**IN THE MISSISSIPPI COURT OF APPEALS**

**CASE NUMBER 2010-CA-00632-COA**

**HARRY BAKER SMITH ARCHITECTS II, PLLC**
**Appellant**

**vs**

**SEA BREEZE I, ET AL.**
**Appellees**

**Appeal from the Final Ruling of Harrison County Chancery Court, Second Judicial District (Hon. Jim Persons, Chancellor) on Appellees' Motions to Compel Arbitration**

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# REPLY BRIEF OF THE APPELLANT, HARRY BAKER SMITH ARCHITECTS II, PLLC, TO BRIEF SUBMITTED BY SEA BREEZE I, LLC

**ORAL ARGUMENT REQUESTED**

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January 18, 2011

**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2010-CA-00632**

**HARRY BAKER SMITH ARCHITECTS, II, PLLC** **APPELLANT**

**VS.**

**SEA BREEZE I, LLC, ET AL.** **APPELLEES**

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**APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI HONORABLE JUDGE JIM PERSONS, CHANCERY JUDGE**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those listed as representing Appellant Harry Baker Smith Architects, II, PLLC, the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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January 18, 2011

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MAY IT PLEASE THE COURT:

It is important that this Honorable Court consider the entirety of appellee Sea Breeze I, LLC ("Sea Breeze") statements in its STATEMENT OF THE CASE section. Most of these statements only quote various documents in part and leave out other important parts that completely destroy the tenor of the quoted statements, making many, if not all statements by Sea Breeze, suspect and misleading and put serious doubt on the entire Sea Breeze Brief.

## INITIAL ARGUMENT – SEA BREEZE I CHERRY PICKING

### I. NO INCOPORATION OF A201 IN B141

The first and most important misleading statement is on page 8 of Sea Breeze's Brief, second paragraph, last sentence:

> "The B141 contract (The Sea Breeze/HBSA Agreement) also contains a provision, §1.1.5, that incorporates by reference that version of the A201 document signed by Sea Breeze and RAC (Roy Anderson, the contractor), so that the terms in B141 shall have the same meaning as those in the edition of AIA Documents A201. (R328; Appellee R.E.19)." (Emphasis added.)

In order to mislead this Honorable Court claims, Sea Breeze misquotes §1.1.5 and fails to cite §1.3.7.2. The actual §1.1.5 reads:

> "When the services under this Agreement include contract administration services, the General Conditions of the Contract for Construction shall be the edition of AIA Documents A201 current as the date of this Agreement, or as follows:
>
> That version of the AIA Document A201 between Owner and Contractor dates 10/11/2004."

The reference here is NOT TO INCORPORATE A201 into the B141 Agreement by Sea Breeze/HBSA but to stipulate what contract is to be administered by the architect. The provisions of A201 are not incorporated. Then the section which Sea Breeze fails to cite to the Court DOES NOT INCORPORATE the A201 Document between Sea Breeze/Roy Anderson.

> "§1.3.7.2. Terms in this Agreement shall have the same meaning as those in the edition of AIA Document 201, General Conditions of the Contract for Construction, current as of the date of this Agreement (B141)." (Emphasis added.)

Thus, the Agreement A201 actually signed by Sea Breeze and appellee Roy Anderson Corp. ("Roy Anderson") is not even referred to in B141 except for the architect's limited administration job. Nowhere is form A201 INCORPORATED into B141 let along the actual A201 adopted by Sea Breeze and Roy Anderson, merely the meaning of the terms in each form will be the same.

## II. OBJECTION TO ARBITRATION

Another example of a misleading statement by Sea Breeze is on page 3, last paragraph of its Brief. Sea Breeze claims:

> "After Sea Breeze renewed its demand for arbitration with the AAA, HBSA, for the first time, filed an objection to joinder of RAC in the arbitration (A.399)."

First, this so called "renewal" was the first time Sea Breeze had made a joint demand for arbitration against appellant Harry Baker Smith Architects II, PLLC, and Roy Anderson. The demand for mediation had been made separately against HBSA and Roy Anderson. HBSA was not informed by Sea Breeze of a mediation or potential arbitration by Sea Breeze against Roy Anderson.

Second, the actual mediation was held outside the administration of AAA[1] by agreement of the parties upon the suggestion of Sea Breeze. The provision disallowing joint arbitration in B141 applies only to arbitration (not mediation) as shown in section 1.3.5.4 in B141:

> "§ 1.3.5.4, No arbitration arising out of or in relation to this Agreement shall include, by consolidation or joinder or in other manner, an additional person or entity not a party to this Agreement, except by written consent containing reference to this Agreement and signed by the Owner, Architect, and any other person or entity sought to be joined. Consent to

[1] R. at 76; R.E. at 001.

> arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable in accordance with applicable law in any Court having jurisdiction thereof."

There is no similar provision under mediation in the Sea Breeze/ HBSA Agreement. No such written agreement to consolidate other arbitrations with the arbitration between Sea Breeze and HBSA was even made.

Third, both HBSA and Roy Anderson immediately objected to the consolidated arbitration filed by Sea Breeze for the first time on October 9, 2008 with joint demand, subsequent to the failed mediation. Roy Anderson made an objection to the joint arbitration first prior to HBSA's objection.

On December 4, 2008, AAA, as administrators only, without appointing an arbitrator, decided to accept a consolidated arbitration.[2] HBSA II immediately on December 12, 2008 again made its objection to joint arbitration known by filing an application for injunctive and other relief in the United States District Court for the Southern District of Mississippi. However, because of a one month old decision of the United States Court of Appeals for the Fifth Circuit, the District Court determined that it did not have subject matter jurisdiction because one of the members of Sea Breeze was a Louisiana citizen. This was unknown to HBSA at the time it filed its first application for an injunction. But HBSA made it very clear with the Complaint for Injunctive Relief that it protested and objected to consolidation of the Sea Breeze/Roy Anderson and Sea Breeze/HBSA arbitrations which had been instituted for the first time on October 9.

[2] R.at 78; R.E. at 002.

## III. HBSA PROTESTED TO SPECIAL ARBITRATOR

The third example of a misleading statement by Sea Breeze in its Brief is on Page 4, first full paragraph:

> "Thereafter, on December 23, 2008, counsel for HBSA wrote the AAA requesting that a special arbitrator be appointed to decide the consolidation issue pursuant to AAA Rule R7 of the Construction Industry Arbitration Rules, which provides as follows with regard to disputes over joinder and consolidation: . . . (R.97; R.E.58; R.112)"

Remembering that AAA administration decided to go forward with a consolidated arbitration on December 4, 2008 without intervention of an arbitrator, HBSA wrote the December 23, 2008, letter in desperation but maintained its protest and objection in that letter. The second paragraph of the December 23, 2008 letter by HBSA, which Sea Breeze quotes in only selected part, reads as follows:

> "We maintain the rights and defenses and objection to this improperly constituted arbitration on behalf of HBSA II, APPL. In fact, we retain the right to proceed to Chancery Court in Gulfport, Mississippi to enjoin this proceeding, having to dismiss the application for injunctive and other relief in the United States District Court for the Southern District of Mississippi on a previously unknown technicality to diversity of citizenship jurisdiction of that Court."

The expressed HBSA protest and objection was clearly made to the consolidation by AAA, to the AAA proceedings and to the appointment of the Rule R-7 Special Arbitrator. Moreover, HBSA expressly reserved the right to judicial review by making it clear that it would seek an injunction in the Chancery Court of Gulfport to keep the improper arbitration from going forward even after any decision by the Special Arbitrator as to arbitrability. As previously addressed by HBSA, this one clause taken from the above letter is sufficient to provide the Chancery Court with the jurisdiction to review Special Arbitrator Harris' decision as to arbitrability in light of the United States Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995).

Yet again, on page 11 of its Brief, Sea Breeze selectively recites only part of HBSA's February 20, 2009 letter for another of Sea Breeze's efforts to mislead this Court:

> "Then again on February 2 (sic), 2009, HBSA wrote the AAA that ". . . it is imperative that AAA discharge its responsibility under Rule R-7 by appointing a single arbitrator for the limited purpose of deciding the unsolved consolidation and joinder issues in this matter (R.94; R.E.55)."'

The February 20, 2009 letter by HBSA boldly starts out with a protest to the selection of an arbitrator:

> "Subject: Selection of Arbitrator under Protest and with Full Reservation of Rights."

In that letter, HBSA further states:

> "Because HBSA II likewise does not believe that this arbitration is properly constituted as it now stands, HBSA II submits the allowed list of arbitrators under protest and with a full reservation of rights to pursue its objections pursuant to AAA Rule 7 or in a court of law with respect to the consolidation and joinder of RAC in an arbitration involving HBSA II."

In its last sentence, HBSA II further states:

> "There is also a very serious question of jurisdiction of an arbitrator over part of the claims being asserted by Sea Breeze I which are not its claims but that of the condo owners who are not party to the architectural agreement."

Finally, Sea Breeze refers to a February 16, 2009 e-mail to AAA by HBSA II. Sea Breeze quotes only that portion of the e-mail that serves its purpose to again mislead this Court. The quote in the last sentence on page 11 of their Brief beneficially leaves out the first clause of the e-mail:

> "Reserving all rights of Harry Baker Smith Associates II, PLLC . . ."

The e-mails from the AAA had specifically stated:

> "The supplemental arbitrator selected is not for the purpose of determining the request for consolidation in this matter."

This was again a statement by the administrative staff of AAA that it would not consider appointing a Rule R-7 special arbitrator to determine the threshold question of consolidation which HBSA II was being forced to take part in. The Selection of Arbitrator under Protest and with Full Reservation of Rights reservation was stated clearly in the December 23, 2008 letter in the beginning of its letter and HBSA continued:

> ". . . mantain the rights and defenses and objection to this improperly consolidated arbitration on behalf of HBSA II APPL. In fact, we retain the right to proceed to Chancery Court in Gulfport, Mississippi to enjoin this proceeding. . ."

## IV. MEDIATION

As to the issue of the mediation, on page 2, second paragraph of the Sea Breeze Brief, Sea Breeze recites:

> "By agreement, and pursuant to the contractual documents between the parties, the arbitration was placed in abeyance to allow for joint mediation with RAC and HBSA to proceed. (R.55; R.E.26).

A. The Mediation Article §1.3.4.1 in B141 states clearly:

> "Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration *or the institution of legal or equitable proceedings by either party*." (Emphasis added.) (R. at 103)

B. §1.3.4.2 provides:

> "The Owner and Architect shall endeavor to resolve claims, disputes, and other matters in question between them by mediation which, unless the parties mutually agreed otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect." (R. at 103)

Sea Breeze however requested that the parties agree to avoid the AAA and its Rules and the parties held a useless mediation. Sea Breeze then made its first demand for arbitration before the AAA. It could not ask for arbitration otherwise. There was no arbitration held in abeyance. Sea Breeze could not demand arbitration without forcing a useless mediation without discovery.

Carl Hebert, seeing no opportunity for discovery and having no knowledge of whether Sea Breeze had a pending claim against Roy Anderson, suggested:

> ". . . we believe it would be appropriate to have the contractor's participation in any mediation and/or arbitration."

This was an informal suggestion and not a written contract agreement by the parties which could effect a consolidated arbitration. Mr. Hebert's suggestion would have to be acted upon by all parties with a written agreement consenting to a consolidated arbitration referring specifically to the B141 agreement between Sea Breeze and HBSA II. Such action did not occur. This contract provision is very specific and plain, not subject to interpretative emasculation by an arbitrator (not selected by HBSA) out to confirm what the administrative staff of AAA had earlier decided.

## LAW & CONTINUING ARGUMENT

### I. IN ITS BRIEF, SEA BREEZE FAILS TO SHOW THAT HBSA EXHIBITED THE "CLEAR AND UNMISTAKABLE" INTENT REQUIRED PURSUANT TO *FIRST OPTIONS* TO BE BOUND BY THE SPECIAL ARBITRATOR'S DECISION

In its attempt to argue that HBSA relinquished its right to judicial review, Sea Breeze points to the numerous letters submitted to the American Arbitration Association by HBSA. Unsurprisingly, Sea Breeze omits the portion of each letter where HBSA submits to arbitrability under protest and with full reservation of rights—including the right to judicial review by a court. While Sea Breeze can omit whatever portion of the letter they feel they need to in their brief, this does not change the fact that HBSA submitted the question of arbitrability under protest and with the reservation of its right to seek judicial review in a Chancery Court.[3] In particular, HBSA reserved its right to seek judicial review in the Chancery Court of Harrison County, Mississippi. This was set forth in a letter to the AAA and opposing counsel dated

[3] R. at 97; R.E. at 003.

December 23, 2008. Despite Sea Breeze's careful omissions of the letter in their brief. The letter reads:

> We maintain the rights and defenses and objection to this improperly constituted arbitration on behalf of HBSA II, APPL. In fact, we retain the right to proceed to Chancery Court in Gulfport, Mississippi to enjoin this proceeding, having to dismiss the application for injunction and other relief in the United States District Court for the Southern District of Mississippi on a previously unknown technicality to diversity of citizenship jurisdiction of that court.[4]

Indeed, this letter in and of itself is sufficient to establish that, following *First Options,* HBSA did *not* clearly and unmistakably agree to an arbitrator deciding the arbitrability of a consolidated arbitration involving Roy Anderson. Had HBSA clearly and unmistakably agreed to be bound by an arbitrator's decision, then it would not have made clear that it was going to seek injunctive relief in Mississippi state court. As held by the United States Supreme Court in *First Options,* "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate the issue."[5] HBSA submitted—under protest—the arbitrability issue to the special arbitrator based on Sea Breeze's repeated claims that this was required before HBSA could seek an injunction in federal court. Sea Breeze, however, omits this key portion of controlling legal precedent when it accuses HBSA of acting "unabashedly."[6]

Having reserved its right to seek injunctive relief in the Chancery Court in Gulfport, Mississippi, even after a decision by the special arbitrator, Sea Breeze cannot credibly argue, as

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[4] R. at 97; R.E. at 004.

[5] 514 U.S. at 946; *see also RBC Capital Markets Corp., v. Thomas Weisel Partners, LLC,* C.A. Nos. 4709-VCN, 4760-VCN, 2010 WL 681669 at *7 (Del.Ch. Feb. 25, 2010)

[6] Sea Breeze Br. at p. 12

it does, that "there is abundant evidence of HBSA's willing submission of the joinder/consolidation issue to the special arbitrator."[7] Nothing could be further from the truth.

Not only did HBSA fully reserve its right to contest an arbitrator's decision to arbitrability in state court, but HBSA went further and *also* submitted its list of arbitrators under protest. On February 20, 2009, HBSA further wrote to the AAA as well as Sea Breeze and Roy Anderson submitting a list of arbitrators under protest and with a full reservation of rights to pursue its objections in a court of law.[8] The actions taken by HBSA were consistent with, if not exceeding, those taken by the Kaplans in *First Options* who had also objected to an arbitrator deciding arbitrability.

Realizing the harm done by *First Options,* Sea Breeze then attempts to hedge its position by baselessly arguing that "factual discrepancies" between *First Options* and the present case foreclose any "workable analogy" between the two.[9] However, if anything, the distinction between HBSA and the Kaplans in *First Options* is that HBSA went even further than did the Kaplans in preserving their right to judicial review. Not only did HBSA, like the Kaplans,[10] submit the arbitrability question to an arbitrator under protest, but HBSA *also* filed for not one but two injunctions in court seeking to enjoin the consolidated arbitration. This the Kaplans did not do. HBSA's multiple injunctions further supports the applicability of *First Options* to the present case in that, more so than the Kaplans, HBSA did not clearly and unmistakably agree to submit to arbitrability. Indeed, if *First Options* held that the Kaplans preserved judicial review

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[7] Sea Breeze Br. at 29.

[8] R. at 94; R.E. at 003.

[9] Sea Breeze Br. at 25.

[10] 514 U.S. at 946. To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did *not* want the arbitrators to have binding authority over them. *Id.*

by only submitting the arbitrability question to an arbitrator under protest, without filing any injunctions, then surely HBSA has preserved its right to judicial review of Special Arbitrator Harris' decision as HBSA not only submitted under protest but filed multiple injunctions.

It should also be noted that Sea Breeze attempts to argue that the consolidation issue is a "procedural question" that should be determined by an arbitrator. This is not so. Rather, this is a question of arbitrability to be decided by the courts. Arbitrability goes to the question as to whether the parties agreed to arbitrate a particular dispute. Here, the parties did not agree to arbitrate this dispute as consolidated absent certain requirements being met. As previously briefed, these requirements were not met. That this dispute involves the arbitrability of a consolidated arbitration does not turn this into a procedural question. Also, as previously briefed by HBSA, the Fifth Circuit in *General Motors Corp. v. Pamela Equities Corp.*[11] held that the waiver of a party's right to select its own arbitrator of a three-member panel went to the arbitrability of a dispute instead of constituting a "procedural question." Although *Pamela Equities* involved a pre-arbitration dispute as to waiver, the Fifth Circuit nevertheless held that the dispute was one as to substantive arbitrability and applied *First Options.*[12] The arbitrability concerned the arbitrability of an arbitration before a two-member panel instead of a three-member panel. The same logic applies here. The arbitrability at issue is arbitrability of the Sea Breeze/HBSA arbitration as consolidated with the Sea Breeze/Roy Anderson arbitration, or, in actuality, arbitrability of issues between Roy Anderson and HBSA.

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[11] 146 F.3d 242 (5th Cir. 1998)

[12] *Id.* at 248.

## II. SEA BREEZE'S REFERENCES TO THE CONSTRUCTION INDUSTRY ARBITRATION RULES ARE INSUFFICIENT TO ESTABLISH THAT HBSA AGREED TO BE BOUND BY THE SPECIAL ARBITRATOR'S DECISION AS REQUIRED BY THE UNITED STATES SUPREME COURT IN *FIRST OPTIONS*

Sea Breeze's argument that the applicable rules allow the AAA to appoint an arbitrator for the "purpose of deciding whether related arbitration should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder"[13] entirely misses the point that there must be "clear and unmistakable" evidence that HBSA agreed to be *bound* by any decision by the special arbitrator as to consolidation.[14] The key issue on appeal, and the key legal principle promulgated by the Supreme Court in *First Options*, is whether a party is *bound* by an arbitrator's decision as to arbitrability absent that party's "willingness to be effectively bound" as supported by "clear and mistakable" evidence.[15]

As established by both the United States Supreme Court and the Supreme Court of Mississippi, arbitrations are creatures of contract, and thus the plain language of an arbitration provision applies.[16] And here, although R-7 of the Construction Industry Arbitration Rules speaks to the issue of consolidation, nothing in the plain language of that Rule says that the parties agree to be bound by the arbitrator's decision as to arbitrability of a consolidated arbitration.[17] Indeed, nothing in R-7 says anything about the single arbitrator's decision being "final" and/or "binding."[18] Nor does R-7 provide that the single arbitrator's authority is

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[13] Sea Breeze Brief at 23

[14] *First Options,* 514 U.S. at 946.

[15] 514 U.S. at 946.

[16] *B.C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So.2d 483, 487-88 (Miss. 2005); *see also AT&T Technologies,* 475 U.S. at 648.

[17] R. at 112; R.E. at 005.

[18] R. at 112; R.E. at 005.

"exclusive" or "beyond judicial review."[19] The language at issue in R-7 simply does not contain language that clearly requires that HBSA be *bound* by the Special Arbitrator's decision. The only conclusion to be drawn in light of *First Options* is that HBSA has not clearly and unmistakably agreed to be *bound* by the Special Arbitrator's decision as to arbitrability of the arbitrations as consolidated.

Without the intent to be *bound* by the special arbitrator's decision, Sea Breeze cannot credibly argue that HBSA exhibited the "clear and unmistakable" evidence to be *bound* by the special arbitrator's decision as to consolidation and therefore relinquished its right to judicial review. Sea Breeze wants the Court to believe that HBSA is attempting to back out of a contract it signed.[20] In reality, this is a case where, unfortunately for Sea Breeze, the plain language of the contract, including anything allegedly incorporated, does *not* require that the parties be *bound* by any decision of the special arbitrator. Consequently, the Chancery Court retained its authority to rule as to HBSA's injunction against the improperly consolidated arbitration. This Court should thus reverse the judgment of the Chancery Court.

## III. SEA BREEZE MISSES THE POINT OF WHAT IT CLAIMS ARE "UNFOUNDED CRITICISMS" REGARDING THE SPECIAL ARBITRATOR'S RULING

If pointing out the error in Special Arbitrator Harris' ruling amounts to "unfounded criticism," then HBSA has indeed been a critic. Special Arbitrator Harris ignored federal and state law regarding arbitration in ruling as he did, and Sea Breeze asks this Court to turn its back on that same precedent by upholding his erroneous ruling.

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[19] R. at 112; R.E. at 005.

[20] Sea Breeze Brief at 22

The law is clear that the clear terms of an arbitration provision determine whether a party has agreed to submit a dispute to arbitration.[21] As previously discussed, certain requirements needed to be met before HBSA will agree to a consolidated arbitration. These requirements are plainly set forth in provision 1.3.5.4 of B141. Yet, what Special Arbitrator Harris did was clearly contradictory to well-established precedent. For example, the language of an arbitration provision cannot be "twisted" to effect an arbitration otherwise not warranted by the plain language of an arbitration provision.[22] And yet, this is exactly what Special Arbitrator Harris did.

In fact, Special Arbitrator Harris not only "twisted" the words of B141, the contract between Sea Breeze and HBSA, but went further in conjuring up his own contractual provisions which were non-existent as reflected in the plain language of B141. Such a course of action is absolutely prohibited by Mississippi law.[23] And yet, the clear absence of the phrase "unilateral ability" from the relevant arbitration provisions did not prevent Sea Breeze from unabashedly arguing that "Arbitrator Harris took the relevant provisions at face value and according to their plain meaning."[24]

Moreover, rather than address HBSA's point that, under both Mississippi and federal law, the plain language of an arbitration agreement dictates arbitrability,[25] Sea Breeze relied on the 1948 case of *Hutto v. Jordan* for support that Arbitrator Harris' decision to consolidate both

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[21] *Qualcomm, Inc. v. Am. Wireless License Grp.*, 980 So.2d 261, 269 (Miss. 2007) (citing *B.C. Rogers*, 911 So.2d at 487.

[22] *Tropical Cruise Lines, S.A. v. Vesta Ins. Co.*, 805 F.Supp. 409, 412 (S.D. Miss. 1992)

[23] *See, e.g., id; see also B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483, 487 (Miss. 2005).

[24] Sea Breeze Brief at 31

[25] *See, e.g., Qualcomm, Inc. v. Am. Wireless License Grp.*, 980 So.2d 261, 268-69 (Miss. 2007)

arbitrations—even if directly contrary to the contractual language in B141 and thus contrary to Mississippi law—deserves deference. However, *Hutto* involves an *award* by an arbitrator. An *award* is a final decision on the merits.[26] Here, there was no *award* but rather a decision as to arbitrability, a decision plainly subject to Court review.[27] The discretion provided to an arbitrator after a final decision on the merits, such as in *Hutto,* is much greater than and entirely distinct from the discretion given to a special arbitrator who decides arbitrability where one party has fully reserved their rights to judicial review. *Hutto* is inapplicable.

There likewise is not merit to Sea Breeze's argument that, because the A201 was modified, HBSA had the power to join in an arbitration involving Sea Breeze and Roy Anderson,[28] for three reasons: 1) HBSA was not a signatory to A201; 2) the changes at issue were done without HBSA's knowledge[29] and 3) any changes in A201 have no affect on the terms contained in B141.

HBSA is not a party to the Sea Breeze/Roy Anderson contract, A201, and thus not bound by the terms of that contract. And this Court should not be persuaded by Sea Breeze's attempts to have this Court ignore well-established precedent concerning arbitration agreements.[30]

## IV. SEA BREEZE FAILS TO ESTABLISH THAT HBSA CANNOT MEET THE REQUIREMENTS FOR AN INJUNCTION

To obtain an injunction, HBSA need only establish: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the

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[26] MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION, 32:3-5, (West Publishing, Rev. Ed. 2010).

[27] *First Options,* 514 U.S. at 946

[28] Sea Breeze Brief at 32

[29] R. at 461; R.E. at 006.

[30] *See Qualcomm*, 980 So.2d; *B.C. Rogers*, 911 So.2d at 487.

injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.[31]

As to the first element, the fact that the Special Arbitrator disagreed with HBSA does not mean HBSA cannot show a "substantial likelihood of prevailing on the merits." Simply put, the special arbitrator engaged in a wholesale disregard for applicable Mississippi law and the specific plain terms of B141. The record clearly indicates that the special arbitrator not only "twisted" the words of the agreement between Sea Breeze and HBSA but went further and added provisions which were non-existent.[32]

At the risk of redundancy, the Mississippi Supreme Court case of *B.C. Rogers Poultry Inc., v. Wedgeworth*[33] held that the plain meaning of an agreement must be accepted where no ambiguity exists. A court, or an arbitrator in this case, cannot "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated."[34] And, much like the Boiler Growing Agreement in *B.C. Rogers* did not include a single word or phrase expressing an intent by the parties that the arbitration agreement should be applied retroactively,[35] here, nothing in the agreement between HBSA and Sea Breeze provides HBSA with the "unilateral ability" to consolidate the Sea

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[31] *Canal Auth. of the State of Florida v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974).

[32] For example, Special Arbitrator Harris held that HBSA possessed the "unilateral ability" to enforce a consolidated arbitration with Sea Breeze and Roy Anderson, despite the fact that such a phrase, "unilateral ability" existed nowhere in anything signed by HBSA.

[33] 911 So.2d 483 (Miss. 2005)

[34] *Id.* at 487 (quoting *EEOC v. Waffle House Inc.,* 534 U.S. 279, 294 (2002))

[35] *Id.* at 487

Breeze/HBSA arbitration with the Sea Breeze/Roy Anderson arbitration in the absence of the requirements of 1.3.5.4 being fulfilled.

Sea Breeze continuously fails to grasp the integral concept under Mississippi law that the plain language of the contract controls.[36] Having ignored the plain language of the contract, Sea Breeze cannot credibly argue that the Special Arbitrator *did not* take the relevant provisions at "face value." Rather than explain how Special Arbitrator Harris' opinion was "well-reasoned" Sea Breeze relies on the special arbitrator's "impeccable qualifications."[37] However, the existence of any "impeccable qualifications" does not change the fact that the special arbitrator not only ignored the contractual language between Sea Breeze and HBSA but further twisted the words of the contract and the agreement between Sea Breeze and Roy Anderson to achieve a result inconsistent with the contract's express, unambiguous language.

Special Arbitrator Harris completely ignored the plain language of the relevant arbitration agreement and completely ignored governing law governing the interpretation of arbitration provisions. Consequently, HBSA has more than a "substantial" likelihood of success on the merits in establishing the consolidation is improper and that Special Arbitrator Harris' decision should be vacated. Merriam-Webster defines "substantial" as "considerable in quantity: significantly great." In light of the well-standing federal and state precedent governing the interpretation of arbitration provisions, HBSA certainly meets the first requirement for an injunction.

As to the second element, Sea Breeze completely ignores the entire portion of HBSA's brief, in which HBSA sets forth that irreparable harm exists when contractual rights, such as those of HBSA, are at risk and "when the nature of those rights make establishment of the dollar

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[36] *Id.*

[37] Sea Breeze Brief at 30

value of the loss . . . especially difficult or speculative."[38] Rather than address this argument and its supporting precedent, Sea Breeze simply argues that HBSA cannot meet the second element because HBSA has not shown that its injury "cannot be undone through monetary remedies.'" Sea Breeze completely disregards the underlying notion that HBSA's harm is irreparable because the contractual rights that will be lost to HBSA are very difficult and speculative to measure.[39] Sea Breeze cites *City of Meridian, Mississippi v. Algernon Blair, Inc.*, to argue that HBSA's harm is not irreparable because such harm would be the expense of an improper arbitration. However, it is more than simply the expense of an improper arbitration which forms the basis for its injunction. HBSA's contractual rights are at stake.

Moreover, *Algernon Blair* is further distinguishable from the present case because, unlike the City of Meridian ("City"), which the court held "could continue to challenge," appeal the arbitrator's award in Court,[40] if unfavorable; here, once the arbitration involving HBSA does go to an arbitrator who renders a final decision on the merits, that decision would be final and binding. In other words, the harm faced by HBSA is all the more irreparable than that faced by the City because the HBSA would have no appeal, whereas the City did. Not only does this key distinction serve to distinguish the present case from *Algernon Blair,* but the fact that an unwarranted arbitration would be final and binding on HBSA further serves to establish the "independent proof" which Sea Breeze argues HBSA is required to establish to secure an injunction. Of course, only the award would be final and binding.[41] The award would be the

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[38] *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806 (5th Cir. 1989).
[39] *See id.*

[40] *City of Meridian, Miss. v. Algernon Blair, Inc.*, 721 F.2d 525, 529 (5th Cir. 1983).

[41] *See* MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION, 32:3-5, (West Publishing, Rev. Ed. 2010). An award is a final decision on the merits. There was no award here because no final decision on the merits was made as to Sea Breeze's claims against either HBSA or Roy Anderson. As this Court is already aware, this dispute arises out of Sea

final decision on the merits by the arbitration.[42] The decision by Special Arbitrator Harris, on the other hand, is not final and binding.[43]

Sea Breeze, in its brief, fails to address the third element consisting of the balancing of harm in issuing the injunction versus the balancing of harm in denying the injunction.[44] In failing to address HBSA's argument as to the third element, Sea Breeze effectively concedes HBSA's argument. However, out of an abundance of caution, HBSA simply reiterates that, even if the injunction is granted, Sea Breeze will not lose its right to arbitration against HBSA.

As to the fourth element, that there be no adverse affect on the public interest, Sea Breeze argues that this element is not met because staying the arbitration would adversely affect the public interest. However, no arbitration need be stayed if the arbitration proceeds with HBSA arbitrating against Sea Breeze and not in a consolidated arbitration also involving Roy Anderson. As of now, HBSA is being forced into an arbitration in contravention to its contractual rights, something which itself raises public policy concerns trumping any federal policy favoring arbitration.[45] Indeed, a party simply cannot be compelled to arbitrate any dispute to which they have not agreed to submit to arbitration.[46] The reason behind this is "[a]n agreement to arbitrate

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Breeze's allegations of design and/or construction defects against HBSA and Roy Anderson, respectively. Sea Breeze had a design agreement with HBSA and a construction agreement with Roy Anderson.

[42] *Id.*

[43] *See id.*

[44] *See Canal Auth.*, 489 F.2d at 573.

[45] *See B.C. Rogers*, 911 So.2d at 487 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)); *see also Qualcomm*, 980 So.2d at 269.

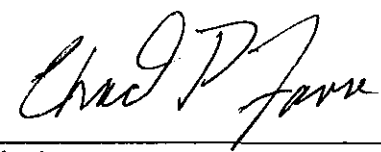
[46] *Qualcomm*, 980 So.2d at 269 (citing *Adams v. Greenpoint Credit, LLC*, 943 So.2d 703, 708 (Miss. 2006).

is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems-an openness this country has been committed to from its inception."[47] Thus, public policy is far better served through preventing an unwarranted and improper consolidation from moving forward. This element weighs in favor of HBSA's injunction.

## CONCLUSION

For the foregoing reasons, the judgment of the Chancery Court should be reversed. The Chancery Court did have the jurisdiction to review the Special Arbitrator's decision as to arbitrability; the decision to compel arbitration should thus be vacated; and this court should render judgment in favor of HBSA as to the injunction sought, setting aside the Special Arbitrator's consolidation order.

Respectfully submitted:



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[47] *Westmoreland v. Sadoux,* 299 F.2d 462, 465 (5th Cir. 2002).

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## CERTIFICATE OF SERVICE

I, Chad P. Favre, hereby certify that I have this date forward by United States Mail, postage pre-paid, a true and correct copy of the foregoing Appellate Brief submitted on behalf of Appellant, Harry Baker Smith Architects II, PLLC, to the following counsel of record:

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I, Chad P. Favre, hereby certify that I have this date forward by United States Mail, postage pre-paid, a true and correct copy of the foregoing Reply Briefs, submitted on behalf of Appellant, Harry Baker Smith Architects II, PLLC, in response to the Brief by Appellee, Sea Breeze I, LLC, and in response to the Brief by Appellee, Roy Anderson Corp., to the Honorable Judge Jim Persons at P.O. Box 457, Gulfport, Mississippi 39502:

SO CERTIFIED this the 21st day of January, 2011.

Chad P. Favre

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