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 APPELLANT

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DIG	Dunn Industrial Group, Inc.; Respondent
Dunn	Dunn Industries, Inc.; Respondent
FAA	Federal Arbitration Act
Joint Motion	DIG and Dunn Motion to Stay Arbitration
Lafarge	Lafarge Corporation; Appellant
Lafarge's Motion	Lafarge's Motion To Stay Litigation and Compel Arbitration
L.F.	Legal File
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Resp. Br.	DIG and Dunn Respondents' Brief to Western District
S.L.F.	Supplemental Legal File
Trial Court	Circuit Court of Jackson County, Missouri, at Independence, Division 5
UAA	Uniform Arbitration Act
Western District	Missouri Court of Appeals, Western District

JURISDICTIONAL STATEMENT

This appeal arises from the November 15, 2001 Order ("Order") of the Trial Court denying the Motion of Appellant, Lafarge Corporation ("Lafarge"), to Stay Litigation and Compel Arbitration ("Lafarge's Motion"), and granting the Joint Motion of Respondents, Dunn Industrial Group, Inc. ("DIG") and Dunn Industries, Inc. ("Dunn"), to Stay Arbitration ("Joint Motion").

A. The Federal Arbitration Act Applies To This Case.

As an initial matter, Lafarge and Respondents have all acknowledged that the Federal Arbitration Act ("FAA"), 9 U.S.C.A. §1, et seq., applies to this matter. [L.F. 89-90, 479-80, 835; Resp. Br. 48]

Where the agreement at issue contains a written arbitration provision and involves interstate commerce, the FAA applies. 9 U.S.C.A §2; Duggan v. Zip Mail Servs., Inc., 920 S.W.2d 200, 203 (Mo. App. E.D. 1996). Construction contracts have been found to "involve commerce" when materials used in the construction are transported across state borders and when contracting parties are from different states. See, e.g., Groceman v. Pulte Homes Corp., 53 S.W.3d 599, 601 n.2 (Mo. App. W.D. 2001) (Michigan company, with an office in Kansas, building home in Missouri utilizing materials purchased in a number of states); Strain-Japan R-16 Sch. Dist. v. Landmark Sys., 51 S.W.3d 916, 919-20 (Mo. App. E.D. 2001) (metal building purchased from Indiana company and shipped to Missouri).

The Contract between Lafarge and DIG ("Contract") contains a written arbitration provision. [L.F. 279; App. A01] The Contract also "involves commerce." Materials and

equipment used in the construction of the Project were obtained from outside of Missouri [L.F. 323], and the contracting parties are from different states: Lafarge is a Maryland corporation with its principal place of business in Virginia [L.F. 166], and DIG and Dunn are Missouri corporations with their principal places of business in Missouri [L.F. 2, 560].

The Missouri Court of Appeals, Western District ("Western District"), also found that the FAA applies to this dispute. [Opinion 7; App. A22]

B. The Order Appealed From Addressed Three Requests For Relief, All of Which Are Immediately Appealable.

Lafarge's Motion sought an order from the Trial Court staying the underlying litigation, as between Lafarge and DIG, and compelling arbitration of all disputes and claims asserted by DIG against Lafarge. [L.F. 68, 89, 104] The Joint Motion of DIG and Dunn sought an order from the Trial Court staying arbitration proceedings commenced by Lafarge on the basis that courts have inherent power to stay arbitration proceedings. [L.F. 545-546] The two motions, Lafarge's Motion and the Joint Motion of DIG and Dunn, encompass all disputes and claims asserted between the parties.

Thus, the appeal is from an Order that responds to three requests for relief. That is, the Order: (1) denies the motion to compel arbitration (Lafarge's Motion), (2) stays the parties' arbitration (Joint Motion of DIG and Dunn), and (3) refuses to stay any of the litigation (Lafarge's Motion). The appealability of the Trial Court's response to these first two requests for relief has never been challenged.

1. The Trial Court's Denial of Lafarge's Motion To Compel Arbitration Is Immediately Appealable.

That portion of the Trial Court's Order denying Lafarge's motion to compel arbitration is immediately appealable. The FAA, and specifically 9 U.S.C.A. §§16(a)(1)(A)&(B), authorizes an appeal from an order denying a motion to compel arbitration. The same result is obtained under Missouri's Uniform Arbitration Act ("UAA"), §435.350, et seq., R.S.Mo.[1], specifically §435.440.1(1), which also authorizes an appeal from an order that denies a motion to compel arbitration.[2]

Before the Western District, DIG and Dunn conceded appellate court jurisdiction of the denial of the motion to compel arbitration. [Resp. Br. 14]

2. The Trial Court's Grant of DIG and Dunn's Joint Motion To Stay Arbitration Is Immediately Appealable.

Likewise, an immediate appeal from that part of the Trial Court's Order staying the arbitration proceedings commenced by Lafarge is authorized under either the FAA or

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[1] All references to Missouri statutes are to R.S.Mo. 2000, unless noted otherwise.

[2] Even though DIG admits the FAA is applicable to this case, one of DIG's contentions is that certain aspects of the FAA are procedural law, not substantive. As such, DIG argues that the Missouri UAA procedural law governs certain issues, particularly with respect to appellate jurisdiction. [Resp. Br. 10; Application 3-6] As explained in this Section of the Brief, appellate jurisdiction is conferred under the Missouri UAA or the FAA, and therefore, both statutes are addressed.

Missouri's UAA. A court order staying arbitration is tantamount to an injunction against arbitration, and the FAA provides for appeals from interlocutory orders granting injunctions against arbitration. See 9 U.S.C.A. §16(a)(2). As such, the Trial Court's grant of DIG and Dunn's Joint Motion is appealable pursuant to 9 U.S.C.A. §16(a)(2) of the FAA. See In re Piper Funds, Inc., 71 F.3d 298, 300 (8th Cir. 1995).

Missouri's UAA also authorizes a court to stay an arbitration proceeding, §435.355.2, and provides for an immediate appeal of such an order, §435.440.1(2). Thus, appellate jurisdiction is conferred for that portion of the Trial Court's Order granting DIG and Dunn's Joint Motion to Stay Arbitration under either the FAA or Missouri's UAA. See Mueller v. Hopkins & Howard, P.C., 5 S.W.3d 182, 187 (Mo. App. E.D. 1999).

Again, before the Western District, DIG and Dunn conceded appellate court jurisdiction of the grant of the motion to stay arbitration. [Resp. Br. 14]

3. The Trial Court's Denial of Lafarge's Motion To Stay Litigation Is Immediately Appealable Under The FAA and Missouri Law.

The denial of Lafarge's Motion To Stay Litigation is also immediately appealable under the FAA and Missouri law. The Western District agreed that Lafarge's request for a stay of litigation was immediately appealable under the FAA, and did not reach the question of whether an alternate basis for appellate jurisdiction was also available under Missouri law, which it is. [Opinion 6–8; App. A21-A23]

The requirement that a court enter an order staying the litigation of issues subject to an arbitration is part of the *substantive* law established by both the Missouri UAA and the FAA. As explained further *infra*, it matters not whether the state or federal

substantive arbitration law governs.

FAA §3 applies and clearly directs a stay of the litigation of all issues subject to arbitration. Under FAA §3, the trial court has no discretion but to stay the litigation of arbitrable issues. See Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238, 1241, 470 U.S. 213, 218 (1985). See also State ex rel. PaineWebber, Inc. v. Vorhees, 891 S.W.2d 126, 128, 130 (Mo. banc 1995). Thus, the question of whether to stay litigation of a claim referable to arbitration pursuant to an agreement enforceable under the FAA is a matter of federal substantive law under FAA §3, and this federal law controls.

Likewise, the Missouri UAA, §435.355.4, states in pertinent part:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this Section ***. When the application is made in such action or proceeding, *the order for arbitration shall include such stay*.

(emphasis added). The above statutory direction plainly and specifically applies here and similarly requires the court ordering the arbitration to contemporaneously order a stay of the litigation of those issues that are subject to arbitration.[3]

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[3] A number of courts have held that, under this provision of the UAA, the court ordering arbitration likewise has no discretion but to stay the litigation of those issues that the parties have agreed to arbitrate. See, e.g., City and County of Denver v. District Court, 939 P.2d 1353, 1370 (Colo. 1997).

Respondents nevertheless argued to the Western District, and DIG contended in its Application for Transfer to this Court [Application 3-6], that appellate jurisdiction is lacking with respect to that part of the Trial Court's Order that denies that part of Lafarge's Motion that requests the Trial Court to stay the litigation because, according to DIG, only FAA procedural law confers appellate jurisdiction for this type of requested relief. Contrary to Respondents' arguments, both this Court and the Western District have jurisdiction and the power to compel the parties to arbitrate and to stay the litigation of issues subject to arbitration, regardless of whether Missouri law or federal law governs.

a. <u>The Trial Court's Denial of Lafarge's Motion To Stay Litigation Is Appealable Under The FAA.</u>

As explained above, the FAA §3 directs a stay of the litigation of claims and issues subject to arbitration. FAA §16(a)(1)(A) allows an appellant to appeal the denial of a motion to stay litigation brought under FAA §3. [App. A48] As the Western District correctly found, FAA §16(a)(1)(A) grants jurisdiction to a Missouri Court to hear an immediate appeal from an order denying a motion to stay the litigation of arbitrable issues brought under FAA §3. [Opinion 7-8; App. A22-A23]

DIG suggests, however, that application of the FAA by Missouri courts creates a black hole precluding appellate jurisdiction because FAA §3 is limited by its terms to federal courts. [Application 4-5] Under DIG's logic, because FAA §3 is limited to federal courts, then consequently there is no jurisdiction for a state appellate court under FAA §16(a)(1)(A). In effect, DIG argues that a Missouri court (or any state court)

applying the FAA must reach a different result than a federal court applying the FAA. This cannot be so.

Indeed, the United States Supreme Court has directly announced that "*** state courts, as much as federal courts, are obliged to grant stays of litigation under §3 of the [Federal] Arbitration Act," because "Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate in federal court, but not against one who sues on the same dispute in state court." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26, 26 n. 34, 103 S. Ct. 927, 942 (1983). See also Wright, Miller & Cooper, Federal Practice and Procedure §3569 (2d ed. 1984)(stating that FAA §3 applies in federal and state courts).

Contrary to DIG's suggestion in its Application for Transfer, the Supreme Court has not retreated from this position. In Volt Info. Sciences , Inc. v. Board of Trustees of Leland Stanford University, 489 U.S. 468, 476-477, 109 S. Ct. 1248, 1254-1255 (1989), which DIG cited in its Application for Transfer, the Supreme Court expressly *declined* to address the question of whether FAA §3 applied to the state court proceeding at issue in that case.

State appellate courts agree that the text in FAA §3 that authorizes a stay of litigation of issues subject to arbitration "in any of the courts of the United States" includes state courts as well as federal courts. See Loche v. Dean Witter Reynolds, Inc., 526 N.E.2d 1296 (Mass. App. Ct. 1988); 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). See also C P &

Associates v. Pickett, 697 S.W.2d 828, 831 (Tex. Civ. App. 1985)("We are also aware that there appears to be no substantial disagreement among the state courts over the applicability of [FAA] §3 to state courts", citing Moses H. Cone Hosp.).

And in State ex rel. PaineWebber, Inc. v. Vorhees, 891 S.W.2d 126, 128, 130 (Mo. 1995), this Court specifically held that a writ of prohibition was warranted in a case where the trial court refused to stay the litigation of arbitrable issues pending arbitration pursuant to FAA §3.

While Respondents note that FAA §3 applies by its express terms to any suit "brought in any of the courts of the United States", Respondents fail to point out the significantly narrower text in FAA §4. That is, FAA §4 states that upon a party's refusal to arbitrate pursuant to an arbitration agreement enforceable under the FAA, the other party may "petition any United States district court" for relief. This distinctly different language is significant in scope. Congress reflected in plain language that relief authorized under FAA §4 may be brought in any United States District Court, while the broader text in FAA §3 demonstrates that Congress intended that the substantive stay requirement apply in every court of the United States, whether federal or state. See Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296 (1983)("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Both the California Appellate Court case, Blue Cross of California v. Superior Court, 78 Cal. Rptr. 2d 779 (1998), and the Maryland Supreme Court case, i.e., Wells v.

Chevy Chase Bank, 768 A.2d 620 (Md. 2001), cited by DIG in its Application for Transfer, are inapposite. Neither case analyzes Congress' use of different terminology in FAA §§3 and 4, and the conclusory statements by those courts are not supported by sound interpretative reasoning. Furthermore, the issue decided by the court in Wells was whether the FAA prevented the appeal of an order *compelling* arbitration pursuant to Maryland procedural rules. The court found that allowing such an appeal does not discriminate against arbitration or impermissibly undermine the objectives of the FAA. These are not our circumstances.

In this case, prohibiting an immediate appeal of that part of the Trial Court's Order denying a stay of the litigation of arbitrable issues pending arbitration would undermine the principles and objective of the FAA. The basic objective of the FAA is to ensure that commercial arbitration agreements are enforced according to their terms. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947, 115 S. Ct. 1920, 1925 (1995). By permitting immediate appeals from orders refusing to stay litigation of arbitrable issues, FAA §16 secures that objective. See Augustea IMPB et Salvataggi v. Mitsubishi Corp., 126 F.3d 95, 98 (2d Cir. 1997). FAA §16(a)(1)(A) therefore expressly provides for immediate appeals from trial court orders denying motions to stay litigation pending arbitration made under FAA §3.

DIG seems to suggest that the Missouri UAA, and specifically §435.440, controls and does not provide for such appeals. [Application 3] Even assuming, for the sake of argument, that §435.440 does not provide for an appeal from an order denying a motion to stay, §435.440 cannot be applied so as to pre-empt the FAA, which expressly does

allow for an immediate appeal of a denial of a motion to stay. Missouri's procedural laws cannot be applied to defeat substantive rights granted by Congress. McClellan v. Barrath Constr. Co., 725 S.W.2d 656, 658 (Mo. App. E.D. 1987).

Application of §435.440 to prohibit an immediate appeal from an order denying a motion to stay pending an arbitration governed by the FAA would effectively undercut the very foundation with which the FAA secures its most basic objective. If §435.440 were applied to foreclose the right to such an appeal under the FAA, the non-moving party essentially would be allowed to force the moving party into potentially lengthy and costly litigation, thereby undermining the essential purpose of the FAA, i.e., to ensure that valid arbitration clauses are enforced according to their terms. See, e.g., Herzog v. Foster & Marshall, Inc., 783 P.2d 1124, 1128 (Wash. Ct. App. 1989).

Because the denial of an immediate appeal from that part of the Trial Court's Order refusing to stay the litigation pending arbitration would be inconsistent with the objectives of the FAA, the Supremacy Clause of the U.S. Constitution would require a holding that FAA §16 preempts §435.440. See Felder v. Casey, 487 U.S. 131, 153, 108 S.Ct. 2302 (1988). See also, Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837, 839 (Mo. banc 1985); Reis v. Peabody Coal Co., 935 S.W.2d 625, 630 (Mo. App. E.D. 1996).

Consequently, as the Western District aptly found, FAA §16 applies, and that part of the Trial Court's Order denying Lafarge's motion to stay the litigation of arbitrable issues pending arbitration is immediately appealable. See VCW, Inc. v. Mutual Risk Mgmt., Ltd., 46 S.W.3d 118, 121-122 (Mo. App. W.D. 2001); Getz Recycling, Inc. v.

Watts, 71 S.W.3d 224, 228 n.1 (Mo. App. W.D. 2002). See also Southern United Fire Ins. Co. v. Howard, 775 So.2d 156 (Ala. 2000).

b. The Trial Court's Denial of Lafarge's Motion To Stay Litigation Is Appealable Under Missouri Law.

DIG assumes that a Missouri court cannot apply the FAA to that part of the Trial Court's Order denying the part of Lafarge's Motion seeking a stay of the litigation of arbitrable issues, and then suggests that this Court also does not have jurisdiction under the Missouri UAA, and specifically §435.440. DIG is mistaken.

As explained above, the FAA provides appellate jurisdiction for this issue, and Missouri law cannot be applied to defeat the FAA. However, even if one assumed for argument's sake that the FAA did not apply and neither this Court nor the Western District has the power under the Missouri UAA to hear an appeal from an Order that simply fails to stay the litigation of arbitrable issues[4], that is not the type of Order that is at issue in this case. Lafarge's Motion was a request to: (1) stay litigation, and (2) compel arbitration of all disputes and claims asserted by DIG against Lafarge. The Joint Motion

[4] A number of courts, construing similar provisions of the UAA, have held that because the denial of such a stay effectively operates as a denial of arbitration, it is the functional equivalent of an order denying a motion to compel arbitration and is immediately appealable under the UAA. See County of Hennepin v. Ada-Bec Systems, 394 N.W.2d 611, 613 (Minn. Ct. App. 1986); Town of Danvers v. Wexler Constr. Co., Inc., 422 N.E.2d 782, 783 n.3 (Mass. Ct. App. 1981).

of DIG and Dunn was a request to stay the pending arbitration between Lafarge and DIG and Dunn. The Trial Court's Order was not limited to one request for relief for a stay of litigation; the Order addressed all three requests for relief – two of which (the motion to compel arbitration and the motion to stay arbitration) DIG has conceded, as it must, are immediately appealable.

It is worthwhile to pause here to first consider the impact of this concession by Respondents. There is no dispute that appellate jurisdiction has been conferred for the denial of that part of Lafarge's Motion that sought to compel arbitration (as well as the granting of Respondents' Joint Motion to stay the arbitration). The two motions, Lafarge's Motion and the Joint Motion of DIG and Dunn, encompass all disputes and issues asserted between the parties. Thus, *each and every dispute and issue* between the parties is properly within the jurisdiction of this Court.

DIG's suggestion that the litigation of its claims asserted against Lafarge can proceed on the merits before the Trial Court, while, *at the same time*, this Court considers whether those very same claims should be arbitrated [Application 5-6], not only conflicts with the underlying fundamental objectives of both the FAA and the Missouri UAA (i.e., that arbitration agreements should be enforced according to their terms), but also flies in the face of the substantive requirements of both FAA §3 and §435.355.4 of the Missouri UAA. Such a result is patently absurd and illogical. When construing statutes, unreasonable and absurd results are to be avoided. Murray v. Missouri Highway and Transp. Com'n, 37 S.W.3d 228, 233 (Mo. banc 2001).

In Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 128 F.3d 504 (7th Cir. 1997), the Court of Appeals was called upon to decide a request for a stay of discovery and trial proceedings pending an appeal of the District Court's denial of a Motion to Stay Litigation Pending Arbitration. The Court of Appeals explained that a stay of discovery and trial proceedings is required pending resolution of such an appeal:

> For it is fundamental to a hierarchical judiciary that 'a Federal District Court and a Federal Court of Appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a Notice of Appeal is an event of jurisdictional significance – it confers jurisdiction on the Court of Appeals and divests the District Court of its control over those aspects of the case involved on the appeal.' [citations omitted] …Whether the case should be litigated in the District Court is not an issue collateral to the question presented by an appeal under §16(a)(1)(A), however; it is the mirror image of the question presented on appeal. Continuation of proceedings in a District Court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals.

Id. at 505. The Court went on to discuss the essential purpose behind such a stay of the trial court proceedings:

> Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forms, or to do this sequentially. The worst possible outcome would be to litigate the dispute, to have the Court of Appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to Court to have the award enforced. Immediate appeal under §16(a) helps to cut the loss from duplication. Yet combining the costs of litigation and arbitration is what lies in store if a District Court continues with the case while an appeal under §16(a) is pending. Cases of this kind are therefore poor candidates for exceptions to the principle that a Notice of Appeal divests the District Court of power to proceed with the aspects of the case that have been transferred to the Court of Appeals.

Id. at 506. The Court of Appeals held that until the appeal was finally decided, all proceedings in the District Court concerning the parties to the appeal were required to be stayed. Id. at 507.

Likewise, in Baron v. Best Buy Co., Inc., 79 F. Supp. 2d 1350, 1353 (S.D. Fla. 1999), the District Court held that all proceedings in the District Court should be stayed pending an appeal of the denial of a motion to stay litigation and compel arbitration. The

District Court explained that the filing of an appeal under FAA §16 divests the District Court of its control over those aspects of the case involved in the appeal, including the question of whether the litigation may go forward in the District Court. Id. at 1353-1354. According to the District Court, the continuation of proceedings in the District Court pending the appeal was simply inconsistent with the purpose of the appeal under FAA §16: to determine whether the proceeding should go forward on the merits in the District Court or in arbitration. Id. at 1354.

Although they have yet to address this precise issue, Missouri Courts have long recognized the essential premise underlying the foregoing decisions: that once an appeal is filed, whether the appeal is interlocutory in nature or filed at the conclusion of the case, the trial court is divested of jurisdiction of the case for most purposes, and retains jurisdiction to exercise only ministerial functions or acts that will not affect the proceedings or issues on appeal. State ex rel. Stickelber v. Nixon, 54 S.W.3d 219, 223 (Mo. App. W.D. 2001); Jordon v. City of Kansas City, 972 S.W.2d 319, 323 (Mo. App. W.D. 1998); State v. Folson, 940 S.W.2d 526, 527 (Mo. App. W.D. 1997).

Here, each and every claim and issue for which Lafarge sought a stay of litigation is otherwise properly before this Court. Thus, under the foregoing principles, once appellate jurisdiction was conferred over those claims and issues, the Trial Court was divested of jurisdiction over those claims and issues.

Even if one assumes that neither the Missouri UAA nor the FAA confers appellate jurisdiction on this Court to review the Trial Court's failure to stay litigation, this Court nonetheless derives that authority from the appellate jurisdiction that it has over the Trial

Court's failure to compel arbitration and failure to stay arbitration. This Court has the jurisdiction to instruct the Trial Court to stay the litigation of arbitrable claims as part of any order reversing the trial court and instructing it to compel arbitration and deny the motion to stay arbitration.

In Duggan v. Zip Mail Services, Inc., 920 S.W.2d 200 (Mo. App. E.D. 1996), a request to stay proceedings was coupled with a request to compel arbitration (as in this case). The Missouri Court of Appeals, Eastern District ("Eastern District"), held that the moving party had the right to immediately appeal the trial court's decision denying both requests under either the FAA or the Missouri UAA. Id. at 202.

This relief comports with common sense and the substantive requirement of §435.355.4, that the court ordering arbitration must also stay the litigation of arbitrable issues. While this Court has jurisdiction over arbitrable claims, it would make no sense for the trial court to proceed with a trial on the merits of those same claims. It would also make no sense to direct the trial court to order arbitration but then allow the trial court to also pursue a trial on the merits of the same claims. This Court certainly has the appellate authority to avoid a conflicting arbitration hearing and trial by directing the Trial Court to compel arbitration and stay the litigation of arbitrable claims.

Furthermore, Missouri law provides that the relief granted by the appellate court should include any relief that the trial court should have given in the first instance. Under §512.160.3, R.S.Mo., in granting relief on appeal, "[t]he appellate court *shall* *** give such judgment as such [trial] court ought to have given, as to the appellate court shall

seem agreeable to law." Supreme Court Rule 84.14 likewise authorizes the appellate court to, *inter alia*, "give such judgment as the [trial] court ought to give."

Here, the Trial Court's Order should have not only compelled arbitration, but also should have included a stay of litigation of arbitrable issues. Under the Missouri UAA, §435.355.4 clearly and unambiguously directs the court ordering the arbitration to *contemporaneously order a stay of the litigation* insofar as litigating those issues that are subject to arbitration. Under §512.160.3 and Rule 84.14, both this Court and the Western District therefore are authorized and, respectfully, mandated by statute, to include such a stay in an order compelling arbitration.

This Court clearly has jurisdiction to overturn the Order and compel the arbitration of every claim and dispute between the parties. And in fashioning such relief, the Court also has the power and authority under Missouri law to include the relief which should have been given by the Trial Court, i.e., a stay of the litigation of arbitrable issues.

C. This Court's Jurisdiction

This case does not fall within the exclusive appellate jurisdiction of the Missouri Supreme Court as delineated in Article V, Section 3 of the Constitution of Missouri in that this matter does not involve the validity of a treaty or statute of the United States, or of a Statute or provision of the Constitution of the State of Missouri. Consequently, jurisdiction of the Missouri Courts of Appeals was properly invoked under Mo. Const. Art. V, §3, 9 U.S.C.A. §16(a)(1)(A)&(B), 9 U.S.C.A. §16(a)(2) and §435.440.1(1)&(2).

The jurisdiction of this Court was ordered pursuant to Supreme Court Rule 83.04. Thus, Mo. Const. Art. V, §10, vests jurisdiction in this Court the same as if the case were heard on the original appeal.

STATEMENT OF FACTS

A. The Project

In October 1998, Lafarge and the City of Sugar Creek, Missouri ("City") executed a Lease Agreement ("Lease") pursuant to which Lafarge agreed to construct new facilities financed with industrial revenue bonds issued by the City pursuant to §100.100, et seq., R.S.Mo. [L.F. 167, 170-223] This industrial development project involves the design and construction of a new 900,000 short ton per year cement manufacturing plant, an underground limestone mine, and other improvements on City-owned property located in Sugar Creek, Missouri. [L.F. 228]

Lafarge contracted with Gunther-Nash, Inc. ("GN") for the construction of the underground limestone mine (the "Mine Project"). [L.F. 823]

Lafarge contracted separately with DIG for the design and construction of the new cement plant. The new cement plant, known as the Sugar Creek II Cement Plant ("Project"), is the subject of this appeal.

B. The Contract and the Broad Arbitration Provision

In June of 1999, Lafarge and DIG signed a contract ("Contract") whereby DIG agreed to design and build the Project for a lump sum amount of $76,131,518, and with a Project completion date of December 2000. [L.F. 167-168, 254-304] At about the same time, Dunn, DIG's parent company, also signed a guaranty ("Guaranty") of DIG's performance of its obligations under the Contract. [L.F. 168, 305-306]

The Contract contains a broad, mandatory arbitration provision. [L.F. 167, 279, 323, 391, 481] Paragraph 6.4.1 of the Contract's "General Conditions", provides:

> 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 Arbitration 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.

[L.F. 279; App. A01]

The arbitration provision was the subject of negotiations between Lafarge and DIG [L.F. 168-169, 310, 317], and in March 1999, the parties agreed on its final form [L.F. 168-169, 317].

C. PCO's and Change Orders

Shortly after signing the Contract, issues arose between Lafarge and DIG concerning delays and the contractual scope of work (the "Work"). When DIG believed there had been a change to the Work, DIG submitted to Lafarge a Potential Change Order ("PCO"). [L.F. 323] Lafarge, in turn, determined whether the PCO constituted a change to the Work. [L.F. 323-324]

Essentially, two types of controversies developed between Lafarge and DIG relating to the PCO's: (1) for some PCO's, Lafarge disagreed with DIG that the PCO constituted a change to the Work and/or disagreed with the amount of additional money or time requested by DIG for the PCO; and (2) for other PCO's, Lafarge was unable to agree with DIG's position because Lafarge was provided with insufficient or no supporting information on DIG's claim of entitlement or on the sum requested. [L.F. 324]

Of course, where Lafarge agreed with DIG, the PCO's were converted to Change Orders to the Contract. [L.F. 324]

From June 1999 to October 2000, Lafarge and DIG agreed to several Change Orders, which increased the Contract Sum from $76,131,518 to $84,561,916. [L.F. 324] However, by October 2000, eighty-seven (87) PCO's remained unresolved, involving a total sum requested by DIG of $38,811,308. [L.F. 325, 384-387]

D. <u>The October Change Order</u>

In October of 2000, Lafarge and DIG negotiated and agreed to a change order ("October Change Order") that addressed many issues then pending between Lafarge and DIG, including the unresolved PCO's. [L.F. 375-387; App. A06-A14]

The October Change Order first provided that:

> On October 4, 2000, Lafarge Corporation (Lafarge) and Dunn Industrial Group, Inc. (DIG) agreed to the following Change Order to their existing contractual agreement ("Contract") for the Lafarge Sugar Creek Project. Except as modified herein, all terms and conditions of the Contract remain in full force and effect and are a part of and 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. [L.F. 379; App. A06]

The October Change Order then covered three primary subjects.

First, in exchange for payment by Lafarge of $3,500,000, DIG agreed to accelerate its work to meet a start-up date of April 20, 2001 for Clinker Production[5], and to waive and release all claims related to such acceleration or related to any delay for causes that were or that should have been known as of October 4, 2000. [L.F. 326, 346, 392]

Second, the parties agreed to an incentive/liquidated damages provision that established an incentive payment to DIG or liquidated damages assessed against DIG, as the case may be, depending on whether the April 20, 2001 Clinker Production date was met. [L.F. 326, 346, 392]

Third, Lafarge agreed to advance DIG $6,500,000 (referred to in the October Change Order as the "PCO Amount"), to be applied toward the resolution of specific identified PCO's called "marked PCO's" in the October Change Order. [L.F. 326, 346, 392] The October Change Order listed the eighty-seven (87) pending PCO's. Thirty-five (35) of those listed PCO's, totaling a claimed $30,631,871, were marked with an asterisk in the margin of the October Change Order, and were referred to therein as "marked PCO's". [L.F. 382, 384-387; App. A11-A14] The October Change Order then went on to state:

> III. Potential Change Order Funding
>
> A. DIG has submitted to Lafarge several Potential Change Orders ("PCO's") which are disputed, in full or in part,

[5] "Clinker" is the intermediate cement product which, after further processing, becomes cement.

by Lafarge. Attached to this Change Order is the list of all PCO's ("PCO List") identified as of the date of this Change Order, with those to which the PCO Amount applies marked by Lafarge and DIG. All unmarked PCO items shall be resolved in due course according to the Contract Documents, and paid promptly on resolution.

B. DIG has requested, and Lafarge has agreed, subject to the terms herein, that Lafarge advance a sum of money pending resolution of the items marked on the PCO List. DIG and Lafarge agree that Lafarge's advance is subject to a full reservation of rights, by each party, regarding the merits and claim amount of each PCO, whether marked or unmarked on the PCO List.

C. In the spirit of compromise and settlement, by the execution of this Change Order, DIG and Lafarge have agreed that Lafarge will advance the amount of $6,500,000 ("PCO Amount") to DIG, by wire transfer on October 25, 2000 pending resolution of the marked PCO's. The PCO Amount shall be treated as a credit on behalf of Lafarge towards the payment of any

resolution of a marked PCO after the execution of this Change Order.

D. Lafarge and DIG agree 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. [L.F. 382; App. A09]

The October Change Order was the product of negotiations spanning several weeks.[6] The negotiations began on October 4, 2000, when representatives from Lafarge, DIG and Dunn met in Kansas City. [L.F. 325, 341-346, 391, 498] At that meeting, the parties agreed upon the approach for resolving PCO's, i.e., that (1) Lafarge would advance DIG a substantial amount of money pending the later resolution of certain outstanding PCO's, and (2) any PCO's that could not be resolved by negotiation would be arbitrated. [L.F. 326, 341-342, 392]

In the negotiations that followed, Mr. Roy Bash, one of DIG's attorneys and a principal negotiator on its behalf, acknowledged that the Contract contained an arbitration clause, and indicated that DIG's October 18 revision to Paragraph III.D of the proposed October Change Order, which included the language "respective contract remedies or remedies as provided by law", was intended to allow DIG to preserve its rights to file and

[6] The ebb and flow of those talks are described at length in documents that make up the Legal File in this case. [L.F. 325-329, 338-346, 347-353, 354-368, 391-396, 498-499]

perfect a mechanic's lien claim. [L.F. 436, 455] Mr. Bash stated that although the underlying dispute may be arbitrated, DIG did not want to be precluded from filing an action to perfect its mechanic's lien claim under Missouri Statutes. [L.F. 436, 455] This explanation was consistent with Lafarge's understanding of the language of Paragraph III.D, including Lafarge's understanding that unresolved PCO's would be resolved by arbitration if not settled by negotiation. [L.F. 395]

At no time during the negotiations of the October Change Order did anyone from DIG or Dunn state that DIG's revision of Paragraph III.D was intended to change, modify or limit the Contract arbitration provision, or to create any new right for DIG to litigate, rather than arbitrate, the "marked PCO's" or other claims. [L.F. 330, 395-396, 436, 455, 497-501]

Upon the execution of the October Change Order on October 25, 2000, Lafarge wire-transferred $10,000,000 to DIG, which constituted the payment of the $3,500,000 and the advance of the $6,500,000 "PCO Amount" pursuant to the October Change Order. [L.F. 329, 395] The October Change Order was later incorporated into a formal Change Order document, Number CO61-071, which was issued to DIG on December 4, 2000. [L.F. 329, 395]

E. The Proceedings Below

1. DIG's Mechanic's Lien Claims

In March 2001, DIG filed three separate mechanic's lien claims against the Project. Two of those lien claims were filed on March 3, 2001. One lien claim totals $6,877,825 and relates to alleged extra mass excavation work. [L.F. 773-775, 804-805]

The second lien claim totals $7,636,501 and covers alleged extra work in assembling equipment supplied by Krupp Polysius (the "Polysius Equipment"). [L.F. 776-781, 806-807] The third claim, filed on March 20, 2001, totals $875,140 and covers alleged extra work for the Limestone Tunnel. [L.F. 782-788, 808-809]

DIG assigned PCO numbers to these three mechanic's lien claims as follows: PCO 105 - Limestone Tunnel; PCO 175 - Mass Excavation; and PCO 229 - Polysius Equipment. [L.F. 324-325, 332, 333]

PCO 175 ("Mass Excavation") is not a "marked PCO" in the October Change Order. [L.F. 385] On the other hand, PCO 105 ("Limestone Tunnel") and PCO 229 ("Polysius Equipment") are "marked PCO's", but DIG substantially increased the amount of those two PCO's from the time of the October 2000 Change Order to the time the mechanic's liens were filed in March 2001. [L.F. 384, 386]

2. DIG's Original Petition and the Motion to Compel Arbitration

On March 28, 2001, DIG filed a Petition against Lafarge and the City in the Circuit Court of Jackson County, Missouri, at Kansas City, Case No. 01CV207640, asserting claims for breach of contract, breach of warranty, negligent misrepresentation, quantum meruit, and to foreclose its mechanic's lien claims. [L.F. 1-62] Lafarge and the City thereafter removed the case to the United States District Court, Western District of Missouri, Western Division (the "federal court"), Case No. 01-0489-CV-W-3. [L.F. 63]

On May 14, 2001, Lafarge filed a Motion to Stay Litigation and Compel Arbitration in federal court, together with Suggestions in Support, asserting that DIG's claims alleged in the lawsuit should be stayed pending arbitration of the claims between

Lafarge and DIG pursuant to the mandatory arbitration provision of the Contract. [L.F. 68-473] DIG filed Suggestions in Opposition to Lafarge's Motion To Stay Litigation and Compel Arbitration in federal court [L.F. 474-534], and Lafarge filed a Reply to DIG's Opposition [L.F. 565-585].

3. The Arbitration Proceeding

Shortly after Lafarge filed its motion to compel the arbitration, and stay the litigation, of DIG's claims, on June 8, 2001, Lafarge filed a Demand For Arbitration against DIG and Dunn with the American Arbitration Association. [L.F. 527-534] In its arbitration demand, Lafarge claimed damages from DIG of at least $7,000,000 "for DIG's failure to timely complete the Construction Contract and other damages related to DIG's failure to properly perform and coordinate the construction work", and reserved rights to assert additional damages after the work was completed. [L.F. 528] Lafarge also claimed entitlement to reimbursement from Dunn of all damages asserted against DIG, pursuant to the Guaranty. [L.F. 528] Lafarge's claims against DIG and Dunn do not solely relate to the "marked PCO's" in the October Change Order. [L.F. 528]

4. The Motion to Stay Arbitration and the Order of Remand

On June 19, 2001, Dunn filed a Motion to Intervene For a Limited Purpose in federal court, for the purpose of opposing Lafarge's Demand For Arbitration. [L.F. 535-541] Also on June 19, 2001, Dunn, as intervenor, and DIG filed their Joint Motion to Stay Arbitration in federal court, seeking a stay of the arbitration proceedings commenced by Lafarge. [L.F. 542-564]

On July 5, 2001, the federal court granted DIG's Motion To Remand the case back to the Jackson County Circuit Court at Kansas City. The federal court did not rule on Lafarge's Motion To Stay Litigation and Compel Arbitration, or on the Joint Motion to Stay Arbitration of DIG and Dunn. [L.F. 604-608]

5. <u>The Equitable Mechanic's Lien Case</u>

On June 4, 2001, while the case among Lafarge, the City, DIG and Dunn was pending in the federal court, Kansas City Electrical Supply Co. ("KC Electric") commenced an equitable mechanic's lien action in the Circuit Court of Jackson County, Missouri, at Independence, Case No. 01CV213309. KC Electric's claim arose from the Mine Project, which is situated on the same property as the new cement plant. [L.F. 609-623]

On the Mine Project, GN and Lake Shore Mining Co., Inc. ("Lake Shore"), a subcontractor to GN, proceeded to arbitration. [L.F. 823, 827] The arbitration between GN and Lake Shore did not involve the cement plant. [L.F. 823][7]

However, certain Lake Shore subcontractors and sub-subcontractors (including KC Electric) filed mechanic's lien claims stemming from work at the Mine Project. [L.F. 609-623, 624-641] Since the mine and the new cement plant are situated on the same property, Lafarge, the City and DIG were all named as defendants in the equitable mechanic's lien action commenced by KC Electric. [L.F. 611-614]

[7] The Mine Project arbitration participants recently reached a settlement in mediation.

On August 1, 2001, DIG filed its answer, cross-claims and counterclaims with the Jackson County Circuit Court at Independence, asserting essentially the same claims against Lafarge as those asserted in the remanded case then pending in the Jackson County Circuit Court at Kansas City, Case No. 01CV207640. [L.F. 642-691]

6. The Arbitrators' Interim Order

On September 5, 2001, Lafarge filed a Request For Interim Relief in the arbitration, for the purpose of obtaining interim declaratory and injunctive-type relief, including an award specifically enforcing DIG's obligation under Article 4.1.3 of the Contract to perform disputed work. [S.L.F. 1, 5-7] On September 9, 2001, DIG answered Lafarge's Request For Interim Relief and generally denied Lafarge's allegations. DIG, however, joined in Lafarge's request to the arbitrators for declaratory relief regarding the interpretation and effect of the Contract. [S.L.F. 2, 12]

In answering Lafarge's claim and joining in the request for declaratory relief, DIG stated that it did "not consent to arbitration of all disputes between DIG and Lafarge", but reiterated the statement in its Joint Motion to Stay Arbitration that "DIG believes the parties have altered the agreement to arbitrate certain disputes". [S.L.F. 12]

The arbitrators subsequently issued an Interim Order. [S.L.F. 16-18] That Interim Order provides that DIG consented to the jurisdiction of the arbitrators and the arbitrability of Lafarge's request. [S.L.F. 16] The arbitrators further declared that the Contract was in full force and effect, Article 4.1.3 was valid and enforceable, and ordered DIG to perform all disputed work in accordance with the Interim Order. [S.L.F. 2, 17-18] Lafarge and DIG have complied with the Interim Order since its issuance.

7. The Order of Consolidation and the October 22, 2001 Hearing

On September 20, 2001, the action initiated by DIG against Lafarge in the Jackson County Circuit Court at Kansas City, Case No. 01CV207640, was consolidated into the equitable mechanic's lien action pending in the Jackson County Circuit Court at Independence, Case No. 01CV213309. [L.F. 63-67]

On October 5, 2001, Lafarge and the City filed a motion with the Jackson County Circuit Court at Independence to adopt the pleadings from the Jackson County Circuit Court at Kansas City, Case No. 01CV207640, including those pleadings that had been filed while the cause was pending in the federal court. [L.F. 709-712]

On October 22, 2001, the Trial Court heard Lafarge's Motion To Stay Litigation and Compel Arbitration, and the Joint Motion To Stay Arbitration of DIG and Dunn. [L.F. 810] Prior to the hearing, Lafarge filed a Supplement to its Motion To Stay Litigation and Compel Arbitration. [S.L.F. 1-18] Also, DIG was allowed to file a First Amended Petition, and Lafarge's Motion To Stay Litigation and Compel Arbitration was made applicable to DIG's First Amended Petition. [L.F. 720-722]

8. DIG's First Amended Petition in the Consolidated Action

DIG's First Amended Petition contains claims against Lafarge, the City, and others. The eleven separate counts directed against Lafarge are as follows: Count IV-Breach of Contract (Extra Work) [L.F. 755-759]; Count V-Breach of Contract (Lost Productivity) [L.F. 759-762]; Count VI-Missouri Private Prompt Payment Act Claims [L.F. 763]; Count VII-Missouri Public Prompt Payment Act Claim [L.F. 763-764]; Count VIII-Quantum Meruit (Extra Work) [L.F. 765-766]; Count IX-Quantum Meruit (Polysius

Equipment) [L.F. 766-769]; Count X-Breach of Warranty [L.F. 770-771]; Count XI-Negligent Misrepresentation [L.F. 771-773]; Count XII-Foreclose On Mechanic's Lien (Mass Excavation) [L.F. 773-775]; Count XIII-Foreclose On Mechanic's Lien (Polysius Equipment) [L.F. 776-778]; and Count XV-Foreclose On Mechanic's Lien (Limestone Tunnel) [L.F. 782-784].

Of DIG's eleven (11) Counts asserted against Lafarge, only three (3) are limited to the "marked PCO's" in the October Change Order (i.e., Counts IX, XIII and XV). [L.F. 766-769, 776-778, 782-784] DIG's other eight (8) Counts against Lafarge involve non-Marked PCO's and other claims arising out of or relating to the Contract. [L.F. 755-759, 759-762, 763-764, 765-766, 770-771, 771-773, 773-775] For example, in Count IV, DIG lists 37 PCO's as the basis for its alleged breach of contract claim. [L.F. 756-757] Of the 37 PCO's listed, only 18 are "marked PCO's". [See Lafarge's Comparison of "marked PCO's" to DIG's Amended Petition – L.F. 472-473; App. p. A57][8]

9. <u>Post-Hearing Briefs</u>

At the October 22, 2001 hearing, the Trial Court expressed concern that arbitration of the claims among Lafarge, DIG and Dunn, as well as all other parties in the pending equitable mechanic's lien action, may be precluded by Missouri's equitable mechanic's lien statutes, §§429.270 through 429.300, R.S.Mo, and therefore, allowed the parties to file post-hearing suggestions on this issue. [L.F. 810] This was the first time this issue

[8] The PCO's listed in DIG's First Amended Petition are the same as those listed in its Original Petition. [<u>Compare</u> L.F. 10-11 to L.F. 756-757]

had been raised in this matter. On October 30, 2001, Lafarge filed its Supplemental Suggestions. [L.F. 810-821] On November 1, 2001, DIG and Dunn filed their Supplemental Suggestions. [L.F. 832-846] On November 6, 2001, Lafarge filed Suggestions in Response. [L.F. 854-860]

In its Supplemental Suggestions filed on November 1, 2001, DIG set forth its position regarding the meaning and effect of Paragraph III.D of the October Change Order as follows:

> On the record presented in the pending motions, the only possible conclusion is that the October Change Order modified the original agreement to arbitrate, and expressly removed those items marked on the list attached to the Change Order from any agreement to arbitrate.

[L.F. 833]

10. <u>The Order From Which This Appeal is Taken</u>

By Order dated November 15, 2001, Judge Nixon denied, without opinion, Lafarge's Motion To Stay Litigation and Compel Arbitration and granted the Joint Motion to Stay Arbitration of DIG and Dunn. [L.F. 861; App. A15] The effect of this order was to deny arbitration of any and all claims and controversies among Lafarge, DIG and Dunn.

On November 21, 2001, Lafarge timely filed its Notice of Appeal. [L.F. 862-869]

11. Proceedings Before the Missouri Court of Appeals, Western District

After briefing by the parties, the appeal was argued to the Western District on July 9, 2002. On November 19, 2002, the Western District filed its Opinion. [App. A16-A44]

On December 4, 2002, DIG filed its Motion for Rehearing and Suggestions in Support, and its Alternative Application for Transfer, with the Western District. The Motion and Application were overruled and denied on December 24, 2002.

On January 8, 2003, DIG's Application for Transfer ("Application") was filed with this Court. The Application was sustained on January 28, 2003.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STAY LITIGATION AND COMPEL ARBITRATION BECAUSE THE WRITTEN CONTRACT BETWEEN THE PARTIES INCLUDES AN ENFORCEABLE, MANDATORY ARBITRATION AGREEMENT WHICH ENCOMPASSES ALL DISPUTES AND CLAIMS IN ISSUE BETWEEN THE PARTIES IN THAT (A) ENFORCEMENT OF THE MANDATORY ARBITRATION AGREEMENT IS NOT BARRED BY MISSOURI'S EQUITABLE MECHANIC'S LIEN STATUTES, (B) ALL DISPUTES AND CLAIMS IN ISSUE BETWEEN THE PARTIES, INCLUDING THE DISPUTES AND CLAIMS THAT ARE THE SUBJECT OF THE PARTIES' OCTOBER, 2000 CHANGE ORDER TO THE CONTRACT, ARE WITHIN THE SCOPE OF THE BROAD, MANDATORY ARBITRATION AGREEMENT, AND (C) THE MANDATORY ARBITRATION AGREEMENT HAS NOT BEEN MODIFIED, RESCINDED OR OTHERWISE CHANGED BY THE PARTIES' OCTOBER, 2000 CHANGE ORDER TO THE CONTRACT.

McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881, 889 (Mo. App. W.D. 1993).

Ringstreet Northcrest v. Bisanz, 890 S.W.2d 713, 718 (Mo.App. W.D. 1995).

Dickson County v. Bomar Constr. Co., 935 S.W.2d 413 (Tenn. Ct. App. 1996).

II. THE TRIAL COURT ERRED IN GRANTING THE JOINT MOTION TO STAY ARBITRATION OF RESPONDENT DUNN INDUSTRIAL GROUP, INC. ("DIG") AND RESPONDENT DUNN INDUSTRIES, INC. ("DUNN") BECAUSE BOTH DIG AND DUNN AGREED TO ARBITRATE THE CLAIMS ASSERTED BY DEFENDANT LAFARGE CORPORATION ("LAFARGE") IN THAT (A) THE WRITTEN CONTRACT BETWEEN LAFARGE AND DIG CONTAINS AN ENFORCEABLE, MANDATORY ARBITRATION AGREEMENT, AND THE CLAIMS OF LAFARGE ARE WITHIN THE SCOPE OF THAT ARBITRATION AGREEMENT, AND (B) THE WRITTEN GUARANTY EXECUTED BY DUNN (1) INURES TO THE BENEFIT OF LAFARGE AND (2) INCORPORATED THE WRITTEN CONTRACT AND ARBITRATION AGREEMENT, OR DUNN IS ESTOPPED FROM AVOIDING THE ARBITRATION AGREEMENT.

Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837, 839 (Mo. banc 1985).

Sheffield Assembly of God Church v. American Ins. Co., 870 S.W.2d 926, 931 (Mo.App. W.D. 1994)

Dubail v. Medical West Bldg. Corp., 372 S.W.2d 128, 132 (Mo. 1963).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STAY LITIGATION AND COMPEL ARBITRATION BECAUSE THE WRITTEN CONTRACT BETWEEN THE PARTIES INCLUDES AN ENFORCEABLE, MANDATORY ARBITRATION AGREEMENT WHICH ENCOMPASSES ALL DISPUTES AND CLAIMS IN ISSUE BETWEEN THE PARTIES IN THAT (A) ENFORCEMENT OF THE MANDATORY ARBITRATION AGREEMENT IS NOT BARRED BY MISSOURI'S EQUITABLE MECHANIC'S LIEN STATUTES, (B) ALL DISPUTES AND CLAIMS IN ISSUE BETWEEN THE PARTIES, INCLUDING THE DISPUTES AND CLAIMS THAT ARE THE SUBJECT OF THE PARTIES' OCTOBER, 2000 CHANGE ORDER TO THE CONTRACT, ARE WITHIN THE SCOPE OF THE BROAD, MANDATORY ARBITRATION AGREEMENT, AND (C) THE MANDATORY ARBITRATION AGREEMENT HAS NOT BEEN MODIFIED, RESCINDED OR OTHERWISE CHANGED BY THE PARTIES' OCTOBER, 2000 CHANGE ORDER TO THE CONTRACT.

Summary of the Argument

The Contract between Lafarge and DIG contains a broad, mandatory arbitration agreement, and Missouri's equitable mechanic's lien statutes do not bar the enforcement of the parties' arbitration agreement. See Section I.B, *infra*.

The arbitration agreement encompasses *all* of the claims between Lafarge and DIG within its scope, and the October Change Order did *not* modify, rescind or otherwise change the Contract's broad, mandatory arbitration provision. Therefore, *all* the claims and disputes between the Lafarge and DIG fall squarely within the scope of that arbitration provision and must be arbitrated. See Sections I.C and D, *infra*.

The Trial Court's failure to enforce the Contract arbitration provision, by refusing to compel arbitration of *all* disputes and claims, including claims based upon the "marked PCO's", requires reversal of the Trial Court's Order.

A. Standard Of Review

Questions of contract interpretation and ambiguity are questions of law, and the trial court's decision on such issues receives no deference. See Sligo, Inc. v. Nevois, 84 F.3d 1014, 1019 (8th Cir. 1996) (applying Missouri law), and Fru-Con Constr. Co. v. Southwestern Redevelopment Corp. II, 908 S.W.2d 741, 743-744 (Mo. App. E.D. 1995). Thus, the standard of review for the denial of a motion to stay litigation and compel arbitration, which involves the interpretation of a contract and whether it includes an enforceable arbitration provision, is *de novo*. Getz Recycling, Inc. v. Watts, 71 S.W.3d 224 (Mo. App. W.D. 2002); Fru-Con Constr., 908 S.W.2d at 743-744. See also Collins & Aikman Products Co. v. Building Systems, Inc., 58 F.3d 16, 19 (2d Cir. 1995).

The Western District correctly determined that the standard of review for this appeal is *de novo*. [Opinion 9; App. A24]

DIG urges application of a "clear error" standard of review, the same argument DIG made to the Western District. [Application 6–9; Resp.Br. 23-26] According to

DIG, the Trial Court necessarily made findings of fact that require deference, and the Trial Court has discretion to stay an arbitration to control its docket and conserve judicial resources, all of which is reviewed under an "abuse of discretion" standard. Id.

DIG's argument, however, misses the mark and was soundly rejected by the Western District as follows: "Lafarge's appeal, however, involves the interpretation of the October Change Order and whether it was ambiguous, which is a question of law, and other questions of law (e.g. the effect of the equitable mechanic's lien statute on the arbitration provision of the parties' contract). Review is *de novo*." [Opinion 9 (citing Fru-Con Constr., 908 S.W.2d at 744 n. 1); App. A24]

In Fru-Con Constr., the Eastern District rejected an argument similar to that advanced by DIG in this case, to wit,

> Contractor contends that the trial court made a finding of fact of the meaning of claim in the contract, thereby requiring review under the clearly erroneous standard. We do not find that to be a correct analysis. The court interpreted the meaning of a word in the contract between the parties and determined whether it was ambiguous. That is a conclusion of law which we review *de novo*.

Id. Here, the questions of contract interpretation and the application of law are reviewed *de novo* and require no deference to the Trial Court.

Moreover, where the facts are not in dispute, no deference is due the trial court's judgment and review is, again, *de novo*. Standard Professional Services, Inc. v. Towers,

945 S.W.2d 693, 694 (Mo. App. E.D. 1997); Bremen Bank & Trust Co. v. Muskopf, 817 S.W.2d 602, 604 (Mo. App. E.D. 1991). In this case, there are no facts in dispute. Simply because the parties disagree over the *interpretation* of the Contract and October Change Order does not create an ambiguity or a "disputed issue of fact". Hougland v. Pulitzer Publishing Co., Inc., 939 S.W.2d 31, 33 (Mo. App. W.D. 1997); Jim Carlson Constr., Inc. v. Bailey, 769 S.W.2d 480, 482 (Mo. App. W.D. 1989).

DIG attempted to argue to the Western District that certain facts regarding the Contract negotiation were in dispute. However, nowhere in the record are the "statements" made by DIG's "representatives and counsel" [Resp.Br. 25] to Lafarge during negotiations, regarding the meaning of the language at issue [L.F. 436, 455], controverted or denied. Furthermore, evidence of DIG's subjective intent, while irrelevant, has never been disputed.[9] [See Section II.B, *infra*]

Lafarge has admitted that the facts are *not* in dispute. [L.F. 569, 586] The record shows that DIG never indicated otherwise. Thus, review is *de novo*.

In suggesting an "abuse of discretion" standard for that part of the Order staying arbitration and refusing a stay of litigation, DIG claims that the Trial Court has the discretion to stay proceedings to control its docket and conserve judicial resources. [Application 7; Resp.Br. 23-24, 26] DIG is wrong.

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[9] DIG's evidence did not relate to the *parties'* intent [Resp.Br. 25], but instead dealt with *its own* intent. [L.F. 497-502] It was not controverted. [L.F. 569]

The case cited by DIG in its Application deals with the discretion to grant or deny a request to stay as to *non-arbitrable* claims. Where, however, the request for a stay is directed to the parties or claims covered by an arbitration agreement, the trial court has *no* such discretion. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238, 1241 (1985)("* * * [t]he [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed"); Houlihan v. Offerman & Co., Inc., 31 F.3d 692, 695 (8th Cir. 1994). See also FAA §3 and §435.355.4 of the Missouri UAA.

While the parties argued to the Trial Court the impact of a stay on non-arbitrating parties [Resp.Br. 25-26], neither party requested such relief. [L.F. 68-108, 542-564, 817] Discretionary considerations do not pertain to a proposed stay of issues subject to arbitration. An "abuse of discretion" standard does not apply. Instead, review is, again, *de novo*. K.K.W. Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42, 48 (1st Cir. 1989); Oldroyd v. Elmira Savings Bank F.S.B., 134 F.3d 72, 76 (2d Cir. 1998).[10]

B. Missouri's Equitable Mechanic's Lien Statutes Do Not Bar Enforcement of the Parties' Arbitration Agreement.

[10] An order staying arbitration is not entitled to the standard of review normally accorded a grant of injunctive relief. See K.K.W. Enterprises, Inc., 184 F.3d at 48.

The Trial Court's Order effectively denied arbitration of *all* claims. Although the Trial Court's Order did not contain any reasoning to explain this result, the only way to rationalize the denial of *all* arbitration, particularly in light of DIG's position before the Trial Court that only that portion of its claims based upon "marked PCO's" were removed from the scope of the arbitration agreement, is that the Trial Court found, as a matter of law, that arbitration of all claims was precluded by Missouri's equitable mechanic's lien statutes, a concern the Trial Court expressed during the October 22, 2001 hearing.

The Western District thoroughly addressed the issue and correctly determined that Missouri's equitable mechanic's lien statutes *do not* bar enforcement of the parties' arbitration agreement, and in any event, those statutes are pre-empted by the FAA. [Opinion 13 – 16: "Missouri's equitable mechanic's lien statutes will, therefore, not be applied to bar enforcement of Lafarge's and DIG's agreement to arbitrate the underlying disputes"; App. A28-A31]

In its Application For Transfer, DIG again argued that Missouri's equitable mechanic's lien statutes preclude the enforcement of the otherwise valid and enforceable arbitration agreement between Lafarge and DIG. [Application 8 – 12] In sum, the applicable statutes and case law do not support DIG.

The reasonable interpretation of Missouri's equitable mechanic's lien statutes does not bar the enforcement of valid arbitration agreements. Further, as discussed *infra*, two Missouri Court of Appeals cases directly on point with this issue hold Missouri's equitable mechanic's lien statutes do not bar the enforcement of valid arbitration

agreements and hold that, to apply the equitable mechanic's lien statutes as DIG wishes, would preempt the FAA, a result contrary to federal law. Silver Dollar City v. Kitsmiller Constr. Co., 874 S.W.2d 526, 531, 535 (Mo. App. S.D. 1994) and McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881 (Mo. App. W.D. 1993). Moreover, the U.S. Supreme Court, and legions of other courts, have held that state statutes similar to Missouri's equitable mechanic's lien statutes do not and cannot preempt valid arbitration provisions within the scope of the FAA. See, e.g., Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 858 (1984). In fact, the result that DIG urges is directly contrary to the clear mandates of the U.S. Supreme Court and policy of the FAA to enforce arbitration agreements, as recognized by this Court. Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837, 839 (Mo. banc 1985).

Contrary to DIG's arguments, it is possible to reasonably harmonize Missouri's equitable mechanic's lien statutes with the FAA to give full effect to the intent and policies underlying both laws, in much the same way Paragraph III.D of the October Change Order can and must be read in harmony with the mandatory arbitration clause of the Contract.

Quite simply, the answer is to separate the equitable mechanic's lien action into two parts or phases. The first phase initially determines the amounts of the debts between specific parties underlying the mechanic's liens, and the second phase determines the validity and priority of all mechanic's liens and other secured interests against the property and, if necessary, the collection of the mechanic's liens and other interests against the project property. The first phase is well-suited to arbitration for the resolution

of all disputes, claims and issues between the parties to an arbitration agreement, including a determination of the amount of the underlying debt to a mechanic's lien. For other non-arbitrable mechanic's lien claims and causes of action between other parties, the equitable mechanic's lien court can proceed in parallel with the determination of the amounts of those claims and causes of action.

Upon the conclusion of the first phase, the second phase begins. After all mechanic's lien amounts are established by arbitration or litigation, the equitable mechanic's lien court can then determine issues of the validity and priority of all mechanic's liens and other interests in the property, and subsequently oversee foreclosure of the property and proper collection of debts secured by the property. This process is supported by the reasonable construction and interpretation of Missouri's equitable mechanic's lien statutes.

1. Missouri's Equitable Mechanic's Lien Statutes, By Their Terms, Do Not Preclude Arbitration And Can Be Harmonized With Arbitration.

The express language of Missouri's equitable mechanic's lien statutes does not preclude arbitration. Moreover, Missouri's mechanic's lien statutes can be interpreted consistently and harmonized with both the FAA and Missouri's UAA to give effect to the equitable mechanic's lien statutes and the arbitration statutes. DIG's contention to the contrary is not supported by the statutory language or any reasonable interpretation thereof.

When interpreting statutes, this Court harmonizes all provisions if possible. In re Beyersdorfer, 59 S.W.3d 523, 525 (Mo. banc 2001). Unreasonable and absurd results are

to be avoided. Murray v. Missouri Highway and Transp. Com'n, 37 S.W.3d 228, 233 (Mo. banc 2001).

Missouri's equitable mechanic's lien statutes, §§429.270 through 429.300, do not expressly preclude, or even address, arbitration. Furthermore, nothing in Missouri's Mechanic's and Materialmen's Lien statutes, §§429.010 through 429.360, prohibits arbitration in any respect.

Careful examination of the language, and consideration of the purpose expressed, in the statutes themselves does not reveal an inherent prohibition of arbitration. The equitable mechanic's lien statutes set forth the procedure for the enforcement and adjudication of the rights of multiple mechanic's lien claimants in a single equitable action before the court in which the mechanic's liens are filed. §429.270. The equitable mechanic's lien statutes provide that when the equitable action is commenced, it is "exclusive of other remedies for the enforcement of mechanic's liens". §429.290. Any other "suits that may have been brought on any mechanic's lien claim or demand shall be stayed", and the parties to those suits made parties to the equitable action. §429.300. The court, however, has discretion to submit "any issue upon any separate claim or demand to a jury". §429.320.

Thus, Missouri's equitable lien statutes do not prohibit arbitration. These statutes expressly refer to "suits" and "actions", i.e., litigation. Arbitration, on the other hand, is a form of dispute resolution that is a proceeding *separate* from litigation. Murray v. Missouri Highway and Transp. Com'n, 37 S.W.3d 228, 234 (Mo. banc 2001). The purpose of arbitration is to encourage dispute resolution without resort to the courts. Id.

Unlike the statutory mechanic's lien remedy, arbitration is not an action at law or at equity; it is simply a dispute resolution proceeding outside of the judicial process.

The touchstone of the equitable mechanic's lien action is two , or more, mechanic's lien claims. The equitable mechanic's lien statutes do not apply when only one mechanic's lien is filed against the property. §429.330. However, in any such single mechanic's lien action, the determination and enforcement of the respective priorities between the mechanic's lien and any other lien or encumbrances upon the property is considered an equitable action. Id. Thus, the equitable mechanic's lien action is not unique because it includes third-parties[11] with conflicting property interests and other non-mechanic's lien claims as DIG suggests, it is unique simply because two, or more, mechanic's lien claims are filed.

This Court has found that the equitable mechanic's lien statutes serve the purpose of "uniform treatment" and preventing "races to the courthouse for the purpose of obtaining priorities". State ex rel. Clayton Greens Nursing Center, Inc. v. Marsh, 634

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[11] In an equitable mechanic's lien action, all persons claiming a lien or encumbrance upon the property, and all other persons having rights in or against the property, and all owners and lessees of the property, all as disclosed by public records, are to be made parties. See §429.280. Of course, this is little different from a non-equitable mechanic's lien action, i.e., one mechanic's lien claimant, where all parties to the contract, and other persons with an interest in the matter in controversy, and persons with an interest in the property are to be made parties to such suit. §429.190.

S.W.2d 462, 465 (Mo. banc 1982). Thus, Missouri's equitable mechanic's lien statutes serve the purpose of providing a uniform judicial method for the collection of all debts[12] against the project property. And, as explained above, arbitration is an alternative dispute resolution procedure separate from litigation.

The arbitration statutes recognize the potential for multiparty, multi-issue disputes, like an equitable mechanic's lien action, and clearly evidence the intent that arbitration agreements are nonetheless to be enforced in such situations. Missouri's UAA provides, "Any action or proceeding involving *an issue* subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only." §435.355.4 (emphasis added).[13] The language is clear: if litigation involves *an issue* covered by an arbitration agreement, the litigation must be stayed pending arbitration of the issue and there is no discretion to do otherwise. As such, there is no basis in the arbitration statutes to infer

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[12] A mechanic's lien is no more than a method to collect a debt. R.J. Stephens Drywall and Painting Co. v. Taylor-Morley-Simon, Inc., 628 S.W.2d 374, 375 (Mo. App. E.D. 1982). The project property is the security for the debt.

[13] The FAA similarly provides, "If any suit or proceeding be brought in any of the courts of the United States upon *any issue* referable to arbitration * * *, shall on application of one of the parties stay the trial of the action until such arbitration has been had * * *." 9 U.S.C.A. §3 (emphasis added).

that an arbitration agreement may not be enforced because an action involves multiple parties or other non-arbitrable issues.

As a result, by the literal terms of the mechanic's lien statutes, the equitable mechanic's lien action is made the exclusive proceeding for judicial remedies and suits, and does not refer to the non-judicial remedy of arbitration. The Missouri UAA, therefore, reflects a statutory policy favoring arbitration which can easily be harmonized with the judicial exclusivity of the equitable mechanic's lien statutes.

Thus, lacking any express discord between the statutes, harmonizing Missouri's equitable mechanic's lien statutes with arbitration, to give full effect to each, is easily accomplished. Arbitrable issues, including the determination of the amount of the underlying debt for a mechanic's lien, are first arbitrated, and the litigation for those issues ("severable" issues) is stayed. §435.355.4. For any mechanic's liens and other issues that are not subject to arbitration (and therefore not stayed), a judicial determination can proceed whether by jury or the court. §429.320. Once all of the amounts of all mechanic's lien debts are determined along with all other non-mechanic's lien issues, then the equitable mechanic's lien action can proceed, if necessary, by the court to determine the validity and priority of the mechanic's liens vis-à-vis other interests in the property and, ultimately, the sale and execution of the property and distribution of the proceeds. §429.270.

With this construction of the equitable mechanic's lien statutes, all provisions are given meaning. Arbitration does not supplant the equitable mechanic's lien procedure. Arbitration is recognized for what it is: an alternative dispute resolution proceedure, not a

competing "remedy for the enforcement of a mechanic's lien" or other "suit * * * brought on any mechanic's lien claim or demand". §§429.290 and 429.300. Arbitration can and should be construed to work with, and not against, Missouri's mechanic's lien statutes.

DIG's wished-for construction of the equitable mechanic's lien statutes, on the other hand, requires a finding of inherent dominance over and conflict with arbitration. However, as shown above, there is no such conflict stated in the language of the statutes themselves. Moreover, Missouri's appellate courts have recognized that the equitable mechanic's lien statutes were not designed to be used as a sword or "shield" to preempt all potential actions related to a construction project. Mabin Constr. Co. v. Historic Constructors, Inc., 851 S.W.2d 98, 100-01 (Mo. App. W.D. 1993) (quoting State ex rel. Power Process Piping, Inc. v. Dalton, 681 S.W.2d 514, 517 (Mo. App. E.D. 1984))[14].

[14] In Mabin, the Western District held that the statutory language and legislative intent behind the mechanic's lien statutes dictated a finding that an equitable mechanic's lien action does not prevent other common law actions between parties involved with the same construction project, if the claimant was not made a party to a related equitable mechanic's lien action and the claimant does not avail itself of the mechanic's lien statute. Mabin, 851 S.W.2d at 100-01. "Such breach of contract action is not abrogated by a prior equitable mechanic's lien action filed by another subcontractor to the same construction project." Id. Logically, the equitable mechanic's lien statutes would also not abrogate the arbitration of such a breach of contract action, or any other related action.

DIG's wished-for construction of the equitable mechanic's lien statutes also leads to unreasonable and absurd results. Under DIG's approach, an arbitration agreement suddenly becomes no longer enforceable upon the filing of a second mechanic's lien on a project, although the same arbitration agreement would be enforceable as long as only one mechanic's lien was in existence. Practically, DIG's approach abrogates arbitration provisions in all construction contracts because most projects include many participants – contractors, subcontractors and materialmen – all of which can and do routinely file mechanic's liens. Obviously, this result is unreasonable and absurd and points to the flaw at the core of DIG's argument: that the resolution of disputes by arbitration is inconsistent with the remedy of mechanic's liens. Unfortunately for DIG, there is no support in the statutes or case law for this proposition.

With the harmonized approach, however, the policies and legislative intent of both the equitable mechanic's lien statutes and the arbitration statutes, Missouri's UAA and the FAA, are given full effect and are well served. With respect to arbitration, the important public policy of the FAA and Missouri's UAA to enforce valid arbitration agreements to determine the amount of the underlying debt is given effect. Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 628 n. 4 (Mo. banc 1997). With respect to the equitable mechanic's lien statutes, the purpose of "uniform treatment" and preventing "races to the courthouse for the purpose of obtaining priorities" is also given effect for the collection of the debt. State ex rel. Clayton Greens Nursing Center, Inc. v. Marsh, 634 S.W.2d 462, 465 (Mo. banc 1982). This construction is also in accordance with the case law and sound reasoning of the courts that have addressed the issue.

2. Case Law Supports The Interpretation of Missouri's Equitable Mechanic's Lien Statutes In Harmony With Arbitration.

Missouri courts that have addressed the issue have had no trouble harmonizing arbitration with Missouri's equitable mechanic's lien statutes. Silver Dollar City v. Kitsmiller Constr. Co., 874 S.W.2d 526, 531, 535 (Mo. App. S.D. 1994) and McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881, 892 (Mo. App. W.D. 1993).

In McCarney, the Western District was the first Missouri court to address the enforceability of arbitration agreements in relation to Missouri's equitable mechanic's lien statutes. McCarney involved the consolidation of two cases pertaining to one construction project. Id. at 885. One case concerned an appeal by the project architect of the trial court's denial of its motion to compel arbitration of the owner's claims against it. Id. For the other case, the project owner sought a writ to prohibit the trial court from compelling the owner to arbitrate with the contractor. The architect, the contractor, and one of the contractor's subcontractors had all filed mechanic's liens against the project (although the architect failed to timely file suit to enforce its lien). Id. at 886.

Among several other arguments designed to avoid otherwise valid arbitration agreements with the contractor and architect, the owner contended that the claims asserted by the contractor and architect must be litigated in one equitable mechanic's lien proceeding. Id. at 891. Relying upon this Court's decision in State ex rel. Clayton

Greens Nursing Center, Inc. v. Marsh, 634 S.W.2d 462 (Mo. banc 1982)[15], the owner argued that an arbitration proceeding is the type of action encompassed by Missouri's equitable mechanic's lien statutes so that an equitable mechanic's lien action prohibits separate arbitrations involving the same construction project. Id. at 892.

The Western District disagreed, holding that arbitration cannot be considered "litigation" or the type of "legal action" which Missouri's equitable lien statutes are intended to preclude or stay once an equitable mechanic's lien action is commenced. Id. Moreover, the Western District found the owners' construction of Missouri's equitable mechanic's lien statutes "unreasonable". Id. As a result, and similar to its holding in the instant case, the Western District correctly held an equitable mechanic's lien action is *not* the exclusive means to resolve disputes where the parties have agreed to arbitrate, and parties are entitled to enforce their agreement to arbitrate *regardless of whether there are*

[15] In Clayton Greens, it was held that an earlier filed contract/garnishment action was prevented from proceeding after an equitable mechanic's lien action was initiated and all the parties in the contract case were parties in the equitable action. Clayton Greens, 634 S.W.2d at 465.

multiple liens "creating the basis for an equitable lien action." Id. (emphasis added)[16]. As a result, the Western District ordered the writ of prohibition quashed and also ordered the trial court to enter directions to compel arbitration and stay the lawsuit pending the outcome of the arbitration. Id.

The Missouri Court of Appeals, Southern District, ("Southern District") similarly addressed and rejected an argument that Missouri's equitable mechanic's lien statutes were an exclusive remedy preempting arbitration in Silver Dollar City v. Kitsmiller Constr. Co., 874 S.W.2d 526 (Mo. App. S.D. 1994). Similar to the owner in McCarney, the owner in Silver Dollar City argued that this Court's decision in Clayton Greens required that Missouri's equitable mechanic's lien statutes were the exclusive remedy for resolving multi-party disputes arising from construction projects. Id. at 535.

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[16] DIG has consistently argued before the Western District, and here, that McCarney does not create any Missouri precedent on the issue of the enforceability of a arbitration agreement in the context of an equitable mechanic's lien action because, according to DIG, only one lienholder existed and an equitable mechanic's lien action had not be filed. [Application 11] In its Opinion, the Western District, which decided McCarney, specifically rejected DIG's contention. [Opinion, p. 15 n. 3; App. A30] The Western District clearly explained that the issue asserted and determined in McCarney, that the architect and contractor arbitration demands were not required to be litigated in one equitable mechanic's lien proceeding, is applicable to the instant case. Id.

The Southern District disagreed. The Southern District followed the Western District's holding in McCarney that parties are entitled to enforce their agreement to arbitrate *regardless of whether there are multiple liens "creating the basis for an equitable lien action."* Id. (quoting McCarney, 866 S.W.2d at 892).

The Southern District also went further and found another reason to uphold the arbitration agreement between the owner and contractor. The Southern District correctly determined that Missouri's equitable mechanic's lien statutes cannot be applied to defeat the parties' arbitration agreement, which was within the coverage of the FAA. Silver Dollar City, 874 S.W.2d at 535 – 36 (citing Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837, 839 (Mo. banc 1985)). Finding no exception to the FAA applicable, the Southern District rejected the owner's contention that Missouri's equitable mechanic's lien statutes overrode the arbitration provision. Silver Dollar City, 874 S.W.2d at 535. As a result, the case was remanded back to the trial court for a determination of the validity of the contract and arbitration agreement, an issue that had not been previously determined. Id.

DIG's contention in its Application For Transfer that the Western District's ruling on the equitable mechanic's lien issue was in conflict with other Missouri cases is without merit. None of the cases DIG cites, Clayton Greens; Evergreen National Corp. v. Killian Constr. Co., 876 S.W.2d 633 (Mo. App. W.D. 1994); and State ex rel. Great Lakes Steel Corp. v. Sartorius, 249 S.W.2d 853 (Mo. banc 1952) [Application 1, 8 – 11], address arbitration in any manner with respect to Missouri's equitable mechanic's lien

statutes. Silver Dollar City and McCarney directly address the issue presented in this case, and the Western District's Opinion follows the precedent set in those cases.

The application of Silver Dollar City and McCarney to the instant case is clear. DIG admits the FAA is applicable to this case and the arbitration agreement between Lafarge and DIG is valid and enforceable. Thus, the arbitration agreement between Lafarge and DIG is enforceable regardless of whether multiple mechanic's liens exist creating a basis for an equitable mechanic's lien action. See Silver Dollar City, 874 S.W.2d at 535; McCarney, 866 S.W.2d at 892. See also Opinion, p. 15; App. A30. Clayton Greens, and other cases relied upon by DIG to find conflict between the equitable mechanic's lien statutes and arbitration, do not apply to the instant case because arbitration is not a type of "legal action" that Missouri's equitable lien statutes are intended to preclude. As such, the proper result is to require the arbitration of all disputes between Lafarge and DIG, and stay the enforcement proceedings of the equitable mechanic's lien action until the conclusion of the arbitration.

a. Federal and Other State Courts Support Harmonizing Arbitration and Mechanic's Lien Statutes.

In addition to the Missouri cases of McCarney and Silver Dollar City, virtually all other courts and authorities that have addressed the issue have harmonized the statutory remedy provided by mechanic's liens with arbitration. See CVN Group, Inc. v. Delgado, 2002 Tex. Lexis 218, *16 - 28 (Tex. 2002)(publication status pending); N.C. Monroe Constr. Co. v. Virginia Eastern Co., 2002 Va. Cir. Lexis 61, *9-11 (Va. Cir. Ct. 2002); Thomas Group, Inc. v. Wharton Senior Citizen Hous. Inc., 750 A.2d 743, 751 (N.J.

2000); Clinton National Bank v. Kirk Gross Co., 559 N.W.2d 282, 284 (Iowa 1997); State ex rel. Center Designs, Inc. v. Henning, 491 S.E.2d 42, 45 (W.Va. 1997); Caretti, Inc. v. Colonnade L.P., 655 A.2d 64, 66 (Md. Ct. Spec. App. 1995); Rose Heart, Inc. v. Ramesh C. Batta Assoc., P.A., 1994 Del. Super. Lexis 175, *12-13 (Del. Super. Ct. 1994); Mountain Plains Constructors, Inc. v. Torrez, 785 P.2d 928, 931 (Colo. 1990); B&M Constr., Inc. v. Mueller, 790 P.2d 750 (Az. Ct. App. 1989); Buckminster v. Acadia Village Resort, Inc., 565 A.2d 313, 315 (Me. 1989); Pine Gravel, Inc. v. Cianchette, 514 A.2d 1282, 1285 (N.H. 1986); Sentry Eng'g and Constr., Inc. v. Mariner's Cay Devel. Corp., 338 S.E.2d 631, 635 (S.C. 1985); J&K Cement Constr., Inc. v. Montalbano Builders, Inc., 456 N.E.2d 889, 903 (Ill. App. Ct. 1983); H.R.H. Prince Ltc. Faisal M. Saud v. Batson-Cook Co., 291 S.E.2d 249, 251 (Ga. Ct. App. 1982); Harris v. Dyer, 623 P.2d 662, 665 (Or. Ct. App. 1981), aff'd as modified, 637 P.2d 918 (Or. 1981); Lane-Tahoe, Inc. v. Kindred Constr. Co., 536 P.2d 491, 495 (Nev. 1975), disapproved on other grounds, County of Clark v. Blanchard Constr. Co., 653 P.2d 1217 (Nev. 1982); Mills v. Robert W. Gottfried, Inc., 272 So. 2d 837, 838-839 (Fla. Dist. Ct. App. 4th Dist. 1973). Also see generally *Demand For Or Submission To Arbitration As Affecting Enforcement of Mechanic's Lien*, 73 A.L.R.3d 1042; *Filing of Mechanic's Lien or Proceeding For Its Enforcement As Affecting Right To Arbitration*, 73 A.L.R.3d 1066; John G. McGill, *Liens and Arbitration*, 13 Constr. Law. 3 (April 1993); and Bruner & O'Conner on

Construction Law, §20:53 *Arbitrating Statutory Mechanic's Lien Claims*, Vol. 6 (2002).[17] Thus, the obligation to arbitrate and the mechanic's lien remedy can (and do) indeed work together.

As explained by the Texas Supreme Court in the recent CVN case, "Whatever the approach of a given state, the crux of the coordinate proceedings is that the court defers to arbitration on the underlying debt claim, but retains jurisdiction over the dispute, and later incorporates the amount of the arbitration award into its order of foreclosure." Id. at *51. See also John G. McGill, *Liens and Arbitration*, 13 Constr. Law. 3 (April 1993)("The linchpin of harmonized arbitration and lien proceedings is that the court

[17] In addition to the cited cases in which courts have harmonized mechanic's lien statutes and arbitration statutes, New York and California have specific statutes to harmonize mechanic's liens and arbitration. See Sette-Juliano Constr. v. Aetna Cas. & Sur. Co., 246 A.D.2d 142 (N.Y. App. 1998) and DiKaneko Ford Design v. Citipark, Inc., 202 Cal. App. 3d 1220 (Cal. Ct. App. 1988). Numerous cases were also found in jurisdictions other than those in the cited cases, in which parties arbitrated issues in the context of mechanic's liens proceedings. See, e.g., Eastern Dredging & Constr., Inc. v. Parliament House, LLC, 698 So. 2d 102 (Ala. 1997); United Tech. And Resources, Inc. v. Dar Al Islam, 846 P.2d 307 (N.M. 1993); Merle's Constr. Co. v. Berg, 442 N.W.2d 300 (Minn. 1989); Worthington & Kimball Constr. Co. v. C & A Devel. Co., 777 P.2d 475 (Utah 1989) and Foley Co. v. Grindsted Prod., Inc., 662 P.2d 1254 (Kan. 1983).

defers to arbitration, but retains jurisdiction over the dispute, and later embodies the arbitration award into its own determinations.")

It is interesting to note that, in this case, before the Trial Court first raised the issue of whether arbitration is consistent with Missouri's equitable mechanic's lien statutes, DIG itself *acknowledged* that it could "file mechanic's liens, sue in a court of law to enforce the liens, and then arbitrate its contract claims", and that after the arbitration award was rendered, it could then "return to a Missouri court to register the award and execute on its lien." [L.F. 489, n. 10] DIG apparently had no problem harmonizing arbitration with Missouri's equitable lien statutes, at least at that point in time.

The application of the foregoing cases is not limited to single issue, two-party litigation. The support for harmonizing arbitration and mechanic's lien statutes includes multi-party, multi-issue litigation; the type of litigation brought about by Missouri's equitable mechanic's lien statutes. In upholding an arbitration provision, the interplay between arbitration and litigation of mechanic's liens in a multi-party construction project setting was addressed in B&M Constr., Inc. v. Mueller, 790 P.2d 750 (Az. Ct. App. 1989). There, the court stated:

> Construction litigation often involves many lien claimants, contesting not only whether a lien has been properly perfected but which of many liens have priority. These claimants would not be parties to the contract requiring arbitration or to the resulting arbitration and would not be bound by it. Accordingly, they would be free to litigate validity and

> priority. Because that would be a common result, it is sensible to exclude these issues from arbitration and to have them tried once in an action between all competing lien claimants. Id.

Moreover, the case of J&K Cement Constr., Inc. v. Montalbano Builders, Inc., 456 N.E.2d 889 (Ill. Ct. App. 1983), also addressed several arguments raised against arbitration in a multi-party mechanic's lien suit. In that case, fifteen subcontractors and the general contractor filed mechanic's liens, and two separate suits, which were later consolidated, were filed to foreclose on the mechanic's liens against the project real property. Id. at 892.

In short, the J&K Cement court found that Illinois' UAA and policy to enforce valid arbitration agreements required the enforcement of agreements to arbitrate despite pending multi-party litigation. Id. at 898. The court specifically rejected numerous arguments, similar to those raised by DIG, opposing arbitration on unfounded concerns for judicial economy, duplication of proof and the potential for inconsistent results. Id. at 898 – 901. Based on statutory language in Illinois' enactment of the UAA, which is the same language as Missouri's §435.455.4, the court stated, "we believe the drafters of the Uniform Arbitration Act anticipated multiparty problems and intended that arbitration agreements nonetheless be enforced in such situations." Id. at 903 (citing Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711 (7th Cir. 1967), and Charles J. Frank, Inc. v. Associated Jewish Charities of Baltimore, Inc., 450 A.2d 1304 (Md. 1982)).

The Illinois Supreme Court recently reaffirmed the holding in J&K Cement and the principle that arbitration agreements must be enforced in multiparty litigation. Board

of Managers of the Courtyards at the Woodlands Condominium Assoc. v. IKO Chicago, Inc., 697 N.E.2d 727, 732 (Ill. 1998) ("In Illinois, the general rule is that agreements to arbitrate will be enforced despite the existence of claims by third parties or of pending multiparty litigation.").

This result is not surprising because the U.S. Supreme Court has mandated the enforcement of valid arbitration agreements in multi-party, multi-issue litigation. See Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 20, 103 S. Ct. 927, 939 (1983) (holding that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement" and mandates enforcement of an arbitration agreement "notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"; emphasis added). See also Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, S. Ct. 1238 (1985). There is no basis to do otherwise. See generally T. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L.Rev. 473 (1987).

3. There Are Strong Public Policies Favoring Arbitration In Construction Disputes, Including Mechanic's Lien Disputes.

The FAA and Missouri UAA clearly express and enable the important public policies in favor of enforcing arbitration agreements, and encouraging arbitration proceedings without resort to the courts. See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983); Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 628 n.4 (Mo. banc 1997).

Perhaps in no other industry is this strong public policy favoring arbitration more important than in the construction industry, where disputes often involve unique and complex issues that require specialized knowledge for their resolution. See, e.g., K.P. Meiring Constr. v. Northbay I & E, Inc., 761 So.2d 1221, 1223 (Fla. Dist. Ct. App. 2000). See also Adrian L. Bastianelli, *Notes From The Editor - ADR*, 22 Constr. L. 3 (Summer 2002)("Construction litigation often involves complex factual, technical, and legal issues; large numbers of documents; and lengthy hearings. The proceedings can be expensive and may not be well suited for a lay trier of fact.")

Moreover, the construction industry is clearly recognized as being at the forefront of alternative dispute resolution, including the use of arbitration. Id.; John W. Hinchey and Laurence Shor, *The Quest for the Right Questions in the Construction Industry*, 57 Dispute Res. J. 8 (August – October 2002); James P. Groton, *Alternative Dispute Resolution in the Construction Industry*, 52 Dispute Res. J. 48 (Summer 1997). In fact, arbitration clauses were included in the first construction form contracts prepared by the American Institute of Architects in 1915, and today, are included in most of the major construction form contracts. Bruner & O'Conner on Construction Law, *Genesis of Construction Arbitration*, §20:1 (2002).

Recognizing the importance of the role of arbitration in the construction industry, the American Arbitration Association ("AAA") has promulgated a specific set of rules and procedures specially designed towards the timely and efficient resolution of construction claims and disputes. See American Arbitration Association Construction Industry Dispute Resolution Procedures (Including Mediation and Arbitration Rules)

(2003)(as explained in the introductory statements, the AAA Construction Industry Rules are sponsored by twenty-two construction organizations that form the National Construction Dispute Resolution Committee).

"The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices …". Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 280, 115 S. Ct. 834, 843 (1995) Both the FAA and Missouri's UAA share the common purpose of furthering these advantages of arbitration. G. William Quatman, *Missouri Arbitration Law Part I: The Uniform and Federal Arbitration Acts*, 52 J. Mo. B. 78 (March/April 1996). Moreover, as explained in the previous section of this Brief, the advantages of arbitration are decidedly applicable to complex, multi-party mechanic's lien litigation.

To interpret the equitable mechanic's lien statutes to bar enforcement of a party's arbitration agreement would run counter to the important public policies favoring arbitration and have devastating effects upon all construction projects. The construction industry, which is well known for its pioneering use of alternative dispute resolution in contracts, could no longer rely upon freely bargained-for arbitration rights. Subsequent to entering into a construction contract containing an arbitration provision, virtually any participant on a construction project could not only avoid the arbitration provision for their own-perceived advantage, they could also vitiate arbitration provisions for other

participants on the project as well. For example, an unscrupulous contractor, wishing to avoid arbitration with an owner, could simply not pay its subcontractors and suppliers so that multiple mechanic's liens are filed and an equitable mechanic's lien action is commenced.[18] Essentially, all alternative dispute resolution provisions in construction contracts would become illusory.

The result DIG seeks is clearly contrary to the important public policies underlying arbitration, and undermines the foundation of the construction industry's use of alternative dispute resolution. Simply stated, there is no rational basis to treat arbitration and construction projects in such a manner.

4. <u>If Missouri's Equitable Mechanic's Lien Statutes Are Interpreted As DIG Argues, Then The Statutes Are In Conflict With The Federal Arbitration Act, Which Controls Over Conflicting State Laws</u>.

Since the arbitration agreement between Lafarge and DIG is admittedly within the coverage of the FAA, the extensive case law set forth by the U.S. Supreme Court, and other courts, regarding the enforcement of valid arbitration provisions under the FAA are applicable and relevant. In short, the teachings of these cases is that Missouri's equitable

[18] Other permutations are also possible. Subcontractors wishing to avoid arbitration could team up against the general contractor, voiding all subcontract arbitration agreements. Or, an owner could put all contractors desiring arbitration to a Hobson's choice: file liens and forego arbitration, or arbitrate without the potential security of a mechanic's lien to collect any award.

mechanic's lien statutes *cannot* be applied so as to preclude arbitration required by the FAA.

The extensive legal background of the FAA, its application in state courts and the interplay between state laws and the FAA, is well known and sufficiently set forth in Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 270 – 72, 115 S. Ct. 834, 837 – 39 (1995). The basic purpose of the FAA is to overcome courts' refusal to enforce agreements to arbitrate. Id. at 270 (citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474, 109 S. Ct. 1248, 1253 (1989)). The FAA is an enactment of Congressional power to regulate interstate commerce. Allied-Bruce at 271 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405, 87 S. Ct. 1801, 1807 (1967)). And, the FAA is to be applied by state courts and preempts state laws that invalidate arbitration agreements. Allied-Bruce at 271-72 (citing Southland Corp. v. Keating, 465 U.S. 1, 15-16, 104 S. Ct. 852, 860-61 (1984)). State courts are required to apply the FAA because "Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." Allied-Bruce at 272.

The preemptive effect of the FAA upon conflicting state laws is certain and clear. In enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 858 (1984). Under the FAA, there are only two limitations on the enforceability of arbitration provisions: they must be part of a written

maritime contract or a contract 'evidencing a transaction involving commerce' and the provision may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract'. Id. at 10-11(quoting FAA §2). There is nothing in the FAA "indicating that the broad principle of enforceability is subject to any additional limitation under State law." Id.

In fact, Southland is on point with the instant case. In Southland, the U.S. Supreme Court addressed the effect of a California statute that required judicial consideration of claims brought under California's franchise statutes. This is analogous to DIG's argument that Missouri's equitable mechanic's lien statutes require judicial consideration of all claims in an equitable mechanic's lien action. The U.S. Supreme Court found that the California statute directly conflicted with the FAA and could not be applied to bar the enforcement of a valid arbitration agreement.

Numerous other federal courts have similarly found that the FAA preempts state statutes that require litigation or arbitration in a state's forum. Arkcom Digital Corp. v. Xerox Corp., 289 F.3d 536 (8th Cir. 2002) (rejecting argument that state statute did not specifically target arbitration); OPE Int'l L.P. v. Chet Morrison Contractors, Inc., 258 F.3d 443 (5th Cir. 2001) ("The statute directly conflicts with §2 of the FAA because the Louisiana statute conditions the enforceability of arbitration agreements on selection of a Louisiana forum; a requirement not applicable to contracts generally"); Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157, 163 (2d Cir. 1998) (reasoning that New Jersey caselaw invalidating a franchise agreement's forum selection clause "applied to one sort of contract provision (forum selection) in only one type of contract (a franchise

agreement)," and so was preempted by the FAA); and Bradley v. Harris Research, Inc., 275 F.3d 884 (9th Cir. 2001) (California statute that was not a generally applicable contract defense and that applied to any contract was preempted by FAA).

Moreover, this Court has long recognized the FAA's broad principle of enforceability and preemption over conflicting state statutes. See, e.g, Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837, 839 (Mo. banc 1985) (Missouri notice statute could not be applied to defeat the arbitration provision of a contract within the coverage of the FAA).

The bottom line is that DIG asks this Court to stand alone and place Missouri law directly in conflict with federal statutes and U.S. Supreme Court precedent by holding that Missouri's equitable mechanic's lien statutes preempt the FAA. As explained above, Missouri's equitable mechanic's lien statutes can and should be harmonized with the FAA. There is no principled basis to reach the result DIG requests. This Court should hold, as the Western District held, that Missouri's equitable mechanic's lien statutes should not be applied to bar enforcement of Lafarge and DIG's agreement to arbitrate the underlying disputes.

C. The Contract Contains a Broad, Mandatory Arbitration Agreement, and All the Claims and Disputes Between the Parties Fall Squarely Within That Agreement to Arbitrate.

Courts applying the FAA recognize the strong federal policy favoring arbitration agreements, a policy which requires courts to resolve "any doubts" concerning arbitrability in favor of arbitration. See, e.g., Moses H. Cone Memorial Hosp. v. Mercury

Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983). The policy favoring arbitration applies whether the issue at hand is the construction of the contract language itself, the determination of the scope of the arbitration provision, or an allegation of waiver, delay, or a like defense to arbitrability. Id.; Houlihan v. Offerman & Co., 31 F.3d 692, 695 (8th Cir. 1994).

Missouri likewise recognizes the strong policy in favor of enforcing arbitration agreements, and encouraging arbitration proceedings. Local 781 Int'l Ass'n of Firefighters v. City of Independence, 996 S.W.2d 112, 115-16, (Mo. App. W.D. 1999); Westridge Inv. Group, L.P. v. McAtee, 968 S.W.2d 243, 245 (Mo. App. W.D. 1998). As such, if there is any doubt in this case concerning the scope of the arbitration agreement or whether any defense to arbitrability applies, that doubt *must* be resolved in favor of arbitration.

Under the FAA, a court must stay litigation and compel arbitration if it determines that the parties agreed to arbitrate and if the disputes between the parties are within the scope of the parties' arbitration agreement. 9 U.S.C.A. § 3; Houlihan, 31 F.3d at 695. See also Village of Cairo v. Bodine Contr. Co., 685 S.W.2d 253, 258 (Mo. App. W.D. 1985); Fru-Con Constr. Co. v. Southwestern Redevelopment Corp. II, 908 S.W.2d 741, 744 (Mo. App. E.D. 1995).

Thus, in determining whether the issues involved in this case are referable to arbitration, a Court's authority is limited to a two-step inquiry: *first*, whether the parties agreed to arbitrate; and *second*, whether that agreement covers the underlying dispute. See AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643,

648-650, 106 S. Ct. 1415, 1418-1419 (1986); Houlihan, 31 F.3d at 694-695. Once a Court answers these questions in the affirmative, the parties must take up all additional concerns with the arbitrator. Id.

Here, Lafarge and DIG agreed to arbitrate. [L.F. 279] Both parties agree that the Contract contains a binding arbitration agreement. [L.F. 481, 748] Therefore, unless the October Change Order somehow modified the parties' arbitration agreement with respect to claims based on "marked PCO's", the first step of this two-step inquiry is complete.

The parties' arbitration agreement is also sufficiently broad so as to include all of the disputes between the parties within its scope. It provides in pertinent part: "Any controversy or claim *arising out of or relating to* this contract, or the breach thereof, *shall* be settled by arbitration …". [L.F. 279; App. A01 (emphasis added)] This is an extremely broad arbitration clause. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397-398, 87 S. Ct. 1801, 1802-1803 (1967) (similar "arising out of or relating to" language held to be broad); Collins & Aikman Prods. Co. v. Building. Sys., 58 F.3d 16, 20 (2d Cir. 1995) (language requiring arbitration of any claim or controversy "arising out of or relating to the agreement" described by Court as "the paradigm of a broad clause").

Where a contract contains a broad arbitration clause, such as the clause in the Contract between Lafarge and DIG, there is a *strong presumption* of arbitrability which is overcome only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Creative Telcoms., Inc. v. Breeden, 120 F. Supp. 2d 1225, 1237 (D. Haw. 1999) (citing United Steelworkers of

America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S. Ct. 1347 (1960)); McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881, 889 (Mo. App. W.D. 1993). And, when interpreting the scope of an arbitration clause, there must be a clearly expressed intent *not* to arbitrate an issue before the issue can be ruled one for judicial determination. Creative Telcoms., 120 F. Supp. 2d at 1236. The Court therefore "should refer all issues not clearly outside the scope of the agreement to an arbiter." Id.

Also, in ascertaining whether a particular claim or dispute "arises out of" or "relates to" the parties' agreement, and is therefore within the scope of such an arbitration clause, the characterization of the claim or dispute in the pleadings is not controlling:

> In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims "touch matters" covered by the parties' ... agreements, then those claims must be arbitrated, whatever the legal labels attached to them.

Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 622 n.9, 624 n.13, 105 S. Ct. 3346, 3351 n.9, 3352 n.13 (1985)).

In this case, all of the claims raised by DIG in its Amended Petition, including the claims based upon the "marked PCO's", arise out of or relate to the Contract, and therefore fall squarely within the scope of the parties' broad arbitration agreement.

Counts IV and V of DIG's Amended Petition allege that Lafarge failed to perform its obligations under and breached the Contract (¶¶ 90, 92, 93, 95, 108-110). [L.F. 758-759, 762] DIG claims that Lafarge failed to "issue change orders" and to pay "amounts due" under the Contract for alleged extra or changed work performed by DIG, and that Lafarge failed to pay for "lost productivity" claimed to have resulted from the performance of this "extra" or "changed" work. [L.F. 755-762] Clearly, these claims "aris[e] out of or relat[e] to" the Contract or "the breach thereof". See Crochet Equip. Co. v. Board of County Comm'rs, 20 F. Supp. 2d 987, 990 (M. D. La. 1998) (claim for payment for "extra work" requires interpretation of contract requirements, and therefore arises out of the contract and must be arbitrated).

Counts VI and VII of DIG's Amended Petition assert alternative claims for statutory interest and attorney's fees, pursuant to Missouri's Private and Public Prompt Payment Acts, respectively. [L.F. 763-764] Both Counts seek an award of attorney's fees and interest because, according to DIG, DIG has been forced to "collect payments *due under the Contract*" (¶¶ 116, 125 (emphasis added)). [L.F. 763, 764] Both Counts also incorporate all facts alleged by DIG in its breach of contract claims, and include a requested extension of the Contract schedule. [L.F. 763, 764] The analysis of both Counts requires an examination of the parties' respective obligations and performance under the Contract. These claims therefore "aris[e] out of or relat[e] to" the Contract.

Counts VIII and IX of DIG's Amended Petition are captioned "quantum meruit" claims. [L.F. 765-769] Count VIII is based upon the "above-identified PCO's" set forth in, and the very same allegations of "extra" and "changed" work which form the basis of,

DIG's breach of contract claims. [L.F. 765] Count VIII, like Count IV, relates to whether the alleged "extra" or "changed" work covered by the listed PCO's is required under the terms of the Contract. See Bangor Hydro-Electric Co. v. New Eng.Tel. & Tel. Co., 62 F. Supp .2d 152, 159 (D. Me. 1999) (where resolution of "quantum meruit" claim required reference to parties' agreement, claim "related to" that agreement and was arbitrable). Count IX is based upon DIG's allegations that certain equipment arrived on-site in more pieces than as per Lafarge's promises *"memorialized in the Contract"* (¶¶ 139-141(emphasis added)), and that DIG was therefore required to furnish *"extra* labor and material" to assemble that equipment (¶¶ 145, 149 (emphasis added)). [L.F. 768, 769] Both Counts clearly find their genesis in the terms of, and have a significant relationship to, the Contract. See American Recovery Corp. v. Computerized Thermal Imaging, 96 F.3d 88, 95 (4th Cir. 1996) ("quantum meruit" claim "related to" contract, and was therefore arbitrable, where it relied on terms of contract); United States & Int'l Travel & Tours, Inc. v. Tarom S.A., 98 F. Supp. 2d 979, 980 (N.D. Ill. 2000) ("quantum meruit" claim arose "in connection with" contract, and was therefore arbitrable, where claimed services were commenced pursuant to contract).

Count X of DIG's Amended Petition alleges Lafarge breached a "warranty" that purportedly exists by reason of the Contract reached between the parties and the "quantity spreadsheets and design sketches included *in the Contract*" (¶ 153, 154 (emphasis added)), and which purportedly was breached when Lafarge required "significant *changes* in the agreed Scope of Work" (¶ 157 (emphasis added)). [L.F. 770-771] Thus, the terms of the Contract must be examined to resolve this claim. As such,

this claim clearly "aris[es] out of or relat[es] to" the Contract, and therefore falls within the scope of the arbitration clause.

Count XI of DIG's Amended Petition is DIG's "negligent misrepresentation" claim, and is based upon alleged representations by Lafarge, purportedly made at the time of contracting, that DIG's "firm fixed price" to perform the Contract work was adequate to satisfy all of "the requirements" of the Contract. [L.F. 771-773] The *real* thrust of DIG's "tort" claim is that it has not been paid for work which it believes was beyond its original scope of work under the Contract (¶¶ 161-163), which is nothing more than a restatement of its contract claims. [L.F. 772] Indeed, this Count incorporates all of the facts alleged by DIG in its breach of contract claims [¶ 159; L.F. 771], suggesting that the facts constituting alleged "breaches" of the Contract are critical to this claim. Gregory v. Electro-Mechanical Corp., 83 F.3d 382, 384 (11th Cir. 1996). DIG also asks for "its economic damages *arising from its contract* with Lafarge", i.e., the purported benefit of its bargain. [L.F. 772 (emphasis added)] See Bass v. SMG, Inc., 2002 Ill. App. LEXIS 130, p. 10 (Ill. App. Ct. Feb. 26, 2002)(party's pursuit of "benefit of the bargain" damages in its "tort" claims was found "compelling" in Court's determination that claims relate to parties' agreement and are arbitrable). The facts alleged clearly demonstrate a significant relationship to, and touch matters covered by, the Contract. See URS Company-Kansas City v. Titus County Hosp. Dist., 604 F. Supp. 423, 425 (W.D. Mo. 1985)(broad arbitration clause held to cover negligence claim arising from or relating to contractual relationship between parties).

The remaining Counts of DIG's Amended Petition directed against Lafarge, i.e., Counts XII, XIII and XV, all seek to foreclose purported mechanic's liens filed by DIG against the Project. [L.F. 773-778, 782-784] Each of these Counts alleges entitlement to recover "reasonable attorney's fees in an action to recover amounts owed *pursuant to a contract* for private construction work", and is based upon Lafarge's purported failure to pay for work alleged by DIG to have been "extra work" beyond its original scope of work under the Contract (¶¶ 175, 192, 227 (emphasis added)). [L.F. 774-776, 778, 782, 784] Again, the terms and requirements of the Contract must be examined to determine whether this "extra" work was, or was not, included in DIG's Scope of Work. These claims clearly arise out of or relate to the Contract. Crochet Equip., 20 F. Supp. 2d at 990.

All of the claims asserted by DIG against Lafarge in DIG's Amended Petition arise out of or relate to the Contract or "the breach thereof", and therefore fall within the scope and coverage of the parties' broad arbitration agreement. As the Western District concluded, the October Change Order did nothing to change that. [Opinion 9-10; App. A24-A25]

D. The October Change Order Did Not Modify or Change the Contract's Mandatory Arbitration Provision.

The broad arbitration agreement in the Contract, quoted above, was incorporated into the October Change Order. [L.F. 370] Nothing in the October Change Order reduces or diminishes the scope of that mandatory arbitration agreement.

Paragraph III.D of the October Change Order states:

> Lafarge and DIG agree 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.*

[L.F. 373; App. A09 (emphasis added)] The plain and unambiguous language of the Contract and the October Change Order, and well-recognized legal principles relating to arbitration and contract construction, all lead to one inescapable conclusion: the above-quoted language from the October Change Order was meant as a reservation of the parties' respective Contract and legal remedies, and was not intended to modify or change their agreement to arbitrate.

1. The Language of the Contract and October Change Order is Clear, Unambiguous, and Requires the Parties to Arbitrate.

The interpretation of an arbitration agreement follows the ordinary principles of contract law. Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943, 945 (8th Cir. 2001); Daisy Mfg. Co. v. NCR Corp., 29 F.3d 389, 392 (8th Cir. 1994). In this case, Missouri law applies. See Paragraph 1.1.8 of the Contract's "General Conditions" [L.F. 263]

The cardinal rule of contract interpretation is to ascertain the intention of the parties as expressed in the *whole* of the contract. Butler v. Mitchell–Hugeback, Inc., 895 S.W.2d 15, 21 (Mo. banc 1995); United States Fidelity & Guar. v. Drazic, 877 S.W.2d 140, 142 (Mo. App. E.D. 1994). In construing a contract, the words used therein will be given their ordinary meaning. Id. The common sense, ordinary meaning of a term is the

meaning that the average layperson would reasonably understand. Farmland Indus. v. Republic Ins. Co., 941 S.W.2d 505, 508 (Mo. banc 1997).

When the contract terms are clear and unambiguous, there can be no construction by the court because there is nothing to construe. U.S.F.&G. v. Drazic, 877 S.W.2d at 142. It is only where a contract contains an ambiguity such that its language is reasonably susceptible to different meanings that a court must construe the agreement. Jake C. Byers, Inc. v. J.B.C. Inv., 834 S.W.2d 806, 816 (Mo. App. E.D. 1992). That is, an ambiguity exists only if the terms are susceptible to more than one meaning so that reasonable persons may fairly and honestly differ in their construction of the terms. Angoff v. Mersman, 917 S.W.2d 207, 210 (Mo. App. W.D. 1996). Any ambiguities in an agreement will be construed against the party who drafted the contract. Graue v. Missouri Property Ins. Placement Facility, 847 S.W.2d 779, 785 (Mo. banc 1993); City of Beverly Hills v. Village of Velda Village Hills, 925 S.W.2d 474, 477 (Mo. App. E.D. 1996).

The terms of the contract are read as a whole to arrive at the parties' intention, and are construed to avoid rendering any of the terms meaningless. Ringstreet Northcrest v. Bisanz, 890 S.W.2d 713, 718 (Mo. App. W.D. 1995). 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., 876 S.W.2d 629, 632 (Mo. App. W.D. 1994). And finally, a construction attributing a reasonable meaning to each phrase and clause, and harmonizing all provisions of the agreement, is preferred to one which leaves some of the provisions without function or

sense. Ringstreet Northcrest v. Bisanz, 890 S.W.2d at 718; Village of Cairo v. Bodine Contr. Co., 685 S.W.2d 253, 264 (Mo. App. W.D. 1985).

We start with the four corners of the Contract and October Change Order. The Contract, including its broad *mandatory* arbitration clause, was incorporated into the October Change Order by reference. [L.F. 370] Incorporation by reference of an arbitration provision is valid and enforceable under both the FAA and Missouri law. See Metro Demolition & Exc. Co. v. H.B.D. Contr., Inc., 37 S.W.3d 843 (Mo. App. E.D. 2001); Sheffield Assembly of God Church v. American Ins. Co., 870 S.W.2d 926 (Mo. App. W.D. 1994).

The terms of that broad arbitration clause were not themselves expressly changed or modified by the October Change Order. The language at issue in the October Change Order, Paragraph III.D, specifically states that either party may resort to "their respective contract remedies". Thus, each party may pursue whatever remedy is available under the Contract and, by reason of the incorporation of the arbitration clause, each party must arbitrate its claim.

Significantly, Paragraph III.D of the October Change Order does *not* state that the right and obligation to arbitrate was modified, limited or waived, or that litigation has been substituted as the means for formally resolving claims. Paragraph III.D does *not* state that either party may pursue an "action at law".

Moreover, the language of Paragraph III.D can be interpreted consistently with the Contract's mandatory arbitration provision. The Western District agreed. [Opinion 12; App. A27] Paragraph III.D refers to the parties' "*respective*" remedies under the

Contract or at law, connoting those remedies in existence and possessed by both parties *at that time*. Contract remedies included termination under Section 4.3 of the Contract's "General Conditions" [L.F. 275], and the submission of contract interpretation questions to Lafarge for decision under Sections 4.1.1 through 4.1.3 [L.F. 274-275].

The parties also possessed their respective legal remedies *not inconsistent with* their obligation to arbitrate, such as either party's right to confirm an arbitration award pursuant to 9 U.S.C.A §9, or DIG's remedy of filing a statutory mechanic's lien. The use of language in Paragraph III.D referring to *respective legal remedies* does not lead to the conclusion that a *respective contract remedy* has been somehow modified or limited.

It is clear from the very terms that Paragraph III.D of the Change Order was meant as a reservation of the parties *respective* contract remedies and their *respective* legal remedies that are not inconsistent with their obligation to arbitrate. The language of Paragraph III.D is equal and parallel in nature. There is no language indicating that one remedy is any greater or more important than the other remedy. The phrase "contract remedies," which includes mandatory arbitration, can and must be interpreted consistently with the phrase "legal remedies" so that one does not conflict with or subsume the other.

The terms "contract remedies" and "remedies as provided by law" are *not* inconsistent. The phrase "remedies as provided by law", read in harmony with the phrase "contract remedies" and the arbitration clause, refers to those remedies provided by law (as opposed to contractual remedies) that are not inconsistent with arbitration, such as (1) a tort claim (as opposed to a contract remedy), which clearly can be arbitrated, and (2) as

DIG itself has acknowledged, the filing and enforcement of a mechanic's lien. [L.F. 489, n.10] A reservation of "remedies as provided by law" does not vitiate the obligation to arbitrate.

Indeed, as we have noted, DIG effectively acknowledged that the language of the October Change Order was not intended to abrogate the duty to arbitrate, but rather was intended by DIG to preserve its right to file a mechanics lien and thereby obtain security for payment. [L.F. 436, 455]

A case on point is Dickson County v. Bomar Constr. Co., 935 S.W.2d 413 (Tenn. Ct. App. 1996). In that case, the contract contained a mandatory arbitration clause (i.e., Paragraph 7.9.1), and also included a "Rights and Remedies" clause (i.e., Paragraph 7.6.1) providing that the rights and remedies available under the contract were in addition to and not a limitation of rights and remedies available by law. Id. at 414. The trial court held that the "Rights and Remedies" clause conflicted with and rendered ineffective the compulsory nature of the arbitration clause. Id. at 415. The Tennessee Court of Appeals reversed, citing the "well-accepted rule that all provisions of a contract should be construed in harmony with the other", and holding:

> In conformity with the above authorities, this Court declines to interpret the two clauses in such a manner as to produce a repugnancy and consequence failure of one provision. Instead, this Court elects to follow the above authorities by interpreting the provisions so as to produce harmony and effectiveness of both. That is, Paragraph 7.9.1 means that the

> parties are obligated to submit to arbitration all disputes arising under the contract. Paragraph 7.6.1 means, the parties do not waive other unspecified rights or remedies which do not nullify their obligation to arbitrate.

Id. at 415. See also Stiglich Constr., Inc. v. Larson, 621 N.W.2d 801, 803 (Minn. Ct. App. 2001) (holding that a similar reservation of "legal" rights and remedies must be construed in harmony with the contract's mandatory arbitration clause, and therefore referred to non-litigation legal remedies such as statutory mechanic's lien rights); Harris v. Dyer, 637 P.2d 918, 920-921(Ore. 1981) (construing similar reservation of "legal" remedies as those remedies not inconsistent with arbitration proceeding, such as mechanic's lien and attorney's fees).

As explained previously in this Brief, Section I.B, *supra*, the contract right of arbitration and the legal remedy of a mechanic's lien are not mutually exclusive or inconsistent. A mechanic's lien is, in essence, a statutory vehicle for securing payment of amounts claimed by a contractor for lienable work – by means of statutorily foreclosing on the owner's property and improvements - while arbitration is the method for resolving the underlying dispute as to the amounts actually due the contractor. A suit to enforce a mechanic's lien can be filed in order to perfect the mechanic's lien pursuant to statute, and the suit can then be stayed while the parties arbitrate their underlying dispute over the amount due (if any).

Here, the arbitration and the equitable mechanic's lien litigation will not run on independent tracks. The arbitration will determine how much is due from DIG and Dunn

to Lafarge, or how much is due from Lafarge to DIG. Thereafter, the arbitration award, if not subject to vacation or modification under the FAA, can be confirmed into a judgment in the equitable mechanic's lien action. Other issues related to the mechanic's liens can then be adjudicated in the litigation.

As the Western District concluded, the language of Paragraph III.D of the October Change Order *can* and *must* be read in harmony with the mandatory arbitration clause of the Contract. [Opinion 12; App. A27] Under the broad arbitration clause, the parties manifested their objective intent to arbitrate all claims arising out of or relating to the Contract. This Contract remedy, among others, was expressly reserved, without limitation, in the October Change Order. The October Change Order also preserved the legal remedies that do not nullify the parties' obligation to arbitrate, such as the right to claim statutory interest and attorney's fees under §§34.057 and 431.180, R.S.Mo., the right to confirm an arbitration award, and the right to file and enforce a mechanic's lien. Paragraph III.D does *not* modify or reduce the scope of the parties' broad arbitration agreement.

2. DIG's Construction of the October Change Order

DIG argued to both the Trial Court and the Western District – and may thus be expected to argue here – that Paragraph III.D of the October Change Order was meant to modify and "partially rescind" the mandatory arbitration agreement and carve out from the scope and coverage of that arbitration agreement those claims based upon the "marked PCO's". [L.F. 481-484, 833, 840; Resp.Br. 32] If DIG's position in this Court remains the same, it is worthwhile to pause before further analysis to first measure the

extent of the concession they have made by advancing it. Only *three* of the eleven Counts asserted against Lafarge in DIG's Amended Petition are based solely on "marked PCO's". Thus, by DIG's own admission, the remaining eight Counts against Lafarge, which are not based solely on the "marked PCO's" (all of which, as previously explained, Section I.C, *supra*, arise out of or relate to the Contract), are subject to arbitration.

According to DIG, the clause "remedies as provided by law" somehow modified the previous clause in the same sentence which states that the parties "may resort to their respective contract remedies", and changed or rescinded the mandatory arbitration clause so that it is now a "permissive" one with respect to claims based upon the "marked PCO's". [L.F. 833, 840] If, as DIG contends, the language "remedies as provided by law" gives DIG the option to litigate or arbitrate, then it would render *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).

A construction attributing a reasonable meaning to each phrase and clause, and harmonizing all provisions of the agreement, is preferred to one which leaves some of the provisions without function or sense. Ringstreet, 890 S.W.2d at 718; Bomar Constr. Co., 935 S.W.2d at 415. Yet, DIG's proffered interpretation of the October Change Order creates conflict in the terms of Paragraphs III.D itself and, with respect to the claims based upon the "marked PCO's", would essentially leave the mandatory arbitration clause without function or sense.

The Western District soundly rejected DIG's proffered interpretation of Paragraph III.D and the Contract, stating: "[DIG's] interpretation would be contrary to the principles that a contract should be construed as a whole, that all provisions should be harmonized if possible, and that a construction that would render a provision meaningless should be avoided." [Opinion 13; App. A28]

DIG's interpretation of Paragraph III.D relies upon narrowly focusing on the phrase "remedies as provided by law" and the *inference* that "legal remedies" is so inconsistent with mandatory arbitration that the arbitration provision must somehow be modified, reduced or rescinded. DIG's approach diminishes, if not negates, the import of the terms "contract remedies" in the same sentence. There is no language in Paragraph III.D which infers that the phrase "*remedies as provided by law*" is of any greater importance than "*contract remedies*". The very reasoning advanced by DIG was rejected in Bomar Constr., and is at complete odds with the strong federal and Missouri policies favoring arbitration.

In fact, the terms "contract remedies" and "remedies as provided by law" are *not* inconsistent, as explained above. There is no need for one phrase to take precedence over the other. The filing of a mechanic's lien statement, and the filing of suit to enforce the mechanic's lien, is a "legal remedy", and yet it is *not inconsistent with* the obligation to arbitrate the underlying dispute. McCarney, 866 S.W.2d at 892. DIG is confusing its "legal remedies" with the method chosen by the parties for resolving their disputes – arbitration. The issue is not whether one phrase prevails over another, but how both

phrases can be given meaning. Lafarge's interpretation of Paragraph III.D is the only reasonable interpretation that gives meaning to the entirety of the language used.

DIG's interpretation also suffers from a lack of clear language expressing an intent to vitiate the mandatory arbitration provision contained in the Contract. DIG neglects to give meaning to the words *"their respective"* found in the same sentence of Paragraph III.D, which clearly connotes existing contractual or legal remedies possessed by the parties, not new or different remedies. There is no clear intent expressed to modify or partially rescind the parties' arbitration agreement, or to create a new remedy in addition to any existing remedies. Significantly, Paragraph III.D does *not* state that either party may pursue "an action at law."

Proof of rescission must be clear, positive, unequivocal, and decisive, and it must manifest the parties' actual intent to abandon contract rights. AAA Uniform and Linen Supply, Inc. v. Barefoot, Inc., 17 S.W.3d 627, 629 (Mo. App. W.D. 2000). See also McBee v. Gustaaf Vandecnocke Revocable Trust, 986 S.W.2d 170, 173 (Mo. banc 1999). And language excluding certain disputes from arbitration must be "clear and unambiguous" or "unmistakably clear." Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 847 (2d Cir. 1987). Here, that DIG must rely solely upon the *inference* that reference to 'legal remedies' is so inconsistent with arbitration that the arbitration provision must somehow be modified or rescinded, is a *de facto* admission that the purported modification or rescission is not clear, positive, unequivocal and decisive. Indeed, as stated by the Western District, "Paragraph III.D of the October Change Order

does not clearly, positively, unequivocally or decisively state that the right and obligation to arbitrate was modified, limited or rescinded." [Opinion 13; App. A28]

The only reasonable reading of the language "remedies as provided by law" is that it refers to those legal remedies *available at that time* in light of, and *consistent with*, mandatory arbitration (e.g., the filing of a mechanic's lien). To hold otherwise would, in effect, require the Contract's arbitration clause to be rewritten so that, with respect to claims based upon "marked PCO's", the word "shall" would be changed to the word "may." Bomar Constr., 935 S.W.2d at 415.

A court cannot, under the guise of construction, re-write the terms of the Contract's arbitration clause or the October Change Order. See Executive Hills Home Builders, Inc. v. Whitley, 770 S.W.2d 507, 508 (Mo. App. W.D. 1989) ("A court cannot make a contract for the parties that they did not make for themselves.").

Looking at the documents in their entirety, the only reasonable interpretation of the Contract's arbitration clause and the October Change Order is that the parties intended to maintain and preserve the *status quo* of the parties' existing remedies under the Contract and at law. This is the only interpretation that made sense to the Western District: "[Paragraph III.D] preserves the parties' agreement to arbitrate and other unspecified rights or remedies that are not inconsistent with thar obligation." [Opinion

13; App. A28] This is the only reasonable reading that gives "function and sense" to the entirety of the language used.[19]

What's more, this reading of Paragraph III.D is entirely consistent with the parties' negotiation of the October Change Order and, in fact, is *precisely* what DIG told Lafarge this language meant.[20]

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[19] To the extent that this Court may determine that the language of Paragraph III.D is ambiguous, any such ambiguities should be construed against DIG as the drafter. City of Beverly Hills v. Village of Velda Village Hills, 925 S.W.2d 474, 477 (Mo. App. E.D. 1996). Furthermore, any such ambiguities should be resolved in favor of arbitration. See, e.g., Miller v. Flume, 139 F.3d 1130, 1136 (7th Cir. 1998) ("[O]nce it is clear that the parties have a contract that provides for arbitration of some issues between them, any doubts concerning the scope of the arbitration clause are resolved in favor of arbitration.").

[20] Extrinsic evidence of the execution and interpretation of the contract by the parties can be considered by this Court whether the contract is unambiguous or ambiguous. Craig v. Jo B. Gardner, Inc., 586 S.W.2d 316, 325 (Mo. banc 1979)(collateral facts may be considered as an aid in interpreting an unambiguous contract), and Busch & Latta Painting Corp. v. State Highway Com., 597 S.W.2d 189, 197-198 (Mo. App. W.D. 1980)(extrinsic facts and circumstances may be considered to construe ambiguous contract).

After DIG drafted the language at issue in Paragraph III.D, DIG's outside counsel, Mr. Roy Bash, explained DIG's intent of this language that "although the underlying dispute may be arbitrated, DIG did not want to be precluded from filing a mechanic's lien claim in court to perfect its mechanic's lien rights". [L.F. 436]

Construing the terms of the Contract's arbitration clause and the October Change Order in harmony, and construing those terms in favor of arbitration in accordance with controlling law, it is clear that the October Change Order preserved the parties' agreement to arbitrate all claims arising out of or relating to the Contract. DIG's expressed intention reinforces this conclusion.

E. The Trial Court's Order Must Be Reversed.

The Trial Court's Order must be reversed. As shown above, the Trial Court clearly erred in entering its Order because Lafarge and DIG are subject to a broad and enforceable, mandatory arbitration provision, that was not modified by the October Change Order, and that encompasses all of the disputes and claims between the parties.

Furthermore, the causes of action pending in the Trial Court between Lafarge and DIG should be stayed pending the completion of the arbitration. The danger in not staying the litigation of claims involving issues of fact or law common to the arbitration is that the parties' agreement to arbitrate can be effectively destroyed or severely hampered if issues subject to arbitration are decided in the first instance in the related litigation. Several courts have specifically recognized this significant difficulty, and have supported stay orders designed to protect against such injury, even when the stay order affects non-parties to the arbitration agreement. See, e.g., Subway Equip. Leasing Corp.

v. Forte, 169 F.3d 324, 329 (5th Cir. 1999); Contracting Northwest, Inc. v. Fredericksburg, 713 F.2d 382, 386-87 (8th Cir. 1983).

II. THE TRIAL COURT ERRED IN GRANTING THE JOINT MOTION TO STAY ARBITRATION OF RESPONDENT DUNN INDUSTRIAL GROUP, INC. ("DIG") AND RESPONDENT DUNN INDUSTRIES, INC. ("DUNN") BECAUSE BOTH DIG AND DUNN AGREED TO ARBITRATE THE CLAIMS ASSERTED BY APPELLANT LAFARGE CORPORATION ("LAFARGE") IN THAT (A) THE WRITTEN CONTRACT BETWEEN LAFARGE AND DIG CONTAINS A BROAD, MANDATORY ARBITRATION AGREEMENT, AND THE CLAIMS OF LAFARGE ARE WITHIN THE SCOPE OF THAT ARBITRATION AGREEMENT, AND (B) THE WRITTEN GUARANTY EXECUTED BY DUNN (1) INURES TO THE BENEFIT OF LAFARGE AND (2) INCORPORATED THE WRITTEN CONTRACT AND ARBITRATION AGREEMENT, OR DUNN IS ESTOPPED FROM AVOIDING THE ARBITRATION AGREEMENT.

Summary of the Argument

The Trial Court erred not only in refusing to compel arbitration, but also in ordering a stay of the arbitration proceedings commenced by Lafarge.

The entire premise underlying the Joint Motion to Stay Arbitration of DIG and Dunn was that neither of them have any agreement to arbitrate the claims asserted by Lafarge in the Arbitration proceedings. [L.F. 544]

Under the FAA, the question of whether parties have agreed to arbitrate is a factual question, to be decided under ordinary contract principles, and in light of the "federal policy favoring arbitration." Daisy Mfg. Co. v. NCR Corp., 29 F.3d 389, 392

(8th Cir. 1994); In re Hart Ski Mfg. Co., 711 F.2d 845 (8th Cir. 1983). Here, the Trial Court erred in granting the Joint Motion to Stay Arbitration of DIG and Dunn because the undisputed facts demonstrate that: (1) DIG agreed to arbitrate Lafarge's claims; (2) the Guaranty executed by Dunn clearly inures to the benefit of Lafarge; (3) the arbitration agreement contained in the Contract between DIG and Lafarge was incorporated into the Guaranty, and (4) Dunn should be estopped from avoiding arbitration with Lafarge.

A. Standard Of Review

For that part of the Trial Court's Order staying arbitration, Lafarge has addressed the appropriate standard of review in Point I.A of this Brief, and will not repeat (but incorporates) those arguments here.

Suffice it to say that this Court's standard of review for granting a stay of arbitration, which involves the interpretation of a contract to determine whether that contract includes an enforceable arbitration provision, is *de novo*. Fru-Con Constr. Co. v. Southwestern Redevelopment Corp. II, 908 S.W.2d 741, 743-44 (Mo .App. E.D. 1995).

B. The Contract Between Lafarge and DIG Contains a Broad, Mandatory Arbitration Agreement, and the Claims of Lafarge Fall Within the Scope of that Arbitration Agreement.

In the Joint Motion, DIG raised the same arguments for avoiding arbitration of Lafarge's claims that it gave in opposing Lafarge's Motion to Stay Litigation and Compel Arbitration. [L.F. 544, 551-553] Lafarge has answered those arguments in Point I of this Brief, and will not repeat (but does incorporate) them here.

As the Western District correctly found, the Contract between Lafarge and DIG contains a broad, mandatory arbitration agreement obligating DIG to arbitrate all claims "arising out of or relating to" the Contract, and that the October Change Order did *not* in any way alter or modify this agreement to arbitrate. [Opinion 13; App. A28] Clearly, Lafarge's claim for DIG's "failure to timely complete" the Contract and "properly perform and coordinate" the work under the Contract [L.F. 558] arises out of and relates to the Contract, and is therefore within the substantive scope of the parties' arbitration agreement. [See Opinion 17; App. A32]

DIG argued to both the Trial Court and the Western District, and can therefore be expected to argue here, that Lafarge's claims are purportedly "compulsory counterclaims", and must therefore be brought as such in the pending equitable mechanic's lien action pursuant to Missouri Supreme Court Rule 55.32. [L.F. 552-553, 841-842] This argument fails for several reasons.

First, as explained above, *all* of the claims between DIG and Lafarge are arbitrable. As such, the litigation of all of those claims must be stayed, and the parties should be compelled to arbitrate, those claims. [See Opinion 17; App. A32] The compulsory counterclaim rule under Rule 55.32 therefore becomes moot.

Second, nothing in Rule 55.32 suggests that it is designed to overrule the arbitration of claims pursuant to a broad arbitration agreement enforceable under the FAA. Any such application of Rule 55.32, to force Lafarge to bring its otherwise arbitrable claims as counterclaims in the litigation, would run afoul of the FAA, in which case the FAA could preempt the Rule. See Bunge Corp. v. Perryville Feed & Produce,

Inc., 685 S.W.2d 837, 839 (Mo. banc 1985) (FAA pre-empts substantive *or procedural* state laws in derogation of arbitration governed by the FAA).

Furthermore, while a court has the power to stay the litigation of non-arbitrable claims and disputes pending the arbitration of arbitrable claims and disputes (see, e.g., Fru-Con Constr. Co. v. Southwestern Redevelopment Corp. II, 908 S.W.2d 741, 744 (Mo. App. E.D. 1995); DJ Mfg. Corp. v. Tex-Shield, Inc., 998 F.Supp. 140, 145-146 (D.P.R. 1998)), the opposite is *not* true. Dean Witter Reynolds v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 1240-1243 (1985)(even if the result is piecemeal resolution of some claims in arbitration and other claims in litigation, a court must not stay an arbitration of arbitrable claims and disputes pending litigation of non-arbitrable claims and disputes).

And even if this Court was to find that some of DIG's claims could be litigated, DIG cannot avoid its obligation to arbitrate simply by filing suit on related, nonarbitrable claims. A similar argument was rejected in International Brotherhood of Electrical Workers v. G. P. Thompson Electric, Inc., 363 F.2d 181, 185 (9th Cir. 1966). In that case, the union filed grievances for arbitration that the employer asserted were compulsory counterclaims to a pending legal action and could not be arbitrated. The Court of Appeals held that the grievances, although compulsory counterclaims, should be arbitrated. The Court explained that if one of the disputing parties could, by filing a complaint alleging a claim outside the scope of the parties' arbitration agreement, force his opponent to by-pass arbitration and assert counterclaims as to controversies otherwise arbitrable, the desired intent and purpose of arbitration agreements could be effectively frustrated. Id. See also Fur Dressers Union Local 2F v. DeGeorge, 462 F .Supp. 890, 893 (M.D.Pa.

1978)(claims subject to arbitration are not compulsory counterclaims under F.R.C.P 13(a)); California Trucking Ass'n v. Corcoran, 74 F.R.D. 534, 545-46 (N.D. Cal. 1977) (employer should not be allowed to circumvent arbitration of issues that the employer has agreed to arbitrate by mere filing of a suit).

In Bristol Farmers Market and Auction Co. v. Arlen Realty & Dev. Corp., 589 F.2d 1214 (3d Cir. 1978), the landlord attempted to enjoin arbitration of the tenant's claims, arguing that those claims should have been brought in prior litigation between the parties as compulsory counterclaims. The Court of Appeals rejected this argument. Id. at 1220-1221. The Court cited the strong public policy favoring arbitration, and explained that because the claims would proceed in arbitration, the "goal" of the compulsory counterclaim rule of avoiding multiple litigation would still be achieved. Id. See also Bratt Enterprises, Inc. v. Noble International, Ltd., 99 F. Supp. 2d 874, 887-888 (S.D. Ohio 2000).

Here, DIG is attempting to circumvent the arbitration of issues it agreed to arbitrate simply because it filed a lawsuit. DIG should not be allowed to frustrate arbitration in such a manner. Furthermore, DIG's touted concerns of "judicial economy" and avoiding multiple "separate litigation" are not well-taken; arbitration of Lafarge's claims would not involve separate litigation, and would actually conserve judicial resources by keeping the Trial Court from having to entertain arbitrable claims. Bristol Farmers Market, 589 F.2d at 1220-1221. DIG cannot avoid its obligations to arbitrate

Lafarge's arbitrable claims simply by filing suit.[21]

C. The Written Guaranty Executed By Dunn (1) Inures to the Benefit of Lafarge and (2) Incorporated the Contract and Arbitration Agreement, or Dunn is Estopped From Avoiding the Arbitration Agreement.

The asserted bases for Dunn's attempt to avoid arbitration of Lafarge's claims are two-fold: (1) that because the Guaranty names "Lafarge Canada, Inc." as the sole obligee, the terms of the Guaranty apply only to "Lafarge Canada, Inc." and not to Appellant Lafarge Corporation, and as Lafarge Corporation is not a party to the Guaranty, it cannot demand arbitration of disputes arising from or relating to the Guaranty [L.F. 547-548]; and (2) the Guaranty contains no arbitration agreement [L.F. 548-551]. Dunn is mistaken on both accounts.

1. Dunn's Guaranty Inures to the Benefit of Lafarge.

Notwithstanding the general proposition that guaranty contracts are "construed strictly to protect the guarantor", a guarantor is *not* entitled to demand an unfair and strained interpretation of the words used, in order to be released from its obligation. Zoglin v. Layland, 328 S.W.2d 718, 721 (Mo. App. 1959).

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[21] In addition, the Western District, citing Publicis Communication v. True N. Communications, Inc., 132 F.3d 363, 366 (7th Cir. 1997), held that the preclusion effect of Rule 55.32 is subject to contractual adjustment by the parties, so that "a dispute covered by a contract's arbitration clause need not be asserted as a compulsory counterclaim in litigation to avoid waiver." [Opinion 18; App. A33]

A guaranty contract is subject to the same rules of construction applicable to other contracts. Boatmen's First Nat'l Bank v. P.P.C., Inc., 927 F.2d 394, 396 (8th Cir. 1991). The terms of the guaranty are to be understood in their plain and ordinary sense, when read in light of the surrounding circumstances and the object intended to be accomplished. FDIC v. Indian Creek Warehouse, 974 F. Supp. 746, 750 (E.D. Mo. 1997). The guaranty may be construed together with any contemporaneously executed documents dealing with the same subject matter as an aid in ascertaining the intention of the parties. Id. And where the guaranty is ambiguous or of doubtful meaning, the intention of the parties must be determined from all the facts and circumstances, including parol evidence, regarding the relationship of the parties, business usage, the execution of the contract, and the parties' interpretations. Industrial Bank & Trust Co. v. Hesselberg, 195 S.W.2d 470, 476 (Mo. 1946); Zoglin v. Layland, 328 S.W.2d at 721. See also In re Eppinger, 61 B.R. 89, 94-95 (Bkrtcy. W.D. Mo. 1986); United Siding Supply, Inc. v. Residential Improv. Servs., Inc., 854 S.W.2d 464, 466-469 (Mo. App. W.D. 1993).

Here, without question, the Guaranty identifies "Lafarge Canada, Inc." as Obligee. [L.F. 305] Lafarge Canada, Inc. is a wholly-controlled subsidiary of Lafarge Corporation, and was extensively involved in and essentially responsible for the management of the Project for and on behalf of Lafarge Corporation. [L.F. 168]

However, the Guaranty goes on to recite, in the second paragraph, that the Obligee "has executed a Contract" for construction of the Project with DIG. [L.F. 305] The Contract for the design and construction of the Project, which was attached to and

specifically referenced throughout the Guaranty, was executed by and between DIG and *Lafarge Corporation*, not Lafarge Canada, Inc. [L.F. 167, 254] Throughout the body of the Guaranty (see Sections 1, 2, 3 and 5), clear reference is made to Dunn's guarantee of *DIG's obligations under the Contract to the Obligee*. [L.F. 305] Clearly, Dunn's obligations under the Guaranty were intended to run to the party with whom DIG contracted for the construction of the Project – *Lafarge Corporation*. Dunn's argument is nothing more than an attempt to hide behind an obvious mistaken reference to the wrong entity as "Obligee", in order to thwart the intent of the parties and avoid its obligations under the Guaranty. See, e.g., Duenke v. Brummett, 801 S.W.2d 759, 765 (Mo. App. S.D. 1991)(reformation will correct obvious mutual mistake in instrument to reflect true intent of parties).

The absurdity of the interpretation placed on the Guaranty by Dunn is only amplified when one considers the stated purpose of the Guaranty – to guarantee performance of *the underlying Contract between the Obligee and DIG*. [L.F. 305] If, as Dunn contends, the Guaranty is construed so that Lafarge Canada, Inc. is deemed the Obligee, then the meaning of the Guaranty comes into question as there was no "underlying Contract" between Lafarge Canada, Inc. and DIG. The Court must avoid an interpretation that renders the Guaranty redundant, illusory or absurd. Boatmen's First Nat'l Bank, 927 F.2d at 397. Dunn's interpretation qualifies as "absurd".

If there was any doubt as to the intent of the parties that the Guaranty inure to the benefit of Lafarge Corporation, that doubt was erased by the execution of the October Change Order. That October Change Order (which incorporated the Contract)

specifically stated that Dunn's obligations under the Guaranty applied to and covered *DIG's obligations to Lafarge Corporation* under the Change Order. [L.F. 433] The Change Order was signed by DIG, Dunn and *Lafarge Corporation*. [L.F. 433]

At best for Dunn, the terms of the Guaranty conflict with the Contract and are therefore ambiguous. It was clearly the intent of Lafarge that Dunn's obligations under the Guaranty inure to the benefit of "Lafarge Corporation", as the Guaranty was intended as a substitute for a performance and payment bond in favor of Lafarge. [L.F. 168, 305-307] Since Dunn furnished the Guaranty [L.F. 168], the Guaranty should be construed against Dunn. In re Eppinger, 61 B.R. at 94. See also Graue v. Missouri Property Ins. Placement Facility, 847 S.W.2d 779, 785 (Mo. banc 1993).

Moreover, even if Lafarge Canada, Inc. is deemed to be the Obligee under the Guaranty, Lafarge Canada, Inc. was clearly acting as the agent of its principal, Lafarge Corporation. On the top of each page of the Contract, reference is made to "Lafarge Corporation c/o Lafarge Canada". [L.F. 254-304] As principal, Lafarge Corporation clearly has the right to enforce (and demand arbitration under) the Guaranty. See Phillips v. Hoke Constr., Inc., 834 S.W.2d 785 (Mo. App. S.D. 1992).

2. The Arbitration Agreement Was Incorporated Into Dunn's Guaranty.

Dunn's second argument against arbitration - that the Guaranty did not include an arbitration agreement - is premised upon the mistaken belief that an arbitration provision cannot be enforced against a party who does not sign the agreement containing the arbitration provision. Courts applying the FAA have recognized numerous different theories, including incorporation by reference, alter ego and equitable estoppel, to bind

nonsignatories to arbitration agreements. See International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000). Missouri law, as well, recognizes the principle of binding a non-signatory to an arbitration agreement. See, e.g., Sheffield Assembly of God Church v. American Ins. Co., 870 S.W.2d 926, 931 (Mo. App.W.D. 1994)(incorporation by reference). In this case, the Contract and its arbitration provision were incorporated into the Guaranty.

"Incorporation by reference" may be accomplished by a reference to another writing without an actual annexation or physical integration. 17A C.J.S., Contracts §316 (1999). The reference to the incorporated document must be clear and its terms must be known or easily available. Id. Missouri law is in accordance with these principles. Metro Demolition & Excavating Co. v. H.B.D. Contr., Inc., 37 S.W.3d 843, 846 (Mo. App. E.D. 2001).

Missouri follows the majority rule to enforce broad arbitration agreements against nonsignatories. 1 Domke on Commercial Arbitration, §10.04 (Gabriel M. Wilner ed. Supp. 1999)[22] ("A majority of the state courts have followed suit in compelling sureties to arbitrate where the bond incorporates an agreement containing an arbitration provision"; citing, among other cases, Sheffield Assembly of God Church v. American Ins. Co., 870 S.W.2d 926, 931 (Mo. App. W.D. 1994)). Under the majority rule, the incorporating document must incorporate the underlying document containing the arbitration provision to bind the nonsignatory. Domke, at §10.04.

[22] Hereinafter referred to as "Domke".

In Sheffield Assembly of God Church, a surety issued a performance bond binding itself to the owner, as obligee, to perform the construction contract in the event the contractor failed to perform under the terms of the construction contract, or to pay the cost of completion of the project. Sheffield Assembly of God Church, 870 S.W.2d at 928. The owner obtained an arbitration award against the contractor and sought to enforce the award against the surety on the basis that the surety was subject to the arbitration provision. Id. The court agreed with the owner, stating "It is a fundamental rule of construction that when a contract, which is the subject of a performance bond, is referred to in the bond, that the contract is to be regarded as a part of the undertaking of the surety under the bond". Id. at 931. As such, the surety "was subject to the arbitration clause included in the construction contract" and was bound by the "award entered against" the contractor. Id. The same result should hold here.

In this case, the Guaranty does incorporate the Contract. The Guaranty clearly identifies, references and attaches the Contract. The Guaranty (Section 1) requires Dunn to pay Lafarge or to complete the Work of the Contract "[I]f Principal [DIG] defaults in its performance of said obligations under the Contract according to its terms and conditions * * *". [L.F. 305] Significantly, the Guaranty (Section 8) also provides that Lafarge may join Dunn in any proceeding (i.e., mandatory arbitration, per the Contract) by Lafarge against DIG. [L.F. 306] The *only* way Section 8 has meaning is if Dunn is subject to arbitration should Lafarge demand arbitration. Taken together, the clear intent from the Guaranty is that the Contract, which contains the arbitration provision, is incorporated into the Guaranty.

Even if there were any doubt regarding the parties' intent from the Guaranty document itself, the involvement of Dunn principals (including Mr. Terrence Dunn, who signed the Guaranty for Dunn [L.F. 306]) in the negotiations for the October Change Order shows Dunn's intent and acceptance of the requirement to arbitrate. [L.F. 341-342] The result, the incorporation of the Contract and its arbitration provision, is consistent with the principles set forth in Sheffield Assembly of God Church. Dunn is compelled to arbitrate with Lafarge by the arbitration agreement contained in the Contract, which is incorporated into the Guaranty.

3. Dunn is Estopped from Avoiding the Arbitration Agreement.

Alternatively, Dunn should be estopped from avoiding its obligation to arbitrate. Courts have also held that under the doctrine of *equitable estoppel*, a non-signatory to a contract containing an arbitration clause may be bound to arbitrate claims which are "inextricably intertwined" with or "inherently inseparable" from other claims subject to arbitration. J.J. Ryan & Sons Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988); McBro Planning & Dev. Co. v. Triangle Electrical Constr. Co., 741 F.2d 342 (11th Cir. 1984). Here, the claims against Dunn under the Guaranty and against DIG under the Contract are inextricably intertwined. If Dunn is allowed to litigate an issue arising out of or relating to the Contract, it effectively destroys the arbitrability of that issue as between DIG and Lafarge.

Furthermore, Dunn should be estopped from avoiding its obligation to arbitrate in that Dunn has previously sought the benefit of other provisions of the very same Contract whose arbitration provision Dunn now seeks to avoid. Dubail v. Medical West Bldg.

Corp., 372 S.W.2d 128, 132 (Mo. 1963) ("As a general rule, by accepting benefits a person may be estopped from questioning the existence, validity, and effect of a contract. A party will not be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations, or burdens.").

In this case, Dunn cannot deny that it has accepted the benefits of the Contract. In fact, after Lafarge notified Dunn of DIG's defaults under the Contract, Dunn sought to avoid its responsibilities to Lafarge by citing provisions of the October Change Order that are a part of the Contract. [L.F. 534] Dunn cannot be allowed to use the Contract as a shield on one hand, and avoid arbitration under the Contract on the other hand.

CONCLUSION

For all the foregoing reasons, Lafarge respectfully submits that the Trial Court Order, entered on November 15, 2001, which denied Lafarge's Motion To Stay Litigation and Compel Arbitration and granted DIG's and Dunn's Joint Motion To Stay Arbitration, should be reversed.

In addition, this Court should direct the Trial Court to compel arbitration and to stay all causes of action among Lafarge, DIG and Dunn in the Trial Court pending the completion of the arbitration.

Alternatively, Lafarge respectfully submits that transfer of this case from the Western District was improvidently granted and, therefore, requests retransfer to the Western District.

Respectfully submitted

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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 27,296 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 Appellants' Opening 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 on this 3rd day of March, 2003, two hard copies of the foregoing instrument, along with a diskette containing such document, was served upon the following attorneys by depositing same in an envelope addressed to said attorneys, and by placing said envelope with Federal Express, postage prepaid, to be delivered on the 4th day of March, 2003, said envelope being addressed as follows:

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