

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 ,

v

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

Respondent,

Appellants

BRIEF OF APPELLANTS

Edward J Westbrook, Esq
Catherine H McElveen, Esq
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Building A
Mount Pleasant, SC 29494
(843) 727-6513
Attorneys for Appellants

RECEIVED
NOV 30 2011
SC COURT OF APPEALS

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES ON APPEAL	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
I In a Nutshell	6
II The Details	7
A The Parties, the Contract, and the Project	7
B The Controversy	9
C The Litigation and Motion to Arbitrate	10
D The Oral Argument and Proposed Orders	10
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I Standard of Review	16
II Arbitration is a Favored Mechanism for Commercial Dispute Resolution That Courts Should Not Strain to Avoid	16
III Cape Romain is Bound by its Agreement to Invoke the FAA	20
IV The Contract Affected Interstate Commerce Sufficiently to Invoke the FAA Regardless of Cape Romain's Intentions	22
A Materials Used in the Project Were Shipped From Outside South Carolina	25
B The Permit for the Project was Issued by the Army Corps of Engineers Pursuant to the Commerce Clause	29
C The Transaction Itself Took Place on the Channels of Interstate Commerce and Used the Instrumentalities of Interstate Commerce	30

D	Cape Romain Directly Participated in Interstate Commerce by Purchasing Fuel and Sending Money Across State Lines	31
E	The Combination of Interstate Commerce Effects Overwhelmingly Supports Applying the FAA	32
F	The Lower Court Misapplied the “Affecting Commerce” Test	35
V	Wando E Should Be Permitted to Participate in the Arbitration	37
A	Non-Signatories Can Enforce An Arbitration Agreement Against Signatories When An Intertwined Dispute and Closely Related Parties Exist	37
B	Wando E Can Enforce the Arbitration Clause as a Third Party Beneficiary of the Contract	41
C	The AIA Contract Anticipates Third Parties Participating in Arbitration	42
VI	The Quantum Meruit Claim Should be Dismissed Because It Is Subject to Arbitration, the Parties’ Relationship is Governed by an Express Contract, and There Has Been No Unjust Enrichment	43
A	The Quantum Meruit Claim Is Subject to Arbitration	43
B	The Quantum Meruit Count Cannot Survive The Existence of an Express Contract	44
C	Quantum Meruit Cannot Survive Where There Is No Unjust Enrichment	46
VII	The Action to Foreclose the Mechanic’s Lien Cannot Proceed Until the Arbitration Determines Whether Cape Romain Has Any Right to Recovery	47
	CONCLUSION	48
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Aiken v World Financial Corp of South Carolina</i> , 367 S C 176, 623 S E 2d 873 (Ct App 2005)	16
<i>A L Green & Co Inc v Great-West Life Assurance Co</i> , 738 F Supp 965 (W D N C 1990)	44
<i>Allied-Bruce Terminix Companies, Inc v Dobson</i> , 513 U S 265 (1995)	25, 26, 28
<i>AT&T Mobility LLC v Concepcion</i> , 131 S Ct 1740 (2011)	16, 17, 21
<i>Blanton v Stathos</i> , 351 S C 534, 570 S E 2d 565 (Ct App 2002)	23, 26, 28, 33, 34, 36
<i>Choice Hotels International v BSR Tropicana Resort</i> , 252 F 3d 707 (4th Cir 2000)	48
<i>Circle S Enterprises Inc v Stanley Smith & Sons</i> , 288 S C 428 343 S E 2d 45 (Ct App 1986)	25, 28, 29, 35
<i>Citizens Bank v Alafabco Inc</i> 539 U S 52 (2003)	36, 37
<i>Cleveland v Policy Management Systems Corp</i> , 526 U S 795 (1999)	8
<i>Columbia Wholesale Co Inc v Scudder May NV</i> , 312 S C 259, 440 S E 2d 129 (1994)	46
<i>Davis v K B Home of South Carolina Inc</i> , No 4851, 2011 WL 2792385 (S C Ct App July 13, 2011)	20, 22
<i>Episcopal Housing Corp v Federal Insurance Co</i> , 269 S C 631, 239 S E 2d 647 (1977)	10, 27, 34
<i>Gardner v Mazingo</i> , 293 S C 23, 358 S E 2d 390 (1987)	41
<i>Goode v St Stephens United Methodist Church</i> , 329 S C 433, 494 S E 2d 827 (Ct App 1997)	41
<i>Grant v Magnolia Manor-Greenwood Inc</i> , 383 S C 125, 678 S E 2d 435 (2009)	17, 21, 24

<i>Herron v Century BMW</i> , 387 S C 525, 693 S E 2d 394 (2010)	16
<i>Hinson v Jusco Co Ltd</i> , 868 F Supp 145 (D S C 1994)	37, 38, 40
<i>Horowitz v Federal Kemper Life Assurance Co</i> , 52 F 3d 300 (3d Cir 1995)	24
<i>Hughes Masonry Co v Greater Clark Co School Building Corp</i> , 659 F 2d 836 (7th Cir 1981)	46
<i>JJ Ryan & Sons Inc v Rhone Poulenc Textile, S A</i> , 863 F 2d 315 (4th Cir 1988)	38, 44
<i>Jennings v First of Georgia Underwriters Co</i> , 283 S C 455, 322 S E 2d 694 (Ct App 1984)	42
<i>Leslie Salt Co v Froehlke</i> , 578 F 2d 742 (9th Cir 1978)	29
<i>Liberty Builders Inc v Horton</i> , 336 S C 658, 521 S E 2d 749 (Ct App 1999)	47
<i>Long v Silver</i> , 248 F 3d 309, 320 (4th Cir 2001)	19, 24, 38
<i>Mastrobuono v Shearson Lehman Hutton Inc</i> , 514 U S 52 (1995)	20
<i>Mathews v Fluor Corp</i> , 312 S C 404, 440 S E 2d 880 (1994)	11, 13, 23, 24, 28
<i>McGill v Moore</i> , 381 S C 179, 672 S E 2d 571 (2009)	21
<i>Mills v Robert W Gottfried Inc</i> , 272 S 2d 837 (Fla Dist Ct App 1973)	47
<i>Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc</i> , 473 U S 614 (1985)	17, 19, 42
<i>Munoz v Green Tree Financial Corp</i> , 343 S C 531, 542 S E 2d 360 (2001)	13, 20, 21, 24, 28
<i>New Hope Missionary Baptist Church v Paragon Builders</i> , 379 S C 620, 667 S E 2d 1 (Ct App 2008)	35, 36

<i>North Carolina Utilities Commission v United States</i> , 253 F Supp 930 (E D N C 1966)	27
<i>Osteen v T E Cuttino Construction Co</i> , 315 S C 422, 434 S E 2d 281 (1993)	34, 36
<i>Pavilion Development Corp v K-Con Inc</i> , No 2001-CP-10-713, 2002 WL 34138292 (S C Ct Com Pl Oct 24, 2002)	19, 47
<i>Phillips v Morbark Inc</i> , 481 F Supp 2d 461 (D S C 2007)	8
<i>Postal v Mann</i> , 308 S C 385, 418 S E 2d 322 (Ct App 1992)	40, 45
<i>Prima Paint Corp v Flood & Conklin</i> , 388 U S 395 (1967)	28
<i>R J Griffin & Co v Beach Club II Homeowners Association</i> , 384 F 3d 157 (4th Cir 2004)	41
<i>Sonic Auto Inc v Watts</i> , 131 S Ct 2872 (2011)	16
<i>Spann v Style Crest Products Inc</i> , 171 F Supp 2d 605 (D S C 2001)	46
<i>Sunkist Soft Drinks Inc v Sunkist Groves Inc</i> , 10 F 3d 753 (11th Cir 1993)	40
<i>Swanson v Stratos</i> , 350 S C 116, 564 S E 2d 117 (Ct App 2002)	44
<i>Swift Textiles Inc v Watkins Motor Lines Inc</i> , 799 F 2d 697 (11th Cir 1986)	27
<i>THI of South Carolina at Columbia LLC v Wiggins</i> , C/A No 3 11-888-CMC, 2011 U S Dist LEXIS 103638 (D S C Sept 13, 2011)	45
<i>Timms v Greene</i> , 310 S C 469, 427 S E 2d 642 (1993)	11, 23, 24
<i>Thornton v Trident Medical Center L L C</i> , 357 S C 91, 592 S E 2d 50 (Ct App 2003)	16
<i>Toler s Cove Homeowners Association v Trident Construction Co Inc</i> , 355 S C 605, 586 S E 2d 581 (2003)	21

<i>Towles v United Healthcare Corp</i> , 338 S C 29, 524 S E 2d 839 (Ct App 1999)	1, 23
<i>Trident Technical College v Lucas & Stubbs Ltd</i> , 286 S C 98, 333 S E 2d 781 (1985)	16, 34
<i>United States v 30 54 Acres of Land</i> , 90 F 3d 790 (3d Cir 1996)	29
<i>United States v Angell</i> , 292 F 3d 333 (2d Cir 2002)	29
<i>United States v Erie Railroad Co</i> , 280 U S 98 (1929)	27
<i>United States v Lopez</i> , 514 U S 549 (1995)	31
<i>United States v Rands</i> , 389 U S 121 (1967)	29
<i>United States v Zeigler</i> , 19 F 3d 486 (10th Cir 1994)	32
<i>Volt Information Sciences Inc v Board of Trustees of Leland Stanford Junior University</i> , 489 U S 468 (1989)	20, 21
<i>Wise v Picow</i> 232 S C 237, 101 S E 2d 651 (1958)	41, 42
<i>Zabinski v Bright Acres Association</i> , 346 S C 580, 553 S E 2d 110 (2001)	16, 22, 30, 40, 44

Statutes

9 U S C § 2 (1999)	22, 37
9 U S C § 3 (1999)	15
9 U S C § 4 (1999)	20

Other Sources

66 Am Jur 2d <i>Restitution and Implied Contracts</i> § 81 (2001)	44
66 Am Jur 2d <i>Restitution and Implied Contracts</i> § 83 (2004)	44
U S Const art I § 8, cl 3	29

STATEMENT OF JURISDICTION

This is an appeal of a July 11, 2011 Order of the Court of Common Pleas for Berkeley County denying Appellants' motion to dismiss and compel arbitration. South Carolina Rule of Appellate Procedure 201 gives this Court jurisdiction to hear appeals "from any appealable order." Orders denying motions to compel arbitration are immediately appealable. *Towles v United Healthcare Corp*, 338 S C 29, 34-35, 524 S E 2d 839, 842-43 (Ct App 1999)

STATEMENT OF ISSUES ON APPEAL

- 1 When sophisticated commercial parties to a standard American Institute of Architects construction contract choose arbitration for dispute resolution and designate the Federal Arbitration Act as the governing law, did the circuit court err in refusing to enforce the parties' clear choice?
- 2 When the contract at issue involves (a) marina construction under a federal permit, (b) using out-of-state dock components, (c) Respondent's transportation of those dock components over the navigable waters of the United States, (d) Respondent's purchase of marine fuel that moved interstate for its tugs, and (e) Respondent's interstate payment of over \$2,000 to a consulting firm, did the circuit court err in holding that the transaction did not sufficiently affect interstate commerce to invoke the Federal Arbitration Act?
- 3 Did the circuit court err in signing Respondent's proposed order on the arbitration issue when that order relied on an overruled case, and did not address or mention its reversal?
- 4 If arbitration is to take place for the dispute involving the subcontractor (Respondent Cape Romain) and contractor (Appellant Barnes), who both signed the contract, did the circuit court err in refusing to allow the owner for whom the contract was being performed (Appellant Wando E) to participate when (a) Wando E has voluntarily agreed to participate, (b) its participation would allow all issues to be resolved in one forum, (c) Cape Romain claimed that Barnes was acting for and with authority from Wando E, (d) Wando E was the third party beneficiary of the contract, (e) Wando E had paid Cape

Roman for its work under the contract, and (f) the contract envisioned third parties participating in the arbitration?

- 5 Did the circuit court err in refusing to dismiss or stay the quantum meruit count where that count was based on the same facts as the contract claim and should be arbitrated, where there was an express contract governing the relationship of the contracting parties which no party had disavowed, and where there was no unjust enrichment?
- 6 Should all proceedings below, including the mechanic's lien foreclosure, be stayed or dismissed without prejudice until the arbitration sought by Appellants has been conducted?

STATEMENT OF THE CASE

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

After refusing to arbitrate, Cape Romain filed a complaint on March 29, 2011 against Barnes and Wando E alleging Breach of Contract, Foreclosure of Mechanic’s Lien, and Quantum Meruit (R p 15) (Complaint) It sought \$158,413 14 in damages (R p 21) (Complaint, Prayer) On April 20, 2011, Barnes and Wando E filed a motion to dismiss and compel arbitration (R p 28) (Mot to Dismiss and Compel Arbitration) Cape Romain responded on April 28, 2011 (R p 46) (Return of Cape Romain Contractors, Inc to Mot to Dismiss and Compel Arbitration) Barnes and Wando E replied on May 11, 2011 (R p 83) (Defs ’ Reply in Supp of Mot to Dismiss and Compel Arbitration)

The lower court heard the motion to dismiss and compel arbitration on June 21, 2011, and then requested proposed orders (R p 1) (Judgment in a civil case) Both sides supplied proposed orders on June 30, 2011 (R p 123, R p 137) (Proposed Orders) On July 11, 2011, the court signed Cape Romain’s proposed order denying Barnes and Wando E’s motion to dismiss and to compel arbitration

(R p 13, R pp 3-12) (Order) On August 8, 2011, Barnes and Wando E filed their notice of appeal On August 9, 2011, they ordered the transcript of the circuit court hearing The Clerk of Court received the notice of appeal on August 10, 2011, and docketed the appeal on August 18, 2011 On October 18, 2011, Appellants received the transcript

STATEMENT OF FACTS

I In a Nutshell

This appeal arises from a broken promise. Riparian landowner Wando E wanted a marina. It asked dock builder Sean Barnes to get it done. Barnes did not have the heavy equipment the job required so he contracted with Cape Romain (which did) to assemble the dock components. In its contract, Cape Romain promised to resolve any disputes by arbitration. When trouble arose with Cape Romain's performance, Barnes requested the promised quick resolution through arbitration. Wando E agreed to participate. Cape Romain resisted any quick resolution. It hired a lawyer and said the arbitration clause was no good. Rather than arbitrate, Cape Romain sued Barnes and Wando E. Seven months later, the parties are here. Cape Romain wants to litigate, violating its promise. Barnes and Wando E want Cape Romain to honor its promise.

To decide this case, the Court can take the long route and read the next 42 pages to learn how the transaction qualifies for arbitration under the applicable precedents, and why Cape Romain's arguments hold no water. Or the Court can save a lot of time, and read three sections of the contract:

- § 5.1 (choosing arbitration and rejecting litigation) (R. p. 60)
- § 19.2 (specifying the FAA as the governing law) (R. p. 72)
- § 21.6 (permitting third parties to join an arbitration) (R. p. 74)

Either avenue will lead to the same result – Cape Romain's promise to arbitrate all disputes under the Federal Arbitration Act should be enforced.

II The Details

As set forth below, the facts of the case relevant to the arbitration issue are essentially undisputed

A The Parties, the Contract, and the Project

On July 26, 2010, Cape Romain and Barnes entered into an AIA standard form of agreement under which Cape Romain was to be paid \$165,000 for the “complete assembly and installation” of all the structural components for a new marina, including the fixed aluminum walkway, pierhead deck units, floating dock assemblies, concrete piles, and aluminum gangway (R p 75) (Ex No 1 to 7/26/10 AIA Contract ¶ 1) While negotiating the contract, Cape Romain knew that Barnes was not the owner of the marina and that it was being built for a client of Barnes (R pp 120-121) (DuPre Supp Aff ¶ 3) That client was Wando E ¹

The agreement required Cape Romain to pick up prefabricated dock sections from Barnes’ yard that were being delivered from an Ohio fabricator and to transport them to their final destination - the marina site (R p 75) (Ex No 1 to AIA Contract ¶ 2) At least two months before signing the July 26, 2010 contract, Cape Romain knew that the dock sections were being fabricated out of state (R p 101) (Barnes Aff ¶ 3) ²

¹ Barnes avers he told Cape Romain that his client was Wando E (R p 103) (Barnes Aff ¶ 8) Cape Romain claimed not to know the actual name of the owner but admitted that Barnes told its representative that he was speaking for a client (R p 121) (DuPre Supp Aff ¶ 3)

² Although Cape Romain’s representative Mr DuPre filed an affidavit before the motion hearing claiming he was not aware of the origin of the dock sections when he negotiated the contract (R p 120) (DuPre Supp Aff ¶ 1) Appellants introduced at the hearing Mr DuPre’s May 25 2010 email to the project engineer where he acknowledged learning from Barnes before he signed the contract that [Barnes] goes up north early next week to visit fab operation So we’re good till late next week to finalize [the contract] (R p 2) (5/25/10 email from S DuPre to M Kirby) There is no question the fab operation Mr DuPre was referring to was the dock fabrication as shown by his letter

Transporting the Ohio dock sections to the marina site required the use of Cape Roman's tugs and barges over the navigable waters of the United States (R p 121) (DuPre Supp Aff ¶ 4) Cape Roman conceded that the labor and equipment cost necessary to move its equipment and dock sections on navigable waters to the site was approximately \$8,250, i e , 5% of the value of Cape Roman's \$165,000 contract (R p 121) (DuPre Supp Aff ¶ 4) Cape Roman also admitted to using between 75 to 100 gallons of marine fuel for its tugs and barges during the trips (R p 121) (DuPre Supp Aff ¶ 4), which Appellants estimated would cost approximately \$200 - \$400 at today's prevailing fuel prices (R p 126, line 2) This fuel necessarily traveled interstate as South Carolina has no refineries³ Cape Roman also sent an interstate payment of over \$2,000 to the Chicago office of a consulting firm it hired for the project (R p 113) (Attach 6 to Defs' Reply Mem), (R p 120) (DuPre Supp Aff ¶ 4)

As an experienced marine contractor, Cape Roman knew that marina construction can only be carried out with appropriate permits, as its contract acknowledged (R p 75) (Ex No 1 to AIA Contract ¶ 3) This marina project was authorized under a permit from the Army Corps of Engineers (R p 108) (Attach 5 to

accompanying his signature on the contract which noted dock fabrication seems to have been delayed somewhat (R p 78) (7/8/2010 letter from S DuPre M Kirby) A party cannot manufacture a dispute of fact by contradicting its contemporaneous statements 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 the two conflicting versions of the plaintiff's testimony is correct) In light of his contemporaneous email Mr DuPre's contradictory affidavit may charitably be ascribed to forgetfulness

³ See R pp 104 05 (Attach 4 to Defs' Reply in Supp of Mot to Dismiss and Compel Arbitration) (hereinafter Defs' Rep Mem)

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 question arising out of or relating to this Contract ” (R pp 60, 73) (AIA Contract §§ 5 1, 21 1, 21 4) Importantly, the contract specifically provided that arbitration would be governed by the FAA

§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 [the arbitration procedures provision]

(R p 72) (emphasis added)

B The Controversy

The project proceeded initially without significant impediment Cape Romain submitted several progress payment requests which the project engineer approved and Wando E paid (R p 102) (Barnes Aff ¶ 8) The dispute that brings the parties here arose after Wando E had paid Cape Romain over \$70,000 on the contract (R p 102) (Barnes Aff ¶ 8) The project engineer, who is not a party to this suit, refused to certify further payment to Cape Romain and raised issues including certain dock sections being misaligned and pilings being driven at an angle rather than straight (R p 102) (Barnes Aff ¶¶ 6, 7)⁴ When Barnes requested arbitration of the dispute, and Wando E agreed to participate, Cape Romain refused (R p 102) (Barnes Aff ¶ 9) Cape Romain did not deny that the arbitration provision would cover this dispute

⁴ Under the contract Cape Romain was not entitled to be paid until the project engineer (called architect in the contract) certified the work for payment (R p 68) (AIA Contract §§ 15 2 2 15 2 3)

Rather, it contended that the arbitration provision was unenforceable because there was insufficient contact with interstate commerce for the Federal Arbitration Act to apply⁵ (R p 47) (Return of Cape Romain Contractors, Inc to Mot to Dismiss and Compel Arbitration ¶ 3) Further, Cape Romain contended that even if it had to arbitrate with Barnes, the arbitration should not include Wando E, the owner of the project, because Wando E had not signed the contract (R p 46) (Return of Cape Romain ¶ 1)

C The Litigation and Motion to Arbitrate

After Cape Romain refused to arbitrate, it filed suit on March 29, 2011 with claims for breach of contract, quantum meruit, and foreclosure of a mechanic's lien⁶ (R p 15) Barnes and Wando E moved to dismiss and compel arbitration (R p 28) Cape Romain responded that neither the South Carolina Arbitration Act, nor the FAA applied (R pp 46-47)⁷ After the parties filed their briefs with accompanying exhibits and affidavits, the Court held argument on June 21, 2011 (R p 1)

D The Oral Argument and Proposed Orders

At oral argument, Wando E and Barnes discussed the numerous contacts of the project with interstate commerce (R pp 152-157) (Tr pp 3-8) They also introduced as an additional exhibit an email from Cape Romain's representative

⁵ Cape Romain did 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 Hous Corp v Fed Ins Co* 269 S C 631 239 S E 2d 647 (1977) (R p 163 lines 2 8) (Tr p 14 lines 2 8)

⁶ Cape Romain had filed its mechanic s lien on January 18 2011 (R p 23)

⁷Wando E and Barnes did not press the issue of the applicability of the South Carolina Arbitration Act but relied on the FAA which was designated as the applicable law in the contract (R p 72) (AIA Contract ¶ 19 2)

acknowledging he knew the dock sections were coming from “up north” two months before he signed the contract (R p 154, line 18-p 156, line 7) (Tr p 5, line 18-p 7, line 7), (R p 2) (5/25/10 email from S DuPre to M Kirby)

Cape Romain argued that the arbitration issue was controlled by *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), which it discussed in detail (R p 164, line 2-p 165, line 20) (Tr p 15, line 2-p 16, line 20) According to Cape Romain, those cases held that the intention of the parties to affect interstate commerce as expressed on the face of the contract controlled the arbitration decision (R p 163, line 17-p 164, line 4) (Tr p 14, line 17-p 15, line 4) Cape Romain described these as the “two cases we rely on” (R p 164, line 3) (Tr p 15, line 3), and elaborated

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

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

What is determinative here is whether the express agreement between the parties requires the interstate commerce, and that’s what the case law indicates The two cases we rely on, *Timms vs Greene* and *Mathews vs Fluor*, illustrate that requirement

(R p 163, line 17-p 164, line 4) (Tr p 14, line 17-p 15, line 4)

Cape Romain did not dispute any of the facts regarding its purchase of marine fuel (R p 169, lines 7-19) (Tr p 20, lines 7-19), its sending a payment out of state (R p 168, line 19-p 169, line 6) (Tr p 19, line 19-p 20, line 6), its transportation of the dock components over navigable waters (R p 169, line 20-p 170, line 5) (Tr p

20, line 20-p 21, line 5), or the construction being regulated by a federal permit (R p 170, line 6-p 171, line 16) (Tr p 21, line 6-p 22, line 16) Instead it disputed their relevance, asserting they were not substantial activities required on the face of the contract

So the bottom line is that while there are several contacts here and while they are all in the background none of them are expressly required by the contract and none of them are sufficient enough to justify – to trigger, as the case law says, the power of Congress to regulate trade between the state[s]

(R p 171, lines 17-22) (Tr p 22, lines 17-22) Likewise, while admitting that the dock components came from Ohio, Cape Romain argued that was also irrelevant because the contract did not mention it, “So I don’t doubt that the materials came from Ohio but it’s not relevant It’s not mentioned in the contract ” (R p 168, line 16-18) (Tr p 19, lines 16-18)

After hearing both sides, the circuit judge asked for proposed orders by July 1, 2011 (R p 1) Both sides provided orders on June 30, 2011 (R pp 123 137) Wando E and Barnes’ proposed order recounted in significant detail the multiple effects on interstate commerce of the contract and project (R pp 124-36), and pointed out that Cape Romain had specifically agreed to the FAA as the law to govern arbitration (R p 127, n 6) Their order also discussed (a) why Wando E, as the client who owned the marina, who had paid Cape Romain, and who Cape Romain claimed had given Barnes its authority to act, should be permitted to participate in the arbitration, (b) why the quantum meruit claim should be dismissed because there was an express contract governing the dock construction, and (c) why all proceedings should be stayed until the arbitration took place (R pp 134-36)

Cape Romain's proposed order continued to rely on *Mathews* on the FAA interstate commerce issue (R p 146) (Cape Romain Proposed Order ¶ 6) As at oral argument, Cape Romain did not mention in its proposed order that *Mathews* had been overruled on the FAA "intention of the parties" issue by *Munoz v Green Tree Fin Corp*, 343 S C 531, 539 n 3, 542 S E 2d 360, 363 n 3 (2001) Cape Romain's proposed order also posited that (a) Wando E should not be allowed to participate in any arbitration because its precise relationship to Barnes had not been established (R p 144) (Cape Romain Proposed Order ¶ 3), and (b) the quantum meruit claim should not be dismissed because Wando E and Barnes had not yet answered and might disavow the contract in the future (R pp 147-48) (Cape Romain Proposed Order ¶ 7)

With no apparent recognition that Cape Romain's proposed order relied on a case that had been overruled ten years earlier, the circuit court signed its proposed order (R pp 3-12)

SUMMARY OF ARGUMENT

The Federal Arbitration Act applies here for several reasons. First and foremost, the contracting parties specifically agreed that any disputes would be settled by an arbitration governed by the FAA. There is no reason why the circuit court should have ignored this binding agreement. This Court should enforce the parties' agreement in accordance with its terms.

Second, even if the parties had not explicitly designated the FAA to apply, the FAA nevertheless applies to all arbitration agreements that affect interstate commerce. A contract need only have a slight nexus to interstate commerce for the FAA to apply. The FAA reaches to the limits of Congress's commerce clause authority. The project here undoubtedly affects commerce sufficiently to trigger the FAA because (1) it used extensive materials shipped from outside South Carolina (2) it was regulated by the Army Corps of Engineers under a commerce clause federal permit, (3) it occurred on the navigable waterways of the United States—an instrumentality of interstate commerce, and (4) Cape Romain directly participated in interstate commerce by, *inter alia*, buying marine fuel for its tugs and barges, and paying the Chicago office of an engineering firm over \$2,000 for project consultation.

Because arbitration should be ordered between the subcontractor (Cape Romain) and the contractor (Barnes), the marina owner (Wando E) should be permitted to participate. The factual basis of the claim against Wando E is identical to the factual basis of the claim against Barnes. It is well settled that when there is essentially a single controversy and interrelated parties on one side - one of whom has signed an arbitration agreement - the non-signatory, related party should be permitted

to participate in the arbitration so the entire dispute can be resolved in one forum. Here, Cape Romain pled that Barnes was acting for Wando E, and that Wando E paid Cape Romain for its work. Cape Romain also pled that it conferred a benefit on Wando E. The contract to build the marina was made for Wando E's benefit. Third party beneficiaries can enforce arbitration clauses in contracts made for their benefit. Wando E should be at the arbitration table to get everything settled. The contract specifically provides for the joinder of voluntary participants like Wando E in an arbitration to facilitate an overall resolution where there is "a common question of law or fact." That certainly exists here.

Cape Romain's claim for quantum meruit should be dismissed. That claim relies on the same facts as the breach of contract claim and is subject to arbitration. It is well settled that claims arising out of a contract containing an arbitration clause are subject to arbitration regardless of their label. Moreover, quantum meruit recovery is inappropriate if an express contract exists. Cape Romain's work is governed by an express contract that has not been rescinded or abandoned. On the contrary, Barnes and Wando E have relied on the contract in seeking arbitration. The lower court's speculation (with no basis in the record) that Barnes and Wando E might possibly disavow the contract in the future is an insufficient reason to allow the quantum meruit claim to proceed in the face of their stated reliance on the express contract.

This entire litigation should, at a minimum, be stayed pending arbitration. The FAA requires such a stay. 9 U.S.C. § 3 (1999). And when the statute of limitations is not a concern, which it is not here, a court can also dismiss the action without prejudice to reduce docket congestion.

ARGUMENT

I Standard of Review

An appeal from the denial of a motion to compel arbitration is subject to de novo review *Aiken v World Fin Corp of S C*, 367 S C 176, 179, 623 S E 2d 873, 874 (Ct App 2005) Nevertheless, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings *Thornton v Trident Med Ctr L L C*, 357 S C 91, 94, 592 S E 2d 50, 51 (Ct App 2003)

II Arbitration is a Favored Mechanism for Commercial Dispute Resolution That Courts Should Not Strain to Avoid

Before delving into the specific issues here, it is helpful to recall that both the United States Supreme Court and our South Carolina Supreme Court have repeatedly recognized that arbitration is a favored method of dispute resolution *AT&T Mobility LLC v Concepcion*, 131 S Ct 1740, 1745 (2011) (Noting a “liberal federal policy favoring arbitration”), *Herron v Century BMW*, 387 S C 525, 531, 693 S E 2d 394, 397 (2010) (same)⁸ Our Supreme Court has recognized arbitration’s “laudable goal of providing a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings” *Trident Technical Coll v Lucas & Stubbs Ltd*, 286 S C 98, 104, 333 S E 2d 781, 785 (1985) (internal quotations omitted)

Because arbitration is favored over protracted litigation, “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration” *Zabinski v Bright Acres Assocs*, 346 S C 580, 597, 553 S E 2d 110, 118 (2001) A

⁸ While the United States Supreme Court agreed with the *Herron* court on the liberal federal policy concerning arbitration it vacated the *Herron* holding that class actions must be permitted in arbitration *Sonic Auto Inc v Watts* 131 S Ct 2872 (2011)

motion to compel arbitration should only be denied when the arbitration 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), *see also Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 U S 614, 628 (1985) (“Having made the bargain to arbitrate, the party should be held to it

”) By choosing arbitration as their dispute resolution mechanism, 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*, 473 U S at 628

The FAA was enacted to end judicial hostility to arbitration agreements *AT&T Mobility*, 131 S Ct at 1745 The U S Supreme Court recognizes that the FAA “requires that we rigorously enforce agreements to arbitrate” *Mitsubishi Motors Corp*, 473 U S at 626 As discussed later in this brief, South Carolina appellate courts have not hesitated to reverse lower courts that take a restrictive view on arbitration This is especially so in commercial arbitration where sophisticated parties willingly choose arbitration under a specific set of rules Courts recognize that broad arbitration clauses, such as the clause at issue here, should be given a liberal interpretation

Before executing the AIA contract, Cape Romain was cautioned, “This document has important legal consequences Consultation with an attorney is encouraged with respect to its completion or modification” (R p 55) (AIA Contract, p 1) With access to legal advice, this sophisticated marine contractor made four clear choices while executing the agreement that it now seeks to avoid

First, Cape Romain explicitly chose arbitration for dispute resolution, and rejected litigation. Cape Romain's representative, Mr. DuPre, initialed page 6 of the contract which contains the following:

§ 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)*

(R p 72) (AIA Contract § 5.1)

Presented with a clear choice between litigation or arbitration, Cape Romain chose arbitration.

Second, Cape Romain agreed that the arbitration it chose would be governed by the FAA. Its representative, Mr. DuPre, initialed page 18 of the contract containing § 19.2:

§ 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.

(R p 72) (AIA Contract § 19.2)

Third, Cape Romain agreed to broad arbitration coverage. Mr. DuPre initialed page 19 of the contract entitled, "CLAIMS AND DISPUTES." That section provides:

for an initial mediation, followed by arbitration to address all “[c]laims, disputes and other matters in question arising out of or relating to this Contract” (R p 73) (AIA Contract § 21.1) (emphasis added). Such clauses are broadly construed. *See, e.g., Pavilion Dev Corp v K-Con Inc*, No. 2001-CP-10-713, 2002 WL 34138292 (S.C. Ct. Com. Pl. Oct. 24, 2002) (citing *Mitsubishi Motors*, 473 U.S. at 617), (R p 43) (“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”) (emphasis added), *Long v Silver*, 248 F.3d 309, 316 (4th Cir. 2001) (citing numerous cases holding “arising out of or relating to” a contract signals a broad scope for arbitration).

Fourth, Cape Roman agreed that third parties (like Wando E) could join an arbitration. The signature page of the contract, executed by Mr. DuPre, contains § 21.6 which provides in part

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.

(R p 74)

As discussed below, this case involves a knowingly-selected and broadly-worded arbitration clause with the explicit choice of the FAA as the governing law. The decision below failed to acknowledge these threshold facts or the other compelling facts about the project that warrant application of the FAA and reversal of the order below.

III Cape Romain is Bound by its Agreement to Invoke the FAA

The lower court's order ignored the controlling fact that Cape Romain promised that any disputes would be subject to arbitration, and that in arbitration "the Federal Arbitration Act shall govern" (R p 72) (AIA Contract ¶ 19.2) Cape Romain is a sophisticated marine contractor that freely chose arbitration and selected the FAA as the applicable law. These choices are controlling here.

Arbitration is a matter of contract and it is well settled that "[a]rbitration agreements, like other contracts, are enforceable in accordance with their terms" *Munoz v Green Tree Fin Corp*, 343 S C 531, 539, 542 S E 2d 360, 363-64 (2001), *see also Mastrobuono v Shearson Lehman Hutton Inc*, 514 U S 52, 57 (1995) ("Arbitration under the [FAA] is a matter of consent and parties are generally free to structure their arbitration agreements as they see fit")

Parties are free to include a choice-of-law provision indicating which law shall govern their arbitration. Courts interpreting an arbitration provision must respect the parties' choice-of-law and enforce it in accordance with its terms. The FAA requires that, "arbitration proceed in the manner provided for in [the parties'] agreement." 9 U S C § 4 (1999). The Supreme Court has noted that, "[j]ust as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted" *Volt Info Scis Inc v Bd of Trustees of Leland Stanford Junior Univ*, 489 U S 468, 479 (1989) (internal citation omitted). As this Court said recently in deciding arbitrability, "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect" *Davis v KB Home of SC Inc*,

No. 4851, 2011 WL 2792385, at *5 (S. Ct. App. July 13, 2011) (quoting *McGill v Moore*, 381 S. Ct. 179, 185, 672 S. E. 2d 571, 574 (2009)). The U.S. Supreme Court has recently reiterated that parties are free to “arbitrate according to specific rules.” *AT&T Mobility*, 131 S. Ct. at 1749. The “specific rule” Cape Romain agreed to here was the FAA. (R. p. 72) (AIA Contract ¶ 19.2).

In *Grant v Magnolia Manor-Greenwood Inc.*, 383 S. Ct. 125, 130, 678 S. E. 2d 435, 438 (2009), the South Carolina Supreme Court applied the FAA to a nursing home dispute without further discussion because “[t]he parties’ arbitration agreement provides that the arbitration shall be administered pursuant to the FAA.” Likewise, in *Munoz v Green Tree Financial Corp.*, 343 S. Ct. 531, 542 S. E. 2d 360 (2001), our Supreme Court required parties to honor their selection of the FAA before looking into whether interstate commerce was in fact involved.

Here, the arbitration agreement, which applies to “this contract and the relationships which result from this contract,” provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms.

Id. at 539, 542 S. E. 2d at 363-64 (quoting *Volt Information*, 489 U.S. at 478), *see also Toler v Cove Homeowners Ass’n v Trident Constr. Co. Inc.*, 355 S. Ct. 605, 610, 586 S. E. 2d 581, 584 (2003) (noting the necessity to determine if interstate commerce was involved only because the “arbitration agreement does not include a choice of law provision.”) The AIA contract here had a specific choice of law provision. This Court should uphold the clearly expressed agreement of the parties, require arbitration pursuant to the FAA, and reverse the lower court’s refusal to do so.

IV The Contract Affected Interstate Commerce Sufficiently to Invoke the FAA Regardless of Cape Romain's Intentions

Because the parties explicitly chose the FAA to apply, it should not be necessary to delve further in order to reverse the lower court's refusal to apply the FAA. There is, however, a second, independently sufficient reason for applying the FAA even if the contract had not specified it. By federal law, arbitration agreements in contracts that affect interstate commerce are governed by the FAA, "whether or not the parties contemplated an interstate transaction." *Davis v KB Home of SC Inc*, No. 4851, 2011 WL 2792385, at *3 (S.C. Ct. App. July 13, 2011).

Section 2 of the FAA provides as follows:

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 (1999)

Both South Carolina and the federal jurisprudence take an expansive view of what constitutes interstate commerce. *Zabinski v Bright Acres Assocs*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Our Supreme Court recognized in *Zabinski*, that the "basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements." *Id.* at 590-91, 553 S.E.2d at 115. It further recognized that the U.S. Supreme Court has "'federalized' the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause." *Id.* at 590, 553 S.E.2d at 115. The lower court's order fails to apply this directive and should be reversed on this ground as well.

Whether a contract affects interstate commerce is determined by an examination of the agreement, the complaint, and the facts surrounding the contract. *Blanton v Stathos*, 351 S C 534, 540, 570 S E 2d 565, 568 (Ct App 2002). In making its examination, a court must look to see what transpired as the project was performed, not what the parties may originally have envisioned. 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 (Ct App 1999) (internal parentheses and quotations omitted).

Cape Romain argued the opposite principle to the lower court, relying on its erroneous view that because it did not contemplate affecting interstate commerce by so stating on the face of the contract, the FAA could not apply. (R p 163, lines 17-p 164, line 4) (Tr p 14, line 17-p 15, line 4). Its argument hinged on two cases it cited to the circuit court holding that the FAA does not apply unless the agreement on its face shows an intent to engage in activities having a substantial relationship to interstate commerce. See *Mathews v Fluor Corp*, 312 S C 404, 440 S E 2d 880 (1994), *Timms v Greene*, 310 S C 469, 427 S E 2d 642 (1993), (R p 164, lines 2-4) (Tr p 15, lines 2-4).

These cases are not reliable authority. First and foremost, the holding of *Mathews* that the intent to engage in interstate commerce must appear on the face of

the contract was overruled ten years ago in *Munoz v Green Tree Fin Corp* , 343 S C 531, 539 n 3, 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* had relied upon *Timms* for this holding, *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) Reliance on overruled authority seriously undermines a party’s argument ⁹ See *Long v Silver*, 248 F 3d 309, 320-21 (4th Cir 2001) (lower court erred in relying on case appellate court had previously rejected), *Horowitz v Fed Kemper Life Assurance Co* , 861 F Supp 1252, 1260 (E D Pa 1994) (“perhaps the most practical reason why defendant’s reliance on the *Ostrov* decision is misplaced is that it was vacated by the Third Circuit”) ¹⁰

Notwithstanding the fact that Cape Romain agreed to the FAA as the law governing arbitration, it attempted to escape arbitration by claiming that the contract did not affect interstate commerce In response, Wando E and Barnes identified

⁹ Appellants do not fault the busy circuit judge for failing to discover that *Mathews* had been overruled or for signing a proposed order that failed to disclose it Nor do Appellants ascribe a nefarious motive to Cape Romain for citing an overruled case as its principal authority Rather it appears to have been a case of inadvertence

¹⁰ Ironically the *Horowitz* decision was itself vacated in part on an insurance issue *Horowitz v Fed Kemper Life Assurance Co* 52 F 3d 300 (3d Cir 1995)

numerous interstate commerce relationships with the marina project and Cape Romain's performance of it. These include

- Materials Cape Romain used on the project were shipped from outside South Carolina with Cape Romain's knowledge,
- The permit for the project was issued by the Army Corps of Engineers pursuant to the interstate commerce clause,
- The project was built on the country's navigable waterways, and
- Cape Romain bought marine fuel that moved in interstate commerce for its tugs, transported the dock sections over the navigable waters of the United States, and paid over \$2,000 to the out-of-state office of a consulting firm

Although the lower court mentioned these facts, its analysis of them deviated significantly from established jurisprudence as discussed below

A Materials Used in the Project Were Shipped From Outside South Carolina

It is undisputed that the main dock components were transported from Ohio. When a construction project receives materials from out of state, there is a sufficient effect on interstate commerce to trigger the FAA. *Allied-Bruce Terminix Cos. Inc. v. Dobson*, 513 U.S. 265, 282 (1995) (the FAA applies to a single home termite treatment dispute with a multistate firm when the "termite-treating and house-repairing material used to carry out the terms of the Plan, came from outside [the state]"), *Circle S Enters. Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 431-32, 343 S.E.2d 45, 47 (Ct. App. 1986) (because materials used in a construction project were shipped from out of state, the transaction affected commerce sufficiently to trigger the FAA)

Importantly, it is of no consequence whether the party challenging application of the FAA purchased the out-of-state material *Blanton v Stathos*, 351 S C 534, 570 S E 2d 565, 569 (Ct App 2002) (out of state materials were to be purchased by others, not the architect, but dispute over the architect's contract still subject to the FAA) What matters is that materials used in the project traveled in interstate commerce If this occurs, the expansive Commerce Clause reach of the FAA comes into play

Further, Cape Romain knew that materials being shipped from out of state were intended for the marina site, and it participated in their delivery In his email, Cape Romain's representative acknowledged he knew that the marina dock sections were being fabricated "up north," and thus would necessarily be moving in interstate commerce (R p 2)¹¹ Cape Romain participated in their interstate journey from the Ohio fabricators to the marina site by picking up the sections at Barnes' Mount Pleasant yard and transporting them first by truck and then on its barges to the marina site¹² (R p 121)

Cape Romain argued that it only shipped the materials locally after they had arrived from Ohio (R p 52) (DuPre Aff ¶ 6) But the U S Supreme Court has recognized that interstate commerce continues until designated goods are delivered to the ultimate consumer In *Allied-Bruce Terminix Co* , the Court cited to earlier cases

¹¹ As pointed out it is not necessary that Cape Romain contemplated participation in activities that affect commerce for the FAA to apply Nevertheless Cape Romain certainly knew the dock materials were coming from out of state before it signed the contract

¹² Although Cape Romain s Mr DuPre averred that the contract required that the dock sections were to be delivered to the yard of Cape Romain (R p 52) (DuPre Aff ¶ 6) the contract actually required Cape Romain to pick up the material at Barnes yard (R p 75) (Exh 1 to the AIA Contract ¶ 2) Cape Romain did in fact pick up the dock sections from Barnes as the contract required (R p 101) (Barnes Aff ¶ 4) Mr DuPre s error is again likely attributable to inadvertence not intent

defining the flow of commerce “to include the generation of goods and services for interstate markets and their transport and distribution to the consumer” 513 U S at 273 (internal quotations omitted) It is well settled that 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) (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) (textile machinery held temporarily in Savannah after ocean transport and shipped to LaGrange, Georgia retained the character of the original ocean shipment), *NC Utils Comm n v United States*, 253 F Supp 930 (E D N C 1966) (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)¹³

Like the materials in the cited cases, the Ohio dock materials had no use until they got to the marina site They were being specifically fabricated for this job (R p 101) (Barnes Aff ¶ 3) Cape Romain knew they were coming from “up north” and had to be taken to their final destination at the marina to be put to use Out-of-state construction materials often come through local intermediaries, but that does not change their nature as interstate commerce If it did, virtually all construction projects would be exempt from the FAA But the opposite is true, as our courts have realistically held that it is virtually impossible to build any sizeable, modern construction project without affecting commerce See *Episcopal Hous Corp v Fed*

¹³ While these cases support the view that the dock sections were still in commerce until delivery to the marina site it is sufficient for reversal here that the continued shipment of the components by Cape Romain affected commerce which it surely did

Ins Co , 269 S C 631, 640, 239 S E 2d 647, 652 (1977), *Blanton v Stathos*, 351 S C 534, 541, 570 S E 2d 565, 569 (Ct App 2002)

The court below adopted Cape Romain's view that the project did not affect interstate commerce because it is not "mentioned anywhere in the agreement that the materials originate out-of-state" (R p 6, lines 1-2) (Order ¶ 5) The U S Supreme Court expressly rejected this "contemplation of the parties" view in *Allied-Bruce*, 513 U S at 278 Our Supreme Court agreed in *Munoz* 343 S C at 538 The lower court's interpretation of "affecting commerce" as dependent upon the language of the contract reflects a misguided reliance on the overruled view of *Mathews v Fluor*, 312 S C 404, 440 S E 2d 880 (1994) (R p 9) (Order ¶ 6)

The lower court's error is illustrated by *Circle S Enterprises Inc v Stanley Smith & Sons*, 288 S C 428, 431-32, 343 S E 2d 45, 47 (Ct App 1986), where this Court considered an arbitration provision of a standard AIA contract The contract in *Circle S* did not say that any equipment or material for the project was to be furnished from outside of South Carolina This Court, however, found that to be immaterial, noting that "in determining whether a contract evidences a transaction involving commerce, the court is not limited to considering only those transactions expressly authorized on the face of the contract but may also look to affidavits" *Id* at 431, 343 S E 2d at 47 (citing *Prima Paint Corp v Flood & Conklin Mfg Co* , 388 U S 395 (1967)) In *Circle S* , an affidavit proved that some materials for the project had been shipped from outside South Carolina In light of this, this Court concluded that the transaction affected commerce, notwithstanding silence in the agreement 288 S C at 431-32, 343 S E 2d at 47

Here, as in *Circle S*, it is undisputed that significant components for the marina traveled interstate.¹⁴ The circuit court's focus on whether the contract itself indicated "that the materials originate[d] out-of-state," was in error. The use of materials shipped from outside South Carolina is dispositive in concluding that the project affected interstate commerce.

B The Permit for the Project was Issued by the Army Corps of Engineers Pursuant to the Commerce Clause

Cape Romain was performing under the requirements of a federal permit issued by the Army Corps of Engineers pursuant to the Commerce Clause.¹⁵ U.S. Const. art. I, § 8, cl. 3, (R. p. 108). The federal government's power over navigable waterways flows from the Commerce Clause.

The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 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)¹⁶

Because navigable waters are subject to "all the requisite legislation by Congress" under the Commerce Clause, the FAA applies by definition to projects in

¹⁴ Cape Romain admitted this at the hearing. (R. p. 168 lines 16-18) (Tr. p. 19 lines 16-18).

¹⁵ 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 Appropriation Act."). That Act was passed pursuant to Congress's authority to regulate commerce amongst the states. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir. 1978) (internal brackets omitted) ("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.

¹⁶ To the extent that *Rands* prohibited consideration of the riparian value of an upland tract, it was modified by subsequent legislation that did not affect the Commerce Clause statement. See *United States v. 30.54 Acres of Land*, 90 F.3d 790 (3d Cir. 1996).

navigable waters. Indeed, an important aspect of this project that the Corps of Engineers was regulating under its Commerce Clause permit was Cape Roman's work, i.e., the assembly and installation of the marina. In requiring a federal permit, the Corps of Engineers determined that the marina project impacted interstate commerce sufficiently to be regulated.

It is logically impossible for the Commerce Clause to authorize regulation of Cape Roman's marina construction under a federal permit, but not to authorize handling marina construction disputes under the FAA. Both are natural exercises of the federal government's broad power over matters affecting commerce. This is particularly so when our Supreme Court has recognized that the broad language of the FAA "indicates Congress' intent to exercise its commerce power in full." *Zabinski*, 346 S. Ct. at 591, 553 S.E.2d at 115. The lower court's conclusion that, "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" (R. p. 10, lines 18-20) is simply wrong. It fails to recognize the established Commerce Clause significance of a Corps of Engineers' permit and should be reversed on this basis as well.

C The Transaction Itself Took Place on the Channels of Interstate Commerce and Used the Instrumentalities of Interstate Commerce

Cape Roman's activities further impacted commerce by taking place on the navigable waters of the United States (the channels of interstate commerce), and by using tugs and barges (the instrumentalities of interstate commerce). It is well settled that "Congress may regulate the use of the channels of interstate commerce," as well as "the instrumentalities of interstate commerce, or persons or things in interstate

commerce ” *United States v Lopez*, 514 U S 549, 558 (1995), *see also United States v Morrison*, 529 U S 598, 609 (2000)

The majority of Cape Romain’s work involved transporting dock sections by barge through Charleston Harbor, up the Wando River to the marina site, and then constructing the marina using its barges and pile drivers on the navigable waters of the United States. Cape Romain admitted that in carrying out the contract, it was using the navigable waters. (R. p. 121) (DuPre Supp. Aff. ¶ 4). Because Congress has the authority to regulate the channels and instrumentalities of interstate commerce pursuant to the Commerce Clause, and Cape Romain used both in carrying out its contractual duties, its activity possessed an additional nexus with interstate commerce sufficient to trigger the FAA. The circuit court’s order should be reversed for failing to recognize this additional interstate commerce connection as sufficient to invoke the FAA.

D Cape Romain Directly Participated in Interstate Commerce by Purchasing Fuel and Sending Money Across State Lines

In addition to its activities that affected interstate commerce, Cape Romain directly participated in interstate commerce during the project by purchasing 75 - 100 gallons of maritime fuel for its tugs and barges (R. p. 121) (DuPre Supp. Aff. ¶ 4), and sending over \$2,000 to the Chicago office of a multistate engineering firm that it hired to survey its work (R. p. 113) (Ex. 6 to Defs.’ Rep. Mem.), (R. p. 120) (DuPre Supp. Aff. ¶ 2).

The lower court inexplicitly ignored the fact that Cape Romain sent \$2,000 interstate and instead focused on the purchase of the 44¢ stamp used to send the payment. (R. p. 10) (Order at 8, lines 10-13) (“an expenditure of 44 cents for

postage is hardly a sufficient nexus or impact on commerce”) The interstate commerce involved in the payment was principally the money sent (\$2,000), not the stamp used to send it¹⁷

It is obvious why Cape Romain’s proposed order ignored the \$2,000 payment and did not try to deny that it is more than sufficient to invoke the Commerce Clause Courts have held that activities involving smaller amounts have a sufficient effect on commerce to invoke federal jurisdiction For example, in *United States v Zeigler*, 19 F 3d 486 (10th Cir 1994), the Tenth Circuit found the interstate commerce threshold of the Hobbs Act satisfied when a defendant robbed a convenience store and, “[t]he money taken in the robberies ranged from a low of \$160 to a high of approximately \$1500, amounts we do not consider so trivial as to automatically place these robberies beyond the reach of the Act” *Id* at 491 (citing cases) If Cape Romain’s \$2,000 payment had been the sole involvement with commerce here, it would still be enough to invoke the FAA The lower court erred in this regard as well

E The Combination of Interstate Commerce Effects Overwhelmingly Supports Applying the FAA

Each of the interstate commerce effects discussed above is individually sufficient to invoke the FAA Taken together, they are overwhelming In summary, the dispute here involves (1) Cape Romain’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 Cape Romain knew were being shipped from out of state, (4) whose shipment to

¹⁷ Cape Romain’s position that it did not participate in any interstate commerce relevant to this suit is further undermined by the fact that it seeks to recover this interstate payment as part of its damages (See R p 27 Cape Romain’s Statement of Account sought in lawsuit including Draw #5 and R p 112 Cape Romain’s invoice showing out of state payment as part of its Draw #5 claim)

the marina site was completed by Cape Romain, (5) where, in performance of its duties, Cape Romain 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 the project, which (7) Cape Romain now seeks as part of its damages. 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.C. 534, 570 S.E.2d 565 (Ct. App. 2002), which this 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. *Id.* at 537, 570 S.E.2d at 567. The architect began her work, but was terminated before she completed her duties. *Id.* at 538, 570 S.E.2d at 567. The architect's only interstate contacts were consulting with several out of state companies regarding specifications. *Id.* Like Cape Romain, the architect's contract was a "labor only" contract. The contract at issue in *Blanton* never contemplated that the architect would purchase any materials, and at the time of her termination, no construction had begun. *Id.* 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. *Id.* at 540, 570 S.E.2d at 568. This Court 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 Cape Romain's knowledge that Barnes was visiting the fabricators "up north" in connection with a schedule for delivery of the materials. And while the architect in *Blanton* had not completed her design before she was terminated, Cape Romain performed substantial work on the marina project affecting commerce, including delivery 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 Cape Romain did not itself purchase the out-of-state materials is immaterial. 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.¹⁸

It is a considerable perhaps insurmountable burden for a party to show that any sizeable, modern day construction contract will not affect interstate commerce. Cape Romain cited below no construction case where a South Carolina appellate court had found that interstate commerce was insufficiently affected to invoke the FAA. In contrast, numerous South Carolina appellate cases support FAA application in a variety of construction scenarios. *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*

¹⁸ Cape Romain's proposed order adopted by the lower court did not discuss or attempt to distinguish *Blanton*.

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 (Ct App 2008) (church), *Circle S Enters Inc v Stanley Smith & Sons*, 288 S C 428, 343 S E 2d 45 (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 involves the additional facts of a project on navigable waters, under a Commerce Clause federal permit, where Cape Romain itself sent an interstate payment for work on the project

F The Lower Court Misapplied the “Affecting Commerce” Test

The lower court’s order posited a novel test to determine if an activity affects interstate commerce sufficiently to invoke the FAA This “test” compares the amount of commerce involved in a project to the total of all similar commerce to see if the amount involved is a significant percentage of the total commerce As the order described this rationale

[T]he use of 75 to 100 gallons of diesel fuel is insignificant relative to the millions of gallons used in daily 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

(R p 10) (Order at 8, lines 13-16)

This rationale finds no support in the case law Comparing the amount of money or material used, or the distance traveled in a given transaction, to the amount nationwide is irrelevant to the analysis of whether that transaction in fact affects interstate commerce Indeed, such an analysis would gut the FAA since few individual projects involve a significant percentage of the total commerce in any

material. Certainly the projects for the residence in *Osteen*, the church in *New Hope Missionary Baptist Church*, and the restaurant in *Blanton* would have failed Cape Romain's novel test. Yet the FAA applied to each of these projects. Not surprisingly, Cape Romain's proposed order cited no case supporting its approach.

The lower court's error is the same as that of the Alabama Supreme Court which the U.S. Supreme Court corrected in *Citizens Bank v. AlaFabco Inc.*, 539 U.S. 52, 56-57 (2003). In that case, the Alabama Supreme Court held that "a particular contract, in order to be enforceable under the Federal Arbitration Act must, by itself, have a substantial effect on interstate commerce." *Id.* at 55. In reversing, the U.S. Supreme Court noted that application of the FAA is not

defeated because the individual transactions, taken alone, did not have a substantial effect on interstate commerce. Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice [] subject to federal control.

Id. at 56-57 (internal citation and quotations omitted). The circuit court erred when it found that the project here did not sufficiently impact commerce on the faulty rationale that the amount of material used was insignificant compared to the amount used nationwide.

Wando, E. and Barnes have shown overwhelmingly that this project sufficiently affected interstate commerce to invoke the FAA. But even if that were not so, the FAA would still apply because the general practices in which Cape Romain participated affect interstate commerce. *Citizens Bank* directs the inquiry to the general economic activity of an industry. *Id.* Cape Romain participates in marine construction, which occurs on the navigable waterways of the United States, and

undoubtedly uses materials shipped from other states¹⁹ The economic activity of Cape Romain, when considered with the aggregate economic activity of all those similarly situated, sufficiently affects commerce to prompt the application of the FAA under *Citizens Bank*

V Wando E Should Be Permitted to Participate in the Arbitration

In addition to opposing arbitration of the dispute generally, Cape Romain tried to further complicate an overall resolution by arguing that Wando E could not participate in any arbitration because it is “not a party to the contract ” (R p 46) (Cape Romain Return ¶ 1) Cape Romain’s position is wrong on the law and inadvisable as a matter of policy Because arbitration must be ordered for the Cape Romain – Barnes issues, Wando E should be permitted to participate

A Non-Signatories Can Enforce An Arbitration Agreement Against Signatories When An Intertwined Dispute and Closely Related Parties Exist

Because of the strong federal policy favoring arbitration, arbitration agreements can be enforced by non-signatories 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 a signatory brings intertwined claims against related parties, one of whom signed an arbitration agreement, it makes little sense to have those disputes separated into two forums Where there is a close commonality of interest between a signatory and non-

¹⁹ Congress highlighted its interest in arbitration affecting maritime activities by specifically applying the FAA to any maritime transaction as well as to contracts involving commerce 9 U S C § 2 (1999)

signatory, the non-signatory can join with the signatory in seeking arbitration of the dispute²⁰ *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 *JJ Ryan & Sons Inc v Rhone Poulenc Textile SA*, 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 signatory, "is willing to submit Ryan's disputes with it to arbitration" and that the strong policy in favor of arbitration would be thwarted if Rhone Poulenc was left out of the arbitration *Id* at 320-21 The same scenario exists here where Cape Roman is claiming the same damages from Barnes and Wando E, and its claims arise from a single contract with Barnes for Wando E's marina

A closely analogous scenario 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 reiterated that if a party were allowed to proceed in court against one group of closely-related defendants on an intertwined

²⁰ This is not a situation where a party is seeking to force a non signatory to arbitrate Cape Roman is a signatory Wando E a non signatory voluntarily agreed to participate in the arbitration between Barnes and Cape Roman to resolve all issues in one forum

dispute, while arbitrating against another group, the 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 ²¹ If Cape Romain were allowed to litigate against the owner (Wando E), while arbitrating against the contractor (Barnes), there would be two redundant proceedings involving the same people, the same claims, and the same evidence The purpose of the FAA – quick, inexpensive dispute resolution – would be totally frustrated

Cape Romain’s complaint confirms that this is essentially a unitary dispute in which Cape Romain named two defendants to protect its right to recover – the contractor with whom it signed the arbitration agreement (Barnes), and the owner for whom the project was being built and from whom it was receiving payments (Wando E) Cape Romain specifically alleged that while it performed “under the agreement with Sean Barnes,” Barnes “had authority from or acted rightly for the defendant and owner, Wando E, LLC ” (R p 19) (Complaint ¶ 5) Thus, Cape Romain clearly alleged an agency relationship with Barnes acting for Wando E Further, Cape Romain pled 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

(R p 19) (Complaint ¶ 6)

These allegations in Cape Romain’s breach of contract claim belie its position that Wando E has no right to enforce the arbitration clause in the same contract

²¹ It is difficult to see what advantage Cape Romain hoped to gain by opposing a single arbitration except multiplying the time and costs for all involved when its interest should have been to resolve the dispute expeditiously

There can be no doubt that Cape Romain's claims against Wando E for additional payments are "intimately founded in and intertwined with the underlying contract obligations" involving Barnes *Sunkist Soft Drinks Inc v Sunkist Growers Inc*, 10 F 3d 753, 757 (11th Cir 1993) (requiring plaintiff to arbitrate with non-signatory to arbitration agreement where claims were founded upon and intertwined with agreement containing arbitration clause)²²

In light of Cape Romain's complaint alleging an agency relationship between Barnes and Wando E, and its knowing receipt of payment from Wando E on the contract, it is clear that that Wando E's participation in the arbitration is desirable, if not essential, to resolve this controversy²³ The court below erred in refusing to allow Wando E to participate in the arbitration on the grounds that the precise relationship of Wando E to Barnes was unknown (R p 8) (Order ¶ 3) Cape Romain is bound by its pleadings alleging that Barnes acted with authority from, and for the benefit of Wando E (R p 19) (Complaint ¶ 5) *Postal v Mann*, 308 S C 385, 387, 418 S E 2d 322, 323 (Ct App 1992) (parties are bound by their pleadings) It is undisputed that Cape Romain knew before it signed the contract that Barnes was acting for a "client" (R pp 120-21) (DuPre Supp Aff ¶ 3), and it accepted payments from that client, Wando E, for its work under the contract (R p 19) (Complaint ¶ 6) Wando E

²² The Eleventh Circuit has recently made it clear that traditional state law principles such as agency estoppel and contract determine when third parties can enforce arbitration clauses *Lawson v Life of the South Ins Co* Case No 10 11651 2011 U S App LEXIS 16412 at *11 (11th Cir Aug 10 2011) As pointed out herein those principles all support enforcement of the arbitration clause by Wando E

²³ 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 145 149 (D S C 1994) *Zabinski v Bright Acres Assoc* 346 S C 580 597 553 S E 2d 110 118 (2001) Here all of Cape Romain's claims emanate from the contract dispute

obviously has a vital interest in how the dispute over its marina construction will be resolved and should be permitted to participate in the arbitration so that this dispute can be resolved expeditiously in one forum

B Wando E Can Enforce the Arbitration Clause as a Third Party Beneficiary of the Contract

The lower court's focus on determining the precise label to apply to Wando E in the dispute (R p 8) (Order ¶ 3) exalts form over substance. Not only was it undisputed that Barnes was, by Cape Romain's admission, acting for Wando E, but all involved knew the marina was being built for a third party whom Cape Romain called the "client"²⁴. Under South Carolina law, a person who is not a party to a contract can enforce the contract if it is a third party beneficiary. *See, e.g., Wise v Picow*, 232 S C 237, 244, 101 S E 2d 651, 655 (1958), *Goode v St Stephens United Methodist Church*, 329 S C 433, 445, 494 S E 2d 827, 833 (Ct App 1997). To determine whether the parties intended for a non-party to be a third party beneficiary, the court looks to the contract. *See R J Griffin & Co v Beach Club II Homeowners Ass n*, 384 F 3d 157, 164 (4th Cir 2004) (citing *Gardner v Mozingo*, 293 S C 23, 25, 358 S E 2d 390, 392 (1987)). The court must determine whether, "at the time of contracting, the parties intended to provide [a third party] with a direct benefit." *R J Griffin*, 384 F 3d at 165. There can be little doubt that is the case here.

Cape Romain knew that Barnes was contracting to build the marina for a third party client and that "Barnes was not the owner of the subject property" (R p

²⁴ As discussed above Cape Romain admits knowing it was building the marina for a client of Barnes (R p 121) (DuPre Supp Aff ¶ 3) and was accepting payment from Wando E for its work (R p 19) (Complaint ¶ 6). Barnes avers that Cape Romain knew the client was Wando E (R p 102) (Barnes Aff ¶ 8). There can be little doubt Cape Romain knew it was building the marina for Wando E. Why else would Wando E be paying it? Moreover its complaint alleges that Wando E is the owner (R p 18) (Complaint ¶ 3).

120) (DuPre Supp Aff ¶ 3)²⁵ In its complaint, Cape Romain averred that in constructing the marina, it “thereby conferred a benefit” on Wando E (R p 20) (Complaint ¶ 14) Additionally, all the payments to Cape Romain on the contract were made by Wando E (R p 102) (Barnes Aff ¶ 8) Surely, Wando E is entitled to participate in arbitration of a contract to build its marina on which it has made all the payments The lower court erred in denying its participation

C The AIA Contract Contemplates Third Parties Participating in Arbitration

The cases cited above allowing non-signatories to participate in arbitration of intertwined disputes under “principles of agency or contract” are consistent with the AIA contract The arbitration clause here is extremely broad Barnes and Cape Romain did not, as some agreements do, simply agree to arbitrate disputes “between the parties” See, e g , *Mitsubishi Motors*, 473 U S 614 They agreed to arbitrate without limitation, “Claims, disputes and other matters in question arising out of or relating to this Contract ” (R p 73) (AIA Contract ¶ 21 1) Under the literal language of the contract, Cape Romain has agreed to arbitrate these matters without regard to whether all others involved have signed the agreement There can be no question that Cape Romain’s issues with Wando E are “arising out of or relating to”

²⁵ Cape Romain’s fixation on denying it knew that the name of the client was Wando E (R p 121 line 1) (DuPre Supp Aff ¶ 3) is as irrelevant as it is illogical As long as Cape Romain knew it was contracting to build the marina for a third party the third party can enforce the contract It is not necessary for the third party to be named in the contract *Wise v Picow* 232 S C 237 244 101 S E 2d 651 655 (1958) (This Court has held in numerous cases that a contract between two persons for the benefit of a third even though he be not named therein can be enforced by such third party) *Jennings v First of Ga Underwriters Co* 283 S C 455 457 322 S E 2d 694 695 (Ct App 1984) (The Supreme Court has held contracts between two persons for the benefit of a third party can be enforced by the third person even though she is not named therein) If Cape Romain were curious to know the client’s name (assuming it did not already know as Barnes says it did) (R p 102) (Barnes Aff ¶ 8) it could have checked the public records It obviously did so as its mechanic’s lien notice shows in identifying the owner as Wando E (R pp 24 25)

the contract. But for the contract, Cape Romain would not have been on the job building Wando E's marina, and all its allegations relate to its failure to be paid what it believes is due under the contract.

In opposing Wando E's participation in the arbitration, Cape Romain again ignores the AIA agreement it signed that specifically speaks to this issue:

§ 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.

(R. p. 74) (AIA Contract ¶ 21.6) Here, Barnes wanted Wando E to participate in the arbitration and Wando E agreed to do so. Wando E's presence is undoubtedly required for complete resolution of the issues. Having agreed in the contract that third parties could be joined in arbitration, Cape Romain has no basis to oppose Wando E's involvement. The contract leaves no doubt that Wando E's participation is proper. The lower court erred in denying Wando E that participation.

VI The Quantum Meruit Claim Should be Dismissed Because It Is Subject to Arbitration, the Parties' Relationship is Governed by an Express Contract, and There Has Been No Unjust Enrichment

A The Quantum Meruit Claim Is Subject to Arbitration

In addition to suing on the contract, Cape Romain contended that it was entitled to quantum meruit recovery for its construction work. (R. p. 20-21) (Complaint ¶¶ 13-17) As an initial matter, the validity of any quantum meruit claim must be determined by arbitration. A broadly worded arbitration clause like that here encompasses every dispute having a "significant relationship" to the contract.

regardless of the label attached to the dispute *Zabinski v Bright Acres Assocs* , 346 S C 580, 598, 553 S E 2d 110, 117 (2001), *J J Ryan & Sons Inc v Rhone Poulenc Textile, S A* , 863 F 2d 315, 321 (4th Cir 1988) The quantum meruit claim relies on the same facts as the contract claim and is identical in all material respects to it In fact, it expressly incorporates the factual allegations underlying the breach of contract claim (R p 20) (Complaint ¶ 13) Because it is subject to arbitration, the quantum meruit claim should be stayed or dismissed without prejudice while the arbitration proceeds

B The Quantum Meruit Claim Cannot Survive The Existence of An Express Contract

Moreover, the quantum meruit claim should be dismissed on the additional ground that it cannot survive in the face of the express AIA contract “As a general proposition, an express contract and an implied contract for the same thing cannot exist at the same time Where an express contract is in force, the law does not recognize an implied one” 66 Am Jur 2d *Restitution and Implied Contracts* § 83 (2004) Under South Carolina law, “if a contract exists, a plaintiff cannot recover on the theory of quantum meruit” *A L Green & Co Inc v Great-West Life Assurance Co* , 738 F Supp 965, 971 (W D N C 1990) (applying South Carolina law) As this Court has noted “If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit” *Swanson v Stratos* 350 S C 116, 122, 564 S E 2d 117, 120 (Ct App 2002), *see also* 66 Am Jur 2d *Restitution and Implied Contracts* § 81 (2001)

(“[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished ”)

Cape Romain entered into an express contract for the construction of the marina. It has already been paid over \$70,000 for its work under the contract. The balance of the contract sum is in dispute because of issues about Cape Romain’s performance. Because an express contract exists for the goods and services for which Cape Romain seeks equitable relief, Cape Romain’s action for quantum meruit should be dismissed.

The lower court refused to dismiss the quantum meruit count because it speculated that when Wando E and Barnes answered the complaint, they might disavow the contract. (R. p. 11, lines 15-20) (Order ¶ 7). But this speculation does not acknowledge that both sides agree the contract is valid. Cape Romain alleged the contract is valid in its complaint (R. p. 18-19) (Complaint ¶ 4), and Wando E and Barnes have already relied on the contract as valid in moving to enforce its arbitration clause. (R. p. 84, lines 5-7) (Defs.’ Reply Mem. at 2) (“[T]his contract for maritime construction is clearly enforceable under the Federal Arbitration Act ”)

Parties are bound by their pleadings. *Postal v. Mann*, 308 S. C. 385, 387, 418 S. E. 2d 322, 323 (Ct. App. 1992) (“a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action ”). Having explicitly invoked the contract to enforce it, Wando E and Barnes could not disavow it, and have never expressed any intention of doing so. It is well settled that one cannot rely on a contract and then disavow it. *THI of S C at Columbia LLC v*

Wiggins, C/A No 3 11-888-CMC, 2011 U S Dist LEXIS 103638, at *21 (D S C Sept 13, 2011) (“to allow a party to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the FAA”) (internal brackets and quotations omitted) *Hughes Masonry Co Inc v Greater Clark County Sch Bldg Corp*, 659 F 2d 836, 839 (7th Cir 1981) (“[A party] cannot rely on the contract when it works to its advantage, and repudiate it when it works to (its) disadvantage”) The speculative scenario the lower court used to retain the quantum meruit claim could not occur²⁶

C Quantum Meruit Cannot Survive Where There Is No Unjust Enrichment

Finally, quantum meruit is inappropriate because Barnes and Wando E have not been unjustly enriched To recover under quantum meruit, a plaintiff must show “(1) a benefit conferred upon the defendant by the plaintiff, (2) realization of that benefit by the defendant, and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value” *Columbia Wholesale Co Inc v Scudder May NV* 312 S C 259, 261, 440 S E 2d 129, 130 (1994) In other words, the defendant must have been unjustly enriched At present, Wando E has paid Cape Romain over \$70,000 on the contract for the work Cape Romain has done This is all that the project engineer approved Cape Romain has not shown a right to be paid anything more under the contract, and consequently, Wando E and Barnes have not been unjustly enriched by withholding any money due to Cape Romain None of the elements of quantum meruit has been satisfied

²⁶ In addition to the legal impossibility of disavowing a contract upon which one relies is the judicial admonishment that it would not be a good career move for a lawyer to attempt such legerdemain with a court See *Spann v Style Crest Prods Inc* 171 F Supp 2d 605 610 n 5 (D S C 2001) (Lawyers will be held to their representations)

With the above principles in mind, the Court should reverse the refusal to dismiss Cape Romain's quantum meruit claim because (1) the claim must be arbitrated, not litigated, (2) there is an express contract governing Cape Romain's entitlement to be paid, and (3) Barnes and Wando E have not been unjustly enriched

VII The Action to Foreclose the Mechanic's Lien Cannot Proceed Until the Arbitration Determines Whether Cape Romain Has Any Right to Recovery

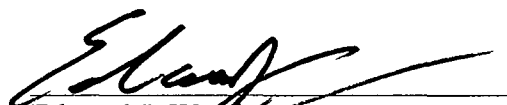
Although the contract permits Cape Romain to preserve its mechanic's lien by "comply[ing] with the lien notice or filing deadlines" (R p 73) (Contract ¶ 21 2), Cape Romain must honor the arbitration clause and pursue arbitration to determine its right to recover on the lien *Pavilion Dev Corp v K-Con Inc*, No 2001-CP-10-713, 2002 WL 34138292 (S C Ct Com Pl Oct 24, 2002) (mechanic's lien clause only permits party to comply with filing deadline, not to avoid arbitration) (R p 43, lines 11-17), *Liberty Builders Inc v Horton*, 336 S C 658, 667, 521 S E 2d 749, 754 (Ct App 1999) (arbitration clause covers claims subject to mechanic's lien and subcontractor should have stayed mechanic's lien action and sought arbitration), *see also Mills v Robert W Gottfried Inc*, 272 So 2d 837 (Fla Dist Ct App 1973) (mechanic's lien preserves right to recover if arbitration is successful) If an award is rendered for Cape Romain in the arbitration, the contract provides "judgment may be entered upon it in accordance with applicable law " (R p 74, lines 2-3) (AIA Contract ¶ 21 4) If Cape Romain has a valid mechanic's lien, it can pursue recovery under its lien at that time

CONCLUSION

Cape Romain's position has nothing to recommend it – not precedent, not equity, not fairness, not the English language, and not normal contract interpretation. The need for predictability in commercial transactions requires that Cape Romain be told unequivocally, “You made a promise. Keep it.”

For the foregoing reasons, Appellants Barnes and Wando E respectfully request that this Court reverse the order of the trial court below, order the parties to arbitrate their dispute, and stay or dismiss all other proceedings until the arbitration determines whether Cape Romain has any right to further payment.²⁷

Respectfully Submitted,



Edward J. Westbrook
Catherine H. McElveen
Richardson Patrick Westbrook
& Brickman
1037 Chuck Dawley Blvd , Bldg A
Mount Pleasant, SC 29464
(843) 727-6513
ATTORNEYS FOR APPELLANTS

November 29, 2011

²⁷ In support of judicial economy the Court may dismiss without prejudice rather than staying the action. *Choice Hotels Int'l v. BSR Tropicana Resort*, 252 F.3d 707, 709 (4th Cir. 2000). There is no statute of limitations issue here that would argue against dismissal.

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,

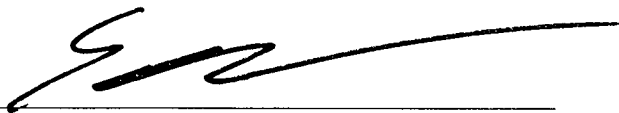
v

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

Appellants

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR



Edward J Westbrook, Esq
Catherine H McElveen, Esq
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Building A
Mount Pleasant, SC 29494
(843) 727-6513
Attorneys for Appellants

November 29, 2011

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Appellants has been served upon the following counsel of record via first class mail this 29th day of November, 2011

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

RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC

By 

Edward J Westbrook, Esq
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Bldg A
Mount Pleasant, SC 29464
Phone 843 727 6513