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

REPLY BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Respondents concede that appellate jurisdiction has been conferred for the denial of that part of Lafarge's Motion that sought to compel arbitration of DIG's claims against Lafarge, and for the granting of Respondents' motion to stay the arbitration of Lafarge's claims against DIG and Dunn. [Resp.Sub.Br. 17, 24][1] Respondents argue, however, that jurisdiction is lacking for the denial of that part of Lafarge's Motion that sought to stay the litigation of the very same claims for which the order compelling arbitration was sought. Id. Respondents are wrong.

The Trial Court's denial of Lafarge's request to stay the litigation of arbitrable issues is immediately appealable under the FAA, which applies in this case. [App.Sub.Br. 27-28] FAA §3 (much like §435.355.4, R.S.Mo.) directs a stay of the litigation of claims and issues subject to arbitration, and FAA §16(a)(1)(A) authorizes an immediate appeal from the denial of a motion to stay litigation brought under FAA §3. [App.Sub.Br. 31-37]

Respondents argue, however, that FAA §16(a)(1)(A) cannot provide a Missouri court with appellate jurisdiction because FAA §3 is limited to federal courts. [Resp.Sub.Br. 17-21] Respondents suggest that the terms "any of the courts of the United States" in FAA §3 means the U.S. District Courts. Respondents ignore the

[1] "Resp.Sub.Br." means Respondents' Substitute Brief, and "App.Sub.Br." means Appellant's Substitute Brief. The "Abbreviations" in Lafarge's Substitute Brief [App.Sub.Br. 26] have the same meaning in this Brief.

distinctly different language of FAA §4, which permits a party to "petition any United States district court" for relief. The broader language in FAA §3 reflects Congress' intent that the substantive stay requirement applies whether the action is in federal court or state court. [App.Sub.Br. 34]

Respondents' reliance on Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University, 489 U.S. 468, 109 S.Ct. 1248 (1989), is misplaced. As the Western District noted, in Volt, the Supreme Court expressly *declined to decide* whether FAA §3 applies to state court proceedings. [Opinion 7; App. A22] Contrary to Respondents' characterization, the Volt decision is anything but "seminal." The greater weight of authority confirms that FAA §3 applies to actions in state as well as federal courts. [App.Sub.Br. 33-37] Boogher v. Stifel, Nicolaus & Co., Inc., 825 S.W.2d 27, 30 (Mo. App. E.D. 1992).

Even if one assumed, for the sake of argument, that the FAA does not apply, an appeal from the denial of Lafarge's request to stay the litigation of arbitrable issues is still authorized under Missouri law. [App.Sub.Br. 37-43]

Lafarge's Motion contained two requests for relief: (1) for an order compelling the arbitration of DIG's claims against Lafarge; and (2) for a stay of the litigation of those very same claims. Respondents agree that Lafarge's appeal from the denial of this first request is authorized. Accordingly, each and every claim for which Lafarge sought a stay

of litigation is before this Court.[2] Both Federal and Missouri law dictate that an order compelling the arbitration of claims *must* include a stay of the litigation of those claims. 9 U.S.C.A. §3; §435.355.4, R.S.Mo. Therefore, this Court not only has the authority to review and overturn the denial of Lafarge's request to compel the arbitration of DIG's claims, it *also* has the authority to contemporaneously stay the litigation of those claims. §512.160.3, R.S.Mo.; Supreme Court Rule 84.14. [App.Sub.Br. 41-43]

Furthermore, the two requests for relief contained in Lafarge's Motion are inextricably intertwined. For each request, the inquiry is the same: whether the parties agreed to arbitrate, and whether that agreement covers DIG's claims. [App.Sub.Br. 92-93] Thus, even if this Court were to find that Lafarge's request to stay the litigation of DIG's claims, standing alone, is not otherwise immediately appealable, that request is so intertwined with Lafarge's request to compel the arbitration of DIG's claims that the

[2] Thus, for *each* of DIG's claims against Lafarge, this Court has the exclusive jurisdiction to determine whether that claim must be arbitrated or litigated. To allow the litigation of these claims to proceed on their merits (and under more expansive discovery rules than in arbitration) pending this Court's decision, as Respondents to suggest [Resp.Sub.Br. 21-24], would not only usurp this Court's jurisdiction, but would undercut the very purpose of allowing an interlocutory appeal from the denial of a motion to compel arbitration – to determine whether the proceeding should go forward on the merits in the Circuit Court or in arbitration. [App.Sub.Br. 38-41] Respondents miss the point.

denial of both requests can properly be reviewed. See, Transatlantic Ltd. v. Salva, 71 S.W.3d 670, 675 (Mo. App. W.D. 2002) (denial of summary judgment motion, which is not otherwise appealable, can be reviewed when its merits are intertwined with a grant of summary judgment for an opposing party, which is appealable).

This Court clearly has jurisdiction.

ARGUMENT

Many of Respondents' arguments are internally inconsistent. While DIG argues that the contract language at issue is unambiguous, it insists that the arbitration agreement and October Change Order *must* be read to conflict, and that attempts to harmonize them must be resisted. [See Secs. I.C.1 and I.C.3, *infra*]

Respondents also take positions inconsistent with their positions before the Trial Court. DIG argued before the Trial Court that the arbitration agreement was modified *only* with respect to the "marked PCO's" identified in the October Change Order.[3] Now, DIG suggests (without explanation) that *all* claims in its Amended Petition (not just those based on "marked PCO's") can be litigated. [Resp.Sub.Br. 35] DIG now states that the "modified" arbitration agreement "freed" it from its obligation to arbitrate *any* dispute relating to the October Change Order. [See Sec. II.B.1, *infra*]

Furthermore, Respondents ignore key facts and issues. While DIG argues that Lafarge must be "bound by what it actually did and said" during negotiations over the October Change Order, DIG ignores the express statements it made to Lafarge during those negotiations that the language at issue should be interpreted *precisely* the way Lafarge interprets it – as a reservation of rights. [See Sec. I.C.2, *infra*] Respondents' silence speaks volumes.

[3] Only three of the eleven Counts against Lafarge in DIG's Amended Petition are based solely upon these "marked PCOs". [App.Sub.Br. 57; App. A57]

I. REPLY ARGUMENTS IN SUPPORT OF LAFARGE POINT I

A. The Standard Of This Court's Review Is *De Novo*.

In suggesting that the standard of this Court's review should be something other than *de novo* [Resp.Sub.Br. 37-42], Respondents advance the same basic arguments that were rejected by the Western District. [Opinion 9, n.1; App. A24] The result here should be no different.

Respondents first complain that Lafarge erroneously advocates a standard of review announced in cases in which the FAA was applied. [Resp.Sub.Br. 37-38] Regardless of whether the FAA or the Missouri UAA applies, the standard of this Court's review is the same – *de novo*.

Missouri courts have long held that questions of contract interpretation and ambiguity are questions of law, and the trial court's decision on such issues receives no deference. Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 32 (Mo. banc 1991). Because arbitration is a matter of contract, the question of whether a dispute is covered by an arbitration clause is relegated to the courts *as a matter of law*, to be determined from the parties' contract. Greenwood v. Sherfield, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995); Village of Cairo v. Bodine Contracting Co., 685 S.W.2d 253, 258 (Mo. App. W.D. 1985) (applying both FAA and Missouri UAA). 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*. Fru-Con Constr. Co. v. Southwestern Redevelopment Corp. II, 908 S.W.2d 741, 743-744 (Mo. App. E.D. 1995).[4]

Respondents, however, suggest that under Missouri law, motions to stay or compel arbitration are "classic requests for injunctive relief", and that something more restrictive than a *de novo* review should apply. [Resp.Sub.Br. 38] Respondents cite no Missouri authority for this proposition. In fact, the Missouri cases on which Respondents rely do not even involve arbitration.

Respondents also claim that a "clear error" standard should apply, arguing that the Order is based on the resolution of disputed fact issues, and that because findings of fact and conclusions of law were neither requested nor issued, all fact issues are assumed to have been resolved in accordance with the result reached. [Resp.Sub.Br. 39-42] However, the legal principles cited by Respondents have no application where there are no facts in dispute. Where the facts are not disputed, no deference is due the Trial Court's decision and review is *de novo*. [App.Sub.Br. 64-65]

While Respondents cite the conflicting *arguments* of the parties regarding the interpretation of the Contract and October Change Order [Resp.Sub.Br. 40-41], and regarding the effect of a stay on non-arbitrating parties [Resp.Sub.Br. 42], Respondents point to no specific "disputed issue of fact" in the record. None exists. Simply because

[4] Courts in other jurisdictions which have likewise adopted the UAA agree that appellate review of the arbitrability of a dispute is *de novo*. See, e.g., R.M. Bennett Heirs v.Ontario Iron Co., 426 N.W.2d 921 (Minn. Ct. App. 1988).

the parties disagree over the interpretation of the Contract and October Change Order, or the impact of arbitration on third parties, does not create an ambiguity or a "disputed issue of fact". [App.Sub.Br. 64-65] Because the facts are not in dispute, review is *de novo*. Fru-Con Constr., 908 S.W.2d at 743-744, 746 (n.1).

And for that part of the Order staying arbitration and refusing a stay of litigation, Respondents suggest that because the Trial Court has the discretion to stay proceedings to control its docket and conserve judicial resources, an "abuse of discretion" standard applies. [Resp.Sub.Br. 39, 42] However, discretionary considerations have no application to a proposed stay of arbitrable issues, and, therefore, an "abuse of discretion" standard does not apply. Instead, review is *de novo*. [App.Sub.Br. 65-66]

Lafarge's appeal involves the interpretation of the October Change Order and whether it was ambiguous, the interpretation of the Guaranty, and the effect of Missouri's equitable mechanic's lien statutes on the parties' arbitration agreement. As the Western District correctly found, these are all questions which can be reviewed *de novo*. [Opinion 9, n.1; App. A24]

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

DIG advances three principal arguments to support its proposition that Missouri's equitable mechanic's lien statutes must be applied to bar enforcement of the parties' otherwise valid arbitration agreement. [Resp.Sub.Br. 42-60] To reach this result, this Court would not only have to disregard U.S. Supreme Court precedent, but would also have to overturn two Missouri Court of Appeals decisions which are directly on point. DIG's arguments have been consistently rejected by the courts that have considered them, and DIG offers nothing new (nor could it) of legal substance to change the inevitable outcome here. In short, arbitration and Missouri's equitable mechanic's lien statutes can and must be harmonized to give effect to each, and DIG's approach – to bar enforcement of valid arbitration agreements – must be rejected. [App.Sub.Br. 66-91]

DIG's first argument consists of a largely irrelevant discussion of preemption. [Resp.Sub.Br. 44-50] DIG's analysis is off point because it ignores the progeny of Supreme Court cases that have addressed the preemptive effect of the FAA. See Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 858 (1984) (Congress withdrew the power of the states to require a judicial forum for the resolution of claims which the parties agreed to arbitrate); Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837, 839 (Mo. banc 1985) ("Any requirement of state law which adds a burden not imposed by Congress is in derogation of the Congressional power, and pro tanto invalid."). State laws may not be applied to preclude the enforcement of an arbitration agreement within the coverage of the FAA. Boogher v. Stifel, Nicolaus &

Co., Inc., 825 S.W.2d 27, 29 (Mo. App. E.D. 1992) (Missouri legislature cannot enact provision of Missouri Human Rights Act precluding arbitration without violating Supremacy Clause).

DIG concedes that the FAA is applicable. [Resp.Sub.Br. 44] Thus, any preemption analysis must start with the law relevant to the FAA. Incredibly, DIG relies upon Paul v. Jackson, 910 S.W.2d 286 (Mo. App. W.D. 1995), which does not even address arbitration. DIG simply ignores applicable law; its first point is without merit.[5]

DIG's second argument is a twisted attempt to "harmonize" the FAA and Missouri's equitable mechanic's lien statutes. DIG tries to shoehorn Missouri's equitable mechanic's lien statutes into the lone exception to enforcement of arbitration agreements under the FAA. [Resp.Sub.Br. 50–52] However, DIG's argument is not new, and has been rejected by numerous courts.

FAA §2 provides that written arbitration agreements "shall be valid irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C.A. §2 (emphasis added). This exception has been construed to refer to general contract defenses, such as fraud, duress or unconscionability, that apply

[5] DIG incorrectly asserts that "no court in the United States has ever found that the FAA preempted a state's mechanic's lien law." [Resp. Sub. Br. 47] In Silver Dollar City v. Kitsmiller Constr. Co., 874 S.W.2d 526, 535 – 36 (Mo. App. S.D. 1994), the Court correctly found that Missouri's equitable mechanic's lien statutes could not defeat the enforcement of an arbitration agreement covered of the FAA.

to the enforceability of the entire contract. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686 – 87 (1996). This exception does not apply, as DIG wishes, to invalidate a specific provision within a contract. "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 281 (1995).

Bradley v. Harris Research, Inc., 275 F.3d 884 (9th Cir. 2001), involved a California franchise statute that made any provision restricting venue to a forum outside of California void. Like DIG, the plaintiff in Bradley argued that the FAA §2 exception should apply because the franchise statute "treats arbitration and litigation equally and does not single out arbitration as a disfavored form of dispute resolution." Id. at 890. The Court of Appeals quickly rejected this argument because the franchise statute only applied to forum selection clauses, and did not apply generally to "any contract" as required by FAA §2. Id.[6]

[6] The Ninth Circuit found its holding consistent with decisions in the First, Second and Fifth Circuits, as well as several district court cases. Id. The Eighth Circuit rejected a similar argument in Arkcom Digital Corp. v. Xerox Corp., 289 F.3d 536 (8th Cir. 2002). Although these cases were cited by Lafarge [App.Sub.Br. 90-91], DIG offers no basis to distinguish these cases from the present circumstances. Obviously, DIG has no answer.

It is possible to reasonably harmonize Missouri's equitable mechanic's lien statutes with arbitration without rendering the FAA essentially meaningless. [App.Sub.Br. 66-91] As such, DIG's second point, and its approach to "harmonizing" the statutes, is without merit.

DIG's third argument is equally without merit. DIG contends that the interests of judicial economy, non-arbitrating third parties, and Missouri's "sovereign determination" over real property, compel litigation and preclude enforcement of a valid arbitration agreement. [Resp.Sub.Br. 52-60] Once again, DIG's argument has been soundly rejected by courts and criticized by commentators.

First, in arguing that "Courts have repeatedly refused to stay pending judicial proceedings or compel arbitration in matters with multiple parties where * * * not all parties were subject to an arbitration agreement" [Resp.Sub.Br. 53], DIG misstates the law. The Supreme Court has emphasized that the FAA "leaves no place for the exercise of discretion" by trial courts, but instead mandates that trial courts "*shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218, (1985)(emphasis added). Regardless of the presence of nonarbitrible claims or nonarbitrating parties, where the FAA applies, a trial court *must* direct the parties who agreed to arbitrate to proceed to arbitration on arbitrable issues. Id. See also Bruner & O'Conner on Construction Law, §20:53 *Arbitrating Statutory Mechanic's Lien Claims*, Vol. 6 (2002) ("The Supreme Court's ruling [in Byrd] has essentially done away with the argument that a mechanic's lien claimant should not be compelled to arbitrate because the issues that

will be presented in the arbitration also will be the subject of court proceedings involving other lien claimants who may not be required to arbitrate."), and T. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L.Rev. 473, 487 (1987) ("[T]he weight of authority under the FAA affirms that enforcement of an arbitration agreement will not be denied, despite the presence of other parties that cannot be ordered to arbitrate. Allowing a court to exercise discretion in enforcing an arbitration clause ignores the mandatory language of the FAA's enforcement provision and frustrates the strong federal policy favoring arbitration."). The four cases DIG cites for support are all prior to Byrd, and are of questionable authority.[7]

Moreover, DIG's "concerns" about the rights of those who are not parties to the arbitration agreement between DIG and Lafarge are unfounded. The potential for multiparty litigation involving the Project was certainly within contemplation when DIG

[7] See Pennsylvania Life Ins. Co. v. Simoni, 641 N.W.2d 807, 811-812 (Iowa 2002) (limiting the County of Jefferson case relied upon by DIG, based upon an Iowa arbitration statute that mirrors FAA §2) and Mears Park Holding Corp. v. Morse/Diesel, Inc., 426 N.W.2d 214 (Minn. App. 1988) (noting that Prestressed Concrete was decided before the FAA was adopted and was also later challenged by the Minnesota Supreme Court in Fairview Cemetary Assoc. v. Eckberg, 385 N.W.2d 812 (Minn. 1986)).

agreed to arbitrate.[8] This Project is no different from any other construction project (or other type of multi-party commercial transaction) in which some parties may choose arbitration as alternative dispute resolution. DIG's twisted logic would essentially mean the *end* of arbitration in construction disputes. The law is clear, however, that in such circumstances, valid arbitration provisions must be enforced despite the presence of other parties or issues that cannot be ordered to arbitration.

Furthermore, DIG's concerns about all lien claimants being able to "*fully* challenge the claims by any other lien claimant" are equally unfounded. [Resp.Sub.Br. 55] Lafarge has explained the process followed by virtually all jurisdictions, by which issues of "indebtedness" are arbitrated between those parties who have agreed to arbitrate, and lien enforcement issues are litigated between all parties with an interest in the real property. [App.Sub.Br. 68-69, 72-74] Since lien enforcement issues, such as validity and priority, can be challenged by all parties with an interest in the property, DIG's apparent "concerns" can only relate to the establishment of the lien "indebtedness". Any such concerns, however, are hollow.

[8] DIG has only itself to blame for any concerns regarding a lack of arbitration agreements with its subcontractors. DIG was contractually required to incorporate all Contract terms (including the arbitration provision) into its subcontracts. (General Conditions Section 5.2.2 [L.F. 277]) And DIG fails to mention that the "mine side" of the Project continued with arbitration proceedings. [L.F. 823, 827]

Arbitration is well-suited to the determination of the amount of "indebtedness" for construction disputes, and is generally recognized as being an efficient, speedy and economical process. Moreover, the adversarial arbitration process is in no way insufficient in determining the proper amount of "indebtedness" between two parties to a contract. The law is clear that arbitration agreements must be enforced despite the presence of non-arbitrating parties or non-arbitrable issues.

DIG's *real* concerns are after the "indebtedness" is determined – the mechanic's lien enforcement and collection phase – which is not supplanted by arbitration. The equitable mechanic's lien statutes were specifically designed to address DIG's concerns and prevent "races to the courthouse." Arbitrating "indebtedness" issues takes nothing away from the viability of the equitable mechanic's lien statutes.

Finally, DIG offers little substantive analysis of the Missouri cases, and cases from other jurisdictions, which support harmonizing arbitration and Missouri's equitable mechanic's lien statutes by enforcing the arbitration agreement. DIG's attempts to distinguish the McCarney case and the Silver Dollar City case are not well-taken; both cases directly addressed, and correctly decided, the same issues presented in this case, and DIG offers no compelling reasons to overturn them. [App.Sub.Br. 76-80]

Moreover, the numerous cases cited by Lafarge from other jurisdictions provide valuable guidance for harmonizing the determination of "indebtedness" by arbitration, and the mechanic's lien enforcement by litigation. [App.Sub.Br. 80-82] DIG fails to recognize the universal enforcement of arbitration agreements in these cases, which, by their very nature, include third party property interests. It is telling that, save for two

dissenting justices of the Nevada Supreme Court twenty-eight years ago, DIG is unable to provide this Court with *any* credible authority expressing concerns regarding enforcement of arbitration provisions in mechanic's lien actions, including multi-party mechanic's lien actions.

Sound legal reasoning and the weight of authority dictate that Missouri's equitable mechanic's lien statutes do not bar enforcement of valid arbitration provisions.

C. The October Change Order Did Not Modify or "Partially Rescind" the Arbitration Provision.

DIG argues that the October Change Order modified "and, at a minimum, partially rescinded" the Contract's arbitration provision, thereby rendering it permissive, not mandatory. [Resp.Sub.Br. 63-81] DIG's argument lacks merit.

1. DIG's Interpretation of the Contract and Change Order is Unreasonable.

DIG points to no clear or unequivocal statement in the October Change Order that the arbitration agreement is somehow modified or changed, or that allows either party to pursue an "action at law." No such statement exists. Instead, DIG proffers an interpretation of Paragraph III.D of the October Change Order that narrowly focuses on the phrase "remedies as provided by law" and the *inference* that reference to 'legal remedies' is so inconsistent with arbitration that the arbitration provision must therefore be modified or rescinded. [App.Sub.Br. 107-108]

Proof of rescission must be clear and unequivocal, and must manifest the parties' actual intent to abandon contract rights, and language excluding certain disputes from

arbitration must clearly and unambiguously do so. [App.Sub.Br. 108] As the Western District correctly found, DIG's "proof" came up well short. [Opinion 13; App. A28]

DIG's interpretation of Paragraph III.D overlooks the words "their respective" found in the same sentence. "Respective" is defined as "relating to particular persons or things", and clearly connotes an existing, possessory interest. Black's Law Dictionary, 1179 (5th Ed. 1979). The words "their *respective* . . . remedies as provided by law" clearly refer to the existing legal remedies each party possessed at the time of the October Change Order (which were limited by the parties' contract obligation to arbitrate); they do not indicate that a new right to litigate has been created.

DIG maintains, however, that the phrase "remedies as provided by law" means a "conventional civil lawsuit", citing Rhodes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 75 A.D.2d 767, 427 N.Y.S.2d 826 (N.Y. App. Div. 1980) in support. [Resp.Sub.Br. 67-68] At issue in Rhodes was an NYSE Constitutional provision, authorizing the arbitrators to dismiss agreed-upon arbitration proceedings, and then referring the parties to their legal remedies. Thus, once arbitration proceedings were dismissed under the NYSE rules, the parties were left to pursue their claims by a conventional lawsuit. The Rhodes case is inapposite

The terms "contract remedies" and "remedies as provided by law" are *not* inconsistent, as DIG contends. 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) which are *not inconsistent* with arbitration [App.Sub.Br. 101-105], such as (1) a tort claim (as opposed to a contract

remedy), which clearly can be arbitrated [App.Sub.Br. 97], and (2) as DIG itself has acknowledged, the filing and enforcement of a mechanic's lien. [L.F. 489, n.10] Indeed, DIG's preservation of its mechanic's lien rights was the expressed reason for this language. [L.F. 436, 455]

DIG's cited definitions of "remedy at law" [Resp.Sub.Br. 67] do not lead to a different result. Both definitions speak to the dichotomy between law and equity courts. One remedy "traditionally available in the law courts" (as opposed to equity courts) is money damages. Is it DIG's contention that money damages cannot be sought in arbitration? A remedy available in "the law courts" can be equally available in arbitration, and does not vitiate the parties' obligation to arbitrate their underlying dispute. Significantly, Paragraph III.D does *not* state that either party may pursue "an action at law." DIG confuses its "remedies" with the forum for resolving disputes. The *only* provision in the Contract and October Change Order that addresses the *forum* for resolving disputes is the arbitration clause.

The upshot of DIG's interpretation (i.e., that Paragraph III.D permits an election to litigate [Resp.Sub.Br. 66-68]) is that whoever "wins the race" to the Courthouse or to the American Arbitration Association controls the means of dispute resolution.[9] No such intent was expressed. Such an interpretation is patently unreasonable.

[9] Furthermore, DIG's compulsory counterclaim argument [Resp.Sub.Br. 93-96] suggests that DIG could "veto" arbitration, thus abrogating the arbitration clause in total.

2. Lafarge's Interpretation of the Contract and Change Order is Consistent with the Parties' Negotiations.

Even an unambiguous contract must be interpreted; the court can consider the surrounding circumstances at the time of contracting and the parties' actions to aid in the interpretation of, but not to vary, contradict or modify, the written terms. [App.Sub.Br. 110, n.20] See Cure v. City of Jefferson, 380 S.W.2d 305, 310-311 (Mo. 1964).

DIG claims that its October 18, 2000 black-lined version of Paragraph III.D is the "most powerful" evidence of the parties' intent to forego arbitration. [Resp.Sub.Br. 68-74] DIG's single reference to this isolated portion of the record is misleading.

First, DIG neglects to mention that the very same October 18 draft included language incorporating the terms of the Contract, including the mandatory arbitration clause, by reference. [L.F. 359] Incorporation of an arbitration clause by reference is valid and enforceable under the FAA and Missouri law. [App.Sub.Br. 101] Contrary to what DIG would have this Court believe, there was *no* "unmistakeable striking" of language requiring arbitration.

Furthermore, a review of the entire negotiation of the October Change Order reflects no such agreement to forego arbitration. DIG's first draft of the October Change Order, dated October 9, 2000 [L.F. 327, 338-346, 393, 498], provided that either party could resort to "any available legal remedy" [L.F. 339]. Lafarge responded with its own draft on October 13, 2000 [L.F. 328, 393-394]. It provided that the parties would first attempt to resolve the "marked PCO's" by negotiation, but that either party could demand arbitration for any unresolved PCO's. [L.F. 352] DIG then responded with its October

18 draft [L.F. 328, 354-368, 394, 498-499], which incorporated the Contract terms [L.F. 359] and revised Paragraph III.D to state that the parties would first attempt to resolve "marked PCO's" by negotiation, but that either party "may resort to their respective contract remedies or remedies as provided by law." [L.F. 357]

When the entire exchange is examined, it becomes clear that there was no agreement to forego arbitration. The language in DIG's October 18 draft clearly reflects an intent to maintain the *status quo*, and to clarify DIG's right to pursue a legal remedy (mechanic's lien) not inconsistent with arbitration.[10]

This is *precisely* what DIG, at the time, said it meant. DIG specifically stated that although the underlying dispute may be arbitrated, DIG did not want to be precluded from filing a mechanic's lien, and that the intent of DIG's October 18 draft was to preserve its right to file a mechanic's lien claim. [App.Sub.Br. 50-51] Nowhere in the record does DIG dispute that those statements were made.

Neither DIG nor Dunn disclosed during negotiations that the language at issue was intended to modify the arbitration provision, or create any new right to litigate "marked PCO's" or other claims. [L.F. 330, 395-396, 436, 455, 497-501] That DIG now contends that it "needed to be freed from its arbitration obligations" is a far cry from its express

[10] If the parties' truly intended to create the option to litigate, they could have expressly so provided. They did not (although they did specifically modify other portions of their Contract in the October Change Order). DIG's interpretation also neglects Lafarge's reservation of *its* contract remedies (i.e., arbitration).

statements during negotiations. What DIG secretly intended is irrelevant. Fiegener v. Freeman-Oak Hill Health Systems, 996 S.W.2d 767, 773 (Mo. App. S.D. 1999).

Contrary to DIG's assertions, Lafarge's evidence and interpretation is consistent with the arbitration clause and Paragraph III.D, and gives meaning to each term.

3. Lafarge's Interpretation of the Contract and Change Order is Reasonable.

DIG attacks Lafarge's interpretation of the Contract and October Change Order by arguing that Paragraph III.D takes precedence over the arbitration clause. [Resp.Sub.Br. 74-76] The interpretation rules cited by DIG have no application, however, where the contract language can be harmonized. The rule that specific words take precedence over general words applies *only* where the claimed inconsistent language cannot be reconciled. Clayton Brokerage Co. v. Raleigh, 679 S.W.2d 376, 378 (Mo. App. E.D. 1984). Likewise, where contract clauses can be harmonized, resort to an "order of precedence" clause is unnecessary. Sperry Corp. v. U.S., 845 F.2d 965, 968 (Fed. Cir. 1988); Pellerin Construction, Inc. v. Witco Corp., 169 F. Supp. 2d 568, 583 (E.D. La. 2001).

A court must give meaning to all contract terms and, where possible, harmonize them. [App.Sub.Br. 100-101] Only where contract clauses cannot be harmonized does an inconsistency or ambiguity result. Tuttle v. Muenks, 21 S.W. 3d 6, 14 (Mo. App. W.D. 2000).

Here, there is no need to resort to the Change Order's "order of precedence" clause, or to any rule that specific terms prevail over general terms.[11] The arbitration clause and Paragraph III.D can be read together, without conflict. [App.Sub.Br. 101-111]

This was *precisely* the interpretation given to two very similar clauses in Dickson County v. Bomar Construction Co., 935 S.W.2d 413 (Tenn. Ct. App. 1996). [App.Sub.Br. 103-104] DIG attempts to distinguish Bomar Constr. on the basis that, in that case, the clauses at issue were contained in one document, while the clauses at issue here are in separate documents. [Resp.Sub.Br. 75-76] DIG's suggestion that the Contract and Paragraph III.D cannot be read together is erroneous.

A contract may be modified as to particular provisions, yet stand as to the residue of the original agreement. Cranor v. Jones Co., 921 S.W.2d 76, 81 (Mo. App. E.D. 1996). And in interpreting the modified contract's terms, the modification will be treated as a single document consisting of not only the new terms, but also the terms of the original agreement that have not been abrogated by the amendment. 17A Am.Jur.2d, Contracts, §529 (p. 544). The entire agreement, consisting of the contract and the amendment, must be read together. Simply because a "change order" was executed does not mean that all parts of the Contract were modified.

Here, the Contract specifically contemplated subsequent changes and modifications by the parties without invalidating unaffected terms of the original

[11] DIG's contention that Paragraph III.D is more specific than the arbitration clause is wrong.

Contract (General Conditions Section 9.1.1 [L.F. 287]), and that such changes or modifications, when agreed upon, would become part of the Contract (General Conditions Section 2.1.1 [L.F. 265]).

Furthermore, the October Change Order incorporated the Contract by reference. [L.F. 370] Thus, the Contract terms, except where directly abrogated, were as much a part of the Change Order as if they had been set out therein *"in haec verba"*. Metro Demolition & Excavating Co., Inc. v. H.B.D. Contracting, Inc., 37 S.W.3d 843, 846 (Mo. App. E.D. 2001). The terms of the Change Order must be interpreted together with the terms of the Contract, including the arbitration clause. J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club, 491 S.W.2d 261, 264 (Mo. banc 1973) (entire instrument must be read together, including matters incorporated by reference). DIG fails to do so.

DIG also contends that Lafarge's interpretation renders the phrase "remedies as provided by law" a nullity, and questions why Paragraph III.D exists if its dispute resolution rights before and after the Change Order were identical. [Resp.Sub.Br. 76-78] To determine why this language exists, one need look no further than DIG's contemporaneous explanation when it proposed the language:

> To "maintain the existing parties' positions regarding available dispute resolution remedies under the Contract" and to "allow DIG to preserve its rights" to file a mechanic's lien claim. [L.F. 435-436, 454-455]

The parties agreed to first negotiate the "marked PCO's"; if unsuccessful, they would pursue arbitration. The phrase "remedies as provided by law" indicates the parties' intent

to also maintain their existing legal remedies not inconsistent with arbitration, such as the right to file a mechanic's lien (which is exactly what DIG said it meant).

DIG's complaint about the word "or" is also not persuasive. [Resp.Sub.Br. 78] Lafarge's interpretation recognizes DIG's available remedies at the time of the October Change Order: to immediately file for arbitration, *or* perfect its lien rights or pursue other remedies not inconsistent with arbitration. Moreover, as recognized in the case cited by DIG, Herrick Motor Co. v. Fischer Oldsmobile Co., 421 S.W.2d 58, 66 (Mo. App. 1967), "there are situations in which 'or' properly may be construed as 'and' where that is necessary to effectuate the intention of the parties".

Finally, DIG argues that Lafarge's interpretation adds new terms (i.e., "existing at that time") to Paragraph III.D. [Resp.Sub.Br. 78-79] DIG also pleads that "Lafarge must be bound by what it actually did and said". [Resp.Sub.Br. 79] First, Lafarge does not seek to add terms. Giving meaning to the words "*their respective*" is sufficient. Second, Lafarge expected both parties to be bound by what they did and said. Two undisputed facts bear repeating:

- Lafarge was clear with DIG that the arbitration provision would remain effective. [L.F. 325-326, 328, 348, 391-392, 394, 400, 407, 411]
- DIG told Lafarge that Paragraph III.D was meant to preserve DIG's mechanic's lien rights. [L.F. 435-436, 454-455]

DIG simply ignores these facts.

II. REPLY ARGUMENTS IN SUPPORT OF LAFARGE POINT II

A. The Standard of This Court's Review is *De Novo*.

Lafarge has addressed the appropriate standard of review in Point I.A of its Substitute Brief [App.Sub.Br. 63-66, 114] and Point I.A of this Brief, and will not repeat (but incorporates) those arguments here. Review is *de novo*.

B. The Contract Contains a Written Arbitration Agreement, and Lafarge's Claims Fall Within Its Scope.

1. Lafarge's Claims Must Be Arbitrated Even Under DIG's Purported "Modified" Arbitration Agreement.

DIG does *not* dispute that the Contract contains a broad, mandatory arbitration agreement, and that the Contract was incorporated into the October Change Order by reference. DIG also does not dispute that Lafarge's claims against DIG in the arbitration proceedings otherwise fall within the scope of the arbitration agreement. [App.Sub.Br. 115]

Instead, DIG argues that Lafarge's claims arise out of the same October Change Order which "*freed DIG from its obligation to arbitrate*." [Resp.Sub.Br. 92-93] DIG's argument not only distorts the facts, but is also *completely inconsistent* with DIG's position before the Trial Court.

DIG's arguments for "modification" of the arbitration agreement are based on the language of Paragraph III.D, which, by its very terms (and read together with Paragraph III.A), was limited to "items *marked* on the PCO List" attached to the Change Order.

[L.F. 382] Paragraph III.D was clearly meant to only address the resolution of "marked PCO's", and not other non-marked PCO's. *Nothing* suggests it was intended to apply to any and all claims relating to the Change Order.

Although DIG initially pled to the Trial Court that the arbitration agreement was modified with respect to *any* October Change Order dispute [L.F. 553], DIG later changed its position and *admitted* to the Trial Court that the arbitration agreement was modified *only* with respect to the "marked PCO's." [L.F. 833, 840] DIG now comes before this Court and asserts a *completely different and inconsistent* argument: that Paragraph III.D abrogated DIG's obligation to arbitrate *any* claim relating to the October Change Order, not just the "marked PCO's." DIG is bound by the position it took before the Trial Court; its inconsistent position here should be rejected. Johnson v. Rival Mfg. Co., 813 S.W.2d 78, 80 (Mo. App. W.D. 1991).

As the Western District correctly found, the October Change Order did not modify or rescind the parties' arbitration agreement. [Opinion 17; App. A32] However, even if this Court were to adopt DIG's position before the Trial Court and find that the October Change Order somehow modified the arbitration agreement (which Lafarge denies), then it did so *only* with respect to the "marked PCO's". Lafarge's claims against DIG and Dunn do *not* solely relate to those "marked PCO's". [L.F. 528] Thus, whether Lafarge's

claims are deemed to arise out of the Contract or the October Change Order, they would fall within the scope of the "modified" arbitration agreement.[12]

2. Missouri's Compulsory Counterclaim Rules Do Not Bar Arbitration.

DIG also argues that Lafarge's claims in the arbitration proceedings are "compulsory counterclaims" and must therefore be brought in the pending equitable lien action pursuant to Supreme Court Rule 55.32. [Resp.Sub.Br. 93-96]

DIG cites no Missouri case for this proposition. None exists. However, Federal Courts that have considered this same argument have soundly rejected it. [App.Sub.Br. 116-118] DIG seeks to distinguish these Federal cases by arguing, *without analysis*, that they dealt with arbitration clauses in collective bargaining agreements. [Resp.Sub.Br. 96] However, as explained in Bristol Farmers Market and Auction Co. v. Arlen Realty & Dev. Corp., 589 F.2d 1214, 1220-1221 (3rd Cir. 1978), the reasoning behind these Federal decisions is equally applicable to arbitration agreements in commercial contracts.

DIG also fails to explain how its suggested application of Rule 55.32 squares with the preemptive effect of the FAA. [App.Sub.Br. 115-116] Rule 55.32, applied in such a manner, would conflict with FAA §2, which controls.

Finally, DIG argues that by reason of the "exclusive jurisdiction provisions" of Missouri's equitable lien statutes, Lafarge was required to litigate its otherwise arbitrable

[12] DIG ignores Lafarge's point that the majority of DIG's *own* claims would fall within the scope of the "modified" agreement. [App.Sub.Br. 94-98, 105-106]

claims in the pending equitable lien action. [Resp.Sub.Br. 96] However, as explained by Lafarge [App.Sub.Br. 66-91], and as the Western District aptly found [Opinion 15-16; App. A30-A31], Missouri's equitable lien statutes *cannot* be applied to bar enforcement of the parties' agreement to arbitrate their disputes.

DIG's attempt to circumvent the arbitration of issues it agreed to arbitrate, simply because it filed a lawsuit, must be rejected. DIG should not be allowed to frustrate arbitration in such a manner.

C. Dunn Is Obligated to Arbitrate.

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

Dunn persists with its *absurd* contention that because the Guaranty names "Lafarge Canada" rather than Lafarge Corporation as the Obligee, the Guaranty inures solely to the benefit of Lafarge Canada, and Lafarge Corporation has no standing to demand arbitration from Dunn. [Resp.Sub.Br. 89-91] Conspicuously absent from Dunn's "analysis", however, is any mention of the repeated references throughout the Guaranty to Lafarge Corporation as the Obligee.[13] [App.Sub.Br. 118-121] The Western District agreed that Dunn's obligations under the Guaranty were intended by the parties to run to the party with whom DIG contracted for the construction of the Project – *Lafarge Corporation*. [Opinion 22; App. A37]

[13] Contrary to Dunn's contention [Resp.Sub.Br. 70], the record *does* show that Lafarge Canada was acting for and on behalf of Lafarge on the Project. [App.Sub.Br. 121]

While Dunn may be entitled to a strict interpretation of the Guaranty, Dunn is *not* entitled to disregard the clear intent expressed in the Guaranty and demand an unfair and strained interpretation of the words used, simply to be released from its obligation. An interpretation that renders the Guaranty redundant, illusory or absurd must be avoided. [App.Sub.Br. 120] As the Western District found, that is *precisely* what Dunn is proposing here. [Opinion 23; App. A38]

2. The Arbitration Agreement Was Incorporated Into Dunn's Guaranty, or Dunn is Estopped from Avoiding Arbitration.

In arguing that the Guaranty does not incorporate the Contract (and the arbitration clause), Dunn points solely to the language of Guaranty Section 1 and contends that this language is insufficient to effect the incorporation. [Resp.Sub.Br. 85] However, this text cannot be read in a vacuum, and must be read together with the rest of the Guaranty.

Dunn fails to mention Guaranty Section 8, which provides that Lafarge may join Dunn in any action (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 required to arbitrate. Dunn also ignores the substantial involvement of its principals in the negotiations for the October Change Order. [App.Sub.Br. 124]

The clear intent from the *whole* of the Guaranty (and Dunn's involvement with the October Change Order) is that the Contract, including the arbitration provision, is incorporated into the Guaranty.

Dunn's reliance on the Grunstad case, to argue that such a "wholesale incorporation" is insufficient because the Guaranty does not unambiguously express an intent to arbitrate [Resp.Sub.Br. 86-88], is mistaken. Grunstad reflects the *minority* rule. 1 Domke on Commercial Arbitration, §10.04 (Gabriel M. Wilner ed. Supp. 1999). Missouri, however, follows the *majority* rule to enforce broad arbitration agreements against nonsignatories. [App.Sub.Br. 122]

Dunn also mistakenly relies on the Aggrow and Swensen cases in urging that the Grunstad rule prevails in the Eighth Circuit. [Resp.Sub.Br. 86-88] The Aggrow case was decided under North Dakota law, not Missouri law. Moreover, Swensen actually stands for the *opposite* conclusion than that stated by Dunn. Foster v. Sears, Roebuck and Co., 837 F.Supp. 1006, 1008 (W.D. Mo. 1993). Here, the arbitration provision is broad, and applicable law compels Dunn to arbitrate.

Dunn also missed ITT Hartford Life & Annuity Ins. Co. v. Amerishare Investors, Inc., 133 F.3d 664, 670 (8th Cir. 1998) (citing Campania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2nd Cir. 1975)). In Campania, the court found that, upon the principal's default, the guarantors were bound by the broad arbitration clause in the original contract because (similar to Dunn's agreement here) the guarantors agreed to perform the balance of the original contract and assume the rights and obligations under the original contract, including arbitration. Campania, 527 F.2d at 973-974.

Finally, Dunn does not contest Lafarge's alternative argument that Dunn should be estopped from avoiding the arbitration agreement. [See App.Sub.Br. 124-125] Dunn

also ignores the significant fact that it was not only involved in negotiating the October Change Order, but was also a *signatory* to that Change Order (which incorporated the arbitration agreement). Dunn expressly "acknowledge[d] and accept[ed]" the Change Order terms. [L.F. 383] Thus, Dunn was a signatory to an agreement containing an arbitration clause. Dunn should be estopped from avoiding arbitration.

3. Dunn's Obligation to Arbitrate Has Not Expired.

Dunn argues it cannot be compelled to arbitrate because its Guaranty obligations "terminated" when the Guaranty "expired". [Resp.Sub.Br. 91-92] Dunn is mistaken.

An arbitration provision in a contract survives the contract's termination unless there is clear evidence that the parties intended to override this presumption. Riley Mfg. Co., Inc. v. Anchor Glass Container Corp., 157 F.3d 775, 781 (10th Cir. 1998).

This presumption in favor of continuing arbitrability can be rebutted only if the parties express or clearly imply an intent to repudiate arbitrability, or if the dispute does not arise under the original contract. Encore Productions, Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1108-1109 (D. Colo. 1999). Dunn points to no such clear expression or implication to repudiate arbitrability with the "termination" of the Guaranty. None exists. Furthermore, Dunn has not contended that Lafarge's claim for breach of the Guaranty does not arise out of or relate to the Guaranty. Finally, the arbitration commenced before the Guaranty "expired". [Resp.Sub.Br. 91] Dunn's obligation to arbitrate survived any purported "termination" of the Guaranty.

CONCLUSION

Lafarge respectfully requests reversal of the Trial Court's Order and the grant of relief consistent with that requested in Lafarge's Substitute Brief of Appellant.

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 7,698 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 Appellant's Reply 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 two hard copies of the foregoing instrument, along with a diskette containing such document, was served upon the following attorneys by depositing same in envelope addressed to said attorneys, and by placing said envelope with Federal Express, to be delivered on the 7th day of April, 2003, said envelope being addresses as follows:

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