THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Deadra L. Jefferson, Circuit Court Judge
Case No. 2011-CP-5191

Appellate Case No. 2013-002679

Lend Lease (US) Public Partnership, LLC, f/k/a Actus Lend Lease, LLC.....Respondent,

v.

Allsouth Electrical Contractors, Inc.....Appellant

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On July 22, 2010, Respondent filed a Complaint instituting a civil action in the South Carolina Court of Common Pleas for Charleston County (the "State Court") against Appellant. Compl. Contemporaneously, Respondent served an arbitration demand on Appellant. Among other things, the Complaint alleged that the dispute between the Parties was subject to arbitration. Compl. pp. 4, 16. The Appellant filed an Answer, which, among other things, denied that the dispute was subject to arbitration. Answer p. 5.

On October 7, 2011, the Respondent filed a Motion to Stay and Compel Arbitration. Mot. Stay Compel Arbitration. On October 17, 2011, the Appellant filed Defendant Allsouth Electrical Contractors, Inc. Memorandum in Opposition to the Plaintiff's Motion to Stay and Compel Arbitration. Def. Mem. Opp'n Pl.'s Mot. Stay Compel Arbitration. On December 5, 2011, Respondent filed its Memorandum in Support of Motion to Stay and Compel Arbitration. Mem. Supp. Mot. Stay Compel Arbitration. On December 5, 2011, the Respondent's Motion to Stay and Compel Arbitration came on for hearing, and was heard, before the State Court, the Honorable Deadra L. Jefferson presiding. Tr.

On February 9, 2012, Judge Jefferson entered an Order Granting Plaintiff's Motion to Stay and Compel Arbitration, which ordered the State Court Action be stayed and the Parties proceed to arbitrate the dispute between them. Order Grant. Pl.'s Mot. Stay Compel Arbitration p. 8. Subsequently, on March 6, 2012, Judge Jefferson denied Appellant's Rule 59 Motion. Def. R. 59 Motion; Order Den. Def.'s Rule 59, SCRCP Mot.

The Parties proceeded to arbitrate, and on November 29, 2012, an Arbitration Award was entered in the arbitration styled "*Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC v. Allsouth Electrical Contractors, Inc.*," (American Arbitration Association Case No. 31 110 00193 11), (the "Award" entered in the "Arbitration"). Notice Filing Ex. A. Subsequently, the Arbitrator denied Appellant's request for modification of the Award or rehearing. Notice Filing Ex. B.

On February 27, 2013, Appellant filed with the United States District Court for the District of South Carolina (the "Federal Court") Allsouth Electrical Contractors, Inc.'s Notice and Petition to Vacate an Arbitration Award pursuant to 9 U.S.C. § 10 (the "Petition to Vacate"), which sought to have the Award vacated. On June 13, 2013, the Federal Court entered an Order that dismissed the Petition to Vacate and confirmed the Award. Notice Filing Ex. C. Also on June 13, 2013, the Federal Court entered a Judgment in a Civil Action, reducing the Award to judgment. Notice Filing Ex. D. Subsequently, on July 19, 2013, the Federal Court denied Appellant's request that it alter or amend its Order and Judgment. Notice Filing Ex. E.

The Appellant did not appeal the Federal Court's June 13, 2013 Order, June 13, 2013 Judgment in a Civil Action, or July 19, 2013 Order.

The Appellant did not file any motion with the State Court seeking any of the orders enumerated in *Section 15-48-200 of the South Carolina Code of Laws*, nor did the Appellant file any motion with the State Court seeking to vacate, correct, or modify the Award pursuant to the Federal Arbitration Act.

On August 26, 2013—almost nine months after the entry of the Award and more than two months after the entry of Judgment by the Federal Court—Appellant filed Defendant Allsouth Electrical Contractors, Inc.'s Motion to Lift the Stay, seeking to have the State Court lift the stay that had been entered by Judge Jefferson at the time she compelled the Parties to arbitrate on February 9, 2012. Def. Mot. Lift Stay. This was the first action of either Party before the State Court since Judge Jefferson's March 6, 2012 Order Denying Defendant's Rule 59, SCRCP Motion. On November 14, 2013, Respondent filed a Notice of Filing, providing the State Court with copies of, among other things, the Award and the Judgment in a Civil Action. Notice Filing.

On November 27, 2013, the State Court, the Honorable Kristi L. Harrington presiding, granted Defendant Allsouth Electrical Contractors, Inc.'s Motion to Lift the Stay. Form 4 J. in Civil Case. On December 9, 2013, Respondent served Plaintiff's Rule 59 Motion, seeking to have Judge Harrington alter or amend her November 27, 2013 ruling. Pl.'s Rule 59 Mot. This Motion was never ruled upon due to the immediate appeal.

Appellant filed a Notice of Appeal on December 11, 2013, and, per this Court's direction, a Memorandum on Appealability in this Matter on January 15, 2014.

ARGUMENT

I. This Appeal must be dismissed because it is an improper attempt to appeal directly from an order compelling arbitration.

Even when, as here, the Federal Arbitration Act is applicable, South Carolina's procedural rule on the appealablity of arbitration orders applies. *See* Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 610–12, 586 S.E.2d 581, 584–85 (2003).[1] In this regard, a South Carolina State Court's order compelling arbitration is not immediately appealable as it is not one of the grounds stated in *Section 15-48-200 of the South Carolina Code of Laws*. Id.

In Main Corp. v. Black, the South Carolina Supreme Court ruled that:

> *South Carolina Code Ann. § 15-48-180* (Supp. 2002) states that making an agreement providing for arbitration in South Carolina confers jurisdiction on the court to "enforce the agreement under this chapter and to enter judgment on an award thereunder." The only appeals that may be taken under the Uniform Arbitration Act are from orders issued by the circuit court pursuant to *S.C. Code Ann. § 15-48-200* (Supp. 2002). If the circuit court has not resumed jurisdiction and issued one of the orders enumerated in *Section 15-48-200*, there is no court order that can be the subject of an appeal. Since the circuit court did not resume jurisdiction over the case, the Court of Appeals cannot have jurisdiction over the case. *S.C. Code Ann. § 14-8-200 (a)* (Supp. 2002) (The Court of Appeals "shall have jurisdiction over any case in which an appeal is taken *from an order, judgment, or decree of the circuit or family court*") (emphasis supplied).

357 S.C. 179, 181–82, 592 S.E.2d 300, 301–302 (2004) (explaining that at the time the trial judge sent the case to an arbitrator, the circuit court was divested of jurisdiction and that neither the appellants nor the respondents had filed a motion with the circuit court to

[1] The suggestion in the Initial Brief of the Appellant, p. 3, that Respondent argued to the State Court at the hearing on the Motion to Stay and Compel Arbitration that the South Carolina Uniform Arbitration Act did not apply is simply baseless. Tr.

confirm, vacate, modify or correct the award as would be necessary to cause the trial court to resume jurisdiction). *Section 15-48-200(a)* enumerates the orders of the Circuit Court that may be appealed in an arbitration case as follows:

> An appeal may be taken from:
> (1) An order denying an application to compel arbitration made under § 15-48-20;
> (2) An order granting an application to stay arbitration made under § 15-48-20(b);
> (3) An order confirming or denying confirmation of an award;
> (4) An order modifying or correcting an award;
> (5) An order vacating an award without directing a rehearing; or
> (6) A judgment or decree entered pursuant to the provisions of this chapter.

S.C. Code Ann. § 15-48-200(a) (2005). In this regard, it is plain that in an arbitration case, any party hoping to eventually bring its arguments before this Court must first seek (or be subject to) an order enumerated in *Section 15-48-200* from the Circuit Court, and then appeal from that order. Indeed, this was recently clarified when this Court explained that:

> The basis of the court's holding in Main Corporation is that in arbitration cases, this court only has jurisdiction over appeals from orders of the circuit court enumerated in *section 15-48-200.* In other words, the type of order appealed from triggers this court's jurisdiction, not the fact that the circuit court has resumed jurisdiction and issued an order enumerated in *section 15-48-200.* The post-arbitration motions allowed by statute in circuit court are more than a mere formality; they provide the basis for a properly perfected appeal of an arbitration award in this court.

Steinmetz v. Am. Media Serv., LLC, 393 S.C. 72, 75–76, 709 S.E.2d 708, 710 (Ct. App. 2011) (internal citation omitted).

Here, neither the Appellant nor the Respondent sought any order enumerated in *Section 15-48-200* from the State Court (and the State Court entered no such orders). Rather, the Appellant attempts to appeal directly from the Order Granting Plaintiff's Motion to Stay and Compel Arbitration. As this is plainly an arbitration case, and appeal is not taken from an order enumerated in *Section 15-48-200*, this Court lacks jurisdiction over this Appeal and the Appeal must be dismissed. *S.C. Code Ann. § 15-48-200 (2005)*; Main Corp. (affirming dismissal of appeal by Court of Appeals for lack of jurisdiction); Steinmetz (dismissing appeal for lack of jurisdiction).

The Appellant should not be heard to complain that it must necessarily be able to appeal from the Order Granting Plaintiff's Motion to Stay and Compel Arbitration at some point. *Cf.* Memo. Appealability p. 4. The Appellant could have properly raised any valid arguments it had before this Court by seeking to have the Circuit Court vacate, correct or modify the Award (including upon the contention that the Award exceeded the scope of matters properly referable to arbitration). *See* Sentry Eng'g and Const. Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 350, 338 S.E.2d 631, 634 (1985) (explaining that "S.C. Code Ann. Sections 15-48-130 (Supp. 1984) and 15-48-140 (Supp. 1984) provide the exclusive procedures for vacating or modifying awards where arbitrators exceed their powers or award upon a matter not properly submitted to them.") Rather, the Appellant chose to seek redress solely in the Federal Court, where the Award was confirmed and reduced to judgment. Notice Filing Exs. C, D and E.

Regarding the Appellant's Memorandum on Appealability in this Matter, which addresses some of this issues raised in this argument, it is notable that:

- The Memorandum on Appealability argues that the Appellant went to Federal Court because it sought to apply the Federal Arbitration Act (Mem. Appealability p. 3), it is, however, plain that the Federal Arbitration Act "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise," (Am. Health and Life Ins. Co. v. Heyward, 272 F. Supp. 2d 578, 580 (D.S.C. 2003)), and that the South Carolina Court of Common Pleas has the ability to interpret and enforce the Federal Arbitration Act, (*see, e.g.* Circle S. Enterp., Inc. v. Stanley Smith & Sons, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986) (reversing the circuit court for failure to apply the Federal Arbitration Act)). Indeed, absent diversity of citizenship, the Federal Court would not have had jurisdiction.

- The Memorandum on Appealability states that the Appellant, before the Federal Court, "expressly reserved its right to appeal the state court order(s) compelling arbitration," (Mem. Appealability p. 3). What actually happened was that the Appellant stated, in a footnote to Allsouth Electrical Contractors, Inc.'s Notice and Petition to Vacate and Arbitration Award Pursuant to Rule 9 U.S.C. § 10, which was filed with the Federal Court,[2] that:

> Allsouth does not waive its right to appeal the state court's order(s) compelling arbitration. However, for the purpose of this action, even if the Court was correct in ordering arbitration of the indemnity cause

[2] Docket Entry 1 in Allsouth Electrical Contractors Inc. v. Lend Lease US Public Partnership LLC (D.S.C. 2:13-cv-00514-RMG).

> of action, which is expressly denied by Allsouth, the arbitrator exceeded his authority in issuing an award that [sic] on grounds other than indemnification.

There was no agreement or court approval regarding any such reservation.

Nor is it apparent from where such right arose or how it existed.

The Appeal must be dismissed.

II. <u>This Appeal must be dismissed because, under South Carolina Law and the Federal Arbitration Act, it amounts to an untimely effort to have an arbitration award vacated.</u>

The question of arbitrability now raised by the Appellant was put before the Arbitrator, who, among other things, found and concluded:

> Allsouth contends that Lend Lease's claim is for indemnity only and is therefore barred based on the contractual indemnity language and the principles of equitable indemnity. I find that Allsouth's view of its indemnity obligations is too narrow. While it is true that the [State] Court's February 9, 2012 order found that Lend Lease's action was in the nature of indemnity and was therefore subject to arbitration, Allsouth's contractual indemnity obligations are not limited to those set out in paragraph 9.1 of the subcontract. Allsouth also owes indemnity obligations to Lend Lease as set out in paragraphs 3.1.1, 3.1.4, 4.2.1.2, 6.2, 6.7 and others. By nature of the contractual indemnity agreement between the Owner, Lend Lease and Allsouth, any claim that Lend Lease has against Allsouth for defects that the Owner asserted against Lend Lease is by definition an indemnity claim.

<u>Notice of Filing</u> Ex. A, p. 12.

Under either the Federal Arbitration Act or the Uniform Arbitration Act a party displeased with an arbitration award must attack the award—by seeking to modify or vacate—within either three (3) months or ninety (90) days. *9 U.S.C. § 12* (requiring that notice of motion to vacate or modify under the Federal Arbitration Act be served within

three months after the award is delivered or filed); *S.C. Code Ann. § 15-48-130(b) (2005)* (requiring that application under Uniform Arbitration Act to vacate an award be made within ninety days of delivery of copy of the award); *S.C. Code § 15-48-140 (2005)* (requiring same regarding application to modify). No motion to vacate or modify was filed with the State Court, at any time.

For this Court to now rule, as the Appellant requests, that no claims should have been before the Arbitrator would be wholly inconsistent with the Award and amount to an untimely vacatur or modification of the Award. *See* Sentry Eng'g and Const. Inc., 287 S.C. at 350–51, 338 S.E.2d at 634 (holding that award becomes law of case where no motion to vacate or modify is filed within 90 days of delivery of a copy of the award).[3]

Accordingly, the Appeal must be dismissed.

III. This Appeal must be dismissed because it raises only a non-justiciable question in light of the Federal Court having entered Judgment confirming the Arbitration Award.

The Appellant chose to pursue vacatur in the Federal Court. Notice Filing Ex. C p. 1. On June 13, 2013, the Federal Court entered an Order that, among other things, dismissed Appellant's Petition to Vacate and confirmed the Award. Notice Filing Ex. C pp. 1, 4. On even date, the Federal Court also entered a Judgment in a Civil Action, confirming the Award. Notice Filing Ex. D.

Even if this Appeal were otherwise proper, any result would necessarily be purely academic or amount to an attack on the Order and Judgment in a Civil Action of the Federal Court. Neither objective is permissible, and, accordingly, this appeal must be

[3] Notably, even in the instance where a party seeks to vacate an arbitration award on the grounds that there was in fact no arbitration agreement, that party must make application for vacatur within 90 days of delivery of the award. *S.C. Code Ann. §§ 15-48-130(a)(5) and (b)(2005).*

dismissed. *See, e.g.*, Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (explaining "[a]n appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. . . . A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.") (citations omitted) (some alterations in original); G.C. and K.B. Inv., Inc. v. Wilson, 326 F.3d 1096, 1106–1110 (9th Cir. 2003) (affirming district court's enjoining party from further pursuing state court orders the effect of which was to attempt to have declared invalid an arbitration as the same amounted to an attempt to circumvent the district court's judgment confirming the award entered in that arbitration).

Notably, to the extent the Memorandum on Appealability argues that "the issue of whether or not the action was subject to arbitration in the first instance as ordered by the state lower court was not before the federal court," (Mem. Appealability p. 3), such argument is belied by the language of the Federal Court's Order, which provides:

> Allsouth contends the arbitrator in this case exceeded his powers in violation of 9 U.S.C § 10(a)(4) because the award was not consistent with terms of Allsouth's contractual indemnity obligations. Allsouth argues that the indemnification provision of the contract, Section 9.1, expressly excludes indemnification for damages to "the Subcontractor's [i.e. Allsouth's] work." (Dkt. No. 16 at 7-8; 10-2 at 36-37). Thus, the arbitrator must have exceeded his authority by awarding damages for expenses incurred by Lend Lease to correct Allsouth's work. (Dkt. No. 16 at 7-8).
>
> The arbitrator, however, found that several other sections of the contract contained provisions which imposed indemnity obligations on Allsouth. Specifically, the arbitrator held that paragraphs 3.1.1, 3.1.4, 4.2.1.2, 6.2,

> 6.7 and others set out indemnity obligations. (Dkt. No. 1-4 at 14). Allsouth argues that these sections "have nothing to do with indemnification" and therefore provide no basis for the arbitrator's award. (Dkt. 16 at 8) However, "neither misinterpretation of a contract nor an error of law constitutes a ground on which an award can be vacated." *MCI*, 610 F.3d at 862 (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193-194 (4th Cir. 1998)). "'As long as the arbitrator[]{is}even arguably construing or applying the contract,'...{his} award [] will not be disturbed." *MCI*, 610 F.3d at 862 (quoting *Norfolk & W. Ry Co. v. Transp. Commc'ns Int'l Union*, 17 F.3d 696, 700 (4th Cir. 1994)). Here the Court finds that the arbitrator was interpreting and applying the contract, and therefore denies Allsouth's petition to vacate the award.

Notice Filing Ex. C. In this regard, however the Appellant may attempt to couch its argument, the objective is identical to that before both the Arbitrator and the Federal Court—to avoid compliance with any award pursuant to an argument that the Appellant was no longer obligated to arbitrate any claim. *Cf.* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 7–12 (1983) (explaining that a proceeding in state court to stay arbitration and a proceeding in federal court to compel arbitration involved "the identical issue of arbitrability of the claims" such that the determination by either court would amount to *res judicata* as to the other).

Appellant chose to go to Federal Court. Appellant chose not to appeal the Order and Judgment in a Civil Action of the Federal Court. Whether or not these decisions were wise, they resulted in a final adjudication that precludes this Appeal. Interestingly, taken to its logical conclusion, Appellant's position would allow it to return to this Court in an effort to circumvent the Award even if the United States Supreme Court had affirmed its final adjudication (i.e. confirmation by the Federal District Court). Principles

of comity, res judicata, estoppel, waiver, good faith and equity prohibit such a wasteful approach to judicial resources.

As it would be improper for this Court to pass on a purely academic question or to undercut the Order and Judgment in a Civil Action of the Federal Court, this appeal presents no justiciable issue and must be dismissed.

IV. The Trial Court did not err in entering the order compelling arbitration.

The arbitration provisions at issue here provide in pertinent part that:

> Except for claims by [Respondent] for express and implied indemnity arising from or relating to claims for patent or latent defects in the Work performed by [Appellant], . . . *a demand for arbitration must be made within 180 days after the party knew, or should have reasonably known, of facts giving rise to the claim*.

Aff. of A. Roman Ex. A p. 22–23 (emphasis in original). In essence, the Appellant now urges that it was error for the State Court to have compelled it to arbitrate any claims because it does not believe any part of the dispute between the Parties to encompass claims that either (a) came within the exception "for express or implied indemnity arising from or relating to claims for patent or latent defects" or (b) were first known to Respondent within the 180 days prior to it demanding arbitration.

First, this argument is incomplete in that it fails to acknowledge that, even if the Appellant's argument was otherwise wholly correct, which it is not, it would leave the result that the State Court was correct to compel some claims to arbitration. *Compare* Tr. 21:9–22:22 (counsel for Appellant arguing that the label on claims in the Complaint is determinative as to whether they seek express or implied indemnity arising from or relating to claims for patent or latent defects) *and* Initial Br. Appellant p. 10–11 (conceding that the Parties agreed to submit any claims for damages for express or

implied indemnification to arbitration, regardless of the passage of 180 days), *with* Compl. pp. 6, 9, 12 and 15 (stating claims for relief entitled "Indemnity") *and* Compl. pp. 3–16 (making plain that even as to claims not entitled "Indemnity," Respondent was seeking to be made whole for the cost of correcting patent or latent defects in Appellant's work as demanded by the owner of the subject project). *See* First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994) ("Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.") *See also* Gissel v. Hart, 382 S.C. 235, 242, 676 S.E.2d 320, 324 (2009) (explaining that it is error to look to the complaint to determine whether the award was proper). *See also S.C. Code Ann. §§ 15-48-20 (d) and (e)(2005)* (explaining that: "Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be made with respect thereto only. . . . " and "[a]n order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides . . . .").

Second, even setting the indemnity exception aside, the Appellant does not dispute that it was proper for the State Court to order to arbitration any claim that arose in the prior 180 days. Rather, the Appellant attempted to argue that certain letters exchanged between the Parties evidenced that the Respondent knew of any claims more than 180 days prior to demanding arbitration. *See* Def. Mem. Opp'n Pl.'s Mot. Stay Compel Arbitration p. 3 (arguing that Respondent first informed Appellant "of the potential claims on May 10, 2010"); Aff. W. Lesesne, Exs. A–C (providing the letters on which Appellant relied in arguing that Respondent knew of claims). The Appellant's

argument wholly ignores that the letters evidence only a series of negotiations and demands for performance of various contractual obligations by the Appellant, and do not foreclose the possibility that some or all of the Appellant's breaches in failing to correct its work could have or did occur within 180 days of the arbitration demand. Said differently, the Appellant's argument ignores that breach of contract, warranty, and negligence claims may (and, here, often did) arise out of the Appellant's failure to meet its obligations, warranties and duties to indemnify the Respondent for certain repairs and replacements ordered by the owner of the project. *See* Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (providing that "unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

Third, when read as a whole, it is apparent that the Complaint was filed for the purposes of tolling the statute of limitations while arbitrating claims for express and implied indemnity arising from claims arising out of or relating to patent or latent defects.[4] *See Rule 8 (f), SCRCP* ("All pleadings shall be so construed as to do substantial

[4] *See, e.g.,* Complaint ¶¶ 9–12, alleging that:

> [Respondent] has given notice to [Appellant] of the defective work and the Owner's demand and made demand on [Appellant] to honor its contracts and warranties by making the Repairs. . . . Despite notice and demand, [Appellant] has failed and refused to honor its contracts and warranties and has not made the repairs. . . . Per the requirements of the Owner, [Respondent] has undertaken, after notice to [Appellant], to enter into a subcontract with a third-party electrical subcontractor . . . to make the Repairs . . . [Respondent], in addition to incurring the cost of the Repairs, will incur other damages including, but not limited to, the costs of extended general conditions and overhead to manage the Repairs . . ., the cost of additional work necessitated by the Repairs, such as the replacement

justice to all parties."); Doe ex rel. Legal Guardian v. Barnwell School Dist. 45, 369 S.C. 659, 662, 633 S.E.2d 518, 520 (Ct. App. 2006) ("In construing a complaint . . . the court must review the entire pleading."). *See also* Notice Filing Ex. A, p. 13 (concluding in Award that: "By the nature of the contractual agreement between the Owner, [Respondent] and [Appellant], any claim that [Respondent] has against [Appellant] for defects that the Owner asserted against [Respondent] is by definition an indemnity claim.").

Boiled down, the Appellant's argument is only that the State Court should have compelled the Parties to arbitrate less than the entire dispute between them. Even ignoring its fundamental lack of merit, this argument does not lead to the conclusion that the State Court erred in compelling arbitration at all. There is no dispute that those claims either falling within the indemnity exception or that came to light within the prior 180 days were properly referable to arbitration.

Any contention by the Appellant that the actual Award ruled upon claims beyond those properly referable to arbitration is now time barred and, moreover, has been finally adjudicated by the Federal Court.

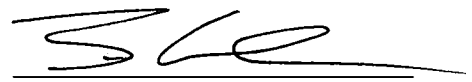
The Order Granting Plaintiff's Motion to Stay and Compel Arbitration should be affirmed.

> of fencing and landscaping . . ., and additional damages as may be incurred in connection with the defective work and making the Repairs all as will be shown. . . . .

and Complaint ¶¶ 24, 31 and 43 (alleging, under causes of action entitled "Breach of Subcontract," "Breach of Warranty" and "Negligence," that the damages for which Respondent sought to recover "include, but are not limited to, the cost to repair the defective work, extended overhead and general conditions and other costs incurred, or to be incurred, in making the Repairs."). Compl. pp. 3–4, 5 and 7.

CONCLUSION

This Appeal is an improper attack on a Federal Judgment and an Arbitration Award that lacks any good faith basis, and should be dismissed. Alternatively, the Order Granting Plaintiff's Motion to Stay and Compel Arbitration should be affirmed.



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v.

Allsouth Electrical Contractors, Inc.....Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent along with the Respondent's Designation of Matter to be Included in the Record on Appeal on Appellant Allsouth Electrical Contractors, Inc., by depositing copies of each in a sealed envelope in the United States Mail, postage prepaid, on May 14, 2014, addressed to Appellant's counsel of record, M. Brent McDonald, Smith, Bundy, Bybee & Barnett, PC, Post Office Box 1542, Mount Pleasant, SC 29465.

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May 14, 2014

Via United States Mail
The Honorable Jenny Abbot Kitchings
South Carolina Court of Appeals, Clerk
P.O. Box 11629
Columbia, SC 29211

Re: Lend Lease (US) Public Partnership LLC f/k/a Actus Lend Lease LLC v. Allsouth Electrical Contractors, Inc. (Appellate Case No. 2013-002679)

Dear Ms. Kitchings:

Please find enclosed for filing with the South Carolina Court of Appeals one original and one copy of each of the following:

1. Initial Brief of the Respondent
2. Respondent's Designation of Matter to be Included in the Record on Appeal
3. Proof of Service, regarding the above.

Please file the originals and return a file-stamped copy of each to me in the enclosed self-addressed envelope.

Thank you for your attention to this matter.

With kindest regards, I am

Respectfully yours,

Trip Coyne

cc: M. Brent McDonald (w/ one copy of each enclosure)

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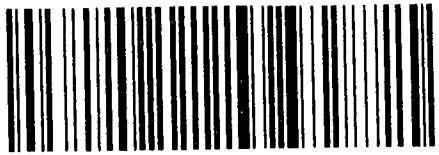

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