No. 2D18-1140

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

MAINSTREET CAPITAL HOLDINGS, LLC,
a Florida limited liability company,

Appellant,

v.

DEBARTOLO DEVELOPMENT, LLC, a Delaware limited liability company, EDWARD M. KOBEL, DK MAINSTREET, LLC, a Florida limited liability company, DAVID J. PERLSTEIN, and MAGNO AERE, LLC, a Delaware limited liability company,

Appellees.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit
in and for Hillsborough County, Florida
L.T. No. 13-CA-5383, Hon. Steven Scott Stephens

INITIAL BRIEF OF MAINSTREET CAPITAL HOLDINGS, LLC

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STATEMENT OF THE CASE AND FACTS

Nature of the case

This nonfinal appeal arises from a dispute over the enforceability of an arbitration clause in a business contract. Appellant, Mainstreet Capital Holdings, LLC ("Mainstreet"), sued its former business partners, Appellees, DeBartolo Development, LLC ("DeBartolo"), Edward Kobel, DK Mainstreet, LLC ("DK Mainstreet"), David Perlstein, and Magno Aere, LLC ("Magno Aere") for sabotaging the fundraising and real estate development venture they had jointly undertaken. App. 13-32.[1] Defendants had caused the venture's failure by committing a variety of business torts and breaching their fiduciary duties to DeBartolo-Mainstreet Capital Partners, LLC ("DMCP"), the company the parties had formed to carry out the venture. App. 13-32.

Essential to this appeal is ¶ 13.08 of DMCP's LLC Agreement ("the Contract"). App. 120. Paragraph 13.08 endeavored to prevent any Member of DMCP from "initiat[ing] litigation" without first offering "an opportunity for non-binding arbitration." App. 120. Paragraph 13.08 also established parameters for the dispute resolution process it called "non-binding arbitration." App. 120.

[1] Throughout this brief, Mainstreet collectively refers to (1) DeBartolo, Kobel, and DK Mainstreet as the "DeBartolo Defendants," and (2) David Perlstein and Magno Aere as the "Perlstein Defendants."

After significant motion practice (*see* App. 138-43, 144-49, 335-40, 343-45, 346-51, 352-59) and two hearings addressing ¶ 13.08 (*see* App. 82-87, 138-43, 144-49, 335-40, 343-45, 346-51, 352-59), the trial court ruled ¶ 13.08 was enforceable and, accordingly, compelled non-binding arbitration. App. 341, 399. It further ruled "[t]he party that desires to file a claim for non-binding arbitration is responsible for any costs of initiating such arbitration." App. 399.

This appeal concerns whether ¶ 13.08 was a valid and enforceable written agreement to arbitrate and, if it was, which litigants are responsible for the costs of non-binding arbitration (*i.e.*, the defendants seeking it, or Mainstreet).

Course of the proceedings

Mainstreet sued the DeBartolo Defendants and the Perlstein Defendants in a four-count complaint. App. 13-32. In Counts I (fraud) and II (negligent misrepresentation), Mainstreet asserted claims against only the DeBartolo Defendants. App. 25-26. In Count III (tortious interference with advantageous business relationship), it asserted claims against only Kobel and DeBartolo. App. 29-30. In Count IV (breach of fiduciary duty), it asserted claims against all the defendants. App. 18-20.

None of the defendants answered the complaint. Instead, the DeBartolo Defendants sought multiple extensions of time to answer the complaint, refused to produce Kobel for deposition, and, as a pretext to further delay the litigation, claimed they were waiting for their insurer to defend. *See* App. 10-11, 73-81, 84.

Thereafter, Mainstreet moved to compel (App. 67-73) Kobel's deposition (App. 155-188), and the trial court convened a motion hearing (App. 82-87). The DeBartolo Defendants did not file a written response to Mainstreet's motion. Instead, at the hearing, when it became clear the trial court was going to compel Kobel's deposition, the DeBartolo Defendants argued the action should be submitted to arbitration. App. 84. They informed the trial court they would be filing a motion to dismiss or stay the proceedings based on the arbitration provision. App. 84.

The DeBartolo Defendants then moved to dismiss the action, stay the trial court proceedings, or compel arbitration pursuant to ¶ 13.08. App. 92-101. Mainstreet responded (App. 138-43), the DeBartolo Defendants replied (App. 144-49), and the trial court convened an evidentiary hearing (App. 150, 236-309). The trial court denied the motion to dismiss but compelled arbitration. App. 341.

Before the trial court rendered a written order compelling arbitration (App. 341), Mainstreet moved for reconsideration. App. 335-40, 346-51. The DeBartolo Defendants responded. App. 343-44, 352-58. After an evidentiary hearing (App. 366-67, 374-88), the trial court rendered a written order denying reconsideration, which vacated the previous order compelling arbitration and explained the order

denying reconsideration was to be substituted for the order granting a stay. App. 398-99. This nonfinal appeal followed. App. 401-05.[2]

Disposition in the lower tribunal

A. DeBartolo, Kobel, and Perlstein entice the Marshall Brothers to create and fund a joint venture

DeBartolo was a large real estate developer with a national presence. *See* App. 15, 54-65. Kobel was its manager and chief operating officer ("COO"). App. 14.[3] While DeBartolo had historically specialized in commercial real estate, in 2014, it sought to expand its multifamily residential real estate business in the Southeastern United States. App. 15.

Todd and Craig Marshall (the "Marshall Brothers") are real estate investors who specialize in multifamily properties (*e.g.*, apartment complexes). App. 15. The Marshall Brothers met Kobel and Perlstein, a financier, in the spring of 2014. App. 16. Kobel told them DeBartolo wanted to enter into a partnership to establish a fund to invest in apartment complexes. App. 16. The fund would be similar to those DeBartolo had previously used to invest in commercial real estate. App. 16. DeBartolo wanted to partner with the Marshall Brothers because of their experi-

[2] This Court has jurisdiction. *See* Fla. R. App. P. 9.130(a)(3)(C)(iv) (permitting appeals from nonfinal orders that "determine … the entitlement of a party to arbitration"); *Avatar Properties, Inc.* v. *Greetham*, 27 So. 3d 764, 765 n.1 (Fla. 2d DCA 2010) (permitting immediate appeal from nonfinal order that "determined [a defendant's] contractual right, *i.e.*, entitlement to arbitration").

[3] The flipbook attached as an exhibit to the complaint indicates Kobel was also DeBartolo's president. App. 43.

ence in acquiring developing, selling, and managing multifamily properties. App. 15-16.

To entice the Marshall Brothers, Kobel provided them with written materials purporting to evince DeBartolo's vastly successful past and present commercial real estate ventures. *See* App. 16. He explained that he and DeBartolo would bring their unmatched expertise to the proposed multifamily property venture. App. 16. He further claimed he and DeBartolo had ties to all of the major financial institutions in the Untied States and could provide avenues to investment capital through those institutions and their customers. App. 16. Similarly, Perlstein asserted he had "longstanding connections with wealthy New York investors and had extensive expertise negotiating with financial institutions … throughout the [N]ortheast." App. 16

The Marshall Brothers explained to Kobel and Perlstein the scale of the development projects they had been involved in was much smaller than the one Kobel proposed. App. 16. They further explained they could not raise the requisite capital on their own. App. 16.

Following extensive discussions with Kobel and Perlstein, the Marshall Brothers told them they would pursue a venture of this sort only if Kobel and DeBartolo agreed to actively work to attract the nine-figure investment capital the

venture required. App. 17. Kobel and DeBartolo would also need to supply their reputation, name, experience, and abilities. App. 17. They agreed. App. 17.

Thereafter, Kobel announced that a large institutional investor with whom DeBartolo had worked in the past would invest $40 million. App. 17. Based on this representation and the documents chronicling DeBartolo's track record, the Marshall Brothers formed On Target Partners, LLC to serve as Mainstreet's managing member. App. 18.

In August 2014, DMCP's Certificate of Formation was filed in Delaware. App. 18. The next month, Mainstreet was formed and Mainstreet, DK Mainstreet, and Magno Aere, entered into the Contract and became DMCP's Managers. App. 18, *see also* App. 102, 104, 124, 131.[4] DMCP's main purpose was to carry out the fundraising and multifamily property development venture. *See* App. 18-20, 40-66. To that end, Mainstreet, DK Mainstreet, and Magno Aere each invested $500,000 of startup capital in DMCP. App. 18.

B. The Contract

The Contract defined the signatories, Members, and Managers and contained a venue clause and a non-binding arbitration clause.

[4] Although not mentioned in the complaint, DCMP itself was also a party to the Contract. *See* App. 102. DeBartolo was DK Mainstreet's sole manager (App. 14), and Perlstein was Magno Aere's managing member (App. 15).

1. The signatories, Members, and Managers (¶¶ 3.01 and 5.02)

DMCP, Mainstreet, DK Mainstreet, and Magno Aere were the only signatories to the Contract (*i.e.*, Kobel, DeBartolo, and Perlstein were not signatories to the Contract). App. 102. Paragraphs 3.01 and 5.02 defined Mainstreet, DK Mainstreet, and Magno Aere as "Members" and "Managers" of DMCP. App. 103-04. The Contract did not admit Kobel or DeBartolo as Members. *See* App. 103.

2. The venue clause (¶ 13.07)

The venue clause of ¶ 13.07 provided, "[s]ubject to first satisfying the provisions of" the non-binding arbitration clause of ¶ 13.08, "any litigation … and any Dispute. … arising between the Members or between any Member and the Company shall be resolved by litigation in the state or federal courts lying in Hillsborough County, Florida." App. 120. It further provided that "the laws of the State of Delaware" would "govern all matters relating to the interpretation and effect of this agreement." App. 120.

3. The non-binding arbitration clause (¶ 13.08)

The non-binding arbitration clause of ¶ 13.08 provided that, notwithstanding the venue clause's provisions, "no Member or the Company shall initiate litigation unless an opportunity for non-binding arbitration, as hereafter provided, is first offered to the Person against whom a claim is to be filed (the 'Respondent') and, if the Respondent so elects, the non-binding arbitration is held and concluded." App.

120. In explaining how to invoke non-binding arbitration, ¶ 13.08 stated a petitioner "shall not initiate litigation with respect to the Dispute *until such Dispute has been submitted* to non-binding arbitration and such arbitration proceeding has concluded." App. 120 (emphasis added).

Finally, it also set parameters for the dispute resolution process it called "non-binding arbitration." App. 120. It explained non-binding arbitration "shall be submitted to and determined by arbitration by the American Arbitration Association in Hillsborough County, Florida, in accordance with its rules then in force and effect." App. 120. Upon conclusion, "any award entered in such arbitration proceeding may be adopted and complied with by the parties to such proceeding and the Company." App. 120. Nevertheless, "such award shall not be entitled to be made part of a judgment of a court of competent jurisdiction and shall not be entitled to any court ordered specific performance." App. 120.

C. The DeBartolo and Perlstein Defendants sabotage the fundraising and real estate development venture

Once DMCP was formed, Kobel and DeBartolo gave Mainstreet a flipbook DeBartolo had apparently used in previous fundraising ventures. App. 18. It contained information about DeBartolo's finances, track record, ability, and expertise. App. 18. Kobel and DeBartolo suggested DMCP should use the flipbook to raise investment capital. App. 18. Mainstreet revised it to describe the DCMP venture, and DeBartolo and Kobel approved its contents. App. 18. Kobel and DeBartolo

specifically approved the DeBartolo financial and track-record information (App. 18) that was included in the revised flipbook (App. 40-66).[5]

Abruptly, Kobel casually revealed the institutional investor who had supposedly committed to invest $40 million would not proceed. App. 19. By then, DCMP had exhausted nearly all of its startup capital and paid Kobel $500,000 (out of $1.5 million) for bringing the DeBartolo name and credentials to the company. App. 20.

In the spring of 2015, the Marshall Brothers and Perlstein arranged and attended several meetings with private and public financial institutions in New York. App. 21. Some of these institutions were large international banks, such as UBS and Credit Suisse. App. 21. Most wanted to schedule a follow-up meeting with Kobel before deciding to invest. App. 21. Apart from one meeting with UBS, Kobel did not meet with any financial institutions on DMCP's behalf. App. 21.

Of these institutions, Credit Suisse and UBS expressed the most interest in DMCP. App. 21. They requested particularized financial information about DeBartolo from Kobel, so they could conduct customary due diligence on DeBartolo's track record. App. 21. Notwithstanding Credit Suisse's and UBS's requests, Kobel instructed DeBartolo not to provide most of the information. App. 22. As a result,

[5] Although the flipbook was revised several times during the course of the relationship, the overriding content remained the same and was provided by Kobel and DeBartolo. *See* App. 18.

the banks could not advise their wealthy customers to invest in the venture. App. 22.

Because DMCP could not raise money from the banks without disclosing the requisite financial information, Kobel suggested trying to directly raise investment capital from brokerage firms, wealthy individuals, and other entities. App. 22. Accordingly, Mainstreet reached out to several people who had previously invested in development projects. App. 22. It used the revised flipbook and other documents about the venture to persuade them to invest. App. 22. Through its efforts, Mainstreet raised a total of $800,000 from these investors. App. 22.[6] Additionally, Perlstein raised $300,000. App. 22.

Thereafter, Kobel recommended DMCP contact a Tampa private securities broker who had previously helped Kobel and DeBartolo raise investment capital. App. 23. DeBartolo and Kobel directed Mainstreet to provide the broker with the description of DeBartolo and its financials that they had given DMCP and Mainstreet. App. 23. Using these materials, the broker was able to secure from potential investors $5 million, which it held in escrow. App. 23. This positive momentum shift, however, was short lived. *See* App. 23-32.

When Mainstreet representatives arrived at DeBartolo's office in Tampa to attend a scheduled meeting with Kobel and other DeBartolo employees in March

[6] These investors assigned Mainstreet their claims against the defendants. App. 22, 33-39.

2016, an administrative assistant hastily rushed them out of the building. App. 23. The assistant told the Mainstreet representatives Kobel would meet them at a nearby Panera Bread restaurant. App. 23. When Kobel arrived at Panera Bread, he was out of breath and wearing a sweaty t-shirt. *See* App. 23. There, he announced he intended to disassociate the DeBartolo name from DMCP and gave no explanation other than that the board did not want to proceed with DMCP or the investment fund. App. 23.

Over the next two months, Mainstreet attempted to convince the DeBartolo Defendants that Kobel's removal of the DeBartolo name doomed the venture and rendered the investments in DMCP worthless. App. 24. In response, an attorney for Kobel and DeBartolo wrote "'DeBartolo Development LLC is no longer interested in the [*sic*] types of investments … and will not proceed.'" App. 24. The attorney demanded "'all references to DeBartolo LLC be removed from any memorandum.'" App. 24. The Perlstein Defendants refused to help Mainstreet address the DeBartolo Defendants' withdrawal from the venture. App. 24-25.

Kobel's and DeBartolo's actions caused the Tampa broker to refund the $5 million in escrow to his investors. App. 24. Ultimately, in addition to the $1.3 million investment in DMCP Mainstreet and the other investors lost ($500,000 by Mainstreet, $800,000 by other investors), Mainstreet lost profits reasonably antici-

pated to exceed $20 million. App. 25 Accordingly, Mainstreet sued the DeBartolo and Perlstein Defendants. App. 13-32.

D. To decide whether to compel arbitration, the trial court convenes two hearings

After some procedural wrangling (App. 84-85, 92-101, 138-42), the trial court convened an evidentiary hearing and a reconsideration hearing to decide whether and how to compel arbitration.

1. The September 5, 2017 evidentiary hearing

At the evidentiary hearing, the Contract was admitted into evidence (App. 242), and DeBartolo's and DK Mainstreet's corporate representative (App. 239) testified (App. 244-53). The trial court found his testimony provided context for the Contract and established that the Contract applied to the parties. App. 254.

The DeBartolo Defendants argued they had met the three requirements for an order compelling arbitration: (1) the existence of a valid written agreement to arbitrate; (2) the existence of an arbitrable issue; and (3) the absence of a waiver of the right to arbitrate. App. 254. With regard to the existence of an arbitrable issue, the DeBartolo Defendants asserted that under ¶ 13.08, whether an issue was arbitrable did not turn on the type of claim being brought. App. 254-56. It contended that ¶ 13.08 was instead qualified by the second sentence in ¶ 13.08, which limited the provision's scope to "litigation against another member or the company." App.

256. Accordingly, under ¶ 13.08, whether a claim was arbitrable depended on who was bringing the claim and against whom the claim was being brought. App. 256.

The DeBartolo Defendants then explained the Contract was confusing regarding which jurisdiction's law governed the construction of the arbitration provision. App. 256-57. In that regard, they stated, "in this contract … we have venue here in Florida and we have the agreement governed by Delaware law … and both parties have cited … federal court case law." App. 257. They then contended both Florida and Delaware law favor arbitration. App. 257, 264.

In response, Mainstreet argued "[t]he nonbinding arbitration procedure proposed by the DeBartolo defendants has been" criticized by federal courts throughout the United States. App. 259.

Initially, the trial court expressed its inclination to stay the circuit court proceedings while the parties underwent non-binding arbitration despite the non-binding nature of the arbitration. App. 262. The trial court then identified Mainstreet's access to the courts as the issue it considered to be decisive on ¶ 13.08's enforceability. App. 262-63.

The trial court then asked the DeBartolo Defendants if there were differences between American Arbitration Association ("AAA") non-binding arbitration and that authorized under the Florida Rules of Civil Procedure. App. 267. Although the DeBartolo Defendants could not specifically recall if there were differ-

ences, the trial court stated, "Well, the only difference is the proceedings under the rule would all be public and the proceedings under the arbitration wouldn't be public unless the parties elected trial de novo after the arbitration and wanted to file any part of that." App. 267. It did not mention ¶ 13.08 expressly prohibited any award by the arbitrator from being made part of a judgment and from serving as the basis for any court-ordered specific performance. *See* App. 120.[7]

The trial court explained to Mainstreet that if it were to order non-binding arbitration, it would be doing so because the Contract required it, not because it had the discretionary authority (without regard to any contractual provision) to refer the parties to non-binding arbitration. App. 268-69; *see also* App. 303-04. Mainstreet reasserted that ¶ 13.08 was unenforceable because the dispute resolution process it required did not allow the entry of an enforceable award and therefore was not Federal Arbitration Act ("FAA") arbitration. App. 269-70. It also suggested that the FAA preempts other arbitration laws with respect to the construction of ¶ 13.08. App. 274.

The trial court then questioned Mainstreet about the FAA's applicability and explained the analytical approach it would be taking in deciding whether to enforce ¶ 13.08:

[7] Indeed, the AAA non-binding arbitration rules themselves do not permit such awards to be confirmed as part of a judgment. *See infra* Argument I.B.

THE COURT: Does [the FAA] preempt or is [¶ 13.08] not covered? I don't understand which position you're taking.

MR. BELTRAN: Well, the FAA covers the arbitration. That's what the DeBartolo defendants have asserted. I'll accept that for purposes of—

THE COURT: Well, that would be true only because the contract says so.

It's not true because the federal law that favors arbitration contacts or anything like that. It's not something any federal law preempts, it's not something the triple—the AAA. It's not inherently, right?

It's only subject to that because the contract says so.[8]

They're just asking me to enforce a contractual provision as a prelude to the—that's about whether you can bring suit as a prelude to bringing the full suit.

And, yeah, they probably are … because it's expensive and because it gives them a chance to keep something off the public record.

….

They're asking me to enforce a contractual provision. *And you-all are both putting a lot of legal baggage on what to me is … a fairly simple request to enforce a contract. Not a request to enforce [a binding] arbitration.*

….

It may double the expenses, but it's also the product of an agreement that the parties entered into as far as I can tell.

App. 274-76 (emphasis added).

[8] Paragraph 13.08 does not mention the FAA. *See* App. 120.

In that regard, the trial court explained it would not rely on federal case law holding non-binding arbitration clauses unenforceable under the FAA, because the FAA does not contemplate non-binding arbitration, whereas the Florida Rules of Civil Procedure expressly provide for it. App. 279-280 (noting DeBartolo Defendants were "wrong" to rely on FAA when the Contract was "really what they're relying on"); *see also* App. 287-88 (the inclusion of rules governing non-binding arbitration in the Florida Rules of Civil Procedure indicates "a policy decision by the Supreme Court of Florida that says we should have this tool"). Instead, the trial court explained the decision whether to compel arbitration could be decided by relying on general Florida contract principles. App. 280-82.

The trial court also ruled the choice-of-law provision in the venue clause made no difference because "we have this … very useful proposition in Florida law that says … unless somebody presents us with some clear evidence that another state's law is different, we just apply Florida—assume that Delaware's law is the same as Florida law and apply Florida law." App. 283-84; *see also* App. 292-93.[9] Lastly, the trial court also clarified the Florida and Delaware public policies favoring arbitration applied only to binding arbitration, not non-binding arbitration (App. 285-86) and that it was not treating non-binding arbitration "as arbitration

[9] But recall that of the DeBartolo Defendants, only DK Mainstreet was a party to the Contract. App. 102, 124. DeBartolo only signed the Contract on behalf of DK Mainstreet (as its Manager), and Kobel only signed the contract as DeBartolo's COO. App. 124.

within the" FAA (App. 291, *see* 293-94) or the Revised Florida Arbitration Code ("RFAC") (*see* App. 294).

Evaluating ¶ 13.08 under general contract principles and finding the provision did not violate any public policy (App. 292), the trial court stated it would grant the motion once it decided what form the written order would take (App. 297).

2. The January 5, 2018 reconsideration hearing

Mainstreet sought reconsideration. App. 341, 346-51. It focused on whether Mainstreet or the DeBartolo Defendants had to bear the non-binding arbitration costs. App. 346-51. The order compelling arbitration (App. 341) was silent on the matter, and the parties continued to disagree about it (*see* App. 320-29).

Mainstreet argued if the trial court interpreted the Contract to require Mainstreet to pay the non-binding arbitration costs, then ¶ 13.08 was unenforceable because it was "prohibitively expensive under the circumstances." App. 350-51. It further contended "[n]o known case holds that a party may invoke such a provision and impose the costs thereof on its adversary." App. 351. As such, Mainstreet requested that the trial court "rule that any defendant invoking nonbinding arbitration is obligated to cover the costs of such proceeding in full." App. 351. In response, the DeBartolo Defendants argued that because Mainstreet filed the lawsuit and was "the party seeking affirmative relief in arbitration, it must initiate the arbitration

proceedings, prepare its statement of claim and pay the costs of initiating that arbitration proceeding." App. 353.

At the reconsideration hearing, Mainstreet argued that under ¶ 13.08, the DeBartolo Defendants were the parties electing to submit the dispute to arbitration, and therefore they should have to pay for it. App. 376. Furthermore, Mainstreet contended non-binding arbitration was "a very expensive duplicative proceeding that ha[d] been elected by" the DeBartolo Defendants (A. 377), and it would "materially impair Mainstreet's ability to access the courts" and would not "advance the merits of [the] litigation" (App. 379, 384). Put simply, Mainstreet asserted, "the person who makes the choice should pay for the cost of that choice." App. 377.

In response, the DeBartolo Defendants contended that under Florida case law, "the party who files the lawsuit or wants to pursue the claim" is "obligated to pay for [non-binding arbitration] initially." App. 379. The trial court acknowledged, however, that the Contract's specific language would control over general principles. App. 379. With regard to ¶ 13.08's effect on the payment issue, the DeBartolo Defendants argued that once they had elected to submit the dispute to arbitration, ¶ 13.08 placed the burden on Mainstreet to file their claim with the AAA and to "advance the arbitration fees." App. 380.

The trial court interpreted ¶ 13.08 as if there were an ambiguity concerning which party had to pay. App. 381, 378 ("It clearly doesn't say directly who has to

pay."). But Mainstreet contended that ¶ 13.08 clearly required the DeBartolo defendants to pay the $16,000 initiation fee and the arbitrator's $175-450 hourly fee. App. 381-382.

Focusing on how the expense of non-binding arbitration might affect a party's ability to litigate the case in court after arbitration, the trial court expressed dislike for non-binding arbitration provisions in contracts. App. 384. Nevertheless, despite recognizing Mainstreet's argument "has a lot of appeal" and presented "a very close case," the trial court ruled the Contract did not "unequivocally assign[] the obligation to initiate the arbitration to the respondent" (*i.e.*, the DeBartolo Defendants) and therefore did not require them to "pay for the [non-binding arbitration] filing fees." App. 386.

Alternatively, Mainstreet argued ¶ 13.08 was so ambiguous that the trial court could not construe it and that it should therefore be severed from the rest of the Contract pursuant to the Contract's severability provision. App. 386. Again, the trial court disagreed. App. 386-87.

Ultimately, the trial court concluded ¶ 13.08 was an enforceable non-binding arbitration provision. App. 387. It further concluded ¶ 13.08 "doesn't clearly say that the respondent, which in this case would be the defendant, has to pay, so it would fall back on the default rules that say the petitioner has to pay." App. 387.

The trial court reduced its rulings at the reconsideration hearing to a written order denying reconsideration. App. 398-99. The order stated the trial court was treating the DeBartolo Defendants' motion to dismiss or stay the proceedings "as a request for an order compelling non-binding arbitration and grant[ing] that relief." App. 399. The order also stayed the action as to Kobel, DeBartolo, and DK Mainstreet pending an arbitration determination "by the American Arbitration Association in Hillsborough County, in accordance with its rules." App. 399. Additionally, the order explained "[t]he party that desires to file a claim for non-binding arbitration is responsible for any costs of initiating such arbitration." App. 399. Finally, the order denying reconsideration vacated and replaced the previous order compelling arbitration. App. 399.

SUMMARY OF ARGUMENT

1. The trial court erred when it compelled non-binding arbitration under ¶ 13.08. Florida trial courts derive their authority to compel arbitration exclusively from the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, or the Revised Florida Arbitration Code ("RFAC"), §§ 682.01-.25, *Fla. Stat.* As such, before compelling arbitration, a trial court must first determine an agreement qualifies as an agreement to arbitrate under either the FAA or the RFAC. The trial court correctly ruled ¶ 13.08 was not an agreement to which the FAA applied and correctly recognized it also was not an arbitration agreement under the RFAC. Accordingly, the

trial court had no procedural authority to enforce ¶ 13.08 by compelling non-binding arbitration, and the order should be reversed in its entirety.

2. Even if the trial court had procedural authority to compel non-binding arbitration, the trial court erred when it ruled Mainstreet was responsible for paying all arbitration costs. To the contrary, either the DeBartolo Defendants should bear all non-binding arbitration costs, or the parties should split them. Under ¶ 13.08, the DeBartolo Defendants were the parties who could elect to submit the dispute to non-binding arbitration. Accordingly, interpreting ¶ 13.08 to require Mainstreet to pay the costs of initiating non-binding arbitration was unjust and inequitable because Mainstreet did not elect to submit the dispute to non-binding arbitration. Alternatively, because ¶ 13.08 did not address which party had to pay the non-binding arbitration costs, the trial court should have applied the default AAA non-binding arbitration rules and required the parties to equally split the filing fee and the arbitrator's compensation.

ARGUMENT

I. Issue 1: Did the trial court err when it enforced ¶ 13.08 by compelling non-binding arbitration that was subject to the American Arbitration Association's non-binding arbitration rules?

The trial court erred when it compelled arbitration even though ¶ 13.08 was not an enforceable arbitration agreement under the FAA or the RFAC.

Standard Of Review

Orders compelling arbitration are reviewed de novo. *Dea* v. *PH Fort Myers, LLC*, 208 So. 3d 1204, 1206 (Fla. 2d DCA 2017); *accord Utd. Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Workers Int'l Union Local 200* v. *Wise Alloys, LLC*, 807 F.3d 1258, 1266 (11th Cir. 2015).[10]

Merits

Under the FAA and the RFAC, the only type of agreement Florida courts may enforce by an order compelling arbitration is an agreement to arbitrate. *See infra* Argument I.A. As such, a trial court must determine "'whether a valid written agreement to arbitrate exists'" before "'ruling on a motion to compel arbitration of a given dispute.'" *Shotts* v. *OP Winter Haven*, 86 So. 3d 456, 464 (Fla. 2011) (quoting *Seifert* v. *U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)); *accord Sherwood* v. *Slazinski*, 162 So. 3d 229, 231 (Fla. 2d DCA 2015). Whether an agreement was an agreement to arbitrate turns on whether the dispute resolution process the parties agreed to qualifies as arbitration under the FAA or the RFAC. *See Allstate Ins. Co.* v. *Suarez*, 833 So. 2d 762, 765-66 (Fla. 2002) (appraisal provision was not "an agreement to arbitrate," which precluded application of the

[10] Mainstreet was unable to find any authority setting forth the standard under which this Court reviews an order compelling "non-binding" arbitration. That appears to be because § 682.03, *Fla. Stat.*, does not confer upon Florida trial courts the authority to enforce non-binding arbitration agreements by order compelling arbitration. *See infra* Argument I.A.1.

Florida Arbitration Code); *Advanced Bodycare Solutions, LLC* v. *Thione Int'l*, *Inc.*, 524 F.3d 1235, 1238 (11th Cir. 2008) (if a given dispute resolution procedure "is not FAA 'arbitration,'" it "is not enforceable under the FAA").

Accordingly, the trial court erred when it ruled its FAA analysis was inapplicable and that it could enforce ¶ 13.08 by compelling arbitration simply because Florida law otherwise permits non-binding arbitration. *See* App. 279-82. Nevertheless, the trial court correctly determined the dispute resolution procedure ¶ 13.08 required (*i.e.*, AAA non-binding arbitration) was not "arbitration" within the meaning of the FAA (*see* App. 279-82) or the RFAC (*see* App. 293-94). The corollary of this determination is that ¶ 13.08 was not an arbitration agreement under the FAA or the RFAC. Hence, the trial court committed procedural error when it enforced ¶ 13.08 by order compelling non-binding arbitration.

A. The trial court could not compel non-binding arbitration because the dispute resolution procedure ¶ 13.08 required did not qualify as arbitration under the FAA or the RFAC

The trial court had no authority to enforce ¶ 13.08 by order compelling arbitration unless it was an arbitration agreement within the scope of the FAA or the RFAC.[11] Because the Contract's non-binding arbitration clause (which required AAA non-binding arbitration) was not such an agreement, the trial court acted beyond its procedural authority when it compelled arbitration.

[11] The trial court did not state the authority (statutory or common law) under which it was compelling non-binding arbitration. *See* App. 398-99.

At the hearing on the DeBartolo Defendants' motion to dismiss or stay, the trial court ruled the FAA and the "whole body of federal law" construing it applied only to agreements to submit a dispute to binding arbitration. App. 279-80. It made the same observation with regard to authorities construing the RFAC. App. 293-94. And because ¶ 13.08 did not require binding arbitration, it ruled, "I don't think I'm bound by that body of law." App. 280. Rather, the trial court explained it could resolve the issue whether to compel arbitration by assessing ¶ 13.08's validity under general Florida contract principles. App. 279-82. It reasoned that because the Florida Statutes and Rules of Civil Procedure expressly provide for non-binding arbitration, and ¶ 13.08 purported to require non-binding arbitration, it could enforce ¶ 13.08 by compelling arbitration. App. 279-82, 287-88; *see* § 44.103, *Fla. Stat.* (2017) ("Court-ordered, nonbinding arbitration"); Fla. R. Civ. P. 1.820 ("Hearing Procedures for Non-Binding Arbitration").

This rationale was misguided, however, because it presumed a Florida trial court's authority to compel arbitration is not limited to arbitration agreements that are covered by the FAA or the RFAC. That is not the case. *See infra* Argument I.A.1. Florida trial courts derive their authority to compel arbitration exclusively from the FAA and the RFAC. *See id.* Accordingly, for a Florida trial court to com-

pel arbitration, there must be a valid written agreement that requires a dispute resolution procedure that qualifies as arbitration under the FAA or the RFAC. *See id.*[12]

To be clear, the dispositive inquiry involved in determining whether ¶ 13.08 qualified as an arbitration agreement is not whether non-binding arbitration is categorically enforceable or unenforceable under the FAA or the RFAC. Rather, to determine if these arbitration laws, including the provisions that authorize trial courts to compel arbitration, applied, this Court must determine whether the particular dispute resolution procedure ¶ 13.08 required (*i.e.*, AAA non-binding arbitration) was arbitration within the meaning of the FAA or the RFAC. As the trial court correctly observed, AAA non-binding arbitration is not FAA arbitration. App. 279-82. Nor is it RFAC arbitration. *See infra* Argument I.C. Accordingly, ¶ 13.08 was not a written agreement to arbitrate and was therefore not enforceable by order compelling arbitration.

1. A Florida trial court can compel arbitration pursuant to a contract provision only if that provision requires a dispute resolution procedure that qualifies as "arbitration"

Florida trial courts cannot enforce an arbitration clause by compelling arbitration unless that contract provision requires "arbitration" within the meaning of the FAA or RFAC.

[12] As a related matter, AAA non-binding arbitration does not qualify as non-binding arbitration under § 44.103, *Fla. Stat.* The applicability of § 44.103, *Fla. Stat.* is discussed in Argument I.D.

Section 4 of the FAA grants federal district courts the authority to compel arbitration if a party refuses "to arbitrate under a written agreement for arbitration." 9 U.S.C. § 4. It, however, "speaks only of a petition to 'any United States district court.'" *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 26 n.35 (1983) (quoting 9 U.S.C. § 4); *see also Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967) ("Section 4 provides a federal remedy."). Nevertheless, "*Prima Paint Corp.* requires a judicial order compelling arbitration when" litigants have entered a valid arbitration agreement that is "governed by the [FAA]." *Basulto* v. *Hialeah Automotive*, 141 So. 3d 1145, 1154 (Fla. 2014); *see also Shotts*, 86 So. 3d at 463 (the FAA "'applies in state as well as federal courts'" (citation omitted)).

The RFAC, in turn, empowers Florida courts to carry out this directive by expressly granting them the authority to compel arbitration. § 682.03, *Fla. Stat.*; *see also Basulto*, 141 So. 3d at 1154 n.2 (both the Florida Arbitration Code and the RFAC have provisions comparable to § 4).[13] Under the RFAC, upon a party's motion, a trial court must compel arbitration if it determines an enforceable "agreement to arbitrate" exists. § 682.03(1)-(2), *Fla. Stat.* If a trial "court finds that there

[13] The Florida Arbitration Code was "revised substantially in 2013" and is now referred to as the Revised Florida Arbitration Code. *CT Miami, LLC* v. *Samsung Elec. Latinoamerica Miami, Inc.*, 201 So. 3d 85, 91 (Fla. 3d DCA 2015). The RFAC, not its predecessor, applies to ¶ 13.08. *See* § 682.013, *Fla. Stat.* (the RFAC "governs an agreement to arbitrate made on or after July 1, 2013").

is no enforceable agreement to arbitrate," however, it may not compel arbitration. § 682.03(3), *Fla. Stat.* These requirements are consistent with § 4 of the FAA. *See e.g.*, *O'Keefe Architects, Inc.* v. *CED Constr. Partners, Ltd.*, 944 So. 2d 181, 186 n.6 (Fla. 2006) ("[b]oth the [Florida Arbitration Code] and the FAA require the court to compel arbitration if it finds that a valid arbitration agreement exists").

As such, a Florida trial court's procedural authority to compel arbitration is tethered to an "agreement to arbitrate." § 682.03, *Fla. Stat.* So if an agreement is not an agreement to arbitrate, an order compelling arbitration is not available to a Florida court as a means of enforcing the agreement. *See Avatar Properties, Inc.* v. *Greetham*, 27 So. 3d 764, 767 (Fla. 2d DCA 2010) (Altenbernd, J., concurring) (a case without an agreement for binding arbitration "is not a case where the trial court can enter an order compelling arbitration pursuant to section 682.03"). This is also true with regard to a Florida trial court's authority to compel arbitration under the FAA. *See Advanced Bodycare Solutions, LLC* v. *Thione Int'l*, *Inc.*, 524 F.3d 1235, 1238 (11th Cir. 2008) (concluding if a given dispute resolution procedure "is not FAA 'arbitration,'" it "is not enforceable under the FAA"); *cf. Basulto*, 141 So. 3d at 1155 ("trial court's judgment that no arbitration agreements, governed by the FAA, existed [was] dispositive").

Accordingly, whether the trial court had the authority to compel arbitration depended on whether ¶ 13.08 was an agreement to arbitrate. This required the trial court to construe both the RFAC and the FAA. *See infra* Argument I.A.2.

2. The question whether ¶ 13.08 called for "arbitration" requires interpretation of both the FAA and the RFAC

"In Florida, an arbitration clause in a contract involving interstate commerce is subject to the Florida Arbitration Code … to the extent [it does not] conflict with the FAA." *Shotts*, 86 So. 3d at 463-64; *accord Visiting Nurse Ass'n of Fla., Inc.* v. *Jupiter Med. Ctr., Inc.*, 154 So. 3d 1115, 1124 (Fla. 2014); *Kendall Imports, LLC* v. *Diaz*, 215 So. 3d 95, 106 (Fla. 3d DCA 2017); *CT Miami, LLC* v. *Samsung Elecs. Latinoamerica Miami, Inc.*, 201 So. 3d 85, 90 n.3 (Fla. 3d DCA 2015); *see also* 9 U.S.C. §§ 1-2 (explaining the FAA applies to "written provision[s] in … contract[s] evidencing a transaction involving commerce" and defining "'commerce'" as "interstate commerce").

In their motion to dismiss or stay, the DeBartolo Defendants asserted the Contract involved interstate commerce and was, "therefore, governed by the FAA." App. 96. Mainstreet agrees that the Contract involved interstate commerce. Therefore, an explanation of how the FAA and RFAC interact is necessary.

"The FAA was intended to place arbitration agreements on the same footing as other contracts." *Shotts*, 86 So. 3d at 462. Its "primary substantive provision is contained in section 2." *Id.* Under Section 2, arbitration agreements in contracts in-

volving interstate commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. "In enacting section 2, 'Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Shotts*, 86 So. 3d at 462 (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984)).

Importantly, "[t]he FAA 'create[d] a body of federal substantive law,' which was 'applicable in federal and state courts.'" *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445 (2006) (citation omitted). Furthermore, in *Doctor's Assocs. Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996), the U.S. Supreme Court "articulated [another] fundamental tenant of the FAA: 'Courts may not … invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.'" *Shotts*, 86 So. 3d at 463 (citation omitted).

With respect to whether ¶ 13.08 was an agreement that was enforceable by order compelling arbitration, these principles shed light on the rule announced in *Shotts* (*i.e.*, the RFAC applies to the extent it does not conflict with the FAA). First, if ¶ 13.08 qualified as an arbitration agreement under the FAA (and was not otherwise unenforceable), the trial court was required to compel arbitration pursuant to § 4 of the FAA. *See supra* Argument I.A.1. The trial court's obligation to do

so could not be restricted by anything in the RFAC. *See Shotts*, 86 So. 3d at 465 (state laws applicable only to arbitration provisions cannot bar enforcement if the contracts in which the provisions appear are governed by the FAA).

If, however, ¶ 13.08 did not qualify as an arbitration agreement under the FAA, then the FAA, including § 4 (authorizing enforcement by order compelling arbitration), did not apply, and the trial court had no authority under the FAA to compel arbitration. Yet if ¶ 13.08 was an agreement to arbitrate within the meaning of the RFAC (but not the FAA), the trial court could have properly compelled arbitration under § 682.03, *Fla. Stat.*

If ¶ 13.08 was not an arbitration agreement under the FAA or the RFAC, however, the trial court had no authority to compel arbitration. Put simply, the trial court could have enforced ¶ 13.08 by order compelling arbitration only if ¶ 13.08 qualified as an arbitration agreement under the FAA or the RFAC. Because ¶ 13.08 was not an arbitration agreement within the meaning of either statute, *see infra* Argument I.B-C, the trial court could not have properly enforced ¶ 13.08 by order compelling arbitration, *see supra* Argument I.A.1.

B. Under the test established in *Advanced Bodycare Solutions, LLC* v. *Thione Int'l Inc.*, ¶ 13.08 did not qualify as an arbitration agreement under the FAA

Paragraph 13.08 did not qualify as an arbitration agreement under the FAA under the test established in *Advanced Bodycare Solutions, LLC* v. *Thione Int'l*

Inc., 524 F.3d 1235, 1238 (11th Cir. 2008). Under that test, the dispute resolution procedure ¶ 13.08 required (*i.e.*, AAA non-binding arbitration) could not qualify as FAA arbitration because it would not produce a confirmable award. Even though this Court is not bound by *Advanced Bodycare Solutions*, it should adopt its test.[14]

"[T]he FAA does not define its key term, 'arbitration,' and courts have had a difficult time defining just what types of procedures are enforceable under the statute." *Id.* Mainstreet has not found any Florida case law expressly addressing the question whether the particular dispute resolution procedure a contract provision requires qualifies as arbitration *under the FAA*. But *Newcastle Shipyards, LLC* v. *C & N Yacht Refinishing, Inc.*, 166 So. 3d 939 (Fla. 4th DCA 2015), comes close. Although *Newcastle Shipyards, LLC* did not expressly state it was deciding whether the dispute resolution provision it addressed called for *FAA* arbitration, it did apply *Advanced Bodycare Solutions* in determining the provision actually required "arbitration" despite dubbing the procedure "Mediation." 166 So. 3d at 939-40 (the dispute resolution "provisions were … intended to operate as an irrevocable substitution for litigation").

[14] "Florida courts are bound only by the United States Supreme Court in interpreting acts of Congress." *Donald & Co. Secs.* v. *Mid-Fla. Cmty. Servs., Inc.*, 620 So. 2d 192, 193 (Fla. 2d DCA 1993). When the Supreme Court has not ruled on a specific issue, however, Florida courts are free to apply Florida law. *Id.* at 194.

In *Advanced Bodycare Solutions, LLC*, the Eleventh Circuit resolved the issue whether the FAA "permits enforcement of a contract clause requiring an aggrieved party, prior to filing a lawsuit, to institute mediation or non-binding arbitration." 524 F.3d at 1236. Its analysis turned on whether the agreement was "'an agreement to settle by arbitration a controversy,' thereby making the dispute 'referable to arbitration'" under the FAA. *Id.* at 1238 (quoting 9 U.S.C. §§ 2, 3). It concluded if an agreement requires a dispute resolution procedure (such as non-binding arbitration or mediation) that "is not FAA 'arbitration,' [the] agreement is not enforceable under the FAA." *Id.*

Before enunciating its own test, *Advanced Bodycare Solutions* discussed the analytical frameworks other federal courts had used to determine whether a given dispute resolution procedure qualified as FAA arbitration. *Id.* at 1239. It observed "[o]ne widely-followed opinion asks whether the parties have agreed to submit a dispute to a third party for a decision." *Id.* (citing *AMF Inc.* v. *Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985)). And "[o]ther authority considers how closely the procedure chosen resembles 'classic arbitration' and whether enforcing it serves the intuited purposes of Congress." *Id.* (citing *Fit Tech, Inc.* v. *Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6-7 (1st Cir. 2004), and *Salt Lake Tribune Publ'g Co., LLC* v. *Mgmt. Planning Inc.*, 390 F.3d 684, 689-90 (10th Cir. 2004)). *Advanced Bodycare Solutions* posited "[t]hese differing verbal formulations do not

constitute a real disagreement, because submitting a dispute to a third party for a binding decision is quintessential 'classic arbitration.'" *Id.* (citation omitted).[15]

Instead, the Eleventh Circuit gleaned several characteristics it considered "'common incidents' of 'classic arbitration'":

> (i) an independent adjudicator, (ii) who applies substantive legal standards (*i.e.*, the parties' agreement and background contract law), (iii) considers evidence and argument (however formally or informally) from each party, and (iv) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief.

Id. (citation omitted). Yet the existence of these factors is not "outcome determinative," and the FAA affords parties "great flexibility" to select or craft their own dispute resolution procedures. *Id.*

Nevertheless, *Advanced Bodycare Solutions* acknowledged, "while there are few clear rules in delineating the bounds of FAA arbitration … much of arbitration law is predicated on the existence of an award." *Id.* at 1239. Based on that observation, it established a "bright line rule" for determining whether a particular dispute resolution procedure qualifies as FAA arbitration: "If a dispute resolution proce-

[15] Notably, *Fit Tech* stated "other circuits (defensibly, in our view) have declined to treat an agreement for non-binding arbitration as 'arbitration' within the meaning of the Act." 374 F.3d at 7. It then held the agreement at issue was one for "arbitration" because the remedy was "'final'" and required "an independent adjudicator, substantive standards … and an opportunity for each side to present its case." *Id.* (citation omitted). *Salt Lake Tribune Publ'g Co., LLC* likewise focused on whether the third-party neutral's decision would "settle the dispute" and held the "appraisal did not constitute an arbitration." 390 F.3d at 690.

dure does not produce some type of award that can be meaningfully confirmed, modified, or vacated by a court upon proper motion, it is not arbitration within the scope of the FAA." *Id.* at 1239.

Advanced Bodycare Solutions, LLC elaborated on its rule:

> The inverse is not true, however. The presence of an award does not by itself make a procedure "arbitration" if the procedures that produce the award bear no resemblance to classic arbitration. The parties could not contract for a binding coin flip, with the winner to receive an award of his choice, and expect the agreement to be enforced under the FAA.

Id. at n.3.

It justified this bright line rule by reasoning the FAA's purpose is to "'relieve congestion in the courts and to provide parties with an alternative method of dispute resolution that is speedier and less costly than litigation.'" *Id.* at 1239-40 (citation omitted). The Eleventh Circuit explained the FAA's laudatory goals "'will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest.'" *Id.* at 1240.

With regard to the rule's application, *Advanced Bodycare Solutions* stated "labels do not control." *Id.* at 1240 n.4. Rather, "if an agreement specifies in detail a dispute resolution procedure which it calls 'mediation' (or anything else) but

which is, in substance 'FAA' arbitration, substance controls over title." *Id.*[16] As such, under *Advanced Bodycare Solutions*'s test, this Court must examine whether the non-binding arbitration under the AAA's rules was FAA arbitration.

In that regard, both the express terms of ¶ 13.08 and the AAA's non-binding arbitration rules completely foreclose the possibility of an award that can be confirmed or vacated by a court. *See* App. 120 ("any award entered … may be adopted and complied with by the parties … but such award shall not be entitled to be made part of any judgment of a court … and shall not be entitled to any court ordered specific performance"); AAA Non-Binding Arbitration Rules for Consumer Disputes and Business Disputes, 1(b) ("Absent mutual agreement of the parties, any award rendered pursuant to these Rules shall not be entered as a judgment in any court.").[17] Therefore, under *Advanced Bodycare Solutions*, ¶ 13.08 was not an agreement to arbitrate and was unenforceable (by order compelling arbitration) under the FAA.

Moreover, the non-binding arbitration ¶ 13.08 required would certainly not have acted as a "speedier and less costly" alternative to litigation, nor would it have been an alternative to litigation at all. *Advanced Bodycare Solutions, LLC*,

[16] *Advanced Bodycare Solutions* ultimately held mediation was not FAA arbitration but "reserve[d] for another day whether *non-binding* arbitration is within the" FAA's scope. 524 F.3d at 1240-41.

[17] The AAA Non-Binding Arbitration Rule 1(b) can be found at https://www.adr.org/sites/default/files/Non-Binding%20Arbitration%20Rules%20for%20Consumer%20Disputes%20and%20Business%20Disputes.pdf.

524 F.3d at 1240. Indeed, the trial court even called non-binding arbitration needlessly "expensive" (App. 262) and "a silly appendage" (App. 384), and it ruled the dispute resolution procedure ¶ 13.08 required was not FAA arbitration (App. 279-80). This conclusion is consistent with how "Black's Law Dictionary defines arbitration as 'a method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding.—Also termed (redundantly) binding arbitration.'" *Evanston Ins. Co.* v. *Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012) (citation omitted).[18]

Accordingly, this Court should not treat the dispute resolution procedure ¶ 13.08 required as FAA arbitration and should hold that ¶ 13.08 was thus unenforceable under the FAA.

[18] Indeed, many federal courts have also distinguished between dispute resolution procedures that result in a confirmable award and those that do not in deciding whether a contract provision requires FAA arbitration. *See, e.g.*, *Evanston Ins. Co.*, 683 F.3d at 693 (appraisal did not constitute FAA arbitration); *Harrison* v. *Nissan Motor Corp.*, 111 F.3d 343, 350-52 (3d Cir. 1997) (refusing to enforce dispute resolution clause under the FAA because it was likely to waste time and introduce additional impediments to the adjudication of claims, and dismissing the appeal for lack of appellate jurisdiction); *Bates* v. *Smuggler's Enters., Inc.*, 2010 WL 3293347, at *5 (M.D. Fla. August 19, 2010) (citing *Advanced Bodycare Solutions, LLC* and holding presuit non-binding mediation was not FAA arbitration); *Seed Holdings, Inc.* v. *Jiffy Int'l AS*, 5 F. Supp. 3d 565, 577 n.5 (S.D.N.Y 2014) ("The Second Circuit standard puts heavy emphasis on the binding nature of the third party's resolution while deemphasizing the relevance of the procedures used.").

C. Paragraph 13.08 was not a written agreement to arbitrate within the RFAC's scope

Under a plain reading of the relevant RFAC provisions and the sparse Florida authorities that have construed some type of non-binding dispute resolution procedure under the RFAC, ¶ 13.08 was not an agreement to which the RFAC applied.

The statutory mechanism by which Florida trial courts may compel arbitration is § 682.03, *Fla. Stat.* That statute is procedural in nature. *See Tandem Health Care of St. Petersburg, Inc.* v. *Whitney*, 897 So. 2d 531, 532 (Fla. 2d DCA 2005) (observing "[s]ection 682.03(1) … furnishes a guide to the procedure that the trial court must follow in adjudicating" whether an agreement to arbitrate exists).[19]

As such, the Contract's venue provision, which stated Delaware law governed "all matters relating to the effect and interpretation of" the Contract (App. 120), was inapplicable. *See Am. Family Mut. Ins. Co.* v. *Alvis*, 72 So. 3d 314, 317 (Fla. 2d DCA 2011) ("'when confronted by a choice of law problem, a court will apply foreign law when it deals with the substance of a case and will apply the forum's law to matters of procedure'" (citation omitted)). Rather, Florida law controls the question whether ¶ 13.08 was within the RFAC's scope. *See Allstate Ins. Co.* v. *Suarez*, 833 So. 2d 762, 756-66 (Fla. 2002) (applying Florida law in analyz-

[19] *See Southeast Floating Docks, Inc.* v. *Auto-Owners Ins. Co.*, 82 So. 3d 73, 78 (Fla. 2012) ("*practice and procedure* 'encompass the *course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights* or obtains redress for their invasion'" (citation omitted)).

ing whether the nature of the proceedings the parties agreed to excluded or was inconsistent with the Florida Arbitration Code).

Generally, the RFAC allows parties to an arbitration agreement to "waive" or "vary the effect of" its requirements. § 682.014(1), *Fla. Stat.* It, however, places several limitations on this general allowance. *See* § 682.014(2)-(3), *Fla. Stat.* Because the AAA non-binding arbitration rules and ¶ 13.08's terms prohibit a court from confirming an award by entering a judgment or by ordering specific performance, *see supra* Argument I.B, they effectively vary several RFAC requirements that may not be waived or modified. Accordingly, ¶ 13.08 was not an agreement to arbitrate and the trial court could thus not compel arbitration as a means of enforcing ¶ 13.08. *See supra* Argument A.1.

For example, under § 682.014(2)(a)5, *Fla. Stat.*, a party to an arbitration agreement may not, before a controversy arises, waive or vary the trial court's exclusive jurisdiction "to enter judgment on an award." § 682.014(2)(a)5, *Fla. Stat.* (cross-referencing § 682.181, *Fla. Stat*.). Similarly, § 682.014(3)(f), *Fla. Stat.*, prohibits the parties to an arbitration agreement from waiving or varying "[t]he right to [judicial] confirmation of an award as provided under s. 682.12," and subsection (3)(i) prevents them from waiving or varying "[t]he validity and enforceability of a judgment or decree based on an award under 682.15(1) or (2)."

§ 682.014(3)(f), (i), *Fla. Stat.* Paragraph 13.08's bar on the entry of judgment as a means of confirming an award flies in the face of these RFAC requirements.

Moreover, § 682.014(3)(d), *Fla. Stat.,* prohibits parties to an arbitration agreement from waiving or varying at any time "[a] party's right to seek judicial enforcement of an arbitration preaward ruling under s. 682.081," which authorizes injunctive or equitable relief. § 682.014(3)(d), *Fla. Stat*; *see also* § 682.081, *Fla. Stat.* Paragraph 13.08 violates this RFAC requirement because it purports to strip the trial court of the ability to order specific performance in connection with an arbitration award.

Furthermore, in *Suarez*, the Florida Supreme Court disapproved the trial court's "analysis that 'the appraisal provision'" in an insurance contract "'neither exclude[d] application of the Florida Arbitration Code, nor set[] forth procedures inconsistent with the Arbitration Code.'" 833 So. 2d at 765 (citation omitted). It concluded the Florida Arbitration Code did not apply to appraisal proceedings because they are "wholly different" from the "proceedings contemplated by an agreement to arbitrate." *Id.* Here, the proceedings ¶ 13.08 required are wholly different from those contemplated by the RFAC. Therefore, the RFAC, including § 682.03 (authorizing courts to compel arbitration), did not apply to ¶ 13.08.

Additionally, in *Avatar Properties, Inc.* v. *Greetham*, Judge Altenbernd's concurrence explained "[t]he provisions in the [Florida] arbitration code … seem

designed to apply to binding arbitration." 27 So. 3d 764, 767 (Fla. 2d DCA 2010). Because the contract in *Avatar Properties* called for non-binding arbitration, he reasoned, "[t]his is not a case where a trial court can enter an order compelling arbitration pursuant to § 682.03." *Id.* Instead, he posited, "contractual provisions for nonbinding arbitration are similar to the nonbinding arbitration that the court itself can order pursuant to Florida Rule of Civil Procedure 1.820 and [§ 44.103, *Fla. Stat.*]."[20]

In sum, because the dispute resolution procedure ¶ 13.08 and the AAA non-binding arbitration rules require was not arbitration within the meaning of the FAA or the RFAC, ¶ 13.08 was not an agreement to arbitrate. *See supra* Argument I.A-C. Therefore, the trial court did not have the authority under the FAA or the RFAC to compel arbitration. *See supra* Argument I.A.

[20] Without discussing the non-binding nature of the arbitration required by the provision, the *Avatar Properties* majority opinion held "[t]he trial court erred in concluding that there was no agreement to arbitrate" and reversed the order denying the motion to compel arbitration. 27 So. 3d at 767. But the issue whether the Florida Arbitration Code grants trial courts the authority to enforce non-binding arbitration agreements by compelling arbitration was not presented to the appellate court or addressed in the majority opinion. *See id.* (Altenbernd, J., concurring) ("[n]othing in this special opinion is derived from the arguments of the parties"); *cf. Byrd* v. *United States*, 2018 WL 2186175, at *6 (U.S. May 14, 2018) (an appellate court is "'a court of review, not of first view'" (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). As such, *Avatar Properties* does not foreclose the issue raised in Argument I.A.

D. The trial court did not and could not have *sua sponte* referred the case to non-binding arbitration pursuant to § 44.103, *Fla. Stat.*, or the Florida Rules of Civil Procedure that govern non-binding arbitration

The trial court did not and could not have *sua sponte* referred the case to non-binding arbitration pursuant to § 44.103, *Fla. Stat.*, or the Florida Rules of Civil Procedure that govern non-binding arbitration.

"[P]ursuant to the rules adopted by the [Florida] Supreme Court," a Florida trial court "may refer any contested civil action … to nonbinding arbitration." § 44.103(2), *Fla. Stat.* At the hearing on the DeBartolo Defendants' motion to dismiss or stay the proceedings, however, the trial court stated that if it were to order non-binding arbitration, it would do so pursuant to the Contract, not via its discretionary authority to refer the case to non-binding arbitration. *See* App. 268-69, 303-04.

In any event, the trial court's order compelling non-binding arbitration (App. 398-99) cannot be construed as an order referring the parties to non-binding arbitration under § 44.103, *Fla. Stat.*, for two reasons. First, the non-binding arbitration required by ¶ 13.08 runs afoul of § 44.103, *Fla. Stat.* Second, the trial court did not and could not have made the findings required by Florida Rule of Civil Procedure 1.800.

"An arbitration decision shall be final if a request for trial de novo is not filed within the" required timeframe. § 44.103(5), *Fla. Stat.* "If no request for trial

de novo is made within the time provided … the presiding judge in the case … shall enter such orders and judgments as are required to carry out the terms of the decision." *Id.* But unlike § 44.103, *Fla. Stat.*, the non-binding arbitration procedure ¶ 13.08 required does not allow a trial court to enter judgment on the arbitrator's award under any circumstances. *See supra* Argument I.C. Thus, for the parties to obtain an enforceable judgment, they would necessarily have to endure the effort and expense of both AAA non-binding arbitration and litigation in circuit court. As such, the non-binding arbitration ¶ 13.08 required was not the type of statutory non-binding arbitration to which the trial court could have referred the parties.

Additionally, Rule 1.800 allows a trial court to order a civil action to non-binding arbitration only "if the judge determines the action to be of such a nature that arbitration could be of benefit to the litigants or the court."[21] The non-binding arbitration in ¶ 13.08 would have increased litigation expenses by an order of magnitude (*see* App. 381-83) and would not have advanced the merits of the litigation (*see* App. 379, 384). Moreover, arbitration in accordance with ¶ 13.08's mandates would not substantially reduce the judicial labor to be performed, because the AAA non-binding arbitration cannot produce a confirmable award. Instead, to ob-

[21] Although Rule 1.800 speaks in terms of "arbitration," not non-binding arbitration, it applies to both types of arbitration. *See Bacon Family Partners, L.P.* v. *Apollo Condo. Ass'n, Inc.*, 852 So. 2d 882, 886 (Fla. 2d DCA 2003) ("the trial court ordered the parties … to nonbinding arbitration pursuant to [§ 44.103, *Fla. Stat.*] and Florida Rule of Civil Procedure 1.800").

tain an enforceable judgment, the parties would have no choice but to litigate the case in court. Therefore, had the trial court undertaken the analysis required by Rule 1.800, it could not have concluded non-binding arbitration would benefit it or the litigants. Indeed, recall the trial court had even called the AAA non-binding arbitration "expensive" (App. 262) and "a silly appendage" (App. 384).

II. Issue 2: Did the trial court err when it required Mainstreet to pay all costs of non-binding arbitration?

Even if the trial court had correctly compelled AAA non-binding arbitration, it still erred when it required Mainstreet to pay all costs of non-binding arbitration. That is because the DeBartolo Defendants, not Mainstreet, had elected to submit the dispute to non-binding arbitration. The trial court further erred when, relying on inapplicable rules and authorities for AAA *binding* arbitration, it ruled the petitioner initiating arbitration (*i.e.*, Mainstreet) would be responsible for all costs of AAA non-binding arbitration.

Standard Of Review

The "construction of [an] arbitration agreement and its application of the law to the facts found" is reviewed de novo. *New Port Richey Med. Investors, LLC* v. *Stern ex. rel. Petscher*, 14 So. 3d 1084, 1086 (Fla. 2d DCA 2009).

Merits

At the hearing on Mainstreet's reconsideration motion, the trial court ruled ¶ 13.08 "clearly doesn't say directly who has to pay" the AAA non-binding arbitra-

tion costs. App. 378; *see also* App. 381. It explained ¶ 13.08 did not unequivocally require the respondents (*i.e.*, the DeBartolo Defendants) to "initiate the arbitration." App. 386. Accordingly, it concluded the "default rules" require the petitioner (*i.e.* Mainstreet) to pay the costs of initiating AAA non-binding arbitration. App. 387. In that regard, the trial court ruled in its order denying reconsideration that "[t]he party that desires to file a claim for non-binding arbitration is responsible for any costs of initiating such arbitration." App. 399.

The AAA non-binding arbitration rules do not specifically require either party to wholly bear the costs of initiating non-binding arbitration. As such, the trial court erred when it required Mainstreet to pay all those costs.

A. The trial court should have required the DeBartolo Defendants to pay the non-binding arbitration costs

The trial court should have required the DeBartolo Defendants to pay the non-binding arbitration costs because they, not Mainstreet, elected to submit the dispute to non-binding arbitration.

1. AAA non-binding arbitration is a waste of time and money

Under ¶ 13.08 and the AAA non-binding arbitration rules, there is no possibility that non-binding arbitration will result in an award that can be confirmed in a judgment. *See supra* Argument I.C. Therefore, non-binding arbitration will in no way advance the merits of the litigation, and Mainstreet will inevitably be back in circuit court seeking justice. Such a futile detour will serve no purpose other than

to exacerbate the financial devastation Mainstreet has suffered at the hands of the DeBartolo and Perlstein Defendants. *See* App. 24-25. AAA non-binding arbitration is this antithesis of a "speedier and less costly" alternative to litigation, *Advanced Bodycare Solutions, LLC*, 524 F.3d at 1240, and the trial court was correct to call it needlessly "expensive" (App. 262) and "a silly appendage" (App. 384).

2. Because AAA non-binding arbitration is a waste of time and money, and the DeBartolo Defendants want to do it for precisely that reason, they should have to pay for the wasteful additional expense

Paragraph 13.08 placed on the DeBartolo Defendants the burden of electing to submit the dispute to non-binding arbitration: "no Member or the Company shall initiate litigation unless an opportunity for non-binding arbitration … is first offered to the Person against whom a claim is to be filed (the 'Respondent') and, *if the Respondent so elects*, the non-binding arbitration is held and concluded." App. 120 (emphasis added). Paragraph 13.08 further provided "[p]rior to filing any litigation against another Member or the Company, the Company and/or Member that desires to file the claim ('Petitioner') shall serve notice … on the Respondent(s) setting forth a description of the claims the Petitioner intends to make ('Dispute') and offering the Respondent the opportunity *to elect to submit* such Dispute to non-binding arbitration." App. 120 (emphasis added).

Pursuant to this Contract language, it was the DeBartolo Defendants (*i.e.*, the respondents)—not Mainstreet—that elected to submit the dispute to non-binding

arbitration. *See* App. 364 ("DeBartolo has elected to submit the Dispute to non-binding arbitration under Paragraph 13.08."). Because ¶ 13.08 dealt with non-binding arbitration, however, the arbitration in this case was not "intended to operate as an irrevocable substitute for litigation." *Aberdeen Golf & Country Club* v. *Bliss Constr., Inc.*, 932 So. 2d 235, 236 (Fla. 4th DCA 2005).

Hence, the analogy Florida courts have drawn between the initiation of a lawsuit and the initiation of binding arbitration is inapplicable here. *See, e.g.*, *ProSpec, L.L.C.* v. *Mazzei*, 963 So. 2d 938, 940 (Fla. 4th DCA 2007) (as "the party pursuing the claim, and pursuant to the contract," the plaintiff "is required to initiate the arbitration proceedings and advance the arbitration filing fee"); *Am. Sales & Mgmt. Org.* v. *Admanco Overseas, Inc.*, 842 So. 2d 289, 290 (Fla. 3d DCA 2003) ("[s]ince the plaintiff filed the lawsuit and is the party seeking affirmative relief, it follows that the plaintiff must now initiate the arbitration process"); *Kessel* v. *Dugand*, 508 So. 2d 45, 36 (Fla. 4th DCA 1987) (holding "the initial payment of the arbitration expenses required to commence the proceeding should be paid by the party initiating it, *i.e.*, the party pursuing the claim").

Moreover, non-binding arbitration will not advance the merits of this litigation and will add "an additional layer" to an already "protracted contest." *Advanced Bodycare Solutions*, 524 F.3d at 1240. Accordingly, ¶ 13.08 should be interpreted to require the DeBartolo Defendants, which elected to submit the dispute

to non-binding arbitration, to pay the non-binding arbitration costs. *See Hunt* v. *First Nat'l Bank of Tampa*, 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980) (where a contract reveals a latent ambiguity, the court should ascertain the parties' intention by interpreting the contract in a way that would lead to a fair and equitable result).

B. At minimum, the trial court should have required Mainstreet and the DeBartolo Defendants to equally split the non-binding arbitration costs

At the very least, the trial court should have required Mainstreet and the DeBartolo Defendants to equally split the non-binding arbitration costs in accordance with the AAA's non-binding arbitration rules.

At the reconsideration hearing, the trial court ruled that absent contrary contract language, the default rules applied to its determination of which party had to pay the initial arbitration costs. App. 386-87. It also found the "the default rules … say that the petitioner has to pay." App. 387. That is not the case.

The section of the AAA non-binding arbitration rules for business disputes entitled "Administrative Fees" states:

> The AAA fee is due at the time the demand for or submission to AAA Non-Binding Arbitration is filed. Unless the parties agree otherwise, *arbitrator compensation and deposits shall be deposited equally among the parties*. These fees cover a streamlined arbitration heard by documents only or in a one-day hearing.

Non-Binding Arbitration Rules for Consumer Disputes and Business Disputes, *at* https://www.adr.org/sites/default/files/Non-Binding%20Arbitration%20Rules%20

for%20Consumer%20Disputes%20and%20Business%20Disputes.pdf. Had it applied the correct "default rule," the trial court would have, at the very least, required Mainstreet and the DeBartolo Defendants to equally share the costs of initiating arbitration.

Instead, the rule the trial court relied on seems to be the one mentioned in the Florida authorities the DeBartolo Defendants had cited in their response to Mainstreet's reconsideration motion. *See* App. 354-55. Of those authorities, the ones that specifically reference arbitration rules point to the rules governing AAA *binding* arbitration. *See ProSpec, LLC*, 963 So. 2d at 939 ("R-49 of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures states that '[t]he filling fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award'"); *Kessel*, 508 So. 2d at 46 (the AAA rules "provide that the party initiating the proceeding must advance the necessary fee" (citing American Arbitration Association, Commercial Arbitration Rule § 48 (1986)).[22]

[22] The American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures have been amended since *ProSpec, LLC* and *Kessel* were decided. Today, which party has to pay the initial arbitration costs is now addressed in R-4(a), which states: "Arbitration under an arbitration provision shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract." The American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures, *at* https://www.adr.org/sites/default/files/CommercialRules_Web_FINAL_0.pdf. With regard to binding

But the AAA *binding* arbitration rules are inapplicable to the non-binding arbitration procedure ¶ 13.08 contemplated. As such, the trial court erred when it required Mainstreet to pay the costs of initiating and pursuing non-binding arbitration. Rather, it should have either ruled the DeBartolo Defendants were responsible for the non-binding arbitration costs, *see supra* Argument II.A, or applied the AAA's non-binding arbitration rules and split those costs among the parties.

CONCLUSION

The Court should reverse the portion of the order denying reconsideration that compels non-binding arbitration. Alternatively, the Court should reverse the portion of the order that requires Mainstreet to pay all costs of AAA non-binding arbitration and either hold (1) the DeBartolo Defendants are responsible for all those costs or (2) the parties must equally split them.

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arbitration pursuant to a court order, R-4(b)(ii) states "[t]he filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make such other arrangements so that the filing fee is submitted to the AAA with the demand." *Id.*

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I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

May 22, 2018

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