STATE OF NORTH CAROLINA

COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-2805

BEFORE THE NORTH CAROLINA BUSINESS COURT

AMERICAN DRYWALL CONSTRUCTION, INC.,

Plaintiff,

v.

INTRACOASTAL LIVING, LLC, and SUPERIOR CONSTRUCTION CORPORATION,

Defendants.

SUPERIOR CONSTRUCTION CORPORATION'S BRIEF IN SUPPORT OF MOTION TO STAY AND COMPEL ARBITRATION OF CLAIMS

COMES NOW, Defendant, Superior Construction Corporation ("Superior" or "Defendant") and files this Brief in Support of Motion to Stay and Compel Arbitration of Claims, respectfully showing as follows:

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. Contract Between Superior and Intracoastal Living, LLC for the Preserve.

On or about January 21, 2005, Superior entered into a written contract (the "Primary Contract") with Intracoastal Living, LLC the Owner ("Intracoastal" or the "Owner") of the Preserve Project, located in Oak Island, North Carolina (the "Preserve" or the "Project") for the construction of Buildings 2, 3, and 4 of the Project.

B. Buildings 2 & 3 of the Preserve.

American Drywall Construction, Inc. ("American Drywall") was brought onto the Project to replace a subcontractor who was terminated for non-performance. Affidavit of Mike Dickman ("Dickman Aff.") ¶ 5. At the time American Drywall began work on the Project, Building 2 was

90% complete, so it was agreed that American Drywall would perform the necessary work for Building 2 on a time and material purchase order. *Id.* ¶¶ 7, 8. For the work on Building 3, a Subcontract was negotiated between Superior and American Drywall (the "Building 3 Subcontract"). *Id.* ¶ 9; *See* **Exhibit A**. The Building 3 Subcontract was issued by Superior on or about April 10, 2006 and sent to Ryan Wells of American Drywall. *Id.* The Building 3 Subcontract contains Article 14, which requires the arbitration of all claims arising out of or relating to the Agreement:

> **14.1 AGREEMENT TO ARBITRATE.** All claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described in Article 14.7, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law.

The Building 3 Subcontract contains a "Subcontract Number" on the cover page: 05MBD006-S21. Although the Building 3 Subcontract is not signed, there are numerous Addenda, at least four of which are signed by representatives of both American Drywall and Superior. *See* Building 3 Addenda, **Exhibit B**. These Addenda state in part:

> The following Additions and Changes are hereby incorporated into, complement and constitute part of the Subcontract fo [sic] Construction between and American Drywll Construction, Subcontract # 05MBD006-S21 on Project Number 05MBD006 . . . Except as expressly and specifically set forth, all terms and conditions of the Subcontract and the Contract Documents are incorporated herein by reference and shall remain in full force and effect.

See **Exhibit B**. The Subcontract price stated in the Building 3 Subcontract, $770,000.00, is the same amount referred to as the "Initial Subcontract Value" on the Addenda. *Compare* **Exhibit A** and **Exhibit B**. Ryan Wells also submitted Applications for Payment which reflect the same

Subcontract Number stated on the Building 3 Subcontract, # 05MBD006-S21 and the original contract sum stated in the Building 3 Subcontract of $770,000.00. *See* Applications for Payment, **Exhibit C.** These Applications for Payment are signed by Ryan Wells. The Applications for Payment also state "SUBCONTRACTOR HEREBY REPRESENTS, WARRANTS, AND CERTIFIES to Superior Construction Corporation, as 'Contractor' that this Application For Progress Payment is made in strict accordance with the terms of the Subcontract . . ." *See* **Exhibit C**. American Drywall also submitted Lien Waiver forms, signed by Ryan Wells, which also reflect the Subcontract Number stated on the Building 3 Subcontract, # 05MBD006. *See* Lien Waivers, **Exhibit D.**

C. Building 4 of the Preserve.

On or about April 25, 2006, Superior issued a Subcontract for Building 4 in the contract amount of $492,500.00 (the "Building 4 Contract") and sent it to American Drywall. *See* **Exhibit E**; *see also* Dickman Aff. ¶¶ 10-13.

The Building 4 Subcontract contains the same Article 14, which requires the arbitration of all claims arising out of or relating to the Agreement. *See* **Exhibit E.** The Building 4 Subcontract contains a "Subcontract Number" on the cover page: 05MBD014-S09. There are numerous Addenda to the Building 4 Subcontract which state in part:

> The following Additions and Changes are hereby incorporated into, complement and constitute part of the Subcontract fo [sic] Construction between and American Drywall Construction, Subcontract # 05MBD014-S09 on Project Number 05MBD014 . . . Except as expressly and specifically set forth, all terms and conditions of the Subcontract and the Contract Documents are incorporated herein by reference and shall remain in full force and effect.

See Building 4 Addenda, **Exhibit F**. The Subcontract price stated in the Building 4 Subcontract, $492,500.00, is the same amount referred to as the "Initial Subcontract Value" on the Addenda.

Compare **Exhibit E** and **Exhibit F**. There is correspondence from Mike Dickman to Ryan Wells enclosing some Addendum Number Five and stating:

> "[p]lease find enclosed two (2) copies of Addendum Number FIVE (5), which has been incorporated into your Subcontract on the above referenced Project."

See **Exhibit F**.

Ryan Wells also submitted Applications for Payment, some of which are signed, which reflect the same Subcontract Number stated on the Building 4 Subcontract, # 05MBD014-S09 and the original contract sum stated in the Building 4 Subcontract of $492,500.00. *See* Applications for Payment, **Exhibit G.** The Applications for Payment reference the Addenda, which incorporate the terms of the Building 4 Subcontract. The Applications for Payment also state:

> "SUBCONTRACTOR HEREBY REPRESENTS, WARRANTS, AND CERTIFIES to Superior Construction Corporation, as 'Contractor' that this Application For Progress Payment is made in strict accordance with the terms of the Subcontract . . ."

See **Exhibit G**. American Drywall also submitted Lien Waiver forms, signed by Ryan Wells, which also reflect the Subcontract Number stated on the Building 4 Subcontract, # 05MBD014. *See* Lien Waivers, **Exhibit H.**

D. Building 5 of the Preserve.

On or about November 6, 2006, Mike Dickman of Superior sent a Letter of Intent to Ryan Wells of American Drywall informing him of Superior's intent to issue a Subcontract in the amount of $1,061,150.00 for drywall and related construction on Building 5 of the Project (the "Building 5 Subcontract"). *See* **Exhibit I**. The Building 5 Subcontract was issued by Superior on or about April 26, 2007 and sent to American Drywall. *See* **Exhibit J**; *see also* Dickman Aff. ¶¶ 10-13. The Building 5 Subcontract contains a "Subcontract Number" on the

cover page: 07MBD020-S06. *See* **Exhibit J.** American Drywall submitted Applications for Payment for Building 5, signed by Ryan Wells, referencing the "Original Contract Amount" of $1,061,150.00 and stating:

> "all work and materials performed and furnished to date by said subcontractor or materialman have been completed in accordance with the subcontract between said contractor or materialman and Superior Const. . . ."

See Applications for Payment, **Exhibit K**.

E. American Drywall Performed Pursuant to the Terms of the Subcontracts.

American Drywall performed pursuant to the terms of each of the Subcontracts, including, but not limited to, the scope of work, how the work was to be performed, the sequence in which the work was to be performed, when applications for payment were to be submitted, the form of the application for payment, the construction scheduling, and change order requests. Dickman Aff. ¶ 16. American Drywall always attempted to perform its work—thousands of dollars worth—in accordance with the requirements of the Subcontracts, including, for example, the thickness of the steel studs and drywall. *Id.* ¶¶ 30, 31.

American Drywall is now demanding payment pursuant to the terms of the Subcontracts, including all of the requests for payment made by change orders and addenda submitted by American Drywall incorporating, and pursuant to, the terms of the Subcontracts. *Id.* ¶¶ 17, 33.

F. American Drywall Never Objected to the Arbitration Provisions Contained in Each Subcontract.

Neither Ryan Wells nor any other representative of American Drywall ever discussed any issue or concern with any of the language contained in the Subcontracts for the Project with Mike Dickman. Dickman Aff. ¶ 14. Mike Dickman was the only person at Superior authorized to discuss the terms of the Subcontracts with American Drywall other than Mr. Larry Taylor, the

Superior Division Manager. *Id.* No one with American Drywall ever discussed the provisions of the Subcontracts with Mike Dickman or, to his knowledge, Mr. Larry Taylor. *Id.*

Superior never received any written documentation from or on behalf of American Drywall relating to any issue or concern with any language contained in the Subcontracts for the Project. *Id.* ¶ 15. American Drywall never "marked up" a Subcontract and returned it to Superior. *Id.* American Drywall simply received the Subcontracts and started performing work pursuant to the Subcontracts. *Id.*

American Drywall never requested that any provision of Superior's subcontract be waived. *Id* . ¶ 28. At all times throughout construction of the Project, American Drywall presented itself pursuant to the terms of the Subcontracts and never advised anyone involved in the Project that, in fact, American Drywall was not bound by the terms of the Subcontracts presented by Superior for the Project. *Id.* ¶ 29. At no time did American Drywall ever raise any objection to or concern with any provision or term of any Subcontract. *Id.* ¶ 32. Specifically, American Drywall never raised any concern in regard to the arbitration clause in any Subcontract. *Id.*

G. Barden Rogers Was Not Involved With Negotiating Subcontracts on Behalf of Superior for Any Project, Including the Preserve.

Barden Rogers has stated in his Affidavit that he was employed by Superior from January, 2006 to April, 2007. *See* Affidavit of Barden Rogers, submitted by American Drywall. Barden Rogers was actually employed by Superior Construction beginning May 1, 2006. Dickman Aff. ¶ 19. Mr. Rogers was terminated by Superior Construction on March 30, 2007. *Id.* Mr. Barden Rogers' W-4 form is attached to Mike Dickman's Affidavit, showing his dates of employment with Superior. *See* Dickman Aff., **Exhibit A**.

The Subcontracts for Buildings 3 and 4 were sent to American Drywall in April of 2006, before Mr. Rogers was ever employed by Superior. Dickman Aff. ¶ 19.

The terms of the Subcontracts were negotiated before the written Subcontracts were prepared and sent to American Drywall. *Id.* ¶ 26. Barden Rogers was not even an employee of Superior at the time Superior and American Drywall negotiated the work to be performed on Buildings 2, 3, and 4 of the Project. *Id.* Therefore, he cannot possibly have any personal knowledge of the intention and agreements of the parties involved. *Id.*

Mr. Rogers was employed as an estimator with Superior Construction. *Id.* ¶ 20. As an estimator at Superior Construction, Mr. Rogers would be involved in preparing bids for Superior to provide to Owners. Mr. Rogers would not be involved in negotiating subcontracts. *Id.* ¶ 21.

Estimators at Superior Construction are never involved with the subcontractor negotiations after a project has been awarded to Superior. *Id.* ¶ 22. Such negotiations are handled by the Project Manager for each project. *Id.*

Barden Rogers was never authorized to negotiate subcontracts for any project. *Id.* ¶ 24. That is not what an estimator does. *Id.* That is not in an estimator's job description. *Id.*

In Paragraph 4 of Mr. Rogers' Affidavit, Mr. Rogers states, "Superior agreed to Ryan going forward on the Preserve Project, with the implication and understanding that he would not be bound by the arbitration clause of the subcontract." *Id.* ¶ 25. That is not accurate. *Id.* Actually, Superior agreed for American Drywall to go forward with the understanding that both Superior and American Drywall were bound by all of the terms and provisions of each Subcontract. *Id.*

Furthermore, Barden Rogers in his capacity as an estimator would never have authority to authorize a waiver of any provision of Superior's subcontract. *Id.* ¶ 27. Any such request would have required approval from a Division Manager at Superior. *Id.*

H. American Drywall's Work Has Not Been Approved.

The work performed by American Drywall has not been approved or accepted by either the Owner or Project Architect. Dickman Aff. ¶ 34.

II.
ARGUMENT AND CITATION OF AUTHORITY

A. The Federal Arbitration Act Applies and Requires That This Dispute Be Arbitrated.

The Federal Arbitration Act ("FAA") applies to this dispute. *See* 9 U.S.C.A. § 1 *et seq.* The FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. "Commerce" is defined in pertinent part as "commerce among the several States." 9 U.S.C.A. § 1. The Preserve involved "commerce" as defined by the FAA. There were subcontractors working on the Preserve from "several States." For example, Turner Electric, the electrical subcontractor on the Preserve, is based in Charleston, South Carolina. Materials were ordered and shipped from all over the United States and incorporated into the Project. Without question, the Project involved "commerce" as defined under the FAA.

The FAA requires that if a suit is brought in any court in the United States based upon an arbitrable issue under an agreement in writing for arbitration, "the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3.

The Subcontracts between Superior and American Drywall for Buildings 3, 4 and 5 each contain a written arbitration provision in Article 14 requiring "[a]ll claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof" to be decided by arbitration." This written arbitration provision meets the requirements of the FAA which require a stay of the action pending arbitration. Superior has filed a Motion to Stay and Compel Arbitration in this action. Clearly then, American Drywall's claim for recovery—as to disputed amounts owed for work performed on Buildings 3, 4, and 5—should be stayed pursuant to the FAA, 9 U.S.C. § 3, pending the arbitration of the dispute.

B. Even If the Federal Arbitration Act Does Not Apply, North Carolina's Arbitration Act Requires the Arbitration of This Dispute.

The result would be the same under North Carolina's Arbitration Act. Even assuming that the FAA did not apply—which Superior disputes—North Carolina's Arbitration Act would apply. North Carolina's Revised Uniform Arbitration Act is found in N.C.G.S. §§ 1-569.1 through 1-569.31. The statute defines arbitration obligations broadly. Section 1-569.6 defines the parameters of which disputes should be referred to arbitration:

> 1-569.6. **Validity of agreement to arbitrate.** (a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract. (b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate . . .

North Carolina Courts will resolve all issues in favor of arbitration. *See Carteret County v. United Contractors*, 120 N.C. App. 336, 462 S.E.2d 816 (1995) (noting that North Carolina has a strong public policy in favor of arbitration and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration).

Whether the FAA or North Carolina's Arbitration Act applies, this Court should stay American Drywall's claims under each of the Subcontracts pending the arbitration of this dispute.

C. The United States Supreme Court Has Held that Courts May Not Enforce Some Terms of a Contract While Not Enforcing the Arbitration Clause.

This Court should not permit American Drywall to recover on the basis of the Subcontracts while avoiding the arbitration clauses. American Drywall is seeking to recover sums it claims it is due for work performed pursuant to its Subcontracts while arguing that it should be allowed to avoid the arbitration provision contained in the Subcontracts. It is not permitted to do this. As the United States Supreme Court stated:

> 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. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent. [*Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 115 S.Ct. 834 (1995)].

D. The Subcontracts Are Enforceable Even Though They Were Not Signed.

The fact that the Subcontracts for Buildings 3, 4, and 5 were never signed by the parties does not render the arbitration provisions contained in them unenforceable. To the contrary, the provisions mandating arbitration are valid and enforceable. *See, e.g., Real Color Displays, Inc. v. Universal Applied Techs.*, 950 F. Supp. 714 (E.D.N.C. 1997); *see also Microstrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001); *American States Ins. Co. v. Sorrell*, 258 A.D.2d 782, 684 N.Y.S.2d 711 (1999); *Marino v. Dillard's, Inc.*, 413 F.3d 530 (La. Ct. App. 5th Cir. 2005); *Hurley v. Fox*, 520 So.2d 467 (La. Ct. App. 4th Cir. 1988).

In *Real Color*, a seller of display boards for use in newspaper vending machines filed a motion to confirm an arbitration award against Universal, a buyer of the display boards. *See*

Real Color, 950 F. Supp. 714. Real Color had sent an "Offer and Agreement" to Universal. The Offer and Agreement contained terms of the agreement, including an arbitration clause. No signature was ever obtained on the offer form. However, Universal sent back a purchase order form, and continued to order shipments. After Universal failed to pay for the display boards, Real Color submitted the dispute to the American Arbitration Association. Universal claimed that it had never agreed to arbitrate any disputes with Real Color. The district court for the Eastern District of North Carolina rejected Universal's argument. The court noted that "as in contract law, there is no requirement that the written arbitration agreement necessarily be signed by the party to be charged." *Real Color*, 950 F. Supp. at 717. The court concluded that Universal had accepted Real Color's offer, which contained an arbitration clause, by sending its own purchase order and by its conduct in ordering shipments. *See id.* at 718. The court also stated:

> The writings, coupled with the conduct of the parties, convince the court that there was indeed a contract between these two entities, and the arbitration agreement was part of that contract. In addition, the court is guided by the liberal federal policy favoring arbitration in contracts governed by the Federal Arbitration Act. Any doubts about the construction of the putative arbitration clause are to be resolved in favor of arbitration.

Id. This case is squarely on point with *Real Color*. American Drywall's conduct demonstrates that it intended to be bound by its Subcontracts with Superior, including the arbitration clauses contained in each Subcontract. After receiving copies of each of the Subcontracts, American Drywall accepted each Subcontract by its conduct. Specifically, American Drywall commenced and continued performance in accordance with the requirements of the Subcontracts.

American Drywall proceeded to perform its work, i.e., building each building, in strict accordance with the provisions of each Subcontract. Not only that, American Drywall obtained a

Certificate of Insurance, as required by the Subcontracts. While performing work pursuant to the parties' agreement, American Drywall submitted Addenda, some of which were signed, expressly incorporating the terms of the Subcontracts. American Drywall also submitted signed Applications for Payment stating that the "Original Contract Sum" for each building, which matched the amounts in the written Subcontracts. The Addenda, Applications for Payment, and Lien Waivers also referenced the Subcontract Number contained in each of the Subcontracts. As in *Real Color*, the written Subcontracts and the conduct of the parties demonstrate that there were three separate contracts between Superior and American Drywall and that an arbitration agreement was a part of each of those contracts.

Other courts have similarly distinguished between a "writing" requirement and a "signing" requirement. "A writing requirement does not necessarily imply a signing requirement. Signing is an additional requirement beyond writing." *Hurley*, 520 So.2d at 469. In *Hurley*, the court held that "if the [arbitration] agreement between the parties is written, the provisions of the statute are satisfied even though the writing is not signed by the parties." *Id.*

American Drywall's conduct clearly demonstrates that it accepted each of the Subcontracts and performed pursuant to each Subcontract. American Drywall is seeking to recover on sums it claims it is due under the contract, while avoiding the arbitration clause in the agreement. This is contrary to the FAA and the North Carolina Arbitration Act which strongly favor the arbitration of disputes where a written arbitration agreement exists. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834 (1995). As long as the agreement to arbitrate is in writing and the parties' conduct shows that the parties had an agreement, the fact that the agreement, or Subcontract, is unsigned, is not determinative. *See, e.g., Real Color*, 950

F. Supp. 714; *Microstrategy,* 268 F.3d 244; *Sorrell*, 258 A.D.2d 782; *Marino*, 413 F.3d 530; and *Hurley*, 520 So.2d 467.

CONCLUSION

There are three written Subcontracts between Superior and American Drywall for work to be performed on Buildings 3, 4 and 5 of the Preserve. These written Subcontracts meet the requirement for a "writing" or "record" under both the FAA and the North Carolina Arbitration Act. American Drywall's conduct demonstrates that it had a binding contract with Superior for each of Buildings 3, 4 and 5. American Drywall never objected verbally or in writing to any provision of the Subcontracts, including the arbitration provisions. American Drywall performed in accordance with the Subcontracts. American Drywall submitted addenda/change orders, applications for payment, and lien waivers all referencing the original contract amounts and Subcontract Numbers contained in the Subcontracts. The addenda/change orders expressly incorporated the terms of the Subcontracts, and the applications for payment stated that the work was performed in accordance with the Subcontracts. Signing the addenda and change orders, which incorporate the original Subcontract, is the same as signing the original Subcontract.

American Drywall now seeks to enforce its contractual right to payment for work performed pursuant to the Subcontracts, while avoiding the arbitration provisions which were a part of its contractual agreement with Superior. This it cannot do. It is contrary to precedent of the United States Supreme Court and to North Carolina law.

REQUEST FOR ORAL ARGUMENT

Pursuant to North Carolina Business Court Rule 15.4(a), counsel for Superior requests oral argument on its Motion to Stay and or Compel Arbitration due to the complexity of the issues.

CERTIFICATION

The undersigned hereby certifies that this memorandum of law complies with the requirements of North Carolina Business Court Rule 15.8. The undersigned certifies that, excluding the caption and this certification, the word count does not exceed 7,500 words.

This the 25th day of June 2008.

SHUMAKER, LOOP & KENDRICK, LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he served a copy of the foregoing ***SUPERIOR CONSTRUCTION CORPORATION'S BRIEF IN SUPPORT OF MOTION TO STAY AND COMPEL ARBITRATION OF CLAIMS*** upon the parties listed below by electronic filing and by depositing a copy thereof in the United States mail in Charlotte, North Carolina, postage pre-paid and addressed as follows:

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This the 25th day of June 2008.

s/Steele B. Windle, III
Steele B. Windle, III