

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2016-CP-02-02339
Appellate Case No.: 2018-001039

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SC Court of Appeals

University of South Carolina Aiken.Respondent.

V.

University Housing Services, Inc., H.G. Reynolds Company, Inc., Southern Wall Systems, Inc.,
McElroy Specialty Interiors, Inc., Crosby Broadwater d/b/a Broadwater Construction, Tim
Stephens d/b/a Sa-Glo Carolina a/k/a San-Glo Glass, Inc., William Bell d/b/a Bell Siding &
Roofing a/k/a Bell Siding & Roofing, LLC, Croft Hill Siding, Inc., East Coast Painting, Inc.,
and John Doe 3 Defendants.

University Housing Services, Inc. Third-Party Plaintiff,

V.

Aiken, Aiken, Beauchamp and Sheetz Architects, Inc. Third-Party Defendant.

Of which University Housing Services, Inc. and H.G. Reynolds Company, Inc.
are the Appellants.

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR BY FAILING TO FIND THAT USC WAS BOUND TO THE DESIGN-BUILD AGREEMENT AND ITS ARBITRATION PROVISION.**

- II. DID THE CIRCUIT COURT ERR BY FAILING TO FIND THAT USC'S CLAIMS AGAINST H.G. REYNOLDS ARE SUBJECT TO ARBITRATION.**

STATEMENT OF THE CASE

This litigation arises out of the construction of the Pacer Commons dormitory building at the University of South Carolina Aiken Campus. These are appeals from the circuit court's Order Denying University Housing Services, Inc. and H.G. Reynolds Company, Inc.'s Motions to Dismiss or Stay Civil Action for Arbitration ("Order Denying Arbitration"), Order Granting Leave to File Second Amended Complaint ("Order Granting Motion to Amend"), and Form 4 Decision of the circuit court denying Appellants H.G. Reynolds Company, Inc. ("H.G. Reynolds") and University Housing Services, Inc.'s ("UHS") Motions to Reconsider the Order Denying Arbitration and Order Granting Motion to Amend ("Order Denying Motion to Reconsider").

On October 21, 2016, the University of South Carolina Aiken ("USCA") commenced Civil Action 2016-CP-02-02339 by filing its Complaint against Appellants and other parties alleging construction defects in the development and construction of Pacer Commons dormitory building. (Complaint). On October 24, 2016, USCA filed its First Amended Complaint. (First Amended Complaint). On December 5, 2016, H.G. Reynolds filed its Answer, Cross-Claims and Third-Party Complaint. (H.G. Reynolds Answer, Cross-Claims and Third-Party Complaint). On December 27, 2016, UHS filed its Answer to the First Amended Complaint and Cross-Claims. (UHS Answer). On December 30, 2016, UHS filed its Motion to Dismiss or in the Alternative, Motion to Substitute Real Party in Interest ("Real Party-in-Interest Motion"). On January 9, 2017, UHS filed its Motion to Dismiss or Stay the Civil Action in Favor of Arbitration. On January 27, 2017, H.G. Reynolds filed its Motion to Dismiss or Stay the Civil Action for Arbitration. On March 9, 2017, USCA filed its Motion to Amend First Amended Complaint to: 1) change the Plaintiff's name to the University of South Carolina ("USC") instead

of University of South Carolina Aiken; 2) assert direct causes of action against the third-party defendants; and 3) add new defendants to the civil action ("Motion to Amend").

At the hearing on the Motions to Compel Arbitration, Real Party-in-Interest Motion and Motion to Amend, USCA agreed to amend its First Amended Complaint to change the name of the Plaintiff to USC. (April 10, 2017 Transcript, p.31, line 21-p.32, line 6). The parties then argued the Arbitration Motion, which was opposed by USCA. USCA also attempted to make an oral motion to withdraw its breach of contract cause of action. (April 10, 2017 Transcript, p.3, lines 13- 21). Given the oral motion, the circuit court did not decide the Motion to Amend on April 10, 2017 and rescheduled a hearing on it for May 1, 2017. (April 10, 2017 Transcript, p.33, line 13-p.35, line 15). The circuit court also took the Motions to Compel Arbitration under advisement.

At the hearing on May 1, 2017, the circuit court granted the Motion to Amend and continued to hold the Arbitration Motion under advisement. (May 1, 2017 Transcript, p.11, lines 3-11). The circuit court filed its Order Granting Leave to File Second Amended Complaint on May 19, 2017 ("Order Granting Motion to Amend"). On May 23, 2017, the circuit court filed its Order Denying University Housing Services, Inc. and H.G. Reynolds Company, Inc.'s Motion to Dismiss or Stay Civil Action for Arbitration ("Order Denying Arbitration"). On May 26, 2017, UHS filed its Motion to Reconsider the Order Denying Arbitration and Order Granting Motion to Amend. On May 30, H.G. Reynolds filed its Motion and Memorandum of Law in Support of Its Motion to Alter or Amend the Court's Order Denying H.G. Reynolds Company, Inc.'s Motion To Dismiss or Stay Civil Action for Arbitration, its Motion to Alter or Amend Pursuant to Rule 59(E), SCRPC, and Memorandum in Support of Its Motion To Reconsider the Order Granting the Plaintiff's Motion to Amend.

The circuit court denied the Motion to Reconsider and filed a Form 4 Decision on May 10, 2018 ("Form 4 Decision"). UHS filed and served a Notice of Appeal on June 4, 2018 and H.G. Reynolds filed and served a Notice of Appeal on June 5, 2018, to appeal the Order Denying Arbitration, Order Granting Motion to Amend, and the Form 4 Decision.

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

FACTS

This case is an alleged construction defect claim concerning the Pacer Commons student housing building on the campus of USCA.¹ By way of background, the development, financing, and construction of Pacer Commons was undertaken with the issuance of Economic Development Revenue Bonds involving the South Carolina Jobs Economic Development Authority, Carolina Housing Properties, Inc. ("Carolina Housing Properties"), the Aiken Student Housing Foundation, Inc. ("Aiken Foundation") and other companies. (Underwriting Agreement, p.1).

Before the construction of Pacer Commons, the Aiken County Commission for Higher Education ("Aiken Commission") held title to the real estate on which the building is constructed. (Lease Agreement ("Lease Agreement"), p.1; General Warranty Deed). For the construction, the Aiken Commission entered into a ground lease agreement dated August 1, 2003 with Collegiate Housing Properties for Collegiate Housing Properties to build Pacer Commons on the real estate.² Among other things, the Lease Agreement states that Collegiate Housing Properties will assign all its interests, rights and obligations in the lease to the Aiken Foundation. (Lease Agreement, p. 3, ¶ 11). The assignment was to occur once the Aiken Foundation became a qualified corporation under Section 501(c)(3) of the Internal Revenue Code. (Lease Agreement, p. 3, ¶ 11). The assignment of the lease was in fact

¹ USCA is one of eight campuses of the University [of South Carolina] System. USC identifies USCA as one of its three "Comprehensive Universities" in the University System. South Carolina state law authorizes USC to incur bond indebtedness for the construction of university facilities. S.C. Code Ann. § 59-117-210 et seq.

² Collegiate Housing Properties is a not-for-profit public benefit corporation organized and existing under the law of the State of Florida. Collegiate Housing Properties is not a party in the Civil Action.

effectuated in an agreement titled *Assignment and Assumption Agreement re: Inter Alia Lease Agreement (with Tenants) Recorded in Deed Volume 2339, Page 99*, which also included an assignment of the project documents rights, interest and obligations. ("Assignment and Assumption Agreement to the Aiken Foundation").

To develop and construct Pacer Commons, Collegiate Housing Properties entered into an agreement dated August 13, 2003 with University Housing Services, Inc., titled *Design-Build Agreement Between Collegiate Housing Properties, Inc. and UHS, Inc.* ("Design-Build Agreement") for the development and construction of Pacer Commons.

The Design-Build Agreement provides for arbitration as the forum for resolving any controversy or claim. (Design-Build Agreement, § Article 12, ¶ 12.1 to ¶ 12.3). The Design-Build Agreement states, "[a]ny controversy or claim arising out of or relating to this Agreement or its breach" shall be resolved by arbitration. (Design Build Agreement, p. 22, ¶ 12.2) (emphasis added). The Design-Build Agreement states that an arbitration shall be conducted pursuant to the Construction Industry Arbitration Rules of the American Arbitration Rules of the American Arbitration Association, unless the parties agree otherwise. (Design-Build Agreement, p. 22, ¶ 12.2). The Design-Build Agreement further provides "12.6 MULTIPARTY PROCEEDING. The parties agree that all parties necessary to resolve a claim shall be parties to the same arbitration proceeding. Appropriate provisions shall be included in all other contracts relating to the Work to provide for the consolidation of arbitrations." Design-Build Agreement ¶12.6

It is asserted but not conceded at this time that UHS entered into an agreement dated August 13, 2003 with Appellant H.G. Reynolds Company, Inc. ("H.G. Reynolds") titled *Standard Form of Agreement Between Owner and Contractor* ("H.G. Reynolds

Construction Agreement") for H.G. Reynolds to be the general contractor. To design Pacer Commons, UHS entered into an agreement dated August 13, 2003 with Aiken, Aiken, Beauchamp & Sheetz Architects, Inc., a Georgia corporation, titled *Standard Form of Agreement Between Owner and Architect*.

After the construction of Pacer Commons, the Aiken Foundation entered into an agreement dated April 3, 2006 with USC and the Aiken Commission titled *Assignment, Assumption and Consent Agreement* for the Aiken Foundation to transfer its rights, interests and obligations in Pacer Commons to USC. ("Assignment, Assumption and Consent Agreement to USC"). In March 2006, the Aiken Commission deeded title to Pacer Commons to USC. ("General Warranty Deed").

Twelve years after Pacer Commons was constructed, USCA commenced the civil action against UHS and H.G. Reynolds and other parties involved in the construction, design and development of Pacer Commons alleging construction defects. The alleged defects involve the exterior parts of the building, including the roof, windows/doors, stucco and the masonry veneer. (Plaintiffs' First Amended Complaint). Among other allegations, USCA alleged that UHS had contracted with USCA to construct Pacer Commons and had breached that contract because of the construction defects with the building. (Plaintiffs' First Amended Complaint).

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN NOT FINDING THAT USC WAS BOUND TO THE DESIGN-BUILD AGREEMENT AND ITS ARBITRATION PROVISION.

The circuit court found that USC was not required to arbitrate because it was neither a party nor a signatory to any agreement with H.G. Reynolds or UHS, much less an arbitration agreement. (Order Denying Arbitration, p. 4).

The circuit court erred in not finding there was a binding agreement compelling arbitration as to USC's claims against H.G. Reynolds. USC was bound to the Design-Build Agreement and the arbitration provision in the Design-Build Agreement is broad and includes USC's claims against H.G. Reynolds. The circuit court erred in: not finding that the Federal Arbitration Act was the controlling law; not finding the four criteria required to compel arbitration have been met; and in not compelling the matter to arbitration.

The circuit court rested its decision on the fact that USC did not sign an agreement, however, the circuit court erred by not following the law that binds a non-signatory to an arbitration agreement.

A. The Federal Arbitration Act ("FAA") Governs and is the Controlling Law, and the Circuit Court Erred by Failing to Compel USC to Arbitration Under the FAA as the Requirements of the FAA to do so have been Met.

The FAA is the controlling law for an arbitration in this case. This is because the construction of Pacer Commons involved interstate commerce. Accordingly, any requirements of S.C. Code §15-48-10 et seq. that are inconsistent with the FAA do not apply because the FAA supersedes and preempts state law. *See e.g., Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002); *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977).

Title 9 U.S.C. § 2 of the FAA provides in pertinent part:

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

A party may compel arbitration under the FAA by demonstrating the following: “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002).

The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). “[U]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered.” *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007).

The Federal Arbitration Act also declares a liberal policy favoring arbitration. *Soil Remediation Company v. Nu-Way Environment, Inc.*, 323 S.C. 454, 458, 476 S.E.2d 149, 151 (1996). Section 2 of the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Where it applies, the FAA binds both federal and state courts. *Id.*; see also *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 272 (1995).

In *Zabinski*, the South Carolina Supreme Court instructed as follows:

To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.

Zabinski, 346 S.C. at 597, 553 S.E.2d at 118-119 (citations omitted).

As discussed below, the four criteria required to show that this matter is subject to the FAA and that this matter should be arbitrated are met, and the circuit court erred in not compelling the matter to arbitration. First, there is a dispute between the parties. Second, there is a written agreement (the Design-Build Agreement) that includes an arbitration provision which purports to cover the dispute. Third, the transaction involves interstate commerce. And fourth, USC has failed or neglected to file a claim for arbitration with the American Arbitration Association and instead filed the present civil action. *See Adkins v. Labor Ready, Inc.*, 303 F.3d at 500-01. H.G. Reynolds will further discuss each of the four criteria *infra*.

- 1. The first requirement to compel arbitration has been met that there is a dispute between the parties and the circuit court erred by not compelling the matter to arbitration.**

The first requirement is not at issue. The Complaint and its Amendments evidence a dispute between the parties. USC asserted claims against H.G. Reynolds. H.G. Reynolds, answered and denied that they are liable for the alleged damages. USC has not asserted that this first criteria is not met.

2. The second requirement that there be a written agreement containing an arbitration provision that should be read as covering USC's claims against H.G. Reynolds has been met and the circuit court erred in not compelling arbitration.

a. USC is bound by the arbitration provision in the Design-Build Agreement, and must arbitrate its claims against H.G. Reynolds.

Initially, as outlined in the Brief of UHS which H.G. Reynolds incorporates herein by reference to the extent not inconsistent herewith, and as discussed below, USC is bound by the Design-Build Agreement and the arbitration provision contained therein. Given that USC is bound by the arbitration provision in the Design-Build Agreement, the arbitration provision is broad and includes USC's claims against H.G. Reynolds.

First, H.G. Reynolds will address USC being bound to the Design-Build Agreement. The arbitration provision in the Design-Build Agreement is broad and includes USC's claims against H.G. Reynolds. Therefore, USC must arbitrate its claims against H.G. Reynolds.

b. The circuit court erred when it misapprehended H.G. Reynolds' arguments as to which contract H.G. Reynolds' argued was applicable and contained an arbitration provision which H.G. Reynolds argued bound USC.

The circuit court misapprehended H.G. Reynolds' argument as to which contract bound USC to arbitrate. The circuit court erred in its finding as to the contract between University Housing Services and H.G. Reynolds. H.G. Reynolds has always maintained that USC is bound by the arbitration provision in the Design-Build Agreement and that provision is broad and includes USC's claims against H.G. Reynolds as discussed below.

- c. The circuit court erred by finding that USC was not bound to any agreement to arbitrate because it was neither a party nor a signatory to any agreement with H.G. Reynolds.**

The circuit court found that USC was not bound to any agreement to arbitrate because it was neither a party nor a signatory to any agreement with H.G. Reynolds or UHS. The circuit court came to this erroneous conclusion by finding that “policies favoring arbitration do not apply to the determination of whether there is a valid agreement to arbitrate between the parties. Likewise, the circuit court erred in finding there is no compelling evidence to suggest that the University of South Carolina ever agreed to arbitrate any claims against University Housing Service or H.G. Reynolds Company.” Order Denying Arbitration, pp.3-4.

- i. The FAA and South Carolina State Law heavily favoring arbitration applies to the determination whether a non-signatory can be compelled to arbitrate its claims otherwise subject to the FAA.**

To begin with, the circuit court found that the policy favoring arbitration does not factor into an analysis of the second requirement of the FAA or the determination of whether there is a valid agreement to arbitrate binding USC. (Order Denying Arbitration, p. 3). It appears that the circuit court relied on *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) as precedent for this finding. (Order Denying Arbitration, p. 3).³

The circuit court erred in following the decision of the Fifth Circuit Court of Appeals due to the fact that neither the South Carolina circuit courts, Court of Appeals nor the Supreme Court follow that precedent. Rather, the South Carolina Court of Appeals follows precedent from the Fourth Circuit Court of Appeals. *See Pearson v. Hilton Head Hosp.*, 400

³ While the sentence in the Order Denying Arbitration does not include a citation to a judicial decision; the *Fleetwood Enterprises* decision does stand for that proposition and is cited in another sentence in the order. (Order Denying Arbitration, p. 3).

S.C. 281, 289, 733 S.E.2d 597, 600-01 (Ct. App. 2012) (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000)). Per the Fourth Circuit Court of Appeals, South Carolina law does factor in the policy favoring arbitration into an analysis of the second requirement, where a party seeks to compel a non-signatory to arbitrate. The South Carolina Court of Appeals has stated, "[b]ecause the determination of whether a non-signatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question." *Id.* at 289-90, 733 S.E.2d at 601.

ii. The FAA and South Carolina State law heavily favor arbitration.

Factoring in the FAA policy favoring arbitration into the second requirement of the FAA should have led the circuit court to only one conclusion, which is that USC is required to arbitrate its claims against H.G. Reynolds. South Carolina courts have consistently held that arbitration itself is the favored forum for resolving disputes — particularly for construction cases. The policy of the United States and South Carolina is to favor arbitration of disputes. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. at 384, 759 S.E.2d at 734; *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000). There is a strong presumption in favor of the validity of arbitration agreements based on the strong policy under South Carolina law favoring arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (both federal and state policy favor arbitrating disputes); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (it is the policy of South Carolina to favor arbitration of disputes).

Given that arbitration is heavily favored, the circuit court erred in finding that USC's claims against H.G. Reynolds were not subject to arbitration.

- iii. **The FAA and South Carolina State Law does not require USC to sign an agreement in order to compel USC to arbitrate, and therefore, the circuit court erred in not compelling USC to arbitrate its claims against H.G. Reynolds.**

As argued by UHS in their Brief with those arguments being incorporated herein by reference, whether the FAA or South Carolina policy factors into the second requirement, the FAA and South Carolina law require that USC arbitrate its claims against H.G. Reynolds.

The fact that the Board of Trustees for USC did not sign the Design-Build Agreement does not mean that USC cannot be required to arbitrate pursuant to the FAA. A duty to arbitrate pursuant to the FAA is not limited to only those parties who sign an agreement. The South Carolina Court of Appeals has held that no requirement exists in the FAA or in contract law that a contract must be signed by all parties to be enforceable. *Wilson v. Willis*, 416 S.C. 395, 410, 786 S.E.2d 571, 578-79 (Ct. App. 2016), cert. granted (March 28, 2018) (addressing a claim for arbitration and compelling arbitration). "While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow... that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'" *Pearson v. Hilton Head Hosp.*, 400 S.C. at 288, 733 S.E.2d at 600. "Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause." *Id.* "Well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Id.* at 288, 733 SE.2d at 600 (quoting *Int'l Paper Co.*, 206 F.3d at 416-17).

The South Carolina Supreme Court and the South Carolina Court of Appeals have cited six established theories or principles, recognized by other courts analyzing the FAA, that can be used to compel, a non-signatory, to arbitrate: "1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel." *Pearson v. Hilton Head Hosp.*, 400 S.C. at 289, 733 S.E.2d at 601; *Malloy v. Thompson*, 409 S.C. 557, 562, 762 S.E.2d 690, 692 (2014)("In addition to [the five] theories, some federal courts have recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled to arbitrate as a non-signatory."). Not all must apply. That said, at least four of the six principles apply to the facts in this case and any one principle compels the conclusion that USC is bound by the Design-Build Agreement and is required to arbitrate.

First, the assumption principle binds USC to the Design-Build Agreement. In the Assignment and Assumption Agreement to the Aiken Foundation, Collegiate Housing Properties assigned its rights, interests and obligations in Pacer Commons to the Aiken Foundation:

Section I. Project Assignment. The Assignor does hereby assign to the Assignee, as of the date hereof, and subject to all liens and security interests thereon in favor of Bank of America, N.A. all of Assignor's right, title and interest in the Project and all documents, permits and agreements related to the Project, including, but not limited to, those set forth on Schedule A attached hereto and all of the Assignor's duties and obligations therewith. **The Assignee hereby assumes all the responsibilities of Assignor with respect to the Project under the Loan Agreement.**

(Assignment and Assumption Agreement to the Aiken Foundation, p. 2) (emphasis added).

Thereafter, in the Assignment, Assumption and Consent Agreement to USC, the Aiken Foundation assigned its rights, interests and obligations in Pacer Commons to USC:

Assignment and Assumption. Aiken Student Housing Foundation hereby assigns to the University of South Carolina all of its rights, title and interest in the Lease Agreement, the Demised Premises, all easements granted pursuant to the Lease Agreement, and all obligations thereunder, and all

improvements made to the Demised Premises, said improvements being a student housing facility commonly known as Pacer Commons, and the **University of South Carolina agrees to assume all of Aiken Student Housing Foundation's rights, title and interest in said matters.**

(Assignment, Assumption and Consent Agreement to USC, p. 2) (emphasis added).

USC's actions can also be characterized as an "acceptance". "[I]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Wilson v. Willis*, 416 S.C. at 410, 786 S.E.2d at 578 (quoting *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986)). Further, "[a] contract does not always require the signature of both parties; it may be sufficient[] if signed by one and accepted and acted on by the other." *Id.* 416 S.C. at 409, 786 S.E.2d at 578-79 (quoting *Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975) (stating to give validity to a contract, it is not always necessary that it be signed by both parties, but rather it may be sufficient if one party signed the contract and the other party accepted, held, and acted upon it)).

Second, the estoppel principle binds USC to the Design-Build Agreement which requires USC to arbitrate the dispute. The principle is explained in the following citations. "In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*" *Pearson v. Hilton Head Hosp.*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper Co.*, 206 F.3d at 418) (emphasis in original). "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *Id.* "[A] party may not 'rely on the contract when it works to its

advantage, and repudiate it when it works to its disadvantage." *Id.* 400 S.C. at 295, 733 S.E.2d at 604. "When a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a 'direct benefit' from a contract containing an arbitration clause." *Id.* at 295, 733 S.E.2d at 604.

Here, USC is seeking the direct benefits of the Design-Build Agreement in its suit while simultaneously seeking to avoid the burdens of the same agreement.

Third, the agency principle binds USC to the Design-Build agreement and requires USC to arbitrate. There can be no dispute that USCA is at least an apparent agent of USC. USCA is one of eight campuses of the "University System" and is governed ultimately by the Board of Trustees for USC.⁴ Further, USC is not a bona-fide purchaser or a subsequent purchaser that was not previously involved with Pacer Commons such that it may be unfair somehow to compel arbitration. USC cannot contend that it had no involvement with the development of Pacer Commons prior to the Aiken Commission deeding title to USC. USC has been involved with Pacer Commons from the inception of the project.

Fourth, the third-party beneficiary principle binds USC to the Design-Build Agreement and requires USC to arbitrate. The Design-Build Agreement reads, "2.3 Extent of Agreement. This Agreement is solely for the benefit of the parties and the Lessor and the University, which are third party beneficiaries hereof." (Design-Build Agreement, p. 3 ¶ 2.3). Again, USCA is part of the University System. It is clear that USC's exposure and stature, as

⁴The eight campuses compose the University System. The Columbia campus is the central one. The Chancellor of USCA reports to the President of the University System, who reports to USC's Board of Trustees. The official name of the school system is the University of South Carolina. See University of South Carolina ByLaws promulgated and adopted by the USC Board of Trustees.

an institution of higher education, is greatly improved by having multiple campuses and facilities that can accommodate growth and provide alternatives to students. The ultimate third-party beneficiary in the Design-Build Agreement is USC.

USC is bound to the Design-Build Agreement even though it is a non-signatory since it assumed the Design-Build Agreement; USC is estopped from asserting that the lack of its signature on the Design-Build Agreement precludes enforcement of the Design-Build Agreement's arbitration clause when USC has consistently maintained that other provisions of the Design-Build Agreement should be enforced to benefit USC. The agency principle binds USC to the Design-Build agreement. Additionally, USC is the ultimate third-party beneficiary in the Design-Build Agreement and requires USC to arbitrate. As USC is bound to the Design-Build Agreement, the Agreement is broad and includes USC's claims against H.G. Reynolds as will be discussed below.

3. The third requirement is met, and the circuit court erred in denying the motion to compel arbitration. The development and construction of Pacer Commons involved interstate commerce.

The third criteria to compel arbitration under the FAA is the relationship of the transaction to interstate or foreign commerce, as evidenced by the agreement. The third criteria is met here as the development and construction of Pacer Commons is a transaction involving interstate commerce.

"Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA." *Landers v. Federal Deposit Ins. Co.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)). The United States Supreme Court has interpreted the words "involving commerce" broadly. *Allied-Bruce Terminix Companies, Inc.*, 513 U.S. at 276.

In *Allied-Bruce Terminix Companies, Inc.*, the Court held the words “involving commerce” are the functional equivalent of “affecting commerce,” which typically indicates Congress’ intent to exercise its commerce power in full. *Id.* at 273-74. The FAA extends to the outermost limits of Congress’ constitutional powers under the Commerce Clause. Thus, an arbitration agreement comes within the FAA if it is executed in connection with a transaction that involves interstate commerce in any way, “even if the parties did not contemplate an interstate commerce connection.” *Allied-Bruce Terminix Cos.* 513 U.S. at 281.

The United States Supreme Court “has previously described the [FAA]’s reach expansively as coinciding with that of the Commerce Clause.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 274. The FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. at 285; *Soil Remediation Co. v. Nu—Way Envtl., Inc.*, 323 S.C. at 460, 476 S.E.2d at 152.

In determining whether the FAA applies to an arbitration provision, a court considers whether the contract concerns a transaction involving interstate commerce. *Episcopal Housing Cmp. v. Fed. Ins. Co.*, 269 S.C. at 637, 239 S.E.2d at 650. To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint and the surrounding facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 594, 553 S.E.2d at 117.

The South Carolina Supreme Court has stated the following concerning commerce and a construction project:

We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are

governed by the FAA. *See, e.g., Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (holding that performance required under a contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) (finding contract for construction of a church pertained to a transaction "involving interstate commerce due to the nature of the construction project" and the builders' affidavit swearing the project would involve businesses and supplies from outside of South Carolina).

Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012).

In *Episcopal Housing Corp. v. Fed. Ins. Co.*, *supra*, the contract for the construction of a housing project for the elderly contained a provision for arbitration. The Supreme Court of South Carolina affirmed the circuit court order enforcing this provision of the contract under the Act, giving two reasons for holding that the contract evidenced a transaction involving commerce: (1) contract documents referred to equipment and materials to be furnished from outside South Carolina as well as subcontractors which were from outside this state, and (2) the nature of the project and the actual work to be performed were sufficient to give notice that materials, equipment and supplies from outside South Carolina would be required. *Id.* at 640, 239 S.E.2d at 651-52; *Circle S. Enterprises v. Stanley Smith & Sons*, 288 S.C. 428, 431, 343 S.E.2d 45, 46 (Ct. App. 1986).

In *Circle S. Enterprises* the contract documents, unlike the contract documents in *Episcopal Housing*, did not specifically say that equipment or materials were to be furnished from outside South Carolina and did not refer to subcontractors, either inside or outside the state. *Circle S. Enterprises v. Stanley Smith & Sons*, 288 S.C. at 431, 343 S.E.2d at 47. The Court stated 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.* An affidavit made a part of the record stated

without contradiction that numerous items specified by one of the contract documents were in fact purchased and shipped from outside South Carolina was sufficient. *Id.*

Furthermore, the nature of the project and the work to be performed were sufficient to give notice that materials, equipment and supplies from outside South Carolina would be required. *Id.* The Court found that anyone who knew what would be required to perform the contract in the instant case would also know that it could not be performed without equipment and materials from outside South Carolina. *Id.* at 431-32, 343 S.E.2d at 47. The Court stated that in adherence to the liberal policy favoring arbitration declared by the Federal Arbitration Act, it was holding that the contract evidenced a transaction involving commerce and that the provision of the contract requiring arbitration was enforceable. *Id.* at 432, 343 S.E.2d at 47.

In *Blanton v. Stathos, supra*, Blanton averred that her “design and drawings contemplated the purchase or acquisition of materials and labor from states other than South Carolina, particularly the state of Georgia, due to the proximity of Seneca to the state of Georgia.” *Blanton v. Stathos*, 351 S.C. at 541, 570 S.E.2d at 568-69.

Importantly, she explained: [T]he restaurant plans designed, drawn, and submitted by [Blanton] to Mr. Stathos pursuant to the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce.

Id. at 541, 570 S.E.2d at 569.

Stathos did not dispute Blanton's affidavit. *Id.* The court found the nature of the project and the affidavit by Blanton were sufficient to uphold the decision of the circuit court that the contract evidenced a transaction involving interstate commerce. *Id.* Accordingly, the court concluded that the circuit court judge was correct in confirming the arbitration award. *Id.*

The present case evidences a transaction involving commerce. The construction, design, financing, materials and parties involved in Pacer Commons involve interstate commerce. The contracts at issue on their face evidence interstate commerce.⁵

Jeffrey Reynolds of HG Reynolds submitted an Affidavit dated March 30, 2017. *See* Affidavit of Jeffrey Reynolds. That Affidavit is a listing of the parties involved, material suppliers, and subcontractors for this project. McElroy Specialty Interiors, Inc. was at all relevant times a corporation organized and existing pursuant to the laws of the State of Georgia. *Id.* Southern Walls Systems, Inc. was at all relevant times a corporation organized and existing pursuant to the laws of the State of Georgia. *Id.*

The developer, University Housing Services, was out of Florida and was a Florida corporation. *Id.* The contacts for the developer had telephone numbers and addresses which were out of the State of South Carolina. *Id.*

The architect was from Georgia. *Id.* The architect's contact was in Georgia. *Id.* The subcontractors and material suppliers included subcontractors and material suppliers from Augusta, Georgia; Charlotte, North Carolina; Evans, Georgia; Stockbridge, Georgia; Huntersville, North Carolina; Corona, California; Marietta, Georgia; and Johnston, Rhode Island. *Id.*

The building consisted of 117,300 square feet. The building contains 79 four-person residential apartments with common areas. *Id.* Interstate communications, and products that were manufactured outside the State of South Carolina, were used for the construction of the project at issue. *Id.* Clearly, this project involved interstate commerce such that the third criteria is met and the circuit court erred in not compelling this matter to arbitration.

⁵ H.G. Reynolds incorporates the additional factual arguments asserted by UHS in their Brief.

4. **The fourth criteria is met. USC filed the present civil action instead of a demand for arbitration with the American Arbitration Association.**

It does not appear the fourth requirement is in dispute. USC has failed or neglected to file a claim for arbitration with the American Arbitration Association and instead filed the present civil action.

II. THE CIRCUIT COURT ERRED BY NOT FINDING THAT THE DESIGN-BUILD AGREEMENT THAT USC IS BOUND BY IS BROAD AND INCLUDES ALL OF USC'S CLAIMS AGAINST H.G. REYNOLDS.

The Design-Build Agreement that USC is bound by is broad and includes all of USC's claims against H.G. Reynolds, and the circuit erred by not so holding.

A. The Design-Build Agreement that USC is Bound by is Broad.

The broadness of the scope of the arbitration provision in the Design-Build Agreement includes all of USC's claims against H.G. Reynolds.

The Design-Build Agreement provides as follows:

ARTICLE 12

DISPUTE RESOLUTION

12.2 AGREEMENT TO ARBITRATE. Any controversy or claim arising out of or relating to this Agreement or its breach not resolved by mediation, except for claims that have been waived by the making or acceptance of final payment, shall be decided by arbitration. Such arbitration shall be conducted pursuant to the Construction Industry Arbitration Rules of the American Arbitration Rules of the American Arbitration Association, unless the parties agree otherwise.

...

12.6 MULTIPARTY PROCEEDING. The parties agree that all parties necessary to resolve a claim shall be parties to the same arbitration proceeding. Appropriate provisions shall be included in all other contracts relating to the Work to provide for the consolidation of arbitrations.

(Design-Build Agreement ¶12.2 and ¶12.6).

A clause which provides for arbitration of all disputes "arising out of or relating to" the

contract is construed broadly. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 213-14 (citing *see, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). "Courts have held that such broad clauses are 'capable of an expansive reach.'" *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 214 (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996)).

Both the Fourth Circuit Court of Appeals and the Supreme Court of South Carolina have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 214 (citing *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988)). "Thus, the scope of the clause does 'not limit arbitration to the literal interpretation or performance of the contract. [but] embraces every dispute between the parties having a significant relationship to the contract.'" *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109-10, 739 S.E.2d at 214 (citing *J.J. Ryan*, 863 F.2d at 321).

In applying this standard, the Supreme Court of South Carolina stated that it "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 110, 739 S.E.2d at 214 (citing *J.J. Ryan*, 863 F.2d at 319; *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 597, 553 S.E.2d at 118). "[U]nder the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration

clause.” *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 111, 739 S.E.2d at 214 (citing *see J.J. Ryan*, 863 F.2d at 321 (finding that under the significant relationship test, broad arbitration clause does not limit arbitration to literal interpretation or performance of the contract)).

The law on arbitration is heavily weighted toward compelling arbitration. *See Towles v. United Healthcare Corp.*, 338 S.C. at 37, 524 S.E.2d at 844 (both federal and state policy favor arbitrating disputes). Although the intention of parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 108-09, 739 S.E.2d at 213 (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d at 94). The policy of the United States and South Carolina is to favor arbitration of disputes. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. at 399, 540 S.E.2d at 865. It is the policy of this state and federal law to favor arbitration and “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 213.

There is a strong presumption in favor of the validity of arbitration agreements based on the strong policy under South Carolina law favoring arbitration. *Towles v. United Healthcare Corp.*, 338 S.C. at 36, 524 S.E.2d at 844. The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 213. The presumption in favor of arbitration is strengthened when an arbitration clause is broadly written. *Id.* (citing *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986)). Therefore, unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration must generally be ordered. *Id.*

The Design-Build Agreement provides that, “Any controversy or claim arising out of or relating to this Agreement or its breach” is subject to arbitration. Design-Build Agreement ¶12.2 (emphasis added). The law is clearly established that a clause which provides for arbitration of all disputes "arising out of or relating to" the contract is to be construed broadly. See e.g., *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 213-14; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. at 398 (labeling as "broad" a clause that required arbitration of “[a]ny controversy or claim arising out of or relating to this Agreement”). Therefore, the provision in the Design-Build Agreement must be construed broadly and to include USC’s claims against H.G. Reynolds as discussed *infra*.

B. The Design-Build Agreement that USC is Bound by is Broad and Encompasses All of USC’s Claims Against H.G. Reynolds.

The Design-Build agreement which contains a broad arbitration provision encompasses the entire construction of this large multi-million dollar project and therefore includes USC’s claims against H.G. Reynolds. As discussed *supra*, the provision in the Design-Build Agreement must be construed broadly. Given the required construction, USC is required to arbitrate its claims against H.G. Reynolds.

The Design-Build Agreement provides “PROJECT The Project shall consist of certain housing facilities of the Owner, including buildings, improvements and equipment, which facilities, when completed, will be utilized by the University of South Carolina Aiken (the "University") to house a portion of their student population. The Project is more particularly described in EXHIBIT A hereto.” (Design-Build Agreement Article 1).

“The Developer agrees to procure architectural, engineering, and construction services set forth below, to furnish administration and supervision of the Work and to

assist in obtaining financing for the Project.” (Design-Build Agreement ¶2.1).

“Contract Documents consist of: a. Change Orders and written amendments to this Agreement signed by the Owner and Developer; b. this Agreement; c. the most current Drawings and Specifications approved by the Owner pursuant to Subparagraph 3.1.1; d. the information provided by the Owner pursuant to Clause 4.1.2.1; e. the Owner's Program provided pursuant to Subparagraph 4.1.1.” (Design-Build Agreement ¶2.4).

“Work comprises the completed construction of the Project and includes labor necessary to produce such construction, materials and equipment incorporated or to be incorporated in such construction, the Design and Preconstruction Services procured in accordance with Paragraph 3.1, the Construction Services provided in accordance with Paragraph 3.2, Additional Services in accordance with Paragraph 3.7, and other services which are necessary to complete the Project in accordance with and reasonably inferable from the Contract Documents.” (Design-Build Agreement ¶2.4, #5).

“The Developer shall be responsible for procuring the design and construction of the Work and monitoring and overseeing the performance of the Subcontractors consistent with this Agreement. The Developer shall exercise reasonable skill and judgment in the performance of the Work. The Developer's responsibility and scope of liability shall be the same as if it were performing the work being done by the Subcontractors, but it shall not have to personally perform such work.” (Design-Build Agreement Article 3).

“3.1.5 SUPERVISION. Developer will, both before and during construction, monitor and provide regular and continuous management of the Project and

to exert its best efforts to assure the Project is finished on schedule.” (Design-Build Agreement ¶3.1.5).

“VALUE ENGINEERING. Developer will both prior to and during construction review, or cause to be reviewed, materials, systems, furniture fixtures and equipment for cost, desirability, maintainability and replacement availability in order to achieve cost effective savings for the Owner.” (Design-Build Agreement ¶3.1.8).

“FACULTY OPERATION. The Developer can engage for the Owner the services of an entity experienced in the operation of facilities such as the Project. The Developer will work closely with such entity in developing a plan for the operation of the Project, including projected costs per student, per semester for the use of the Project, along with projected annual increases in that cost.” (Design-Build Agreement ¶3.1.10).

“In order to complete the Work, the Developer shall provide or cause to be provided all necessary construction supervision, inspection, construction equipment, construction labor, materials, tools and subcontracted items.” (Design-Build Agreement ¶3.2.2).

“The Developer shall maintain or cause to be maintained the Schedule of Work. This schedule shall indicate the dates for the start and completion of the various stages of the construction, including the dates when information and approvals are required from the Owner. It shall be revised as required by the conditions of the Work.” (Design-Build Agreement ¶3.2.4).

“The Developer shall assist the Owner in securing the building permits necessary for the construction of the Project.” (Design-Build Agreement ¶3.2.5).

“4.2 RESPONSIBILITIES DURING DESIGN 4.2.1 The Owner shall review and approve in a manner timely so as to meet the Schedule of Work further development of the

drawings and specifications as set forth in Article 3.” (Design-Build Agreement ¶4.2 and ¶4.2.1).

4.3 RESPONSIBILITIES DURING CONSTRUCTION

4.3.1 The Owner shall review the Schedule of Work and timely respond to its obligations. 4.3.2 If the Owner becomes aware of any error, omission or failure to meet the requirements of the Contract Documents or any fault or defect in the Work, the Owner shall give prompt written notice to the Developer. 4.3.3 The Owner shall communicate with the Subcontractors and suppliers only through the Developer or its designee appointed in a writing delivered to Owner. The Owner shall have no contractual obligations to Subcontractors. 4.3.4 The Owner shall provide insurance for the Project as provided in Article 10.

Design-Build Agreement ¶4.3.

4.4 OWNER'S REPRESENTATIVE. The Owner's representative is Tony Ateca who is agreed to by the Developer. The representative:

1. shall be fully acquainted with the Project;
2. agrees to furnish the information and services required of the Owner pursuant to paragraph 4.1 so as not to delay the Developer's Work; and
3. shall have authority to bind the Owner in all matters requiring the Owner's approval, authorization or written notice. If the Owner changes its representative or the representative's authority as listed above, the Owner shall notify the Developer in advance in writing.

Design-Build Agreement ¶4.4.

Article 2.4 DEFINITIONS. “4. Subcontractor is a person or entity (including, without limitation, the Building Contractor, and the Architect/Engineer) that has an agreement with the Developer to perform any portion of the Work....” (Design-Build Agreement ¶2.4, #4).

ARTICLES SUBCONTRACTS

Work not performed by the Developer with its own forces shall be performed by Subcontractors.

5.1 SUBCONTRACTORS. The Developer shall not retain any Subcontractors whom the Owner has a reasonable and timely objection, provided that the Owner agrees to adjust the Contract Price for any additional costs incurred by the Developer as a result of such objection. The Developer shall not be required to retain any Subcontractor to whom the Developer has a reasonable objection.

5.2 MANAGEMENT OF SUBCONTRACTORS. The Developer shall be responsible for the management of the Subcontractors in the performance of their work.

5.3 ASSIGNMENT OF SUBCONTRACT AGREEMENTS. The Developer shall provide for assignment of subcontract agreements to the Owner in the event that the Owner terminates this Agreement for cause as provided in paragraph 11.2. Following such termination, the Owner shall notify in writing those Subcontractors whose assignments will be accepted, subject to the rights of sureties, if any.

Design-Build Agreement Article 5.

Article 6 defines the commencement of the work and the substantial completion of the work which is the entire project. (Design-Build Agreement Article 6). The contract price was Twelve Million Four Hundred Forty Three Thousand Six Hundred Seventy Nine Dollars (\$12,443,679) which included the construction of the entire project.

(Design-Build Agreement Article 7).

In addition, ¶13.6 provides:

13.6 THIRD PARTY BENEFICIARIES. The Owner and Developer agree that the Owner is an intended third-party beneficiary of all contracts for design, engineering, and construction services between the Developer and third parties. The Developer shall include a provision in its contracts for design and construction services that the Owner is a third-party beneficiary of the services provided thereby. It is further understood that the Architect and Contractor, though contractually obligated to the Developer, are working for the benefit of the Owner. The Architect will perform project administration services for the benefit of both the Owner and the Developer.

Design-Build Agreement ¶13.6.

“To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. [Citations omitted].

Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, arbitration should be ordered.” *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 563-64, 437 S.E.2d 22, 25 (1993).

A motion to compel arbitration should only be denied where the subject arbitration clause is not susceptible to any interpretation, which would cover the asserted dispute. *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 597, 553 S.E.2d at 118-19; *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 213 (“any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”). Arbitrability determinations are subject to *de novo* review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. at 379, 759 S.E.2d at 731. “However, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” *Id.* “[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Id.* (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. at 91).

Landers concerned the scope of an arbitration clause under the Federal Arbitration Act (FAA). *Landers v. Federal Deposit Ins. Corp.*, *supra*. Respondent Christopher Landers served as Appellant Atlantic Bank & Trust’s executive vice president pursuant to an employment contract. *Id.* at 103, 739 S.E.2d at 210. The contract contained a broad arbitration provision, requiring arbitration of “any controversy or claim arising out of or relating to this contract, or breach thereof.” *Id.* In the underlying action, Landers alleged five causes of action. *Id.* Appellants moved to compel arbitration pursuant to the employment contract. *Id.* The trial court found that only Landers’ breach of contract claim was subject to the arbitration provision, while his other four causes of action of slander/slander per se, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion as a director comprised of several tort and corporate claims were not within the scope of the arbitration clause. *Id.*

The Supreme Court disagreed and found that the claims, including the tort claims, were within the scope of the agreement’s broad arbitration provision, and held that all of Landers’

causes of action must be arbitrated. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 112, 739 S.E.2d at 215. The agreement at issue provided, “Except matters contemplated by Section 17 below [Applicable Law and Choice of Forum], *any controversy or claim arising out of relating to this contract, or the breach thereof*, shall be settled by binding arbitration” *Id.* at 104, 739 S.E.2d at 211 (emphasis in original). The Court stated that “[g]enerally, any arbitration agreement affecting interstate commerce, such as the one at issue, is subject to the FAA.” *Id.* at 108, 739 S.E.2d at 213. Once it is determined that the FAA applies to a dispute, federal substantive law regarding arbitrability controls. *Id.* at 108, 739 S.E.2d at 213 (citing *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA].”))

To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Parsons v. John Weiland Homes*, 418 S.C. 1, 7, 791 S.E.2d 128, 131 (2016). “[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d at 92 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989)); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. at 597, 553 S.E.2d at 118 (“To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim.”). When the scope of an arbitration clause remains “open to question” regarding the

inclusion of a particular issue, a court must declare that the issue is subject to arbitration.

Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d at 812.

The Design-Build Agreement, which contains a broad arbitration provision, encompasses the entire construction of this large multi-million dollar project. The Design-Build Agreement as discussed above is replete with examples that the agreement encompasses the entire project. *See e.g.*, Design-Build Agreement Article 1 (project definition as including all of the construction of the building); Design-Build Agreement ¶2.4, #5 (“Work comprises the completed construction of the Project and includes labor necessary to produce such construction, materials and equipment incorporated or to be incorporated in such construction, the Design and Preconstruction Services procured in accordance with Paragraph 3.1, the Construction Services provided in accordance with Paragraph 3.2, Additional Services in accordance with Paragraph 3.7, and other services which are necessary to complete the Project in accordance with and reasonably inferable from the Contract Documents.”).

In *Landers, supra*, the Court held the arbitration provision which contains the same language as the arbitration provision in the Design-Build Agreement was a broad arbitration provision, requiring arbitration of “any controversy or claim arising out of or relating to this contract, or breach thereof.” The Supreme Court of South Carolina held that not only was Landers’ breach of contract claim subject to the arbitration provision, but his other four causes of action of slander/slander per se, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion as a director comprised of several tort and corporate claims were within the scope of the arbitration clause. The Supreme Court so held because of the broadness of the arbitration provision. The same language is contained within the arbitration at

issue here and must be broadly construed and would include USC's allegations against H.G. Reynolds.

USC alleged as follows (H.G. does not concede or admit any of the below but for the purposes of this Brief lists USC's allegations). USC is a government body created under S.C. Code § 59-56-10, et seq. of the laws of South Carolina and is the owner of the University of South Carolina Aiken Pacer Commons dormitory student housing (the "Subject Property"). (Second Amended Complaint ¶ 1). The building houses 316 residents and contains 79 four person residential apartments, with associated lounges, computer room, game room, and laundry area. (Second Amended Complaint ¶ 1).

USC further alleges this is a construction defects matter arising from alleged negligent design and construction of the Pacer Commons student-housing dormitory at University of South Carolina Aiken. (Second Amended Complaint ¶ 10). Upon information and belief, construction of the Subject Property commenced in or around August 18, 2003, and was substantially complete in or around 2004. (Second Amended Complaint ¶ 21).

Upon information and belief, University Housing Services, Inc. acted as developer for the Subject Property, and was responsible for coordination, hiring of contractors, and supervision of construction. (Second Amended Complaint ¶ 22). Upon information and belief, H.G. Reynolds Co., Inc. acted as general contractor for the Subject Property, and was responsible for coordination and supervision of construction. (Second Amended Complaint ¶ 3). Upon information and belief, Southern Wall Systems, Inc. installed the stucco, waterproofing, flashings, or other related appurtenances at the Subject Property, and otherwise observed construction of same. (Second Amended Complaint ¶ 24). Upon information and belief, McElroy Specialty Interiors, Inc. installed the framing, masonry, decks, windows and doors,

building wrap, flashings, or related appurtenances at the Subject Property, and otherwise observed construction of same. (Second Amended Complaint ¶ 25). Upon information and belief, Defendant Broadwater installed the masonry, building wrap, flashings, and related appurtenances at the Subject Property, and otherwise observed construction of same. (Second Amended Complaint ¶ 26). Upon information and belief, Defendant San-Glo supplied and installed the storefront windows and doors, flashings, and related appurtenances at the Subject Property, and otherwise observed construction of same. (Second Amended Complaint ¶ 27). Upon information and belief, Defendant Bell Siding & Roofing installed the roofing components, subcomponents, waterproofing, and related flashings or appurtenances at the Subject Property, and otherwise observed construction of same. (Second Amended Complaint ¶ 28). Upon information and belief, Croft Hill Siding, Inc. installed the gutters, downspouts, waterproofing, and related flashings or appurtenances at the Subject Property, and otherwise observed construction of same. (Second Amended Complaint ¶ 29). Upon information and belief, East Coast Painting, Inc. worked as an exterior painter, and caulker at the Subject Property, and otherwise observed same. (Second Amended Complaint ¶ 30).

USC alleges that the Subject Property contains numerous design and construction defects. (Second Amended Complaint ¶ 32). USC alleges H.G. Reynolds Co., Inc. owed duties to USC to exercise the degree of skill necessary to construct, supervise, and review the design and otherwise deliver the Subject Property free of construction and design defects and in conformity with customary and ordinary standards of the building and construction industry. (Second Amended Complaint ¶ 47). USC alleges that the deficiencies and defects which exist at the Subject Property are the proximate and direct result of the negligence and/or gross negligence of H. G. Reynolds Co., Inc., as general contractor, in one or more of the following particulars:

- a) In failing to properly construct the Subject Property by deviating from the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards; using defective materials; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturers' instructions;
- b) In failing to properly supervise the subcontractors and/or other trades in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry;
- c) In accepting non-conforming or defective materials;
- d) In accepting and performing deficient and/or defective workmanship and/or materials without proper inspection to ensure the work was correct and in conformity with industry standards and in accordance with the plans and specifications and the manufacturers' instructions;
- e) In failing to inform the architect and/or owner of defects in the plans and specifications;
- f) In constructing the Subject Property in violation of applicable building codes; and
- g) In failing to act as a reasonable and prudent general contractor would have acted under the circumstances then and there existing.

(Amended Complaint ¶ 48).

USC alleges that H.G. Reynolds Co., Inc. provided construction services to the Subject Property which were accompanied implied warranties. (Second Amended Complaint ¶ 46).

USC alleged all of the defendants were negligent in the development and construction of Pacer Commons. (Second Amended Complaint). USC alleged breach of warranties in the development and construction of Pacer Commons. (Second Amended Complaint).

The Design-Build Agreement provides that, "Any controversy or claim arising out of or relating to this Agreement or its breach" is subject to arbitration. USC's allegations in the Amended Complaint come well within the breadth of the phrase "*[a]ny controversy or claim arising out of or relating to this Agreement or its breach.*" This language is to be broadly construed. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 213-14 (a clause which provides for arbitration of all disputes "arising out of or relating to" the contract is

construed broadly). Therefore, the provision at issue in this case is capable of expansive reach. *See Landers v. Federal Deposit Ins. Corp., supra.*

The Design-Build Agreement is broad and includes the construction of the entire project. The Design-Build agreement is replete with the evidence that the agreement was for the construction and development of the entire project and would include the claims as asserted by USC as discussed *supra*. *See Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 114, 739 S.E.2d at 216 (“Similarly here, *Landers*’ pleadings link the alleged illegal proxy solicitation to his wrongful termination and the resulting breach of the Agreement. Thus, we conclude his illegal proxy solicitation claim is significantly related to the Agreement. Moreover, this Court cannot say with positive assurance that the proxy cause of action is not within the scope of the arbitration clause. Because any doubt must be resolved in favor of arbitration, we reverse the trial court and find *Landers*’ illegal proxy solicitation claim must be arbitrated”).

As both the Fourth Circuit Court of Appeals and the Supreme Court of South Carolina have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained, the claims against of USC clearly fall within the broadly worded arbitration provision. *See Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 214. The scope of the clause at issue does “not limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship to the contract.” *See Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109-10, 739 S.E.2d at 214. The alleged dispute at issue concerns the construction of the project which clearly bears a significant relationship to the design-build contract which is all inclusive as the cited provisions above illustrate. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 111, 739

S.E.2d at 214 (Under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause (citing *see J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d at 321 (finding that under the significant relationship test, broad arbitration clause does not limit arbitration to literal interpretation or performance of the contract))). Accordingly, this Court should reverse the circuit court’s order denying H.G. Reynolds’ Motion to Compel Arbitration and should find that USC must arbitrate its claims against H.G. Reynolds.

C. H.G. Reynolds, A Non-Signatory, Can Bind USC to the Arbitration Provision in the Design-Build Agreement.

Once it has been determined that the arbitration provision that USC is bound by is broad and includes the claims against H.G. Reynolds, the next issue is whether H.G. Reynolds can bind USC to the arbitration provision in the Design-Build Agreement since H.G. Reynolds is a non-signatory, which it can as discussed *infra*.

- 1. The language in the arbitration provision that USC must arbitrate any controversy or claim “arising out of or relating to” the Design-Build Agreement includes USC’s claims against the non-signatory Defendant H.G. Reynolds.**

This was a project developed and constructed pursuant to a design-build contract. One of the commonly touted benefits of the design-build delivery approach is the “single-point” responsibility when things go wrong. 8 Bruner & O’Connor Construction Law § 21:173 *Arbitration disputes under design-build contracts* (2016). In other words, the owner avoids the “finger pointing” between the design professional and contractor under the design-build delivery model because the design and construction responsibilities reside in one entity—the design-builder. *Id.* A common variant of this delivery approach is for the design-builder to subcontract the design services to a licensed architect or engineer. *Id.*

In *Cunningham Hamilton Quiter, P.A. v. B.L. of Miami, Inc.*, 776 So.2d 940 (Fla. 3d DCA 2000), Cunningham Group Construction Services, LLC (CGCS) and B.L. of Miami, Inc., (B.L.) entered into a signed, written agreement (“Design-Build contract”) for the design and construction of B.L.’s entertainment complex with CGCS. The Design-Build contract provided for arbitration of “[a]ny controversy or claim arising out of or relating to this Agreement or its breach.” *Id.* at 941. It further provided that “all parties necessary to resolve a claim shall be parties to the same arbitration proceeding. *Id.* Appropriate provisions shall be included in other contracts relating to the Work to provide for the consolidation of arbitrations.” *Id.* After a dispute arose between the parties, B.L. (owner) instituted arbitration proceedings against CGCS (design-builder) and filed suit against Cunningham (architect). *Id.* at 942. Cunningham moved to dismiss and compel arbitration pursuant to the arbitration clause in the Design-Build contract. The trial court denied the motion. *Id.* The District Court of Appeal of Florida, reversed. *Id.*

B.L. (owner) argued that it could not be forced to arbitrate its claims against Cunningham (architect) because there was no signed contract directly between the parties. *Id.* The court stated that it is well established that the courts broadly construe arbitration provisions containing the language, “arising out of or relating to,” such that in certain instances the clause will include non-signatories. *Id.* at 942. Such an instance is presented here. *Id.* The Design-Build arbitration clause, by its own words, provided for inclusion of “necessary parties” in arbitration. *Id.* The Court stated that because B.L.’s claims were intertwined with the Design-Build contract, Cunningham was a necessary party to the arbitration. *Id.*

The court in *Cunningham* stated that it was clear that the parties intended to settle disputes by arbitration rather than through the courts. *Id.* The Design-Build contract specifically named Cunningham as the architect/engineer to be retained by CGCS and provided

that subcontracts must contain an arbitration provision similar to that in the Design-Build contract. *Id.* The Design-Build contract obligated Cuningham to agree to arbitration. *Id.* The subcontract between Cuningham and CGCS did, in fact, contain the required arbitration clause and incorporated by reference the Design-Build contract. *Id.* This requirement that subcontracts must contain arbitration clauses, together with the “necessary parties” clause, express B.L.’s intent to arbitrate disputes with subcontractors, specifically Cuningham, pursuant to the Design-Build agreement. *Id.*

B.L. argued that its claims do not “arise out of or relate to” the Design-Build contract. The Court disagreed. *Id.* at 943. B.L.’s claims for professional malpractice, negligent misrepresentation, and fraud stem from the same allegations, namely, that Cuningham negligently failed to perform its duties during the pre-design stage and that Cuningham “self-serving[ly]” misadvised B.L. to retain CGCS, Cuningham’s affiliate. *Id.* Therefore, the Court found that all of the claims were subject to arbitration. *Id.*

The present matter involves a design-build agreement with the design-builder subcontracting the design services to a licensed architect or engineer and the building to a general contractor. The Design-Build Agreement required arbitration. The Design-Build Agreement provides “[t]he parties agree that all parties necessary to resolve a claim shall be parties to the same arbitration proceeding. Appropriate provisions shall be included in all other contracts relating to the Work to provide for the consolidation of arbitrations.” Design-Build Agreement ¶ 12.6. UHS and H.G. Reynolds putative contract included the clause for arbitration. *See* General Conditions § 4.6 of University Housing Services and H.G. Reynolds’ Putative Contract. This fulfills the requirement in the Design-Build Agreement ¶ 12.6. This inclusion in the putative contract between UHS and H.G. Reynolds is consistent with ¶ 13.6 of the Design-Build Agreement which provides:

13.6 THIRD PARTY BENEFICIARIES. The Owner and Developer agree that the Owner is an intended third-party beneficiary of all contracts for design, engineering, and construction services between the Developer and third parties. The Developer shall include a provision in its contracts for design and construction services that the Owner is a third-party beneficiary of the services provided thereby. It is further understood that the Architect and Contractor, though contractually obligated to the Developer, are working for the benefit of the Owner. The Architect will perform project administration services for the benefit of both the Owner and the Developer.

Design-Build Agreement ¶ 13.6.

The contract that UHS argues is applicable between UHS and H.G. Reynolds provided that “3.1 Collegiate Housing Properties, Inc., a non-profit Florida corporation, is and [sic] intended third-party beneficiary of the services provided under this Agreement.” *See* University Housing Services and H.G. Reynolds’ Putative Contract with General Conditions. The putative contract allows for consolidation.

Accordingly, *Cunningham* is applicable to this present situation. The arbitration provision in the Design-Build agreement in *Cunningham* is the same as the Design-Build Agreement in this case. Both the arbitration provision in *Cunningham* and in the present case provide that “all parties necessary to resolve a claim shall be parties to the same arbitration proceeding.” Both provided for “[a]ppropriate provisions shall be included in other contracts relating to the Work to provide for the consolidation of arbitrations.” In *Cunningham*, the owner also argued that it could not be forced to arbitrate its claims against *Cunningham* (architect) because there was no signed contract directly between the parties, but the court found that courts should broadly construe arbitration provisions containing the language, “arising out of or relating to,” such that in certain instances the clause will include non-signatories. *Id.* at 942. The *Cunningham* court found that such an instance was presented there. The same instance is presented in this case. The *Cunningham* court found that the Design-Build arbitration clause, by its own words, provided for inclusion of “necessary parties” in arbitration, which is also provided for in the present case. *See id.*

The owner in *Cunningham* who was bound to the design-build agreement had to arbitrate its claims against a non-signatory. The owner in this case, USC, is bound to the broad arbitration provision and must arbitrate its claims against all parties including the non-signatory, H.G. Reynolds. Therefore, the motion to compel arbitration should have been granted, and the circuit court erred when it did not compel arbitration.

2. The arbitration provision can be enforced by non-signatories (H.G. Reynolds) such that USC's claims against H.G. Reynolds are subject to arbitration.

Although USC did not sign a contract directly with H.G. Reynolds, USC should be compelled to arbitrate its claims against H.G. Reynolds since it is bound by the Design-Build agreement as discussed *supra* and in UHS' Brief. As USC is bound to the arbitration provision, H.G. Reynolds as a non-signatory can enforce the arbitration provision.

“Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” *Wilson v. Willis*, 416 S.C. at 417, 786 S.E.2d at 582.

In *Wilson v. Willis*, *supra*, which is currently pending before the Supreme Court in a Petition for Writ of Certiorari, the Insurers filed motions to compel arbitration and dismiss the suits, seeking to apply against the Insureds (non-signatories) and Agents (non-signatories) an arbitration provision from a 2010 agency agreement (the 2010 Agency Agreement) the Insurers entered into with Southern Risk (also did not sign). *Wilson v. Willis*, 416 S.C. at 407, 786 S.E.2d at 577. The Court found that no requirement exists under the Federal Arbitration Act or in contract law that a contract must be signed by all parties to be enforceable. *Id.* (citing *Jaffe v. Gibbons*, 290 S.C. at 473, 351 S.E.2d at 346 and *Peddler, Inc. v. Rikard*, 266 S.C. at 32, 221 S.E.2d at 117). Arbitration is a matter of contract, and a party cannot be required to submit to

arbitration any dispute that the party has not agreed to submit. *Id.* (citing *Chassereau v. Glob.–Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005)). Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement.” *Id.* (citing *Chassereau v. Glob.–Sun Pools, Inc.*, 363 S.C. at 632, 611 S.E.2d at 307 quoting *Zabinski*, 346 S.C. at 596–97, 553 S.E.2d at 118)). Unless the parties contract otherwise, the FAA applies to any arbitration agreement involving interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Id.* (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)).

The Court found that although Southern Risk did not sign the 2010 Agency Agreement, the agreement—as well as the arbitration provision contained therein—was valid and binding upon the parties. *Id.* at 411, 786 S.E.2d at 579 (citing *Poteat v. Rich Prods. Corp.*, 91 Fed. Appx. 832, 834 (4th Cir. 2004) (finding an agreement to arbitrate enforceable under South Carolina law, despite the fact that the employer never signed the agreement containing the arbitration provision)).

In their memoranda in *Wilson v. Willis*, the Insureds and Agents asserted no valid or enforceable agreement to arbitrate existed because the agreement upon which the Insurers based their motion was not signed by any representative of Southern Risk. *Id.* at 407, 786 S.E.2d at 577. The Insureds and Agents further alleged they were not signatories or parties to the 2010 Agency Agreement, and their claims against the Insurers did not fall within the arbitration clause in the agreement. *Id.* The Court found that notwithstanding the accuracy of those facts, there was a valid and enforceable arbitration provision that would bind all of the parties. The same holding applies in this case.

USC's claims which arise from the Design-Build contract require USC to arbitrate its claims against H.G. Reynolds given the broadness of the arbitration clause as discussed *supra*. It is immaterial that H.G. Reynolds did not sign an agreement with USC. The arbitration provision is valid and binding upon USC and its claims against H.G. Reynolds.

III. THE CIRCUIT COURT ERRED IN GRANTING USC'S MOTION TO AMEND ITS FIRST AMENDED COMPLAINT TO WITHDRAW ITS BREACH OF CONTRACT CAUSE OF ACTION.

The circuit court ruled that USC may amend its First Amended Complaint to withdraw its breach of contract cause of action without prejudice. (Order Granting Leave to File Second Amended Complaint filed May 19, 2017). H.G. Reynolds incorporates by reference UHS' arguments to any extent that the circuit court's ruling allowing USC to withdraw its breach of contract claim without prejudice prejudices H.G. Reynolds' rights to compel arbitration.


INCORPORATION

H.G. Reynolds hereby incorporates and joins in all arguments made and factual basis asserted by UHS that are not inconsistent with H.G. Reynolds' position.

CONCLUSION

USC is bound by the arbitration provision in the Design-Build Agreement. Given that USC is bound by the arbitration provision in the Design-Build Agreement, the arbitration provision is broad and includes USC's claims against H.G. Reynolds. Accordingly, the circuit court erred in finding that USC was not bound by the arbitration provision in the Design-Build Agreement, and erred in finding that the arbitration provisions did not include USC's claims against H.G. Reynolds.

October 19, 2018



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Case No. 2016-CP-02-02339
Appellate Case No.: 2018-001039

University of South Carolina Aiken.....Respondent.

V.

University Housing Services, Inc., H.G. Reynolds Company, Inc., Southern Wall Systems, Inc.,
McElroy Specialty Interiors, Inc., Crosby Broadwater d/b/a Broadwater Construction, Tim
Stephens d/b/a Sa-Glo Carolina a/k/a San-Glo Glass, Inc., William Bell d/b/a Bell Siding &
Roofing a/k/a Bell Siding & Roofing, LLC, Croft Hill Siding, Inc., East Coast Painting, Inc.,
and John Doe 3 Defendants.

University Housing Services, Inc. Third-Party Plaintiff,

V.

Aiken, Aiken, Beauchamp and Sheetz Architects, Inc. Third-Party Defendant.

Of which University Housing Services, Inc. and H.G. Reynolds Company, Inc.
are the Appellants.

APPELLANT H.G. REYNOLDS COMPANY, INC.'S PROOF OF SERVICE OF INITIAL
BRIEF

I certify that I have served the Initial Brief on Respondent and all Counsel of Record by depositing a copy of it in the United States Mail, postage prepaid, on October 19, 2018 addressed to their attorneys of record, listed as follows:

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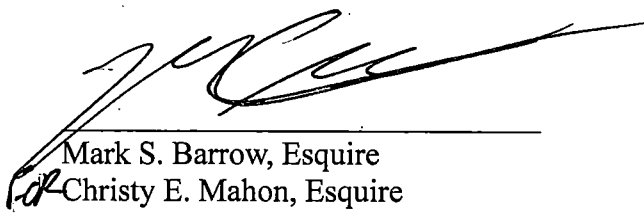
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October 19, 2018

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VIA HAND DELIVERY

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RE: University of South Carolina- Aiken v. H G Reynolds Company, Inc., et al.
Appellate Case No.: 2018-001039
Civil Action No.: 2016-CP-02-02339
Our File: 1395-10472

Dear Ms. Kitchings:

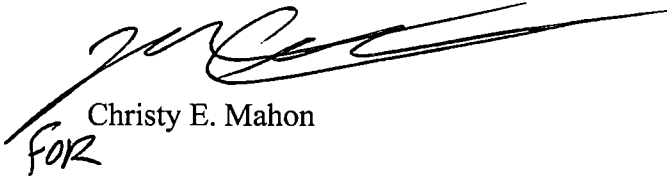
Enclosed for filing is the Initial Brief of Appellant H G Reynolds Company, Inc. with Proof of Service, and the Designation of Matter with Proof of Service in the above case. Please file the originals and return a filed copy to the courier.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.


Christy E. Mahon

FOR

CEM/mha
Enclosures

October 19, 2018

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