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

REPLY BRIEF OF MAINSTREET CAPITAL HOLDINGS, LLC

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Statutes **Page(s)**

Rules **Page(s)**

ARGUMENT

I. The DeBartolo Defendants' arguments fail to rebut, or even address, the trial court's lack of procedural authority to compel the specific type of non-binding arbitration ¶ 13.08 required (DeBartolo Issues A-G)

Dismissing Mainstreet's arguments as "convoluted" (*see* DeBartolo Br. 12, 15, 24), the DeBartolo Defendants fail to address the main decision points in this appeal. That a legal argument is technical or complicated, however, does not mean it is incorrect. Nor is it an excuse for an appellee to ignore it altogether. *See Dania Jai-Alai Palace, Inc.* v. *Sykes*, 450 So. 2d 1114, 1122 (Fla. 1984) (cautioning that declining to respond to arguments raised in a brief "could prove hazardous" when the appellate court reviews the case's merits).[1]

Instead of engaging with Mainstreet's arguments, the DeBartolo Defendants' entire case essentially boils down to one proposition: that ¶ 13.08 was a binding,

[1] In its initial brief, Mainstreet raised two issues and identified each with a corresponding Roman numeral and heading. *See* Mainstreet Br. iii-iv; Fla. R. App. P. 9.210(b)(1) (initial brief shall include "headings and subheadings that identify the issues presented for review"). The answer brief did not respond to those issues or Mainstreet's arguments. Rather, without identifying the main or sub-issues for this Court's determination or acknowledging the applicable standard of review, the DeBartolo Defendants advance a flurry of disjointed arguments in support of an affirmance. *See* DeBartolo Br. 10-24 (advancing arguments A-J); Fla. R. App. P. 9.210(b)(5), (c) (both initial and answer briefs should contain argument that includes the applicable standard of review). As such, the initial brief and the answer brief are like "two ships passing in the night, never seeing each other." *Paisley* v. *Dep't of Ins.*, 526 So. 2d 167, 169 n.3 (Fla. 1st DCA 1988); *see also Dania Jai-Alai Palace, Inc.*, 450 So. 2d at 1122 (Fla. 1984) ("answer briefs should be prepared in the same manner as the initial brief so that the issues before the Court are joined"). To avoid any further confusion, misunderstanding, or inconvenience, Mainstreet cross-references the arguments in this reply brief to the answer brief.

negotiated agreement, so the trial court could therefore enforce it by any means. *See* DeBartolo Br. 10-13. That argument is, no doubt, simple. But it ignores crucial considerations specific to would-be arbitration agreements.[2]

A. Paragraph 13.08 was not straightforward (DeBartolo Issue A)

The DeBartolo Defendants argue ¶ 13.08 "provides a simple framework for the nonbinding arbitration." DeBartolo Br. 10. They thus presume that because ¶ 13.08 called the dispute resolution procedure it required "non-binding arbitration," that procedure was unquestionably "non-binding arbitration" within the meaning of Florida Rule of Civil Procedure 1.820 and § 44.103, *Fla. Stat.* They are mistaken, however, because "labels do not control." *Advanced Bodycare Solutions, LLC* v. *Thione Int'l, Inc.*, 524 F.3d 1235, 1240 n.4 (11th Cir. 2008). Instead, "substance controls over title." *Id.* And ¶ 13.08's substance shows that procedure was neither non-binding arbitration under Rule 1.820 and § 44.103, *Fla. Stat.*, (*see*

[2] One such consideration is whether a purported arbitration agreement is, indeed, an arbitration agreement. *See* Mainstreet Br. 23-41. Another is whether a trial court can, under the Revised Florida Arbitration Code ("RFAC"), compel arbitration pursuant to an agreement that is not an "agreement to arbitrate." *See* Mainstreet Br. 23-41. Yet another consideration is whether an agreement to resolve a dispute through a procedure dubbed "non-binding arbitration" actually calls for the type of non-binding arbitration contemplated by Florida Rule of Civil Procedure 1.820 and § 44.103, *Fla. Stat. See* Mainstreet Br. 41-43. And, of course, there is the ultimate question whether the RFAC grants Florida trial courts the procedural authority to "compel" arbitration when a purported arbitration agreement does not qualify as an "agreement to arbitrate" within the meaning of the RFAC or the Federal Arbitration Act ("FAA"). *See* Mainstreet Br. 23-30.

Mainstreet Br. 41-43), nor arbitration under the RFAC or the FAA (*see* Mainstreet Br. 34-36, 38-40).

B. Contrary to the DeBartolo Defendants' "simple contract" argument, the trial court could have compelled arbitration only if ¶ 13.08 were an "agreement to arbitrate" and were therefore within the RFAC's and the FAA's scope (DeBartolo Issue B)

Without a single citation to authority, the DeBartolo Defendants argue "[t]his Court should not look beyond the Agreement," "should not re-write the Agreement," and should enforce the non-binding arbitration agreement. DeBartolo Br. 11-12. Those arguments are misguided.

Mainstreet is not asking the Court to re-write ¶ 13.08. Rather, it is asking the Court to look to statutory and decisional authority to hold the procedure ¶ 13.08 required was not arbitration within the meaning of the RFAC or the FAA, and is not non-binding arbitration within the meaning of Rule 1.820 and § 44.103, *Fla. Stat. See* Mainstreet Br. 21-43. Additionally, the DeBartolo Defendants' assertion that the "contract must be enforced" because this case presents "a simple matter of contract law" (DeBartolo Br. 11) ignores the notion that Florida trial courts do not have the procedural authority to enforce an agreement by compelling arbitration if that agreement, like ¶ 13.08, was not an agreement to arbitrate (*see* Mainstreet Br. 23-30). For instance, Florida trial courts have no procedural authority to grant a motion to compel alternative dispute resolution via a non-binding game of tiddly-winks, which is essentially the type of agreement into which the parties entered.

C. The DeBartolo Defendants misunderstand Mainstreet's arguments, misinterpret *Avatar Properties, Inc.* v. *Greetham*, and mistakenly rely on an order that the trial court vacated (DeBartolo Issue C)

The DeBartolo Defendants claim: "Plaintiff makes a very convoluted argument that nonbinding arbitration provisions cannot be enforced under either Florida or federal law" and "has failed to cite any case that supports that proposition." DeBartolo Br. 12. They are wrong.

Mainstreet did not argue that non-binding arbitration agreements cannot, under any circumstances, be enforced by a Florida court. Rather, Mainstreet's arguments pertain to whether a trial court has the *procedural authority* to enforce an agreement by *entering an order compelling arbitration* if that agreement is not an agreement to arbitrate. In other words, the question presented here is how may a court enforce an agreement that calls for a dispute resolution procedure that is not FAA arbitration or RFAC arbitration (*i.e.*, binding arbitration)? The answer to that question is: not by entering an order compelling arbitration (which is what the trial court did here). And contrary to the DeBartolo Defendants' assertion (*see* DeBartolo Br. 12), Mainstreet cited many authorities for that proposition in its initial brief.[3]

[3] *See* Mainstreet Br. 21-40 (citing *e.g.*, *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 Florida Arbitration Code); *Advanced Bodycare Solutions, LLC*, 524 F.3d at 1238 (if a given dispute resolution procedure "is not FAA 'arbitration,'" it "is not enforceable under the FAA"); *Avatar Properties, Inc.* v. *Greetham*, 27 So. 3d 764, 767 (Fla. 2d DCA 2010) (Altenbernd, J., concurring)

The DeBartolo Defendants also contend *Avatar Properties, Inc.* v. *Greetham* is "clearly precedent … for enforcement of nonbinding arbitration." DeBartolo Br. 12. They are wrong. *Avatar Properties* did reverse an order denying a motion to compel non-binding arbitration. *Avatar Properties, Inc.* v. *Greetham*, 27 So. 3d 764, 767 (Fla. 2d DCA 2010); Mainstreet Br. 40 n. 20 (acknowledging *Avatar Properties Inc.*'s holding). But as noted in Mainstreet's initial brief (*see* Mainstreet Br. 40 n.20), the issue whether trial courts have procedural authority under the RFAC to enforce non-binding arbitration agreements by *compelling* arbitration (*i.e.*, instead of referring a case to non-binding arbitration under the Florida Rules of Civil Procedure) was not raised in that appeal. *See Avatar Properties, Inc.*, 27 So. 3d at 767 (Altenbernd, J., concurring) ("[n]othing in this special opinion is derived from the arguments of the parties"); *cf. Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (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)). Therefore, the main opinion in *Avatar Properties, Inc.* does not foreclose Mainstreet's argument that under the RFAC, the trial could not enforce ¶ 13.08 by entering an order compelling non-binding arbitration.

Additionally, the DeBartolo Defendants state: "Judge Altenbernd notes that 'contractual provisions for nonbinding arbitration are similar to the nonbinding ar-

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(case involving agreement for non-binding arbitration was "not a case where the trial court can enter an order compelling arbitration pursuant to section 682.03")).

bitration that the court itself can order pursuant to Florida Rule of Civil Procedure 1.820 and section 44.103, *Florida Statutes*." DeBartolo Br. 12 (quoting *Avatar Properties, Inc.*, 27 So. 3d at 767 (Altenbernd, J., concurring)). With that major premise, Mainstreet agrees. But it disagrees with the minor premise that the procedure required by ¶ 13.08 was the type of non-binding arbitration to which a trial court can refer a matter per Rule 1.820 and § 44.103, *Fla. Stat.* Rather, Mainstreet extensively explained (Mainstreet Br. 41-43) why non-binding arbitration pursuant to the AAA's non-binding arbitration rules, which ¶ 13.08 required (*see* App. 218), fundamentally conflicts with the non-binding arbitration procedures prescribed by Rule 1.820 and § 44.103, *Fla. Stat.* The DeBartolo Defendants neither acknowledge nor attempt to rebut those arguments in their answer brief.

Furthermore, in discussing Judge Altenbernd's concurring opinion, the DeBartolo Defendants omit the main point: 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." *Avatar Properties, Inc.*, 27 So. 3d at 767. Instead, citing the trial court's October 17, 2017 order partially granting their motion to dismiss or stay the proceedings (App. 341), the DeBartolo Defendants argue "the Lower Court had the power and authority not only to enforce the provisions of the Agreement, but utilize the Rules of Civil Procedure to make such a referral" (DeBartolo Br. 13). They are wrong for three reasons.

First, they rely (DeBartolo Br. 12) on the October 17, 2017 order for its conclusion that "[t]he Rules of Civil Procedure apply to non-binding arbitration." App. 341. Again, Mainstreet does not dispute that general proposition. But that order's limiting language, which the DeBartolo Defendants omit, explained Rules 1.700-1.820 "apply in this case *except that in the event of conflict, the rules chosen by the contract will prevail*." App. 341 (emphasis added). Paragraph 13.08 required non-binding arbitration "in accordance with" the AAA's non-binding arbitration rules. App. 120. As Mainstreet explained (*see* Mainstreet Br. 41-43), the AAA non-binding arbitration rules conflict with those procedural rules and § 44.103. Thus, the DeBartolo Defendants misplace reliance on the October 17, 2017 order's general statement that Rules 1.700-1.820 apply to non-binding arbitration.

Second and more importantly, the trial court's order denying reconsideration vacated and superseded the October 17, 2017 order. App. 398-99. The trial court also expressly ruled it was not referring the case to non-binding arbitration via its discretionary authority to do so under the Florida Rules of Civil Procedure; instead, it "compelled" non-binding arbitration as a means of enforcing ¶ 13.08. App. 268-69, 303-04, 398-99. Accordingly, the DeBartolo Defendants' observation that "many judges within the Hillsborough County Circuit Court routinely send cases to nonbinding arbitration" (DeBartolo Br. 13) is of no moment. *Cf. Colby* v. *J.C. Penney Co., Inc.*, 811 F.2d 1119, 1124 (7th Cir. 1987) (Posner, J.) (courts "must

not treat decisions by" trial court judges "as controlling" because "the responsibility for maintaining the law's uniformity" lies with "appellate rather than trial judges"). Furthermore, unlike the October 17, 2017 order, the order denying reconsideration did not mention the Florida Rules of Civil Procedure; instead, the order denying reconsideration mentioned only the AAA's rules, which further shows the trial court did not refer the case to arbitration pursuant to Rule 1.820 and § 44.103, *Fla. Stat. See* App. 399.[4]

Third, the trial court's own findings show it could not have referred this dispute to non-binding arbitration pursuant to its discretionary authority under the Rules. Rule 1.800 allows a trial court to refer a case to non-binding arbitration only if it "determines the action to be of such a nature that arbitration could be of benefit to the litigants or the court." Fla. R. Civ. P. 1.800. Here, the trial court bemoaned AAA non-binding arbitration as "expensive" (App. 262) and a "silly appendage" (App. 384). Accordingly, it could not have referred the case to non-binding arbitration under the Florida Rule of Civil Procedure.

[4] The DeBartolo Defendants also assert that "an order sending a case to non-binding arbitration is not an appealable non-final order." DeBartolo Br. 13. Regardless whether or not that statement is legally correct, it is irrelevant because the trial court did not refer the case to non-binding arbitration under the Florida Rules of Civil Procedure; rather, it compelled AAA non-binding arbitration pursuant to the RFAC. App. 268-69, 303-04, 398-99. Accordingly, it "determin[ed]" if [the DeBartolo Defendants] had a 'right to arbitration,'" so this Court has "jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv)." *Avatar Properties, Inc.*, 27 So. 3d at 765 n.1.

D. The FAA did not require or allow the trial court to compel arbitration because the dispute resolution procedure ¶ 13.08 required was not FAA arbitration (DeBartolo Issue D)

Citing the FAA's policy favoring arbitration and the RFAC's requirement that Florida courts enforce valid arbitration agreements, the DeBartolo Defendants alternatively contend ¶ 13.08 was enforceable under the FAA. DeBartolo Br. 13-14. But they do not even attempt to rebut Mainstreet's arguments that (1) the dispute resolution procedure ¶ 13.08 required was not "arbitration" within the FAA's meaning, (2) ¶ 13.08 was therefore not an arbitration agreement, and (3) the trial court thus exceeded its procedural authority under the FAA and the RFAC when it enforced ¶ 13.08 by compelling arbitration. *See* Mainstreet Br. 23-40.

E. The DeBartolo Defendants' argument that Florida law favors arbitration ignores the distinction that the RFAC applies only to agreements for binding arbitration, not non-binding arbitration (DeBartolo Issue E)

The DeBartolo Defendants argue: "Both Federal and Florida laws strongly favor arbitration such that this Court's only inquiry is whether the parties entered into an arbitration provision within a contract." DeBartolo Br. 15. They then contend that, because the parties had "knowingly agreed to nonbinding arbitration," "Florida law mandates the enforcement of that agreement." DeBartolo Br. 15.

But, as the trial court correctly ruled (*see* App. 279-80, 293-94), the FAA and the RFAC apply only to agreements to submit a dispute to *binding* arbitration, *see Avatar Properties, Inc.*, 27 So. 3d at 767 (Altenbernd, J., concurring) ("The

provisions in the arbitration code, chapter 682, *Florida Statutes* (2009), seem designed to apply to *binding* arbitration." (emphasis added)). Because ¶ 13.08 was not an agreement for binding arbitration (*see* Mainstreet Br. 23-30, 37-40), the RFAC and Florida policies favoring enforcement of arbitration agreements did not apply in this case.

F. The DeBartolo Defendants falsely accuse Mainstreet of misrepresenting the holding of *Advanced Bodycare Solutions, LLC* v. *Thione Int'l, Inc.* (DeBartolo Issue F)

In their brief, the DeBartolo Defendants accuse Mainstreet of "inaccurately assert[ing]" that *Advanced Bodycare Solutions* held "nonbinding arbitration is unenforceable under the [FAA]." DeBartolo Br. 16. That accusation is false and misperceives Mainstreet's argument.

In its initial brief, Mainstreet expressly recognized *Advanced Bodycare Solutions* did not hold that non-binding arbitration agreements are categorically unenforceable under the FAA. *See* Mainstreet Br. 35 n.16 ("*Advanced Bodycare Solutions* ultimately … 'reserve[d] for another day [deciding] whether *non-binding* arbitration is within the' FAA's scope." (quoting 524 F.3d at 1240-41)). As such, the DeBartolo Defendants' attack on Mainstreet for misrepresenting *Advanced Bodycare Solutions*'s holding is unfounded.[5]

[5] Using the same exact wording as they did in their answer brief, the DeBartolo Defendants had, in their reply to Mainstreet's response to their motion to dismiss, falsely accused Mainstreet of misrepresenting *Advanced Bodycare Solu-*

Moreover, the DeBartolo Defendants misperceive Mainstreet's argument about how *Advanced Bodycare Solutions* should be applied in this case. *Advanced Bodycare Solutions* held if an agreement requires a dispute resolution procedure that "is not FAA 'arbitration,' [the] agreement is not enforceable under the FAA." 524 F.3d at 1238. It then formulated a test for determining whether a particular dispute resolution procedure qualifies as FAA arbitration: "If a dispute resolution procedure 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. In its initial brief, Mainstreet argued that, under *Advanced Bodycare Solutions*'s test, the dispute resolution procedure ¶ 13.08 required was not FAA arbitration, so it was unenforceable under the FAA. Mainstreet Br. 30-36. The DeBartolo Defendants make no attempt to argue that, under *Advanced Bodycare Solutions*'s test, the dispute resolution procedure ¶ 13.08 required was FAA arbitration.

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tions's holding. *Compare* App. 140 (Mainstreet responding, "The court then said that 'we reserve for another day whether non-binding arbitration is within the scope of the FAA.'" (quoting *Advanced Bodycare Solutions, Inc.*, 524 F.3d at 1240-41)), *with* App. 145 (DeBartolo replying, "Based primarily on the holding in *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*, Plaintiff inaccurately asserts that non-binding arbitration is unenforceable under the Federal Arbitration Act (the 'FAA')."), *and* DeBartolo Br. 16 (same).

G. The DeBartolo Defendants mistakenly argue Mainstreet does not dispute that ¶ 13.08 was an agreement to arbitrate (DeBartolo Issue G)

The DeBartolo Defendants argue Mainstreet "does not dispute that an agreement to arbitrate exists, nor that the parties have a contractual duty to arbitrate under the Agreement." DeBartolo Br. 18-19. Not so. In fact, the central premise of Mainstreet's entire argument is that ¶ 13.08 was not an agreement to arbitrate and was therefore unenforceable under the FAA and the RFAC.[6]

II. The DeBartolo Defendants fail to rebut Mainstreet's arguments that, under the specific requirements of ¶ 13.08 and the AAA non-binding arbitration rules, they were required to pay all or half of the arbitration costs (DeBartolo Issues H-J)

The trial court should have required the DeBartolo Defendants to pay the non-binding arbitration costs because they had elected to submit the dispute to

[6] *See, e.g.*, Mainstreet Br. 20 ("¶ 13.08 was not an agreement to which the FAA applied"; "it also was not an arbitration agreement under the RFAC"), 21 ("¶ 13.08 was not an enforceable arbitration agreement under the FAA or the RFAC"), 23 ("Because the Contract's non-binding arbitration clause … was not [an arbitration] agreement, the trial court acted beyond its procedural authority when it compelled arbitration."), 25 ("¶ 13.08 was not a written agreement to arbitrate and was therefore not enforceable by order compelling arbitration"), 30 ("Because ¶ 13.08 was not an arbitration agreement within the meaning of either statute, … the trial court could not have properly enforced ¶ 13.08 by order compelling arbitration."), 36 ("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"), 38 ("¶ 13.08 was not an agreement to arbitrate and the trial court could thus not compel arbitration as a means of enforcing ¶ 13.08"), 40 ("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.").

non-binding arbitration. Alternatively, the trial court should have required the parties to equally split those costs, because that was precisely what the AAA non-binding arbitration rules required.

A. Under ¶ 13.08, the DeBartolo Defendants were the ones who elected to submit the dispute to non-binding arbitration, so the trial court should have required them to pay the non-binding arbitration costs (DeBartolo Issue H)

The DeBartolo Defendants argue that, because Florida law requires the party pursuing a claim in arbitration to initiate the arbitration proceedings and pay the arbitration costs, Mainstreet was required to initiate non-binding arbitration and pay those costs. DeBartolo Br. 19. In its initial brief, Mainstreet distinguished the authorities the DeBartolo Defendants relied on for that argument. *See* Mainstreet Br. 43-50. It also argued that, because the DeBartolo Defendants were the parties who had elected to submit the dispute to non-binding arbitration, they should have been required to pay the non-binding arbitration costs. *See* Mainstreet Br. 43-47. Here, the DeBartolo Defendants do not attempt to argue they were not the parties who had elected to submit the dispute to arbitration.

B. The DeBartolo Defendants ignore the requirement that parties to AAA non-binding arbitration equally split the non-binding arbitration costs (DeBartolo Issue I)

Citing only *ProSpec, LLC* v. *Mazzei*, 963 So. 2d 938, 939-40 (Fla. 4th DCA 2007), *Am. Sales & Mgmt. Org.* v. *Admanco Overseas, Inc.*, 842 So. 2d 289 (Fla. 3d DCA 2003), and *Kessel* v. *Dugand*, 508 So. 2d 45 (Fla. 4th DCA 1987), and re-

gurgitating arguments they made in the trial court verbatim (App. 354-55), the DeBartolo Defendants contend Florida law forecloses Mainstreet's position that they must pay all, or at least half, the arbitration costs. DeBartolo Br. 20-21.

In its initial brief, Mainstreet distinguished those three cases on the basis that they involved binding arbitration and, unlike this case, did not involve a contract provision placing the onus of electing to submit a dispute to arbitration on a particular party. Mainstreet Br. 45-46. For that reason, Mainstreet explained, "the analogy" those cases drew "between the initiation of a lawsuit and the initiation of binding arbitration is inapplicable here." Mainstreet Br. 46. Mainstreet further distinguished *ProSpec, LLC* and *Kessel* on the basis that the AAA *binding* arbitration rule on which they relied required the party seeking relief in arbitration to pay the costs, whereas the AAA *non-binding* arbitration rule applicable here requires the parties to equally split the arbitration costs. Mainstreet Br. 47-48. The DeBartolo Defendants do not respond to those arguments here.

C. The DeBartolo Defendants rebut an argument made in the trial court and ignore those advanced on appeal (DeBartolo Issue J)

Again regurgitating an argument they made in the trial court verbatim, the DeBartolo Defendants rebut a straw man argument that the non-binding arbitration fee was "'prohibitively expensive.'" *Compare* DeBartolo Br. 21-24, *with* App. 356-57. Because Mainstreet raised no such argument in its initial brief, there is no need for it to address that argument in this reply brief.

Then, in arguing Mainstreet should be required to pay the arbitration costs, the DeBartolo Defendants assert, "Plaintiff has not cited a single case … supporting its position that a non-claimant should be required to initiate a claim in arbitration." DeBartolo Br. 24. That is because Mainstreet is not arguing the DeBartolo Defendants should be required to initiate non-binding arbitration.

Rather, Mainstreet argues (1) the DeBartolo defendants should be required to *pay* all the arbitration costs because, under ¶ 13.08, they were the ones who had elected to submit the dispute to the useless and expensive non-binding arbitration (*see* Mainstreet Br. 44-47), or (2) the parties should be required to equally split the non-binding arbitration costs because that is what the AAA non-binding arbitration rules require (*see* Mainstreet Br. 47-49). Although the DeBartolo Defendants argue Florida law requires Mainstreet to initiate non-binding arbitration, they do not address the issue about which party had, under ¶ 13.08, elected to submit the dispute to non-binding arbitration. Nor do they acknowledge the AAA non-binding arbitration rules' requirement that parties equally split the non-binding arbitration costs.

CONCLUSION

The Court should either (1) reverse the portion of the order compelling AAA non-binding arbitration or (2) reverse the portion of the order requiring Mainstreet to pay all costs of AAA non-binding arbitration and instead order the DeBartolo Defendants to pay all or at least half of such costs.

Respectfully submitted,

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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.

August 20, 2018

/s/ Thomas Burns
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