IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: SC05-1417
LOWER TRIBUNAL NO.: 5D05-651

O'KEEFE ARCHITECTS, INC.

Petitioner,

v.

CED CONSTRUCTION
PARTNERS, LTD., ET AL.

Respondents.

REPLY BRIEF OF PETITIONER

On Certification of Conflict by the
Fifth District Court of Appeal

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SUMMARY OF ARGUMENT

Under both Florida[1] and U. S. Supreme Court[2] precedent, courts are required to exercise their primary power to determine arbitrability of a given dispute, unless the arbitration agreement between the parties clearly and unmistakably manifests an intent to have the arbitrators decide arbitrability[3].

In the present case, the arbitration clause of the agreements contained a specific provision that no demand for arbitration shall be made after the date the claim would be barred by the applicable statutes of limitation. The agreements specifically prohibited their assignment (including, presumably, assignment of the contract right to compel arbitration) without mutual consent of both parties. The agreements specifically prohibited consolidated arbitration proceedings. By entering into these agreements, O'Keefe expressed an intent not to arbitrate time-barred claims, to only arbitrate with the owner contracted with, and not to consolidate an arbitration with other owners, contractors, subcontractors, or anyone else. The trial court erred by failing to analyze and determine whether O'Keefe had agreed to arbitrate time-barred claims (which would require analysis of the applicable statutes of limitation), whether O'Keefe had agreed to arbitrate assigned claims (which would require analysis of the law distinguishing between

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[1] Seifert v. U.S. Home Corporation, 750 So.2d 633 (Fla. 1999).

[2] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

[3] Reuter Recycling of Florida, Inc. v. City of Dania Beach, 859 So.2d 1271, 1273 (Fla. 4th DCA 2003), quoting First Options at 944.

assignment of claims and assignment of contracts), and whether O'Keefe agreed to arbitrate consolidated claims (which would require analysis whether use of a single panel to hear different claims constitutes an improper consolidation). The Fifth District similarly erred by failing to require the trial court to engage in the necessary analysis to determine arbitrability, in accordance with Seifert and First Options.

I. A TRIAL COURT SHOULD DETERMINE THE ARBITRABILITY OF TIME-BARRED CLAIMS.

In both the AAA proceedings and before the trial court, Petitioner has asserted that at least some of the owners' claims are time-barred and that it cannot be compelled to arbitrate these time-barred claims. Although CED's statement (at page 5 of its amended answer brief) that O'Keefe did not raise this issue at the August 30, 2004 hearing is technically accurate, it is also misleading. The issue was clearly presented to the trial judge on that date by CED's own counsel who acknowledged that O'Keefe's counsel had raised the statute of limitations. (Appendix 9: page 24, lines 15-18; page 29, lines 16-18) The trial judge then discussed a method of preparing an order so that AAA would recognize a relation back of any bifurcated case, a method of avoiding the statute of limitations. (Appendix 9: page 29, line 23 – page 30, line 2). The matter was also clearly discussed at the January 6, 2005 hearing before the trial judge entered the order appealed from, and she decided that the arbitrators should determine the statute of

limitations.[4] (Appendix 10: page 11, line 12 – page 15, line 2; page 22, lines 22 - 25).

Respondent CED has suggested (at page 7 of its amended answer brief) that O'Keefe is pursuing an unpled affirmative defense and that because this involves potentially disputed issues of fact, it must be left for decision by arbitrators. In fact, O'Keefe raised the statute of limitation defense in the arbitration, along with its objection to arbitrating with an assignee in a consolidated arbitration, and the arbitrators ruled against it on all three grounds (Petitioner's Appendix 5), which resulted in O'Keefe filing the complaint below and arguing these same objections to arbitration. Therefore, the implication that the argument has not been properly preserved for appellate review is without merit.

CED further states (at page 11 of its amended answer brief) that having courts rule on statutes of limitations and other fact-based defenses would "mangle arbitration proceedings."[5] CED implies that there is some distinction between a "fact-based defense" and a "law-based defense", and mischaracterizes (at footnote

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[4] Respondent suggests (at page 8 of its amended answer brief) that the court determined the arbitrability of the dispute by deciding that the arbitrators would determine the statute of limitations defense. However, deferring to the decision of arbitrators can hardly be characterized as the court itself making a determination.

[5] The reference to Cardegna v. Buckeye Check Cashing, Inc., 894 So.2d 860 (Fla. 2005) at page 11, footnote 5, of CED's amended answer brief is surprising. Is CED suggesting that this Court "mangled arbitration proceedings" by deciding that "the Florida courts, and not an arbitrator, must first determine the contract's legality before a party may be required to submit to arbitration under a provision of the contract?" Id. at 865. It is otherwise unclear why CED cited this case.

6, page 14, of its amended answer brief) cases cited by O'Keefe in its initial brief, claiming that those cases merely analyzed legal questions, not factual ones. It is apparent that Respondent did not review these cases closely before making this argument. If it had, it might have discovered that the court in Romano v. Goodlette Office Park, Ltd., 700 So.2d 62 (Fla. 2d DCA 1997) (one of the cited cases) reversed a trial court that refused to consider the arbitrability of a counterclaim and whether the counterclaim was barred by the statute of limitations. The truth is that the statute of limitations defense in this case, the usury defense asserted in Cardegna, and the various defenses to arbitrability asserted in the cited cases, all involve the application of law to facts.

CED also asserts that the Fourth District misinterpreted First Options when deciding Reuter Recycling of Florida, Inc. v. City of Dania Beach, 859 So.2d 1271 (Fla. 4th DCA 2003), erroneously claiming (at page 9 of its amended answer brief) that the First Options court adopted a two-question inquiry, but only answered the first question and didn't address the second question at all. CED then misstates the two questions addressed by the First Options court. In fact, the two questions actually presented were "(1) how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute, and (2) how a court of appeals should review a district court's decision confirming, or refusing to vacate an arbitration award." First Options at 940. In analyzing the first question, the

First Options court noted that there were three types of disagreement present: the merits of the dispute, the arbitrability of the dispute, and who should have the primary power to decide the arbitrability of the dispute. Id. at 942. The First Options court then proceeded to consider only the third issue and decided that primary power rests with the courts. It then proceeded to answer the second question concerning appellate review, concluding that the standard of review in arbitration cases should be no different than the standard of review in ordinary contract cases (accepting findings of fact that are not "clearly erroneous" but deciding questions of law *de novo*).

In interpreting an arbitration clause virtually identical to section 7.2 of the arbitration clause in the present case, the Reuter Recycling court found that the arbitration clause was unambiguous and expressly excluded time-barred claims from arbitration. However, in addressing the argument that the arbitration clause was somehow ambiguous, and without misconstruing First Options, the Reuter Recycling court quoted an earlier decision that in turn had quoted First Options:

> The rule is that 'courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.' An ambiguity as to who should determine arbitrability means that the parties have not clearly and unmistakably manifested an intent to have arbitrators decide the issue as to what specific claims they have agreed to arbitrate. Thus, if the agreement is ambiguous, then it is for the court to say what claims should be arbitrated.

Id. at 1273. Thus, a close analysis of Reuter Recycling reveals that it was

decided, not on the issue of who determines arbitrability as discussed in First Options, but on the question of whether the particular dispute was one that both parties had agreed to arbitrate. In other words, without citing to Seifert, the Reuter Recycling court followed its holding in determining that the parties did not agree to arbitrate time-barred claims. Contrarily, the court in CED Construction, Inc.v. Kaiser-Taulbee Associates, Inc., 816 So.2d 813 (Fla. 5th DCA 2002) does not appear to have considered or followed Seifert or First Options in rendering its decision.

Respondent's argument (at page 10 of its amended answer brief) that there is a distinction to be drawn between *who should rule* and *who will rule* is without merit, and is an inappropriate suggestion that courts abdicate their responsibility to determine arbitrability of disputes where the arbitration agreement does not clearly and unmistakably call for the arbitrators to determine arbitrability. This argument is also contrary to the holding in Seifert, which requires courts to review the controversies or disputes between the parties to determine if they agreed to submit the matters to arbitration.

Respondent's suggestion (at page 13 of its amended answer brief)) that the Supreme Court somehow provided guidance that was missing in First Options in the case of Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) is misguided. In Howsam, the customer and her investment company had entered

into an agreement permitting the customer to select the arbitration forum, and she had selected arbitration with the NASD. After she signed the claim submission agreement, Dean Witter filed an action in federal court seeking to enjoin the arbitration because of an NASD procedural rule that bars the submission of claims occurring more than six years before the filing date. The district court dismissed the action, ruling that the NASD arbitrator was the appropriate person to interpret the NASD rule. The Tenth Circuit reversed, however, concluding that a court, not an arbitrator, was to interpret the effect of the NASD procedural rule.

The Supreme Court granted certiorari and reversed the Tenth Circuit. The court found that the NASD rule was a matter of arbitration procedure. Specifically, the court found that the NASD procedural rule did not rise to the level of a "question of arbitrability." The court reasoned that the parties anticipated that the NASD would interpret its own rules. "[The] NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it." Id. at 85.

Clearly, the Supreme Court did not retreat from its First Options holding in deciding Howsam. First Options stands for the proposition that a determination of the arbitrability of a dispute rests with a court. Howsam stands for the proposition that an arbitrator is to decide whether the parties have complied with the arbitral body's procedural rules. There were no procedural rules at issue in First Options

and there are no AAA procedural rules at issue in this case, only a Florida statute of limitations issue. Thus, this matter is factually distinct from Howsam, in which the parties consented to the use of NASD procedural rules covering the timeliness of claims. Rather, like First Options, this Court must resolve whether a court or arbitrators will rule on three substantive issues arising from the two agreements, specifically, the contract prohibitions against assignment and consolidated arbitrations, and the statute of limitations defense.

II. A TRIAL COURT SHOULD DETERMINE THE ARBITRABILITY OF ASSIGNED CLAIMS WHERE THE ARBITRATION AGREEMENT PROHIBITS ASSIGNMENT.

CED states (at page 6 of its amended answer brief) that Petitioner has engaged in "gamesmanship" by insisting that the anti-assignment clause in the arbitration agreement be specifically enforced. Yet, in footnote 4 of its amended answer brief, CED admits that the initial and amended demands for arbitration were not brought by the owners (as required by the arbitration clauses in both agreements), but solely by it, as assignee. CED further acknowledges that it executed a reassignment, reassigning the claims back to the owners, perhaps because it recognized the validity of Petitioner's objections to assignment. Surprisingly, despite the reassignment, the owners were never made part of the arbitration, and CED, which purportedly retained no interest in the claims, soldiered on against O'Keefe in the arbitration proceedings. The paper trail ended

with CED "reaffirm[ing] the original assignment," and continuing to maintain its claims as assignee of the owners. Therefore, any gamesmanship in this matter has been by CED, which has flip-flopped on whether there is or is not an assignment, while O'Keefe has consistently from the beginning objected to CED's standing to participate in the arbitration due to the anti-assignment clauses in the agreements. As an additional act of gamesmanship, CED, during the pendency of the Fifth District appeal, amended its arbitration demand to claim that, in addition to being an assignee,[6] it is also an equitable subrogee to the owners' claims. (Respondent's Appendix 2) However, assignment of a claim and equitable subrogation to a claim are mutually exclusive concepts. (See Reply brief of Appellant (Fifth District) at page 2 and following.)

Respondent CED (at pages 7 and 16 of its amended answer brief) attempts to make a distinction between an assignment of contract rights and privileges (which it apparently concedes would violate the anti-assignment clauses of the agreements), and an assignment of claims (which it contends would not). Although this distinction might merit a valid debate of Florida law on this issue under different circumstances, the distinction is meaningless in this case. CED is

[6] CED has admitted (at page 3 of its amended answer brief) that the owners made demand on it, as the general contractor on both projects, to remedy the defects and that it did so, at its own expense. This raises the separate question, pointed out by O'Keefe in its Fifth District reply brief at page 2, whether CED had any claims to pursue as assignee because the owners' claims would have been satisfied by CED's remediation, and there would be nothing left to assign.

not merely pursuing an assigned claim; it is seeking to enforce a contract right to compel arbitration. CED seeks to enforce a specific provision of the agreements between the owners and O'Keefe that requires arbitration of disputes between them, despite the fact those same contractual provisions prohibit assignment of the agreements (and presumably the arbitration clauses contained within those agreements). The right to compel arbitration is a contract right. It cannot be forced on a party who did not contractually agree to arbitrate with an assignee. Petitioner has not found any Florida case that even suggests what CED maintains: that an assignee of a claim arising under a written contract can specifically enforce a written provision in the contract requiring arbitration while at the same time avoiding a separate written provision in the contract prohibiting its assignment.

Assume, for the sake of argument, that CED filed an action in circuit court for the alleged claims for damages it held by virtue of the assignments from the owners. In this hypothetical, O'Keefe could not compel CED to arbitrate the assigned claims because CED never contracted to do so. The converse is also true: CED cannot compel Petitioner to arbitrate with it because there is no contract between Petitioner and CED providing for arbitration. The only parties required to arbitrate are Petitioner and the owners because the obligation to arbitrate arose solely from Petitioner's contracts with the owners. CED cannot bootstrap its alleged claim for damages into an agreement to arbitrate.

This Court, consistent with its holding in Seifert, should, like the courts in American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) and I. S. Joseph Company, Inc. v. Michigan Sugar Company, 803 F.2d 396 (8th Cir. 1986) require that a trial court determine whether there is an arbitrable agreement between the parties at all, and whether the assigned claims are to be arbitrated before an arbitrator can decide the merits.

III. A TRIAL COURT SHOULD DETERMINE THE ARBITRABILITY OF CONSOLIDATED CLAIMS WHERE THE ARBITRATION AGREEMENT PROHIBITS CONSOLIDATION.

Respondent's argument on the consolidation issue misses the point. The trial judge did state that O'Keefe should have separate panels (Petitioner's Appendix 11, page 9), but then stated she couldn't interfere with AAA (Appendix 11, page 9, 10). It is inconsistent to order "separate panels" and then disavow any ability to ensure that the identical persons are not on both panels. In such a scenario, how could it fairly be said that the panels were separate? That is why the Seventh Circuit, in Lefkovitz v. Wagner, 395 F.3d 773 (7th Cir. 2005) interpreted a prohibition on consolidation of arbitration proceedings to foreclose hearing of different disputes by the same arbitrator.

Respondent's claim (at page 25 of its amended answer brief) that O'Keefe's position requires a court to interfere in AAA's decision to select arbitrators is also meritless. AAA does not pick the arbitrators to hear a case, the parties do. Had the

owners filed separate demands for arbitration, AAA would have supplied a list of prospective arbitrators for both sides to select a panel from. O'Keefe would have been able to ensure that different people served on each panel, if for no other reason than the fact that the locale of each hearing would have been different. However, because CED, as assignee, filed a single demand for arbitration, AAA only provided for a single panel. Having the single panel conduct separate final hearings in the single arbitration case (AAA Case No. 33 110 00210 020) does not undo the problem created by CED. This Court should find that the contract prohibition on consolidation requires the AAA to have separate panels assigned to hear the two arbitration cases.

CONCLUSION

Petitioner requests this Court: (i) reverse the decision of the Fifth District in this case and hold that Reuter Recycling was correctly decided and (ii) reverse the trial court order compelling arbitration and direct the trial court to enjoin arbitration with CED because of the non-consolidation, non-assignment provisions in the contracts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 10th day of November, 2005, to Kevin P. Kelly, Esquire, Gray Robinson, P. O. Box 3068, Orlando, Florida 32802-3068.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply Brief has a typeset of Times New Roman 14.

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