

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

26 th Street Hospitality, LLP,)	
)	Supreme Court No. 20150259
Plaintiffs-Appellants,)	Burleigh County No. 08-2013-CV-02544
)	
vs.)	
)	
Real Builders, Inc.; Joel J. Feist, individually)	
and as Managing Partner of 26 th Street)	
Hospitality, LLP, Joeleon Holdings, LLP, Solid)	
LLC,)	
)	
Defendants-Appellees,)	

APPEAL OF FEBRUARY 21, 2014, ORDER OF JUDGE BRUCE A. ROMANICK OF
THE SOUTH CENTRAL JUDICIAL DISTRICT GRANTING MOTION
COMPELLING ARBITRATION AND STAYING FURTHER PROCEEDINGS

CIVIL NO. 08-2013-CV-02544

**BRIEF OF APPELLEES REAL BUILDERS, INC., JOEL J. FEIST,
INDIVIDUALLY AND AS MANAGING PARTNER OF 26TH STREET
HOSPITALITY, LLP, AND JOELEON HOLDINGS, LLP**

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TABLE OF CONTENTS

	Paragraph Number
<u>STATEMENT OF THE ISSUES</u>	1
<u>STATEMENT OF THE CASE</u>	2
<u>STATEMENT OF STANDARD OF REVIEW</u>	7
<u>STATEMENT OF RELEVANT FACTS & PROCEDURAL BACKGROUND</u>	8
I. THE LIMITED LIABILITY PARTNERSHIP AGREEMENT	8
A. The Management of the Partnership	9
B. The Contributions of the Partners	10
C. Partner Authority Under the Partnership Agreement.....	12
D. The Partnership Agreement’s Arbitration Provision	15
II. THE CONSTRUCTION CONTRACT FOR THE HOTEL.....	17
A. The Construction Contract’s Arbitration Provision	18
III. THE PARTNERSHIP’S BREACH OF CONTRACT AND THE BURLEIGH COUNTY LITIGATION.....	19
A. The Partnership’s Burleigh County Complaint.....	21
B. Defendants’ Burleigh County Counterclaim	24
IV. JOELEON AND FEIST’S MOTION TO COMPEL ARBITRATION	25
V. THE DISTRICT COURT’S ORDERS COMPELLING ARBITRATION	27
VI. THE ARBITRATION AND ARBITRATION AWARD.....	29
VII. THE DISTRICT COURT’S CONFIRMATION OF THE ARBITRATION AWARD	33
<u>ARGUMENT</u>	34
I. PURSUANT TO THE FEDERAL ARBITRATION ACT, THE DISTRICT COURT PROPERLY FOUND THAT THE ARBITRATOR WOULD	

DETERMINE THE ARBITRABILITY OF THE PARTIES’ CLAIMS UNDER THE PARTNERSHIP AGREEMENT AND THE CONSTRUCTION CONTRACT	34
A. The Federal Arbitration Act Applies To The Partnership Agreement’s Arbitration Provision.	35
B. The FAA Applies To The Partnership Agreement Because the Partnership And Its Businesses Involve Interstate Commerce	39
C. The FAA Preempts North Dakota Law	42
II. THE PARTNERSHIP AGREEMENT’S ARBITRATION PROVISION DETERMINED THE FORUM FOR RESOLUTION OF THE PARTNERSHIP’S CLAIM THAT THE CONSTRUCTION CONTRACT WAS INVALID.....	45
A. Whether The Construction Contract Was Procured By Fraud Does Not Invalidate The Enforceable Arbitration Provision	52
III. THE PARTNERSHIP AGREEMENT AND THE AAA RULES GAVE THE ARBITRATOR THE AUTHORITY TO DETERMINE ARBITRABILITY OF CLAIMS	54
A. Under <u>Fallo v. High-Tech Institute</u> , The Arbitrator Properly Determined The Scope of Arbitrable Claims Under The AAA Rules.	59
IV. ALL OF THE CLAIMS AND PARTIES WERE PROPERLY SUBJECT TO ARBITRATION	63
A. Based On The Arbitration Provisions In The Partnership Agreement And the Construction Contract, The Arbitrator Could Address And Resolve All Of The Parties’ Claims.....	63
B. Based On The Partnership’s Allegations In The Complaint, The Non-Signatories To The Partnership Agreement Could Appropriately Participate in The Arbitration	69
V. RBI IS ENTITLED TO 18% POST-JUDGMENT INTEREST PURSUANT TO N.D.C.C. § 28-20-34	71
<u>CONCLUSION</u>	74

TABLE OF AUTHORITIES

	Paragraph Number
<u>CASES</u>	
<u>Allied-Bruce Terminix Cos., Inc. v. Dobson</u> , 513 U.S. 265 (1995)	37, 39
<u>Allstate Ins. Co. v. Nodak Mut. Ins. Co.</u> , 540 N.W.2d 614 (N.D. 1995).....	46
<u>Apollo Computer, Inc. v. Berg</u> , 886 F.2d 469 (1st Cir. 1989).....	61
<u>AT & T Mobility LLC v. Concepcion</u> , 131 S.Ct. 1740 (2011)	43
<u>Barker v. Golf U.S.A., Inc.</u> , 154 F.3d 788 (8th Cir. 1998).....	40
<u>Buckeye Check Cashing v. Cardegna</u> , 546 U.S. 440 (2006)	52
<u>CD Partners, LLC v. Grizzle</u> , 424 F.3d 795 (8th Cir. 2005)	69
<u>Contec Corp. v. Remote Solution Co.</u> , 398 F.3d 205 (2nd Cir. 2005).....	61
<u>C. P. Robinson Const. Co. v. National Corp. for Housing Partnerships</u> , 375 F.Supp. 446 (D.C. N.C. 1974)	40
<u>Fallo v. High-Tech Institute</u> , 559 F.3d 874 (8th Cir. 2009).....	60–62, 65
<u>First Options of Chi., Inc. v. Kaplan</u> , 514 U.S. 938 (1995).....	60
<u>Gammaro v. Thorp Consumer Discount Co.</u> , 15 F.3d 93 (8th Cir. 1994)	39
<u>In re Mercury Const. Corp.</u> , 656 F.2d 933 (4th Cir. 1981).....	36, 59
<u>KPMG LLP v. Cocchi</u> , 132 S.Ct. 23 (2011).....	43
<u>Marmet Health Care Center, Inc. v. Brown</u> , 132 S. Ct. 1201 (2012)	43
<u>Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.</u> , 473 U.S. 614 (1985)	43
<u>Prima Paint v. Flood & Conklin</u> , 388 U.S. 395 (1967).....	52
<u>PRM Energy Systems, Inc. v. Primenergy, LLC</u> , 592 F.3d 830 (8th Cir. 2010).....	69
<u>Qualcomm Inc. v. Nokia Corp.</u> , 466 F.3d 1366 (Fed. Cir. 2006).....	61
<u>Schwarz v. Gierke</u> , 2010 ND 166, 788 N.W.2d 302	7, 46, 64

<u>Superpumper, Inc. v. Nerland Oil, Inc.</u> , 1998 ND 144, 582 N.W.2d 647	36
<u>Terminix Int'l Co. v. Palmer Ranch LP</u> , 432 F.3d 1327 (11th Cir. 2005)	61
<u>United States v. Rea</u> , 300 F.3d 952 (8th Cir. 2002).....	41
<u>Westmoreland v. Sadoux</u> , 299 F.3d 462 (5th Cir. 2002)	69

OTHER

9 U.S.C. §§ 1 to 16.....	27, 37
N.D.C.C. § 28-20-34.....	1, 33, 72–73
N.D.C.C. §32-29.3-08.....	27
N.D.C.C. § 32-39.3-05.....	27

STATEMENT OF THE ISSUES

(1)

- I. Whether the district court properly ruled that the arbitrator would determine the arbitrability of the parties' claims under the Partnership Agreement and Construction Contract.
- II. Whether Real Builders, Inc. is entitled to 18% post- judgment interest pursuant to N.D.C.C. § 28-20-34.

STATEMENT OF THE CASE

(2) This case concerns a partnership formed to build and operate the Williston Mainstay Suites hotel (the "Hotel"). The district court properly decided that the applicable Partnership Agreement contained an unambiguous, enforceable, and broad arbitration provision that left the issue of arbitrability to the arbitrator. This Court should affirm the district court's decision.

(3) The Partnership filed a Complaint alleging violations of the Partnership Agreement and sought damages and declaratory relief. As the district court correctly determined, the Partnership's claims arose out of and were related to the Partnership Agreement. As such, the court enforced the parties' contract and compelled the Partnership to bring its claims in arbitration and the arbitrator would determine which claims were arbitrable.

(4) The district court recognized the implication of referring the parties' claims to arbitration to resolve the issues of the enforceability of the Construction Contract and the arbitrability of the various claims. The court's order stated that "[t]here may be certain aspects of the litigation that cannot be resolved in arbitration and those matters will have to be stayed pending the resolution of any arbitration." (Appellant's Appendix (hereinafter "A-App.") 311, ¶14) The district court understood that the arbitrator's

resolution of the enforceability of the Construction Contract and which claims were arbitrable would also determine which claims, if any, would remain for the court to resolve.

(5) Tellingly, on appeal, the Partnership has not identified which claims would be subject to the Partnership Agreement’s arbitration provision. The Partnership was formed for the purpose of “[a]cquiring, building, owning, and operating the Partnership Property as a Hotel” The Partnership ironically admits the parties’ contractual arbitration provision that states “any claim or controversy arising out of or relating to this Agreement,” is “somewhat broad,” but then must demur and claim that the “construction related claims, equitable claim, and fraud claims – all of which arise out of and relate to the construction project *and not the Partnership Agreement* – were simply not within the intentions of the parties to the Partnership Agreement and cannot arise out of or relate to that agreement.” (Appellant’s Brief, ¶21) The Partnership is apparently hoping that this Court will not read the claims in the Complaint and Counterclaim that was before the district court because to do so will result in the upholding of the order to compel arbitration.

(6) Because the district court properly determined that the Partnership Agreement’s arbitration provision required arbitration of the parties’ claims, this Court should affirm the district court’s order compelling arbitration.

STANDARD OF REVIEW

(7) The Court reviews the district court’s orders staying the litigation and compelling arbitration, the district court’s order confirming the arbitration award, and the final judgment under the *de novo* standard of review. See Schwarz v. Gierke, 2010 ND 166, ¶

11, 788 N.W.2d 302, 306 (reviewing order denying motion to compel arbitration under *de novo* standard). “Construction of a written contract to determine its legal effect is a question of law, fully reviewable on appeal.” *Id.* (citations omitted).

STATEMENT OF RELEVANT FACTS & PROCEDURAL BACKGROUND

I. THE LIMITED LIABILITY PARTNERSHIP AGREEMENT.

(8) On August 10, 2011, eight individuals and/or other legal entities entered into the 26th Street Hospitality, LLP Limited Liability Partnership Agreement (the “Partnership Agreement”). (A-App. 092–118) Article III of the Partnership Agreement expressly states that the sole business of the Partnership consisted of “[a]cquiring, building, owning, and operating the Partnership Property as a Hotel” (A-App. 095, Art. III, ¶1) (emphasis added.)

A. The Management of the Partnership.

(9) The Partnership Agreement vested the management of the Partnership with three managing partners: Joel J. Feist (“Feist”), Daniel Schmaltz (“Schmaltz”), and Robert W. Dora (“Dora”). (A-App. 099, Art. VII, ¶1). Feist owns an interest in partner Joeleon Holdings, LLP (“Joeleon”), and Joeleon owns a 13.5593% partnership interest. (A-App. 109, 112) Schmaltz owns an interest in partner West-Dak Properties, LLC, (“West-Dak”) and Dora owns an interest in partner RJJ Bakken, LLC (“RJJ Bakken”) (A-App. 112).

B. The Contributions of the Partners.

(10) From its inception, the Partnership engaged in interstate commerce: RJJ Bakken is an Indiana limited liability company with a principal place of business in Fishers, Indiana. (A-App. 109–110; *see also* Appellees’ Appendix (hereinafter “R-App.”) 035)

RJJ Bakken made a capital contribution of \$250,000 for an 8.4746% ownership interest. (A-App. 109) Partner Dimche Kuzmanovski (“Kuzmanovski”) is a resident of New Albany, Ohio. (R-App. 036) Kuzmanovski made a capital contribution of \$300,000 for a 10.1695% ownership interest. (A-App. 109) The remaining partners are either businesses or individuals located in North Dakota. (A-App. 111–112)

(11) The others being mostly silent partners, three primary partners brought a particular skill to the Hotel venture: real estate development, hospitality services, and construction services. These skills are reflected in their contributions to the Partnership under the Partnership Agreement. Feist, through his ownership of Real Builders, Inc. (“RBI”), was the general contractor for the construction of the Hotel. (R-App. 001, ¶1; 002–003 ¶9) Schmaltz, on behalf of West-Dak, contributed the developed land required for the Hotel. (A-App. 110, ¶7) Dora, on behalf of RJJ Bakken, contributed hotel management and operation services. (A-App. 109–110, ¶4) These contributions to the Partnership demonstrate the intent of the Partnership to construct and operate the Hotel.

C. Partner Authority under the Partnership Agreement.

(12) As the managing partners, Feist, Schmaltz, and Dora received specific grants of authority. The managing partners “in their sole discretion, have the full and entire right, power and authority, in the management of the Partnership business, to do any and all acts and things necessary, proper, convenient or advisable to effectuate the purposes of the Partnership.” (A-App. 099, Art. VII, ¶1)

(13) The managing partners were also:

. . . specifically authorized and empowered to execute the Annual Report of the Partnership . . . and any and all instruments and documents as shall be required by any lender in connection with any loan or loans, including, but not limited to, executing any mortgage, note, contract, building loan

agreement, bank resolution and signature card, release, discharge or any other document or instrument in any way related thereto or necessary or appropriate in connection therewith.

(Id.)

(14) The Partnership Agreement addressed whether the Partnership could conduct business with partners of the Partnership: “Partners may contract with any person, firm or corporation, including, without limitation, any of the Partners, any firm or corporation in which any of the Partners may have an interest and/or affiliated or related corporation or other entity, at reasonable and competitive rates of compensation. . . .

(A-App. 100, Art. VIII)

D. The Partnership Agreement’s Arbitration Provision.

(15) The Partnership Agreement has a broad-form arbitration provision requiring arbitration of any and all disputes arising out of the Partnership Agreement. (A-App. 106–107) Article XIV(3) of the Partnership Agreement provides that “any claim or controversy arising out of or relating to this Agreement, or a breach of it, shall, upon the request of any party involved, be submitted to and settled by arbitration in accordance with the rules of the American Arbitration Association” (A-App. 106) (emphasis added).

(16) Under Rule R-1(a) of the Commercial Arbitration Rules (the “Rules”) of the American Arbitration Association (the “AAA”), “[t]he parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules.” (R-App. 047) (emphasis added) The Rules

also provide at R-7 that the jurisdiction of the arbitrator appointed by the AAA determines the enforceability of contracts and the parties' arbitration agreements:

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(R-App. 050) Under the Partnership Agreement's arbitration provision, the partners agreed to vest the arbitrator with the responsibility to determine the arbitrability of claims. The Partnership has never disputed the validity of the Partnership Agreement nor the arbitration provision.

II. THE CONSTRUCTION CONTRACT FOR THE HOTEL.

(17) On November 8, 2011, the Partnership entered into an American Institute of Architects, Document A103-2007 Standard form Agreement between Owner and Contractor (the "Construction Contract") for the construction of the Hotel. (R-App. 068–077) Under the Agreement, RBI agreed to provide labor, materials, equipment, and skill for the construction of the Hotel. (Id.) Pursuant to his authority as a managing partner under the Partnership Agreement, and as owner of RBI, Feist signed the Construction Contract on behalf of the Partnership and RBI. (R-App. 077)

A. The Construction Contract's Arbitration Provision.

(18) The Construction Contract between RBI and the Partnership included an arbitration clause requiring all disputes to be resolved through arbitration. (R-App. 075,

§13.2) The Construction Contract expressly incorporated the General Conditions found in AIA A201-2007. (R-App. 069, Art. 1; 075, §13.2) The General Conditions of the AIA A201-2007 provided in relevant part:

§ 15.4 ARBITRATION

§ 15.4.1 If the parties have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association . . .

(R-App. 147–148)

III. THE PARTNERSHIP’S BREACH OF CONTRACT AND THE BURLEIGH COUNTY LITIGATION.

(19) RBI provided the Partnership a September 7, 2011, Sworn Construction Statement that detailed the costs for the construction of the Hotel. (R-App. 002, at ¶6) The Partnership used the Sworn Construction Statement for the purpose of obtaining a construction loan. (R-App. 002, ¶7) RBI began constructing the Hotel on or about November 1, 2011. (R-App. 002, ¶9) The Partnership, however, did not pay all sums billed by RBI for its work constructing the Hotel. (Id.) Instead, RBI carried a balance due on the Construction Contract that varied between \$80,000 to \$2.25 million during the course of construction. (Id.)

(20) On November 9, 2012, the Partnership had beneficial use of the Hotel, but RBI was owed \$681,687.78 for its work. (R-App. 003, ¶10) Between January 2013 and October 2013, RBI attempted to negotiate a settlement of the amount owed by the Partnership without success. (R-App. 003, ¶11) As part of these attempts, the Partnership hired an independent auditor to review and examine RBI’s invoicing for the construction. (R-App. 003, ¶12) Except for a *de minimus* invoicing error, the

independent auditor found that RBI's construction cost accounting for the construction of the Hotel was 99.96% accurate. (Id.) Despite this verification, the Partnership failed and refused to make payment to RBI. (R-App. 003, ¶13)

A. The Partnership's Burleigh County Complaint.

(21) On November 14, 2013, the Partnership commenced this action against RBI, Feist, Joeleon, and Solid. (A-App. 008–027) The Partnership's primary allegation centered on Feist's lack of authority under the Partnership Agreement to sign the Construction Contract on behalf of the Partnership. (A-App. 011, ¶XV.) The Complaint's remaining arguments grew from this initial assertion that because Feist did not have the authority in the Partnership Agreement to enter into the Construction Contract with RBI, the Partnership was not obligated to pay RBI for its work building the Hotel and that Feist's conduct amounted to fraud. The Partnership also asserted numerous allegations regarding Joeleon and Feist's rights and responsibilities arising out of the Partnership Agreement. (See generally, A-App. 008–027) For example, the Complaint asserted the following:

- Paragraph X: "The managing partners of the Partnership at all times relevant hereto were and are Dan Schmaltz, Bob Dora, and Joel J. Feist." (A-App. 010)
- Paragraph XIII: "[RBI's 8.5% general contractor fee] was agreed to by the Partnership and by the group." (A-App. 011)
- Paragraph XIV: "Feist purportedly entered into a standard-form AIA A103-207 – Standard Form of Agreement Between Owner and Contractor, purportedly dated November 8, 2011 (hereinafter "Invalid Contract") signing both on behalf of his own business [RBI] and on behalf of the Partnership." (A-App. 011)
- Paragraph XV: "The Invalid Contract was executed without the requisite knowledge and authority of the Partnership and/or without the requisite knowledge and authority of a majority of the partners and/or managing

partners of the Partnership, as is required by the 26th Street Hospitality, LLP Limited Liability Partnership Agreement (“Partnership Agreement”) and by the applicable North Dakota law. . . .” (A-App. 012)

- Paragraph XVII: “Neither the partnership nor the Managing Partners Dan Schmaltz and Bob Dora ever ratified, adopted, or consented to the Invalid Contract.” (A-App. 012–013)

(22) The Partnership Agreement and Feist’s authority under it were at the core of the claims asserted by the Partnership. Count One of the Complaint sought a “Judicial Determination of Invalidity and Unenforceability of Invalid Contract” based on “RBI and/or Feist, and/or jointly, knowingly wrongfully and intentionally entered into the Invalid Contract in secret and without the required Partnership permission, knowledge or authority.” (A-App. 014, ¶XXII) Count Four of the Complaint for “Fraud and/or Deceit” claimed that “RBI and/or Feist, and/or jointly, knowingly, wrongfully and intentionally entered into the Invalid Contract in secret, outside the scope of authority, and without the required Partnership knowledge or approval, which actions were not in the Partnership’s interests or best interests.” (A-App. 018, ¶XXXIII) Count Seven of the Complaint, “Breach of Statutory and Other Duties,” claimed that:

As partners and/or as managing partner, Feist and Joeleon Holdings, owed the Partnership and other partners certain non-waivable and non-delegable fiduciary duties including but not limited to duties of loyalty, care, good faith, fair dealing, duties to account and to hold property in trust and/or for the benefit of the Partnership, preference to the Partnership, non-competition, and other duties.

(A-App. 024, ¶LXIII.)

(23) Finally, the Partnership’s prayer for judgment sought a determination regarding Feist’s authority under the Partnership Agreement to bind the Partnership to the Construction Contract with RBI and also sought the removal of Feist as a managing partner of the Partnership. (A-App. 025–026, ¶¶1, 2, 5, 6, and 7)

B. Defendants' Burleigh County Counterclaim.

(24) In order to preserve their claims and not be deemed to have waived them, Feist, RBI, and Joeleon filed an Answer, Counterclaim and Cross-Claim in the Burleigh County litigation. (A-App. 167–183) The Counterclaim asserted by RBI sought payment of amount owed on the Construction Contract and Feist sought a declaration he had authority to bind the Partnership to the Construction Contract as a managing partner. (A-App. 179–180, ¶¶31–38)

IV. JOELEON AND FEIST'S MOTION TO COMPEL ARBITRATION.

(25) Along with their Answer, Counterclaim, and Cross-claim, Feist and Joeleon filed a motion to compel arbitration and stay proceedings in the Burleigh County action. (A-App. 119–139; 248–262) In support of the motion, Feist submitted a sworn affidavit to the district court which directly rebutted the Partnership's contentions that the Construction Contract had been procured by fraud. (R-App. 001–003) In their motion, Feist and Joeleon contended that the gravamen of the Partnership's Complaint stemmed from Feist's authority, as a managing partner, to execute the Construction Contract for the Partnership and RBI. (A-App. 120, ¶6; 134, ¶42; 135–136, ¶45)

(26) The scope of Feist's authority, along with the claims about the construction of the Hotel, all related back to the Partnership Agreement. (Id.; see also A-App. 139, ¶51) Feist and Joeleon's motion argued that the Partnership Agreement granted the arbitrator the authority to determine which claims were subject to arbitration. Feist and Joeleon also argued that, at a minimum, if an arbitrator found that Feist had authority under the Partnership Agreement to enter into the Construction Contract, the Partnership's construction defect claims would be subject to arbitration based on the arbitration

provision in the Construction Contract. (A-App. 251, ¶6) Because the Partnership Agreement contained a broad arbitration provision, Feist and Joeleon maintained that the Partnership should be compelled to arbitrate all of the claims that arose out of and related to the Partnership Agreement as demonstrated by the Partnership’s allegations in the Complaint. (Id.) RBI also consented to be joined to the arbitration proceedings. (R-App. 003, ¶14)

V. THE DISTRICT COURT’S ORDERS COMPELLING ARBITRATION

(27) After the parties submitted sixty pages of briefing addressing the issue of arbitrability, the district court entered an order granting the motion to compel arbitration and stay further proceedings on February 21, 2014. (A-App. 307–312) The district court observed that “the complaint requests the Court to find the construction contract entered into between Feist as a managing partner of 26th Street and RBI as invalid and unenforceable as part of the complaint.” (A-App. 308, ¶3) The district court found that “[p]ursuant to N.D.C.C. § 32-39.3-05 and 32-29.3-08 and the Federal Arbitration Act, 9 U.S.C. sections 3 and 4, the Court should order the matter into arbitration and stay the remaining proceedings in the District Court.” (A-App. 308 ¶5). The district court determined that the language of the arbitration clause in the Partnership was unambiguous and that the arbitration provision was a broad provision by nature of the wording “any claim or controversy arising out of or relating to this Agreement.” (A-App. 310, ¶10) After reviewing the allegations against Feist, RBI, and Joeleon in the Complaint, the court concluded that the Partnership’s Complaint contained allegations related to or arising out of the Partnership Agreement. (A-App. 311, ¶¶13–14) Because

the partners agreed to arbitrate disputes when they entered into the Partnership Agreement, the district court compelled arbitration. (A-App. 311–312, ¶14–15)

(28) Displeased with the district court’s order, the Partnership filed a motion for clarification and/or reconsideration with the district court. (A-App. 313–321) After an additional twenty-nine pages of briefing and a hearing on the issue, the district court issued its order denying the Partnership’s request to reconsider and/or clarify the order compelling arbitration. (A-App. 322–341; 398–399, ¶2)

VI. THE ARBITRATION AND ARBITRATION AWARD.

(29) This dispute proceeded to arbitration with the AAA. In their Demand for Arbitration, Feist, RBI, and Joeleon alleged claims against the Partnership, including a request for declaratory relief regarding the validity and enforceability of the contract between the parties; breach of contract; and unjust enrichment/quantum meruit. (R-App. 160–163) Feist, RBI, and Joeleon sought a determination that the Construction Contract was enforceable, and RBI sought the money due under the Construction Contract. (R-App. 163)

(30) The Partnership’s Counterclaim in the arbitration asserted the exact same claims against Feist, RBI, and Joeleon that it had asserted in this litigation: determination of invalidity and unenforceability of invalid contract; breach of contract; negligence and gross negligence; fraud and/or deceit; conversion; breach of implied trust/constructive trust; quasi contract, unjust enrichment, unclean hands and other equitable relief; and breach of statutory partnership duties. (R-App. 164–181)

(31) During a twelve-day hearing in February and March 2015, the parties presented their cases before Arbitrator Gary Cole. (R-App. 204, ¶10) The parties selected

Arbitrator Cole after being presented with seventeen other choices. On May 7, 2015, the arbitrator issued the arbitration award in accordance with the arbitration clause contained in the Partnership Agreement, the AAA rules, and the Construction Contract. (A-App. 446) The arbitrator first concluded that Feist had actual and inherent authority as a managing partner under the Partnership Agreement to enter into the Construction Contract with the Partnership for the construction of the Hotel. (Id. at ¶I.A.1(i)) Given that Feist had the authority to enter into the Construction Contract, the arbitrator next analyzed whether the Construction Contract between the Partnership and RBI was enforceable. (Id. at ¶I.A.1(ii)) The arbitrator ordered that the Partnership was estopped from denying the existence and enforceability of the Construction Contract for the construction of the Hotel. (Id.)

(32) After finding that the Construction Contract was enforceable, the arbitrator then exercised his authority under R-7 of the AAA to determine the parties' remaining claims under the Partnership Agreement and Construction Contract. (A-App. 446–448, ¶¶ I.A.2–II) The arbitrator found that RBI was entitled to payment and interest pursuant to the Construction Contract. (A-App. 446, ¶I.A.2(i)) The arbitrator concluded that the Partnership was entitled to damages for punch list items and other defects. (A-App. 447, ¶¶II.A.3(i); II.A.4(i)) Finally, the arbitrator denied the Partnership's claims against Feist, RBI, and Joeleon for lost revenue, fraud, and exemplary damages. (A-App. 447–448, ¶¶II.A.1(i); II.A.2(i); II.A.6(i)) The arbitrator awarded RBI damages totaling \$681,687.78, plus interest in the amount of \$253,144.23. (A-App. 446, ¶I.A.2(i)) The arbitrator awarded the Partnership \$576,757.95. (A-App. 448 ¶II.B.1) The net result was an award in favor of RBI of \$358,074.06.

VII. THE DISTRICT COURT’S CONFIRMATION OF THE ARBITRATION AWARD.

(33) On July 30, 2015, the district court filed its Order Lifting Stay; Confirming Arbitration Award; Entering Judgment; and Awarding Post-Judgment Interest. (A-App. 440–441) In the order, the district court concluded that because the arbitration award fully resolved all of the claims and counterclaims between the parties in the litigation, no claims remained outstanding. (A-App. 441, ¶4) The Partnership did not contest the court’s determination that all claims were resolved in the arbitration. The court further ordered that RBI was entitled to post-judgment interest at a rate of 18% annum pursuant to the Construction Contract and N.D.C.C. § 28-20-34. (Id. at ¶6)

ARGUMENT

I. PURSUANT TO THE FEDERAL ARBITRATION ACT, THE DISTRICT COURT PROPERLY FOUND THAT THE ARBITRATOR WOULD DETERMINE THE ARBITRABILITY OF THE PARTIES’ CLAIMS UNDER THE PARTNERSHIP AGREEMENT AND THE CONSTRUCTION CONTRACT.

(34) The district court correctly determined that the parties’ claims were subject to arbitration under the Federal Arbitration Act (“FAA”) for four reasons. First, under the FAA, courts must enforce an arbitration agreement that gives the arbitrator the authority to determine the validity and arbitrability of the parties’ claims. Second, the FAA will not invalidate an arbitration provision based on the general allegation that the contract as a whole was procured by fraud. Third, the resolution of the Partnership’s claim that the Construction Contract was invalid had to be resolved based on the Partnership Agreement and in arbitration. Finally, under broad arbitration provisions involving interrelated claims, non-signatories to an arbitration agreement may enforce an arbitration agreement.

A. The Federal Arbitration Act Applies To The Partnership Agreement's Arbitration Provision.

(35) The FAA applies to the Partnership Agreement's arbitration provision. In its appellate brief, however, the Partnership oscillates as to whether the FAA or North Dakota's Uniform Arbitration Act ("UAA") ultimately controls the arbitrability of this dispute. (Compare Partnership Brief at ¶15 with Partnership Brief at ¶19) Despite the Partnership's avoidance of this issue, this Court should determine that the FAA applies to the Partnership Agreement's arbitration provision.

(36) This Court has recognized that the FAA "preempts state law and governs all written arbitration agreements in contracts involving interstate commerce." Superpumper, Inc. v. Nerland Oil, Inc., 1998 ND 144, ¶ 14, 582 N.W.2d 647. If the arbitration agreement falls under the FAA, it is "governed by the federal substantive law developed in connection with the federal Act and not by state law." In re Mercury Const. Corp., 656 F.2d 933, 938 (4th Cir. 1981).

(37) The Federal Arbitration Act ("FAA") is codified at 9 U.S.C. §§ 1 to 16. In relevant part, Section 2 of the FAA provides that:

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

9 U.S.C. § 2. The FAA states that "'commerce', as herein defined, means commerce among the several States" 9 U.S.C. § 1. See Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 277 (1995) (interpreting the words "involving commerce" under the FAA as broadly as the words "affecting commerce"; and, holding these words mean Congress's "full exercise of constitutional power.").

(38) Because the FAA governs, this Court should analyze the arbitration clauses and claims at issue in this appeal under the FAA and related case precedent.

B. The FAA Applies To The Partnership Agreement Because The Partnership And Its Business Involve Interstate Commerce.

(39) The business of the Partnership is the construction and operation of a Hotel. The Partnership Agreement involves interstate commerce. As such, the FAA should control. “The FAA preempts state law and governs all written arbitration agreements in contracts involving interstate commerce.” Gammara v. Thorp Consumer Discount Co., 15 F.3d 93, 95 (8th Cir. 1994) (applying North Dakota law and citing Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995)). “The FAA makes agreements to arbitrate valid, irrevocable, and enforceable in federal and state courts.” Id. (emphasis added).

(40) The Partnership Agreement involves “commerce” under the FAA because business and individuals from different states made capital contributions to the Partnership for an interest in the Partnership. (A-App. 109; R. App. 035–036) “The case law definition of transactions involving commerce to which Title 9 is applicable is broad and includes trade generally between citizens of the several states, including the purchase and sale of property of all kinds and descriptions.” C. P. Robinson Const. Co. v. National Corp. for Housing Partnerships, 375 F.Supp. 446, 451 (D.C. N.C. 1974); see also Barker v. Golf U.S.A., Inc., 154 F.3d 788, 791 (8th Cir. 1998) (finding the FAA applicable when the parties to the arbitration agreement were located in different states, Oklahoma and Missouri, and the agreement contemplated the transfer of money between the states). The Partnership Agreement involves interstate commerce because RJJ Bakken, an Indiana limited liability company, and Kuzmanovski, an individual residing in Ohio,

contributed a combined \$550,000 in exchange for an interest in the Partnership, a North Dakota limited liability partnership.

(41) The Construction Contract between RBI and the Partnership for the construction of the Hotel also involved interstate commerce. It should be undisputed that the construction of a \$10 million hotel in Williston, North Dakota involves interstate commerce under the FAA. See United States v. Rea, 300 F.3d 952, 961 (8th Cir. 2002) (“Examples of property with uses that directly implicate interstate commerce include residential rental property and hotels.”) Therefore, the Court should find that the Partnership Agreement and Construction Contract involve interstate commerce and the FAA applies to the arbitration provisions.

C. The FAA Preempts North Dakota Law.

(42) The FAA applies to valid and enforceable arbitration clauses involving interstate commerce. As a result, the FAA displaces state law regarding the forum for the resolution of disputes subject to an arbitration agreement. In its appellate brief, the Partnership contends that some of its claims against Feist, RBI, and Joeleon could not be resolved in arbitration because they require a “judicial” determination of the validity and enforceability of a contract under North Dakota law. (Appellant’s Brief at ¶¶4, 13) The Partnership also claims other provisions of the North Dakota Century Code preclude arbitration of its claims. (Appellant’s Brief ¶¶14, 21) The Partnership cites no case law to support its position because, under the FAA, the Partnership’s argument is misplaced.

(43) In Marmet Health Care Center, Inc. v. Brown, the United States Supreme Court addressed a claim that despite the applicability of the FAA, a West Virginia law required a judicial forum for the resolution of wrongful death and personal injury claims. 132 S.

Ct. 1201, 1203–04 (2012). The Supreme Court considered such an argument as “both incorrect and inconsistent with clear instruction in the precedents of this Court.” *Id.* The Court held that the FAA “requires courts to enforce the bargain of the parties to arbitrate.” *Id.* The FAA “reflects an emphatic federal policy in favor of arbitral dispute resolution.” *Id.* (citing KPMG LLP v. Cocchi, 132 S.Ct. 23, 25 (2011) (per curiam) (quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 631 (1985); internal quotation marks omitted)) (emphasis added); see also AT & T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1747, (2011) (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”).

(44) In this case, the validity and enforceability of the Partnership Agreement and Construction Contract were properly resolved in arbitration pursuant to the FAA. Therefore, the Court should affirm the order of by the district court.

II. THE PARTNERSHIP AGREEMENT’S ARBITRATION PROVISION DETERMINED THE FORUM FOR RESOLUTION OF THE PARTNERSHIP’S CLAIM THAT THE CONSTRUCTION CONTRACT WAS INVALID.

(45) In its Complaint before the district court, the Partnership claimed that the Construction Contract was invalid because Feist signed the agreement on behalf of RBI and the Partnership. The district court correctly found that the determination of Feist’s authority as a managing partner would require an interpretation of the Partnership Agreement. As a result, the court compelled the Partnership to seek the requested relief in arbitration because the claim arose from and was related to the Partnership Agreement.

(46) In Schwarz v. Gierke, 2010 ND 166, 788 N.W.2d 302, the North Dakota Supreme Court “recognize[ed] a strong state and federal public policy favoring the arbitration

process, [and] this Court resolves any doubts concerning the scope of arbitrable issues in favor of arbitration when there is a broad arbitration clause and no exclusion clause.” Schwarz, 2010 ND 166, ¶ 11, 788 N.W.2d 302; see also Allstate Ins. Co. v. Nodak Mut. Ins. Co., 540 N.W.2d 614, 619 (N.D. 1995) (same).

(47) In appealing the district court’s order compelling arbitration, the Partnership claims that the court erred by not providing “a summary judicial forum to the Partnership to determine the validity of the [Construction Contract].” (Appellant’s Brief, ¶17.) The Partnership claims that the “district court was clearly on notice the Partnership had raised and presented undisputed evidence of fraud, and had specifically raised the issue as a basis to invalidate the [Construction Contract] (thereby avoiding the requested binding arbitration of the fraud and other construction claims).” (Appellant’s Brief, ¶18.) The Partnership, however, fails to acknowledge that the basis of the fraud claims and the validity of the Construction Contract arose out of and were directly related to the Partnership Agreement.

(48) The Partnership’s Complaint before the district court stated that the Construction Contract:

[W]as executed without the requisite knowledge and authority of the Partnership and/or without the requisite knowledge and authority of a majority of the partners and/or managing partners of the Partnership, as is required by the 26th Street Hospitality, LLP Limited Liability Partnership Agreement (“Partnership Agreement”) and by the applicable North Dakota law. Therefore, it is not an arm’s length transaction, was entered into fraudulently, beyond the scope of [Defendant] Feist’s authority and/or agency, and is otherwise in derogation of Feist’s fiduciary and other contractual and statutory duties as a Partner and Managing Partner of the Partnership.

(A-App 011–012, XV.)

(49) The Partnership’s Complaint centered on the argument that because Feist did not have the authority to enter into the Construction Contract with RBI under the Partnership Agreement, the Partnership was not obligated to pay RBI for its work building the Hotel under the Construction Contract. The Complaint also asserted allegations about Joeleon and Feist’s rights and responsibilities arising out of the Partnership Agreement. (A-App. 010–012, ¶¶X, XIII, XIV, XV, XVII) The first, fourth, and seventh counts of the Complaint all arose out of and directly related to the Partnership Agreement. (A-App. 019, ¶XXXIII; 024, ¶LXIII.) Finally, the Partnership’s prayer for judgment in the Complaint sought a determination regarding Feist’s authority under the Partnership Agreement and the removal of Feist as a managing member of the Partnership. (A-App. 025–026, ¶¶1, 2, 5, 6, and 7.)

(50) The district court correctly determined that the claims asserted by the Partnership could only be resolved under Article XIV(3) of the Partnership Agreement that provided “any claim or controversy arising out of or relating to this Agreement, or a breach of it, shall, upon the request of any party involved, be submitted to and settled by arbitration in accordance with the rules of the American Arbitration Association” (A-App. 106, ¶XIV(3))

(51) Because the Partnership’s own allegations contained in the Complaint regarding the validity of the Construction Contract were based on Feist’s authority under the Partnership Agreement and Feist and Joeleon’s fiduciary duties under the Partnership Agreement, the district court properly compelled these claims to be resolved by arbitration.

A. Whether The Construction Contract Was Procured By Fraud Does Not Invalidate The Enforceable Arbitration Provision.

(52) The Partnership’s position that it is entitled to a summary disposition in a judicial forum with respect to the allegedly fraudulent Construction Contract is also unsupported under the FAA. Courts have repeatedly recognized that the statutory language of the FAA only allows courts to adjudicate fraud in the inducement of the arbitration clause itself—not fraud in the inducement of the contract generally. See, e.g., Prima Paint v. Flood & Conklin, 388 U.S. 395, 403–04 (1967). When a party alleges that the entire contract is fraudulent, the contract’s validity is determined by the arbitrator. See Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 445–46 (2006) (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”) Significantly, the Supreme Court has held that these principles apply in state as well as in federal courts. See id.

(53) The Partnership’s only arguments concerning fraud or deceit are based on allegations that Feist lacked the authority to enter into the Construction Contract; that RBI and Feist intentionally requested payment for the same materials and/or work on more than one occasion; that RBI and Feist ordered greater quantities of building materials than necessary; and that RBI and Feist wrongfully were paid a percentage contractor fee higher than agreed to with the Partnership. (Appellant App. 018–019, ¶¶XXXIII–XXXVIII) Despite these contentions, the Partnership’s allegations fail to identify any fraud specifically related to the arbitration clause in the Construction Contract. Therefore, the validity of the Construction Contract was properly put before the arbitrator.

III. THE PARTNERSHIP AGREEMENT AND THE AAA RULES GAVE THE ARBITRATOR THE AUTHORITY TO DETERMINE ARBITRABILITY OF CLAIMS.

(54) When the district court ordered the parties to proceed to arbitration, it did so under the Partnership Agreement’s arbitration provision. Under the AAA Rules and the FAA, the arbitrator determines what claims are arbitrable, not the district court. Pursuant to this authority, the arbitrator determined that all claims brought by the parties were properly arbitrable and issued an award accordingly.

(55) The Partnership asserts that the district court “concluded the broad [arbitration] provision encompassed essentially all of the claims in the Complaint.” (Appellant’s Brief ¶20) To the contrary, the court acknowledged that after the arbitrator determined arbitrability, “[t]here may be certain aspects of the litigation that cannot be resolved in arbitration” (Id.) As such, the court recognized that the arbitrator would determine which claims were subject to arbitration provision of the Partnership Agreement and the enforceability of the Construction Contract.

(56) RBI, Joeleon, and Feist’s demand for arbitration asserted that the parties were bound to arbitrate all of their disputes under the Partnership Agreement and the Construction Contract. (A-App. 152, ¶¶7–8; 153, ¶¶12–15) RBI, Feist, and Joeleon also requested a declaration from the arbitrator that Feist had the authority to enter into the Construction Contract and that the Partnership was estopped from denying the enforceability of the Contract. (A-App. 163) RBI then requested damages based on the Partnership’s breach of the Construction Contract for failing to pay RBI. (Id.)

(57) Rule R-1(a) of the Rules of the AAA provides that when parties agree to resolve a dispute through arbitration with the AAA, the AAA’s Rules apply. (R-App. 047) The

AAA rules apply to the Partnership Agreement because it states that disputes will “be submitted to and settled by arbitration in accordance with the rules of the American Arbitration Association” (A-App. 106, Art. XIV(3)) Under R-7 of the AAA’s Rules, the arbitrator determines the claims that will be arbitrable. R-7(a) states that the arbitrator decides his/her jurisdiction, the enforcement of an arbitration agreement, and the arbitrability of any claim or counterclaim. (R-App. 050)

(58) Because the district court correctly found the Partnership Agreement’s arbitration agreement was enforceable and that the Partnership’s Complaint raised claims arising out of and related to the Partnership Agreement, the district court enforced the parties’ contract, issued the order compelling arbitration and reserved the issue of arbitrability for the arbitrator as the parties agreed by contract. In the arbitrator’s May 7, 2015 award, the arbitrator stated that based on the arbitration agreement contained in the Partnership Agreement and the Construction Contract, he decided all claims and counterclaims asserted by the Partnership, Feist, Joeleon, and RBI. The arbitrator determined his authority based on the AAA Rules that the Partnership agreed were applicable to any dispute arising out of the Partnership Agreement.

A. Under Fallo v. High-Tech Institute, The Arbitrator Properly Determined The Scope Of Arbitrable Claims Under The AAA Rules.

(59) The FAA requires that arbitration provisions in contracts involving interstate commerce be enforced and interpreted pursuant to the substantive law developed under the Act. In re Mercury Const. Corp., 656 F.2d 933, 938 (4th Cir. 1981).

(60) In Fallo v. High-Tech Institute, 559 F.3d 874 (8th Cir. 2009), the Eighth Circuit considered whether the district court or the arbitrator would decide whether the claims raised by the parties were arbitrable. Id. at 877. The Fallo court recognized that “[j]ust

as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about that matter.’” Id. at 877–78 (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)).

(61) The Fallo court, therefore, had to look to the arbitration provision of the parties’ contract to determine whether the arbitrator or the district court would decide the arbitrability of the plaintiff’s tort claims. Id. The Fallo court proceeded to consider prior precedent under the FAA and the National Association of Securities Dealers (“NASD”) Code’s jurisdictional rule and concluded the following:

The act of incorporating Rule 7(a) of the AAA Rules provides even clearer evidence of the parties’ intent to leave the question of arbitrability to the arbitrator than does the act of incorporating Section 35 of the NASD Code because Rule 7(a) expressly gives the arbitrator “the power to rule on his or her own jurisdiction.” Consequently, we conclude that the arbitration provision’s incorporation of the AAA Rules, like the incorporation of the NASD Code in FSC, constitutes a clear and unmistakable expression of the parties’ intent to leave the question of arbitrability to an arbitrator. Most of our sister circuits that have considered this issue agree with our conclusion that an arbitration provision’s incorporation of the AAA Rules- or other rules giving arbitrators the authority to determine their own jurisdiction-is a clear and unmistakable expression of the parties’ intent to reserve the question of arbitrability for the arbitrator and not the court.

Fallo v. High-Tech Institute, 559 F.3d at 877–78 (citing approvingly Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006); Terminix Int’l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2nd Cir. 2005); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 472–73 (1st Cir. 1989)).

(62) The same Rule 7(a) considered by the Eighth Circuit in Fallo is applicable here: “[t]he arbitrator shall have the power to rule on his or her own jurisdiction” (R-App.

050) The Partnership has not disputed the validity or enforceability of the Partnership Agreement or the arbitration clause. Therefore, the district court properly compelled arbitration and left the issue of the arbitrability of the claims for the arbitrator.

IV. ALL OF THE CLAIMS AND PARTIES WERE PROPERLY SUBJECT TO ARBITRATION.

A. Based On The Arbitration Provisions In The Partnership Agreement And The Construction Contract, The Arbitrator Could Address And Resolve All Of The Parties' Claims.

(63) The Partnership Agreement and the Construction Contract's arbitration provisions allow for the resolution of all of the parties' claims through arbitration. In its appellate brief, the Partnership incorrectly contends that its fraud, equitable, and construction-related claims should have been decided by a jury in the North Dakota courts rather than in arbitration as those claims were not claims or disputes which fell under an applicable arbitration provision. (Appellant's Brief, ¶23) The Partnership also claims that "non-parties" and "construction related claims" were not subject to arbitration. (Appellant's Brief, ¶¶21–22) The Partnership's arguments misconstrue the applicable law.

(64) The Partnership Agreement's arbitration provision applied to all of the parties' claims. "In construing arbitration clauses, courts have categorized such clauses as 'broad' or 'narrow.' A broad arbitration provision covers all disputes arising out of a contract to arbitrate; a narrow provision limits arbitration to specific types of disputes." Schwarz v. Gierke, 2010 ND 166, ¶ 17, 788 N.W.2d 302 (citations omitted). The arbitration provision indicated that it applied to all disputes arising out of the contracts at issue: Article XIV(3) provides that "any claim or controversy arising out of or relating to this Agreement, or a breach of it, shall, upon the request of any party involved, be

submitted to and settled by arbitration in accordance with the rules of the American Arbitration Association” (A-App. 106–107) (emphasis added.)

(65) The Partnership Agreement’s arbitration provision incorporated the AAA Rules. Under the AAA Rules, the arbitrator determines what claims and parties should be in the arbitration proceeding. The Court in Fallo confirmed the enforceability of the AAA Rules as a “clear and unmistakable expression of the parties’ intent to leave the question of arbitrability to an arbitrator.” Fallo v. High-Tech Institute, 559 F.3d at 877–78. Therefore, the Partnership’s claim that the district court did not properly compel arbitration because of the presence of “non-parties” and “construction related claims” is unfounded. (Appellant’s Brief ¶¶ 21, 22)

(66) The Partnership’s claims against Feist, RBI, and Joeleon revolved around whether Feist, as a managing partner of the Partnership, had the authority to enter into the Construction Contract with RBI. (Appellant App. 010–014, 018, 024–026) Those claims necessarily arose out of Feist’s role as a managing partner and the scope of his authority under the Partnership Agreement. Given the broad arbitration provision in the Partnership Agreement, those claims unambiguously were subject to arbitration. The arbitrator determined that Feist had actual and inherent authority as a managing partner under the Partnership Agreement to enter into the Construction Contract with the Partnership for the construction of the Hotel.

(67) The arbitrator next concluded that the Construction Contract between the Partnership and RBI was valid and enforceable. (Appellant App. 446; see also R-App. 050) The arbitrator found that RBI was entitled to payment and interest pursuant to the terms of the Construction Contract. (Appellant App. 446) The arbitrator also concluded

that the Partnership was entitled to damages for punch list items and other defects arising out of RBI's breach of the Construction Contract. (Appellant App. 447) In their Demand for Arbitration, Feist, RBI, and Joeleon identified the jurisdictional basis for their claims to include the arbitration provisions of the Partnership Agreement and the Construction Contract. (R-App. 152–153, ¶¶5–16) The Partnership alleges that the “Feist Defendants never raised the fraudulent [Construction Contract] and its arbitration provision as a basis to compel arbitration in the district court.” (Appellant’s Brief ¶23.) Although Feist, RBI, and Joeleon did not raise the Construction Contract as a basis for compelling arbitration, the Construction Contract’s arbitration provision would be applicable once the arbitrator determined the enforceability of the Construction Contract.

(68) Based on the broad arbitration provisions in the Partnership Agreement, the Construction Contract, and the AAA rules, all of the claims between the parties were subject to—and resolved in—arbitration.

B. Based On The Partnership’s Allegations In The Complaint, The Non-Signatories To The Partnership Agreement Could Appropriately Participate In The Arbitration.

(69) Alternatively, RBI was a proper party to the arbitration under the FAA. It is well-established that a non-signatory can invoke the protections of an arbitration clause when the signatory to the agreement containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the agreement. *See, e.g., PRM Energy Systems, Inc. v. Primenergy, LLC*, 592 F.3d 830, 834-35 (8th Cir. 2010); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 799 (8th Cir. 2005); *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002).

(70) The Partnership wrongly contends that the Partnership Agreement is not broad enough to force non-parties (RBI) to the Partnership Agreement into the arbitration. In this case, the Partnership’s allegations in its Complaint against the Feist, RBI, and Joeleon are interdependent and intertwined under the Partnership Agreement:

- The Partnership contended that “RBI and/or Feist, and/or jointly, knowingly, wrongfully and intentionally entered into the Invalid Contract” (Appellant App. 014, at ¶XXII; 018, at ¶XXXIII)
- The Partnership alleges that “RBI and/or Feist, and/or jointly, without notice to or authority of the Partnership entered into the Invalid Contract” (Appellant App. 018, at ¶XXXIII)
- The Partnership asserts that “RBI, Feist and/or Solid, and/or some or all of them jointly, knowingly, wrongfully, and intentionally requested payment and were paid a percentage contractor fee higher” (Appellant App. 019 at ¶XXXVII; 020 at ¶XLI; 022 at ¶L)

The Complaint contains repeated, interrelated allegations of misconduct between Feist (a signatory to the Partnership Agreement) and RBI (a non-signatory to the Partnership Agreement) which ultimately relate to Feist’s authority under the Partnership Agreement. Therefore RBI was a proper party to the arbitration.

V. RBI IS ENTITLED TO 18% POST-JUDGMENT INTEREST PURSUANT TO N.D.C.C. § 28-20-34.

(71) The district court properly awarded 18% interest to RBI based on the interest provision of the Construction Contract. Under the North Dakota Century Code, RBI is entitled to the rate of interest stated in the Construction Contract.

(72) Section 28-20-34 of the North Dakota Century Code provides: “Interest is payable on judgments entered in the courts of this state at the same rate as is provided in the original instrument upon which the action resulting in the judgment is based . . .” Id. In this case, the arbitrator determined that the Construction Contract between the Partnership and RBI was valid and enforceable. (A-App. 446) The Construction Contract expressly included an interest provision which imposed interest at an annual rate of 18%. (R-App. 076, §15.2) The arbitrator awarded RBI contractual interest at a rate of 18% based on the Construction Contract. (A-App. 446)

(73) The Partnership wrongly claims that the award of 18% interest is improper since the district court compelled this case to arbitration based upon the arbitration clause in the Partnership Agreement. The arbitrator awarded damages to RBI based upon the provisions of the enforceable Construction Contract. The judgment against the Partnership is based on the arbitration award for damages under the Construction Contract, and the applicable rate of interest is provided in that contract. Therefore, the district court’s determination that RBI is entitled to post-judgment interest at the rate of 18% pursuant to N.D.C.C. § 28-20-34 and the Construction Contract should be affirmed.

CONCLUSION

(74) Appellees respectfully request that the Court affirm the district court’s order compelling arbitration.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES** was on the 24th day of November, 2015, emailed to the following:

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