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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge

Case No. 2024-CP-08-02013

Gillam & Associates, Inc,

Appellant.

v.

Pampa Bay Landscape Construction, LLC,

Respondent,

RECORD ON APPEAL

Matthew E. Cox, SC Bar No. 16603

mecox@smithcurrie.com

Eugene F. Rash, SC Bar No. 8887

gfrash@smithcurrie.com

Smith Currie Oles LLP

5727 Westpark Drive, Suite 200

Charlotte, North Carolina 28217

PH: (704) 334-3459

FX: (704) 334-7850

Attorneys for Appellant

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Pampa Bay Landscape Construction,
LLC,

C/A No. 2024-CP-08-02013

Plaintiff,

**ORDER DENYING DEFENDANT GILLAM
& ASSOCIATES, INC.'S MOTION TO STAY
ACTION PENDING ARBITRATION**

vs.

Gillam & Associates, Inc. and Drayton-
Parker Companies, LLC,

Defendants.

INTRODUCTION

This matter came before the Court on Defendant Gillam & Associates, Inc.'s ("Gillam") Motion to Stay Action Pending Arbitration. A hearing was held in-person on January 7, 2025. Gillam was represented by Matthew E. Cox, Esq., and the Plaintiff, Pampa Bay Landscape Construction, LLC ("Pampa Bay"), was represented by Dylan R. Glick, Esq. Based on briefs filed by the Parties, arguments made during the hearing, and South Carolina law, the Court **DENIES** Gillam's Motion to Stay Action Pending Arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

This dispute revolves around a subcontract ("Subcontract") Pampa Bay entered into with Gillam on or around June 23, 2023 to perform certain landscaping work at a new Parker's Kitchen gas station located at 343 College Park Road in Ladson, South Carolina 29456. A dispute arose as to Pampa Bay's payment and performance under the Subcontract leading to the instant action filed by Pampa Bay.

Pampa Bay filed a mechanic's lien on June 27, 2024 and its corresponding foreclosure complaint on July 19, 2024. Gillam filed a Motion to Dismiss, a Motion to Stay and Compel Arbitration, and an Answer and Counterclaim (subject to the Motion to Stay Action) on August 26, 2024. Gillam's Motion to Stay and Compel Arbitration is premised on an arbitration provision found within the Subcontract which reads as follows:

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor's failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise. The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the

disputes between Contractor and Subcontractor may be consolidated or joined in the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion.

Subcontract, Art. 10.1.

FINDINGS OF LAW

I. THE ARBITRATION CLAUSE IS UNENFORCEABLE BECAUSE IT FAILS TO MEET NOTICE REQUIREMENTS SET FORTH IN S.C. CODE ANN. § 15-48-10(A). IN ADDITION, THE FEDERAL ARBITRATION ACT (FAA) DOES NOT OTHERWISE APPLY.

a. Notice Requirements of S.C. Code ann. § 15-48-10(a) not met.

The South Carolina Uniform Arbitration Act (“SCUAA”) requires that any instrument requiring arbitration to boldly display notice to the parties that the instrument is subject to arbitration. S.C. Code Ann. § 15-48-10(a) provides, in relevant part:

Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

If notice is not provided as required by S.C. Code Ann. § 15-48-10(a), then the requirement to arbitrate is unenforceable. *Id.*

As recently as 2023, the Supreme Court of South Carolina refused to enforce an arbitration clause which failed the notice requirement required by S.C. Code Ann. § 15-48-10(a). *Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023). In *Hicks Unlimited, Inc.*, a dispute arose between UniFirst Corporation – a uniform rental company – and Hicks. UniFirst Corporation sought to enforce the arbitration provision in its contract. Importantly, the provision did not comply with the notice requirements of the South Carolina Uniform Arbitration Act. *Id.* at 628. The Circuit Court agreed and declined to enforce arbitration on that basis. The Court of Appeals reversed on other grounds. Finally, the Supreme Court of South Carolina agreed and declined to enforce the arbitration provision for failure to comply with South

Carolina Uniform Arbitration Act and because the FAA did not otherwise apply to the parties' contract. *Id.*

South Carolina courts require strict interpretation of statutes when the language is clear. *See Soil Remediation Co. v. Nu-Way Env't.*, 323 S.C. 454, 457 (1996) ("where the terms of the statute are clear, the court must apply those terms according to their literal meaning.").

Here there is no dispute that the Subcontract does not meet the SCUAA notice requirements. The notice of arbitration is not prominently rubber-stamped on the first page, nor does it appear in capitalized and underlined letters anywhere in the Subcontract. The arbitration provision in the Subcontract is the same font size and color as every other provision in the Subcontract. The portion of the Subcontract where the arbitration clause is found is found on pages 11 and 12 with the inconspicuous title 'Claims,' without any mention of arbitration except further in that section. Based on Gillam's failure to comply with the statutory requirements of S.C. Code Ann. § 15-48-10(a), the Court finds that arbitration clause in Gillam's Subcontract is unenforceable.

B. The FAA does not apply to the Subcontract.

I. The Subcontract states South Carolina law shall apply.

Gillam argues that even though its arbitration provision does not comply with SCUAA, the requirements of the SCUAA do not apply because they are preempted by the FAA. The South Carolina Uniform Arbitration Act ("SCUAA") applies to any agreement to arbitrate in South Carolina unless it is stipulated that SCUAA shall not apply in the agreement. S.C. Code Ann. § 15-48-10(b). In that case, the Federal Arbitration Act may apply only if interstate commerce is demonstrated by the moving party. The party claiming the FAA preempts state law bears the burden

of proving the contract involves interstate commerce. 9 U.S.C.A. § 1; *see also Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023).

South Carolina Courts have held that parties to a contract are free to elect state arbitration law or the FAA for dispute resolution. *See e.g. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) (“Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA.”); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (“Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.”)

The Court observes that Gillam’s Subcontract does not make any reference to the FAA. The FAA is not mentioned in the arbitration provision nor is it mentioned anywhere else in the 13-page Subcontract. On the contrary, Subcontract explicitly states it is governed by South Carolina law. Paragraph 11.1 provides “[t]he provision of this Subcontract shall be controlled and interpreted by the laws of the State of South Carolina. . .” The arbitration provision in the Subcontract specifically provides “this agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina.” The arbitration provision further provides any arbitration hearing shall take place in Aiken or Columbia, South Carolina and that the arbitrator shall be a South Carolina resident. The Court finds that these requirements in Gillam’s Subcontract evince a clear intent that South Carolina law should govern. “To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007)

(citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). Accordingly, the Court finds Gillam intended for SCUAA to govern the arbitration provision in the Subcontract.

II. Even assuming the Subcontract did not specify South Carolina Law applied, Gillam has failed to demonstrate the existence of interstate commerce to invoke the FAA.

The previously cited 2023 South Carolina Supreme Court opinion in *Hicks Unlimited, Inc.* also has particular relevance for resolving the question of applicability of the FAA. The Court in *Hicks* held “a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce.” 439 S.C. at 632, 889 S.E.2d at 568. Importantly, a party “may not make the connection by declaring or contemplating the FAA will govern.” *Id.* By reaching this conclusion, the Court clarified the opinions in *Munoz* and *Damico* which ushered in a presumption of the applicability of the FAA, especially in construction contracts. “To the extent *Munoz v. Green Tree Fin. Corp.* and *Damico v. Lennar Carolinas, LLC* have been read as allowing parties to agree the FAA preempts South Carolina law without an accompanying demonstration the contract involves interstate commerce, we clarify now they do not.” *Id.* To determine whether interstate commerce is implicated by the parties, a court looks to “the agreement, the complaint, and the surrounding facts, including any affidavits submitted.” (internal quotations omitted). *Id.* The Court held that the mere shipping of products from Kentucky to South Carolina, payment made outside the state of South Carolina, and one of the parties being domiciled in Massachusetts were all insufficient to invoke interstate commerce. As a result, the Court affirmed the trial court’s decision to deny arbitration as unavailing under the FAA and failing to comply with the SCUAA.

Gillam’s Motion to Stay Action Pending Arbitration Between the Parties argues that the FAA should apply instead of SCUAA because the Subcontract involves interstate commerce. To

support this argument, Gillam offers the Affidavit of Eric Floyd, the project manager for Gillam. The Affidavit contains statements by Mr. Floyd about where materials used by Pampa Bay may have originated from. Mr. Floyd attests ‘I understand that Pampa Bay purchased the following products from SiteOne Landscape Supply which procured the materials outside South Carolina:

- (a) Irrigation heads and clock valves from Hunter Brand – these were distributed from *either* Charlotte, North Carolina or Atlanta, Georgia;
- (b) PVA pipe from Crestline Pipe which were directly sourced from Pennsylvania *or* Indiana Fittings (Spears) and distributed from either Charlotte or Atlanta.’

Aff. of Eric Floyd ¶ 4 (a-b).

The Court is unwilling to accept Mr. Floyd’s Affidavit as sufficient evidence to support the existence of interstate commerce. The Affidavit amounts to unsupported assumptions by Mr. Floyd about the origin of various products. Mr. Floyd cannot even narrow down the state of origin of particular products to less than two possible states, even assuming his assumptions are correct at the outset. This is insufficient under the new standard for demonstrating the existence of interstate commerce set forth in *Hicks Unlimited*; *see also Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 285, 851 S.E.2d 724, 734 (Ct. App. 2020), *aff’d as modified*, 440 S.C. 456, 892 S.E.2d 297 (2023) (trial court has discretion to strike or disallow an affidavit for consideration).

Moreover, Peter Gallo, Pampa Bay’s owner, submitted an Affidavit attesting Pampa Bay did not directly source the products Mr. Floyd cites from out-of-state sources and were instead purchased and picked up from a local Ladson store. Aff. of Peter Gallo ¶¶ 8, 10.

Based on the Affidavits of Peter Gallo and Eric Floyd, it is clear there is a genuine dispute about the existence of interstate commerce. Under these circumstances and our case law, it would be inappropriate to deprive Pampa Bay of its constitutional right to a jury trial. Accordingly, the FAA does not preempt the SCUAA under the facts at hand because Gillam has failed to demonstrate the existence of interstate commerce.

CONCLUSION

For the foregoing reasons, the Court denies Gillam's Motion to Stay Action Pending Arbitration.

[Judge's electronic signature page to follow]



Berkeley Common Pleas

Case Caption: Pampa Bay Landscape Construction Llc VS Gillam & Associates, Inc.
, defendant, et al
Case Number: 2024CP0802013
Type: Order/Other

And It Is So Ordered!

s/Dale E. Van Slambrook S.C. Circuit Court Judge
#2781

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STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	THE NINTH JUDICIAL CIRCUIT
	)	
Pampa Bay Landscape Construction LLC,	)	
	)	C/A No.: 2024-CP-08-_____
Plaintiff,	)	
	)	
v.	)	
	)	
Gillam & Associates, Inc, Drayton-Parker	)	SUMMONS
Companies LLC.	)	
	)	
Defendants.	)	
_____	)	

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said pleading upon the subscribers at their offices, 1201 Main Street, Suite 1800, Post Office Box 1799, Columbia, South Carolina 29202, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully Submitted,

FINKEL LAW FIRM LLC

s/ Dylan R. Glick

Dylan R. Glick (SC Bar #: 105210)

Post Office Box 1799 (Mailing Address)

1201 Main Street, Suite 1800 (Physical Address)

Columbia, South Carolina 29202

Email: dglick@finkellaw.com

Phone: (803) 765-2935

Attorney for the Plaintiff

Columbia, South Carolina
July 19, 2024

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	THE NINTH JUDICIAL CIRCUIT
	)	
Pampa Bay Landscape Construction LLC,	)	
	)	C/A No.: 2024-CP-08-_____
Plaintiff,	)	
	)	
v.	)	COMPLAINT
	)	<i>(jury trial demanded)</i>
Gillam & Associates, Inc., Drayton-Parker	)	
Companies LLC,	)	
	)	
Defendant.	)	

Plaintiff by and through its undersigned counsel, would respectfully allege as follows:

PARTIES AND JURISDICTION

1. Plaintiff Pampa Bay Landscape Construction LLC (hereinafter “Pampa Bay”) is a limited liability company created and existing under the laws of the State of South Carolina.
2. Defendant Gillam & Associates, Inc. (hereinafter “Gillam”) is a corporation created and existing under the laws of the State of South Carolina with its principal place of business in Aiken County, South Carolina.
3. Defendant Drayton-Parker Companies LLC is a foreign limited liability company created and existing under the laws of the State of Georgia.
4. This action revolves around a contract for landscaping services which was performed upon real property situated in Berkeley County, South Carolina.
5. This Court has jurisdiction over the parties and subject matter alleged herein and venue is proper in this forum.

FACTUAL BACKGROUND

6. This is an action alleging unpaid balances for landscaping services by Pampa Bay at (“Subject Property”).

7. Pampa Bay entered into a subcontract (“Subcontract”) with Gillam to provide certain landscaping labor and materials on the real estate at 343 College Park Rd. Ladson, SC 29456 (“Subject Property”) on or around June 23, 2023. A true and accurate copy of the Subcontract is attached as **Exhibit A**.

8. The Subcontract amount, together with mutually agreed upon change orders, extras, and materials, totaled \$117,648.85.

9. Pampa Bay timely and satisfactorily performed its scope of work pursuant to the terms of the Subcontract from the beginning of the Project through April, 2024.

10. Towards the end of the Project in May 2024, Pampa Bay was prevented from completing its work due to delays attributable to another subcontractor.

11. The delays were outside Pampa Bay’s control.

12. Pampa Bay provided written notices to Gillam notifying it of the delays that impacted its ability to complete the scope of work in a timely manner.

13. Despite the delays, Pampa Bay reassured Gillam it was ready, willing, and able to complete its work as soon as the site was suitable for final landscaping. Pampa Bay had materials delivered to the Subject Property during this timeframe to be used to complete its scope of work.

14. Instead of resolving the issues with other subcontractors to make the site suitable for final landscaping and irrigation by the promised date to owner (Drayton-Parker Companies LLC), Gillam opted instead to hastily terminate Pampa Bay on May 22 and hire a Georgia subcontractor to perform the remaining work.

15. Gillam terminated Pampa Bay on May 22 via e-mail communication.

16. As a part of the termination, Gillam demanded Pampa Bay leave its materials on site for which Pampa Bay had not yet been paid.

17. Gillam's termination of Pampa Bay and its subsequent conduct was improper under the Subcontract.

18. Pampa Bay was not provided the right to cure any alleged deficiencies prior to its termination by Gillam.

19. On June 13, 2024, Pampa Bay sent a written demand by certified mail for payment to Defendants for materials and labor provided pursuant to S.C. Code Ann. §§ 27-1-15 and 29-6-30 (otherwise known as the 'Prompt Pay Act'). A copy of the letter is attached as **Exhibit B**.

20. Notwithstanding, Gillam has unreasonably failed to pay the outstanding balance of \$60,335.89 due to Pampa Bay and, upon information and belief, did not make a reasonable inquiry into the alleged balance owed.

21. Pampa Bay is due \$60,335.89. This amount includes retainage for work already completed, materials delivered and installed, and materials on site which were subsequently unusable due to delays.

22. On or about June 27, 2024, within ninety days from last supplying labor and/or furnishing materials at the Subject Property, Pampa Bay filed and properly served its Statement and Notice of Mechanic's Lien in the amount of Fifty Thousand Five Hundred Twenty-Seven and 78/100 Dollars (\$50,527.78) (the "Mechanic's Lien").

23. The Subcontract provides for recovery of reasonable attorney's fees and costs and other costs of collection.

FOR A FIRST CAUSE OF ACTION
(Foreclosure of Mechanic's Lien)

The foregoing paragraphs are realleges as if fully set forth herein verbatim.

24. On or about June 27, 2024, within ninety days from last supplying labor and/or furnishing materials at the Subject Property, Pampa Bay filed and served its Statement and Notice

of Mechanic's Lien in the amount of Fifty Thousand Five Hundred Twenty-Seven and 78/100 Dollars (\$50,527.78) (the "Mechanic's Lien"). The Mechanic's Lien was filed with the Berkeley County Register of Deeds Office and recorded in Book 4899, Page 373.

25. A true and accurate copy of the Mechanic's Lien is attached hereto as **Exhibit C** and is incorporated herein by reference.

26. The owner of the Subject Property is Drayton-Parker Companies, LLC. Upon information and belief, there are no other owners or entities which have any interest in the Subject Property.

27. Despite Pampa Bay's demand for payment and its filing of the Mechanic's Lien, Gillam has refused to pay the amount claimed.

28. The Mechanic's Lien was filed to secure debts due for the labor, materials and services that Pampa Bay provided to the Subject Property, the payment of which was the responsibility of Gillam.

29. Pampa Bay is informed and believes that the Mechanic's Lien constitutes a valid lien on the leasehold estate in the Subject Property and, accordingly, Pampa Bay is entitled to have the Mechanic's Lien foreclosed to pay Pampa Bay the amount due and owing under the Mechanic's Lien, together with the costs of this action and reasonable attorney's fees allowed by law.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

30. Pampa Bay entered into a valid Subcontract supported by consideration with the Gillam to provide certain landscaping labor and materials for the Project.

31. As part of the Subcontract and under applicable law, Gillam agreed to remit timely payment to Pampa Bay for labor performed and materials supplied.

32. The Subcontract contains a payment clause which reads: “The Contractor agrees to pay to the Subcontractor for the satisfactory completion of Subcontractor's Work the sum of Eighty-Four Thousand Three Hundred Two And 29/100 \$84,302.29 in monthly payments of ninety percent of the work performed in any preceding month.” (SUBCONTRACT § 2.1).

33. As stated herein, the Subcontract sum was increased due a change order together with additional necessary materials.

34. Gillam materially breached the Subcontract because it failed to timely remit payment to Pampa Bay for work already performed, materials supplied, and for costs of materials which were unusable due to avoidable delays.

35. The Subcontract also set forth a specific procedure for termination of a subcontractor.

36. Gillam contracted to a termination clause which requires it to provide a notice of default and right to cure to Pampa Bay “no less than two (2) calendar days.” SUBCONTRACT § 9.2.

37. Pampa Bay was not provided a notice of default or a right to cure as defined in the Subcontract prior to termination.

38. Gillam additionally and materially breached the Subcontract because it failed to provide required notices under the Subcontract.

39. As a consequence of Gillam’s failure to timely remit payment to Pampa Bay and improper termination of Pampa Bay, Gillam was prohibited from withholding Pampa Bay’s payment, hiring a supplemental contractor and deducting its balance from Pampa Bay’s outstanding balance, and is estopped from enforcement of other unconscionable, one-sided remedies set forth in the Subcontract.

40. As the drafter of the Subcontract, all provisions are to be construed against Gillam

and in favor of Pampa Bay.

41. As a direct and proximate result of Gillam's material breaches of the Subcontract, Pampa Bay has suffered damages as outlined above and is entitled to recover from Gillam all direct, consequential, contractual, and statutory damages that are provable in a court of law.

FOR A THIRD CAUSE OF ACTION
(Unjust Enrichment/Quantum Meruit)

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

42. If this court determines the Subcontract, change orders, or other complained of invoices and charges do not constitute a valid and enforceable contract, then Pampa Bay seeks equitable relief under the theory of Unjust Enrichment/Quantum Meruit.

43. Pampa Bay provided valuable labor and materials for the Subject Property which conferred a significant benefit on Gillam as the general contractor responsible for delivering a final project to the owner, Drayton-Parker Companies LLC.

44. Gillam realized this benefit by receiving these benefits, being paid by the owner, and being aware of Pampa Bay's reasonable expectation to be paid pursuant to the Subcontract.

45. By receiving a benefit under Subcontract as set forth herein, it would be unjust for Gillam to retain said benefit without compensating Pampa Bay all reasonable amounts due.

FOR A FOURTH CAUSE OF ACTION
(Violation of S.C. Code Ann. § 29-6-50 ['Prompt Pay Act'])

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

46. The Prompt Pay Act provides, in relevant part:

If a periodic or final payment to a subcontractor is delayed by more than seven days after receipt of periodic or final payment by the contractor . . . [the] contractor shall pay his . . . subcontractor interest, beginning on the due date, at the rate of one percent a month or a pro rata fraction thereof on the unpaid balance as may be due. . . . In case of a willful breach of the contract provisions as to time of payment, the interest rate specified in this section shall apply.

S.C. Code Ann. § 29-6-50.

47. On June 13, 2024, Pampa Bay sent a written demand by certified mail for payment to Defendants for materials and labor provided pursuant to S.C. Code Ann. §§ 27-1-15 and 29-6-30.

48. Gillam failed to remit final payment to Pampa Bay within seven (7) days.

49. Per statute, Gillam's failure to promptly remit payment necessitates any unpaid balance to accrue at an additional interest rate of 1% per month.

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

The foregoing paragraphs are realleged as if fully set forth herein verbatim.

50. Per, S.C. Code Ann. § 27-1-15:

Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

51. On June 13, 2024, Pampa Bay sent a written demand by certified mail for payment to Defendants for materials and labor provided pursuant to S.C. Code Ann. §§ 27-1-15 and 29-6-30.

52. Gillam has unreasonably failed to pay the outstanding balance of \$60,335.89 due to Pampa Bay and, upon information and belief, did not make a reasonable inquiry into the alleged balance owed.

53. Pampa Bay is entitled to reasonable attorney's fees and interest at the judgment rate

(12.5%) from the date of the demand.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays the Court hold the Defendant liable for the actions set forth herein, to enter judgment against the Defendant and in favor of Plaintiff, and to award the following relief:

- A. Award Plaintiff an Order from the Court entering judgment directing foreclosure of the Subject Property pursuant to the Mechanic's Lien thereon and directing application of the proceeds to satisfy the debt due by Defendant Gillam for the unpaid labor materials provided on the Property in the amount of at least \$50,527.78, plus attorneys' fees, interest, costs, and any other relief afforded by S.C. Code Ann. § 29-5-10 *et. seq.*
- B. Award Plaintiff all actual, consequential, contractual, and statutory damages against Gillam in an amount to be proven at trial;
- C. Award Plaintiff all relief afforded under S.C. Code Ann. §§ 27-1-15 and 29-6-30, including attorney's fees, costs, and interest on the unpaid balance;
- D. Award Plaintiff all costs it has incurred as a result of this action including attorneys' fees and costs; and
- E. Any other relief this Court deems just and equitable.

Respectfully Submitted,

FINKEL LAW FIRM LLC

s/ Dylan R. Glick
Dylan R. Glick (SC Bar #: 105210)
Post Office Box 1799 (Mailing Address)
1201 Main Street, Suite 1800 (Physical Address)
Columbia, South Carolina 29202
Email: dglick@finkellaw.com
Phone: (803) 765-2935
Attorney for the Plaintiff

Columbia, South Carolina
July 19, 2024

THE ASSOCIATED GENERAL CONTRACTORS



JUL 11 2023

STANDARD SUBCONTRACT AGREEMENT FOR BUILDING CONSTRUCTION

This Document has important legal and insurance consequences; consultation with an attorney and insurance consultants and carriers is encouraged with respect to its completion or modification.

2345-0288

THIS AGREEMENT made at Aiken, SC on **June 23, 2023** by and between **Gillam & Associates, Inc., PO Box 1607, Aiken SC 29802**, hereinafter referred to as the contractor, and **Pampa Bay Landscape Construction, LLC, 431 St. James Ave. Suite L212, Goose Creek, SC, 29445** hereinafter referred to as the Subcontractor, to perform part of the Work on the following Project:

PROJECT: Spinx#370, Johns Island SC
3285 Timberland Drive
Johns Island SC 29455

OWNER: The Spinx Company
1414 East Washington Ave.
Greenville, SC 29607

ARCHITECT: Betsch Associates, Inc.
101 North Main Street, Suite 808
Greenville, SC 29601

Spinx#370, Johns Island SC
June 23, 2023

ARTICLE 1

Scope of Work

1.1 The Contractor employs the Subcontractor as an independent contractor, to perform the following part of the Work which the Contractor has contracted with the Owner to provide on the Project:

Furnish all labor, material and equipment to complete the Landscaping in accordance with the plans, submittals, contract documents and applicable codes including compliance with environmental protection.

Any person on site will adhere to all safety compliances per the on-site Superintendent and Safety Manager. Any person that does not adhere to the safety protocols will be warned and removed from the site, if necessary, by the site superintendent or qualified personnel.

All subcontractors will keep the debris from their daily tasks cleaned daily. It is the subcontractors' responsibility to remove the debris from their daily work and not the responsibility of Gillam and Associates. A warning will be given, and a fee will be charged if any issues persist.

The Subcontractor agrees to perform such part of the Work (hereinafter called "Subcontractor's Work") under the general direction of the Contractor and subject to the final approval of the Architect/Engineer or other specified representative of the Owner, in accordance with the Contract Documents. Subcontractor will furnish all of the labor and materials, along with competent supervision, shop drawings and samples, tools, equipment, scaffolding, and permits which are necessary for such performance. **This subcontract and the Contract Documents supersede all prior negotiations and representations, and constitute the entire agreement between the parties unless amended by change order signed by the Contractor.**

1.2 The Contract Documents are:

- 1.) AIA A102 – 2017 Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price, dated June 9, 2023 **and all documents incorporated therein ("Agreement Between Owner and Contractor" or Prime Contract");**
- 2.) The plans and project manual prepared by the Architect, Betsch Associates, Inc., 101 North Main Street, Suite 808, Greenville SC 29601 entitled Spinx Station#370, 3285 Timberline Drive, Johns Island SC 29455; Architect's Project No. 0600.00, and the engineer, HLA, 29A Leinbach Drive, Charleston SC 29407; Engineer's Project No. 04060.41.

1.3 Should any question arise with respect to the interpretation of the drawings and specifications, such questions shall be submitted to the Architect/Engineer and his decision shall be final and binding. If there is no Architect/Engineer for this Project, the Contractor's decision shall be followed by the Subcontractor. **The Contract Documents are incorporated herein by reference as if set forth herein in full and are available upon written request and also available on-line via Contractor's plan distribution system at <https://secure.smartbidnet.com/Main/login.aspx>.**

1.4 The Contractor and Subcontractor shall be mutually bound by the terms of this Subcontract and by the terms of the Prime Contract between Contractor and Owner (and all documents incorporated therein by reference) which are incorporated herein by reference. The Contractor assumes toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor assumes toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of the Prime Contract is inconsistent with a provision of this Agreement, the Prime Contract shall govern except that Articles 2, 9 and 10 of this Subcontract and notice provisions in Article 4 of this Subcontract shall control over the Prime Contract terms to the extent of any conflict.

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1.5 The following additions, deletions and / or corrections to the printed conditions contained herein are hereby acknowledged by both parties to form a part of this Contract and to be incorporated herein by reference:

Exhibit "A" – Safety Rules & Regulations
Exhibit "B" – Subcontractor's Application for Payment Form
Exhibit "C" – Supplier / Subcontractor Affidavit
Exhibit "E" – Model Certificate of Insurance / Insurance Compliance Verification
Exhibit "F" – Gillam & Associates, Inc.'s Online Plan Room Service - SmartBidNet

ARTICLE 2

Payments

2.1 The Contractor agrees to pay to the Subcontractor for the satisfactory completion of Subcontractor's Work the sum of **Forty-Nine Thousand Seven Hundred Sixty-Two And 00/100 \$49,762.00** in monthly payments of **ninety five** percent of the work performed in any preceding month, in accordance with estimates prepared by the Subcontractor and approved by the Contractor and **Owner**. Payments made on account of materials not incorporated in the work, but delivered and suitably stored at the site, or at some other location agreed upon in writing, shall be in accordance with the terms and conditions of the Contract Documents. Subcontractor will provide monthly completed lien waivers and supplier affidavit forms, in a form satisfactory to the Owner and Contractor. Also, payment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipts by the Contractor of payment **for the Subcontractor's Work** from the Owner. **Payment from the Owner to the Contractor for the Subcontractor's Work shall be an absolute condition precedent to Contractor's payment to Subcontractor for Subcontractor's Work, and Subcontractor shall only be entitled to payment of the amount paid by Owner to Contractor for Subcontractor's Work less any offsets, backcharges and expenses permitted under this Subcontract, or otherwise permitted by law or equity. (In the event applicable law prohibits payment by the Owner to the Contractor from being a condition precedent to payment by the contractor to the Subcontractor, then that condition shall not apply but approval of the Subcontractor's Work by the Owner shall remain a condition precedent to payment by the Contractor to the Subcontractor.)** Approval and payment of Subcontractor's monthly or final application for payment is specifically agreed not to constitute or imply acceptance by the Contractor or Owner of any portion of the Subcontractor's Work.

2.2 In the event the Subcontractor does not submit to the Contractor such monthly estimates **with the required documentation by 20th of each month** then the Contractor may at his option include in his monthly estimate to the Owner for Work performed during the preceding month such amount as he may deem proper for the Work of Subcontractor for the preceding month and the Subcontractor agrees to accept such approved portion thereof in lieu of the monthly payment based upon the Subcontractor's estimate.

2.3 In the event it appears to the Contractor that the labor, material and other bills incurred in the performance of Subcontractor's Work are not being currently paid, the Contractor may take such steps as he deems necessary **in his sole discretion** to insure that the money paid with any progress payment will be utilized to pay such bills; **or the contractor may take any other action permitted by the law including paying these bills directly or by joint check and deducting the amount from this subcontract.**

2.3.1 The Subcontractor agrees to furnish a list of names, addresses, telephone numbers, and prices of all major material suppliers and subcontractors as outlined in Exhibit "C" which is hereby incorporated as part of this Subcontract within thirty (30) days of execution of the subcontract or before any periodic or final payment is made.

2.3.2 Subcontractor covenants to cause any lien, claim, security interest or encumbrance brought by Subcontractor's suppliers or subcontractors to be discharged or bonded off within five business days of notice thereof.

2.3.3 In case suit or other legal proceeding to establish lien is brought by any person, firm or corporation employed by or furnishing material to said Subcontractor under this subcontract, Subcontractor will at his own cost and expenses (including Attorney's fees and expenses) defend such suit and pay such lien established in court or otherwise, plus any expense to the Contractor resulting from such lien action. In the event Contactor

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must file a bond to discharge a lien claim filed by any person, firm or corporation employed by or furnishing material to Subcontractor under this subcontract then Subcontractor shall be liable to Contractor for all bond premiums as well as costs and expenses (including attorney's fees and expenses) incurred by Contractor to defend such suit and/or to pay such lien, plus any other expense to the Contractor resulting from such lien.

2.4 Final payment shall be paid to the Subcontractor upon approval by the Owner, Architect and the Contractor of the Subcontractor's Work and, upon payment having been received by the Contractor for all of Subcontractor's Work and satisfactory evidence having been received by the Contractor that all labor, including customary fringe benefits and payments due under collective bargaining agreements, and all subcontractors and **suppliers** have been paid to date and are waiving their lien rights, **and all other conditions for final payment under the terms of this Subcontract.**

2.5 The Contractor may deduct from any amounts due or to become due to the Subcontractor any sum or sums owing by the Subcontractor to the Contractor; and in the event of any breach by the Subcontractor of any provision or obligation of this Subcontract, or in the event of the assertion by other parties of any claim or lien against the Owner, the Contractor, Contractor's Surety, or the premises upon which the Work was performed, which claim or lien arises out of the Subcontractor's performance of this Agreement, the Contractor shall have the right, but is not required, to retain out of any payments due or to become due to the Subcontractor an amount sufficient to completely protect the Contractor from any and all loss, damage or expense therefrom, until the claim or lien has been adjusted by the Subcontractor to the satisfaction of the Contractor, **and if the amount of any payments due or to become due to Subcontractor from the performance of this Agreement are insufficient to completely protect Contractor then Subcontractor shall be immediately liable to pay the additional loss, damage or expense to Contractor.** This paragraph shall be applicable even though the Subcontractor has posted a full payment and performance bond.

2.6 In accordance with IRS Regulations, Subcontractor must furnish his taxpayer identification number (TIN) or Social Security Number (SSN) to the Contractor. Failure to do so will invoke a mandatory backup withholding of an additional twenty percent 28% to be withheld from all payment requests.

2.7 Payments otherwise due, either interim Progress Payments, if any, or final payment under Article 2 herein, may be withheld by Contractor on account of: (1) defective Work not remedied; (2) claims filed or reasonable evidence indicating probability of claims; (3) failure of Subcontractor to make payment to its subcontractors or suppliers for material or labor, or applicable taxes, fees, and fringe benefits; (4) reasonable doubt that Subcontractor's Work can be completed for the balance of the Subcontract Amount then unpaid or within the Schedule; (5) any other breach of the Subcontract Documents; and (6) any breach by Subcontractor of any other subcontract or agreement between Contractor and Subcontractor regarding the Project or any other project. If these deficiencies are not remedied, Contractor may remedy such deficiencies at Subcontractor's expense. Contractor may offset against the unpaid balance of the Subcontract Amount any liquidated or unliquidated obligations of Subcontractor to Contractor, whether or not arising out of the Subcontract Documents, Subcontractor's Work on the Project, Subcontractor's subcontract(s) with Contractor on any other project, or Subcontractor's work on any project other than the Project.

Should Subcontractor be in breach of any other contract with Contractor, and should that breach not be cured after written notice, Contractor may terminate this Subcontract or set off money otherwise due Subcontractor for damages caused by this breach. Contractor may rectify any breach at Subcontractor expense and withhold from monies due or to become due or otherwise recover such amount from Subcontractor. Subcontractor grants a first security interest and right of set-off to Contractor in any unpaid funds or amounts due or to become due to Subcontractor whether under this Subcontract or otherwise, to secure Subcontractor's obligations to Contractor, whether under this Subcontract or otherwise.

ARTICLE 3

Prosecution of the Work

3.1 Time is of the essence for both parties, and they mutually agree to see to the performance of their Work and the Work of their subcontractors so that the entire project may be completed in accordance with the Contract Documents. The Subcontractor shall provide the Contractor with scheduling information and Subcontractor's proposed schedule for

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the Subcontractor's Work. The Contractor shall then prepare the Schedule of the Work and, as may be necessary, revise such schedule as the Work progresses. Subcontractor acknowledges that revisions may be made in such schedule and agrees to make no claim for acceleration or delay by reason of such revisions.

3.2 The Subcontractor shall prosecute Subcontractor's Work in a prompt and diligent manner in accordance with the Schedule of Work without hindering the Work of the Contractor or any other subcontractor. If the work of others is damaged by Subcontractor, the Subcontractor will cause such damage to be corrected to the satisfaction of and without cost to the Contractor and Owner. In the event Subcontractor fails to maintain his part of the Schedule of the Work, he shall, without additional compensation, work such overtime as the Contractor may direct until Subcontractor's Work is in accordance with such schedule.

3.3 The Subcontractor shall be responsible for and will prepare for performance of Subcontractor's Work, including without limitation thereto, the submission of shop drawings, samples, tests, field dimensions, determination of labor requirements and ordering of materials as required to meet the Schedule of Work. Subcontractor shall notify Contractor when portions of his Work are ready for inspection.

3.4 The Subcontractor will furnish periodic progress reports of the Subcontractor's Work as mutually agreed including the progress of materials or equipment to be provided under this Agreement that may be in the course of preparation or manufacture.

3.5 The Subcontractor shall cooperate with the Contractor and subcontractors whose work may interfere with the Subcontractor's Work and participate in the preparation of coordinated drawings and work schedules in areas of congestion, specifically noting and advising the Contractor of any interference by other contractors or subcontractors.

3.6 The Subcontractor shall keep the building and premises reasonably clean of debris resulting from the performance of Subcontractor's Work. If the Subcontractor fails to comply with this paragraph within 48 hours after receipt of notice of noncompliance from the Contractor; the Contractor may perform such necessary clean-up and deduct the cost from any amounts due to the Subcontractor. **All work-related debris is to be disposed of by Subcontractor.**

3.7 The Subcontractor shall give adequate notices pertaining to the Work of the Subcontractor to proper authorities and secure and pay for all necessary licenses and permits to carry on Subcontractor's Work, the furnishing of which is required by the Contract Documents. **No material containing asbestos to be used on this project.**

3.8 SUBCONTRACTOR IS INDEPENDENT CONTRACTOR: It is expressly understood and agreed that the relationship created hereunder is that of an Independent Contractor. Contractor shall have no control or right to exercise any control whatsoever over the employees of Subcontractor in their performance of this subcontract. Contractor shall not have the right nor shall it attempt to exercise the right to establish the rate of pay, benefits, hours of work or other terms or conditions of employment of the employees of the Subcontractor. Contractor shall not select, supervise, direct or in other way control or seek to control the employees of Subcontractor. Subcontractor agrees to and warrants that it will pay all taxes applicable to Subcontractor's work, including but not limited to sales and use taxes, and that it will comply with all applicable federal, state and local laws and regulations, including but not limited to federal and state labor, taxation, safety, immigration and employment laws such as the Immigration Reform and Control Act of 1986 and the Immigration and Naturalization Act, as amended, including those involving the verification of employment authorization for all employees hired after November 30, 1986 and those related to wages, the payment of wages, the withholding of sums from wages for taxes and otherwise, and that it will promptly remit to the appropriate recipients all monies withheld from the pay of employees and all monies due from Subcontractor as an employer related in any way to the employment including, but not limited to, local, state and federal laws relating to discrimination, veterans rights, the hiring of the disabled and worker's compensation laws, and shall indemnify, and save and hold Contractor harmless from penalties, fines, costs, expenses or damages resulting from Subcontractor's failure to do so or the failure of Subcontractor's subcontractors or suppliers to do so.

3.8.1 The Subcontractor agrees to conform to the Safety Rules & Regulations as outlined in Exhibit "A" and comply with Contractor's Health & Safety Program which are hereby incorporated as part of this Subcontract.

3.9 The Subcontractor will not assign this agreement nor subcontract the whole or any part of the Work to be performed hereunder without the prior written consent of the Contractor, with the exception of those subcontractors listed by the

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Subcontractor and furnished to the Contractor at the time this Agreement is executed.

3.10 Subcontractor agrees to only employ persons on the Work who will work at all times in harmony with other persons employed on the Project. Should there be a work stoppage, slow down or any type of interference with the performance of work on the Project involving the Subcontractor or his employees resulting from a labor dispute, which in the judgment of Owner or Contractor, will cause or threatens to cause delay in the progress of construction, then upon 24 hours written notice, Owner or Contractor shall have right to declare Subcontractor in default of this subcontract and take such steps as necessary to finish the uncompleted portion of the Work.

ARTICLE 4

Changes in the Work

4.1 The Contractor and Subcontractor agree that the Contractor may add to or deduct from the amount of Work covered by this Agreement, and any changes so made in the amount of Work involved, or any other parts of this Agreement, shall be by a written amendment hereto setting forth in detail the changes involved and the value thereof which shall be mutually agreed upon between the Contractor and Subcontractor. The Subcontractor agrees to proceed with the Work as changed when so ordered in writing by the Contractor so as not to delay the progress of the Work, and pending any determination of the value thereof.

4.2 Subcontractor shall be entitled to receive no extra compensation for extra Work or materials or changes of any kind regardless of whether the same was ordered by the Contractor or any of his representatives unless a Change Order therefor has been issued in writing by the Contractor. If extra work was ordered by the Contractor and the Subcontractor performed same but did not receive a written order therefor, the Subcontractor shall be deemed to have waived any claim for extra compensation therefor, regardless of any written or verbal protests or claims by the Subcontractor. The Subcontractor shall be responsible for any costs incurred by the Contractor for changes of any kind made by the Subcontractor that increase the cost of the work for either the Contractor or other subcontractors when the Subcontractor proceeds with such changes without a written order therefor.

4.3 The Subcontractor agrees that no claim for additional services rendered or materials furnished by the Subcontractor to the Contractor shall be valid unless written notice is given to the Contractor prior to the furnishing of the services or material and within 5 days of Subcontractor encountering the changed condition. Subcontractor shall provide pricing for the changed work within 5 days of encountering the change condition.

4.4 The Subcontractor will make all claims for extra compensations and for extension of time to the Contractor promptly in accordance with this Article and consistent with the Contract Documents.

4.5 Notwithstanding any other provision, if the Work for which the Subcontractor claims extra compensation is determined by the Owner or Architect not to entitle the Contractor to a Change Order or extra compensation, then the Contractor shall not be liable to the Subcontractor for any extra compensation for such Work, unless Contractor agreed in writing to such extra compensation. **Subcontractor shall not be entitled to payment for any additional work or costs associated with the alleged changed condition, differing site condition or other alleged extra work unless that additional work and costs is first approved and paid for by the Owner. Payment by the Owner to the Contractor for the alleged additional work or costs shall be an absolute condition precedent to Subcontractor receiving any additional compensation for said work or costs, and Subcontractor shall only be entitled to payment of the amount paid by the Owner to the Contractor for the alleged additional work or costs less any offsets, backcharges and expenses permitted under this Subcontract or otherwise permitted by law or equity. (In the event applicable law prohibits payment by the Owner to the Contractor from being a condition precedent to payment by the Contractor to the Subcontractor, then that condition precedent shall not apply but approval of the Subcontractor's Work by the Owner shall remain an absolute condition precedent to payment by the Contractor to the Subcontractor. Contractor's presentment of Subcontractor's claim to Owner shall not be construed as an acknowledgement of the validity thereof, or of a waiver of any right of the Contractor.**

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ARTICLE 5

Insurance and Indemnity

5.1 Prior to starting Work the Subcontractor shall procure and maintain in force, Workers' Compensation Insurance, Employers Liability Insurance, Comprehensive General Liability Insurance with contractual coverage and Automobile Liability Insurance and such other insurance, to the extent required by the Contract Documents for the Subcontractor's Work. **The Subcontractor is to submit all required Insurance Certificates to this office prior to beginning work on the project. Subcontractor's submission of Insurance Certificates is a mandatory condition precedent to Subcontractor receiving payment for work on the Project.**

5.2 Insurance coverage, as required by paragraph 5.1, shall be written for not less than the following limits, or greater if required by law:

a. Comprehensive General Liability

1. Liability for the Project, Completed Operations, Property Damage, Bodily Injury, Personal Injury and Medical Expenses	\$ 1,000,000.00	Each Occurrence
	\$ 2,000,000.00	Aggregate
2. Contractual Liability coverage insuring all Liability assumed by Subcontractor Pursuant to this Subcontract	\$ 1,000,000.00	Each Occurrence
	\$ 2,000,000.00	Aggregate

b. Comprehensive Automobile Liability

1. Including property damage, personal injury And coverage for liability arising out of the Operation of owned, hired and non-owned Vehicles	\$ 1,000,000.00	Combined Single Limit
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c. Umbrella / Liability Insurance

\$ 1,000,000.00

d. Worker's Compensation Insurance

\$ \$1,000,000.00 if no
Statutory limit exists.

Subcontractor's insurance policies shall name Owner and Contractor as an additional insured, including coverage for Completed Operations claims by endorsements CG 2010 and CG 2037, or manuscripted forms providing equivalent coverage, for this project only. This coverage shall be primary and non-contributory as to the Owner and Contractor. Subcontractor agrees to waive Right of Subrogation against the Owner and Contractor. Subcontractor shall maintain Completed Operations coverage for itself and each additional insured for a period of eight (8) years or the statute of repose for the state where the project is located following completion of the Work.

The attached Exhibit "E" is the model Certificate of Insurance for this project. Subcontractor agrees to furnish an acceptable Certificate of Insurance consistent with Exhibit "E" indicating that Subcontractor has obtained all necessary contractual insurance coverage. Contractor shall not be obligated to make any payment to Subcontractor for work on the Project until Subcontractor has provided Contractor with a copy of Subcontractor's Certificate of Insurance indicating that Subcontractor has obtained all necessary contractual insurance coverage.

5.3 Comprehensive General Liability Insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability policy.

5.4 The foregoing policies shall contain a provision that coverage's afforded under the policies will not be canceled or not renewed until at least thirty (30) days' prior written notice has been given to the Contractor. Certificates of Insurance

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acceptable to the Contractor shall be filed with the Contractor prior to the commencement of Work.

5.4.1 The Subcontractor agrees to furnish the Contractor with suitable evidence that Insurance has been taken out, and if the Subcontractor shall sublet any of this work to a third party, he agrees to see that the said third party shall carry Insurance, as mentioned above, in amounts the same as required in paragraph 5.2.

5.5 The Contractor and Subcontractor waive all rights against each other and against the Owner, the Architect/Engineer separate contractors, and all other subcontractors for damages caused by fire or other perils to the extent covered by Builder's Risk or any other property insurance, except such rights as they may have to the proceeds of such insurance.

5.5.1 Subcontractor is responsible for the \$1,000.00 deductible on Builders Risk Insurance.

5.5.2 Subcontractor's obligation to provide the required insurance will not be waived by Subcontractor's failure to provide the certificate of insurance, Contractor's acceptance of a certificate of insurance showing coverage varying from the required coverage, or Contractor's direction to Subcontractor to begin Subcontractor's work.

5.6 To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor, the Owner, the Architect/Engineer and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance, or failure in performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable regardless of whether it is caused in part by a party indemnified hereunder. Such obligations shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph 5.6.

5.6.1 In any and all claims against the Contractor or any of his agents or employees by any employee of the Subcontractor, anyone directly or indirectly employed by him or anyone for whose acts he may be liable, the indemnification obligation under this Paragraph 5.6 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under Workers' Compensation acts, disability benefit acts or other employee benefit acts.

5.6.2 The obligations of the Subcontractor under this Paragraph 5.6 shall not extend to the liability of the Architect / Engineer, his agents or employees, arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (b) the giving of or failure to give directions or instructions by the Architect/Engineer, his agents or employees, providing such giving or failure to give is the primary cause of the injury or damage.

5.6.3 Neither Owner and Contractor's rights nor Subcontractor's indemnification obligations hereunder shall be impaired or affected in any way by the failure of Owner or Contractor to provide Subcontractor with a copy of the Prime Contract, a notice of commencement, a notice of lien, a mechanics lien, or other information requested by the Subcontractor.

ARTICLE 6

Performance Bond and Labor and Material Payment Bond

A Performance Bond and a Labor and Material Payment Bond in a form **and by a surety** satisfactory to the Contractor shall be furnished in the full amount of this Agreement, if required by the Contractor. This obligation shall continue throughout the agreement and may be required at any time **at Contractor's sole option** during the performance of Subcontractor's Work by a change under Article 4.

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ARTICLE 7

Warranty

The Subcontractor agrees to promptly make good without cost to the Owner or Contractor any and all defects due to faulty workmanship and /or materials which may appear within the guarantee or warranty period so established in the Contract Documents; and if no such period be stipulated in the Contract Documents, then such guarantee shall be for a period of one year from date of completion and acceptance of the project by the Owner. The Subcontractor further agrees to execute any special guarantees as provided by the terms of the Contract Documents, prior to final payment.

ARTICLE 8

Contractors' Obligations

8.1 The Contractor agrees to be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Contract Documents and by all provisions thereof affording remedies and redress to the Contractor from the Owner insofar as applicable to this Agreement.

8.2 Upon request, the Contractor will give the Subcontractor written authorization to obtain direct from the Architect/Engineer or Owner's authorized agent, evidence of amount and percentages of completion certified on his account.

8.3 The Contractor shall not issue or give any instruction, order or directions directly to employees or workmen of the Subcontractor other than to the persons designated as the authorized representative(s) of the Subcontractor.

8.4 The Contractor shall make no demand for liquidated damages in any sum in excess of the amount specifically named in this Agreement or the Contract Documents. Liquidated damages shall not be assessed for delays not caused by the Subcontractor. Liquidated damages, when assessed, shall not exceed the Subcontractor's proportionate share of the responsibility for such delay. This provision does not preclude any claim the Contractor may have for direct damages under law.

8.5 The Subcontractor will furnish those temporary facilities and services required by the Subcontractor except for those to be provided by the Contractor set forth in the Attachment A to this Agreement. Adequate storage areas, if available, will be allocated by the Contractor for the Subcontractor's materials and equipment during the course of the Work.

8.6 The Contractor agrees that no claim for services rendered or materials furnished by the Contractor to the Subcontractor shall be valid unless notice is given to the Subcontractor prior to furnishing of the services or material or unless written notice of the claim therefor is given by the Contractor to the Subcontractor not later than the last day of the calendar month following that in which the claim originated, with the amount of the claim to be given in writing by the Contractor as soon as practicable.

ARTICLE 9

Termination

9.1 Should the Subcontractor fail at any time to supply a sufficient number of properly skilled workmen or sufficient materials and equipment of the proper quality, or fail in any respect to prosecute the Work with promptness and diligence, or fail to promptly correct defective Work or fail in the performance of any of the **terms herein contained or incorporated herein**, the Contractor may, at his option, provide such labor, materials and equipment and deduct the cost thereof, together with all loss or damage occasioned thereby, from any money then due or thereafter to become due to the Subcontractor under this Agreement.

9.2 If the Subcontractor at any time shall refuse or neglect to supply sufficient properly skilled workmen, or materials or equipment of the proper quality and quantity, or fail in any respect to prosecute Subcontractor's Work with promptness and diligence, or cause by any action or omission the stoppage or interference with the work of the Contractor or other subcontractors, or fail in the performance of any of the terms herein contained **or incorporated herein**, or be unable to

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meet his debts as they mature, or performs in a manner that permits the Owner to terminate Contractor under the **Prime Contract**, the Contractor may at his option at any time serving written notice of such default with direction to cure in a specific period, but not less than two (2) calendar days. **In the event Subcontractor fails to cure the default within the time prescribed by the Contractor, the Contractor may terminate the Subcontractor's employment by delivering written notice of termination to the Subcontractor. Immediately thereafter,** the Contractor may take possession of the plant and work, materials, tools, appliances, and equipment of the Subcontractor at the building site, and through himself or others provide labor, equipment and materials to prosecute Subcontractor's Work on such terms and conditions as shall be deemed necessary, and shall deduct the cost thereof, including without restriction thereto all charges, expenses, losses, costs, damages, and attorney's fees, incurred as a result of the Subcontractor's failure to perform, **and any other types of charges, expenses, losses, costs or damages that the Owner may be entitled to recover from the Contractor in the event of termination for cause,** from any money then due or thereafter to become to the Subcontractor under this Agreement.

9.3 If the Contractor so terminates the employment of the Subcontractor pursuant to Paragraph 9.1 or Paragraph 9.2, the Subcontractor shall not be entitled to any further payments under this agreement until Subcontractor's Work has been completed and accepted by the Owner, and payment has been received by the Contractor from the Owner with respect thereto. In the event that the unpaid balance due exceeds the Contractor's cost of completion, **plus any other charges, expenses, losses, costs, damages (including but not limited to (a) any backcharges assessed by the Owner or Contractor for Subcontractor's scope of work, (b) any amounts paid by Contractor to subcontractors or suppliers of Subcontractor, (c) any amounts incurred by Contractor to bond off or pay off lien or bond claims asserted by subcontractors of suppliers of Subcontractor, (d) any costs of insurance that is the responsibility of Subcontractor, and (e) any costs to correct deficiencies in Subcontractor's work), and attorney's fees that the Contractor is entitled to recover under this Subcontract,** the difference shall be paid to the Subcontractor; but if such cost of completion, plus any charges, expenses, losses, costs, damages, and attorney's fees expense exceeds the balance due, the Subcontractor agrees promptly to pay the difference to the Contractor.

9.4 In the event Owner terminates Contractor's Work on the Project for any reason not the fault of Subcontractor, Subcontractor's Work shall also be terminated effective on the same date as the effective date of Contractor's termination. In the event of such a termination by Owner, Subcontractor shall only be entitled to compensation for the items for which Contractor is entitled to compensation from the Owner when the Owner terminates the Contractor without cause, and Contractor shall also be entitled to deduct from any such items of compensation: (a) any backcharges assessed by the Owner or Contractor for Subcontractor's scope of work, (b) any amounts paid by Contractor to subcontractors or suppliers of Subcontractor, (c) any amounts incurred by Contractor to bond off or pay off lien or bond claims asserted by subcontractors of suppliers of Subcontractor, (d) any costs of insurance that is the responsibility of Subcontractor, and (e) any costs to correct deficiencies in Subcontractor's work. If the amount of the deductions discussed in the previous sentence exceeds the amount owed for work and materials provided by Subcontractor according to the schedule of values plus overhead and profit as set forth in the previous sentence, then Subcontractor shall reimburse that excess amount to Contractor within 10 days of Contractor providing its accounting. In no event shall Subcontractor be entitled to payment for materials or work or overhead or profit on the Project until Contractor has been paid by Owner for those materials and work.

ARTICLE 10

Claims

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor's failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually

Spinx#370, Johns Island SC
June 23, 2023

agree in writing otherwise. The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the disputes between Contractor and Subcontractor may be consolidated or joined in the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion.

10.2 In the event the Contractor and Owner or others arbitrate (**or litigate**) matters relating to this Subcontract, it shall be the responsibility of the Subcontractor to prepare and present the Contractor's case, to the extent the proceedings are related to this Subcontract.

10.3 Should the Contractor enter into arbitration (**or litigation**) with the Owner or others regarding matters relating to this Agreement, the Subcontractor shall be bound by the result of the arbitration (**or litigation**) between the Owner and the Contractor to the same degree as the Contractor is bound.

10.4 The Subcontractor shall carry on Subcontractor's Work and maintain his progress during any arbitration (**or litigation**) proceedings.

ARTICLE 11

Prevailing Law

11.1 The provisions of this Subcontract shall be controlled and interpreted by the laws of the State of South Carolina; provided, however, that if a dispute arises involving the Owner then the provisions of this Subcontract shall be governed by the State laws governing the Prime Contract.

11.2 The provisions of this Subcontract are severable in whole or in part. If any provision or part of this Subcontract is found to be invalid or unenforceable, that provision or part shall be deemed severed from this Subcontract and the remainder of this Subcontract shall continue in full force and effect, and such provision may be limited in such a manner as to make it valid and enforceable.

ARTICLE 12

Miscellaneous

12.1 All notices called for in this Subcontract shall be sent by certified or registered mail or overnight service (FedEx, UPS, DHL, or U.S. Postal Service) to the address listed for the receiving party on the first page of this Subcontract, except that notices under Article 9 of this Subcontract may be sent by e-mail or facsimile with follow up notice being sent by certified or registered mail or overnight service (FedEx, UPS, DHL, or U.S. Postal Service). Notice shall be effective upon receipt by the receiving party. In the event a party receiving notice changes address from the address identified on the first page of this Subcontract then the new address shall be identified by the party with the new address to the other party within three (3) calendar days of the change of

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June 23, 2023

address. Where a party fails to timely identify the new address then delivery or attempted delivery of notice to the former address in the manner specified herein shall be deemed receipt of notice.

12.2 Nothing in the Subcontract creates any relationship of trust or fiduciary relationship between Contractor and Subcontractor. The Subcontract does not create any obligation or relationship such as a partnership, joint venture or other similar legal relationship. Any correspondence or other reference to "partners" or other similar terms will not be deemed to alter, amend or change the independent contractor relationship between the parties unless there is a formal written agreement specifically detailing the rights, liabilities, and obligations of the parties as to a new, specifically defined legal relationship.

12.3 This Subcontract may be executed in one or more counterparts, all of which shall be deemed one and the same agreement. Any counterpart delivered by, or on behalf of, either party hereto by fax transmission or other electronic delivery of an image file reflecting the execution thereof: (1) may be relied on by the other party as if the document were a manually signed original, and (2) will be binding on the signing party.

12.4 Article, section and paragraph headings are for convenience only and may not be construed as part of the Subcontract or as a limitation on the scope of the particular sections.

12.5 If either party fails to give notice or enforce any right under the Subcontract, the failure shall not constitute a waiver of the right, unless (a) the Subcontract specifically provides otherwise, or (b) the parties reduce the waiver to writing and the waiving party signs the writing. If a party waives its right in writing, the waiver shall not constitute a waiver of any other right or of a subsequent violation of the same right. The rights and remedies of Contractor hereunder are cumulative to, and not exclusive of, any rights or remedies which Contractor would otherwise have in law or at equity.

12.6 In the event of any action or proceeding brought by either party against the other under the Subcontract, the prevailing party will be entitled to recover all costs and expenses, including court costs and reasonable attorneys' fees.

12.7 Subcontractor hereby warrants and represents that it is a duly licensed contractor under the laws of the State in which the Project is located to the extent Subcontractor is required to obtain such a license by the State in which the Project is located.

12.8 The terms of this Contract shall be deemed jointly drafted by the parties and construed and applied without regard to any presumption or rule of law requiring construction against the drafting party.

IN WITNESS WHEREOF the parties hereto have executed this Agreement under seal, the day and year first above written.

ATTEST:



Pampa Bay Landscape Construction, LLC

Subcontractor

By



(Title)

Gillam & Associates, Inc.

Contractor

ATTEST:



By



Michael Knight, Project Manager



Dylan R. Glick, Esq.
dglick@FinkelLaw.com
Attorney at Law
Reply to Columbia Office

June 13, 2024

VIA CERTIFIED MAIL & ELECTRONIC MAIL

Gillam & Associates, Inc.
P.O. Box 1607
Aiken, SC 29802

Gillam & Associates, Inc.
1652 Columbia Hwy
Aiken, SC 29801
9589 0710 5270 1248 8491 44

Drayton-Parker Companies, LLC
171 Crossroads Pkwy
Savannah, GA 31407
9589 0710 5270 1248 8491 82

RE: Notice of Lien and Amounts owed to Pampa Bay Landscape Construction LLC

Project: Parker's #86, 343 College Park Rd.
Ladson, SC 29456
Our File No.: 92433-59578

To Whom It May Concern:

My firm and I have been retained to represent the interests of Pampa Bay Landscape Construction LLC ("Pampa Bay") as it relates to landscaping work performed under contract for the Project. You are advised to contact me directly to discuss this matter and cease all communications with my client. If you are represented by counsel, please provide them this letter and ask that they contact me as soon as possible.

As you are aware, Gillam & Associates, Inc. ("Gillam") entered into a subcontract agreement with Pampa Bay on April 5, 2023, to provide certain landscaping labor and materials for the Project. The contract balance, together with mutually agreed upon change orders, totaled \$117,648.85. Throughout the Project, Pampa Bay performed its scope of work pursuant to the terms of the subcontract. Towards the end of the Project in mid-May, Pampa Bay was prevented from completing its work due to another subcontractor – Heycon – failing to complete final grading. Pampa Bay provided multiple written notices to Gillam communicating the delays outside Pampa Bay's control. Pampa Bay also communicated it was ready, willing, and able to complete its work as soon as the site was suitable for landscaping. Those communications are enclosed.

Instead of resolving the issues with other subcontractors to make the site suitable for final landscaping by the promised date to the owner, Gillam opted instead to wrongfully terminate Pampa Bay and locate another subcontractor to perform the work further delaying completion.

The subcontract sets forth specific grounds for termination, all of which are required to be preceded by a notice of default and right to cure of "no less than two (2) calendar days." SUBCONTRACT § 9.2. None of the grounds for termination have been met here, much less communicated to Pampa Bay as required by the subcontract. Failure to provide notice as required under the subcontract constitutes a waiver of that right and precludes enforcement of the unconscionable, one-sided remedies set forth in the subcontract. SUBCONTRACT § 12.1, 12.5.

COLUMBIA
1201 Main Street, Suite 1800
Post Office Box 1799 (29202)
Columbia, SC 29201
Tel: (803) 765-2935
Fax: (803) 973-0333

CHARLESTON
Litigation, Real Estate & REO
3955 Faber Place Drive, Suite 200
Post Office Box 225 (29402)
North Charleston, SC 29405
Tel: (843) 577-5460

CHARLESTON
Foreclosure
3955 Faber Place Drive, Suite 200
Post Office Box 71727 (29415)
North Charleston, SC 29405
Tel: (843) 577-5460

As stated before, Pampa Bay made clear it was ready, willing, and able to perform its scope of work once the site was ready. Pampa Bay had sod delivered and ready to be installed, but due to delays outside of its control, the sod deteriorated and was wasted – a cost Pampa Bay has incurred.

As of the date of this letter, Pampa Bay is due **\$60,335.89**. This amount includes retainage for work already completed. Pampa Bay has asserted a mechanic's lien against the Project site in the amount of \$50,527.78.

This demand is made pursuant to S.C. Code Ann. §§ 27-1-15 and 29-6-50. S.C. Code Ann. § 27-1-15 requires you to make a reasonable investigation into the amounts claimed by A&A and, within forty-five (45) days, pay the valid balance owed. Failure to do so entitles Pampa Bay to recover its attorney's fees and 12.5% interest from the date of this demand. S.C. Code Ann. § 29-6-50 – otherwise known as the Prompt Pay Act – requires payment of amounts owed to a contractor within twenty-one (21) days of completion of work. Failure to promptly remit payment necessitates any unpaid balance to accrue additional interest at a rate of 1% per month.

The subcontract additionally allows Pampa Bay to recover all costs and expenses incurred, including attorney's fees. SUBCONTRACT § 12.6.

Before filing suit for foreclosure of its mechanic's lien, breach of contract, unjust enrichment, and violations of the above statutes, Pampa Bay is willing to provide you a final opportunity to pay your outstanding balance of \$60,335.89 within **fourteen (14) days**. Thereafter, I have been directed to file suit and seek all amounts owed together with attorney's fees and interest.

This letter shall also serve as Pampa Bay's demand under § 10.1 for an in-person meeting.

You may contact me directly to facilitate payment.

Best Regards,



Dylan R. Glick

DRG/t

Enclosures: *As Stated*

cc: Pampa Bay Landscape Construction LLC (*via email only*); Eric Floyd (*via email* ERIC@gillamandassociates.com); Brent Still (*via email* brent@gillamandassociates.com)

----- Forwarded message -----

From: **Peter Gallo** <peter@pampabaylandscapeconstruction.com>
Date: Sat, May 18, 2024, 6:41 AM
Subject: Parkers 86 For the record this is Sat May 18 630 AM
To: Eric Floyd <ERIC@gillamandassociates.com>, Adam Bjornsen
<ABJORNSEN@parkersav.com>

Attached photos of areas not ready for irrigation and sod
Peter Gallo







----- Forwarded message -----

From: **Peter Gallo** <peter@pampabaylandscapeconstruction.com>
Date: Sun, May 19, 2024, 4:22 PM
Subject: For the record Sunday 425 PM Parkers 86
To: Eric Floyd <ERIC@gillamandassociates.com>, Adam Bjornsen
<ABJORNSEN@parkersav.com>

The areas you have asked us to work in tomorrow are not ready. See attached photos.
Heycon says it might be complete late Tues or Wed. I have been here 2x today.

We have sod delivery on its way.
Also, this area which still needs new irrigation. Some existing pipe is damaged.

When the site is ready we will mobilize.

Peter Gallo

----- Forwarded message -----

From: **Peter Gallo** <peter@pampabaylandscapeconstruction.com>
Date: Mon, May 20, 2024, 9:39 AM
Subject: Parkers 86 Monday May 20 930 AM
To: Eric Floyd <ERIC@gillamandassociates.com>, Adam Bjornsen
<ABJORNSEN@parkersav.com>

My sod delivered...
Site not ready.

Peter Gallo

Tina Kelly

From: Peter Gallo <peter@pampabaylandscapeconstruction.com>
Sent: Tuesday, May 21, 2024 8:56 AM
To: Eric Floyd; Adam Bjornsen
Subject: Parkers 86

Per conversation today by phone our sod,mulch,plant material,pipe,equipment has been onsite.The areas requiring sod,pipe, are not ready.You advised you will be calling another company to complete the work for your upcoming inspection.

Be advised the Change Order you issued for sod is complete and no payments have been made fir any work after Dec 6,2023.

Peter Gallo

Tina Kelly

From: Peter Gallo <peter@pampabaylandscapeconstruction.com>
Sent: Tuesday, May 21, 2024 2:57 PM
To: Eric Floyd; Adam Bjornsen; Brent Still - Gillam & Associates, Inc.
Subject: Parkers 86

I am going to say this one time, out of courtesy for Parkers.

We have been told 6 different dates both by calls and emails the site would be ready over the past 2 weeks. I will not even address the delays since the original Dec ,6th date. Each time material, equipment and manpower were ready.

I have been onsite 3x today, --still not ready for final landscape.

Now you have advised me you have another company to complete the work and you want to use our materials, which are unpaid to date. Our material and equipment will be removed. Be advised you are not to use our materials or equipment unless you wire me good funds for the installed work including materials onsite.

Peter Gallo

----- Forwarded message -----

From: Eric Floyd - Gillam & Associates, Inc. <eric@gillamandassociates.com>
Date: Wed, May 22, 2024, 12:56 PM
Subject: Re: Parkers 86
To: Peter Gallo <peter@pampabaylandscapeconstruction.com>
Cc: Brent Still - Gillam & Associates, Inc. <brent@gillamandassociates.com>, Chris Bunton - Gillam & Associates, Inc. <chris@gillamandassociates.com>, Adam Bjornsen <ABJORNSEN@parkersav.com>

Pete,

I need you to remove all your materials and equipment off Ladson 86 site by 10am Thursday, 5/23/2024.

Thanks

Get [Outlook for iOS](#)

From: Peter Gallo <peter@pampabaylandscapeconstruction.com>
Sent: Tuesday, May 21, 2024 1:59:14 PM
To: Eric Floyd - Gillam & Associates, Inc. <eric@gillamandassociates.com>
Cc: Brent Still - Gillam & Associates, Inc. <brent@gillamandassociates.com>; Chris Bunton - Gillam & Associates, Inc. <chris@gillamandassociates.com>; Adam Bjornsen <ABJORNSEN@parkersav.com>
Subject: Re: Parkers 86

The change order is unpaid. The sod is ours. A truck is scheduled to pick it up.

Peter Gallo

On Tue, May 21, 2024, 1:57 PM Eric Floyd - Gillam & Associates, Inc. <eric@gillamandassociates.com> wrote:

Pete,

We have been watering the sod and are willing to pay you for the SOD,

Please leave the SOD on site.

CYNTHIA B FORTE
BERKELEY COUNTY
REGISTER OF DEEDS

Po Box 6122 ~ Moncks Corner, SC 29461 (843) 719-4084

*** THIS PAGE IS PART OF THE INSTRUMENT - DO NOT REMOVE ***

*** ELECTRONICALLY RECORDED DOCUMENT ***

Instrument #:	2024019628	
Receipt Number:	326542	Return To:
Recorded As:	EREC-MECHANICS LIENS	
Recorded On:	June 27, 2024	
Recorded At:	02:13:28 PM	Received From: SIMPLIFILE
Recorded By:	WK08	Parties:
Book/Page:	RB 4899: 372 - 377	Direct- DRAYTON-PARKER COMPANIES LLC
Total Pages:	6	Indirect- PAMPA BAY LANDSCAPE CONSTRUCTION

*** EXAMINED AND CHARGED AS FOLLOWS ***

Recording Fee:	\$25.00
Tax Charge:	\$0.00



Cynthia B. Forte
Cynthia B Forte - Register of Deeds

NOTICE AND CERTIFICATE OF MECHANICS' LIEN

Said debt is due to Plaintiff for labor and material performed and actually used in improving, the real estate herein described, for supply of equipment, machinery, and/or materials at the request and with the knowledge and consent of Drayton-Parker Companies LLC the owner of said property, or by and through a person authorized by, or rightfully acting for, such owner(s). Said debt is due to Plaintiff because such improvements have been made upon the lands stated herein which has been authorized by said owner(s) pursuant to S.C. Code Ann. § 29-5-26. As shown on the verified statement of Account (**Exhibit A**), Plaintiff last provided labor and/or materials for such improvements within ninety (90) days of the date hereof. Plaintiff is not required

to be licensed under South Carolina law to provide landscaping services and supply materials for that purpose, all of which it did to improve the said property.

By virtue thereof and by the filing of this Notice and Certificate, and pursuant to the applicable provisions of Title 29 of the South Carolina Code of Laws, or otherwise, Plaintiff has and claims a lien to secure the payment of the above-stated indebtedness so due and the costs, including attorney's fees of enforcing said lien upon the improvements hereinabove mentioned and upon the following described real estate:

STREET ADDRESS: 343 College Park Rd., Ladson, SC 29456

LEGAL DESCRIPTION:

All that certain lot, piece or parcel of land, situate, lying and being in the County of Berkeley, State of South Carolina, shown and designated as Tract A, 1.67 acres, on that certain plat entitled "SUBDIVISION PLAT OF A 3.27 ACRE TRACT TO CREATE TRACT A & B OWNED BY: CIRCLE S ENTERPRISES, INC." by F. Elliott Quinn, III, RLS, of Thomas & Hutton Engineering Co., dated July 10, 2000, filed for record July 19, 2000, and recorded in Plat Cabinet O, Page 263-A, in the Office of the Register of Deeds, Berkeley County, South Carolina.

Also Being Described As:

All of that piece, parcel or tract of land, situate, lying and being in Second Goose Creek Parish, formerly School District Number 24, County of Berkeley, State of South Carolina, measuring and containing Three and 27/100 acres, as shown and designated on a plat of same prepared by Thomas L. Evan, R. L. S., dated May 10, 1987, and as modified by a plat of Southeastern Surveying, Inc., dated July 16, 1977.

Said tract of land having such size, shape, measurements, buttings and boundings, all of which will more fully and at large appear by reference to the aforesaid plats.

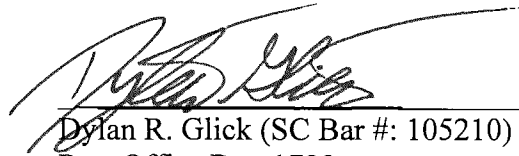
Less and Except:

ALL that certain lot, piece or parcel of land, situate, lying and being in the County of Berkeley, State of South Carolina, shown and designated as Tract B, 1.60 acres, on that certain plat entitled "SUBDIVISION PLAT OF A 3.27 ACRE TRACT TO CREATE TRACT A & B, OWNED BY: CIRCLE S ENTERPRISES, INC." by F. Elliott Quinn, III, RLS, dated July 10, 2000 and recorded in the RMC Office for Berkeley County on July 19, 2000 in Plat Cabinet O, Page 263-A; said property having such size, shape, dimensions, buttings and boundings as shown on said plat.

Being a portion of the property conveyed to Grantor herein by deed of W. L. Jones, also known as William L. Jones, Francine Warring, formerly Francine Ives, Linda Jones and Lillie C. Gilliard, dated July 15, 1988 and recorded on July 28, 1988 in Book A765, Page 334, Berkeley County R.O.D. Office.

TMS NO.: 242-08-01-001

FINKEL LAW FIRM LLC



Dylan R. Glick (SC Bar #: 105210)

Post Office Box 1799

1201 Main Street, Suite 1800

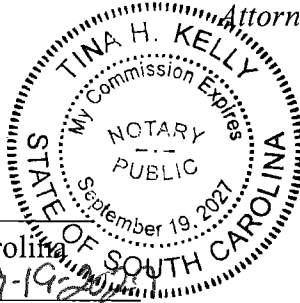
Columbia, South Carolina 29202

dglick@finkellaw.com

(803) 765-2935

*Attorneys for the Plaintiff*June 13, 2024Sworn to and before me
this 13 day of June, 2024

Notary Public for South Carolina

My Commission Expires: 9-19-2027

Principal Amount Due and Owing: \$50,527.78

48

PAMPA BAY LANDSCAPE
CONSTRUCTION LLC

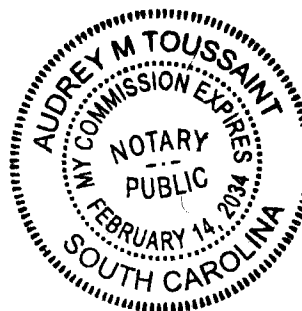
Peter Gallo

By: Peter Gallo

Its: MBR/PTC (Position/Title)

Sworn to before me this 27th
Day of June, 2024

Audrey M Toussaint
Notary Public for the State of South Carolina
My Commission Expires: 2/14/34



STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	THE NINTH JUDICIAL CIRCUIT
	)	
PAMPA BAY LANDSCAPE	)	
CONSTRUCTION, LLC,	)	C.A. No. 2024-CP-08-02013
	)	
Plaintiff,	)	
	)	
v.	)	
	)	ANSWER and COUNTERCLAIM
GILLAM & ASSOCIATES, INC., and	)	(Subject to Motion to Stay Action)
DRAYTON-PARKER COMPANIES LLC,	)	
	)	
<u>Defendants.</u>	)	

**AFFIRMATIVE DEFENSES AND ANSWER
AND COUNTERCLAIM OF GILLAM & ASSOCIATES, INC.**

Gillam & Associates, Inc. (“Gillam”) hereby files its Affirmative Defenses and Answer to the Complaint served on behalf of Pampa Bay Landscape Construction, LLC (“Pampa Bay”). Gillam also files a Counterclaim against Pampa Bay but states that the Counterclaim as well as the Complaint should be stayed and the disputes should be sent to arbitration in light of the arbitration clause in the Subcontract between Gillam and Pampa Bay, as set forth in the Motion to Stay and Compel Arbitration filed concurrently.

AFFIRMATIVE DEFENSES

1. Pampa Bay’s Complaint against Gillam should be dismissed pursuant to SCRP Rule 12(b)(6) because it does not state a cause of action against Gillam.
2. Pampa Bay’s Complaint should be dismissed against Drayton-Parker Companies LLC (“Drayton-Parker”) because the lien which is the basis for Pampa Bay’s claims has been bonded off and discharged, rendering Drayton-Parker a party which is no longer necessary.
3. Pampa Bay’s Complaint against Gillam should be stayed in favor of arbitrating the disputes between Gillam and Pampa Bay in light of Article 10 of the Subcontract between Gillam

and Pampa Bay which prescribes arbitration of the disputes between Gillam and Pampa Bay, South Carolina law and the Federal Arbitration Act.

4. Pampa Bay's Third Cause Of Action should be dismissed because a valid contract exists. The cause of action allege that it is a "possible cause of action if no subcontract exists" between Gillam and Pampa Bay. However, there is a valid Subcontract between Gillam and Pampa Pay, and therefore there is no basis for the cause of action.

ANSWER

FOR A FIRST DEFENSE

Gillam answering the Complaint, would provide the following responses to Pampa Bay's allegations:

1. Gillam admits the allegations in paragraph 1 of the Complaint.
2. Gillam admits the allegations in paragraph 2 of the Complaint.
3. Gillam does not have sufficient knowledge of the facts alleged in paragraph 3 of the Complaint. Therefore, Gillam denies the allegations in paragraph 3 of the Complaint.
4. Gillam admits the allegations in paragraph 4 of the Complaint, but the Subcontract calls for arbitration of the disputes, not court action of the disputes.
5. Gillam denies the allegations in paragraph 5 of the Complaint.
6. Gillam admits that this action involves involved unpaid balances for landscaping services by Pampa Bay but denies the unpaid balances and the remaining allegations in Paragraph 6 of the Complaint.
7. Gillam admits the allegations in paragraph 7 of the Complaint.

8. Gillam denies the allegations in paragraph 8 of the Complaint. The original value of the Subcontract may have been \$117,648.85, but the value of the Subcontract was significantly reduced by the amount of Pampa Bay's unperformed work.

9. Gillam denies the allegations in Paragraph 9 of the Complaint.

10. Gillam denies the allegations in paragraph 10 of the Complaint.

11. Gillam denies the allegations in paragraph 11 of the Complaint

12. Gillam denies the allegations in paragraph 12 of the Complaint.

13. Gillam denies the allegations in paragraph 13 of the Complaint.

14. Gillam denies the allegations in paragraph 14 of the Complaint.

15. Gillam denies the allegations in paragraph 15 of the Complaint.

16. Gillam denies the allegations in paragraph 16 of the Complaint.

17. Gillam denies the allegations in paragraph 17 of the Complaint.

18. Gillam denies the allegations in paragraph 18 of the Complaint.

19. Gillam admits the allegations in paragraph 19 of the Complaint as to Gillam, but denies the amount claimed. Gillam does not have sufficient knowledge of the facts alleged in paragraph 19 of the Complain as to Drayton-Parker. Therefore, Gillam denies the allegations in paragraph 19 of the Complaint as to Drayton-Parker.

20. Gillam denies the allegations in paragraph 20 of the Complaint.

21. Gillam denies the allegations in paragraph 21 of the Complaint.

22. Gillam denies the allegations in paragraph 22 of the Complaint.

23. Gillam admits the allegations in paragraph 23 of the Complaint. Since Pampa Bay is not entitled to recover from Gillam, Gillam is entitled to recover of its attorneys' fees and costs of collection.

Response to First Cause of Action

Gillam incorporates herein the statements set forth above in Paragraphs 1 through 23 of this Answer as if set forth herein in full.

24. On or about June 27, 2024, Pampa Bay filed and served its Statement and Notice of Mechanic's Lien in the amount of Fifty Thousand Five Hundred Twenty-Seven and 78/100 Dollars (\$50,527.78) (the "Mechanic's Lien"). The Mechanic's Lien was filed with the Berkeley County Register of Deeds Office and recorded in Book 4899, Page 373. Gillam denies all other allegations in Paragraph 24 of the Complaint.

25. Gillam admits the allegations in Paragraph 25 of the Complaint.

26. Gillam does not have sufficient knowledge of the facts alleged in paragraph 26 of the Complaint. Therefore, Gillam denies the allegations in paragraph 26 of the Complaint.

27. In response to the allegations contained in Paragraph 27 of the Complaint, it is admitted only that Gillam has refused to pay Pampa Bay and would aver that Gillam has refused to pay the amount demanded by Pampa Bay because Pampa Bay did not perform the work, was delinquent in performing the work, and had not paid its subcontractors, causing them to threaten filing liens on the Project. The remaining allegations are denied.

28. Gillam denies the allegations in Paragraph 28 of the Complaint.

29. Gillam denies the allegations in Paragraph 29 of the Complaint.

Response to Second Cause of Action

Gillam incorporates herein the statements set forth above in Paragraphs 1 through 29 of this Answer as if set forth herein in full.

30. Gillam admits the allegations in Paragraph 30 of the Complaint.

31. Gillam admits the allegations in Paragraph 31 of the Complaint.

32. Gillam admits the allegations in Paragraph 32 of the Complaint, but would aver that payment of the Subcontract Sum was based upon a condition precedent and only due if Pampa Bay performed according to the Subcontract terms, which Pampa Pay failed to do.

33. Gillam admits the allegations in Paragraph 33 of the Complaint, but would aver that payment of the Subcontract Sum was based upon a condition precedent and only due if Pampa Bay performed according to the Subcontract terms, which Pampa Pay failed to do.

34. Gillam denies the allegations in Paragraph 34 of the Complaint.

35. Gillam admits the allegations in Paragraph 35 of the Complaint.

36. Gillam admits the allegations in Paragraph 36 of the Complaint.

37. Gillam admits that it did not terminate Pampa Bay. Gillam would aver that Pampa Bay simply failed to perform its work and breached its Subcontract with Gillam.

38. Gillam denies the allegations in Paragraph 38 of the Complaint.

39. Gillam denies the allegations in Paragraph 39 of the Complaint.

40. Gillam denies the allegations in Paragraph 40 of the Complaint.

41. Gillam denies the allegations in Paragraph 41 of the Complaint.

Response to Third Cause of Action

Gillam incorporates herein the statements set forth above in Paragraphs 1 through 41 of this Answer as if set forth herein in full.

42. Gillam denies the allegations contained in Paragraph 42 of the Complaint.

43. Gillam admits that Pampa Bay provided some benefit for which it was paid by Gillam. However, Pampa Bay failed to perform all of its Subcontract work and owes money to its subcontractors and suppliers for which Pampa Bay was paid.

44. Gillam admits that Pampa Bay provided some benefit for which it was paid by Gillam, but would aver that payment of the Subcontract Sum was based upon a condition precedent and only due if Pampa Bay performed according to the Subcontract terms, which Pampa Pay failed to do.

45. Gillam denies the allegations in Paragraph 45 of the Complaint.

Response to Fourth Cause of Action

Gillam incorporates herein the statements set forth above in Paragraphs 1 through 45 of this Answer as if set forth herein in full.

46. Gillam admits the allegations in Paragraph 46 of the Complaint.

47. Gillam admits the allegations in Paragraph 47 of the Complaint, but would aver that Pampa Bay was not owed any money by Gillam.

48. Gillam admits the allegations in Paragraph 48 of the Complaint, but would aver that Pampa Bay was not owed any money by Gillam.

49. Gillam denies the allegations in Paragraph 49 of the Complaint.

Response to Fifth Cause of Action

Gillam incorporates herein the statements set forth above in Paragraphs 1 through 49 of this Answer as if set forth herein in full.

50. Gillam admits the allegations in paragraph 50 of the Complaint.

51. Gillam admits the allegations in Paragraph 51 of the Complaint, but would aver that Pampa Bay was not owed any money by Gillam.

52. Gillam denies the allegations in Paragraph 52 of the Complaint.

53. Gillam denies the allegations in Paragraph 53 of the Complaint.

54. Gillam denies all allegations in the Complaint which are not specifically admitted in this Answer.

WHEREFORE, Gillam requests that the Court stay Pampa Bay's action pending the outcome of the arbitrate between Gillam and Pampa Bay. Alternatively, if the Court should for any reason refuse to order arbitration of the disputes, the Court should dismiss Pampa Bay's action against Gillam, and award Gillam such relief as Gillam seeks in its Counterclaim below.

COUNTERCLAIM

Gillam files this Counterclaim against Pampa Bay in the event this matter is not stayed pending arbitration of the disputes between Gillam and Pampa Bay. However, this matter should be stayed and the parties ordered to arbitration in accordance with Article 10 of the Subcontract between Gillam and Pampa Bay.

1. This Court has subject matter jurisdiction over the parties to this action, aside from Article 10 of the Subcontract that provides the parties are to arbitrate disputes between them.

2. This Court has venue over the issues and parties to this action, aside from Article 10 of the Subcontract that provides the parties are to arbitrate disputes between them.

3. Gillam entered into an agreement with Drayton-Parker to build the Parker's Center with Gillam serving as the general contractor.

For a First Cause Of Action (Breach of Contract)

4. Gillam incorporates Paragraphs 1 through 3 of the Counterclaim into this Count by reference as if set forth herein in full.

5. Gillam entered into a Subcontract with Pampa Bay in June 2023 pursuant to which Pampa Bay was to perform landscaping work.

6. In the Spring of 2024, Gillam was obligated to perform specific work in order to bring the Project to completion, but Pampa Bay had left the Project and refused to return to the Project to complete the landscaping.

7. Pampa Bay failed to complete the scope of its Subcontract work despite numerous requests from Gillam by the temporary completion date including:

- a. Failed to tie-in the irrigation system and install the heads throughout the site.
- b. Failed to replace dead sod due to it dying because irrigation system not installed.
- c. Failed to install plants per the plans with several plants missing.
- d. Failed to install the irrigation timer.
- e. Failed to install decoders.
- f. Failed to install required valves to support the irrigation system.
- g. Failed to adequately zone the irrigation system.
- h. Failed to install additional irrigation piping, valves, heads and sod.
- i. Failed to freshen mulch per change order.
- j. Failed to install additional 21,000 sq. ft. of centipede sod per change order.
- k. Failed to adequately grade site,
- l. Failed to upright Palmetto Tree installed in a leaning position.
- m. Failed to secure Palmetto Trees with tie down stabilization system per plans.
- n. Failed to properly zone the drip system.

8. Gillam made several attempts to get Pampa Bay to return to the Project and made numerous communications to Pampa Bay to return to the Project, but Pampa Bay failed to return

to the Project which required Gillam to hire another subcontractor to complete the landscaping for the Project.

9. Gillam did not terminate Pampa Bay but rather inquired on numerous occasions as to Pampa Bay's intentions. When Pampa Bay refused to return promptly, Gillam was forced to hire another subcontractor to complete the landscaping work for the Project.

10. Gillam has been informed by at least two of Pampa Bay's subcontractors or suppliers that they were not paid by Pampa Bay as they were required to be paid.

11. The amounts owed by Pampa Bay to the two subcontractors/suppliers plus the amount owed by Pampa Bay to Gillam for the costs of completion of Pampa Bay's work, makes Pampa Bay liable to Gillam for more than \$15,000 for the costs of completing Pampa Bay's Subcontract work.

12. The Subcontract states:

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor's failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. **All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise.** The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take

place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the disputes between Contractor and Subcontractor may be consolidated or joined in the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion. (Emphasis added)

13. Pursuant to the Subcontract, Pampa Bay's and Gillam's disputes are to be resolved by arbitration and this action should be stayed and the parties compelled to arbitrate their disputes.

**For A Second Cause Of Action
(Violation of S.C. Code Ann. § 29-6-50 ('Prompt Pay Act'))**

14. Gillam incorporates Paragraphs 1 through 13 of the Counterclaim into this Count by reference as if set forth herein in full.

15. The Prompt Pay Act provides, in relevant part:

If a periodic or final payment to a subcontractor is delayed by more than seven days after receipt of periodic or final payment by the contractor . . . [the] contractor shall pay his . . . subcontractor interest, beginning on the due date, at the rate of one percent a month or a pro rata fraction thereof on the unpaid balance as may be due. . . . In case of a willful breach of the contract provisions as to time of payment, the interest rate specified in this section shall apply.
S.C. Code Ann. § 29-6-50.

16. On August 26, 2024, Gillam sent a written demand by certified mail for payment to Pampa Bay for materials and labor provided pursuant to S.C. Code Ann. §§ 27-1-15 and 29-6-30.

17. If Pampa Bay fails to remit final payment to Gillam within seven (7) days, Pampa Bay will be liable to Gillam.

18. Per statute, Pampa Bay's failure to promptly remit payment would necessitate any unpaid balance to accrue at an additional interest rate of 1% per month.

**For A Third Cause Of Action
(S.C. Code Ann. § 27-1-15)**

19. Gillam incorporates Paragraphs 1 through 18 of the Counterclaim into this Count by reference as if set forth herein in full.

20. Per S.C. Code Ann. § 27-1-15:

Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

21. On August 26, 2024, Gillam sent a written demand by certified mail for payment to Pampa Bay for materials and labor provided pursuant to S.C. Code Ann. §§ 27-1-15 and 29-6-30.

22. If Pampa Bay unreasonably fails to pay the outstanding balance of at least \$15,000 due to Gillam and, upon information and belief, Pampa Bay has not made a reasonable inquiry into the alleged balance owed.

23. If Pampa Bay does not pay Gillam, Gillam is entitled to reasonable attorney's fees and interest at the judgment rate (12.5%) from the date of the demand.

RELIEF REQUESTED

WHEREFORE, Gillam prays the Court hold that Gillam's and Pampa Bay's pleadings be stayed and the parties compelled to participate in arbitration of the disputes between them pursuant to Article 10 of the Subcontract between the parties. If, for any reason, the Court shall not order arbitration of the disputes between Gillam and Pampa Bay, Gillam requests the Court to enter judgment against Pampa Bay and in favor of Gillam, and to award the following relief:

- A. Award Gillam all actual, consequential, contractual, and statutory damages against Pampa Bay in an amount to be proven at trial;
- B. Award Gillam all relief afforded under S.C. Code Ann. §§ 27-1-15 and 29-6-30, including attorney's fees, costs, and interest on the unpaid balance;
- C. Award Gillam all costs it has incurred as a result of this action including attorneys' fees and costs; and
- D. Any other relief this Court deems just and equitable.

SMITH CURRIE OLES LLC

/s/ Matthew E. Cox
Matthew E. Cox
S.C. Bar No. 16603
5727 Westpark Drive
Suite 200
Charlotte, NC 28217
Email: mecox@smithcurrie.com
T: 704.334.3459
F: 704.334.7850

Attorney for Defendant Gillam & Associates, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2024, a true and correct copy of the within and foregoing **AFFIRMATIVE DEFENSES AND ANSWER AND COUNTERCLAIM OF GILLAM & ASSOCIATES, INC.** was electronically filed with the Clerk of the Court using the Court's electronic system, which will send notification of electronic filing to counsel of record for the Plaintiff as follows:

Dylan R. Glick, Esq.
Post Office Box 1799
Columbia, South Carolina 29202

/s/ Matthew E. Cox
Matthew E. Cox
S.C. Bar No. 16603

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	THE NINTH JUDICIAL CIRCUIT
	)	
PAMPA BAY LANDSCAPE	)	
CONSTRUCTION, LLC,	)	C.A. No. 2024-CP-08-02013
Plaintiff,	)	
	)	
v.	)	
	)	MOTION TO STAY ACTION PENDING
GILLAM & ASSOCIATES, INC., and	)	ARBITRATION BETWEEN THE
DRAYTON-PARKER COMPANIES LLC,	)	PARTIES
	)	
Defendants.	)	

NATURE OF MOTION

Gillam & Associates, Inc. (“Gillam”) seeks to stay the lawsuit filed by Pampa Bay Landscape Construction, LLC (“Pampa Bay”). Gillam & Associates, Inc. (“Gillam”) seeks arbitration of the disputes between the parties as directly called for in the Subcontract between Gillam and Pampa Bay and because the only claims in this action that remain are between Gillam and Pampa Bay.

GILLAM’S MOTION

Pampa Bay has filed an action against Gillam and Drayton-Parker for monies that Pampa Bay maintains it is owed for landscape work on the Parkers’ Project being built by Gillam in Ladson, Berkeley County, South Carolina. Pampa Bay asserts that Gillam is liable for breach of contract, while maintaining that Drayton-Parker is liable for a mechanic’s lien filed by Pampa Bay. Gillam bonded off the claim of lien. See Aff. of Eric Floyd at Exhibit A and Exhibit A-1 thereto. Therefore, the disputes at issue in this case are between Gillam and Pampa Bay.

The Subcontract between Gillam and Pampa Bay requires that the disputes be resolved by arbitration. Article 10.1 of the Subcontract requires that disputes be resolved by arbitration.

That provision states:

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor's failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. **All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise.** The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the disputes between Contractor and Subcontractor may be consolidated or joined in the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion. (Emphasis added)

While Pampa Bay may have sued Drayton-Parker on the lien, the lien had been discharged by a bond filed on the morning of July 26, 2024, prior to the filing of the Complaint.

Therefore, the parties to the bond, Gillam and its bonding company, Liberty Mutual, have released the lien and Pampa Bay's claim stands against Gillam and Liberty which consents to arbitration.

The basis for the Motion being as follows:

1. As alleged in its Complaint, Gillam and Pampa Bay entered into a Subcontract for the landscaping to the Parker's store (the "Subcontract").
2. Pampa Bay attached a copy of the Subcontract as Exhibit "A" to its Complaint.
3. Article 10.1 of the Subcontract provides the foundation for the resolution of the underlying dispute in this matter. Article 10.1 of the Subcontract contains express provisions for Arbitration of Disputes requiring that "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise" (hereinafter, "Arbitration Provision").
4. South Carolina law recognizes that construction involves interstate commerce, as materials and supplies are manufactured from outside of the State of South Carolina.
5. Matters involving interstate commerce and containing arbitration clauses are subject to the Federal Arbitration Act, where applicable.
6. The Federal Arbitration Act preempts S.C. Code § 15-48-10.

7. This motion will be further based upon the state and federal common law, statutes, memorandum of law, and affidavits to be submitted in accordance with the South Carolina Rules of Civil Procedure.

As this matter is subject to Arbitration, the Defendants move for the Court to compel arbitration and stay this matter pending resolution in accordance with the FAA, after which the Award may be vacated, modified or confirmed in accordance with the FAA.

Because this matter is subject to arbitration, this Court should stay this proceeding pending Arbitration as required under the Federal Arbitration Act and South Carolina and Federal law, compelling arbitration and staying the litigation pending arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (“FAA”).

Respectfully Submitted,

SMITH CURRIE OLES LLP

s/ Matthew E. Cox
Matthew E. Cox, SC Bar No. 16603
5727 Westpark Drive, Suite 200
Charlotte, NC 28217
T: 704.334.3459
F: 704.334.7850
Email: mecox@smithcurrie.com

Attorneys for Defendant Gillam &
Associates, Inc

August 26, 2024

Charlotte, North Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2024, a true and correct copy of the within and foregoing **MOTION TO STAY ACTION PENDING ARBITRATION BETWEEN THE PARTIES** was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send notification of electronic filing to counsel of record for the Plaintiff as follows:

Dylan R. Glick, Esq.
Post Office Box 1799
Columbia, South Carolina 29202

s/ Matthew E. Cox

Matthew E. Cox
S.C. Bar No. 16603

Exhibit A

CYNTHIA B FORTE
BERKELEY COUNTY
REGISTER OF DEEDS

Po Box 6122 ~ Moncks Corner, SC 29461. (843) 719-4084

*** THIS PAGE IS PART OF THE INSTRUMENT - DO NOT REMOVE ***



Instrument #:	2024022192		
Receipt Number:	328450	Return To:	MATTHEW E COX
Recorded As:	RELEASE OF MECHANICS LIEN		5727 WESTPARK DR SUITE 200
Recorded On:	July 19, 2024		CHARLOTTE, NC, 28217
Recorded At:	11:18:23 AM	Received From:	MATTHEW E COX
Recorded By:	WK10	Parties:	
Book/Page:	RB 4918: 979 - 980 , 004		Direct- DRAYTON-PARKER COMPANIES LLC
Total Pages:	5		Indirect- PAMPA BAY LANDSCAPE CONSTRUCTION

*** EXAMINED AND CHARGED AS FOLLOWS ***

Recording Fee: \$10.00
Tax Charge: \$0.00



Cynthia B. Forte
Cynthia B Forte - Register of Deeds

ELECTRONICALLY FILED - 2024 Aug 26 4:40 PM - BERKELEY - COMMON PLEAS - CASE#2024CP0802013

Doc: 2024022192
Total Pages: 5

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF BERKELEY	)	IN THE OFFICE OF THE REGISTER OF DEEDS
	)	
	)	
Pampa Bay Landscape Construction, LLC	)	
Claimant,	)	BOND IN RELEASE OF
	)	MECHANICS' LIEN
v.	)	Recorded in Book 4899, Pages 373-377
	)	
Drayton-Parker Companies, LLC, Gillam &	)	
Associates, Inc.	)	
Respondents.	)	

WHEREAS, the above-captioned matter involves a Mechanics' Lien filed by Pampa Bay Landscape Construction, LLC (hereinafter "Claimant") against property owned by Drayton-Parker Companies, LLC (hereinafter "Owner"); and

WHEREAS, the validity and statutory service and filing of this Mechanic's Lien is in dispute and the Owner has required that this this Bond be filed, whereby Liberty Mutual Insurance Company located at 175 Berkeley Street, Boston, MA 02116 (hereinafter "Bonding Company"), as surety will be responsible to the Claimant for payment of any sum which may be determined to be due to the Claimant, if the lien is not dissolved and found to be valid and properly perfected pursuant to the laws of the State of South Carolina, S.C. Code Ann. § 29-5-90 and § 29-5-120, and

WHEREAS, this Bond has been given by Pampa Bay Landscape Construction, LLC ("General Contractor") as substituted security for the property against which the Claimant has filed a lien in the amount of One and one-third times the amount of the claim (claim is \$50,527.78) as provided for in Section 29-5-110, Code of Laws of South Carolina, 1976, as amended.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that Owner, as Principal, and Bonding Company, as Surety are bound to the Claimant, in the principal sum of Sixty-seven Thousand Three Hundred Seventy and 37/100 dollars (\$67,370.37) to the extent that the lien is found to be properly served and filed, and this sum or any portion thereof may be determined to be due to the Claimant only upon a final adjudication of the issues in this action (the liabilities of the surety herein shall be joint and several not to exceed the amount of the Bond). This Bond is given as substituted security for the real property of the Owner located at:

STREET ADDRESS: 343 College Park Road, Ladson, South Carolina, 29456

lien is not otherwise dissolved, released or otherwise found invalid, Claimant shall be entitled to entry of judgment in such an amount against the principal General Contractor and the Surety. Upon satisfaction of such judgment, the obligation under this Bond shall be terminated.

In no event shall the Surety be liable for any amount in excess of the amount of the penal sum of the Bond pursuant to S.C. Code Ann. § 29-5-110.

IN WITNESS WHEREOF, General Contractor, as principal, and Liberty Mutual Insurance Company, as surety have executed this Bond effective this 12th day of July, 2024.

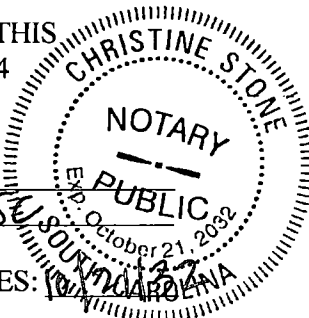
Principal:
Gillam & Associates, Inc.

BY: [Signature]
ITS: Stephen Rawson

SWORN TO BEFORE ME THIS
15th DAY OF July, 2024

C Stone
NOTARY PUBLIC FOR SE South Carolina

MY COMMISSION EXPIRES: 10/21/27



BONDING COMPANY:
Liberty Mutual Insurance Company

BY: [Signature]
ITS: Noah William Pierce

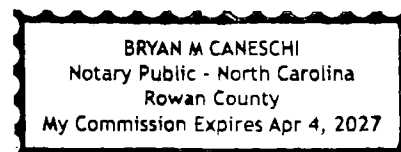
SWORN TO BEFORE ME THIS
17th DAY OF July, 2024

[Signature]
NOTARY PUBLIC FOR North Carolina, Rowan County

MY COMMISSION EXPIRES: 4/4/27

Bryan M Caneschi

3



LEGAL DESCRIPTION:

All that certain lot, piece or parcel of land, situate, lying and being in the County of Berkeley, State of South Carolina, shown and designated as Tract A, 1.67 acres, on that certain plat entitled "SUBDIVISION PLAT OF A 3.27 ACRE TRACT TO CREATE TRACT A & B OWNED BY: CIRCLE S ENTERPRISES, INC." by F. Elliott Quinn, III, RLS, of Thomas & Hutton Engineering Co., dated July 10, 2000, filed for record July 19, 2000, and recorded in Plat Cabinet O, Page 263-A, in the Office of the Register of Deeds, Berkeley County, South Carolina.

Also Being Described As:

All of that piece, parcel or tract of land, situate, lying and being in Second Goose Creek Parish, formerly School District Number 24, County of Berkeley, State of South Carolina, measuring and containing Three and 27/100 acres, as shown and designated on a plat of same prepared by Thomas L. Evan, R. L. S., dated May 10, 1987, and as modified by a plat of Southeastern Surveying, Inc., dated July 16, 1977.

Said tract of land having such size, shape, measurements, buttings and boundings, all of which will more fully and at large appear by reference to the aforesaid plats.

Less and Except:

ALL that certain lot, piece or parcel of land, situate, lying and being in the County of Berkeley, State of South Carolina, shown and designated as Tract B, 1.60 acres, on that certain plat entitled "SUBDIVISION PLAT OF A 3.27 ACRE TRACT TO CREATE TRACT A & B. OWNED BY: CIRCLE S ENTERPRISES, INC." by F. Elliott Quinn, III, RLS, dated July 10, 2000 and recorded in the RMC Office for Berkeley County on July 19, 2000 in Plat Cabinet O, Page 263-A; said property having such size, shape, dimensions, buttings and boundings as shown on said plat.

Being a portion of the property conveyed to Grantor herein by deed of W. L. Jones, also known as William L. Jones, Francine Warring, formerly Francine Ives, Linda Jones and Lillie C. Gilliard, dated July 15, 1988 and recorded on July 28, 1988 in Book A765, Page 334, Berkeley County R.O.D. Office.

TMS NO.: 242-08-01-001

against which the Claimant has filed a mechanics' lien, if the lien is not dissolved, released or otherwise found invalid.

Unless the lien is found to be validly served and filed and suit for enforcement of the lien is commenced as required by Section 29-5-120, the Undertaking herein shall be null and void and the principal shall have the right to have the Bond canceled and the Bond released pursuant to S.C. Code Ann. § 29-5-110.

Nothing contained in this Bond shall be deemed as an admission of any liability on the part of the principal General Contractor in this case or the validity of the Mechanic's Lien, other than an acknowledgement that the surety named herein shall be responsible for satisfaction of any judgment against the Owner or the General Contractor and the Surety, if the lien is not dissolved, released or otherwise found invalid. Upon the determination of an amount due Claimant in such action, if the



**Liberty
Mutual**
SURETY

This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated.

Liberty Mutual Insurance Company
The Ohio Casualty Insurance Company
West American Insurance Company

Certificate No: **8208310-018009**

POWER OF ATTORNEY

KNOWN ALL PERSONS BY THESE PRESENTS: That The Ohio Casualty Insurance Company is a corporation duly organized under the laws of the State of New Hampshire, that Liberty Mutual Insurance Company is a corporation duly organized under the laws of the State of Massachusetts, and West American Insurance Company is a corporation duly organized under the laws of the State of Indiana (herein collectively called the "Companies"), pursuant to and by authority herein set forth, does hereby name, constitute and appoint, Amy R. Waugh, Bryan M. Caneschi, Catherine Thompson, Jynell M. Whitehead, Noah William Pierce

all of the city of Charlotte state of NC each individually if there be more than one named, its true and lawful attorney-in-fact to make, execute, seal, acknowledge and deliver, for and on its behalf as surety and as its act and deed, any and all undertakings, bonds, recognizances and other surety obligations, in pursuance of these presents and shall be as binding upon the Companies as if they have been duly signed by the president and attested by the secretary of the Companies in their own proper persons.

IN WITNESS WHEREOF, this Power of Attorney has been subscribed by an authorized officer or official of the Companies and the corporate seals of the Companies have been affixed thereto this 14th day of July, 2022.



Liberty Mutual Insurance Company
The Ohio Casualty Insurance Company
West American Insurance Company

By:

David M. Carey
David M. Carey, Assistant Secretary

State of PENNSYLVANIA ss
County of MONTGOMERY

On this 14th day of July, 2022 before me personally appeared David M. Carey, who acknowledged himself to be the Assistant Secretary of Liberty Mutual Insurance Company, The Ohio Casualty Company, and West American Insurance Company, and that he, as such, being authorized so to do, execute the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal at King of Prussia, Pennsylvania, on the day and year first above written.



Commonwealth of Pennsylvania - Notary Seal
Teresa Pastella, Notary Public
Montgomery County
My commission expires March 28, 2025
Commission number 1126044
Member, Pennsylvania Association of Notaries

By:

Teresa Pastella
Teresa Pastella, Notary Public

This Power of Attorney is made and executed pursuant to and by authority of the following By-laws and Authorizations of The Ohio Casualty Insurance Company, Liberty Mutual Insurance Company, and West American Insurance Company which resolutions are now in full force and effect reading as follows:

ARTICLE IV - OFFICERS: Section 12. Power of Attorney.

Any officer or other official of the Corporation authorized for that purpose in writing by the Chairman or the President, and subject to such limitation as the Chairman or the President may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Corporation to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact, subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Corporation by their signature and execution of any such instruments and to attach thereto the seal of the Corporation. When so executed, such instruments shall be as binding as if signed by the President and attested to by the Secretary. Any power or authority granted to any representative or attorney-in-fact under the provisions of this article may be revoked at any time by the Board, the Chairman, the President or by the officer or officers granting such power or authority.

ARTICLE XIII - Execution of Contracts: Section 5. Surety Bonds and Undertakings.

Any officer of the Company authorized for that purpose in writing by the chairman or the president, and subject to such limitations as the chairman or the president may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Company by their signature and execution of any such instruments and to attach thereto the seal of the Company. When so executed such instruments shall be as binding as if signed by the president and attested by the secretary.

Certificate of Designation - The President of the Company, acting pursuant to the Bylaws of the Company, authorizes David M. Carey, Assistant Secretary to appoint such attorneys-in-fact as may be necessary to act on behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations.

Authorization - By unanimous consent of the Company's Board of Directors, the Company consents that facsimile or mechanically reproduced signature of any assistant secretary of the Company, wherever appearing upon a certified copy of any power of attorney issued by the Company in connection with surety bonds, shall be valid and binding upon the Company with the same force and effect as though manually affixed.

I, Renee C. Llewellyn, the undersigned, Assistant Secretary, The Ohio Casualty Insurance Company, Liberty Mutual Insurance Company, and West American Insurance Company do hereby certify that the original power of attorney of which the foregoing is a full, true and correct copy of the Power of Attorney executed by said Companies, is in full force and effect and has not been revoked.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seals of said Companies this 12th day of July, 2024.



By:

Renee C. Llewellyn
Renee C. Llewellyn, Assistant Secretary

Not valid for mortgage, note, loan, letter of credit, currency rate, interest rate or residual value guarantees.

For bond and/or Power of Attorney (POA) verification inquiries, contact the undersigned at 202-672-2281 or 202-672-2282.

ELECTRONICALLY FILED - 2024 Aug 26 4:40 PM - BERKELEY COUNTY, MD

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	THE NINTH JUDICIAL CIRCUIT
PAMPA BAY LANDSCAPE	)	
CONSTRUCTION LLC,	)	C.A. No. 2024-CP-08-02013
Plaintiff,	)	
	)	
v.	)	
	)	AFFIDAVIT OF ERIC FLOYD
GILLAM & ASSOCIATES, INC., and	)	
DRAYTON-PARKER COMPANIES LLC,	)	
	)	
<u>Defendants.</u>	)	

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

I, Eric Floyd, having been duly sworn, does hereby depose and state as follows:

1. I am over 21 years of age and I make this affidavit based on my personal knowledge.
2. I am a Project Manager of Gillam & Associates, Inc. (“Gillam”) which was the general contractor for construction of the Parker’s #86 store in Ladson, South Carolina (“Project”).

3. Gillam entered into a subcontract with Pampa Bay Landscape Construction, LLC (“Pampa Bay”) for Pampa Bay to perform the landscaping work on the Project site.

4. This construction contract involved interstate commerce. As part of its subcontract work on the Project, I understand that Pampa Bay purchased the following products from SiteOne Landscape Supply which procured the materials outside South Carolina:

(a) Irrigation heads and clock and valves from Hunter Brand – These were distributed from either Charlotte, North Carolina or Atlanta, Georgia;

(b) PVC pipe from Crestline Pipe which were direct sourced from Pennsylvania or Indiana Fittings (Spears) and distributed from either Charlotte or Atlanta; and

(c) Wire from Regency Wire in Missouri.

5. I understand that the products listed in numbered paragraph 4 of this affidavit were purchased and used in the Project.



Eric Floyd

Sworn to and subscribed before
me this 26 day of August, 2024.



Notary Public

My commission expires: 9/2032



STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Pampa Bay Landscape Construction,
LLC,

Plaintiff,

vs.

Gillam & Associates, Inc. and Drayton-
Parker Companies, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

C/A No. 2024-CP-08-02013

**PLAINTIFF’S MEMORANDUM IN
OPPOSITION TO DEFENDANT GILLAM &
ASSOCIATES, INC.’S MOTION TO STAY
ACTION PENDING ARBITRATION**

INTRODUCTION

The Plaintiff, Pampa Bay Landscape Construction, LLC (“Pampa Bay”), respectfully requests that the Court deny Defendant Gillam & Associates, Inc.’s (“Gillam”) Motion to Stay Action Pending Arbitration Between the Parties for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

On June 23, 2023, Pampa Bay entered a subcontracting agreement (“Subcontract”) with Gillam to perform landscaping at 343 College Park Rd. in Ladson, South Carolina 29456 (“the Subject Property”). Pampa Bay timely performed its scope of work pursuant to the terms of the Subcontract from the beginning of the project through April 2024. The next month, Pampa Bay was unable to complete its work at Subject Property because another subcontractor was delayed. Pampa Bay provided written notice to Gillam on its inability to complete its work due to the other subcontractor’s delays. Frustrated by the delay in completion, Gillam improperly terminated Pampa Bay and failed to provide a contractual right to cure any deficiencies at Subject Property. Following the termination, Gillam demanded that Pampa Bay abandon materials it had procured

for its work at Subject Property. After termination, Pampa Bay was owed an outstanding balance of Sixty Thousand, Three Hundred Thirty-Five and 89/100 Dollars (\$60,335.89), which was demanded in writing and sent to Gillam via certified mail pursuant to S.C. Code Ann. § 27-1-15 and 29-6-30 ('Prompt Pay Act'). Gillam refused final payment, insisting it had to hire another contractor to finish Pampa Bay's work—which Pampa Bay was denied the opportunity to perform itself—and further, that somehow Pampa Bay now owed Gillam money.

Pampa Bay filed a mechanic's lien on June 27, 2024 and its corresponding foreclosure complaint on July 19, 2024. Gillam responded by bonding off the lien, filing a Motion to Dismiss, a Motion to Stay and Compel Arbitration, and an Answer and Counterclaim (subject to the Motion to Stay Action). Pampa Bay now responds.

ARGUMENT

I. THE ARBITRATION CLAUSE IS UNENFORCEABLE BECAUSE IT FAILS TO MEET NOTICE REQUIREMENTS SET FORTH IN S.C. CODE ANN. § 15-48-10(A). IN ADDITION, THE FEDERAL ARBITRATION ACT (FAA) DOESN'T OTHERWISE APPLY.

a. Notice Requirements of S.C. Code ann. § 15-48-10(a) not met.

The South Carolina Uniform Arbitration Act ("SCUAA") applies to any agreement to arbitrate in South Carolina unless it is stipulated that SCUAA shall not apply in the agreement. S.C. Code Ann. § 15-48-10(b). In that case, the Federal Arbitration Act may apply only if interstate commerce is demonstrated by the moving party. 9 U.S.C.A. § 1; *see also Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023).

SCUAA requires that any instrument requiring arbitration to boldly display notice to the parties that the instrument is subject to arbitration. provides, in relevant part:

Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration."

If notice is not provided as required by S.C. Code Ann. § 15-48-10(a), then the requirement to arbitrate is unenforceable. *Id.*

The arbitration provision in the Subcontract is found on Pages 11 and 12 under the section header “Article 10 Claims.” The provision is reproduced in its entirety below.

“10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor’s failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor’s failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (“AAA”) then obtaining unless the parties mutually agree in writing otherwise. The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the disputes between Contractor and Subcontractor may be consolidated or joined in

the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion.”

Subcontract, Art. 10.1. A true and accurate copy of the parties’ subcontract is attached to this memorandum as **Exhibit A**.

As recently as last year, the Supreme Court of South Carolina refused to enforce an arbitration clause which failed the notice requirement required by S.C. Code Ann. § 15-48-10(a). *Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023). In *Hicks Unlimited, Inc.*, a dispute arose between UniFirst Corporation (a uniform rental company) and Hicks. UniFirst Corporation sought to enforce the arbitration provision in its contract. Importantly, the provision did not comply with the notice requirements of the South Carolina Uniform Arbitration Act. *Id.* at 628. The Circuit Court agreed and declined to enforce arbitration. The Court of Appeals reversed on other grounds. Finally, the Supreme Court of South Carolina agreed and declined to enforce the arbitration provision for failure to comply with South Carolina Uniform Arbitration Act and because the FAA did not otherwise apply to the parties’ contract. *Id.*

South Carolina courts require strict interpretation of statutes when the language is clear. *See Soil Remediation Co. v. Nu-Way Env’t.*, 323 S.C. 454, 457 (1996) (“where the terms of the statute are clear, the court must apply those terms according to their literal meaning.”).

Courts which have evaluated the enforceability of certain provisions depriving parties of essential rights, such as a jury trial, have considered factors like the visibility of the provision and its prominence within the document as important factors to decide to enforce such a provision. *See, e.g., Wachovia Bank, Nat. Ass’n v. Blackburn*, 407 S.C. 321, 333, 755 S.E.2d 437, 443 (2014), abrogated on other grounds by *Deutsche Bank Nat’l Tr. Co. as Tr. for NovaStar Mortg. Funding Tr., Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1 v. Est. of Houck*, 440 S.C. 409, 892 S.E.2d 280 (2023).

Here, the Subcontract does not meet the SCUAA notice requirements. The notice of arbitration is not prominently rubber-stamped on the first page, nor does it appear underlined anywhere in the Subcontract. The arbitration provision in the Subcontract is the same font size and color as every other provision in the Subcontract. The portion of the Subcontract where the arbitration clause is found is buried on pages 11 and 12 with the inconspicuous title ‘Claims,’ without any mention of arbitration. Based on the plan requirements of S.C. Code Ann. § 15-48-10(a), the arbitration clause in Gillam’s Subcontract does not comply with SCUAA. As a result, Gillam is prohibited from compelling arbitration under the SCUAA.

B. The FAA does not apply to the Subcontract.

South Carolina Courts have held that parties to a contract are free to elect state arbitration law or the FAA for dispute resolution. *See e.g. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) (“Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA.”); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (“Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.”) (emphasis added).

The party claiming the FAA preempts state law bears the burden of proving the contract involves interstate commerce. *Hicks Unlimited, Inc.*, 439 S.C. at 633, 889 S.E.2d at 569.

Gillam’s Subcontract does not invoke or otherwise implicate the FAA.¹ The FAA is not mentioned in the arbitration provision nor is it mentioned anywhere else in the 13-page Subcontract. On the contrary, the Subcontract, which was drafted and offered by Gillam, explicitly

¹ The arbitration provision does mention the AAA (American Arbitration Association). However, the AAA is a non-profit service which merely offers arbitration services throughout the United States.

states it is governed by South Carolina law. The arbitration agreement in the Subcontract provides **“this agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina.”** The provision further evinces an intent that South Carolina law should apply by designating situs for any arbitration hearing in Aiken or Columbia, South Carolina and that the arbitrator shall be a South Carolina resident. Gillam, as the drafter of the Subcontract, clearly intended for SCUAA to govern the arbitration agreement.

“To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007) (citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). Gillam clearly manifested its intentions for the arbitration provision to be governed by South Carolina law. Indeed, Gillam intended for the whole Subcontract to be governed by South Carolina law. Paragraph 11.1 provides “[t]he provision of this Subcontract shall be controlled and interpreted by the laws of the State of South Carolina. . .”

The previously cited 2023 Supreme Court opinion in *Hicks Unlimited, Inc.* also has particular relevance for resolving the question of applicability of the FAA. The Court in *Hicks* held “a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce.” 439 S.C. at 632, 889 S.E.2d at 568. Importantly, a party “may not make the connection by declaring or contemplating the FAA will govern.” *Id.* By reaching this conclusion, the Court clarified the opinions in *Munoz* and *Damico* which ushered in a presumption of the applicability of the FAA, especially in construction contracts. “To the extent *Munoz v. Green Tree Fin. Corp.* and *Damico v. Lennar Carolinas, LLC* have been read as allowing parties to agree the FAA preempts South Carolina law without an accompanying demonstration the contract involves

interstate commerce, we clarify now they do not.” *Id.* To determine whether interstate commerce is implicated by the parties, a court looks to “the agreement, the complaint, and the surrounding facts, including any affidavits submitted.” (internal quotations omitted). *Id.* In that case, the Court held that the mere shipping of products from Kentucky to South Carolina, payment made outside the state of South Carolina, and one of the parties being domiciled in Massachusetts were all insufficient to invoke interstate commerce. As a result, the Court affirmed the trial court’s decision to deny arbitration as unavailing under the FAA and failing to comply with the SCUAA.

Gillam’s Motion to Stay Action Pending Arbitration Between the Parties argues that the Federal Arbitration Act (“FAA”) should apply instead of SCUAA because the Subcontract involves interstate commerce. To support this argument, Gillam offers the Affidavit of Eric Floyd, the project manager for Gillam. The Affidavit contains nothing more than threadbare assumptions from Mr. Floyd about where materials used by Pampa Bay *may* have originated from. Mr. Floyd attests ‘*I understand* that Pampa Bay purchased the following products from SiteOne Landscape Supply which procured the materials outside South Carolina:

- (a) Irrigation heads and clock valves from Hunter Brand – these were distributed from *either* Charlotte, North Carolina or Atlanta, Georgia;
- (b) PVA pipe from Crestline Pipe which were directly sourced from Pennsylvania *or* Indiana Fittings (Spears) and distributed from either Charlotte or Atlanta.

Aff. of Eric Floyd ¶ 4 (a-b). (emphasis added).

Gillam’s attempt to create an issue of interstate commerce falls flat as nothing more than guesses and naked assumptions by Mr. Floyd about the origin of various products. Mr. Floyd cannot even narrow down the state of origin of particular products to less than two possible states, even assuming his assumptions are correct at the outset. Without more, Mr. Floyd’s Affidavit should be disregarded as unsubstantiated and nothing more than pure guesswork designed to divest Pampa Bay of its right to a jury trial. *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 285, 851

S.E.2d 724, 734 (Ct. App. 2020), *aff'd as modified*, 440 S.C. 456, 892 S.E.2d 297 (2023) (trial court has discretion to strike or disallow an Affidavit for consideration).

Peter Gallo, Pampa Bay's owner, submitted an Affidavit attesting the following key facts:

- Pampa Bay is a South Carolina Limited Liability company based in Goose Creek, South Carolina.
- Gillam & Associates, Inc. is based in Aiken, South Carolina.
- Pampa Bay did not directly source the products Mr. Floyd cites from out-of-state sources as Mr. Floyd claims.
- Pampa Bay purchased and picked up the other products Mr. Floyd cites from a local store located at 9491 Hamburg Road, Ladson, South Carolina 29456.

Aff. of Peter Gallo ¶¶ 3-4, 8, 10. A true and accurate copy of the Affidavit of Peter Gallo is attached as **Exhibit B**.

Based on the Affidavit of Peter Gallo, there are key factual disputes about the existence of interstate commerce. Under these circumstances and our case law, it would be inappropriate to deprive Pampa Bay of its constitutional right to a jury trial.

To summarize, the Subcontract was entered into between two South Carolina companies. The Subcontract concerned work performed exclusively within South Carolina. The drafting party Gillam clearly demonstrated an intent for the SCUAA to apply to the Subcontract based on the clear terms of the Subcontract. There is no credible proof of interstate commerce, rather only the assumptions of a removed project manager hired by Gillam. On other hand, Pampa Bay's principal Peter Gallo attests the products Mr. Floyd mentions were purchased exclusively from a local store.

It is clear that Gillam has not met its burden of proof to demonstrate interstate commerce under the new heightened standard set forth in *Hicks Unlimited, Inc.* If Gillam intended for the FAA to apply to the arbitration agreement it should have indicated otherwise in its agreement. As is, there are no credible facts implicating interstate commerce. On the contrary, the record

demonstrates a litany of facts showing only South Carolina has an interest in this dispute. Therefore, this Court should find that SCUAA is the applicable law, and the FAA does not apply.

II. IF THIS COURT FINDS THE FAA OR SCUAA IS APPLICABLE, THE ARBITRATION AGREEMENT STILL SHOULD NOT BE ENFORCED BECAUSE IT IS UNCONSCIONABLE.

Unconscionability is “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them, and no fair and honest person would accept them.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25 (2007) (citation omitted).

The absence of meaningful choice refers to the fundamental fairness of the bargaining process for both parties to a contract. *Id.* “The presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature.” *Id.* at 26. South Carolina defines an adhesion contract as a “standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” *Id.* at 26-27. Adhesion contracts, while not per se unconscionable, severely limit the bargaining power of the complaining party and provide a starting point of the analysis. *Id.* Terms within a contract are oppressive “when no reasonable person would make them and no fair and honest person would accept them.” *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 88 (Ct. App. 2013). South Carolina courts uphold the belief that arbitration should be “geared toward achieving an unbiased decision by a neutral decision-maker.” *Id.*

Here, the Subcontract between Pampa Bay and Gillam was a standard subcontract agreement consistently used in Gillam’s business transactions as a thirty-year practicing contracting corporation. Pampa Bay, a new small landscaping business, was not presented with the

opportunity to negotiate any terms of the Subcontract and did not draft any portion of the Subcontract. Pampa Bay had a simple choice: sign the Subcontract, or don't get the job. Therefore, the Subcontract is clearly an adhesion contract and subject to "considerable skepticism." *Id.*

Therefore, the arbitration agreement is aimed at preventing claims, not at achieving a fair result.

CONCLUSION

For all the above reasons, Pampa Bay respectfully requests that the Court deny Gillam's Motion to Stay Action Pending Arbitration Between the Parties.

Respectfully submitted,

s/Dylan R. Glick
Dylan R. Glick, SC Bar No. 105210
Gallivan, White & Boyd, P.A.
Post Office Box 7368
Columbia, SC 29202
dglick@gwblawfirm.com
(803) 779-1833

Attorney for Plaintiff

January 3, 2025

THE ASSOCIATED GENERAL CONTRACTORS



STANDARD SUBCONTRACT AGREEMENT FOR BUILDING CONSTRUCTION

This Document has important legal and insurance consequences; consultation with an attorney and insurance consultants and carriers is encouraged with respect to its completion or modification.

2325-0288A

THIS AGREEMENT made at Aiken, SC on **April 5, 2023** by and between **Gillam & Associates, Inc., PO Box 1607, Aiken SC 29802**, hereinafter referred to as the contractor, and **Pampa Bay Landscape Construction, LLC, 431 St. James Ave. Suite L212, Goose Creek, SC, 29445** hereinafter referred to as the Subcontractor, to perform part of the Work on the following Project:

PROJECT: Parker's #86, Ladson SC
343 College Park Road
Ladson SC 29456

OWNER: Drayton-Parker Companies, LLC
17 W. McDonough Street
Savannah, GA 31401

ARCHITECT: Cuhaci & Peterson, Architects
2600 Maitland Center Parkway, Suite 200
Maitland, FL 32751

ARTICLE 1

Scope of Work

1.1 The Contractor employs the Subcontractor as an independent contractor, to perform the following part of the Work which the Contractor has contracted with the Owner to provide on the Project:

Provide all labor, material and equipment for Landscaping and Irrigation requirements in accordance to contract documents and local jurisdiction.

The Subcontractor agrees to perform such part of the Work (hereinafter called "Subcontractor's Work") under the general direction of the Contractor and subject to the final approval of the Architect/Engineer or other specified representative of the Owner, in accordance with the Contract Documents. Subcontractor will furnish all of the labor and materials, along with competent supervision, shop drawings and samples, tools, equipment, scaffolding, and permits which are necessary for such performance. **This subcontract and the Contract Documents supersede all prior negotiations and representations, and constitute the entire agreement between the parties unless amended by change order signed by the Contractor.**

1.2 The Contract Documents are:

- 1.) AIA A101 – 2017 Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum, dated March 2023 **and all documents incorporated therein ("Agreement Between Owner and Contractor" or Prime Contract");**
- 2.) The plans and specifications prepared by the Architect, Cuhaci & Peterson, 2600 Maitland Center Parkway, Suite 200, Maitland FL 32751 entitled Parker's Kitchen Store #86, College Park Rd and Treeland Dr, Ladson SC 29456; Architect's Project Number: 2210654 and the Engineer, Bowman Consulting Group, 880 Island Park Drive, Suite 400, Charleston SC 29492; Engineer's Project Number: 150009-01-001.

1.3 Should any question arise with respect to the interpretation of the drawings and specifications, such questions shall be submitted to the Architect/Engineer and his decision shall be final and binding. If there is no Architect/Engineer for this Project, the Contractor's decision shall be followed by the Subcontractor. **The Contract Documents are incorporated herein by reference as if set forth herein in full and are available upon written request and also available on-line via Contractor's plan distribution system at <https://secure.smartbidnet.com/Main/login.aspx>.**

1.4 The Contractor and Subcontractor shall be mutually bound by the terms of this Subcontract and by the terms of the Prime Contract between Contractor and Owner (and all documents incorporated therein by reference) which are incorporated herein by reference. The Contractor assumes toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor assumes toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of the Prime Contract is inconsistent with a provision of this Agreement, the Prime Contract shall govern except that Articles 2, 9 and 10 of this Subcontract and notice provisions in Article 4 of this Subcontract shall control over the Prime Contract terms to the extent of any conflict.

1.5 The following additions, deletions and / or corrections to the printed conditions contained herein are hereby acknowledged by both parties to form a part of this Contract and to be incorporated herein by reference:

- Exhibit "A" – Safety Rules & Regulations
- Exhibit "B" – Subcontractor's Application for Payment Form
- Exhibit "C" – Supplier / Subcontractor Affidavit
- Exhibit "D" – Affidavit of Payment and Waiver of Lien
- Exhibit "E" – Model Certificate of Insurance / Insurance Compliance Verification
- Exhibit "F" – Gillam & Associates, Inc.'s Online Plan Room Service - SmartBidNet

ARTICLE 2

Payments

2.1 The Contractor agrees to pay to the Subcontractor for the satisfactory completion of Subcontractor's Work the sum **Eighty-Four Thousand Three Hundred Two And 29/100 \$84,302.29** in **monthly payments of ninety percent of the work performed in any preceding month**, in accordance with estimates prepared by the Subcontractor and approved by the Contractor and **Owner**. Payments made on account of materials not incorporated in the work, but delivered and suitably stored at the site, or at some other location agreed upon in writing, shall be in accordance with the terms and conditions of the Contract Documents. Subcontractor will provide monthly completed lien waivers and supplier affidavit forms, in a form satisfactory to the Owner and Contractor. Also, payment of the approved portion of the Subcontractor's monthly estimate shall be conditioned upon receipts by the Contractor of payment **for the Subcontractor's Work** from the Owner. **Payment from the Owner to the Contractor for the Subcontractor's Work shall be an absolute condition precedent to Contractor's payment to Subcontractor for Subcontractor's Work**, and Subcontractor shall only be entitled to payment of the amount paid by Owner to Contractor for Subcontractor's Work less any offsets, backcharges and expenses permitted under this Subcontract, or otherwise permitted by law or equity. **(In the event applicable law prohibits payment by the Owner to the Contractor from being a condition precedent to payment by the contractor to the Subcontractor, then that condition shall not apply but approval of the Subcontractor's Work by the Owner shall remain a condition precedent to payment by the Contractor to the Subcontractor.)** Approval and payment of Subcontractor's monthly or final application for payment is specifically agreed not to constitute or imply acceptance by the Contractor or Owner of any portion of the Subcontractor's Work.

2.2 In the event the Subcontractor does not submit to the Contractor such monthly estimates **with the required documentation by 20th of each month** then the Contractor may at his option include in his monthly estimate to the Owner for Work performed during the preceding month such amount as he may deem proper for the Work of Subcontractor for the preceding month and the Subcontractor agrees to accept such approved portion thereof in lieu of the monthly payment based upon the Subcontractor's estimate.

2.3 In the event it appears to the Contractor that the labor, material and other bills incurred in the performance of Subcontractor's Work are not being currently paid, the **Contractor may take such steps as he deems necessary in his sole discretion to insure that the money paid with any progress payment will be utilized to pay such bills; or the contractor may take any other action permitted by the law including paying these bills directly or by joint check and deducting the amount from this subcontract.**

2.3.1 The Subcontractor agrees to furnish a list of names, addresses, telephone numbers, and prices of all major material suppliers and subcontractors as outlined in Exhibit "C" which is hereby incorporated as part of this Subcontract within thirty (30) days of execution of the subcontract or before any periodic or final payment is made.

2.3.2 Subcontractor covenants to cause any lien, claim, security interest or encumbrance brought by Subcontractor's suppliers or subcontractors to be discharged or bonded off within five business days of notice thereof.

2.3.3 In case suit or other legal proceeding to establish lien is brought by any person, firm or corporation employed by or furnishing material to said Subcontractor under this subcontract, Subcontractor will at his own cost and expenses (including Attorney's fees and expenses) defend such suit and pay such lien established in court or otherwise, plus any expense to the Contractor resulting from such lien action. **In the event Contractor must file a bond to discharge a lien claim filed by any person, firm or corporation employed by or furnishing material to Subcontractor under this subcontract then Subcontractor shall be liable to Contractor for all bond premiums as well as costs and expenses (including attorney's fees and expenses) incurred by Contractor to defend such suit and/or to pay such lien, plus any other expense to the Contractor resulting from such lien.**

2.4 Final payment shall be paid to the Subcontractor upon approval by the Owner, Architect and the Contractor of the Subcontractor's Work and, upon payment having been received by the Contractor for all of Subcontractor's Work and satisfactory evidence having been received by the Contractor that all labor, including customary fringe benefits and payments due under collective bargaining agreements, and all subcontractors and **suppliers** have been paid to date and are waiving their lien rights, **and all other conditions for final payment under the terms of this Subcontract.**

2.5 The Contractor may deduct from any amounts due or to become due to the Subcontractor any sum or sums owing by the Subcontractor to the Contractor; and in the event of any breach by the Subcontractor of any provision or obligation of this Subcontract, or in the event of the assertion by other parties of any claim or lien against the Owner, the Contractor's Surety, or the premises upon which the Work was performed, which claim or lien arises out of the Subcontractor's performance of this Agreement, the Contractor shall have the right, but is not required, to retain out of any payments due or to become due to the Subcontractor an amount sufficient to completely protect the Contractor from any and all loss, damage or expense therefrom, until the claim or lien has been adjusted by the Subcontractor to the satisfaction of the Contractor, and if the amount of any payments due or to become due to Subcontractor from the performance of this Agreement are insufficient to completely protect Contractor then Subcontractor shall be immediately liable to pay the additional loss, damage or expense to Contractor. This paragraph shall be applicable even though the Subcontractor has posted a full payment and performance bond.

2.6 In accordance with IRS Regulations, Subcontractor must furnish his taxpayer identification number (TIN) or Social Security Number (SSN) to the Contractor. Failure to do so will invoke a mandatory backup withholding of an additional twenty percent 28% to be withheld from all payment requests.

2.7 Payments otherwise due, either interim Progress Payments, if any, or final payment under Article 2 herein, may be withheld by Contractor on account of: (1) defective Work not remedied; (2) claims filed or reasonable evidence indicating probability of claims; (3) failure of Subcontractor to make payment to its subcontractors or suppliers for material or labor, or applicable taxes, fees, and fringe benefits; (4) reasonable doubt that Subcontractor's Work can be completed for the balance of the Subcontract Amount then unpaid or within the Schedule; (5) any other breach of the Subcontract Documents; and (6) any breach by Subcontractor of any other subcontract or agreement between Contractor and Subcontractor regarding the Project or any other project. If these deficiencies are not remedied, Contractor may remedy such deficiencies at Subcontractor's expense. Contractor may offset against the unpaid balance of the Subcontract Amount any liquidated or unliquidated obligations of Subcontractor to Contractor, whether or not arising out of the Subcontract Documents, Subcontractor's Work on the Project, Subcontractor's subcontract(s) with Contractor on any other project, or Subcontractor's work on any project other than the Project.

Should Subcontractor be in breach of any other contract with Contractor, and should that breach not be cured after written notice, Contractor may terminate this Subcontract or set off money otherwise due Subcontractor for damages caused by this breach. Contractor may rectify any breach at Subcontractor expense and withhold from monies due or to become due or otherwise recover such amount from Subcontractor. Subcontractor grants a first security interest and right of set-off to Contractor in any unpaid funds or amounts due or to become due to Subcontractor whether under this Subcontract or otherwise, to secure Subcontractor's obligations to Contractor whether under this Subcontract or otherwise.

ARTICLE 3

Prosecution of the Work

3.1 Time is of the essence for both parties, and they mutually agree to see to the performance of their Work and the Work of their subcontractors so that the entire project may be completed in accordance with the Contract Documents. The Subcontractor shall provide the Contractor with scheduling information and Subcontractor's proposed schedule for the Subcontractor's Work. The Contractor shall then prepare the Schedule of the Work and, as may be necessary, revise such schedule as the Work progresses. Subcontractor acknowledges that revisions may be made in such schedule and agrees to make no claim for acceleration or delay by reason of such revisions.

3.2 The Subcontractor shall prosecute Subcontractor's Work in a prompt and diligent manner in accordance with the Schedule of Work without hindering the Work of the Contractor or any other subcontractor. If the work of others is damaged by Subcontractor, the Subcontractor will cause such damage to be corrected to the satisfaction of and without cost to the Contractor and Owner. In the event Subcontractor fails to maintain his part of the Schedule of the Work, he shall, without additional compensation, work such overtime as the Contractor may direct until Subcontractor's Work is in accordance with such schedule.

3.3 The Subcontractor shall be responsible for and will prepare for performance of Subcontractor's Work, including without limitation thereto, the submission of shop drawings, samples, tests, field dimensions, determination of labor requirements and ordering of materials as required to meet the Schedule of Work. Subcontractor shall notify Contractor when portions of his Work are ready for inspection.

3.4 The Subcontractor will furnish periodic progress reports of the Subcontractor's Work as mutually agreed including the progress of materials or equipment to be provided under this Agreement that may be in the course of preparation or manufacture.

3.5 The Subcontractor shall cooperate with the Contractor and subcontractors whose work may interfere with the Subcontractor's Work and participate in the preparation of coordinated drawings and work schedules in areas of congestion, specifically noting and advising the Contractor of any interference by other contractors or subcontractors.

3.6 The Subcontractor shall keep the building and premises reasonably clean of debris resulting from the performance Subcontractor's Work. If the Subcontractor fails to comply with this paragraph within 48 hours after receipt of notice of noncompliance from the Contractor; the Contractor may perform such necessary clean-up and deduct the cost from any amounts due to the Subcontractor. **All work-related debris is to be disposed of by Subcontractor.**

3.7 The Subcontractor shall give adequate notices pertaining to the Work of the Subcontractor to proper authorities and secure and pay for all necessary licenses and permits to carry on Subcontractor's Work, the furnishing of which is required by the Contract Documents. **No material containing asbestos to be used on this project.**

3.8 **SUBCONTRACTOR IS INDEPENDENT CONTRACTOR:** It is expressly understood and agreed that the relationship created hereunder is that of an Independent Contractor. Contractor shall have no control or right to exercise any control whatsoever over the employees of Subcontractor in their performance of this subcontract. Contractor shall not have the right nor shall it attempt to exercise the right to establish the rate of pay, benefits, hours of work or other terms or conditions of employment of the employees of the Subcontractor. Contractor shall not select, supervise, direct or in other way control or seek to control the employees of Subcontractor. Subcontractor agrees to and warrants that it will pay all taxes applicable to Subcontractor's work, including but not limited to sales and use taxes, and that it will comply with all applicable federal, state and local laws and regulations, including but not limited to federal and state labor, taxation, safety, immigration and employment laws such as the Immigration Reform and Control Act of 1986 and the Immigration and Naturalization Act, as amended, including those involving the verification of employment authorization for all employees hired after November 30, 1986 and those related to wages, the payment of wages, the withholding of sums from wages for taxes and otherwise, and that it will promptly remit to the appropriate recipients all monies withheld from the pay of employees and all monies due from Subcontractor as an employer related in any way to the employment including, but not limited to, local, state and federal laws relating to discrimination, veterans rights, the hiring of the disabled and worker's compensation laws, and shall indemnify, and save and hold Contractor harmless from penalties, fines, costs, expenses or damages resulting from Subcontractor's failure to do so or the failure of Subcontractor's subcontractors or suppliers to do so.

3.8.1 The Subcontractor agrees to conform to the Safety Rules & Regulations as outlined in Exhibit "A" and comply with Contractor's Health & Safety Program which are hereby incorporated as part of this Subcontract.

3.9 The Subcontractor will not assign this agreement nor subcontract the whole or any part of the Work to be performed hereunder without the prior written consent of the Contractor, with the exception of those subcontractors listed by the Subcontractor and furnished to the Contractor at the time this Agreement is executed.

3.10 Subcontractor agrees to only employ persons on the Work who will work at all times in harmony with other persons employed on the Project. Should there be a work stoppage, slow down or any type of interference with the performance of work on the Project involving the Subcontractor or his employees resulting from a labor dispute, which in the judgment of Owner or Contractor, will cause or threatens to cause delay in the progress of construction, then upon 24 hours written notice, Owner or Contractor shall have right to declare Subcontractor in default of this subcontract and take such steps as necessary to finish the uncompleted portion of the Work.

ARTICLE 4

Changes in the Work

4.1 The Contractor and Subcontractor agree that the Contractor may add to or deduct from the amount of Work covered by this Agreement, and any changes so made in the amount of Work involved, or any other parts of this Agreement, shall be by a written amendment hereto setting forth in detail the changes involved and the value thereof which shall be mutually agreed upon between the Contractor and Subcontractor. The Subcontractor agrees to proceed with the Work as changed when so ordered in writing by the Contractor so as not to delay the progress of the Work, and pending any determination of the value thereof.

4.2 Subcontractor shall be entitled to receive no extra compensation for extra Work or materials or changes of any kind regardless of whether the same was ordered by the Contractor or any of his representatives unless a Change Order therefor has been issued in writing by the Contractor. If extra work was ordered by the Contractor and the Subcontractor performed same but did not receive a written order therefor, the Subcontractor shall be deemed to have waived any claim for extra compensation therefor, regardless of any written or verbal protests or claims by the Subcontractor. The Subcontractor shall be responsible for any costs incurred by the Contractor for changes of any kind made by the Subcontractor that increase the cost of the work for either the Contractor or other subcontractors when the Subcontractor proceeds with such changes without a written order therefor.

4.3 The Subcontractor agrees that no claim for additional services rendered or materials furnished by the Subcontractor to the Contractor shall be valid unless written notice is given to the Contractor prior to the furnishing of the services or material and within 5 days of Subcontractor encountering the changed condition. Subcontractor shall provide pricing for the changed work within 5 days of encountering the change condition.

4.4 The Subcontractor will make all claims for extra compensations and for extension of time to the Contractor promptly in accordance with this Article and consistent with the Contract Documents.

4.5 Notwithstanding any other provision, if the Work for which the Subcontractor claims extra compensation is determined by the Owner or Architect not to entitle the Contractor to a Change Order or extra compensation, then the Contractor shall not be liable to the Subcontractor for any extra compensation for such Work, unless Contractor agreed in writing to such extra compensation. **Subcontractor shall not be entitled to payment for any additional work or costs associated with the alleged changed condition, differing site condition or other alleged extra work unless that additional work and costs is first approved and paid for by the Owner. Payment by the Owner to the Contractor for the alleged additional work or costs shall be an absolute condition precedent to Subcontractor receiving any additional compensation for said work or costs, and Subcontractor shall only be entitled to payment of the amount paid by the Owner to the Contractor for the alleged additional work or costs less any offsets, backcharges and expenses permitted under this Subcontract or otherwise permitted by law or equity. (In the event applicable law prohibits payment by the Owner to the Contractor from being a condition precedent to payment by the Contractor to the Subcontractor, then that condition precedent shall not apply but approval of the Subcontractor's Work by the Owner shall remain an absolute condition precedent to payment by the Contractor to the Subcontractor. Contractor's presentment of Subcontractor's claim to Owner shall not be construed as an acknowledgement of the validity thereof, or of a waiver of any right of the Contractor.**

ARTICLE 5

Insurance and Indemnity

5.1 Prior to starting Work the Subcontractor shall procure and maintain in force, Workers' Compensation Insurance, Employers Liability Insurance, Comprehensive General Liability Insurance with contractual coverage and Automobile Liability Insurance and such other insurance, to the extent required by the Contract Documents for the Subcontractor's Work. **The Subcontractor is to submit all required Insurance Certificates to this office prior to beginning work on the project. Subcontractor's submission of Insurance Certificates is a mandatory condition precedent to Subcontractor receiving payment for work on the Project.**

5.2 Insurance coverage, as required by paragraph 5.1, shall be written for not less than the following limits, or greater if required by law:

a. Comprehensive General Liability

1. Liability for the Project, Completed Operations, Property Damage, Bodily Injury, Personal Injury and Medical Expenses	\$ 1,000,000.00	Each Occurrence
	\$ 2,000,000.00	Aggregate
2. Contractual Liability coverage insuring all Liability assumed by Subcontractor Pursuant to this Subcontract	\$ 1,000,000.00	Each Occurrence
	\$ 2,000,000.00	Aggregate

b. Comprehensive Automobile Liability

1. Including property damage, personal injury And coverage for liability arising out of the Operation of owned, hired and non-owned Vehicles	\$ 1,000,000.00	Combined Single Limit
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c. Umbrella / Liability Insurance \$ 1,000,000.00

d. Worker's Compensation Insurance \$ \$1,000,000.00 if no Statutory limit exists.

Subcontractor's insurance policies shall name Owner and Contractor as an additional insured, including coverage for Completed Operations claims by endorsements CG 2010 and CG 2037, or manuscripted forms providing equivalent coverage, for this project only. This coverage shall be primary and non-contributory as to the Owner and Contractor. Subcontractor agrees to waive Right of Subrogation against the Owner and Contractor. Subcontractor shall maintain Completed Operations coverage for itself and each additional insured for a period of eight (8) years or the statue of repose for the state where the project is located following completion of the Work.

The attached Exhibit "E" is the model Certificate of Insurance for this project. Subcontractor agrees to furnish an acceptable Certificate of Insurance consistent with Exhibit "E" indicating that Subcontractor has obtained all necessary contractual insurance coverage. Contractor shall not be obligated to make any payment to Subcontractor for work on the Project until Subcontractor has provided Contractor with a copy of Subcontractor's Certificate of Insurance indicating that Subcontractor has obtained all necessary contractual insurance coverage.

5.3 Comprehensive General Liability Insurance may be arranged under a single policy for the full limits required or by a combination of underlying policies with the balance provided by an Excess or Umbrella Liability policy.

5.4 The foregoing policies shall contain a provision that coverage's afforded under the policies will not be canceled or not renewed until at least thirty (30) days' prior written notice has been given to the Contractor. Certificates of Insurance acceptable to the Contractor shall be filed with the Contractor prior to the commencement of Work.

5.4.1 The Subcontractor agrees to furnish the Contractor with suitable evidence that Insurance has been taken out, and if the Subcontractor shall sublet any of this work to a third party, he agrees to see that the said third party shall carry Insurance, as mentioned above, in amounts the same as required in paragraph 5.2.

5.5 The Contractor and Subcontractor waive all rights against each other and against the Owner, the Architect/Engineer separate contractors, and all other subcontractors for damages caused by fire or other perils to the extent covered by Builder's Risk or any other property insurance, except such rights as they may have to the proceeds of such insurance.

5.5.1 Subcontractor is responsible for the \$1,000.00 deductible on Builders Risk Insurance.

5.5.2 Subcontractor's obligation to provide the required insurance will not be waived by Subcontractor's failure to provide the certificate of insurance, Contractor's acceptance of a certificate of insurance showing coverage varying from the required coverage, or Contractor's direction to Subcontractor to begin Subcontractor's work.

5.6 To the fullest extent permitted by law, the Subcontractor agrees to indemnify, defend and hold harmless the Contractor, the Owner, the Architect/Engineer and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance, or failure in performance of the Subcontractor's Work under this Subcontract, provided that any such claim damage, loss or expense (1) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) **arising out of** any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable regardless of whether it is caused in part by a party indemnified hereunder. Such obligations shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph 5.6.

5.6.1 In any and all claims against the Contractor or any of his agents or employees by any employee of the Subcontractor, anyone directly or indirectly employed by him or anyone for whose acts he may be liable, the Indemnification obligation under this Paragraph 5.6 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under Workers' Compensation acts, disability benefit acts or other employee benefit acts.

5.6.2 The obligations of the Subcontractor under this Paragraph 5.6 shall not extend to the liability of the Architect / Engineer, his agents or employees, arising out of (a) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (b) the giving of or failure to give directions or instructions by the Architect/Engineer, his agents or employees, providing such giving or failure to give is the primary cause of the injury or damage.

5.6.3 Neither Owner and Contractor's rights nor Subcontractor's indemnification obligations hereunder shall be impaired or affected in any way by the failure of Owner or Contractor to provide Subcontractor with a copy of the Prime Contract, a notice of commencement, a notice of lien, a mechanics lien, or other information requested by the Subcontractor.

ARTICLE 6

Performance Bond and Labor and Material Payment Bond

A Performance Bond and a Labor and Material Payment Bond in a form **and by a surety** satisfactory to the Contractor shall be furnished in the full amount of this Agreement, if required by the Contractor. This obligation shall continue throughout the agreement and may be required at any time **at Contractor's sole option** during the performance of Subcontractor's Work by a change under Article 4.

ARTICLE 7

Warranty

The Subcontractor agrees to promptly make good without cost to the Owner or Contractor any and all defects due to faulty workmanship and /or materials which may appear within the guarantee or warranty period so established in the Contract Documents; and if no such period be stipulated in the Contract Documents, then such guarantee shall be for a period of one year from date of completion and acceptance of the project by the Owner. The Subcontractor further agrees to execute any special guarantees as provided by the terms of the Contract Documents, prior to final payment.

ARTICLE 8

Contractors' Obligations

8.1 The Contractor agrees to be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Contract Documents and by all provisions thereof affording remedies and redress to the Contractor from the Owner insofar as applicable to this Agreement.

8.2 Upon request, the Contractor will give the Subcontractor written authorization to obtain direct from the Architect/Engineer or Owner's authorized agent, evidence of amount and percentages of completion certified on his account.

8.3 The Contractor shall not issue or give any instruction, order or directions directly to employees or workmen of the Subcontractor other than to the persons designated as the authorized representative(s) of the Subcontractor.

8.4 The Contractor shall make no demand for liquidated damages in any sum in excess of the amount specifically named in this Agreement or the Contract Documents. Liquidated damages shall not be assessed for delays not caused by the Subcontractor. Liquidated damages, when assessed, shall not exceed the Subcontractor's proportionate share of the responsibility for such delay. This provision does not preclude any claim the Contractor may have for direct damages under law.

8.5 The Subcontractor will furnish those temporary facilities and services required by the Subcontractor except for those to be provided by the Contractor set forth in the Attachment A to this Agreement. Adequate storage areas, if available, will be allocated by the Contractor for the Subcontractor's materials and equipment during the course of the Work.

8.6 The Contractor agrees that no claim for services rendered or materials furnished by the Contractor to the Subcontractor shall be valid unless notice is given to the Subcontractor prior to furnishing of the services or material or unless written notice of the claim therefor is given by the Contractor to the Subcontractor not later than the last day of the calendar month following that in which the claim originated, with the amount of the claim to be given in writing by the Contractor as soon as practicable.

ARTICLE 9

Termination

9.1 Should the Subcontractor fail at any time to supply a sufficient number of properly skilled workmen or sufficient materials and equipment of the proper quality, or fail in any respect to prosecute the Work with promptness and diligence, or fail to promptly correct defective Work or fail in the performance of any of the terms herein contained or incorporated herein, the Contractor may, at his option, provide such labor, materials and equipment and deduct the cost thereof, together with all loss or damage occasioned thereby, from any money then due or thereafter to become due to the Subcontractor under this Agreement.

9.2 If the Subcontractor at any time shall refuse or neglect to supply sufficient properly skilled workmen, or materials or equipment of the proper quality and quantity, or fail in any respect to prosecute Subcontractor's Work with promptness and diligence, or cause by any action or omission the stoppage or interference with the work of the Contractor or other subcontractors, or fail in the performance of any of the terms herein contained or incorporated herein, or be unable to meet his debts as they mature, or performs in a manner that permits the Owner to terminate Contractor under the Prime Contract, the Contractor may at his option at any time serving written notice of such default with direction to cure in a specific period, but not less than two (2) calendar days. In the event Subcontractor fails to cure the default within the time prescribed by the Contractor, the Contractor may terminate the Subcontractor's employment by delivering written notice of termination to the Subcontractor. Immediately thereafter, the Contractor may take possession of the plant and work, materials, tools, appliances, and equipment of the Subcontractor at the building site, and through himself or others provide labor, equipment and materials to prosecute Subcontractor's Work on such terms and conditions as shall be deemed necessary, and shall deduct the cost thereof, including without restriction thereto all

charges, expenses, losses, costs, damages, and attorney's fees, incurred as a result of the Subcontractor's failure to perform, and any other types of charges, expenses, losses, costs or damages that the Owner may be entitled to recover from the Contractor in the event of termination for cause, from any money then due or thereafter to become to the Subcontractor under this Agreement.

9.3 If the Contractor so terminates the employment of the Subcontractor pursuant to Paragraph 9.1 or Paragraph 9.2 the Subcontractor shall not be entitled to any further payments under this agreement until Subcontractor's Work has been completed and accepted by the Owner, and payment has been received by the Contractor from the Owner with respect thereto. In the event that the unpaid balance due exceeds the Contractor's cost of completion, plus any other charges, expenses, losses, costs, damages (including but not limited to (a) any backcharges assessed by the Owner or Contractor for Subcontractor's scope of work, (b) any amounts paid by Contractor to subcontractors or suppliers of Subcontractor, (c) any amounts incurred by Contractor to bond off or pay off lien or bond claims asserted by subcontractors of suppliers of Subcontractor, (d) any costs of insurance that is the responsibility of Subcontractor, and (e) any costs to correct deficiencies in Subcontractor's work), and attorney's fees that the Contractor is entitled to recover under this Subcontract, the difference shall be paid to the Subcontractor; but if such cost of completion, plus any charges, expenses, losses, costs, damages, and attorney's fees expense exceeds the balance due, the Subcontractor agrees promptly to pay the difference to the Contractor.

9.4 In the event Owner terminates Contractor's Work on the Project for any reason not the fault of Subcontractor, Subcontractor's Work shall also be terminated effective on the same date as the effective date of Contractor's termination. In the event of such a termination by Owner, Subcontractor shall only be entitled to compensation for the items for which Contractor is entitled to compensation from the Owner when the Owner terminates the Contractor without cause, and Contractor shall also be entitled to deduct from any such items of compensation: (a) any backcharges assessed by the Owner or Contractor for Subcontractor's scope of work, (b) any amounts paid by Contractor to subcontractors or suppliers of Subcontractor, (c) any amounts incurred by Contractor to bond off or pay off lien or bond claims asserted by subcontractors of suppliers of Subcontractor, (d) any costs of insurance that is the responsibility of Subcontractor, and (e) any costs to correct deficiencies in Subcontractor's work. If the amount of the deductions discussed in the previous sentence exceeds the amount owed for work and materials provided by Subcontractor according to the schedule of values plus overhead and profit as set forth in the previous sentence, then Subcontractor shall reimburse that excess amount to Contractor within 10 days of Contractor providing its accounting. In no event shall Subcontractor be entitled to payment for materials or work or overhead or profit on the Project until Contractor has been paid by Owner for those materials and work.

ARTICLE 10

Claims

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor's failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise. The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the

AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the disputes between Contractor and Subcontractor may be consolidated or joined in the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion.

10.2 In the event the Contractor and Owner or others arbitrate (or litigate) matters relating to this Subcontract, it shall be the responsibility of the Subcontractor to prepare and present the Contractor's case, to the extent the proceedings are related to this Subcontract.

10.3 Should the Contractor enter into arbitration (or litigation) with the Owner or others regarding matters relating to this Agreement, the Subcontractor shall be bound by the result of the arbitration (or litigation) between the Owner and the Contractor to the same degree as the Contractor is bound.

10.4 The Subcontractor shall carry on Subcontractor's Work and maintain his progress during any arbitration (or litigation) proceedings.

ARTICLE 11

Prevailing Law

11.1 The provisions of this Subcontract shall be controlled and interpreted by the laws of the State of South Carolina; provided, however, that if a dispute arises involving the Owner then the provisions of this Subcontract shall be governed by the State laws governing the Prime Contract.

11.2 The provisions of this Subcontract are severable in whole or in part. If any provision or part of this Subcontract is found to be invalid or unenforceable, that provision or part shall be deemed severed from this Subcontract and the remainder of this Subcontract shall continue in full force and effect, and such provision may be limited in such a manner as to make it valid and enforceable.

ARTICLE 12

Miscellaneous

12.1 All notices called for in this Subcontract shall be sent by certified or registered mail or overnight service (FedEx, UPS, DHL, or U.S. Postal Service) to the address listed for the receiving party on the first page of this Subcontract, except that notices under Article 9 of this Subcontract may be sent by e-mail or facsimile with follow up notice being sent by certified or registered mail or overnight service (FedEx, UPS, DHL, or U.S. Postal Service). Notice shall be effective upon receipt by the receiving party. In the event a party receiving notice changes address from the address identified on the first page of this Subcontract then the new address shall be identified by the party with the new address to the other party within three (3) calendar days of the change of address. Where a party fails to timely identify the new address then delivery or attempted delivery of notice to the former address in the manner specified herein shall be deemed receipt of notice.

12.2 Nothing in the Subcontract creates any relationship of trust or fiduciary relationship between Contractor and Subcontractor. The Subcontract does not create any obligation or relationship such as a partnership, joint venture or other similar legal relationship. Any correspondence or other reference to "partners" or other similar terms will not be deemed to alter, amend or change the independent contractor relationship between the parties unless there is a formal written agreement specifically detailing the rights, liabilities, and obligations of the parties as to a new, specifically defined legal relationship.

12.3 This Subcontract may be executed in one or more counterparts, all of which shall be deemed one and the same agreement. Any counterpart delivered by, or on behalf of, either party hereto by fax transmission or other electronic delivery of an image file reflecting the execution thereof: (1) may be relied on by the other party as if the document were a manually signed original, and (2) will be binding on the signing party.

12.4 Article, section and paragraph headings are for convenience only and may not be construed as part of the Subcontract or as a limitation on the scope of the particular sections.

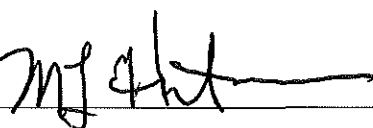
12.5 If either party fails to give notice or enforce any right under the Subcontract, the failure shall not constitute a waiver of the right, unless (a) the Subcontract specifically provides otherwise, or (b) the parties reduce the waiver to writing and the waiving party signs the writing. If a party waives its right in writing, the waiver shall not constitute a waiver of any other right or of a subsequent violation of the same right. The rights and remedies of Contractor hereunder are cumulative to, and not exclusive of, any rights or remedies which Contractor would otherwise have in law or at equity.

12.6 In the event of any action or proceeding brought by either party against the other under the Subcontract, the prevailing party will be entitled to recover all costs and expenses, including court costs and reasonable attorneys' fees.

12.7 Subcontractor hereby warrants and represents that it is a duly licensed contractor under the laws of the State in which the Project is located to the extent Subcontractor is required to obtain such a license by the State in which the Project is located.

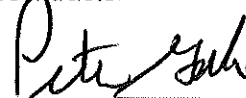
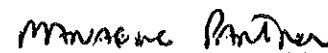
12.8 The terms of this Contract shall be deemed jointly drafted by the parties and construed and applied without regard to any presumption or rule of law requiring construction against the drafting party.

IN WITNESS WHEREOF the parties hereto have executed this Agreement under seal, the day and year first above written.

ATTEST: 

Pampa Bay Landscape Construction, LLC

Subcontractor

By  
(Title)

Gillam & Associates, Inc.

Contractor

ATTEST:

By _____
Eric Floyd, Project Manager

Exhibit "A"
SAFETY RULES & REGULATIONS

PROJECT: **Parker's #86, Ladson SC**

These rules & regulations apply to ALL workers on the Construction project referenced above. The following items are excerpts from Gillam & Associates, Inc. safety program, and are intended to serve as a quick-reference reminder for subcontractors. All OSHA safety procedures must be followed at all times.

1. Workers must wear hard-hats, sturdy shoes and any other personal protective equipment as required by governmental agencies' regulations.
2. Stored materials will be kept in an orderly fashion, and the job site is to be cleaned daily with trash removed to a designated site.
3. All power tools, equipment and ladders will be used in a safe manner and in compliance with governmental agencies' regulations for use and maintenance.
4. Guardrail and/or barricades will not be taken down without permission from the subcontractor that erected them and the job superintendent. Any removal of such guardrails and/or barricades must be replaced immediately. Applicable subcontractors will ensure that all barricades and other devices for fall protection are installed immediately and kept in good condition.
5. Only authorized and trained personnel will operate equipment and vehicles.
6. Subcontractor shall designate an employee as its competent person and notify superintendent of such
7. Report all injuries and / or hazardous conditions to your supervisor immediately.
8. No personal radios of any kind or pets are allowed on the job site.
9. No hazardous or toxic substances will be disposed of on the job site.
10. All federal, state and local laws relating to the use of hazardous or toxic materials will be complied with at all times.
11. The use and/or possession of alcoholic beverages or controlled substances on the job site is prohibited. Their use will be grounds for immediate removal of the user from the job site and dismissal from project.
12. All employees shall adhere to all OSHA regulations. Subcontractors are responsible to ensure safe working conditions for their own personnel and for OSHA standards including any fines or suits stemming from non-compliance.
13. Subcontractors' lead man will attend weekly safety meetings.
14. All subcontractors shall hold weekly safety meetings, and the subcontractors' lead man will provide Job Superintendent with minutes and attendees' names from these meetings at the weekly safety meetings.
15. All subcontractors are required to report to the Job Superintendent prior to initiating work on a project, and should also report prior to leaving a job for more than 24 hours.
16. Any person visiting or requesting to see someone on site must report to the job trailer and wait for assistance. Unauthorized persons are not allowed in work areas.

I have read and understand each of the Safety Rules & Regulations listed above and agree to comply with them. I further understand that non-compliance may result in an OSHA fine and/or termination of my contract and/or employment.

By: Peter G. Gillam
(Sign & print name)

Title: MANAGING PARTNER

For: Pampa Bay Landscape Construction, LLC

Date: 4-8-23

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Pampa Bay Landscape Construction,
LLC,

Plaintiff,

vs.

Gillam & Associates, Inc. and Drayton-
Parker Companies LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

C/A No.: 2024CP0802013

AFFIDAVIT OF PETER GALLO

PERSONALLY APPEARED BEFORE ME, Peter Gallo, who being duly sworn deposes and says:

1. I am an authorized member of Pampa Bay Landscape Construction, LLC ("Pampa Bay"). I have the authority to execute this Affidavit on behalf of Pampa Bay.
2. As an authorized member of Pampa Bay, I am personally familiar with the records of Pampa Bay, all of which are kept in the regular course of business.
3. Pampa Bay is a South Carolina Limited Liability company based in Goose Creek, South Carolina.
4. I understand that Gillam & Associates, Inc. is based in Aiken, South Carolina.
5. I have reviewed the Affidavit submitted by Eric Floyd of Gillam & Associates, Inc.
6. In his Affidavit, Mr. Floyd speculates on where I sourced certain products from that were used as a part of Pampa Bay's scope of work on the Parker's #86 project in Ladson, South Carolina.
7. Specifically, Mr. Floyd speculates that Pampa Bay sourced irrigation heads, clocks, valves, and PVC pipe from SiteOne Landscape Supply and wire from Regency Wire which were from out of state sources.
8. Pampa Bay did not directly source the products Mr. Floyd cites from out-of-state sources as Mr. Floyd claims.
9. Pampa Bay did not use wire from Regency Wire.
10. I, on behalf of Pampa Bay, purchased and picked up the other products Mr. Floyd cites from a local SiteOne Landscape Supply store located at 9491 Hamburg Road, Ladson, South Carolina 29456.
11. The products purchased are stock items which are kept at local locations regardless of an order.

12. The products Mr. Floyd cites never left South Carolina because they were used by Pampa Bay at the Parker's #86 project in Ladson.

PAMPA BAY LANDSCAPE CONSTRUCTION,
LLC

1-3-25

Date

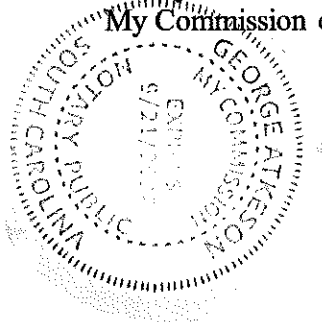
Peter Gallo

By: Peter Gallo

Its: Authorized Member

Sworn to and Subscribed before me this
3rd day of JANUARY, 2024.

George Atkins
Notary Public for CHARLESTON SC
My Commission expires: 9/21/27



STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	THE NINTH JUDICIAL CIRCUIT
	)	
PAMPA BAY LANDSCAPE	)	
CONSTRUCTION, LLC,	)	C.A. No. 2024-CP-08-02013
Plaintiff,	)	
	)	
v.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO STAY ACTION PENDING
GILLAM & ASSOCIATES, INC., and	)	ARBITRATION
DRAYTON-PARKER COMPANIES LLC,	)	
	)	
Defendants.	)	

NATURE OF MOTION

Gillam & Associates, Inc. (“Gillam”) seeks to stay the lawsuit filed by Pampa Bay Landscape Construction, LLC (“Pampa Bay”). Gillam & Associates, Inc. (“Gillam”) seeks arbitration of the disputes between the parties as directly called for in the Subcontract between Gillam and Pampa Bay and because the only claims in this action that remain are between Gillam and Pampa Bay.

GILLAM’S MOTION

Pampa Bay has filed an action against Gillam and Drayton-Parker for monies that Pampa Bay maintains it is owed for landscape work on the Parkers’ Project being built by Gillam in Ladson, Berkeley County, South Carolina. Pampa Bay asserts that Gillam is liable for breach of contract, while maintaining that Drayton-Parker is liable for a mechanic’s lien filed by Pampa Bay. Gillam bonded off the claim of lien. See Aff. of Eric Floyd at Exhibit A and Exhibit A-1 to the Motion. Therefore, the disputes at issue in this case are between Gillam and Pampa Bay.

The Subcontract between Gillam and Pampa Bay requires that the disputes be resolved by arbitration. Article 10.1 of the Subcontract requires that disputes be resolved by arbitration.

That provision states:

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor's failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. **All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise.** The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the disputes between Contractor and Subcontractor may be consolidated or joined in the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion. (Emphasis added)

The basis for the Motion being as follows:

1. As alleged in its Complaint, Gillam and Pampa Bay entered into a Subcontract for the landscaping to the Parker's store (the "Subcontract").
2. Pampa Bay attached a copy of the Subcontract as Exhibit "A" to its Complaint.
3. Article 10.1 of the Subcontract provides the foundation for the resolution of the underlying dispute in this matter. Article 10.1 of the Subcontract contains express provisions for Arbitration of Disputes requiring that "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise" (hereinafter, "Arbitration Provision").
4. South Carolina law recognizes that construction involves interstate commerce, as materials and supplies are manufactured from outside of the State of South Carolina.
5. Matters involving interstate commerce and containing arbitration clauses are subject to the Federal Arbitration Act, where applicable.
6. The Federal Arbitration Act preempts S.C. Code § 15-48-10.
7. This motion will be further based upon the state and federal common law, statutes, memorandum of law, and affidavits to be submitted in accordance with the South Carolina Rules of Civil Procedure.

NATURE OF THE CASE

This action is before the Court pursuant the Complaint filed on April 1, 2020, by the Plaintiffs asserting claims for Breach of Contract, Breach of Express and Implied Warranties, Breach of Contract Accompanied by a Fraudulent Act, Constructive Fraud and Unfair and Deceptive Trade Practices, pursuant to a Contract attached as Exhibit A to the Complaint.

DEFENDANTS' MOTION

On June 4, 2020, Defendants Donald G. Chapman, Individually and d/b/a Icon Construction of South Carolina, Inc., and Icon Construction of South Carolina, LLC (“Defendants”) filed their motion for an order dismissing this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure, or alternatively compelling arbitration and staying the litigation pending arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (“FAA”).

The basis for the motion being as follows:

1. As alleged in its Complaint, “Defendants prepared a contract for the construction of an addition and renovation to the home of the Plaintiffs dated May 2, 2019” (hereinafter, the “Contract”).
2. Plaintiffs attached a copy of the Contract as Exhibit “A” to their Complaint.
3. The Contract provides the foundation for the underlying dispute in this matter.

Article 12 of the Contract contains express provisions for Arbitration of Disputes requiring that “[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American

Arbitration Association under its Construction Industry Rules” (hereinafter, “Arbitration Provision”).

4. South Carolina law recognizes that construction involves interstate commerce, as materials and supplies are manufactured from outside of the State of South Carolina.
5. Matters involving interstate commerce and containing arbitration clauses are subject to the Federal Arbitration Act, where applicable.
6. The Federal Arbitration Act preempts S.C. Code § 15-48-10.
7. This motion will be further based upon the state and federal common law, statutes, memorandum of law, and affidavits to be submitted in accordance with the South Carolina Rules of Civil Procedure.

As this matter is subject to Arbitration, the Defendants have moved for the Court to compel arbitration and stay this matter pending resolution in accordance with the FAA, after which the Award may be vacated, modified or confirmed in accordance with the FAA.

LEGAL ANALYSIS

A. South Carolina recognizes FAA preemption.

This matter involves a construction contract performed in South Carolina, containing an arbitration clause. Since 2001, South Carolina has recognized that “[t]he FAA preempts state laws that invalidate the parties’ agreement to arbitrate ‘[b]ut it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself.’” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538 n. 2, 542 S.E.2d 360, 363 n. 2 (2001) (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior*

Univ., 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). *See also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001). “To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117.

B. The FAA applies because construction involves Interstate Commerce

As the South Carolina Supreme Court held in *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013), “[g]enerally, any arbitration agreement affecting interstate commerce . . . is subject to the FAA. The United States Supreme Court ‘has previously described the [FAA]’s reach expansively as coinciding with that of the Commerce Clause.’ **Thus, in determining whether the FAA applies to a particular arbitration agreement, a court considers whether the contract concerns a transaction involving interstate commerce.**” *Id.* at 405 S.C. 115, 121-122, 747 S.E.2d 461, 464 (**emphasis added**) (*citations omitted*).

This construction contract involved interstate commerce. For example, products used in construction, even if purchased solely in the State of South Carolina, were likely made in China, or someplace other than the State of South Carolina. There is a long line of cases in South Carolina where the courts have found that construction and construction contracts involve interstate commerce. Indeed, in deciding a case in 2012, the South Carolina Supreme Court cited numerous decisions where South Carolina’s appellate courts found that construction involves interstate commerce, and the Court expressly emphasized that “our appellate courts have consistently recognized that contracts for construction are governed by the FAA.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312, n. 8 (2012). *See also Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2020) (“The transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to

Petitioners' specifications rather than the purchase of pre-existing homes.” *citing to Bradley*). It is axiomatic that the materials used in construction are shipped by water, air or interstate travel, which are means of interstate commerce, and therefore subject to the FAA.

As set forth in *Cape Romain*, wherein the Supreme Court reversed the trial court’s denial of a motion to compel arbitration as to a construction contract that involved interstate commerce, “Under the reach of the Commerce Clause, ‘Congress has authority to regulate (1) the use of the *channels* of interstate commerce, (2) the *instrumentalities* of interstate commerce, or persons or things in interstate commerce ... and (3) those activities having a *substantial relation* to interstate commerce.’ *United States v. Gould*, 568 F.3d 459, 470 (4th Cir.2009) (quoting *United States v. Morrison*, 529 U.S. 598, 609, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000)). ‘Channels of commerce are ‘the interstate transportation routes through which persons and goods move.’ *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir.2005) (quoting *Morrison*, 529 U.S. at 613 n. 5, 120 S.Ct. 1740) (noting channels of interstate commerce include highways, railroads, navigable waterways, airspace, telecommunications networks and even national securities markets). ‘Instrumentalities of interstate commerce, by contrast, are the people and things themselves moving in commerce. . . .’ *Id.* at 1226 (identifying automobiles, airplanes, boats, shipments of goods, pagers, telephones and mobile phones as instrumentalities of interstate commerce). *Cape Romain* at 405 SC 115, 122, 7547 S.E.2d 461, 464. In *Cape Romain*, the Supreme Court held that even mechanic’s liens, which is also before this Court, are subject to arbitration. *Id.* at 405 SC 115, 127, 7547 S.E.2d 461, 467.

C. The Contract is enforceable.

The Contract clearly provides that: “**All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the**

meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise." See Contract Article 10.1. Plaintiffs are signatories to the Contract. The language is clear and unambiguous.

As the Court held in *Cape Romain*, "[t]he FAA simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). "[C]ourts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify *with whom* the parties choose to arbitrate their disputes,' and 'the rules under which that arbitration will be conducted.' *Id.* at 405 S.C. 115, 125, 747 S.E.2d 461, 466.

As the South Carolina Supreme Court pointed out in *Damico*, utilizing the United State Supreme Court's *Prima Paint* doctrine, "the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608–09, 879 S.E.2d 746, 753 (2022) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001), citing *Prima Paint*, 388 U.S. at 395, 87 S.Ct. 1801). "The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608–09, 879 S.E.2d 746, 753 (2022), citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) ("[U]nless the

challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.”).

D. Defendants have not waived their right to Arbitration.

Plaintiffs may argue that Defendants have waived their rights, but such is not true. While the very right to enforce an arbitration clause is capable of being waived, no such waiver has occurred here. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct.App. 2011) (“The right to enforce an arbitration clause may be waived”). No discovery has been engaged, other than Defendants preserving their rights to arbitration and Defendants have not yet answered the Complaint. South Carolina law is clear, that “[i]n order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration.” *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct.App.1999). “There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case.” *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 256–57, 743 S.E.2d 868, 872 (Ct. App. 2013) (*citations omitted*).

E. Conclusion.

Because this matter is subject to arbitration, this Court should stay this proceeding pending Arbitration as required under the Federal Arbitration Act and South Carolina and Federal law, compelling arbitration and staying the litigation pending arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (“FAA”).

Respectfully Submitted,

SMITH CURRIE OLES LLP

s/ Matthew E. Cox

Matthew E. Cox, SC Bar No. 16603
5727 Westpark Drive, Suite 200
Charlotte, NC 28217
T: 704.334.3459
F: 704.334.7850
Email: mecox@smithcurrie.com

Attorneys for Defendant Gillam &
Associates, Inc

January 3, 2025

Charlotte, North Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January 2025, a true and correct copy of the within and foregoing MEMORANDUM IN SUPPORT OF **MOTION TO STAY ACTION PENDING ARBITRATION** was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send notification of electronic filing to counsel of record for the Plaintiff as follows:

Dylan R. Glick, Esq.
Post Office Box 1799
Columbia, South Carolina 29202

s/ Matthew E. Cox
Matthew E. Cox
S.C. Bar No. 16603

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

The Honorable Dale E. Van Slambrook

C.A. No.: 2024-CP-08-02013

Pampa Bay Landscape Construction, LLC.....Plaintiff/Respondent

v.

Gillam & Associates, Inc. Defendant/Appellant

NOTICE OF APPEAL

Please take notice that Gillam & Associates, Inc. (“Appellant”), pursuant to Rule 203, SCACR,
appeals the following Order:

1. Order filed February 12, 2025, denying Gillam & Associates, Inc.’s Motion to Stay Action
Pending Arbitration.

The Appellant received written notice of the entry of the February 12, 2025 Order on that same
date. This Notice of Appeal is timely filed. A copy of the Order is attached to this Notice as
Exhibit A.

February 27, 2025

Respectfully Submitted,

SMITH CURRIE OLES LLP

s/ Matthew E. Cox
Matthew E. Cox, SC Bar No. 16603
5727 Westpark Drive, Suite 200
Charlotte, NC 28217
PH: 704.334.3459

FX: 704.334.7850

mecox@smithcurrie.com

*Attorneys for Defendant/Appellant Gillam &
Associates, Inc*

Other Counsel of Record:

Dylan R. Glick, Esq.

Gallivan, White & Boyd, P.A.

Post Office Box 7368

Columbia, South Carolina 29202

T: 803-724-1821

dglick@gwblawfirm.com

Attorneys for Plaintiff/Respondent

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Pampa Bay Landscape Construction,
LLC,

Plaintiff,

vs.

Gillam & Associates, Inc. and Drayton-
Parker Companies, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

C/A No. 2024-CP-08-02013

**ORDER DENYING DEFENDANT GILLAM
& ASSOCIATES, INC.'S MOTION TO STAY
ACTION PENDING ARBITRATION**

INTRODUCTION

This matter came before the Court on Defendant Gillam & Associates, Inc.'s ("Gillam") Motion to Stay Action Pending Arbitration. A hearing was held in-person on January 7, 2025. Gillam was represented by Matthew E. Cox, Esq., and the Plaintiff, Pampa Bay Landscape Construction, LLC ("Pampa Bay"), was represented by Dylan R. Glick, Esq. Based on briefs filed by the Parties, arguments made during the hearing, and South Carolina law, the Court **DENIES** Gillam's Motion to Stay Action Pending Arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

This dispute revolves around a subcontract ("Subcontract") Pampa Bay entered into with Gillam on or around June 23, 2023 to perform certain landscaping work at a new Parker's Kitchen gas station located at 343 College Park Road in Ladson, South Carolina 29456. A dispute arose as to Pampa Bay's payment and performance under the Subcontract leading to the instant action filed by Pampa Bay.

Pampa Bay filed a mechanic's lien on June 27, 2024 and its corresponding foreclosure complaint on July 19, 2024. Gillam filed a Motion to Dismiss, a Motion to Stay and Compel Arbitration, and an Answer and Counterclaim (subject to the Motion to Stay Action) on August 26, 2024. Gillam's Motion to Stay and Compel Arbitration is premised on an arbitration provision found within the Subcontract which reads as follows:

10.1 All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof shall be addressed by in-person meeting between corporate officers of the Contractor and the Subcontractor within twenty-five (25) calendar days after notice of the claim is first delivered. Additional meetings may be agreed to in writing by Contractor. Subcontractor's failure to attend that meeting for reasons beyond the control of the Contractor shall constitute a waiver of the claim or dispute if the claim or dispute is initiated by the Subcontractor for additional money or time. All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof not resolved at the meeting described in the first sentence of this paragraph or in a subsequent meeting agreed to in writing by Contractor, and not waived by Subcontractor's failure to meet, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") then obtaining unless the parties mutually agree in writing otherwise. The parties agree that the arbitration shall be administered by the arbitrator selected by agreement of the parties and not by the AAA unless the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party. If the parties cannot agree on an arbitrator within 30 days of the submission of a demand for arbitration to the other party then the arbitration shall be administered through the AAA, the arbitrator shall be selected through the rules and procedures of the AAA, and the parties shall be responsible for payment of AAA fees according to the Construction Industry Arbitration Rules of the AAA. This agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina. The arbitration hearing shall take place in Aiken or Columbia, South Carolina and the arbitrator shall be a South Carolina resident. The award rendered by the arbitrator(s) shall be final, and judgment may be entered in accordance with applicable law in any court having jurisdiction thereof. The foregoing notwithstanding, in the event the dispute resolution procedures in the Prime Contract differ from those set forth in this Subcontract, the claim and dispute resolution procedures of the Prime Contract shall govern disputes between Contractor and Subcontractor and supersede the prior terms of this subparagraph 10.1 to the extent Contractor determines, in its sole discretion, that disputes between the Contractor and the Subcontractor involve common issues of fact or law with disputes between the Contractor and the Owner. Subcontractor agrees that as to any disputes it has with the Contractor which the Contractor deems to involve common issues of fact or law with disputes with Owner or other subcontractors, then the

disputes between Contractor and Subcontractor may be consolidated or joined in the same dispute resolution procedure with other subcontractors, the Owner, and other entities as Contractor deems appropriate in its sole discretion.

Subcontract, Art. 10.1.

FINDINGS OF LAW

I. THE ARBITRATION CLAUSE IS UNENFORCEABLE BECAUSE IT FAILS TO MEET NOTICE REQUIREMENTS SET FORTH IN S.C. CODE ANN. § 15-48-10(A). IN ADDITION, THE FEDERAL ARBITRATION ACT (FAA) DOES NOT OTHERWISE APPLY.

a. Notice Requirements of S.C. Code ann. § 15-48-10(a) not met.

The South Carolina Uniform Arbitration Act (“SCUAA”) requires that any instrument requiring arbitration to boldly display notice to the parties that the instrument is subject to arbitration. S.C. Code Ann. § 15-48-10(a) provides, in relevant part:

Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

If notice is not provided as required by S.C. Code Ann. § 15-48-10(a), then the requirement to arbitrate is unenforceable. *Id.*

As recently as 2023, the Supreme Court of South Carolina refused to enforce an arbitration clause which failed the notice requirement required by S.C. Code Ann. § 15-48-10(a). *Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023). In *Hicks Unlimited, Inc.*, a dispute arose between UniFirst Corporation – a uniform rental company – and Hicks. UniFirst Corporation sought to enforce the arbitration provision in its contract. Importantly, the provision did not comply with the notice requirements of the South Carolina Uniform Arbitration Act. *Id.* at 628. The Circuit Court agreed and declined to enforce arbitration on that basis. The Court of Appeals reversed on other grounds. Finally, the Supreme Court of South Carolina agreed and declined to enforce the arbitration provision for failure to comply with South

Carolina Uniform Arbitration Act and because the FAA did not otherwise apply to the parties' contract. *Id.*

South Carolina courts require strict interpretation of statutes when the language is clear. *See Soil Remediation Co. v. Nu-Way Env't.*, 323 S.C. 454, 457 (1996) ("where the terms of the statute are clear, the court must apply those terms according to their literal meaning.").

Here there is no dispute that the Subcontract does not meet the SCUAA notice requirements. The notice of arbitration is not prominently rubber-stamped on the first page, nor does it appear in capitalized and underlined letters anywhere in the Subcontract. The arbitration provision in the Subcontract is the same font size and color as every other provision in the Subcontract. The portion of the Subcontract where the arbitration clause is found is found on pages 11 and 12 with the inconspicuous title 'Claims,' without any mention of arbitration except further in that section. Based on Gillam's failure to comply with the statutory requirements of S.C. Code Ann. § 15-48-10(a), the Court finds that arbitration clause in Gillam's Subcontract is unenforceable.

B. The FAA does not apply to the Subcontract.

I. The Subcontract states South Carolina law shall apply.

Gillam argues that even though its arbitration provision does not comply with SCUAA, the requirements of the SCUAA do not apply because they are preempted by the FAA. The South Carolina Uniform Arbitration Act ("SCUAA") applies to any agreement to arbitrate in South Carolina unless it is stipulated that SCUAA shall not apply in the agreement. S.C. Code Ann. § 15-48-10(b). In that case, the Federal Arbitration Act may apply only if interstate commerce is demonstrated by the moving party. The party claiming the FAA preempts state law bears the burden

of proving the contract involves interstate commerce. 9 U.S.C.A. § 1; *see also Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023).

South Carolina Courts have held that parties to a contract are free to elect state arbitration law or the FAA for dispute resolution. *See e.g. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) (“Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA.”); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (“Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.”)

The Court observes that Gillam’s Subcontract does not make any reference to the FAA. The FAA is not mentioned in the arbitration provision nor is it mentioned anywhere else in the 13-page Subcontract. On the contrary, Subcontract explicitly states it is governed by South Carolina law. Paragraph 11.1 provides “[t]he provision of this Subcontract shall be controlled and interpreted by the laws of the State of South Carolina. . .” The arbitration provision in the Subcontract specifically provides “this agreement to arbitrate shall be specifically enforceable under the arbitration law of South Carolina.” The arbitration provision further provides any arbitration hearing shall take place in Aiken or Columbia, South Carolina and that the arbitrator shall be a South Carolina resident. The Court finds that these requirements in Gillam’s Subcontract evince a clear intent that South Carolina law should govern. “To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007)

(citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). Accordingly, the Court finds Gillam intended for SCUAA to govern the arbitration provision in the Subcontract.

II. Even assuming the Subcontract did not specify South Carolina Law applied, Gillam has failed to demonstrate the existence of interstate commerce to invoke the FAA.

The previously cited 2023 South Carolina Supreme Court opinion in *Hicks Unlimited, Inc.* also has particular relevance for resolving the question of applicability of the FAA. The Court in *Hicks* held “a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce.” 439 S.C. at 632, 889 S.E.2d at 568. Importantly, a party “may not make the connection by declaring or contemplating the FAA will govern.” *Id.* By reaching this conclusion, the Court clarified the opinions in *Munoz* and *Damico* which ushered in a presumption of the applicability of the FAA, especially in construction contracts. “To the extent *Munoz v. Green Tree Fin. Corp.* and *Damico v. Lennar Carolinas, LLC* have been read as allowing parties to agree the FAA preempts South Carolina law without an accompanying demonstration the contract involves interstate commerce, we clarify now they do not.” *Id.* To determine whether interstate commerce is implicated by the parties, a court looks to “the agreement, the complaint, and the surrounding facts, including any affidavits submitted.” (internal quotations omitted). *Id.* The Court held that the mere shipping of products from Kentucky to South Carolina, payment made outside the state of South Carolina, and one of the parties being domiciled in Massachusetts were all insufficient to invoke interstate commerce. As a result, the Court affirmed the trial court’s decision to deny arbitration as unavailing under the FAA and failing to comply with the SCUAA.

Gillam’s Motion to Stay Action Pending Arbitration Between the Parties argues that the FAA should apply instead of SCUAA because the Subcontract involves interstate commerce. To

support this argument, Gillam offers the Affidavit of Eric Floyd, the project manager for Gillam. The Affidavit contains statements by Mr. Floyd about where materials used by Pampa Bay may have originated from. Mr. Floyd attests ‘I understand that Pampa Bay purchased the following products from SiteOne Landscape Supply which procured the materials outside South Carolina:

- (a) Irrigation heads and clock valves from Hunter Brand – these were distributed from *either* Charlotte, North Carolina or Atlanta, Georgia;
- (b) PVA pipe from Crestline Pipe which were directly sourced from Pennsylvania *or* Indiana Fittings (Spears) and distributed from either Charlotte or Atlanta.’

Aff. of Eric Floyd ¶ 4 (a-b).

The Court is unwilling to accept Mr. Floyd’s Affidavit as sufficient evidence to support the existence of interstate commerce. The Affidavit amounts to unsupported assumptions by Mr. Floyd about the origin of various products. Mr. Floyd cannot even narrow down the state of origin of particular products to less than two possible states, even assuming his assumptions are correct at the outset. This is insufficient under the new standard for demonstrating the existence of interstate commerce set forth in *Hicks Unlimited*; *see also Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 285, 851 S.E.2d 724, 734 (Ct. App. 2020), *aff’d as modified*, 440 S.C. 456, 892 S.E.2d 297 (2023) (trial court has discretion to strike or disallow an affidavit for consideration).

Moreover, Peter Gallo, Pampa Bay’s owner, submitted an Affidavit attesting Pampa Bay did not directly source the products Mr. Floyd cites from out-of-state sources and were instead purchased and picked up from a local Ladson store. Aff. of Peter Gallo ¶¶ 8, 10.

Based on the Affidavits of Peter Gallo and Eric Floyd, it is clear there is a genuine dispute about the existence of interstate commerce. Under these circumstances and our case law, it would be inappropriate to deprive Pampa Bay of its constitutional right to a jury trial. Accordingly, the FAA does not preempt the SCUAA under the facts at hand because Gillam has failed to demonstrate the existence of interstate commerce.

CONCLUSION

For the foregoing reasons, the Court denies Gillam's Motion to Stay Action Pending Arbitration.

[Judge's electronic signature page to follow]



Berkeley Common Pleas

Case Caption: Pampa Bay Landscape Construction Llc VS Gillam & Associates, Inc.
, defendant, et al
Case Number: 2024CP0802013
Type: Order/Other

And It Is So Ordered!

s/Dale E. Van Slambrook S.C. Circuit Court Judge
#2781

Electronically signed on 2025-02-12 13:06:49 page 9 of 9

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF BERKELEY) COURT OF COMMON PLEAS NONJURY

3

4 PAMPA BAY LANDSCAPE CONSTRUCTION,)
5 LLC,)

TRANSCRIPT

6

PLAINTIFF,)

OF

7

VS.)

RECORD

8

GILLAM & ASSOCIATES, INC. AND)
8 DRAYTON-PARKER COMPANIES, LLC,)

2024-CP-08-2013

9

DEFENDANTS.)

10

11

January 7th, 2025

12

13 B E F O R E:

14

THE HONORABLE DALE E. VAN SLAMBROOK, Judge.

15

16 A P P E A R A N C E S:

17

DYLAN R. GLICK

18

ESQ.

Attorney for the Plaintiff

19

MATTHEW E. COX

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ESQ.

Attorney for the Defendant

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Transcribed by Pamela E. Green, from
WebEx

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I N D E X

(WHEREUPON, there were no exhibits marked or
testimony taken during this hearing.)

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

2
3 THE COURT: Next I have 2024-CP-08-02013, motion to
4 dismiss.

5 Anybody here on that?

6 UNIDENTIFIED SPEAKER: (Indiscernible) Gillam.

7 MR. COX: Matthew Cox for the defendant and movant,
8 Your Honor.

9 It's in connection---

10 THE COURT: Mr. Cox.

11 MR. COX: It's in connection with the one that
12 follows, which is the motion to stay. It's actually a
13 motion to compel arbitration and stay the proceeding
14 (indiscernible).

15 THE COURT: I see both of them now. That one is --.

16 Okay. I want to make sure I wasn't calling them too
17 early and I absolutely am not cause that was scheduled for
18 11:00 I think.

19 (WHEREUPON, there was an indiscernible statement made
20 at this time.)

21 THE COURT: All right. So, this is a motion to
22 dismiss and motion to stay pending arbitration.

23 So, who -- and these are your motions?

24 MR. COX: Yes, Your Honor.

25 THE COURT: Okay. All right. I'll be happy to hear

1 from you.

2 MR. COX: So, this is Mr. Glick. He's representing
3 the plaintiff.

4 MR. GLICK: Yes, Your Honor. Dylan Glick on behalf
5 of the plaintiff.

6 I have no objection to the initial motion to dismiss.
7 That is simply to dismiss Drayton-Parker Companies who's
8 brought in simply because they're on the mechanic's lien.

9 THE COURT: Okay.

10 MR. GLICK: At this point, the lien's been bonded
11 off. So we have no objection to the motion to dismiss to
12 remove them as a party --

13 THE COURT: Okay.

14 MR. GLICK: -- which -- and I do understand it's the
15 only basis for the motion to dismiss.

16 MR. COX: That's it.

17 THE COURT: So, we can do a Form 4 that just says
18 motion granted and which party is it that's being
19 dismissed?

20 MR. GLICK: This is Drayton-Parker Companies.

21 THE COURT: Okay.

22 MR. COX: They were the mortgage holder, Your Honor.

23 THE COURT: Okay. So we'll take care of that and the
24 only substance is motion to stay arbitration.

25 Is that right?

1 MR. COX: Yes, Your Honor.

2 THE COURT: All right. And y'all've worked that one
3 out yet?

4 MR. COX: Well, we've tried.

5 MR. GLICK: We have not. I think we need to go
6 forward on that one.

7 MR. COX: Yeah.

8 THE COURT: Okay. All right. Be happy to hear from
9 you on that one.

10 MR. COX: Thank you, Your Honor.

11 Your Honor, it's actually a very narrow issue.

12 This matter involves Gillam & Associates, which is a
13 general contract. They contracted with Pampa Bay, which
14 is a landscaping company. This is on a construction
15 project that took place here in Berkeley County, Your
16 Honor, and the contract between the parties is a -- an HEC
17 contract.

18 Mr. Glick actually attached it to his memorandum in
19 opposition to the, to the motion and it's a standard form
20 that is by the Associated General Contractors of America
21 standard subcontract agreement for building construction.
22 It was entered into on April 5th, 2023.

23 On the very face of it, it says the park -- that the
24 project is Parker's #86 in Ladson, South Carolina. The
25 owner is Drayton-Parker Companies, LLC. The architect is

1 Cuhaci & Peterson, architects, which is out of Maitland
2 Florida. The owner's out of Savannah, Georgia, Your
3 Honor.

4 It's actually 10.1 of the agreement between the
5 parties which is signed by Pampa Bay. It provides for any
6 and all disputes to be resolved through arbitration. All
7 claims, disputes, and other matters in question arising
8 out of, related to this subcontract or the breach thereof,
9 shall be adversely in person meeting between corporate
10 officers. Then, after that, failure for that, it is
11 subject to arbitration through the rules of the American
12 Arbitration Association and also pursuant to South Carolina
13 law.

14 Mr. Glick, his client has asserted, Your Honor, that
15 it's not subject or it's not proper arbitration provision
16 because it violates the South Carolina Arbitration Act,
17 which requires, as you know, Your Honor, has to be in
18 bold. It has to be at the top of the agreement and all of
19 those requirements.

20 However, we argue that this is an agreement between
21 parties that have -- is a construction agreement and that
22 construction agreements in South Carolina are recognized
23 to be subject to the Federal Arbitration Act, which is --
24 which preempts South Carolina law.

25 Your Honor, Mr. Glick has cited to the case and *Hicks*

1 is a recent case that came out that says -- it's *Hicks*
2 *versus UniFirst* and it is a case that -- let's pull it up
3 here.

4 It's a case that involved a, a dispute between an
5 employer and their use of the uniform service UniFirst and
6 it had a provision in their arbitration, in their contract
7 that had arbitration subject to the FAA. And what the,
8 what the Court said -- the Supreme Court said in June of
9 2023 was that was insufficient to merely have it stated in
10 the con -- in, in the contract that was subject to FAA was
11 insufficient under federal law.

12 It has to be interstate commerce and not that that
13 matter wasn't. After the Circuit Court denied their
14 arbitration and it went forward into that case, what the
15 Supreme Court found was the problem with what the Court of
16 Appeals did, which was reverse the circuit court, is that
17 the conclusion was based on a position that was relied
18 upon that failed in the contract between Hicks and
19 UniFirst. It involved -- that it involved interstate
20 commerce.

21 But it was too late. It first appeared in UniFirst's
22 motion to alter or amend and it was never mentioned by the
23 circuit court and it said it was error for them to rely on
24 in deciding the contract involved interstate commerce when
25 it'd never been brought before before the circuit court.

1 In other words, it wasn't raised in the lower court. So
2 you can't raise it up on appeal.

3 So, the Supreme Court reversed the circuit, Your
4 Honor, reversed the Court of Appeals which reversed the
5 circuit court. That's not the case here.

6 In this matter, Your Honor, we are initially
7 asserting that it is interstate commerce. There are
8 cases -- Your Honor, they're a plethora of cases that find
9 construction is subject to interstate commerce.

10 We have submitted an affidavit. Mr. Glick has --
11 client has submitted affidavit to challenge that saying
12 no, we didn't buy these materials from where you said we
13 bought them from and, with that, that's immaterial. Even
14 if they bought them here in South Carolina, Your Honor,
15 this construction still involves interstate commerce.

16 Those products were not manufactured in the State of
17 South Carolina. They had to probably come from China or
18 some other foreign place that manufactures those that are
19 actually brought, shipped, and ends up in a distribution
20 facility where they're sold and incorporated into the
21 construction. I don't have that information because I
22 didn't know where they bought it from. What we -- what
23 we've provided affidavits is where we thought it had been
24 bought from.

25 But the *Hicks* case, Your Honor, was recently raised

1 in the case of *Dixon v. Pattee*, and that is a December,
2 2023 case, Your Honor, Court of Appeals, 442 South
3 Carolina 233, and the Court, the Court of Appeals in that
4 matter goes through and, and discusses the *Hicks* case and
5 it also discusses again why interstate commerce is --
6 involves construction and it references those cases which
7 construction is found to have involved and what is telling
8 is Page 168.

9 This is after going through the *Bradley* case and the
10 *Bradley* case, Your Honor, is a Supreme Court case where
11 the, the Court went through -- United States Supreme Court
12 went through where the FAA applies. They, they applied --
13 they applied a number of different factors.

14 In *Bradley*, the Court explained that the contract was
15 not for construction of a house that had already been
16 completed.

17 And so what the -- sorry -- the South Carolina
18 Supreme Court said in *Bradley* was if it's just for the
19 sale of a house, it's not interstate commerce. But if it
20 is for the sale of a house that involves construction,
21 because construction is deemed to be interstate commerce,
22 then it would of been subject to it. And in there it says
23 specifically however, the Court clarified had the
24 agreement actually encompassed the construction of the
25 residence that would have been subject to the FAA as our

1 appellate courts have consistently recognized that
2 contracts for construction are governed by the FAA.
3 That's the Federal Arbitration Act.

4 There's no question this is a contract for
5 construction. In the complaint -- that they performed the
6 construction, that they filed a mechanic's lien. The case
7 law in the State of South Carolina's clear in *Cape Romain*,
8 which was decided in 2012, that mechanic's liens are even
9 subject to arbitration.

10 This was not a contract of adhesion. There's no
11 unconscionability. The contract itself even contains a
12 clause that awards the prevailing party attorney's fees.

13 So, this is a negotiated for contract. It's not a
14 contract of adhesion. So, there's no challenge to the, to
15 the clause itself.

16 THE COURT: And notes the position of the plaintiff
17 that it's unconscionable as well.

18 MR. COX: He does note that.

19 But, again, it doesn't, doesn't expressly state that
20 this is a contract of adhesion, which we've seen in
21 consumer type cases, and this is a contract, Your Honor,
22 which was negotiated between two equally bargain --
23 bargaining parties, and, again, the other clause was
24 within the contract suggests that it is fair and
25 reasonable. It's not one sided.

1 THE COURT: Okay. All right. Thank you.

2 Mr. Glick.

3 MR. GLICK: Thank you, Your Honor.

4 May it please the Court.

5 Before I begin, we've mentioned the *Hicks* case a fair
6 bit. I appreciate Mr. Cox's rundown of his interpretation
7 of the case.

8 If I may, I'd like to hand up the *Hicks* case as well
9 as another recent Court of Appeals case from this past
10 November, which are relevant to my argument, as well as a
11 copy of the party's contract.

12 THE COURT: Sure. I'll be happy to take a copy.

13 MR. GLICK: The contract is on top and two cases are
14 underneath it.

15 Thank you, Your Honor.

16 I agree with Mr. Cox in that this case really
17 presents a narrow issue. But we can -- here presents a
18 simple question which is whether the requirements of the
19 South Carolina Uniform Arbitration Act were met and it --
20 whether the Federal Arbitration Act, the FAA, applies and
21 it's our position that neither of those are accomplished
22 by Mr. Cox's client, Gillam & Associates, Inc., which is a
23 stateside GC, been in business a long time. They know
24 what they're doing and it's going to be important for the
25 purpose of the subcontract I handed up for our argument

1 because, if you look at the first and the cover page of
2 it, the AIA cover of the contract, it is clear that there
3 is no rubber stamped arbitration is subject to -- this
4 agreement is subject to arbitration as we see on all sorts
5 of construction contracts.

6 Ones that I draft always have it to get rid of this
7 issue because the statute is very clear that notice that a
8 contract is subject to arbitration pursuant to this
9 chapter shall be typed in underlined capital letters or
10 rubber stamped prominently on the first page of the
11 contract and the consequence of failing to do so is also
12 made clear in the statute. Unless such notice is
13 displayed thereon, the contract shall not be subject to
14 arbitration. That's 15-48-10(a).

15 That is clear, Your Honor. But I want to bring up
16 the FAA because Mr. Cox mentions that South Carolina
17 Courts have recognized that, even though the notice
18 provision is not on a contract, if the FA -- FAA applies,
19 then it may be preempted and then you can still arbitrate
20 under the FAA. There are cases which say that.

21 That's why I cite to the *Hicks Unlimited* case because
22 this is a recent case by the Supreme Court which adds a
23 new standard that Mr. Cox's previously cited cases that
24 are knows (phonetic), soil remediation, among others, do
25 not mention, which is for the first time in *Hicks*, that a

1 party must affirmatively prove that there is this
2 interstate commerce for the FAA to apply. That can't
3 merely state in the contract that the FAA is called for or
4 that there's a general presumption that same contract
5 cases or construction cases like Mr. Cox mentions that
6 these are just somehow automatically subject to the FAA.

7 That simply isn't the law and there was some
8 confusion for about 20 years whether that was the case and
9 the recent Supreme Court case in *Hicks*, opinion by Justice
10 Hill, makes clear that "we hold that a party seeking to
11 compel arbitration under the FAA must demonstrate that the
12 contract and locates interstate commerce."

13 There's other good language in the case, Your Honor,
14 which mentions that blanket references to the FAA or other
15 innuendo that interstate commerce may apply by citing the
16 FAA or the commerce clause is simply insufficient now even
17 in cases like construction which have previously been held
18 under the gambit of the FAA.

19 The other reason too, Your Honor, is the other case
20 that I handed up, the *315 Corley CW, LLC* case, this is a
21 Court of Appeals case from just this past November, not
22 even two months old yet, that held the parties in a
23 contract can choose whether the South Carolina Uniform
24 Arbitration Act applies or the FAA. They can designate
25 themselves if they want one to govern over the other.

1 In that case, the Court of Appeals said, because the
2 party's agreement explicitly requires application of the
3 South Carolina Arbitration Law, we not -- need not engraft
4 (phonetic) any requirements for FAA coverage. Instead, we
5 hold that the South Carolina Uniform Arbitration Act
6 applies.

7 Your Honor, the reason I handed up the contract with
8 the full arbitration provision in it is Gillam made that
9 choice. In the arbitration clause, which is in Article 10
10 at Page 11 and 12 or 12 and 13, it's about midway through
11 the paragraph, I'll, I'll read it out, Your Honor, Gillam,
12 in its arbitration provision, says "this agreement to
13 arbitrate shall be specifically enforceable under the
14 arbitration law of South Carolina."

15 In addition, Gillam has a prevailing law provision
16 later in the contract which makes it clear that the
17 contract is to be construed under South Carolina law.

18 So, it's not only clear under the arbitration
19 provision, but also clear under the contract as a whole,
20 that South Carolina law is to apply.

21 well---

22 THE COURT: That's in, that's in 10.1?

23 MR. COX: It is, Your Honor.

24 MR. GLICK: It's about halfway through the paragraph.
25 It's nested right there in the middle, single sentence.

1 THE COURT: Where does it say South Carolina in here?
2 Did, did you say that it said -- it mentions South
3 Carolina in this, in this paragraph?

4 MR. GLICK: Yes, Your Honor.

5 Halfway through there is a sentence which says "this
6 agreement to arbitrate shall be specifically enforceable
7 under the arbitration law of South Carolina.

8 MR. COX: It's in---

9 MR. GLICK: It's in the---

10 MR. COX: Top of Page 12, Your Honor.

11 THE COURT: All right. Maybe that's why I'm missing
12 it.

13 Okay. I got it now. I was looking right past it.
14 Thank you.

15 MR. GLICK: Your Honor, that really is the, the end
16 of the question here.

17 Since Gillam's own arbitration agreement says South
18 Carolina laws do apply, South Carolina law's clear on how
19 a notice provision for arbitration needs to be prominently
20 in all under -- underlying capitalized letters or rubber
21 stamped on the first page. It's out. The arbitration
22 provision is unenforceable.

23 THE COURT: Mr., Mr. Cox, how, how, how do you get
24 past the South Carolina in the contract?

25 MR. COX: And no question that it, it, it references

1 South Carolina law, Your Honor. However, it does not
2 reference the South Carolina Uniform Arbitration Act, and,
3 furthermore, Your Honor, it is---

4 THE COURT: Well, it says the agreement to arbitrate
5 specifically enforceable under the arbitration law of
6 South Carolina.

7 MR. COX: Right.

8 THE COURT: Isn't that enough?

9 MR. COX: No, sir, because this matter is, Your
10 Honor, is interstate commerce, the FAA still applies. And
11 what the Court said in *Dixon versus Pattee* is the basic
12 purpose of the Federal Arbitration Act is to overcome
13 Court's refusals to enforce agreements to arbitrate and
14 ensure that arbitration will proceed in the event a state
15 law would have a conclusive effect on the otherwise valid
16 arbitration agreement.

17 The arbitration agreement, Your Honor, is not
18 challenged here as, as it has to be from coercion. It has
19 to be by fraud or, or some other nature. It says,
20 accordingly, unless the parties specifically contracted
21 otherwise, the FAA applies whenever an arbitration
22 agreement involves interstate commerce.

23 Now, it says that South Carolina law shall apply but
24 it doesn't say specifically that the South Carolina
25 Uniform Arbitration Act should apply.

1 THE COURT: Okay. But it does say the arbitration
2 law of South Carolina.

3 MR. COX: It, it does, Your Honor. It does.

4 THE COURT: Okay.

5 MR. COX: But, again, that's incorporating the, the,
6 the law of, of the -- the common law that the Courts use
7 to enforce that. It doesn't specifically reference the
8 act and that the act will apply.

9 And so, Your Honor, the Federal Arbitration Act says
10 that an otherwise valid arbitration agreement, the
11 presumption should be validity in federal and state
12 courts.

13 THE COURT: Okay. All right. Thank you.

14 All right. Mr. Glick, I interrupted you to ask a
15 question of Mr. Cox. So, if you need to finish or if you
16 got anything else, please share.

17 MR. GLICK: Certainly, Your Honor. Thank you. I, I
18 appreciate the, the questions.

19 I identified the key issues that I want to bring up
20 just to assist the Court in its evaluation. I'll take --
21 I'll assume that the FAA applies but there's a problem
22 here under *Hicks* and that's the FAA does not reflect
23 civilly applied. So, I do want to talk about the
24 affidavit that Mr. Cox's client filed as well as the
25 affidavit filed by my client regarding the existence of

1 interstate commerce because the importance of *Hicks* is, on
2 top of saying the FAA doesn't apply in a case without
3 interstate commerce, and the importance of the *315 Corley*
4 case where it says the same thing is that it's Mr. Cox's
5 burden here today to demonstrate that interstate commerce
6 applies. Not that it might or it could. And the problem
7 that Mr. Cox and Gillam & Associates have is that they
8 can't demonstrate interstate commerce exists.

9 They're merely asserting it. They're saying that it
10 might. However, they can't demonstrate it.

11 The importance of *Hicks* is now the standard is that
12 the moving party, to deprive another party of its right to
13 a jury trial, must demonstrate that there is interstate
14 commerce. The affidavit of Eric Floyd clearly shows that
15 there is no interstate commerce that can be demonstrated.
16 There is suspicion about where certain products may have
17 arrived from.

18 Mr. Cox, in his argument, likely indicated too that
19 there is perhaps some products that may have come from out
20 of the country or out of state. But there's nothing more
21 definitive than that and *Hicks* found that that was
22 insufficient as does *315 Corley* in a different context
23 that, if we're going to deprive a party of a jury trial
24 right, you got to come with something more than just this
25 is a construction contract, and, as a result, surely there

1 must be some product that came from China or elsewhere.

2 The affidavit of Eric Floyd does not achieve that
3 purpose. Mr. Cox's argument does not, and to add further
4 proof that there is no interstate commerce or that there's
5 a genuine dispute as to whether there's interstate
6 commerce, my client, Peter Gallo, who's the principal of
7 Pampa Bay Landscape Construction, in his affidavit asserts
8 that all the products that Mr. Floyd contends were
9 purchased out of state or sourced from out of state were
10 purchased right in Ladson, South Carolina. All the
11 products were used in Ladson, South Carolina.

12 Gillam & Associates is a South Carolina company.
13 Pampa Bay Construction is a South Carolina company.

14 This is a South Carolina dispute, Your Honor.
15 There's no interstate commerce and we think it is fair, we
16 think under the law of South Carolina, that a local jury
17 ought to determine who's owed what in this case, what the
18 issues are in this case to go forward.

19 I will make one last mention to the unconscionability
20 argument. I won't spend too much time on it.

21 Mr. Cox indicated the contract of adhesion law in
22 South Carolina which we're not going to dispute. There's
23 plenty of that we've cited to it in our brief.

24 But I will mention one other thing from that same
25 claim provision that has the arbitration clause nested it

1 in, Your Honor, and that is the very first sentence which
2 reads all claims, disputes, and other matters in question
3 arising out of or relating to the subcontract or the
4 breach thereof shall be addressed by in-person meeting
5 between former officers of the contractor and a
6 subcontractor within 25 calendar days after notice of the
7 claim is first delivered. In a sentence farther on, Your
8 Honor, says that if a subcontractor doesn't attend that
9 meeting, then they may waive their claim.

10 Now, Pampa Bay demanded that meeting and Gillam &
11 Associates did not grant them that meeting. They worked.

12 So, to further make this contract, the arbitration
13 provision, unenforceable and unconscionable is how is it
14 that Gillam & Associates can claim that a subcontractor
15 failing to show up for this first 25 day meeting mean they
16 waive their claim but, at the same time, Gillam &
17 Associates doesn't acknowledge its own requirement under
18 its contract?

19 That is an additional reason to not enforce its
20 arbitration clause. It's even nested within the same
21 provision, Your Honor. Gillam & Associates isn't
22 following it themself.

23 So, we're asking the Court today -- to do today is
24 look at the language of the arbitration clause, apply
25 South Carolina law as Gillam intended when it drafted the

1 contract as the drafter of the contract, and find that,
2 based on the clear first page of the contract, that there
3 is not a provision that says this arbitration -- this
4 agreement is subject to arbitration. It's not underlined.
5 It's not in capital letters and allow these parties to
6 simply have this dispute in front of a jury as, as was
7 intended.

8 THE COURT: All right. Thank you.

9 MR. COX: Your Honor --

10 THE COURT: Mr. Cox.

11 MR. COX: -- as far as the presumption that Gillam
12 drafted the contract, I do point the Court to Section 12.8
13 that says the term of the contract shall be deemed jointly
14 drafted by the parties and construed and applied without
15 regard to any presumption or rule of law.

16 Additionally, Your Honor, for consideration, if we
17 look at -- again, if we look at the cases that exist, I, I
18 believe that the, that the misnomer is that somehow that
19 the -- I'm sorry.

20 what -- that the holding in *Hicks* said is that the
21 *Munoz* and *Damico*, *Damico* Courts held that the FAA
22 preemptive South Carolina law only after finding the
23 contracts at issue involved interstate commerce in fact.
24 And so South Carolina's arbitration law still applied
25 without the provision that requires all of the different

1 things that would render the contract otherwise
2 unenforceable.

3 So South Carolina's arbitration law can still apply
4 without throwing out the arbitration clause, which is what
5 the FAA's designed to do. It's designed so that matters
6 that are agreed to be arbitrated should be arbitrated.

7 As far as to the 25 day meeting, I don't, I don't
8 have anything to speak to that. I can't make a
9 representation to the Court. But I think that the
10 arbitration provision, as drafted, does involve con --
11 construction.

12 Construction has repeatedly been deemed by the Courts
13 to be interstate commerce. And if you look at the
14 contract, Your Honor, you'll see that the planned
15 specifications were created in Florida. The owner was out
16 of Georgia and all of this was for construction for real
17 property that was here in South Carolina.

18 And, again, if you look at the, the, the *Dixon* case,
19 we were just talking about the sale of land. I've got no
20 claim -- I've got no case and we got no plaintiff's
21 arbitration provision could be enforced under the FAA.
22 But because it involves construction and, again, it says
23 that the Court clarified had the agreement actually
24 encompassed -- encouraged -- encompassed the construction
25 of the residence, and in this case the construction of the

1 facility, it would have been subject to the FAA as our
2 Appellate Courts have consistently recognized that
3 contracts for construction are governed by the FAA.

4 I don't have to -- even under *Hicks*, if you read it,
5 and please read through *Hicks* and digest it, but even
6 under *Hicks*, I don't have to come in with a ton of
7 information showing all of the interstate commerce that
8 occurred. It's actually presumed because of the types of
9 construction or the types of interaction that occurred and
10 require construction and there's a, there's a whole
11 history of cases. But I can't just -- I can't have, under
12 *Hicks*, I can't have just a provision that says this is
13 subject to the FAA, then we're done. It has to show that
14 it's actually a construction contract and that's what this
15 construct -- contract is.

16 And, you know, again, maybe if *UniFirst*, if you read
17 through that case, you'll see that they had asserted those
18 claims in the beginning. I think that case gets a
19 different, a different outcome than what the Court
20 reached.

21 So, thank you.

22 THE COURT: Thank you, Mr. Cox.

23 Thank you, Mr. Glick.

24 All right. Well, I'm gonna, I'm gonna take the
25 matter under advisement and I'm gonna read through the

1 cases. I'd, I'd looked at them but I need to look at them
2 closer now after, after that and I certainly appreciate
3 y'all's preparation of the memorandum as well as your
4 arguments today. So, either of you.

5 I'll, I'll reach out to one or both of y'all to help
6 me out with an order on this after I make a decision and
7 I'll endeavor to do that as quickly as I can.

8 MR. COX: Thank you, Your Honor.

9 THE COURT: Okay. Thank you.

10 MR. GLICK: I appreciate the Court's time.

11

12 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Berkeley County, South Carolina, on the 7th day of January, 2025.

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

April 22nd, 2025



PAMELA E. GREEN, Court Reporter

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SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

July 29, 2025

/s/ Matthew E. Cox

Matthew E. Cox, SC Bar No. 16603

mecox@smithcurrie.com

Eugene F. Rash, SC Bar No. 8887

gfrash@smithcurrie.com

Smith Currie Oles LLP

5727 Westpark Drive, Suite 200

Charlotte, North Carolina 28217

PH: (704) 334-3459

FX: (704) 334-7850

Attorneys for Appellant

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Jul 29 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKLEY COUNTY

Court of Common Pleas

The Honorable Dale E. Van Slambrook, Circuit Court Judge

Case No. 2024-CP-08-02013

Appeal No. 2025-000500

Gillam & Associates, Inc.,..... Appellant,

v.

Pampa Bay Landscape Construction, LLC,..... Respondent.

PROOF OF SERVICE

I certify that I have served the Record on Appeal of Appellant on Pampa Bay Landscape Construction, LLC by depositing a copy of it in the United States Mail, postage prepaid, on July 23, 2025, addressed to its attorney of record, Dylan R. Glick, Post Office Box 7368, Columbia, South Carolina 29202.

July 29, 2025

Respectfully Submitted,

SMITH CURRIE OLES LLP

/s/Matthew E. Cox

Matthew E. Cox, SC Bar No. 16603

mecox@smithcurrie.com

Eugene F. Rash, SC Bar No. 8887

gfrash@smithcurrie.com

5727 Westpark Drive, Suite 200

Charlotte, NC 28217

PH: (704) 334-3459

FX: (704) 334-7850

Attorneys for Appellant.