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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M Young, Sr , Circuit Court Judge

Case No 2011-CP-08-985

Cape Romain Contractors, Inc ,

Respondent,

v

Wando E , LLC and Sean Barnes a/k/a Sean A Barnes,

Appellants

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

Case No 2011-CP-08-0985

CAPE ROMAIN CONTRACTORS

versus

WANDO E, LLC

Plaintiff(s)

Defendant(s)

CHECK ONE

- ☐ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☒ **DECISION BY COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON)** ☐ Rule 12(b), SCRPC ☐ Rule 41(a), SCRPC (Ver. nonsuit)
☐ Rule 43(k), SCRPC (Settled) ☐ Other -
- ☐ **ACTION STRICKEN (CHECK REASON)** ☐ Rule 40(j), SCRPC, ☐ Bankruptcy, ☐ Binding Arbitration
Subject to right to restore to confirm, vacate or modify arbitration award ☐ Other
- ☐ **DISPOSITION OF APPEAL TO CIRCUIT COURT (CHECK REASON)** ☐ Affirmed ☐ Reversed, ☐ Remanded ☐ Other
- NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED

☐ See attached order,

☒ Statement of Judgment by Court

Defendant Wando E's Motion to Dismiss and Motion to Compel Arbitration was Taken Under Advisement
Attorney to submit proposed orders to Judge Young for consideration by July 1 2011

Dated at Moncks Corner, South Carolina

Date

Judge

This judgment was entered on the 21st Day of June, 2011, and a copy mailed first class this 24th Day of June 2011, to attorneys of record or to parties (when appearing pro-se) as follows

Attorney(s) for Plaintiff(s)

Attorney(s) for Defendant(s)

Cl. gw
Cl. xc

May P. Brown
Clerk of Court

Edward Westbrook

From sean barnes [seanbarnes8180@hotmail com]
Sent Saturday June 18 2011 4 02 PM
To Edward Westbrook
Subject FW Document1

From sonny@caperomaincontractors com
To mkirby@jgtinc com
CC seanbarnes8180@hotmail com
Date Tue, 25 May 2010 15 25 04 -0400
Subject RE Document1

Ok, and Sean and I just spoke, and we agree to limit or call a \$10,000 maximum to my daily rate/extra work deal We also agreed we would wait till next week to get contract finalized I'm out Wed thru Friday, he goes up north early next week to visit fab operation So we're good till late next week to finalize

From Mike Kirby [mailto:mkirby@jgtinc com]
Sent Tuesday, May 25, 2010 3 27 PM
To Sonny Dupre
Subject RE Document1

Hi Sonny

That looks reasonable to me and actually is probably somewhat described in the AIA Contract - but just not as specific to the project as your document I will forward to Sean and see what he thinks

Thanks
Mike

From Sonny Dupre [mailto:sonny@caperomaincontractors com]
Sent Tuesday, May 25, 2010 1 49 PM
To 'Mike Kirby
Subject Document1

Mike these are the couple of concerns I had This would be one way of handling it Let me know your thoughts Thanks

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011-CP-08-985
	)	
CAPE ROMAIN CONTRACTORS, INC ,	)	
	)	
Plaintiff,	)	
vs	)	ORDER DENYING DEFENDANTS'
	)	MOTIONS TO DISMISS AND TO
	)	COMPEL ARBITRATION
WANDO E, LLC AND SEAN BARNES	)	
A/K/A SEAN A BARNES,	)	
	)	
Defendants	)	

2011 JUL 11 AM 11 58
CLERK OF COURT
NINTH JUDICIAL CIRCUIT
SOUTH CAROLINA

This matter came before the Court for a hearing on the Defendants' Motions to Dismiss and to Compel Arbitration on Tuesday, June 21, 2011. Present before the Court were Edward J Westbrook of Richardson, Patrick, Westbrook & Brickman for the Defendant moving parties and Albert A Lacour, III, for the Plaintiff, Cape Romain Contractors, Inc.

The Court has reviewed and considered the motion and attachments dated April 22, 2011 and the Reply in Support of the Motion and its attachments dated May 10 2011 filed on behalf of the Defendants. The Court has also reviewed and considered the Return of Cape Romain to the Motions to Dismiss and Compel Arbitration dated April 28, 2011 and its attachments and the Supplemental Affidavit of Anthony T DuPre, Jr in support of that return filed May 18, 2011. Upon consideration of the arguments of counsel and review of the pleadings and attachments referenced above the Court makes the following findings

FINDINGS OF FACT

1 The motions before the Court are to dismiss this action for lack of subject matter jurisdiction under Rule 12(b)(1) and to dismiss for failure to state facts sufficient

EW
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to constitute a cause of action under Rule 12(b)(6) Defendants also seek dismissal of the Plaintiff's third cause of action for quantum meruit The original motion has two attachments submitting matters beyond the face of the complaint One of the attachments is a partial copy of the agreement between Barnes and the Plaintiff The Reply In Support of the Motion to Dismiss contains 8 more attachments including an affidavit of the Defendant Barnes attesting to certain facts The moving party has therefore submitted matters outside the face of the pleadings and the motion under Rule 12(b)(6) should be treated as one for summary judgment as is provided in SCRCF Rule 12(b)

2 The Defendants argue that Wando E, LLC has a right to enforce the Arbitration Agreement even though Wando E, LLC is not a signatory to the Arbitration Agreement The Defendants argue that enforcement of such agreements to arbitrate by non-signatories against signatories has been allowed in the past in cases involving non-signatories who have a relationship with the signatory party such as (a) parent and subsidiary, (b) corporation and shareholder, or (c) agent and principal The agreement between the parties refers to Sean Barnes as the "owner" of the project The affidavit of Barnes refers to Barnes' involvement as being that of the "contractor" The affidavit of DuPre mentions that, although Mr DuPre knew that Barnes was not the owner, Barnes only referred to the true owner as his "client" The record is devoid of any agreement of any kind between Barnes and Wando E, LLC The complaint alleges only that the Plaintiff believes that Barnes "had authority from or acted rightly for" the true owner, as is required by the Mechanic's Lien statute The Court at this stage of the proceedings does not have the benefit of any pleading on behalf of the Defendants concerning the



nature of the relationship, if any, between Barnes and Wando E, LLC

3 The Defendants conceded during the argument of these motions that the notice which is required by S C Code Ann §15-48-10(a) does not appear on the first page of the agreement and that therefore the South Carolina Uniform Arbitration Act is not applicable

4 The Defendants contend a number of circumstances concerning this project impact Interstate Commerce substantially enough to invoke the power of Congress to regulate commerce and allow the application of the Federal Arbitration Act. The factors indicated by the Defendants are (a) the actual use of materials fabricated in Ohio, (b) engagement of engineering services by the Plaintiff and payment for such services through the United States mail, (c) the utilization of diesel fuel which moves in commerce by the Plaintiff's equipment, (d) movement of the materials and equipment and the construction itself within navigable waters in the State of South Carolina, and (e) the conduct of the project pursuant to a permit issued by the United States Army Corps of Engineers pursuant to authority vested in the Secretary of the Army

5 The Plaintiffs argue that although some materials did in fact originate in Ohio, the written agreement between the parties does not require Cape Romain to furnish any materials as their agreement is for labor only for the assembly and installation of such materials. The agreement on its face mentions in paragraph 2.2 that the owner is obligated to ensure timely delivery of materials to the contractor, provides for adjustments to the date of substantial completion if there are delays, and provides in paragraph 2 of Exhibit #1 that the Plaintiff is to pick up the materials from Docks Unlimited, Inc and transport them to the Plaintiff's yard in Berkeley County to be barged

to the project location. Nowhere is it mentioned anywhere in the agreement that the materials originate out-of-state. As the agreement is a labor only contract and the Plaintiff is not required to provide any materials, the cost of materials represents zero dollars of the \$165,000.00 contract amount.

6 The affidavit of Anthony T. DuPre indicates that Cape Romain utilized 75 to 100 gallons of diesel fuel to move the materials from its yard in Berkeley County to the project site also located in Berkeley County. The affidavit indicates that its equipment and barges traveled 14 miles from Cape Romain's yard through the Charleston Harbor and up the Wando River to the location of the project. The affidavit of Anthony DuPre indicates that the cost of moving the materials furnished by the "owner", Barnes, constitutes less than 5% of the total job costs. A review of the affidavits submitted by the parties indicates that the parties, the engineer, and the project were all located within Berkeley and Charleston Counties. All materials to be moved by the Plaintiff were to be picked up within Charleston and Berkeley Counties and transported to the job site in Berkeley County.

7 Cape Romain concedes in its Supplemental Affidavit that it engaged an engineer to assist in defending against claims of imperfect performance raised by the Defendants. Cape Romain also concedes that it mailed the check to the engineering firm in the State of Illinois.

8 The project was constructed under a permit issued by the United States Army Corps of Engineers pursuant to authority vested in the Secretary of the Army. The agreement between the parties simply provides that Cape Romain "excludes any and all engineering or permitting" and that all necessary permits are to be furnished by the

A handwritten signature in black ink, appearing to be 'Jm' or similar, located at the bottom right of the page.

"owner" in advance of Cape Romain mobilizing to the project site. The number and nature of the permits to be obtained by the owner is not spelled out in the agreement. The terms of the agreement do not require any activity to be conducted in interstate commerce relative to permits.

9 The complaint contains a claim for quantum meruit in the third cause of action and prays for relief in the alternative to the relief sought on the legal claims for breach of contract and foreclosure of mechanic's lien. No pleading has been filed on behalf of the Defendants at this point in the development of the case and therefore the Court is not able to know whether the Defendants challenge the sufficiency or formation of the agreement upon which the Plaintiff relies. The agreement between the parties recognizes the right of the Plaintiff to enforce its mechanic's lien in Article 21 §21.2.

Having made the foregoing findings of fact the Court therefore formulates the following conclusions:

CONCLUSIONS OF LAW

1 I conclude that subject matter jurisdiction to entertain an action for foreclosure of a mechanic's lien is vested in the Circuit Court for the County in which the building or structure is situated by virtue of the terms of S.C. Code Ann. §29-5-140 (1976 as amended). The Federal Arbitration Act does not divest the State Courts of jurisdiction. If the Federal Act is applicable, the proceedings in this case will be stayed, rather than dismissed, in favor of Arbitration, as is provided by the express terms of the Act. 9 U.S.C. § 3

2 I conclude that the submission of matters outside the face of the complaint has converted the motion under Rule 12(b)(6) to one pursuant to Rule 56. The Court

must therefore consider the evidence and all inferences to be drawn from them in the light most favorable to the non-moving party. Viewing the facts in the light most favorable to Cape Romain, the motion must be denied if the record indicates that there exist genuine issues of material fact. Turner v. Milliman, 708 S E 2d 766 (2011)

3 I conclude that a genuine issue of material fact exists as to what relationship, if any, exists between the Defendant Sean Barnes and the Defendant Wando E, LLC. In the record before the Court it appears the Plaintiff is not privy to the details of any such relationship. The Defendants, although having had adequate opportunity to do so, have not submitted any definitive information upon which this Court can rule that the relationship is one of parent and subsidiary, corporation and shareholder, or agent and principal. The record as it currently stands does not support the right of Wando E, LLC to enforce the Arbitration Agreement.

4 I conclude that the South Carolina Uniform Arbitration Act is not applicable to the agreement to arbitrate between the parties because the notice required by S C Code Ann. §15-48-10(a) does not appear on the first page of the agreement. By the express terms of the act, in the absence of such notice, the act is not applicable. Circle S v. Stanley Smith & Sons, 288 S C 428, 343 S E 2d 45 (Ct. App. 1986), Timms v. Greene, 310 S C 469, 427 S E 2d 642 (1993), Soil Remediation v. Nu-way Environmental, Inc., 323 S C 454, 476 S E 2d 149 (1996).

5 I conclude that in general, the Federal Arbitration Act does not divest that South Carolina State Courts of jurisdiction. The Federal Act is enforceable in the state courts and, if applicable, preempts South Carolina common law on the subject of arbitration. Episcopal Housing Corp. v. Federal Insurance Company, 269 S C 631, 239



S E 2d 647, at 649 (1977) For the Federal Act to apply, the four elements outlined by the Court in Episcopal Housing must be present Of the four requisite elements, only the requirement that the contract "evidences a transaction involving commerce" is challenged by Cape Romain Episcopal Housing, 239 S E 2 at 650, 9 U S C §1, §2 I conclude that for the Federal Act to apply, the contract must have a sufficient nexus to interstate commerce The agreement must have an effect on interstate commerce and involve enough activity in interstate commerce to justify or trigger federal jurisdiction T J Paramore v Inter-Regional Financial Group, 68 N C App 659, 316 S E 2d 90 (1984) The relationship to commerce must be substantial enough to trigger the power of the Federal Government to regulate commerce between the states and with foreign nations as set forth in the United States Constitution 9 U S C §1 To determine whether the contract involves interstate commerce, the Court must examine the agreement, the complaint and the facts to ascertain whether the transaction is one involving commerce within the meaning of the act Soil Remediation Company v Nu-way Environmental, 476 S E 2d at 152, Mathews v Fluor, 312 S C 404, 440 S E 2d 880 at 881

6 The cases of Timms v Greene, 310 S C 469, 427 S E 2d 642 (1993) and Mathews v Fluor Corporation, 312 S C 404, 440 S E 2d 880 (1994) were both decided after Episcopal Housing and offer insight into what the Court intended by its decision in Episcopal Housing Initially, if the face of the agreement reflects a requirement of interstate commerce then the Federal Act is applicable I have reviewed the agreement between the parties presently before the Court and can find no term whatsoever of the agreement between the parties that requires the involvement of interstate commerce



Quite to the contrary, the agreement addresses only the activities of the parties thereto and appears to contemplate that all activities take place within Charleston and Berkeley Counties. The allegations of the complaint do not reflect any activity that involves commerce between the States or with foreign nations. The Court must also examine the actual course of performance of the parties to discern any impact upon interstate commerce. I conclude that the performance of the express terms of the agreement between the parties in this case does not involve a sufficient nexus to interstate commerce to justify application of the Federal Act. The movement of materials between the business location of Sean Barnes in Charleston County and the project location in Berkeley County did not involve interstate commerce. The mailing of a check to the engineering firm hired by the Plaintiff did involve the use of the United States Mail, but an expenditure of 44 cents for postage is hardly a sufficient nexus or impact on commerce. Likewise the use of 75 to 100 gallons of diesel fuel is insignificant relative to the millions of gallons used daily in commerce, and moving the equipment and the materials 14 miles from Cape Romain's yard to the job site is insignificant compared to the 200 plus miles of coastline navigable waters within the State. According to the affidavit of Cape Romain, this activity represented less than 5% of the total job cost. Lastly, the permit issued by the Corps of Engineers, Department of the Army, has not been shown to have any relationship to commerce between the States or among foreign nations. The Court concludes that there is no impact on commerce here sufficient to justify or trigger the power of congress to regulate trade between the States and with foreign nations. Timms and Greene, *supra*. At the very least the affidavits reflect genuine issues of material fact which exist such that the Defendants' motion must be



denied

7 I conclude that SCRCP Rule 8(a) allows the Plaintiff to plead claims for different types of relief in the alternative. The Plaintiff may seek foreclosure of its mechanic's lien and also plead the claim for quantum meruit in the alternative in the event that, for whatever reason, its express contract claims are not proved at trial. Swanson v. Stratos, 350 S.C. 116, 564 S.E.2d 117 (2002) stands for the proposition that the claim for quantum meruit may be an appropriate alternative claim if the Plaintiff is unable to prove its express contract. "The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit unless the original contract remains in force." Swanson, 564 S.E.2d at 118. In that case the trial court held that an express agreement on the subject did exist. On appeal it was held that the existence of the express agreement on the subject prevented any recovery in quantum meruit. In the present case no answer has been filed by the Defendants and no ruling has yet been made on whether the express agreement between the parties is valid and enforceable. Dismissing the quantum meruit claim now might eliminate a potentially appropriate remedy on the part of the Plaintiff before the pleadings are closed and before the Defendants have, through their pleadings, indicated whether they take issue with the validity of the express agreement. Any such ruling would be premature at this point in the development of the case.

IT IS THEREFORE

ORDERED that the Defendants' Motion to Dismiss pursuant to SCRCP Rule 12(b)(1) is DENIED as the subject matter jurisdiction of the Court to entertain an action

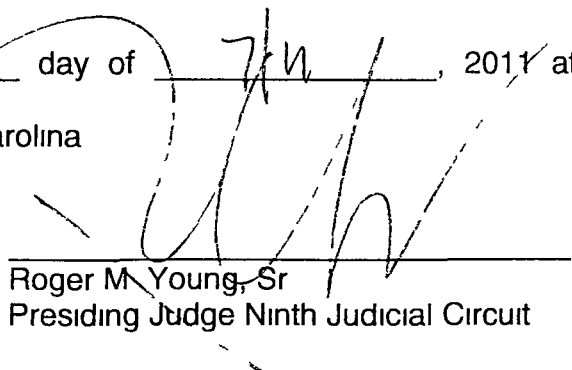


for foreclosure of a mechanic's lien is statutory, and it is further,

ORDERED that the Defendants' Motion to Dismiss pursuant to SCRPC Rule 12(b)(6) as converted by the Defendants to a motion pursuant to Rule 56 is DENIED because the agreement on its face does not contemplate interstate commerce and the facts submitted by the parties concerning the performance of the agreement indicate, at most, that genuine issues of material fact exist as to whether the actual performance of the agreement by the parties involved a sufficient impact upon commerce to justify or trigger the power of congress to regulate trade between the states or with foreign nations, and it is further,

ORDERED that the Defendants' Motion to Dismiss Plaintiff's quantum meruit claim is DENIED, and it is further,

ORDERED that the Defendants' request for the Court's ruling that Wando E, LLC is entitled to enforce the arbitration agreement although not a signatory to same is DENIED as there exist genuine issues of material fact as to the nature of the relationship between Barnes and Wando E, LLC and whether the relationship is such that Wando E as a non-signatory may be entitled to enforce the arbitration agreement

AND IT IS SO ORDERED this 7th day of July, 2011 at
Charleston, South Carolina

Roger M. Young, Sr.
Presiding Judge Ninth Judicial Circuit

Edward Westbrook

From Young, Roger Law Clerk (Mary B Ramsay) [ryounglc@sccourts.org]
Sent Monday, July 11, 2011 4:10 PM
To Connie Dixon
Cc Edward Westbrook
Subject RE: Cape Romain Contractors, Inc. v. Wando E. LLC, et al (case no. 2011-CP-08-985)

Counsel

After reviewing all materials and the proposed orders, Judge Young has decided to sign the proposed order Denying Defendants' Motion to Dismiss and to Compel Arbitration.

An order has been signed and sent to the Berkeley County Clerk of Court for filing.

All the best

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

From Connie Dixon [mailto:CDixon@CLAWSONANDSTAUBES.COM]
Sent Thursday, June 30, 2011 4:18 PM
To Young, Roger Law Clerk (Mary B. Ramsay)
Cc ewestbrook@rpwb.com
Subject Cape Romain Contractors, Inc. v. Wando E. LLC, et al (case no. 2011-CP-08-985)

Dear Judge Young,

Attached please find correspondence to you from Mr. Lacour as well as the Proposed Order regarding the above referenced case. I have also sent opposing counsel a copy of the same via this e-mail.

**CLAWSON
AND
STAUBES**
LLC

7/15/2011

Connie Dixon

Legal Assistant to Albert A Lacour, III

126 Seven Farms Drive, Suite 200 | Charleston SC | 29492-8144

Phone 843 577 2026 Ext 272 | Fax 843 722 2867

Website www.clawsonandstaubes.com | Email cdixon@clawsonandstaubes.com | Location [Map](#)

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY

CIVIL ACTION COVER SHEET

APE ROMAIN CONTRACTORS INC

Plaintiff(s)

-CP-

vs

2011 CP-08-985

WANDO E LLC AND SEAN BARNES A/K/A SEAN A BARNES

Defendant(s)

(Please Print)
Submitted By
AddressAlbert A Lacour III
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(843) 577-2026
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alacour@clawsonandstaubes.com

FILED
2011 MAR 29 AM 10:06
CLERK OF COURT
BERKELEY COUNTY

NOTE The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed and dated. A copy of this Cover Sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)
**If Action is Judgment/Settlement do not complete*

- ☒ **JURY TRIAL** demanded in complaint ☐ **NON-JURY TRIAL** demanded in complaint
☐ This case is subject to **ARBITRATION** pursuant to the Circuit Court Alternative Dispute Resolution Rules
☐ This case is subject to **MEDIATION** pursuant to the Circuit Court Alternative Dispute Resolution Rules
☐ This case is exempt from ADR (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Construction (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Previous Not of Intent Case# 20-CP
☐ Notice/File Med Mal (230)
☐ Other (299)

Torts Personal Injury

- ☐ Assault/Slander/Label (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☒ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate- Civil (910)
☐ Magistrate- Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex/Other

- ☐ Environmental (600)
☐ Automobile Arb (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practice (640)
☐ Out-of State Deposition (650)
☐ Motion to Quash Subpoena in an Out-of County Action (660)
☐ Sexual Predator (540)

SUBMITTING PARTY SIGNATURE



DATE

3/29/11

NOTE Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC Rule 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only) and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN
ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT

You are required to take the following action(s)

- 1 The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
- 2 The initial ADR conference must be held within 300 days after the filing of the action.
- 3 Pre-suit medical malpractice mediations required by S.C. Code § 15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
- 4 Cases are exempt from ADR only upon the following grounds:
 - a Special proceeding or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition.
 - b Requests for temporary relief,
 - c Appeals
 - d Post Conviction relief matters,
 - e Contempt of Court proceedings,
 - f Forfeiture proceedings brought by the government entities,
- g Mortgage foreclosures and
- h Cases that have been previously subjected to an ADR conference unless otherwise required by Rule 3 or statute.
- 5 In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
- 6 Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

Please Note You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

2011-CP-08-985

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
CAPE ROMAIN CONTRACTORS, INC,)
Plaintiff,)
vs)
WANDO E, LLC AND SEAN BARNES)
A/K/A SEAN A BARNES,)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO _____

SUMMONS

JURY TRIAL DEMANDED

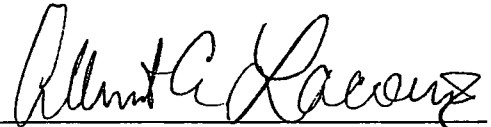
CONTRACT, MECHANIC'S LIEN,
QUANTUM MERUIT

FILED
2011 MAR 29 AM 10 48
CLERK OF COURT
BERKELEY, CA

TO THE DEFENDANT(S) ABOVE NAMED

YOU ARE HEREBY SUMMONED and REQUIRED to answer the Complaint for Foreclosure of Mechanic's Lien of the Plaintiff in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint for Foreclosure of Mechanic's Lien on the subscriber at his office at 126 Seven Farms Drive, Suite 200, Charleston, SC 29492-8144, within thirty (30) days after the service hereof, exclusive of the day of such service, and, if you fail to answer the Complaint for Foreclosure of Mechanic's Lien within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the said Complaint for Foreclosure of Mechanic's Lien

CLAWSON & STAUBES, LLC



Albert A Lacour, III
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorney for Plaintiff

Charleston, South Carolina
29 day of March, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
CAPE ROMAIN CONTRACTORS, INC ,)
Plaintiff,)
vs)
WANDO E, LLC AND SEAN BARNES)
A/K/A SEAN A BARNES,)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO _____

20 11 -CP-08- 985

COMPLAINT FOR FORECLOSURE
OF MECHANIC'S LIEN

BREACH OF CONTRACT,
MECHANIC'S LIEN, QUANTUM
MERUIT

JURY TRIAL DEMANDED

FILED
2011 MAR 29 AM 10:46
CLERK OF COURT
BERKELEY COUNTY

The Plaintiff complaining of the Defendants above named alleges and would show
unto this Honorable Court as follows

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

1 That the Plaintiff is a corporation duly organized and existing pursuant to the
laws of the State of South Carolina and having its principal place of business in the County
of Charleston, State aforesaid

2 That upon information and belief the Defendant, Sean Barnes a/k/a Sean A
Barnes is a citizen and resident of the County of Charleston, State aforesaid

3 That upon information and belief, the Defendant, Wando E , LLC, is a limited
liability company organized pursuant to the laws of the State of South Carolina and is the
owner of the real property more particularly described in Exhibit "A", which is attached
hereto and made a part hereof which property is located in the County of Berkeley, State
of South Carolina

4 That the Plaintiff and Sean Barnes a/k/a Sean A Barnes entered into an
agreement for the Plaintiff to provide labor for the installation of materials to be provided
by others for improvements which include, but are not limited to, the fixed docks and

floating docks and the piling supporting same on the property which is described above

5 That the Plaintiff furnished such labor under the agreement with Sean Barnes a/k/a Sean A Barnes, who had authority from or acted nghtly for the Defendant and owner, Wando E, LLC

6 That the Defendant and owner, Wando E, LLC knew and was aware of the work being performed by the Plaintiff and has in the past made certain payments of monies to Plaintiff on account of the work performed by the Plaintiff

7 That despite due demand for payment, the Defendant, Sean Barnes a/k/a Sean A Barnes has failed and refused to pay the Plaintiff pursuant to the agreement between the parties and such failure to pay constitutes a material breach of the terms of the agreement and has caused damage to the Plaintiff in the sum of \$158,413 14

FOR A SECOND CAUSE OF ACTION
(Mechanic's Lien)

8 That the Plaintiff reiterates and re-alleges the allegations contained in paragraphs 1 through 7 above as fully as if the same were set forth here verbatim

9 That the Plaintiff has performed all of the work required by the Defendants in a workmanlike manner and no complaints have been made to the Plaintiff regarding the work performed or the quality or the quantity of materials furnished

10 That the Plaintiff timely recorded a Statement for Mechanic's Lien in the Office of the Register of Deeds for Berkeley County in Book 8785 at Page 192 and served a copy of the same on the Defendant-Owner, Wando E, LLC, and a copy of the same is attached hereto as Exhibit "B" and made a part hereof by reference

11 That six months has not expired since the last day that work was performed or labor and materials furnished by the Plaintiff

12 That there is a balance due and owing to the Plaintiff upon the agreement in the amount of One Hundred Fifty-Eight Thousand Four Hundred Thirteen and 14/100 (\$158,413 14) Dollars together with reasonable attorney's fees and the other costs and disbursements of this action and interest at the rate of 8 75% on the amount so due, and despite due demand the Defendants have failed to pay same to the Plaintiff

FOR A THIRD CAUSE OF ACTION
(Quantum Meruit)

13 That the Plaintiff reiterates and re-alleges the allegations contained in paragraphs 1 through 12 above as fully as if the same were set forth here verbatim

14 That the Plaintiff furnished labor for the assembly and installation of all piling and fixed docks and floating docks which labor was incorporated into the construction of the fixed and floating docks on the property owned by the Defendant, Wando E, LLC and Plaintiff thereby conferred a benefit upon the Defendants Wando E, LLC and Sean Barnes a/k/a Sean A Barnes

15 That the materials and labor so furnished by the Plaintiff were of a reasonable value of \$158,413 14 and that such materials were appreciated by the Defendants Wando E, LLC and Sean Barnes a/k/a Sean A Barnes and utilized in such construction, and the Defendants Wando E, LLC and Sean Barnes a/k/a Sean A Barnes thereby realized the value of such materials and labor

17 That Defendants Wando E, LLC and Sean Barnes a/k/a Sean A Barnes have accepted the materials so furnished and retained those materials and improvements and under the circumstances of this case it would be inequitable for Defendants Wando E, LLC and Sean Barnes a/k/a Sean A Barnes to retain such benefit without paying the

reasonable value thereof

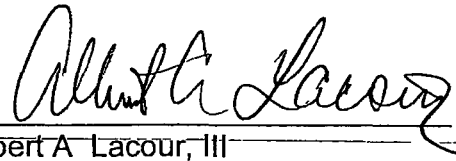
WHEREFORE, THE Plaintiff PRAYS JUDGMENT

(a) against the Defendant, Sean Barnes a/k/a Sean A Barnes for the sum of \$158,413 14 together with interest at the rate of 8 75% and together with the costs and disbursements of this action, for breach of contract,

(b) against the Defendant, Wando E, LLC for foreclosure of the above Mechanic's Lien in the amount of \$158,413 14 together with interest at 8 75% and reasonable attorney's fees and other costs and disbursements of this action and further, directing that the property be sold and the proceeds thereof applied to payment and satisfaction of the debt, or

(c) in the alternative, against the Defendants Wando E, LLC and Sean Barnes a/k/a Sean A Barnes, in the amount of \$158,413 14 together with the costs and disbursements of this action for quantum meruit

CLAWSON & STAUBES, LLC



Albert A. Lacour, III
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

Attorneys for the Plaintiff

Charleston, South Carolina

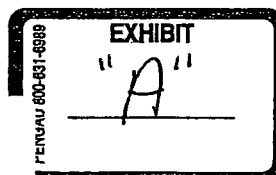
29 day of March, 2011

EXHIBIT "A"

ALL that piece, parcel or tract of land, shown as Tract B containing 10 322 acres highland and 0 005 acres marsh, for a total of 10 327 acres, more or less, as more fully shown on the plat entitled 'A Boundary Survey of Tract A and B, Hwy 41, Containing 23 682 Acres Total, Owned By William J Detyens Located in St Thomas and St Dennis Parishes in Berkeley County, South Carolina" prepared by Mark S Buscy, S C P L S No 10032, of Southeastern Surveying of Charleston, Inc , dated January 15, 2004 and recorded in the Office of the Register of Deeds for Berkeley County, South Carolina, in Plat Cabinet Q at Page 157B being both highland and marshland, the said lot having such size, shape, dimensions, buttings and boundings more or less, as will by reference to said plat more fully appear

Together with all the Grantor's right, title, and interest in any highlands or marshlands lying between the boundaries of all described Tract B and the mean high water mark of the Wando River

TMS# 269-00-00-035



Berkeley County
Cynthia B Forte
Register of Deeds
Moncks Corner 294616120

00000961 Vol 8785 Pg 192



53 2011 00000961

Instrument Number 2011- 00000961

As

Mechanics Lien

Recorded On January 18 2011

Parties WANDO E LLC

To

CAPE ROMAIN CONTRACTORS INC

Recorded By CLAWSON & STAUBES

Num Of Pages

5

Comment

**** Examined and Charged as Follows ****

Mechanics Lien	10 00
Recording Charge	10 00

**** THIS PAGE IS PART OF THE INSTRUMENT ****

I hereby certify that the within and foregoing was recorded in the Register of Deeds Office For Berkeley County SC

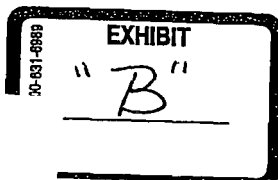
File Information

Record and Return To

Document Number	2011- 00000961	CLAWSON & STAUBES
Receipt Number	309593	126 SEVEN FARMS DRIVE
Recorded Date/Time	January 18 2011 10 35 07A	SUITE 200
Book-Vol/Pg	Bk-R VI-8785 Pg-192	CHARLESTON SC 29492
Cashier / Station	B Blake / Cash Station 7	



23



Cynthia B. Forte
Cynthia B Forte - Register of Deeds

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	IN THE NINTH JUDICIAL CIRCUIT
Cape Romain Contractors, Inc , INC ,	)	
	)	
Plaintiff,	)	STATEMENT FOR
vs	)	MECHANIC'S LIEN
WANDO E, LLC,	)	
	)	
Defendant	)	

NOTICE IS HEREBY GIVEN that Cape Romain Contractors, Inc , license number G11073, is due the sum of One Hundred Fifty Eight Thousand Four Hundred Thirteen and 14/100 (\$158,413 14) Dollars from Sean Barnes, a statement of a just and true account of said indebtedness being attached hereto and made a part hereof

That said debt is due to the Plaintiff for materials and labor furnished and actually used in the improvement of the real estate herein described and owned by Wando E, LLC, by virtue of an agreement with, or by the consent of such owner(s) or a person or persons authorized by or rightly acting for said owner(s), or the debt is due because such improvements have been authorized by such owner(s) That as shown by the attached

statement the Plaintiff furnished materials and labor for such buildings, structures or improvements within ninety (90) days of the date hereon, on or after the 20th day of December, 2010

That by virtue thereof, by the service and filing of this Notice and Affidavit, pursuant to the provisions of the statutes in such cases made and provided, the undersigned has and claims a lien to secure the payment of the debt so due and the costs of enforcing said lien including reasonable attorney's fees all as provided by law upon the buildings or

structures hereinafter mentioned and upon the following described real estate

ALL that piece, parcel or tract of land, shown as Tract B containing 10 322 acres highland and 0 005 acres marsh, for a total of 10 327 acres, more or less, as more fully shown on the plat entitled "A Boundary Survey of Tract A and B, Hwy 41, Containing 23 682 Acres Total, Owned By William J Detyens Located in St Thomas and St Dennis Parshes in Berkeley County, South Carolina" prepared by Mark S Buscy, S C P L S No 10032, of Southeastern Surveying of Charleston, Inc , dated January 15, 2004 and recorded in the Office of the Register of Deeds for Berkeley County, South Carolina, in Plat Cabinet Q at Page 157B being both highland and marshland, the said lot having such size, shape, dimensions, buttings and boundings, more or less, as will by reference to said plat more fully appear

Together with all the Grantor's right, title, and interest in any highlands or marshlands lying between the boundanes of all described Tract B and the mean high water mark of the Wando River

TMS# 269-00-00-035

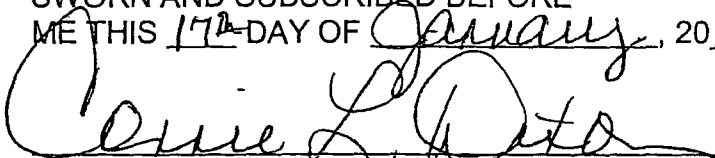
CLAWSON & STAUBES, LLC



Albert A Lacour, III
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026

ATTORNEYS FOR THE PLAINTIFF

SWORN AND SUBSCRIBED BEFORE
ME THIS 17th DAY OF January, 2011



NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 9-24-13

VERIFICATION

PERSONALLY appeared before me Anthony T DuPre, Jr , who, being duly sworn, deposes and says that he is the President of Cape Romain Contractors, Inc , the Plaintiff, in the foregoing action, that he has read the foregoing Statement for Mechanic's Lien and the allegations contained therein are true and correct of his own knowledge, save and except those matters alleged upon information and belief, and as to those matters he believes the same to be true

Cape Romain Contractors, Inc

Anthony T DuPre Jr
Anthony T DuPre, Jr , its President

SWORN AND SUBSCRIBED BEFORE
ME THIS 17 DAY OF July, 2011

Allan A. LeCours
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 10/7/2020

STATEMENT OF ACCOUNT

PERSONALLY appeared before me Anthony T DuPre, Jr , who being duly sworn deposes and says that he is the President of Cape Romain Contractors, Inc , the Plaintiff, and authorized to make the within Statement of Account

That the sum of One Hundred Fifty Eight Thousand Four Hundred Thirteen and 14/100 (\$158,413 14) Dollars is currently due and owing upon the following invoices

<u>INVOICE DATE</u>	<u>INVOICE NUMBER</u>	<u>AMOUNT</u>
10/28/10	Draw #3	\$33,525 00
12/07/10	Draw #4	\$81,950 00
12/22/10	Payment on Account	[\$23,555 25]
1/14/11	Draw #5 (change order 1)	\$66,493 39
Total Balance Due and Owing		\$158,413 14

That interest accrues from and after December 31, 2010 at the rate of 8 3/4% per annum or \$20 592 per day on past due amounts exclusive of Draw #5, which is not yet past due

That the foregoing statement is a true and just account of all sums due and owing

and no part thereof has been paid by discount or otherwise

Cape Romain Contractors, Inc

Anthony T. DuPre Jr.
Anthony T DuPre, Jr , its President

SWORN AND SUBSCRIBED BEFORE
ME THIS 11th DAY OF July, 2011

Albert G. Loefer
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 10/7/2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011-CP-08-985
	)	
CAPE ROMAIN CONTRACTORS, INC ,	)	
	)	
Plaintiff,	)	MOTION TO DISMISS AND TO
	)	COMPEL ARBITRATION
vs	)	
	)	
WANDO E, LLC AND SEAN BARNES	)	
A/K/A SEAN BARNES,	)	
	)	
Defendants	)	

Pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants respectfully move that the Court compel Cape Romain Contractors, Inc to comply with the dispute resolution procedures of the contract at issue and pursue mediation and arbitration, if necessary, as required by the contract

INTRODUCTION

In its complaint, Cape Romain Contractors claims that it has not been paid for work it performed under a dock construction contract with Defendant Sean Barnes.¹ Defendant Barnes disputes that Cape Romain performed its work completely or satisfactorily. On the contrary, the engineer for the project has identified a series of deficiencies in Cape Romain's performance.

The contract under which Cape Romain was performing is an AIA "Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope," AIA Document A107-2007. Cape Romain's representative initialed each page of the contract, including Page 6, where Article 5 of the contract governing "Dispute Resolution" provides:

For any claim subject to, but not resolved by, mediation pursuant to Section 21.3, the method of binding dispute resolution shall be as follows:

¹ Cape Romain has also named as a Defendant, Wando E LLC, the owner of the property for whom Defendant Barnes was building the dock, and asserts that Barnes "had authority from or acted rightly for the Defendant and owner Wando E LLC" (Complaint ¶5). Cape Romain has filed a lis pendens on the property to secure the recovery it seeks.

(Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved in a court of competent jurisdiction.)

☒ Arbitration pursuant to Section 21.4 of this Agreement

☐ Litigation in a court of competent jurisdiction

☐ Other (*Specify*)²

After the dispute concerning Cape Romain's performance arose, Defendant Barnes asked Cape Romain to proceed with mediation / arbitration as required by the contract, and Wando E has joined that request. Cape Romain has refused.

ARGUMENT

A The Action Should be Dismissed Because the Parties Chose Arbitration as Their Binding Dispute Resolution Mechanism

The contracting parties signed a standard AIA document and specifically checked the box stating that their disputes would be resolved by "Arbitration pursuant to Section 21.4 of this Agreement." They rejected the alternative in the contract of "Litigation in a court of competent jurisdiction." In light of their explicit choice, this action should be dismissed and the parties ordered to proceed with the dispute resolution procedures they chose in their contract.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 3354 (1985) ["Having made the bargain to arbitrate, the party should be held to it."]

Because the parties have chosen arbitration, rather than litigation, to resolve their dispute, this Court lacks jurisdiction over the subject matter of the dispute and the action should be dismissed pursuant to S.C.R. Civ. P. 12(b)(1). *Pavilion Development Corp. v. K-CON, Inc.*, No. 2001-CP-10-713, 2002 WL 34138292 (S.C. Cir. 2002). Attachment B. Likewise, because Cape

² The cited portions of the contract are attached for reference. Attachment A.

Romain fails to state facts sufficient to constitute a cause of action in this Court due to the arbitration clause, the action should be dismissed pursuant to S C R Civ P 12(b)(6)

The alternate dispute resolution sections of the contract, which provide for an initial mediation, followed by arbitration, cover all “Claims, disputes and other matters in question arising out of or relating to this Contract” Attachment A, Section 21.1 (emphasis added) Such clauses are broadly construed See Pavilion Development [“A clause providing for arbitration of all ‘disputes, controversies, or differences which may arise between [the parties] out of or in relation to [the contract between the parties]’ should be broadly construed ”] Attachment B at 3 (emphasis in original) Because the disputes between the parties relate to Cape Romain’s performance under the contract, the parties should be relegated to their freely-chosen, exclusive method of dispute resolution

Both federal and state policies favor arbitration when the parties have agreed in advance to resolve their disputes by arbitration *Herron v Century BMW*, 387 S C 525, 693 S E 2d 394 (2010) Because arbitration is favored over protracted litigation, “Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ” *Zabinski v Bright Acres Assocs* 346 S C 580 597 533 E 2d 110, 118 (2001) ³ A motion to compel arbitration pursuant to an arbitration clause in a written contract should only be denied when the clause is not susceptible of any interpretation that would cover the asserted dispute *Grant v Magnolia Manor-Greenwood Inc* , 383 S C 125, 129, 678 S E 2d 435, 437-38 (2009) ⁴

³ In order to expedite resolution of the dispute, Defendant Barnes offered Cape Romain the option of naming five candidates whom Barnes might consider as mediators before proceeding to arbitration (per the contract) Defendant Barnes has also offered to have any mediation / arbitration conducted locally instead of through the American Arbitration Association as permitted by the contract (See Attachment A § 21.4 [arbitration] unless the parties mutually agree otherwise shall be administered by the American Arbitration Association ’) To date Cape Romain has refused all such offers

⁴ Although the contract permits Cape Romain to preserve its mechanics lien by comply[ng] with the lien notice or filing deadlines’ (Attachment A, § 21.2), Cape Romain must honor the arbitration clause and pursue arbitration to determine its right to recovery on the lien *Pavilion Development Corp v K-CON Inc* No 2001-CP 10-713 2002 WL 34138292 (S C Cir 2002) [Mechanics lien clause only permits party to comply with filing deadline not to avoid arbitration] *Liberty Builders Inc v Horton* 336 S C 658, 521 S E 2d 749 754 (Ct. App 1999) See also

Arbitration clauses in standard AIA contracts are uniformly honored by the courts. By choosing arbitration as the ultimate dispute resolution mechanism, the parties recognize that they are trading “the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.” *Mitsubishi Motors Corp*, 473 U S at 628. The South Carolina Supreme Court regularly enforces AIA arbitration clauses. In *Episcopal Housing Corp v Fed Ins Co*, 269 S C 631, 239 S E 2d 647 (1977), the Supreme Court adopted the trial judge’s order finding that an AIA contract for the construction of an apartment building was enforceable pursuant to the Federal Arbitration Act. The FAA governed because it would be virtually impossible to construct an apartment building with materials, equipment and supplies all produced and manufactured within South Carolina. *Episcopal Housing*, 269 S C at 640, 239 S E 2d at 652. The same is true, of course, of the marina Cape Romain was building.

In *Osteen v T E Cuttino Const Co*, 315 S C 422, 434 S E 2d 281 (1993), the Supreme Court reversed the lower court for failing to enforce “an arbitration clause contained in a standard form construction contract” 315 S C at 423, 434 S E 2d at 282. The Court applied the Federal Arbitration Act to a standard AIA contract for construction of a residence. Likewise, in *Blanton v Stahos*, 351 S C 534, 570 S E 2d 565 (Ct App 2002), the court applied the Federal Arbitration Act and ordered the parties to a standard AIA contract for construction of a restaurant in Seneca to submit their dispute to arbitration. See also *Zeigler Const Co v Parkson Corp*, No 90-156, 1991 U S App LEXIS 12213 (4th Cir June 14, 1991) [requiring parties to standard AIA contract to submit their dispute over construction of a South Carolina wastewater treatment plant to arbitration]. The AIA arbitration clause should likewise be enforced here.

Mills v Robert W Godfried Inc 272 S 2d 837 (Fla Dist Ct App 1973) [Mechanics lien preserves right to recover if arbitration is successful] If an award is rendered for Cape Romain in the arbitration judgment may be entered upon it in accordance with applicable law (Attachment A § 21.4)

B The Quantum Meruit Cause of Action Should be Dismissed Because the Parties' Dispute Arises From a Written Contract

In paragraphs 1-12 of the complaint, which assert breach of contract and right to foreclose a mechanics lien, Cape Romain alleges that it and Defendant Barnes “entered into an agreement” for the disputed work (§4), that Defendant Barnes acted for Defendant Wando E, LLC (§5), that Wando E, LLC has made payments to Cape Romain for the contracted work (§6), and that there is a “balance due and owing to the Plaintiff upon the agreement” (§12)

In the Quantum Meruit cause of action, Cape Romain “reiterates and re-alleges the allegations contained in paragraphs 1 through 12 above as fully as if the same were set forth here verbatim” (§13) It then requests the same recovery amount (§15) as it did in the breach of contract claim (§7) for the same work (Compare §4 (Breach of Contract), with §14 (Quantum Meruit))

It is well settled that when a relationship is governed by an express contract, quantum meruit claims are barred *Swanson v Stratus*, 350 S C 116, 564 S E 2d 117, 122 (Ct App 2002) The third cause of action should be dismissed for this additional reason ⁵

CONCLUSION

For the reasons stated herein, Defendants respectfully request that the Court dismiss this action and compel Cape Romain to submit its claims to arbitration ⁶

⁵ Cape Romain is not entitled to a jury on its quantum meruit claim in any event Accordingly its jury demand should be stricken as to this claim

⁶ Any further proceeding on the mechanics lien issue should, at a minimum, be stayed or dismissed without prejudice to its refiling following the conclusion of arbitration The Federal Arbitration Act requires a stay of any pending litigation until such time as arbitration has been held 9 USC § 3 In support of judicial economy the Court may dismiss without prejudice rather than staying the action *Choice Hotels International Inc v BSR Tropicana Resort Inc* 252 F 3d 707, 709 (4th Cir 2001)

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Edward J. Westbrook", written over a horizontal line.

Edward J Westbrook
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Bldg A
Mount Pleasant, SC 29464
(843) 727-6513
ATTORNEY FOR DEFENDANTS

Charleston, South Carolina
April 20, 2011

ATTACHMENT A



AIA[®] Document A107[™] - 2007

Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope

AGREEMENT made as of the TWENTY-SIXTH day of JULY
in the year TWO THOUSAND AND TEN
(In words indicate day month and year)

BETWEEN the Owner
(Name address and other information)

SEAN BARNES

MT PLEASANT, SC 29465

PHONE (843) 209-8180

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

and the Contractor
(Name address and other information)

CAPE ROMAIN CONTRACTORS, INC

612 CAPE ROMAIN ROAD

WANDO, SC 29492

PHONE (843) 884-5167

for the following Project
(Name location and detailed description)

WANDO MARINA

LOCATED ON THE WANDO RIVER, NEAR CAENHOY, IN
BERKELEY COUNTY, SOUTH CAROLINA

* REFER TO THE ATTACHED SCOPE OF WORK (EXHIBIT #1) FOR
A DETAILED DESCRIPTION OF THE PROJECT AND ALL
WORK REQUIRED.

The Architect
(Name, address and other information)

ALL REFERENCE MADE TO THE "ARCHITECT" THROUGHOUT THIS
DOCUMENT SHALL MEAN THE "ENGINEER", JON GUERRY
TAYLOR AND ASSOCIATES, INC

JON GUERRY TAYLOR & ASSOCIATES, INC
761 COLEMAN BLVD, SUITE C
MT PLEASANT, SC 29464
PHONE: (843) 884-6415

The Owner and Contractor agree as follows

35

Init

TABLE OF ARTICLES

- 1 THE WORK OF THIS CONTRACT
- 2 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION
- 3 CONTRACT SUM
- 4 PAYMENT
- 5 DISPUTE RESOLUTION
- 6 ENUMERATION OF CONTRACT DOCUMENTS
- 7 GENERAL PROVISIONS
- 8 OWNER
- 9 CONTRACTOR
- 10 ARCHITECT
- 11 SUBCONTRACTORS
- 12 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS
- 13 CHANGES IN THE WORK
- 14 TIME
- 15 PAYMENTS AND COMPLETION
- 16 PROTECTION OF PERSONS AND PROPERTY
- 17 INSURANCE & BONDS
- 18 CORRECTION OF WORK
- 19 MISCELLANEOUS PROVISIONS
- 20 TERMINATION OF THE CONTRACT
- 21 CLAIMS AND DISPUTES

ARTICLE 1 THE WORK OF THIS CONTRACT

The Contractor shall execute the Work described in the Contract Documents except as specifically indicated in the Contract Documents to be the responsibility of others

ARTICLE 2 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 2.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner

(Insert the date of commencement if it differs from the date of this Agreement or if applicable state that the date will be fixed in a notice to proceed.)

DATE OF COMMENCEMENT SHALL BE NO LATER THAN ~~JUNE 16, 2010~~

AUGUST 16, 2010

MLK
7-23-10

§ 2.2 The Contract Time shall be measured from the date of commencement.

36

§ 4.2 FINAL PAYMENT

§ 4.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when

- 1 the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Section 18.2 and to satisfy other requirements, if any which extend beyond final payment
- 2 the contractor has submitted a final accounting for the Cost of the Work, where payment is on the basis of the Cost of the Work with or without a guaranteed maximum price and
- 3 a final Certificate for Payment has been issued by the Architect.

§ 4.2.2 The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment or as follows

ARTICLE 5 DISPUTE RESOLUTION

§ 5.1 BINDING DISPUTE RESOLUTION

For any claim subject to, but not resolved by mediation pursuant to Section 21.3, the method of binding dispute resolution shall be as follows

(Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved in a court of competent jurisdiction.)

☒ Arbitration pursuant to Section 21.4 of this Agreement

☐ Litigation in a court of competent jurisdiction

☐ Other (Specify)

ARTICLE 6 ENUMERATION OF CONTRACT DOCUMENTS

§ 6.1 The Contract Documents are defined in Article 7 and, except for Modifications issued after execution of this Agreement are enumerated in the sections below

§ 6.1.1 The Agreement is this executed AIA Document A107-2007 Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope

§ 6.1.2 The Supplementary and other Conditions of the Contract

Document	Title	Date	Pages
----------	-------	------	-------

REFER TO EXHIBIT #1, AND EXHIBIT #2
EXHIBIT #2 ENUMERATES ALL DRAWINGS FOR
THIS PROJECT (C1 THROUGH C16), WHICH SHALL ALL
BE PART OF THIS CONTRACT

§ 6.1.3 The Specifications

(Either list the Specifications here or refer to an exhibit attached to this Agreement)

Section	Title	Date	Pages
---------	-------	------	-------

ALL PROJECT SPECIFICATIONS ARE INCORPORATED
WITHIN THE PROJECT DRAWINGS.

37

from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination and damages

§ 20.2 TERMINATION BY THE OWNER FOR CAUSE

§ 20.2.1 The Owner may terminate the Contract if the Contractor

- 1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials
- 2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors
- 3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of a public authority or
- 4 otherwise is guilty of substantial breach of a provision of the Contract Documents

§ 20.2.2 When any of the above reasons exists, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may, without prejudice to any other remedy the Owner may have and after giving the Contractor seven days' written notice, terminate the Contract and take possession of the site and of all materials, equipment, tools and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 20.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 20.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 20.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

§ 20.3 TERMINATION BY THE OWNER FOR CONVENIENCE

The Owner may at any time terminate the Contract for the Owner's convenience and without cause. The Contractor shall be entitled to receive payment for Work executed and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

ARTICLE 21 CLAIMS AND DISPUTES

§ 21.1 Claims, disputes and other matters in question arising out of or relating to this Contract, including those alleging an error or omission by the Architect but excluding those arising under Section 16.2, shall be referred initially to the Architect for decision. Such matters, except those waived as provided for in Section 21.8 and Sections 15.5.3 and 15.5.4, shall, after initial decision by the Architect or 30 days after submission of the matter to the Architect, be subject to mediation as a condition precedent to binding dispute resolution.

§ 21.2 If a claim, dispute or other matter in question relates to or is the subject of a mechanic's lien, the party asserting such matter may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

§ 21.3 The parties shall endeavor to resolve their disputes by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with their Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing delivered to the other party to this Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 21.4 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any claim, subject to but not resolved by mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association, in accordance with the Construction Industry Arbitration Rules in effect on the date of this Agreement. Demand for arbitration shall be made in writing delivered to

the other party to the Contract, and filed with the person or entity administering the arbitration. The award rendered by the arbitrator or arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 21.5 Either party at its sole discretion may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 21.6 Any party to an arbitration may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described in the written Consent.

§ 21.7 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 21.8 CLAIMS FOR CONSEQUENTIAL DAMAGES

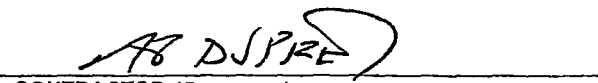
The Contractor and Owner waive claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 20. Nothing contained in this Section 21.8 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

This Agreement entered into as of the day and year first written above.


OWNER (Signature)


CONTRACTOR (Signature)


(Printed name and title)


(Printed name and title)

CAUTION: You should sign an original AIA Contract Document on which this text appears in PED. An original assures that changes will not be obscured.

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تحت

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PAVILION DEVELOPMENT)
CORPORATION,)

Plaintiff,)

vs)

K-CON, INC)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO 2001-CP-10-713

ORDER GRANTING K-CON'S
MOTION TO COMPEL
ARBITRATION

2002 OCT 24 PM 4 09
CLERK OF COURT

ED

This matter came before the court on motion by Defendant K-Con Inc (hereinafter "K-Con") to compel the arbitration of the above captioned action filed by the Plaintiff Pavilion Development Corporation (hereinafter "Pavilion"), asserting causes of action for the dissolution of the mechanics lien filed by K-Con, slander of title and abuse of process. A hearing was held on October 21, 2002 at which the Plaintiff was represented by William Hogan, Esquire of The Gilreath Law Firm, and the Defendant was represented by Michael C. Scarafale, Esquire of the McNair Law Firm. Following oral arguments and after a careful review of the evidence presented, by way of memorandum, exhibits, and the arguments of counsel, I find the following:

Procedural History

The Plaintiff filed this action on February 26, 2001 alleging causes of action for the dissolution of the mechanics lien filed by K-Con, slander of title and abuse of process. The Defendant, on March 16, 2001, filed its answer and counterclaim seeking to foreclose its mechanics lien and simultaneously moved to dismiss the complaint and stay

Aug 11

Charleston, 223470

the remaining counterclaims Following the denial of the Defendant's motion to dismiss, the Defendant filed this motion to compel arbitration on August 23, 2001 ¹

Findings of Fact

In March of 2000, the Plaintiff and Defendant entered into a contract for K-Con to provide Pavilion with architectural and engineering design work. Subsequently, on July 6, 2000, the parties entered into an AIA Contract for the design and construction of three condominium buildings containing 30 condominium units Following a dispute between the parties, the Defendant, on December 5, 2000, filed a mechanic's lien in the office of the RMC for Charleston County and a demand for arbitration with the American Arbitration Association under the terms of the contract entered into between the parties The Plaintiff then filed this action on February 26, 2001

Conclusions of Law

"The policy of the United States and this State is to favor arbitration of disputes " Heffner v Destiny, Inc., 321 S C 536, 537, 471 S E 2d 135, 136 (1995) Furthermore, a motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation that would cover the asserted dispute Towles v United Healthcare Corp., 338 S C 29, 524 S E 2d 839 (Ct App 1999) To determine whether an arbitration clause encompasses a dispute, the court must determine whether the factual allegations underlying the claims are within the scope of the arbitration clause, regardless of the legal label assigned to the claims Mitsubishi Motors Corp vs Sole Chrysler-Plymouth, Inc., 473 U S 614, 622, n 9

¹ The Plaintiff asserted the position that the issues in this motion to compel arbitration had previously been heard as part of the Defendant's motion to dismiss. However based upon a review of the Court of Appeals Order dated August 17, 2001 finding in agreement with the Plaintiff's position on appeal, that K Con had not moved to compel arbitration I find that this matter is properly before this Court.

(1985) A clause providing for arbitration of all "disputes, controversies, or differences which may arise between [the parties] out of or in relation to [the contract between the parties]" should be broadly construed Id. at 617 (emphasis added) Furthermore, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Zabinski vs Bright Acres Association, 346 S C 580, 533 S E 2d 110 (2001)

Paragraph 4 6 1 of the July 6, 2000 contract states that "[a]ny claim arising out of or related to the Contract, , shall, 30 days after submission of the claim, be subject to arbitration " Accordingly, I find that, as the only relationship between the parties is the one created by the above referenced contracts, the allegations raised in the Plaintiff's complaint fall within the scope of the arbitration clause contained in the contract

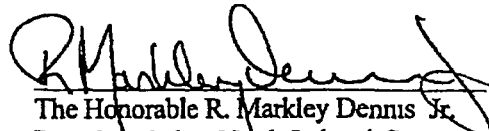
Furthermore, while paragraph 4 4 8 of the contract states that "[i]f a claim relates to or is the subject of a mechanic's lien, the party asserting such a Claim may proceed in accordance with the applicable law to comply with the lien notice or filing deadlines prior to the resolution of the Claim by mediation or by arbitration", I find that this provision merely permits the parties to comply with the statutory filing deadlines, as they may be necessary to protect a parties interests, and does not conflict with the provision requiring the arbitration of all issues

Additionally, once the court submits these claims to arbitration, it no longer has jurisdiction over this matter and must dismiss the pending litigation. See Plaza Dev Serv Vs Joe Harden Build. Inc., 296 S C 115, 370 S E 2d 893 (Ct. App 1988) (rev'd on other grounds) Therefore, as all claims asserted in this action are subject to arbitration, the court lacks subject matter jurisdiction over these claims and must dismiss them.

RMA/3

Conclusion

Accordingly, it is hereby ordered that the Plaintiff's complaint and the accompanying counterclaims filed by the Defendant are hereby dismissed and referred to binding arbitration pursuant to the terms of the agreements entered into by the parties


The Honorable R. Markley Dennis Jr.
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
October 23, 2002

my 13

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to Dismiss and to Compel Arbitration has been served upon the following counsel of record via Regular U S Mail this 20th day of April, 2011

Albert A LaCour, III
Clawson & Staubes
126 Seven Farms Drive, Suite 200
Charleston, SC 29492

ATTORNEY FOR NESS MOTLEY

RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC

By 

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011-CP-08-985
	)	
CAPE ROMAIN CONTRACTORS, INC ,	)	
	)	
Plaintiff,	)	RETURN OF CAPE ROMAIN
vs	)	CONTRACTORS, INC TO MOTION
	)	TO DISMISS AND COMPEL
WANDO E, LLC AND SEAN BARNES	)	ARBITRATION
A/K/A SEAN A BARNES,	)	
	)	
Defendants	)	
	)	

TO EDWARD J WESTBROOK, ESQUIRE, ATTORNEY FOR WANDO E, LLC AND SEAN BARNES A/K/A SEAN A BARNES

The Plaintiff, Cape Romain Contractors, Inc making Return to the Motion by the Defendants, Wando E, LLC and Sean Barnes a/k/a Sean A Barnes would show unto this Honorable Court

1 That the Defendant, Wando E, LLC, is not a party to any agreement with the Plaintiff and therefore lacks standing to make any claim, seek any interest under or enforce any rights under the agreement to which they are not a party An action on a contract may not be brought by one not a party to the contract Tidewater Supply Company, Inc v Industrial Electric Co., 253 S C 483, 171 S E 2d 607 (1969)

2 That the arbitration agreement which the Defendant Barnes seeks to enforce is not enforceable under the South Carolina Arbitration Act because the first page of the agreement does not contain the notice required by S C Code Ann §15-48-10(a) The statute requires that '[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed and underlined in 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 " In the absence of the statutory notice the arbitration clause is not enforceable under the state act Circle S v Stanley Smith, 288 S C 428, 343 S E 2d 45 (Ct App 1986), Timms v Greene, 310 S C 469, 427 S E 2d 642 (1993), Soil Remediation Company v Nu-Way Environmental, Inc 323 S C 454, 476 S E 2d 149 (1996)

3 That the arbitration agreement which Barnes seeks to enforce is also not enforceable under the Federal Arbitration Act While the Federal Act is enforceable in the state courts, the Federal Act only applies where the agreement evidences a transaction involving commerce Episcopal Housing Corporation v Federal Insurance Company 269 S C 631, 239 S E 2d 647 (1977) In the present case there is no interstate commerce sufficient to support the application of the Federal Act apparent from the face of the agreement Timms v Greene, supra, Matthews v Fluor Corporation, 312 S C 404, 440 S E 2d 880 (1994) The Affidavit of Anthony T DuPre, Jr attached hereto establishes facts to support the position of Cape Romain Contractors that the agreement before the Court does not contemplate any substantial relationship to interstate commerce on its face and therefore does not represent a sufficient nexus to commerce such as is necessary to support application of the Federal Act *CF* Episcopal Housing Corporation v Federal Insurance Company, supra and Oxford Construction, LLC v Weiss, et al, 2008-CP-10-1012 (Order of April 17, 2009, attached as Exhibit B")

4 That the portion of the Defendant s motion seeking dismissal of the claim for quantum meruit should be denied Relief under the quantum meruit cause of action is prayed for in the alternative A claimant may seek relief in the alternative of several different types SCRPC Rule 8(a) The case law cited by the Defendants in support of its position the cause of action should be dismissed actually supports Cape Romain's position

that quantum meruit may be an alternative claim in the event a claim in contract fails Swanson v Stratos, 350 S C at 122 In that particular case the court found that the express contract was in fact viable and enforceable and having so ruled, then the express agreement governs the rights of the parties and recovery cannot be had in quantum meruit 350 S C at 123 A ruling on the viability of the express agreement in the present case will not be obtained until the end of the trial or at least a ruling on a directed verdict or dismissal motion At this stage we do not even know whether the Defendants challenge the validity of the express agreement between the parties because the Defendants have not yet filed an answer It would be inappropriate to eliminate a potential remedy before the pleadings are closed and premature to rule on the applicability of the quantum meruit claim before ruling on the enforceability and validity of the express agreement

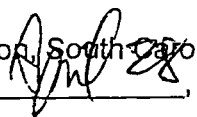
For the foregoing reasons, the Plaintiff respectfully submits that the Motion to Dismiss and/or Stay should be denied

CLAWSON & STAUBES, LLC



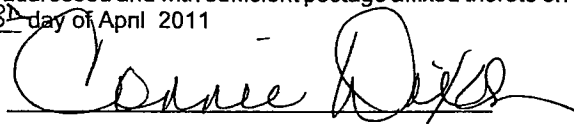
Albert A Lacour, III
126 Seven Farms Drive, Suite 200
Charleston South Carolina 29492-8144
(843) 577-2026

Attorney for the Plaintiff

Charleston, South Carolina
 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading has been served upon opposing counsel by mailing hand delivering or electronically forwarding a copy properly addressed and with sufficient postage affixed thereto on this 28th day of April 2011



SUPPORTING AFFIDAVIT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011-CP-08-985
	)	
CAPE ROMAIN CONTRACTORS, INC	)	
	)	
Plaintiff,	)	AFFIDAVIT OF
vs	)	ANTHONY T DUPRE, JR IN
	)	SUPPORT OF RETURN OF CAPE
WANDO E, LLC AND SEAN BARNES	)	ROMAIN CONTRACTORS, INC TO
A/K/A SEAN A BARNES,	)	MOTION TO DISMISS AND COMPEL
	)	ARBITRATION
Defendants	)	
	)	
	)	

Personally appeared before me, Anthony T DuPre, Jr , who being duly sworn,
deposes and says

1 That I am the President of Cape Romain Contractors, Inc and that I am personally familiar with the facts surrounding the negotiation and execution of the agreement attached hereto as Exhibit "A", and that I am personally familiar with the execution of the work in the field pursuant to the terms of the agreement

2 That the principal offices of Cape Romain Contractors and the property on which the work was done, are both located in the County of Berkeley That upon information and belief, Defendant Barnes resides and works in the County of Charleston, State of South Carolina and the design engineer for the project is located in the Town of Mt Pleasant, County of Charleston, State of South Carolina

3 That the agreement on its face does not require Cape Romain Contractors to furnish any materials whatsoever in the execution of the work The agreement is essentially a labor only contract for services to be performed by Cape Romain entirely within the County of Berkeley

4 That the agreement on its face does not contemplate any sub-contractors or suppliers to be engaged by Cape Romain

5 That the agreement on its face specifically contemplates that Cape Romain will pick up the concrete piling to be installed at Tekna Corporation of Charleston located within Charleston County, State of South Carolina

6 That the agreement on its face specifically provides that the dock materials to be furnished by the Defendant Barnes were to be delivered to the yard of Cape Romain Contractors for loading and transport by barge The yard of Cape Romain Contractors is located at its principal offices, in Berkeley County and the jobsite to which Cape Romain transported those materials by barge is also located within Berkeley County

7 That the agreement on its face requires Cape Romain to obtain appropriate business licenses from the County of Berkeley which are obtained within the county

8 That during the performance of the agreement, no interstate commerce was in fact involved in the installation of the piles and the dock sections, all of which occurred in Berkeley County

9 That during the performance of the agreement by Cape Romain, no interstate commerce was involved in fact because the materials were all delivered to Cape Romain's yard or delivered to the jobsite within Berkeley County or picked up by Cape Romain in Charleston County

10 That during performance of the agreement, no interstate commerce was involved in fact as the materials, the owner, the contractor, the jobsite, the engineer of record, and the permitting were all available in either the County of Charleston or the County of Berkeley

FURTHER AFFIANT SAYETH NOT

CAPE ROMAIN CONTRACTORS, INC

By Anthony T. DiPrei
Its President

SWORN AND SUBSCRIBED BEFORE
ME THIS 27 DAY OF April, 2011

Albert A. Rocco
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 10/7/2020

EXHIBIT A

AIA Document A107™ – 2007

Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope

AGREEMENT made as of the TWENTY-SIXTH day of JULY
in the year TWO THOUSAND AND TEN
(In words indicate day month and year)

BETWEEN the Owner
(Name address and other information)

SEAN BARNES --- --
--- --
MT PLEASANT, SC 29465
PHONE (843) 209-8186

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

and the Contractor
(Name address and other information)

CAPE ROMAIN CONTRACTORS, INC
612 CAPE ROMAIN ROAD
WANDO, SC 29492
PHONE. (843) 884-5167

for the following Project.
(Name location and detailed description)

WANDO MARINA

LOCATED ON THE WANDO RIVER, NEAR CAENHOY, IN
BERKELEY COUNTY, SOUTH CAROLINA

* REFER TO THE ATTACHED SCOPE OF WORK (EXHIBIT #1) FOR
A DETAILED DESCRIPTION OF THE PROJECT AND ALL
WORK REQUIRED

The Architect
(Name address and other information)

ALL REFERENCE MADE TO THE "ARCHITECT" THROUGHOUT THIS
DOCUMENT SHALL MEAN THE "ENGINEER", JON GUERRY
TAYLOR AND ASSOCIATES, INC

JON GUERRY TAYLOR & ASSOCIATES, INC
761 COLEMAN BLVD, SUITE C
MT PLEASANT, SC 29464
PHONE: (843) 884-6415

The Owner and Contractor agree as follows

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Handwritten initials/signature

TABLE OF ARTICLES

1	THE WORK OF THIS CONTRACT
2	DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION
3	CONTRACT SUM
4	PAYMENT
5	DISPUTE RESOLUTION
6	ENUMERATION OF CONTRACT DOCUMENTS
7	GENERAL PROVISIONS
8	OWNER
9	CONTRACTOR
10	ARCHITECT
11	SUBCONTRACTORS
12	CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS
13	CHANGES IN THE WORK
14	TIME
15	PAYMENTS AND COMPLETION
16	PROTECTION OF PERSONS AND PROPERTY
17	INSURANCE & BONDS
18	CORRECTION OF WORK
19	MISCELLANEOUS PROVISIONS
20	TERMINATION OF THE CONTRACT
21	CLAIMS AND DISPUTES

ARTICLE 1 THE WORK OF THIS CONTRACT

The Contractor shall execute the Work described in the Contract Documents except as specifically indicated in the Contract Documents to be the responsibility of others

ARTICLE 2 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 2.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner

(Insert the date of commencement if it differs from the date of this Agreement or if applicable state that the date will be fixed in a notice to proceed.)

DATE OF COMMENCEMENT SHALL BE NO LATER THAN ~~JULY 16, 2010~~ **AUGUST 16, 2010** *mkk 7/23/10*

§ 2.2 The Contract Time shall be measured from the date of commencement

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§ 2.3 The Contractor shall achieve Substantial Completion of the entire Work not later than (60) days from the date of commencement, or as follows
(Insert number of calendar days Alternatively a calendar date may be used when coordinated with the date of commencement If appropriate insert requirements for earlier Substantial Completion of certain portions of the Work.)

SUBSTANTIAL COMPLETION OF THE ENTIRE WORK SHALL BE NO LATER THAN SEPTEMBER 14, 2010 60 DAYS FROM RECEIPT OF WORK LINES #5 #4 ENTIRELY AT CRC YARD. ADJ

subject to adjustments of this Contract Time as provided in the Contract Documents
~~(Insert provisions if any for liquidated damages relating to failure to achieve Substantial Completion on time or for bonus payments for early completion of the Work.)~~

OWNER SHALL ENSURE TIMELY DELIVERY OF ALL MATERIALS TO THE CONTRACTOR. DELAYS IN MATERIAL DELIVERY MAY RESULT IN ADJUSTMENTS TO THE DATE FOR SUBSTANTIAL COMPLETION - AS STATED ABOVE

ARTICLE 3 CONTRACT SUM

§ 3.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor's performance of the Contract. The Contract Sum shall be one of the following
(Check the appropriate box.)

- ☒ Stipulated Sum, in accordance with Section 3.2 below
- ☐ Cost of the Work plus the Contractor's Fee in accordance with Section 3.3 below
- ☐ Cost of the Work plus the Contractor's Fee with a Guaranteed Maximum Price in accordance with Section 3.4 below

(Based on the selection above complete Section 3.2, 3.3 or 3.4 below)

§ 3.2 The Stipulated Sum shall be ONE HUNDRED AND SIXTY-FIVE THOUSAND Dollars (\$ 165,000.00) subject to additions and deletions as provided in the Contract Documents

§ 3.2.1 The Stipulated Sum is based upon the following alternates if any which are described in the Contract Documents and are hereby accepted by the Owner

(State the numbers or other identification of accepted alternates. If the bidding or proposal documents permit the Owner to accept other alternates subsequent to the execution of this Agreement attach a schedule of such other alternates showing the amount for each and the date when that amount expires.)

N/A

§ 3.2.2 Unit prices if any

(Identify and state the unit price and state the quantity limitations if any to which the unit price will be applicable.)

Item	Units and Limitations	Price per Unit
------	-----------------------	----------------

N/A

SHB
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3

§ 3.2.3 Allowances included in the stipulated sum if any
(Identify allowance and state exclusions if any from the allowance price)

Item

Allowance

N/A

§ 3.3 COST OF THE WORK PLUS CONTRACTOR'S FEE

§ 3.3.1 The Cost of the Work is as defined in Exhibit A, Determination of the Cost of the Work.

§ 3.3.2 The Contractor's Fee

(State a lump sum, percentage of Cost of the Work or other provision for determining the Contractor's Fee and the method of adjustment to the Fee for changes in the Work.)

N/A

§ 3.4 COST OF THE WORK PLUS CONTRACTOR'S FEE WITH A GUARANTEED MAXIMUM PRICE

§ 3.4.1 The Cost of the Work is as defined in Exhibit A, Determination of the Cost of the Work.

§ 3.4.2 The Contractor's Fee

(State a lump sum, percentage of Cost of the Work or other provision for determining the Contractor's Fee and the method of adjustment to the Fee for changes in the Work.)

N/A

§ 3.4.3 GUARANTEED MAXIMUM PRICE

§ 3.4.3.1 The sum of the Cost of the Work and the Contractor's Fee is guaranteed by the Contractor not to exceed Dollars (\$) subject to additions and deductions by changes in the Work as provided in the Contract Documents. Such maximum sum is referred to in the Contract Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Contractor without reimbursement by the Owner.
(Insert specific provisions if the Contractor is to participate in any savings.)

N/A

§ 3.4.3.2 The Guaranteed Maximum Price is based on the following alternates if any which are described in the Contract Documents and are hereby accepted by the Owner

N/A

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§ 3.4.3.3 Unit Prices if any

(Identify and state the unit price and state the quantity limitations if any to which the unit price will be applicable)

Item	Units and Limitations	Price per Unit
------	-----------------------	----------------

N/A

§ 3.4.3.4 Allowances included in the Guaranteed Maximum Price if any

(Identify and state the amounts of any allowances and state whether they include labor materials or both.)

Item	Allowance
------	-----------

N/A

§ 3.4.3.5 Assumptions if any on which the Guaranteed Maximum Price is based

N/A

ARTICLE 4 PAYMENTS

§ 4.1 PROGRESS PAYMENTS

§ 4.1.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents

§ 4.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month or as follows: OWNER SHALL PAY CONTRACTOR \$15,000.00 FOR MOBILIZATION PRIOR TO THE MOBILIZATION OF EQUIPMENT TO THE SITE. ALL OTHER PAYMENTS SHALL BE MADE IN ACCORDANCE WITH ARTICLES 4.1.3, 4.1.4, 4.1.5, AND 4.2 - AS INDICATED

§ 4.1.3 Provided that an Application for Payment is received by the Architect not later than the LAST day of a month, the Owner shall make payment of the certified amount to the Contractor not later than the 15th day of the FOLLOWING month. If an Application for Payment is received by the Architect after the date fixed above, payment shall be made by the Owner not later than 15 days after the Architect receives the Application for Payment (Federal, state or local laws may require payment within a certain period of time)

§ 4.1.4 Retainage if any shall be withheld as follows

10% RETAINAGE TO BE WITHHELD ON ALL PROGRESS PAYMENTS THROUGH PROJECT COMPLETION

§ 4.1.5 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below or in the absence thereof at the legal rate prevailing from time to time at the place where the Project is located (Insert rate of interest agreed upon, if any)

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§ 4.2 FINAL PAYMENT

§ 4.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when

- 1 the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Section 18.2 and to satisfy other requirements if any which extend beyond final payment,
- 2 the contractor has submitted a final accounting for the Cost of the Work, where payment is on the basis of the Cost of the Work with or without a guaranteed maximum price and
- 3 a final Certificate for Payment has been issued by the Architect.

§ 4.2.2 The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows

ARTICLE 5 DISPUTE RESOLUTION

§ 5.1 BINDING DISPUTE RESOLUTION

For any claim subject to but not resolved by mediation pursuant to Section 21.3 the method of binding dispute resolution shall be as follows

(Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below or do not subsequently agree in writing to a binding dispute resolution method other than litigation, claims will be resolved in a court of competent jurisdiction.)

☒ Arbitration pursuant to Section 21.4 of this Agreement

☐ Litigation in a court of competent jurisdiction

☐ Other (Specify)

ARTICLE 6 ENUMERATION OF CONTRACT DOCUMENTS

§ 6.1 The Contract Documents are defined in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated in the sections below

§ 6.1.1 The Agreement is this executed AIA Document A107-2007 Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope

§ 6.1.2 The Supplementary and other Conditions of the Contract

Document	Title	Date	Pages
	REFER TO EXHIBIT #1, AND EXHIBIT #2 EXHIBIT #2 ENUMERATES ALL DRAWINGS FOR THIS PROJECT (C1 THROUGH C16), WHICH SHALL ALL BE PART OF THIS CONTRACT		

§ 6.1.3 The Specifications

(Either list the Specifications here or refer to an exhibit attached to this Agreement)

Section	Title	Date	Pages
	ALL PROJECT SPECIFICATIONS ARE INCORPORATED WITHIN THE PROJECT DRAWINGS.		

§ 6 1 4 The Drawings

(Either list the Drawings here or refer to an exhibit attached to this Agreement)

Number	Title	Date
	SEE EXHIBIT #2 (ATTACHED) FOR LISTINGS OF ALL DRAWINGS FOR THIS PROJECT	
	* CONTRACTOR HAS BEEN FORWARDED PDF COPIES OF ALL FINAL DRAWINGS FOR THIS PROJECT (C1 THROUGH C16)	

§ 6 1 5 The Addenda if any

Number	Date	Pages
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Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are enumerated in this Article 6

§ 6 1 6 Additional documents if any forming part of the Contract Documents

- ~~1 Exhibit A Determination of the Cost of the Work, if applicable~~
- ~~2 AIA Document E201™ 2007 Digital Data Protocol Exhibit, if completed or the following~~
- 3 Other documents
(List here any additional documents that are intended to form part of the Contract Documents)
EXHIBIT #1 (DATED 6-3-10)
EXHIBIT #2 (LIST OF DRAWINGS; DATED 3-3-10)

ARTICLE 7 GENERAL PROVISIONS

§ 7 1 THE CONTRACT DOCUMENTS

The Contract Documents are enumerated in Article 6 and consist of this Agreement (including if applicable Supplementary and other Conditions of the Contract) Drawings Specifications Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement. A Modification is (1) a written amendment to the Contract signed by both parties (2) a Change Order (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary and what is required by one shall be as binding as if required by all. Performance by the Contractor shall be required to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

§ 7 2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Owner and the Contractor.

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§ 7.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents whether completed or partially completed, and includes all other labor materials equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

§ 7.4 INSTRUMENTS OF SERVICE

Instruments of Service are representations in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the Architect and the Architect's consultants under their respective professional services agreements. Instruments of Service may include without limitation, studies surveys models sketches drawings specifications and other similar materials.

§ 7.5 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE

§ 7.5.1 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service including the Drawings and Specifications and will retain all common law statutory and other reserved rights including copyrights. The Contractor Subcontractors Sub-subcontractors and material or equipment suppliers shall not own or claim a copyright in the Instruments of Service. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' reserved rights.

§ 7.5.2 The Contractor Subcontractors Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce the Instruments of Service provided to them solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice if any shown on the Instruments of Service. The Contractor Subcontractors Sub-subcontractors and material or equipment suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner Architect and the Architect's consultants.

§ 7.6 TRANSMISSION OF DATA IN DIGITAL FORM

If the parties intend to transmit Instruments of Service or any other information or documentation in digital form they shall endeavor to establish necessary protocols governing such transmission unless otherwise provided in the Agreement or in the Contract Documents.

ARTICLE 8 OWNER

§ 8.1 INFORMATION AND SERVICES REQUIRED OF THE OWNER

§ 8.1.1 The Owner shall furnish all necessary surveys and a legal description of the site.

§ 8.1.2 The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

§ 8.1.3 Except for permits and fees that are the responsibility of the Contractor under the Contract Documents including those required under Section 9.6.1 the Owner shall secure and pay for other necessary approvals easements assessments and charges required for the construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

§ 8.2 OWNER'S RIGHT TO STOP THE WORK

If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or repeatedly fails to carry out the Work in accordance with the Contract Documents the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof until the cause for such order is eliminated however the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

§ 8.3 OWNER'S RIGHT TO CARRY OUT THE WORK

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness the Owner without prejudice to any other remedy the Owner may have may correct such deficiencies and may deduct the reasonable cost thereof including Owner's expenses and compensation for the Architect's services made necessary thereby from the payment then or thereafter due the Contractor.

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ARTICLE 9 CONTRACTOR

§ 9.1 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

§ 9.1.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents

§ 9.1.2 Because the Contract Documents are complementary the Contractor shall before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 8.1.1 shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors omissions or inconsistencies in the Contract Documents however the Contractor shall promptly report to the Architect any errors inconsistencies, or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents

§ 9.1.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws statutes ordinances codes rules and regulations or lawful orders of public authorities but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require

§ 9.2 SUPERVISION AND CONSTRUCTION PROCEDURES

§ 9.2.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means methods techniques sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters

§ 9.2.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees Subcontractors and their agents and employees and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors

§ 9.3 LABOR AND MATERIALS

§ 9.3.1 Unless otherwise provided in the Contract Documents the Contractor shall provide and pay for labor materials equipment, tools construction equipment and machinery water heat, utilities transportation and other facilities and services necessary for proper execution and completion of the Work whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

§ 9.3.2 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

§ 9.3.3 The Contractor may make a substitution only with the consent of the Owner after evaluation by the Architect and in accordance with a Modification.

§ 9.4 WARRANTY

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects except for those inherent in the quality of the Work the Contract Documents require or permit. Work materials or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse alterations to the Work not executed by the Contractor improper or insufficient maintenance improper operation or normal wear and tear under normal usage

§ 9.5 TAXES

The Contractor shall pay sales consumer use and other similar taxes that are legally enacted when bids are received or negotiations concluded whether or not yet effective or merely scheduled to go into effect.

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§ 9 6 PERMITS FEES, NOTICES, AND COMPLIANCE WITH LAWS

§ 9 6 1 Unless otherwise provided in the Contract Documents the Contractor shall secure and pay for the building permit as well as other permits fees licenses and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded

§ 9 6 2 The Contractor shall comply with and give notices required by applicable laws statutes ordinances codes rules and regulations and lawful orders of public authorities applicable to performance of the Work. If the Contractor performs Work knowing it to be contrary to applicable laws statutes ordinances codes rules and regulations or lawful orders of public authorities the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction

§ 9 7 ALLOWANCES

The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents The Owner shall select materials and equipment under allowances with reasonable promptness Allowance amounts shall include the costs to the Contractor of materials and equipment delivered at the site and all required taxes less applicable trade discounts Allowance amounts shall not include the Contractor s costs for unloading and handling at the site labor installation overhead and profit

§ 9 8 CONTRACTOR'S CONSTRUCTION SCHEDULES

§ 9 8 1 The Contractor promptly after being awarded the Contract shall prepare and submit for the Owner s and Architect s information a Contractor s construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents shall be revised at appropriate intervals as required by the conditions of the Work and Project shall be related to the entire Project to the extent required by the Contract Documents and shall provide for expeditious and practicable execution of the Work.

§ 9 8 2 The Contractor shall perform the Work in general accordance with the most recent schedule submitted to the Owner and Architect.

§ 9 9 SUBMITTALS

§ 9 9 1 The Contractor shall review for compliance with the Contract Documents and submit to the Architect Shop Drawings Product Data Samples and similar submittals required by the Contract Documents in coordination with the Contractor s construction schedule and in such sequence as to allow the Architect reasonable time for review By submitting Shop Drawings Product Data, Samples and similar submittals the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them (2) determined and verified materials field measurements and field construction criteria related thereto or will do so and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents The Work shall be in accordance with approved submittals

§ 9 9 2 Shop Drawings Product Data, Samples and similar submittals are not Contract Documents

§ 9 10 USE OF SITE

The Contractor shall confine operations at the site to areas permitted by applicable laws statutes ordinances codes rules and regulations lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment

§ 9 11 CUTTING AND PATCHING

The Contractor shall be responsible for cutting fitting or patching required to complete the Work or to make its parts fit together properly

§ 9 12 CLEANING UP

The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials rubbish, the Contractor s tools construction equipment, machinery and surplus material from and about the Project.

§ 9 13 ROYALTIES, PATENTS AND COPYRIGHTS

The Contractor shall pay all royalties and license fees The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof but shall not

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be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings Specifications or other documents prepared by the Owner or Architect. However if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect

§ 9 14 ACCESS TO WORK

The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located

§ 9 15 INDEMNIFICATION

§ 9 15 1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner Architect, Architect's consultants and agents and employees of any of them from and against claims damages losses and expenses including but not limited to attorneys fees arising out of or resulting from performance of the Work, provided that such claim, damage loss or expense is attributable to bodily injury sickness disease or death or to injury to or destruction of tangible property (other than the Work itself) but only to the extent caused by the negligent acts or omissions of the Contractor a Subcontractor anyone directly or indirectly employed by them or anyone for whose acts they may be liable regardless of whether or not such claim, damage loss or expense is caused in part by a party indemnified hereunder Such obligation shall not be construed to negate abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 9 15 1

§ 9 15 2 In claims against any person or entity indemnified under this Section 9 15 by an employee of the Contractor a Subcontractor anyone directly or indirectly employed by them or anyone for whose acts they may be liable the indemnification obligation under Section 9 15 1 shall not be limited by a limitation on amount or type of damages compensation or benefits payable by or for the Contractor or Subcontractor under workers compensation acts disability benefit acts or other employee benefit acts

ARTICLE 10 ARCHITECT

§ 10 1 The Architect will provide administration of the Contract and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents unless otherwise modified in writing in accordance with other provisions of the Contract.

§ 10 2 The Architect will visit the site at intervals appropriate to the stage of the construction to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not have control over charge of or responsibility for the construction means methods techniques sequences or procedures or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents

§ 10 3 On the basis of the site visits the Architect will keep the Owner reasonably informed about the progress and quality of the portion of the Work completed and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor and (2) defects and deficiencies observed in the Work. The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor Subcontractors or their agents or employees or any other persons or entities performing portions of the Work.

§ 10 4 Based on the Architect's evaluations of the Work and of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts

§ 10 5 The Architect has authority to reject Work that does not conform to the Contract Documents and to require inspection or testing of the Work.

§ 10 6 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings Product Data and Samples but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents

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§ 10.7 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims disputes and other matters in question between the Owner and Contractor but will not be liable for results of any interpretations or decisions rendered in good faith.

§ 10.8 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

§ 10.9 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

ARTICLE 11 SUBCONTRACTORS

§ 11.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

§ 11.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of the Subcontractors or suppliers for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor or supplier to whom the Owner or Architect has made reasonable written objection within ten days after receipt of the Contractor's list of Subcontractors and suppliers. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

§ 11.3 Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by the Contract Documents, assumes toward the Owner and Architect, and (2) allow the Subcontractor the benefit of all rights, remedies and redress against the Contractor that the Contractor, by these Contract Documents, has against the Owner.

ARTICLE 12 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

§ 12.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such claim as provided in Article 21.

§ 12.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's activities with theirs as required by the Contract Documents.

§ 12.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

ARTICLE 13 CHANGES IN THE WORK

§ 13.1 By appropriate Modification, changes in the Work may be accomplished after execution of the Contract. The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, with the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construction Change Directive signed by the Owner and Architect.

§ 13.2 Adjustments in the Contract Sum and Contract Time resulting from a change in the Work shall be determined by mutual agreement of the parties or in the case of a Construction Change Directive signed only by the Owner and Architect, by the Contractor's cost of labor, material, equipment, and reasonable overhead and profit, unless the parties agree on another method for determining the cost or credit. Pending final determination of the total cost of a Construction Change Directive, the Contractor may request payment for Work completed pursuant to the Construction Change Directive. The Architect will make an interim determination of the amount of payment due for purposes of certifying the Contractor's monthly Application for Payment. When the Owner and Contractor agree on adjustments to the Contract Sum and Contract Time arising from a Construction Change Directive, the Architect will prepare a Change Order.

§ 13.3 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

§ 13.4 If concealed or unknown physical conditions are encountered at the site that differ materially from those indicated in the Contract Documents or from those conditions ordinarily found to exist, the Contract Sum and Contract Time shall be equitably adjusted as mutually agreed between the Owner and Contractor, provided that the Contractor provides notice to the Owner and Architect promptly and before conditions are disturbed.

ARTICLE 14 TIME

§ 14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 14.2 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

§ 14.3 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

§ 14.4 The date of Substantial Completion is the date certified by the Architect in accordance with Section 15.4.3.

§ 14.5 If the Contractor is delayed at any time in the commencement or progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine, subject to the provisions of Article 21.

ARTICLE 15 PAYMENTS AND COMPLETION

§ 15.1 APPLICATIONS FOR PAYMENT

§ 15.1.1 Where the Contract is based on a Stipulated Sum or the Cost of the Work with a Guaranteed Maximum Price, the Contractor shall submit to the Architect, before the first Application for Payment, a schedule of values allocating the entire Contract Sum to the various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used in reviewing the Contractor's Applications for Payment.

§ 15.1.2 With each Application for Payment where the Contract Sum is based upon the Cost of the Work, or the Cost of the Work with a Guaranteed Maximum Price, the Contractor shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and any other evidence required by the Owner to demonstrate that cash disbursements already made by the Contractor on account of the Cost of the Work equal or exceed (1) progress payments already received by the Contractor, less (2) that portion of those payments attributable to the Contractor's Fee, plus (3) payrolls for the period covered by the present Application for Payment.

§ 15.1.3 Payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment stored and protected from damage off the site at a location agreed upon in writing.

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§ 15 1 4 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall to the best of the Contractor's knowledge, information and belief be free and clear of liens, claims, security interests or other encumbrances adverse to the Owner's interests.

§ 15 2 CERTIFICATES FOR PAYMENT

§ 15 2 1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 15 2 3.

§ 15 2 2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner based on the Architect's evaluations of the Work and the data comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

§ 15 2 3 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Section 15 2 2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Section 15 2 1. If the Contractor and the Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 9 2 2, because of:

- 1 defective Work not remedied
- 2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor
- 3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment
- 4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum
- 5 damage to the Owner or a separate contractor
- 6 reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or
- 7 repeated failure to carry out the Work in accordance with the Contract Documents

§ 15 2 4 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

§ 15 3 PROGRESS PAYMENTS

§ 15 3 1 The Contractor shall pay each Subcontractor no later than seven days after receipt of payment, the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to sub-subcontractors in similar manner.

§ 15 3 2 Neither the Owner nor Architect shall have an obligation to pay or see to the payment of money to a Subcontractor except as may otherwise be required by law.

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§ 15 3 3 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents

§ 15 4 SUBSTANTIAL COMPLETION

§ 15 4 1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use

§ 15 4 2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately is substantially complete the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents

§ 15 4 3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. When the Architect determines that the Work or designated portion thereof is substantially complete the Architect will issue a Certificate of Substantial Completion which shall establish the date of Substantial Completion, establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§ 15 4 4 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payments shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

§ 15 5 FINAL COMPLETION AND FINAL PAYMENT

§ 15 5 1 Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions stated in Section 15 5 2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

§ 15 5 2 Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including costs and reasonable attorneys' fees.

15 5 3 The making of final payment shall constitute a waiver of claims by the Owner except those arising from

- 1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled
- 2 failure of the Work to comply with the requirements of the Contract Documents, or
- 3 terms of special warranties required by the Contract Documents - - -

§ 15 5 4 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

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ARTICLE 16 PROTECTION OF PERSONS AND PROPERTY

§ 16 1 SAFETY PRECAUTIONS AND PROGRAMS

The Contractor shall be responsible for initiating maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of and shall provide reasonable protection to prevent damage injury or loss to

- 1 employees on the Work and other persons who may be affected thereby
- 2 the Work and materials and equipment to be incorporated therein whether in storage on or off the site under care custody or control of the Contractor or the Contractor's Subcontractors or Subsubcontractors and
- 3 other property at the site or adjacent thereto such as trees shrubs lawns walks pavements roadways structures and utilities not designated for removal relocation or replacement in the course of construction

The Contractor shall comply with and give notices required by applicable laws statutes ordinances codes rules and regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage injury or loss. The Contractor shall promptly remedy damage and loss to property caused in whole or in part by the Contractor a Subcontractor a sub-subcontractor or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 16 1 2 and 16 1 3 except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 9 15.

§ 16 2 HAZARDOUS MATERIALS

§ 16 2 1 The Contractor is responsible for compliance with the requirements of the Contract Documents regarding hazardous materials. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance including but not limited to asbestos or polychlorinated biphenyl (PCB) encountered on the site by the Contractor, the Contractor shall upon recognizing the condition immediately stop Work in the affected area and report the condition to the Owner and Architect in writing. When the material or substance has been rendered harmless Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shutdown delay and start-up.

§ 16 2 2 To the fullest extent permitted by law the Owner shall indemnify and hold harmless the Contractor Subcontractors Architect Architect's consultants and agents and employees of any of them from and against claims damages losses and expenses including but not limited to attorneys' fees arising out of or resulting from performance of the Work in the affected area, if in fact, the material or substance presents the risk of bodily injury or death as described in Section 16 2 1 and has not been rendered harmless provided that such claim, damage loss or expense is attributable to bodily injury sickness disease or death or to injury to or destruction of tangible property (other than the Work itself) except to the extent that such damage loss or expense is due to the fault or negligence of the party seeking indemnity.

§ 16 2 3 If without negligence on the part of the Contractor the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

ARTICLE 17 INSURANCE AND BONDS

§ 17 1 The Contractor shall purchase from, and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, insurance for protection from claims under workers' compensation acts and other employee benefit acts which are applicable claims for damages because of bodily injury including death and claims for damages other than to the Work itself to property which may arise out of or result from the Contractor's operations and completed operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than limits of liability specified in the Contract Documents or required by law whichever coverage is greater and shall include contractual liability insurance applicable to the Contractor's obligations under Section 9 15. Certificates of Insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. Each policy shall contain a provision that the policy will not be canceled or allowed to expire until at least 30 days prior written notice has been given to the Owner. The Contractor shall cause the commercial liability coverage required by the Contract

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Documents to include (1) the Owner the Architect and the Architect s Consultants as additional insureds for claims caused in whole or in part by the Contractor s negligent acts or omissions during the Contractor s operations and (2) the Owner as an additional insured for claims caused in whole or in part by the Contractor s negligent acts or omissions during the Contractor s completed operations

§ 17 2 OWNER'S LIABILITY INSURANCE

The Owner shall be responsible for purchasing and maintaining the Owner s usual liability insurance

§ 17 3 PROPERTY INSURANCE

§ 17 3 1 Unless otherwise provided the Owner shall purchase and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located property insurance on an all risk or equivalent policy form, including builder s risk, in the amount of the initial Contract Sum, plus the value of subsequent modifications and cost of materials supplied and installed by others comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance until final payment has been made as provided in Section 15 5 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 17 3 1 to be covered, whichever is later. This insurance shall include interests of the Owner the Contractor Subcontractors and sub subcontractors in the Project.

§ 17 3 2 The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be canceled or allowed to expire and that its limits will not be reduced, until at least 30 days prior written notice has been given to the Contractor.

§ 17 3 3 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors sub subcontractors agents and employees each of the other and (2) the Architect, Architect s consultants separate contractors described in Article 12 if any and any of their subcontractors sub subcontractors agents and employees for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to Section 17 3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor as appropriate shall require of the Architect, Architect s consultants separate contractors described in Article 12 if any and the subcontractors sub subcontractors agents and employees of any of them, by appropriate agreements written where legally required for validity similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise did not pay the insurance premium directly or indirectly and whether or not the person or entity had an insurable interest in the property damaged.

§ 17 3 4 A loss insured under the Owner s property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds as their interests may appear subject to requirements of any applicable mortgagee clause. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor and by appropriate agreements written where legally required for validity shall require Subcontractors to make payments to their sub-subcontractors in similar manner.

§ 17 4 PERFORMANCE BOND AND PAYMENT BOND

§ 17 4 1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

§ 17 4 2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

ARTICLE 18 CORRECTION OF WORK

§ 18 1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents whether discovered before or after Substantial Completion and whether or not fabricated installed or completed. Costs of correcting such rejected Work, including additional testing and inspections the cost of uncovering and replacement, and compensation for the Architect s services and expenses made necessary thereby shall

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be at the Contractor's expense unless compensable under Section A 2 7 3 in Exhibit A Determination of the Cost of the Work

§ 18 2 In addition to the Contractor's obligations under Section 9 4 if within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 15 4 3 or by terms of an applicable special warranty required by the Contract Documents any of the Work is found to be not in accordance with the requirements of the Contract Documents the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty

§ 18 3 If the Contractor fails to correct nonconforming Work within a reasonable time the Owner may correct it in accordance with Section 8 3

§ 18 4 The one year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual completion of that portion of the Work.

§ 18 5 The one year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Article 18

ARTICLE 19 MISCELLANEOUS PROVISIONS

§ 19 1 ASSIGNMENT OF CONTRACT

Neither party to the Contract shall assign the Contract without written consent of the other except that the Owner may without consent of the Contractor assign the Contract to a lender providing construction financing for the Project if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

§ 19 2 GOVERNING LAW

The Contract shall be governed by the law of the place where the Project is located, except, that if the parties have selected arbitration as the method of binding dispute resolution the Federal Arbitration Act shall govern Section 21 4

§ 19 3 TESTS AND INSPECTIONS

Tests inspections and approvals of portions of the Work required by the Contract Documents or by applicable laws statutes ordinances codes rules and regulations or lawful orders of public authorities shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests inspections and approvals with an independent testing laboratory or entity acceptable to the Owner or with the appropriate public authority and shall bear all related costs of tests inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of (1) tests inspections or approvals that do not become requirements until after bids are received or negotiations concluded and (2) of tests inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating the costs to the Contractor

§ 19 4 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

The Owner and Contractor shall commence all claims and causes of action whether in contract, tort, breach of warranty or otherwise against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 19 4

ARTICLE 20 TERMINATION OF THE CONTRACT

§ 20 1 TERMINATION BY THE CONTRACTOR

If the Architect fails to certify payment as provided in Section 15 2 1 for a period of 30 days through no fault of the Contractor or if the Owner fails to make payment as provided in Section 4 1 3 for a period of 30 days the Contractor may upon seven additional days written notice to the Owner and the Architect, terminate the Contract and recover

from the Owner payment for Work executed including reasonable overhead and profit, costs incurred by reason of such termination and damages

§ 20.2 TERMINATION BY THE OWNER FOR CAUSE

§ 20.2.1 The Owner may terminate the Contract if the Contractor

- 1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials
- 2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors
- 3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of a public authority or
- 4 otherwise is guilty of substantial breach of a provision of the Contract Documents

§ 20.2.2 When any of the above reasons exists, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may, without prejudice to any other remedy the Owner may have and after giving the Contractor seven days' written notice, terminate the Contract and take possession of the site and of all materials, equipment, tools and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

§ 20.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 20.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 20.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

§ 20.3 TERMINATION BY THE OWNER FOR CONVENIENCE

The Owner may at any time terminate the Contract for the Owner's convenience and without cause. The Contractor shall be entitled to receive payment for Work executed and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

ARTICLE 21 CLAIMS AND DISPUTES

§ 21.1 Claims, disputes and other matters in question arising out of or relating to this Contract, including those alleging an error or omission by the Architect but excluding those arising under Section 16.2, shall be referred initially to the Architect for decision. Such matters, except those waived as provided for in Section 21.8 and Sections 15.5.3 and 15.5.4, shall, after initial decision by the Architect or 30 days after submission of the matter to the Architect, be subject to mediation as a condition precedent to binding dispute resolution.

§ 21.2 If a claim, dispute or other matter in question relates to or is the subject of a mechanic's lien, the party asserting such matter may proceed in accordance with applicable law to comply with the lien notice or filing deadlines.

§ 21.3 The parties shall endeavor to resolve their disputes by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with their Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing delivered to the other party to this Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 21.4 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any claim, subject to but not resolved by mediation, shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with the Construction Industry Arbitration Rules in effect on the date of this Agreement. Demand for arbitration shall be made in writing delivered to

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the other party to the Contract, and filed with the person or entity administering the arbitration. The award rendered by the arbitrator or arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof

§ 21.5 Either party at its sole discretion may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s)

§ 21.6 Any party to an arbitration may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described in the written Consent

§ 21.7 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof

§ 21.8 CLAIMS FOR CONSEQUENTIAL DAMAGES

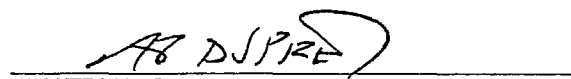
The Contractor and Owner waive claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

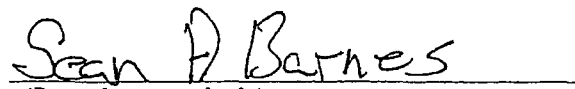
- 1 damages incurred by the Owner for rental expenses for losses of use income profit, financing business and reputation and for loss of management or employee productivity or of the services of such persons and
- 2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there for losses of financing business and reputation and for loss of profit except anticipated profit arising directly from the Work

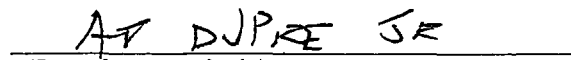
This mutual waiver is applicable without limitation to all consequential damages due to either party's termination in accordance with Article 20. Nothing contained in this Section 21.8 shall be deemed to preclude an award of liquidated damages when applicable in accordance with the requirements of the Contract Documents

This Agreement entered into as of the day and year first written above


OWNER (Signature)


CONTRACTOR (Signature)


(Printed name and title)

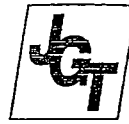

(Printed name and title)

CAUTION You should sign an original AIA Contract Document on which this text appears in RED. An original assures that changes will not be obscured

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**Jon Guerry Taylor
& Associates, Inc**

ENGINEERS PLANNERS ENVIRONMENTAL CONSULTANTS

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PHONE 843 884 6415
FAX 843 884 4026
www.jgtinc.com

Date June 3 2010

Sean Barnes, Docks Unlimited, Inc
Sonny DuPre Cape Romain Contractors Inc

RE Wando Marina -- Scope Of Work for Contract agreement

EXHIBIT #1

The follow Scope Of Work describes the work that shall be required for this project

1 Contract amount \$165,000 00

Includes all work by Cape Romain Contractors Inc (CRC) involving complete assembly and installation of the fixed aluminum walkway and pierhead deck units, which will include driving of all timber piles for fixed walkway and pierhead, installation and bolting of all timber split pile caps and aluminum header angles timber cross-bracing as called for on the plans and all misc attachments and connections of the above mentioned work items Floating dock assembly and installation including installation of all concrete piling, and installation of aluminum gangway shall also be completed as part of the work for this project at the above-mentioned contract price *(Concrete piling will be loaded onto CRC s barge at TEKNA Corp of Charleston and transported to the project site by CRC)* Owner shall provide all materials, deck units dock units, gangway piles and hardware for the project.

\$15 000 for mobilization will be payable in advance of mobilizing equipment The remaining \$150 000 will be invoiced by CRC at the end of each month based on a percentage of work completed at that time to be determined and approved at the time of invoicing

2 CRC shall be responsible for hauling all materials and fabricated items from Docks Unlimited, Inc to the CRC yard for loading and transport by barge and other equipment as necessary to the project site Materials and fabricated items include but may not be limited to aluminum floating dock units aluminum fixed pier walkway and pierhead deck units, aluminum gangway timber piles concrete piles and all other related materials and hardware for the complete installation of these items for this project.

3 CRC excludes furnishing Bonds for the project CRC excludes any and all engineering or permitting All necessary permits are to be furnished by the Owner in advance of CRC mobilizing to the project site

4 CRC shall be responsible for obtaining and maintaining property and liability insurance upon the Work at the site Workers Compensation (statutory) 'all-risk' insurance coverage, Longshoreman s Insurance as required, and other as may be required by Article 17 of AIA Document A107 2007 CRC shall list the Owner and Engineer as an insured or additional insured.

5 CRC shall be responsible for obtaining relevant business licenses for Berkeley County, or other, as may be required for the project

CRC has 5% of contract budgeted for licenses/permits IF permits or licenses required exceed 5% of the contract amount w/it be adjusted accordingly

SPB

ADH

- 6 CRC plans to use a D30 Delmag single-acting diesel hammer to drive the piles Jetting may be allowed for initial 'set' of the piles but only as directed and approved by the Engineer
- 7 CRC shall be prepared to start work for the project by no later than July 16 2010 Some materials and fabricated items for the project will be arriving prior to this date and will either be delivered to CRC's yard upon receipt by the Owner, or may be picked up by CRC and hauled to CRC's yard.
- 8 CRC shall be responsible for taking all precautions necessary to ensure that damage does not occur to the new fixed pier deck units and/or floating dock units during construction Plastic sheeting and/or plywood should be used to cover the surface of the fixed pier deck units and floating dock units to protect them from damage if used for access during construction. Contractor shall coordinate the use of protective measures with the Owner and Engineer and shall ensure that the protection measures are in place and properly functioning throughout the duration of the project. Contractor shall be responsible for the repair or replacement of materials or items damaged during construction/assembly/installation.
- 9 Contractor shall proceed continuously with all work until the project is complete

A handwritten signature in black ink, appearing to be 'JGT', located in the bottom right corner of the page.

EXHIBIT #2

CONSTRUCTION DOCUMENTS

WANDO MARINA (HWY 41) BERKELEY COUNTY, SOUTH CAROLINA

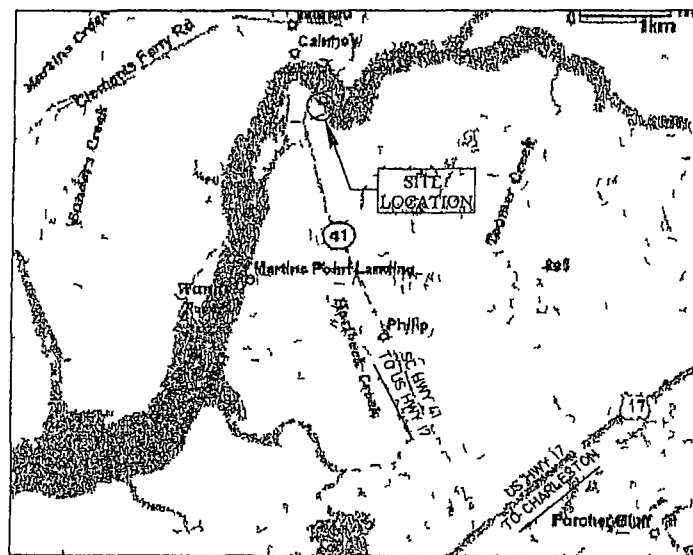
DRAWING INDEX

DESCRIPTION	DRAWING NUMBER
TITLE SHEET	T1
OVERALL PROJECT SITE PLAN & KEY SHEET	C1
MARINA LAYOUT PLAN	C2
FIXED PIER LAYOUT PLAN, PROFILE, DETAILS, SECTIONS & NOTES	C3
FIXED PIER DECK UNIT SHOP DRAWING DETAILS	C4
FIXED PIER HANDRAIL SHOP DRAWING DETAILS & TYPICAL SECTION	C5
CONCRETE PILE LAYOUT AND SIZE SPECIFICATION SHEET	C6
FLOATING DOCK FABRICATION AND PEDESTAL LOCATION KEY SHEET (FOR SHOP DRAWINGS)	C7
SHOP DRAWINGS FOR FLOATING DOCK FRAMING (DOCK W/ 18 PILES)	C8
SHOP DRAWING DETAILS FOR FLOATING DOCK FRAMING (DOCK W/ 14 PILES)	C9
SHOP DRAWING DETAILS FOR FLOATING DOCK FRAMING (SPECIAL GANGWAY LANDING DOCK UNIT)	C10
PILE GUIDE MOUNTING FRAME FABRICATION DETAILS	C11
PILE GUIDE FABRICATION DETAILS	C12
ALUMINUM GANGWAY FABRICATION DETAILS SECTIONS AND NOTES	C13
ALUMINUM GANGWAY HINGE AND ROLLER FABRICATION DETAILS	C14
MISC FABRICATION DETAILS FOR FIXED PIER AND FLOATING DOCK	C15
FLOATING DOCK FLOTATION UNIT LAYOUT SHEET	C16

ISSUE DATE

03 03 10

REVISION DATE



PROJECT LOCATION PLAN



**Jon Guerry Taylor
& Associates, Inc.**

ENGINEERS PLANNERS & ENVIRONMENTAL CONSULTANTS

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EMAIL: INFO@JGTINC.COM WEB: WWW.JGTINC.COM

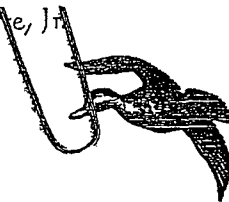


WANDO MARINA (HWY 41) BERKELEY COUNTY, SOUTH CAROLINA

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Cape Romain Contractors, Inc

612 CAPE ROMAIN ROAD
WANDO, SC 29492

TELEPHONE 843-884-516
FAX 843-884-0516

July 8, 2010

Jon Guerry Taylor & Associates, Inc
761 Coleman Blvd Suite C
Mt Pleasant, SC 29464

Attn Mike Kirby P E
RE Wando Marina

Dear Mike,

We have executed the enclosed AIA contract for the Wando Marina. Thanks for your help in getting this document together

I hope it is ok, as I took the liberty of changing the Substantial Completion under 2.3 to read "60 days from the receipt of dock lines #4 and #5 entirely at CRC yard". Being that dock fabrication seems to have been delayed somewhat, I thought this would be a fair approach

Also as discussed, I added onto item #5 of your exhibit #1, concerning permit/license fees

Please call with any questions

Sincerely,

Anthony T DuPre
President
Cape Romain Contractors, Inc

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

OXFORD CONSTRUCTION, LLC,

Plaintiff,

v

MARK WEISS and PAULETTE
MARIE LAMBERT, n/k/a Paulette
Lambert Weiss,

Defendants

MARK WEISS and PAULETTE
MARIE LAMBERT n/k/a Paulette
Lambert Weiss

Third-Party Plaintiff,

v

CHRISTOPHER BENSON, RAY HUFF
and HUFF + GOODEN ARCHITECTS,
LLC,

Third-Party Defendants

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO 2008-CP-10-1012

**ORDER DENYING DEFENDANT'S
MOTION TO COMPEL ARBITRATION**

BY _____

JULIE J ARMSTRONG
CLERK OF COURT

2009 APR 17 AM 9:45

FILED

This matter came before the Court on March 4, 2009 at 3 00 p m on the Motion of the Defendants, Wark Weiss and Paulette Marie Lambert, n/k/a Paulette Lambert Weiss, to compel arbitration The Defendants' Motion is supported by the Affidavit of Paulette Lambert, the Memorandum of Law, and copies of the agreement and general conditions containing the agreement to arbitrate

MOT 1

The Plaintiff filed a Return to the Motion, which included the case law relied upon by Plaintiff, a supporting Affidavit of Christopher Benson, and a Supplemental Affidavit of Benson responsive to the Affidavit of Lambert

The issue before the Court is whether the Arbitration Agreement between the parties is enforceable under either the SC Uniform Arbitration Act or the Federal Arbitration Act

As to the state act, all parties concede that the notice required by S C Code Ann §15-48-10 (a) does not appear on the first page of the contract. The arbitration agreement may therefore not be enforced under the state act. Timms v Greene 310 S C 469, 427 S E 2nd 642 (1993), Soil Remediation v Nu-way Environment, 323 S C 454, 476 S E 2nd 149 (1996)

Turning to the Federal Act, the Defendants must establish four elements to enforce the arbitration agreement under the Federal Act: (1) there must be a written provision for arbitration in the agreement, (2) the contract must evidence a transaction involving commerce, (3) there must be an arbitrable issue pursuant to the written arbitration agreement, and (4) the moving party must not be in default in doing so. See Episcopal Housing Corporation v Federal Insurance Company, 269 S C 131, 239 S E 2nd 647 at 650 (1977). The Plaintiff raises no issue as to the first, third, and fourth elements, and contests the Motion on the grounds of the absence of the required interstate commerce.

The Defendants' position is that interstate commerce is sufficiently present in the transaction to trigger the power of the federal government to regulate commerce between the states and with foreign nations. Defendants cite Episcopal Housing *supra* and New Hope Missionary Baptist Church v Paragon Builders, 379 S C 620, 667 S E 2d 1 (Ct App 2008) in support of Defendants' position.

NOT 2

The Plaintiff's position is that while the decision in Episcopal Housing can be read as broadly as Defendants urge, the more recent decisions by our Supreme Court have limited Episcopal Housing to contracts that on their face clearly require activities by the parties that involve interstate commerce

I find and conclude that Episcopal Housing, *supra* is distinguishable as the agreement there did expressly require the involvement of interstate commerce I further find and conclude that New Hope Missionary Baptist Church v. Paragon Builders is distinguishable from the present case because the issue in New Hope was whether there existed a valid, enforceable contract between the parties and is further distinguishable because the contractor in New Hope submitted an affidavit that confirmed the express terms of the agreement involved interstate commerce in fact

I have reviewed the Complaint, the facts as set forth in the Affidavits of the parties, and the express terms of the agreement I find that the express terms of the agreement before the Court do not involve interstate commerce, as I am unable to discern any activity involving interstate commerce which is required by the terms of the agreement Timms v. Greene, *supra*, Mathews v. Fluor Corporation, 312 S. C. 404, 440 S. E. 2d 880 (1994) I conclude that there exists no nexus between the contract and interstate commerce sufficient to activate application of the Federal Act Accordingly, the Defendants' Motion to Compel Arbitration is DENIED


The Honorable R. Markley Dennis, Jr.
Chief Administrative Judge
Ninth Judicial Circuit

Charleston, South Carolina

4/16, 2009

ATTEST A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK CP, GS & FC
By 
DEPUTY CLERK

NOT 3

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
CAPE ROMAIN CONTRACTORS, INC ,)
Plaintiff,)
vs)
WANDO E, LLC AND SEAN BARNES)
A/K/A SEAN BARNES,)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO 2011-CP-08-985

DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO DISMISS AND
COMPEL ARBITRATION

2011 MAY 1 PM 12 35
FILED
CLERK OF COURT
BERKELEY COUNTY SC
COPY

Introduction

In July 2010, Cape Romain, a sophisticated maritime contractor, signed a \$165,000 standard AIA contract for the assembly and installation of the walkways, pierhead, piling, and floating docks for Wando E's marina on the Wando River. Defendant Sean Barnes was the general contractor for the project. Cape Romain knew that the dock sections were being fabricated in Ohio and their delivery to the Wando marina site required Cape Romain to pick up the sections from Defendant Barnes' Mount Pleasant shop (where he was adding decking and floats), and transport them by barge from Cape Romain's North Charleston yard through Charleston Harbor and up the Wando River.

Having accepted substantial benefits under the contract, including payments of over \$70,000¹, Cape Romain now attempts to refute its agreement to arbitrate all "[c]laims, disputes and other matters in question arising out of or relating to this Contract" (Contract § 21.1). Cape Romain makes two claims to avoid arbitration. First, it asserts that Wando E cannot seek to compel arbitration because Cape Romain signed the agreement to arbitrate only with Defendant Barnes. Second, Cape Romain contends that the arbitration agreement is

¹ See Affidavit of Sean Barnes ¶8 (Attach 3)

unenforceable because the contract does not affect interstate commerce to invoke the Federal Arbitration Act (FAA) ² Both contentions are incorrect

As Defendants will show, it is well settled that where there a close relationship exists between a party signing an arbitration clause and another party, the other party can enforce the arbitration clause Moreover, this contract for maritime construction on navigable waters involving both instrumentalities of interstate commerce and affecting interstate commerce is clearly enforceable under the Federal Arbitration Act

I Wando E, LLC Can Enforce the Arbitration Clause Against Cape Romain

Cape Romain does not dispute that if the arbitration agreement is enforceable, it must arbitrate with Defendant Barnes But Cape Romain contends that Wando E cannot be a party to that arbitration because it is “not a party to the contract ” (Cape Romain Return, ¶1) Cape Romain’s position is wrong on the law and inadvisable as a matter of policy

Because of the strong federal policy favoring arbitration, arbitration agreements can be enforced by non-signatory parties against signatories when the claims against the non-signatories “are based on the same alleged facts underlying claims against a party to the agreement ”

Hinson v Jusco Co Ltd , 868 F Supp 145, 149 (D S C 1994) (Norton, C J) Courts have noted that when intertwined claims are brought against related parties, one of whom signed an arbitration agreement, it makes little sense to have those disputes separated into two forums A typical scenario in which this arises is in claims involving a parent and subsidiary, or a corporation and its stockholders Where there is a close commonality of interest on one side of the dispute, the fact that either the parent or the subsidiary has not signed the arbitration

² Cape Romain also claims the arbitration clause does not comply with South Carolina law but that is irrelevant since the parties expressly stated the FAA would apply (Contract ¶19 2) and the FAA applies whenever interstate commerce is affected

agreement does not prevent both from seeking arbitration³ *Id* In *Hinson*, Judge Norton ruled that plaintiff-executives must arbitrate their employment disputes with both their employer, with whom they signed an arbitration agreement, and its corporate parents, who had not In Judge Norton's words, "Efficient resolution of the dispute clearly calls for all parties to be involved in one arbitration process" *Id*

Similarly, in *J J Ryan & Sons Inc v Rhone Poulenc Textile S A*, 863 F 2d 315 (4th Cir 1988), the court required a company that had signed an arbitration agreement with Rhone Poulenc's affiliates to arbitrate against Rhone Poulenc as well The court noted that Rhone Poulenc, though not a signator, "is willing to submit Ryan's disputes with it to arbitration" (863 F 2d at 320), and that the strong policy in favor of arbitration would be thwarted if Rhone Poulenc was left out of the arbitration The same scenario exists here where Cape Romain is claiming the same damages from Defendant Barnes and Wando E, and its claims arise from a single contract with Barnes for Wando E's marina

Another typical scenario closely analogous here arises where an agency relationship exists, and the agent has signed an arbitration agreement In such circumstances, the party for whom the agent acts may enforce the arbitration agreement As the Fourth Circuit Court of Appeals has noted

A non-signatory may invoke an arbitration clause under ordinary state law principles of agency or contract

Long v Silver, 248 F 3d 309, 320 (4th Cir 2001)

The *Long* court noted again that if a party were allowed to proceed in court against one group of closely-related defendants on an intertwined dispute, while arbitrating against another group, the

³ This is not a situation where a party is seeking to force a non-signatory to arbitrate Cape Romain is a signatory Wando E a non signatory will voluntarily participate in the arbitration between Barnes and Cape Romain to get all issues settled in one forum

arbitration agreement, “would be rendered meaningless and the federal policy in favor of arbitration effectly thwarted ” *Id* The same policy against duplicating effort applies here ⁴

Cape Romain’s complaint confirms that this is essentially a unitary dispute in which Cape Romain has named two defendants to protect its right to recover – the contractor with whom it signed the arbitration agreement, and the owner for when the project was being built Cape Romain alleges that although it performed “under the agreement with Sean Barnes”, Barnes “had authority from or acted rightly for the defendant and owner, Wando E, LLC ” (Complaint, ¶5) Thus, Plaintiff has clearly alleged an agency relationship by Defendant Barnes acting for Wando E Further, Cape Romain concedes that its payments for work under the contract had come from Wando E

That the defendant and owner, Wando E, LLC knew and was aware of the work being performed by the Plaintiff and has in the past made certain payments of monies to Plaintiff on account of the work performed by the Plaintiff

Complaint, ¶6

These allegations in Cape Romain’s breach of contract cause of action belie its current position that Wando E has no right to enforce the arbitration clause in the same contract Cape Romain has alleged that Defendant Barnes was Wando E’s agent, and that Wando E provided it payments under the contract There can be no doubt that Cape Romain’s claims against Wando E are “intimately founded in and intertwined with the underlying contract obligations” involving Defendant Barnes *Sunkist Soft Drinks Inc v Sunkist Groves Inc* , 10 F 3d 753, 757 (11th Cir 1993) [requiring plaintiff to arbitrate against non-signatory to arbitration agreement where claims were founded upon and intertwined with agreement containing arbitration clause] See also *Hughes Masonry Co v Greater Clark Co Sch Bldg Corp* , 659 F 2d 836, 840-841 (7th Cir

⁴ It is difficult to see what advantage Cape Romain hopes to gain by opposing a single arbitration, except multiplying time and costs for all involved when its interest should be to get the dispute resolved expeditiously

1981)⁵ Wando E should be permitted to participate in the arbitration so that this dispute can be resolved expeditiously in one forum

II The Arbitration Clause Is Enforceable Under the Federal Arbitration Act

The Federal Arbitration Act provides that

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

9 USC § 2 (1988)

In interpreting this section, the South Carolina Supreme Court has noted the broad reach of the Federal Arbitration Act

The United States Supreme Court has interpreted the words “involving commerce” broadly According [to] the Supreme Court in *Dobson*, the words “involving commerce” are the functional equivalent of “affecting commerce,” which typically indicates Congress’ intent to exercise its commerce power in full

Zabinski v Brainard, 346 SC 580, 591, 553 S E 2d 110, 115 (2001)

The contract here clearly meets the “affecting commerce” test As shown by the contract addendum, which specifies the work to be performed, Cape Romain was to pick up from Defendant Barnes’ yard numerous aluminum dock sections that had been fabricated in Ohio Cape Romain was to transport those sections to its yard “for loading and transport by barge and other equipment, as necessary, to the project’s site ” Attach 1 Cape Romain knew at the time of contracting that those dock sections would travel to it through interstate commerce from Ohio Indeed, Cape Romain was aware of the fabrication schedule for the dock sections in Ohio and informed Defendant Barnes that “[b]eing that dock fabrication seems to have been delayed

⁵ It makes no difference what label Cape Romain puts on its claims (breach of contract, quantum meruit) as courts look to the substance of the claims to see if they are intertwined not their labels It is not the legal label assigned to a claim but the substance of the underlying allegations that determine whether claims are arbitrable *Hinson v Jusco Co* 868 F Supp 145 147 (D S C 1994)

somewhat”, Cape Romain had changed the date of contract completion before signing the contract See Letter from Cape Romain & Assoc regarding Wando Marina (July 8, 2010) Attach 2 When issues arose concern Cape Romain’s performance, specifically its misalignment of the dock sections, Cape Romain blamed their fabrication for the misalignment Affidavit of Sean Barnes, ¶7, Attach 3

Further, in transporting over forty (40) large dock sections up the Wando River, Cape Romain used its tugs and barges This equipment required significant amounts of fuel that had to travel in interstate commerce and be purchased by Cape Romain for use on its vessels ⁶ The contract clearly had an effect on interstate commerce Moreover in performing its contract, Cape Romain’s vessels used the instrumentalities of interstate commerce (navigable waterways) to transport the materials to the marina site Indeed, the entire marina was built on navigable waters by Cape Romain using its barges as construction platforms

Viewed realistically, there can be little question that the contract to assemble and install dock sections traveling in interstate commerce from Ohio that Cape Romain picked up at an intermediary location to complete their journey to the marina site by barge on navigable waters had an effect on commerce The FAA applies whenever a transaction affects commerce between the states There can be little doubt that this contract does so The dock sections from the Ohio fabricators were of no use on land They had to be transported from their Ohio origination to the marina site in several steps, culminating in their barge journey to the site The plans under which

⁶ South Carolina has no refineries, so the fuel used by Cape Romain’s tugs to transport the dock sections and to operate its tugs and barges for several months while assembling the dock sections on site travelled in interstate commerce See Capacity of Operable Petroleum Refineries by State as of January 1 2010 Energy Information Administration (2010) Attach 4

they were built clearly designated the marina site as their final destination Sean Barnes

Affidavit, ¶3 Attach 3⁷

When determining if an activity “affects commerce” the core question is whether the activity relates to a project over which the federal government could assert its expansive “commerce clause” jurisdiction As noted previously, the Supreme Court has unequivocally determined that the Federal Arbitration Act applies to any activity to which the commerce power of the United States could extend The South Carolina Supreme Court has recognized this expansive reach of the FAA See Zabinski, 356 S C at 591, 553 S E 2d at 115 The question is not whether Cape Romain’s activities were “in commerce,” or were interstate activities themselves, but whether Cape Romain’s activities, even if wholly intrastate, “affected” commerce In other words, would there be any basis for the federal government to assert

⁷ Although not essential to the decision here because of the project’s numerous other ‘ effects on commerce as discussed herein the interstate nature of the dock sections travel did not terminate until their final destination Over eighty years ago the Supreme Court held that it is the essential character of the commerce that governs the nature of a shipment *United States v Erie Railroad Co* 280 U S 98 50 S Ct 51 (1929) In that case the railroad contended that foreign commerce ended when wood pulp was delivered from overseas to the port From there the wood pulp was sometimes held on the dock because of congestion at its ultimate destination The Court found that because the intent was to eventually deliver the wood pulp to its final destination the nature of the commerce did not change because the pulp was stored temporarily and the subsequent shipment of the pulp by rail from the dock to the customer retained the same character as the original shipment The Court noted that the nature of the shipment was not dependent upon (1) when or to whom the title passed (2) that the subsequent shipment was ‘under a local bill of lading which is wholly intrastate or (3) that the shipment was detained elsewhere before its local delivery 280 U S at 101 102 50 S Ct at 52-53

Likewise, in *Swift Textiles Inc v Watkins Motor Lines Inc* 799 F 2d 697 (11th Cir 1986) the court held that the local shipment of textile machinery from Savannah (where it was temporarily stored after its arrival by ocean carrier) to LaGrange Georgia under a separate bill of lading from the ocean transport retained the same character as the original ocean shipment and was not intrastate commerce The court cited with approval *North Carolina Utilities Comm v United States* 253 F Supp 930 (E D N C 1966) where the court held that storage of a hardware chain s iron and steel products at an intermediary warehouse after their arrival from overseas and their subsequent shipment by truck to the retail chain s various outlet under new bills of lading did not change the nature of the original shipment or not make the reshipments intrastate commerce In its holding the court noted that the iron and steel products were of no use at the warehouse which was but a mere link in the chain of foreign commerce that continues until the goods have arrived at their intended destination that is at the individual stores 253 F Supp at 936 Similarly here the custom dock sections designed and intended for the marina were of no use at Defendant Barnes’ shop and their intended destination was always the Wando marina site This fact was known to both the Ohio fabricators and Cape Romain See Sean Barnes Affidavit ¶3 Attach 3

commerce clause jurisdiction over Cape Romain's activities? Clearly there is such a basis for at least three reasons

First, Cape Romain overlooks the fact that the marina it was assembling and installing was being constructed under a permit from the federal government (Army Corps of Engineers) issued under its commerce clause power⁸ Attach. 5 Cape Romain knew its activities had to comply with that permit See Attach. 1, ("All necessary permits are to be furnished by the Owner in advance of [Cape Romain] mobilizing to the project site " ¶3) In the eyes of the federal government Cape Romain's assembly of the marina certainly affects commerce Indeed this is why the federal government asserts commerce clause jurisdiction over marina construction An improperly built marina could endanger travel on the navigable waters of the United States, of which the Wando River is certainly one The question whether the marina construction affected commerce has already been answered by the federal government's assertion of commerce clause jurisdiction over the marina

Second, Cape Romain's activities directly impacted commerce in several ways First, Cape Romain utilized the navigable waterways of the United States to transport the large dock sections from the Cooper River through Charleston Harbor and up the Wando River Barnes Affidavit, ¶4 Attach. 3 The transport of goods and equipment over the navigable waters of the United States is certainly an activity affecting commerce In fact, the Federal Arbitration Act applies both to "any maritime transaction or a contract evidencing a transaction involving commerce " 9 USC § 2 A significant portion of Cape Romain's activities involve the maritime transportation of the dock equipment to its location Thus, not only were the dock

⁸ The federal government's power to regulate marina construction flows from the same commerce clause as its power to regulate arbitration in contracts that affect commerce See *United States v. Rand* 389 US 121 (1967) "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary of all navigable waters of the United States For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress

sections continuing their journey in interstate commerce from their fabrication point in Ohio to their final destination on the Wando River (thus moving in interstate commerce), but they were traveling on the navigable waters of the United States (instrumentalities of interstate commerce), under Cape Romain's control (a maritime activity). These aspects of Cape Romain's performance come within the commerce clause's ambit.⁹

Third, Cape Romain's activities directly involved interstate commerce. When the project engineer informed Cape Romain that it was not constructing the dock in accordance with the plans because sections were misaligned, Cape Romain hired Stantec Consulting Services, Inc., a multi-state consulting firm,¹⁰ for engineering and survey work to support Cape Romain's position on the location of the docks. For this work, Cape Romain paid Stantec over \$2,000, which it remitted to

Stantec Consulting Services, Inc. (SCSI)
13980 Collections Center Drive
Chicago, IL 60693

(See Stantec invoice 454545, Attach 6)

Ironically, while denying any effect on interstate commerce, Cape Romain is claiming this money that it sent interstate as part of its damages.¹¹ Complaint ¶¶7, 12, 15. Thus, not only did Cape Romain participate in the interstate transportation of the dock sections on the navigable waters of the United States and purchase fuel that moved in interstate commerce, but it also

⁹ Cape Romain was also aware that other dock components, including power pedestals and a pump-out system that were being shipped from out-of state, were to be installed after Cape Romain assembled the dock sections. Barnes Affidavit, ¶5.6. Attach 3. As discussed herein, the vast majority of the materials and equipment for the marina project came from out-of state.

¹⁰ Stantec has 160 offices in North America. Attach 8.

¹¹ Compare Cape Romain Statement of Account attached to the complaint (Attach 7) with Cape Romain's proposed change order (Attach 6) (both reflecting \$2,167.50 in Stantec charges as part of the \$66,493.39 claim for extra damages).

consulted with, hired, and then sent money to the Chicago office of a multi-state engineering / surveying firm in connection with its work on the contract

The fundamental error in Cape Romain's position is similar to the error made by the defendant in *Blanton v Stathos*, 351 S C 534, 570 S E 2d 565 (S C App 2002) In that case, an architect began to draft design specifications for construction of a restaurant in Seneca In drafting the specifications, the architect consulted with several out-of-state companies regarding equipment specifications But before the architect completed her duties, and before any materials had been purchased or the restaurant construction begun, the owner fired the architect When the architect submitted her claim to arbitration, the owner contended that because no construction had begun when the architect was fired, and all work was by South Carolina residents, the contract did not evidence interstate commerce The Court of Appeals rejected that position, finding that the architect's consultation with out-of-state companies, and the fact that the contract work by others would have involved the purchase of materials out-of-state, were sufficient to invoke the FAA

In light of Cape Romain's position here, it is important to note that the contract in *Blanton* never contemplated that the architect would be purchasing any out-of-state materials for construction Rather, that work was to be done by others Here, Cape Romain contends that because it did not purchase the out-of-state dock sections, its work in transporting, assembling and installing them did not affect commerce See Anthony DuPre Aff (attached to Return of Cape Romain) That position is obviously incorrect in light of *Blanton*, where the Court looked to the nature of the overall project that was going to be affected by the architect's activities Thus, even though the architect in *Blanton* acted wholly in-state and her only activity touching interstate commerce was consulting with out-of-state companies, the Court held that the

architect's contract affected interstate commerce noting, "realistically, the project could not be constructed without the use of materials in interstate commerce" 351 S C at 541, 570 S E 2d at 569 The same is true of course, here As the *Blanton* court noted

To ascertain whether a transaction involves commerce within the meaning of FAA, the Court must examine the agreement, the complaint, and the surrounding facts

351 S C at 540, 570 S E 2d at 568

Here, the agreement, complaint and surrounding facts all point to activities affecting commerce The agreement contemplates the transportation, installation, and assembly on navigable waters of materials moving in interstate commerce The complaint seeks recovery of monies that Cape Romain paid to an out-of-state consulting firm The surrounding facts show that Cape Romain was clearly on notice that the dock components were coming from out-of-state, knew it would have to use the navigable waters of the United States to transport the dock components, and knew that the project was under federal commerce clause permitting jurisdiction Further, when an issue arose concerning Cape Romain's performance, it blamed the dock components' fabrication, and hired and paid the Chicago office of a multi-state company to perform engineering work to avoid liability ¹²

It is important to note that South Carolina courts have fully embraced the doctrine that it is the realistic effect an activity has on commerce, not what one of the parties intended, that controls FAA application In *Towles v United Healthcare Corp* , 338 S C 29, 524 S E 2d 839 (S C App 1999), the Court noted

The requirement that the underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause The phrase "evidencing a transaction" only requires

¹² While local representatives of the engineering firm may have done the actual work that does not change the interstate nature of the transaction when money was sent for the services to Chicago

that the “transaction in fact involve” interstate commerce, even if the parties did not contemplate an interstate commerce connection

338 S C at 35, 524 S E 2d at 843
(emphasis added, internal parenthesis removed)

As shown above, Cape Romain’s contract in fact did involve interstate commerce and certainly “affected” interstate commerce in numerous ways. Indeed, although it is not necessary to the result, Cape Romain was clearly on notice that “an interstate commerce connection” was contemplated by the contract, as set forth above.

Conclusion

Sophisticated parties in a major maritime construction project agreed to arbitrate any disputes that arose. Such disputes have arisen. The Court should order Cape Romain to honor its agreement to arbitrate, dismiss this case, and send the parties to their previously-chosen forum for resolution.

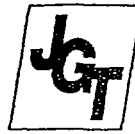
Respectfully Submitted,



Edward J. Westbrook
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Bldg A
Mount Pleasant, SC 29464
(843) 727-6513
ATTORNEY FOR DEFENDANTS

Charleston, South Carolina
May 19, 2011

ATTACHMENT 1



**Jon Guerry Taylor
& Associates, Inc**

P O BOX 1082 MOUNT PLEASANT SC 29465 USA
PHONE 843 884 6415
FAX 843 884 4026
www.jgtinc.com

Date June 3 2010

Sean Barnes, Docks Unlimited, Inc
Sonny DuPre, Cape Romain Contractors Inc

RE Wando Marina – Scope Of Work for Contract agreement

EXHIBIT #1

The follow Scope Of Work describes the work that shall be required for this project

1 Contract amount \$165,000 00

Includes all work by Cape Romain Contractors Inc (CRC) involving complete assembly and installation of the fixed aluminum walkway and pierhead deck units which will include driving of all timber piles for fixed walkway and pierhead, installation and bolting of all timber split pile caps and aluminum header angles, timber cross-bracing as called for on the plans, and all misc attachments and connections of the above-mentioned work items Floating dock assembly and installation, including installation of all concrete piling, and installation of aluminum gangway shall also be completed as part of the work for this project at the above-mentioned contract price *(Concrete piling will be loaded onto CRC's barge at TEKNA Corp of Charleston and transported to the project site by CRC)* Owner shall provide all materials deck units, dock units gangway, piles, and hardware for the project

\$15,000 for mobilization will be payable in advance of mobilizing equipment The remaining \$150,000 will be invoiced by CRC at the end of each month based on a percentage of work completed at that time, to be determined and approved at the time of invoicing

- 2 CRC shall be responsible for hauling all materials and fabricated items from Docks Unlimited, Inc to the CRC yard for loading and transport by barge and other equipment, as necessary, to the project site Materials and fabricated items include, but may not be limited to aluminum floating dock units, aluminum fixed pier walkway and pierhead deck units aluminum gangway timber piles concrete piles, and all other related materials and hardware for the complete installation of these items for this project.
- 3 CRC excludes furnishing Bonds for the project. CRC excludes any and all engineering or permitting All necessary permits are to be furnished by the Owner in advance of CRC mobilizing to the project site
- 4 CRC shall be responsible for obtaining and maintaining property and liability insurance upon the Work at the site, Workers Compensation (statutory) "all-risk" insurance coverage Longshoreman's Insurance as required, and other as may be required by Article 17 of AIA Document A107-2007 CRC shall list the Owner and Engineer as an insured or additional insured.

- 5 CRC shall be responsible for obtaining relevant business licenses for Berkeley County, or other, as may be required for the project

Handwritten notes:
 CRC has .5% of contract
 licenses/permits IF permits or
 licenses required exceed 5% of the contract
 amount w/it be adjusted accordingly

Jon Guerry Taylor & Associates, Inc

- 6 CRC plans to use a D30 Delmag single-acting diesel hammer to drive the piles Jetting may be allowed for initial "set" of the piles, but only as directed and approved by the Engineer
- 7 CRC shall be prepared to start work for the project by no later than July 16, 2010 Some materials and fabricated items for the project will be arriving prior to this date and will either be delivered to CRC's yard upon receipt by the Owner, or may be picked up by CRC and hauled to CRC's yard.
- 8 CRC shall be responsible for taking all precautions necessary to ensure that damage does not occur to the new fixed pier deck units and/or floating dock units during construction Plastic sheeting and/or plywood should be used to cover the surface of the fixed pier deck units and floating dock units to protect them from damage if used for access during construction. Contractor shall coordinate the use of protective measures with the Owner and Engineer and shall ensure that the protection measures are in place and properly functioning throughout the duration of the project. Contractor shall be responsible for the repair or replacement of materials or items damaged during construction/assembly/installation.
- 9 Contractor shall proceed continuously with all work until the project is complete

A handwritten signature in black ink, appearing to be 'JGT' or similar, located in the bottom right corner of the page.

ATTACHMENT 2

Anthony T "Sonny" DuPre, Jr.
President

612 Cape Romain Road
Wando SC 29492
(843) 884-5167 - Office
(843) 884 0516 Fax
(843) 514 1270 Mobile
sonny@caperomaincontractors.com
www.caperomaincontractors.com

Cape Romain Contractors, Inc.

612 CAPE ROMAIN ROAD
WANDO, SC 29492

TELEPHONE 843-884-5167
FAX 843-884-0516

July 8, 2010

Jon Guerry Taylor & Associates, Inc
761 Coleman Blvd Suite C
Mt. Pleasant, SC 29464

Attn: Mike Kirby, P.E.
RE: Wando Marina

Dear Mike,

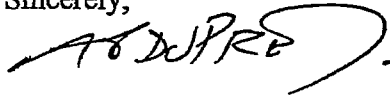
We have executed the enclosed AIA contract for the Wando Marina. Thanks for your help in getting this document together.

I hope it is ok, as I took the liberty of changing the Substantial Completion under 2.3 to read "60 days from the receipt of dock lines #4 and #5 entirely at CRC yard". Being that dock fabrication seems to have been delayed somewhat, I thought this would be a fair approach.

Also as discussed, I added onto item #5 of your exhibit #1, concerning permit/license fees.

Please call with any questions.

Sincerely,



Anthony T. DuPre
President
Cape Romain Contractors, Inc.

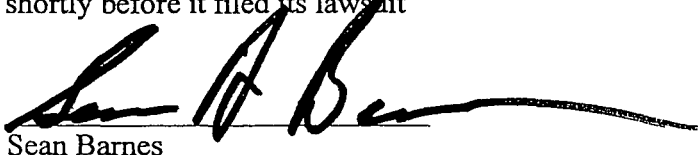
ATTACHMENT 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011-CP-08-985
	)	
CAPE ROMAIN CONTRACTORS, INC ,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF SEAN BARNES
	)	
vs	)	
	)	
WANDO E, LLC AND SEAN BARNES	)	
A/K/A SEAN BARNES,	)	
	)	
Defendants	)	

Sean Barnes being dully sworn and deposed says

- 1 I am the contractor hired by Wando E, LLC for the marina project that is the subject of this lawsuit,
- 2 As part of my responsibility for the overall construction, I consulted with several companies regarding their interest in transporting, assembling and installing floating dock, walkway and gangway sections of the marina project One of the companies I consulted and eventually entered into a contract with was Cape Romain Contractors, Inc ,
- 3 In the course of discussing the potential contract with Cape Romain, I communicated to Sonny DuPree of Cape Romain the facts that the dock sections were being fabricated in Ohio, that they would be shipped from Ohio by truck to my yard in Mount Pleasant, and that after decking and floats were added at my shop, the sections would need to be picked up and transported to the marina site by Cape Romain Everyone involved, including the Ohio fabricators and Cape Romain, knew that the final destination for the dock sections was the marina site The marina plans showed this clearly,
- 4 It was agreed that Cape Romain would pick up the dock sections and bring them over to Cape Romain's yard on the Cooper River where they would be loaded on Cape Romain's barges and transported by its barges and tugs down the Cooper River, through Charleston Harbor and up the Wando River, passing through the Highway 41 bridge on the Wando River The majority of the dock sections were transported this way, with some also transported by Cape Romain from another boat landing,
- 5 In addition to the dock sections that Cape Romain knew were coming from out-of-state, Cape Romain was also aware that other components of the dock would be installed by my company or others following Cape Romain's installation of the basic dock sections, and that the installation of these additional items depended on Cape Romain's proper performance of its work These additional items included power pedestals and a pump-out system, both of which were being shipped from out-of-state,

- 6 When problems arose with Cape Romain's installation of the dock sections, specifically piles being driven that were not straight and dock sections that were not lined up correctly, I informed Cape Romain that its inadequate performance was holding up the installation of this additional equipment,
- 7 In response to the project engineer's notice that Cape Romain had improperly installed certain dock sections, Cape Romain attempted to blame the out-of-state dock sections it received as being improperly fabricated. In addition, Cape Romain hired Stantec, an engineering and survey company, to come on the site and perform surveying work on its behalf,
- 8 From the outset of its involvement, Cape Romain has been aware that the marina was being constructed for Wando E, LLC. All of the payments to Cape Romain for its work under the contract have been made to Cape Romain by Wando E, LLC. These amount to \$73,080.25 to date,
- 9 At no time after Cape Romain executed the AIA contract at issue, including its voluntary selection of arbitration as a means of resolving disputes, did it raise any issue concerning arbitration until shortly before it filed its lawsuit.


Sean Barnes

Dated 5-9-11

Sworn to on this 9th day of May, 2011

Kimberly A. Garua
Notary Public for South Carolina
Printed Name Kimberly A. Garua
My Commission Expires 2/04/2014

ATTACHMENT 4

Table 3 Capacity of Operable Petroleum Refineries by State as of January 1 2010
(Barrels per Stream Day Except Where Noted)

State/Refiner/Location	Atmospheric Crude Oil Distillation Capacity				Downstream Charge Capacity				
	Barrels per Calendar Day		Barrels per Stream Day		Vacuum Distillation	Thermal Cracking			
	Operating	Idle	Operating	Idle		Delayed Coking	Fluid Coking	Visbreaking	Other/Gas Oil
Alabama	20,100	0	130,000	0	46,000	14,600	0	0	0
Goodway Refining LLC									
Atmore	4 100	0	5 000	0	0	0	0	0	0
Hunt Refining Co									
Tuscaloosa	36 000	0	40 000	0	16 000	14 600	0	0	0
Shell Chemical LP									
Saraland	80 000	0	85 000	0	30 000	0	0	0	0
Alaska	299 034	94 946	321 200	98 000	31 500	0	0	0	0
BP Exploration Alaska Inc									
Prudhoe Bay	12,780	0	14 200	0	0	0	0	0	0
ConocoPhillips Alaska Inc									
Prudhoe Bay	15 000	0	16 000	0	0	0	0	0	0
Flint Hills Resources Alaska LLC									
North Pole	124 554	94 946	128 500	98 000	5 500	0	0	0	0
Petro Star Inc									
North Pole	19 700	0	22,500	0	0	0	0	0	0
Valdez	55 000	0	60 000	0	0	0	0	0	0
Tesoro Alaska Petroleum Co									
Kenai	72,000	0	80 000	0	26 000	0	0	0	0
Arkansas	82 600	0	87 700	0	48,600	0	0	0	0
Lion Oil Co									
El Dorado	75 000	0	80 000	0	45 000	0	0	0	0
Martin Midstream Partners LP									
Smackover	7 500	0	7 700	0	3 500	0	0	0	0
(Formerly Cross Oil Refining & Marketing Inc)									
California	1,859,718	187 500	1,939 000	195,000	1,273,566	487,600	52 000	6,000	0
Big West Of California									
Bakersfield	0	66 000	0	68 000	40 000	22 000	0	0	0
BP West Coast Products LLC									
Los Angeles	265 000	0	266 000	0	140 000	67 100	0	0	0
Chevron USA Inc									
El Segundo	265 500	0	279 000	0	155 000	75 000	0	0	0
Richmond	245 271	0	257 200	0	123 466	0	0	0	0
ConocoPhillips Company									
Rodeo	120 200	0	128 000	0	93 200	50 600	0	0	0
Wilmington	139 000	0	147 000	0	82 000	53 200	0	0	0
Edgington Oil Co Inc									
Long Beach	0	31 500	0	35 000	25 000	0	0	0	0
ExxonMobil Refining & Supply Co									
Torrance	149 500	0	155 800	0	102 300	54 600	0	0	0
Greka Energy									
Santa Maria	9,500	0	10 000	0	10 000	0	0	0	0

X X X X X X X X X

Table 3 Capacity of Operable Petroleum Refineries by State as of January 1, 2010
(Barrels per Stream Day Except Where Noted)

State/Refiner/Location	Downstream Charge Capacity							
	Desulfurization (Incl. Catalytic Hydrotreating)							
	Naphtha/ Reformer Feed	Gasoline	Kerosene/ Jet Fuel	Diesel Fuel	Other Distillate	Residual	Heavy Gas Oil	Other
New Mexico	47,800	0	12,000	47,000	0	0	51,000	0
Navajo Refining Co								
Artesia	36,000	0	12,000	41,000	0	0	51,000	0
Western Refining Southwest Inc								
Bloomfield ..	5,000	0	0	3,000	0	0	0	0
Gallup	6,800	0	0	3,000	0	0	0	0
North Dakota	13,600	4,300	0	14,000	0	0	0	0
Tesoro West Coast								
Mandan	13,600	4,300	0	14,000	0	0	0	0
Ohio	169,000	100,000	39,600	69,600	0	0	74,000	0
BP-Husky Refining LLC								
Toledo	40,000	0	0	18,500	0	0	47,000	0
Lima Refining Company								
Lima	63,000	35,000	0	32,000	0	0	0	0
Marathon Petroleum Co LLC								
Canton	26,500	0	9,500	19,000	0	0	27,000	0
Sunoco Inc								
Toledo	39,500	65,000	30,000	0	0	0	0	0
Oklahoma	136,556	69,282	18,500	104,981	31,171	0	58,338	35,548
ConocoPhillips Company								
Ponca City ..	49,056	47,282	18,500	31,981	31,171	0	23,888	13,948
Holly Refining & Marketing Co								
Tulsa East	20,000	22,000	0	24,000	0	0	0	0
(Formerly Sinclair Tulsa Refining Co)								
Tulsa West	28,000	0	0	0	0	0	0	21,600
(Formerly Sunoco Inc)								
Valero Refining Co Oklahoma								
Ardmore	26,500	0	0	32,000	0	0	34,450	0
Ventura Refining & Transmission LLC								
Thomas	0	0	0	0	0	0	0	0
Wynnewood Refining Co								
Wynnewood ..	13,000	0	0	17,000	0	0	0	0
Pennsylvania	235,700	134,600	27,800	44,800	207,200	0	40,000	0
American Refining Group Inc								
Bradford	3,600	0	0	0	0	0	0	0
ConocoPhillips Company								
Trainer	77,100	0	23,300	27,300	4,200	0	40,000	0
Sunoco Inc								
Marcus Hook ..	45,000	65,000	0	0	40,000	0	0	0
Sunoco Inc (R&M)								
Philadelphia ..	88,000	65,000	0	0	163,000	0	0	0
United Refining Co								
Warren	22,000	4,500	4,500	17,500	0	0	0	0

Table 3 Capacity of Operable Petroleum Refineries by State as of January 1, 2010
(Barrels per Stream Day Except Where Noted)

State/Refiner/Location	Atmospheric Crude Oil Distillation Capacity				Downstream Charge Capacity				
	Barrels per Calendar Day		Barrels per Stream Day		Vacuum Distillation	Thermal Cracking			
	Operating	Idle	Operating	Idle		Delayed Coking	Fluid Coking	Visbreaking	Other/Gas Oil
Tennessee	180 000	0	182 000	0	0	0	0	0	0
Premcor Refining Group Inc									
Memphis	180 000	0	182 000	0	0	0	0	0	0
Texas	4 681 519	58 500	4 926 900	65 000	2 349 400	764 100	42 000	0	0
Age Refining Inc									
San Antonio	14 021	0	14 500	0	0	0	0	0	0
Alon USA Energy Inc									
Big Spring	67 000	0	70 000	0	24 000	0	0	0	0
Belvieu Environmental Fuels									
Mont Belvieu	0	0	0	0	0	0	0	0	0
BP Products North America Inc									
Texas City	437 080	0	475 000	0	237 000	43 000	0	0	0
Citgo Refining & Chemical Inc									
Corpus Christi	163 000	0	165 000	0	84 000	45 000	0	0	0
ConocoPhillips Company									
Sweeny	247 000	0	260 000	0	132 100	78 700	0	0	0
Deer Park Refining LTD Partnership									
Deer Park	327 000	0	340 000	0	180 000	90 000	0	0	0
Delek Refining LTD									
Tyler	58 000	0	60 000	0	15 000	6 500	0	0	0
Equistar Chemicals LP									
Channelview	0	0	0	0	0	0	0	0	0
ExxonMobil Refining & Supply Co									
Baytown	580 640	0	584 000	0	287 000	54 000	42 000	0	0
Beaumont	344 500	0	359 100	0	148 800	48 000	0	0	0
Flint Hills Resources LP									
Corpus Christi	290 078	0	305 000	0	87 500	13 300	0	0	0
Houston Refining LP									
Houston	280 700	0	302 300	0	202 000	107 000	0	0	0
Marathon Petroleum Co LLC									
Texas City	78 000	0	81 500	0	0	0	0	0	0
Motiva Enterprises LLC									
Port Arthur	285 000	0	300 000	0	147 000	57 500	0	0	0
Pasadena Refining Systems Inc									
Pasadena	100 000	0	106 500	0	38 000	12 500	0	0	0
Premcor Refining Group Inc									
Port Arthur	287 000	0	320 000	0	219 000	99 700	0	0	0
South Hampton Resources Inc									
Silsbee	0	0	0	0	0	0	0	0	0
Total Petrochemicals Inc									
Port Arthur	173 500	58 500	175 000	65 000	54 000	0	0	0	0
Trigeant LTD									
Corpus Christi	0	0	0	0	29 000	0	0	0	0
Valero Energy Corporation									
Sunray	171 000	0	181 000	0	50 000	0	0	0	0
Three Rivers	93 000	0	97 000	0	35 000	0	0	0	0
Valero Refining Co Texas LP									
Corpus Christi	142 000	0	146 000	0	97 000	19 000	0	0	0
Houston	83 000	0	85 000	0	38 000	0	0	0	0

ATTACHMENT 5

DEPARTMENT OF THE ARMY PERMIT

Permittee WANDO RIVER, LLC

462 COMMONWEALTH ROAD
MT PLEASANT, SC 29466

Permit No 2005-1E-006

Issuing Office CHARLESTON DISTRICT

NOTE The term "you" and its derivatives as used in this permit means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

Project Description

The work consists of constructing a community docking facility for the private recreational use of the future lot owners of the future private community in accordance with the attached drawings entitled "Proposed Construction Community Boat Docks That Will Provide Boat Docking Space And Access To Navigable Waters For Community Residents, Located Near Camhoy, On Wando River, County of Berkeley, State of SC, Owner/Applicant Wando River, LLC Sheets 1 thru 9 of 9 dated November 14, 2005 (Revised)".

Project Location

This project is located on the Wando River, within the closure zone of Detyens Shipyard, near the bridge on S C Hwy #41, near Camhoy, Berkeley County, South Carolina.

Permit Conditions

General Conditions

1. The time limit for completing the work authorized ends on **31 March 2011**. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.
2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.
3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

ATTACHMENT 6



Cape Romain Contractors, Inc.

612 CAPE ROMAIN ROAD
WANDO, SC 29492

January 14, 2011

TELEPHONE 843 884-5167
FAX 843-884-0516

Sean Barnes
1361 Old Georgetown Rd
Mt Pleasant, SC 29465

JGT & Associates, Inc
Attn Mike Kirby, P E
761 Coleman Blvd. Suite C
Mt Pleasant, SC 29464

Re Wando Marina

Please find attached Change Order No 1, for delays and additional work performed at the Wando Marina, and an invoice reflecting an increase to the contract amount

Please execute the change order and process the invoice for payment.

Sincerely

Anthony T DuPre Jr
President
Cape Romain Contractors, Inc



Document G701™ - 2001

Change Order

PROJECT (Name and address) Wando Marina CHANGE ORDER NUMBER 01 OWNER ☒
Beckley County DATE 1/13/11 ARCHITECT ☒
SC ARCHITECT'S PROJECT NUMBER N/A CONTRACTOR ☒
 TO CONTRACTOR (Name and address) Cape Romain CONTRACT DATE 1/13/11 FIELD ☐
612 Cape Romain Rd CONTRACT FOR Wando SC 29492 OTHER ☐
Wando SC 29492

The Contract is changed as follows:

(Include where applicable any undisputed amount attributable to previously executed Construction Change Directives)

Payment for delays and additional work performed by Cape Romain SEE ATTACHED INVOICES and supporting documentation

The original (Contract Sum) (Guaranteed Maximum Price) was \$ 165,000.00
 The net change by previously authorized Change Orders \$ -0-
 The (Contract Sum) (Guaranteed Maximum Price) prior to this Change Order was \$ 165,000.00
 The (Contract Sum) (Guaranteed Maximum Price) will be increased (decreased) (unchanged) by this Change Order in the amount of \$ 66,493.39
 The new (Contract Sum) (Guaranteed Maximum Price) including this Change Order will be \$ 231,493.39
 The Contract Time will be (increased) (decreased) (unchanged) by () days
 The date of Substantial Completion as of the date of this Change Order therefore is

(Note: This Change Order does not include changes in the Contract Sum, Contract Time or Guaranteed Maximum Price which have been authorized by Construction Change Directive until the cost and time have been agreed upon by both the Owner and Contractor in which case a Change Order is executed to supersede the Construction Change Directive.)

NOT VALID UNTIL SIGNED BY THE ARCHITECT, CONTRACTOR AND OWNER.

ARCHITECT (Firm name)	<u>Cape Romain</u>	OWNER (Firm name)
ADDRESS	<u>612 Cape Romain Rd</u>	ADDRESS <u>Wando SC 29492</u>
BY (Signature)	<u>[Signature]</u>	BY (Signature)
(Typed name)	<u>Anthony T. D'Pice Jr</u>	(Typed name)
DATE	<u>1/13/11</u>	DATE

CAUTION: You should sign an original AIA Contract Document, on which this text appears in RED. An original assures that changes will not be obscured.

AIA Document G701™ - 2001 Copyright © 1979, 1987, 2000 and 2001 by The American Institute of Architects. All rights reserved. WARNING: This document is protected by U.S. Copyright Law and International Treaties. Unauthorized reproduction or distribution of this AIA Document or any portion of it may result in severe civil and criminal penalties and will be prosecuted to the maximum extent possible under the law. Permission is granted to reproduce this document when completed. To report copyright violations of AIA Contract Documents, e-mail The American Institute of Architects, legal.copyright@aia.org.

Wando Marina
Cape Romain Contractors, Inc
Invoice for Delays and Additional Work Performed



Delay or Additional Work Description	Dates	\$ Amount Due
Delay and additional work regarding upstream shift in marina to avoid gas main		
1) One day delay to full crew and equipment	8/30/2010	\$ 6 463 00
2) Six days standby delay of equipment	8/31 - 9/5	\$ 14 850 00
Delay regarding alignment due to mfg/material defects		
1) Fourteen days standby delay of equipment	10/25 - 11/9	\$ 34 650 00
Additional engineering/survey expense to document mfg/material defects dispute original as built of docks #5 and #4		
1) Third party survey crew hired	12/10/2010	\$ 2 167 50
2) CRC survey crew performed additional work	12/8/2010	\$ 917 20
Additional handling of gangway, dock units extra trips to adjacent boat landing		
1) Additional handling of gangway 1/2 day full crew and equipment to retrieve gangway from landing	9/20/2010	\$ 3 231 50
2) Additional handling and loading/unloading gangway at CRC yard	Aug 2010	\$ 500 00
3) Units from dock #4 delivered to boat ramp in lieu of CRC yard due to unknown delays 1/2 day full crew and equipment to retrieve units from landing	9/27/2010	\$ 3 231 50
Interest on past-due payments		
1) Draw #3	10/28/2010	\$ 318 87
2) Draw #4	12/7/2010	\$ 163 82
3) Combined debt/ accumulating	after 12/31	\$20 592/day
Total (excludes interest after 12/31)		\$ 66 493 39

**See attached invoices and backup information



Stantec

INVOICE

REC'D DEC 15 2010

Page 1 of 1

Invoice Number 454545
 Invoice Date December 13 2010
 Purchase Order 178420508
 Customer Number 85506
 Project Number 178420508

Bill To

Cape Romain Contractors Inc
 David J Osgood PE
 612 Cape Romain Road
 Wando SC 29492
 United States

Please Remit To

Stantec Consulting Services Inc (SCSI)
 13980 Collections Center Drive
 Chicago IL 60693
 United States

Project	Highway 41 & Wando River Marina		
Project Manager	Gillette Cleve	Contract Upset	5 000 00
Current Invoice Total (USD)	2 167 50	Amount Billed to Date	2 167 50
		For Period Ending	December 10 2010

Top Task 200 **Asbuilt Survey**
Professional Services

		Current Hours	Rate	Current Amount
Level 7	Stiffler Kathy F	0 50	67 00	33 50
Level 11	Colwell Clifford A (Cliff)	10 00	94 00	940 00
	Usage 2 Person Survey Crew	6 00	115 00	690 00
Level 17	Gillette Andrew C (Cleve)	4 00	126 00	504 00
Subtotal Professional Services		<u>20 50</u>		<u>2,167 50</u>

Top Task Subtotal	Asbuilt Survey	2 167 50
Total Fees & Disbursements		<u>2 167 50</u>
INVOICE TOTAL (USD)		<u>2,167 50</u>

Due on Receipt

#454545
 12-13-10

2,167 50

104038

DIOSO/OTH

PROF SVCS

2,167.50

ATTACHMENT 7

STATEMENT OF ACCOUNT

PERSONALLY appeared before me Anthony T DuPre, Jr , who being duly sworn deposes and says that he is the President of Cape Romain Contractors, Inc , the Plaintiff, and authorized to make the within Statement of Account

That the sum of One Hundred Fifty Eight Thousand Four Hundred Thirteen and 14/100 (\$158,413 14) Dollars is currently due and owing upon the following invoices

<u>INVOICE DATE</u>	<u>INVOICE NUMBER</u>	<u>AMOUNT</u>
10/28/10	Draw #3	\$33,525 00
12/07/10	Draw #4	\$81,950 00
12/22/10	Payment on Account	[\$23,555 25]
1/14/11	Draw #5 (change order 1)	\$66,493 39
Total Balance Due and Owing		\$158,413 14

That interest accrues from and after December 31, 2010 at the rate of 8 3/4% per annum or \$20 592 per day on past due amounts exclusive of Draw #5, which is not yet past due

That the foregoing statement is a true and just account of all sums due and owing and no part thereof has been paid by discount or otherwise

Cape Romain Contractors, Inc

Anthony T. DuPre Jr.
Anthony T DuPre, Jr , its President

SWORN AND SUBSCRIBED BEFORE
ME THIS 17th DAY OF July, 2011

Albert H. Loefer
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 10/7/2020

ATTACHMENT 8



[Buildings](#)
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[Industrial](#)
[Transportation](#)
[Urban Land](#)
[Careers](#)
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[Integrated Solutions](#)
[Innovative Solutions](#)

Stantec founded in 1954 provide professional consulting services in planning engineering architecture interior design, landscape architecture surveying environmental sciences project management, and project economics for infrastructure and facilities projects. Continually striving to balance economic, environmental, and social responsibilities we are recognized as a world-class leader and innovator in the delivery of sustainable solutions. We support public and private sector clients in a diverse range of markets at every stage from initial concept and financial feasibility to project completion and beyond.

In simple terms the world of Stantec is the water we drink the routes we travel the buildings we visit, the industries in which we work, and the neighborhoods we call home.

Our services are offered through approximately 10 500 employees operating out of more than 160 offices in North America. Stantec trades on the TSX and on the NYSE under the symbol STN.

Stantec is One Team providing Infinite Solutions.

[Community Investment](#)

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[Funding Priorities](#)
[Application Process](#)
[Funding Limitations And Exclusions](#)

[Evolution](#)
[50th Anniversary Book](#)
[Growth](#)
[Acquisition Update](#)

[Contact](#)

[communityinvestment@stantec.com](#)
[sustainability@stantec.com](#)

To find the office nearest you, please check our location.



CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Defendants' Reply in Support of Motion to Dismiss and Compel Arbitration has been served upon the following counsel of record via Regular U S Mail this 10th day of May, 2011

Albert A LaCour, III
Clawson & Staubes
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
Attorney for Cape Romain Contractors, Inc

RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC

By

_____

CLAWSON & STAUBES, LLC
ATTORNEYS AT LAW

ALBERT A LACOUR III
alacour@clawsonandstaubes.com

May 17, 2011

Reply to Charleston Office
File No 2010 1273 aal

The Honorable Mary P Brown
Berkeley County Clerk of Court
300-B California Avenue
PO Box 219
Moncks Corner, SC 29461

Re Cape Romain Contractors, Inc v Wando E LLC and Sean Barnes a/k/a Sean A Barnes
Case No 2011-CP-08-985

Dear Ms Brown

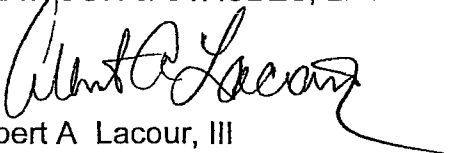
Enclosed herewith please find the original and one copy of the Supplemental Affidavit of Anthony T DuPre, Jr In Support of Return Of Cape Romain Contractors, Inc To Motion To Dismiss and Compel Arbitration filed by the Defendants Please file the original Affidavit and clock and return the extra copy in the envelope provided as proof of filing

Thank you very much for your attention to the above

With best regards I remain,

Very truly yours,

CLAWSON & STAUBES, LLC


Albert A Lacour, III

AALIII/cld
Enclosure

cc ✓ Edward J Westbrook, Esquire (w/enclosures)
Cape Romain Contractors, Inc (w/enclosures)

Charleston Office
126 Seven Farms Dr Suite 200
Charleston SC 29492 8144
(o) 843 577 2026
(f) 843 722 2867

Charlotte Office
756 Tyvola Rd Suite 130
Charlotte NC 28217 3535
(o) 704 940 9128
(f) 704 522 9033

clawsonandstaubes.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011-CP-08-985
	)	
CAPE ROMAIN CONTRACTORS INC ,	)	
	)	SUPPLEMENTAL AFFIDAVIT OF
Plaintiff	)	ANTHONY T DUPRE, JR IN
vs	)	SUPPORT OF RETURN OF CAPE
	)	ROMAIN CONTRACTORS, INC TO
WANDO E LLC AND SEAN BARNES	)	MOTION TO DISMISS AND COMPEL
A/K/A SEAN A BARNES	)	ARBITRATION
	)	
Defendants	)	
	)	
	)	

Personally appeared before me Anthony T DuPre Jr , who being duly sworn deposes and says

1 That I was not aware of the origin of any materials furnished by Sean Barnes under the agreement at the time we negotiated it I am unaware of any term of the agreement which requires materials to be furnished from out-of-state locations In any event, the value of out-of-state materials constitutes 0% of the total value of the agreement because no such materials were required to be furnished by Cape Romain Contractors

2 That the agreement does not require Cape Romain to furnish any engineering services That an engineering company was retained by Cape Romain Contractors and the principal point of contact with the engineering company was located in North Charleston South Carolina That the engineer was only involved by Cape Romain Contractors after we received inaccurate claims from Sean Barnes regarding the work in place That to my knowledge Cape Romain Contractors did mail payment for the engineer's services to its Chicago Illinois office as requested

3 That I was aware that Sean Barnes was not the owner of the subject property

during the negotiation of the agreement but the identity of the owner was not revealed Only Mr Barnes and the project engineer were involved in the negotiation of the terms of the agreement and Mr Barnes represented to me at that time that he was speaking for a client"

4 That Cape Romain Contractors did transport the dock sections and the equipment of Cape Romain Contractors through the navigable waters of the United States and the State of South Carolina by barge That the labor and equipment cost necessary to move Cape Romain s equipment and the dock sections represents less than 5% of the total value of Cape Romain s contract That the total distance traveled from Cape Romain s yard to the job site is approximately 14 miles by water That between 75 and 100 gallons of fuel would have been consumed to move the equipment and the dock sections the required distance

5 That the terms of the agreement require Cape Romain Contractors to provide local business licenses as necessary but do not require Cape Romain Contractors to provide any construction permits whatsoever Additionally, no copies of any construction permits were provided to Cape Romain despite requests for same during the course of the work That Cape Romain was not provided a copy of the Army Corps of Engineers permit until it was received as an attachment to Defendants' Memorandum of May 10 2011

FURTHER AFFIANT SAYETH NOT

CAPE ROMAIN CONTRACTORS INC

By Anthony T. DJR

Its President

SWORN AND SUBSCRIBED BEFORE
ME THIS 16th DAY OF May 2011

Kimberly D Latta
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires ~~—~~ **My Commission Expires On**
September 27th, 2017

Edward Westbrook

From Kim Jones
Sent Thursday June 30 2011 5 46 PM
To ryounglc@sccourts.org
Cc alacour@clawsonandstaubes.com'
Subject Cape Romain Contractors Inc v Wando E, LLC et al (Case no 2011-CP-08 985)
Attachments order for motion to dismiss and compel arbitration 6212011.doc

Dear Judge Young

In accordance with your direction, attached please find Defendants' Proposed Order on our Motion to Dismiss and Compel Arbitration in Word format for editing

Sincerely,

Edward J Westbrook, Esq
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Bldg A
Mount Pleasant, SC 29464
Direct Phone 843 727 6513
Direct Fax 843 727 6689
Email ewestbrook@rpwb.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011-CP-08-985
	)	
CAPE ROMAIN CONTRACTORS, INC ,	)	
	)	
Plaintiff,	)	ORDER
	)	
vs	)	
	)	
WANDO E, LLC AND SEAN BARNES	)	
A/K/A SEAN BARNES,	)	
	)	
Defendants	)	

This matter is before the Court on Defendants’ Motion to Dismiss and Compel Arbitration For the reasons stated below, the Court grants the motion to compel arbitration and stays the current proceedings

This case involves the construction of a marina facility pursuant to a standard American Institute of Architects (“AIA”) contract where the parties to the contract selected arbitration as their dispute resolution mechanism When disputes arose, Defendant Barnes (Contractor) sought arbitration and Defendant Wando E (Owner) joined in that request Plaintiff (Subcontractor) objected to arbitration on the grounds (1) that the contract does not sufficiently affect interstate commerce to invoke the Federal Arbitration Act (“FAA”), and (2) that Wando E was not a party to that contract

The Court has received briefs from all parties and entertained oral argument on June 21, 2011 Following argument, the Court invited proposed orders from each side which have been received Based on the entire record in this matter, the Court finds and concludes as follows

On July 26, 2010, Plaintiff and Defendant Barnes entered into an AIA standard form of agreement under which Plaintiff was to be paid \$165,000 for the “complete assembly and

installation” of all the structural components for a substantial marina, including the fixed aluminum walkway, pierhead deck units, floating dock assemblies, concrete piles, aluminum gangway, and aluminum fixed pier walkway (Ex No 1 to AIA Contract ¶¶1-2, June 3, 2010) ¹ The agreement also required Plaintiff to pick up pre-fabricated dock sections from Defendant Barnes’ yard that were being delivered from the fabricator in Ohio, and to transport them to their final destination, the marina site Id at ¶2 At least two months before signing the July 26, 2010 contract, Cape Romain was aware that the dock sections were being fabricated by an out-of-state supplier (Barnes Aff ¶3) Cape Romain’s representative, Mr DuPre, has filed an affidavit stating he was not aware of the origin of the dock sections when he negotiated the contract (DuPre Supplemental Aff ¶1) But at the hearing, Defendants introduced Mr DuPre’s May 25, 2010 email to the project engineer where he acknowledged learning from Defendant Barnes that, “[Barnes] goes up north early next week to visit fab operation So we are good til [sic] late next week to finalize ” The Court finds that Plaintiff was on notice that the dock sections it would be picking up from Defendant Barnes’ yard were travelling in interstate commerce and that Plaintiff was responsible for completing their journey to the marina site ²

The transport of the Ohio dock sections to the marina site required the use of Plaintiff’s tug boats and barges over the navigable waters of the United States Cape Romain concedes that the labor and equipment cost necessary to move its equipment and the dock sections to the site was approximately \$8,600 – 5% of the value of Cape Romain’s contract (DuPre Supplemental Aff ¶4) Plaintiff also admits using between 75 to 100 gallons of marine fuel for its tugs and

¹ All cited documents are in the record as attachments to briefs or were submitted during argument

² A party cannot create a genuine factual dispute by contradicting its earlier statement by a later affidavit See *Cleveland v Policy Mgmt Sys Corp* 526 U S 795 806 (1999) (noting that a party cannot create an issue of fact by filing an affidavit that contradicts an earlier statement), *Phillips v Morbark Inc* 481 F Supp 2d 461 470 (D S C 2007) (A genuine issue of material fact is not created where the only issue of fact is to determine which of two conflicting versions of the plaintiff’s testimony is correct)

barges during the trips (DuPre Supplemental Aff ¶4), which, at today's prevailing fuel prices, would cost approximately \$200 - \$400. This fuel also necessarily traveled interstate as South Carolina has no refineries.³

As an experienced marine contractor, Plaintiff was aware that marina construction can only be carried out with appropriate permits which its contract acknowledged (Ex No 1 to AIA Contract ¶3, June 3, 2010). This marina project was authorized under a permit from the Army Corps of Engineers (Attach 5 to Defs' Rep Mem), which has jurisdiction over projects in the navigable waters of the United States.

It is undisputed that Cape Romain signed the AIA standard contract and checked the box in the contract requiring it to arbitrate all "[c]laims, disputes and other matters in questions arising out of or relating to this contract" (Contract § 5.1, § 21.1). The dispute in question arose after Plaintiff had been paid over \$70,000 on its contract. The project engineer refused to certify further payment to Plaintiff and raised issues including certain dock sections being misaligned and pilings being driven at an angle rather than straight.

Cape Romain does not deny that the arbitration provision would cover this dispute. Rather, it contends that the arbitration provision is unenforceable because there is insufficient contact with interstate commerce for the Federal Arbitration Act to apply.⁴ Further, Cape Romain contends that even if it must arbitrate with Defendant Barnes, the arbitration should not

³ See Attach 4 to Defs' Reply in Supp. of Mot. to Dismiss and Compel Arbitration [hereinafter Defs' Rep Mem.]

⁴ Plaintiff does not contest that the other three requirements for the FAA to apply – a written arbitration agreement, an arbitrable issue, and a timely demand – are present. *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S. Ct. 631, 239 S. E. 2d 647 (1977).

include Defendant Wando E, the owner of the project, because Wando E did not sign the contract. For the reasons set forth herein, the Court disagrees.⁵

While the parties do not differ significantly on the underlying facts set forth herein, they do differ on the impact those facts should have on the Court's analysis. Plaintiff contends that the Court should limit its analysis to the face of the contract, considering only whether the contract explicitly required Plaintiff to engage in interstate commerce. Plaintiff asserts that its intent controls rather than what actually may have happened in carrying out the contract.⁶ Defendants disagree with Plaintiff's analytical framework and posit that the inquiry is broader. Defendants contend that the Court should review the contract, the complaint, and the surrounding facts in light of the situation existing when the request to arbitrate was made to determine if interstate commerce was impacted.

Defendants are correct. In *Blanton v Stathos*, 351 S.C. 534, 570 S.E.2d 565 (S.C. Ct. App. 2002), the Court of Appeals cited authority from the South Carolina Supreme Court that

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.

351 S.C. at 540, 570 S.E.2d at 568
(quoting *Zabinski v Bright Acres Assocs.*, 346 S.C. 580, 594,
553 S.E.2d 110, 117 (2001))

Accordingly, it is appropriate for the Court to review the facts developed, as well as the complaint and the contract. In doing so, the Court looks to see what transpired as the project was

⁵ Defendants do not contest that the arbitration agreement fails to comply with the notice provision of the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-70 (Supp. 1999), but assert that it is irrelevant because the FAA applies.

⁶ Even if the parties' intent were a valid factor (which it is not, see *infra* note 7), this would not assist Plaintiff since the contract specifically provided that the FAA would govern dispute resolution. (See Contract § 19.2) Governing law: if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern. Section 21.4 [arbitration procedure]. Plaintiff is in a very weak position to claim that application of the FAA, which it explicitly chose, is inappropriate.

performed, not what Plaintiff may originally have envisioned⁷ It is the realistic effect a contract has on commerce, not what one of the parties intended, that controls application of the FAA

The requirement that the underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause The phrase “evidencing a transaction” only requires that “the transaction in fact involve” interstate commerce, even if the parties did not contemplate an interstate commerce connection

Towles v United Healthcare Corp , 338 S C 29, 36, 524 S E 2d 839, 843 (S C Ct App 1999) (internal parenthesis omitted)

As discussed above, the record shows that Plaintiff did in fact know that the marina dock sections were being fabricated “up north” and would be moving in interstate commerce It is undisputed that the final destination for the dock sections was the marina site and, therefore, Plaintiff participated in their interstate journey from the Ohio fabricators to the marina site by picking up the sections at Defendant Barnes’ yard and transporting them first by truck and then on its barges to the marina site A foreign or interstate shipment does not lose its character by virtue of being held at an intermediary point before final delivery See *United States v Erie R R Co* , 280 U S 98 (1929) (holding that wood pulp held at a dock before delivery to its final destination retains its original shipment character), *Swift Textiles, Inc v Watkins Motor Lines Inc* , 799 F 2d 697 (11th Cir 1986) (holding that textile machinery held temporarily in Savannah after ocean transport and shipped to LaGrange, Georgia retains the character of the original

⁷ In its brief and at oral argument, Plaintiff relied on two cases to support its position that the FAA does not apply unless the agreement shows on its face an intent to engage in activities having a substantial relationship to interstate commerce *Mathews v Fluor Corp* , 312 S C 404 440 S E 2d 880 (1994) and *Timms v Greene*, 310 S C 469 427 S E 2d 642 (1993) These cases are not controlling here for several reasons First and foremost the holding of *Mathews* that interstate commerce must appear from the face of the contract was overruled ten years ago in *Munoz v Green Tree Fin Corp* 343 S C 531 539 542 S E 2d 360 363 n 3 (2001) (‘We overrule *Mathews v Fluor Corp* 312 S C 404, 440 S E 2d 880 (1994), to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied) Since *Mathews* relied upon *Timms*, *Timms* similar holding is also undermined Further, *Timms* involved an entirely different factual situation (nursing home patient burned under a hair dryer suing the nursing home) South Carolina courts have since applied the FAA to nursing home injury cases further undermining *Timms* See *Grant v Magnolia Manor-Greenwood Inc* 383 S C 125 678 S E 2d 435 (2009) (applying FAA to nursing home injury, but finding arbitration agreement void because designated arbitrator no longer available)

ocean shipment), *N C Utils Comm v United States*, 253 F Supp 930 (E D N C 1966) (holding that storage of a hardware chain's iron and steel products at an intermediary warehouse after their overseas arrival and subsequent shipment by truck to the retail chain's outlets did not change the nature of the original shipment)

In considering the contract, complaint, and surrounding facts, as instructed by our appellate courts, the Court keeps in mind that

The United States Supreme Court has interpreted the words "involving commerce" broadly. According [to] the Supreme Court in *Dobson*, the words "involving commerce" are the functional equivalent of "affecting commerce," which typically indicates Congress' intent to exercise its commerce power in full

Zabinski v Bright Acres Assocs, 346 S C 580, 591, 553 S E 2d 110, 115 (2001)
(citing *Allied-Bruce Terminix Co v Dobson*, 513 U S 265, 274 (1995))

As discussed in detail below, the Court concludes that the multi-faceted impact of this project on interstate commerce warrants the conclusion that the Federal Arbitration Act applies to enforce the arbitration clause

Federal policy, with which South Carolina agrees, favors arbitration when the parties have agreed to that dispute resolution mechanism. *AT&T Mobility LLC v Concepcion*, ____ U S ____, 131 S Ct 1740, 1745 (2011), *Soil Remediation Co v Nu-Way Envtl Inc*, 323 S C 454, 458, 476 S E 2d 149, 151 (1996). Because arbitration is favored over protracted litigation, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Zabinski*, 346 S C at 597, 533 S E 2d at 118. "A motion to compel arbitration should only be denied where the [arbitration] clause is not susceptible to any interpretation that would cover the asserted dispute." *Grant v Magnolia Manor-Greenwood Inc*, 383 S C 125, 129, 678 S E 2d 435, 437-38 (2009). To streamline dispute resolution, arbitration agreements should be enforced according to their terms. *AT&T Mobility LLC v Concepcion*, 131 S Ct at

1748 Plaintiff does not dispute that the explicit terms of this arbitration agreement designated the FAA as the governing law See supra text accompanying note 6

Nevertheless, Plaintiff attempts to escape the arbitration clause it signed by claiming that the contract did not affect interstate commerce ⁸ In response, Defendants have identified numerous interstate commerce relationships in connection with the marina project and Plaintiff's performance of it First, Plaintiff was performing under the requirements of a federal permit issued by the Army Corps of Engineers pursuant to the Commerce Clause U S Const art 1, § 8, c1 ⁹ The United States Supreme Court has held that the federal government's power over navigable waterways flows from the Commerce Clause

The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress

United States v Rands, 389 U S 121, 122-23 (1967)
(internal quotations omitted)

Because navigable waters are subject to "all the requisite legislation by Congress" under the Commerce Clause, the FAA, by definition, applies to projects in navigable waters Indeed, the specific aspect of this project that the Army Corps of Engineers was regulating under its Commerce Clause permit was Plaintiff's work, i e the assembly and installation of a marina In

⁸ Because the Court finds that there are sufficient interstate commerce connections to invoke the FAA it need not decide whether Plaintiff's agreement to the FAA in the contract estops it from disputing the FAA's application here At a minimum, the selection of the FAA is strong evidence of Plaintiff's understanding that the contract would involve activities that support FAA application

⁹ The Army Corps of Engineers issues permits for marine construction pursuant to its authority under the Rivers and Harbors Appropriations Act 33 U S C A § 403 *United States v Angell* 292 F 3d 333, 337 (2d Cir 2002) (Congress has given the Army Corps exclusive jurisdiction to enforce the Rivers and Harbors Act) That Act was passed pursuant to Congress' authority to regulate commerce amongst the states *Leslie Salt Co v Froehlke*, 578 F 2d 742 753 (9th Cir 1978) (The Rivers and Harbors Acts of 1890 and 1899 were enacted pursuant to the Commerce Clause) Hence, when issuing permits for marine construction the Army Corps of Engineers is doing so by virtue of the Commerce Clause

requiring a federal permit, the Army Corps of Engineers determined that the marina project impacted interstate commerce sufficiently that it needed to be regulated. It would be anomalous indeed if the Commerce Clause supported regulating Plaintiff's construction of the marina through a federal permit, but the same Commerce Clause did not support application of the FAA. This is particularly so when our courts have recognized that the language of the FAA "indicates Congress' intent to exercise its commerce power in full." *Zabinski*, 346 S. C. at 591, 553 S. E. 2d at 115.

The Court further concludes that Plaintiff's activities impacted commerce by taking place upon the navigable waters of the United States - the instrumentalities of interstate commerce. The vast majority of Plaintiff's work involved transporting dock sections by barge through Charleston Harbor, up the Wando River to the marina site, and the subsequent construction of the marina using Plaintiff's barges and pile drivers on the navigable waters of the United States.

In addition to its activities that affected interstate commerce, the Court concludes that Plaintiff directly participated in interstate commerce during the project by purchasing 75 - 100 gallons of maritime fuel for its tugs and barges, and sending over \$2,000 to the Chicago office of an interstate engineering firm that it hired to survey its work.¹⁰ Plaintiff seeks to recover these funds as part of its damages in this case.¹¹ Plaintiff's position that it did not participate in interstate commerce in connection with its work is further undermined by its seeking this interstate payment as part of its damages. Moreover, its argument that it did not intend the FAA to apply is negated by its explicit selection of the FAA as the law governing any arbitration. See supra text accompanying note 6.

¹⁰ Ex. 6 to Defs. Rep. Mem.

¹¹ Ex. 7 to Defs. Rep. Mem.

In summary, the dispute here involves (1) Plaintiff's performance of a maritime project authorized under a federal permit issued pursuant to the Commerce Clause, (2) on a marina constructed on the navigable waters of the United States, (3) with components that Plaintiff knew were being shipped from out of state, (4) whose shipment to the marina site was completed by Plaintiff, (5) where, in performance of its duties, Plaintiff purchased significant quantities of maritime fuel that moved interstate, and (6) sent a significant amount of money interstate to a firm it hired in connection with its duties, which (7) Plaintiff now seeks as part of its damages in this case. The Court concludes that these activities are more than sufficient under the broad reach of the Commerce Clause to invoke the Federal Arbitration Act.

Ample precedent supports this conclusion. The interstate commerce contacts here are much more extensive than those in *Blanton v. Stathos*, 351 S. Ct. 534, 557 S. E. 2d 565 (S. Ct. App. 2002), which the court found sufficient to support application of the FAA. In *Blanton*, an architect was hired to provide the design and drawings for construction of a restaurant in Seneca under a standard AIA contract. The architect began her work, but was terminated before she completed her duties. The architect's only interstate contacts were consulting with several out-of-state companies regarding specifications. Like Plaintiff here, the architect's contract was a "labor only" contract. The contract never contemplated that the architect would purchase any materials, and at the time of her termination, no construction had begun. Thus, no interstate materials had been purchased by anyone. When the architect sought arbitration, the owner denied there was a sufficient interstate commerce connection to invoke the FAA. The Court of Appeals disagreed, finding that the architect's design contemplated the purchase of materials from out-of-state by others, and the court took notice that "realistically the project could not be constructed without the use of materials in interstate commerce." *Id.* at 541, 570 S. E. 2d at 569.

Here, the use of out-of-state materials was not just to be realistically expected, but was specifically contemplated, as shown by Plaintiff's knowledge that Defendant Barnes was visiting the fabricators "up north" in connection with a schedule for delivery of the materials. Moreover, the architect in *Blanton* had not completed her design before she was terminated. Plaintiff here performed substantial work on the marina project affecting commerce, including the transport of out-of-state dock sections to their final destination, purchase of fuel that moved interstate, and sending over \$2,000 to Chicago in connection with engineering services for the project. The fact that Plaintiff did not itself purchase out-of-state materials is not controlling. The architect in *Blanton* neither purchased out-of-state materials nor was ever expected to do so. Thus, even though "construction had not yet begun, and all work was done by individuals residing in South Carolina," the *Blanton* court found that the contract had a sufficient nexus with interstate commerce to invoke the FAA. *Id.* at 540, 570 S E 2d at 568. The same is true here.

It is a considerable, perhaps insurmountable, burden for a party to show that any sizeable, modern day construction contract will not affect interstate commerce. Plaintiff has cited no construction case where a South Carolina appellate court has found that interstate commerce was not sufficiently affected to invoke the FAA. In contrast, numerous South Carolina appellate cases support FAA application in a variety of construction cases. *See, e.g., Osteen v T E Cuttino Constr Co*, 315 S C 422, 434 S E 2d 281 (1993) (residence), *Trident Technical Coll v Lucas & Stubbs Ltd*, 286 S C 98, 333 S E 2d 781 (1985) (college buildings), *Episcopal Hous Corp v Fed Ins Co*, 269 S C 631, 239 S E 2d 647 (1977) (housing project), *New Hope Missionary Baptist Church v Paragon Builders*, 379 S C 620, 667 S E 2d 1 (S C Ct App 2008) (church), *Circle S Enters Inc v Stanley Smith & Sons*, 288 S C 428, 343 S E 2d 45 (S C Ct App 1986) (truck stop). The current case not only involves the interstate shipment of

materials for the project, as in the cited cases, but the additional facts of a project on navigable waters under a Commerce Clause federal permit where Plaintiff itself sent an interstate payment for work on the project

Having concluded that the arbitration agreement is enforceable, the Court next addresses Plaintiff's contention that Defendant Wando E cannot participate in the arbitration even if Plaintiff must arbitrate with Defendant Barnes. Plaintiff's complaint makes clear, however, that it alleges a close association between Defendants Barnes and Wando E. While only Defendant Barnes signed the arbitration agreement, Plaintiff pleads that it furnished labor under the agreement to Defendant Barnes "who had authority from or acted rightly for the Defendant and owner, Wando E, LLC" (Compl ¶5). In addition, Plaintiff asserts "that the Defendant and Owner, Wando E, LLC knew and was aware of the work being performed by the Plaintiff and has in the past made certain payments of monies to Plaintiff on account of the work performed by the Plaintiff" (Compl ¶6).

Having pled that Defendant Barnes was acting for the owner, Wando E, and that Wando E was the entity that paid Plaintiff, Plaintiff is ill-suited to contend that Wando E should not participate in the arbitration with Defendant Barnes. The contract, complaint, and facts developed in the record reflect that this is essentially a single dispute revolving around Plaintiff's work on a project owned by Wando E. The allegations and damages sought by Plaintiff against Wando E mirror the allegations and damages sought by Plaintiff against Defendant Barnes.

As acknowledged by Plaintiff's counsel at argument, non-signatories to an arbitration agreement can participate in arbitrations against signatories when the claims involving the non-signatories are closely intertwined with claims involving signatories. That is the case here. Not only is this essentially a single dispute over Plaintiff's performance during the marina

construction and its right to be paid any further monies, but Plaintiff pled that the Defendant who signed the arbitration clause (Barnes) was acting for the Defendant who did not (Wando E) Because of the strong federal policy favoring arbitration, arbitration agreements can be enforced by non-signatory parties in such a circumstance *See Hinson v Jusco Co Ltd* , 868 F Supp 145, 149 (D S C 1994) (requiring the plaintiff executives to arbitrate their employment disputes with both their employer with whom they had signed an arbitration agreement and its corporate parents, who had not)

In *Long v Silver*, the Fourth Circuit noted that “[a] non-signatory may invoke an arbitration clause under ordinary state law principles of agency or contract ” 248 F 3d 309, 320 (4th Cir 2001) Plaintiff has pled such agency in claiming that Defendant Barnes was acting for Wando E ¹² As expressed in *Hinson* “[e]fficient resolution of the dispute clearly calls for all parties to be involved in one arbitration process ” *Hinson*, 868 F Supp at 149 Wando E is willing to participate in the arbitration in an effort to get this matter resolved at one time Such universal resolution of disputes should be encouraged *J J Ryan & Sons Inc v Rhone Poulenc Textile S A* , 863 F 2d 315 (4th Cir 1988) (where non-signatory is willing to submit its disputes to arbitration, strong public policy in favor of arbitration would be thwarted to leave it out) When claims against a non-signatory are “intimately founded in and intertwined with the underlying contract obligations involving a signatory, a single arbitration is warranted *Sunkist Soft Drinks Inc v Sunkist Growers Inc* , 10 F 3d 753, 757 (11th Cir 1993)

Conclusion

For the foregoing reasons, the Court finds that the Federal Arbitration Act applies, the arbitration provision freely selected by these sophisticated parties should be enforced, and that

¹² Plaintiff is bound by the allegations in its Complaint *Postal v Mann* 308 S C 385 418 S E 2d 322 (S C Ct App 1992)

Wando E should be permitted to participate in the arbitration. Accordingly, it is hereby ordered that Defendants' Motion to Compel Arbitration is GRANTED, and the proceedings are stayed pending arbitration.¹³ 9 U.S.C. § 3

Hon. Roger M. Young

Dated _____
Moncks Corner, South Carolina

¹³ As all of Plaintiff's claims arise out of its performance under the contract, they are subject to arbitration regardless of the label (breach of contract, quantum meruit) it gave to them. *Hinson v Jusco Co. Ltd.* 868 F. Supp. 145, 149 (D.S.C. 1994) (It is not the legal label assigned to a claim but the substance of the underlying allegations that determine whether claims are arbitrable.) Because the entire matter is to be arbitrated, the Court need not pass on Defendants' additional argument that the quantum meruit claim is defective because it is duplicative of the breach of contract claim.

Edward Westbrook

From Connie Dixon [CDixon@CLAWSONANDSTAUBES.COM]
Sent Thursday, June 30, 2011 4:18 PM
To ryounglc@sccourts.org
Cc Edward Westbrook
Subject Cape Romain Contractors, Inc. v. Wando E. LLC et al (case no. 2011-CP-08-985)
Attachments Ltr to Judge Young re proposed order.pdf; Order (based on Mot Hrg 6-21-11) 06-27-11.doc

Dear Judge Young,

Attached please find correspondence to you from Mr. Lacour as well as the Proposed Order regarding the above-referenced case. I have also sent opposing counsel a copy of the same via this e-mail.



Connie Dixon
Legal Assistant to Albert A. Lacour, III

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CLAWSON & STAUBES, LLC
ATTORNEYS AT LAW

ALBERT A. LACOUR III
alacour@clawsonandstaubes.com

June 30, 2011

Reply to Charleston Office
File No. 2010-1273 aal

VIA-EMAIL-ONLY --ryounglc@sccourts.org-----

The Honorable Roger M. Young, Sr.
Charleston County Judicial Center
100 Broad St., Suite 368
Charleston, SC 29401

Re Cape Romain Contractors Inc v Wando E LLC and Sean Barnes a/k/a Sean A Barnes
Case No. 2011-CP-08-985

Dear Judge Young

You indicated at the hearing on June 21, 2011 that you wanted proposed Orders from both the Plaintiff and Defendants submitted by July 1. We attach herewith our proposed Order on the Defendants' Motion to Dismiss and Compel Arbitration.

We will provide a copy of the proposed Order to opposing counsel via this e-mail.

Thank you very much for your attention to the above.

With best regards I remain,

Very truly yours,

CLAWSON & STAUBES, LLC



Albert A. Lacour III

AALIII/cld
Enclosure

cc Edward J. Westbrook, Esquire (w/enclosures) (via e-mail only)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011-CP-08-985
	)	
CAPE ROMAIN CONTRACTORS, INC ,	)	
	)	
Plaintiff,	)	ORDER ON DEFENDANTS= MOTIONS
vs	)	TO DISMISS AND TO COMPEL
	)	ARBITRATION
WANDO E, LLC AND SEAN BARNES	)	
A/K/A SEAN A BARNES,	)	
	)	
Defendants	)	

This matter came before the Court for a hearing on the Defendants= Motions to Dismiss and to Compel Arbitration on Tuesday, June 21, 2011 Present before the Court were Edward J Westbrook of Richardson, Patrick, Westbrook & Brickman for the Defendant moving parties and Albert A Lacour, III, for the Plaintiff, Cape Romain Contractors, Inc

The Court has reviewed and considered the motion and attachments dated April 22, 2011 and the Reply in Support of the Motion and its attachments dated May 10, 2011 filed on behalf of the Defendants The Court has also reviewed and considered the Return of Cape Romain to the Motions to Dismiss and Compel Arbitration dated April 28, 2011 and its attachments and the Supplemental Affidavit of Anthony T DuPre, Jr in support of that return filed May 18, 2011 Upon consideration of the arguments of counsel and review of the pleadings and attachments referenced above, the Court makes the following

FINDINGS OF FACT

1 The motions before the Court are to dismiss this action for lack of subject matter jurisdiction under Rule 12(b)(1) and to dismiss for failure to state facts sufficient

to constitute a cause of action under Rule 12(b)(6). Defendants also seek dismissal of the Plaintiff's third cause of action for quantum meruit. The original motion has two attachments submitting matters beyond the face of the complaint. One of the attachments is a partial copy of the agreement between Barnes and the Plaintiff. The Reply In Support of the Motion to Dismiss contains 8 more attachments including an affidavit of the Defendant Barnes attesting to certain facts. The moving party has therefore submitted matters outside the face of the pleadings and the motion under Rule 12(b)(6) should be treated as one for summary judgment as is provided in SCRCP Rule 12(b).

2 The Defendants argue that Wando E, LLC has a right to enforce the Arbitration Agreement even though Wando E, LLC is not a signatory to the Arbitration Agreement. The Defendants argue that enforcement of such agreements to arbitrate by non-signatories against signatories has been allowed in the past in cases involving non-signatories who have a relationship with the signatory party such as (a) parent and subsidiary, (b) corporation and shareholder, or (c) agent and principal. The agreement between the parties refers to Sean Barnes as the Aowner@ of the project. The affidavit of Barnes refers to Barnes's involvement as being that of the Acontractor@. The affidavit of DuPre mentions that, although Mr. DuPre knew that Barnes was not the owner, Barnes only referred to the true owner as his Aclient@. The record is devoid of any agreement of any kind between Barnes and Wando E, LLC. The complaint alleges only that the Plaintiff believes that Barnes A had authority from or acted rightly for@ the true owner, as is required by the Mechanic's Lien statute. The Court at this stage of the

proceedings does not have the benefit of any pleading on behalf of the Defendants concerning the nature of the relationship, if any, between Barnes and Wando E, LLC

3 The Defendants conceded during the argument of these motions that the notice which is required by S C Code Ann ' 15-48-10(a) does not appear on the first page of the agreement and that therefore the South Carolina Uniform Arbitration Act is not applicable

4 The Defendants contend a number of circumstances concerning this project impact Interstate Commerce substantially enough to invoke the power of Congress to regulate commerce and allow the application of the Federal Arbitration Act The factors indicated by the Defendants are (a) the actual use of materials fabricated in Ohio, (b) engagement of engineering services by the Plaintiff and payment for such services through the United States mail, (c) the utilization of diesel fuel which moves in commerce by the Plaintiff=s equipment, (d) movement of the materials and equipment and the construction itself within navigable waters in the State of South Carolina and (e) the conduct of the project pursuant to a permit issued by the United States Army Corps of Engineers pursuant to authority vested in the Secretary of the Army

5 The Plaintiffs argue that although some materials did in fact originate in Ohio, the written agreement between the parties does not require Cape Romain to furnish any materials as their agreement is for labor only for the assembly and installation of such materials The agreement on its face mentions in paragraph 2 2 that the owner is obligated to ensure timely delivery of materials to the contractor, provides for adjustments to the date of substantial completion if there are delays, and provides in

paragraph 2 of Exhibit #1 that the Plaintiff is to pick up the materials from Docks Unlimited, Inc and transport them to the Plaintiff=s yard in Berkeley County to be barged to the project location. Nowhere is it mentioned anywhere in the agreement that the materials originate out-of-state. As the agreement is a labor only contract and the Plaintiff is not required to provide any materials, the cost of materials represents zero dollars of the \$165,000.00 contract amount.

6 The affidavit of Anthony T. DuPre indicates that Cape Romain utilized 75 to 100 gallons of diesel fuel to move the materials from its yard in Berkeley County to the project site also located in Berkeley County. The affidavit indicates that its equipment and barges traveled 14 miles from Cape Romain=s yard through the Charleston Harbor and up the Wando River to the location of the project. The affidavit of Anthony DuPre indicates that the cost of moving the materials furnished by the Aowner@, Barnes, constitutes less than 5% of the total job costs. A review of the affidavits submitted by the parties indicates that the parties, the engineer, and the project were all located within Berkeley and Charleston Counties. All materials to be moved by the Plaintiff were to be picked up within Charleston and Berkeley Counties and transported to the job site in Berkeley County.

7 Cape Romain concedes in its Supplemental Affidavit that it engaged an engineer to assist in defending against claims of imperfect performance raised by the Defendants. Cape Romain also concedes that it mailed the check to the engineering firm in the State of Illinois.

8 The project was constructed under a permit issued by the United States

Amy Corps of Engineers pursuant to authority vested in the Secretary of the Army. The agreement between the parties simply provides that Cape Romain excludes any and all engineering or permitting and that all necessary permits are to be furnished by the owner in advance of Cape Romain mobilizing to the project site. The number and nature of the permits to be obtained by the owner is not spelled out in the agreement. The terms of the agreement do not require any activity to be conducted in interstate commerce relative to permits.

9 The complaint contains a claim for quantum meruit in the third cause of action and prays for relief in the alternative to the relief sought on the legal claims for breach of contract and foreclosure of mechanic's lien. No pleading has been filed on behalf of the Defendants at this point in the development of the case and therefore the Court is not able to know whether the Defendants challenge the sufficiency or formation of the agreement upon which the Plaintiff relies. The agreement between the parties recognizes the right of the Plaintiff to enforce its mechanic's lien in Article 21 '21 2.

Having made the foregoing findings of fact the Court therefore formulates the following

CONCLUSIONS OF LAW

1 I conclude that subject matter jurisdiction to entertain an action for foreclosure of a mechanic's lien is vested in the Circuit Court for the County in which the building or structure is situated by virtue of the terms of S.C. Code Ann. '29-5-140 (1976 as amended). The Federal Arbitration Act does not divest the State Courts of jurisdiction. If the Federal Act is applicable, the proceedings in this case will be stayed,

rather than dismissed, in favor of an Arbitration as is provided by the express terms of the Act 9 U S C '13

2 I conclude that the submission of matters outside the face of the complaint has converted the motion under Rule 12(b)(6) to one pursuant to Rule 56. The Court must therefore consider the evidence and all inferences to be drawn from them in the light most favorable to the non-moving party. Viewing the facts in the light most favorable to Cape Romain, the motion must be denied if the record indicates that there exist genuine issues of material fact. Turner v Milliman, ____ S C ____, 708 S E 2d 766 (2011)

3 I conclude that a genuine issue of material fact exists as to what relationship, if any, exists between the Defendant Sean Barnes and the Defendant Wando E, LLC. In the record before the Court it appears the Plaintiff is not privy to the details of any such relationship. The Defendants, although having had adequate opportunity to do so, have not submitted any definitive information upon which this Court can rule that the relationship is one of parent and subsidiary, corporation and shareholder, or agent and principal. The record as it currently stands does not support the right of Wando E, LLC to enforce the Arbitration Agreement.

4 I conclude that the South Carolina Uniform Arbitration Act is not applicable to the agreement to arbitrate between the parties because the notice required by S C Code Ann '15-48-10(a) does not appear on the first page of the agreement. By the express terms of the act, in the absence of such notice, the act is not applicable. Circle S v Stanley Smith & Sons, 288 S C 428, 343 S E 2d 45 (Ct App 1986), Timms v

Greene, 310 S C 469, 427 S E 2d 642 (1993), Soil Remediation v Nu-way Environmental, Inc., 323 S C 454, 476 S E 2d 149 (1996)

5 I conclude that in general, the Federal Arbitration Act does not divest that South Carolina State Courts of jurisdiction. The Federal Act is enforceable in the state courts and, if applicable, preempts South Carolina common law on the subject of arbitration. Episcopal Housing Corp v Federal Insurance Company, 269 S C 631, 239 S E.2d 647, at 649 (1977). For the Federal Act to apply, the four elements outlined by the Court in Episcopal Housing must be present. Of the four requisite elements, only the requirement that the contract evidences a transaction involving commerce⁴ is challenged by Cape Romain. Episcopal Housing, 239 S E 2 at 650, 9 U S C '1, '2. I conclude that for the Federal Act to apply, the contract must have a sufficient nexus to interstate commerce. The agreement must have an affect on interstate commerce and involve enough activity in interstate commerce to justify or trigger federal jurisdiction. T.J. Paramore v Inter-Regional Financial Group, 68 N C App 659, 316 S E 2d 90 (1984). The relationship to commerce must be substantial enough to trigger the power of the Federal Government to regulate commerce between the states and with foreign nations as set forth in the United States Constitution. 9 U S C '1. To determine whether the contract involves interstate commerce, the Court must examine the agreement, the complaint and the facts to ascertain whether the transaction is one involving commerce within the meaning of the act. Soil Remediation Company v Nu-way Environmental, 476 S E 2d at 152, Mathews v Fluor, 312 S C 404, 440 S E 2d 880 at 881.

6 The cases of Timms v. Greene, 310 S. C. 469, 427 S. E. 2d 642 (1993) and Mathews v. Fluor Corporation, 312 S. C. 404, 440 S. E. 2d 880 (1994) were both decided after Episcopal Housing and offer insight into what the Court intended by its decision in Episcopal Housing. Initially, if the face of the agreement reflects a requirement of interstate commerce then the Federal Act is applicable. I have reviewed the agreement between the parties presently before the Court and can find no term whatsoever of the agreement between the parties that requires the involvement of interstate commerce. Quite to the contrary, the agreement addresses only the activities of the parties thereto and appears to contemplate that all activities take place within Charleston and Berkeley Counties. The allegations of the complaint do not reflect any activity that involves commerce between the States or with foreign nations. The Court must also examine the actual course of performance of the parties to discern any impact upon interstate commerce. I conclude that the performance of the express terms of the agreement between the parties in this case does not involve a sufficient nexus to interstate commerce to justify application of the Federal Act. The movement of materials between the business location of Sean Barnes in Charleston County and the project location in Berkeley County did not involve interstate commerce. The mailing of a check to the engineering firm hired by the Plaintiff did involve the use of the United States Mail, but an expenditure of 44 cents for postage is hardly a sufficient nexus or impact on commerce. Likewise the use of 75 to 100 gallons of diesel fuel is insignificant relative to the millions of gallons used daily in commerce, and moving the equipment and the materials 14 miles from Cape Romain's yard to the job site is insignificant compared to

the 200 plus miles of coastline navigable waters within the State. According to the affidavit of Cape Romain, this activity represented less than 5% of the total job cost. Lastly, the permit issued by the Corps of Engineers, Department of the Army, has not been shown to have any relationship to commerce between the States or among foreign nations. The Court concludes that there is no impact on commerce here sufficient to justify or trigger the power of congress to regulate trade between the States and with foreign nations. Timms and Greene, *supra*. At the very least the affidavits reflect genuine issues of material fact which exist such that the Defendants' motion must be denied.

7 I conclude that SCRPC Rule 8(a) allows the Plaintiff to plead claims for different types of relief in the alternative. The Plaintiff may seek foreclosure of its mechanic's lien and also plead the claim for quantum meruit in the alternative in the event that, for whatever reason, its express contract claims are not proved at trial. Swanson v. Stratos, 350 S.C. 116, 564 S.E.2d 117 (2002) stands for the proposition that the claim for quantum meruit may be an appropriate alternative claim if the Plaintiff is unable to prove its express contract. The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit unless the original contract remains in force. @ Swanson, 564 S.E.2d at 118. In that case the trial court held that an express agreement on the subject did exist. On appeal it was held that the existence of the express agreement on the subject prevented any recovery in quantum meruit. In the present case no answer has been filed by the Defendants and no ruling

has yet been made on whether the express agreement between the parties is valid and enforceable. Dismissing the quantum meruit claim now might eliminate a potentially appropriate remedy on the part of the Plaintiff before the pleadings are closed and before the Defendants have, through their pleadings, indicated whether they take issue with the validity of the express agreement. Any such ruling would be premature at this point in the development of the case.

IT IS THEREFORE

ORDERED that the Defendants' Motion to Dismiss pursuant to SCRCP Rule 12(b)(1) is denied as the subject matter jurisdiction of the Court to entertain an action for foreclosure of a mechanic's lien is statutory, and it is further,

ORDERED that the Defendants' Motion to Dismiss pursuant to SCRCP Rule 12(b)(6) as converted by the Defendants to a motion pursuant to Rule 56 is denied because the agreement on its face does not contemplate interstate commerce and the facts submitted by the parties concerning the performance of the agreement indicate, at most, that genuine issues of material fact exist as to whether the actual performance of the agreement by the parties involved a sufficient impact upon commerce to justify or trigger the power of congress to regulate trade between the states or with foreign nations, and it is further

ORDERED that the Defendants' Motion to Dismiss Plaintiff's quantum meruit claim is denied, and it is further,

ORDERED that the Defendants' request for the Court's ruling that Wando E, LLC is entitled to enforce the arbitration agreement although not a signatory to same is

denied as there exist genuine issues of material fact as to the nature of the relationship between Barnes and Wando E, LLC and whether the relationship is such that Wando E as a non-signatory may be entitled to enforce the arbitration agreement

AND IT IS SO ORDERED this _____ day of _____, 2011 at _____, South Carolina

Roger M Young, Sr.
Presiding Judge Ninth Judicial Circuit

State of South Carolina	)	Court of Common Pleas
County of Berkeley	)	Ninth Judicial Circuit
 Cape Romain Contractors Inc ,	)	Transcript of Record
Plaintiffs,	)	2011-CP-08-00985
V	)	
Wando E, LLC,	)	
<u>Defendant</u>	)	

June 21, 2011

Moncks Corner, South Carolina

B E F O R E

The Honorable Roger M Young, Sr , Judge

A P P E A R A N C E S

Albert A Lacour, III, Esquire

Attorney for the Plaintiff

Edward J Westbrook, Esquire

Attorney for the Defendant

SHARON L VIZER-HANKS - CIRCUIT COURT REPORTER

I N D E X

Motion to Compel Arbitration and Dismiss Action	
Argument by Mr Westbrook	3
Argument by Mr Lacour	10
 Certificate of Reporter	 25

NO EXHIBITS WERE INTRODUCED

1 Tuesday, June 21, 2011

2 THE COURT All right What's next here? A motion
3 to compel arbitration and a motion to dismiss on Cape
4 Romain Contractors vs Wando E, LLC All right Whose
5 actual motion is this?

6 MR WESTBROOK Your Honor, the defendants bring
7 the motion Ed Wesbbrook for the defendants

8 THE COURT Okay What do you want to tell me?

9 MR WESTBROOK Your Honor, this case involves a
10 rather substantial marina construction project on the
11 Wando River above Highway 41 Bridge and disputes over
12 that construction The plaintiff was the contractor
13 hired to transport sections of the dock, assemble them
14 and install them during the project

15 Disputes arose when the engineer refused to certify
16 certain of the plaintiffs work for payment To
17 capsulize, some dock sections were crooked instead of
18 being straight and piles were put up slanted instead of
19 being vertical When the engineer refused to certify
20 that for payment the plaintiff raised question about it

21 The defendants, Defendant Barnes, who was the
22 contractor on the project, the other defendant, Wando E,
23 is the owner of the project

24 Defendant Barnes sought to have the matters
25 arbitrated The parties had signed a standard A I A

1 contract and had checked the box saying the disputes
2 would be arbitrated When that issue came up the
3 plaintiff said the arbitration clause is no good because
4 this contract has no affect on interstate commerce

5 So the issue before the Court -- really two, is
6 there any affect on interstate commerce from this project
7 and contract, and number two, if there is to be an
8 arbitration whether the owner can participate in the
9 arbitration

10 Your Honor, as to the first point, our courts have
11 made it clear that under the Federal Arbitration Act the
12 power of the Federal Arbitration Act extends to the
13 limits of the commerce power of the United States So
14 the question to be asked is whether this project has an
15 affect on interstate commerce that the commerce power
16 could reach, and for several reasons certainly it does

17 First and foremost, Your Honor, the entire project
18 was under the commerce clause jurisdiction of the United
19 States It was being constructed by the plaintiff
20 pursuant to an Army Corps of Engineers permit that had
21 been issued itself under the commerce clause power of the
22 United States, which makes sense because the entire
23 project was being built on the navigable waters of the
24 United States which are themselves the instrumentalities
25 of interstate commerce

1 In addition, Your Honor, the plaintiff's
2 performance involves aspects of interstate commerce One
3 of the main tasks the plaintiff had to do was to pick up
4 dock sections that were being fabricated in Ohio,
5 delivered to Defendant Barnes' yard where Defendant
6 Barnes attached planking

7 Then the plaintiff was to pick up those sections,
8 to travel from Ohio, bring them over to its yard in North
9 Charleston, load them on barges, bring them through the
10 harbor up to the marina site and construct them

11 We have filed an affidavit from the Defendant
12 Barnes saying that the plaintiff was aware that the dock
13 sections were coming from up north in Ohio through
14 interstate commerce The plaintiffs recently filed a
15 supplemental affidavit stating that they were not aware
16 that the dock sections were coming from out of state
17 Mr Dupree's affidavit is in the record

18 Your Honor, I've met Mr Dupree I think he's a
19 nice fellow but he's simply misinformed on that It's
20 clear that Mr Dupree knew months before the contract was
21 signed that the sections he was going to be picking up
22 and installing had themselves traveled through interstate
23 commerce and that he would be continuing their journey
24 on, and we'd like to supplement the record, Your Honor,
25 with an e-mail from Mr Dupree which is in May, two

1 months before the contract

2 Your Honor, may I hand it up to the Court?

3 THE COURT Uh-huh

4 MR WESTBROOK Your Honor, if I can read from this
5 copy Your Honor, this is in May 2010 The contract
6 itself was signed in July 2010, and the issue involves
7 the fabrication of these dock sections

8 And Sonny at Cape Romain is Mr Dupree, Cape
9 Romain's representative, and he writes to Mr Kirby, who
10 is the engineer on the project, copies Mr Barnes and
11 he's relating a conversation he just had with Mr Barnes
12 two months before the contract And he says, Okay, and
13 Shawn and I just spoke -- and he goes on about some other
14 matters Then he says, I'm out Wednesday through Friday
15 He goes up north early next week to visit fab operation,
16 so we're good until late next week to finalize

17 He's talking about the fabrication operation for
18 the dock sections So, Your Honor, though it's not
19 essential that the plaintiff knew the sections were
20 moving through interstate commerce Mr Barnes has filed
21 an affidavit, says it was clear that Mr Dupree and Cape
22 Romain knew that the sections were coming through
23 interstate commerce

24 That e-mail shows that Mr Dupree knew that
25 Mr Barnes was going to the fab operation up north where

1 the sections were to be fabricated So the major
2 components of the dock, the dock sections, were all
3 moving through interstate commerce themselves Mr
4 Dupree's operation was picking them up, taking them on
5 the navigable waters of the United States and
6 constructing it on the navigable waters of the United
7 States

8 In addition, Mr Dupree has admitted in his
9 affidavit that they purchased 75 or a hundred gallons of
10 diesel fuel which itself moved through interstate
11 commerce, and Mr Dupree has admitted that in connection
12 with the construction of the marina project plaintiff
13 hired a multi-state consulting firm, Stan Tech, to whom
14 they sent over \$2,000 to Chicago to pay for their
15 operation

16 So, Your Honor, whether you look at it through the
17 lens of the overall umbrella of the project being
18 constructed under an interstate commerce permit through
19 the Army Corps of Engineers, or the travel of the major
20 sections of the marina all traveling through interstate
21 commerce, or through the plaintiff's own activities,
22 picking these up and taking these on barges through the
23 interstate waters of the United States, or through the
24 plaintiff's own spending of money and sending it
25 interstate you have a plethora of interstate contacts

1 with this particular project

2 And our courts have held that, Your Honor, The
3 requirement that the underlying transaction involve
4 commerce is to be broadly construed so as to be
5 coextensive with congressional power to regulate under
6 the commerce clause The phrase evidencing a transaction
7 only requires that the transaction, in fact, involved
8 interstate commerce even if the parties did not
9 contemplate an interstate commerce connection

10 And that's from the Towles vs United Healthcare
11 Corporation Court of Appeals decision we site on page 11
12 of our reply brief

13 Your Honor, we have found no case which has had
14 this extensive amount of interstate commerce connection
15 where the courts have ever said that the F A A would
16 not apply and the parties' freely selected arbitration
17 clause should not be enforced

18 These are two sophisticated contractors The
19 plaintiff is seeking all and all over \$230,000 in
20 payments that has already been paid over \$70,000 So
21 this is not a mom and pop operation that was going on
22 here This is not a mom and pop project

23 Your Honor, for all these reasons we believe that
24 there is sufficient effects on interstate commerce for
25 the F A A to be applied, and the parties freely

1 selected arbitration clause to be enforced

2 The second point, Your Honor, is if there is to be
3 an arbitration, and we believe there should be as the
4 parties selected, the owner of the project, Wando E, who
5 the plaintiff has seen fit to sue, should be allowed to
6 participate It makes no sense to have the dispute
7 concerning the marina decided without the owner being
8 involved Plaintiff has pled in its complaint that it
9 was the owner for whom Defendant Barnes was acting They
10 essentially plead agency They say Defendant Barnes was
11 acting rightfully for and with authority from the owner

12 And the plaintiff also concedes that its payments
13 under the contract, the over \$70,000, have actually come
14 from the owner So if there is to be more money to be
15 paid and there's going to be some financial adjustment it
16 certainly makes sense for the owner to be involved

17 And we have cited Judge Norton's case, the
18 Jusco [ph] case, where he says in situations where you
19 have closely related parties, one of whom signed the
20 arbitration and one of whom didn't that are on the same
21 side of the dispute, it makes sense to get everybody
22 involved in the arbitration It comes up in situations
23 involving a parent subsidiary corporation, a stockholder,
24 and stockholders of the corporation, and the corporation,
25 and in principles and agency

1 And here, Your Honor, we have essentially a single
2 dispute, is plaintiff entitled to more money or not, or
3 was his work satisfactory or not? The only reason
4 Wando E is in the case is because it is the owner of the
5 project. There's no independent delict that Wando E has
6 committed. It's simply there because it owns the
7 project, and according to the plaintiff the Defendant
8 Barnes was acting for Wando E. So if there is to be an
9 adjustment of some type financially it makes sense for
10 Wando E to be there.

11 So we ask that the Court grant our motion to compel
12 arbitration, dismiss the action and send the parties to
13 their freely chosen forum, which was arbitration under a
14 standard A A A contract. Thank you, Your Honor.

15 THE COURT All right. Mr. Lacour?

16 MR. LACOUR Please the Court, Your Honor. Andy
17 Lacour on behalf of Cape Romain Contractors. We did file
18 this mechanics lien case to collect money on a project
19 which we performed in Berkeley County.

20 It's our position that the arbitration agreement is
21 not enforceable under the state act for absence of the
22 notice required on the front page of the contract and
23 that it's not enforceable under the federal act for
24 absence of the necessary nexus to commerce which is
25 required, and, Your Honor, those are the only two

1 mechanisms which we know of that exist for the Court to
2 send this matter to arbitration

3 There are four parts to my argument The first is
4 consideration of what is the standard under which the
5 Court is deciding this motion They filed a motion under
6 12(b)(1) and 12(b)(6)

7 Their motion also has attached to it a partial copy
8 of the contract which means that they are taking or
9 offering to the Court matters that go beyond the face of
10 the pleadings, and presenting matters essentially outside
11 of the pleadings takes them beyond Rule 12 and converts
12 this to a Rule 56 motion

13 Now, we have responded with our own two affidavits,
14 and I don't know I might stop a minute and ask if you
15 have these before you Have you got the two, the return
16 and the supplemental affidavit filed by the plaintiffs?
17 I'll be happy to hand up another copy

18 THE COURT Cape Romain Contractors supplemental of
19 Anthony Dupree, Jr ?

20 MR LACOUR Yeah Yes, sir There's a
21 supplemental affidavit and before that was our return to
22 their motion

23 THE COURT Right Yep

24 MR LACOUR Well, essentially -- but I'm going to
25 refer to both of those Essentially, we responded with

1 our two affidavits and a complete copy of the contract
2 instead of pieces and parts that were submitted
3 initially, and we're proceeding under Rule 56 And as
4 Your Honor knows, unless they are able to establish no
5 genuine issue of any material fact exists as to the
6 relief they seek then their motion is going to have to be
7 denied under 56

8 We believe that our affidavits at the very least
9 raise a genuine issue of material fact on the issue of
10 commerce or not, and the first question that we have to
11 deal with is whether -- in our view, the first question
12 we have to deal with is who it is that is entitled to
13 seek this relief

14 Motion by Shawn Barnes, he is a party to the
15 contract He attached a copy to that and have no problem
16 with that Wando E, on the other hand, is not a party to
17 the agreement

18 As counsel has pointed out, there have been cases
19 where they have allowed non signatories to enforced it
20 against signatories An arbitration agreement can be
21 enforced against the signatory by somebody in a parent
22 subsidiary relationship, in a corporate shareholder
23 relationship or in an agent principal relationship
24 That's a great argument except for the fact that their
25 affidavit doesn't establish that any of these

1 relationships exist

2 There are no facts in the record from which the
3 Court can find that Barnes is a parent or subsidiary of
4 Wando E, or that Barnes is a corporate shareholder of
5 Wando E, or that Barnes is an agent and a principal of
6 Wando E They had the opportunity to submit that
7 information via their affidavits and they did not It's
8 not in there

9 So the only information we have is that in Barnes'
10 affidavit he says he was a contractor Well, a
11 contractor by definition is an independent contractor
12 He's not an agent He's the guy on the other end of an
13 arm's length transaction, an agreement, a contract That
14 doesn't put him in any of those three relationships with
15 Wando E

16 So basically the first point is that we're really
17 talking about enforcing arbitration here between
18 Mr Barnes and my client, Cape Romain, and it doesn't
19 involve Wando E at this point

20 The second thing is whether you can enforce this
21 under the state act If you'll look at the first page of
22 the contract which is exhibit ---

23 MR WESTBROOK Excuse me, Your Honor No dispute
24 that the state act -- under the state act you couldn't
25 enforce it I'll save him some time

1 MR LACOUR Thank you I appreciate that

2 Okay Then moving to the federal act There are
3 four required elements to be able to enforce an
4 arbitration agreement under the federal act The first
5 three we don't challenge The absence of default on
6 their fault, the presence of an arbitral issue and a
7 written agreement to arbitrate all exist We're not
8 challenging those for purposes of this argument

9 What we're saying is that there's not a sufficient
10 nexus to interstate commerce on this project for the
11 federal act to apply The case law says that there must
12 be an affect on interstate commerce which means enough
13 involvement of interstate commerce It must be a
14 substantial enough involvement of interstate commerce to
15 trigger power of the federal government to regulate
16 commerce between the states and with foreign nations

17 And also the case law indicates that the agreement
18 must show on its face that commerce was contemplated In
19 other words, the express terms of the agreement must
20 refer to some requirement of interstate commerce

21 Every case that's been decided there was another
22 side of the coin In every case that was decided you
23 could go to some level behind the transaction and find
24 interstate commerce That's not determined

25 What is determinative here is whether the express

1 agreement between the parties requires the interstate
2 commerce, and that's what the case law indicates The
3 two cases we rely on, Timms vs Greene and Mathews vs
4 Fluor, illustrate that requirement

5 In Timms vs Greene, a lady was a patient in a
6 nursing home and the contract for services was to be
7 performed in the Nursing home Now, the arguments had to
8 do with, well, they are buying materials in interstate
9 commerce, there's money flowing in interstate commerce
10 There's all those other things in the background

11 The Supreme Court said, No The lady is in the
12 nursing home The contract is about the services
13 rendered to her right there in the nursing home There's
14 nothing interstate about it The face of the agreement
15 does not require interstate commerce, denied the motion

16 The other agreement, Mathews vs Fluor, was the
17 sale of an office building in Greenville, South Carolina
18 The contract was like a standard real estate contract,
19 required people to appear at the closing and consummate
20 the transaction on a certain day

21 Well, the arguments, again, were that, well, we've
22 got a seller in a state other than South Carolina and a
23 buyer in a state other than South Carolina, that we've
24 got money moving in interstate commerce, we've got
25 opinions and appraisals, testing labs involved from other

1 states, and all this other stuff in the background

2 The ruling was, you know what, none of that is
3 required by the terms of the agreement The only thing
4 required to happen is that the people consummate this
5 transaction in Greenville, South Carolina All this
6 other stuff in the background is not relevant

7 The agreement did not require anybody to hire
8 out-of-state testing people, did not require anybody to
9 do anything in interstate commerce It just required
10 them to appear at one conference room table in
11 Greenville, South Carolina and consummate the deal
12 Again, denied the motion

13 So it's important to keep in mind that -- and it's
14 cited in our brief, the Episcopal Housing case, which
15 everybody goes back to Both of these cases, Timms and
16 Mathews, are decided after Episcopal Housing Both of
17 those cases are discussed in the Soil Mediation vs
18 Nu-Way decision, which we've cited Both of these cases
19 were -- the Supreme Court in Soil Mediation quoted both
20 of them with approval

21 Episcopal Housing that everybody relies on and
22 makes everybody in this State think that arbitration is
23 just automatic, if you just move for it you're going to
24 get it, was an 18-story office building where the
25 contract required them to use 13 out-of-state suppliers

1 where they, in fact, used four out-of-state
2 subcontractors, and the Supreme Court had somehow a
3 factual basis in the record to hold that the materials
4 needed for this 18-story office building were not
5 available in South Carolina

6 Well, in our case instead of 13 out-of-state
7 material suppliers we've got no materials We are a
8 labor only contractor, subcontractor for assembly We
9 furnish no material In our case instead of four
10 out-of-state subs we have no subs In our case instead
11 of an 18-story office building it's a 175,000 dollar
12 dock So our case contrasts

13 And I would refer Your Honor to the affidavit of
14 Mr Dupree The differences between this case and the
15 Episcopal Housing case go farther, first of all,
16 geography Everything that we had to do was done in
17 Charleston and Berkeley Counties The job was located in
18 Berkeley and the engineer for the project was in Mount
19 Pleasant

20 Now, I'm not sure what I heard earlier but when
21 they were talking about the materials that moved in
22 interstate commerce, if you'll look at the agreement
23 between the parties attached to our supplemental
24 affidavit at the last couple of pages there's a letter,
25 exhibit one attached That exhibit one makes it clear

1 that if anything moved in interstate commerce it happened
2 without our involvement

3 Our contract says we are to pick up the dock
4 sections in Charleston County and move them to Berkeley
5 County Within a few miles of the job site is where
6 Mr Barnes' shop was and that's where the materials were
7 supposed to be made available to us, and if not there at
8 our yard, in Berkeley County

9 So everything we had to do was Charleston and
10 Berkeley County The farthest we had to go was to
11 another location in the Charleston Harbor to pick up the
12 pallets and put them on our barge So geography makes a
13 difference, and that's a distinction between these cases

14 The second thing about the difference between our
15 agreement and the agreement in the leading case on
16 Episcopal Housing is that, again, instead of many
17 millions of dollars being spent by the general contractor
18 on materials we spent zero dollars on materials
19 Everything was to be furnished by Mr Barnes We were
20 labor only

21 The third thing about it is that the actual
22 performance of the work we did, in fact, perform without
23 subs and without going anyplace outside of Berkeley and
24 Charleston County, wholly within the County of Berkeley
25 Like I said, we didn't have to go 20 miles in any

1 direction, and that's established in the two affidavits
2 of Mr Dupree

3 So then their arguments on the impact on commerce
4 To get to the heart of it, there's five things that they
5 point out and say, Okay, these are a substantial enough
6 impact, this is a substantial enough nexus to interstate
7 commerce to justify the invocation of congressional power
8 to regulate trade and commerce between the states, and
9 here's what they say Well, the materials came from
10 Ohio

11 Well, Your Honor, there's not a thing written in
12 this agreement anywhere about materials from Ohio
13 There's nothing in this agreement that says where the
14 materials come from Zero percent of the value of this
15 contract is materials because this is a labor only
16 contract to be performed in Berkeley County So I don't
17 doubt that the materials came from Ohio but it's not
18 relevant It's not mentioned in the contract

19 The second thing they say is engineering services
20 were engaged by my client Well, Judge, the contract
21 doesn't require us to furnish any engineering materials
22 -- engineering services What happened was when they
23 made claims that we disagreed with about the work we had
24 to go hire an engineer to protect ourselves

25 The engineer was in North Charleston That's in

1 the affidavits That's the facts And one 43-cent stamp
2 was utilized to mail a check to Chicago because that's
3 where they told us to send the check Forty-three cents
4 for a stamp is not a big impact on interstate commerce
5 That's not a sufficient nexus to trigger the power of
6 Congress to regulate trade

7 The next thing they said was fuel And we put in
8 our affidavit that, Yeah, you're right We spent 75 to a
9 hundred dollars worth of gallons of fuel to move material
10 from Clouder Creek where -- our yard is right across from
11 the Naval yard on the Cooper River, down through the
12 harbor and back up the Wando River to where this dock is
13 right by the Highway 41 Bridge So if you're familiar
14 with the harbor then you know the route we had to take

15 Seventy-five or a hundred gallons of diesel fuel,
16 Your Honor, is insignificant compared to the millions of
17 gallons of diesel fuel utilized to move things in
18 commerce every day It's in the millions of barrels
19 range, not just gallons

20 The next thing they said was, Well, you're in the
21 navigable waters of the United States Well, yep, the
22 affidavit will reflect that we traveled a whole 14 miles
23 down Clouder Creek and around the harbor and up the Wando
24 River, a whole 14 miles when South Carolina has over 200
25 plus miles of the coastline in navigable waters

1 That moving of materials was less than five percent
2 of the contract balance It's not a significant impact
3 if it's less than five percent of a 165,000-dollar face
4 contract That's not -- 14 miles out of 200 miles is,
5 again, not an impact on commerce

6 And the last thing, and probably what they figure
7 is their ace in the hole, the Corps of Engineers permit
8 that they referred to is attached to one of the documents
9 they submitted

10 The first thing is the agreement simply requires
11 that permits be furnished by others, as far as I know
12 It's in that last -- there's something about it in that
13 last two pages Whether it requires one of the parties
14 to furnish it or says they are furnished by others I
15 don't remember but definitely permits were not part of
16 our work So it's kind of like the first argument on
17 materials We didn't furnish any permits

18 The second thing is the Corps of Engineers doesn't
19 have anything to do with commerce If you go back and
20 look at 33 U S C 401, 402 and 403 when they first set up
21 this arrangement it came about under the River and Harbor
22 Act of March 3, 1899, and what they did in those statutes
23 was said that you can't build any kind of bridge, or
24 causeway, or dike, or anything like that on any navigable
25 waters of the United States without approval of -- here

1 we go No wharf, pier, dolphin, boom, weir, breakwater,
2 bulkhead, jetty, or other structures on any navigable
3 river or other water of the United States without the
4 plans recommended by the Chief of Engineers and
5 authorized by the Secretary of War

6 In 1899 this was under the Secretary of War Why?
7 Because they didn't want people building things that
8 would somehow inhibit the Army and the Navy from
9 defending the Country, and they later in 19 -- it wasn't
10 until after 1947, after the Third World War that they
11 transferred the authority from the Secretary of War to
12 the Secretary of the Army

13 It doesn't have anything to do with transportation
14 It has to do with National Defense It doesn't have
15 anything to do with commerce but it has to do with
16 National Defense

17 So the bottom line is that while there are several
18 contacts here and while they are all in the background
19 none of them are expressly required by the contract and
20 none of them are sufficient enough to justify -- to
21 trigger, as the case law says, the power of Congress to
22 regulate trade between the state

23 There's one more item that wasn't mentioned in
24 their motion They also moved to dismiss my quantum
25 meruit cause of action I always plead quantum meruit as

1 an alternative to a mechanics lien in case for some
2 reason my contract claim falls apart It only applies in
3 the alternative Rule 8(a) says we can plead alternative
4 claims

5 We don't know if they disagree that the contract is
6 valid or not because they haven't filed any pleadings
7 yet It would certainly be premature to rule that we
8 can't recover on quantum meruit when there hadn't been a
9 ruling yet that the contract is or isn't valid

10 So on that last point they cite a case, Swanson vs
11 Stratos, that stands for the proposition of law that I
12 just quoted I think it supports us It's not the point
13 in time in the case where you can dismiss our cause of
14 action before there's been any ruling on the facts on
15 that, Your Honor

16 So for all those reasons we think the motion should
17 be denied and we should proceed with our litigation
18 Thank you

19 THE COURT Here's what I'm going to do I'm going
20 to give you all 10 days to submit proposed orders to me,
21 and that will give me a chance to think about your
22 arguments today and any counter arguments that you want
23 to make If you can get them to me by -- I'll tell you
24 what, what's today? The 21st End of the day, you know,
25 July 1st That works? In the next week?

1 MR LACOUR Yes, sir That's fine with me, Your
2 Honor

3 MR WESTBROOK That's fine, Your Honor

4 THE COURT All right Thank you

5 MR LACOUR Thank you, Judge

6 MR WESTBROOK Thank you, Judge

7 (WHEREUPON, the hearing was concluded)

8

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C E R T I F I C A T E

I, Sharon L Vizer-Hanks, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 1st day of June 21, 2011

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

October 17, 2011


SHARON L VIZER-HANKS

CIRCUIT COURT REPORTER

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M Young, Sr , Circuit Court Judge

Case No 2011-CP-08-985

Cape Romain Contractors, Inc ,

Respondent,

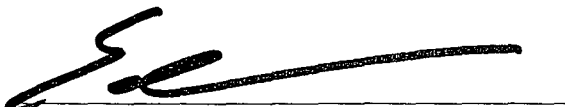
v

Wando E, LLC and Sean Barnes a/k/a Sean A Barnes,

Appellants

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



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November 22 2011

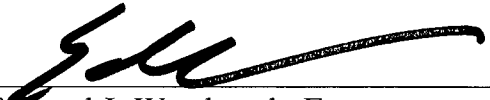
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Record on Appeal has been served upon the following counsel of record via first class mail this 22nd day of November, 2011

Albert A LaCour, III
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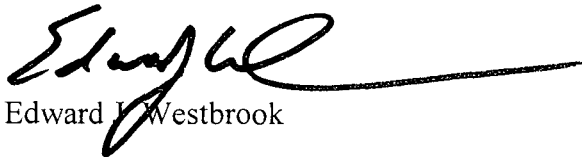
Hon Tanya A Gee, Clerk
South Carolina Court of Appeals
Edgar A Brown Building
1205 Pendleton Street
Columbia, SC 29201

Re *Cape Romain Contractors Respondent v Wando E LLC and Sean Barnes a/k/a Sean A Barnes Appellants*, Case No 2011-CP-08-985,
Appeals Court Tracking No 2011197207

Dear Madame Clerk

Pursuant to South Carolina Rule of Appellate Procedure 208(b)(7), Appellants wish to bring to the attention of the Court today's decision of the United States Supreme Court in *Compucredit Corp et al v Greenwood et al*, No 10-48 (Jan 10, 2012), which is relevant to Appellants' arguments in Section II (page 16) and Section III (page 20) of Appellants' opening brief See Compucredit Corp slip op at 2 (enclosed)

Respectfully,



Edward J. Westbrook

EJW/kaj

Enclosure

cc Albert A LaCour, III (with enclosures)

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Syllabus

NOTE Where it is feasible a syllabus (headnote) will be released as is being done in connection with this case at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COMPUCREDIT CORP. ET AL. v. GREENWOOD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 10–948 Argued October 11, 2011—Decided January 10, 2012

Although respondents' credit card agreement required their claims to be resolved by binding arbitration, they filed a lawsuit against petitioner CompuCredit Corporation and a division of petitioner bank, alleging *inter alia* violations of the Credit Repair Organizations Act (CROA). The Federal District Court denied the defendants' motion to compel arbitration, concluding that Congress intended CROA claims to be nonarbitrable. The Ninth Circuit affirmed.

Held Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the Federal Arbitration Act (FAA) requires the arbitration agreement to be enforced according to its terms. Pp. 2–10.

(a) Section 2 of the FAA establishes a liberal federal policy favoring arbitration. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.* 460 U. S. 1, 24. It requires that courts enforce arbitration agreements according to their terms. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213, 221. That is the case even when federal statutory claims are at issue, unless the FAA's mandate has been overridden by a contrary congressional command. *Shearson/American Express Inc. v. McMahon*, 482 U. S. 220, 226. Pp. 2–3.

(b) The CROA provides no such command. Respondents contend that the CROA's disclosure provision—which requires credit repair organizations to provide consumers with a statement that includes the sentence, "You have a right to sue a credit repair organization that violates the [Act]" 15 U. S. C. §1679c(a)—gives consumers the right to bring an action in a court of law, and that because the CROA prohibits the waiver of any right of the consumer under this subchapter, §1679f(a), the arbitration agreement's waiver of the right to bring a court action cannot be enforced. Respondents' premise is

Syllabus

flawed. The disclosure provision creates only a right for consumers to receive a specific statement describing the consumer protections that the law elsewhere provides, one of which is the right to enforce a credit repair organization's liability for failure to comply with [the Act]. §1679g(a). That provision does not override the FAA's mandate. Its mere contemplation of judicial enforcement does not demonstrate that the Act provides consumers with a right to initial judicial enforcement. Pp. 3–8.

(c) At the time of the CROA's enactment in 1996, arbitration clauses such as the one at issue were no rarity in consumer contracts generally or in financial services contracts in particular. Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest. Pp. 8–9.

615 F. 3d 1204 reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. SO TOMAYOR, J., filed an opinion concurring in the judgment, in which KAGAN, J., joined. GINSBURG, J., filed a dissenting opinion.

Opinion of the Court

NOTICE This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–948

COMPUCREDIT CORPORATION, ET AL, PETITIONERS
v WANDA GREENWOOD ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 10, 2012]

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether the Credit Repair Organizations Act (CROA), 15 U.S.C. §1679 *et seq.* precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act.

I

Respondents are individuals who applied for and received an Aspire Visa credit card marketed by petitioner CompuCredit Corporation and issued by Columbus Bank and Trust, now a division of petitioner Synovus Bank. In their applications they agreed to be bound by a provision which read: “Any claim, dispute or controversy (whether in contract, tort or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, ‘Claims’), upon the election of you or us, will be resolved by binding arbitration.” App. 62.

In 2008, respondents filed a class action complaint against CompuCredit and Columbus in the United States District Court for the Northern District of California, alleging, as relevant here, violations of the CROA. The

Opinion of the Court

claims largely involved the defendants' allegedly misleading representation that the credit card could be used to rebuild poor credit and their assessment of multiple fees upon opening of the accounts which greatly reduced the advertised credit limit

The District Court denied the defendants' motion to compel arbitration of the claims, concluding that "Congress intended claims under the CROA to be non arbitrable" 617 F Supp 2d 980 988 (2009) A panel of the United States Court of Appeals for the Ninth Circuit affirmed, Judge Tashima dissenting 615 F 3d 1204 (2010) We granted certiorari, 563 U S ____ (2011)

II

The background law governing the issue before us is the Federal Arbitration Act (FAA) 9 U S C §1 *et seq* , enacted in 1925 as a response to judicial hostility to arbitration *AT&T Mobility LLC v Concepcion*, 563 U S ____ (2011) (slip op at 4) As relevant here the FAA provides

'A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" 9 U S C §2

This provision establishes a liberal federal policy favoring arbitration agreements *Moses H Cone Memorial Hospital v Mercury Constr Corp* , 460 U S 1 24 (1983) See also, *e g* , *Concepcion supra*, at ____ (slip op , at 4) *Gilmer v Interstate/Johnson Lane Corp* , 500 U S 20, 25 (1991) It requires courts to enforce agreements to arbitrate according to their terms See *Dean Witter Reynolds Inc v Byrd*, 470 U S 213 221 (1985) That is the case even when the claims at issue are federal statutory claims unless the

Opinion of the Court

FAA's mandate has been 'overridden by a contrary congressional command' *Shearson/American Express Inc v McMahon*, 482 U S 220, 226 (1987). See also *Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc* 473 U S 614 628 (1985). Respondents contend that the CROA contains such a command.

That statute regulates the practices of credit repair organizations, defined as certain entities that offer services for the purpose of '(i) improving any consumer's credit record, credit history or credit rating or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i)'.¹ 15 U S C §1679a(3). In its principal substantive provisions, the CROA prohibits certain practices, §1679b, establishes certain requirements for contracts with consumers, §1679d and gives consumers a right to cancel, §1679e. Enforcement is achieved through the Act's provision of a private cause of action for violation §1679g, as well as through federal and state administrative enforcement §1679h.

III

Like the District Court and the Ninth Circuit, respondents focus on the CROA's disclosure and nonwaiver provisions. The former, which is reproduced in full in the Appendix *infra*, sets forth a statement that the credit repair organization must provide to the consumer before any contract is executed §1679c(a). One sentence of that required statement reads 'You have a right to sue a credit repair organization that violates the Credit Repair Organization Act.' The Act's nonwaiver provision states,

¹The District Court said that petitioners do not dispute that they come within this definition. See 617 F Supp 980 984 n 2 (ND Cal 2009). The Ninth Circuit did not address that issue see 615 F 3d 1204 1207 n 3 (2010) nor do we.

Opinion of the Court

“Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter— (1) shall be treated as void, and (2) may not be enforced by any Federal or State court or any other person” §1679f(a)

The Ninth Circuit adopted the following line of reasoning urged upon us by respondents here. The disclosure provision gives consumers the “right to sue” which “clearly involves the right to bring an action in a court of law” 615 F.3d, at 1208. Because the nonwaiver provision prohibits the waiver of “any right of the consumer under this subchapter” the arbitration agreement—which waived the right to bring an action in a court of law—cannot be enforced. *Id.* at 1214.

The flaw in this argument is its premise that the disclosure provision provides consumers with a right to bring an action in a court of law. It does not. Rather, it imposes an obligation on credit repair organizations to supply consumers with a specific statement set forth (in quotation marks) in the statute. The only consumer right it *creates* is the right to receive the statement, which is meant to describe the consumer protections that the law *elsewhere* provides. The statement informs consumers, for instance, that they can dispute the accuracy of information in their credit file and that “[t]he credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information.” 15 U.S.C. §1679c(a). That description is derived from §1681i(a), which sets out in great detail the procedures to be followed by a credit bureau in the event of challenges to the accuracy of its information. Similarly, the required statement informs consumers that they may “cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it”—the right created and set forth in more detail in §1679e. And the “right to sue” language describes the consumer’s right to enforce the credit repair organization’s

Opinion of the Court

liability” for failure to comply with any provision of this subchapter” provided for in §1679g(a)² Thus contrary to the dissent’s assertion, our interpretation does not reduce the required disclosure to insignificance *post* at 6 The disclosure provision informs consumers of their right to enforce liability for *any* failure to conform to the statute—information they might otherwise not possess It is the dissent’s interpretation that effectively reduces a portion of the CROA to a nullity Interpreting the ‘right to sue’ language in §1679c(a) to “create” a right to sue in court not only renders it strikingly out of place in a section that is otherwise devoted to giving the consumer notice of rights created elsewhere, it also renders the creation of the right to sue” elsewhere superfluous

Respondents suggest that the CROA’s civil liability provision §1679g (set forth in full in the Appendix, *infra*), demonstrates that the Act provides consumers with a right to bring an action in court They cite the provision’s repeated use of the terms “action,” “class action,” and “court”—terms that they say call to mind a judicial proceeding These references cannot do the heavy lifting that respondents assign them It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action including the relief available, in the context of a court suit If the mere formulation of the cause of action in this standard fashion were sufficient to establish the “contrary congressional com

²Accordingly when a consumer sues to enforce liability under the CROA he does so under §1679g(a) not in light of §1679c *post* at 4 (GINSBURG J dissenting) An action under the CROA need not refer to §1679c at all unless it is based on the company’s failure to provide the statement required under that section Section 1679g(a) creates the right at issue and describes it in detail not contained in §1679c’s summary When determining the scope of that right it is therefore §1679g(a)—and not §1679c—that must govern

Opinion of the Court

mand' overriding the FAA, *McMahon supra* at 226 valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law. In *Gilmer* we enforced an arbitration agreement with respect to a cause of action created by the Age Discrimination in Employment Act of 1967 (ADEA) which read, in part "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter. 29 U.S.C. §626(c)(1). In *McMahon* we enforced an arbitration agreement with respect to a cause of action created by a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) which read, in part "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit

18 U.S.C. §1964(c). And in *Mitsubishi Motors* we enforced an arbitration agreement with respect to a cause of action created by a provision of the Clayton Act which read, in part "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States and shall recover threefold the damages by him sustained and the cost of suit including a reasonable attorney's fee. 15 U.S.C. §15(a). Thus we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court. See *Gilmer*, 500 U.S. at 28, *McMahon*, 482 U.S. at 240, *Mitsubishi Motors*, 473 U.S. at 637. To be sure, none of the statutes described above contained a nonwaiver provision as the statute before us does. But if a cause of action provision mentioning judicial enforcement does not create a right to initial judicial enforcement, the waiver of initial judicial enforcement is not the waiver of a "right of the consumer," §1679f(a). It

Opinion of the Court

takes a considerable stretch to regard the nonwaiver provision as a congressional command' that the FAA shall not apply³

Moreover, if one believes that §1679g's contemplation of court suit (combined with §1679f(a)) establishes a nonwaivable right to initial judicial enforcement, one must also believe that it establishes a nonwaivable right to initial judicial enforcement in *any* competent judicial tribunal, since it contains no limitation. We think it clear, however, that this mere "contemplation of suit in any competent court does not *guarantee* suit in all competent courts, disabling the parties from adopting a reasonable forum selection clause. And just as the contemplated availability of all judicial forums may be reduced to a single forum by contractual specification, so also can the contemplated availability of judicial action be limited to judicial action compelling or reviewing initial arbitral adjudication. The parties remain free to specify such matters, so long as the *guarantee* of §1679g—the *guarantee of the legal power to impose liability*—is preserved.

Respondents and the dissent maintain that if the CROA does not create a right to a judicial forum, then the disclosure provision effectively requires that credit repair organizations mislead consumers. We think not. The disclosure provision is meant to describe the law to consumers in a manner that is concise and comprehensible to the layman—which necessarily means that it will be imprecise. The required statement says, for example, that the CROA prohibits deceptive practices by credit repair organiza-

³ *Gulmer* noted that the ADEA had been amended after conclusion of the arbitration agreement in that case to preclude waiver of rights or claims that may arise after the date the waiver is executed. 29 U S C §626(f)(1)(C). The Court said in dictum that this provision did not explicitly preclude arbitration or other nonjudicial resolution of claims. 500 U S at 29.

Opinion of the Court

tions' 15 U S C §1679c(a) This is in some respects an overstatement, and in some respects an understatement, of the "Prohibited practices' set forth in §1679b It would include for example deception apart from the offer or sale of the services of the credit repair organization" §1679b(a)(4) Yet we would not hold in order to prevent the required statement from being "misleading' that a consumer has a right to be protected from deceptive practices beyond those actually covered by §1679b So also with respect to the statement's description of a "right to sue" This is a colloquial method of communicating to consumers that they have the legal right enforceable in court, to recover damages from credit repair organizations that violate the CROA We think most consumers would understand it this way without regard to whether the suit in court has to be preceded by an arbitration proceeding Leaving that possibility out may be imprecise, but it is not misleading—and certainly not so misleading as to demand, in order to avoid that result, reading the statute to contain a guaranteed right it does not in fact contain

IV

At the time of the CROA's enactment in 1996 arbitration clauses in contracts of the type at issue here were no rarity Quite the contrary the early 1990s saw the increased use of arbitration clauses in consumer contracts generally, and in financial services contracts in particular See Ware, Arbitration and Unconscionability After *Doctor's Associates, Inc v Casarotto* 31 Wake Forest L Rev 1001, 1001 and n 3 (1996) J Shimabukuro Congressional Research Service Report for Congress The Federal Arbitration Act Background and Recent Developments 1 (2002)

Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest When it

Opinion of the Court

has restricted the use of arbitration in other contexts it has done so with a clarity that far exceeds the claimed indications in the CROA. See *e.g.*, 7 U S C §26(n)(2) (2006 ed., Supp. IV) (“No predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this section”), 15 U S C §1226(a)(2) (2006 ed.) (“Notwithstanding any other provision of law whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy”) cf. 12 U S C §5518(b) (2006 ed., Supp. IV) (granting authority to the newly created Consumer Financial Protection Bureau to regulate predispute arbitration agreements in contracts for consumer financial products or services).⁴ That Congress would have sought to achieve the same result in the CROA through combination of the nonwaiver provision with the “right to sue” phrase in the disclosure provision, and the references to “action” and

⁴The dissent questions the relevance of these statutes since they postdated the CROA and since this Court’s intervening decisions compelling arbitration increasingly alerted Congress to the utility of drafting antiwaiver prescriptions with meticulous care. *Post* at 8. But as the dissent implicitly recognizes Congress had been alerted much before these post CROA statutes were passed. The CROA itself followed a series of this Court’s seminal decisions compelling arbitration decisions which held that the FAA had established a federal policy favoring arbitration. *Gilmer v. Interstate/Johnson Lane Corp.* 500 U S 20 26 (1991) and that “[t]he burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies.” *Shearson/American Express Inc. v. McMahon* 482 U S 220 227 (1987). To the extent Congress is ever stimulated by this Court’s decisions *post* at 8 there is no reason to think the Congress that enacted the CROA was any less stimulated than subsequent Congresses.

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'court in the description of damages recoverable, is unlikely

* * *

Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms. The judgment of the Ninth Circuit is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered

Appendix to opinion of the Court

APPENDIX

Section 1679c provides

“(a) Disclosure required

“Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed

“‘Consumer Credit File Rights Under State and Federal Law

You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any ‘credit repair’ company or credit repair organization has the right to have accurate current and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

“ You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance, or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.

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‘ You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it

“Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However, mistakes may occur

“You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau

“ If the credit bureau’s reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you

‘ The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact

“ The Public Reference Branch

“Federal Trade Commission

“ Washington, D C 20580

“(b) Separate statement requirement

The written statement required under this section shall be provided as a document which is separate from any written contract or other agreement between the credit repair organization and the consumer or any other written material provided to the consumer

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“(c) Retention of compliance records

“(1) In general

The credit repair organization shall maintain a copy of the statement signed by the consumer acknowledging receipt of the statement

“(2) Maintenance for 2 years

“The copy of any consumer’s statement shall be maintained in the organization’s files for 2 years after the date on which the statement is signed by the consumer”

* * *

Section 1679g provides

“(a) Liability established

“Any person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person in an amount equal to the sum of the amounts determined under each of the following paragraphs

“(1) Actual damages

“The greater of—

“(A) the amount of any actual damage sustained by such person as a result of such failure or

(B) any amount paid by the person to the credit repair organization

“(2) Punitive damages

“(A) Individual actions

“In the case of any action by an individual such additional amount as the court may allow

“(B) Class actions

In the case of a class action, the sum of—

“(i) the aggregate of the amount which the court may allow for each named plaintiff and

Appendix to opinion of the Court

(11) the aggregate of the amount which the court may allow for each other class member, without regard to any minimum individual recovery

“(3) Attorneys’ fees

In the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with reasonable attorneys’ fees

“(b) Factors to be considered in awarding punitive damages

“In determining the amount of any liability of any credit repair organization under subsection (a)(2) of this section, the court shall consider, among other relevant factors—

‘(1) the frequency and persistence of noncompliance by the credit repair organization

“(2) the nature of the noncompliance

“(3) the extent to which such noncompliance was intentional, and

“(4) in the case of any class action, the number of consumers adversely affected’

SOTOMAYOR J concurring in judgment

SUPREME COURT OF THE UNITED STATES

No 10–948

COMPUCREDIT CORPORATION, ET AL , PETITIONERS
v WANDA GREENWOOD ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 10 2012]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins,
concurring in the judgment

Claims alleging the violation of a statute such as the Credit Repair Organizations Act (Act), 15 U S C §1679 *et seq* , are generally subject to valid arbitration agreements unless Congress evinces a contrary intent in the text history, or purpose of the statute See *Gilmer v Interstate/Johnson Lane Corp* , 500 U S 20, 26 (1991) I agree with the Court that Congress has not shown that intent here But for the reasons stated by the dissent, I find this to be a much closer case than the majority opinion suggests

The Act creates a cause of action in its liability provision see §1679g(a) denominates the cause of action a ‘right to sue’ in the mandatory disclosure statement, §1679c(a) and then provides that right[s] may not be waived, §1679f(a) Those for whom Congress wrote the Act—lay readers ‘of limited economic means and inexperienced in credit matters §1679(a)(2)—reasonably may interpret the phrase “right to sue” as promising a right to sue *in court* And it is plausible to think that Congress, aware of the impact of its words, intended such a construction of the liability provision

But while this interpretation of the Act is plausible, it is in my view no more compelling than the contrary con

SOTOMAYOR J concurring in judgment

struction that petitioners urge. As the majority opinion notes, the disclosure provision does not itself confer a cause of action, and the liability provision that does is materially indistinguishable from other statutes that we have held not to preclude arbitration. In my mind this leaves the parties' arguments in equipoise, and our precedents require that petitioners prevail in this circumstance. This is because respondents, as the opponents of arbitration, bear the burden of showing that Congress disallowed arbitration of their claims, and because we resolve doubts in favor of arbitration. See *id.*, at 26. Of course, if we have misread Congress' intent, then Congress can correct our error by amending the statute.

I add one more point. The majority opinion contrasts the liability provision of the Act with other, more recently enacted statutes that expressly disallow arbitration. I do not understand the majority opinion to hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims. We have never said as much, and on numerous occasions have held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question. See *ibid.* ("If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes.") *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) ("If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from [the statute's] text or legislative history, or from an inherent conflict between arbitration and the statutes underlying purposes" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614, 628 (1985), citation omitted)). I agree with the dissent that the statutes the majority opinion cites shed little light on the thoughts of the Congress that passed the Act. But the Act's text is not

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SOTOMAYOR J concurring in judgment

dispositive and respondents identify nothing in the legislative history or purpose of the Act that would tip the balance of the scale in favor of their interpretation

GINSBURG J dissenting

SUPREME COURT OF THE UNITED STATES

No 10–948

COMPUCREDIT CORPORATION ET AL PETITIONERS
v WANDA GREENWOOD ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 10 2012]

JUSTICE GINSBURG, dissenting

Congress enacted the Credit Repair Organizations Act (CROA) to protect consumers who have experienced credit problems —‘particularly those of limited economic means —against the unfair and deceptive practices of credit repair organizations 15 U S C §1679(a) Central to the legislation, Congress sought to arm consumers with information needed to make intelligent decisions about purchasing a repair organization’s services To that end Congress directed that, ‘before [execution of] any contract between [a] consumer and [a] credit repair organization,” the organization must make certain disclosures One of the required disclosures reads

“You have a right to sue a credit repair organization that violates the [CROA] This law prohibits deceptive practices by [such] organizations §1679c(a)

The Act’s civil liability provision describes suits consumers may bring in court individual and class actions for damages (actual and punitive) and attorneys fees A further provision renders void any purported waiver of any protection or right the Act grants to consumers

The Court today holds that credit repair organizations can escape suit by providing in their take it or leave it contracts that arbitration will serve as the parties sole

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dispute resolution mechanism. The right to sue' the Court explains merely connotes the vindication of legal rights whether in court or before an arbitrator. That reading may be comprehensible to one trained to think like a lawyer." But Congress enacted the CROA with vulnerable consumers in mind—consumers likely to read the words right to sue to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration.

In accord with the Ninth Circuit I would hold that Congress, in an Act meant to curb deceptive practices, did not authorize credit repair organizations to make a false or misleading disclosure—telling consumers of a right they do not, in fact, possess. If the Act affords consumers a nonwaivable right to sue in court, as I believe it does, a credit repair organization cannot retract that right by making arbitration the consumer's sole recourse.

I

CompuCredit marketed a credit card to consumers with weak credit ratings. It did so through massive direct mail and Internet solicitations, urging recipients to acquire a card under the brand name Aspire Visa and thereby "rebuild poor credit" and "improve [their] credit rating." App. 40, Complaint ¶11 (internal quotation marks omitted). Plaintiffs, individuals who applied for and received CompuCredit's card, sought redress for multiple violations of the CROA.

Their complaint alleged that CompuCredit's promotional materials told potential customers that no deposit would be required, and that cardholders would receive, upfront, a credit line of \$300. In fact, plaintiffs asserted they were charged an initial finance fee of \$29, a monthly fee of \$6.50, and an annual fee of \$150, assessed immediately against the \$300 limit. In the aggregate, plaintiffs calculated fees charged the first year amounted to \$257.

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CompuCredit's fee exactions did appear in the promotional materials in small print buried amidst other information, and removed from the clearer representation that no deposit would be required. *Id.* at 40–41, Complaint ¶¶12–13. Far from improving their credit rating, plaintiffs complained CompuCredit knew that its card, saddled with these fees, 'would not provide any meaningful assistance whatsoever with regard to rebuilding credit and improving a credit rating.' *Id.*, at 48, Complaint ¶41(b). Furthermore, plaintiffs stated, CompuCredit did not provide them with the written disclosures of their rights required by the CROA. *Id.*, at 42, Complaint ¶23.

Seeking damages for the alleged violations, along with attorneys' fees, plaintiffs requested class certification. In the District Court and Court of Appeals, they successfully resisted CompuCredit's motion to compel arbitration pursuant to a form contract that barred class proceedings.¹ This Court, however, interprets the CROA to permit CompuCredit's demand that plaintiffs proceed, if at all, before an arbitrator.² I read the governing statute differently.

II

Three sections of the CROA considered together, indicate Congress' intention to preclude mandatory, creditor imposed, arbitration of CROA claims. See 15 U S C §§1679c(a), 1679g, and 1679f. Before entering into any

¹The contract signed by cardholders did not itself require arbitration. Rather, it incorporated by reference an enclosed insert providing that all disputes would be resolved by arbitration at the discretion of CompuCredit or the cardholder. App. 61–63.

²CompuCredit's form contract specified that arbitration was to occur under the auspices of the National Arbitration Forum (NAF). In 2009, after the Attorney General of Minnesota filed an action alleging that NAF had engaged in numerous violations of consumer protection laws, NAF entered into a consent decree barring it from handling consumer arbitrations. See Press Release by Lori Swanson, Attorney General of Minnesota (July 19, 2009).

GINSBURG J dissenting

consumer contract credit repair organizations must give potential customers a written statement of rights they possess under that Act and related consumer protection laws §1679c(a) Congress dictated every word of the required notification Credit repair organizations must tell consumers, in plain terms how they may enforce their rights “You have a right to sue a credit repair organization that violates the Credit Repair Organization Act
Ibid

The ‘right to sue’ refers to the claim for relief Congress afforded consumers in §1679g Any person who violates another’s rights under the CROA “shall be liable’ for actual damages and attorneys fees and may be liable for punitive damages as well §1679g(a)(1)–(3) The Act sets out the factors “the court shall consider in determining the amount of punitive damages ‘the court may allow aggrieved consumers to recover either individually or as a class §1679g(a)(2) and (b) The liability created here, in §1679g is precisely what the consumer, in light of §1679c, may sue to enforce

The Act renders void and unenforceable [a]ny waiver by any consumer of any protection provided by or *any right* of the consumer under this subchapter §1679f (emphasis added) ³ The rights listed in §1679c(a) rendered nonwaivable by §1679f are the right to sue and the ‘right to cancel [a] contract for any reason within 3 business days from the date [the consumer] signed it’ ⁴

³Section 1679f(a) omitted from the Court’s statutory appendix *ante* at 11–14 provides in full

Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—

(1) shall be treated as void and

(2) may not be enforced by any Federal or State court or any other person

⁴Two provisions although described by §1679c(a) as consumer right[s] are not rendered nonwaivable by §1679f because they are not right[s] under this subchapter Rather the right to dispute

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The question on which this case turns is what Congress meant when it created a nonwaivable ‘right to sue’. Recall that Congress’ target audience in the CROA is not composed of lawyers and judges accustomed to nuanced reading of statutory texts, but laypersons who receive a disclosure statement in the mail. Recall, as well, Congress’ findings that these individuals are often “of limited economic means and inexperienced in credit matters” §1679(a)(2). Attributing little importance to this context, the Court construes the right to sue as the legal right enforceable in court, to recover damages without regard to whether the suit in court has to be preceded by an arbitration proceeding.” *Ante*, at 8. I read Congress’ words without that sophisticated gloss. The right to sue, I would hold, means the right to litigate in court.

The Court is quite right in recognizing that consumers have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA.’ *Ibid*. But the Court is quite wrong, as I see it, to characterize as merely “imprecise” *ibid*, Congress’ failure to include the caveat that access to court may be conditioned upon an anterior arbitration. The ‘right to sue’ may well be ‘a colloquial method of communicating to consumers.’ See *ibid*. But it surely is not colloquially *understood* by recipients of the required disclosures as the right, not to adjudicate in court but only to seek, or defend against, court enforcement of an award rendered by the arbitrator chosen by the credit repair organization. Few, if any, credit repair customers would equate the right to

inaccurate information in your credit report and the right to obtain a copy of your credit report referred to in §1679c(a) are rights conferred elsewhere in the U S Code. See §1681i(a) §1681j. Section 1679f also makes nonwaivable the *protection/s* provided under this subchapter (emphasis added) these protections include the prohibition of certain business practices see §1679b and the provision in writing of certain contractual terms and conditions see §1679d.

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sue, §1679c(a), with the extremely limited judicial review given to an arbitrator's award, see *e.g.* *Hall Street Associates, L L C v Mattel Inc*, 552 U S 576, 586–589 (2008)

The Court discounts the references to ‘class action’ and ‘court’ in §1679g, the provision that “create[s] the consumers’ claim for relief.” See *ante*, at 5. Despite similar statutory language the Court observes we have enforced arbitration agreements to settle disputes arising under other Acts of Congress. The CROA, however, is distinguished by its disclosure requirements prime among them the obligation imposed on the credit repair organization to inform potential customers they “have a right to sue” an organization that violates the Act §1679c(a). Yet the Court refuses to read this language in concert with §1679g, notwithstanding our frequent acknowledgment that “a statute is to be read as a whole since the meaning of statutory language depends on context.” *King v St Vincent’s Hospital* 502 U S 215, 221 (1991) (citation omitted). As just explained, I believe Congress meant what an ordinary reader of the disclosure requirement would likely comprehend. A credit repair organization that engages in deceptive practices may be sued *in court*.

Reducing the required disclosure to insignificance, see *ante* at 4–5, the Court’s construction of the CROA scarcely advances the Act’s goals. Congress aimed to ensure prospective customers “are provided with the information necessary to make an informed decision” and also to “protect the public from unfair or deceptive advertising and business practices.” 15 U S C §1679(b). The Court’s interpretation, however, enables the very deception Congress sought to suppress. Today’s decision permits credit repair organizations to deny consumers, through fine print in a contract, an important right whose disclosure is decreed in the U S Code.

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This unfortunate result is not compelled by our precedents. The Court cites three decisions for the proposition by now uncontroversial that the mere existence of a statutory right of action does not preclude agreements to arbitrate disputes. See *ante* at 5–6 (citing *Gilmer v Interstate/Johnson Lane Corp.*, 500 U S 20, 28 (1991), *Shearson/American Express Inc v McMahon*, 482 U S 220, 240 (1987) and *Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc* 473 U S 614 637 (1985)). As the Court acknowledges, *ante*, at 6, none of the statutes at issue in those cases contained a nonwaiver clause analogous to §1679f. Yet the presence of such a clause would not have affected the outcome the Court maintains, a nonwaiver provision would not have precluded arbitration because the statutes conferred no underlying right to proceed in court.

Precisely the point. The CROA differs from the statutes we have construed in the past in just that respect. The Act does not merely create a claim for relief. It designates that claim as an action entailing a ‘right to sue’, mandates that consumers be informed, prior to entering any contract, of that right and precludes the waiver of any “right conferred by the Act. Neither *Gilmer*, *McMahon* nor *Mitsubishi* construed a statute of a similar order.⁵

III

The Court’s final point is that, elsewhere Congress has spoken with particular clarity in guaranteeing a judicial

⁵ [I]f one believes [the CROA] establishes a nonwaivable right to initial judicial enforcement the Court states one must also believe that it establishes a nonwaivable right to initial judicial enforcement in any competent judicial tribunal. *Ante* at 7. In Sports Illustrated’s words, it ain’t necessarily so. While there is good reason to believe Congress cared about the *institutional* location of consumers’ suits under the CROA, there is no reason to think Congress sought to disturb the personal jurisdiction and venue rules that determine in which court a civil action may be brought.

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forum and proscribing arbitration but here, it did not do so. The two statutes the Court cites as exemplary post date the CROA's enactment by 14 and 6 years, respectively. (A third merely delegates regulatory authority over certain arbitration agreements.) See *ante* at 9. Notably these recent statutes were framed following a string of this Court's decisions compelling arbitration pursuant to contractual stipulations.⁶ Our decisions have increasingly alerted Congress to the utility of drafting antiwaiver prescriptions with meticulous care. But the Congress that drafted the CROA was not similarly stimulated and we cannot fairly assess that enactment in the light of subsequent legislative responses to developments unknown to the CROA's drafters. Cf. *United States v Price*, 361 U S 304, 313 (1960) ([T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

Beyond question the Federal Arbitration Act, "standing alone, favors the enforcement of arbitration agreements." *McMahon*, 482 U S at 226. To depart from that rule however, Congress need not employ "magic words." See Tr of Oral Arg. 6. In determining whether the Arbitration Act's general rule has been displaced by another statutory prescription it remains our responsibility to examine carefully "the text of the [statute], its legislative history, and Congress' underlying purposes." *Gilmer*, 500 U S at 26 (citing *McMahon*, 482 U S at 227). See also *14 Penn Plaza LLC v Pyett*, 556 U S 247, 258 (2009) (arbitration agreements will be enforced unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue (quoting *Gilmer*, 500 U S at 26 in turn quoting *Mitsubishi*, 473 U S, at 628)). No "unmistakably clear" statement is

⁶See Brief for American Association for Justice as *Amicus Curiae* 12 and n. 5 (listing arbitration decisions since the CROA's enactment).

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necessary to proscribe the arbitration clause CompuCredit seeks to enforce

* * *

The CROA mandates that potential customers shall be told of their ‘right to sue a credit repair organization’ for damages arising from deceptive practices 15 U S C §1679c(a) But CompuCredit’s adhesion contract provided that consumers would not have the right to go to court” App 61 (capitalization omitted) Congress’ direction must prevail over CompuCredit’s opposing declaration Accordingly, I would affirm the judgment of the Court of Appeals for the Ninth Circuit