

The Supreme Court of South Carolina

Cape Romain Contractors, Inc , Respondent,

v

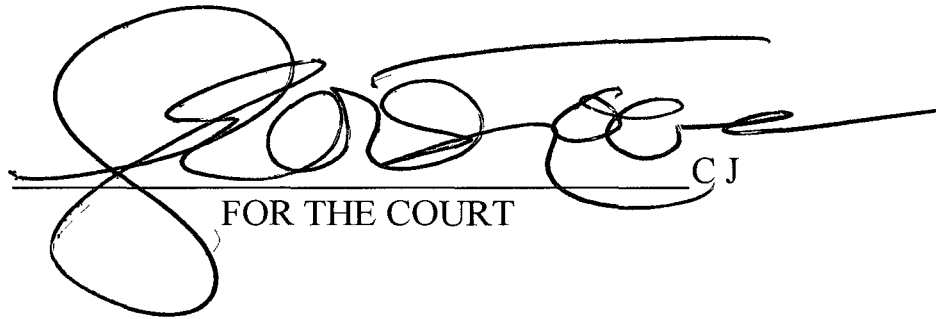
Wando E , LLC and Sean Barnes a/k/a Sean A Barnes,
Appellants

Appellate Case No 2011-197207

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED



CJ
FOR THE COURT

Columbia, South Carolina

July 25, 2012

cc

E J Westbrook

Albert A Lacour, III

Catherine H McElveen

The Honorable Jenny Kitchings



The South Carolina Court of Appeals

TANYA A. GEF
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V. CLAIRE ALLFN
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February 20, 2012

Albert A. Lacour, III, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive
Suite 200
Charleston, SC 29492-7595

Re Cape Romain v. Wando E, LLC
Case Tracking # 2011197207

Dear Counsel

The following Order has been endorsed on your "Motion to Remand for Purposes of Limited Discovery" in the above entitled case on appeal.

"Denied

s/ John Cannon Few C J

February 20, 2012 "

Please be advised the Record on Appeal and all final briefs will be submitted for the Court's consideration.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc E. I. Westbrook, Esquire



RICHARDSON PATRICK
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January 10, 2012

Hon Tanya A Gee, Clerk
South Carolina Court of Appeals
Edgar A Brown Building
1205 Pendleton Street
Columbia, SC 29201

Re *Cape Romain Contractors Respondent v Wando E LLC and Sean
Barnes a/k/a Sean A Barnes Appellants*, Case No 2011-CP-08-985,
Appeals Court Tracking No 2011197207

Dear Madame Clerk

Pursuant to South Carolina Rule of Appellate Procedure 208(b)(7), Appellants wish to bring to the attention of the Court today's decision of the United States Supreme Court in *Compucredit Corp et al v Greenwood et al*, No 10-48 (Jan 10, 2012), which is relevant to Appellants' arguments in Section II (page 16) and Section III (page 20) of Appellants' opening brief See Compucredit Corp slip op at 2 (enclosed)

Respectfully,



Edward J Westbrook

EJW/kaj

Enclosure

cc Albert A LaCour, III (with enclosures)

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Syllabus

NOTE Where it is feasible a syllabus (headnote) will be released as is being done in connection with this case at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COMPUCREDIT CORP. ET AL. v. GREENWOOD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 10–948 Argued October 11, 2011—Decided January 10, 2012

Although respondents' credit card agreement required their claims to be resolved by binding arbitration, they filed a lawsuit against petitioner CompuCredit Corporation and a division of petitioner bank alleging *inter alia* violations of the Credit Repair Organizations Act (CROA). The Federal District Court denied the defendants' motion to compel arbitration, concluding that Congress intended CROA claims to be nonarbitrable. The Ninth Circuit affirmed.

Held Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the Federal Arbitration Act (FAA) requires the arbitration agreement to be enforced according to its terms. Pp. 2–10.

(a) Section 2 of the FAA establishes a liberal federal policy favoring arbitration. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24. It requires that courts enforce arbitration agreements according to their terms. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221. That is the case even when federal statutory claims are at issue, unless the FAA's mandate has been overridden by a contrary congressional command. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226. Pp. 2–3.

(b) The CROA provides no such command. Respondents contend that the CROA's disclosure provision—which requires credit repair organizations to provide consumers with a statement that includes the sentence, "You have a right to sue a credit repair organization that violates the [Act]" (15 U.S.C. §1679c(a))—gives consumers the right to bring an action in a court of law, and that because the CROA prohibits the waiver of any right of the consumer under this subchapter, §1679f(a), the arbitration agreement's waiver of the right to bring a court action cannot be enforced. Respondents premise is

Syllabus

flawed. The disclosure provision creates only a right for consumers to receive a specific statement describing the consumer protections that the law elsewhere provides, one of which is the right to enforce a credit repair organization's liability for failure to comply with [the Act] §1679g(a). That provision does not override the FAA's mandate. Its mere contemplation of judicial enforcement does not demonstrate that the Act provides consumers with a right to initial judicial enforcement. Pp. 3–8.

(c) At the time of the CROA's enactment in 1996, arbitration clauses such as the one at issue were no rarity in consumer contracts generally or in financial services contracts in particular. Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest. Pp. 8–9.

615 F. 3d 1204 reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. SO TOMAYOR, J., filed an opinion concurring in the judgment, in which KAGAN, J., joined. GINSBURG, J., filed a dissenting opinion.

Opinion of the Court

NOTICE This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–948

COMPUCREDIT CORPORATION, ET AL, PETITIONERS
v WANDA GREENWOOD ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 10, 2012]

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether the Credit Repair Organizations Act (CROA), 15 U.S.C. §1679 *et seq.*, precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that Act.

I

Respondents are individuals who applied for and received an Aspire Visa credit card marketed by petitioner CompuCredit Corporation and issued by Columbus Bank and Trust, now a division of petitioner Synovus Bank. In their applications they agreed to be bound by a provision which read: ‘Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, Claims) upon the election of you or us will be resolved by binding arbitration.’ App. 62.

In 2008, respondents filed a class action complaint against CompuCredit and Columbus in the United States District Court for the Northern District of California, alleging, as relevant here, violations of the CROA. The

Opinion of the Court

claims largely involved the defendants' allegedly misleading representation that the credit card could be used to rebuild poor credit and their assessment of multiple fees upon opening of the accounts, which greatly reduced the advertised credit limit

The District Court denied the defendants' motion to compel arbitration of the claims, concluding that "Congress intended claims under the CROA to be non-arbitrable" 617 F Supp 2d 980 988 (2009) A panel of the United States Court of Appeals for the Ninth Circuit affirmed, Judge Tashima dissenting 615 F 3d 1204 (2010) We granted certiorari 563 U S ____ (2011)

II

The background law governing the issue before us is the Federal Arbitration Act (FAA) 9 U S C §1 *et seq* , enacted in 1925 as a response to judicial hostility to arbitration *AT&T Mobility LLC v Concepcion*, 563 U S ___, ____ (2011) (slip op , at 4) As relevant here the FAA provides

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract" 9 U S C §2

This provision establishes "a liberal federal policy favoring arbitration agreements" *Moses H Cone Memorial Hospital v Mercury Constr Corp* , 460 U S 1, 24 (1983) See also, *e g* , *Concepcion supra*, at __ (slip op , at 4) *Gilmer v Interstate/Johnson Lane Corp* 500 U S 20, 25 (1991) It requires courts to enforce agreements to arbitrate according to their terms See *Dean Witter Reynolds Inc v Byrd* 470 U S 213 221 (1985) That is the case even when the claims at issue are federal statutory claims, unless the

Opinion of the Court

FAA's mandate has been "overridden by a contrary congressional command." *Shearson/American Express Inc v McMahon*, 482 U S 220, 226 (1987). See also *Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc*, 473 U S 614 628 (1985). Respondents contend that the CROA contains such a command.

That statute regulates the practices of credit repair organizations, defined as certain entities that offer services for the purpose of (i) improving any consumer's credit record, credit history, or credit rating, or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).¹ 15 U S C §1679a(3). In its principal substantive provisions the CROA prohibits certain practices §1679b, establishes certain requirements for contracts with consumers, §1679d, and gives consumers a right to cancel, §1679e. Enforcement is achieved through the Act's provision of a private cause of action for violation, §1679g, as well as through federal and state administrative enforcement, §1679h.

III

Like the District Court and the Ninth Circuit respondents focus on the CROA's disclosure and nonwaiver provisions. The former, which is reproduced in full in the Appendix, *infra*, sets forth a statement that the credit repair organization must provide to the consumer before any contract is executed §1679c(a). One sentence of that required statement reads: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." The Act's nonwaiver provision states,

¹The District Court said that petitioners do not dispute that they come within this definition. See 617 F Supp 980 984 n 2 (ND Cal 2009). The Ninth Circuit did not address that issue. See 615 F 3d 1204 1207 n 3 (2010). nor do we.

Opinion of the Court

“Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter— (1) shall be treated as void, and (2) may not be enforced by any Federal or State court or any other person” §1679f(a)

The Ninth Circuit adopted the following line of reasoning, urged upon us by respondents here. The disclosure provision gives consumers the right to sue ‘which “clearly involves the right to bring an action in a court of law” 615 F.3d, at 1208. Because the nonwaiver provision prohibits the waiver of “any right of the consumer under this subchapter’ the arbitration agreement—which waived the right to bring an action in a court of law—cannot be enforced. *Id.*, at 1214.

The flaw in this argument is its premise that the disclosure provision provides consumers with a right to bring an action in a court of law. It does not. Rather, it imposes an obligation on credit repair organizations to supply consumers with a specific statement set forth (in quotation marks) in the statute. The only consumer right it *creates* is the right to receive the statement, which is meant to describe the consumer protections that the law *elsewhere* provides. The statement informs consumers, for instance, that they can dispute the accuracy of information in their credit file and that “[t]he credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. 15 U.S.C. §1679c(a). That description is derived from §1681i(a), which sets out in great detail the procedures to be followed by a credit bureau in the event of challenges to the accuracy of its information. Similarly, the required statement informs consumers that they may “cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it”—the right created and set forth in more detail in §1679e. And the “right to sue” language describes the consumer’s right to enforce the credit repair organization’s

Opinion of the Court

‘liab[ility]’ for “fail[ure] to comply with any provision of this subchapter” provided for in §1679g(a)² Thus, contrary to the dissent’s assertion, our interpretation does not “[r]educ[e] the required disclosure to insignificance,” *post*, at 6 The disclosure provision informs consumers of their right to enforce liability for *any* failure to conform to the statute—information they might otherwise not possess It is the dissent’s interpretation that effectively reduces a portion of the CROA to a nullity Interpreting the “right to sue” language in §1679c(a) to ‘create’ a right to sue in court not only renders it strikingly out of place in a section that is otherwise devoted to giving the consumer notice of rights created elsewhere, it also renders the creation of the right to sue” elsewhere superfluous

Respondents suggest that the CROA’s civil liability provision §1679g (set forth in full in the Appendix *infra*), demonstrates that the Act provides consumers with a “right” to bring an action in court They cite the provision’s repeated use of the terms “action,” “class action,” and “court”—terms that they say call to mind a judicial proceeding These references cannot do the heavy lifting that respondents assign them It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action including the relief available, in the context of a court suit If the mere formulation of the cause of action in this standard fashion were sufficient to establish the “contrary congressional com

²Accordingly when a consumer sues to enforce liability under the CROA he does so under §1679g(a) not in light of §1679c *post* at 4 (GINSBURG J dissenting) An action under the CROA need not refer to §1679c at all unless it is based on the company’s failure to provide the statement required under that section Section 1679g(a) creates the right at issue and describes it in detail not contained in §1679c’s summary When determining the scope of that right it is therefore §1679g(a)—and not §1679c—that must govern

Opinion of the Court

mand' overriding the FAA, *McMahon*, *supra*, at 226, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law. In *Gilmer* we enforced an arbitration agreement with respect to a cause of action created by the Age Discrimination in Employment Act of 1967 (ADEA) which read, in part "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. §626(c)(1). In *McMahon* we enforced an arbitration agreement with respect to a cause of action created by a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) which read, in part "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit

' 18 U.S.C. §1964(c). And in *Mitsubishi Motors* we enforced an arbitration agreement with respect to a cause of action created by a provision of the Clayton Act which read, in part "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15(a). Thus, we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court. See *Gilmer*, 500 U.S., at 28, *McMahon*, 482 U.S. at 240, *Mitsubishi Motors* 473 U.S., at 637. To be sure, none of the statutes described above contained a nonwaiver provision as the statute before us does. But if a cause of action provision mentioning judicial enforcement does not create a right to initial judicial enforcement, the waiver of initial judicial enforcement is not the waiver of a 'right of the consumer,' §1679f(a). It

Opinion of the Court

takes a considerable stretch to regard the nonwaiver provision as a “congressional command that the FAA shall not apply”³

Moreover, if one believes that §1679g’s contemplation of court suit (combined with §1679f(a)) establishes a nonwaivable right to initial judicial enforcement, one must also believe that it establishes a nonwaivable right to initial judicial enforcement in *any* competent judicial tribunal, since it contains no limitation. We think it clear, however, that this mere “contemplation” of suit in any competent court does not *guarantee* suit in all competent courts, disabling the parties from adopting a reasonable forum selection clause. And just as the contemplated availability of all judicial forums may be reduced to a single forum by contractual specification, so also can the contemplated availability of judicial action be limited to judicial action compelling or reviewing initial arbitral adjudication. The parties remain free to specify such matters, so long as the *guarantee* of §1679g—the *guarantee of the legal power to impose liability*—is preserved.

Respondents and the dissent maintain that if the CROA does not create a right to a judicial forum, then the disclosure provision effectively requires that credit repair organizations mislead consumers. We think not. The disclosure provision is meant to describe the law to consumers in a manner that is concise and comprehensible to the layman—which necessarily means that it will be imprecise. The required statement says, for example, that the CROA “prohibits deceptive practices by credit repair organiza-

³ *Gilmer* noted that the ADEA had been amended after conclusion of the arbitration agreement in that case to preclude waiver of rights or claims that may arise after the date the waiver is executed. 29 U S C §626(f)(1)(C). The Court said in dictum that this provision did not explicitly preclude arbitration or other nonjudicial resolution of claims. 500 U S at 29.

Opinion of the Court

tions,” 15 U S C §1679c(a) This is in some respects an overstatement, and in some respects an understatement, of the “Prohibited practices” set forth in §1679b It would include, for example, deception apart from ‘the offer or sale of the services of the credit repair organization’ §1679b(a)(4) Yet we would not hold, in order to prevent the required statement from being “misleading,” that a consumer has a right to be protected from deceptive practices beyond those actually covered by §1679b So also with respect to the statement’s description of a ‘right to sue’ This is a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA We think most consumers would understand it this way, without regard to whether the suit in court has to be preceded by an arbitration proceeding Leaving that possibility out may be imprecise but it is not misleading—and certainly not so misleading as to demand, in order to avoid that result, reading the statute to contain a guaranteed right it does not in fact contain

IV

At the time of the CROA’s enactment in 1996, arbitration clauses in contracts of the type at issue here were no rarity Quite the contrary, the early 1990s saw the increased use of arbitration clauses in consumer contracts generally, and in financial services contracts in particular See Ware, Arbitration and Unconscionability After *Doctor’s Associates, Inc v Casarotto* 31 Wake Forest L Rev 1001 1001 and n 3 (1996) J Shimabukuro Congressional Research Service Report for Congress The Federal Arbitration Act Background and Recent Developments 1 (2002)

Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest When it

Opinion of the Court

has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA. See, *e.g.*, 7 U S C §26(n)(2) (2006 ed., Supp. IV) (“No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section”), 15 U S C §1226(a)(2) (2006 ed.) (“Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy”), cf. 12 U S C §5518(b) (2006 ed., Supp. IV) (granting authority to the newly created Consumer Financial Protection Bureau to regulate predispute arbitration agreements in contracts for consumer financial products or services).⁴ That Congress would have sought to achieve the same result in the CROA through combination of the nonwaiver provision with the “right to sue” phrase in the disclosure provision, and the references to “action” and

⁴The dissent questions the relevance of these statutes since they postdated the CROA and since this Court’s intervening decisions compelling arbitration increasingly alerted Congress to the utility of drafting antiwaiver prescriptions with meticulous care. *Post* at 8. But as the dissent implicitly recognizes, Congress had been alerted much before these post CROA statutes were passed. The CROA itself followed a series of this Court’s seminal decisions compelling arbitration decisions which held that the FAA had established a federal policy favoring arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U S 20, 26 (1991) and that “[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies.” *Shearson/American Express Inc. v. McMahon*, 482 U S 220, 227 (1987). To the extent Congress is ever stimulated by this Court’s decisions *post* at 8, there is no reason to think the Congress that enacted the CROA was any less stimulated than subsequent Congresses.

Opinion of the Court

“court” in the description of damages recoverable, is unlikely

* * *

Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms. The judgment of the Ninth Circuit is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Appendix to opinion of the Court

APPENDIX

Section 1679c provides

“(a) Disclosure required

“Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed

““Consumer Credit File Rights Under State and Federal Law

“You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any credit repair company or credit repair organization has the right to have accurate, current, and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

“You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

“You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.

Appendix to opinion of the Court

“You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it

“Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However mistakes may occur

“You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau

‘ If the credit bureau’s reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau, to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you

“The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact

“The Public Reference Branch

“Federal Trade Commission

“Washington D C 20580

“(b) Separate statement requirement

‘The written statement required under this section shall be provided as a document which is separate from any written contract or other agreement between the credit repair organization and the consumer or any other written material provided to the consumer

Appendix to opinion of the Court

“(c) Retention of compliance records

“(1) In general

‘The credit repair organization shall maintain a copy of the statement signed by the consumer acknowledging receipt of the statement

“(2) Maintenance for 2 years

“The copy of any consumer’s statement shall be maintained in the organization’s files for 2 years after the date on which the statement is signed by the consumer”

* * *

Section 1679g provides

“(a) Liability established

“Any person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person in an amount equal to the sum of the amounts determined under each of the following paragraphs

“(1) Actual damages

“The greater of—

“(A) the amount of any actual damage sustained by such person as a result of such failure or

(B) any amount paid by the person to the credit repair organization

“(2) Punitive damages

“(A) Individual actions

“In the case of any action by an individual such additional amount as the court may allow

“(B) Class actions

In the case of a class action, the sum of—

(i) the aggregate of the amount which the court may allow for each named plaintiff and

Appendix to opinion of the Court

‘(11) the aggregate of the amount which the court may allow for each other class member, without regard to any minimum individual recovery

“(3) Attorneys’ fees

In the case of any successful action to enforce any liability under paragraph (1) or (2) the costs of the action together with reasonable attorneys fees

“(b) Factors to be considered in awarding punitive damages

‘In determining the amount of any liability of any credit repair organization under subsection (a)(2) of this section the court shall consider among other relevant factors—

“(1) the frequency and persistence of noncompliance by the credit repair organization

“(2) the nature of the noncompliance

“(3) the extent to which such noncompliance was intentional, and

‘(4) in the case of any class action, the number of consumers adversely affected ’

SOTOMAYOR J concurring in judgment

SUPREME COURT OF THE UNITED STATES

No 10–948

COMPUCREDIT CORPORATION, ET AL , PETITIONERS
v WANDA GREENWOOD ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 10 2012]

JUSTICE SOTOMAYOR with whom JUSTICE KAGAN joins,
concurring in the judgment

Claims alleging the violation of a statute, such as the Credit Repair Organizations Act (Act) 15 U S C §1679 *et seq* , are generally subject to valid arbitration agreements unless Congress evinces a contrary intent in the text, history, or purpose of the statute See *Gilmer v Interstate/Johnson Lane Corp* , 500 U S 20 26 (1991) I agree with the Court that Congress has not shown that intent here But for the reasons stated by the dissent, I find this to be a much closer case than the majority opinion suggests

The Act creates a cause of action in its liability provision, see §1679g(a), denominates the cause of action a “right to sue” in the mandatory disclosure statement, §1679c(a) and then provides that right[s]’ may not be waived, §1679f(a) Those for whom Congress wrote the Act—lay readers “of limited economic means and inexperienced in credit matters,” §1679(a)(2)—reasonably may interpret the phrase “right to sue” as promising a right to sue *in court* And it is plausible to think that Congress, aware of the impact of its words, intended such a construction of the liability provision

But while this interpretation of the Act is plausible, it is in my view no more compelling than the contrary con

SOTOMAYOR J concurring in judgment

struction that petitioners urge. As the majority opinion notes, the disclosure provision does not itself confer a cause of action, and the liability provision that does is materially indistinguishable from other statutes that we have held not to preclude arbitration. In my mind this leaves the parties' arguments in equipoise, and our precedents require that petitioners prevail in this circumstance. This is because respondents, as the opponents of arbitration, bear the burden of showing that Congress disallowed arbitration of their claims, and because we resolve doubts in favor of arbitration. See *id.*, at 26. Of course if we have misread Congress' intent then Congress can correct our error by amending the statute.

I add one more point. The majority opinion contrasts the liability provision of the Act with other, more recently enacted statutes that expressly disallow arbitration. I do not understand the majority opinion to hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims. We have never said as much, and on numerous occasions have held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question. See *ibid.* ("If such an intention exists, it will be discoverable in the text of the [statute] its legislative history or an 'inherent conflict' between arbitration and the [statute s] underlying purposes.") *Shearson/American Express Inc v McMahon*, 482 U S 220 227 (1987) ("If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from [the statute s] text or legislative history,' or from an inherent conflict between arbitration and the statute s underlying purposes (quoting *Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc*, 473 U S 614 628 (1985) citation omitted)). I agree with the dissent that the statutes the majority opinion cites shed little light on the thoughts of the Congress that passed the Act. But the Act's text is not

SOTOMAYOR J concurring in judgment

dispositive, and respondents identify nothing in the legislative history or purpose of the Act that would tip the balance of the scale in favor of their interpretation

GINSBURG J dissenting

SUPREME COURT OF THE UNITED STATES

No 10–948

COMPU CREDIT CORPORATION ET AL, PETITIONERS
v WANDA GREENWOOD ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 10 2012]

JUSTICE GINSBURG, dissenting

Congress enacted the Credit Repair Organizations Act (CROA) to protect consumers ‘who have experienced credit problems —‘particularly those of limited economic means’—against the unfair and deceptive practices of credit repair organizations 15 U S C §1679(a) Central to the legislation, Congress sought to arm consumers with information needed to make intelligent decisions about purchasing a repair organization s services To that end Congress directed that, “before [execution of] any contract between [a] consumer and [a] credit repair organization,” the organization must make certain disclosures One of the required disclosures reads

“You have a right to sue a credit repair organization that violates the [CROA] This law prohibits deceptive practices by [such] organizations ” §1679c(a)

The Act’s civil liability provision describes suits consumers may bring in court individual and class actions for damages (actual and punitive) and attorneys fees A further provision renders void any purported waiver of any protection or right the Act grants to consumers

The Court today holds that credit repair organizations can escape suit by providing in their take it or leave it contracts that arbitration will serve as the parties sole

GINSBURG J dissenting

dispute resolution mechanism. The right to sue,” the Court explains, merely connotes the vindication of legal rights, whether in court or before an arbitrator. That reading may be comprehensible to one trained to “think like a lawyer.” But Congress enacted the CROA with vulnerable consumers in mind—consumers likely to read the words “right to sue” to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration.

In accord with the Ninth Circuit, I would hold that Congress, in an Act meant to curb deceptive practices, did not authorize credit repair organizations to make a false or misleading disclosure—telling consumers of a right they do not, in fact, possess. If the Act affords consumers a nonwaivable right to sue in court, as I believe it does, a credit repair organization cannot retract that right by making arbitration the consumer’s sole recourse.

I

CompuCredit marketed a credit card to consumers with weak credit ratings. It did so through massive direct mail and Internet solicitations, urging recipients to acquire a card under the brand name Aspire Visa, and thereby “rebuild poor credit” and “improve [their] credit rating.” App. 40, Complaint ¶11 (internal quotation marks omitted). Plaintiffs, individuals who applied for and received CompuCredit’s card, sought redress for multiple violations of the CROA.

Their complaint alleged that CompuCredit’s promotional materials told potential customers that no deposit would be required, and that cardholders would receive, upfront, a credit line of \$300. In fact, plaintiffs asserted, they were charged an initial finance fee of \$29, a monthly fee of \$6.50, and an annual fee of \$150, assessed immediately against the \$300 limit. In the aggregate, plaintiffs calculated fees charged the first year amounted to \$257.

GINSBURG J dissenting

CompuCredit's fee exactions did appear in the promotional materials in small print, buried amidst other information, and removed from the clearer representation that no deposit would be required. *Id.*, at 40–41, Complaint ¶¶12–13. Far from improving their credit rating, plaintiffs complained, CompuCredit knew that its card, saddled with these fees, “would not provide any meaningful assistance whatsoever with regard to rebuilding credit and improving a credit rating.” *Id.*, at 48, Complaint ¶41(b). Furthermore, plaintiffs stated, CompuCredit did not provide them with the written disclosures of their rights required by the CROA. *Id.*, at 42, Complaint ¶23.

Seeking damages for the alleged violations, along with attorneys' fees, plaintiffs requested class certification. In the District Court and Court of Appeals, they successfully resisted CompuCredit's motion to compel arbitration pursuant to a form contract that barred class proceedings.¹ This Court, however, interprets the CROA to permit CompuCredit's demand that plaintiffs proceed, if at all, before an arbitrator.² I read the governing statute differently.

II

Three sections of the CROA, considered together, indicate Congress' intention to preclude mandatory creditor imposed arbitration of CROA claims. See 15 U S C §§1679c(a), 1679g, and 1679f. Before entering into any

¹The contract signed by cardholders did not itself require arbitration. Rather, it incorporated by reference an enclosed insert providing that all disputes would be resolved by arbitration at the discretion of CompuCredit or the cardholder. App. 61–63.

²CompuCredit's form contract specified that arbitration was to occur under the auspices of the National Arbitration Forum (NAF). In 2009, after the Attorney General of Minnesota filed an action alleging that NAF had engaged in numerous violations of consumer protection laws, NAF entered into a consent decree barring it from handling consumer arbitrations. See Press Release by Lori Swanson, Attorney General of Minnesota (July 19, 2009).

GINSBURG J dissenting

consumer contract credit repair organizations must give potential customers a written statement of rights they possess under that Act and related consumer protection laws §1679c(a) Congress dictated every word of the required notification Credit repair organizations must tell consumers in plain terms, how they may enforce their rights ‘You have a right to sue a credit repair organization that violates the Credit Repair Organization Act’
Ibid

The ‘right to sue’ refers to the claim for relief Congress afforded consumers in §1679g ‘Any person who violates another’s rights under the CROA ‘shall be liable’ for actual damages and attorneys’ fees, and may be liable for punitive damages as well §1679g(a)(1)–(3) The Act sets out the factors ‘the court shall consider’ in determining the amount of punitive damages ‘the court may allow’ aggrieved consumers to recover, either individually or as a class §1679g(a)(2) and (b) The liability created here, in §1679g, is precisely what the consumer, in light of §1679c may sue to enforce

The Act renders void and unenforceable [a]ny waiver by any consumer of any protection provided by or *any right* of the consumer under this subchapter §1679f (emphasis added)³ The rights listed in §1679c(a) rendered nonwaivable by §1679f are the ‘right to sue’ and the ‘right to cancel [a] contract’ for any reason within 3 business days from the date [the consumer] signed it⁴

³Section 1679f(a) omitted from the Court’s statutory appendix *ante* at 11–14 provides in full

Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—

(1) shall be treated as void and

(2) may not be enforced by any Federal or State court or any other person

⁴Two provisions although described by §1679c(a) as consumer right[s] are not rendered nonwaivable by §1679f because they are not right[s] under this subchapter Rather the right to dispute

GINSBURG J dissenting

The question on which this case turns is what Congress meant when it created a nonwaivable “right to sue.” Recall that Congress’ target audience in the CROA is not composed of lawyers and judges accustomed to nuanced reading of statutory texts, but laypersons who receive a disclosure statement in the mail. Recall as well, Congress’ findings that these individuals are often “of limited economic means and inexperienced in credit matters.” §1679(a)(2). Attributing little importance to this context, the Court construes the right to sue as the legal right, enforceable in court, to recover damages without regard to whether the suit in court has to be preceded by an arbitration proceeding.” *Ante* at 8. I read Congress’ words without that sophisticated gloss. The right to sue, I would hold, means the right to litigate in court.

The Court is quite right in recognizing that consumers have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA.” *Ibid*. But the Court is quite wrong, as I see it, to characterize as merely “imprecise” *ibid*, Congress’ failure to include the caveat that access to court may be conditioned upon an anterior arbitration. The “right to sue” may well be “a colloquial method of communicating to consumers.” See *ibid*. But it surely is not colloquially *understood* by recipients of the required disclosures as the right, not to adjudicate in court, but only to seek, or defend against, court enforcement of an award rendered by the arbitrator chosen by the credit repair organization. Few, if any, credit repair customers would equate the right to

inaccurate information in your credit report and the right to obtain a copy of your credit report referred to in §1679c(a) are rights conferred elsewhere in the U.S. Code. See §1681i(a), §1681j. Section 1679f also makes nonwaivable the *protection[s]* provided under this subchapter (emphasis added); these protections include the prohibition of certain business practices see §1679b and the provision in writing of certain contractual terms and conditions see §1679d.

GINSBURG J dissenting

sue ’ §1679c(a) with the extremely limited judicial review given to an arbitrator’s award, see, *e g* , *Hall Street Associates, L L C v Mattel, Inc* 552 U S 576, 586–589 (2008)

The Court discounts the references to action, “class action,” and “court” in §1679g, the provision that “create[s] the consumers claim for relief See *ante* at 5 Despite similar statutory language the Court observes we have enforced arbitration agreements to settle disputes arising under other Acts of Congress The CROA however, is distinguished by its disclosure requirements prime among them the obligation imposed on the credit repair organization to inform potential customers they “have a right to sue an organization that violates the Act §1679c(a) Yet the Court refuses to read this language in concert with §1679g, notwithstanding our frequent acknowledgment that “a statute is to be read as a whole since the meaning of statutory language depends on context’ *King v St Vincent’s Hospital*, 502 U S 215, 221 (1991) (citation omitted) As just explained I believe Congress meant what an ordinary reader of the disclosure requirement would likely comprehend A credit repair organization that engages in deceptive practices may be sued *in court*

Reducing the required disclosure to insignificance, see *ante*, at 4–5, the Court’s construction of the CROA scarcely advances the Act’s goals Congress aimed to ensure prospective customers “are provided with the information necessary to make an informed decision,” and also to “protect the public from unfair or deceptive advertising and business practices’ 15 U S C §1679(b) The Court’s interpretation, however, enables the very deception Congress sought to suppress Today’s decision permits credit repair organizations to deny consumers, through fine print in a contract, an important right whose disclosure is decreed in the U S Code

GINSBURG J dissenting

This unfortunate result is not compelled by our precedents. The Court cites three decisions for the proposition, by now uncontroversial, that the mere existence of a statutory right of action does not preclude agreements to arbitrate disputes. See *ante*, at 5–6 (citing *Gilmer v Interstate/Johnson Lane Corp.*, 500 U S 20, 28 (1991); *Shearson/American Express Inc. v. McMahon*, 482 U S 220, 240 (1987), and *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U S 614, 637 (1985)). As the Court acknowledges, *ante*, at 6, none of the statutes at issue in those cases contained a nonwaiver clause analogous to §1679f. Yet the presence of such a clause would not have affected the outcome the Court maintains, a nonwaiver provision would not have precluded arbitration because the statutes conferred no underlying right to proceed in court.

Precisely the point. The CROA differs from the statutes we have construed in the past in just that respect. The Act does not merely create a claim for relief. It designates that claim as an action entailing a “right to sue”, mandates that consumers be informed prior to entering any contract, of that right, and precludes the waiver of any “right” conferred by the Act. Neither *Gilmer*, *McMahon*, nor *Mitsubishi* construed a statute of a similar order.⁵

III

The Court’s final point is that, elsewhere, Congress has spoken with particular clarity in guaranteeing a judicial

⁵ [I]f one believes [the CROA] establishes a nonwaivable right to initial judicial enforcement, the Court states, one must also believe that it establishes a nonwaivable right to initial judicial enforcement in any competent judicial tribunal. *Ante*, at 7. In Sports Illustrated’s words, it ain’t necessarily so. While there is good reason to believe Congress cared about the *institutional* location of consumers’ suits under the CROA, there is no reason to think Congress sought to disturb the personal jurisdiction and venue rules that determine in which court a civil action may be brought.

GINSBURG J dissenting

forum and proscribing arbitration, but here, it did not do so. The two statutes the Court cites as exemplary post date the CROA's enactment by 14 and 6 years, respectively. (A third merely delegates regulatory authority over certain arbitration agreements.) See *ante*, at 9. Notably, these recent statutes were framed following a string of this Court's decisions compelling arbitration pursuant to contractual stipulations.⁶ Our decisions have increasingly alerted Congress to the utility of drafting antiwaiver prescriptions with meticulous care. But the Congress that drafted the CROA was not similarly stimulated, and we cannot fairly assess that enactment in the light of subsequent legislative responses to developments unknown to the CROA's drafters. Cf. *United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.")

Beyond question, the Federal Arbitration Act, standing alone, favors the enforcement of arbitration agreements. *McMahon*, 482 U.S. at 226. To depart from that rule, however, Congress need not employ "magic words." See Tr. of Oral Arg. 6. In determining whether the Arbitration Act's general rule has been displaced by another statutory prescription, it remains our responsibility to examine carefully "the text of the [statute], its legislative history," and Congress "underlying purposes." *Gilmer*, 500 U.S. at 26 (citing *McMahon*, 482 U.S. at 227). See also *14 Penn. Plaza LLC v. Pyett*, 556 U.S. 247–258 (2009) (arbitration agreements will be enforced unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (quoting *Gilmer*, 500 U.S. at 26, in turn quoting *Mitsubishi*, 473 U.S. at 628)). No "unmistakably clear" statement is

⁶ See Brief for American Association for Justice as *Amicus Curiae* 12 and n. 5 (listing arbitration decisions since the CROA's enactment).

GINSBURG J dissenting

necessary to proscribe the arbitration clause CompuCredit seeks to enforce

* * *

The CROA mandates that potential customers shall be told of their “right to sue a credit repair organization for damages arising from deceptive practices” 15 U S C §1679c(a) But CompuCredit’s adhesion contract provided that consumers would not have the right to go to court App 61 (capitalization omitted) Congress direction must prevail over CompuCredit’s opposing declaration Accordingly, I would affirm the judgment of the Court of Appeals for the Ninth Circuit



Albert A Lacour, III
alacour@clawsonandstaubes.com

December 6 2011

File No 2010 1273 aal

VIA FEDERAL EXPRESS

Honorable Tanya A Gee, Clerk
The South Carolina Court of Appeals
Edgar A Brown Building
1205 Pendleton Street
Columbia, S C 29201

RECEIVED
DEC 07 2011
SC Court of Appeals

Re Cape Romain, Respondent v Wando E, LLC and Sean Barnes, Appellants
Case No 2011-CP-08-985
Appeals Court Case Tracking No 2011197207

Dear Ms Gee

Enclosed herewith for filing pursuant to Rules 208(a) and 209(a) SCACR, please find

- 1 Original unbound Final Brief of the Respondent together with 14 copies for filing with the Court,
- 2 Original Certificate of Compliance of the Final Brief, and
- 3 Original Proof of Service of the Final Brief

We have also enclosed one additional copy of the Brief, Certificate of Compliance and Proof of Service and ask that you please clock those additional copies and return them to me in the envelope provided

Thank you very much for your attention to the above

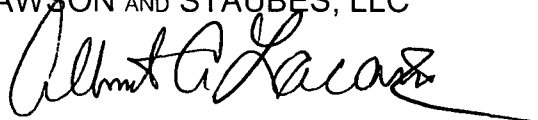
www.clawsonandstaubes.com
126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492
Fax (843) 722 - 2867 / Office (843) 577 - 2026

Honorable Tanya A Gee, Clerk
2010-1273 aal
December 6, 2011
Page 2

With best regards I remain,

Very truly yours,

CLAWSON AND STAUBES, LLC

A handwritten signature in black ink, appearing to read "Albert A. Lacour, III". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Albert A Lacour, III

AALIII/cld
Enclosure

cc (w/enclosures)
Edward J Westbrook, Esquire

RECEIVED
DEC 07 2011
SC Court of Appeals



RICHARDSON PATRICK
WESTBROOK & BRICKMAN LLC

EDWARD J WESTBROOK
843 727 6513 Direct
843 727 6688 Fax
ewestbrook@rpwb.com

November 29, 2011

Hon Tanya A Gee, Clerk
South Carolina Court of Appeals
Edgar A Brown Building
1205 Pendleton Street
Columbia, SC 29201

Re *Cape Romain Contractors Respondent v Wando E LLC and Sean
Barnes a/k/a Sean A Barnes Appellants*, Case No 2011-CP-08-985,
Appeals Court Tracking No 2011197207

Dear Ms Gee

Pursuant to Rule 211(a), enclosed please find sixteen copies (fifteen bound, one unbound) of
Appellants' Final Brief and Final Reply Brief, along with the certification required in compliance
with Rule 211(b) Please return one filed-stamped copy of each in the enclosed self-addressed
stamped envelope

Thank you so much your assistance with this matter

Respectfully,

Edward J. Westbrook

EJW/kaj
Enclosures
cc Albert A LaCour, III (with enclosures)

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NOV 30 2011
SC Court of Appeals

James C Bradley
Michael J Brickman
Elizabeth Middleton Burke
J David Butler
Aaron R Dias
Jerry Hudson Evans
Nina H Fields
Thomas P Gressette Jr
H Blair Hahn
Daniel S Haltiwanger
David Hendricks
Gregory A Lofstead
Christiaan A Marcum
Katie McElveen
Christopher J Moore
Karl E Novak
Kimberly Keevers Palmer
Charles W Patrick Jr
Terry E Richardson Jr
Thomas D Rogers
A Hoyt Rowell III
Brady R Thomas
T Christopher Tuck
James L Ward Jr
Edward J Westbrook
Kenneth J Wilson
Robert S Wood

Of Counsel
Daniel O Myers
Gordon C Rhea (CA DC & USVI ly)
James H Rion Jr
Howard Siegel (DC & MD only)
David L Suggs (MN & NY only)
Robert M Turkewitz

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

**RETURN TO MOTION TO REMAND FOR
PURPOSES OF LIMITED DISCOVERY**

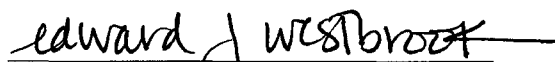
Edward J Westbrook, Esq
Catherine H McElveen, Esq
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Building A
Mount Pleasant, SC 29494
(843) 727-6513
Attorneys for Appellants

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DEC 28 2011
SC Court of Appeals

The motion should be denied Briefing on this appeal is concluded The case is ready for decision There is absolutely no reason the appeal should be remanded to allow discovery The course of discovery will be determined by the decision in the appeal If this Court enforces the contract and orders arbitration, the arbitration panel will make discovery decisions The orderly administration of justice requires that further proceedings below abide this Court's ruling on the appeal

December 27, 2011

Respectfully Submitted,

A handwritten signature in black ink, reading "Edward J. Westbrook", with a horizontal line extending to the right.

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Return To Motion To Remand For Purposes of Limited Discovery has been served upon the following counsel of record via first class mail this 27 day of December, 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
Edward J Westbrook, Esq
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Bldg A
Mount Pleasant, SC 29464
Phone 843 727 6513



RICHARDSON PATRICK
WESTBROOK & BRICKMAN LLC

EDWARD J WESTBROOK
843 727 6513 Direct
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ewestbrook@rpwb.com

December 27, 2011

Hon Tanya A Gee, Clerk
South Carolina Court of Appeals
Edgar A Brown Building
1205 Pendleton Street
Columbia, SC 29201

Re *Cape Romain Contractors Respondent v Wando E LLC and Sean
Barnes a/k/a Sean A Barnes Appellants*, Case No 2011-CP-08-985,
Appeals Court Tracking No 2011197207

Dear Ms Gee

Pursuant to Rule 240(e), enclosed please find an original and seven copies of Appellants' Return
To Motion To Remand For Purposes of Limited Discovery Please return one filed-stamped
copy of the Return to us in the enclosed self-addressed stamped envelope

Thank you so much your assistance with this matter

Respectfully,

Edward J Westbrook

EJW/kaj
Enclosures

cc Albert A LaCour, III (with enclosures)

James C Bradley
Michael J Brickman
Elizabeth Middleton Burke
J David Butler
Aaron R Dias
Jerry Hudson Evans
Nina H Fields
Thomas P Gressette Jr
H Blair Hahn
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Robert M Turkewitz

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DEC 28 2011

SC Court of Appeals

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

**MOTION TO REMAND FOR
PURPOSES OF LIMITED DISCOVERY**

Albert A Lacour, III
CLAWSON AND STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026
Attorney for the Respondent

Denied.

John Cannon Jr

filed 2/20/12
GCarter

RECEIVED
DEC 22 2011
SC Court of Appeals

Now comes the Respondent, Cape Romain Contractors, Inc and respectfully moves that the Court of Appeals remand this case to the Circuit Court for the purpose of allowing limited discovery pending the appeal Respondent respectfully requests that all project documents be exchanged between the parties and that the engineer on the project and the material supplier for the project, who are not parties to the present litigation, be required to produce their files

The grounds for this motion are that the Respondent served interrogatories and requests for production on the Defendants prior to the appeal The Defendants objected to answering interrogatories or responding to formal requests for production due to the pending appeal (Objections dated August 18 2011 attached) Counsel for Respondent then wrote opposing counsel and suggested that the parties voluntarily exchange files, including all documents which are not privileged (letter of October 26, 2011) Counsel for the Respondent also prepared and served a subpoena for the entire file of the engineer engaged by the Defendants to design the project (letter and subpoena of October 26, 2011) The engineer is not a party to the pending suit The proposal to exchange producible documents was rejected and Counsel for Defendants contacted the engineer to object to engineer s compliance with the subpoena (letter of November 2, 2011) Counsel for the engineer objected to the subpoena and based the objection on the pending appeal after apparent consultation with counsel for the Defendants (letter of November 10, 2011)

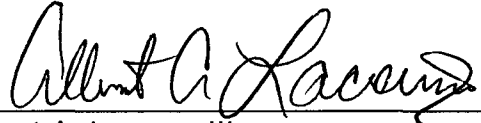
The Respondent, Cape Romain Contractors, Inc is concerned that important records in the files of the Defendants and the files of the Defendants engineer and the files of the material supplier, may become lost or destroyed or damaged during the pendency

of the appeal. This appeal may be pending for two or more years. Counsel is concerned that electronic information and correspondence stored in the computers of Defendants and Defendants' engineer and material supplier may become lost, damaged or destroyed during the pendency of the appeal.

Whether this matter is heard in arbitration or in circuit court, the file records concerning the project will almost certainly be exchanged by the parties and obtained from the engineer and supplier. The production and exchange of the files containing relevant documents is almost always required in the course of an arbitration. The correspondence attached hereto and the subpoena and accompanying correspondence all indicate that the proposed production of the records was to be accomplished at no expense to the party producing the records. The Respondent's objective is simply to preserve the records while the appeal instituted by the Defendants runs its course. S C A C R 205 allows matters unaffected by the appeal to proceed in the trial court. Discovery has been allowed to proceed in the Circuit Court during the pendency of an appeal when the discovery dispute was not the subject of the appeal. Metts v Mims 384 S C 491, 682 S E 2d 813 (2009), Cousar v New London Engineering Co., Inc. 306 S C 37, 410 S E 2d 243 (1991).

For the foregoing reasons, Cape Romain Contractors, Inc. moves the Court of Appeals to remand the case to the Circuit Court in Berkeley County for the purpose of allowing the Circuit Court to retain jurisdiction over limited discovery. The particular discovery sought at this time includes (1) a mutual production and exchange of the file records of the parties, and (2) the ability to obtain the records of the project engineer and the supplier of the dock materials for the purpose of securing the records at this time instead of delaying production of such records until after the appeal.

RESPECTFULLY SUBMITTED,



Albert A. Lacour, III
CLAWSON AND STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
(843) 577-2026
Attorney for the Respondent

Charleston, South Carolina

Dec. 21, 2011

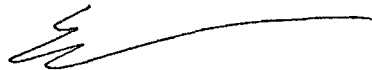
2010-1273

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO 2011 CP 08 985
	)	
CAPE ROMAIN CONTRACTORS INC	)	
	)	DEFENDANTS OBJECTIONS TO
Plaintiff	)	INTERROGATORIES AND
	)	REQUESTS FOR PRODUCTION OF
vs	)	CAPE ROMAIN CONTRACTORS INC
	)	
WANDO E LLC AND SEAN BARNES	)	
A/K/A SEAN BARNES	)	
	)	
Defendants	)	

TO Albert A LaCour III Esq
Attorney for Plaintiff

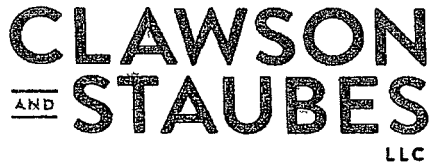
Defendants hereby object to each and every interrogatory and request for production of Cape Romain Contractors Inc on the ground that Defendants have filed a Notice of Appeal and all proceedings in this Court are stayed Defendants reserve all other objections to the interrogatories and requests for production until such time as further responses are required

Respectfully Submitted



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

Charleston, South Carolina
August 18, 2011



Albert A. Lacour, III
alacour@clawsonandstaubes.com

October 26 2011

File No 2010 1273 aal

Edward J. Westbrook Esquire
Richardson Patrick Westbrook & Brickman LLC
P O Box 1007
Mt Pleasant SC 29465

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

Dear Ed

My purpose in calling recently was to find out whether we could cooperate in accomplishing some discovery which would be discovery we would have to provide even if we were in arbitration. It has been my experience that the arbitrators typically require both sides to produce their complete files on a project being arbitrated. While I can understand your reluctance to answer Interrogatories or Requests for Production and can certainly respect your objection to that process pending your appeal, I think it would be to everyone's benefit that we exchange files now while the records are available and before things start to get lost.

Please let me know if you can cooperate in this limited fashion in discovery. Thank you very much for your attention to the above.

With best regards I remain

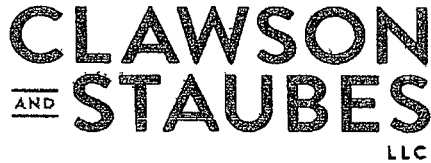
Very truly yours

CLAWSON AND STAUBES LLC


Albert A. Lacour III

AALIII/cld

www.clawsonandstaubes.com
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Fax: (843) 722 2867 / Office (843) 577 2026



Albert A. Lacour, III
alacour@clawsonandstaubes.com

October 26 2011

File No 2010 1273 aal

VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

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

Dear Sir/Madam

Enclosed herewith please find a subpoena for a complete copy of all the records in your possession regarding the project known as the marina constructed on property owned by Wando E LLC and generally referred to as the Wando Marina project #09-001 including but not limited to all documents furnished to you or produced by you in connection therewith

You will note that this is a Subpoena for records only. A personal appearance is not required. Please return the documents along with the enclosed Certificate of Authenticity stating that the copies are true, accurate and complete copy of all of the requested documents as kept in the normal course of business. Also pursuant to the South Carolina Rules of Evidence we must have this Certificate notarized in order for them to be self-authenticated for use at trial. If you prefer, your own form may be utilized to certify the authenticity of the records but please have it notarized. These documents must be received by this office on or before Thursday November 10 2011 as indicated on the Subpoena. We will of course pay for any reasonable expense incurred in complying with our request. If the costs are expected to exceed \$200 please contact us for permission prior to incurring any costs.

By copy of this correspondence I am advising all counsel of my request for these records. This letter will serve to notify all counsel that once the subject documents have been received from your facility they will be available for review and copying at our office upon appointment and that we reserve the right to utilize the subject documents in the trial of this action.

www.clawsonandstaubes.com
126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492
Fax (843) 722 2867 / Office (843) 577 2026

Custodian of Records
2010-1273 aal
October 26 2011
Pg 2

Thank you very much for your attention to the above

With best regards I remain

Very truly yours

CLAWSON AND STAUBES LLC


Albert A. Lacour III

AALIII/cld
Enclosure

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

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

The undersigned hereby certifies that the enclosed documents are a complete true and accurate copy of all records in possession of the undersigned as kept in the normal course of business regarding the project known as the marina constructed on property owned by Wando E LLC and generally referred to as the Wando Marina project #09-001

Signature _____
 Print Name _____
 Position _____
 Today's Date _____
 Company _____
 Address _____

SWORN AND SUBSCRIBED BEFORE
 ME THIS _____ DAY OF _____ 2011

 NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires _____

STATE OF SOUTH CAROLINA

ISSUED BY THE COURT OF COMMON PLEAS IN THE COUNTY OF BERKELEY

CAPE ROMAIN CONTRACTORS Plaintiff(s)

v

SUBPOENA DUCES TECUM IN A CIVIL CASE

WANDO E LLC AND SEAN BARNES
A/K/A SEAN A BARNES Defendant(s)

Case Number
Pending In BERKELEY County

TO CUSTODIAN OF RECORDS
Jon Guerry Taylor & Associates Inc
761 Coleman Blvd Suite C
Mt Pleasant SC 29464

[] YOU ARE COMMANDED to appear in the above named court at the place date and time specified below to testify in the above case

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

[] YOU ARE COMMANDED to appear at the place date and time specified below to testify at the taking of a deposition in the above case

PLACE OF DEPOSITION	DATE AND TIME
---------------------	---------------

[X] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession custody or control at the place date and time specified below (list documents or objects) **SEE ATTACHMENT A**

PLACE CLAWSON AND STAUBES LLC 126 SEVEN FARMS DRIVE SUITE 200 CHARLESTON SC 29492	DATE AND TIME THURSDAY NOVEMBER 10 2011 at 2 00 p m
--	--

[] YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below

PREMISES	DATE AND TIME
----------	---------------

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6) SOUTH CAROLINA RULES OF CIVIL PROCEDURE TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS DIRECTORS OR MANAGING AGENTS OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF AND SHALL SET FORTH FOR EACH PERSON DESIGNATED THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S NAME ADDRESS AND PHONE NUMBER
ALBERT A LACOUR III CLAWSON AND STAUBES 126 SEVEN FARMS DRIVE SUITE 200
CHARLESTON SC 29492 8144 (843) 577 2026

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES

 ATTORNEY FOR PLAINTIFF DATE Oct 26, 2011
ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

See Rule 45 South Carolina Rules of Civil Procedure Parts (c) & (d) on Page two

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS [] YES [] NO AMOUNT \$ _____
	PLACE	
SERVED ON (PRINT NAME)		MANNER OF SERVICE
SERVED BY (PRINT NAME)		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct

Executed on _____
DATE

SIGNATURE OF SERVER

 126 Seven Farms Drive, Suite 200, Charleston, SC 29482
 ADDRESS OF SERVER

Rule 45 South Carolina Rules of Civil Procedure Parts (c) and (d)

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include but is not limited to lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect any copy the materials or inspection the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued or regarding a subpoena commanding appearance at a deposition or production or inspection directed to a non party, the court in the county where the non party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance or
- (ii) requires a person who is not a party or an officer, director or managing agent of a party to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from the county where the subpoena was served to the place within the state where the trial is held, or
- (iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer, director or managing agent of a party to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT A'

The project known as the marina constructed on property owed by Wando E LLC
and generally referred to as the Wando Marina project #09-001

i

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only - No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

0 2510-1A73 45 E

7009 2250 0002 3891 5616

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark
 10-26-11

Sent to *Records Custodian*
Jon Guerry Taylor & Assoc.
 Street Apt. or PO Box No. *761 Coleman Blvd Suite C*
 City State ZIP *Mt Pleasant SC 29464*

PS Form 3811, August 2004

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
☒ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ☒ Print your name and address on the reverse so that we can return the card to you. ☒ Attach this card to the back of the mailpiece or on the front if space permits.	A. Signature <i>[Signature]</i> ☒ Agent ☐ Addressee B. Received by (Printed Name) <i>CRAG Alan Paulink</i> C. Date of Delivery <i>10/31/11</i> D. Is delivery address different from item 1? ☐ Yes ☐ No If YES, enter delivery address below:
1. Article Addressed to Records Custodian Jon Guerry Taylor & Associates Inc 761 Coleman Blvd Suite C Mt Pleasant SC 29464	3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☒ Return Receipt for Merchandise ☐ Insured Mail ☐ COD
2. Article Number (Transfer from service label) 7009 2250 0002 3891 5616	4. Restricted Delivery? (Extra Fee) ☐ Yes

PS Form 3811 February 2004

Domestic Return Receipt

102595-02 M 1540

2010-1273



EDWARD J WESTBROOK
843 727 6513 Direct
843 727 6688 Fax
ewestbrook@rpwb.com

November 2 2011

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

Re *Cape Romain Contractors Inc v Wando E LLC and Sean Barnes*

Dear Andy

I received a copy of your October 26 2011 letter with subpoena to Jon Guerry Taylor I was surprised that your letter contained a subpoena issued in the civil litigation the validity of which is now on appeal as we believe the parties clearly agreed to arbitrate not litigate any disputes I was also surprised that you did not inform Jon Guerry Taylor of the status of the matter with the arbitration issue now on appeal I have done so to give Jon Guerry Taylor a more complete picture of the current status

We do not believe that anyone and certainly not a third party should have to spend time and money on discovery until we have the threshold issue settled

Sincerely

Edward J Westbrook
EJW/kaj

cc Records Custodian Jon Guerry Taylor & Associates Inc

J mes C B dly
M ch I J B l km
Ell b th M d d l t Bu ke
J D d B tl
A ron R D l
Jerry H dso E a s
N na H Field
Thomas P G s ette J
H Bl r H h
D n iel S Halt wa g r
M tth w D H m k
D vid Hend cks
G g ry A Lofst ad
Ch isti A M m
K ti M El
Ch i t ph J M
K I E No k
Kimbe ly K P lmer
Ch i W P t k J
T y E R h d J
Th mas D R g
A Hoyt R well III
B dy R Th m s
T Chr stopher Tuck
Jam s L Ward Jr
Edward J Westbrook
Ke eth J W l s n
Rob rt S Wood
O f C i
Da i l i O My
G d C Rh (CA DC & USVI ly)
Jam H Ri J
H wa d S g i (DC & MD ly)
D id L Sugg (MW & NY ly)
Robert M T k witz

SMITH, COX & ASSOCIATES, LLP

ATTORNEYS AND COUNSELORS AT LAW

GEOFFREY M. SMITH
W. JAMISON COX*
WILLIAM M. McLEAN**
*ALSO ADMITTED IN CA AND GA
ALSO ADMITTED IN NC

160 East Bay Street, Ste 201
Charleston SC 29401

Phone (843) 853 5577
Fax (843) 853 5757

November 10, 2011

VIA EMAIL AND FIRST CLASS MAIL

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

Re Cape Romain Contractors, Inc. v Wando E, LLC and Sean Barnes
a/k/a/ Sean A. Barnes Case No 2011 CP 08 985
Our File No 9593

Dear Andy

Thank you for talking to me the other day. As discussed, we represent Jon Guerry Taylor & Associates, Inc. We are in receipt of a copy of your letter of October 26, 2011, and attached document subpoena. Please be advised that my client objects to the subpoena. Jon Guerry Taylor is not a party to this lawsuit. It was the engineering firm on the marina project that is the subject of the lawsuit. Under the contract signed by Cape Romain Contractors, Inc., disputes arising out of the contract were to be arbitrated.

We understand that you nevertheless filed a civil action, but that action is now on appeal to determine whether the parties' choice of arbitration will be enforced. If the appeal determines that the arbitration selection should be enforced, then a civil action subpoena under Rule 45 is invalid. Since the validity of the subpoena is dependent upon the outcome of the appeal, it is a proceeding directly affected by that appeal and accordingly stayed by the appeal. S.C.R. App p. 205. There is no harm in waiting for the outcome of the appeal prior to any discovery.

Because the parties signed a contract agreeing that any disputes would be resolved by arbitration and the validity of that agreement controlling the forum and scope of discovery is on appeal, we object to your subpoena. Please call with any questions.

Sincerely,

SMITH COX & ASSOCIATES LLP

Geoffrey M. Smith

GMS/tds



Albert A. Lacour, III
alacour@clawsonandstaubes.com

November 15 2011

File No 2010 1273 aal

Geoffrey M. Smith Esquire
Smith Cox & Associates LLP
160 East Bay Street Suite 201
Charleston SC 29401

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

Dear Mr. Smith

Thank you for your letter of November 10 2011. This will acknowledge that Jon Guerry Taylor & Associates Inc. has indicated an objection to our subpoena for records. I intend to confer with my client as to whether we should move forward with a motion to compel under Appellate Rule 205 and Rule 45 on the grounds that the production of your client's file is unrelated to the matters on appeal. In this regard, I would ask that you reconsider your position given that your client is not a party to the agreement containing the arbitration clause and can claim no rights thereunder.

Your letter indicates that you believe there could be no harm in delaying discovery until the appeal is concluded. The harm we seek to avoid by obtaining the file now is the disappearance or loss of records in the interim. If your client chooses not to cooperate in discovery at this time, then this letter serves as notice to you and your client that they should make every effort to preserve all documents in their possession at this time and in particular to preserve all documents retained in electronic format, including but not limited to e-mails which may be within their system at this time.

This letter is intended simply to acknowledge your objection and we reserve all rights to proceed before the circuit court on a motion to compel.

Thank you very much for your attention to the above.

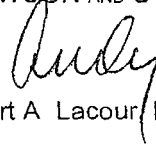
www.clawsonandstaubes.com
126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492
Fax (843) 722 2867 / Office (843) 577 2026

Geoffrey M. Smith Esquire
2010 1273 aal
November 15 2011
Page 2

With best regards I remain

Very truly yours

CLAWSON AND STAUBES LLC

A handwritten signature in black ink, appearing to read "Andy", written over the printed name.

Albert A. Lacour III

AALIII/cid

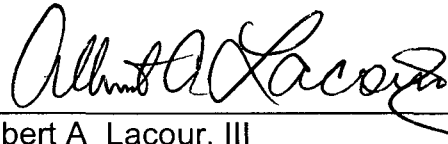
cc Cape Romain Contractors Inc

PROOF OF SERVICE

I, Albert A Lacour, III, Counsel for the Respondent, hereby certify that I have served the within Motion to Remand For Purposes of Limited Discovery by depositing a copy of the same in the United States Mail, postage prepaid, addressed to the following

Edward J Westbrook, Esquire
Richardson Patrick Westbrook & Brickman, LLC
1037 Chuck Dawley Blvd , Bldg -A (29464)
P O Box 1007
Mt Pleasant, SC 29465
843-727-6513

CLAWSON AND STAUBES, LLC



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

Attorney for Respondent

Charleston, South Carolina

Dec. 21, 20 11

**CLAWSON
AND
STAUBES**
LLC

Albert A. Lacour, III
alacour@clawsonandstaubes.com

December 21, 2011

File No 2010 1273 aal

Honorable Tanya A. Gee, Clerk
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Cape Romain Respondent v Wando E, LLC and Sean Barnes, Appellants
Case No 2011-CP-08-985
Appeals Court Case Tracking No 2011197207

Dear Ms. Gee

Enclosed herewith for filing please find

- 1 Original and six copies of the Motion to Remand for Purposes of Limited Discovery and Proof of Service, and
- 2 Our firm's check in the amount of \$25.00 for the required motion fee

We have also enclosed an additional copy of the motion and proof of service and request that you please file the original documents and clock and return one copy of the motion and proof of service in the envelope provided as proof of filing. By copy of this letter and enclosures all of the above have been served upon opposing counsel.

Thank you very much for your attention to the above.

RECEIVED

DEC 22 2011

SC Court of Appeals

www.clawsonandstaubes.com
126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492
Fax (843) 722-2867 / Office (843) 577-2026

Honorable Tanya A Gee, Clerk
2010-1273 aal
December 21 2011
Page 2

With best regards I remain,

Very truly yours,

CLAWSON AND STAUBES, LLC

A handwritten signature in black ink, appearing to read "Albert A. Lacour, III". The signature is fluid and cursive, with a long horizontal stroke at the end.

Albert A Lacour, III

AALIII/cld
Enclosure

cc **(w/enclosures)**
Edward J Westbrook, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29 01
TELEPHONE (803) 734 1890
FAX (803) 7 4 1839
www.sccourts.org

December 1, 2011

E J Westbrook, Esquire
Richardson Patrick Westbrook & Brickman, LLC
P O Box 1007
Mt Pleasant, SC 29465

Re Cape Romain v Wando E, LLC
2011197207

Dear Mr Westbrook

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1205 Pendleton Street, Columbia, S C 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/ma
cc Albert A Lacour, III, Esquire

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Reply Brief of Appellants has been served upon the following counsel of record via first class mail delivery this 21st 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

RECEIVED
NOV 23 2011
SC Court of Appeals



RICHARDSON PATRICK
WESTBROOK & BRICKMAN LLC

EDWARD J WESTBROOK
843 727 6513 Direct
843 727 6688 Fax
ewestbrook@rpwb.com

November 21, 2011

Hon Tanya A Gee, Clerk
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re *Cape Romain Contractors Respondent v Wando E, LLC and Sean
Barnes a/k/a Sean A Barnes Appellants*, Case No 2011-CP-08-985,
Appeals Court Tracking No 2011197207

Dear Ms Gee

Enclosed find two copies of Appellants' Initial Reply Brief in the above-captioned matter
Please return one filed-stamped copy in the enclosed self-address stamped envelope

Thank you so much your assistance with this matter

Respectfully,

Edward J. Westbrook

EJW/kaj
Enclosures
cc Albert A LaCour, III (with enclosures)

James C Bradley
Michael J Brickman
Elizabeth Middleton Burke
J David Butler
Aaron R Dias
Jerry Hudson Evans
Nina H Fields
Thomas P Gressette Jr
H Blair Hahn
Daniel S Haltiwanger
David Hendricks
Gregory A Lofstead
Christiaan A Marcum
Katie McElveen
Christopher J Moore
Karl E Novak
Kimberly Keevers Palmer
Charles W Patrick Jr
Terry E Richardson Jr
Thomas D Rogers
A Hoyt Rowell III
Brady R Thomas
T Christopher Tuck
James L Ward Jr
Edward J Westbrook
Kenneth J Wilson
Robert S Wood

Of Counsel
Daniel O Myers
Gordon C Rhea (CA DC & USVI only)
James H Rion Jr
Howard Siegel (DC & MD only)
David L Suggs (MN & NY only)
Robert M Turkewitz

RECEIVED

NOV 23 2011

SC Court of Appeals

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

INITIAL REPLY 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 23 2011
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORTIES	11
I Introduction	1
II Cape Romain Has Ignored State and Federal Precedent Unanimously Holding That The Denial of a Motion to Compel Arbitration is Immediately Appealable	3
III Cape Romain Has Failed to Address The Fundamental Fact That It Is Bound By Its Agreement to Arbitrate Under the FAA	8
IV Cape Romain Continues to Rely on Overruled Precedent	10
V Cape Romain’s Brief is Replete With Other Errors That Infect Its Arguments	13
1 Incorrect Standard of Review	13
2 Incorrect Federal Permit Authority Characterization	13
3 Incorrect Focus on a Stamp	15
4 Incorrect Description of Its Contractual Duties	16
5 Incorrect Filing Date	17
VI Cape Romain Has Failed to Rebut the Clear Authority Confirming That Wando E Can Participate in the Arbitration	18
VII Cape Romain Has Failed to Rebut the Arguments that the Quantum Meruit Claim Should Be Arbitrated and/or Dismissed	20
CONCLUSION	22
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Alascom Inc v ITT North Electric Co</i> , 727 F 2d 1419 (9th Cir 1984)	6
<i>Blanton v Stathos</i> , 351 S C 534, 570 S E 2d 565 (Ct App 2002)	11, 12, 14
<i>Choice Hotels International v BSR Tropicana Resort</i> , 252 F 3d 707 (4th Cir 2000)	22
<i>Curtis v South Carolina</i> , 345 S C 557, 549 S E 2d 591 (2001)	7
<i>Davis v K B Home of South Carolina Inc</i> , 394 S C 116, 713 S E 2d 799 (Ct App 2011)	5, 9
<i>Grant v Magnolia Manor-Greenwood Inc</i> , 383 S C 125, 678 S E 2d 435 (2009)	5, 9, 10
<i>Heffner v Destiny Inc</i> , 321 S C 536, 471 S E 2d 135 (1995)	4
<i>Hutson v South Carolina State Ports Authority</i> , 390 S C 108, 700 S E 2d 464 (Ct App 2010)	20
<i>Kansas Gas & Electric Co v Westinghouse Electric Corp</i> , 861 F 2d 420 (4th Cir 1988)	6
<i>Lamar v Croft</i> , 735 S C 407, 535 S E 540 (1906)	7
<i>Leslie Salt Co v Froehlke</i> , 578 F 2d 742 (9th Cir 1978)	14
<i>Liberty Builders Inc v Horton</i> , 336 S C 658, 521 S E 2d 749 (Ct App 1999)	5
<i>Mathews v Fluor Corp</i> , 312 S C 404, 440 S E 2d 880 (1994)	10, 11, 14
<i>Munoz v Green Tree Financial Corp</i> , 343 S C 531, 542 S E 2d 360 (2001)	6, 9, 11, 15
<i>New Hope Missionary Baptist Church v Paragon Builders</i> , 379 S C 620, 667 S E 2d 1 (Ct App 2008)	12

<i>Nordin v Nutri-System Inc</i> , 897 F 2d 339 (8th Cir 1990)	6
<i>Osteen v T E Cuttino Construction Co</i> , 315 S C 422, 434 S E 2d 281 (1993)	5, 12
<i>Stedor Enterprises Ltd v Armtex Inc</i> , 947 F 2d 727 (4th Cir 1991)	4
<i>Soil Remediation Co v Nu-Way Environmental Inc</i> , 323 S C 454, 476 S E 2d 149 (1996)	5
<i>Timms v Greene</i> , 310 S C 469, 427 S E 2d 642 (1993)	10, 11
<i>Towles v United Healthcare Corp</i> , 338 S C 29, 524 S E 2d 839 (Ct App 1999)	3, 4, 16, 20
<i>United States v Angell</i> , 292 F 3d 333 (2d Cir 2002)	14
<i>Zabinski v Bright Acres Associates</i> , 346 S C 580, 553 S E 2d 110 (2001)	6
<u>Statutes</u>	
S C Code Ann § 15-48-200 (Supp 1998)	4
9 U S C A § 16 (1999)	4
33 U S C A § 403	14
<u>Other Sources</u>	
15 C Wright, A Miller & E Cooper, Federal Practice and Procedure § 3914 34 (Supp 1990)	4

I Introduction

When Cape Romain wanted this marina job, it freely signed a standard AIA construction contract choosing arbitration under the FAA for disputes, and rejecting litigation. But when trouble arose, Cape Romain reneged on its promise and launched the parties on a year long litigation detour.

Commercial construction cannot function this way. Thousands of contractors work every day under AIA contracts with arbitration clauses. Construction breeds disputes. Almost every project engenders some disagreement. If every dispute can foster a lawsuit despite an arbitration clause, construction costs will skyrocket and projects will grind to a halt. Projects often run on a tight schedule. If parties believe they can threaten litigation as leverage, commerce and respect for contracts will suffer.

There is nothing unique about this AIA contract. But its assurance of swift resolution of any dispute failed because Cape Romain dishonored its promise. Promises made in construction contracts must be promises kept. Certainty in South Carolina construction law requires that this Court reaffirm that message and reverse the Order below.

In Barnes and Wando E's opening brief ("Op Br"), we showed that

- the facts concerning arbitration were undisputed, (Op Br 7-13)
- the contract provisions requiring arbitration were clear, (Op Br 18-19) and
- the precedents compelling arbitration were overwhelming (Op Br 32-35)

Cape Romain's brief ("C R Br") concedes the facts, ignores the contract's arbitration provisions, and fails to rebut the precedent.

With little to argue on the merits, Cape Romain sets a number of “rabbits” loose in its brief. It seeks to avoid defending its untenable arbitration position by raising the red herring issue that the ruling below is unappealable (C R Br 6-7). It tries to salvage its reliance on an overruled case by claiming the case was only partially overruled (albeit on the precise point for which Cape Romain had cited it) (C R Br 13-14). It misstates the standard of review (C R Br 5). And it ignores its own pleadings in trying to keep Wando E out of the arbitration (C R Br 18). As we show below, Cape Romain’s arguments hold no water.

The lower court’s order is not based on findings about disputed facts, the facts were not in dispute. The court committed legal errors by, *inter alia*, ignoring the undisputed language of the contract and misapplying the affecting commerce test, errors this Court can review and correct de novo (Op Br 16).

II Cape Romain Has Ignored State and Federal Precedent Unanimously Holding That The Denial of A Motion to Compel Arbitration is Immediately Appealable

As set forth in our opening brief, both state and federal policy strongly favor arbitration as a simple, expedient alternative to protracted litigation (Op Br 16-17) This policy would be thwarted if a party's right to arbitration could be delayed until after it had endured the very litigation that arbitration was designed to avoid An erroneous denial of an arbitration motion threatens the policy of prompt arbitration For this reason, state and federal precedent unanimously holds that denial of a motion to compel arbitration is immediately appealable

Cape Romain completely ignores controlling precedent in arguing that this Court has no jurisdiction to hear an appeal from the circuit court's order denying a motion to compel arbitration (C R Br 6-7) Cape Romain's brief does not cite or discuss any of the numerous cases addressing this issue¹ Most surprisingly, Cape Romain ignores this Court's express rejection of its position in *Towles v United Healthcare Corp*, 338 S C 29, 524 S E 2d 839 (Ct App 1999)

In *Towles*, an employee and employer entered into a contract with an arbitration clause When a dispute arose, the employee (like Cape Romain) ignored the arbitration provision and sued the employer The employer (like Barnes and Wando E) filed a motion to dismiss and compel arbitration The circuit court (like the court below) denied the motion The employer appealed, "contending the circuit court erred in denying [its] motion to compel arbitration under the Federal Arbitration Act (FAA) "

¹ Cape Romain's appealability argument focuses entirely on the motion to dismiss and not on the motion to compel arbitration which was the principal motion argued (C R Br 6 7) It was clear to the lower court at argument that there were two motions ' What's next here? A motion to compel arbitration and a motion to dismiss (R p 152 lines 2 3) The bulk of the argument and briefing below related to the motion to compel arbitration By the time of Barnes and Wando E's reply brief the controversy had focused on the viability of arbitration under the FAA (R p 87 94) Yet Cape Romain never addresses the cases dealing with appealability of a denial of a motion to compel arbitration under the FAA

Id. at 34, 524 S E 2d at 842 This Court issued a definitive ruling recognizing the right to an immediate appeal Because the ruling is dispositive on both the law and the policy, we quote it at length

We must initially determine whether United may appeal from the circuit court's order United contends that circuit court's order is appealable under both federal and state law We agree

Both federal and state policy favor arbitrating disputes *Heffner v Destiny, Inc*, 321 S C 536, 537, 471 S E 2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes") This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration

The FAA states "An appeal may be taken from an order denying an application under section 206 of this title to compel arbitration" 9 U S C A § 16(a)(1)(C) (1999) Enacting this provision revealed Congress's "deliberate determination that appeal rules should reflect a strong policy favoring arbitration" *Stedor Enter, Ltd v Armtex, Inc*, 947 F 2d 727, 730 (4th Cir 1991) (quoting 15 C Wright, A Miller & E Cooper, Federal Practice and Procedure § 3914 34, at 412 (Supp 1990))

South Carolina's statutory law provides a similar framework South Carolina's Uniform Arbitration Act states "an appeal may be taken from an order denying an application to compel arbitration made under § 15-48-20" S C Code Ann § 15-48-200(a)(1) (Supp 1998) Therefore, "an order that favors litigation over arbitration -- whether it refuses to stay the litigation in deference to arbitration, refuses to compel arbitration or grants, continues, or modifies an injunction against arbitration -- is immediately appealable, even if interlocutory" *Stedor*, 947 F 2d at 730 (emphasis added)

The circuit court's order favored litigation over arbitration by refusing to compel arbitration until the parties conducted additional discovery Therefore, United may appeal the circuit court's order denying its motion to compel arbitration *See* 9 U S C A § 16 (a)(1)(C) (1999), S C Code Ann § 15-48-200(a)(1) (Supp 1998), *Stedor*, 947 F 2d at 730

Id. at 34-35, 524 S E 2d at 842-43

Having found that state and federal policy and precedent favor immediate appeal, the *Towles* court reversed the circuit court for the same error (misconstruing the interstate commerce requirement) that the circuit court committed below *Id.* at 36, 524

S E 2d at 843 (“Because interstate commerce is involved, the FAA applies and displaces South Carolina’s Uniform Arbitration Act ”)

Cape Romain’s ostrich-like attitude of avoiding discussion of the relevant caselaw does not change the fact that this Court consistently entertains immediate appeals from orders denying FAA arbitration *See, e g , Liberty Builders Inc v Horton*, 336 S C 658, 660 n 2, 521 S E 2d 749, 751 n 2 (Ct App 1999) (“An order refusing to stay an action pending arbitration or compel arbitration is immediately appealable ”), *Davis v K B Home of S C Inc* , 394 S C 116, 713 S E 2d 799 (Ct App 2011) (entertaining immediate appeal of arbitration denial in contract under the FAA)²

Likewise, our Supreme Court regularly hears immediate appeals from orders denying motions to dismiss and compel arbitration in FAA cases In *Osteen v T E Cuttino Construction Co* , 315 S C 422, 434 S E 2d 281 (1993), the parties entered into a residential construction contract with an arbitration clause When disputes arose, the homeowners filed suit and the contractor moved to dismiss and require arbitration The circuit court denied the motion and the contractor appealed The Court found that the South Carolina Arbitration Act did not apply because the agreement failed to have the statutory language required, but nevertheless reversed the circuit court because the FAA governed *Id* at 428, 434 S E 2d at 284-85

In *Soil Remediation Co v Nu-Way Environmental, Inc* , 323 S C 454, 476 S E 2d 149 (1996), a party to a contractual dispute moved the circuit court to compel arbitration The circuit court denied the motion and the aggrieved party appealed The Supreme Court affirmed reversal of the circuit court, finding that the FAA controlled the dispute and the arbitration agreement was enforceable *See also Grant v Magnolia*

² Importantly this Court ruled in *Davis* that a party must move promptly to compel arbitration and if it delays its motion for an extended period of time while engaging in any litigation activity, it can waive its right to enforce an arbitration clause

Manor-Greenwood, 383 S C 125, 678 S E 2d 435 (2009) (entertaining an immediate appeal of a denial of a motion to compel arbitration in a contractual dispute involving the FAA), *Zabinski v Bright Acres Assocs* , 346 S C 580, 553 S E 2d 110 (2001) (entertaining an immediate appeal from an order denying a motion to compel arbitration and finding the FAA applied), *Munoz v Green Tree Fin Corp* , 343 S C 531, 542 S E 2d 360 (S C 2001) (entertaining an immediate appeal from a denial of a motion to compel arbitration under the FAA, reversing the circuit court)

The federal courts agree with our appellate courts on the need for immediate appeals of arbitration denials. As noted by the Fourth Circuit Court of Appeals in reversing such a denial: “If a party ‘must undergo the expense and delay of trial before being able to appeal, the advantages of arbitration – speed and economy – are lost forever.’” *Kansas Gas & Elec Co v Westinghouse Elec Corp* , 861 F 2d 420, 422 (4th Cir 1988) (quoting *Alascom, Inc v ITT North Elec Co* , 727 F 2d 1419, 1422 (9th Cir 1984))

The denial of a motion to compel arbitration not only thwarts federal and state policy favoring swift arbitration of disputes, it also acts as a de facto injunction against a party who seeks to proceed in the alternative forum of arbitration. As such, denials of motions to compel arbitration are immediately appealable on this additional ground. As the *Kansas Gas & Electric Co* court noted

[O]rders denying arbitration do have an injunctive affect and have “serious, perhaps irreparable, consequence.” The order is injunctive because it enjoins proceedings in another tribunal. It has serious consequences because of the “irreparable harm that exists when arbitration is denied *ab initio*.”

Id. at 422

The federal court in *Nordin v Nutri-System Inc* , 897 F 2d 339, 342 (8th Cir 1990) agreed that because an order denying arbitration has an injunctive effect and

serious, perhaps irreparable consequences, “a denial of a motion to compel arbitration can only be effectively challenged on immediate appeal because the advantages of arbitration will be forever lost if the appeal is delayed ” Similarly, South Carolina courts have long held that orders having an injunctive effect are immediately appealable See *Curtis v South Carolina*, 345 S C 557, 568, 549 S E 2d 591, 596 (2001), *Lamar v Croft*, 735 S C 407, 410-11, 535 S E 540, 541 (1906) The order below is appealable on this additional ground as well

An essential attribute of arbitration under federal or state law is the right to speedy arbitration The necessary concomitant of that attribute is the right to have an erroneous order denying arbitration immediately appealable Cape Romain has cited no case where a South Carolina court has refused immediate appeal of an order denying a motion to compel arbitration involving the FAA The numerous cases cited above confirm South Carolina’s agreement with the federal courts that immediate appeal of an order denying arbitration is integral to the FAA

III Cape Romain Has Failed to Address The Fundamental Fact That It Is Bound By Its Agreement to Arbitrate Under the FAA

During the proceedings on the motion below, Barnes and Wando E pointed out that the contracting parties had signed a standard AIA form of agreement (a) selecting arbitration as their dispute resolution mechanism (R p 28-29, Mot to Dismiss and to Compel Arbitration at 1-2), (Op Br 9), and (b) choosing the FAA as the applicable law (R p 84 n 2, Defs ' Reply in Support of Mot to Dismiss and to Compel Arbitration at 2 n 2), (Op Br 18) Wando E and Barnes asked the circuit court to enforce the clear language of the contract and order the parties to arbitration "as required by the contract" (R p 29, Mot to Dismiss and to Compel Arbitration at 2) Rather than litigating, Barnes and Wando E urged the court that, "the parties should be relegated to their freely-chosen, exclusive method of dispute resolution" (R p 30, Mot to Dismiss and to Compel Arbitration at 3)

In the court below, Cape Romain invoked the mantra that the contractual language was critical in determining whether the FAA applied (Op Br 11) Yet Cape Romain has ignored this principle by not addressing the fundamental point in our opening brief that the plain language of the agreement Cape Romain signed provided (1) that all disputes would be subject to arbitration, (2) the Federal Arbitration Act would govern the arbitration, and (3) the arbitration could include any third party involved in a common question of law or fact whose presence was required for complete relief (Op Br 17-21)

Cape Romain's failure to address why the plain language of the contract does not bind it to its agreements concerning arbitration, the applicable law, and the joinder of third parties in the arbitration dooms its position on appeal As pointed out in our opening brief, when parties specifically agree that the FAA shall apply to an arbitration,

that agreement is binding. See *Grant v Magnolia Manor-Greenwood Inc*, 383 S C 125, 130, 678 S E 2d 435, 438 (2009) (Op Br 21). Likewise, when the parties specifically agree to include third parties in arbitration (Op Br 19), that choice controls as well. As our Supreme Court said in *Munoz*, “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” 343 S C at 539, 542 S E 2d at 363-64. Barnes and Wando E urged this principle below (R p 29, Mot to Dismiss and to Compel Arbitration at 2).

This Court has recently endorsed the view that, “General contract principles of state law apply to arbitration clauses governed by the FAA,” and “Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Davis v K B Home of S C Inc*, 394 S C 116, 127, 713 S E 2d 799, 805 (Ct App 2011). Because the contract’s plain language disposes of the arbitrability, FAA applicability, and third party involvement issues, this Court should reverse the lower court’s refusal to compel arbitration.

Although it should be unnecessary, therefore, to address the other grounds for reversal, we reply to several of Cape Romain’s most egregious errors to complete the record.

IV Cape Romain Continues to Rely on Overruled Precedent

In the court below, Cape Romain never acknowledged that its primary authority, *Mathews v Fluor Corp*, 312 S C 404, 440 S E 2d 880 (1994), had been overruled on any ground. Rather, it urged the case on the circuit court as standing for the proposition that the express agreement of the parties must require interstate commerce for the FAA to apply.

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

R p 163, line 25–p 164, line 4, (Tr p 14, line 25–p 15, line 4), (Op Br 11)

Now that it is aware that *Mathews* was overruled on this issue, Cape Romain has tried to recast *Mathews*, and its predecessor, *Timms v Greene*, as “still good authority for the proposition that where the essence of the contract is to perform an activity entirely within the state of South Carolina there is no interstate commerce in fact involved in the performance of the agreement, and the Federal Act does not apply.” (C R Br 13)

Cape Romain’s continued reliance on *Timms* and *Mathews* is a very weak reed. *Timms* did hold that a patient’s nursing home contract would not invoke the FAA because commerce was not required by the express terms of the agreement, nor were interstate activities involved. But the subsequent nursing home case of *Grant v Magnolia Manor-Greenwood Inc*, 383 S C 125, 678 S E 2d 435 (2009), reached the opposite conclusion where the parties’ agreement (like here) specified the FAA would apply. *Id.* at 130, 678 S E 2d at 438. Cape Romain does not cite or discuss *Grant*.

Likewise, Cape Romain’s reliance on the *Mathews* holding that a South Carolina real estate transaction would not implicate the FAA despite out of state participants,

financing, and legal opinions is questionable to say the least 312 S C 404, 440 S E 2d 880 (1994) As noted in our opening brief (Op Br 23-24), *Munoz v Green Tree Financial Corp* , 343 S C 531, 542 S E 2d 360 (2001) overruled *Mathews* on the FAA “contemplation of the parties” issue But just as importantly, it also held that even though a real estate improvements financing agreement involved South Carolinians, the existence of an out of state credit agreement and financing rendered the transaction subject to the FAA *Id* at 539, 542 S E 2d at 364 Under current South Carolina law, it is likely that neither *Mathews* nor *Timms* would be decided the same way

Perhaps more damaging to Cape Romain’s position than what it says in continuing to rely on *Mathews* and *Timms*, is what it does not say in failing to find any modern construction contract case holding that an arbitration clause failed the FAA “affecting commerce” test In contrast, Barnes and Wando E cited a plethora of construction cases holding that the FAA applies because of the project’s effects on commerce (Op Br 33–35)

Cape Romain attempts to distinguish these cases by saying that they were cases where “commerce was not an issue in the court below or upon appeal ” (C R Br 17) Cape Romain’s broad assertion is incorrect Many of the cases involved disputes about the extent of commerce involved In *Blanton v Stathos*, 351 S E 534, 570 S E 2d (Ct App 2002), for instance, an architect was hired on a “labor only” contract (like Cape Romain) to provide the design and drawings for construction of a restaurant The architect was terminated before she completed her design and before anyone had purchased anything for the project When the architect sought arbitration, the owner denied there was a sufficient interstate commerce connection to invoke the FAA This Court recognized the dispute about the extent of commerce and rejected the owner’s attempt to avoid the FAA, “However, *Stathos* claims the contract does not evidence

interstate commerce and, therefore, the FAA does not apply. We disagree.” *Id.* at 540, 570 S.E.2d at 568. In rejecting the owner’s position, this Court made an observation equally applicable here 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.

Likewise, in *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008), this Court ruled that a single church construction project involved sufficient interstate commerce based on an affidavit stating that the project would involve out of state materials. *Id.* at 627, 667 S.E.2d at 4. Clearly, the issue of interstate commerce was being contested.

After years of consistent precedent, the fact that virtually every modern construction project will sufficiently affect interstate commerce to invoke the FAA is so well established that many litigants no longer contest the point even on projects smaller than this marina project. *See, e.g., Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 425 n.2, 434 S.E.2d 281, 283 n.2 (1993) (single residence). Far from supporting *Cape Romain*, however, such cases indicate that realistic litigants no longer waste time arguing positions they know are bound to lose.

V **Cape Romain's Brief is Replete With Other Errors That Infect Its Arguments**

In addition to its errors regarding appealability, its failure to address the contract's plain language, and its reliance on overruled/outmoded authority, Cape Romain's brief is riddled with numerous other errors of various degrees of severity. Since many of these errors are refuted in our opening brief, we will discuss only those where an additional comment may be helpful.

1 **Incorrect Standard of Review**

In this appeal from an order denying a motion to compel arbitration, Cape Romain inexplicably provides the standard of review for an appeal following foreclosure of a mechanic's lien. (C R Br 5) Barnes and Wando state the correct standard of review in our opening brief. (Op Br 16)

2 **Incorrect Federal Permit Authority Characterization**

Cape Romain recognizes that the federal permit authorizing its construction of the marina seriously undermines its "no commerce involvement" argument if the permit flowed from commerce clause authority. In an effort to avoid that problem, Cape Romain declares that the permit has "nothing whatsoever to do with commerce," but "rather relates to the power of Congress to equip its Army and its Navy." (C R Br 17) Unsurprisingly, Cape Romain supports its *ipse dixit* with no case authority. Cape Romain's claim is illogical and wrong.

Cape Romain does not attempt to explain how the Army Corps of Engineers would be furthering the equipping of the Army or Navy by regulating construction of a civilian marina in the Wando River. It is clearly understandable, however, why the Army Corps would be exercising its commerce clause authority to ensure that a marina in a major waterway did not obstruct commerce.

In our opening brief, Barnes and Wando E set forth the authority demonstrating that the Army Corps issues marine construction permits under laws enacted pursuant to the commerce clause (Op Br 29) To reiterate, the Army Corps of Engineers issues permits for marine construction under the Rivers and Harbors Appropriation Act, 33 U S C A § 403 That Act prohibits “the creation of any obstruction to the navigable capacity of any of the waters of the United States” without a federal permit *Id* , see *United States v Angell*, 292 F 3d 333, 337 (2nd Cir 2002) (“Congress has given the Army Corps exclusive jurisdiction to enforce the Rivers and Harbors Appropriation Act

“) The Act was passed pursuant to Congress’s authority to regulate commerce among the states *Leslie Salt Co v Froehlke*, 578 F 2d 742, 753 (9th Cir 1978) (“The Rivers and Harbors Acts of 1890 and 1899 were enacted pursuant to the commerce clause ”) Hence, when issuing permits for marine construction, the Army Corps of Engineers is doing so by virtue of the commerce clause to protect “the navigable capacity” of our navigable waters Cape Romain’s “equipping the troops” theory is baseless

Cape Romain also argues that the federal permit under which it was constructing the marina is irrelevant because its contract did not require it to obtain the permit (C R Br 16 – 17) This fallback to the discredited “face of the contract” view of *Mathews* is unavailing Cape Romain does not dispute that it was constructing the marina under the federal permit It is irrelevant who obtained the permit, the critical point is that the permit controlled Wando E’s activities In *Blanton v Stathos*, the contract gave the architect no responsibility to buy any materials Yet this Court found that the project would require the purchase of out of state materials by others, hence interstate commerce was involved in the project *Blanton*, 351 S C at 538, 541, 570 S E 2d at

567, 569 Cape Romain's focus on who got the permit is unavailing The relevant fact is that a federal commerce clause permit controlled the project

3 Incorrect Focus on a Stamp

Cape Romain does not dispute that during the project it hired an engineering firm to survey its work for which it paid \$2,000 to the firm's Chicago office (Op Br 8, 31-32), (C R Br 15) Nor does it dispute that it is seeking this \$2,000 as part of its contract damages claim (Op Br 32 n 17) Yet, in a classic example of myopia, Cape Romain continues to argue that the only relevant factor is the stamp used to mail the payment, not the payment Its brief takes solace in the fact that, "The circuit court found the use of a single forty-three stamp to mail a check to Chicago, Illinois was not a significant impact upon commerce " (C R Br 15) While the order Cape Romain prepared for the circuit court may have ignored the undisputed \$2,000 payment, the payment has not vanished from the record ³

Not only is a \$2,000 interstate payment by itself a sufficient impact on commerce to invoke federal authority (Op Br 32), but under Cape Romain's theory, it could have sent ten million dollars out of state without affecting commerce As long as the money was mailed with a 43¢ stamp, there would be no impact on commerce The absurdity of this argument speaks for itself In *Munoz v Green Tree Financial Corp* , 343 S C 531, 542 S E 2d 360 (2001), our Supreme Court correctly focused on the fact that a \$15,000 home improvement loan was sent interstate as the underpinning for FAA involvement The Court never mentioned the cost of the stamp or wire to send the

³ As we have said in our Opening Brief (Op Br 24 n 9) we do not fault the busy circuit court judge for relying on the completeness of a proposed order rather than conducting an independent review of the record

money The circuit court committed clear error by focusing on the stamp and ignoring the payment ⁴

4 Incorrect Description of Its Contractual Duties

While Cape Romain now admits the incontrovertible fact that the majority of the dock materials came from Ohio, it argues this is irrelevant because “the contract at issue here is a labor only agreement to assemble those materials ” (C R Br 15) Cape Romain is wrong on the facts and the law Cape Romain was hired not simply to assemble the materials, but to transport them from Barnes’ yard to their final destination at the marina site (Op Br 7-8) These dock sections were custom built for this marina and were of no use until they arrived at their final destination on the Wando River As we have pointed out in our opening brief, Cape Romain played a pivotal role in the dock sections’ journey from Ohio to the marina by delivering them to their final destination using its barges (instrumentalities of commerce), on the navigable waters of the United States (channels of interstate commerce), and purchasing marine fuel that had moved in commerce (Op Br 8, 26-27)⁵

Cape Romain argues that purchasing marine fuel is irrelevant because fuel “is consumed on every construction project ” (C R Br 16) Cape Romain ignores the fact that the marine fuel involved here was specifically for the tugs and barges transporting the dock sections over navigable waters and was essential to accomplishing the completion of their journey from Ohio to the marina site Cape Romain’s performance of the project required this marine fuel purchase with its effect on interstate commerce

⁴ Cape Romain also throws in an argument that it never contemplated having to hire an engineer or send an interstate payment when it signed the contract (C R Br 15) Its contemplation is irrelevant What actually happened during the project controls *Towles v United Healthcare Corp* 338 S C 29 36 524 S E 2d 839 843 (Ct App 1999) (The FAA applies even if the parties did not contemplate an interstate commerce connection)

⁵ Cape Romain concedes elsewhere in its brief that it also had to transport the materials (C R Br 3)

5 Incorrect Filing Date

Reading Cape Romain's brief, one could get the impression that although Cape Romain filed suit on March 29, 2011, Barnes and Wando E waited until August 20, 2011 to file our motion to dismiss and compel arbitration (C R Br 4) In fact, there was no such delay Cape Romain incorrectly states the filing date of our motion as August 20, 2011, when it was actually filed on April 20, 2011 (Op Br 4) There should be no issue that Barnes and Wando E acted promptly in filing our motion Cape Romain's error is likely due to inadvertence

VI Cape Romain Has Failed to Rebut the Clear Authority Confirming That Wando E Can Participate in the Arbitration

As pointed out in Section III, Cape Romain expressly agreed in the contract that third parties could participate in the arbitration if they were involved in a common question of law or fact and their presence was needed for complete relief (Op Br 19) Cape Romain's brief makes no response to this compelling fact Its silence is telling and conclusive

Barnes and Wando E have shown that Wando E (a) was willing to participate in the arbitration, (b) was the owner of the project, and identified by Cape Romain as the "client", (c) had paid Cape Romain all the money it received on the contract and, (d) was alleged by Cape Romain to be the party for whom Barnes was acting (Op Br 37–43) Clearly, Wando E had an important interest in the marina construction

Cape Romain cannot deny that it contractually agreed that third parties could participate in the arbitration regardless of whether they were deemed a "principal," "parent," etc (Op Br 43)⁶ The contract allows a third party to participate in the arbitration regardless of title as long as the third party was "substantially involved in a common question of law or fact and whose presence is required if complete relief is to be accorded in arbitration " (Op Br 19) Wando E clearly fits that criteria Indeed, the strongest evidence that Wando E is important to complete resolution of the dispute is that Cape Romain sued Wando E along with Barnes Cape Romain certainly believed a suit without Wando E participating would be incomplete The same is obviously true for arbitration

⁶ Cape Romain also makes no response to the cases in our opening brief holding that Cape Romain should be bound to its pleadings where it alleges Barnes was the agent for Wando E (Op Br 39 40) If a close relationship were required for Wando E to participate in the arbitration Cape Romain has certainly alleged it and it is bound by those allegations

Even though Wando E can participate under the clear terms of the agreement as a third party regardless of its title, Barnes and Wando E must point out that Cape Romain is also wrong that, “the only information in the record [regarding Wando E’s status] is Paragraph 1 in the Affidavit of Barnes in which he states he is a contractor to or for Wando E, LLC ” (C R Br 18) The undisputed record shows that Wando E

- Paid Cape Romain its construction draws, (Op Br 9)
- Was known by Cape Romain to be the entity who authorized Barnes to act, (Op Br 39)
- Was known to Cape Romain (by the term “client” if not actual name) to be the entity for whom the marina was being built, (Op Br 41)
- Was identified by name by Cape Romain before it filed its first lien, (Op Br 42 n 25)
- Was known by Cape Romain to be following Cape Romain’s performance on the project (Op Br 39)

In short, the record shows far more than the bare fact that Barnes was a contractor for Wando E

The language of the contract permitting third parties to participate in the arbitration controls this issue In addition, the authority we cited in our opening brief permitting principals and third party beneficiaries of contracts to participate in arbitration also supports Wando E’s participation to get this matter resolved (Op Br 37-43) No logic would support having an arbitration on this project without participation of the owner who has paid the bills

VII Cape Romain Has Failed to Rebut the Arguments that the Quantum Meruit Claim Should Be Arbitrated and/or Dismissed

In our opening brief, we showed that the quantum meruit claim arises from the same facts as the contractual claim and is subject to arbitration (Op Br 43–44) Cape Romain makes no response to this argument in its brief for the obvious reason that it is correct The quantum meruit claim should be arbitrated

Moreover, because we have already relied on the contract in seeking to enforce its arbitration clause, and Cape Romain has relied on the contract by suing on it, there is no question there is a valid express contract As such, quantum meruit cannot proceed (Op Br 44–46) Indeed our motion to compel arbitration depends on there being a valid contract and we have urged its validity In our motion, we expressly asked the court to compel Cape Romain to arbitrate “as required by the contract,” and to enforce “the dispute resolution procedures they chose in their contract” (R p 29, Mot to Compel Arbitration 2)

Parties are bound by their pleadings (Op Br 45-46) This is just as true in motions to compel arbitration *Towles v United Healthcare Corp*, 338 S C 29, 33, 524 S E 2d 839, 841 (Ct App 1999) (Party’s pleading on a motion to compel arbitration binds the party) In light of Barnes and Wando E’s pleading affirming the validity of the contract, the lower court’s speculation that Barnes or Wando E could disavow the contract in the future is just that – unsupported speculation and contrary to the admitted fact that both sides have already relied upon the contract as valid in these proceedings Speculation cannot suffice as a basis for decision *See Hutson v South Carolina State Ports Authority*, 390 S C 108, 113, 700 S E 2d 464, 465 (Ct App 2010) (workers compensation) (“While a finding of fact of the commission will normally be upheld, such a finding may not be based on surmise, conjecture, or speculation, but must be

founded on evidence of sufficient substance to afford a reasonable basis for it ”)

Because all parties agree there is a valid express contract, quantum meruit cannot survive

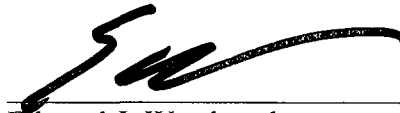
The quantum meruit claim, like the express contract claim, is subject to arbitration. Moreover, it is redundant of the express contract claim and should be dismissed. (Op. Br. 44–46)

CONCLUSION

This case involves a garden variety AIA contract with a standard arbitration clause. There never should have been a dispute over Cape Romain's obligation to arbitrate. By failing to honor its promise to arbitrate all disputes arising out of this marine construction contract, Cape Romain has delayed the resolution of this controversy by almost a year and cost Barnes and Wando E much time and expense in attempting to correct the error below. For the reasons set forth in our opening brief and herein, Barnes and Wando E respectfully request that the Court reverse the Order of the circuit court, require that the arbitration clause be enforced, and stay or dismiss all other proceedings.⁷

November 21, 2011

Respectfully Submitted,



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⁷ In support of judicial economy, the Court may dismiss without prejudice in favor of arbitration 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

RECEIVED
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SC Court of Appeals

Cape Romain Contractors, Inc

Respondent,

v

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

Appellants

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities	II
Statement of Issues on Appeal	1
Counter-Statement of the Case	3
Standard of Review	5
Arguments	
I This Matter is Not Immediately Appealable	6
A Denials of Motions Under Rule 12(b)(1) and 12(b)(6) Are Not Immediately Appealable	6
B Denial of Motions Under 12(b)(6) Converted to Rule 56 Are Not Immediately Appealable	6
II The Circuit Court Does Not Lack Subject Matter Jurisdiction	7
III The Arbitration Clause is Not Enforceable Under the South Carolina Act	8
IV The Arbitration Clause is Not Enforceable Under the Federal Arbitration Act	8
A Episcopal Housing - Contract Requiring Commerce on its Face	9
B Activities of the Parties in Fact Involving Interstate Commerce	11
V The Arbitration Clause Cannot be Enforced by Wando E LLC	18
VI The Motion to Dismiss the Quantum Meruit Claim is Premature	19
Conclusion	19

TABLE OF AUTHORITIES

Cases

<u>Blanton v Stathos</u> , 351 S C 534, 570 S E 2d (Ct App 2002)	17
<u>Breland v Love Chevrolet Olds, Inc</u> , 339 S C 89, 529 S E 2d 11 (2000)	6
<u>Butler Contracting, Inc v Court Street, LLC</u> , 369 S C 121, 631 S E 2d 252 (2006)	5
<u>Circle S v Stanley Smith</u> , 288 S C 428 343 S E 2d 45 (Ct App 1986)	8, 17
<u>Cohen's Drywall Co , Inc v Sea Spray Homes, LLC</u> , 374 S C 195, 648 S E 2d 598 (2007)	5
<u>Dena v Tenet Physician Services of Hilton Head, Inc</u> , 383 S C 115, 678 S E 2d 430 (2009)	7
<u>Episcopal Housing Corporation v Federal Insurance Company</u> , 269 S C 631, 239 S E 2d 647 (1977)	8, 9, 10, 11, 12
<u>Ex parte Reichlyn</u> , 310 S C 495, 427 S E 2d 661 (1993)	7
<u>Holloman v McAllister</u> 289 S C 183, 345 S C 2d 728 (1986)	7
<u>Matthews v Fluor</u> , 312 S C 404, 440 S E 2d 880 (1994)	11, 12, 13, 14, 15, 17
<u>McLendon v S C Dep't of Highways and Pub Transp</u> , 313 S C 525, 443 S E 2d 539 (1994)	6, 7
<u>Metts v Mims</u> , 384 S C 491, 682 S E 2d 813 (2009)	7
<u>Munoz v Green Tree Fin Corp</u> , 343 S C 531, 542 S E 2d 360 (2001)	13, 14
<u>New Hope Missionary Baptist Church v Paradigm Builders</u> , 379 S C 620, 667 S E 2d 1(Ct App 2008)	11 17
<u>Olson v Faculty House of Carolina, Inc</u> , 354 S C 161, 580 S E 2d 440 (2003)	7
<u>Osteen v Cuttino</u> , 315 S C 422, 434 S E 2d 281 (1993)	17
<u>Raino v Goodyear Tire</u> , 390 S C 255, 422 S E 2d 98 (1992)	7
<u>Sabb v S C State Univ</u> , 350 S C 416, 567 S E 2d 231 (2002)	6
<u>Soil Remediation v Nu-way Environmental</u> 323 S C 454, 476 S E 2d 149 (1996)	8

<u>Swanson v Stratos</u> , 350 S C 116, 564 S E 2d 117 (2002)	19
<u>Thornton v South Carolina Electric & Gas Corporation</u> , 391 S C 297, 705 S E 2d 475 (2011)	7
<u>Timms v Greene</u> , 310 S C 469, 427 S E 2d 642 (1993)	8, 11, 12, 14, 15, 17
<u>T J Paramore v The Inter-Regional Financial Group</u> , 68 N C App 659, 316 S E 2d 90 (1984)	9
<u>Townes Associates, Ltd v City of Greenville</u> , 266 S C 81 221 S E 2d 773 (1976)	5
<u>Trident v Lucas & Stubbs, Ltd</u> 286 S C 98, 333 S E 2d 781 (1985)	17
<u>Woodward v Westvaco Corp</u> , 319 S C 240, 460 S E 2d 392 (1995)	6

Statutes

9 U S C §1	8, 9
9 U S C §2	8
9 U S C §3	8
33 U S C	17

STATEMENT OF ISSUES

I

May a Defendant appeal the denial of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) SCRCF, and the denial of a motion to dismiss for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), where the basis of the motions is the alleged existence and enforceability of an agreement for arbitration in the contract?

II

May Defendants appeal the denial of a motion for summary judgment under Rule 56 asserting a right to arbitrate?

III

Did the circuit court err in holding that it does not lose subject matter jurisdiction of a mechanic's lien foreclosure when the agreement of the parties contains an arbitration clause?

IV

Did the circuit court err in holding genuine issues of material fact exist as to whether there exists a sufficient nexus to interstate commerce to invoke the power of the Federal Government to regulate trade between the several states and with foreign nations?

V

Did the circuit court err in holding genuine issues of material fact exist as to whether the relationship between Wando E, LLC and Sean Barnes is such that Wando E, LLC is entitled to enforce the arbitration clause, although not a signatory to the clause?

VI

Did the circuit court err in denying the motion to dismiss the claim for quantum meruit as premature when the pleadings are not yet closed and the issues are not yet joined?

COUNTER-STATEMENT OF THE CASE

Cape Romain Contractors, Inc began negotiations in late 2009 which carried over into January 2010 on a 'labor only" contract to build a marina for Sean Barnes. The parties reached an agreement on the essential terms in January 2010, but the agreement was not reduced to writing until June 2010. The written agreement was for Cape Romain to assemble and install fixed and floating aluminum pier sections (walkways) as well as install all of the piles necessary to secure the fixed and floating walkways. All materials were to be provided by Barnes. Cape Romain was responsible for picking up the materials from the yard of Barnes' Company, Docks Unlimited, Inc., in Charleston County, and transporting them to the yard of Cape Romain in Berkeley County. Cape Romain was also responsible to transport any other materials which had to be transported by barge to the project site, such as the piling. The design of the project was provided by Barnes. Cape Romain excluded from its scope of work any and all engineering and all permitting necessary for the project, all of which remained the responsibility of Barnes. A detailed scope of work was incorporated into the agreement between the parties as Exhibit #1" dated June 30, 2010 (Exhibit #1 to agreement). Work started in September 2010.

During the work, Cape Romain encountered several delays and ongoing problems related to design errors and deficiencies in the materials provided. Cape Romain substantially completed the work in early December 2010 and invoiced Barnes for the work completed and for the extras incurred as a result of the problems encountered. Barnes refused to pay Cape Romain for the extras and alleged that the deficiencies were the responsibility of Cape Romain entitling Barnes to withhold a portion of the funds being requested in payment of the original scope of the work. The heart of the dispute is whether the present condition of the walkways is the result of deficiencies in the materials (responsibility of Barnes) or is the result of deficiencies in the assembly of the materials.

(responsibility of Cape Romain)

Cape Romain's Mechanic's Lien dated January 17, 2011 was filed and served on January 18, 2011. This action was thereafter commenced on March 29, 2011 by the filing of an amended Lis Pendens, Summons and Complaint containing causes of action for breach of contract, foreclosure of mechanic's lien and quantum meruit. The debt alleged to be due to Cape Romain is \$158,413.14 plus interest according to the terms of the agreement. The prayer is for judgment on the breach of contract claim, for foreclosure of the mechanic's lien, and for relief in the alternative in quantum meruit.

The initial response of the Defendants was to file a motion to dismiss and compel arbitration pursuant to SCRCP Rule 12(b)(1) and Rule 12(b)(6) dated August 20, 2011. Attachments to the motion included five pages of excerpts from the agreement between the parties and an order from a local circuit court judge addressing the arbitrability of claims, which was an issue not raised by the motion.

Cape Romain filed a return to the motion on April 28, 2011 asserting that the arbitration agreement was not enforceable under the South Carolina Arbitration Act or the Federal Arbitration Act and setting forth the authority for its position. The affidavit of Anthony T. Dupre, Jr. was attached providing factual background along with a complete copy of the agreement and exhibits between the parties including the scope of work. And, in an effort to "fight fire with fire," an unreported order of the same local circuit judge who had signed an order denying a similar motion to compel arbitration on similar grounds.

On May 10, 2011, the Defendants responded by filing a reply in support of their motion to dismiss and compel arbitration and set forth additional exhibits which included more excerpts of the agreement, an affidavit from Sean Barnes providing factual background, information on the amount of crude oil moving in interstate commerce, a portion of the permit issued by the Army Corps of Engineers, excerpts from invoices and the mechanic's lien and some background information on an engineering firm hired by

Cape Romain to substantiate its claims

Thereafter, Cape Romain timely filed and served a supplemental affidavit of Anthony T Dupre, Jr providing additional factual background dated May 16, 2011

The court heard oral argument on June 21, 2011, took the matter under advisement and issued a Form 4 Order to that effect and requested proposed orders be submitted by the parties by July 1, 2011 Thereafter the court issued its order denying the motions of the Defendants on July 11, 2011 The Defendants timely served a Notice of Appeal on August 8, 2011

STANDARD OF REVIEW

The foreclosure of a mechanic's lien is an action at law Butler Contracting, Inc v Court Street, LLC, 369 S C 121, 631 S E 2d 252 (2006) In an action at law, tried without a jury, an appellate court will not disturb the trial court's findings of fact unless they are wholly unsupported by the evidence or unless it clearly appears the findings are controlled by an error of law Cohen s Drywall Co , Inc v Sea Spray Homes, LLC, 374 S C 195, 648 S E 2d 598 (2007) Townes Associates, Ltd v City of Greenville 266 S C 81 221 S E 2d 773 (1976)

I THIS MATTER IS NOT IMMEDIATELY APPEALABLE

The Order which is under appeal denied a Rule 12(b)(6) motion to dismiss converted to a Rule 56 motion for summary judgment on two specific issues related to the right of the Defendants to arbitrate, and denied a Rule 12(b)(6) motion to dismiss the equitable claim for Quantum Meruit. These Orders are not appealable under S.C. Code Ann. §14-3-330.

A Denials of Motions Under Rule 12(b)(1) and Rule 12(b)(6) Are Not Immediately Appealable

Motions made under SCRPC Rule 12, are generally considered interlocutory and not immediately appealable. See Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000) (noting that court does not allow the immediate appeal of the denial of any Rule 12(b) motion), Woodward v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995) (holding that denial of Rule 12(b)(1) motion does not meet any of the categories listed under §14-3-330 and thus is not immediately appealable), *overruled* on other grounds by Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002), McLendon v. S.C. Dep't of Highways and Pub. Transp., 313 S.C. 525, 443 S.E.2d 539 (1994) (holding that denial of a 12(b)(6) motion to dismiss was not immediately appealable).

B Denial of Motions Under 12(b)(6) Converted to Rule 56 Are Not Immediately Appealable

An interlocutory order not governed by a specialized appealability statute¹ is not immediately appealable unless it fits into one of the categories listed in S.C. Code Ann. §14-3-330 (1976, as amended). Generally, orders granting summary judgment in whole or in part may be immediately appealed under one or more sections of the statute, however, orders denying a motion for summary judgment are not immediately appealable.

¹ S.C. Code Ann. §15-48-200(a)(1) is such a specialized appealability provision, but no motion was made under the South Carolina Uniform Arbitration Act. As discussed later in this brief at part III, Defendants conceded that the South Carolina Uniform Arbitration Act did not apply to this Arbitration agreement.

Thornton v South Carolina Electric & Gas Corporation, 391 S C 297, 705 S E 2d 475 (2011), Olson v Faculty House of Carolina, Inc., 354 S C 161, 580 S E 2d 440 (2003) Our Supreme Court has repeatedly held that denial of a motion for summary judgment is not directly appealable and is not even reviewable in the context of a proper appeal from a final judgment See Olson, supra 580 S E 2d at 443 (citing Raino v Goodyear Tire, 390 S C 255, 422 S E 2d 98 (1992) and Holloman v McAllister, 289 S C 183, 345 S C 2d 728 (1986))

II THE CIRCUIT COURT DOES NOT LACK SUBJECT MATTER JURISDICTION

The Order appealed denied a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. A motion made pursuant to SCRCP Rule 12(b)(1) is a motion which challenges the subject matter jurisdiction of the court. Subject matter jurisdiction is the power of the court to hear and determine cases of the general class to which the proceedings in question belong. Dena v Tenet Physician Services of Hilton Head, Inc., 383 S C 115, 678 S E 2d 430 (2009) Metts v Mims 384 S C 491, 682 S E 2d 813 (2009) The circuit courts have jurisdiction over foreclosure of mechanic's lien cases by virtue of S C Code Ann §29-5-140 (1976 as amended) and accordingly any claims by the Appellants that the court lacks subject matter jurisdiction are meritless. Metts, 682 S E 2d at 817

Our Supreme Court has observed that a question of subject matter jurisdiction cannot be waived. Ex parte Reichlyn, 310 S C 495, 427 S E 2d 661 (1993) A party's right to arbitrate may be waived and therefore it follows that a motion concerning a party's right to arbitrate does not present an issue of subject matter jurisdiction. Compare McLendon v South Carolina Department of Highways and Public Transportation, 313 S C 525, 443 S E 2d 539 (1994)

III THE ARBITRATION CLAUSE IS NOT ENFORCEABLE UNDER THE SOUTH CAROLINA ACT

S C Code Ann §15-48-10 requires that any contract which contains an arbitration clause must have a notice on the first page of the contract or agreement form bringing the presence of the arbitration clause to the attention of the parties thereto. In the absence of the notice, the arbitration clause is not enforceable. 15-48-10(a). The form agreement at issue in this case is a standard AIA form agreement (contract and Exhibit #1). AIA forms do not have the notice required by the South Carolina Uniform Arbitration Act included as part of the standard agreement and the notice was not added in the drafting process. In the absence of the notice language, the agreement is not subject to arbitration under the state act. Circle S v Stanley Smith, 288 S C 428, 343 S E 2d 45 (Ct App 1986), Timms v Greene 310 S C 469, 427 S E 2d 642 (1993), Soil Remediation v Nu-way Environmental, 323 S C 454, 476 S E 2d 149 (1996). Counsel for the Defendants conceded in argument before the circuit court that the notice required by the statute was not present and thus the agreement was not enforceable under the state act (record of hearing at page ____).

IV THE ARBITRATION CLAUSE IS NOT ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT

Under the Federal Arbitration Act there are four elements required for an arbitration clause to be enforceable. First, there must be a written provision for arbitration in the contract as required by 9 U S C §2. Second, the contract must evidence a transaction involving commerce as required by 9 U S C §1 & 2. Third, the court must be satisfied that the issue involved in the suit is an arbitrable issue pursuant to the terms of the arbitration clause (as required by 9 U S C §2). Fourth, the party moving for the stay and referral of the claim to arbitration must not be in default in proceeding with that motion as required by 9 U S C §3. Episcopal Housing Corporation v Federal Insurance Company, 269 S C

631, 239 S E 2d 647 (1977) For the purpose of the present motion, Cape Romain did not challenge the first, third and fourth requirements and based its objection entirely upon the absence of an adequate connection to interstate commerce The Federal Arbitration Act requires that the agreement between the parties must have a sufficient nexus to interstate commerce in order to justify the application of the Federal Act There must be a sufficient involvement of interstate commerce and a substantial enough nexus (i e a substantial enough level of activity in interstate commerce) to justify or trigger federal jurisdiction T J Paramore v The Inter-Regional Financial Group, 68 N C App 659, 316 S E 2d 90 (1984) The relationship to commerce must be substantial enough to trigger the power of the federal government to regulate trade and commerce between the states or trade with foreign nations as set forth in the United States Constitution 9 U S C §1

A Episcopal Housing - Contract Requiring Commerce on its Face

In Episcopal Housing *supra*, the Supreme Court initially looked to the written terms of the agreement to determine whether on its face the agreement evidenced a transaction involving commerce Episcopal Housing, 239 S E 2d at 650 If the face of the agreement reflects a requirement of interstate commerce then the Federal Act will apply Where the express terms of the written agreement between the parties require some activity to occur which directly involves the parties to the agreement in interstate commerce, the commerce requirement will be deemed to have been met In the Episcopal Housing case, the court was able to delineate activities specifically called for in the agreement that would involve the parties engaging in interstate commerce The court pointed out that the subject of the agreement was an 18-story apartment building which, by the express terms of the agreement, required the contractor to purchase materials from 13 out-of-state suppliers, to hire 4 out-of-state subcontractors and to go beyond the borders of the State in order to obtain materials and supplies necessary to complete the work

By comparison, the initial affidavit of Cape Romain (Affidavit of A T DuPre April 27,

2011) indicates that the terms of the agreement here did not require any materials whatsoever to be furnished by Cape Romain, but rather all materials were furnished by the Defendants. The only mention of materials in the agreement is that they were to be furnished by Barnes and picked up by Cape Romain at the place of business of Barnes in Charleston County, transported to the place of business of Cape Romain in Berkeley County, and then transported by barge up the river to the place where the work has to be done in Berkeley County. All of this activity took place in either Charleston or Berkeley counties. The agreement is a "labor only" contract for the services involving the assembly of the walkways and the installation of the piles to support or hold them in place. The materials, being the walkways themselves and the piling, were all to be provided by Defendants. As to subcontractors, there is no mention of any subcontractors being engaged by Cape Romain to perform any portion of the work expressed in the agreement. Also by comparison, the subject of the agreement is not an 18-story apartment building but rather a \$165,000.00 floating dock.

The initial affidavit submitted by Cape Romain with its Return, (Affidavit of A T DuPre April 27, 2011) and the supplemental affidavit submitted in response in the second filing by the Defendants (Affidavit of A T DuPre May 16, 2011) highlight the differences between this case and the facts in Episcopal Housing. In the present case the parties are located in the adjoining counties of Berkeley and Charleston with Cape Romain's principal place of business being in Berkeley County and Sean Barnes' principal place of business being in Charleston County. The job itself is located in the Wando River within Berkeley County. The engineer who designed the project was located in Charleston County in the Town of Mt. Pleasant.

There are also differences in the scope of the agreement. In the Episcopal Housing case, the general contractor had to furnish both labor and materials whereas in the present case no materials at all are required of Cape Romain. The only thing required of Cape

Romain is that it furnish its equipment and its local labor to assemble and install the walkways and the piling in the river. Likewise, the present agreement does not discuss or contemplate any subcontractors being utilized by Cape Romain and in fact none were used.

The scope of work for Cape Romain did not include the furnishing of any permits or licenses of any kind other than a local business license if one is required by the County of Berkeley. All other permits were to be furnished by someone other than Cape Romain.

B Activities of the Parties in Fact Involving Interstate Commerce

Subsequent to Episcopal Housing, later cases have indicated that regardless of the express requirements on the face of the agreement, the Federal Act has been found to apply if the performance of the agreement in fact involved interstate commerce. See New Hope Missionary Baptist Church v. Paradigm Builders, 379 S. C. 620, 667 S. E. 2d 1 (Ct. App. 2008). The Court of Appeals indicated in New Hope that the involvement of commerce in fact is sufficient even though the written agreement does not itself contemplate commerce in the performance of the agreement. Although the Court of Appeals cites Episcopal Housing for the proposition that the involvement of commerce in fact is sufficient, the only language in the Episcopal Housing decision appears to be at 239 S. E. 2d at 652 where the Court observes in dicta that 'one need only consider the nature of the project and the actual work performed in fulfillment of the contractual obligations' and then proceeds to *speculate* that the project could not be completed without the utilization of materials and subcontractors from outside of the State.

The actual performance of the work, as indicated in the affidavits of Cape Romain, was in fact all conducted within Berkeley and Charleston Counties and the affidavits reflect that Cape Romain did not travel more than 20 miles in any direction from the jobsite in order to complete the project.

Timms v. Greene, 310 S. C. 469, 427 S. E. 2d 642 (1993) and Matthews v. Fluor, 312

S C 404, 440 S E 2d 880 (1994) were both subsequent to Episcopal Housing and are instructive of what the Court intended by its decision in Episcopal Housing. In every decided case, one party or the other who favored arbitration came in with an entire litany of reasons why the performance of the agreement might somehow touch or concern commerce. Timms and Matthews illustrate why it is necessary to take a very close look at the activities required by the agreement and distinguish between the activities contemplated by the agreement between the parties as opposed to activities not required by the performance of the agreement which involve commerce or the utilization of materials that might have moved in commerce at some point in time but do not have to move in commerce during the actual performance of the agreement at issue.

For example, in Timms v. Greene the agreement was a patient services agreement between a patient in a nursing home and the nursing home. It was argued that the nursing home was a division of a national organization, marketed its services in states other than South Carolina, hired employees from outside the state, purchased the majority of its goods, equipment and supplies from outside the state, and obtained payment by the use of commerce. The Court pointed out that while all that may be true, the scope of services contemplated by the agreement at issue before the court was simply to render patient care services at the nursing home within the State of South Carolina and there was no express term of that agreement that required the nursing home to conduct any activities in interstate commerce. The agreement on its face only required that nursing care be provided at an intrastate location. Had the agreement specifically required the nursing home to use materials specifically described to have to come from out of state, then the result may have been different. The Court ultimately reached the conclusion that the agreement in Timms was not enforceable under the Federal Act because commerce was not required by the express terms of the agreement, nor was it involved in the actual performance of the agreement.

Matthews v Fluor, decided the following year, involved a real estate transaction. The seller of the property was a California entity and the buyer was from Pennsylvania. Legal opinions on employee benefits, the financing lender, legal environmental law opinions, and the funds necessary to consummate the transaction all involved either out-of-state providers or utilization of commerce. The actual terms of the agreement simply required the transaction to close at a location within the State of South Carolina. There was no express term in the agreement that required interstate commerce to close the transaction and the agreement did not attempt to dictate the parties use any out-of-state opinions, financing or other services for actual performance of the agreement. The Court again held that the Federal Act was not applicable in the absence of commerce. Both cases are still good authority for the proposition that where the essence of the contract is to perform an activity entirely within the State of South Carolina there is no interstate commerce in fact involved in the performance of the agreement, and the Federal Act does not apply. This Court cannot eliminate the requirement of commerce or allow it to be diluted to the point that transactions which do not involve commerce in the performance of the agreement become subject to the Federal Act. Such an expansion of the applicability of the Act by interpretation would be contrary to the intent of Congress as expressed in the statute that the Federal Act only apply when there is interstate commerce present.

Appellants take the position that the Matthews case was overruled by the decision of the Court in Munoz v. Green Tree Fin. Corp., 343 S. Ct. 531, 542 S. E. 2d 360 (2001). All the court said in Munoz was that it is not necessary that the express terms of the agreement contemplate interstate commerce if the performance of the agreement in fact involves commerce.² The Court's ruling in Munoz was that the Federal Act applies to any

²It should go without saying that if the contract on its face does require interstate commerce, then the actual performance of the agreement will always involve interstate

transaction that in fact involves a sufficient nexus to interstate commerce regardless of the express terms of the agreement. The decision in Munoz does not overrule Matthews to the extent that Matthews holds that the actions of the parties in accomplishing the agreement did not in fact involve substantial activities or connections to interstate commerce and therefore the Federal Act did not apply. See Munoz v. Green Tree Fin. Corp., 542 S.E.2d at 363.

The affidavits submitted by Cape Romain clearly indicate no interstate commerce was involved in the actual performance of the agreement by the parties. The materials were made available for Cape Romain to pick up in Charleston County. Cape Romain moved those materials from Charleston County to the jobsite in Berkeley County and installed those materials without resort to out-of-state providers or subcontractors. The fact that the dock sections may have moved in interstate commerce before the performance of the agreement started is no different than the fact that in Timms the materials utilized by the nursing home may have moved in interstate commerce before the nursing home utilized them to provide services to Mary Greene. Likewise, the fact that in Matthews legal opinions may have been obtained by the parties to the agreement from outside the State of South Carolina before the parties sat down to close the sale of the property within the State of South Carolina, did not change the fact that the actual performance of the agreement for the sale of the property - the closing itself - did not involve any commerce whatsoever.

In this appeal the factual basis relied upon by the Defendants is contained in their Reply in Support of Motion to Dismiss and Compel Arbitration and the additional attachments they provided (Reply in Support and attachments May 10, 2011). The position of Cape Romain Contractors is primarily contained in the supplemental affidavit

commerce

of Anthony T Dupre (Affidavit of A T DuPre May 16, 2011)

Defendants argue that the majority of materials which comprise the floating walkways themselves were obtained from a manufacturer in Ohio. The problem with this argument is that the contract at issue here is a labor only agreement to assemble those materials. Cape Romain did not obtain or furnish those materials. The Defendant Barnes was required to make those materials available to Cape Romain in Charleston County at his place of business. The materials represent zero percent of the value of the agreement and zero dollars of the total cost. While those materials may have originated in Ohio and may have moved in interstate commerce before they became relevant to the performance of the agreement, such is no different than the materials used to furnish nursing services in Timms and the opinions obtained prior to closing in Matthews.

Defendants argue that Cape Romain obtained engineering services from a firm that required Cape Romain to mail a check to Illinois. As pointed out above, the agreement between the parties contemplated no engineering services to be furnished for the project by Cape Romain whatsoever. All engineering was to be furnished by the Defendants. As a result of apparent defects in design and defects in material, Cape Romain was forced to retain a local engineering firm to defend against the claims of defects in the performance of Cape Romain. In other words, the involvement of the local engineer on behalf of Cape Romain was solely related to Cape Romain's efforts to obtain payment and had nothing whatsoever to do with the actual performance of the work. The affidavit reflects that a local office in North Charleston, South Carolina was the point of contact and source of the services. The circuit court found that the use of a single forty-three cent stamp to mail a check to Chicago, Illinois was not a significant impact upon commerce.

The third issue raised by Defendants is the use of diesel fuel by the equipment used to transport the materials. The affidavit of Cape Romain indicates that 75 to 100 gallons of diesel fuel was used to barge materials up the river to the point of the project.

Attachment 4 in support of the Defendants' reply, contains information regarding the millions of barrels of diesel fuel that move in commerce yearly within the United States. An argument that the use of fuel can transform a local activity into interstate commerce would eviscerate the requirement that the commerce be interstate in nature. Fuel, whether diesel or gasoline or electric power, is consumed on every construction project, large or small. The court found that the fact that Cape Romain's equipment burned 75 or 100 gallons of diesel fuel was insignificant compared to the millions of gallons which are used in commerce daily and found that such was simply not a significant impact or nexus to commerce.

The fourth issue raised by Defendants is that Cape Romain moved materials on its barges on navigable waters of the United States. Cape Romain agrees that they moved the materials approximately fourteen miles by water and that this activity consumed or involved less than five percent of the total job costs. The materials never moved beyond the adjoining counties of Berkeley and Charleston. The trial court properly ruled that the short distance involved in moving these materials to the jobsite as well as the relatively insignificant value of the work as related to the whole of the contract did not represent a significant or substantial relationship to interstate commerce. If all that was required to trigger the Federal Act was some transportation of some materials on an entirely in-state portion of an interstate road or waterway, then there would be no meaningful difference in local and interstate commerce.

Lastly, Defendants allege that the work required an Army Corps of Engineers permit and the work therefore had a nexus to interstate commerce. This argument, like the first one concerning materials from Ohio, overlooks the fact the agreement specifically states that "permits are to be obtained by others" and not by Cape Romain. There is no specific requirement in the agreement at all for an Army Corps of Engineers permit and full performance of all obligations under the contract by Cape Romain did not require Cape

Romain to conduct any operation in commerce to obtain one. Although only a portion of the permit was provided by the Defendants, a complete copy of the permit would reveal it was issued by the Department of the Army. The permit has nothing whatsoever to do with commerce, but rather relates to the power of Congress to equip its Army and its Navy. The permits are issued under 33 U.S.C. Chapter 9 which is unrelated to commerce. The permit would reflect, if the entire permit was to be furnished, that it was issued by the Secretary of the Army and administered by the United States Army Corps of Engineers and it most likely was issued locally by the Charleston Office of the Army Corps of Engineers located in Charleston, South Carolina.

The cases relied upon by the Defendants are distinguishable. The Timms and Matthews cases appear to be the only two reported cases where the issue of commerce was challenged. All of the cases cited in the Appellants' brief and relied upon for the proposition that it is "easy to find commerce" or to support their position that the courts "always find commerce" are in fact cases in which commerce was not an issue in the court below or upon appeal. In Blanton v. Stathos, 351 S.C. 534, 570 S.E.2d (Ct. App. 2002) an affidavit alleging commerce was submitted by Blanton and was not contested by the appellant. 570 S.E.2d at 569. Circle S v. Stanley Smith, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986) involved an affidavit asserting the existence of actual commerce in fact which was uncontradicted. 343 S.E.2d at 47. New Hope v. Paradigm Builders, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) also involved an affidavit alleging commerce which was not challenged. 667 S.E.2d at 4. Osteen v. Cuttino, 315 S.C. 422, 434 S.E.2d 281 (1993) states clearly in footnote 2 at 434 S.E.2d at 283 that there was no controversy raised that the project involved interstate commerce. Trident v. Lucas & Stubbs, Ltd. 286 S.C. 98, 333 S.E.2d 781 (1985) reflects in footnote 2, 333 S.E.2d at 785, that there is no issue on the appeal as to whether the case involves commerce or not.

V THE ARBITRATION CLAUSE CANNOT BE ENFORCED BY WANDO E, LLC

At the hearing, the Defendant Wando E, LLC took the position that although they were not a party signing the agreement to arbitrate they were entitled as a non-signatory to enforce the arbitration agreement against Cape Romain. The Defendants argued that non-signatory parties have been allowed in limited cases to enforce arbitration agreements against signatory parties in circumstances where the party seeking the enforcement was either a parent or subsidiary company of the signatory, was in a relationship of corporation and shareholder to the signatory, or was in a relationship of agent and principal to the signatory.

Although Wando E, LLC was in a position to produce facts for the record which would allow it to establish one of these three types of relationships with Sean Barnes, Wando E, LLC did not do so. There is no affidavit in the record from Wando E, LLC and the entity did not attempt to place into evidence any information concerning the nature or extent of the relationship between it and Sean Barnes.

The only information in the record is paragraph 1 in the affidavit of Barnes in which he states that he is a contractor to or for Wando E, LLC. The nature of the contractor relationship, whether independent contractor or general agent was not described in the affidavit. The only thing that is clear from the affidavit is that Barnes has some type of contract arrangement with Wando E, LLC. A copy of that contract has not been produced by the Defendants and the terms remain unknown to Cape Romain. Clearly there are no facts in the record upon which the Court can determine the nature of the relationship between Wando E, LLC and Sean Barnes and therefore there are no facts upon which the Court can base a determination that the relationship is one which justifies or allows Wando E, LLC to enforce an arbitration agreement against Cape Romain to which Wando E, LLC is not a party.

VI THE MOTION TO DISMISS THE QUANTUM MERUIT CLAIM IS PREMATURE

Under SCRCP Rule 8(a) a party may plead relief in the alternative. The prayer in this case does seek relief in quantum meruit in the alternative to the mechanic's lien and contract claims. If the contract claim is valid and the Plaintiff can recover on the express agreement, in either contract or on its mechanic's lien, then the quantum meruit recovery is not necessary. If, on the other hand, the contract claim fails for some reason and the lien therefore also fails, then quantum meruit can be an appropriate remedy in the absence of an express agreement on the subject.

There has been no ruling by the court at this point in the proceedings as to whether the agreement between the parties is a valid contract. In fact, no answer has been filed by the Defendants at this point in the proceedings so there is no way to know if the Defendants even challenge the validity and enforceability of the contract alleged by Cape Romain. The lower court appropriately refused to eliminate a remedy before the pleadings were closed and before the Defendants were on record as to whether they agree that there is a valid, binding, enforceable contract between the primary parties or whether they dispute it.

The case of Swanson v. Stratos, 350 S.C. 116, 564 S.E.2d 117 (2002) simply stands for the proposition that quantum meruit may be an alternative claim if the claims of express contract for some reason fail. Id. 564 S.E.2d at 120. In the Swanson case the Court ultimately found that the contract was in fact viable and enforceable and therefore ruled that the express contract between the parties governed their rights and that quantum meruit could not be claimed. Id. The lower court properly refused the motion to dismiss the quantum meruit claim as premature.

CONCLUSION

For the reasons stated, this Court should either dismiss the Appeal or affirm the judgment of the circuit court

RESPECTFULLY SUBMITTED,



Albert A. Lacour, III
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Attorney for the Respondent

Charleston, South Carolina

Nov 11, 2011

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

**DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL OF RESPONDENT**

Respondent proposes the following to be included in the Record on Appeal

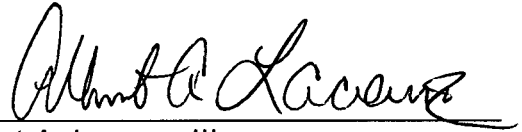
- 1 Title Page,
- 2 Index,
- 3 Form 4 dated June 21, 2011,
- 4 Order Denying Defendants' Motion to Dismiss and Compel Arbitration
dated July 11, 2011,
- 5 Complaint and Exhibits,
- 6 Motion to Dismiss and Compel Arbitration Under Rules 12(b)(1) and
12(b)(6) dated April 20, 2011 with attachments,
- 7 Return of Cape Romain to Motion to Dismiss and Compel Arbitration
dated April 28, 2011 with attachments,
- 8 Reply of Defendants dated May 10, 2011 with attachments,
- 9 Supplemental affidavit of Anthony T Dupre dated May 16, 2011,
- 10 Transcript of Proceedings of June 21, 2011

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The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal

November 11, 2011

CLAWSON AND STAUBES, LLC

A handwritten signature in black ink, appearing to read "Albert A. Lacour, III", written over a horizontal line.

Albert A. Lacour, III
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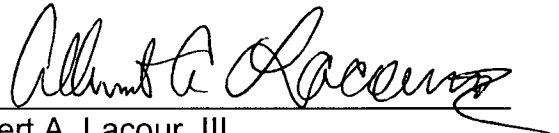
Attorney for the Respondent

PROOF OF SERVICE

I, Albert A Lacour, III, Counsel for the Respondent, hereby certify that I have served the within Designation of Matter on Appeal by depositing a copy of the same in the United States Mail postage prepaid, addressed to the following

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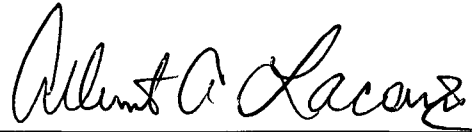
Charleston, South Carolina
Nov. 11, 2011

PROOF OF SERVICE

I, Albert A Lacour, III, Counsel for the Respondent, hereby certify that I have served the within Initial Brief by depositing a copy of the same in the United States Mail, postage prepaid, addressed to the following

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Albert A Lacour, III
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November 11 2011

File No 2010 1273 aal

Honorable Tanya A Gee, Clerk
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Cape Romain, Respondent v Wando E LLC and Sean Barnes, Appellants
Case No 2011-CP-08-985
Appeals Court Case Tracking No 2011197207

Dear Ms Gee

Enclosed herewith for filing pursuant to Rules 208(a) and 209(a), SCACR, please find

- 1 Original and one of the Respondent's Initial Brief,
- 2 Proof of Service of Respondent's Initial Brief
- 3 Original and one of the Designation of Matter on Appeal, and
- 4 Proof of Service of the Designation of Matter on Appeal

Please file the original documents and clock and return a copy of the Brief and Designation of Matter in the envelope provided as proof of filing By copy of this letter and enclosures, all of the above have been served upon opposing counsel

Thank you very much for your attention to the above

With best regards I remain,

Very truly yours,

CLAWSON AND STAUBES LLC

Albert A Lacour, III

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SC Court of Appeals

AALIII/cld
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Honorable Tanya A Gee, Clerk
2010-1273 aal
November 11, 2011
Page 2

cc **(w/enclosures)**
 Edward J Westbrook, Esquire



The South Carolina Court of Appeals

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November 1, 2011

E J Westbrook, Esquire
Richardson Patrick Westbrook & Brickman, LLC
P O Box 1007
Mt Pleasant, SC 29465

Re Cape Romain v Wando E, LLC
Case Tracking # 2011197207

Dear Mr Westbrook

We have received the Appellants' Initial Brief and Designation of Matter in regards to the above mentioned appeal. Please be advised that the caption on the cover of the brief and designation is incorrect.

All parties are requested to use the correct caption on all future filings in this matter. The correct caption is:

Cape Romain Contractors, Inc ,

Respondent,

v

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

Appellants

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/ec

cc Albert A Lacour, III, Esquire

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,

Respondent,

Appellants

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	111
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 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
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<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
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<i>Cleveland v Policy Management Systems Corp ,</i> 526 U S 795 (1999)	8
<i>Columbia Wholesale Co Inc v Scudder May N V ,</i> 312 S C 259, 440 S E 2d 129 (1994)	46
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<i>Episcopal Housing Corp v Federal Insurance Co ,</i> 269 S C 631, 239 S E 2d 647 (1977)	10, 27, 34
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<i>Hughes Masonry Co v Greater Clark Co School Building Corp</i> , 659 F 2d 836 (7th Cir 1981)	46
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<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
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<i>Prima Paint Corp v Flood & Conklin</i> , 388 U S 395 (1967)	28
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<i>Trident Technical College v Lucas & Stubbs Ltd</i> , 286 S C 98, 333 S E 2d 781 (1985)	16, 34
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<i>United States v Lopez</i> , 514 U S 549 (1995)	31
<i>United States v Rands</i> , 389 U S 121 (1967)	29
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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
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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

Romain 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 __) (Complaint). It sought \$158,413.14 in damages (R p __) (Complaint, Prayer). On April 20, 2011, Barnes and Wando E filed a motion to dismiss and compel arbitration (R p __) (Mot to Dismiss and Compel Arbitration). Cape Romain responded on April 28, 2011 (R p __) (Return of Cape Romain Contractors, Inc to Mot to Dismiss and Compel Arbitration). Barnes and Wando E replied on May 11, 2011 (R p __) (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 __) (Judgment in a civil case). Both sides supplied proposed orders on June 30, 2011 (R p __, R p __) (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 __, R pp __) (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. __)
- § 19.2 (specifying the FAA as the governing law) (R. p. __)
- § 21.6 (permitting third parties to join an arbitration) (R. p. __)

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 __) (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 __) (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 __) (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 __) (Barnes Aff ¶ 3) ²

¹ Barnes avers he told Cape Romain that his client was Wando E (R p __) (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 __) (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 __) (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 __) (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 Romain's tugs and barges over the navigable waters of the United States (R p ____) (DuPre Supp Aff ¶ 4) Cape Romain 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 Romain's \$165,000 contract (R p ____) (DuPre Supp Aff ¶ 4) Cape Romain also admitted to using between 75 to 100 gallons of marine fuel for its tugs and barges during the trips (R p ____) (DuPre Supp Aff ¶ 4), which Appellants estimated would cost approximately \$200 - \$400 at today's prevailing fuel prices (R p ____, line ____) This fuel necessarily traveled interstate as South Carolina has no refineries³ Cape Romain also sent an interstate payment of over \$2,000 to the Chicago office of a consulting firm it hired for the project (R p ____) (Attach 6 to Defs' Reply Mem), (R p ____) (DuPre Supp Aff ¶ 4)

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

accompanying his signature on the contract which noted 'dock fabrication seems to have been delayed somewhat (R p ____) (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 ____ (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 ____) (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 ____) (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 ____) (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 ____) (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 ____) (Barnes Aff ¶¶ 6, 7) ⁴ When Barnes requested arbitration of the dispute, and Wando E agreed to participate, Cape Romain refused (R p ____) (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 ____) (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 __) (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 __) (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 __) Barnes and Wando E moved to dismiss and compel arbitration (R p __) Cape Romain responded that neither the South Carolina Arbitration Act, nor the FAA applied (R pp ____)⁷ After the parties filed their briefs with accompanying exhibits and affidavits, the Court held argument on June 21, 2011 (R p __)

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 ____)(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 __ lines __)(Tr p 14 lines 2 8)

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

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 __) (AIA Contract ¶ 19 2)

acknowledging he knew the dock sections were coming from “up north” two months before he signed the contract (R p ___, line 18-p ___, line 7) (Tr p 5, line 18-p 7, line 7), (R p ___) (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 ___, line 2-p ___, 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 ___, line 17-p ___, line 4) (Tr p 14, line 17-p 15, line 4) Cape Romain described these as the “two cases we rely on ” (R p ___, 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 ___, line 17-p ___, 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 ___, lines 7-19) (Tr p 20, lines 7-19), its sending a payment out of state (R p ___, line 19-p ___, line 6) (Tr p 19, line 19-p 20, line 6), its transportation of the dock components over navigable waters (R p ___, line 20-p ___, line 5) (Tr p

20, line 20-p 21, line 5), or the construction being regulated by a federal permit (R p ___, line 6-p ___, 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 ___, 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 ___, 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 ___) Both sides provided orders on June 30, 2011 (R pp ___, ___) Wando E and Barnes proposed order recounted in significant detail the multiple effects on interstate commerce of the contract and project (R pp ___-___), and pointed out that Cape Romain had specifically agreed to the FAA as the law to govern arbitration (R p ___, n __) 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 ___-___)

Cape Romain's proposed order continued to rely on *Mathews* on the FAA interstate commerce issue (R p ____) (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 ____) (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 ____ - ____) (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 __-__)

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 __) (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 ____) (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 ____) (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 __) (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 __) (“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 Romain 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 __)

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 ____) (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 K B Home of S C Inc*,

No. 4851, 2011 WL 2792385, at *5 (S.C. Ct. App. July 13, 2011) (quoting *McGill v. Moore*, 381 S.C. 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. ___) (AIA Contract ¶ 19.2).

In *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 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.C. 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.C. 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. K B Home of S C 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 ___, lines 17-p ___, 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 ___, 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 __)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 __)

Cape Romain argued that it only shipped the materials locally after they had arrived from Ohio (R p __) (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 __) (DuPre Aff ¶ 6) the contract actually required Cape Romain to pick up the material at Barnes yard (R p __) (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 __) (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), *N C 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 ____) (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 __, 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 __) (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. ____). 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. ____, 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).

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navigable waters. Indeed, an important aspect of this project that the Corps of Engineers was regulating under its Commerce Clause permit was Cape Romain'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 Romain'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 ___, 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 Romain'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 ____) (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 ____) (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 ____) (Ex 6 to Defs ’ Rep Mem), (R p ____) (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 ____) (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 it ¹⁷

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 ___ Cape Romain’s Statement of Account sought in lawsuit including Draw #5, and R p ___ 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. Ct. 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 __) (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 ____) (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 dispute.²⁰ *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 Romain 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 Romain is a signatory. Wando E, a non-signatory, voluntarily agreed to participate in the arbitration between Barnes and Cape Romain 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 ____) (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 ____) (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 __) (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 __) (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 ____ - __) (DuPre Supp Aff ¶ 3), and it accepted payments from that client, Wando E, for its work under the contract (R p __) (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 ____) (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 Mazingo*, 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 ____) (DuPre Supp. Aff. ¶ 3) and was accepting payment from Wando E for its work (R p ____) (Complaint ¶ 6). Barnes avers that Cape Romain knew the client was Wando E (R p ____) (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 ____) (Complaint ¶ 3).

____) (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 ____) (Complaint ¶ 14) Additionally, all the payments to Cape Romain on the contract were made by Wando E (R p ____) (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 ____) (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 ____ 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 Georgia 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 ____) (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 ____)

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. __) (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. __-__) (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 __) (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 Count 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. ___, 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. ___-___) (Complaint ¶ 4), and Wando E and Barnes have already relied on the contract as valid in moving to enforce its arbitration clause. (R. p. ___, 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 __) (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 __, 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 __, 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 Roman'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 Roman 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 Roman 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

October 21, 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 BERKELY COUNTY
Court of Common Pleas

Roger M Young, Sr , Circuit Court Judge

Case No 2011-CP-08-985

RECEIVED

OCT 24 2011

SC Court of Appeals

Cape Romain Contractors, Inc ,

v

Wando E, LLC and Sean Barnes,

Respondent,

Appellants

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

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

Dated October 21, 2011

ORIGINAL

Appellants propose the following to be included in the Record on Appeal

- 1 Circuit Court Order Taking Motions Under Advisement and Requiring Proposed Orders, (with attached email presented at June 21, 2011 hearing), dated June 21, 2011,
- 2 Circuit Court Order Denying Defendants' Motion To Dismiss and To Compel Arbitration, dated July 11, 2011
- 3 Notice of Order by Circuit Court Deciding to Sign Proposed Order Denying Defendants' Motion To Dismiss and To Compel Arbitration, dated July 11, 2011,
- 4 Summons and Complaint with attachments, dated March 29, 2011,
- 5 Defendants' Motion to Dismiss and To Compel Arbitration, with attachments, dated April 20, 2011,
- 6 Return of Cape Romain Contractors, Inc to Motion To Dismiss and To Compel Arbitration, with attachments, dated April 28, 2011,
- 7 Defendants' Reply In Support of Motion To Dismiss and Compel Arbitration, with attachments, dated May 10, 2011,
- 8 Supplemental Affidavit of Anthony T DuPre, Jr , with cover letter, dated May 17, 2011,
- 9 Defendants' Proposed Order on Motion to Dismiss and Compel Arbitration, with cover letter, dated June 30, 2011,
- 10 Plaintiff's Proposed Order on Motion to Dismiss and Compel Arbitration, with cover letter, dated June 30, 2011,
- 11 Transcript of Motion Hearing on June 21, 2011

I certify that this designation contains no matter which is irrelevant to this appeal



Edward J Westbrook, Esq
Catherine H McElveen Esq
Richardson Patrick Westbrook
& Brickman
1037 Chuck Dawley Blvd , Bldg A
Mount Pleasant, SC 29494
Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Brief of Appellants has been served upon the following counsel of record via hand delivery this 21st day of October, 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

2

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Designation of Matter To Be Included In The Record of Appeal has been served upon the following counsel of record via hand delivery this 21st day of October, 2011

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

RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC

By



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October 21, 2011

Hon Tanya A Gee, Clerk
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re *Cape Romain Contractors Respondent v Wando E LLC and Sean
Barnes Appellants*, Case No 2011-CP-08-985, Appeals Court Tracking
No 2011197207

Dear Ms Gee

Enclosed for filing pursuant to Rules 208(a) and 209(a), SCACR , please find

- 1 Two copies of Appellants' Initial Brief, with proof of service on counsel for Respondent (please return one filed-stamped copy in the enclosed self-addressed stamped envelope),
- 2 Two copies of Appellants' Designation of Matter to be Included in the Record on Appeal with proof of service on counsel for Respondent (please return one filed-stamped copy in the enclosed self-addressed stamped envelope)

Respectfully,

Edward J Westbrook

EJW/kaj

Enclosures

cc Albert A LaCour, III (with enclosures)

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OCT 24 2011
SC Court of Appeals

James C Bradley
Michael J Brickman
Elizabeth Middleton Burke
J David Butler
Aaron R Dias
Jerry Hudson Evans
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Of Counsel
Daniel O Myers
Gordon C Rhea (CA DC & USVI only)
James H Rion Jr
Howard Siegel (DC & MD only)
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Robert M Turkewitz



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October 18, 2011

Ms Sharon L Vizer-Hanks
P O Box 52
Honea Path, SC 29654

Re *Cape Romain Contractors Inc v Wando E LLC and Sean Barnes*
aka Sean Barnes Case No 2011-CP-08-985

Dear Ms Vizer-Hanks

I am in receipt of the transcript in the above-referenced case Enclosed please find a check in the amount of \$6 25 representing the balance for the transcript

If you have any questions, please do not hesitate to contact me Thank you for your assistance with this matter

Sincerely,

Edward J Westbrook

EJW/kaj
Enclosure

cc Albert A LaCour, III
Ms Tanya Gee, S C Court of Appeals Clerk of Court
Ms Motte Talley, S C Court Administration Assistant Director

James C Bradley
Michael J Brickman
Elizabeth Middleton Burke
J David Butler
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Of Counsel
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James H Rion Jr
Howard Siegel (DC & MD only)
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Robert M Turkewitz

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OCT 19 2011

SC Court of Appeals

Sharon L Vizer-Hanks
Circuit Court Reporter
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PO Box 52
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SVizer-Hanks@sccourts.org

October 17, 2011

Richardson, Patrick, Westbrook & Brickman, LLC
PO Box 1007
Mount Pleasant, SC 29465

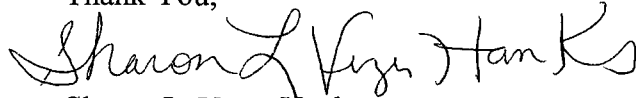
Attention Edward Westbrook, Esquire

Re Transcript of Record
Cape Romain vs Wando E, LLC
11-CP-08-00985
June 21, 2011 – CPNJ Motion Hearings
Before The Honorable Roger Young

1 – Original Transcript	\$ 81 25
Deposit	- \$ 75 00

Total balance due	\$ 6 25

Thank You,



Sharon L Vizer-Hanks
Circuit Court Reporter

NOTE PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF \$ 75 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT " ALL REQUESTS FOR COPIES OF THE ATTACHED TRANSCRIPT FROM OPPOSING PARTY OR NON-PARTIES SHOULD BE SENT TO ME AT THE ABOVE ADDRESS



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
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1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

August 18, 2011

E. J. Westbrook, Esquire
Richardson Patrick Westbrook & Brickman, LLC
P.O. Box 1007
Mt. Pleasant, SC 29465

Re: Cape Romain v. Wando E, LLC
Case Tracking # 2011197207

Dear Mr. Westbrook:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Albert A. Lacour, III, Esquire
The Honorable Mary P. Brown



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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August 18, 2011

E J Westbrook, Esquire
Richardson Patrick Westbrook & Brickman, LLC
P O Box 1007
Mt Pleasant, SC 29465

Re Cape Romain v Wando E, LLC
Case Tracking # 2011197207

Dear Mr Westbrook

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: Edgar A. Brown Building, 1205 Pendleton Street, Columbia, S C 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

notification requirements \ ule 207(a)(5), SCACR, also, please a e the Court in writing
upon receipt of the transcript

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,
Tanya A. Gee
CLERK


TAG/ec

cc Albert A. Lacour, III, Esquire
The Honorable Mary P. Brown



RICHARDSON PATRICK
WESTBROOK & BRICKMAN LLC

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843 727 6688 Fax
ewestbrook@rpwb.com

August 9, 2011

Ms Sharon L Vizer-Hanks
P O Box 52
Honea Path, SC 29654

Re *Cape Romain Contractors Inc v Wando E LLC and Sean Barnes*
aka Sean Barnes Case No 2011-CP-08-985

Dear Ms Vizer-Hanks

We would like to order the transcript of the June 21, 2011 motion hearing in the above-referenced case before Judge Young for our appeal. If it is easier for you, you can email it to my assistant, Kim Jones, at kjones@rpwb.com

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

Sincerely,

Edward J Westbrook

EJW/kaj

Cc Albert A LaCour, III
Ms Tanya Gee, S C Court of Appeals Clerk of Court
Ms Motte Talley, S C Court Administration Assistant Director

James C Bradley
Michael J Brickman
Elizabeth Middleton Burke
J David Butler
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Of Counsel
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James H Rion Jr
Howard Siegel (DC & MD only)
David L Suggs (MN & NY only)
Robert M Turkewitz

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELY COUNTY
Court of Common Pleas

Roger M Young, Sr , Circuit Court Judge

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AUG 10 2011
SC Court of Appeals

Case No 2011-CP-08-985

Cape Romain Contractors, Inc ,

Respondent,

v

Wando E, LLC and Sean Barnes,

Appellants

NOTICE OF APPEAL

Notice is hereby given that Wando E, LLC and Sean Barnes ("Appellants"), hereby appeal to the South Carolina Court of Appeals from the order of the Honorable Roger M Young, Sr dated July 11, 2011 Appellants received written notice of entry of this order on July 11, 2011

The parties to the Order appealed from and the names, addresses, and telephone numbers of their respective counsel are as follows

Respondent

Cape Romain Contractors, Inc

Albert A Lacour, III
Clawson & Staubes
126 Seven Farms Dr , Ste 200
Charleston, SC 29492
Phone 843 577 2026
Email alacour@clawsonandstaubes.com

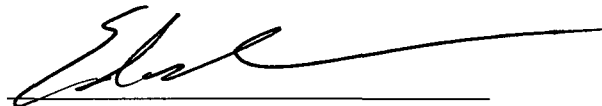
Appellants

Sean Barnes
Wando E, LLC

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

Dated August 8, 2011

Respectfully submitted,

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

Edward J Westbrook
Richardson Patrick Westbrook & Brickman
1037 Chuck Dawley Blvd , Building A
Mount Pleasant, SC 29494
(843) 727-6645

Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal has been served upon the following counsel of record via Regular U S Mail this 8th of August, 2011

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

By Kim Jones
Kim Jones
Assistant to Edward J Westbrook, Esq
Richardson Patrick Westbrook & Brickman
P O Box 1007
Mount Pleasant, SC 29464
Phone (843) 727-6670



RICHARDSON PATRICK
WESTBROOK & BRICKMAN LLC

EDWARD J WESTBROOK
843 727 6513 Direct
843 727 6688 Fax
ewestbrook@rpwb.com

August 8, 2011

Ms Tanya Gee, Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re *Cape Romain Contractors Inc v Wando E LLC and Sean Barnes*
aka Sean Barnes Case No 2011-CP-08-985

Dear Honorable Clerk

Enclosed please find the original and one copy of Appellants' Notice of Appeal in the above-referenced case, along with a copy of the Order being appealed, proof of service, and a check in the amount of \$100 representing the filing fee. I would appreciate your returning a filed-stamped copy of the Notice to us in the enclosed stamped envelope.

Sincerely,

Edward J Westbrook

EJW/kaj
Enclosures
cc Albert A Lacour (with enclosures)

James C Bradley
Michael J Brickman
Elizabeth Middleton Burke
J David Butler
Aaron R Dias
Jerry Hudson Evans
Nina H Fields
Thomas P Gressette Jr
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Terry E Richardson Jr
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A Hoyt Rowell III
Brady R Thomas
T Christopher Tuck
James L Ward Jr
Edward J Westbrook
Kenneth J Wilson
Robert S Wood

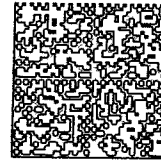
Of Counsel
Daniel O Myers
Gordon C Rhea (CA DC & USVI only)
James H Rion Jr
Howard Siegel (DC & MD only)
David L Suggs (MN & NY only)
Robert M Turkewitz

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AUG 10 2011
SC Court of Appeals



RICHARDSON PATRICK
WESTBROOK & BRICKMAN LLC

P O BOX 1007 1037 CHUCK DAWLEY BLVD BLDG A MT PLEASANT SC 29464



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AUG 08 2011

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Ms Tanya Gee Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia SC 29211

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

ORDER DENYING DEFENDANTS'
MOTIONS TO DISMISS AND TO
COMPEL ARBITRATION

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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



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



denied

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

IT IS THEREFORE

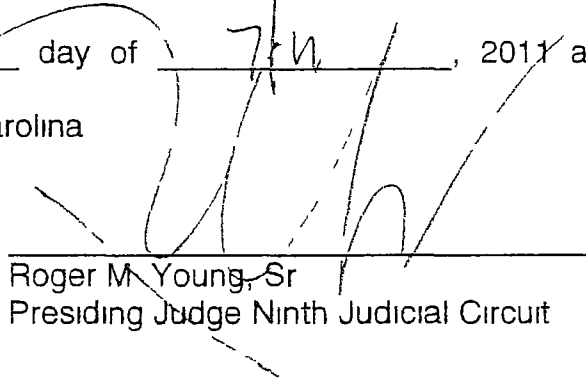
ORDERED that the Defendants' Motion to Dismiss pursuant to SCRCP Rule 12(b)(1) is DENIED as the subject matter jurisdiction of the Court to entertain an action

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

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

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

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

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

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