IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00632

HARRY BAKER SMITH ARCHITECTS, PLLC **APPELLANT**

VS.

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

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

BRIEF OF APPELLANT, HARRY BAKER SMITH ARCHITECTS II, PLLC

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October 27, 2010

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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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STATEMENT OF THE CASE

This matter is before the Court on a fundamental question of contractual rights. Specifically, Appellant Harry Baker Smith Architects II, PLLC ("HBSA") has been compelled into a consolidated arbitration to which it never agreed, and in direct contravention of the requirements of a contract to which it is a party. The Chancery Court refused to consider whether HBSA's contractual rights had been violated. HBSA submits that the question of whether it can be compelled into an arbitration to which it has not agreed is a matter squarely within the Chancery Court's jurisdiction, and further submits that it is entitled to an injunction against the arbitration proceeding.

The underlying dispute is over alleged defects in the construction of the Sea Breeze Condominium Complex ("Condominium Complex") in Biloxi, Mississippi. On October 21, 2004, Sea Breeze I, LLC ("Sea Breeze") contracted with HBSA to provide design services for the Condominium Complex. The Sea Breeze/HBSA contract was on American Institute

of Architects ("AIA") Document B141—1997 Part 1.[1] The B141 agreement contained an arbitration provision, § 1.3.5.4, that provides as follows:

> "No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement and signed by the Owner, Architect, and any other person or entity sought to be joined."[2]

In other words, the Sea Breeze/HBSA contract specifically protected HBSA from being compelled into an arbitration with anyone other than Sea Breeze, unless HBSA, Sea Breeze, and the other proposed party to the mediation all gave "written consent containing a specific reference to" the Sea Breeze/HBSA contract. No such writing appears in the Record and no such writing exists.

Sea Breeze also entered into a construction contract with Roy Anderson Corp. ("Roy Anderson"). HBSA was not a party to the contract between Sea Breeze and Roy Anderson.

In May 2008, Sea Breeze sought mediation against both HBSA and Roy Anderson for claims pertaining to alleged defects in the Condominium Complex. No settlement was reached through the mediation. Consequently, on October 9, 2008, Sea Breeze filed an arbitration action against both HBSA and Roy Anderson.[3] Sea Breeze thereafter sought to consolidate its arbitration against Roy Anderson with its arbitration against HBSA.[4]

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[1] R. at 102; R.E. at 62.

[2] R. at 104; R.E. at 63.

[3] R. at 75-77; R.E. at 46-48.

[4] R. at 75-77; R.E. at 46-48.

Both HBSA and Roy Anderson objected to the consolidated arbitration,[5] and both filed an objection in the arbitration proceedings.[6] The American Arbitration Association ("AAA"), however, proceeded with the consolidated arbitration in contravention of HBSA's contractual rights under § 1.3.5.4 of B141.[7] HBSA promptly sought injunctive relief in the United States District Court for the Southern District of Mississippi, on the grounds that it was being compelled into an arbitration to which it had never consented as required by § 1.3.5.4 of B141.[8]

HBSA filed its complaint for injunctive relief in federal court to protect and preserve its contractual rights against an arbitration that was improperly consolidated in light of the express language of § 1.3.5.4. HBSA filed this complaint for injunctive relief despite the objections of Sea Breeze that a special arbitrator was required to determine whether the Sea Breeze/HBSA arbitration should be consolidated with the Sea Breeze/Roy Anderson arbitration pursuant to Rule 7 of the Construction Rules for Arbitration. If consolidated, HBSA would be forced into arbitration against Roy Anderson despite the fact that HBSA never agreed to arbitrate anything with and/or against Roy Anderson.

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[5] R. at 83; R.E. at 53 (Sea Breeze response directed to both HBSA and Roy Anderson's objections to consolidation of the Sea Breeze/HBSA arbitration with the Sea Breeze/Roy Anderson arbitration).

[6] R. at 82-83; R.E. at 52-53.

[7] R. at 78; R.E. at 48.

[8] *See* R. at 50-81, R. at 96-97; R.E. at 50-51, R.E. at 57-58.

HBSA voluntarily dismissed its complaint for injunctive relief solely due to a federal subject matter jurisdiction defect. Unknown to HBSA at the time of its filing for injunctive relief, there was no complete diversity as required for jurisdiction under 28 U.S.C. § 1332.[9]

> As a result, this Court finds that, because there is not complete diversity of citizenship and there is no federal question in this matter, this Court does not have subject matter jurisdiction to adjudicate the dispute between the parties. Therefore, the Court finds that the Motion to Dismiss should be granted.[10]

HBSA neither knew nor could ascertain at the time of filing in federal court that one of Sea Breeze members (Sea Breeze is a limited liability company) was a Louisiana citizen, same citizenship as HBSA, thus destroying the complete diversity required for federal jurisdiction.[11] HBSA voluntarily moved to dismiss the case.[12]

However, HBSA continued to vehemently object to and protest the consolidation of the Sea Breeze/HBSA arbitration with the Sea Breeze/Roy Anderson arbitration.[13] Under protest, HBSA submitted the matter, along with Sea Breeze and Roy Anderson, to a special arbitrator who would preliminarily decide whether Sea Breeze could be compelled to arbitrate with both Sea Breeze and Roy Anderson. Again, HBSA did so under protest and with a full reservation of rights of judicial review.[14]

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[9] R. at 80; R.E. at 50.

[10] R. at 80; R.E. at 50.

[11] As this Court may already be aware, 28 U.S.C. § 1332 requires complete diversity of citizenship between Plaintiff and Defendant. Where one of the parties is a limited liability company (an "LLC"), its citizenship is determined by the citizenship of its members. *Unity Communications, Inc. v. Unity Communications of Colorado, LLC,* No. 03-60899, 105 Fed.Appx. 546, 547, 2004 WL 1576550 at *1 (5th Cir. July 15, 2004).

[12] R. at 80; R.E. at 50.

[13] R. at 93-97; R.E. at 54-58.

[14] R. at 94; R.E. at 55.

HBSA specifically and continuously reserved its right to seek an injunction in state court despite its reluctant submission of the consolidation issue to a special arbitrator.[15] In a February 20, 2009, e-mail to Cheryl Grant (case manager for the AAA), and copying counsel for Sea Breeze and Roy Anderson, counsel for HBSA wrote:

> Because HBSA II likewise does not believe that this arbitration is properly constituted as it now stands, HBSA II submits the attached list of arbitrators under protest and with a full reservation of rights to pursue its objections pursuant to AAA Rule R-7 or *in a court of law* with respect to the consolidation and joinder of RAC in an arbitration involving HBSA II.[16]

The subject matter of this e-mail was: "Selection of Arbitrator under Protest and with Full Reservation of Rights."[17]

Further, in its December 23, 2008, correspondence to the AAA, HBSA expressly retained "the right to proceed to Chancery Court in Gulfport, Mississippi, to enjoin this proceeding."[18] HBSA further maintained the rights and defenses to object to the improper consolidation of the Sea Breeze/HBSA arbitration with the Sea Breeze/Roy Anderson arbitration. Counsel for Sea Breeze and Roy Anderson were, again, copied.

On or about July 6, 2009, the parties submitted their briefs to W. Hensil Harris ("Harris"), the special arbitrator appointed. Sea Breeze sought to consolidate both arbitrations whereas HBSA and Roy Anderson both objected to same. After submission of

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[15] R. at 97; R.E. at 58.

[16] R. at 94; R.E. at 55 (emphasis added).

[17] R. at 93; R.E. at 54.

[18] R. at 97; R.E. at 58.

written briefs, Harris, on July 30, 2009, ordered that the arbitration be consolidated.[19] Harris ordered that Roy Anderson be joined as an additional party to the arbitration between HBSA and Sea Breeze. This ruling meant that the Sea Breeze/HBSA arbitration would be consolidated with the Sea Breeze/Roy Anderson arbitration despite the fact that there existed no "written consent containing a specific reference to [the Sea Breeze/HBSA contract] and signed by the Owner, Architect, and any other person or entity sought to be joined[,]" as required under the Sea Breeze/HBSA contract.

Harris based his opinion on the grounds that the arbitration provision in the contract between Roy Anderson and Sea Breeze, was "materially different than what would otherwise be provided."[20] Based on this change of language, Harris concluded that HBSA, who was not a party to the Sea Breeze/Roy Anderson contract, somehow possessed the "unilateral ability" to bring Roy Anderson into a consolidated arbitration despite the requirements of the contract to which HBSA was a party.[21] HBSA would only have the "unilateral ability" if both Roy Anderson and Sea Breeze had previously agreed to consolidated arbitration without any further steps having been taken by any parties. However, both § 4.6.4 of A201, as well as § 1.3.5.4 of B141, provide that additional steps need to be taken before all three parties can be joined into a consolidated arbitration. These steps were never fulfilled.

More importantly, there is no mention whatsoever in B141 that HBSA had the "unilateral ability" to force all three parties into a consolidated arbitration. Armed with the erroneous belief that HBSA possessed this "unilateral ability", the special arbitrator then

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[19] R. at 99-101; R.E. at 59-61.

[20] R. at 99-100; R.E. at 59-60.

[21] R. at 100; R.E. at 60.

turned his attention to a letter from C.J. Hebert ("Hebert"), initial counsel for HBSA, to Sea Breeze's counsel on May 2, 2008.[22] Of specific importance to the arbitrator was a portion of the letter which stated, "... we believe that it would be appropriate to have the contractor's participation in any mediation and/or arbitration. We ask for your agreement to same..." The special arbitrator also noted further communications from Hebert, on May 22, 2008, which stated "what are your positions on where we stand on an appointed mediator and what effect does/will this have on any arbitration date, if necessary?"[23] The special arbitrator took note that "no one appear[ed] to have timely questioned or challenged that statement."[24] Additionally, the special arbitrator noted that the attorney for Roy Anderson did not appear to have expressed any reservations with the statements by Mr. Hebert in the letter dated May 2, 2008 and the email dated May 22, 2008."[25] Harris thus decided that Hebert's letter was "written consent containing a specific reference to [the Sea Breeze/HBSA contract] and signed by the Owner, Architect, and any other person or entity sought to be joined[,]" and concluded that the dispute between all three parties was arbitrable in a single arbitration proceeding.

Because the requirements of § 1.3.5.4 of the Sea Breeze/HBSA contract are not satisfied – that is, because there is no writing requiring HBSA to arbitrate jointly with Sea Breeze and Roy Anderson – HBSA then sought injunctive relief on September 21, 2008, in

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[22] R. at 100; R.E. at 60.

[23] R. at 100; R.E. at 60.

[24] R. at 100; R.E. at 60.

[25] R. at 100; R.E. at 60.

the Chancery Court of Harrison County.[26] HBSA filed this injunction seeking, *inter alia*, to restrain Sea Breeze and the AAA from moving forward with the consolidation of both arbitrations which, based on the clear language of § 1.3.5.4, was not an arbitration HBSA agreed to submit to[27] and in violation of guiding principles of Mississippi and federal law.[28] In response, Sea Breeze filed its Motion to Dismiss or Stay and Compel Arbitration on October 29, 2009.[29] Sea Breeze's motion was heard on March 10, 2010 before Judge Persons of the Chancery Court of Harrison County, Mississippi.

The Chancery Court did not reach the merits of either HBSA's complaint for injunctive relief or Sea Breeze's motion to dismiss. Rather, Judge Persons denied the Petition for Injunctive Relief and granted the Motion to Compel Arbitration based solely on his reasoning that the Chancery Court did not have jurisdiction over the present matter to review the special arbitrator's decision because the special arbitrator had already decided the consolidation issue.

> I do find and rule that I am without authority to grant the relief sought by the architect in this matter; that arbitration having been invoked, that I do not have the authority – no court in

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[26] R. at 1-17; R.E. at 9-25.

[27] R. at 509-10; R.E. at 66-67 (sworn affidavit of Harry Baker Smith, Jr., that HSBA did not agree for the Sea Breeze/HBSA arbitration to be consolidated with the Sea Breeze/Roy Anderson arbitration).

[28] R. at 14; R.E. at 22 *see also Qualcomm, Inc. v. Am. Wireless License Grp.*, 980 So.2d 261, 269 (Miss. 2007) (citing *Adams v. Greenpoint Credit, LLC,* 943 So.2d 703, 708 (Miss. 2006)) (the Mississippi Supreme Court held that a party cannot be required to submit to arbitration any dispute which he has not agreed to submit); *see also Westmoreland v. Sadoux,* 299 F.3d 462, 465 (5th Cir. 2002) ("an agreement to arbitrate 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").

[29] R. at 55; R.E. at 26-45.

> Mississippi, from my appreciation of the law, has the authority or the jurisdiction to reverse an arbitrator's ruling in this matter; that once the arbitration is invoked, the procedural issues – And I view this as a procedural issue even though it's in the contract – it's been decided by the arbitrator, rightfully or wrongfully, and I don't have the authority to reverse that.[30]

Judge Persons' ruling constituted a final order granting Sea Breeze and Roy Anderson's motions to compel arbitration[31] and dismissing HBSA's complaint for injunctive relief.[32] HBSA timely filed its notice of appeal.[33]

SUMMARY OF THE ARGUMENT

In *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995), the United States Supreme Court held that a party is entitled to judicial review of an arbitrator's decision as to the arbitrability of a dispute unless there is "clear and unmistakable" evidence that the party agreed to submit to an arbitrator's jurisdiction. "Merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate the issue."[34] Accordingly, HBSA was entitled to have the Chancery Court review the arbitrability of the dispute between Sea Breeze, HBSA, and Roy Anderson, and specifically to review whether HBSA had consented to such an arbitration.

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[30] Hearing Transcript at page 51; R.E. at 7.

[31] Roy Anderson relinquished its objection to the consolidated arbitration when it was sued in Circuit Court by Sea Breeze Condominium & Resort Owner's Association ("Owner's Association").

[32] Hearing Transcript at page 51; R.E. at 7.

[33] R. at 524; R.E. at 69.

[34] *First Options,* 514 U.S. at 943.

Arbitration being a matter of contract, it cannot be said that both parties mutually agreed to an arbitrator deciding arbitrability and having binding, non-reviewable authority where one party forcefully objects to the arbitrator's decision.[35] The paramount consideration is to ensure that commercial arbitration agreements like other contracts are enforced according to their terms.[36] Here, HBSA's contract with Sea Breeze contained a provision precluding the joinder of any other party in an arbitration involving HBSA and Sea Breeze absent the express, written and signed agreement of all three parties.[37] This clear, unambiguous contractual prerequisite to a consolidated arbitration was never satisfied. Simply put, HBSA never agreed to the consolidation of its arbitration with Sea Breeze to the Sea Breeze/Roy Anderson arbitration, nor did HBSA ever agree to arbitrate anything with and/or against Roy Anderson.

The Chancery Court was incorrect as a matter of law in its ruling that it was without such jurisdiction to review the special arbitrator's decision.[38] Consequently, this Court should vacate the Chancery Court's decision that it did not have the jurisdiction to review the special arbitrator's decision.[39] Moreover, this court should reverse the Chancery Court's decisions to compel HBSA into the improperly consolidated arbitration and to deny HBSA's complaint for injunctive relief. These decisions were made solely because the Chancery

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[35] *Id.*

[36] *Id.* at 947 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995)).

[37] R. at 104; R.E. at 63; *see also* R. at 4; R.E. at 12.

[38] *See id.* (merely arguing the issue of arbitrability to an arbitrator does not indicate a clear willingness to arbitrate that issue).

[39] Hearing Transcript at page 51; R.E. at 7.

Court thought it lacked jurisdiction.[40] Those decisions should also be vacated. HBSA never agreed to submit to the arbitration as consolidated nor did HBSA contractually agree to arbitrate anything with and/or against Roy Anderson. Sea Breeze's motion to compel should have been denied and HBSA's complaint for injunctive relief to enjoin the improperly consolidated arbitration from proceeding should have been granted.

LAW & ARGUMENT

I. THE CHANCERY COURT ERRED IN REFUSING TO EXERCISE ITS JURISDICTION OVER THE QUESTION OF THE ARBITRABILITY OF A DISPUTE BETWEEN HBSA, SEA BREEZE, AND ROY ANDERSON BECAUSE HBSA NEVER AGREED TO SUCH AN ARBITRATION UNDER THE TERMS OF ITS CONTRACT WITH SEA BREEZE

A. A *DE NOVO* STANDARD OF REVIEW APPLIES TO THE PRESENT APPEAL BECAUSE THE QUESTION OF WHETHER A COURT POSSESSES THE NECESSARY JURISDICTION TO HEAR A MATTER IS A QUESTION OF LAW

This case is on appeal because the Chancery Court judge ruled that he did not have the authority or jurisdiction to reverse the arbitrator.[41] Under Mississippi law, whether a court has jurisdiction is a question of law which is reviewed *de novo*.[42]

B. THE CHANCERY COURT ERRED IN ITS RULING THAT IT DOES NOT HAVE THE POWER TO ENJOIN, OVERTURN OR OTHERWISE REVIEW THE DECISION REACHED BY THE SPECIAL ARBITRATOR

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[40] Hearing Transcript at page 51; R.E. at 7.

[41] Hearing Transcript at page 51; R.E. at 7.

[42] *Trustmark Nat'l Bank v. Johnson,* 865 So.2d 1148, 1150 (2004) (citing *Briggs & Stratton Corp. v. Smith,* 854 So.2d 1045, 1048 (Miss. 2003)).

The key issue on appeal is whether the Chancery Court had the authority or the jurisdiction to reverse a special arbitrator's decision to consolidate two separate arbitrations. The Chancery Court ruled that it did not have jurisdiction and, on this basis, dismissed HBSA's petition for injunctive relief and granted Sea Breeze and Roy Anderson's motions to compel HBSA into a consolidated arbitration.[43] Yet, the Chancery Court's decision was in direct contravention of the United States Supreme Court's unanimous decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) and HBSA's fundamental contractual rights. There simply is no evidence at all, much less the "clear and unmistakable" evidence required by *First Options*, that HBSA intended to allow the arbitrator to be the final arbiter of the question of arbitrability.

1. Courts Retain Power To Review Arbitration Decisions As To Arbitrability Unless The Parties "Clearly and Unmistakably" Agreed To Relinquish Judicial Review Of The Arbitrator's Decision As To Arbitrability

In *First Options*, the United States Supreme Court unanimously held that Courts are not to assume that the parties agreed to arbitrate arbitrability unless there is "clear[r] and unmistakable[e]" evidence that they did so.[44] The presumption is that a court retains its power to decide arbitrability and review an arbitrator's decision as to same.[45] Merely arguing procedural issues to an arbitrator does not constitute such "clear and unmistakable"

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[43] Hearing Transcript at page 51; R.E. at 7.

[44] 514 U.S. at 944 (citing *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986)).

[45] *Id.* "We conclude that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts." *Id.* at 947.

evidence that a party has agreed to be effectively bound by the arbitrator's ruling on said issue.[46] Thus, a court retains its jurisdiction to review a decision by an arbitrator where one of the parties objects to the submission to the arbitrator, reserves its rights or files for injunctive relief seeking to enjoin the arbitration from proceeding.[47] Here, HBSA did all three. Moreover, the Sea Breeze/HBSA contract – the only contract to which HBSA was a party – contains no indication whatsoever that the arbitrator is entitled to decide whether the claim is subject to arbitration.

Similar to the issue facing this court on appeal, *First Options* involved a dispute as to whether a particular claim was to be arbitrated. On one side of the argument was a clearing house, First Options, who sought to compel arbitration of claims brought by Manuel Kaplan ("Kaplan").[48] On the other side, Kaplan and his wife denied that their claims against First Options were arbitrable and filed written objections.[49] The dispute as to whether Kaplans' claims were arbitrable was submitted, over the Kaplans' objections to an arbitration panel.[50] The panel ruled that the claims were arbitrable and then ruled in favor of First Options as to the substantive claims.[51] The Kaplans then asked the district court to vacate the arbitration decision.[52] The district court, however, confirmed the decision so the Kaplans appealed.[53]

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[46] *Id.* at 946.

[47] *See id.* at 946.

[48] *Id.* at 940.

[49] *Id.* at 941.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

The district court's confirmation was reversed by the United States Court of Appeal for the Third Circuit.[54] The United States Supreme Court affirmed the appellate court's ruling that First Options could not show that Kaplan "clearly and unmistakably" agreed to have the arbitrators decide the question of arbitrability. Consequently, the district court had the power to review the arbitrator's decision of arbitrability on an independent, *de novo* basis.[55]

Important to the Court's decision was the Kaplans' reservation of rights when they submitted the question of arbitrability to the arbitration panel. First Options argued that the Kaplans waived the right of judicial review of an arbitrator's decision regarding the arbitrability of the issue submitted to arbitration because the Kaplans had argued the arbitrability issue to an arbitrator.[56] In no uncertain terms, the Court replied:

> But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrator's deciding their dispute with First Options; one naturally would think that they did *not* want the arbitrators to have binding authority over them.[57]

The United States Court of Appeals for the Fifth Circuit followed *First Options* in *General Motors Corp. v. Pamela Equities Corp.*[58] The *Pamela Equities* court also held that courts should not assume or conclude that the parties agreed to submit the question of

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[54] *Id.*

[55] *Id.* at 947.

[56] *Id.* at 946.

[57] *Id.*

[58] 146 F.3d 242 (5th Cir. 1998).

arbitrability to an arbitrator unless there is clear and unmistakable evidence that they did so.[59] The *Pamela Equities* court applied *First Options* to hold that the party seeking to avoid arbitration, General Motors Corp. ("GMC"), did not waive its right to judicial review of the special arbitrator's decision concerning arbitrability.[60]

In *Pamela Equities*, the issue was whether GMC waived its right under the arbitration agreement to select its own arbitrator in its arbitration with Pamela Equities Corporation ("PEC").[61] Per their agreement, disputes submitted to arbitration would be heard by a panel of three including one arbitrator selected by each party and a disinterested umpire selected by both arbitrators. PEC alleged that GMC waived its right to appoint an arbitrator because it had not done so within fifteen days as required per the parties' agreement.[62] GMC objected and formally requested, via letter, to PEC's selected arbitrator, Stephen H. Kupperman ("Kupperman"), that GMC's appointment of its arbitrator be honored.[63] The next month, Kupperman responded that he had reviewed GMC's submissions regarding the selection of its arbitrator but nevertheless ruled that GMC's attempt to appoint its arbitrator was untimely.[64] Consequently, the arbitration proceeded with only two panel members, Kupperman and the disinterested umpire.[65]

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[59] *Id.* at 248.

[60] *Id.* at 250.

[61] *Id.*

[62] *Id.* at 246.

[63] *Id.*

[64] *Id.*

[65] *Id.*

GMC objected and filed a motion in the district court to appoint its own arbitrator.[66] The district court, however, held that it was without the power to review Kupperman's decision that GMC had waived its right to select its own arbitrator to be present on the three member panel.[67] The district court held that GMC waived its right to judicial review of Kupperman's decision by not expressly reserving this right.[68]

The Fifth Circuit, however, vacated the district court's decision that GMC waived its right of judicial review as to Kupperman's decision.[69] "On the record before us, PEC cannot show that GMC clearly and unmistakably agreed to submit to Kupperman the dispute over GMC's appointment of its arbitrator and the composition of the arbitration panel."[70] The Fifth Circuit reasoned that GMC's letter to Kupperman, addressing him as the arbitrator and formally requesting that they recognize their selection for the third panelist—despite being untimely—did not constitute clear and unmistakable evidence of GMC's agreement to grant Kupperman the authority to decide whether GMC waived its right to appoint a third panelist.[71] The use of such terms did not constitute clear and unmistakable evidence of GMC's agreement to grant Kupperman the authority to decide whether GMC waived its right to appoint an arbitrator—the third panelist.[72]

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[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 249.

[70] *Id.*

[71] *Id.* at 250.

[72] *Id.*

The Fifth Circuit held that the district court reached the opposite conclusion because it did not apply the *First Options* presumption against the finding of an agreement to arbitrate arbitral authority "or, in other words, the *First Options* requirement that such agreements be proved by clear and unmistakable evidence."[73] The Fifth Circuit concluded that, "[b]ecause all the evidence as a whole does not clearly and unmistakably demonstrate an agreement to submit the dispute over arbitral powers to Kupperman as sole arbitrator" GMC did not waive its right to judicial review of Kupperman's decision as to arbitrability.[74]

In *RBC Capital Markets Corp., v. Thomas Weisel Partners, LLC,*[75] the chancery court, following *First Options,* held that it retained jurisdiction to review the decision by an arbitrator as to arbitrability.[76] The plaintiffs, RBC and Merrill, sought to enjoin the arbitration from moving forward since they claimed that the defendant's claims against them were not arbitrable.[77] Specifically, the defendant, Weisel, brought arbitration claims against RBC and Merrill before the Financial Industry Regulatory Authority, Inc. ("FINRA") for material misrepresentations in connection with the sale of auction rate securities.[78] RBC and Merrill, however, argued that these claims were not arbitrable because Weisel was bringing such claims on behalf of its customers who did not have standing under FINRA to submit a

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[73] *Id.*

[74] *Id.*

[75] C.A. Nos. 4709-VCN, 4760-VCN, 2010 WL 681669 (Del.Ch. Feb. 25, 2010).

[76] *Id.* at *7.

[77] *Id.* at *3.

[78] *Id.*

claim to mandatory arbitration.[79] The matter was first submitted to the FINRA Director who held that the Weisel's claims were arbitrable and would thus proceed in arbitration.[80]

Similar to the present case, the RBC and Merrill filed a complaint for injunctive relief seeking to enjoin Weisel from proceeding with the FINRA arbitration to the extent that Weisel sought to arbitrate disputes concerning auction rate securities owned by its customers.[81] RBC and Merrill also sought to stay any arbitration proceeding before FINRA until the Court could determine the proper scope of issues to be decided.[82] Weisel sought to have Merrill and RBC's claims dismissed or stayed until the completion of the arbitration proceeding.[83] Weisel contended that all parties consented to arbitration and that there were no questions of arbitrability available for judicial review.[84] The chancery court disagreed and held that there was no express concession by the plaintiff to submit the question of arbitrability to the arbitrator.[85] The chancery court relied on *First Options* in holding that simply contesting arbitrability before an arbitrator did not indicate a clear willingness to submit that issue to the arbitrator.[86]

The chancery court noted that, rather than abandon their right to judicial review of the arbitrator's decision as to arbitrability, RBC and Merrill immediately filed their complaint for

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[79] *Id.*

[80] *Id.*

[81] *Id.* at *4.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at *7.

[86] *Id.* at *6 (citing *First Options*, 514 U.S. at 946).

injunctive relief after the FINRA Director's decision.[87] Nor did the chancery court find that RBC and Merrill, both having conceded to some form of arbitration, necessarily relinquished their opportunity to judicial review of the arbitrator's decision as to arbitrability.[88]

2. Here, HBSA Retained The Right To Judicial Review Of The Special Arbitrator's Decision Because HBSA Did Not "Clearly And Unmistakably" Agree To Submit To A Special Arbitrator The Question Of Arbitrability As To Consolidation

HBSA has continuously objected to the consolidation of both arbitrations, and sought judicial relief from the AAA decisions. Further, HBSA fully reserved its rights to judicial review when it agreed to submit the dispute to the special arbitrator.[89] Moreover, similar to the RBC and Merrill in *RBC Capital Markets,* HBSA filed a complaint for injunctive relief shortly after the special arbitrator's decision.[90] In fact, HBSA took more action than the Kaplans did in *First Options* by filing for injunctive relief before the arbitrator's decision as to arbitrability. And yet the United States Supreme Court in *First Options* unanimously held that the Kaplans did not "clearly and unmistakably" agree to arbitrate arbitrability and waive their right to judicial review of same.[91]

Following the breakdown of mediation and Sea Breeze's attempt at consolidation, HBSA raised the issue that consolidation of both arbitrations was improper.[92] Roy Anderson

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[87] *Id.*

[88] *Id.*

[89] *See* R. at 93-97; R.E. at 46-50.

[90] R. at 1-17; R.E. at 9-25; *see also* R. at 99-101; R.E. at 59-61.

[91] 514 U.S. at 947.

[92] *See* R. at 83; R.E. at 53.

joined in that objection.[93] HBSA filed its first complaint for injunctive relief following the receipt of a letter from the AAA that was addressed to counsel for Sea Breeze, HBSA and Roy Anderson and evidenced an intent to move forward with the arbitration in contravention of HBSA's contractual rights under § 1.3.5.4.[94] HBSA filed its complaint for injunctive relief in federal court, rather than initially submitting the issue to a special arbitrator in accordance with Rule 7 of the Construction Rules.[95] HBSA dismissed its complaint for injunctive relief in federal court only because of a jurisdictional defect which was unknown to HBSA at the time of filing.

Following the voluntary dismissal of its complaint for injunctive relief, HBSA then submitted the arbitrability issue to a special arbitrator determining consolidation because, based on the representations of Sea Breeze, this was required under Rule 7 of the American Arbitration Rules for Construction cases. However, HBSA did so under protest and with full reservation of rights.[96] HBSA, in no uncertain terms, reserved its right to proceed in court to enjoin the proceedings should the special arbitrator rule that the Sea Breeze/HBSA arbitration be consolidated with the Sea Breeze/Roy Anderson arbitration:[97]

> We maintain the rights and defenses and objection to this improperly constituted arbitration on behalf of HBSA . . . 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

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[93] *See* R. at 82; R.E. at 52 (Roy Anderson was the first party to object to Sea Breeze's attempt to join both parties in a consolidated arbitration and have HBSA arbitrate against Sea Breeze which is something that HBSA never agreed to do).

[94] R. at 78; R.E. at 49.

[95] *See* R. at 97; R.E. at 58.

[96] R. at 97; R.E. at 58.

[97] R. at 97; R.E. at 58.

> United States Court for the Southern District of Mississippi on a previously unknown technicality to diversity of citizenship jurisdiction of that court.[98]

This was in a letter to Angela Warren, a case manager with the AAA assigned to overseeing the Sea Breeze/HBSA arbitration and the Sea Breeze/Roy Anderson arbitration. Both counsel for Roy Anderson and Sea Breeze were copied on this letter.

HBSA's protests and objections continued. In a February 20, 2009, e-mail to Cheryl Grant, another AAA case manager, HBSA, again, expressly reserved its rights to judicial review of any decision by the special arbitrator regarding the consolidation of the Sea Breeze/HBSA arbitration with the Sea Breeze/Roy Anderson arbitration:

> Because [HBSA] likewise does not believe that this arbitration is properly constituted as it now stands, [HBSA] *now submits the attached list of arbitrators under protest and with a full reservation of rights* to pursue its objections pursuant to AAA Rule R-7 *or in a court of law* with respect to the consolidation and joinder of [Roy Anderson] in an arbitration involving [HBSA].[99]

And in a February 18, 2009 e-mail to Cheryl Grant, copying counsel for both Sea Breeze and Roy Anderson, HBSA continued its record of reserving its rights against any decision as to consolidation by a special arbitrator:

> Reserving all rights of [HBSA], your letter of February 12, 2009 setting forth the selection process of an arbitrator does not indicate whether the chosen arbitrator is being selected for the purpose set forth in Rule 7 of AAA's Construction Industry Arbitration Rules and Mediation Procedures with regard to a single arbitrator to be selected for the sole purpose of deciding the consolidation conflict in this matter.[100]

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[98] R. at 97 (emphasis added); R.E. at 58.

[99] R. at 94; R.E. at 55 (emphasis added).

[100] R. at 95; R.E. at 56.

The record clearly shows that HBSA has not expressed an unmistakable willingness to submit to an arbitrator the question as to whether both arbitrations, Sea Breeze/HBSA and Sea Breeze/Roy Anderson, proceed as consolidated. HBSA has never agreed to arbitration with Roy Anderson as required in its agreement with Sea Breeze.

As in *Pamela Equities,* the evidence as a whole does not clearly and unmistakably demonstrate that HBSA submitted the issue of arbitrability with Roy Anderson to Harris. As mentioned above, HBSA fully reserved its rights to judicial review. Consequently, the Chancery Court, in light of the Supreme Court's unanimous decision in *First Options*, *retained* the jurisdiction to overrule the decision by Harris, the special arbitrator.[101] This Court should remand this case back to the Chancery Court so it can further determine whether the Sea Breeze/HBSA and Sea Breeze/Roy Anderson arbitrations were consolidated in violation of HBSA's contractual rights under § 1.3.5.4 of B141.

II. THE CHANCERY COURT ERRED BY COMPELLING ARBITRATION BETWEEN THREE PARTIES WHO NEVER AGREED TO ARBITRATE WITH ONE ANOTHER

Because contracts B141 and A201 affect interstate commerce, the Federal Arbitration Act ("FAA") governs the current analysis.[102] Both FAA and Mississippi jurisprudence hold that arbitration is a matter of contract.[103] When reviewing an arbitration provision, a court must construe the same as it would a contract by accepting the contract's plain meaning as

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[101] 514 U.S. at 947.

[102] *See Qualcomm, Inc. v. Am. Wireless License Grp., LLC,* 980 So.2d 261 (Miss. 2007).

[103] *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.

the intent of the parties if no ambiguity exists.[104] This means that a Court must "accept the plain meaning of a contract as the intent of the parties if no ambiguity exists."[105] A court *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.[106] In other words, a party *cannot* be forced to arbitrate any dispute which it did not agree to arbitrate.[107] Consequently, a court, or a special arbitrator in this case, cannot "twist" the words of a contract to effect an arbitration that is not warranted by the clear language of an arbitration provision, such as the consolidated arbitration not agreed to by HBSA.[108]

Here the special arbitrator more than twisted the contractual language. He entirely deleted from the Sea Breeze/HBSA contract the requirement of a "written consent containing a specific reference to [the Sea Breeze/HBSA contract] and signed by the Owner, Architect, and any other person or entity sought to be joined." The central question of arbitrability in this instance was whether HBSA could be compelled into a consolidated arbitration despite the fact that the foregoing contractual requirement was not satisfied. As set forth above, HBSA was entitled to judicial review of the arbitrability of this dispute. For the reasons that follow, the appropriate outcome of that judicial review would be an injunction against the consolidated arbitration.

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[104] *Qualcomm,* 980 So.2d at 269. The purpose of the Federal Arbitration Act "was to make arbitration agreements as enforceable as other contracts, but not more so." *Tropical Cruise Lines, S.A. v. Vesta Ins. Co.,* 805 F.Supp. 409, 412 (S.D. Miss. 1992).

[105] *Id.* (citing *B.C. Rogers,* 911 So.2d at 487).

[106] *B.C. Rogers,* 911 So.2d at 487 (quoting *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 294 (2002)).

[107] *See id.*

[108] *Tropical Cruise Lines,* 805 F.Supp. at 412 (citing *Goldberg v. Bear, Stearns & Co.,* 912 F.2d 1418, 1419 (11th Cir. 1990)).

1. Here, The Special Arbitrator, Hensil Harris, Twisted The Words Of The Contract Between Sea Breeze and Roy Anderson, To Which HBSA Was Not A Party, To Achieve An Arbitration

Here, the contract between HBSA and Sea Breeze does not provide for consolidated arbitration unless the requirements of § 1.3.5.4 are met. Specifically, § 1.3.5.4 provides:

> No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner an additional person or entity not a party to this Agreement except by written consent containing a specific reference to this Agreement and signed by the Owner, Architect, and any other person and entity sought to be joined. Consent to arbitration involving an additional party 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."[109]

Moreover, HBSA's contract does not provide for any arbitration involving Roy Anderson, it only provides for arbitration with Sea Breeze. Under Mississippi law and the FAA, arbitration agreements are essentially creatures of contract."[110] An arbitrator cannot "twist" the language in a contract to achieve a result which is favored by federal policy [such as arbitration] but contrary to the intent of the parties.[111]

However, that is what the special arbitrator did in this instance. The special arbitrator twisted the language of the two contracts—apparently to achieve a result in favor of the public policy favoring arbitration—by somehow ruling that § 4.6.4 provided HBSA with the "unilateral ability" to enter into a consolidated arbitration with Sea Breeze and Roy

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[109] R. at 104; R.E. at 63.

[110] *Tropical Cruise Lines,* 805 F.Supp. at 412 (citing *Goldberg v. Bear, Stearns & Co.,* 912 F.2d at 1419).

[111] *Id.*

Anderson. First, HBSA is not a party to A201. Moreover, not a word or phrase in § 4.6.4 of A201 provides HBSA with this "unilateral ability." § 4.6.4 of A201 reads as follows:

> No arbitration shall include, by consolidation or joinder or in any other manner, parties other than Architect, the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party of additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein 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 the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.[112]

While the modified § 4.6.4 does provide for the *possibility* of a consolidated arbitration between HBSA, Sea Breeze and Roy Anderson, provided the requirements of § 1.3.5.4 are met, this provision does *not* provide that HBSA has the "unilateral ability" to institute a consolidated arbitration with Sea Breeze and Roy Anderson. Wholly absent from § 4.6.4 is any reference to "unilateral ability" or any language even remotely indicating that HBSA (the architect), had the "unilateral ability" to effect a consolidated arbitration. Thus, the special arbitrator did the very thing prohibited by *Tropical Cruise Lines*. He *twisted* the terms of the 4.6.4 to achieve an otherwise improperly consolidated and unwarranted arbitration between HBSA and Roy Anderson.

[112] R. at 107; R.E. at 64.

Similar facts also existed in *B.C. Rogers Poultry Inc., v. Wedgeworth.*[113] In *B.C. Rogers,* the district court had denied the defendants' motion to compel arbitration and an interlocutory appeal was filed.[114] The defendants asserted that the district court erred because the dispute arose out of the arbitration clause contained in the contract.[115] The plaintiff, however, argued that his claims originated before the arbitration clause was enacted and were therefore outside the scope of the arbitration clause.[116] The Mississippi Supreme Court, in affirming the trial court's denial of the motion to compel arbitration, held that the arbitration clause did *not* contain any retroactive language which would be required to impose arbitration on the plaintiff's claims.[117]

The *B.C. Rogers* court reasoned: "[h]ere, the language of the Broiler Growing Agreement does not include a single word or phrase which expresses intent by the parties that the arbitration clause should be applied retroactively to conduct occurring prior to its execution. Au contraire, the plain language states otherwise."[118] The court noted that the first paragraph of the Agreement containing the arbitration provision was forward looking covering agreements "on or after."[119] The court reasoned that the contract containing the arbitration provision contained "no language revealing intent by the parties to suggest, much

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[113] 911 So.2d 483 (Miss. 2005).

[114] *Id.* at 485.

[115] *Id.* at 486.

[116] *Id.*

[117] *Id.* at 489.

[118] *Id.* at 487 (emphasis added).

[119] *Id.*

less require, retroactive application of the arbitration clause to putative claims which arose prior to the date of the agreement."[120]

Here, similar to *B.C. Rogers*, there is also "not a single word or phrase" in § 4.6.4 revealing any intent to provide HBSA with any "unilateral ability" to effect a consolidated arbitration involving Sea Breeze and Roy Anderson, outside the terms of provision 1.3.5.4 which also says nothing about HBSA possessing any "unilateral ability" to effect a consolidated arbitration involving itself, Roy Anderson and HBSA. The special arbitrator "twisted" the words of a contract to achieve an arbitration contrary to Mississippi law.[121] The motion to compel HBSA into the consolidated arbitration with Sea Breeze and Roy Anderson should not have been granted.

2. The Special Arbitrator's Decision Completely Ignored the Express, Plain Language of § 1.3.5.4 In Consolidating The Arbitrations And Thus Abused His Discretion In Committing HBSA To A Consolidated Arbitration To Which It Had Not Agreed And In Forcing HBSA Into An Arbitration With Roy Anderson.

Mississippi law is clear that a court, or in this case a special arbitrator, cannot undermine the clear intent or otherwise reach a result inconsistent with the plain language of the arbitration provision in a parties' contract.[122] In other words, if arbitration is to be ordered by a court, or in this case a special arbitrator, the terms of the arbitration provision

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[120] *Id.* at 487.

[121] *See Tropical Cruise Lines,* supra.

[122] *Qualcomm, Inc.*, 980 So.2d at 269.

must be met.[123] This is derived from the underlying principle that "[A] party cannot be required to submit to arbitration any dispute which he has not agreed to submit."[124]

And yet, here, HBSA is being forced into a consolidated arbitration to which it never agreed. This is in contravention of Mississippi law which requires that the Court, or special arbitrator in this case, accept the plain meaning of the arbitration agreement, not some twisted interpretation.[125]

The language of § 1.3.5.4, the provision concerning consolidated arbitrations in the contract between HBSA and Sea Breeze, is clear and unambiguous. Per the plain language there can be no consolidation or joinder of all three parties "except by written consent containing a specific reference to this Agreement and signed by the Owner, Architect and any other person or entity sought to be joined."[126] However, in the instant case, there was never any written consent to a consolidated arbitration that contained a specific reference to B141 and was signed by all three parties. Consequently, the consolidated arbitration is proceeding in contravention of HBSA's contractual rights under § 1.3.5.4.

A party simply cannot be compelled to submit to arbitration any dispute to which it has not agreed to submit.[127] Consequently, a consolidated arbitration was not in order here as the contractual prerequisites expressly set forth in § 1.3.5.4 of B141 were never satisfied. Nor should HBSA be forced to arbitrate against Roy Anderson as well as Sea Breeze. Both HBSA and Roy Anderson specifically objected to arbitration against each other.

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[123] *See id.*

[124] *Id.* (quoting *Adams v. Greenpoint Credit, LLC,* 943 So.2d 703, 708 (Miss. 2006)).

[125] *B.C. Rogers,* 911 So.2d at 487.

[126] R. at 104; R.E. at 63.

[127] *AT&T Technologies,* 475 U.S. at 648.

The "clear and unmistakable" evidence standard, promulgated by the U.S. Supreme Court in *First Options*, applies equally to whether HBSA agreed to consolidation of the arbitrations of Sea Breeze against HBSA and Roy Anderson. The special arbitrator ruled under the auspices of the AAA which has continuously tried to force a consolidation. Harris, the special arbitrator, twisted the words of Hebert who only suggested the possibility of involving Roy Anderson to a mediation and/or arbitration between Sea Breeze and HBSA.[128] However, no agreement to consolidate was ever entered into as required by B141. Harris twisted and stretched the words of Hebert's letter to somehow establish that Hebert signed, on behalf of HBSA, a written agreement pursuant to B141 section 1.3.5.4 which, in Harris' imagination, had already also been signed by Roy Anderson, Sea Breeze and referenced B141. However, Hebert's letter is signed only by Hebert (and not all three parties) and bears no reference to B141.[129] Roy Anderson certainly had not agreed to the suggestion either in a written agreement or otherwise (it should further be noted that the written agreement required by section 1.3.5.4 of agreement B141 does not apply to mediation in the B141 agreement).

Harris again twisted the words of A201, the agreement between Roy Anderson and Sea Breeze (not HBSA), to somehow reach the conclusion that Roy Anderson signed a special written agreement among HBSA, Roy Anderson and Sea Breeze agreeing to the consolidation of the two arbitrations with specific reference to B141.[130] Harris cited Article

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[128] R. at 445; R.E. at 65. Hebert had only indicated that it may be "appropriate" to have Roy Anderson's participation in a mediation or arbitration between Sea Breeze and HBSA. Nevertheless, no agreement was ever executed by all three parties as required and HBSA never agreed to the suggestion.

[129] *See* R. at 445; R.E. at 65.

[130] R. at 100; R.E. at 60.

6 when making this determination.[131] According to Harris, Roy Anderson somehow preliminarily agreed to the joinder of a claim by Sea Breeze against HBSA.[132] However, nothing in Article 6 of A201 provides that Roy Anderson preliminarily agreed to the joinder of HBSA, absent additional steps being taken, such as the satisfaction of the requirements in § 1.3.5.4. In fact, Roy Anderson was the first party to object to the attempt by Sea Breeze to the consolidation after the mediation had failed because neither Roy Anderson nor Sea Breeze refused discovery prior to the mediation. HBSA was simply not a party to A201, and special arbitrator Harris cannot use language in A201 to affect HBSA's contractual rights pertaining to arbitration.

III. THE CHANCERY COURT ERRED IN DENYING HBSA'S PETITION FOR INJUNCTIVE RELIEF

The Chancery Court denied HBSA's complaint for injunctive relief on the same grounds, that it did not have jurisdiction to rule on the matter after the special arbitrator had decided the consolidation issue.[133] The Chancery Court did not hear any evidence as to the merits of HBSA's complaint for injunctive relief. Thus, the Chancery Court's decision to deny the injunction was *not* based on any factual determinations.

HBSA moves to have this Honorable Court reverse the Chancery Court's denial of the injunction and to render a decision of injunctive relief in favor of HBSA so as to prevent the arbitration between Sea Breeze and HBSA proceeding as a consolidated arbitration also involving the arbitration between Sea Breeze and Roy Anderson.

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[131] R. at 100; R.E. at 60.

[132] R. at 100; R.E. at 60.

[133] Hearing Transcript at page 51; R.E. at 7.

A. *De Novo* Standard Applies to the Chancery Court's Decision to Deny Injunctive Relief

The Chancery Court's decision to deny HBSA's complaint for injunctive relief did not go into the merits of HBSA's claim. Rather, the denial of injunctive relief was based on the Chancery Court's conclusion of law that it was without jurisdiction to review the special arbitrator's decision because the issue had been submitted to a special arbitrator, albeit under protest. Because the decision to deny HBSA's complaint for injunctive relief was based on the application of a legal principal, a *de novo* standard applies.[134]

B. HBSA Meets The Requirements for Injunctive Relief To Restrain The Arbitration As Consolidated From Moving Forward

In order for a court to grant a preliminary injunction based on a breach of the provisions of an arbitration agreement, a plaintiff must establish the following elements: 1) substantial likelihood of success on the merits; 2) substantial threat that the plaintiff will suffer irreparable injury if the injunction is denied; 3) that the threatened injury to the plaintiff outweighs any damage that an injunction might cause the defendant; and 4) that granting the injunction will not disserve the public interest.[135]

The first element is met. The law is clear that a party cannot be forced to arbitrate a dispute it did not agree to arbitrate.[136] Arbitration is a matter of contract meaning that an arbitration provision's contractual language dictates which disputes a party has agreed to

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[134] *Hoover v. Morales,* 164 F.3d 221, 224 (5th Cir. 1998). The ultimate decision of whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, however a decision based on the erroneous application of legal principles is reviewed de novo. *Id.*

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

[136] *B.C. Rogers,* 911 So.2d at 488; *see also AT&T Technologies,* 475 U.S. at 648.

arbitrate as opposed to those disputes the parties did not agree to submit to arbitration.[137] Here, the agreement requires that, before the Sea Breeze/HBSA arbitration can be consolidated with the Sea Breeze/Roy Anderson arbitration, there must be a written agreement to consolidate the arbitrations, signed by all parties and referencing B141, the agreement between Sea Breeze and HBSA.[138] As previously mentioned, these prerequisites were not met. HBSA never agreed to the consolidation of its arbitration against Sea Breeze with the Sea Breeze/Roy Anderson consolidation. The special arbitrator, in contravention of Mississippi and federal law pertaining to arbitration, twisted the verbiage of an agreement HBSA was not a party to in order to effect the consolidation of the Sea Breeze/HBSA arbitration with the Sea Breeze/Roy Anderson arbitration. Mississippi law only requires that the party seeking an injunction establish that it has a *substantial* likelihood of succeeding on the merits.[139] This element is clearly met in that HBSA's chances of success are not only substantial but strong given the well-established precedent that, because arbitration is creature of contract, a party cannot be compelled to arbitrate what it did not agree to arbitrate.[140]

The second requirement is also met. Mississippi law requires that a party next establish that it will suffer irreparable harm if the injunction is not issued.[141] The central inquiry for this element is whether the plaintiff's injury could be compensated by money

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[137] *Id.* at 487.

[138] R. at 104; R.E. at 63.

[139] *Union Nat'l Life Ins. Co. v. Tillman,* 143 F.Supp.2d 638, 641 (N.D. Miss. 2000).

[140] *Tropical Cruise Lines,* 805 F.Supp. at 412 (citing *AT&T Technologies,* 475 U.S. at 648).

[141] *Canal Auth.*, 489 F.2d at 572.

damages.[142] Irreparable harm exists when contractual rights are at risk and "when the nature of those rights make establishment of the dollar value of the loss . . . especially difficult or speculative." [143] Further, wrongful enforcement of an arbitration clause constitutes sufficient irreparable harm to justify an injunction.[144] The procession of an unwarranted arbitration poses the threat of irreparable injury to the party rightfully resisting arbitration.[145]

Here, it is virtually impossible, and certainly speculative, to attempt to place a monetary value on HBSA's contractual rights under § 1.3.5.4. Moreover, any decision by an arbitrator as to the merits of the arbitration between Sea Breeze and HBSA, even if consolidated with the arbitration between Sea Breeze and Roy Anderson, would be final and binding. As a final and binding award, there would be no appeal allowed making the harm suffered by HBSA all the more irreparable if this arbitration proceeds as improperly consolidated. Finally, the procession of an unwarranted arbitration poses the threat of irreparable injury to the party, such as HBSA, that is rightfully resisting same.

The third requirement for injunctive relief is also met.[146] The third requirement requires that the harm to the plaintiff if the injunction is not issued outweigh the harm to the defendant if the injunction is issued. Here, HBSA will stand to lose its contractual rights which dictate the circumstances under which it will submit to a consolidated arbitration and arbitration with Roy Anderson. As previously discussed, the policy that a party cannot be required to submit to any arbitration to which it did not contractually agree to trumps any

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

[143] *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 810 (5th Cir. 1989).

[144] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1259 (Del. Ch. 2004).

[145] *Id.*

[146] *Canal Auth.*, 489 F.2d at 572.

policy favoring arbitration. As stated by the Mississippi Supreme Court, "this is so because '[a]n agreement to arbitrate 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.'"[147] Indeed, the basic objective in enforcing arbitration is to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms.[148]

Here, the consolidation of the Sea Breeze/HBSA arbitration with the Sea Breeze/Roy Anderson arbitration was not something to which HBSA agreed. Moreover, consolidation of both arbitrations, without satisfying § 1.3.5.4 of B141, is in direct contravention of HBSA's contractual rights. On the other hand, even if not consolidated, Sea Breeze is not robbed of the benefit of its bargain to arbitrate its claims against HBSA and Roy Anderson. Sea Breeze will only need to do so separately.

Finally, the fourth factor must be met. This factor is that granting the injunction will not be inconsistent with the public interest.[149] The party seeking the injunction need not show that granting the injunction will serve the public interest.[150] Rather, as just alluded to, the party seeking the injunction need only show that granting the injunction *will not disserve* the public interest.[151] Here, the public has an interest in upholding the express language of a contract. Indeed, both the United States Supreme Court and the Supreme Court of

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[147] *Qualcomm*, 980 So.2d at 269 (quoting *Westmoreland v. Sadoux,* 299 F.3d 462, 465 (5th Cir. 2002)).

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

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

[150] *Tillman,* 143 F.Supp.2d at 646.

[151] *Id.*

Mississippi have already ruled that arbitration is dictated by the plain, specific language of an arbitration agreement regardless of any policy favoring arbitration.[152]

CONCLUSION

HBSA respectfully requests that the judgment of the Chancery Court be reversed and this Court grant HBSA injunctive relief from the ill-advised and twisted interpretation of the agreements B141 and A201 consolidating the arbitrations by Sea Breeze against Roy Anderson and HBSA II.

[152] *AT&T Technologies,* 475 U.S. at 648; *see also Adams v. Greenpoint Credit, LLC,* 943 So.2d 703 (Miss. 2006)

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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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CERTIFICATE OF SERVICE

I, Chad P. Favre, hereby certify that I have this date served via Hand-Delivery, a true and correct copy of the foregoing Appellant Brief submitted on behalf of Appellant, Harry Baker Smith Architects II, PLLC, to the following Trial Court Judge:

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