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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Marvin H. Dukes, III, Circuit Court Judge

Appellate Case No. 2025-002327
Case No. 2025-CP-10-02139

Boris Van Dyck and Boris Van Dyck, LLC, ... Respondents,

v.

Woodlock Capital, LLC, ...Appellant.

FINAL REPLY BRIEF OF APPELLANT

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s/Clayton B. McCullough
Clayton B. McCullough, Esq. (SC Bar #13722)
McCULLOUGH KHAN, LLC
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
clay@mklawsc.com

Counsel for Appellant

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ARGUMENTS IN REPLY

I. THE ARBITRATION PROVISION IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT (THE "FAA") BECAUSE THE UNDISPUTED FACTS SET FORTH IN THE AFFIDAVIT OF ANDREW BATKINS (THE "AFFIDAVIT") EVIDENCE AN INTERSTATE TRANSACTION.

In their Initial Brief, Respondents contend (1) the arbitration provision in the Real Estate Consulting Fee Agreement (the "Agreement") is unenforceable under the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. § 15-48-10(a); (2) the Agreement lacks a sufficient interstate nexus for the FAA to apply; (3) the Appellant misapplies cases like *Blanton v. Stathos*, 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002); and (4) the Affidavit fails to establish interstate commerce "in fact." Respondents' Br. at 6-10. Respondents further argue that the question of arbitrability was properly decided by the Circuit Court, and that the invalidity of the arbitration provision under the SCUAA preserved the Court's subject matter jurisdiction over the underlying dispute. *Id*., at 11-14.

Each of these arguments is fundamentally flawed as they (1) misapply the FAA's broad preemptive scope over state law restrictions on arbitration when interstate commerce is implicated; (2) misread the expansive application of *Blanton* and other cases relied on by the Appellant to analogous consulting agreements tied to interstate activities; (3) overlook the uncontroverted evidentiary details in the Affidavit that align with the "in fact" analysis endorsed in *Hicks Unlimited, Inc. v. UniFirst Corp*., 439 S.C. 623, 889 S.E.2d 564 (2023); and (4) conflate the gateway issue of the provision's validity with the merits of case, contrary to settled precedent that courts must enforce valid arbitration clauses under the FAA unless clearly divested by agreement.

A. Respondent's Arguments Misinterpret the FAA's Applicability.

Although Appellant admits the arbitration provision does not satisfy the SCUAA's notice requirements, this concession is immaterial because the SCUAA's procedural mandates are

preempted by federal law when interstate commerce is implicated, as demonstrated in the Affidavit (and its exhibits) in the present case. *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 434 S.E.2d 281, 282 (1993); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). Similarly, the Circuit Court erred in its finding that the Agreement is a "purely intrastate" and limited to a "local transaction of undeveloped acreage." R. at 3. While Respondents echo this view, it is inconsistent with the FAA's expansive reach and selectively ignores the broad judicial interpretation of "commerce" along with the evidentiary record set forth in the Affidavit which a clearly establishes an interstate connection. Respondents' Br. at 7-8.

Under 9 U.S.C.S § 2, the FAA applies to any "contract evidencing a transaction involving commerce." Similarly, the United States Supreme Court has made clear that the term "involving commerce" extends to and is the functional equivalent of transactions "affecting commerce" in any way. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995). The Court has further clarified that the FAA encompasses a wider range of transactions than those actually "in commerce" and provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 2040 (2003). South Carolina courts have likewise adopted this expansive interpretation, holding that the FAA applies whenever a transaction "affects" interstate commerce, even indirectly. *Hicks*, 439 S.C. at 632, 889 S.E.2d at 568.

B. The Affidavit Constitutes Prima Facie Evidence of Interstate Commerce.

Contrary to Respondents' narrow characterization, the Affidavit plainly establishes that the consulting services in the Agreement were inextricably tied to interstate commerce "in fact." Specifically, the Appellant's services were aimed at facilitating the sale of the property with an implicit focus on its planned development value. R. at 40-129, Aff. ¶¶ 3-20. This is supported by

the details in the Affidavit (and its exhibits) which demonstrate that Appellant's efforts involved nationwide marketing of the Property, extensive communications with out of state potential buyers in Georgia, Alabama, Illinois, and Florida, solicitation and negotiation of Letters of Intent from out-of-state entities (Vista Realty Partners in Atlanta, GA; LIV Development in Birmingham, AL; MCZ Capital Fund in Northbrook, IL; Orange Properties in Chicago, IL; and Southern Waters Capital in Fort Lauderdale, FL), and facilitation of interstate financing proposals, culminating in the Property's eventual sale to a Florida-based purchaser. R. at 40-129, Aff. ¶¶ 3-20; see also Appellant's Br. at 2-3.

The Circuit Court's Order reinforces this, noting the dispute centered on a "fee dispute" arising from the "underlying Real Estate Consulting Fee Agreement," which included an arbitration clause. R. at 1. The court analyzed it as a consulting services contract, not a mere land conveyance, emphasizing that the FAA's applicability hinged on whether the "commerce involved in the Real Estate Consulting Fee Agreement" was interstate. R. at 2; see also Respondents' Br. at 2. To achieve the Agreement's goals, Appellant needed to solicit a particular variety of buyers – those with comprehensive development experience, access to substantial financing, and interest in developing multifamily planned development. R. at 40-129, Aff. ¶¶ 3-20. Local buyers in South Carolina might lack the scale or resources for such endeavors, necessitating outreach to national or regional developers. Appellant's Br. at 2-3 (arguing interstate elements via affidavit evidence); R. at 40-129; Aff. ¶¶ 3-20 (explaining "nationwide marketing" to secure suitable buyers).

These activities hardly support a "purely intrastate" endeavor and demonstrate the Appellant directly engaged interstate channels of commerce thereby satisfying the FAA's threshold under both federal and South Carolina precedent. *Blanton*, 351 S.C. at 541, 570 S.E.2d at 569; *Osteen*, 315 S.C. at 427, 434 S.E.2d at 284. These interstate activities were not incidental, but

essential to the Agreement's success. Respondents' attempt to distinguish cases like *Blanton* as limited to "construction contracts with interstate supply chains" overlooks their broader principle: the FAA governs whenever a contract's performance affects interstate commerce, as it does here through Appellant's cross-border consulting and marketing that facilitated an out-of-state sale. Respondents' Br. at 8-9. These facts align with precedent that contracts involving the use of out-of-state materials or services, or involving interstate financial arrangements, evidence a sufficient nexus to interstate commerce to invoke the FAA. *Blanton*, 351 S.C. at 541, 570 S.E.2d at 569.

C. The Affidavit Establishes Interstate Commerce "In Fact," and Respondents' Challenge Fails Absent Counter-Evidence.

Respondent's contention that the Affidavit fails to prove interstate commerce "in fact" Respondents' is incorrect. Respondents offered no counter-evidence to rebut the Affidavit's detailed interstate connections, which should be presumed as true under South Carolina law. *Blanton*, 351 S.C. at 541, 570 S.E.2d at 569; Rule 56(e), SCRCP; Br. at 9-10.

An affidavit, being a sworn statement subject to perjury, provides prima facie evidence of its asserted facts when clear, direct, and uncontroverted; especially for establishing FAA applicability. *Blanton* at 542-43, 570 S.E.2d at 569-70 (holding the undisputed affidavit in that case implicating interstate elements warranted dismissal under FAA); *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 95-96, 592 S.E.2d 50, 52 (Ct. App. 2003) (reversing denial of arbitration on unrebutted affidavit). This principle aligns with the evidentiary maxim that an unrebutted affidavit stands as prima facie evidence as demonstrated in Rule 56(e) SCRCP, which requires opposing parties to set forth specific facts showing a genuine issue, or risk the affidavit's assertions being deemed admitted.[1]

[1] *See* Rule 56(e), SCRCP (providing that if an adverse party fails to respond with affidavits or other evidence setting forth specific facts showing a genuine issue for trial, summary judgment, if appropriate, shall be entered against them.

While this matter proceeds under Rule 12(b)(1), SCRCP, rather than Rule 56 summary judgment procedures, South Carolina courts recognize that jurisdictional challenges permit consideration of evidence beyond the pleadings, including affidavit testimony, to resolve factual disputes regarding the court's authority to hear the case. See *Blanton*. The Affidavit satisfies the foundational requirements established in Rule 56(e), SCRCP,[2] as Mr. Batkins demonstrates personal knowledge of the interstate commercial activities through his direct participation, the facts stated regarding communications with out-of-state entities and interstate negotiations are based on his firsthand observations and business records, and his position and involvement in the underlying transaction establish his competency to testify on these matters.

Under the principles articulated in *Blanton* and *Thornton*, cases, like this matter, involving Rule 12(b)(1) and an unrebutted affidavit meeting these foundational requirements creates a rebuttable presumption in favor of the stated facts, thereby shifting the burden to Respondents to present contrary evidence or demonstrate genuine factual disputes regarding the interstate nature of the underlying agreement. Respondents' failure to rebut the Affidavit with counter-affidavits, discovery materials, or other admissible evidence effectively concedes the interstate commerce allegations necessary to establish FAA applicability and this Court's lack of jurisdiction over the arbitrable dispute. Without any counter-affidavit or other sworn testimony, the Circuit Court incorrectly discounted the Affidavit's account of Appellant's services, including nationwide marketing, cross-state negotiations with out of state buyers, and interstate financing facilitation. R. at 40-129, Aff. ¶¶ 3-20. These unrebutted facts compel a finding of interstate commerce under

[2] *Id.* (stating that an affidavit submitted on a motion for summary judgment must be made on personal knowledge, set forth facts that would be admissible in evidence, and affirmatively show the affiant is competent to testify to the matters stated).

the FAA. *Hicks,* 439 S.C. at 632, 889 S.E.2d at 568 (holding fact-specific "in fact" analysis via evidentiary records like affidavits).

This standard fits Appellant's Rule 12(b)(1), SCRCP, motion for jurisdictional dismissal due to arbitration, allowing courts to weigh external evidence like affidavits without summary judgment conversion. *Baird v. Charleston Cnty*., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 248, 551 S.E.2d 274, 277 (Ct. App. 2001) (upholding dismissal on unrebutted affidavits). Respondents' unsupported arguments provided no grounds to reject the Affidavit or retain jurisdiction.

D. Respondents Misinterpret the Application of *Blanton* and the Other Cases Relied on by Appellant to Analogous Consulting Agreements Tied to Interstate Activities Supported by Unrefuted Affidavits.

Respondents argue that Appellant mistakenly relies on *Blanton* and *Osteen* because those cases involved construction contracts with interstate supply chains, rather than an allegedly "purely intrastate" real estate consulting agreement. Respondents' Br. at 8-9. Respondents cite *Bradley v. Brentwood Homes, Inc*., 398 S.C. 447, 730 S.E.2d 312 (2012), and *Dixon v. Pattee*, 442 S.C. 233, 898 S.E.2d 158 (Ct. App. 2023), to demonstrate that real estate deals are inherently intrastate. However, Respondents' dependence on *Bradley* and *Dixon* (which merely reiterates *Bradley*) is misplaced, as the holding in *Bradley* hinges on a highly specific and limited scenario; a contract for the purchase and sale of an already-completed single-family home. *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. The "Home Purchase Agreement" in that case notably struck all "New Construction" provisions as "N/A," with no development under the contract, making its "essential nature" a simple intrastate sale. *Id.* Importantly, this served as the basis for to the *Bradley* Court's finding that the affidavit's interstate references to prior construction materials were "irrelevant"

and "inapposite" because they predated the agreement. *Id*.; *Dixon*, 442 S.C. at 253, 898 S.E.2d at 169.

This Agreement stands in stark contrast, as the Agreement is not a contract for the purchase or sale of a completed residence, but rather a service agreement under which Appellant agreed to perform extensive real estate consulting and marketing services for the sale of undeveloped acreage zoned and intended for a large multifamily development. R. at 18-19, 30-31 (Ex. A to Complaint and Motion to Dismiss). Unlike the irrelevant, pre-contract construction details in *Bradley*, the interstate elements here are integral to the Agreement's execution as Appellant's services directly involved soliciting qualified out-of-state buyers capable of developing a multifamily residential project with hundreds of apartment units and related facilities and amenities over multiple parcels. R. at 40-129, Aff. ¶¶ 3-20. Accordingly, the Circuit Court misinterpreted the "essential character" of the Agreement given Appellant's performance involved interstate-linked services, warranting FAA scrutiny. *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. at 95, 592 S.E.2d at 52. Respondents' attempt to shoehorn this case into *Bradley's* narrow holding ignores these distinctions and overlooks the FAA's broad application to contracts "affecting" commerce in any meaningful way. *Hicks*, 439 S.C. at 632, 889 S.E.2d at 568.

Respondents' misinterpretation of *Blanton* and *Osteen* compounds this error by artificially confining those cases to "construction contracts with interstate supply chains." Respondents' Br. at 8. These precedents illustrate the FAA's applicability to a wide array of service-oriented agreements where performance implicates interstate activities; principles directly analogous to the consulting services here. In *Blanton*, the court applied the FAA to an architectural design contract for a restaurant, even though no construction had begun, based on an unrebutted affidavit detailing interstate communications with out-of-state technicians during the design phase. *Blanton*, 351

S.C. at 541-43, 570 S.E.2d at 569-70. Similarly, *Osteen* enforced arbitration under the FAA for a home construction contract involving out-of-state materials and services, preempting the SCUAA's notice requirements. *Osteen*, 315 S.C. at 427, 434 S.E.2d at 284. These cases emphasize a holistic review of the contract's real-world impact on commerce, not a categorical exclusion of non-construction agreements. See also *Thornton*, 357 S.C. at 95-96, 592 S.E.2d at 52. Respondents' narrow interpretation disregards this expansive framework.

The Affidavit proves this nexus "in fact," unlike *Bradley's* irrelevant one, by linking unrebutted evidence directly to performance: LOIs from Georgia and Alabama developers, agreements with Florida and Illinois entities, and financing communications. R. at 40-129, Aff. ¶¶ 5-15, 18-20; *Hicks*, 439 S.C. at 632, 889 S.E.2d at 568. Absent counter-evidence, these facts should be treated as conclusive under Rule 12(b)(1). *Blanton*, 351 S.C. at 542-43, 570 S.E.2d at 569-70; *Baird v. Charleston Cnty*., 333 S.C. at 527, 511 S.E.2d at 73. The Circuit Court's reliance on Bradley to discount this evidence was thus legal error, as it overlooked the FAA's preemption where, as here, interstate activities are integral to the contract's performance.

II. THE CIRCUIT COURT ERRED IN ITS ARBITRABILITY DETERMINATION BECAUSE THE FAA MANDATES ARBITRATION UPON A FINDING OF INTERSTATE COMMERCE.

Respondents correctly note that arbitrability is generally a judicial question relying on cases such as *Chassereau v. Glob. Sun Pools, Inc*., 373 S.C. 168, 644 S.E.2d 718 (2007), *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022), and *Est. of Solesbee by Bayne v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). Respondents' Br. at 11. While these precedents affirm that courts decide gateway issues like validity or scope absent delegation, once the FAA is triggered by interstate commerce, preemption requires enforcement. See *Towles v. United Healthcare Corp*. For instance, in *Chassereau*, the

court addressed arbitrability under state law without FAA involvement, holding that unclear delegation clauses do not divest judicial authority. *Chassereau*, at 373 S.C. at 171-72, 644 S.E.2d at 720.

While *Damico* and *Solesbee* addressed state-law defenses to arbitration agreements, *Damico* explicitly analyzed the interplay between the FAA and state unconscionability doctrine, and *Solesbee* focused on delegation and authority issues under state law. Neither case supports the proposition that courts may decline to enforce valid arbitration agreements when the FAA applies.[3] Accordingly, the Circuit Court erred in misapplying these cases to retain jurisdiction over this dispute as the Agreement demonstrably implicates interstate commerce, and neither case provides authority for courts to ignore FAA mandates when a valid arbitration agreement involves interstate commerce. Once the FAA applies the court must compel arbitration and stay or dismiss the action. 9 U.S.C. § 3; *Towles*, at 37.

Respondents further argue that the SCUAA's invalidity preserves circuit court jurisdiction over the dispute, citing *Mid-State Distributors, Inc. v. Century Importers, Inc*., 310 S.C. 330, 426 S.E.2d 777 (1993), and provisions of the Declaratory Judgment Act. Respondents' Br. at 12-13 (citing S.C. Code Ann. §§ 15-53-10 et seq.). This position conflates state-law validity with federal preemption. Where the FAA governs, as it must here, state procedural bars like notice requirements are preempted, and courts lack discretion to adjudicate the merits. *Towles*, 338 S.C. at 37, 524 S.E.2d at 843; see also *Zabinski v. Bright Acres Assocs*., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (courts decide arbitrability but enforce FAA clauses upon validity). The Circuit

[3] *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) (recognizing FAA preemption, but declining to sever unconscionable provisions due to public policy concerns); see also *Est. of Solesbee by Bayne v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023) (holding the agreement as invalid due to lack of authority to bind the resident, making FAA preemption inapplicable).

Court thus erred in exercising jurisdiction over this justiciable controversy, as the FAA divests state courts of authority once arbitration is compelled.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the Circuit Court's Order denying the Motion to Dismiss and remand with instructions to compel arbitration under the FAA.

s/Clayton B. McCullough
Clayton B. McCullough, Esq. (SC Bar #13722)
McCULLOUGH KHAN, LLC
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
clay@mklawsc.com

Counsel for Appellant

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