IN THE MISSOURI SUPREME COURT

DUNN INDUSTRIAL GROUP, INC., DUNN INDUSTRIES, INC.,	)	
Respondents,	)	
vs.	)	**Case No. SC85024**
CITY OF SUGAR CREEK, MISSOURI, ET AL.,	)	
Defendants,	)	
LAFARGE CORPORATION,	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT INDEPENDENCE HONORABLE W. STEPHEN NIXON, DIVISION NO. 5

SUBSTITUTE BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

This appeal arises from the trial court's order denying motions to stay litigation and to compel arbitration and granting a motion to stay arbitration. Missouri law provides this Court with jurisdiction to hear the appeal from those parts of the Order denying an application to compel arbitration and granting an application to stay arbitration. *See* R.S.Mo. § 435.440.1(1)-(2) (2000). Missouri law does not provide jurisdiction to hear an appeal of the denial of the Motion to Stay litigation.

The creation of the right to appeal the order denying a motion to stay the trial court proceedings can only arise by statute. *See* Mo. R. C. P. 81.01; *Starnes v. Aetna Cas. & Sur. Co.*, 503 S.W.2d 129, 130 (Mo. App. 1973) (right to any appeal "is purely statutory"). The Western District's opinion candidly acknowledges that under the Missouri Uniform Arbitration Act, "a denial of a motion to stay proceedings pending arbitration is not appealable in Missouri under section 435.440, R.S.Mo. 2000" Opinion, p. 6; Laf. App. A21.[1]

Rather than dismiss the appeal of this narrow issue, as the Missouri statute would appear to require, the Western District instead determined that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), empowered the Western District to hear an appeal of a trial court's order denying a motion to stay the civil action. In so holding, the Western District relied on three Missouri appellate decisions: *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 228 n. 1 (Mo. App. W.D. 2002); *VCW, Inc. v. Mutual Risk Management,*

[1] References to Appellant Lafarge's Appendix are denominated "Laf. App. XX."

Ltd., 46 S.W.3d 118, 121-22 (Mo.App. W.D. 2001); *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182, 186-87 (Mo. App. E.D. 1999).

The plain language of the FAA and the United States Supreme Court's interpretations of its terms govern whether the FAA provides a state appeals court with jurisdiction to review an appeal of a trial court order denying a stay of the proceedings. The three Missouri cases relied on by the Western District to support its jurisdictional authority reached their conclusions without even mentioning, much less analyzing, the language of the FAA. Respondent has reviewed the briefs submitted by each party in *Getz*, *VCW*, and *Mueller*, and *no party* alerted the appellate courts to the FAA's language limiting the application of section 3 of the FAA (concerning such stays) to "courts of the United States."

Although Section 16(a)(1)(A) of the FAA provides that "[a]n appeal may be taken from an order refusing a stay of any action under Section 3 of this title," the relevant text of Section 3 limits that grant of jurisdiction to actions initiated in *federal* courts:

> if any suit or proceeding be brought in *any of the courts of the United States* upon any issue referable to arbitration under an agreement of writing for such arbitration the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

9 U.S.C. § 3 (emphasis added).

The United States Supreme Court has expressly declined to decide whether Sections 3 and 4 of the Federal Arbitration Act apply in *state court* actions. In fact, "the United States Supreme Court has repeatedly indicated that sections 3 and 4 of the Act do not apply in state courts." *Blue Cross of California v. Superior Court of Los Angeles County*, 78 Cal. Rptr. 2d 779, 790-791 (Cal. Ct. App. 1998); *see also Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468, 476-477 (footnote omitted) (1989);[2] *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 625 (Md. 2001) (Maryland's highest court provides a detailed analysis of language and case law on issue); *Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349, 360 (S.C. 2002), *cert. granted*, 154 L.Ed.2d 766 (2003) (the United States Supreme Court "has never held that sections 3 and 4 of the FAA applied to state courts"). In fact, it appears that the only *state* supreme court to fully address the issue has held that sections 3 and 4 of the FAA do *not* apply to the state courts. *See Wells*, 768 A.2d at 625.

[2] In *Volt*, the Court explained: "While we have held that the FAA's 'substantive' provisions – Sections 1 and 2 are applicable in state as well as federal court, we have never held that Sections 3 and 4, *which by their terms appear to apply only to proceedings in federal court*, are nonetheless applicable in state court." *Id.* (emphasis added).

To counter the language of the statute, the language by the Supreme Court in its 1989 decision in *Volt*, *and* the recent line of cases holding that section 3 of the FAA does not apply to state court proceedings, Lafarge relies on two state appeals court cases predating the seminal *Volt* decision[3] and two cases from intermediate appellate courts in New York and Minnesota, none of which offer any discussion, analysis, or even mention of the applicability of section 3 to state court actions in light of the Supreme Court's comments in *Volt*.[4] The *Churchill* case offers no instruction at all on the issue and the court in *Davis* denies a party's motion to compel expedited arbitration and merely restates the pre-*Volt* language of *Moses H. Cone*. In light of the authority on which it relies, Lafarge's criticism of the detailed jurisdictional analysis of both Maryland's highest court and the California Court of Appeals as "not supported by sound interpretative reasoning"[5] is mystifying.

Further, under Lafarge's interpretation of § 3 of the FAA, when Congress used the language "courts *of* the United States" what Congress *really* meant was "courts *in* the United States." "Of" is not synonymous with "in" – "of" is used "as a function word to

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[3] *Loche v. Dean Witter Reynolds, Inc.*, 526 N.E.2d 1296 (Mass. App. Ct. 1988); *C P & Associates v. Pickett*, 697 S.W.2d 828, 831 (Tex. Civ. App. 1985); App. Br. at 28-29.

[4] *Davis v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 625 N.Y.S.2d 795 (S. Ct. 1994); *Churchill Env. and Ind. Equity Partners, L.P. v. Ernst & Young, L.L.P.*, 643 N.W.2d 333, 336 (Minn. Ct. App. 2002).

[5] App. Br. at 35.

indicate belonging or a possessive relationship {king ~ England}." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 819 (1983). "In" is "used as a function word to indicate inclusion, location, or position within limits {~ the lake}." *Id.* at 607. Under Lafarge's interpretation, any court included within the borders of the United States, including courts like the Jackson County municipal courts, the Greene County drug court, and the Pettis County family law court, would be required under supreme federal law to exercise jurisdiction over applications brought under section 3 of the FAA.[6] This is not what Congress said, and certainly not what Congress could have intended. Courts should resist "reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538 (1994) (Court's task is "to apply the text, not to improve upon it.").

Finally, Lafarge's lengthy arguments as to why, from a policy perspective, the trial court must lose jurisdiction over all aspects of the case pending Lafarge's appeal misconstrue the very nature of an interlocutory appeal. Lafarge's argument that "*each and every dispute and issue* between the parties is properly within the Jurisdiction of this Court"[7] is simply wrong. Lafarge's appeal is limited and interlocutory in nature. Missouri law and federal law are in agreement that an interlocutory appeal does not

[6] "Congress intended that the substantive stay requirement apply in every court of the United States, whether federal or state." App. Br. at 34.

[7] App. Br. at 38 (emphasis in original).

deprive the trial court of jurisdiction except with respect to the limited matter that is the subject of the appeal. In Missouri, this rule is particularly well-settled. As stated by a Missouri Court of Appeals in 1910:

> It would seem to be the true rule that, whatever the judgment below legitimately covers, the appeal embraces, and the jurisdiction of the lower court over all matters so covered and embraced is suspended pending the appeal; and *that matters independent of and distinct from the questions involved in the appeal are not taken from the jurisdiction of the trial court. State ex. rel. Riefling v. Sale*, 133 S.W. 119 (Mo.App. 1910); *see also Lardinois v. Lardinois*, 852 S.W.2d 872, 873 (Mo. App. 1993) (matters distinct from issue on appeal remain with trial court).

Federal law is on all fours with this rule. As noted by the Eighth Circuit Court of Appeals, a notice of appeal divests the district court of jurisdiction of only "those aspects of the case involved in the appeal." *Liddell v. Board of Education,* 73 F.3rd 819, 822 (8th Cir. 1996) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see also* Manual for Complex Litigation § 25.12 (3d ed. 1995); *United States v. Weber*, 1997 WL 61442 (W.D. Mo. 1997) (citing *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990)).

The trial court thus retains jurisdiction to proceed with the substantive issues that are not the subject of Lafarge's narrow appeal. As Lafarge's notice of appeal makes clear, Lafarge's appeal is limited to the narrow issue of arbitrability.[8] There is thus nothing to prevent the Court from allowing discovery to proceed, or from allowing those claims clearly not subject to any arbitration clause to go forward. As stated by the United States Supreme Court, the issue of arbitrability is "easily severable from the merits of the underlying dispute." *Moses H. Cone Memorial Hosp. v. Mercury Construction*, 460 U.S. 1, 21 (1983) (the "Hospital will have to litigate the arbitrability issue in federal rather than state court, that dispute is easily severable from the merits of the underlying disputes"). As the language in the *Moses H. Cone Memorial Hospital* decision makes clear, because the issue of arbitrability is readily severable from the case on the merits,

[8] In its Notice of Appeal, Lafarge lists as the issues on Appeal:

> (1) Whether the Circuit Court erred when it denied Lafarge's Motion to Stay Litigation and Compel Arbitration when the Contract between Lafarge and DIG contains a written provision calling for the parties to arbitrate claims and disputes?
>
> (2) Whether the Circuit Court erred when it granted the Joint Motion to Stay Arbitration of DIG and Dunn, when the Contract between Lafarge and DIG contains a written provision calling for the parties to arbitrate claims and disputes, and that arbitration agreement was incorporated into Dunn's Guaranty?

when the only substantive issue in an appeal is the issue of arbitrability, the trial court is "not divested of jurisdiction to proceed with the case on the merits." *Britton*, 916 F.2d at 1412. Lafarge's arguments that the trial court lacks jurisdiction to proceed with those aspects of the case that are not part of the interlocutory appeal is wholly without merit, and not supported by Missouri law, or even the weight of federal authority.

Jurisdiction is appropriate for the appeal of the denial of the motion to compel arbitration and grant of the motion to stay arbitration. However, because the right to appeal in Missouri is purely statutory, this Court lacks jurisdiction under the Missouri Uniform Arbitration Act to entertain an appeal of an Order denying a motion to stay civil litigation.

STATEMENT OF FACTS

Respondents believe Appellant's Statement of Facts contains certain errors and omissions. Pursuant to Mo.R.C.P. 84.04(f), Respondents provide the following statement of facts.

Appellant Lafarge Corporation ("Lafarge" or "Appellant")[9] appeals the trial court's Order of November 15, 2001 denying Lafarge's Motion to Stay Litigation and Compel Arbitration and granting the Joint Motion of Dunn Industries, Inc. ("Dunn") and Dunn Industrial Group, Inc. ("DIG") to Stay Arbitration. L.F. 861; App. p. A-1[10].

The October Change Order modified the Contract between Lafarge and DIG.

There is no dispute that the original contract document, executed in June of 1999 by Lafarge and DIG, contains an arbitration provision. L.F. 481. However, in October of 2000, Lafarge and DIG, following three weeks of negotiations and exchanges of numerous drafts of proposed terms, agreed to Change Order CO61-071, also known as the "October 2000 Change Order." Robert Burcham, president of DIG, and Peter Cooke,

[9] Lafarge is the North American Subsidiary of the Lafarge Group, a large, French, multinational corporation. *See* www.lafarge.com.

[10] Pertinent portions of the Legal File, including the foregoing Order, are reproduced in the Appendix of this brief for the convenience of the court, and references thereto are designated as "App. p. XX".

executive vice president of Lafarge, executed the Change Order.[11] The October 2000 Change Order arose from a meeting on October 4, 2000 in which many of DIG's outstanding claims on the Project ("PCO's") were addressed. L.F. 498. During the October 4, 2000 meeting, the parties discussed and negotiated the dispute resolution procedures applicable to DIG's claims. L.F. 498. After the October 4 meeting, DIG and Lafarge exchanged significant correspondence and conducted additional negotiations concerning the Change Order and the dispute resolution procedures that would govern the parties' relationship. L.F. 497 – 501.

On October 18, 2000, DIG delivered a letter to Lafarge enclosing a proposed Change Order resulting from the October 4, 2000 meeting and as a response to a proposed Change Order prepared by Lafarge. L.F. 498, 512-526. In the October 18, 2000 version of the proposed Change Order, DIG deleted Lafarge's language in paragraph III(d), which had stated that arbitration was the only method for dispute resolution. L.F. 524. In its place, DIG added that "either party, at any time, may resort to their respective contract remedies or remedies as provided by law." L.F. 524.

To ensure that Lafarge was fully aware of all changes that were made in the October 18, 2000 version of the proposed Change Order, DIG enclosed with the October 18, 2000 letter a redlined (also referred to as a "black lined") version of the Change Order, which indicated the revisions that had been made to Lafarge's October 13, 2000

[11] A true and accurate copy of the Change Order is found in the Legal File at pages 375-387, App. pp. A-2 – A-14.

proposal. L.F. 521-525. The red lined version highlighting the modifications made in paragraph III(d) is reproduced here:

> Lafarge and DIG agree to first attempt to resolve the [disputed] PCO's on the PCO List by negotiation~~{. However, at the option of either party, arbitration in accordance with the Contract may be demanded at any time for any or all of the unresolved PCO's on the PCO List.}~~[, however, either party, at any time, may resort to their respective contract remedies or remedies as provided by law.][12]

The first full paragraph of the executed October Change Order provides:

> Except as modified herein, all terms and conditions of the Contract remain in full force and effect and are incorporated into this Change Order as if fully set forth herein. In the event of any conflict or ambiguity between the terms of this Change Order and the Contract, the terms of this Change Order shall prevail.[13]

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[12] A true and accurate copy of the October 18, 2000 letter and its attachments are contained in the Legal File at pp. 512-526 and are contained in the Appendix. App. pp. A-15 – A-28.

[13] L.F. 379; App. p. A-6.

The Action at Law.

On March 28, 2001, Respondent DIG filed in the Circuit Court of Jackson County its multi-count Petition against Lafarge and the City of Sugar Creek. L.F. 1. On pages ten and eleven of its Petition, DIG listed the PCO's that form the basis of its claims against Lafarge. L.F. 10 - 11. The only PCOs listed on pages ten and eleven of DIG's Petition, which were not contained in the PCO list attached to the October Change Order, are the PCOs numbered 287, 289, 292, 293, 295, and 304. L.F. 501

Lafarge's Request for Interim Relief with the AAA.

In October 2001, DIG's mechanical and electrical contractors refused to continue work on anything other than base scope of work, and refused to work on changed or added work. S.L.F. 009.[14] In order to determine whether DIG and its subcontractors had a right to stop work on the Project, DIG consented and agreed to an arbitration to resolve this narrow issue of contract interpretation. In its Answering Statement to the American Arbitration Association, DIG stated "DIG does not consent to arbitration of all disputes between DIG and Lafarge; rather, as stated in its Motion to Stay Arbitration pending before the Circuit Court of Jackson County, DIG believes the parties have altered the agreement to arbitrate certain disputes." S.L.F. 012.

Dunn's Guaranty.

On June 15, 1999, Dunn executed a contract guarantee to Lafarge Canada, Inc. ("Lafarge Canada"). L.F. 560-561; App. p. A-29 – A-30. The contract guarantee does

[14] The Supplemental Legal File is referred to in this Brief as "S.L.F."

not contain an arbitration clause, nor did it specifically incorporate by reference any arbitration clause in any other contract. App. p. A-29 – A-30. The Guaranty provides that Dunn's obligations "shall terminate no later than two years from the date [of execution] hereof." Section 2 of Guaranty, App. p. A-29.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR IN DENYING APPELLANT'S MOTION TO STAY LITIGATION AND COMPEL ARBITRATION BECAUSE (A) MISSOURI'S EQUITABLE MECHANIC'S LIEN STATUTE VESTS EXCLUSIVE JURISDICTION WITH THE CIRCUIT COURT FOR THE COUNTY WHERE THE LIENED PROPERTY IS LOCATED FOR ALL CLAIMS, IS NOT PREEMPTED BY THE FEDERAL ARBITRATION ACT, IN THAT THE MISSOURI STATUTE AND FEDERAL STATUTE MAY BE READ IN HARMONY AND (B) APPELLANT AGREED THAT RESPONDENT DUNN INDUSTRIAL GROUP, INC., COULD BRING AN ACTION AT LAW FOR ITS CLAIMS ON THE PROJECT IN THAT APPELLANT ENTERED INTO A CHANGE ORDER THAT CHANGED THE TERMS OF DISPUTE RESOLUTION PROCEDURES OF THE CONTRACT.

State ex rel. Great Lakes Steel v. Sartorius, 249 S.W.2d 853 (Mo. banc 1952)

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University, 489 U.S. at 476-477 (1989).

Paul v. Jackson, 910 S.W.2d 286, 291 (Mo. App. W.D. 1995)

Rhodes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 427 N.Y.S.2d 826, 827 (N.Y. App. Div. 1980).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR ERR IN GRANTING RESPONDENT'S MOTION TO STAY THE ARBITRATION PROCEEDING INITIATED BY LAFARGE BECAUSE (1) NEITHER RESPONDENT DUNN INDUSTRIAL GROUP NOR DUNN INDUSTRIES WERE BOUND BY CONTRACT TO ARBITRATE THE MATTERS RAISED BY THE PROCEEDING IN THAT DUNN INDUSTRIES NEVER AGREED TO ARBITRATE PROJECT DISPUTES WITH LAFARGE AND THE OCTOBER CHANGE ORDER CHANGED THE DISPUTE RESOLUTION PROCEDURES FOR DIG FOR PROJECT DISPUTES AND (2) THE ARBITRATION PROCEEDING IS BARRED BY MISSOURI'S PROCEDURAL RULES PERTAINING TO COMPULSORY COUNTERCLAIMS AND BY THE MISSOURI EQUITABLE LIEN STATUTE IN THAT THE ARBITRATION PROCEEDINGS BY LAFARGE WERE BROUGHT AFTER THE EQUITABLE LIEN ACTION BEGAN AND CONCERNED THE SAME CONSTRUCTION PROJECT THAT IS THE SUBJECT OF THE PREVIOUSLY-FILED EQUITABLE LIEN ACTION.

AgGrow Oils, L.L.C. v. National Union Fire Ins. Co., 242 F.3d 777, 780 (8th Cir. 2001).

Grundstad v. Ritt, 106 F.3d 201, 204 (7th Cir. 1997).

Central City Ltd. Partnership v. United Postal Savings Association, 903 S.W.2d 179, 183 (Mo. App. 1995).

Evergreen Nat'l Corp. v. Killian Constr. Co., 876 S.W.2d 633, 635 (Mo. App. W.D. 1994).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR IN DENYING APPELLANT'S MOTION TO STAY LITIGATION AND COMPEL ARBITRATION BECAUSE (A) MISSOURI'S EQUITABLE MECHANIC'S LIEN STATUTE VESTS EXCLUSIVE JURISDICTION WITH THE CIRCUIT COURT FOR THE COUNTY WHERE THE LIENED PROPERTY IS LOCATED FOR ALL CLAIMS, IS NOT PREEMPTED BY THE FEDERAL ARBITRATION ACT, IN THAT THE MISSOURI STATUTE AND FEDERAL STATUTE MAY BE READ IN HARMONY AND (B) APPELLANT AGREED THAT RESPONDENT DUNN INDUSTRIAL GROUP, INC., COULD BRING AN ACTION AT LAW FOR ITS CLAIMS ON THE PROJECT IN THAT APPELLANT ENTERED INTO A CHANGE ORDER THAT CHANGED THE TERMS OF DISPUTE RESOLUTION PROCEDURES OF THE CONTRACT.

Summary of the Argument

As explained more fully below, the trial court did not err in following the plain terms of the Missouri equitable mechanic's lien statute. That statute unambiguously places exclusive jurisdiction for all claims related to the property subject to the liens in the circuit court for the county in which the property is located. R.S.Mo. §§ 429.270, 429.300. The statute further instructs that *all other actions* brought on any mechanic's

lien claim against the same property *must be stayed* and all parties are to be joined in one equitable action for determination. R.S.Mo. § 429.300 (emphasis added).[15]

This Court has previously held that once an equitable mechanic's lien action is filed, the circuit court hearing the action has exclusive jurisdiction for any lien claims *or* contract claims concerning that same liened project. *State ex rel. Great Lakes Steel v. Sartorius*, 249 S.W.2d 853 (Mo. banc 1952); *see also State ex rel. Clayton Greens Nursing Center, Inc. v. Marsh*, 634 S.W.2d 462, 464 (Mo. banc 1982) (breach of contract suit filed in separate proceeding from equitable lien action could not be maintained where causes arose out of the same construction project); *State ex rel. Kirkwood Excavating, Inc. v. Stussie*, 689 S.W.2d 131, 133 (Mo. App. 1985) ("breach of contract suit arising out of a construction project cannot be maintained. . . if an equitable lien action has been filed"); *State ex rel. Power Process Piping, Inc. v. Dalton*, 681 S.W.2d 514 (Mo. App. 1984) (allowing contract claimants to intervene in pending mechanic's lien action because lien action was exclusive forum for resolution of their claims); *Evergreen Nat'l Corp. v. Killian Constr. Co.*, 876 S.W.2d 633, 635 (Mo. App. W.D. 1994) (refusing to apply a contractual forum selection clause that would have permitted a contract claim to be tried outside a pending mechanic's lien action). As this Court explained, the words of

[15] A similar state statutory provision was at issue in *Volt* where a California statute allowed the state court to stay claims that otherwise would be subject to arbitration, if third parties are involved who would not be bound by arbitration results, and there is the possibility of conflicting rulings on a common issue of law or fact. *Volt*, 489 U.S. at 471.

the equitable lien statute encompass both the lien claim and the underlying contract claim: "the lien prayed for is but incidental to the money judgment prayed for, in that the lien claimant must have either a money judgment or *a finding of indebtedness* to support the adjudication of his lien. In other words, a mechanic's lien suit or action must *always involve both elements*." 249 S.W.2d at 854 (emphasis added) (quoting *Richards Brick Co. v. Wright*, 82 S.W.2d 274, 281 (Mo.App. 1935)). Accordingly, the trial court here did not err in complying with the terms of the statute and the prior opinions of this Court. The "finding of indebtedness" that DIG or Lafarge would obtain in any arbitration proceeding is the exactly the type of action, suit or demand that is stayed by Missouri's equitable lien statute.

Further, the FAA does not preempt the exclusive jurisdiction provisions of Missouri's mechanic's lien statute as it applies to lien and contract claims generally; the Missouri statute neither focuses on, nor discriminates against, arbitration agreements.

Concerning Lafarge's contract claims, Lafarge cannot establish that any valid or binding arbitration agreement exists that governs all claims raised by DIG in its Petition. Thus, the trial court did not err in denying Lafarge's motion to compel arbitration. As of October 4, 2000, the Executive Vice President for Lafarge, Peter H. Cooke, and the President of DIG, Robert F. Burcham, executed Change Order number CO061-071, the "October Change Order." This Change Order fundamentally affected the parties' rights and obligations under the existing contract for the Lafarge Sugar Creek Project. The Change Order contractually addresses the dispute resolution mechanism of nearly all of the proposed Change Orders that are the subject of plaintiff DIG's Petition.

Lafarge continues to misunderstand the fundamental nature of a Change Order to a Contract. The central thrust of the Lafarge's argument is that the October Change Order and the Contract document should be read as a single document, and the terms and provisions of each document must be harmonized together. "We start with the four corners of the Contract and October Change Order." App. Br. 35. This method of interpretation is contrary to the express terms of the October Change Order, contrary to applicable law, and contrary to common sense.

The language of this Change Order provided that in the event of any conflict or ambiguity between the Change Order and Contract "the terms of this Change Order shall prevail."[16] By their very nature, Change Orders change, replace, annul or alter underlying Contract obligations. The remedial provisions of the Contract, which admittedly contained an arbitration clause, were changed by the terms of the October Change Order. It is, after all, a CHANGE order to the terms of the original agreement.

In addressing the potential change orders (PCOs), which are the subject of the Petition, Lafarge and DIG specifically agreed to "first attempt to resolve the items marked on the PCO list by negotiation; however, either party, at any time, may resort to their respective contract remedies *or remedies as provided by law.*" (Change Order, p. 4, App p. A-6) (emphasis added). To the extent any contract remedy provided for or required arbitration, the Change Order modified and rescinded any obligation by DIG to arbitrate the PCO disputes at issue with Lafarge and freed DIG to proceed with this

[16] L.F. 379; App. p. A-6.

action at law. Accordingly, the trial court did not err in denying Lafarge's motion to compel arbitration.

A. Standard of Review

The standard of review articulated by Appellant on page 63 of its Brief is incomplete, and fails to provide appropriate deference to Missouri law.

Lafarge concludes without analysis that the appropriate standard of review is guided by federal law, and makes reference to decisions concerning the FAA. App. Br. at 63-66. Lafarge's argument on this issue is in error – as more fully explained in DIG's arguments on jurisdiction,[17] the United States Supreme Court has stated that the FAA's *substantive* provisions are applicable to the states, but has never held that the *procedural* provisions of the FAA are similarly applicable to state courts. *Volt*, 489 U.S. 476-477 (footnote omitted). Further, various courts, including the Supreme Court, have determined that the standard of appellate review is a *procedural* matter and thus presumptively a question of state, rather than federal, law. "Our conclusion that the standard of review used by state courts is presumptively a question of state law is supported by the fact that federal appellate courts characterize the standard of review as a matter of procedural, rather than substantive, law in analogous situations." *State v. Thurman*, 846 P.2d 1256, 1267 (Utah 1993); *see also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712 (1986) (state courts "not required" to apply Federal Rule 52 in reviewing state trial court determinations in federal Fair Labor Standards Act cases); *Milstead v. Diamond M Offshore, Inc.*, 676 So.2d 89, 95-96 (La. 1996) ("it is

obvious that standards of appellate review are procedural in nature"); *Maxwell v. Olsen*, 468 P.2d 48, 52-53 (Alaska 1970) ("questions pertaining to the scope of appellate review are procedural in nature"); *Felder v. United States*, 543 F.2d 657, 664 (9th Cir. 1976) ("standard of appellate review is a procedural matter in which the forum will utilize its own standards even when it is applying the substantive law of another jurisdiction").

Motions for stay and motions to compel are classic requests for injunctive relief. *See State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996); *Commission Row Club v. Lambert*, 161 S.W.2d 732, 736 (Mo. App. 1942); *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 370 (10th Cir. 1996); *Miller v. British Am. Assur. Co.*, 119 S.E.2d 527, 532 (S.C. 1961). Under settled *Missouri* law, appellate review of judgments granting or denying injunctive relief is the same as appellate review of an order or judgment in any court-tried case. *Home Shopping Club, Inc. v. Roberts Broadcasting Co.*, 989 S.W.2d 174, 177 (Mo. App. 1998); *see also Marshall v. Green Giant Co.*, 942 F.2d 539, 548 (8th Cir. 1991) (review of issues are the same as review after bench trial). As such, the trial court's judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The trial court's findings and determinations are entitled to greater deference under Missouri law than suggested by Lafarge.

Even under cases interpreting the FAA, the trial court's findings are entitled to greater deference than that employed by the Western District Court or suggested by

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[17] Pp. 11 – 13, *supra*.

Lafarge in its brief. DIG agrees that when a trial court determines the arbitrability of a dispute *strictly* on the basis of contract interpretation, the Court's review is *de novo*. *See Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir. 2001); *PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C.*, 225 F.3d 974, 978 (8th Cir. 2000). However, the governing authorities interpreting the Federal Arbitration Act make clear that if the trial court's findings or order is based on factual findings or the resolution of disputed issues of fact, review is for clear error. *See Lyster*, 239 F.3d at 945; *PCS Nitrogen Fertilizer*, 225 F.3d at 978; *see also Moses.com Securities, Inc. v. Comprehensive Software Sys., Inc.*, 263 F.3d 783, 784 (8th Cir. 2001).

Further, it is within the court's inherent power to stay proceedings "in order to control its docket, conserve judicial resources, and provide for the just determination of the cases pending before it." *Webb v. R. Rowland & Co., Inc.*, 800 F.2d 803, 808 (8th Cir. 1986). Accordingly, when a court weighs such issues as economy, docket control, and whether a stay would advance the just determination of the case, "the decision whether to grant or deny a request for stay is a matter lying within the sound discretion of the district court which will be overturned only upon a clear showing of an abuse of that discretion." *Id.*; *see also Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1518 (10th Cir. 1995) (*citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, n.23 (1983)).

Under these rules, the appropriate standard of review must be determined. At the trial level, prior to the entry of the Order, neither party requested findings of fact and conclusions of law from the trial court. When a trial court does not specify reasons for its

Order, the appellate court presumes that the trial court acted for one of the reasons stated in the Respondent's pleadings, and the judgment should be affirmed under any reasonable theory supported by the evidence. *See Consolidated Financial Invs., Inc. v. Manion*, 948 S.W.2d 222 (Mo. App. E.D. 1997); *see also Warren v. Tom,* 946 S.W.2d 754 (Mo. App. S.D. 1997); *Jensen v. Borton*, 734 S.W.2d 580 (Mo. App. W.D. 1987).

Based on the breadth of the parties' pleadings, the evidence offered by the parties pursuant to Missouri Rule 55.28,[18] and the oral arguments presented to Judge Nixon, he necessarily resolved fact issues in order to determine the intent of the parties in rewriting the dispute resolution mechanisms of their contractual relationship. In its briefs, affidavits and exhibits before the trial court, and on this appeal, Lafarge offered extensive evidence of "extrinsic facts and circumstances" which were and are designed to aid the trial court and this Court in not only interpreting the language of the Change Order but discerning the disputed intent of the parties in making the agreement. *See, e.g.*, App. Br. 50 - 51; L.F. 78-85, 96. In fact, ***two*** of the ***six*** volumes of the Legal File on Appeal are *wholly devoted* to *Lafarge's evidence* (exhibits and affidavits) designed to explain Lafarge's and DIG's intent in signing the October Change Order. *See* Vol. II, III; L.F. 109-473. In its brief to this Court, Lafarge downplays this evidence as merely the "ebb and flow" of the negotiations concerning the October Change Order. *See* App. Br. 50, n. 6. Appellant Lafarge, though, relied on the ambiguity of the October Change Order to

[18] Missouri Rule 55.28 states : "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties . . ."

introduce statements by DIG's representatives and counsel to support their arguments on the intent of the parties concerning the negotiations of the remedies available under the October Change Order. *See* App. Br. 103 ("DIG effectively acknowledged that the language of the October Change Order was not intended to abrogate the duty to arbitrate"). DIG disputed the factual allegations and evidence offered by Lafarge and, in response to Lafarge's evidence, DIG offered evidence of the intent of the parties in preparing the language of the October Change Order. L.F. 497 – 534.

Lafarge's argument before this Court that DIG's evidence "did not relate to the *parties'* intent, but instead dealt with its *own intent*" is specious at best.[19] In the trial court, Lafarge offered evidence of the intent of the parties from its perspective and DIG replied with the same. Further, at the time of the briefings to the trial court on this issue, no discovery had been conducted (in fact, Lafarge had moved to stay any discovery) and so for DIG to provide the trial court with Lafarge's documents to indicate Lafarge's intent would have been a procedural impossibility. Through its offer of evidence on the intent of the parties, which Lafarge, at oral argument before the Court of Appeals and in its brief to this Court,[20] concedes is wholly appropriate to discern intent, Lafarge placed into issue the fact dispute of the parties' intent in executing the October Change Order.

In its Order, the trial court resolved these disputed issues of fact in favor of DIG and against Lafarge. Under Missouri law, this Court's review is deferential and limited

[19] App. Br., p. 59, n. 9 (emphasis in original).

[20] App. Br. at 99-100.

to whether such determinations are against the weight of the evidence. Under Federal law, the standard of review would be for *clear error*. In neither case is the standard *de novo*, as Lafarge suggests.

Additionally, the issues of whether a stay of the trial proceedings or the stay of the arbitration would increase the cost, length and complexity of this action involving multiple parties, many of whom have no colorable right to arbitrate, were vigorously controverted by the parties in their pleadings and during oral argument of the motions. L.F. 837-839. The trial court's Order necessarily resolved the disputed issues of judicial efficiency and inconsistent results in favor of Respondents. L.F. 837 – 839 (DIG's argument regarding this issue); L.F. 817 (Lafarge argues that non-arbitrating parties will not be impacted). Accordingly, this Court reviews for abuse of discretion the trial court's Order granting the motion to stay the arbitration proceedings. *See Webb v. R. Rowland & Co., Inc.*, 800 F.2d at 808. Further, should this Court hold that it has jurisdiction to review the denial of the motion to stay the civil proceedings, its review of the trial court's Order denying the stay of the civil action would be for abuse of discretion as well.[21]

B. After determining that, as a result of the October Change Order, the vast majority of DIG's claims were no longer subject to mandatory arbitration, the trial court did not abuse its discretion or otherwise err in finding that <u>all</u> claims brought by DIG were appropriately within

[21] No Missouri statute provides this Court with jurisdiction to review a trial court's Order denying a motion to stay civil proceedings. *See* Jurisdictional Statement, *supra*.

the jurisdiction of the Circuit Court, as the plain language of the Missouri equitable lien statute and the interests of judicial economy, fair and just docket control, and concerns of fairness to all non-arbitrating parties, supported the trial court's Order.

1. The Trial Court Properly Interpreted the Express Terms of the Missouri Mechanics' Lien Statute so That all Pending and Subsequently Filed Lien Claims Would be Consistently and Economically Resolved in This Action.

Once an equitable lien action is initiated, the Missouri mechanic's lien statute places exclusive jurisdiction for claims in the circuit court of the county where the liened property is located. The Missouri lien statute unambiguously provides that the exclusive jurisdiction for equitable mechanic's lien claims resides in the circuit court of the county where the liened property is located. R.S.Mo. §§ 429.270, 429.300. The statute further instructs that all other actions brought on any mechanic's lien claim against the same property *must be stayed* and all parties are to be joined in one equitable action for determination. R.S.Mo. § 429.300 (emphasis added).[22] In relevant part, the statute provides:

[22] A similar state statutory provision was at issue in *Volt*, *infra*, where a California statute allowed the state court to stay claims that otherwise would be subject to arbitration, if third parties are involved who would not be bound by arbitration results, and there is the possibility of conflicting rulings on a common issue of law or fact. *Volt*, 489 U.S. at 471.

> The equitable action above provided for shall be brought in the proper court of record regardless of the amount claimed by the plaintiff or plaintiffs in such action, and all other suits that may have been brought on any mechanic's lien claim or demand shall be stayed and no further prosecuted, and the parties in any such other suit shall be made parties to such equitable action as in the foregoing sections provided …. R.S.Mo. § 429.300.

a. The FAA does not preempt the exclusive jurisdiction provisions of Missouri's mechanic's lien statute as it applies to lien and contract claims generally; the Missouri statute neither focuses on, nor discriminates against, arbitration agreements.

DIG acknowledges that the Project at issue involves interstate commerce; therefore, the arbitration agreement is to be construed in light of the FAA. Simply because the FAA applies to the interpretation of the alleged arbitration agreement, however, does not suggest that the FAA preempts the Missouri mechanic's lien law. Lafarge's argument on this issue misconstrues the preemptive scope of the FAA.

The opinion in *Paul v. Jackson*, 910 S.W.2d 286, 291 (Mo. App. W.D. 1995), is a valuable guide to determining whether the FAA preempts the exclusive jurisdiction provisions of Missouri's lien statute. *Paul* confirms that the trial court did not err in its

conclusions as set out in the Order of November 15, 2001, because neither express preemption, implied preemption, nor conflict preemption is present here.

(i) The Federal Arbitration Act does not expressly preempt the states from applying local mechanic's lien laws to resolve disputes regarding property within that state.

"Express preemption is found where Congress has made it unmistakably clear by statute, or in legislative history, or in regulations promulgated pursuant to statute, that its enactments alone are to regulate a certain area of law." *Paul*, 910 S.W.2d at 290. Lafarge does not and cannot claim that the FAA expressly preempts the state of Missouri from enforcing its mechanic's lien laws. The United States Supreme Court has stated: "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration" *Volt*, 489 U.S. at 477. The FAA does not expressly preempt the entire field of arbitration law, much less preempt the historic state interests of property rights and property ownership.

(ii) The Federal Arbitration Act does not occupy the field of dispute resolution so as to impliedly preempt the states from applying mechanic lien laws in a manner requiring that claims associated with the liens be tried and resolved in the county where the property is located.

The second type of preemption is implied preemption, which is found where "Congress has legislatively occupied an entire field of law, thereby implying that additional or contrary state regulation is impermissible." *Paul*, 910 S.W.2d at 291. The Supreme Court begins any analysis of preemption with the "starting presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 654 (1995). "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). Further, the ownership of property is a field of traditional state regulation. *Paul*, 910 S.W.2d at 291 (property rights are an area traditionally occupied by the states). Accordingly, where federal law (the FAA) is said to bar state action (Missouri's lien statute) in fields of traditional state regulation (property ownership), the Supreme Court works "on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Travelers*, 514 U.S. at 655; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470,

496 - *Paul,* 910 S.W.2d at 291; *White v. Medical Review Consultants*, 831 S.W.2d 662, 664 (Mo. App. W.D. 1992).

The crucial inquiry, accordingly, is whether it is the clear and manifest purpose of Congress that the FAA so occupy the field of dispute resolution so as to bar Missouri from enforcing its mechanic's lien law, a law that places exclusive jurisdiction for the resolution of claims affecting the subject property in a single court, in the county where the real property is located, for the resolution of all such issues in a single proceeding. As noted, the United States Supreme Court has already answered this question in the negative. "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477.

Further, no court in the United States has ever found that the FAA preempted a state's mechanic's lien law. Contrast this dearth of authority with cases where mechanic's lien laws have been held preempted by Federal statutes with sweeping preemption language, like ERISA.[23] *EKLECCO v. Iron Workers Locals 40, 361 & 417 Union Security Funds*, 170 F.3d 353 (2d Cir. 1999) (broad preemptive scope of ERISA preempts New York Lien law); *McCoy v. Massachusetts Inst. of Tech*., 950 F.2d 13 (1st Cir. 1991) (ERISA preempts mechanic lien law). Unlike those federal statutes with broad preemption clauses, however, the FAA does not preempt all state laws that touch on, or

[23] The text of section 514 of ERISA is "clearly expansive" and preempts "all state laws insofar as they relate to any employee benefit plan." *Travelers*, 514 U.S. at 655 (*quoting* § 514 (a)).

relate to, the issue of arbitration agreements. *Compare EKLECCO* (broad preemptive scope of ERISA preempts New York Lien law) *with Volt*, 489 U.S. at 477 ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration").

There is absolutely no indication that Congress intended the FAA to so occupy the field of dispute resolution that it would supplant state mechanic lien laws that place exclusive jurisdiction for the resolution of claims affecting the property in a single court for the resolution in a single proceeding. The language of the FAA does not even remotely indicate that the FAA should have such a broad preemptive sweep over such matters that are a traditional state concern. The Supreme Court instead flatly holds otherwise. There is no implied preemption by the FAA of Missouri's mechanic's lien statute.

(iii) Because the provisions of the Federal Arbitration Act are not in irreconcilable conflict with Missouri's equitable mechanic's lien law, the exclusive jurisdiction provisions of the lien law are not preempted under conflict preemption analysis.

The third type of preemption, conflict preemption, is a form of implied preemption that arises from the fact that application of the state law at issue would necessarily and irreconcilably conflict with the enforcement of the federal law, and "hence the state law must be held to be preempted." *Paul*, 910 S.W.2d at 292. As a form of implied preemption, conflict preemption will not be lightly presumed, particularly where "it is

alleged that a conflict exists between federal law and an area of law normally reserved for the states – in this case property rights and nuisance laws." *Id.* DIG contends that the area of law at issue here (matters affecting title to real estate) are similarly "normally reserved for the states."

Lafarge apparently argues that conflict preemption applies, because it claims the exclusive jurisdiction provisions of Missouri's lien statute "cannot be applied so as to preclude arbitration required by the FAA." App. Br. at 90. Lafarge misunderstands the apparent intent of the FAA. The FAA does not *require* the arbitration of all disputes; rather, the Supreme Court has repeatedly stated the purpose of the Act is simply to preclude "states from singling out arbitration provisions for suspect status, requiring instead such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

Applying the exclusive jurisdiction provisions of the Missouri lien statute does not single out arbitration provisions for "suspect status." *See Doctor's Assocs., Inc.*, 517 U.S. at 687. Nor does it in any way diminish the validity of an agreement to arbitrate. Under the Missouri statute, arbitration agreements are treated identically to all other clauses that select the venue or forum for the resolution of claims.[24] The Missouri statute reasonably

[24] Once an equitable lien action is filed, the exclusive jurisdiction of the circuit court in a equitable lien action trumps private agreements which select an alternate forum for the

provides that because competing property rights of third parties are at issue, a single forum to resolve all claims in one exclusive, efficient and consistent manner must exist. The provisions of the FAA do not usurp such a sovereign state legislative determination. Instead, the limited preemption of the FAA focuses only on those statutes that target arbitration for less favorable treatment. "The common denominator of the recent Supreme Court decisions that have held state laws preempted by § 2 of the FAA seems to be that those state statutes have targeted agreements to arbitrate and treated them less favorably than other contracts." *Wells*, 768 A.2d at 627 (discussing *Southland, Volt, Doctor's Assocs., Allied-Bruce Terminex, Perry*).[25] The Missouri mechanic's lien statute *does not* target arbitration agreements or otherwise treat them any less favorably than any other private contract clause.

2. The Missouri Equitable Lien Statute and Section 2 of the FAA can be harmonized.

Section 2 of the FAA states that arbitration agreements are "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 (2000) (emphasis added). The Missouri equitable lien statute is

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resolution of construction disputes. *See Evergreen Nat'l Corp. v. Killian Constr. Co.*, 876 S.W.2d 633, 635 (Mo. App. W.D. 1994).

[25] *Southland*, 461 U.S. 1; *Volt*, 489 U.S. 468; *Doctor's Assocs.*, 517 U.S. at 686; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, (1995); *Perry v. Thomas*, 482 U.S. 483, (1987); (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

simply a “ground at law” for the revocation of any contract that attempts to select a forum or venue for the resolution of equitable lien claims. As such, the lien statute can be harmonized with the provisions of the FAA. Lafarge’s argument fails to reconcile the language of Section 2 of the FAA with the exclusive jurisdiction provisions of the Missouri equitable lien statute.

The Missouri lien statute is a “ground at law” for the revocation of any forum selection agreement in a contract. "Revocation" is defined by Black's Law Dictionary, Sixth Edition (1990) as "The withdrawal or recall of some power, authority or thing granted ....” Prior to the passage of the equitable lien statute, parties could enforce their forum selection clauses or venue agreements in cases involving mechanic's liens on Missouri property. After the passage of the equitable lien statute, however, that right to select a forum or venue has been revoked at law. *See Evergreen Nat’l Corp*, 876 S.W.2d 633 (Mo. App. W.D. 1994). To grant or allow arbitration agreements superior treatment to other private forum selection clauses would be to place arbitration agreements on superior footing to like contract provisions. Such a preference for arbitration agreements was never the intent of Congress in enacting the FAA. “The Act was designed to make arbitration agreements as enforceable as other contracts, *but not more so*.” *Volt*, 489 U.S. at 478 (emphasis added) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

Thus, the United States Supreme Court’s analysis in *Travelers* and *Volt*, the ability to harmonize Missouri’s equitable lien statute with Section 2 of the FAA, and the analysis in *Paul* by the Court of Appeals, combine to conclusively show that:

- Application of Missouri's exclusive jurisdiction provisions of its mechanics' lien statute neither impinges on nor thwarts the intent of Congress in enacting the FAA;
- The determination by the Missouri legislature that such exclusive jurisdiction should prevail over private contractual rights when the circumstances attendant with an equitable mechanics lien are presented is applied equally to any private forum selection contract clause;
- The control of title to real estate and resolution of conflicts concerning title to real estate are matters particularly reserved to the states.

On this record, the Missouri equitable lien provision could never "undermine the goals and policies of the FAA," and the Missouri statute should thus be applied. *See Volt*, 489 U.S. at 477-78 (holding that the FAA did not preempt a California statute allowing a stay of arbitration).

3. The trial court's harmonizing of the FAA and the Missouri equitable lien statute advances the interests of judicial economy, promotes the interests of parties with whom no arguable right to arbitrate exists, and preserves the Missouri legislature's sovereign determination that multiple lien claims concerning title to Missouri property must be determined in a single efficient proceeding involving all lien claimants.

The "right" to arbitrate remains, at its most fundamental level, a negotiated contract agreement between private citizens. With this in mind, the provisions of the

equitable lien statute, which permit the efficient, practical resolution of multi-party litigation involving the title to real estate, should take precedence over the private, contractual forum agreements of only some, not all, of the parties. Although the FAA does require close scrutiny of state statutes, the FAA only preempts a state law when the state law is in *irreconcilable* conflict with the FAA. *See Paul*, 910 S.W.2d at 293. Here, no such irreconcilable conflict is present. Further, when a private contractual right to arbitrate becomes intermingled with the rights of third parties, who have no such agreements, and when multiple statutory claims against the title to real estate are present, the exclusive jurisdiction of the circuit court should be recognized under the unambiguous language of the Missouri equitable lien statute.

Reading the equitable lien statute in harmony with the FAA allows the Court to account for the interests of the other lien holders who are parties to the same litigation. Courts have repeatedly refused to stay pending judicial proceedings or compel arbitration in matters with multiple parties where, as here, not all parties were subject to an arbitration agreement, because the claims between the parties were so intermingled that allowing arbitration would increase the cost, length and complexity of resolving the issues. *See Ford Motor Co., Ltd. v. M/S Maria Gorthon*, 397 F. Supp. 1332, 1337 (D. Md. 1975) ("[s]ince economy of time and expense is a factor favoring arbitration, it should also be a reason for denying arbitration when arbitration would defeat the goals it was meant to further"); *Rosenthal v. Berman*, 82 A.2d 455, 457 (N.J. Super. Ct. App. Div. 1951) (stating "Plaintiff's action cannot be stayed as against parties with whom he is not obligated to arbitrate", and noting that under the English rule, such an action cannot

be stayed against any of the parties if "the issues and the relationships are closely intertwined"); *Prestressed Concrete, Inc. v. Adolfson & Peterson, Inc.*, 240 N.W.2d 551, 553 (Minn. 1976) (declining to compel arbitration where some of the parties in the construction lawsuit were not bound by an arbitration agreement and finding that to require arbitration in such a situation would increase the costs, delay and complexity of the case); *Jefferson Cty. v. Barton-Douglas Contractors, Inc.*, 282 N.W.2d 155, 158-59 (Iowa 1979) (finding that when only a few of the parties have agreements to arbitrate, allowing arbitration to proceed on with a few of parties on related issues would lead to the potential for inconsistent results and increase the complexity, cost and delay of the case).

The exclusive jurisdiction of the circuit court to resolve equitable mechanic's liens exists for valid reasons compatible with the policies and goals of the FAA. In this case, there is an equitable lien action, involving parties that do not have agreements to arbitrate. Further, many of the lien claimants in this action have no contractual relationship to DIG as they are from the "mine side" of the Project. DIG does not have an agreement to arbitrate its claims with the City of Sugar Creek; Dunn Industries, Inc. does not have an agreement to arbitrate with any party; and the other lien claimants do not have agreements to arbitrate with DIG, the City, each other, or Lafarge. If DIG and Lafarge are required to arbitrate any pending or subsequently filed lien claim, the rights of other lien claimants are prejudiced and the benefits of the equitable action, including judicial efficiency and avoidance of inconsistent results, are lost.

In order to help the courts determine validity and priority, the equitable lien action is designed so that *all* the lien claimants will be able to *full*y challenge the claims made by any other lien claimant. How can that occur when some of the claimants are arguing their claims in a forum to which others have no access and are not participating? Allowing arbitration and the equitable lien action to proceed at the same time on the same or related issues, would add greatly to cost, occasion delay, and increase complexity. All of the parties to the equitable lien action cannot be forced to arbitrate, nor should their claims be stayed pending the outcome of an arbitration to which they are not a party.

a. No decision by the Supreme Court or by this Court has held that the FAA preempts the exclusive jurisdiction provisions of Missouri's equitable lien statute, and the Missouri Appeals Court decisions, which suggest preemption is required, misinterpreted the nature of an equitable lien action and have failed to harmonize the equitable lien statute with the applicable provisions of the FAA.

This Court should apply the lien statute as written. No precedent compels the holding that "the arbitration agreement between Lafarge and DIG is enforceable regardless whether multiple mechanics liens exist creating a basis for an equitable mechanic's lien action." Opinion, p. 15, Laf.App. A30 (quoting *Silver Dollar City, Inc. v. Kitsmiller Constr. Co.,* 874 S.W.2d 526, 537 (Mo. App. S.D. 1994) and *McCarney v. Nearing, Staats, Prelogar & Jones*, 866 S.W.2d 881 (Mo. App. W.D. 1993)). In fact,

based on its statements in footnote 4 of the Opinion, the Western District apparently misunderstood the facts in *McCarney* and concluded that the case resolved the issue of arbitrability in the context of an equitable lien action. But *McCarney* involved only a *single* contractor's lien. No architect's lien was filed. Because only *one* lienholder existed, no equitable lien action was involved in the issues on that appeal.[26]

The Southern District Court of Appeals, like the Western District below, followed in the misplaced footsteps of *McCarney* in *Kitsmiller*, misinterpreting *McCarney* and apparently relying on that misconception to conclude that the Missouri equitable mechanics lien procedure did not override an arbitration agreement. *Kitsmiller*, 874 S.W.2d at 536 (". . . and *McCarney* defeats it.").

The fact that only one lien was at issue in *McCarney* was not lost on the trial court, as noted by the trial court during the hearing on the motion to compel arbitration, the Western Division Court of Appeals did *not* determine the effect of the statutory equitable lien provisions on a contractual agreement to arbitrate in *McCarney*. That issue was not presented by the facts on that appeal.

Kitsmiller incorrectly states that the Western District in *McCarney* "held" that parties "have a right to arbitration without regard to whether there are multiple mechanic's liens creating the basis for an equitable mechanic's lien action." *Kitsmiller*,

[26] Although footnote 4 of the Western District's opinion references two liens at issue in *McCarney* -- one filed by the architect and one by the contractor -- a careful reading of the *McCarney* case indicates that there was only one lien claimant.

874 S.W.2d at 535 (quoting *McCarney*, 866 S.W.2d at 892). Apparently, the *Kitsmiller* Court misread this quote and believed that an equitable lien action was pending in *McCarney*. But no equitable mechanic's lien action was, in fact, pending in *McCarney*, so the "holding" on which the Southern District purported to rely was never presented for decision. Apart from its misplaced reliance on *McCarney* and a passing reference to *Bunge Corp. v. Perryville Feed & Produce, Inc*., 685 S.W.2d 837 (Mo. banc 1985), and that case's unremarkable holding that a failure to meet Missouri's notice of arbitration requirement does not invalidate an agreement to arbitrate in a contract involving interstate commerce, *Kitsmiller* does not provide any independent legal analysis. Because *Kitsmiller's* reliance on *McCarney* was obviously misplaced, it has no value in the present case, and the Court should instead apply the Missouri lien statute as written.

Further, the litany of cases and articles cited by Lafarge in support of its argument to harmonize (i.e., override) the mechanic's lien statute with the FAA on pages 80 through 85 of its Brief are largely off point for several reasons. First, the referenced cases do not interpret the Missouri statutory scheme. Second, with the exception of only two cases, *all* the cases Lafarge cites in its two-page (pp. 80-82) string cite of cases "harmonizing arbitration and mechanic's lien statutes" concern cases involving only *one* lien claimant. These cases have no value here because if DIG were the only mechanic's lien claimant, the equitable lien statute and the policies underlying it would not come into play. Further, Lafarge misreads one of the two cases it isolates as exemplifying the appropriate interplay between arbitration and "litigation of mechanic's liens in a

multiparty construction project setting" (App. Br. at 83) since, *only one*, *J & K Cement*,[27] concerns a case involving more than one mechanic lien claimant. The Arizona appeals court case of *B&M Construction*,[28] cited by Lafarge as a multiparty lien case instead concerns *only one lien claimant*.

J & K Cement, the other case isolated by Lafarge on the issue of the litigation of multiple mechanic's liens and the interplay with contractual arbitration, is distinguishable from the facts and law presented here. In *J & K Cement*, the court did not address the application of an exclusive jurisdiction equitable lien statute as exists here in Missouri. From a review of the opinion and Illinois statutes, there is no indication that Illinois even has a comparable exclusive jurisdiction statute like the Missouri statutory scheme. Nor did the court address the interplay of the FAA and *any* lien statute. The comparison between *J & K Cement*, involving the construction of a single family residential home, and the issues before this court, involving the construction of a large, commercial facility with lien claims in excess of $20,000,000 asserted by multiple parties, makes the logic of the Illinois intermediate appellate court inapposite. The cases brought forth by Lafarge as instructive are simply uncompelling.

Aside from *J & K Cement*, the only other case cited (but not analyzed) by Lafarge concerning lien claims by more than one party and the interplay with arbitration is *Lane-*

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[27] *J & K Cement Const. Inc. v. Montalbano Builders, Inc.*, 456 N.E.2d 889 (Il. App. 1983) (cited on pp. 84 and 84 of Lafarge's Brief).

[28] *B&M Construction v. Mueller*, 790 P.2d 750 (Az. App. 1989)

Tahoe, Inc. v. Kindred Const. Co., 536 P.2d 491 (Nev. 1975). In *Lane-Tahoe,* the Nevada Supreme Court did not address or discuss the exclusive jurisdiction provisions of a lien law, or whether Nevada even has such a provision. Most telling about this case, though, is that even without an exclusive jurisdiction requirement as in the Missouri statutory scheme, the Nevada Supreme Court was still split 3-2 on the issue of whether arbitration was required. The Chief Judge of the court, writing for the dissent, opines that "staying the lien proceedings while one lien claimant arbitrates potentially warps the lien law" and that the arbitration compelled will "often be futile; for the results will not be binding on the other lien claimants." 536 P. 2d at 495. This case cited by Lafarge supports DIG's position, as even with no analysis of an exclusive jurisdiction statute like Missouri's, two of the five judges on the court nevertheless found the trial court's stay of arbitration warranted because arbitration of a single claim would inconsistent with the interests of Nevada lien law and damaging to the interests of the other lien claimants.

Both the plain language of the Missouri equitable lien statute, and this Court's recognition that a lien suit or action "must necessarily involve" *both* a "finding of indebtedness" *and* the adjudication of the lien[29] support the trial court's Order. That arbitration involves a "finding of indebtedness" cannot be disputed. The FAA is not in irreconcilable conflict with the Missouri equitable mechanic's lien statute as the two may be harmonized in order to appropriately respect the sovereignty of this State to compel, in situations where §429.290 applies, resolution of contract and lien matters affecting real

[29] *Sartorius*, 249 S.W.2d at 854

estate exclusively in the county where the property is situated. The trial court did not err in denying Lafarge's motion to compel arbitration and stay the civil proceeding and granting DIG's and Dunn's joint motion to stay the arbitration.

C. Even when the Federal Arbitration Act Applies, Principles of Contract Interpretation, as set forth under Missouri Law, Govern the Interpretation of the October Change Order. Agreements that Concern Arbitration are Afforded No Greater Favor than Other Contract Provisions.

Despite Lafarge's claims, courts should not treat arbitration agreements with any greater care or deference than any other valid contractual agreement. To the contrary, the purpose of the Federal Arbitration Act[30] "was to reverse judicial hostility to arbitration agreements and to place arbitration agreements on equal footing with other contracts." *Keymer v. Management Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999). Arbitration agreements "can be enforced as with other contracts, but not more so." *MCI Telecom. Corp. v. Exalon Indus., Inc.*, 138 F.3d 426, 429 (1st Cir. 1998) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12); *Collins & Aikman Prod. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995). Consequently, courts[31]

[30] 9 U.S.C. § 1, *et seq.*

[31] Whether an arbitration agreement exists so as to bind the parties to the scope of that agreement is an issue a court, not an arbitrator, must resolve. *See AT&T Technologies*,

"examine arbitration agreements in the same light as any other contractual agreement." *Keymer*, 169 F.3d at 504.

Consistent with its policies respecting the freedom to contract, the Federal Arbitration Act "does not require parties to arbitrate when they have not agreed to do so." *Volt*, 489 U.S. at 478; *see also Village of Cairo v. Bodine*, 685 S.W.2d 253, 258 (Mo. App. W.D. 1985) (obligation to arbitrate rests on free assent and agreement); *Morgan v. Smith Barney Harris Upham & Co*., 729 F.2d 1163, 1165 (8th Cir. 1984) ("only those disputes for which a party has agreed to submit to arbitration may be so resolved"). The intent of the contracting parties as revealed by their written agreement should be the Court's focus, "for arbitration is a matter of consent, not coercion." *Keymer*, 169 F.3d at 504; *Gustin v. F.D.I.C.*, 835 F. Supp. 503, 507 (W.D. Mo. 1993).

When deciding whether the parties have agreed to arbitrate a certain matter, courts "generally apply ordinary state law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Hill's Pet Nutrition*, 101 F.3d at 66.[32] "We apply ordinary state law contract principles to decide whether

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Inc. v. Communication Workers, 475 U.S. 643 (1986): *see also Hill's Pet Nutrition, Inc. v. Fru-Con Construction Corp*., 101 F.3d 63, 65 (7th Cir. 1996).

[32] The parties to the appeal agree that Missouri law applies to the disputes between them. *See* App. Br. at 99. The contract document between Lafarge and DIG specifies "the Laws of the Location of the Work shall govern the interpretation of the Contract." Contract Document, p. E5-1, ¶1.1.8; L.F. 263.

parties have agreed to arbitrate a particular matter." *Keymer*, 169 F.3d at 504. "Because courts are to treat agreements to arbitrate as all other contracts, they must apply general principles of contract interpretation to the interpretation of an agreement covered by the FAA." *E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999) (citing *Volt*, 489 U.S. at 475). Because the obligation to arbitrate rests on free assent and agreement, "the subsistence and validity of an arbitration clause is governed by usual rules and canons of contract interpretation." *Village of Cairo*, 685 S.W.2d at 258. In deciding whether Lafarge and DIG have agreed to submit these particular PCO disputes to arbitration, the Court must find that a valid agreement to arbitrate exists between the parties and that the disputes at issue fall within the scope of the arbitration agreement. *See Keymer*, 169 F.3d at 504. Because the parties have clearly and unequivocally modified their prior arbitration provision so as to allow DIG to proceed with an action at law, Lafarge cannot establish that DIG is required to submit these PCO disputes to arbitration.

D. The plain language of the Change Order modifies the arbitration agreement and frees the respondent DIG to bring an action at law to recover for the claims that were at issue in the Change Order.

1. The arbitration agreement in the contract documents was modified and, at a minimum, partially rescinded.

There is no dispute that the original contract document between Lafarge and DIG contains an arbitration provision.[33] Agreements to arbitrate like other contract provisions, however, are not cast in stone. Like other contracts, they may be amended, modified, or even rescinded.

a. As with any other contract, arbitration agreements may be modified or rescinded.

On October 4, 2000 DIG and Lafarge changed their rights and obligations under the general contract by executing the October Change Order. The FAA and case law interpreting the FAA clearly provide that arbitration agreements may be modified by a subsequent agreement. Section 2 of the FAA states that arbitration agreements are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity*

[33] Paragraph 6.4.1 at p. E5-17 of the Contract states "any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the construction industry rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

for the revocation of any contract." 9 U.S.C. § 2 (2000) (emphasis added); *see also Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339, 1342 (11th Cir. 1998) (arbitration agreements may be modified by subsequent agreement). Moreover, Missouri courts recognize that contracts may be modified by subsequent agreements or change orders. *See, e.g., Cranor v. Jones Co*., 921 S.W.2d 76, 81 (Mo. App. 1996) (contracts may be modified as to particular provisions, yet stand as to residue of original agreement); *Shutt v. Chris Kaye Plastics Corp*., 962 S.W.2d 887, 890 (Mo. banc 1998) ("parties to contract may modify . . . their rights under it or engraft new terms upon it.")

Finally, black letter law as recognized by Corbin's seminal treatise on contracts recognizes that arbitration agreements may be subject to modification or rescission:

> The Arbitration statutes do not deprive contractors of this power. At any stage of the proceedings, before or after the appointment of an arbitrator, even during the course of an arbitration proceeding itself, a mutual rescission will discharge the previously existing right to arbitration . . . The existence, the coverage, and the validity of an alleged mutual rescission or release must be determined just as in the case of any other alleged agreement.

6A Arthur L. Corbin, *Corbin on Contracts* § 1443, at 432 (1962).

Arbitration agreements are subject to modification. The only issue here is whether the Change Order modified or partially rescinded Lafarge's right to demand arbitration of disputes relating to the contract.

b. The Change Order and its provisions, which modified the contract documents, were based upon mutual assent and were supported by consideration.

A contract modification is enforceable "only if it is based upon mutual assent and supported by consideration." *MECO Sys., Inc. v. Dancing Bear Entertainment, Inc.*, 42 S.W.3d 794, 803 (Mo. App. 2001) (citing *Goldstein & Price v. Tonkin & Mondl, L.C.*, 974 S.W.2d 543, 551 (Mo. App. 1998)).

Here, both parties executed the Change Order containing the provision about how the PCO disputes were to be resolved. In particular, on page five of the Change Order, Peter Cooke placed his signature under language stating the Change Order's terms were "Agreed and executed effective October 4, 2000." When determining "assent," courts look to objective manifestations of intent to determine if there was a 'meeting of the minds.' "A person's subjective intent is irrelevant." *MECO Sys*., 42 S.W.3d at 804 (citing *McDaniel v. Park Place Care Ctr., Inc.*, 918 S.W.2d 820, 827 (Mo. App. 1996)).

The Change Order modified the obligations of the parties. Because DIG deemed (and deems) the items on the PCO list to be outside of its agreed scope of work, it was considering stopping work on all PCOs. By paragraph III(g) of this Change Order, DIG agreed to "complete the items on the PCO list." App. p. A-10. The Change Order changed the contract schedule, created a new liquidated damages/incentives provision,

and otherwise altered significantly the obligations of the parties under the Contract documents. *See* ¶¶ I.A., II., of Change Order, App. pp. A-6 – A-8. Consideration to support the change in the dispute resolution procedures is ample, apparent and undeniable. *See Barr v. Snyder*, 294 S.W.2d 4, 9 (Mo. 1956) (consideration exists for change when the agreement contains a change of obligations for each party).

c. The Change Order executed by Lafarge and DIG made arbitration of the PCOs at issue in the Change Order permissive, and not mandatory, and freed DIG to proceed with an action in a court of law.

Federal courts hold that parties "may limit by agreement the claims they wish to submit to arbitration. If the parties make such an intention clear, the federal policy favoring arbitration must yield." *New York v. Oneida Indian Nation of New York*, 90 F.3d 58, 61 (2d Cir. 1996). When the parties to a arbitration agreement "specifically have excepted a certain type of claim from mandatory arbitration, it is the duty of the courts to enforce not only the full breadth of the arbitration clause, but its limitations as well." *Id*. (citing *Volt*, 489 U.S. at 478).

Here, section III of the Change Order specifically addressed the resolution of the PCOs attached to the Change Order, the same ones that form the basis of DIG's claims. Concerning these PCOs, the parties agreed that if they were unable to resolve the PCOs by negotiation, either DIG or Lafarge could exercise its "contract remedies or remedies as provided by law." (emphasis added). App. p. A-9.

The language at issue is unambiguous. If DIG was frustrated with Lafarge's handling of the PCOs and unable to reach a negotiated settlement, DIG could pursue its contract remedies (i.e., arbitration) or could proceed with a remedy provided by law (i.e., a conventional lawsuit). Despite Lafarge's attempts to create an ambiguity, the language of the Change Order is plain. "In determining whether a contract provision is ambiguous, the words are to be given their plain and ordinary meaning understood by the average reasonable person." *Gustin*, 835 F. Supp. at 507. The common sense, ordinary meaning of a term is the meaning that the average layperson would reasonably understand. *See Farmland Indus., Inc. v. Republic Ins. Co*., 941 S.W.2d 505, 508 (Mo. banc 1997).

The plain and ordinary meaning of the contract provision that allows DIG to pursue its contract remedies or legal remedies is that DIG may choose to resolve the disputed PCOs in a court of law. Black's Law Dictionary defines a "legal remedy" as "a remedy available, under the particular circumstances of the case, in a court of law." Black's Law Dictionary 1294 (6th ed. 1990) (emphasis added). Random House Webster's Dictionary of the Law similarly defines legal remedy or remedy at law as "a remedy of a type traditionally available in the law courts." Random House Webster's Dictionary of The Law 370 (2000) (emphasis added).

Courts are in accord that the phrase "remedy provided by law" means a conventional civil lawsuit. For example, in a case involving nearly identical language and nearly identical arguments, a five judge appeals panel from New York construed the language of an arbitration agreement and held that "remedy at law" allows the parties to pursue "their remedies by conventional lawsuit." *Rhodes v. Merrill Lynch, Pierce,*

Fenner & Smith Inc., 427 N.Y.S.2d 826, 827 (N.Y. App. Div. 1980). In that case, as here, the parties seeking to compel arbitration argued that "remedies at law" merely meant arbitration pursuant to the contract. The Appeals Court disagreed with such a strained interpretation, stating: "[t]he natural meaning of the provision . . . is that the arbitrator may terminate the arbitration and leave the parties to their remedies by conventional lawsuit." *Id.*

Missouri law, which governs this issue of contract interpretation, is in accord that an arbitration action is not a remedy at law. As noted by one court, a party "mischaracterized such a proceeding [arbitration] by identifying it as a legal action." *McCarney*, 866 S.W.2d at 892. As noted by the court, to characterize arbitration as a legal action is "contrary to its nature." *Id.*

In the context of the Change Order, and with the understanding that "contract remedies" references the parties' right to arbitrate their disputes, a reasonable person can only conclude that the Change Order provision permitting a party to pursue its "contract remedies or remedies provided by law" permits a party to proceed with a civil action in a court of law. No other interpretation would be reasonable.

d. The intent of the parties to allow DIG to proceed with an action at law is confirmed by their Change Order negotiations.

Evidence from the Change Order negotiations supports the plain language of the Change Order and confirms that the Change Order expressly permitted DIG to proceed with this action at law. Consideration of affidavits or oral testimony or depositions as

evidence when a motion is based on facts not appearing of record is permitted by Missouri Rules. Mo.R.Civ.P. 55.28. Additionally, while DIG understands and believes the October Change Order to unambiguously release DIG from its obligation to arbitrate, the trial court's order resolved competing interpretations of the Change Order's language, with the advocates of each interpretation contending the other's interpretation rendered provisions of the Change Order a nullity. On page 107 of its Brief, Lafarge argues here, as it did in the trial court, that the interpretation by DIG renders "remedies as provided by law" a nullity – DIG's interpretation renders *"meaningless* the immediately preceding language expressly allowing Lafarge to resort to its respective 'contract remedies"', and would conflict with the Contract's mandatory arbitration agreement (which was incorporated into the Change Order)." App. Br. at 107 (emphasis added).

DIG contended before the trial court, as it does here, that it is Lafarge's interpretation that renders Change Order language wholly meaningless. *See supra,* pp. 69-71. "Under Lafarge's misguided interpretation, the language of the Change Order which permits the parties to resort to their "contract remedies [arbitration] or remedies provided by law" should be interpreted to read that DIG may avail itself of its "contract remedies [arbitration] or remedies provided by law [arbitration]." Such an interpretation is nonsensical and fails to comport with the plain language of the contract." Supra, p. 70.

"If the language which appears plain considered alone conflicts with other language in the contract, or if giving effect to it would render other parts of the contract a nullity, then we will find the contract to be ambiguous. Where a contract is ambiguous, then a question of fact arises as to the intent of the parties as to its meaning." *Tuttle v.*

Muenks, 21 S.W.3d 6, 9 (Mo. App. 2000). As this Court has previously held "[e]quivocal terms in a contract may be interpreted in light of all the surrounding circumstance0s, including applicable customs and usages, as well as the contracting parties' own interpretation of the contract." *Graham v. Goodman*, 850 S.W.2d 351, 355 (Mo. banc 1993). Accordingly, the trial court's review of extrinsic evidence offered by affidavits to determine the intent of the parties is not error.

Even if the language of the Change Order is deemed by this Court to be unambiguous, it was not error on the part of the trial court to look to parole evidence to confirm DIG's interpretation of the plain language of the October Change Order. Parole evidence may be used to *confirm* the plain language of an agreement, though it may not be used to introduce ambiguity, nor may parole evidence be used to "contradict, add to, or vary a writing." *Smith v. Githens*, 271 S.W.2d 374, 379–380 (Mo. App. 1954); *Daniels Exp. & Transfer Co. v. GMI Corp*., 897 S.W.2d 90, 92 (Mo. App. 1995) (extrinsic evidence may not be used to introduce ambiguity).

Perhaps the most powerful evidence of the parties' intent is contained in one of the last pieces of correspondence before the Change Order was signed. As Appellants have admitted, the Change Order and its language were subject to intense negotiations by sophisticated parties. App. Br. at 50, *citing* L.F. 325-329, 338-346, 391, 498; *see also* L.F. 497-499. The rights of the parties and DIG's resistance to arbitration were certainly known by Lafarge. Appellants' own exhibits confirm this – Exhibit 1 to the affidavit of Lafarge's Peter Cooke reveals that Robert Burcham told the individuals present at the

October 4 meeting that "DIG will not agree to arbitrate these issues depending on what happens." L.F. 400; see *also* ¶ 7 of Affidavit of Robert Burcham, L.F. at 498.

On October 18, DIG sent Lafarge correspondence that must erase all doubt as to what the parties intended when they agreed to the dispute resolution language of the Change Order. In this correspondence, DIG responded to a Change Order version prepared by Lafarge.[34] Paragraph III(d) of the Lafarge proposed Change Order stated that the only means for dispute resolution for the PCOs was "arbitration in accordance with the Contract." L.F. 411.

DIG objected to this language and the legal actions it foreclosed. DIG responded with a dispute resolution clause that was incorporated into the final version of the Change Order that was signed by all the parties. To insure that Lafarge knew exactly what language had been changed in their proposed Change Order, the October 18, 2000 letter from DIG to Lafarge enclosed a "blacklined" version of the Change Order. Concerning paragraph III(d), this version stated:

> Lafarge and DIG agree to first attempt to resolve the [disputed] PCO's on the PCO List by negotiation~~{. However, at the option of either party, arbitration in accordance with the Contract may be demanded at any time for any~~

[34] Cooke Affidavit, L.F. 406 – "Enclosed please find our draft of the proposed Change Order."

~~or all of the unresolved PCO's on the PCO List.}~~[, however, either party, at any time, may resort to their respective contract remedies or remedies as provided by law.][35]

By this *unmistakable* striking of the language requiring that the PCOs could only be resolved by mandatory arbitration, Lafarge and DIG modified the contract dispute procedures and permitted one another to bring an action at law to resolve disputes concerning the attached PCOs.

The Record on Appeal reveals DIG's intent behind the change. DIG needed to be freed from its arbitration obligations in order to efficiently and economically prosecute its lien claims against Lafarge and the City. L.F. 499. The City was not a party to any arbitration agreement with Lafarge and DIG. *Id*. At the time of the Change Order negotiations, DIG and its counsel recognized that any arbiters' findings concerning Lafarge's liability to DIG for work on the Project would not be binding on the City as it could not be joined to the arbitration proceeding. *Id*. As such, in any lien action against

[35] *See* App. p. A-27; *see also* ¶ 10 of Burcham Affidavit, L.F. 499; Lafarge/Cooke affidavit, Exhibit 3, which reveals Lafarge received this blacklined version of the Change Order. L.F. 421.

the City's interest,[36] DIG would have to again establish Lafarge's contractual liability. *Id*.

Moreover, at the time of the Change Order negotiations, DIG did not have arbitration agreements with all of its subcontractors and suppliers, nor did DIG have arbitration agreements with contractors working on the "mine" side of the project.[37] Should other contractors or suppliers file lien claims against the property leased by Lafarge and owned by the City, Missouri law requires that they be joined in an equitable lien action as defendants, as their interest in the property would be impacted by any execution. R.S.Mo. § 429.300 (2000); L.F. 500. These other contractors' lien actions would need to await the outcome of any arbitration by DIG with Lafarge to be finally resolved.

With these factors in mind, DIG sought to obtain language in the Change Order which would free it to sue in a court of law both the City and Lafarge, and bring its contract claims against Lafarge in a single action. Additionally, DIG sought to *properly*

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[36] Missouri law supports a mechanic's lien claim against the City's interest in the property at the Lafarge cement plan because the property is not devoted to public use. *See River's Bend Red-E-Mix, Inc. v. Parade Park Homes, Inc.*, 919 S.W.2d 1, 3 (Mo. App. 1996); *Layne, Inc. v. Moody*, S.W.2d 115, 116 (Mo. App. 1994).

[37] ¶¶ 14, 15 of Burcham Affidavit, L.F. 500. DIG had no contract with any contractor or supplier on the "mine side" as the general contractor for the "mine side" was Gunther-Nash, Inc. L.F. 823.

and *efficiently* join to its lien action, as required by law, all entities that have filed lien claims on the property leased by Lafarge and owned by the City.

e. Lafarge's arguments that "remedies provided by law" means "arbitration (1) fail to recognize that the Change Order's terms take precedence over the terms of the Contract documents, (2) impermissibly seek to render other Change Order terms a nullity, and (3) improperly attempt to add terms to the contract language agreed to by the parties.

Appellant's argument that "remedies provided by law" means arbitration fails for several reasons.

(i) Despite Lafarge's claims, the claims resolution provision of the Change Order takes precedence over the arbitration clause in the Contract.

Lafarge argues that the because the Change Order incorporated the Contract documents, which contained an arbitration clause, the arbitration agreement must somehow trump or at least render ambiguous the Change Order language of paragraph III (d). Lafarge makes their argument even though the Change Order provision expressly allows DIG to proceed with an action at law.[38] This argument also ignores the nature of a Change Order and fails to give meaning to the clear language contained in the October

[38] App. Br. 101.

Change Order. Paragraph one of the October Change Order *specifically states*, "in the event of any conflict or ambiguity between the terms of this Change Order and the contract, the terms of this Change Order shall prevail." App. p. A-6. (P. 1 of Change Order.) Secondly, the *specific* and heavily-negotiated provision at issue concerning the resolution of the PCO disputes must prevail over the general incorporation by the Change Order of the entire set of contract documents. A specific provision within an agreement will prevail over more general provisions if there is an ambiguity or inconsistency between them. *H. B. Oppenheimer & Co. v. Prudential Ins. Co. of Am.*, 876 S.W.2d 629, 632 (Mo. App. W.D. 1994); *Tuttle*, 21 S.W.3d at 11.[39] Lafarge's argument on this point is meritless.

Lafarge's failure to understand the nature of a Change Order to a Contract should be its undoing on appeal. The "Points Relied On" section of Lafarge's Brief is telling. App. Br. at 60. The *very best* case that Lafarge can cite to support its argument that the Change Order did not modify the arbitration remedies available under the Contract is a three page Tennessee Court of Appeals decision, where, in a *single document* two clauses exist pertaining to arbitration remedies and "remedies otherwise imposed or available by law." *Dickson County v. Bomar Constr. Co., Inc.*, 935 S.W.2d 413, 414 (Tenn. Ct. App. 1996). Under the circumstances, where within a single document there existed a clause

[39] Here, the specific dispute resolution provision of the Change Order prevails over the general clause providing for the general incorporation of the extensive underlying contract save those provisions which conflict with the Change Order.

requiring arbitration of disputes and a clause permitting the availment of "remedies available at law," the Court reasonably harmonized the terms to conclude that "remedies at law" meant other remedies that did not nullify their agreement, within that same document, to arbitrate.

The circumstances here are quite different. Here, two separate documents exist that were executed at two very different points in time. The second document was separately negotiated.[40] The terms of the second document (the October Change Order) make clear that "in the event of any ambiguity between the terms of this Change Order and the Contract, the terms of this Change Order shall prevail." App. p. A-6. There is no need to harmonize any ambiguity that Lafarge may find between the arbitration clause of the Contract and the remedies clause of the October Change Order because the Change Order itself specifically dictates and controls how any ambiguity must be resolved. The trial court did not err in giving the language of the October Change Order its plain and natural meaning and in denying Lafarge's motion to compel arbitration.

(ii) Appellant's interpretation renders absolutely meaningless certain Change Order language.

Further, Lafarge's interpretation also renders a complete nullity the words "remedies provided by law." Missouri law is well-settled that the terms of the contract are read as a whole to arrive at the intention of the parties, and each term and clause is

[40] "The October Change Order was the product of negotiations spanning several weeks." App. Br. 8.

construed to avoid an effect which renders other terms and provisions meaningless. *Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 718 (Mo. App. W.D. 1995). Under Lafarge's misguided interpretation, the language of the Change Order permitting the parties to resort to their "contract remedies [arbitration] or remedies provided by law" would be interpreted to read that DIG may avail itself of its "contract remedies [arbitration] or remedies provided by law [arbitration]." Such an interpretation is nonsensical and fails to comport with the plain language of the contract.

Lafarge tries to bolster its strained interpretation by arguing that "remedies by law" means that DIG may take only those legal actions consistent with its contractual obligation to arbitrate, such as filing (but not enforcing by litigation) a mechanic's lien. App. Br. 102. Lafarge's argument is not persuasive. If the rights of the parties after the Change Order were identical to the rights of the parties before the Change Order, why does the provision on dispute resolution exist at all? Under Lafarge's interpretation, DIG's dispute resolution rights after the Change Order were identical to its rights before the Change Order.[41] Such an interpretation makes superfluous all of paragraph III(d) that

[41] Before the October Change Order and subject to the "exclusive jurisdiction" provisions of Missouri statutes regarding equitable lien actions, DIG already had a right to file mechanic's liens, sue in a court of law to enforce the liens, and then arbitrate its contract claims. Once the arbitration award was rendered and binding, DIG could return to a Missouri court to register the award and execute on its lien.

pertains to PCO dispute resolution. Why have this paragraph in the agreement at all unless it is to have meaning?

Finally, Lafarge's interpretation renders totally meaningless the word "or." The Change Order stated that DIG could avail itself of its contract remedies OR its remedies at law. "Or" is "disjunctive in its very nature and its ordinary use is as a disjunctive participle that marks an alternative corresponding to 'either,' as 'either this or that." *Herrick Motor Co. v. Fischer Oldsmobile Co.,* 421 S.W.2d 58, 66 (Mo. App. 1967). The language used by the parties shows that DIG could either proceed with its contract remedies or proceed with an action at law. Under Lafarge's interpretation, DIG could proceed with its contract remedies *and then* proceed with an action at law (mechanic's lien). Lafarge's interpretation fails to give meaning to every word and phrase of the Change Order. DIG's interpretation does. A construction attributing a reasonable meaning to each phrase and clause, and harmonizing all provisions of the agreement, is preferred to one that leaves some of the provisions without function or sense. *Tuttle,* 21 S.W.3d at 11.

(iii) Lafarge's interpretation improperly seeks to add terms to the language chosen by the parties.

Lafarge's interpretation of paragraph III(d) not only requires the Court to ignore the plain language used by the parties, but it forces the Court to add new and additional terms. As Lafarge argues, what it really intended to say with the language of the Change Order is that DIG could avail itself of its respective contract remedies or remedies provided by law *existing at that time*. App. Br. 102. Missouri law is abundantly clear

that Courts "must give the words used in a contract their natural and ordinary meaning, they may not make contracts or add provisions by judicial interpretation. 'We are to determine what the parties intended by what they said, and we cannot be concerned with what they might have said, or with what they perhaps should have said.'" *Goodman v. Goodman*, 576 S.W.2d 747, 749 (Mo. App. 1979) (*quoting Brackett v. Easton Boot and Shoe Co.*, 388 S.W.2d 842, 847 (Mo. 1965); *Gustin*, 835 F.Supp. at 507.

The stack of exhibits[42] that Lafarge supplied with its motion to compel arbitration could not convince the trial court that the plain terms of the October Change Order should be changed or read differently because Lafarge somehow never "intended" to give up their right to arbitrate. Despite Lafarge's arguments about what, in hindsight, it "really meant to do," Lafarge must be bound by what it actually did and said. The terms of an agreement do "not depend on what one of the parties understood or intended, but rather upon what was actually said and done by the parties." *Gustin*, 835 F.Supp. at 507; *see also Executive Hills Home Builders, Inc. v. Whitley*, 770 S.W.2d 507, 508 (Mo. App. 1989) ("A court cannot make a contract for the parties that they did not make themselves.")

[42] Volumes II and III of the Legal File.

f. In sum, the Change Order can only be reasonably interpreted to provide DIG with a right to bring an action at law.

Despite Lafarge's arguments, and the extensive evidence submitted by Lafarge, the fact remains that Lafarge and its counsel were well aware of the language of the Change Order and what its intended effect would be. How else can this blacklined paragraph be interpreted but to provide DIG with the right to proceed with an action at law:

> Lafarge and DIG agree to first attempt to resolve the [disputed] PCO's on the PCO List by negotiation~~{. However, at the option of either party, arbitration in accordance with the Contract may be demanded at any time for any or all of the unresolved PCO's on the PCO List.}~~[, however, either party, at any time, may resort to their respective contract remedies or remedies as provided by law.]

"Or remedies as provided by law" can only mean the right to proceed with an action in a court of law. No other interpretation makes sense or is reasonable. The trial court did not commit clear error in disregarding Lafarge's volumes of evidence of their

intent. The language of the Change Order, on its own, speaks volumes. The trial court did not err in interpreting such language to allow DIG to proceed with an action at law.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR ERR IN GRANTING RESPONDENT'S MOTION TO STAY THE ARBITRATION PROCEEDING PURSUED BY LAFARGE BECAUSE (1) NEITHER RESPONDENT DUNN INDUSTRIAL GROUP NOR DUNN INDUSTRIES WERE BOUND BY CONTRACT TO ARBITRATE THE MATTERS RAISED BY THE PROCEEDING IN THAT THE OCTOBER CHANGE ORDER CHANGED THE DISPUTE RESOLUTION PROCEDURES FOR PROJECT DISPUTES AND (2) THE ARBITRATION PROCEEDING WAS BARRED BY MISSOURI'S PROCEDURAL RULES PERTAINING TO COMPULSORY COUNTERCLAIMS AND BY THE MISSOURI EQUITABLE LIEN STATUTE IN THAT THE ARBITRATION PROCEEDINGS BY LAFARGE WERE BROUGHT AFTER THE EQUITABLE LIEN ACTION BEGAN AND CONCERNED THE SAME CONSTRUCTION PROJECT WHICH WAS THE SUBJECT OF THE PREVIOUSLY-FILED EQUITABLE LIEN ACTION.

On June 11, 2001, Lafarge filed with the American Arbitration Association ("AAA") a "Demand for Arbitration" in which Lafarge sought breach of "Construction Contract Damages" against plaintiff/respondent DIG of "at least $7,000,000."[43] In its

[43] AAA Demand for Arbitration, p.1, L.F. 728-729.

Demand for Arbitration, Lafarge also brought a contract guaranty action against intervenor/respondent Dunn Industries, Inc. ("Dunn").

In briefs to the trial court and at oral argument before the trial court in October of 2001, Dunn and DIG strenuously contested that neither entity had agreed to arbitrate the disputes raised by Lafarge in its Demand for Arbitration. DIG moved the trial court to stay such an improvident arbitration proceeding pending the Court's ruling on Lafarge's Motion to Compel Arbitration and DIG's motion to Stay arbitration. Dunn, on the other hand, contended that it never agreed to arbitrate any disputes of any kind with Lafarge and moved the Court to enjoin the arbitration proceeding brought by Lafarge against Dunn. In its Order of November 15, 2001, the trial court appropriately granted Dunn and DIG's Joint Motion to Stay Arbitration. Lafarge now improperly seeks to convict the trial court of error.

Lafarge's arguments on Appeal contain the same flaws that were recognized by the trial court. Lafarge seeks to arbitrate certain issues against parties, Dunn and DIG, with whom no binding agreement exists. Further, Lafarge's Demand for Arbitration runs afoul of both Missouri's procedural rules governing the compulsory joinder of claims, and the exclusive jurisdiction provisions of Missouri's equitable lien statute.

A. Standard of Review.

As detailed in the standard of review Section of I, *supra* at 12-15, the standards of review for Orders granting or denying a stay of proceedings is *de novo* only when the Court's ruling is based solely on an issue of contract interpretation. When the trial court's Order resolves issues of fact, the review by this Court is the standard set forth by

Murphy v. Carron, 536 S.W.2d at 32. Even if the FAA standard of review applies, the resolution of the court of the factual issue of the intent of the parties is reviewed for clear error. *Lyster*, 239 F.3d at 945. Further, when the trial court exercises its inherent power to stay proceedings in order to control its docket, allocate judicial resources, or provide for the just determination of the cases pending before it, this Court's review is for abuse of discretion. *Webb*, 800 F.2d at 808.

B. Applicable Legal Standards Concerning the Motion for Stay

The Missouri Arbitration statute specifically provides that, upon finding that no arbitration agreement exists, the trial court may issue an order staying an arbitration proceeding. "On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." R.S.Mo. § 435.355(2).

When trial courts find that there is no binding agreement to arbitrate the disputes at issue or that claims raised by a party are simply not arbitrable, a stay of the arbitration proceeding is warranted. *See, e.g., Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 345 (8th Cir. 1990); *Alascom, Inc. v. ITT North Electric Co*., 727 F.2d 1419, 1422 (9th Cir. 1984); *Playboy Clubs Int'l, Inc. v. Hotel & Restaurant Employers and Bartenders Int'l Union*, 321 F. Supp. 704, 707 (S.D.N.Y. 1971). An injunction staying the arbitration is warranted, because when there is no arbitration agreement, the moving party can necessarily establish (1) the threat of irreparable harm; (2) a favorable balancing of the equities; (3) the probability of success on the merits; and (4) the stay is in the public interest. *Nordin*, 897 F.2d at 345.

C. Because neither Dunn nor DIG has an agreement to arbitrate the disputes at issue with Lafarge, the trial court appropriately stayed the arbitration action with American Arbitration Association.

1. Dunn has no agreement to arbitrate any dispute with defendant Lafarge.

Because Dunn has no agreement to arbitrate with Lafarge, the trial court appropriately enjoined Lafarge's arbitration proceeding against Dunn. As noted recently by the Eighth Circuit, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *AgGrow Oils, L.L.C. v. National Union Fire Ins. Co*., 242 F.3d 777, 780 (8th Cir. 2001) (quoting *AT&T Techs., Inc. v. Communication Workers*, 475 U.S. 643, 648 (1986)); *see also Village of Cairo*, 685 S.W.2d at 258; *Recold, S.A. de C.V. v. Monfort of Colorado, Inc.*, 893 F.2d 195, 197 (8th Cir. 1990) ("creating such agreements were none exists" was never intent of Congress in passing FAA).

a. The Guaranty does not incorporate any arbitration provision in the Contract between DIG and Lafarge.

Despite Lafarge's arguments, Dunn's position as a limited Guarantor of DIG's contract performance is insufficient to obligate Dunn to arbitrate all of its disputes with Lafarge Canada, the obligee of the Guaranty, much less Lafarge. The law on this matter is well settled. "As a general rule, a guarantor who is not a signatory to a contract containing an arbitration clause is not bound by the arbitration clause." *Grundstad v. Ritt*, 106 F.3d 201, 204 (7th Cir. 1997); *Swensen's Ice Cream Co. v. Corsair Corp*., 942

F.2d 1307, 1310 (8th Cir. 1991) (guarantor to agreement not bound by arbitration clause in agreement).

In an attempt to avoid the application of this clear rule of law, Lafarge contends that the Guaranty document incorporates the Contract, including the arbitration provision. App. Br. at 123. This allegation by Lafarge is factually and legally inaccurate.[44]

First, the language of the Guaranty speaks for itself. Nowhere in the language of the Guaranty is the Contract between DIG and Lafarge either "incorporated by reference" or "made a part of the terms hereof" or any similar intent stated. Rather, the Guaranty simply provides, in Section 1, that Dunn will guarantee "prompt and satisfactory performance of the attached Contract in accordance with all its terms and conditions." L.F. 560

The mere attachment of the Contract and reference to it cannot constitute an incorporation of all of its terms. "'Incorporation by reference' requires a reference in one document to the terms of another. Moreover, the incorporating document must not only refer to the incorporated document, it must bring the terms of the incorporated document into itself as if fully set out." *Sucesion J. Serralles, Inc. v. United States*, 46 Fed. Cl. 773,

[44] As explained in the first "Point Relied On", the principal on the Guaranty, DIG, separately contests Lafarge's demand for arbitration. Accordingly, to the extent DIG's obligation to arbitrate is rescinded or modified by agreement or by the operation of the equitable lien statute, any such modification or rescission would apply equally to the guarantor.

785 (Fed. Cl. 2000); *see also Packer v. TDI Sys., Inc.*, 959 F.Supp. 192, 198 (S.D.N.Y. 1997) (no incorporation of document containing forum selection clause); *Atlantic Mut. Ins. Co. v. Metron Eng'g & Constr. Co.*, 83 F.3d 897, 901 (7th Cir. 1996) (to incorporate by reference, "the reference must show an intention to incorporate the document and make it part of the contract"); *Davis v. McDonald's Corp*., 44 F. Supp. 2d 1251, 1257 (N.D. Fla. 1998).

Here, *no language* in the Guaranty by Dunn to Lafarge Canada, Inc., incorporates the Contract between Lafarge and DIG. The mere passing reference to that contract is wholly insufficient to cause some wholesale incorporation of its terms.

b. Even if an incorporation of the Contract occurred, the incorporation simply clarified the performance obligations of Dunn as guarantor, and did not unambiguously reflect intent by the parties to arbitrate disputes arising between Dunn and Lafarge Canada, Inc.

Even if the Contract between DIG and Lafarge had been incorporated into Dunn's Guaranty to Lafarge Canada, Inc., such a wholesale incorporation is insufficient to bind Dunn to arbitrate its Guaranty disputes with Lafarge. In a nearly identical situation involving nearly identical language, the United States Court of Appeals for the Seventh Circuit held that the language at issue was insufficient to bind the guarantor to arbitrate its dispute.

In *Grundstad*, the guaranty obligated the guarantor to "guarantee all of the provisions of the within Agreement, and especially the performance of Atlantic

hereunder." *Grundstad*, 106 F.3d at 205. Here, Dunn's guaranty obligated Dunn to guarantee "prompt and satisfactory performance of the attached Contract in accordance with all its terms and conditions." The language of both guaranties focuses on performance and neither mentions or even alludes to arbitration. Under such circumstances, and after carefully considering the language chosen by the parties, the *Grundstad* court held that no agreement to arbitrate existed:

> We disagree and conclude that the Agreement before us, including the particular language referred to, standing alone, does not unambiguously express Grundstad's intent to be personally bound by the arbitration clause within the Agreement. Nowhere within the document does the guaranty even refer to any undertaking by the guarantors to be bound personally to arbitrate disputes arising from the guaranty. The guaranty simply states that Grundstad and Rahn "hereby guarantee" the Agreement. It does not state that they agree to be bound personally by the Agreement. *Grundstad*, 106 F.3d at 205.

The law as interpreted by the Eighth Circuit Court of Appeals is in accord. In *AgGrow*, the Court decided whether the surety on a construction contract performance bond was obligated to arbitrate its disputes with the Owner on a project. The Court found that the performance bond had incorporated the construction contract, but that it was not clear that the incorporation clause reflected intent by the obligee and surety "to arbitrate

their disputes under the bond." *AgGrow,* 242 F.3d at 781. There, the Court persuasively stated, "we are unwilling to construe an incorporation clause *whose obvious purpose was to clarify the extent of the surety's secondary obligation* as also reflecting *a mutual intent to compel arbitration of all disputes* between the surety and the obligee under the bond." *AgGrow,* 242 F.3d at 782 (emphasis added).[45]

AgGrow and *Grundstad* are factually consistent with the facts presented here and control the disposition of Dunn's motion to stay Lafarge's arbitration proceeding. As in those cases, a bond or guaranty clause referencing a principal's performance obligations under a contract cannot be read to obligate the guarantor to arbitrate all disputes with the obligee. Dunn has no agreement to arbitrate its disputes with Lafarge and Lafarge's arbitration proceeding against Dunn was appropriately and justifiably enjoined.

Further, Lafarge's reliance on *Sheffield Assembly of God Church v. American Ins. Co.*, 870 S.W.2d 926 (Mo. App. 1994) is misplaced. App. Br. at 123. *Sheffield* is wholly distinguishable. As Lafarge's brief concedes, the surety in *Sheffield* was not made to

[45] An arbitration obligation is a two-way street. How successful would Dunn be in compelling Lafarge to arbitrate? Dunn has no agreement with Lafarge Corporation, as its Guaranty agreement runs to Lafarge Canada, Inc. Dunn has no power by contract or otherwise to compel Lafarge to arbitrate disputes arising from its Guaranty, despite the existence at the time of the Guaranty of a contract clause between DIG and Lafarge which required arbitration. Because Dunn was not a party to any arbitration agreement with Lafarge, it cannot compel Lafarge to arbitrate. The converse must be true as well.

arbitrate its disputes with the owner at issue. As Lafarge's Brief admits, the owner obtained an arbitration award against a contractor and then sought to enforce that award in a *court of law* against the surety. App. Br. at 123. In no sense does this decision remotely support Lafarge's tenuous argument that Dunn is bound to arbitrate with Lafarge. The trial court did not err in ruling against Lafarge and granting the stay of arbitration.

c. Dunn's guaranty inures to the benefit of Lafarge Canada, Inc., of Montreal, Canada, not defendant Lafarge Corporation, a Maryland Corporation. As such, Defendant Lafarge lacks standing to demand arbitration from Dunn.

Appellant Lafarge is not the obligee under the plain terms of the Guaranty and therefore cannot invoke the Guaranty's provisions. Lafarge, a Maryland corporation with its principal offices in Herndon, Virginia, brought the "Demand for Arbitration" against Dunn. L.F. 529. Lafarge has no right under the Guaranty to bring an action of any kind against Dunn. Pursuant to the plain terms of the Guaranty, the sole obligee under the Guaranty is Lafarge Canada. L.F. 560. Lafarge Canada is a corporation organized under the law of Canada with its principal office in Montreal, Quebec. L.F. 322. Lafarge Canada and Lafarge are separate although related commercial entities. Because the Guaranty vests Lafarge with no substantive or procedural rights, the trial court did not err in staying the arbitration proceedings brought by Lafarge against Dunn.

Missouri law supports the trial court's determination that the terms of its Guaranty apply only to Lafarge Canada and do not apply to Lafarge. Lafarge's attempts to acquire rights under this Guaranty are an impermissible expansion of the Guaranty's terms. "Under Missouri law, guaranty contracts are construed strictly to protect the guarantor." *In re Spackler*, 17 F.3d 1089, 1091 (8th Cir. 1994) (*citing Boatman's Bank of Jefferson County v. Community Interiors, Inc.*, 721 S.W.2d 72, 79 (Mo. App. 1986)); *see also Landmark Bank of St. Charles County. v. Saettele*, 784 F. Supp. 1434, 1438 (E.D. Mo. 1992) ("Guarantor's liability is construed strictly according to terms of guaranty"); *FDIC v. Indian Creek Warehouse, J.V.*, 974 F. Supp. 746, 750 (E.D. Mo. 1997), *aff'd*, 143 F.3d 1111 (8th Cir. 1998) (the guaranty is to be strictly construed and not extended "beyond the strict letter of the obligation"); *Central City Ltd. Partnership v. United Postal Savings Association*, 903 S.W.2d 179, 183 (Mo. App. 1995) (guarantor's liability is limited by the specific terms of the guaranty agreement and the "guarantor is entitled to strict construction of his obligation in his favor").

Further, Lafarge's argument that, even if it was Lafarge Canada, and not Lafarge, that was the obligee of the Guaranty, Lafarge Canada was "clearly acting as the agent of its principal, Lafarge Corporation",[46] is unfounded, and was resolved against Lafarge in the trial court. Whether a company acts an agent of another company is a question of fact, and the burden is on the party claiming such agency to prove the agent-principal relationship. *Harper v. Business Men's Assurance Co.*, 872 S.W.2d 486, 489 (Mo. App.

[46] App. Br. at 121.

W.D. 1994). Lafarge failed to present any evidence to support such an assertion of agency. Because Lafarge did not carry its burden of establishing agency, the trial court cannot have abused its discretion in finding no agency relationship between Lafarge Canada and Lafarge.

In short, Dunn owes no duty to Lafarge arising from the Guaranty. It necessarily follows that because Lafarge is not a party to the Guaranty, Lafarge cannot require Dunn to arbitrate any disputes arising from the Guaranty. The Demand for Arbitration brought by Lafarge against Dunn is meritless. Lafarge simply cannot establish that the trial court erred in staying the arbitration proceedings brought by Lafarge.

d. Dunn's obligations to Lafarge Canada, including any alleged obligation to arbitrate, have expired.

Dunn agreed to the Guaranty on June 15, 1999. App. p. A-29; L.F. 560. Section 2 of the Guaranty, entitled "Duration", specifically provides that "the obligation of Guarantor hereunder shall terminate no later than two (2) years from the date hereof." *Id.* Lafarge filed its Demand for Arbitration against Dunn on June 8, 2001. L.F. 528. No arbitration proceeding was held prior to the June 15th, 2001.

Dunn cannot be compelled to arbitrate as any arbitration agreement between Dunn and Lafarge or Lafarge Canada has long since expired. The terms of the Guaranty are plain. Dunn's obligations "terminate" no later than June 15, 2001. "Terminate" is uniformly defined by sources as "to end formally and definitely;"[47] "to put an end to; to

[47] Webster's Third International Dictionary, Unabridged (1986).

bring to an end."[48] Dunn cannot be compelled to arbitrate or perform any of its alleged duties at this time, as its obligations under the Guaranty have expired. Again, "under Missouri law, guaranty contracts are construed strictly to protect the guarantor." *In Re Spackler*, 17 F.3d at 1091. The only reasonable construction of the Guaranty is that Dunn's obligations under that Guaranty have long since ceased. The trial court did not abuse its discretion or err in staying the arbitration action brought by Lafarge.

2. Similarly, DIG is not obligated by any contract to arbitrate the disputes raised by Lafarge's "Demand for Arbitration."

The trial court correctly rejected the very same arguments that Lafarge now presses before this Court. In short, Lafarge cannot establish that any valid or binding arbitration provision exists which governs the claims raised in its Demand for Arbitration. In October 2000, the Executive Vice President for defendant Lafarge, Peter H. Cooke, and the President of DIG, Robert F. Burcham, executed the October Change Order. This Change Order fundamentally affected the parties' rights and obligations under the existing contract for the Lafarge Sugar Creek Project. The Change Order addressed the dispute resolution mechanisms for disputes arising from the Change Order, including disputes concerning certain potential Change Orders and schedule disputes.

In its arbitration demand against DIG, Lafarge references the action pending before this Court. To the extent Lafarge's action before AAA can be seen as an attempt

[48] Black's Law Dictionary (7th ed. 1999); *see also Towne v. Towne*, 159 P.2d 352, 359 (Mont. 1945).

to obtain a declaratory judgment from AAA that the breach of contract claims and other claims raised by DIG by its Petition should be arbitrated, the trial court was wholly correct in staying such a declaratory judgment action.

Further, the same Change Order that allowed DIG to pursue its remedies at law created a new schedule for the Project and a new liquidated damages/incentives provision which governed the remedies of the parties in case of delays in completing the Project.[49] Lafarge's claims in arbitration apparently arise from DIG's alleged breaches of this same Change Order. As this new schedule and remedies were part of the Change Order that freed DIG from its obligation to arbitrate, Lafarge's demands for mandatory arbitration must fail.

Lafarge simply cannot establish that DIG remains a party to a binding arbitration clause that compels DIG to arbitrate the claims raised by Lafarge's Demand for Arbitration. Because "arbitration is a matter of consent, not coercion," the trial did not err in granting DIG's and Dunn's Joint Motion to Stay the Arbitration action brought by Lafarge. *Keymer*., 169 F.3d at 504; *Nordin*, 897 F.2d at 345.

D. Since the claims asserted by Lafarge in the arbitration are compulsory counterclaims to the Circuit Court proceedings, the Order to stay the arbitration proceedings was correct.

The United States Supreme Court has recognized, in clear terms, that arbitration agreements, at their most fundamental level, are "in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in

resolving the dispute." *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 519 (1974); *see also Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 617 (11th Cir. 2001) ("Agreements to arbitrate are essentially forum selection clauses.")

Missouri law is clear that forum selection clauses cannot waive or invalidate a party's mandatory obligation to assert compulsory counterclaims pursuant to Rule 55.32. *Evergreen Nat'l Corp.*, 876 S.W.2d at 635; *Zipper v. Health Midwest*, 978 S.W.2d 398, 410 (Mo. App. W.D. 1998). As stated in *Evergreen National Corp*, Rule 55.32 "compels a party to state *any claim* it has against its adversary which arises out of the transaction or occurrence which is the subject matter of the suit. . . [Its] purpose is to discourage separate litigation covering the same subject matter, and require their adjudication in the same action." *Evergreen National Corp*, 876 S.W.2d at 635 (emphasis added). *See also Cantrell v. City of Caruthersville*, 359 Mo. 282, 221 S.W.2d 471, 474 (Mo. 1949); *Myers v. Clayco State Bank*, 687 S.W.2d 256, 260-61 (Mo. App. 1985).

In *Evergreen National Corp*, a contractor brought suit on a mechanic's lien in Stone County Missouri. The Owner subsequently filed tort claims against the contractor in Jackson County, pursuant to an agreed upon forum selection clause. The contractor moved to dismiss the Owner's claims arguing the claims were compulsory which should have been raised in the Stone County lien suit. The trial court dismissed the Owner's claims and this Court affirmed.

In affirming the dismissal, the Court of Appeals held that a private forum selection agreement between parties could not "waive compulsory counterclaims or other

[49] *See* ¶II.A. – D of Change Order. L.F. A-7 – A-8.

procedural matters which affect judicial economy rather than the parties' due process rights." *Evergreen Nat'l Corp.*, 876 S.W.2d at 635. Accordingly, and despite the contractual agreement as to where and how an action could be pursued, the court made clear that private agreements between parties cannot overcome the procedural requirements of Rule 55.32, and the "compulsory" in compulsory counterclaims was not without teeth.

Here, DIG brought suit on claims, including mechanic's lien claims, properly before the Circuit Court of Jackson County. Subsequent to the filing of this action, Lafarge brought a separate arbitration action asserting claims arising from the same Project which is the subject of DIG's Petition. Lafarge's claims arise out of the same transaction or occurrence that is the subject matter of DIG's claims. Under Rule 55.32, the claims subsequently asserted by Lafarge in the arbitration proceedings are compulsory counterclaims to the claims made by DIG in its Circuit Court Petition. The transaction element of the rule is to be "applied 'in its broadest sense,' to encompass all claims connected by a logical nexus." *Myers*, 687 S.W.2d at 261, *citing State ex rel. J.E. Dunn, Jr., & Assoc., Inc. v. Schoenlaub*, 668 S.W.2d 72, 75 (Mo. banc 1984). It is unassailable that the Lafarge arbitration claims are compulsory counterclaims under Rule 55.32 of the Missouri Rules of Civil Procedure. Rule 55.32 and interests of judicial economy require Lafarge to bring its claims against DIG arising from the Project in this civil action. *See Evergreen National Corp,* 876 S.W.2d at 635*; Zipper*, 978 S.W.2d at 410.

Further, this Court's analysis in *Sartorius* of the Missouri lien statute's exclusive jurisdiction provisions applies here and confirms the trial court's Order was correct. In *Sartorius*, this Court held that an equity action filed after an equitable lien action had commenced, and which involved the same transactions, was a nullity, stating that "the subject matter of the suit pending before respondent and the subject matter of the equitable mechanic's lien suit pending in Jackson county grew out of the same transactions." 249 S.W.2d at 853. As such, the action pending is a "nullity and respondent does not have jurisdiction to hear the case pending before him. All the claims in that case can be determined in the equitable mechanic's lien suit." *Id.* at 856. This Court's instruction to the trial court could not be clearer. It was not error for the trial court to follow the plain language of *Sartorius*.

Lafarge's reliance on decisions by the Ninth Circuit Court of Appeals, the Middle District of Pennsylvania, and the Central District of California, concerning *collective bargaining agreements* and the *Labor Management Relations Act*, 29 U.S.C § 186,[50] have *no* application to the disputes at bar and should not encourage this Court to deviate from settled Missouri law.

The Order of the trial court granting the stay of arbitration is proper, and should be affirmed.

CONCLUSION

This Court does not have jurisdiction to consider the appeal of the denial of the motion to stay the litigation. The decisions of the trial court to deny the motion to

compel arbitration and to grant the motion to stay the arbitration were correct. The Court's Order should be affirmed.

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[50] App. Br. at 116 – 117.

CERTIFICATE OF COMPLIANCE

WITH MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function of Microsoft Word 97 by which it was prepared, contains 18,324 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the diskette filed herewith containing this Respondent's Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned certifies that a hard copy of the foregoing instrument, along with a diskette containing such document, was served upon the following attorneys by depositing same in envelopes addressed to said attorneys, with postage fully prepaid and by depositing said envelope in a U.S. Post Office mailbox in Kansas City, Missouri, on the 26th day of March, 2003:

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