the Mississippi action.

6 So the first argument is that there was no
7 standing and no authority. It is all based on this
8 invalid power of attorney, which is buried within
9 the indemnity agreement.

10 The next argument is that they were on notice
11 that AJP and the personal indemnitors did not agree
12 with the settlement. So the settlement, in and of
13 itself, violates Rule 43 of the South Carolina
14 Rules of Civil Procedure. No agreement between
15 counsel effecting proceedings and actions shall be
16 binding unless it is reduced to form and signed by
17 the parties and their counsel. We don't have that
18 situation, so the arbitrator's reliance on that was
19 both invalid and shouldn't be enforceable.

20 We're asking the Court today to deem the
21 settlement agreement reached by Arch in this --
22 this -- this manner to be invalid and
23 unenforceable, and to send the case back to the
24 arbitration where it should have been in the first
25 place.

1 The parties were never able to arbitrate the
2 merits of the case. It was sent to arbitration,
3 and then Arch jumped in and did the settlement and
4 sold out AJP. There were no depositions taken.
5 There was minimal discovery and documents
6 exchanged, and the parties were going to have the
7 opportunity to present both sides of the case at an
8 arbitration, which was scheduled for last
9 September, but then thwarted by the bad acts of
10 Arch, and ultimately by Clark as well.

11 We do believe that the actions of Arch were
12 done in bad faith. They didn't investigate Clark's
13 claim and AJP's defenses to it. They didn't
14 investigate AJP's claims on the other side. All
15 they did was say, Yeah, we'll get rid of our
16 liability by selling off claims, which we are going
17 to pretend that we have a right to, and get Arch to
18 settle everything and be done with it.

19 Now, as a result of that, Counsel did mention
20 that there is a federal court DJ action now to
21 where Arch is seeking payment from AJP and the
22 other indemnitors of the settlement amounts, and
23 AJP has responded with counterclaims against that.
24 The problem being that, in the surety context,
25 there is not a cause of action for a bad faith

1 claim in South Carolina. And so, essentially, what
2 Arch and Clark did was they concocted a scheme to
3 get this settlement agreement in place, which took
4 the whole claim away from AJP with no recourse to
5 go against them. There were some conditions
6 precedent that Arch failed to do, and we've cited
7 those in our brief, as far as notifying AJP of the
8 breach and certain determinations that needed to be
9 made. The arbitration needed to go forward in
10 order to have that determination of a breach, in
11 order to have the ability for Arch then to go and
12 act on the indemnity agreement.

13 Now, even if Arch were able to have some sort
14 of interest in whatever arbitration award was
15 settled at the end of the arbitration, that's just
16 a lien or security interest. There was no
17 assignment of an entire claim. And so, Your Honor,
18 because of this, and the reasons that we've cited
19 in our brief, we are asking the Court to deny the
20 defendants' motion to confirm the order of the
21 court, and ask the Court to deem the settlement
22 agreement unenforceable, and send the case back to
23 arbitration so that the parties can decide the
24 facts on the merits and not by some bad faith
25 action of an insurance company jumping in to save

1 its own neck and putting its insured out to lose
2 everything.

3 Thank you, Your Honor, and I'm happy to
4 answer any questions you may have.

5 THE COURT: Yeah. Let me ask -- I do have a
6 couple of questions. So -- so it is the position
7 of your client, Mr. Cantwell, that there should
8 have been an arbitration hearing between AJP and
9 Clark?

10 MR. CANTWELL: Correct, Your Honor.

11 THE COURT: And that that was the -- in
12 compliance with the court rules that dismissed the
13 -- that dismissed the cause of action, the lawsuit,
14 by AJP against Clark? Or Clark against AJP? Talk
15 to me about that, because that is the genesis of
16 all of this.

17 MR. CANTWELL: Yes, Your Honor. So it
18 started off to where AJP was, obviously, the
19 plaintiff in this case.

20 THE COURT: Okay. As the sub through the
21 general.

22 MR. CANTWELL: As the sub, and a \$600,000
23 mechanic's lien.

24 THE COURT: Okay. And I gather Clark moved
25 to dismiss because of the arbitration?

1 MR. CANTWELL: They did, Your Honor. And,
2 eventually, the case was sent to arbitration, and
3 so --

4 THE COURT: Into arbitration, but it's the
5 position of AJP that there never was an
6 arbitration.

7 MR. CANTWELL: There never was an
8 arbitration?

9 THE COURT: Never was a -- okay. But what
10 did occur was that there was a mediation between
11 the performance bondholder, Arch, right, and the
12 insurance carrier, and Clark? Because Clark took
13 the position that AJP failed to perform, and Clark
14 called on the performance bond, and that ended up
15 in its own wrangling with the filing of the DJ
16 action?

17 MR. CANTWELL: Correct. So Arch was never a
18 party to the arbitration or filed a motion to
19 intervene in the arbitration.

20 THE COURT: Right. Arch was not a party to
21 the suit filed in South Carolina between --

22 MR. CANTWELL: Or the arbitration.

23 THE COURT: Because -- because Arch wasn't
24 subjected to sue in South Carolina, so it wouldn't
25 have been part of that motion to dismiss in that

1 arbitration, right? Right.

2 But, again -- apparently, when Clark called
3 on the bonds, and Arch (inaudible), that began a DJ
4 action in federal court, and ultimately a
5 mediation. And at the mediation, Clark and Arch
6 were able to resolve their differences. I'm using
7 a big term.

8 Now, where AJP and Arch go sideways, if you
9 will, has to do with the payment bonds, the
10 indemnity, and the power of attorney.

11 Now, let me get back and ask, from your
12 perspective, Mr. Cantwell, who can hold -- I hate
13 to say "trigger," but who can activate the payment
14 bonds? Obviously, a general can make a claim on a
15 performance bond and -- well, Arch is like, You're
16 so right. We've contacted our insured. Whatever
17 happened, happened, and all -- all of their
18 employees got Covid. They have no employees.
19 Everybody has Covid and in the hospital, and this
20 was a very strict schedule. We didn't do it,
21 didn't comply. They admit they didn't comply.
22 They called on the performance bond, and here it
23 is. But you are saying that that did not happen
24 here because someone activated the payment bond
25 under the power of attorney? And that was who?

1 MR. CANTWELL: Your Honor, it wasn't that
2 they activated the payment bond under the power of
3 attorney.

4 THE COURT: Okay.

5 MR. CANTWELL: Initially, Arch denied any
6 sort of obligation.

7 THE COURT: Right. Filed the DJ action, and
8 then asked everyone to get together and have a
9 conversation?

10 MR. CANTWELL: Correct. So there was never
11 an assignment of the AJP claim to Arch. But Arch
12 said, Because I have this indemnity agreement, I'm
13 going to settle both of the claims.

14 THE COURT: Okay. Both of the claims being,
15 what and what?

16 MR. CANTWELL: The claims that are going
17 against Clark going towards Arch for the payment
18 bond, and then the claims going by AJP against
19 Clark. So that where we talked about the claims
20 for AJP were for non-payment for the drywall
21 services of \$600 grand. And then the other claims
22 were Arch -- excuse me, Clark's claims for what
23 they said they had to spend after AJP left the
24 project.

25 THE COURT: Okay.

1 MR. CANTWELL: So two separate claims. It's
2 not an interest in one claim that Arch had, even
3 though they acted like they did.

4 THE COURT: Okay. Okay. And is there a
5 provision in the performance bond that says there's
6 an indemnification for amounts paid? What are the
7 circumstances under the -- which activate the
8 indemnity in this case under the payment bonds?

9 MR. CANTWELL: Once the amount is paid by the
10 surety, then the amounts are due to the
11 indemnitors, and that's where the next federal
12 court action comes in, and that was filed after the
13 settlement agreement and the dismissal of the
14 arbitration.

15 THE COURT: Okay. And I gather that AJP and
16 the individuals -- the people with the indemnity --
17 the ultimate out for Arch, they appeared at
18 mediation, but not for the purpose of trying to get
19 their claims resolved with back and forth with
20 Clark, but -- for what purpose?

21 MR. CANTWELL: Exactly. So Clark -- and
22 there is e-mails back and forth about this among
23 the parties. Clark was not going to negotiate with
24 AJP on its claims, the claims that AJP had filed
25 against it. So AJP said, Well, we're not going to

1 go to mediation then. Arch then asked, Will you
2 help us with the factual issues with the claims
3 that Clark filed against Arch? Because, obviously,
4 AJP was there and knew the situation about what
5 work needed to be performed, what was left that
6 wasn't done, and that's the \$400,000 amount for the
7 claims that Clark filed against Arch.

8 So we weren't ever talking about that. And
9 when the issue came up, we specifically told Arch
10 that they did not have the authority to negotiate
11 AJP's claims. And there was counsel for AJP and
12 the indemnitators that all were on the same page with
13 that.

14 THE COURT: Okay. So the mediation moves
15 forward.

16 MR. CANTWELL: And came up with this sham
17 settlement.

18 THE COURT: So there is a settlement. And
19 what does AJP do at that point? What are we
20 talking about?

21 MR. CANTWELL: We're completely in the dark.
22 They contrived this little scheme to settle around
23 us and try to extinguish all the claims of AJP, and
24 then they represented that sham settlement to the
25 arbitrator to get it dismissed.

1 THE COURT: Okay. And has the indemnity
2 agreement been -- excuse me. My noisy law clerks.
3 They just pop up.

4 Now, has Arch made a claim against AJP at
5 this point for indemnification?

6 MR. CANTWELL: Yes, Your Honor, it has.

7 THE COURT: Okay.

8 MR. CANTWELL: That is filed in federal court
9 in Charleston.

10 THE COURT: Okay. Okay. Oh, these are
11 fabulous issues. All right.

12 So now back to where we are. So it is the
13 position of AJP that -- this is quite the kettle of
14 fish -- because AJP's position is that, number one,
15 we would have been happy to be in court in
16 Dorchester County just hanging out and doing our
17 thing, but you made us go arbitrate, Judge, and we
18 didn't even get to do -- all right.

19 I'm going to remove the four-legged law
20 clerks. I'll be right back.

21 (A brief pause in the proceedings and a
22 discussion was had off the record.)

23 THE COURT: All right. They have gone. They
24 have left.

25 So -- okay. I think I have it.

1 Mr. Cantwell, I think I have your position.

2 All right. Mr. Kelley?

3 The court people are going to kill me.

4 MR. KELLEY: I think Your Honor has a very
5 firm grasp of the issues that we're dealing with.
6 I guess if I could just rebut on a couple of
7 points?

8 THE COURT: Yep.

9 MR. KELLEY: And sort of the nuance that I
10 had to your line of questioning about how the
11 indemnity agreement and the power of attorney were
12 activated --

13 THE COURT: Yeah.

14 MR. KELLEY: The settlement agreement that
15 was entered into between Arch and Clark
16 specifically references and releases all of the
17 claims that were asserted in the DJ action between
18 Arch and Clark. It also releases all of the claims
19 of both Clark and AJP in the -- what it refers to
20 as the "triple A arbitration." And so that
21 settlement agreement gets executed. The arbitrator
22 looks at it and says, well, it looks like all of
23 the claims before me have been released, because it
24 appears, to me, as the arbitrator, that Arch does,
25 in fact, have the authority to enter into this

1 agreement on AJP's behalf. Since everything has
2 been released, I have no choice but to dismiss this
3 arbitration.

4 All we're asking the Court to do is to
5 confirm that award, and Mr. Cantwell is asking you
6 to determine whether or not the entry of that order
7 is a manifest disregard of the law. We certainly,
8 obviously, contend that it is not. But everything
9 else that we're talking about today is really
10 between AJP and Arch. And they have -- they have a
11 court case where they can fight that out. We don't
12 take a position as to whether or not AJP has a
13 claim against Arch or a defense against AJP. We
14 are simply asking the Court to look at the
15 arbitrator's order, look at the settlement
16 agreement where the claims were released, and
17 confirm it and dismiss the case.

18 MR. CANTWELL: And, Your Honor, may I clarify
19 one thing?

20 THE COURT: Yes.

21 MR. CANTWELL: And that is the arbitrator's
22 manifest disregard that he didn't look at the power
23 of attorney language. He didn't look at the
24 enforceability of the agreement pursuant to South
25 Carolina law, which is governed, because that is

1 where the agreement took place, as far as the
2 project here in South Carolina.

3 So these issues weren't decided, and he
4 basically punted, manifestly disregarded the case.
5 So all we're asking for is the chance to have our
6 claims heard in one place or another, and now we
7 can't file a bad faith claim against Arch, because
8 in the context of suretyship, there is no bad faith
9 claim.

10 It's different from another insurance case
11 where you have a bad faith because of the
12 difference in the relationship between the surety
13 and the indemnitor, and that's the Master Clean
14 (ph) case in South Carolina. It says, basically,
15 that the bad faith allegations can be a shield, so
16 that, ultimately, AJP would not have to pay, but it
17 can't have a dispositive claim against Arch under a
18 bad faith theory.

19 THE COURT: Let me ask this to clarify. Who
20 held the power of attorney?

21 MR. KELLEY: The bonding company. And I
22 think that if you look at the indemnity
23 agreement -- that, again, is attached to both the
24 motion and Mr. Cantwell's brief -- if you look at
25 Paragraph 7, there is no event that has to occur in

1 order for Arch to be able to step in and act as
2 AJP's attorney in power. It simply says that they
3 can do it. AJP agrees they can do it whenever they
4 need to in order to protect themselves under the
5 indemnity agreement.

6 MR. CANTWELL: It is certainly not an
7 absolute power to where they can do anything they
8 want.

9 THE COURT: What are the conditions
10 precedent?

11 MR. CANTWELL: So they have to notify AJP of
12 the breach. There has to be a determination of the
13 breach in order for them to then execute under that
14 indemnity agreement, and then they only have a lien
15 or a security interest. They don't own everything.
16 What they did is they took everything away from AJP
17 in order to minimize their own exposure under the
18 bond claim. It's perfect -- we may have a bad
19 faith case --

20 THE COURT: Yeah. Yeah. Yes. Yeah.
21 Absolutely. Absolutely.

22 I hate to do this to you, but I have to take
23 this call. I'm so sorry, so sorry. I'll be right
24 back.

25 (A brief pause in the proceedings.)

1 THE COURT: I'm going to say 30 days for an
2 order. But listen to me, you all are busy. This
3 is a substantial order. If you need longer, get
4 together and let my law clerk know when I can
5 expect it. I think I have the issue.

6 Let me tell you where I'm focused so you
7 know. What I'm concerned about is -- I'm concerned
8 about the failure of AJP to be able to prosecute
9 its claim against Clark. Less concerned about
10 Clark's claim against AJP, because I think that a
11 general -- that is the purpose of having a
12 performance bond. Having said that, I'm concerned
13 about AJP being cut out of its ability to prosecute
14 its claim against Clark. Does that make sense what
15 I'm saying?

16 MR. KELLEY: It does, Your Honor. And just
17 so I'm clear, our position is that our claims
18 against AJP have been released. They're gone. So
19 we released them as a part of the settlement with
20 Arch.

21 THE COURT: Got it. I got that, but the
22 problem is they still think you owe them money.

23 MR. KELLEY: Understood.

24 THE COURT: At the end of the day. And they
25 don't think that AJP had the right to do that.

1 MR. KELLEY: Yes, Your Honor. I understand
2 your concern.

3 THE COURT: Wonderful. Thank you all.

4 MR. KELLEY: Thank you.

5 THE COURT: That was so much fun. Thank you.

6 (Whereupon, the hearing concluded.)
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CERTIFICATE OF TRANSCRIBER

Case Name: AJP Solutions, LLC v. Clark
Construction, Inc., of Mississippi, et. al

Case No.: 2022-CP-18-01997

Date of Hearing: November 27, 2023

* * * * *

I, Natalie Dahl, do hereby certify that the
foregoing transcript is a true and correct record
of the recorded proceedings; **that said proceedings
were transcribed to the best of my ability from the
audio recording.**

I do further certify that I am neither of
kin, counsel, nor have interest to any party
hereto.

Natalie Dahl, RPR

Natalie Dahl, Registered Professional
Reporter and transcriber for the State of
South Carolina

APPENDIX V

(Order denying Clark's Motion to Confirm, issued January 10, 2024)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
	)	
AJP SOLUTIONS, LLC	)	CASE NO. 2022-CP-18-01997
	)	
	)	
	)	
vs.	)	
	)	ORDER
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 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 ward 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), 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.

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

APPENDIX VI

(Clark's Motion to Reconsider, filed January 19, 2024)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	C.A. No. 2022-CP-18-01997
AJP Solutions, LLC,	)	
	)	
Plaintiff,	)	DEFENDANT CLARK'S MOTION TO
	)	ALTER OR AMEND JUDGMENT
v.	)	PURSUANT TO SCRPC 59(e)
	)	
Clark Construction, Inc. of Mississippi,	)	
TCABC Real Estate Holdings, LLC, and	)	
Travelers Casualty and Surety Company of	)	
America,	)	
	)	
Defendants.	)	
	)	

COMES NOW Defendant Clark Construction, Inc. of Mississippi ("Clark"), by and through its undersigned counsel, and hereby respectfully moves this Honorable Court pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure to alter or amend this Court's Order issued on January 10, 2024 (the "Order"). The Court's Order constitutes an abuse of discretion by granting relief to Plaintiff AJP Solutions, LLC ("AJP") that is not allowed under South Carolina law. Additionally, the Court should reconsider its decision in finding that the arbitrator "manifestly disregarded the law" and alter or amend the judgment to reflect the same. Furthermore, Clark believes the Court erred for all the reasons raised in Clark's original Motion to Confirm the Arbitration Award (the "Award") and those raised at oral arguments on November 27, 2023.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a subcontract agreement between AJP as subcontractor and Clark as general contractor for certain work surrounding a construction project (the "Project") in Dorchester County. Dispute arose between the parties surrounding payment and AJP's work on the Project. On September 28, 2022, AJP filed a mechanic's lien against the Project. On December

28, 2022, AJP filed this action against Clark, the Project owner TCABC Real Estate Holdings, LLC (“TCABC”), and Clark’s mechanic’s lien discharge bond surety Travelers Casualty and Surety Company of America (“Travelers”). On March 6, 2022, Clark moved to compel arbitration of the dispute between Clark and AJP, and to stay AJP’s claims against TCABC and Travelers pending the outcome of arbitration. Judge McFaddin granted Clark’s motion to compel and ordered that this matter be stayed pending the outcome of arbitration between Clark and AJP on June 22, 2023.

Central to Clark’s Motion to Confirm the Arbitration Award and the underlying arbitration dismissal is a settlement agreement between Clark and Arch Insurance Company (“Arch”). Although AJP has articulated objections to Arch’s authority to enter this settlement agreement, the underlying facts pertinent to this Motion are predominantly undisputed. The genesis of Arch’s involvement with this dispute was its issuance of payment and performance bonds for the Project naming itself as surety and AJP as principal. AJP was required to secure these bonds as a condition of its contract with Clark for the Project.

As a condition of Arch’s issuance of the bonds, AJP and Arch entered an agreement entitled “Arch Insurance Company Indemnity Agreement.” In general terms, this agreement appears to require AJP to defend and indemnify Arch from any claims or losses related to the extension of surety credit. The Indemnity Agreement also includes a Power of Attorney provision, which provides that ***“[AJP] irrevocably appoints [Arch] as Attorney-in-fact with the full right and authority, but not the obligation, to exercise the rights of [AJP] assigned to [Arch] above, and to execute on behalf of and sign [AJP’s] name to any document deemed necessary by [Arch] to give full effect to the purposes of the Agreement.”***

It is undisputed that the matter proceeded to arbitration. The parties further agree that Clark asserted substantial claims against AJP in the arbitration, and AJP asserted counterclaims essentially mirroring the claims it set forth in the instant action. Presumably, Arch was aware of Clark's claims and its intent to pursue Arch if Clark prevailed against AJP in arbitration.

Following this Court's Order to Compel Arbitration, Clark, Arch, and AJP participated in a mediated settlement conference. While AJP disputes both the context and scope of its participation, it is undisputed that the mediation resulted in the settlement agreement between Arch and Clark. That settlement agreement provided: (1) that Arch would pay a certain amount to Clark; (2) that "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;" and (3) that Clark would release its claims against both AJP and Arch.

Following the settlement, Clark moved to dismiss the arbitration on the grounds that all disputes submitted to arbitration were released by the parties in the settlement agreement. AJP objected to Clark's motion on the grounds that: (1) the indemnity agreement did not comply with the South Carolina Uniform Power of Attorney Act; (2) AJP objected to the settlement between Arch and Clark; (3) Arch acted in bad faith in entering the settlement agreement; (4) Arch failed to notify AJP of any breach of the subcontract agreement between Clark and AJP; and (5) Arch failed to satisfy conditions precedent to the invocation of its rights under the indemnity agreement. The arbitrator granted Clark's Motion to Dismiss in spite of AJP's objection, and found those objections exceeded the arbitrator's authority because they related to the enforceability of the indemnity agreement. The Arbitrator held that "[i]nasmuch 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."

On July 28, 2023, the arbitrator granted Clark's Motion to Dismiss in spite of AJP's objection, and found those objections exceeded the arbitrator's authority because they related to the enforceability of the indemnity agreement. The Arbitrator held that "[i]nasmuch 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."

On August 18, 2023, Clark filed a motion before this Court for an order confirming the Award. Four months (122 days) after the arbitrator issued his Award, on November 27, 2023, AJP submitted a memorandum in response to Clark's Motion to Confirm the award. That same day, the Court heard oral arguments between the parties. On December 7, 2023, Arch filed a motion to intervene. However, on January 10, 2024, the Court denied Clark's Motion to Confirm the award, without addressing Arch's motion, and ordered that this matter be sent back to arbitration.

Clark now respectfully moves this Honorable Court to alter or amend its Order denying confirmation of the Award.

LEGAL STANDARD

Rule 59(e), SCRCP, allows a court to alter or amend a judgment upon a party's timely motion (10 days). "It is proper to view a [Rule] [59(e)] motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). Under South Carolina law, a motion for reconsideration is appropriate when "[a] party...believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue,

and the party wished for the court to reconsider or rule on it...[and] when an issue or argument has been raised, but not ruled on.” *Id.* at 24, 602 S.E.2d at 780. A Rule 59(e) motion to reconsider acts as, “one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.” *Id.* at 22, 602 S.E.2d at 778. Furthermore, “[w]hen a party receives an order containing relief that was not requested or contemplated, the party must present its objections to the issue to the trial court in a Rule 59(e), SCRCP...” *Stanley v. S. States Police Benevolent Ass’n*, 435 S.C. 524, 527-528, 868 S.E.2d 412, 414 (Ct. App. 2021) (internal citations omitted). Similarly, Rule 52(b), SCRCP, allows a party to challenge the judgment upon a timely motion (10 days) and provides the court an opportunity to correct errors in its findings. James F. Flannagan, *SOUTH CAROLINA CIVIL PROCEDURE* § 52.B (4th ed. 2020).

ARGUMENT

The Court denied Clark’s Motion for Confirmation of the Arbitration Award: (1) without adhering to or addressing the substantive and procedural requirements under the South Carolina Uniform Arbitration Act (the “UAA”), S.C. Code Ann. §§ 15-48-10 to – 240, or the Federal Arbitration Act (the “FAA”), 9 U.S.C. §§ 1-16, and (2) without explicitly ruling on the arguments and issues raised by Clark. Furthermore Clark contends the Court failed to fully consider the arguments raised in Clark’s Motion for Confirmation of the Arbitration Award and ultimately granted relief that was neither requested nor contemplated by either party. Therefore the Court should alter or amend its January 10th Order denying Clark’s Motion for Confirmation of the Arbitration Award.

Specifically, the Court should not have considered AJP’s arguments in opposition to the motion as a basis for vacating, modifying or correcting the arbitrator’s order as such application

was never made by AJP in the form of a motion to vacate. To the extent such a petition *was* made by AJP (which Clark denies), the application was untimely under the FAA, 9 U.S.C. §§ 1-16, and the UAA, S.C. Code Ann. §§ 15-48-10 to – 240. Furthermore, the Court misapplied the applicable standard set forth in established precedent by finding that the arbitrator manifestly disregarded the law.

A. The Court erred as a matter of law in denying Clark’s Motion to Confirm the Award by failing to consider either the FAA or UAA as AJP’s opposition to the confirmation process was untimely and thus precluded judicial review of the arbitrator’s decision.

Clark timely made an application to this Court to confirm the order issued by the arbitrator on July 28, 2023. Under both the FAA and the UAA, the Court was required to confirm the order absent timely application by AJP to vacate, modify or correct it. *See* S.C. Code Ann. §§ 15-48-120 – 140; 9 U.S.C. §§ 9 – 12. Yet, the Court granted relief to AJP that was neither requested nor contemplated by either party by remanding the matter back to arbitration. “Recordation of an arbitration award is a ministerial act that is a basic part of the arbitration process, not a new judicial proceeding that would require a different justiciable issue. Confirmation is mandatory unless the opposing party has established statutory¹ grounds to vacate, modify, or correct the award.” *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 454, 748 S.E.2d 221, 228 (2013).

1. S.C. Code Ann. § 15-48-120 applies to the confirmation of the Award.

First, the Court should reconsider its ruling because the Court misapplied the law by finding that “[i]n reviewing an arbitration award for the purpose of confirmation or vacating of the same,

¹ *See Gissel v. Hart*, 382 S.C. 235, 242, 676 S.E.2d 320, 324 (2009). “Four statutory grounds on which an arbitrator’s award may be vacated are: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C.S. § 10(a) (1)-(4). S.C. Code Ann. § 15-48-130(a) sets forth similar state grounds.”

this Court must determine whether the arbitrator's award demonstrates a manifest disregard for the law." Order at p. 3. However, the Court was not required nor was it permitted to undertake such review.

The applicable law under the UAA states that, "[u]pon application of a party, the court *shall* confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award." S.C. Code Ann. § 15-48-120 (emphasis added).

Similarly, under the FAA, "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9 (emphasis added).

Under South Carolina law, the South Carolina Supreme Court has held that the confirmation process of an arbitration award is a procedural act to which the UAA applies, even where the substantive law of the FAA applies. *Id.* Nevertheless, under both the FAA and the UAA the result in this case should be the same regardless of which Act applies. The statutory procedure under both Acts dictates that confirmation is mandatory, absent timely application by the party opposing confirmation. *Henderson*, 405 S.C. at 454, 748 S.E.2d at 228 ("Both the UAA and the FAA use the words "shall" or "must" in directing that an award be confirmed upon application in the absence of a motion to vacate, modify, or correct the award, and such language is mandatory.").

The law commands that the order be confirmed. The Court was not entitled to consider such relief without a timely application made by AJP. AJP merely objected to Clark's motion, without affirmatively seeking to vacate or modify the arbitrator's order.

2. *AJP's opposition to confirmation was untimely.*

Even assuming *arguendo* that the Court found that AJP did in fact raise a motion to vacate, modify or correct the award, such application was not timely. Clark simply asked that the Court confirm the Award. The Court erred by deviating from the relief requested by Clark in misapplying the governing law by considering relief requested by AJP where the record is absent that any timely application by AJP was ever raised.

The FAA and UAA require that the party opposing confirmation file its motion or application with the court within ninety (90) days or three months after the award is filed or delivered. *See* S.C. Code Ann. §§ 15-48-130(b) and -140(a); 9 U.S.C. § 12. The statutory requirements for filing a motion to vacate, modify, or correct the award must be strictly adhered to. *See Henderson*, 405 S.C. at 454, n. 7, 748 S.E.2d at 229, n. 7 (quoting *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (“stating the provision for judicial confirmation carries no hint of flexibility and the statement the court must grant the application unless the award is vacated, modified, or corrected is one which unequivocally tells courts to grant confirmation in all cases, except when one of the prescribed exceptions applies.”) (internal quotations omitted)).

Here, the arbitrator issued its Award on July 28, 2023. One hundred and twenty-two days later, and for the first time before this Court, AJP raised its opposition to the Award. However, AJP did not file a motion to vacate, modify or correct the Award. Instead, it merely opposed Clark’s Motion through an argument that the arbitrator’s order exhibited a “manifest disregard for the law” in its response memorandum.

Because no motion was raised nor was the argument timely, the Court should not have considered AJP’s opposition to confirmation on these grounds. Nor should this Court have gone so far as to vacate the arbitrator’s Order and remand the matter back to arbitration. Under the clear

black letter, statutory directive, AJP was required to move the court within ninety (90) days or three months from the issuance of the Award on grounds to vacate, modify, or correct the Award. *See* S.C. Code Ann. §§ 15-48-130² and – 140³; 9 U.S.C. §§ 9 – 12⁴; “[C]ase law clearly prohibits attempts to vacate, modify, or correct an arbitration award once the statutory ninety-day limit has expired.” *Eatman's, Inc. v. Martin Eng'g*, 311 S.C. 282, 284, 428 S.E.2d 736, 737 (Ct. App. 1993); *see also In re Patel*, C.A. No. 03-0132-W, Chapter 11, 2006 WL 4955603 (Bankr. D.S.C. Aug. 30, 2006) (South Carolina courts would not modify an arbitration award on non-statutory grounds, i.e., manifest disregard, after the statutory deadline to modify the award has lapsed) (dicta)).

Raising opposition to the Award within ninety days or three months was a mandatory requirement imposed upon AJP. *See e.g., Henderson*, 405 S.C. at 454, 748 S.E.2d at 228 (citing *Wigfall v. Tideland's Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (“The term ‘shall’ in a statute means that the action is mandatory.”); *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) (“Under the rules of statutory interpretation, use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a mandatory requirement.”)). Respectfully, in the absence of such a motion, the Court exceeded its authority by directing the parties back to arbitration.

AJP failed to timely adhere to the compulsory requirements under the UAA and FAA. Its inaction cannot be excused. Therefore, the Court’s consideration of AJP’s arguments against confirmation of the Award was improper. As a result, denial of Clark’s application of confirmation of the Award is error.

² S.C. Code Ann. § 15-48-130(b) provides that: “[a]n application under this section *shall be made within ninety days* after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.” (emphasis added).

³ S.C. Code Ann. § 15-48-140(a) provides that: “[u]pon application made *within ninety days*.” (emphasis added).

⁴ 9 U.S.C. § 12 provides that: “[n]otice of a motion to vacate, modify, or correct an award *must* be served upon the adverse party or his attorney *within three months* after the award is filed or delivered.” (emphasis added).

B. The Court's Order fails to consider whether the South Carolina Uniform Power of Attorney Act applies to the Indemnity Agreement.

AJP argued, and this Court agreed, that the arbitrator “manifestly disregarded the law.” However, the Court’s decision deviated from the narrow review and analysis in which it was permitted to undertake. AJP contends the Indemnity Agreement and the power of attorney contained therein violated the South Carolina Uniform Power of Attorney Act (the “SCUPOAA”). While Clark maintains that any analysis of the Indemnity Agreement and the Power of Attorney exceeded the scope of the Court’s review under Clark’s Motion, Clark also asserts that the SCUPOAA does not apply to the Indemnity Agreement pursuant to S.C. Code Ann. § 62-8-103(1). The Court’s Order does not address Clarks’ position in this regard.

C. The Court erred in determining that the arbitrator “manifestly disregarded the law.”

The Court should reconsider its ruling because the court misapplied the applicable scope of review to determine that the arbitrator manifestly disregarded the law.

“When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact.” *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). “Factual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers.” *Id.* at 242, 676 S.E.2d at 324.

“The scope of judicial review for an arbitrator’s decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all.” *Group III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 149, 810 S.E.2d 781, 785 (Ct. App. 2018) (internal citations and quotations omitted) (collecting cases). “A manifest disregard of the law is established only where the arbitrator understands and correctly states the law, but proceeds to disregard the same.” *Id.* at 155, 810 S.E.2d at 788 (quoting *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006) (internal quotations omitted)); *see also Gissel*, 382

S.C. at 241-42, 676 S.E.2d at 323 (“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.”) A showing of “manifest disregard of the law” requires something more than a mere error in construing or applying the law. *Harris v. Bennett*, 332 S.C. 238, 244-45, 503 S.E.2d 782, 786 (Ct. App. 1998). This scope of review means that in reviewing an arbitration award, a reviewing court is “limited to determine whether the arbitrators did the job they were told to do – not whether they did it well, or correctly, or reasonably, but simply whether they did it.” *Group III Mgmt.*, 425 S.C. at 150, 819 S.E.2d at 786 (quoting *UBS Fin. Servs. Inc., v. Padussis*, 842 F.3d 336, 339 (4th Cir. 2016) (internal quotations omitted)).

Here, the Court found that “Arch did not have standing or proper authority from the purported power of attorney to participate in the arbitration.” Order p. 4.

Ignoring the precedent as established in our case law, this Court assumed the arbitrator’s powers by making its own findings of law and fact.

D. The Court’s Order does not fully address its application of S.C.R.Civ.P. 43(k).

While Clark again maintains that an analysis of the validity of the settlement agreement exceeded the scope of the Court’s review, we note that the Court’s application of Rule 43(k) is not fully addressed, as the settlement agreement in question was not entered for the purpose of ending this civil action. Instead, it resolved the arbitration, and it was left to the arbitrator to determine whether the settlement agreement affected the arbitration. In other words, the application of the settlement agreement was an issue of arbitrability, which the parties delegated to the arbitrator. “When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). The parties’ arbitration clause incorporates by reference

the Construction Industry Rules and procedures of the American Arbitration Association (the “AAA”). Rule 9 of the AAA Rules provides that “the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.”

Further, “a party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection.” Thus, the AAA rules incorporated into the parties’ contract delegates all decisions regarding arbitrability to the arbitrator. The arbitrator has determined as a question of arbitrability that the settlement agreement released the claims subject to arbitration. Thus, the Court has exceeded its authority by overriding the arbitrator’s decision.

CONCLUSION

For the reasons set forth above and all arguments and issues raised in Clark’s original motion, Clark respectfully requests that the Court alter or amend its Order and grant Clark’s Motion for Confirmation of the Arbitration Award. Clark further requests that the Court grant Clark any further relief as the Court deems just and proper.

SIGNATURE TO FOLLOW ON NEXT PAGE

Respectfully submitted,

s/Bryan P. Kelley

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January 19, 2024
Greenville, South Carolina



******* IMPORTANT NOTICE - READ THIS INFORMATION *******
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2022CP1801997

Official File Stamp: 01-19-2024 05:14:24 PM
Court: CIRCUIT COURT
Common Pleas
Dorchester
Case Caption: Ajp Solutions Llc VS Clark Construction Inc Of Mississippi , defendant, et al
Document(s) Submitted: Motion/Alter and/or Amend
Filed by or on behalf of: Bryan Patrick Kelley

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Kirby Darr Shealy, III for Arch Insurance Company
Bryan Patrick Kelley for Clark Construction Inc Of Mississippi
Katherine Sieber Elmore for Clark Construction Inc Of Mississippi
Eliza Hutto Cantwell for Ajp Solutions Llc
Luke M. Allen for Arch Insurance Company

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Tcab Real Estate Holdings Llc
Travelers Casualty And Surety Company Of America

APPENDIX VII

(Order denying Clark's Motion to Reconsider, issued April 1, 2024)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
	)	
AJP Solutions, LLC,	)	C/A NO. 2022-CP-18-01997
	)	
	)	
Plaintiff,	)	
vs.	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO RECONSIDER
Clark Construction, Inc. of Mississippi,	)	
TCABC Real Estate Holdings, LLC,	)	
and Travelers Casualty and Surety	)	
Company of America,	)	
	)	
Defendants.		

This matter came before the Court on the motion of Defendant Clark Construction, Inc. of Mississippi ("Clark") to confirm the arbitration order issued in this matter and dismissing the action with prejudice. The Court reviewed memorandums submitted by the parties and heard oral arguments of the parties regarding this motion on November 27, 2023. The Court took the matter under advisement and requested proposed orders from both parties within thirty days from the date of the hearing for the Court's consideration during review.

By way of brief background, the underlying matter regarding this dispute is a mechanic's lien foreclosure action where Defendant Clark and Defendant TCABC Real Estate Holdings, LLC ("TCABC") entered into a contract for construction of a project. Clark subcontracted AJP Solutions, LLC, to conduct some of the work on the project. There was a dispute regarding the payment for services rendered and a mechanic's lien was filed by AJP against the named Defendants for the money owed. Defendants filed a motion to compel arbitration and, although AJP opposed and objected to the motion, the Court ordered that the parties were required to arbitrate the matter and further ordered to stay the action pending the outcome of said arbitration.

During arbitration, Clark asserted claims against AJP and AJP answered and asserted counterclaims. AJP participated in a mediated settlement conference with Clark where it was agreed that, among other things, Clark would release its claims against AJP and Arch Insurance Company. (AJP furnished payment and performance bonds naming Arch Insurance Company as surety, AJP as principal, and Clark as obligee.) Arch moved to dismiss the arbitration without regard to this Court's Order. The arbitrator, apparently without knowledge of this Court's Order, dismissed the Court's Order to arbitrate presumably based upon representations of Arch.

The primary issue before the Court on November 27, 2023, was whether the arbitration order should be confirmed given the circumstances as described. Upon review of the materials filed by the parties and the arguments presented by counsel, the Court denied Defendant Clark's motion to confirm the arbitration order and ordered the parties back to arbitration to resolve the claims asserted.

In Defendant Clark's motion to alter or amend judgment pursuant to SCRCP 59(e), Clark argued that the Court should reconsider its ruling. In the motion, Defendant Clark has failed to raise any new arguments which have not previously been before this Court. This Court finds that the issues raised at the hearing were correctly decided and are properly reflected in the Order. Therefore, the motion to alter or amend judgment pursuant to SCRCP 59(e) is respectfully, denied.

IT IS SO ORDERED.

Honorable Diane S. Goodstein
Presiding Judge

Dorchester, South Carolina
This ____ day of _____, 2024.



Dorchester Common Pleas

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

It is so Ordered!

s/Diane S. Goodstein

RECEIVED

Sep 16 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Court of Common Pleas Case No. 2022-CP-18-01997
Appellate Court Case No. 2024-000698

AJP Solutions, LLC, ...Respondent,

v.

Clark Construction, Inc. of Mississippi, TCABC Real Estate Holdings,
LLC, and Travelers Casualty and Surety Company of America, Defendants,

of which

Clark Construction, Inc. of Mississippi is the Appellant.

PROOF OF SERVICE

I certify that on this date, September 16, 2024, I filed the **Appellant's Return to Respondent's Motion to Dismiss** with the South Carolina Court of Appeals via OneDrive and served a copy on Respondent via e-mail, pursuant to The Supreme Court of South Carolina's Amended Order, dated April 24, 2024, to the attorneys of record as follows:

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September 16, 2024
Greenville, South Carolina

From: [Drennan Quattlebaum](#)
To: ["thomas@tklawyers.com"](mailto:thomas@tklawyers.com)
Cc: josh.cantwell@poulinwilley.com; eliza@cantwelllawfirm.org; Bryan Kelley; Katharine Spooner
Subject: AJP Solutions, LLC v. Clark Construction Inc. of Mississippi; Appellate CA. No. 2024-000689
Date: Monday, September 16, 2024 2:02:45 PM
Attachments: [image001.png](#)
[Appellant's Return to Motion to Dismiss w Appendix 2024.09.16.pdf](#)
[Proof of Service - Appellant's Return to Respondent's Motion to Dismiss - 2024.09.16.pdf](#)

Thomas,

Attached, please find Clark Construction Inc. of Mississippi's Return to AJP Solution, LLC's Motion to Dismiss in regard to the above referenced matter. The same is being filed via the Court's OneDrive system. If you have any difficulty opening the attachments, please let me know.

Thanks,
Drennan



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