Case No. 10-40449

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY COVINGTON AND RUSSELL COVINGTON,
PLAINTIFFS-APPELLANTS,

v.

ABAN OFFSHORE LIMITED F/K/A
ABAN LOYD CHILES OFFSHORE, LIMITED
DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION
NO. 1-10-CV-00005

BRIEF OF APPELLEE ABAN OFFSHORE LIMITED

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Interested Person	Connection
Guy Covington	Plaintiff-Appellant
Russell Covington	Plaintiff-Appellant
Beacon Maritime, Inc.	Company owned by Appellants; Instrumentality through which the Covingtons engaged in the conduct which forms the basis of this suit and the arbitration proceeding (discussed below)
Aban Offshore Limited f/k/a Aban Loyd Chiles Offshore Limited	Defendant-Appellee
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/s/ Clayton C. Cannon
Clayton C. Cannon

Attorney of Record
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STATEMENT REGARDING ORAL ARGUMENT

Appellees believe oral argument will not significantly aid the Court in resolving the issues on appeal.

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BRIEF OF APPELLEE
ABAN OFFSHORE LIMITED

STATEMENT REGARDING JURISDICTION

Aban asserts that the Court does not have jurisdiction to consider the Covingtons' appeal.

This case is governed by the FEDERAL ARBITRATION ACT ("FAA"), 9 U.S.C. §§ 1 et seq. (R. at 36). Russell Covington is the President of Beacon Maritime, Inc. ("Beacon") and Guy Covington is Beacon's Vice President. The Covingtons sued Aban Offshore Limited ("Aban") in state district court in Orange, Texas seeking a judgment declaring that they are not bound by an arbitration clause embodied in a contract between Beacon and Aban. Aban removed the case to the Eastern District of Texas, Beaumont Division, under 28 U.S.C. §§ 1332(a) and 1446(a). Aban moved the district court to compel the arbitration of Aban's claims against the Covingtons. An order compelling arbitration was the only substantive relief sought by Aban in the action before the district court.

On March 15, 2010, the district court issued a Memorandum and Order ("Judgment") granting all of the substantive relief sought by Aban. (R. at 665). The district court's Judgment is the type of order that "ends litigation on the merits and leaves nothing for the court to do but execute the judgment." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (citing *Catlin v. United States*, 324 U.S. 229 (1945)). It is an "order from

which an appeal lies" under FEDERAL RULE OF CIVIL PROCEDURE 54(a). The deadline for the Covingtons to file a post-judgment motion under Rule 59 or Rule 60 was 28 days after March 15, 2010, *e.g.*, April 12, 2010[1].

The Covingtons did not treat the March 15 Judgment as an "order from which an appeals lies" under Rule 54(a). Rather, they considered the district court's March 16, 2010 order of dismissal ("Dismissal Order") as the "order from which an appeal lies." The Dismissal Order, however, merely performs the dual functions of allocating attorney's fees and removing the case from the district court's docket. These are collateral issues that do not affect the finality of the March 15, 2010 Judgment which granted to Aban all of the substantive relief it sought. *See Budinich*, 486 U.S. at 199 (in discussing a post-judgment order on attorney's fees, the Supreme Court wrote that "[a] question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order.").

Acting under the theory that the March 16 Dismissal Order is the Rule 54(a) judgment on which an appeal could be based, the Covingtons did not

[1] Rule 60(b) provides in relevant part that a court "may relieve a party….from a final judgment, order or proceeding. . . ." The District Court went out of its way to indicate its position that the Covingtons' post-judgment motion was subject to a Rule 60(b) analysis, *e.g.*, implying that the March 15 judgment is a "final judgment" from which an appeal may be taken. (R. at 699 n. 1).

file their post-judgment motion until April 13, 2010, one day after the expiration of the post-judgment filing deadline. The Covingtons' post-judgment motion did not, therefore, act to extend the deadline to appeal from the March 15 Judgment. That deadline was April 17, 2010. The Covingtons' notice of appeal was not filed until May 12, 2010, well after the expiration of the appellate deadline. The Court is without subject matter jurisdiction to consider this appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue No. 1:

Whether the Covingtons are bound by the arbitration clause embodied in the agreement between Beacon and Aban.

Issue No. 2:

Whether the Covingtons' admission in their Original Answer to Aban's First Amended Arbitration Complaint that "all conditions precedent to Aban's right to recovery herein…have been performed or have occurred" operates as a waiver of the "informal settlement discussions" and mediation procedural requirement in the arbitration clause.

STATEMENT OF THE CASE

The Covingtons' Statement of the Case is generally accurate. For the sake of completeness, Aban adds the following:

- The Covingtons filed an answer to Aban's Arbitration Complaint ("Arbitration Complaint") on July 31, 2009, (R. at 209);

- The Covingtons did not contest their status as parties to the arbitration until November 23, 2009 when they filed the declaratory judgment action in Texas state district court, (R. at 18);

- The Covingtons admitted in their answer to Aban's Arbitration Complaint—in which they have been sued individually—that all conditions precedent to Aban's right of recovery had been performed or had occurred, (R. at 325); and

- The counterclaim filed by Aban in the district court was filed as a precautionary measure, was subject to the district court's ruling on the declaratory judgment action, and was not intended to modify or waive any Aban's rights.

SUMMARY OF ARGUMENT

The district court correctly determined that under state contract law and agency principles the Covingtons, as President/Director and Vice President of Beacon, are bound by the arbitration provision embodied in the Beacon-Aban agreement. (R. at 665-674). The Covingtons concede that they were at all relevant times officers and agents of Beacon, and that the claims alleged against them arise under the arbitration agreement.

Covington Br. at 24. Under analogous circumstances, courts have routinely "afforded [nonsignatory] agents, employees, and representatives the benefit of arbitration agreements entered into by their principals" when their alleged wrongful conduct "relates to their behavior as officers or directors or in their capacities as agents of the corporation." *Creative Telecomm's, Inc. v. Breeden*, 120 F.Supp.2d 1225 (D. Haw. 1999). The fact pattern in these cases involves a nonsignatory agent who is *willing* to accept the benefits of an abitration clause. The Covingtons, however, are *unwilling* nonsignatory agents. For this single reason, they summarily conclude that they cannot be held to the terms of the arbitration clause, notwithstanding that (i) the conduct alleged against them undisputedly while acting on behalf of, and as agents for, and (ii) Aban's claims against them arise under the arbitration agreement. In essence, they ask the Court to create a rule that grants nonsignatory agents the unilateral power to pick and choose when, and under what circumstances, they want to invoke the benefits (or decline the burdens) of bilateral arbitration agreements entered into by their principals. The Covingtons articulate no viable reason for approving, and cite no cases supporting, such a proposition.

ARGUMENT

I. STANDARD FOR RULING UPON A MOTION TO COMPEL ARBITRATION

In ruling upon a motion to compel arbitration a court must determine "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Safer v. Nelson Financial Group, Inc*., 422 F.3d 289, 293 (5th Cir. 2005). Because the Covingtons agree that the second prong is satisfied, Covington Br. at 24, only the first line of inquiry is discussed herein.

The Covingtons acknowledge there is a valid agreement to arbitrate between Beacon and Aban. Covington Br. at 18; (R. at 238) (order granting Beacon's motion to compel arbitration of Aban's claims against it). They also concede that the conduct alleged against them "occurred while they were acting as Beacon's agents," and that the claims fall within the scope of the arbitration clause[2]. Covington Br. at 24. They dispute only whether the district court correctly applied agency principles to find them bound by the arbitration clause.

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[2] The arbitration clause provides that "all disputes arising hereunder **or** related to the work to be performed on the Vessel" shall be submitted to arbitration. (R. at 36) (emphasis added). The district court focused on the language "related to the work to be performed on the Vessel" and concluded that the provision implies a narrower scope than other arbitration clauses which cover the entire contract. (R. at 672). Because the clause includes "all disputes arising [under the contract]," Aban contends that it is as broad as other arbitration provisions that relate to the entire agreement.

A. Application of State or Federal Law Compels the Conclusion that the Covingtons are Bound by the Arbitration Provision

It is unclear whether state or federal substantive law applies to determine whether a nonsignatory is bound by an arbitration clause. *See*, *e.g.*, *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir. 2004) (applying federal law); *Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002) (applying state law); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (whether state or federal law applies is an open question, but Texas endeavors to remain consistent with federal interpretations of the FAA).

Under the FAA, "state law generally governs whether a litigant agreed to arbitrate, and federal law governs the scope of the arbitration clause," but "whether nonsignatories are bound by an arbitration agreement is a distinct issue that may involve either or both of these matters." *Labatt*, 279 S.W.3d at 643 (citing *In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005)). The issue in this case—whether the Covingtons as nonsignatories are bound by the arbitration clause—is akin to the validity of an arbitration agreement, an issue which is to be determined by state law. *See id.* Because the Supreme Court says that courts "generally…should apply ordinary state-law principles that govern the formation of contracts" when a person disputes the

validity of an arbitration agreement, *First Options v. Kaplan*, it stands to reason that state law contract and agency principles should be applied to determine whether the Covingtons are bound by the arbitration agreement[3]. 514 U.S. 938, 944 (1995). But because substantive federal common law is congruent with state contract law and agency principles, the same result would obtain in this case regardless of whether state or federal law is applied. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 355 (5th Cir. 2003).

B. Agency Principles in Arbitration Proceedings

The question of "[w]ho is actually bound by an arbitration agreement is a function of the intent of the parties, as expressed in the terms of the agreement." *Bridas*, 345 F.3d at 355. Generally, a person is not bound by a contract he has not signed. But there are, as this Court and the Texas Supreme Court have repeatedly recognized, numerous exceptions to the general rule, including these six theories: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel, and (6) third-party beneficiary. *Id.* at 356; *In re Kellogg Brown & Root, Inc*., 166 S.W.3d

[3] The parties agreed that the contract would be governed by Texas state law, and the Agreement was executed and performed in Texas. (R. at 35). If state law does apply, then Texas law governs.

732, 738 (Tex. 2005). As to the agency theory, which forms the basis of the district court's decision, the Texas Supreme Court has made it clear that:

> when contracting parties agree to arbitrate all disputes 'under or with respect to' a contract…they generally intend to include disputes about their agents' actions because as a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts.

In re Vesta Ins. Group, Inc., 192 S.W.3d 759, 762 (Tex. 2006) (citations omitted). Further defining the contours of this principle, the Texas Supreme Court later explained:

> Corporations can act only through human agents, and many business-related torts can be brought against either a corporation or its employees. If a plaintiff's choice between suing the corporation or suing the employees determines whether an arbitration agreement is binding, then such agreements have been rendered illusory on one side.

In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185, 188-189 (Tex. 2007).

II. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED UNDER CONTRACT LAW & AGENCY PRINCIPLES

In the parlance of this case, Aban is a "willing signatory" and the Covingtons are "unwilling nonsignatories." The Covingtons concede that "[f]ederal and state courts have allowed…some willing signatories to compel some unwilling nonsignatories to arbitrate," and that principles of agency can be applied to bind unwilling nonsignatories to arbitration agreements. Covington Br. at 23. The Covingtons also admit that they, as

President/Director and Vice President, were at all relevant times acting within the course and scope of their employment as agents of a signatory, Beacon. *Id*.

A. A Nonsignatory Agent Cannot Selectively Decide When it Wishes to Accept or Reject the Benefits and Obligations of An Arbitration Clause

The essence of the Covingtons' position is that a nonsignatory agent of a signatory should be permitted to selectively—even arbitrarily—decide when it wishes to accept or reject an arbitration clause. Their position is without merit.

Nonsignatory agents have been held bound by arbitration clauses under contract law and principles of agency on many occasions. (R. at 669-670). The district court cited a number of these cases in its opinion, most of which involve a willing nonsignatory attempting to compel an unwilling signatory to arbitrate—a situation that is the inverse of the fact pattern now before the Court. *See id*. The Covingtons baldly assert that the decisions cited by the district court are distinguishable on that basis alone, *see* Covington Br. at 26-27, but they provide no authority or rational explanation for why that is, or should be, the case.

The district court observed that the reasoning employed by courts that have "compelled arbitration *in favor* of nonsignatories who sought the

benefit of arbitration" has also been applied to compel arbitration against unwilling nonsignatories, like the Covingtons. (R. at 670) (citing *Lee v. Chica*, 983 F.2d 883 (8th Cir.), *cert. denied*, 510 U.S. 906 (1993); *Breeden*, 120 F.Supp.2d 1225; *Doran v. Bondy*, No. 5:04-CV-99, 2005 WL 1907252, at *6-7 (W.D. Mich. filed Feb. 18, 2005) (Appx. at Tab 4). Tellingly, as the district court pointed out, the Covingtons "present no argument or authority suggesting that Texas state courts would deviate from federal law on this point." (R. at 670).

As the *Breeden* Court aptly noted:

> [F]ederal courts have consistently afforded agents, employees, and representatives the benefit of arbitration agreements entered into by their principals to the extent that the alleged misconduct relates to their behavior as officers or directors or in their capacities as agents of the corporation.

120 F. Supp. 2d at 1240. If agents who engage in misconduct while acting on behalf of corporate signatories have the right to invoke arbitration clauses for their benefit, then they have a corresponding duty to submit to arbitration when a signatory wants to invoke the clause for its benefit. To hold otherwise would approve a rule that grants nonsignatory agents the unilateral power to pick and choose when, and under what circumstances, they want to invoke the benefits (or decline the burdens) of bilateral arbitration agreements entered into by their principals. The Covingtons articulate no

viable reason for approving, and cite no cases supporting, such a proposition.

The Texas Supreme Court's rationale in *Merrill Lynch* is illuminating, and provides a basis for rejecting the Covingtons' position. In that case, the court reasoned that "[i]f arbitration clauses only apply to contractual signatories, then this intent can only be accomplished by having every officer and agent (and every affiliate and its officers and agents) either sign the contract or to be listed as third-party beneficiary." *Merrill Lynch*, 235 S.W.3d at 188-189 (parenthetical in original). This, the court said, "would not place such clauses on an equal footing with all other parts of a corporate contract." *Id.* In other words, "[i]f a plaintiff's choice between suing the corporation or suing the employees determines whether an arbitration agreement is binding, then such agreements have been rendered illusory on one side." *Id*.

Here, based on the allegations against the Covingtons, (R. at 105-110; 121 at ¶ 29; 123 at ¶¶ 45-48; 125-127 at ¶¶ 52-61), there is no doubt that they could compel Aban to submit to arbitration if they so desired. *See, e.g.*, *Bridas*, 345 F.3d 347; *Merrill Lynch*, 235 S.W.3d 185; *Vesta*, 192 S.W.3d 759. If the arbitration clause in this case is placed on "equal footing with all

other parts" of the Beacon-Aban agreement, as it must be, then the clause is not illusory and it is equally binding upon them.

B. The Covingtons Are Bound by the Arbitration Clause Due To Their Actions, Not Merely Their Status, as Agents of Beacon

The Covingtons argue that they cannot be bound to the arbitration clause merely because of their status as agents of Beacon. Covington Br. at 34 ("As shown above, the mere fact that the nonsignatory is an agent of the disclosed principal does not bind the agent to the contract"). The Court has previously decided that agency status alone is insufficient to bind a nonsignatory. *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002). But Aban makes no such contention, and the district court did not base its decision on that theory.

Aban's claims against the Covingtons are tied directly to the Beacon-Aban contract. Aban asserts that the Covingtons frauduluently induced Aban into signing the agreement, and made false, fraudulent, or at least negligent, mispresentations regarding the sufficiency, skill and competency of the management, staff, front line supervision, and others to ensure the project would be performed according to the contract, among other things. (R. at 105-110; 121 at ¶ 29; 123 at ¶¶ 45-48; 125-127 at ¶¶ 52-61). It is for these reasons that district court explicitly found that "the Covingtons can be

compelled to arbitrate claims that arise from their behavior as Beacon's agents. . . ." (R. at 671) (emphasis added). *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (U.S. 1967) (fraudulent inducement claims held to arise under an arbitration agreement); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 847-856 (2d Cir. 1987) (RICO claims, Robinson-Patman Act claims, common law fraud claims, unfair competition claims, and unjust enrichment claims held arbitrable because they arose under an arbitration agreement).

In *Westmoreland*, the Court indicated that a nonsignatory can be bound by an arbitration provision under agency principles if at the time of signing the agreement the parties intended to bring the nonsignatory "into the arbitral tent." 299 F.3d at 466. The clause at issue herein provides that "all disputes arising hereunder" shall be submitted to arbitration. When "contracting parties agree to arbitrate all disputes 'under or with respect to' a contract…they generally intend to include disputes about their agents' actions." *Vesta*, 192 S.W.3d at 762. Naturally, a corporate entity cannot act except through its agents. *Merrill Lynch*, 235 S.W.3d at 188-189 ("Corporations can act only through human agents, and many business-related torts can be brought against either a corporation or its employees"). It was, therefore, at the time of contracting, foreseeable that disputes arising

under this agreement may involve claims of misconduct by the signatories' agents for which the agents may be personally liable. The phrase "all disputes" really means "all disputes." It does not mean "all disputes between the corporate entities, excluding those which involve the entities' agents' conduct while acting on behalf of the entities," or other similar connotation. Conversely, there is no clear intention expressed on the face of the arbitration clause that carves out an exception for claims made by one party against the other's officers, directors, employees or agents. To the contrary, the language illustrates that the parties intended to bring their officers, directors, employees and agents "into the arbitral tent." *See Vesta*, 192 S.W.3d at 762 (arbitration clauses like the one at issue are intended to apply to agents acting on behalf of a signatory).

Given that courts have "consistently afforded agents, employees, and representatives the benefit of arbitration agreements entered into by their principals" when their alleged misconduct "relates to their behavior as officers or directors or in their capacities as agents of the corporation," *Breeden*, the Covingtons should not be allowed to escape the arbitration provision when it does not suit their desires[4]. 120 F. Supp. 2d at 1240.

[4] The Covingtons' discussion about general agency principles under the RESTATEMENT (THIRD) OF AGENCY is misplaced. They contend that because they are not personally liable for breach of contract to Aban under the Beacon-Aban agreement, it follows that

C. The Cases Cited by the Covingtons Are Inapplicable

The district court cited *Lee*, *Breeden*, and *Bondy* as examples of cases in which unwilling nonsignatories were compelled to participate in arbitration under principles of contract and agency law. (R. at 670); 983 F.2d 883; 120 F.Supp.2d 1225; 2005 WL 1907252, at *6-7. The district court did not cite any Texas cases with the same fact pattern, but it appears that no such cases exist. The district court correctly pointed out that the Covingtons "present[ed] no argument or authority suggesting that Texas state courts would deviate from federal law on this point." (R. at 670). The Covingtons make the conclusory assertion that *Lee*, *Breeden*, and *Bondy* "do not represent established federal arbitration law for the precise issue involved in this case," *e.g.*, the "unwilling-nonsignatory-agency" scenario, but they have not cited any case involving the unwilling-nonsignatory-agency scenario where a court has reached a different result.

Instead, they argue that three other cases represent "persuasive federal court decisions as well as controlling principles of contract law articulated by both this Court and the Texas Supreme Court." Covington Br. at 27. The

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they cannot be bound by the arbitration provision. Covington Br. at 33-34. The existence of personal liability for breach of contract is not, however, a prerequisite to a determination that a nonsignatory is bound by an arbitration provision. *See Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000); *Merrill Lynch*, 235 S.W.3d 185; *Vesta*, 192 S.W.3d 759.

first case they point to is *Fleetwood Enters. Inc. v. Gaskamp*, a decision that they claim has a "closely related fact pattern," Covington Br. at 26 n. 11, but which is factually dissimilar and readily distinguishable because it does not involve agency principles. 280 F.3d 1069 (5th Cir. 2002). In *Gaskamp*, two parents filed suit individually and as next friends of their minor children for personal injuries allegedly sustained from formaldehyde exposure in their home. The defendants filed a motion to compel arbitration based on an arbitration agreement signed by the parents. The district court granted the motion and found that the parents and their children were bound by the arbitration clause. The decision was appealed to this Court.

When *Gaskamp* was decided, Texas recognized only two circumstances under which non-signatories could be compelled to arbitrate, "first, where the non-signatory sued on the contract; and second, where the non-signatory was a third-party beneficiary of the contract." *Gaskamp*, 280 F.3d at 1074. The Court ruled that neither theory fit the fact pattern, so the children were not bound by their parents' contract with the homebuilder. *Id*. at 1077. Since *Gaskamp*, Texas courts—and this Court—have recognized six theories under which nonsignatories may be bound to arbitrate, including agency. *See Bridas*, 345 F.3d at 356; *Kellogg*, 166 S.W.3d 732 (citing *Bridas*). The *Gaskamp* fact pattern was markedly different from the one

now before the Court, and that case did not involve the question of agency. Consequently, it has no bearing on the penultimate issue in this case.

Similarly, the *Kellogg* and *Labatt* cases cited by the Covingtons are also inapposite because neither of them involves the agency issue. In *Labatt*, the Texas Supreme Court found that claims brought by wrongful death beneficiaries were subject to an arbitration agreement signed by the decedent because the beneficiaries' claims were derivative of the decedent's claims. 279 S.W.3d 640. And in *Kellogg*, the Texas Supreme Court determined that claims for unjust enrichment and the self-executing mechanic's and materialman's lien under the Texas Constitution were not subject to arbitration under the direct benefits estoppel theory. 166 S.W.3d 732.

D. Procedural Issues are to be Decided by the Arbitrator

As this Court has said, "questions of so-called 'procedural arbitrability,'" the arbitrator, not the court, generally decides whether the parties complied with the agreement's procedural rules." *General Warehousemen & Helpers Union Local 767 v. Albertson's Distrib., Inc*., 331 F.3d 485, 488 (5th Cir. 2003). The Covingtons complain that if they are deemed to be bound by the arbitration agreement, then arbitration still must be stayed pending compliance with the procedural rules set forth in the

arbitration agreement, *e.g.*, that the Covingtons and Aban must first engage in informal settlement negotiations and mediation before arbitration may proceed. Covington Br. at 38. In other words, the Covingtons claim there has been a failure of conditions precedent. Their complaint is a recent one, and is rather disingenuous: the Covingtons have admitted in the arbitration proceeding that "all conditions precedent to Aban's right to recovery herein…have been performed or have occurred." (R. at 167-168).

Because courts should leave procedural arbitrability questions to the arbitrators, the Court should defer this issue to the arbitrators. Alternatively, the Court should conclude that the because the Covingtons' have admitted in their Answer to the Arbitration Complaint that all conditions precedent to Aban's recovery have been performed or have occurred, the Covingtons' argument is without merit.

CONCLUSION & PRAYER

The Court should dismiss the Covingtons' appeal because it is without subject matter jurisdiction to consider it. Alternatively, if the Court does have jurisdiction, then the judgment of the district court should be affirmed because the Covingtons are bound to the arbitration provision (i) by virtue of their conduct as agents (President/Director and Vice President) of Beacon, and (ii) because, as they concede, Aban's claims against them arise under

the arbitration clause. Additionally, the Court should defer to the arbitrators the question of whether procedural mechanisms in the arbitration clause have been followed. If, however, the Court concludes that it should decide the procedural issue, then it should find that the Covingtons' admission that "all conditions precedent" have been performed or have occurred operates as a waiver of the informal settlement negotiations and mediation mechanisms, and is not an impediment to proceeding with an arbitration hearing on the merits. The Court should affirm the judgment of the district court. Lastly, Aban asks the Court to grant to it all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2010 a true and correct copy of the forgoing document was served upon all counsel of record in accordance with the FEDERAL RULES OF APPELLATE PROCEDURE as follows:

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Henry ("Hank") J. Fasthoff, IV

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. R. 32.2.7(b)(3), THE BRIEF CONTAINS:

   A. 4,358 words.

2. THE BRIEF HAS BEEN PREPARED:

   A. in proportionally spaced typeface using:

      Microsoft Word 2007 in Times New Roman 14 point font.

3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THE CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH CIR. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE

BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

/s/ Henry (“Hank” J. Fasthoff, IV
Henry (“Hank”) J. Fasthoff, IV
Dated: July 28, 2010