

**In The
Supreme Court of the United States**

◆

KPMG, LLP,
Petitioner,

v.

**SINGING RIVER HEALTH SYSTEM,
AKA SINGING RIVER
HOSPITAL SYSTEM;
JACKSON COUNTY, MISSISSIPPI,**
Respondents.

◆

**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI**

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**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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William Lee Guice III
Counsel of Record
Maria M. Martinez
RUSHING & GUICE, P.L.L.C.
Post Office Box 1925
Biloxi, Mississippi 39533
(228) 374-2313
bguice@rushingguice.com
mmartinez@rushingguice.com

Counsel for Respondent
Jackson County, Mississippi

Dated: June 27, 2019

QUESTIONS PRESENTED

The Mississippi Supreme Court applied the “Minutes Rule” to the decisions below in accordance with Section 2 of the Federal Arbitration Act. The Minutes Rule has been the law in Mississippi for over a century and has never been applied discriminately against contracts that contain arbitration provisions. The Minutes Rule has been analyzed, explained and adopted by the United States Court of Appeal for the Fifth Circuit. The decisions below did not weigh the merits of the grievance between KPMG and respondents but instead addressed a formation issue within Section 2’s Saving Clause. There was no delegation of threshold arbitrability issues because there was no valid contract in existence.

1. Whether the Mississippi Minutes Rule is one of general applicability to Mississippi contracts with public entities and thus is in harmony with the requirement of Section 2 of the FAA that "courts must place arbitration agreements on an equal footing with other contracts" such that its application is not foreclosed?
2. Did the Mississippi Supreme Court act in accordance with *Henry Schein* in finding that before a dispute can be referred to an arbitrator, including delegated disputes regarding arbitrability, the court must first determine whether a valid arbitration agreement exists in accordance with Mississippi law and the Saving Clause?

PARTIES TO THE PROCEEDING

The following party was the plaintiff in the Mississippi Circuit Court of Jackson County and an appellant in the Mississippi Supreme Court, and is a respondent in this Court: Jackson County, Mississippi.

The following party was a plaintiff in the Mississippi Circuit Court of Jackson County and an appellee in the Mississippi Supreme Court, and is a respondent in this Court: Singing River Health System a/k/a Singing River Hospital System.

The following party was a defendant in the Mississippi Circuit Court of Jackson County and was an appellant and appellee in the Mississippi Supreme Court, and is the petitioner in this Court: KPMG, LLC.

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STATEMENT OF THE CASE

A. BACKGROUND

This is a case which involves a failed audit by KPMG where the accounts receivable of Singing River Health System were overstated by more than eighty-eight million dollars (\$88,000,000.00). Mississippi in order to protect its citizens has applied the common-law Minutes Rule which requires public boards such as the Board of Trustees for Singing River Health System (Board of Trustees) to speak only through their minutes and further states that the boards acts are evidenced solely by entries on their minutes. Where a public board engages in business with another entity, no contract can be implied or presumed but instead the contract must be stated in express terms recorded on the official minutes as the actions of the Board. It is the duty of the party contracting with the public board, in this case KPMG, to assure compliance with the Minutes Rule. KPMG failed in its duty to assure compliance with the rule. Without such compliance, no contract can be formed.

Jackson County is a political subdivision of the State of Mississippi. Jackson County is the owner of Singing River Health System a/k/a Singing River Hospital System (SRHS), a community hospital, which is organized in accordance with the community-hospital statutes and governed by a board of trustees. Miss. Code Ann. §§ 41-13-10 to -107 (Rev. 2013). Over the years, KPMG and its predecessors rendered financial statement auditing services to SRHS. In fiscal years 2008 through 2012, SRHS signed unauthorized engagement letters issued by

KPMG regarding proposed auditing services. The 2008 and 2009 letters had various attachments or addenda that contained dispute resolution provisions. In 2010, 2011, and 2012, KPMG issued a two-page letter, which was to serve as an “amendment” to the March 31, 2009, letter. The only attachment to these two-page letters was a single appendix, labeled “Services and Billing Schedule.” For those three years, no separate attachment regarding dispute resolution had been included. The dispute resolution provisions never appeared within the engagement letters for the years in issue. (Pet. App. 3). At no time were the dispute resolution provisions ever considered by the Board of Trustees.

SRHS is governed by a Board of Trustees. An Audit and Compliance Committee (Committee) was established by the Board of Trustees under the Bylaws of SRHS as set forth in the Singing River Health System Audit and Compliance Committee Charter. In order to form a contract with SRHS the agreement must be spread upon the minutes of the Board of Trustees. At no time did the Board of Trustees delegate its statutory power to contract to the Committee, i.e. the Committee did not have the authority to contract with KPMG. That right was retained by the Board of Trustees, who was required by statute to keep minutes of its official business. Mississippi Code Ann. § 41-13-35(3) and § 41-13-35(5)(g). The KPMG engagement letters, and in particular, the dispute resolution clause with incorporated delegation provisions, were never spread upon the minutes of either the Board of Trustees or the Committee. The proposed contracts were never adopted by the governing body of the

public agency. There are no such minutes in the record because none exist. It was the duty of KPMG to assure that the engagement letters were approved and spread in the Board of Trustees minutes. KPMG failed in said duty.

In the agendas and minutes for the meetings of both the Committee and the Board of Trustees for years 2008 – 2012 the engagement letter appears only twice, both times as an attachment to a meeting agenda, never as an attachment to the minutes of either the Committee or the Board of Trustees. It would have been impossible for the Board of Trustees or the Committee to spread the terms of the engagement letters and more particularly the terms of the dispute resolution clause on their minutes during these years because neither had a copy of the clause before it to review as was expressly discussed by the Mississippi Supreme Court in the SRHS appeal, wherein the appellate court dissected each fiscal year, 2008 through 2012. (App. Pet. 3-11).

For fiscal year 2008, the Committee's minutes are silent as to the terms and conditions of KPMG's 2008 proposal. Additionally, the letters were neither attached to, nor included in, the minutes of the Committee. The Board of Trustees met on May 28, 2008 and failed to recite a single term and/or condition of the 2008 proposal in its minutes. For fiscal year 2009 the Committee minutes again failed to include any terms or conditions. Further, the letter was not attached to the Committee's minutes. The Board of Trustees met on June 24, 2009 and again failed to include a single term and/or condition of the 2009 letter in its minutes nor was the letter attached

to the Board of Trustees' minutes. For fiscal years 2010 – 2012, the Committee met in 2010, 2011, and 2012 and approved KPMG's proposal letters, without reference to any specific terms or conditions and without attaching the letters to the minutes. The Board of Trustees failed to take any action concerning KPMG's letters for fiscal years 2010, 2011, or 2012. The Board of Trustees' minutes reflect that it failed to discuss, review, or approve KPMG's proposals for those years. The Board of Trustees' minutes are devoid of any evidence that SRHS contracted with KPMG to perform services, much less any terms or conditions of such a contract. As with previous years, the letters were neither referenced in, nor attached to, the Board of Trustees' minutes from 2010 to 2012. (App. Pet. 3-11).

B. PRIOR COURT PROCEEDINGS

In 2015, SRHS sued KPMG in the Circuit Court of Hinds County, Mississippi, for breach of contract and professional negligence and malpractice arising from KPMG's audits. (App. Pet. 10). In 2017, Jackson County separately filed suit against KPMG in the Circuit Court of Jackson County, Mississippi. (App. Pet. 38). Both claims arose out of the same failed audit services. KPMG moved to compel arbitration in both cases. In the SRHS case the circuit court denied KPMG's motion to compel arbitration. In the Jackson County case, the circuit court granted KPMG's motion to compel arbitration. (App. Pet. 39).

KPMG appealed the denial of its motion in SRHS and Jackson County appealed the grant of KPMG's motion in Jackson County. The two appeals were

pending before the Mississippi Supreme Court at the same time. The Mississippi Supreme Court issued two separate and consistent opinions, relying upon the Minutes Rule to refuse to enforce the arbitration provisions found within the attachments to the engagement letters. (App. Pet. 1-30 and 35-45).

REASONS FOR DENYING THE PETITION

A. SUPREME COURT RULE 15 MISSTATEMENT OF FACT OR LAW

1. KPMG failed to acknowledge that it is the duty of KPMG to assure compliance with the Minutes Rule and it was their failure to complete the formation of a contract for any purpose let alone the inclusion of an arbitration clause.
2. It is a misstatement of fact and law to state that the Mississippi Supreme Court has merely labeled a dispute for contract law purposes to determine whether an issue is arbitrable as the facts are clear that Mississippi law as to the formation of contracts with public bodies and compliance with the Minutes Rule is applied uniformly in all cases regardless of whether it is a contract with a coffee vendor or a contract with one of the world's largest consulting firms.
3. There was never a meeting of the minds regarding KPMG's engagement to perform auditing services as the terms of the engagement were never passed on by the only entity which could evidence a meeting of the minds that being the Board of Trustees.

4. In *Fed Ins. Co. v. Singing River Health Systems*, 850 F.3d 187, 197 (5th Cir. 2017) the Fifth Circuit recognized the importance and legitimacy of Mississippi's Minute Rule contrary to the position taken by KPMG.

B. BOOTSTRAPS AND BACKDOORS

In a nutshell this is what the case is about. KPMG was a long-term auditor for SRHS and grew complacent and sloppy in its services. KPMG blew the audit of SRHS as KPMG overstated SRHS' accounts receivable by more than eighty-eight million dollars (\$88,000,000.00). As a result SRHS and Jackson County, Mississippi were each independently damaged. Each sued KPMG. KPMG is attempting to avoid trial by jury by bootstrapping an argument that there existed a contract when there did not. KPMG with its vast sophistication and available legal resources failed to comply with the Mississippi Minutes Rule and no contract was formed between SRHS and KPMG. KPMG is extending every effort to bring an arbitration clause in through the backdoor of an instrument that was not a contract to avoid trial by jury in two separate counties in Mississippi. The case at bar is not a case demanding review by the United States Supreme Court as this is not a case which presents any areas of national consideration. This is not a case that will resolve a conflict between the circuits, this is a case that falls squarely within existing law; this is a case involving State Contract Law and the proper application of State Law by Mississippi's Supreme Court. This is simply a case of KPMG trying to avoid the exercise of two public bodies' right to trial by jury. At the end of the day, the

case *sub judice* is nothing more than KPMG attempting to bootstrap a backdoor resolution of a problem which KPMG caused by its failure to complete its duties under Mississippi law.

***C. NO CONTRACT WAS FORMED
(KPMG FUMBLED THE KICKOFF –
5 TIMES)***

As indicated above, Mississippi Law requires that in order to form a contract with a public body said contract must be spread on the minutes of the public body or at least the terms of the contract be described in the minutes sufficient to adequately define the purpose and terms of the contract. It is the duty of the contracting party, in this case KPMG, to assure that the contract is spread on the minutes of the public body, KPMG failed to cause the Engagement letters in question to be properly spread on the minutes of SRHS, and thus **no** contract was formed. In addition to the Engagement letters, KPMG failed to ever cause any arbitration clause to be discussed or spread on the minutes of SRHS.

The chart below clearly demonstrates KPMG's failure with respect to contract formation.

Date

2008	Engagement Letter presented to Audit Committee?	YES
	Engagement Letter spread on minutes Audit Committee?	NO
	Was the Engagement Letter presented to Board of Trustees?	NO
	Were the Terms discussed in minutes of Board of Trustees?	NO
	Was the Engagement Letter spread on the minutes of SRHS Board of Trustees?	NO
	Did KPMG fulfill its duty to assure adoption of contract?	NO
	Was a contract formed under MS State Law?	NO
2009	Engagement Letter presented to Audit Committee?	YES
	Engagement Letter spread on minutes of Audit Committee?	NO
	Was the Engagement Letter presented to Board of Trustees?	NO
	Were the Terms discussed in minutes of Board of Trustees?	NO
	Was the Engagement Letter spread on the minutes of SRHS Board of Trustees?	NO
	Did KPMG fulfill its duty to assure adoption of contract?	NO
	Was a contract formed under MS State Law?	NO

2010 ¹	Engagement Letter presented to Audit Committee?	YES
	Engagement Letter spread on minutes of Audit Committee?	NO
	Discussion of Engagement Letter at Board of Trustee meeting?	NO
	Was the Engagement Letter spread on the minutes of SRHS Board of Trustees?	NO
	Did KPMG fulfill its duty to assure adoption of contract?	NO
	Was a contract formed under MS State Law?	NO
2011	Engagement Letter presented to Audit Committee?	YES
	Engagement Letter spread on the minutes of Audit Committee?	NO
	Discussion of Engagement Letter at Board of Trustee Meeting?	NO
	Was the Engagement Letter spread on the minutes of SRHS Board of Trustees?	NO
	Did KPMG fulfill its duty to assure adoption of contract?	NO
	Was a contract formed under MS State Law?	NO
2012	Engagement Letter presented to Audit Committee?	YES
	Engagement Letter spread on the minutes of Audit Committee?	NO
	Discussion of Engagement Letter at Board of Trustee Meeting?	NO

¹ In 2010, 2011 and 2012, engagement letters do not actually contain the dispute resolution clause but instead attempted to adopt the provisions of prior engagement letters.

Was the Engagement Letter spread on the minutes of SRHS Board of Trustees?	NO
Did KPMG fulfill its duty to assure adoption of contract?	NO
Was a contract formed under MS State Law?	NO

D. SUPREME COURT REVIEW IS NOT WARRANTED

Review is not warranted in this case. No direct confrontation exists between the decisions below and federal circuit precedent. The concept that Mississippi has engaged in a pattern of denying enforcement of arbitration agreements is a figment of KPMG's imagination. There is no conflict with the Federal Arbitration Act (FAA). Many would argue that Mississippi has too often required arbitration when it could have successfully done otherwise. Mississippi has never engaged in a pattern suggestive of routinely denying enforcement of bargained for arbitration agreements and therefore there is no risk of serious consequence to the FAA. The decisions below are entirely within the parameters of Section 2 of the FAA, e.g. the Saving Clause. Arguably, any conflict that may exist with Federal law is too shallow to warrant grant of the writ. The duty to comply with the Minutes Rule was placed squarely upon KPMG, KPMG neglected to fulfill this duty, resulting in a colossal failure on its part which it is now desperate to cure. The flaw in KPMG's plan is that the law does not support its position making Supreme Court review inappropriate.

***E. THE DECISIONS BELOW ARE
CORRECT AND ARE NOT IN
CONFLICT WITH EACH OTHER***

The Minutes Rule is clear. Public boards speak only through their minutes and their acts are evidenced solely by entries on their minutes. Where a public board engages in business with another entity, no contract can be implied or presumed. *Wellness, Inc. v. Pearl River County Hospital*, 178 So.3d 1287, 1291 (Miss. 2015). In *Wellness*, the Mississippi Supreme Court discussed the purposes of the minutes requirement in a case that dealt with an arbitration provision. The court concluded that the requirement "has two major functions" that had been synthesized in a 1937 decision:

(1) That when authority is conferred upon a board, the public is entitled to the judgment of the board after an examination of a proposal and a discussion of it among the members to the end that the result reached will represent the wisdom of the majority rather than the opinion or preference of some individual member; and (2) that the decision or order when made shall not be subject to the uncertainties of the recollection of individual witnesses of what transpired, but that the action taken will be evidenced by a written memorial entered upon the minutes at the time, and to which the public may have access to see what was actually done. *Wellness* at 1294.

The importance of the above restated functions of the Minutes Rule was illustrated by the fact that the very engagement letters which KPMG argued were reviewed and considered by the Board of Trustees could not be found in their records.

The application of the Minutes Rule to a contract with a community hospital was not an issue of first impression, both the Mississippi Supreme Court and the Mississippi Court of Appeals having addressed the issue several times over the last few years. In each instance, the Minutes Rule was strictly interpreted and enforced in various contexts in addition to arbitration. See *Wellness, Inc. v. Pearl River County Hospital*, 178 So.3d 1287 (2015) where a valid arbitration agreement did not exist because the board's minutes did not include sufficient reference to liabilities and obligations to mediate or arbitrate; *Kennedy v. Claiborne County*, 233 So.3d 825 (2017) where the appellate court held that it cannot enforce an employment contract with a public board that limits the board's ability to terminate an employee and contains certain obligations such as notice of termination and an opportunity to correct the cause, without any reference to those obligations in the minutes; *Dhealthcare Consultants, Inc. v. Jefferson County Hospital*, 232 So.3d 192 (2017) where the appellate court could not find that contracts for consultation services were legally enforceable without more than two entries stating only that the board authorized Kennedy to enter into contracts with Dhealthcare.

As previously stated, pursuant to Mississippi Code Ann. § 41-13-35(3), the Board of Trustees of a

Community Hospital is required to keep minutes of its official business. A public board "speaks and acts only through its minutes." *Wellness* at 1290 (Miss. 2015). The minutes "are the sole and exclusive evidence of what the board did" and "must be the repository and the evidence of their official acts." *Pike Cty., Miss. ex rel. Bd. of Supervisors v. Indeck Magnolia, LLC*, 866 F. Supp. 2d 589, 591-92 (S.D.Miss. 2012) (quoting *Thompson v. Jones Cty. Cmty. Hosp.*, 352 So.2d 795, 796 (Miss. 1977)). As illustrated in the recitation of facts above, neither the minutes of the Committee (which would not have been sufficient) nor the minutes of the Board of Trustees spoke to the existence of an arbitration or delegation provision in any of the KPMG engagement letters. The mere mention or reference to the engagement letters was not sufficient. Nor was it acceptable under the Minutes Rule to incorporate the terms of the engagement letters by reference.

KPMG, when contracting with SRHS, was obligated to see that the contract was legal and properly recorded on the minutes of the Board of Trustees, a relatively simple exercise for one of the world's largest, if not the largest, accounting and consulting firms. *Thompson* at 797. KPMG had a clear and well-established duty to ensure that sufficient terms from its contract with SRHS were spread upon the Board of Trustee's minutes. *Wellness* at 1293. KPMG failed to fulfill this duty. As the terms and conditions of the Engagement Letters were not sufficiently contained in the minutes for determination of the liabilities and obligations of the contracting parties, neither the arbitration provision

nor the delegation provision can be enforced on any other provisions that matter. *Thompson* at 797.

The Minutes Rule is a firm rule. It has been enforced over and over again by the Mississippi Supreme Court and the Mississippi Court of Appeal. It has been applied to all types of contracts. It has never signaled out arbitration provisions. There are no exceptions. See, E.g., *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187 (5th Cir. 2017) (insurance coverage dispute); *Myrick v. City of India* (N.D. Miss. 2014) (employment discrimination action); *Board of Sup'rs, Adams County v. Giles*, 168 So.2d 483, 219 Miss. 245 (Miss. 1953) (contracts between citizens and the county which attempted to fix the lines and apportion the accretions between the parties); *Dhealthcare Consultants, Inc. v. Jefferson Cnty. Hosp.*, 232 So.3d 192 (Miss. App. 2017) (contract to provide advertising and recruiting consultation services); *Coast Materials v. Harrison County*, 730 So.2d 1128 (Miss. 1998) (board of supervisors minutes evidencing decision to remove an asphalt company from the industrial district); *Community Extended Care Centers, Inc. v. Bd. Of Supr's*, 756 So.2d 798 (Miss. App. 1999) (validity and enforceability of a lease contract); and *Nichols v. Patterson*, 678 So.2d 673 (Miss. 1996) (city's separate items of expenditures). It was the responsibility of KPMG to ensure that all of the terms of its engagement letters with SRHS were spread upon the minutes of the Board of Trustees. KPMG did not do so. The approval of the engagement letters was handled incorrectly from the outset and now KPMG wants the United States Supreme Court to fix its mistake.

In the SRHS appeal, the Mississippi Supreme Court noted that it has consistently applied the Minutes Rule for well over a century and that it is the responsibility of the entity contracting with a board to ensure that the contract is properly recorded on the minutes of the board. (Pet. App. 14). The appellate court focused on the fact that the Board of Trustees' minutes were exceedingly sparse regarding KPMG's proposals, only briefly mentioning KPMG's letters in 2008 and 2009 and completely failing to reference KPMG's proposals at all in the years 2010, 2011, and 2012. Because the terms and conditions of KPMG's 2008, 2009, 2010, 2011 and 2012 letters were not spread across the Board of Trustees' minutes, the obligations and liabilities of the parties could not be determined, and, therefore, the "court cannot enforce the contract[s], much less the mediation or arbitration clauses [referenced] therein." Because the engagement letters were unenforceable in their entirety, the delegation clause contained in the dispute-resolution provision attached to the engagement letters was unenforceable as well. (Pet. App. 43-44).

In the Jackson County appeal, the Mississippi Supreme Court pointed out that it had unanimously resolved KPMG's appeal against SRHS in SRHS's favor, "finding that the Minutes Rule applied and prevented an enforceable arbitration agreement ever arising." KPMG, LLP, 2018 WL 5291088, at *5-9 (¶¶18-33) and (Pet. App. 13-25). KPMG argued that any application of the Minutes Rule pertained to enforceability of the contracts containing the arbitration provisions and not the formation, the only question being whether the contracts can be enforced

based on the Minutes Rule which is a question for the arbitrator, not the court, to decide. The Mississippi Supreme Court dismissed KPMG's argument, stating that Jackson County's minutes-rule argument went to the issue of whether a contract containing an arbitration provision was ever formed in the first place which was a question of law for the trial court, and not the arbitrator, to decide. The appellate court further deferred to its prior ruling in SRHS, finding that the circuit court in the Jackson County case erred in granting KPMG's motion to compel arbitration consistent with its holding in SRHS. (Pet. App. 42-44).

***F. THE DECISIONS BELOW ARE
CONSISTENT WITH FIFTH
CIRCUIT PRECEDENT***

The existence of an inconsistency between the United States Court of Appeal for the Fifth Circuit and the Mississippi Supreme Court is a misrepresentation by KPMG. KPMG has fabricated a conflict where none exists. KPMG devotes much discussion to *Lefoldt v. Horne, L.L.P.*, 853 F.3d 804 (5th Cir. 2017) but not *Arnold v. Homeaway, Inc.*, 890 F.3d 546 (5th Cir, 2018) which explained and expounded upon *Lefoldt*:

In *Lefoldt for Natchez Regional Medical Center Liquidation Trust v. Horne, L.L.P.*, 853 F.3d 804, 813–17 (5th Cir. 2017), we explained that Mississippi's "Minutes Rule," which requires that contracts with public entities be memorialized in the minutes of the

entity's board meetings, sometimes operates as a rule of contract formation and sometimes as a rule of enforceability. With regard to one contract at issue in *Lefoldt*, the parties did not dispute that there was a contract, but the party resisting arbitration argued that the Minutes rule "either foreclose[d] the possibility that there was an agreement to arbitrate or preclude[d] enforcement of the arbitration provision." *Id.* at 814. We relied on a Mississippi Supreme Court opinion stating, with respect to the Minutes Rule, that "the entire contract need not be placed on the minutes. Instead, it may be enforced where 'enough of the terms and conditions of the contract are contained in the minutes for determination of the liabilities and obligations of the contracting parties without the necessity of resorting to other evidence.'" *Id.* at 812 (cleaned up). This statement, we held, "unmistakably mean[t] that in some instances, the Minutes Rule is not a matter of contract formation but instead is a rule preventing consideration of evidence of the terms of the contract other than what is set forth in the minutes." *Id.* In other words, we concluded that the Minutes Rule was operating as an enforceability argument. *Arnold* at 551.

Arnold makes it clear that there has been no “relabeling” of state law contract challenges by the appellate court below as KPMG has asserted. KPMG’s reliance upon *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir., 1986) is also misguided as the decisions below involve different fact scenarios. *Mesa* involved issues related to the approval of contracts by regulatory agencies with a duty to enforce their own procedures and who were free to pursue their own remedies and not be bound by the arbitration results of parties to a contract involving those regulations. *Id.* at 244.

Contrary to what KPMG has represented, the Fifth Circuit has recognized the importance and legitimacy of Mississippi’s Minutes Rule:

Mississippi law requires that contracts between a public board and a contracting entity be "spread upon the minutes" of the board and places the responsibility of complying with the "Minutes Rule" on the contracting entity. *Wellness, Inc. v. Pearl River Cty. Hosp.*, 178 So.3d 1287, 1291 (Miss. 2015). "[B]y enforcing the Minutes Rule, the [Mississippi Supreme] Court has recognized the importance of recorded, express consent by all board members to board actions, as board members are elected officials charged with the protection of the public's funds." *Id.* at 1292 (citation omitted). *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187, 197 (5th Cir. 2017).

**G. THE DECISIONS BELOW ARE
CONSISTENT WITH HENRY
SCHEIN – SCHEIN IS OF LIMITED
APPLICATION**

Henry Schein confirms that the analysis undertaken by the appellate court below was proper and in accord with Section 2 of the FAA. *Henry Schein* found that the “wholly groundless” exception was inconsistent with the FAA and precedent. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). This Court cited precedent which held that a court may not “rule on the potential merits of the underlying” claim that is assigned by contract to an arbitrator,” even if it appears to the court to be frivolous.” *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-650 (1986).

The decisions below did not weigh the merits of the grievance between KPMG and respondents but instead addressed a formation issue within Section 2’s Saving Clause. There was no delegation of threshold arbitrability issues because there was no valid contract in existence. This distinction was expressly recognized in *Schein*:

To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U. S. C. § 2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability

issue. *Henry Schein* at 7. (emphasis added).

This distinction was also recognized by the Mississippi Supreme Court in footnote 5 to the Jackson County opinion wherein it was noted that the *Schein* opinion did not direct a different outcome. Furthermore, in the SRHS opinion, the Mississippi Supreme Court expressly stated that “KPMG, the party seeking to invoke the dispute resolution, must first establish the existence of a contract including such clause. KPMG has not met its burden. KPMG failed to ensure that the letters and their attachments were legally and properly recorded on the Board’s minutes.” (Pet. App. 26).

H. THE MISSISSIPPI SUPREME COURT DECISION AT ISSUE DOES NOT CIRCUMVENT THE FAA – THIS IS A SECTION 2 SAVING CLAUSE ISSUE

Mississippi has long recognized the liberal federal policy favoring arbitration agreements. *Terminix International Inc. v. Rice*, 904 So.2d 1051, 1054(¶ 7) (Miss. 2004). The Mississippi Supreme Court respects the rights of an individual or an entity in agreeing in advance of a dispute to arbitration or another alternative dispute resolution. *Id.* Doubts as to the availability of arbitration must be resolved in favor of arbitration. *IP Timberlands Operating Co., v. Denmiss Corp.*, 726 So.2d 96, 107(¶ 46) (Miss.1998).

Section 2 of the Federal Arbitration Act contains a Saving Clause which provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2 (1947).

The final phrase of Section 2 permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); see also *Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987). The clause establishes a sort of "equal-treatment" rule for arbitration contracts. *Kindred Nursing Centers L.P. v. Clark*, 137 S. Ct. 1421, 1426 (2017).

The Mississippi Minutes Rule is one of equal treatment/general applicability to all Mississippi contracts with public entities. Section 2 of the FAA requires that arbitration agreements be on an equal footing with other contracts. That requirement was met. Any contract with a public body in Mississippi where the Minutes Rule has not been properly observed is not enforceable, regardless of what type of clause the contract may have.

This is not a situation where defenses were applied by the lower court that targeted arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." *Kindred Nursing*, supra at 1426. The Minutes Rule has never been applied to the individualized nature of arbitration proceedings; the rule does not interfere with one of arbitration's fundamental attributes but instead has consistently been applied in a way that would render any contract unenforceable. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 at 1622 (2018).

CONCLUSION

KPMG failed in its duty to assure compliance with the Mississippi Minutes Rule. No contract was formed. KPMG has failed to meet its burden of proof. KPMG has failed to adequately state a basis for consideration of this issue by the United States Supreme Court. The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

/s/ William Lee Guice III

William Lee Guice III

Counsel of Record

Maria M. Martinez

Rushing & Guice, P.L.L.C.

Post Office Box 1925

Biloxi, Mississippi 39533

(228) 374-2313

bguice@rushingguice.com

mmartinez@rushingguice.com

Counsel for Respondent

Jackson County, Mississippi