IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00632

HARRY BAKER SMITH ARCHITECTS, PLLC, APPELLANT

VS.

SEA BREEZE I, LLC, ET AL., APPELLEES

APPEAL FROM THE CHANCERY COURT
OF HARRISON COUNTY, MISSISSIPPI
HONORABLE JUDGE JIM PERSONS, CHANCERY JUDGE

BRIEF OF APPELLEE, SEA BREEZE I, LLC

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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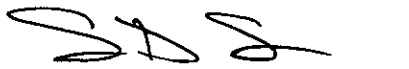

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STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The nature of the underlying dispute to this appeal involves litigation over construction and design defects associated with the Sea Breeze condominium complex in Biloxi, Mississippi. (R. 82; R.E. 52)[1] Appellee Sea Breeze developed the condominium complex at issue in the underlying matter. (R. 82; R.E. 52) Appellant Harry Baker Smith Architects II, PLLC ("HBSA") was the Architect on the project. (R. 82; R.E. 52) The Contractor for the project was Roy Anderson Corp. ("RAC"). (R. 82; R.E. 52)

The procedural course of this case is somewhat convoluted due to Appellant's failed attempts to involve the court system in the arbitration proceedings. HBSA's abbreviated version of the procedural history of the case, however, leaves gaps that fail to convey the entire case history relevant to this appeal. To begin, the course of proceedings commenced in April of 2008 when Sea Breeze filed a simultaneous demand for mediation and arbitration against both HBSA and RAC. (R. 87; Appellee's R.E. 6) By agreement, and pursuant to the contractual documents between the parties, the arbitration was placed in abeyance to allow for joint mediation with RAC and HBSA to proceed. (R. 55; R.E. 26)

On May 2, 2008, counsel for HBSA wrote Sea Breeze legal counsel regarding joint mediation and arbitration. (R. 445; R.E. 65) In that correspondence, HBSA counsel

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[1] For ease of reference, cites to the Record on Appeal are designated as "R. ___"; cites to the Appellant's Record Excerpts, where available, are designated as "R.E. ___"; and, cites to the Appellee's Record Excerpts, where indicated, are designated as "Appellee's R.E. ___".

stated: ". . . we believe it would be appropriate to have the contractor's participation in any mediation and/or arbitration. We ask for your agreement to same, particularly if you are interested in any potentially successful proceedings." (R. 445; R.E. 65) A joint mediation with Sea Breeze, HBSA and RAC occurred in Biloxi, Mississippi on September 30, 2008. (R. 75; R.E. 46) That mediation proved unsuccessful. (R. 75; R.E. 46) At the conclusion of the mediation, the parties agreed that Sea Breeze would wait until October 3, 2008 to make its renewed arbitration demand, in hopes that the case would resolve prior to that time. (R. 75; R.E. 46) The case did not settle and, on October 9, 2008, Sea Breeze renewed its arbitration demand. (R. 75; R.E. 46)

After Sea Breeze renewed its demand for arbitration with the AAA, HBSA, for the first time, filed an objection to joinder of RAC in the arbitration. (R. 399) Sea Breeze responded to the objection with a brief to the AAA that attested to the propriety of joinder under the contractual agreements and as manifested by HBSA's course of conduct by participating in, and even requesting, the joint mediation and arbitration. (R. 82; R.E. 52) On December 4, 2008, AAA sent correspondence to the parties stating that the "Association has carefully reviewed the positions and contentions of the parties" and that Sea Breeze properly filed its joint arbitration demand. (R. 78; R.E. 49) The correspondence further indicated that issues related to the administration of the arbitration could be raised upon appointment of the arbitrator. (R. 78; R.E. 49) Despite AAA's administration of the matter, on or about December 12, 2008, HBSA filed an Application for Injunctive and Other Relief in the United States District Court for the Southern District of Mississippi, seeking an injunction to prevent a joint arbitration

between Sea Breeze, RAC, and HBSA. The federal court dismissed the suit for lack of diversity jurisdiction. (R. 80; R.E. 50)

Thereafter, on December 23, 2008, counsel for HBSA wrote the AAA requesting that a special arbitrator be appointed to decide the consolidation issue, pursuant to AAA Rule R-7 of the Construction Industry Arbitration Rules,[2] which provides as follows with regard to disputes over joinder and consolidation:

> If [the parties] are unable to agree [on joinder], the Association shall directly appoint a single arbitrator for the limited purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder. The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator.

(R. 97, R.E. 58; R. 112)

On February 16, 2009, HBSA again corresponded with the AAA regarding appointment of a special arbitrator. (R. 95; R.E. 56) On February 20, 2009, HBSA counsel wrote AAA that it was "imperative that AAA discharge its responsibilities under Rule R-7 by appointing a single arbitrator for the limited purpose of deciding the unresolved consolidation and joinder issues in this matter." (R. 94; R.E. 55) The AAA acquiesced and appointed special arbitrator, Hensell Harris, Esq. for the sole purpose of deciding the consolidation and joinder issue. (R. 99; R.E. 59)

Upon request of the Special Arbitrator, the parties once again briefed the issue of whether it was proper for HBSA, RAC, and Sea Breeze to be joined in a consolidated

[2] As this Court is likely aware, the AAA has numerous industry-specific rules. For purposes of these appellate papers, any reference to the AAA rules should be construed as referring to the AAA Construction Industry Arbitration Rules.

arbitration. When the briefing was complete, Special Arbitrator Harris then held a hearing on the matter on June 18, 2009. (R. 99; R.E. 59) Additional briefs on the issue were submitted after the hearing. (*See* R. 99; R.E. 59) On July 30, 2009, Special Arbitrator Harris entered an Order that the arbitration should proceed as a joint arbitration between HBSA, RAC, and Sea Breeze. (R. 101; R.E. 61)

Despite HBSA's prior demands for appointment of the Special Arbitrator to decide the joinder/consolidation issue, upon receiving his adverse ruling HBSA filed a complaint for "Injunctive and Other Relief" in the Chancery Court of Harrison County, Mississippi, Second Judicial District. (R. 1; R.E. 9) In the Complaint, HBSA sought to enjoin the consolidated arbitration. (R. 1; R.E. 9) Sea Breeze filed a Motion to Dismiss or Stay and Compel Arbitration on October 29, 2009. (R. 55; R.E. 26) RAC likewise moved to compel arbitration. (R. 131) On January 4, 2010, HBSA filed an Opposition to Sea Breeze's Motion to Dismiss or Stay and Compel Arbitration. (R. 304) Sea Breeze filed a Response to HBSA's Opposition on March 1, 2010 and HBSA filed a reply to the Sea Breeze response on March 8, 2010. (R. 420; 451) On March 10, 2010, the Chancery Court held a hearing on the arbitration motions. (Tr. at 1) Thereafter, on March 31, 2010, the Chancery Court entered judgment compelling consolidated arbitration among Sea Breeze, HBSA and RAC, and dismissing with prejudice the Complaint filed by HBSA. (R. 517-518; R.E. 4-5) HBSA filed its Notice of Appeal on April 13, 2010. (R. 524; R.E. 69)

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Certain facts germane to the instant appeal and central to an understanding of the issues presented are either lacking or glossed over in the Appellant's Brief. (*See e.g.* Appellant Br. at 2) These facts include, for example, HBSA's course of conduct prior to Sea Breeze filing a renewed arbitration demand. (*See generally,* Appellant Br.) Likewise, Appellant's Brief omits discussion of its own repeated demands for appointment of a special arbitrator to decide the joinder/consolidation issue under AAA Rule R-7, and those facts are offered below to complete the narrative of this litigation. Additionally, facts relevant to the Special Arbitrator's ruling and aspects of the contractual agreements helpful to appellate analysis are included for the Court's reference.

Facts relevant to HBSA's course of conduct prior to the renewed arbitration demand

In April 2008, Sea Breeze filed a simultaneous demand for mediation and arbitration against both HBSA and RAC. (R. 87; Appellee's R.E. 6) This demand was made pursuant to the governing contractual agreements, which provided that "the parties shall endeavor to resolve disputes by mediation . . ." (R. 330; Appellee's R.E. 21) On May 2, 2008, HBSA counsel wrote the attorneys for Sea Breeze regarding their mediation and arbitration demand. (R. 445; R.E. 65) In that correspondence, HBSA expressly stated:

> . . . the issues which your clients have, without admission as to the legitimacy and extent of same, if they exist, which is denied, are potentially the result of involvement of other parties, including the contractor. For this reason, we believe that it would be appropriate to have the contractor's participation in any mediation and/or arbitration. We ask for

> your agreement to same, particularly if you are interested in any potentially successful proceedings.
>
> (R. 445; R.E. 65)

Consistent with the manifest intent of HBSA's correspondence, a joint mediation with Sea Breeze, HBSA and RAC took place in Biloxi, Mississippi on September 30, 2008. (R. 75; R.E. 46) During the process of joint mediation, counsel for HBSA made clear that if mediation failed, all parties would proceed to arbitration by asking in May 23, 2008 correspondence "what are your positions on where we stand on an appointed mediator and what effect does/will this have on any arbitration date, if necessary?" (R. 447-448)(emphasis added).

HBSA never objected to a joint mediation with RAC. Indeed, as evidenced by the above-quoted correspondence, HBSA unmistakably sought joint mediation and arbitration. (R. 445; R.E. 65) Significantly, HBSA did not object to joint proceedings at any time during the several months between the initial request for mediation/arbitration in April 2008, and the actual mediation in September 2008. It was not until October 29, 2008, after all parties participated in a joint mediation, and after Sea Breeze had filed its renewed arbitration demand, that HBSA objected for the first time to a consolidated arbitration with RAC. (R. 399) This objection, as Sea Breeze briefed to the AAA, was inconsistent with HBSA's prior representations about joint proceedings, in particular the May 2008 correspondence that expressly requested "joint mediation and/or arbitration."[3] (R. 88; Appellee R.E. 7)

[3] It should be noted that HBSA counsel later filed an Affidavit with the Special Arbitrator, claiming that they never had authority from their client to agree to joinder or consolidation on behalf of HBSA. (R. 392; Appellee R.E. 28) Specifically, the Affidavit states:

The Contractual Documents at Issue and the Contractual Revision that Allowed for Joint or Consolidated Arbitration

Two documents, bearing American Institute of Architects ("AIA") nomenclature, are at issue in this case and relevant to the appeal. The first document is referred to as the B141 document. (*See* R. 325; Appellee R.E. 16) The B141 agreement is between the Owner (developer) and Architect. (R. 325; Appellee R.E. 16) Additionally, there is a General Conditions of the Contract for Construction, document A201, which includes obligations of all three parties—HBSA, RAC, and Sea Breeze. (R. 355; Appellee R.E. 26)

In its appellate brief, HBSA cites to § 1.3.5.4 of the B141 agreement. (Appellant Br. at 2) There are other provisions of the B141 agreement that are not mentioned in HBSA's brief, yet warrant analysis in order to the capture the intent of these interrelated documents. First, the B141 contract, like the A201, expressly provides for application of the Construction Industry Arbitration Rules of the AAA to any arbitration between the parties. (R.331; Appellee R.E. 22) The B141 contract also contains a provision, §1.1.5, that incorporates by reference that version of the A201 document signed by Sea Breeze and RAC, so that the terms in the B141 contract "shall have the same meaning as those in the edition of AIA Document A201." (R. 328; Appellee R.E. 19)

"[Harry Baker Smith] did not authorize anyone including the attorneys defending him in the dispute between Sea Breeze I and his firm, HBSA II, LLC, specifically attorney C. J. Herbert, to agree to joinder and/or consolidation with any other disputes and/or arbitration involving Sea Breeze I, Roy Anderson Corporation and/or the condominium association." (R. 394; Appellee R.E. 30) However, as discussed *infra*, a lawyer is presumed to have authority to bind his client.

Importantly, the B141 further provides for the Architect (in this case HBSA) to play an active role in the preparation of the A201 document. Specifically, subsection 2.4.4.2 provides that:

> During the development of the Construction Documents, the Architect shall assist the Owner in development and preparation of...the Conditions of the Contract for Construction (General, Supplementary and other Conditions).

(R. 338; Appellee R.E. 27)(emphasis added). The role of the Architect in preparing the documents is significant in this matter because of certain revisions that were made to the standard[4] A201 document. In its standard, original version, the A201 document precluded joinder of the Architect in an arbitration with the Developer and Contractor. (R. 443; Appellee R.E. 40) As evidenced by the Additions and Deletions Report for the A201 in this case, however, the parties expressly revised the document to allow for joint arbitration of disputes involving both the Architect and Contractor. (R. 443; Appellee R.E. 40) Indeed, the revised A201 strikes the language prohibiting joint arbitration and instead provides that no arbitration shall include "parties ***other than*** the Architect, the Owner, Contractor, a separate contractor as described in Article 6, and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration." (R. 86; Appellee R.E. 5) (emphasis added) Thus, the A201 was specifically revised in this case to permit joinder of RAC, HBSA, and Sea Breeze in a joint and consolidated arbitration.

[4] As this Court is likely aware, the AIA documents come in "standard" forms, which can then be revised via an "Additions and Deletions Report" to reflect the parties' agreement to the extent they want to deviate from the standard form.

It is undisputed that the A201 document was revised to allow for joint arbitration between these parties. (R. 443; Appellee R.E. 40) The facts further attest to the involvement of HBSA in the revision and drafting of the A201. To begin, it was HBSA's affirmative duty, under the B141 contract, to assist in drafting the terms of the A201. (R. 338; Appellee R.E. 27) Moreover, the evidence proves that HBSA participated in the drafting and review of the A201. (R. 436-442; Appellee R.E. 33-39) An Affidavit from Kathy Sherman, who was involved in the drafting of the subject documents, confirms that "Hank Smith, the Architect on the project made the basis of this action, was advised of and participated in the review and drafting of the applicable contractual documents, including the A201 document." (R. 436; Appellee R.E. 33) Email correspondence further evidences HBSA's participation in the drafting and revision of A201. (R. 438-442; Appellee R.E. 35-39) For example, in a March 1, 2004 email from Hank Smith to Sherman, Smith attaches an "**A-201 – Working Draft**" and notes that "I have left some items open until the completion of the revised documents and for discussion among ourselves as how to proceed." (R. 438; Appellee R.E. 35). Another email of March 30, 2004 from Hank Smith indicates that he received communications involving the construction contracts and would call Sherman to discuss the same. (R. 439; Appellee R.E. 36). In yet another email dated August 5, 2004, Smith is once again advised of, and given the opportunity to participate in, the proposed changes to the A201, and is asked to make relevant revisions to the contractual documents. (R. 440; Appellee R.E. 37)

HBSA's Demand for Appointment of a Special Arbitrator

In its appellate submission, HBSA states: "[f]ollowing the voluntary dismissal of its complaint for injunctive relief, HBSA then submitted the arbitrability issue to a special arbitrator determining consolidation because, *based on the representations of Sea Breeze*, this was required under Rule 7 of the American Arbitration Rules for Construction cases." (Appellant Br. at 20) (emphasis added) The facts belie this statement.

Indeed, on three separate occasions HBSA, not Sea Breeze, wrote the AAA demanding appointment of a Special Arbitrator pursuant to Rule R-7 to decide the joinder/consolidation issue. (R. 93, R.E. 54; R. 95, R.E. 56; R. 96, R.E. 57) On December 23, 2008, for example, HBSA wrote the AAA case manager that: "[w]e further suggest that for the AAA to make an effort to properly constitute arbitration proceeding between Sea Breeze I, LLC and HBSA II, PLLC, the AAA must live up to Rule 7 of the Construction Industry Arbitration rules and select an arbitrator to decide the consolidation issue prior to selection of the arbitrator to decide the merits of the alleged claims." (R. 97; R.E. 58) Then again, on February 2, 2009, HBSA wrote the AAA that "...it is imperative that AAA discharge its responsibilities under Rule R-7 by appointing a single arbitrator for the limited purpose of deciding the unresolved consolidation and joinder issues in this matter." (R. 94; R.E. 55) Thereafter, on February 16, 2009, HBSA once again inquired "whether the chosen arbitrator is being selected for the purpose set forth in Rule 7 of AAA's Construction Industry Arbitration Rules and Mediation Procedures with regard to a single arbitrator to be selected for the sole purpose of deciding the consolidation conflict in this matter." (R. 95; R.E. 56)

Despite this clear record of demands by HBSA to AAA to appoint a special arbitrator to decide the joinder/consolidation issue, HBSA unabashedly claims in its brief that it submitted the joinder/consolidation issue to the special arbitrator "under protest" and that it was "reluctant" to submit the consolidation issue to the special arbitrator. (Appellant Br. at 4, 5, 20) Indeed, HBSA goes so far as to state that it never demonstrated an unmistakable willingness to submit the consolidation issue to an arbitrator. (Appellant Br. at 21) Such statements by HBSA are disingenuous, given the above-referenced correspondence, in which HBSA repeatedly clamors for a special arbitrator to be appointed to decide the joinder/consolidation issue. (R. 93-97; R.E. 54-58)

Undaunted, as evidence of their "objections" to a special arbitrator, HBSA points to correspondence of February 18, 2009,[5] February 20, 2009 and December 23, 2008, wherein HBSA indicated its arbitrator selection was being made under protest and with reservation of rights. (Appellant Br. at 5) What HBSA fails to inform this Court is that all of this correspondence was sent prior to AAA ever agreeing to appoint a *special* arbitrator under Rule R-7. (R. 56-57) HBSA's objections were not directed at appointment of a special arbitrator, but instead were directed at AAA's *failure* to appoint a special arbitrator up to that time. (R. 93-97; R.E. 54-57) In other words, AAA had initially allowed the joint arbitration to proceed without appointing a special arbitrator to decide the joinder/consolidation issue. (R. 56-57; R.E. 27-28) Instead, AAA was simply going to allow the final arbitrator (i.e. the arbitrator chosen to decide the merits) to also

[5] Although HBSA refers to this e-mail as being dated February 18, 2009, it is actually dated February 16, 2009. (R. 95; R.E. 56)

decide the joinder/consolidation issue. (R. 56-57, 78-79; R.E. 27-28, 49) HBSA's objection was to AAA allowing the *final* arbitrator to decide the joinder/consolidation issue without first appointing a *special* arbitrator to decide the joinder/consolidation issue. (R. 93-97; R.E. 54-57) Thus, HBSA misrepresents the record when it claims that it objected to appointment of a special arbitrator to decide the joinder/ consolidation issue. In fact, the very correspondence cited to by HBSA bears this out. (R. 93-97; R.E. 54-57) For example, the February 20, 2009 letter to AAA states:

> Your email sent to me earlier this week suggests that consolidation and joinder issues may be addressed to the same arbitrator selected to decide the merits. This is contrary to AAA Rule R-7, which very plainly states that if the parties are unable themselves to resolve consolidation and joinder issues, the association *shall directly appoint a single arbitrator* for the *limited* purpose of deciding" such matters. Such a directly appointed arbitrator for this limited purpose is obviously different from a party-selected arbitrator to decide the merits. These are separate individuals under the Rules.
>
> [...]it is imperative that AAA discharge its responsibilities under Rule R-7 by appointing a single arbitrator for the limited purpose of deciding the unresolved consolidation and joinder issues in this matter.

(R. 93-94; R.E. 54-55)(emphasis in original). Similarly, the letter of December 23, 2008 states:

> We further suggest for the AAA to make an effort to properly constitute an arbitration proceeding between Sea Breeze I, LLC and HBSA II, PLLC, the AAA must live up to Rule 7 of the Construction Industry Arbitration Rules and select an arbitrator to decide the consolidation issue prior to selection of the arbitrator to decide the merits of the alleged claims.

(R. 97; R.E. 58). Likewise, the February 16, 2009 e-mail to AAA states:

> ...your letter of February 12, 2009 setting forth the selection process of an arbitrator does not indicate whether the chosen arbitrator is being selected for the purpose set forth in Rule 7...with regard to a single arbitrator to be selected for the sole purpose of deciding the consolidation conflict in this

> matter. Could you advise us what is the intention of AAA to follow that rule which has been requested by...Harry Baker Smith Associates II, PLLC.

(R. 95; R.E. 56).

Thus, contrary to HBSA's representations in its brief, HBSA repeatedly demanded that a special arbitrator be appointed to decide the joinder/consolidation issue. (R. 93-97; R.E. 54-58) HBSA's only objection to the special arbitrator came after he rendered a decision adverse to HBSA's position.

Facts Evincing that the AAA Rules Govern the Issue of Joinder or Consolidation

HBSA does not dispute that the B141 contract is binding and governs the relationship between HBSA and Sea Breeze. (Appellant Br. at 2) That contract expressly provides for application of the Construction Industry Arbitration Rules of the American Arbitration Association to an arbitration between HBSA and Sea Breeze. (R. 331; Appellee R.E. 22) Specifically, §1.3.5.2 states:

> Claims, disputes and other matters in question between the parties that are not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, **shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect**. The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association.

(R. 331; Appellee R.E. 22) (emphasis added). In the instant case, mediation proved unsuccessful and there was no agreement among the parties to proceed in any manner other than what the contract required; thus, a course of events ensued that implicated the

above provision requiring application of the Construction Industry Rules of the AAA. (R. 331; Appellee R.E. 22)

The B141 contract between HBSA and Sea Breeze requires application of the Construction Industry Rules of the AAA to govern "claims, disputes and other matters." (R. 331; Appellee R.E. 22) In turn, the AAA Rules expressly provide that the arbitrator has authority to decide all questions regarding his jurisdiction, or the existence, scope or validity of the arbitration clause. (R. 112; Appellee R.E. 15) Specifically, Rule R-8 states that:

> (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.
>
> (b) the arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. [...]

(R.112; Appellee R.E. 15)

Moroever, the AAA rules specifically address the issue of consolidation or joinder and mandate the appointment of a special arbitrator to decide such matters. (*See* R. 112; Appellee R.E. 15) Specifically, Rule R-7 of the AAA Construction Industry Rules provides as follows with regard to disputes over joinder and consolidation:

> If [the parties] are unable to agree [on joinder], the Association shall directly appoint a single arbitrator for the limited purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder. The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator.

(R. 97, R.E. 58; R. 112; Appellee R.E. 15)

Facts Relevant to the Process of the Special Arbitrator's Ruling

HBSA's truncated version of the facts also omits key facts regarding the process by which Special Arbitrator W. Hensell Harris reached his decision on consolidated arbitration. In fact, HBSA's brief seemingly reduces the process to the parties simply submitting briefs on July 6, 2009, and then Harris ordering a consolidated arbitration on July 30, 2009. (Appellant Br. at 6) The course of proceedings, however, was actually much more involved.

Prior to the appointment of Special Arbitrator Harris, the parties briefed the issue of whether it was proper for HBSA, RAC, and Sea Breeze to be joined in a consolidated arbitration to the AAA. (R. 399; R. 82, R.E. 52) These materials were forwarded to Arbitrator Harris for his consideration in reaching a decision on the joinder dispute. (R. 99; R.E. 59) On June 17, 2009, Sea Breeze submitted additional material to Arbitrator Harris. (R. 99; R.E. 59) Thereafter, on June 18, 2009, a teleconference hearing was held by Arbitrator Harris, and all parties and counsel participated in oral argument on this issue. (R. 99; R.E. 59) Additional briefs on the issue were submitted after the hearing, as requested by Arbitrator Harris. (*See* R. 99; R.E. 59) On July 30, 2009, Special Arbitrator Harris entered a carefully-reasoned Order ruling in favor of a consolidated arbitration. (R. 101; R.E. 61)

SUMMARY OF THE ARGUMENT

HBSA frames this appeal as a "fundamental question of contractual rights." (Appellant Br. at 1) Indeed, the instant appeal does involve contractual rights—the right to an arbitration governed by the rules of the American Arbitration Association as expressly required by the contract between HBSA and Sea Breeze. Concomitantly, this appeal involves the right of Sea Breeze to a consolidated arbitration—a right afforded by the express terms of the subject contracts, a right recognized in the Special Arbitrator's ruling, and a right respected by the Chancery Court in its judgment.

To the detriment of HBSA's appellate plea, the facts simply do not bear out the story of an unjustified, illegitimate, and forced arbitration. HBSA attempts to portray itself as the victim of an "ill-advised and twisted" contract interpretation, yet the facts unmistakably evidence a different narrative. No matter how craftily HBSA posits its contentions, the fact remains that the parties agreed to a contract providing for the application of the AAA rules and those rules dictate that a Special Arbitrator, not the courts, determine issues regarding joinder and consolidation. In fact, HBSA repeatedly demanded that AAA follow these rules and appoint a special arbitrator to decide the joinder/consolidation issues. HBSA now seeks to have the judiciary overturn the decision of the very arbitrator that it demanded be appointed to decide these issues. Moreover, there is no escaping the fact that, not only did HBSA request a joint arbitration in May of 2008, but it was also involved in the original revision of the A201 to expressly provide for joint arbitration.

Thus, this appeal is not about subverting the contractual rights of HBSA, nor twisting the words of a contract to achieve arbitration—the facts simply do not support such theories. What this appeal is about is the apt judgment of the Chancery Court in recognizing that it lacked authority to overrule an arbitration decision, made by an arbitrator, pursuant to the AAA rules agreed upon by the parties. The subject agreements dictate that the rules of the AAA apply to all claims, disputes, or other matters not resolved by mediation. The AAA rules establish a process—HBSA demanded the process, the process was followed, and a ruling was made. HBSA's disagreement with the end result of the process does not invalidate the process itself, nor make it appropriate for judicial review or injunctive relief.

ARGUMENT

I. THE CHANCERY COURT CORRECTLY DECLINED TO EXERCISE JURISDICTION BECAUSE THE JOINDER ISSUE FALLS SQUARELY WITHIN THE PURVIEW OF THE ARBITRATION AGREEMENT AND THE APPLICATION OF THE AAA RULES.

Despite the convoluted procedural history up to this point, the instant appeal can be resolved by answering two basic questions: "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of the arbitration agreement." *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 548 (citing *Webb v. Investacorpo, Inc.*, 89 F.3d 252, 257-58 (5th Cir. 1996)). The answer to both questions is a definitive "yes." To begin, it is undisputed that there is a valid agreement to arbitrate between the parties. (*See* Appellant Br. at 2) Indeed, HBSA does not question the validity of the arbitration agreement with Sea Breeze, rather it disputes the propriety of RAC joining the arbitration. Thus, the second question—whether the dispute in question falls within the scope of the arbitration agreement—is the only question bearing analysis.

In this case, the dispute in question is over the issue of joinder; specifically, the consolidation of an arbitration with the same three parties that participated in mediation: Sea Breeze, HBSA and RAC. So, the question becomes in the instant appeal, does this dispute over joinder fall within the scope of the arbitration agreement? Again, the answer is "yes." First, the arbitration agreement between HBSA and Sea Breeze provides for the application of the AAA rules. In fact, §1.3.5.2 expressly dictates:

> Claims, disputes and other matters in question between the parties that are not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, **shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect**. The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association.

(R. 331; Appellee R.E. 22) (emphasis added). The Sea Breeze/HBSA arbitration agreement requires application of the AAA rules and those rules, in turn, provide that the arbitrator has authority to decide all questions regarding his jurisdiction, or the existence, scope or validity of the arbitration clause. (R. 112; Appellee R.E. 15) Specifically, Rule R-8 states that:

> (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.
>
> (b) the arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. [...]

(R.112; Appellee R.E. 15) Clearly, the question of whether the arbitration agreement allows for joinder is a question regarding the "scope" of the arbitration clause; thus, the question is clearly one for the arbitrator to decide. Moreover, the AAA rules have a specific rule for resolution of joinder issues by appointment of a special arbitrator. Specifically, Rule R-7 states:

> If [the parties] are unable to agree [on joinder], the Association shall directly appoint a single arbitrator for the limited purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder. The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator.

(R. 97, R.E. 58; R. 112; Appellee R.E. 15)

Thus, the joinder dispute falls within the scope of the arbitration agreement because that agreement, as defined by the AAA rules, provides for the resolution of joinder issues by appointment of a special arbitrator. This conclusion is not only supported by the arbitration agreement itself, but also analogous case law.

In *Citifinancial, Inc. v. Newton*, the Court addressed "arbitrability" in the context of an agreement that, like the HBSA/Sea Breeze contract, provided for the resolution of claims in accordance with the AAA. 359 F. Supp.2d 545 (S.D. Miss. 2005). This reference to the AAA rules, as the Court explained, sufficiently bound the parties to operation within the AAA procedural rules. *Id.* The Court's analysis is insightful, given the marked similarities with the issues presented in the instant appeal:

> The Arbitration Provision at issue provides that "any Claim ...shall be resolved by binding arbitration *in accordance with* ... the Expedited procedures of the Commercial Arbitration Rules of the American Arbitration Association ... and ...this Provision."... The incorporated rule which Plaintiffs argue mandates the arbitration of arbitrability is AAA Rule 7, entitled "Jurisdiction," provides: "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." *Id.* at p. 10. Plaintiffs argue that because the Arbitration Provision incorporates all the rules of procedure of the AAA, and hence AAA Rule 7, the Arbitration Provision meets the bar of *First Options* and *Webb* by making it "clear and unmistakable" that the parties agreed to arbitrate questions of arbitrability. Plaintiffs bolster their argument with AAA Rule 1, which states:
>
> > The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the [AAA] ...These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA.
>
> * * *

While the Rules of the AAA at issue were referenced and not recited, the Arbitration Provision plainly states that AAA Rules will govern disputes between the parties. Those rules provide that the arbitrator will decide questions of arbitrability. Defendant cannot sign a document that states that AAA procedures will govern disputes between the parties, and then claim she did not understand that AAA procedures will govern disputes between the parties.

Although the United States Court of Appeals for the Fifth Circuit has not addressed the effect of a reference to AAA Rules contained in an arbitration clause, other circuit and district courts have. The Tenth Circuit, in *P & P Indus., Inc. v. Sutter Corp.,* 179 F.3d 861, 867 (10th Cir. 1999), said the following when holding that by merely agreeing to arbitrate before the AAA, the parties also impliedly agreed that AAA procedural rules would apply:

> [The argument has been made], however, that the parties' arbitration clause, which mandates that any disputes shall be arbitrated 'before the American Arbitration Association,' indicates an agreement that the parties be bound by the procedural rules of the AAA. We agree.
>
> Courts interpreting similar contractual clauses, in which the parties agree to arbitrate before the AAA but do not specify which procedural rules are to apply to the arbitration, have held that '[s]ince the drafter of the arbitration provision contemplated arbitration by the AAA of all disputes arising out of the contract, the relevant commercial arbitration rules promulgated by the AAA were incorporated into the arbitration agreement.' *Schulze and Burch Biscuit Co. v. Tree Top, Inc.,* 642 F.Supp. 1155, 1157 (N.D. Ill. 1986), aff'd, 831 F.2d 709 (7th Cir. 1987); *see also Mulcahy v. Whitehill*, 48 F.Supp. 917, 919 (D. Mass. 1943) (stating that 'the defendant's unqualified submission of disputes' to arbitration before the AAA 'necessarily implied a submission to the Rules of Procedure of the [AAA]' and that '[i]t follows ... that the defendant, by consent, is bound ... by the [AAA's] Rules of Procedure'). Indeed, Rule 1 of the AAA, to which P & P did not object, states that '[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.'

> We find the logic of this Rule, and of the courts interpreting similar contractual provisions, to be persuasive, especially in light of the liberal federal policy favoring binding arbitration. *See McKee,* 45 F.3d at 985. ***A party who consents by contract to arbitration before the AAA also consents to be bound by the procedural rules of the AAA, unless that party indicates otherwise in the contract.***

Id. at 549-552 (bold emphasis added; italicized emphasis in original).

Citifinancial stands for the proposition that the arbitrator, pursuant to the AAA rules, retained the ability to "*rule on his or her own jurisdiction,* including any objections with respect to the *existence, scope or validity* of the arbitration agreement." *Id.* The Chancery Court's ruling in the instant case comports with the *Citifinancial* holding by declining to exercise jurisdiction where the AAA rules expressly posit jurisdiction over joinder disputes with the Special Arbitrator.

As in *Citifinancial,* HBSA voluntarily signed a contract providing for arbitration, and providing that the AAA rules would govern. (R. 331-335; Appellee R.E. 22-26) The AAA rules provide that the arbitrator is to decide all questions regarding his or her jurisdiction as well as the existence, scope or validity of the arbitration clause. (R. 112; Appellee R.E. 15) Additionally, the AAA Construction Industry Arbitration Rules include a provision specifically directed to the joinder/consolidation issue. (R. 112; Appellee R.E. 15) Indeed, Rule R-7 expressly mandates that when the parties cannot agree on the issue of consolidation or joinder, the AAA will appoint an arbitrator for the "purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder." (R. 112; Appellee R.E. 15) The rule also indicates that "[t]he AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the

arbitrator." (R. 112; Appellee R.E. 15) Put simply, the joinder issue is one that HBSA agreed to submit to a Special Arbitrator by virtue of agreeing to an arbitration conducted in accordance with the AAA rules. *See id.* at 551 (indicating that "Defendant cannot sign a document that states that AAA procedures will govern disputes between the parties, and then claim she did not understand that AAA procedures will govern disputes between the parties."); s*ee also Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 451-452 (2003) (holding that parties "agreed that an arbitrator, not a judge, would answer the relevant question" regarding class arbitration where they entered into arbitration agreement providing for "all disputes" relating to contract to be resolved by arbitration).

II. CLEAR AND UNMISTAKABLE EVIDENCE THAT HBSA AGREED TO A SPECIAL ARBITRATOR DECIDING THE ISSUE OF JOINDER.

HBSA claims that it did not intend "to allow the arbitrator to be the final arbiter of the question of arbitrability." (Appellant Br. at 12) In making this claim, HBSA relies on the United States Supreme Court's decision in *First Options of Chicago, Inc. v. Kent,* 514 U.S. 938 (1995). Such reliance is unavailing. First, as explained below, the *First Options* case is easily distinguished from the instant matter. Second, and perhaps most importantly, even under the *First Options* rationale, the Chancery Court still reached the correct decision.

In *First Options,* the Supreme Court considered the "narrow question of whether arbitrators or the courts have the primary power to decide whether the parties agreed to arbitrate a dispute's merits." *First Options*, 514 U.S. at 938. The Court ultimately held that the answer to this inquiry "turns upon whether the parties agreed to submit that

question to arbitration. If so, then the court should defer to the arbitrator's arbitrability decision." *Id.* In *First Options*, unlike the instant matter, there was no evidence that the parties agreed to arbitrate arbitrability. *See id.* Indeed, the party challenging arbitrability on appeal was not even a signatory to the arbitration agreement. *See id.* Nor was there any evidence, as there is in this case, that the parties agreed to arbitrate the dispute at issue by signing an agreement providing for the application of AAA rules. *See generally, id.* Thus, the factual discrepancies between the *First Options* case and the instant case foreclose a convincing or workable analogy between the two matters.

HBSA attempts to force an analogy with *First Options* by latching onto the "clear and unmistakable evidence" standard set forth in that case. To the detriment of HBSA's appellate arguments, however, there is clear and unmistakable evidence in this case that HBSA did agree to arbitrate the issue of joinder and consolidation. For example, HBSA signed a contract with an arbitration provision that requires resolution of disputes in accordance with the AAA rules—rules that have an specific regulation for joinder disputes. (R. 331-335; Appellee R.E. 22-26) Moreover, HBSA's repeated demands for appointment of a Special Arbitrator demonstrate clear and unmistakable evidence of an agreement to resolve the joinder dispute in accordance with AAA rules.

Indeed, on three separate occasions, HBSA wrote to the AAA demanding the appointment of a Special Arbitrator to decide the consolidation issue, pursuant to Rule R-7. (R. 93, R.E. 54; R. 95, R.E. 56; R. 96, R.E. 57) On December 23, 2008, for example, HBSA wrote the AAA case manager that: "[w]e further suggest that for the AAA to make an effort to properly constitute arbitration proceeding between Sea Breeze I, LLC

and HBSA II, PLLC, the AAA must live up to Rule 7 of the Construction Industry Arbitration rules and select an arbitrator to decide the consolidation issue prior to selection of the arbitrator to decide the merits of the alleged claims." (R. 97; R.E. 97) On February 2, 2009, HBSA again wrote: "...it is imperative that AAA discharge its responsibilities under Rule R-7 by appointing a single arbitrator for the limited purpose of deciding the unresolved consolidation and joinder issues in this matter." (R. 94; R.E. 55)(emphasis added) Thereafter, on February 16, 2009, HBSA once again inquired "whether the chosen arbitrator is being selected for the purpose set forth in Rule 7 of AAA's Construction Industry Arbitration Rules and Mediation Procedures with regard to a single arbitrator to be selected for the sole purpose of deciding the consolidation conflict in this matter." (R. 95; R.E. 56) Significantly, HBSA even invoked Rule 7 in making its demands, which specifically provides that ". . . **the Association shall directly appoint a single arbitrator for the limited purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder.**" (R. 94, R.E. 55; R 112; Appellee R.E. 15) (emphasis added).

By making demands for appointment of a Special Arbitrator under Rule 7, HBSA manifested an unmistakable understanding and agreement that the AAA rules governed resolution of the joinder dispute. Thus, under the rationale of *First Options,* both the HBSA/Sea Breeze agreement itself and the repeated demands for application of the AAA rules evince that the parties agreed to submit the question of joinder to an arbitrator. Consequently, the Chancery Court correctly deferred to the Special Arbitrator's ruling on

joinder. *See First Options,* 514 U.S. at 943 (". . . a court must defer to an arbitrator's arbitrability decisions when the parties submitted that matter to arbitration.").

In addition to its unmistakable repeated demands for appointment of a special arbitrator to decide the joinder issue, it is likewise unmistakable that HBSA initially requested a joint arbitration. Specifically, in correspondence dated May 2, 2008, HBSA counsel wrote the attorneys for Sea Breeze and unequivocally stated:

> . . . the issues which your clients have, without admission as to the legitimacy and extent of same, if they exist, which is denied, are potentially the result of involvement of other parties, including the contractor. For this reason, we believe that it would be appropriate to have the contractor's participation in any mediation and/or arbitration. We ask for your agreement to same, particularly if you are interested in any potentially successful proceedings.

(R. 445; R.E. 45, 65) That letter was similarly followed up with May 23, 2008 correspondence from HBSA to the other parties, stating "what are your positions on where we stand on an appointed mediator and what effect does/will this have on any arbitration date, if necessary?" (R. 447-448; Appellee R.E. 42-43)(emphasis added). Nonetheless, when the joinder issues was briefed to the Special Arbitrator, HBSA submitted what Arbitrator Harris later referred to as a "carefully drafted" affidavit disclaiming that counsel for HBSA had the authority to act on behalf of their client.[6] (R. 99; R.E. 59) Despite this "eleventh hour" disclaimer, it cannot be denied that HBSA participated in a joint mediation with no objection to RAC's participation. Nor can the disclaimer change the fact that HBSA participated in the drafting and revision of a

[6] Despite this disclaimer, it is clear that a lawyer is presumed to have authority to act on behalf of his client. *See Parmley v. 84 Lumber Co.*, 911 So.2d 569, 573 (Miss. App. 2005)("[a]n attorney is presumed to have the authority to speak for and bind his client.")

document that was specifically changed to allow for joint arbitration between the Architect, Contractor, and Owner. (R. 443; Appellee R.E. 40 R. 436-442; Appellee R.E. 33-39) While the HBSA/Sea Breeze agreement and repeated demands for appointment of a special arbitrator clearly and unmistakably evidence an agreement for an arbitrator to decide joinder, HBSA's conduct and written correspondence clearly and unmistakably evidence an intent to participate in a joint arbitration.

In its brief, HBSA makes much of the fact that it sent correspondence to the AAA with the subject line "under Protest and with Full Reservation of Rights." (Appellant Br. at 20; R. 93; R.E. 54) As pointed out more fully, *supra*, this "objection" was not an objection to appointment of a special arbitrator to decide the joinder/consolidation issue, as HBSA now claims. Nonetheless, HBSA apparently contends that this disclaimer somehow discredits the evidence that it clearly and unmistakably agreed to arbitrate the issue of joinder. In making this contention, HBSA cites to the *First Options* opinion. (Appellant Br. at 14) HBSA's reliance on *First Options* in trying to make this point is once again misplaced. This is so because the factual discrepancies between this case and the scenario presented in *First Options* invalidates the analogy.

In *First Options*, the defendants attempted to prove that the plaintiffs exhibited a willingness to arbitrate by filing a written objection to having the arbitrator decide the question of arbitrability. *First Options*, 514 U.S. at 946. In that context, the Court stated that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue." *Id.* While it is true that HBSA included a protest byline in its correspondence to the AAA, that reservation of rights was directed at the

notion of allowing a consolidated arbitration to move forward without first appointing a special arbitrator to decide that issue. Despite its argument to the contrary, HBSA never objected to appointment of a special arbitrator to decide the joinder/consolidation issue. Indeed, HBSA filed multiple demands *seeking* appointment of a special arbitrator, not objecting to it. (R. 93, R.E. 54; R. 95, R.E. 56; R. 96, R.E. 57) The distinction is a significant one. In *First Options* and its progeny, also cited by HBSA, the Court was considering the issue of whether there was sufficient evidence to demonstrate that the complaining party willingly submitted the issue of arbitrability to the arbitrator. (*See* Appellant Br. at 12-16) In this case, unlike *First Options*, there is abundant evidence of HBSA's willing submission of the joinder/consolidation issue to the special arbitrator, based not only upon the arbitration agreement itself and the AAA rules, but also based on HBSA's repeated demands for a special arbitrator to rule on joinder/consolidation.[7] Thus, in the instant case, there is no connection between HBSA's reservation of rights and the dispute at issue.

HBSA devotes a portion of its appellate submission to the idea that a party cannot be required to "submit to arbitration any dispute to which it has not agreed to submit." (Appellant Br. at 28) What HBSA consistently overlooks and disregards is the fact that it did agree to submit to arbitration the dispute over joinder; in fact, the HBSA/Sea Breeze agreement so provides by application of the AAA rules. Moreover, HBSA on three separate occasions wrote the AAA demanding the appointment of a special arbitrator to

[7] *See also Murray, East & Jennings v. J & S Const. Co., Inc.*, 607 F.Supp. 45, at n. 2 (D.C. Miss. 1985)(noting that "[i]t is clear that procedural issues are to be resolved by the arbitrator under the Federal Arbitration Act.").

decide joinder pursuant to Rule 7. (R. 93, R.E. 54; R. 95, R.E. 56; R. 96, R.E. 57) Thus, the above-cited principle has no application to the instant dispute. HBSA's position that it never demonstrated an unmistakable willingness to arbitrate is simply contrary to the facts.

III. HBSA'S UNFOUNDED CRITICISMS OF THE SPECIAL ARBITRATOR'S RULING SHOULD BE DISREGARDED.

Throughout its appellate papers, HBSA accuses arbitrator Harris of "twisting" contractual language to achieve a result. (Appellant Br. at 24-27) As a threshold issue, if the parties agreed to arbitrate an issue, as they did in this case, the courts are not permitted to look into the merits of the arbitrator's decision. Indeed, an arbitrator's decision cannot even be overturned for mistake of fact or law. *Hutto v. Jordan*, 36 So.2d 809, 811 (Miss. 1948) ("[e]rrors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made.") Further, in this case, the arbitration agreement made clear that the Arbitrator's decisions were "final." (R. 331; Appellee R.E. 22). Nonetheless, HBSA seeks to have this Court look to the merits of the joinder consolidation issue. While judicial review of the merits of the arbitrator's decisions is inappropriate, Sea Breeze will briefly address Appellant's contentions.

HBSA's position, while untenable, is not surprising given that HBSA repeatedly questioned the credibility and ability of Arbitrator Harris in previous submissions; such that, Sea Breeze submitted Harris's resume to the Chancery Court to demonstrate his impeccable qualifications to decide the joinder/consolidation issue. (See R. 420; R. 434-

435; Appellee R.E. 31-32) Moreover, the decision reached by Arbitrator Harris was the result of thoughtful analysis and careful attention to the facts, all of which substantiate his ruling.

Far from twisting the language of the subject contracts, Arbitrator Harris took the relevant provisions at face value and according to their plain meaning in the context of determinative modifications and actions by the parties. For example, Arbitrator Harris began his analysis with the acknowledgment that absent other considerations it would appear that joinder would require execution of an additional written agreement. (R. 99; R.E. 59) Arbitrator Harris explained, however, that certain modifications and considerations change this first-glance assumption. Indeed, as Arbitrator Harris concluded, both the revision of a key document and the conduct of the parties made clear the propriety of consolidation and joinder. In reaching this conclusion, Arbitrator Harris devoted a portion of his analysis to the fact that in this case, through the revision of a contract, the parties agreed to a materially different provision regarding consolidated arbitration than what the standard contract provides. (R. 99-100; R.E. 59-60) Arbitrator Harris explained that, traditionally, the Architect is heavily involved in the preparation of the contract between the owner/developer (Sea Breeze) and the general contractor (RAC) and that the HBSA/Sea Breeze contract expressly provided for this involvement. (R. 99; R.E. 59) In this case, the contract between Sea Breeze and RAC has a "specially modified provision" that provides for joint arbitration. (R. 100; R.E. 60) Thus, Arbitrator Harris concluded that HBSA revised this provision so that it could have the ability to join in an arbitration between Sea Breeze and RAC. (R. 100, R.E. 60)

Arbitrator Harris also considered the conduct of the parties in reaching his decision. (R. 100; R.E. 60) Indeed, Arbitrator Harris explained that a "proper decision under Rule 7 necessarily has to consider, in addition to what the contracts provide, the actions and representations that took place since the time the attorney for Sea Breeze first attempted to proceed under the Sea Breeze architectural and construction contract provisions to request a mediation and arbitration with the contracts." (R. 100; R.E. 60) Of "specific importance" to Arbitrator Harris was the May 2, 2008 letter from HBSA counsel stating that " . . . we believe that it would be appropriate to have the contractor's participation in any mediation and/or arbitration. We ask for your agreement to same . . ." (R. 100; R.E. 60) Also relevant to Arbitrator Harris' analysis, was the fact that all parties participated in a joint mediation without objection. (R. 100; R.E. 60) Thus, in reaching his decision, Arbitrator Harris thoroughly considered contractual language, the revision thereof, and the conduct of the parties that was indicative of their agreements.

IV. THE CHANCERY COURT CORRECTLY DENIED HBSA'S PETITION FOR INJUNCTIVE RELIEF.

The Chancery Court correctly denied HBSA's petition for an injunction because HBSA cannot meet the necessary elements for injunctive relief. In order to find the Chancery Court in error, HBSA must establish that it proved to the Court (1) a substantial likelihood of success on the merits by the movant, (2) a substantial threat that the movant will suffer irreparable injury (3) that the threatened injury outweighs any potential harm to the nonmoving party; and (4) no adverse effect on the public interest. *See Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974); *White v. Carlucci*, 862 F.2d

1209, 1211 (5th Cir. 1989); *Apple Barrel Productions, Inc. v. Beard,* 730 F.2d 384, 386 (5th Cir. 1984); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.,* 600 F.2d 1184, 1187 (5th Cir. 1979). Without question, the irreparable harm element must be satisfied by independent proof, or no injunction may issue. *See White,* 862 F.2d at 1211. To the detriment of HBSA's appeal, there is no evidence to warrant satisfaction of any element for injunctive relief, much less all four elements.

To begin, there is no evidence of a substantial likelihood of success by HBSA. The case of *Murray, East & Jennings v. J & S Const. Co., Inc.*, 607 F.Supp. 45, 48-49 (D.C. Miss. 1985), is instructive on this point. Similar to the instant matter, the court in *Murray* considered a petition for injunctive relief in the context of arbitration. Specifically, the plaintiff developer sought an injunction staying arbitration proceedings after the contractor had filed an arbitration demand. The plaintiff claimed that he was entitled to an injunction because the defendant had failed to file its notice of arbitration in accordance with the terms of the contract. The Court held:

> Section 11-15-105 of the Mississippi Code Annotated provides that any party to an agreement for arbitration may petition the court for an order to proceed with arbitration. "If the court finds that no substantial issue exists as to the making of the agreement or provision, it shall grant the application." MISS. CODE ANN. § 11-15-105(1) (Supp.1984)... Although the motion before this court is one in which a party seeks to enjoin rather than to proceed with arbitration, the court is of the opinion that the statute is applicable by analogy. Since the parties did not question the making of the arbitration agreement, arbitration should be allowed to proceed. Questions regarding the timeliness of the demand are to be decided by the arbitrator. (FN2). Accordingly, the plaintiff has not satisfied the first prong of the *Canal Authority* test.

Id. at 49. Further, the court noted that "**[i]t is clear that procedural issues are to be resolved by the arbitrator under the Federal Arbitration Act.**" *Id.* at 49, n. 2.

(emphasis added)(citing *Belke v. Merrill, Lynch, Pierce, Fenner & Smith,* 693 F.2d 1023, 1027 (11th Cir.1982); *O'Neel v. National Association of Securities Dealers,* 667 F.2d 804, 807 (9th Cir.1982); *Conticommodity Services, Inc. v. Phillip & Lion,* 613 F.2d 1222, 1226 (2nd Cir.1980); *Trade Arbed, Inc. v. S/S Ellispontos,* 482 F.Supp. 991, 998 (S.D. Tex. 1980)). Thus, the court held that because these procedural issues were to be decided by the arbitrator, the movant could not show a substantial likelihood of success on the merits, and the requested injunction was to be denied for this reason alone.

Similarly, the relief sought by HBSA does not have a "substantial likelihood" of prevailing on the merits. This is especially true given that HBSA agreed to a contract providing for the application of rules which specifically state that an arbitrator is to decide the dispute at issue. Further, **Special Arbitrator Harris already ruled against HBSA on the consolidation/joinder issue**. HBSA cannot seriously contend that it has a "substantial likelihood of prevailing on the merits" where it has **already lost** on the merits of this issue in the arbitral forum. The failure of HBSA to establish even the first element to obtain injunctive relief, substantiates the Chancery Court's ruling.

Nor can HBSA establish any of the other factors necessary to obtain an injunction. In *City of Meridian, Miss. v. Algernon Blair, Inc.* 721 F.2d 525, 529 (5th Cir. 1983), the Fifth Circuit addressed a request similar to HBSA's petition for injunctive relief. In that case, the district court actually granted a preliminary injunction to the city, staying any arbitration proceedings, after the general contractor, Blair, had filed a demand for arbitration pursuant to a contractual agreement between the parties. The Fifth Circuit reversed, however, finding that the district court had abused its discretion. After

discussing the first factor, and finding that the city was not likely to prevail on the merits, the court went on to address the other factors, stating:

> The district court also gave summary attention to the other three factors typically used to justify preliminary injunctions. For one, the district court found that the City would suffer irreparable injury if *Blair* were allowed to proceed to arbitration. We disagree. Even if the parties were ordered to begin arbitration, the City could continue to challenge the claim to the arbitrator and to the courts if there was an unfavorable decision. If a legal challenge proved successful, the City obviously would not be bound by the findings or conclusions of the arbitrator. **Although the City may have to suffer the expense of inappropriate arbitration, such expenditures do not constitute irreparable harm. "An injury is 'irreparable' only if it cannot be undone through monetary remedies.**" *Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir.1981).

Id. at 529 (emphasis added). Likewise, HBSA failed to demonstrate that it would suffer irreparable harm if the arbitration was allowed to proceed. Just as in *Blair*, *supra*, HBSA has not shown it will suffer an injury that "cannot be undone through monetary remedies," as required to meet the "irreparable harm" element. Thus, Plaintiff HBSA's Complaint was properly dismissed for this reason as well.

In *Blair*, the Fifth Circuit also found that the injunction was improper because **staying** the arbitration would adversely affect public interest. The Court stated as follows:

> We also disagree with the district court's conclusion that the injunction would not harm Blair or disserve the public interest. In contrast with the City, Blair does stand to suffer irreparable harm. **Even if Blair ultimately wins in court and the issue returns to arbitration, the expense and delay of court action will deprive Blair of a significant portion of its bargain. Since swift and less costly resolution of disputes is the primary reason for an agreement to arbitrate, an injunction against arbitration can cause irreparable harm. That is a major reason why injunctions staying arbitrations are viewed with disfavor.**

> Finally, in light of the strong federal policy favoring arbitration over litigation, 9 U.S.C. §§ 1 et seq., we find that the public interest would be thwarted by an injunction against arbitration on these facts. *See, Seaboard Coast Line Railroad Co. v. National Rail Passenger Corp.,* 554 F.2d 657, 660 (5th Cir. 1977).

Id. at 529 (emphasis added). Similar concerns prevail in this case. The very purpose of arbitration is to avoid the "expense and delay of court action." Thus, the balancing of the hardships weighed against allowing an injunction to issue as well. For all of these reasons, HBSA's petition for injunctive relief was correctly denied.

CONCLUSION

The Chancery Court correctly declined to overrule the Special Arbitrator's judgment on the issue of joinder. By agreeing to arbitrate under the AAA rules, HBSA agreed to have a Special Arbitrator decide the issue of joinder. HBSA's conduct and repeated demands for appointment of a Special Arbitrator under Rule 7 further substantiate the Court's ruling. The Chancery Court also correctly denied HBSA's request for injunctive relief based on the lack of evidence establishing the elements necessary for an injunction to issue. Consequently, Sea Breeze respectfully requests that this Court affirm the ruling of the Chancery Court.

CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of November, 2010, a true and correct copy of the foregoing was served on counsel of record by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to.

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