

IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, LLC

PLAINTIFF

VS.

RICHARD SCRUGGS, Individually;
DON BARRETT, Individually; SCRUGGS
LAW FIRM, P.A.; BARRETT LAW
OFFICE, P.A.; NUTT & McALISTER, PLLC;
and LOVELACE LAW FIRM, P.A.

CIVIL ACTION NO. L07-135
LAFAYETTE COUNTY

FILED

JUL 09 2007

Mary Alice Busby
CIRCUIT CLERK

BY _____ D.C. DEFENDANTS

**DEFENDANTS' REPLY TO PLAINTIFF'S
SUPPLEMENTAL MEMORANDUM BRIEF IN RESPONSE TO
MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION**

A "supplemental memorandum brief" connotes a supplement to a previously made argument based upon a new development or an intervening change in the law rather than a completely new argument, which is directly contrary to an earlier position taken in the same case. Plaintiff's brief falls within the latter category. Plaintiff's untimely "supplemental" memorandum brief is not based upon any new principles of law but is, instead, merely a pretext for plaintiff to make an *ad hominem* argument and unfounded attack on defendants without presenting a meritorious argument with respect to the pending motions.

Plaintiff asserts, for the first time, that some of its claims fall outside the scope of the subject arbitration agreement. Plaintiff's argument is contrary to logic and common sense, and is due to be swiftly rejected.

First, the arbitration agreement at issue in this case provides as follows:

Disputes - Any dispute arising under or relating to the terms of this agreement shall be resolved by **mandatory binding arbitration**, conducted in accordance with the guidelines of the American Arbitration Association.

(Exhibit 1 to Defendants' Motion to Stay Proceedings and Compel Arbitration, p. 3) (underlining added; bold type in original).

Plaintiff's entire supplemental brief is proven incorrect by the foregoing arbitration provision and a single sentence found in paragraph 1 of plaintiff's First Amended Complaint:

All of these actions developed as a result of a joint venture agreement entered into among the plaintiff and the defendants.

(Plaintiff's First Amended Complaint, ¶1) (emphasis added).

It is also obvious from an objective reading of the remainder of plaintiff's First Amended Complaint that all of plaintiff's asserted claims "arise under" and/or "relate to" the joint venture agreement and that, as a result, all of plaintiff's claims fall within the scope of the arbitration agreement. In addition, a party cannot avoid arbitration simply by including related claims against individuals who are employed by the signatory parties to the arbitration agreement. *See Greater Canton Ford Mercury, Inc. v. Ables*, 948 So. 2d 417, 419 (Miss. 2007) and *Ford Motor Co. v. Ables*, 207 Fed. Appx. 443 (5th Cir. 2006) (claims against individual employees of signatory defendant and claims against a non-signatory defendant were held subject to arbitration). *See also Fradella v. Seaberry*, 952 So. 2d 165, 2007 Miss. LEXIS 184, *28-29 (Miss. 2007). Indeed, the defendant law firms in this case can only act through their respective attorneys, including Mr. Scruggs and Mr. Barrett, and plaintiff's claims against Mr. Scruggs and Mr. Barrett unquestionably arise under, relate to, and/or touch the Joint Venture Agreement, as plaintiff correctly admits in the very first paragraph of its First Amended Complaint. *See* First Amended Complaint, ¶ 1 ("All of these actions developed as a result of a joint venture agreement entered into among the plaintiff and the defendants."). *See MS Credit Center, Inc. v. Horton*, 926 So.

2d 167, 176 (Miss. 2006) (“[I]t is only necessary that a dispute ‘touch’ matters covered by the contract to be arbitrable.”).

Second, plaintiff's assertion that some of its claims fall outside the scope of the arbitration agreement is an argument (like plaintiff's waiver argument) that, in and of itself, must be submitted to arbitration. The parties' arbitration agreement incorporates the rules of the American Arbitration Association ("AAA"), and Rule R-7(a) of the AAA's Commercial Arbitration Rules (attached to defendants' Motion to Stay Proceedings and Compel Arbitration as Exhibit 2), provides as follows:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(Emphasis added).

Rule 7(a), which has been incorporated into and is part of the parties' Joint Venture Agreement, provides that the arbitrator, not this Court, must resolve plaintiff's (unfounded) assertion that some of its claims fall outside the scope of the arbitration agreement. *See Ables, supra*, 948 So. 2d at 422 ("The terms of the arbitration provision must be honored in a dispute over arbitrability. Therefore, arbitration of the issue of arbitrability is the mandatory result if those are the terms to which the parties have validly agreed."). Indeed, numerous court decisions have held that the incorporation of AAA's rules into an arbitration agreement constitutes "clear and unmistakable" language requiring the parties to arbitrate issues of "arbitrability," including disagreements about whether certain claims are subject to arbitration, i.e., the scope of the arbitration agreement. *See, e.g., CitiFinancial, Inc. v. Newton*, 359 F.Supp.2d 545, 552 (S.D. Miss. 2005) (incorporation of the AAA rules constitutes an agreement for arbitrator to determine

issue of jurisdiction, including scope of arbitration agreement); *Qwest Corp. v. New Access Communications, LLC*, No. 03-N-1278, 2004 U.S. Dist. LEXIS 28523, at 22 (D.Co. March 31, 2004) (incorporation of the AAA rules constitutes an agreement for arbitrator to determine issue of arbitrability); *Contec Corp v. Remote Solution, Co.*, 398 F.3d (2nd Cir. 2005) (scope and validity of arbitration agreement are for arbitrator when parties incorporate AAA rules in their agreement); *Johnson v. Polaris Sales, Inc.*, 257 F.Supp. 2d 300, 308 (D. Me. 2003) (incorporation of AAA rules into arbitration agreement constitutes an agreement for the arbitrator to decide whether a dispute falls within the scope of the agreement); *Brandon, Jones, Sandal, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 203 F.R.D. 677, 684-85 (S.D. Fla. 2001) (incorporation of AAA rules constitutes clear and unmistakable agreement for arbitrator to determine issue of arbitrability). Nothing in the *Smith* opinion cited by plaintiff changes or challenges the controlling principles of *Ables* and the other cases cited above.

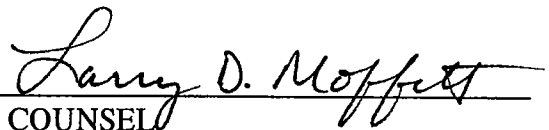
Thus, as with plaintiff's waiver argument, plaintiff's "scope" argument must be resolved by the arbitrator, not this Court, and the Court should compel arbitration of the plaintiff's "scope" argument as a threshold matter. If, however, this Court undertakes to decide the "scope" issue, then this Court should find that all of the plaintiff's claims are subject to arbitration. *See* plaintiff's First Amended Complaint, ¶1 ("All of these actions developed as a result of a joint venture agreement entered into among the plaintiff and the defendants.").

Finally, plaintiff's discussion of Judge Acker's opinion in the *Moran* case is irrelevant to the issue presently before this Court: the arbitrability of the plaintiff's claims. Suffice it to say that Mr. Scruggs and his firm disagree with the conclusions reached by Judge Acker and are prepared to defend and establish the propriety of their actions in connection with the *Moran* proceeding. In

any event, to the extent plaintiff believes defendants' actions in *Moran* have a bearing on the merits of plaintiff's claims, plaintiff may assert its arguments in arbitration; but plaintiff's allegations about *Moran* have no relevance to nor bearing upon the issue presently pending before this Court and should be ignored. Indeed, plaintiff's argument smacks of desperation and is nothing more than a "red herring" through which plaintiff seeks to draw the Court's attention away from the well-established and controlling legal precedents which mandate arbitration of the subject claims. Defendants are confident the Court will see plaintiff's arguments for "what they are" and will grant defendants' motion.

Respectfully submitted,

RICHARD SCRUGGS, Individually; DON BARRETT, Individually; SCRUGGS LAW FIRM, P.A.; BARRETT LAW OFFICE, P.A.; NUTT & McALISTER, PLLC; and LOVELACE LAW FIRM, P.A.

BY: 
OF COUNSEL

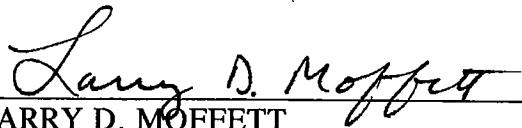
LARRY D. MOFFETT - BAR # 3401
WILTON V. BYARS, III - BAR # 9335
SHEA S. SCOTT - BAR # 100775
DANIEL COKER HORTON & BELL, P.A.
OXFORD SQUARE NORTH
265 NORTH LAMAR BOULEVARD, SUITE R
POST OFFICE BOX 1396
OXFORD, MS 38655-1396
(662) 232-8979

CERTIFICATE

I, Larry D. Moffett, of counsel for Defendants, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing pleading to:

Grady F. Tollison, Jr., Esq.
Tollison Law Firm
100 Courthouse Square
Oxford, MS 38655

THIS, the 5th day of July, 2007.



LARRY D. MOFFETT

**In Re: Katrina Litigation
Joint Venture Agreement
November 8, 2005**

The following parties to this agreement have agreed to associate themselves as Joint Venturers in the above litigation.

It is contemplated that this venture will bring a number of lawsuits on behalf of individuals and businesses who were wrongfully denied insurance coverage for property damage arising out of Hurricane Katrina.

Participants in the Venture

Role in the Venture

Scruggs Law Firm, P.A.
P.O. Box 1136
Oxford, MS 38655

Lead Counsel

Barrett Law Office, P.A.
404 Court Square North
Lexington, MS 39095

Witness Development; including acquisition of videos and pictures of storm damage while occurring

Nutt & McAlister, P.L.L.C.
605 Crescent Blvd., Suite 200
Ridgeland, MS 39157

Funding; client relations

John G. Jones
Jones, Funderburg, Sessums & Peterson, P.L.L.C.
901 N. State Street
P.O. Box 13960
Jackson, MS 39236-3960

Briefing

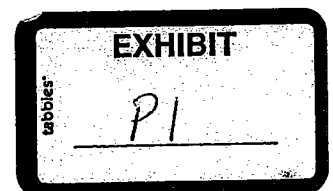
Paul Benton
181 Main Street
P.O. Box 1341
Biloxi, MS 39533-1341

Local Counsel

Dewitt "Sparky" Lovelace
Lovelace Law Firm, P.A.
36474 Emerald Coast Pkwy., Suite 4202
Destin, FL 32541

Expert retention; adjuster retention

Cases Included - This agreement includes all claims asserted and/or cases filed, held, retained or associated on against insurance companies by any party hereto. Joint venturers shall unanimously agree to any association with any other firm and the terms and conditions of any such association with any other party.



Removal - A member of the joint venture may be removed by a super-majority vote of the joint venture members. A super-majority requires a vote of four venturers. All firms must vote to effect a removal. It shall be assumed that the firm sought to be removed votes and votes against the removal. If a firm is removed from the joint venture all rights hereunder shall be forfeited and any capital contribution returned within a reasonable time. Such firm hereby covenants that it will seek no other compensation through litigation or otherwise from the parties to this agreement or any Court before whom this venture has or has had cases pending in the referenced matter.

Capital Contributions - To fund common litigation expenses, Nutt & McAlister will fund up to \$1 million per year as needed. If greater than \$1 million per year is needed, the venturers will fund the litigation pro rata via periodic capital calls. Any venturer who does not pay pursuant to a capital call within 14 days of the call will forfeit venturer status.

Capital Contributions from either of the above sources shall be used only for expenses that are common to the joint venture firms in prosecuting the litigation. Such common fund expenses include but are not limited to the following: retention of consultants and experts, costs to establish and maintain a centralized document depository and an internet-based client database, temporary office and staffing (if necessary), witness fees, deposition costs, document production costs, public relations, etc. Nutt & McAlister will serve as the treasurer for the venture with Ernie Coward serving as the principle contact person. All invoices shall be submitted to Nutt & McAlister for an initial determination of whether an expense is a common account expense or not. A manifest form will be provided to each venturer for use in submitting expenses for reimbursement. The form will provide for three classes: (1) *Client specific* - copies, postage, etc. These expenses must include client's name and social security number and are recoverable from clients from award funds, (2) *Common benefits* - such as experts, depositions, court costs, etc., These expenses are recoverable, pro rata, from clients from award funds (3) *Venture expenses* - are those which benefit the venture but are not recoverable from clients. If these are approved, they will be reimbursed to paying venturer and pro-rated back to all venturers.

There will, from time to time, be disagreements with the Nutt/McAlister decisions relative to payment of expenses. Accordingly, two other reviewers from other venture firms will be elected to review such declinations. If Nutt/McAlister decline payment of an invoice, Mr. Coward and the two other reviewers will decide by 2/3 majority on the final disposition of the matter.

Expenses that are not common fund type expenses include but are not limited to: individual firm's overhead costs, travel expenses (unless for travel related to settlement discussions with one or all defendants), copy costs, mailings, staff, etc. These expenses shall not be reimbursable out of the common fund account when incurred.

Any joint venturer firm may request an accounting or an inspection of the transactions of

the common account of the joint venture upon reasonable notice.

Meetings - Shall occur periodically as the litigation requires.

Disputes - Any dispute arising under or relating to the terms of this agreement shall be resolved by *mandatory binding arbitration*, conducted in accordance with the guidelines of the American Arbitration Association. The site of the arbitration shall be Oxford, MS.

Division of Attorneys' Fees: - All fees or compensation received by any joint venturer and anyone associated by them shall be timely paid in full without reduction to the joint venture and divided as provided in this agreement.

If a judgment or settlement is obtained such that attorneys' fees are to be awarded to the attorneys herein, fees shall be divided as follows:

The joint venture shall distribute proceeds to the firms in the order of capital contributions first, firms' reasonable out of pocket expenses second, and attorneys' fees third. For financing the litigation and for all of their professional efforts herein, Nutt and Associates will receive 35% of the net fee. If the recovery is less than the amount of capital contributions and expenses incurred, the joint venture shall reimburse capital contributions first and then expenses on a pro-rata basis in proportion to the recovery. The joint venture shall distribute proceeds to the firms in the following order: (1) Reimburse Nutt/McAlister for all expenses paid, (2) Refund of all capital contributions, (3) Payment of 35% of net fee to Nutt/McAlister for financing the litigation and for their professional efforts, (4) The remaining 65% of the net fees will be divided among the remaining venturers taking into consideration all factors including Rule 1.5 of the Model Rules of Professional Conduct, and contribution to the success of the litigation. Agreement by 4 of the 5 venturers is required to distribute said fees.

Referring Attorneys

Referring attorneys shall be paid a maximum referral fee of 33 1/3% of the net recovery for each client referred to and accepted by the venture. The venture will consider reimbursement of referring attorneys' expenses, but will not commit to reimburse said expenses unless the venturers decide to do so by unanimous agreement and the expenses are subjected to the same approval process heretofore described.

Miscellaneous

No member shall, without the prior written consent of all of the others, sell or assign his share or interest arising from this agreement.

If one or more of the provisions in this agreement are for any reason held invalid, illegal, or unenforceable, the invalidity or unenforceability shall not effect any other provision, and this agreement shall be construed as if the invalid, illegal, or unenforceable provision was never in the agreement.

This Agreement may be executed in counterparts. Facsimile or photocopied signatures shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be appended to this agreement.

All notices or other required communications to any party to this Agreement shall be in writing (and shall include telecopy or similar writing) and shall be given to the members hereto at the addresses listed above. Any party hereto may change the name and address of the person designated to receive notice on behalf of such party by notice given as provided in this paragraph.

No person shall be considered the drafter of this Agreement.

Modification of this Agreement - This agreement constitutes the sole and only agreement of the members hereto and supersedes any prior understandings, written or oral agreements between the members of this venture. Further, any modification of this agreement will be of no effect unless written and signed by a minimum of 4 of the joint venturers.

DATED this the 14 day of December, 2005, but effective as of _____, 2005.

SIGNATURES:

SCRUGGS LAW FIRM
120-A Courthouse Square
P.O. Box 1136
Oxford, MS 38655

BY: _____

BARRETT LAW OFFICE, P.A.
404 Court Square North
Lexington, MS 39095

BY: _____

NUTT & MCALISTER, P.L.L.C.
605 Crescent Blvd., Suite 200
Ridgeland, MS 39157

BY: _____

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DATED this the _____ day of _____, 2005, but effective as of _____, 2005.

SIGNATURES:

SCRUGGS LAW FIRM
120-A Courthouse Square
P.O. Box 1136
Oxford, MS 38655

BY: _____

BARRETT LAW OFFICE, P.A.
404 Court Square North
Lexington, MS 39095

BY: _____

NUTT & MCALISTER, P.L.L.C.
605 Crescent Blvd., Suite 200
Ridgeland, MS 39157

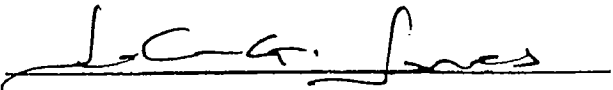
BY: Mary E. McAlister

JONES, FUNDERBURG, SESSUMS & PETERSON, P.L.L.C.

901 N. State Street

P.O. Box 13960

Jackson, MS 39286-3960

BY: 

PAUL BENTON

181 Main Street

P.O. Box 1341

Biloxi, MS 39533-1341

BY: _____

LOVELACE LAW FIRM, P.A.

36474 Emerald Coast Pkwy., Suite 4202

Destin, FL 32541

BY: 

