IN THE MISSISSIPPI COURT OF APPEALS

CASE NUMBER 2010-CA-00632-COA

HARRY BAKER SMITH ARCHITECTS II, PLLC
Appellant

vs

SEA BREEZE I, ET AL.
Appellees

Appeal from the Final Ruling of Harrison County Chancery Court, Second Judicial District (Hon. Jim Persons, Chancellor) on Appellees' Motions to Compel Arbitration

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REPLY BRIEF OF THE APPELLANT, HARRY BAKER SMITH ARCHITECTS II, PLLC, TO BRIEF SUBMITTED BY APPELLEE ROY ANDERSON CORP.

ORAL ARGUMENT REQUESTED

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January 18, 2011

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00632

HARRY BAKER SMITH ARCHITECTS, II, 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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those listed as representing Appellant Harry Baker Smith Architects, II, PLLC, 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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INTRODUCTION

HBSA files this reply brief in response to Roy Anderson Corp.'s ("Roy Anderson") arguments and to further show why Roy Anderson's arguments are without merit. In particular, Roy Anderson's arguments lack merit because: 1) a "limited standard of review" does not apply to Special Arbitrator Harris' decision; 2) that the decision by Special Arbitrator Harris was a question of substantive arbitrability, as opposed to a "procedural question," and is for the court to decide; 3) the holding from *Green Tree v. Bazzle* is only a plurality and not binding precedent; 4) assuming a heightened level of discretion applies, the decision by Special Arbitrator Harris is still due to be vacated based on the criteria set forth in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 130 S.Ct. 1758 (2010); and 5) that HBSA meets all requirements for an injunction.

Formerly aligned with HBSA in opposing this improperly consolidated arbitration,[1] Roy Anderson changed its position and filed its appellee brief in support of the arbitration which was consolidated contrary to Mississippi and federal law.[2] The consolidation here was improper because there was no agreement to consolidate the arbitrations. As held by the Mississippi Supreme Court, "arbitration is simply a matter of contract *between the parties*; it is a way to resolve those disputes but only those disputes that the *parties* have agreed to submit to

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[1] R. at 82; R.E. at 001 (Sea Breeze response during special arbitration proceedings on only consolidation November 2008 to objections to consolidated arbitration by Roy Anderson)

[2] *Qualcomm, Inc. v. Am. Wireless License Grp.*, 980 So.2d 261, 269 (Miss. 2007). ". . .because arbitration provisions are contractual in nature, the general rule is that 'a party cannot be compelled to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* (quoting *Adams v. Greenpoint Credit, LLC*, 943 So.2d 703, 708 (Miss. 2006)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)

arbitration." And here, neither Roy Anderson nor HBSA agreed to submit to the arbitration as consolidated.[3]

Nevertheless, Roy Anderson has changed sides and is now in support of the improperly consolidated arbitration. Aside from the argument that Roy Anderson is estopped from filing its brief in opposition to HBSA based on the doctrine of judicial estoppel,[4] HBSA now respectfully submits why each of Roy Anderson's arguments in its brief are without merit.

LAW & ARGUMENT

I. THE "LIMITED STANDARD OF REVIEW" CITED BY ROY ANDERSON APPLIES TO ARBITRATION *AWARDS*. THE DECISION BY THE SPECIAL ARBITRATOR IS NOT AN *AWARD*. THEREFORE, A "LIMITED STANDARD OF REVIEW" DOES NOT APPLY TO THE PRESENT CASE

Yet, as previously mentioned, no *award* was rendered. Therefore, Roy Anderson argued that this court should affirm the decision of the chancery court because Mississippi law provides for a "more limited than abuse of discretion" standard of review of an arbitration award[5] is incorrect. Moreover, Federal Arbitration Act principal that an arbitrator's decision should not be vacated "if there is a barely colorable justification for the outcome reached," is also incorrect.[6] For both arguments, Roy Anderson only cited to cases in which an actual arbitration final *award* was rendered. No *award* was rendered in the present case.

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[3] R. at 82; R.E. at 001.

[4] *Scott v. Gammons,* 985 So.2d 872, 877 (Miss. 2008) (holding that judicial estoppel prevents a party from assuming a position at one stage of a proceeding and then taking a contrary stand later on in the proceeding). Previously, Roy Anderson was joined with HBSA in opposing consolidated arbitration. It subsequently changed its position when it was sued by the Sea Breeze Condominium and Resort Owner's Association in the Circuit Court of Harrison County.

[5] Roy Anderson Brief at 6.

[6] *Tucker v. Am. Bldg. Maint.,* 451 F.Supp.2d 592, 597 (S.D.N.Y. 2006).

An *award* is referred to as the final decision on the merits in the settlement of a controversy.[7] For there to be an *award*, the merits of the actual, underlying dispute must be heard in the arbitration and the arbitrator must award an amount of damages or final decision as to liability. This is exactly what happened in the cases cited by Roy Anderson.[8] However, this is not what happened in this matter since no *award* was ever rendered. The merits of the underlying disputes, Sea Breeze's alleged construction defect claims against Roy Anderson and its design defect claims against HBSA, have not been presented to an arbitrator. Consequently, no *award* has been rendered and no heightened standard of deference applies.

Because there was no arbitration *award* in the present dispute (as the parties are still disputing whether the Special Arbitrator's decision as to arbitrability and consolidation were proper) the high level of deference argued, and hoped for by Roy Anderson is simply inapplicable. This is so even assuming Special Arbitrator Harris' decision was "honestly made."[9] Special Arbitrator Harris' decision should not be afforded any special deference. However, for reasons further discussed in this reply, even should this Honorable Court hold that the Special Arbitrator's decision, not an *award*, is deserving of deference, then the Court should still vacate the ruling because, in rendering his decision, the Special Arbitrator "strayed from

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[7] MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION, 32:3-5, (West Publishing, Rev. Ed. 2010).

[8] *See, e.g., Wilson v. Greyhound Bus Lines, Inc.*, 830 So.2d 1151 (Miss. 2002) (plaintiff received an arbitration *award* of $46,500 in personal injuries); *Hutto v. Jordan,* 36 So.2d 809 (Miss. 1948) (arbitration award of one car in a dispute as to whether the contract to sell a car was usurious and thus unenforceable).

[9] *See Hutto,* 36 So.2d 809, 811.

interpretation and application of the agreement and effectively dispens[ed] his own brand of industrial justice."[10]

II. WHETHER HBSA CAN BE COMPELLED TO ARBITRATE ITS DISPUTE WITH SEA BREEZE AND ROY ANDERSON IN ONE CONSOLIDATED ARBITRATION IS A QUESTION OF ARBITRABILITY NOT A "PROCEDURAL QUESTION."

Arbitrability (or substantive arbitrability) involves determining whether the parties agreed to submit a particular dispute to arbitration.[11] The question of whether the parties agreed to arbitrate is a question for the courts and not the arbitrator to decide unless, following *First Options,* the parties clearly and unmistakably agreed to arbitrate arbitrability.[12] Here, the issue is whether HBSA agreed to submit to arbitration involving not only Sea Breeze, but also Roy Anderson. This is a question of arbitrability since it goes to whether HBSA agreed to submit to a consolidated arbitration which involved not only Sea Breeze but also Roy Anderson. The question whether an arbitration provision covers the dispute at issue is one for the court to decide.[13]

Roy Anderson would have the Court treat this issue as a "procedural question" rather than an arbitrability issue[14] and seeks to distinguish *General Motors Corp. v. Pamela Equities*

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[10] *Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758, 1767 (2010).

[11] *First Options,* 514 U.S. at 943.

[12] *Id.*

[13] *Allen v. Apollo Group, Inc.,* No. Civ.A.H.-04-3041, 2004 WL 3119918 at *4 (S.D. Tex. Nov. 9, 2004) (citing *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452 (2003).

[14] Roy Anderson Brief at 7.

Corp,[15] on that basis. But arbitrability is at issue in both cases and, if anything, *Pamela Equities* involved more of a "procedural" issue than does the consolidation issue in the present case. It thus follows consequentially that if *Pamela Equities* involved arbitrability, then the present dispute involves arbitrability as well and even more so.

The issue in *Pamela Equities* was whether a party had waived its right to select its own arbitrator to serve as one of three arbitrators on a three-member panel.[16] One of the two parties to the arbitration dispute allegedly waived its right to choose its own arbitrator by failing to timely do so.[17] The Fifth Circuit held that this was a question of arbitrability and applied the *First Options* presumption against arbitrability.[18] While determining whether a party waived its right to appoint its own arbitrator by failing to timely do so could arguably constitute a "procedural question," the Fifth Circuit did not view the issue that way and held that this was a "question of arbitrability" applying the *First Options* presumption.[19] The issue was whether one of the parties agreed to submit its dispute to a two-member panel rather than a three member panel.[20]

The waiver issue in *Pamela Equities* was considered a "question of arbitrability" and *not* a "procedural question."[21] The Fifth Circuit so decided despite the notion that waiver of one's right to select its own arbitrator-panelist for a three member panel could arguably be construed as

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[15] 146 F.3d 242 (5th Cir. 1998).

[16] *Id.* at 248.

[17] *Id.*

[18] *Id.* at 251.

[19] *Id.* at 249.

[20] *Id.* at 250.

[21] *Id.* at 251.

a "procedural question." A "procedural question" or "procedural arbitrability" arises when the dispute is covered by an arbitration clause and involves determining the applicability of a procedural defense to arbitration such as notice, laches, and estoppel.[22] And while *Pamela Equities* involved the issue of waiver—a seemingly "procedural issue"—the Fifth Circuit nevertheless held that this was a question of arbitrability as opposed to a "procedural question."[23]

Even more than *Pamela Equities,* the present case involves a question of arbitrability and not a "procedural question." As previously stated, the issue here is whether HBSA agreed to submit to an arbitration involving not only Sea Breeze (with whom HBSA contracted) but also Roy Anderson—with whom HBSA had never contractually agreed to arbitrate. This goes right to the issue of whether HBSA agreed to submit to this arbitration as consolidated with Sea Breeze's arbitration with Roy Anderson. This thus is a question of substantive arbitrability which is presumptively for the courts to decide.[24] Consequently, Roy Anderson's argument that HBSA is conflating "a procedural question with a question of arbitrability" is completely without merit.

III. THE COURT, NOT THE ARBITRATOR, IS THE PROPER AUTHORITY TO DETERMINE THE ARBITRABILITY OF THE DISPUTE AS CONSOLIDATED.

Roy Anderson cites *Green Tree Financial Corp v. Bazzle,*[25] in support of its argument that the arbitrator, and not the court, has the authority to decide consolidation. Roy Anderson is wrong for four reasons. First, this argument misses the point that a court, and not an arbitrator,

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[22] *See Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84 (2002) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983)).

[23] 146 F.3d at 251.

[24] 514 U.S. at 944.

[25] 539 U.S. 444 (2003).

presumptively decides substantive arbitrability—such as whether HBSA (as well as Roy Anderson) agreed to submit to consolidated arbitration.[26]

Second, Roy Anderson conveniently omits that *Green Tree* involved *class* arbitrations. This is a different type of consolidation governed by an entirely different set of rules—the American Arbitration Association's Supplementary Rules for Class Arbitrations. The AAA's Rules for Class Arbitration are an entirely distinct set of rules which are inapplicable to the present case.[27] Obviously, the consolidated arbitration is not a class-type of arbitration to which *Green Tree* applies. Indeed, *Green Tree* involved a class of 1,899 individuals that was awarded damages, fees, and costs of more than $14 million by a single arbitrator.[28] The arbitration at present is not remotely close to being the type of class arbitration considered by *Green Tree.*

Third, *Green Tree* is further inapplicable to the present case because, assuming *arguendo* that class arbitrations were the same as consolidated arbitrations and subject to the same rules, the contracts at issue in *Green Tree* were silent as to the appropriateness of class arbitrations.[29] This is in *stark contrast* to the contracts at issue in the present case where consolidated arbitration is expressly forbidden. *Green Tree* is thus factually distinguishable from the present case because, here, the relevant contract at issue, AIA Document B141-1997, was *not* silent as to the issue of consolidated arbitration.[30] Quite the contrary to *Green Tree*, provision 1.3.5.4 of the Sea Breeze/HBSA contract *expressly prohibited* the consolidation of the Sea Breeze/HBSA

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[26] *First Options,* 514 U.S. at 946.

[27] *See Stolt-Nielsen v. Animalfeeds Inter'l Corp.,* 130 S.Ct. 1758, 1765 (2010) (discussing application of the American Arbitration Association's Supplementary Rules for Class Arbitrations to the dispute therein).

[28] *Green Tree Fin. Corp. v. Bazzle,* 351 S.C. 244, 251 (2002).

[29] *Green Tree,* 539 U.S. at 454 (Stevens, S., Concurring).

[30] R. at 104; R.E. at 003.

arbitration with any other arbitration unless three specific requirements were met. As previously briefed extensively, these requirements were *not* met. Provision 1.3.5.4 reads as follows:

> No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement and signed by the Owner, Architect, and any other person or entity sought to joined.[31]

As shown above, unlike *Green Tree,* the contract presently at issue is *not* silent as to consolidation.

Fourth, the portion of the case where *Green Tree* holds that an arbitrator, and not a court, should decide whether a class should be certified was only a plurality and thus not binding precedent. Roy Anderson fails to highlight the critical fact that, in *Green Tree,* Justice Stevens did not take a definitive position as to whether the interpretation of the parties' agreement as to class arbitrations should have been made by an arbitrator rather than by the courts.[32] In other words, Justice Stevens did *not* join in the plurality decision that an arbitrator, rather than the court, should decide whether a class should be certified.[33] Importantly, *Green Tree* thus did *not* necessarily overrule the Fifth Circuit decision of *Del E. Webb Construction v. Richardson Hospital Auth.*, that a court, rather than arbitrator, decides whether consolidation of arbitrations is proper.[34] Consequently, the portion of *Green Tree* cited by Roy Anderson used to support its

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[31] R. at 104; R.E. at 003 (emphasis added).

[32] *Green Tree,* 539 U.S. at 455.

[33] *See id.*

[34] 823 F.2d 145, 150 (5th Cir. 1987) (given that *Green Tree* was a plurality, and not a majority, it could not have overruled this portion of *Del E. Webb*).

contention that the arbitrator decides consolidation is a plurality which is not binding precedent.[35] For the above reasons, *Green Tree* is simply inapplicable to the present case.

IV. ASSUMING *ARGUENDO* THAT A HEIGHTENED STANDARD OF REVIEW DOES APPLY, THEN SPECIAL ARBITRATOR HARRIS' DECISION SHOULD STILL BE OVERTURNED BECAUSE HE "STRAYED FROM INTERPRETATION AND APPLICATION OF THE AGREEMENT AND EFFECTIVELY 'DISPENSE[D] HIS OWN BRAND OF INDUSTRIAL JUSTICE'"

HBSA vehemently disagrees that the high deference given to an arbitration *award* also applies to a Special Arbitrator's decision as to arbitrability when protested by two of these parties.[36] However, HBSA alternatively submits that Special Arbitrator Harris' decision should nevertheless be overturned if this Honorable Court is to accept Roy Anderson's argument based on *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp*, 130 S.Ct. 1758 (2010).

Roy Anderson argues that the Supreme Court case of *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*,[37] prevents HBSA from meeting the standard for setting aside an arbitrator's ruling. The standard set forth in *Stolt-Nielsen,* as argued by Roy Anderson, is that an arbitrator's ruling is unenforceable only when he "strays from the interpretation and application of the agreement and effectively dispenses his own brand of industrial justice."[38] Yet, this portion of *Stolt-Nielsen* was not the Court's holding but rather a reference to *Major League Baseball Players Association v. Garvey.*[39] Unlike the present case, *Garvey* involved an arbitration *award.* Indeed, *Garvey*

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[35] *Id.*

[36] *See First Options,* 514 U.S. at 948 (reviewing court need not provide special leeway to decision as to arbitrability when one party submits to same under protest).

[37] 130 S.Ct. at 1767.

[38] *Id.*

[39] 532 U.S. 504 (2001).

involved a claim for damages of $3 million due to breach of a labor contract for which a final arbitration award was rendered denying him an award.[40]

However, even assuming the applicability of this heighted standard of deference promulgated by the *Stolt-Nielsen* Court (which is denied), Special Arbitrator Harris's decision should nevertheless be overturned. The *Stolt-Nielsen* Court vacated an arbitration *award* where the arbitration panel completely ignored the plain language of the arbitration contract at issue and reached a conclusion that was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."[41] Similar to *Stolt-Nielsen,* Special Arbitrator Harris completely ignored the terms of the Sea Breeze/HBSA agreement and forced an arbitration to which there was no consent by either HBSA or Roy Anderson.[42]

First, Special Arbitrator Harris "strayed from the interpretation and application" of the Sea Breeze/HBSA agreement when he completely ignored the terms of § 1.3.5.4 when holding that C.J. Hebert's letter of May 2, 2008,[43] fulfilled the requirements necessary for the consolidation of the Sea Breeze/Roy Anderson arbitration with the Sea Breeze/HBSA arbitration. As discussed above, § 1.3.5.4 requires that: 1) there be a written agreement to consolidation; 2) the agreement be signed by HBSA, Sea Breeze and the third party to be joined; 3) that the agreement reference the contract between HBSA and Sea Breeze.[44]

Mr. Hebert's letter was clearly insufficient to constitute a signed agreement to consolidated arbitration with Roy Anderson. Roy Anderson even objected to the letter's

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[40] *Id.* at 507.

[41] 130 S.Ct. at 1775.

[42] R. at 82; R.E. at 001.

[43] *See* R. at 445; R.E. at 004.

[44] R. at 104; R.E. at 003.

suggestion. The letter does not meet the requirements of § 1.3.5.4. Despite this, Special Arbitrator Harris ignored the express, plain language of § 1.3.5.4, thus forcing an unwarranted and improper consolidated arbitration and brandishing his own form of justice.[45]

Second, Special Arbitrator Harris continued to grossly disregard the language of the Sea Breeze/HBSA agreement when he somehow conjured up the notion that HBSA had the "unilateral ability" to effect a consolidated arbitration involving Sea Breeze, HBSA and Roy Anderson.[46] The problem here is that there is nothing remotely close to such "unilateral ability" in the arbitration provision of the Sea Breeze/HBSA contract. Special Arbitrator Harris' reasoning that HBSA had this "unilateral ability" was based on changes that were made in the Sea Breeze/Roy Anderson agreement and *not* the Sea Breeze/HBSA agreement. Apparently, provision 4.6.4 of the Sea Breeze/Roy Anderson agreement was revised between those two parties—without involvement from HBSA[47]—to allow for the consolidated arbitration between Sea Breeze, Roy Anderson and HBSA. Nevertheless, the changes in the Sea Breeze/Roy Anderson agreement did not affect or negate the relevant arbitration provision, 1.3.5.4, of the Sea Breeze/HBSA agreement. Regardless of any apparent changes to 4.6.4, 4.6.4 of the Sea Breeze/Roy Anderson contract is *not* inconsistent with 1.3.5.4 of the Sea Breeze/HBSA contract. The requirements of 1.3.5.4 still needed to be met by a three-way agreement before HBSA would submit to a consolidated arbitration despite any changes made to 4.6.4. As previously

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[45] *Stolt-Nielsen,* 130 S.Ct. at 1767.

[46] R. at 100; R.E. at 002.

[47] R. at 461; R.E. at 005.

mentioned, the requirements of 1.3.5.4 were never satisfied as neither HBSA nor Roy Anderson wanted to submit to a consolidated arbitration.[48]

And yet, to obtain a consolidated arbitration, Special Arbitrator Harris conjured up the phrase "unilateral ability" and applied it to HBSA.[49] This is a clear example of an arbitrator completely straying from the terms of an agreement and giving his own form of justice. Indeed, very similar to the arbitration panel in *Stolt-Nielsen,* Special Arbitrator Harris forced a consolidated arbitration that was not consented to and thus rendered a decision that was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."[50]

This is a foundational principle of Mississippi law as well. A party cannot be forced to submit to arbitration a dispute which he did not agree to submit.[51] For example, in *B.C. Rogers,* the dispute simply did not fall within the arbitration provision where the plain language in an arbitration provision did not apply to disputes arising before the date the provision was enacted.[52] Similarly, here, *nothing in the plain language of the agreement* provided for consolidation absent satisfaction of the terms set forth in 1.3.5.4. These requirements were simply unfulfilled. Therefore, not only did Harris ignore contractual language regarding arbitration, but he went further and effectively acted as "if [he] had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation."[53]

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[48] R. at 82; R.E. at 001.

[49] R. at 100; R.E. at 002.

[50] *Stolt-Nielsen,* 130 S.Ct. at 1775.

[51] *B.C Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483 (Miss. 2007).

[52] *Id.* at 487.

[53] *Stolt-Nielsen,* 130 S.Ct. at 1768-69.

Moreover, *Stolt-Nielsen* further supports HBSA's argument that consolidation is improper. The class certification provision in *Stolt-Nielsen* was silent as to whether numerous parties could be consolidated into a class. And because the provision at issue in *Stolt-Nielsen* was silent as to class certification, the Supreme Court held that the arbitrators overstepped their bounds in forcing a class arbitration where the arbitration provision did not provide for same.[54] The *Stolt-Nielsen* Court held that the arbitrators' decision strayed from interpretation and application of the relevant agreement and refused to compel the parties to submit their dispute to class arbitration.[55] Here, more than just silent, the relevant provision, § 1.3.5.4, expressly prohibits consolidation absent the satisfaction of certain requirements which simply were not satisfied. Therefore, even assuming that *Stolt-Nielsen* does apply, Special Arbitrator Harris decision is nevertheless without merit and due to be overturned.

V. ROY ANDERSON'S ASSERTION THAT HBSA CANNOT MEET THE REQUIREMENTS FOR INJUNCTIVE RELIEF FAILS FOR REASONS ALREADY BRIEFED ABOVE

Roy Anderson's two pronged attack against HBSA's claim for an injunction is insufficient.[56] 1) The present consolidation issue is one of arbitrability and not procedure—therefore HBSA has a substantial likelihood of success on the merits; 2) assuming its applicability, HBSA meets the criteria for vacating an arbitrator's award in *Stolt-Nielsen.*

First, as established above, the issue of whether HBSA agreed to submit its disputes to a arbitration with not only Sea Breeze but also Roy Anderson is a question of arbitrability. Consequently, it is not a "procedural question" to be decided by an arbitrator.

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[54] *Id.* at 1775.

[55] *See id.* at 1775-76.

[56] Roy Anderson Brief at 16.

Second, assuming that Special Arbitrator Harris' ruling to consolidate the arbitrations, although not an award, receives the same deference, then his ruling should nevertheless be overturned since, as stated earlier, his ruling was "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."[57] HBSA never agreed to submit to a consolidated arbitration. At best, the letter by Hebert was only a suggestion. But, assuming *arguendo* that Hebert's letter did constitute consent by Mr. Hebert, this does not change the fact that Mr. Hebert's letter is insufficient because it is not signed by all three parties nor does it reference B141—the Sea Breeze/HBSA agreement—as required in the very specific § 1.3.5.4 of that agreement.

CONCLUSION

The heightened standard of review as urged by Roy Anderson simply does not apply. And even if it did, Special Arbitrator Harris's decision strayed too far from the actual terms of the arbitration agreement for his decision to be upheld. Further, because this is a question of arbitrability, the court presumptively decides whether all parties agreed to submit to an arbitration as consolidated. As discussed in both HBSA's brief and its reply to Sea Breeze, HBSA did not "clearly and unmistakably" agree to submit the question of arbitrability to Special Arbitrator Harris. It protested the submission to special arbitrator Harris and very clearly reserved its rights. Judicial review of Special Arbitrator Harris' decision was *not* forfeited. Thus, the Chancery Court did possess the jurisdiction necessary to review of Special Arbitrator

[57] *Stolt-Nielsen,* 130 S.Ct. at 1775-76.

Harris' decision.[58] Further, the plurality opinion in *Green Tree* which Roy Anderson relies on to argue otherwise is simply a plurality and not binding precedent.[59]

Based on the foregoing, this Honorable Court should reverse the decision of the Chancery Court Judge and reverse the industrial justice of Mr. Harris, the special arbitrator.

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[58] *First Options,* 514 U.S. at 947.

[59] *Stolt-Nielsen,* 130 S.Ct. at 1772 (holding that portion of *Green Tree* stating that arbitrator, and not court, is to interpret certification provision was supported only by a plurality and not a majority).

CERTIFICATE OF SERVICE

I, Chad P. Favre, hereby certify that I have this date forward by United States Mail, postage pre-paid, a true and correct copy of the foregoing Appellate Brief submitted on behalf of Appellant, Harry Baker Smith Architects II, PLLC, to the following counsel of record:

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SO CERTIFIED this the 18th day of January, 2011.

Chad P. Favre

CHAD P. FAVRE

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CERTIFICATE OF SERVICE

I, Chad P. Favre, hereby certify that I have this date forward by United States Mail, postage pre-paid, a true and correct copy of the foregoing Reply Briefs, submitted on behalf of Appellant, Harry Baker Smith Architects II, PLLC, in response to the Brief by Appellee, Sea Breeze I, LLC, and in response to the Brief by Appellee, Roy Anderson Corp., to the Honorable Judge Jim Persons at P.O. Box 457, Gulfport, Mississippi 39502:

SO CERTIFIED this the 21st day of January, 2011.

Chad P. Favre

CHAD P. FAVRE