APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-CA-01047-SCT

[Filed October 25, 2018]

KPMG, LLP	)
	)
v.	)
	)
SINGING RIVER HEALTH SYSTEM a/k/a SINGING RIVER HOSPITAL SYSTEM	)

DATE OF JUDGMENT:

07/12/2017

TRIAL JUDGE:

HON. WINSTON L. KIDD

TRIAL COURT ATTORNEYS:

KRISTI ROGERS BROWN
EDWARD C. TAYLOR
PATRICIA ANNE GORHAM
AMELIA TOY RUDOLPH
R. DAVID KAUFMAN
TAYLOR BRANTLEY McNEEL

COURT FROM WHICH APPEALED:

HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

R. DAVID KAUFMAN
AMELIA TOY RUDOLPH
PATRICIA ANNE GORHAM
TAYLOR BRANTLEY McNEEL

ATTORNEYS FOR APPELLEE:

EDWARD C. TAYLOR
KRISTI ROGERS BROWN

NATURE OF THE CASE:

CIVIL - OTHER

DISPOSITION:

AFFIRMED AND REMANDED - 10/25/2018

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

BEFORE RANDOLPH, P.J., COLEMAN AND CHAMBERLIN, JJ.

RANDOLPH, PRESIDING JUSTICE, FOR THE COURT:

¶1. Singing River Health System a/k/a Singing River Hospital System ("Singing River") sued KPMG, LLP, in Hinds County Circuit Court. KPMG sought to compel arbitration of Singing River's claims. The circuit court declined to order Singing River to the arbitral forum, and KPMG appealed. The Court affirms the trial court's order denying KPMG's motion to compel

arbitration and remands the case for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2. Singing River is a county-owned community hospital and a political subdivision of Jackson County, Mississippi, 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). Singing River is the second largest employer in Jackson County, employing approximately 2,400 employees. KPMG is one of the largest audit, tax, and advisory firms in the United States. KPMG (and its predecessor firm, Peat Marwick) audited Singing River's financial statements from 1978 to 2012.

¶3. In fiscal years 2008 through 2012, Singing River's former Chief Financial Officer Michael Crews signed engagement letters issued by KPMG regarding proposed auditing services. The 2008 and 2009 letters had various attachments 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.

Fiscal Year 2008

¶4. On May 7, 2008, the Singing River Audit and Compliance Committee ("Committee") met and

discussed KPMG's 2008 proposal.[1] A relevant portion of the Committee's minutes state that

> Mr. Crews reviewed the Engagement Letter for the Fiscal Year 2008 audit by KPMG. Mr. Crews discussed the breakdown of proposed audit fees as stated on the Billing Schedule of the Engagement Letter in detail. On a motion made by Mr. Strickland and a second by Mr. Heidelberg, the Committee voted unanimously to approve the Engagement Letter, including all proposed audit fees.

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[1] A board of trustees of a community hospital is authorized by statute to

> delegate to . . . committees reasonable authority to carry out and enforce the powers and duties of the board of trustees during the interim periods between regular meetings of the board of trustees; provided, however, that any such action taken by an officer or committee shall be subject to review by the board, and actions may be withdrawn or nullified at the next subsequent meeting of the board of trustees if the action is in excess of delegated authority.

Miss. Code Ann. 41-13-35(2) (Rev. 2013). However, the statutory authority to delegate does not absolve a board of trustees of its own statutory (and common law) duty to "keep minutes of its official business[.]" Miss. Code Ann. § 41-13-35(3) (Rev. 2013) (emphasis added). *See* ***Dixon v. Green Cty.***, 76 Miss. 794, 25 So. 665 (1899) ("[T]he board of supervisors cannot delegate powers [e]ntrusted to that board, to be by that board alone exercised, to any superintending board."). Justice Coleman recently wrote for the unanimous Court that "[a]ll acts of the community hospital board of trustees must be "stated in express terms and recorded on the official minutes and the action of the board [of trustees]." ***Wellness, Inc. v. Pearl River Cty. Hosp.***, 178 So. 3d 1287, 1291 (Miss. 2015) (internal alterations omitted).

. . .

> The members of the Committee agreed that the Management Letter, Report on Internal Control, and Engagement Letter should be transmitted to the full Singing River Hospital System Board of Trustees with a recommendation for approval.

¶5. 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 very next day, on May 8, 2008, Crews signed the letter "on behalf of Singing River Hospital System," twenty days *before* the next Singing River Board of Trustees ("Board") meeting.

¶6. The Board met on May 28, 2008. The Board minutes concerning the 2008 letter read as follows:

> Mr. Crews stated that the Audit & Compliance Committee held a meeting on May 7, 2008, during which they approved the Report on Internal Control, Management Letter, and fiscal year 2008 Engagement Letter, copies of which were included in the agendas in advance of the meeting. After discussion and on a motion by Mr. Cronier and a second by Mr. Strickland, the Board voted unanimously to approve the minutes of the Audit & Compliance Committee meeting held May 7, 2008, Report on Internal Control, Management Letter, and fiscal year 2008 Engagement Letter with KPMG, as presented and included in the minutes by reference.

The Board failed to recite a single term and/or condition of the 2008 proposal in its minutes. For example, the minutes are silent as to the date of the letter; the term or length of the service; the scope of work or service to be performed; the fees, expenses, or charges to be paid by the hospital; and other contractual provisions, including a now disputed resolution clause.[2] Although the minutes reflect that copies of the vaguely described documents were included in the Board's agendas in advance of the meeting, the minutes are unclear what meeting the minutes are referencing, *i.e.*, the Board's meeting or the Committee's meeting on May 7. Finally, although the minutes state that the 2008 letter had been presented and incorporated by reference in the minutes, the letter was not attached to the Board's minutes.

Fiscal Year 2009

¶7. On May 7, 2009, only two of the four voting members of the Committee met and discussed KPMG's 2009 letter. The Committee's minutes reflect that

> Mr. Crews presented the Engagement Letter from KPMG for the FY 2009 audits, including the Financial Statement Audit, A-133 Audit, and the Benefit Plan Audit. He reviewed the

[2] This illustrative list of contractual terms and conditions based on the facts of this case is not meant to serve as an exclusive list of what should be included in a public board's minute entries.

> proposed fee schedule, which is identical to the proposed fee schedule on the FY 2008 audit.[3]
>
> Mr. Crews also reviewed the Engagement Letter from KPMG for assistance in the preparation of the FY 2009 Medicare Cost Report. He reviewed the proposed fee for the Cost Report assistance, which is also identical to the proposed fees included in the Engagement Letter from the prior year.
>
> Mr. Crews asked the Committee to approve the Engagement Letters as presented. On a motion made by Mr. Heidelberg and a second by Mr. Tolleson, the Committee voted unanimously to approve the Engagement Letters. The Engagement Letters will also be taken to the SRHS Board of Trustees for final approval.

¶8. The Committee noted that KPMG was to perform a financial statement audit, an A-133 audit, and a benefit plan audit, but the minutes again failed to include any terms or conditions. Further, the letter was not attached to the Committee's minutes. Crews signed the letter "on behalf of Singing River Health System" on May 14, 2009.

¶9. Because only two of the four voting members were present at the May 7, 2009, meeting, a telephonic conference was held on June 23, 2009—one day before the Board was scheduled to meet—for the express purpose of approving the actions taken at the May 7

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[3] The 2008 billing schedule and the 2009 billing schedule are not identical.

meeting, including approval of KPMG's proposal. The terms and conditions of the 2009 letter were, once again, omitted from the Committee's minutes. Likewise, the letter was not attached to the Committee's June 23, 2009, telephonic conference minutes.

¶10. The Board met on June 24, 2009. The minutes of the Board reflect that the Committee's minutes for May and June were unanimously approved, including the approval of KPMG's 2009 proposal:

> Mr. Anderson explained that previous to this meeting, a Board member suggested that since there were only two of four Committee members present for the May 7, 2009, meeting that the minutes be approved while there was a quorum present. For this purpose, a phone poll was conducted of the Committee members on June 23, 2009, and minutes were typed to reflect the approval with a full quorum present. Copies of the minutes of the June 23, 2009, phone poll were distributed at the meeting. Mr. Crews explained the purpose of the May 7, 2009, Audit & Compliance Committee meeting. After discussion and on motion by Mr. Strickland and a second by Ms. Tanner, the Board unanimously approved the minutes of the May 7, 2009, Audit & Compliance Committee meeting, and the minutes of the phone poll conducted on June 23, 2009. Then on a motion by Mr. Tolleson and a second by Mr. Strickland, the Board unanimously approved the report on Internal Control, Management Letter, fiscal year 2009

> Engagement Letter, and Cost Report Assistance Engagement Letter, all of which were approved by the Audit & Compliance Committee at their meeting held May 7, 2009, as presented and included in the minutes by reference.

Again, the Board failed to include a single term and/or condition of the 2009 letter in its minutes.[4] The letter was not attached to the Board's minutes.[5]

Fiscal Years 2010 - 2012

¶11. The record reflects that 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. But unlike the previous two years, the Board failed to take any action concerning KPMG's letters for fiscal years 2010, 2011, or 2012. The Board's minutes reflect that the Board failed to discuss, review, or approve KPMG's proposals for those years. The Board's minutes are devoid of any evidence that Singing River contracted with KPMG to perform services, much less any terms or conditions of such a contract. The letters were neither referenced in, nor attached to, the Board's minutes from 2010 to 2012.

¶12. In fiscal year 2013, Singing River hired Horne, LLP, to conduct Singing River's annual audit. Horne

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[4] The minute deficiencies described in paragraph 6 also exist in the Board's 2009 minutes.

[5] The Board's agenda had attached materials related to items listed on the agenda.

informed Singing River that KPMG's prior audits had resulted in an eighty-eight million dollar ($88,000,000.00) overstatement of Singing River's accounts receivable.

¶13. On October 29, 2015, Singing River filed a complaint in Hinds County Circuit Court against KPMG, alleging separate counts of breach of contract and negligence and/or professional malpractice based on the audits KPMG performed for Singing River in fiscal years 2008 through 2012. Singing River alleged that KPMG failed to comply with the professional auditing and accounting standards expressed in GAAS (Generally Accepted Auditing Standards), GAGAS (Generally Accepted Government Auditing Standards), and GAAP (Generally Accepted Accounting Principles), which KPMG had agreed to follow. Singing River specifically alleged that KPMG's audits were replete with computational errors and incorrect assumptions, and that KPMG had not performed basic tests to substantiate its opinions. Singing River separately alleged that KPMG was negligent and committed professional malpractice by failing to use the skill, prudence, and diligence other reasonable and prudent auditors would use in similar circumstances, as expressed in the standards articulated in GAAS, GAGAS, and GAAP.

¶14. Singing River alleged, *inter alia,* that, as a direct and proximate result of KPMG's audits, Singing River was unaware that its employee-pension plan was underfunded by approximately one-hundred-fifty million dollars ($150,000,000.00). Further, Singing River alleged that it was unaware that it was not in

compliance with certain bond covenants due to KPMG's negligence.

¶15. In response, KPMG filed a motion to compel arbitration and to stay the proceedings pending arbitration. KPMG argued that Singing River's claims arose out of the engagement letters, and that those engagement letters contained a valid and enforceable arbitration clause. KPMG requested the trial court to stay the proceedings and to refer Singing River's dispute to binding arbitration. Singing River responded to KPMG's motion to compel arbitration, requesting that the court deny KPMG's motion. A hearing on KPMG's motion to compel arbitration was held on June 13, 2016. Then, on July 12, 2017, the trial court issued an order denying KPMG's motion to compel Singing River's claims to arbitration. KPMG appealed.

ISSUES

¶16. KPMG argues that the trial court erred in denying its motion to compel arbitration, framing the issues on appeal as follows:

> I. By denying KPMG's motion to compel arbitration, the Circuit Court declined to give effect to the delegation provision in the contracts that states, "Any issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these dispute resolution procedures, including any contention that all or part of these procedures is invalid or unenforceable,

shall be governed by the Federal Arbitration Act and resolved by the arbitrators. By operation of this provision, the parties agree to forego litigation over such disputes in any court of competent jurisdiction." Was this error?

II. Did the Circuit Court err in finding that "the terms of the contract herein were not sufficiently spread across the minutes?"

III. The Circuit Court found that "the terms of the contract herein were not sufficiently spread across the minutes and, thus, the arbitration agreement is not enforceable." Does the Circuit Court's order apply Mississippi's minutes rule in a way that "singles out arbitration agreements for disfavored treatment" and therefore in a manner preempted by the Federal Arbitration Act?

IV. The Circuit Court failed to give collateral estoppel effect to the decision of the United States District Court for the Southern District of Mississippi in ***Jones v. Singing River Health Services Foundation***, No. 1:14-cv-00447-LG-RHW, 2016 WL 1254385 (S.D. Miss. Mar. 29, 2016), which found that Singing River and KPMG "entered into a valid arbitration agreement." Was this error?

V. Under Mississippi's doctrine of direct-benefit estoppel, a plaintiff is equitably

> estopped from suing a defendant for alleged breach of contract and simultaneously denying that it is bound by provisions in that same contract. The Circuit Court failed to address KPMG's argument that Singing River is invoking the audit engagement letters to sue KPMG for their alleged breach and simultaneously contending that it is not bound by the arbitration provisions contained in those same engagement letters. Was this error?

STANDARD OF REVIEW

¶17. The Court applies a *de novo* standard of review in reviewing the grant or denial of a motion to compel arbitration. ***Sawyers v. Herrin-Gear Chevrolet Co., Inc.***, 26 So. 3d 1026, 1034 (Miss. 2010) (citing ***E. Ford, Inc. v. Taylor***, 826 So. 2d 709, 713 (Miss. 2002)).

DISCUSSION

I. Minutes Rule

¶18. In denying KPMG's motion to compel and in declining to order Singing River's claims to the arbitral forum, the trial court ruled that "the terms of the contract herein were not sufficiently spread across the minutes, and, thus, the arbitration agreement is not enforceable." KPMG contests the trial court's finding and argues that "the engagement letters were sufficiently spread upon the minutes for 2008 through 2012."

¶19. For well over a century, this Court has consistently held that public boards speak only through their minutes and that their acts are evidenced solely by entries on their minutes. *See, e.g.*, ***Wellness, Inc. v. Pearl River Cty. Hosp.***, 178 So. 3d 1287, 1290 (Miss. 2015) (board of trustees of community hospital must keep minutes of its official business and speaks and acts only through its minutes); ***Ladner v. Harrison Cty. Bd. of Supervisors***, 793 So. 2d 637, 639 (Miss. 2001) (board of supervisors can only act through its minutes); ***Nichols v. Patterson***, 678 So. 2d 673, 677 (Miss. 1996) (boards of supervisors' contracts, and every other substantial action taken by them, must be evidenced by entries on their minutes and can be evidenced in no other way); ***Bruner v. Univ. of S. Miss.***, 501 So. 2d 1113, 1116 (Miss. 1987) (minutes of the board of supervisors must be the repository and the evidence of their official acts); ***Thompson v. Jones Cty. Cmty. Hosp.***, 352 So. 2d 795, 796 (Miss. 1977) (sustaining motion to dismiss because contract was not entered on minutes and enough of the substance of the contact was not contained in the minutes for a determination of the liabilities and obligations of the contracting parties without evidence dehors the minutes); ***Miss. State Highway Comm'n v. Sanders***, 269 So. 2d 350 (Miss. 1972) (state commission bound only by affirmative action evidenced by an entry on its minutes and one member's individual acts not binding on the commission); ***Cheatham v. Smith***, 229 Miss. 803, 92 So. 2d 203 (1957) (boards of trustees of school districts can act only through their minutes); ***Bd. of Supervisors of Adams Cty. v. Giles***, 219 Miss. 245, 68 So. 2d 483 (1953) (when the board of supervisors' minutes evidenced what the board did and "showed the

substantial provisions of the contract," the minutes rule was satisfied); ***Thornhill v. Ford***, 213 Miss. 49, 56 So. 2d 23 (1952) (a board's contracts are evidenced by the entries on their minutes); ***Martin v. Newell***, 198 Miss. 809, 23 So. 2d 796 (1945) (validity of the contract required an entry of an order on the minutes of the board); ***Smith Cty. v. Mangum***, 127 Miss. 192, 89 So. 913 (1921) (board of supervisors of a county can only enter into an express contract by an order spread upon its minutes); ***Marion Cty. v. Foxworth***, 83 Miss. 677, 36 So. 36 (1904) (contract entered by board of supervisors evidenced on minutes when stated with certainty and full detail and stated with clearness the price to be charged for each specific portion); ***Bridges & Hill v. Bd. of Supervisors of Clay Cty.***, 58 Miss. 817 (1881) (boards of supervisors bind counties only when acting within their range of authority and when their contracts are evidenced by the entries on their minutes).

¶20. Like any other public board, a board of trustees of a community hospital is required to "keep minutes of its official business[.]" Miss. Code Ann. § 41-13-35(3) (Rev. 2013).

> A community hospital board of trustees, as does any public board in the State of Mississippi, speaks and acts only through its minutes . . . . And where a public board engages in business with another entity, no contract can be implied or presumed, it must be stated in express terms and recorded on the official minutes and the action of the board . . . .

> However, 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.

Wellness, Inc., 178 So. 3d at 1290-91 (alterations omitted) (citations and quotations omitted). "However, it is the responsibility of the entity contracting with the Board, not the responsibility of the Board itself, to ensure that the contract is legal and properly recorded on the minutes of the board." ***Id.*** at 1291 (citations omitted) (internal quotations omitted).[6]

¶21. In ***Wellness, Inc.***, the Chief Executive Officer of a community hospital signed a contract on behalf of the hospital for Wellness to provide furnishings, fixtures, equipment, and systems for the community hospital's renovation. ***Id.*** at 1289. The minutes of the hospital's Board of Trustees mentioned Wellness and explained how the renovations were being financed, but the specific contract with Wellness and its terms were not revealed. ***Id.*** Later, the community hospital sued Wellness alleging, *inter alia*, fraud, conspiracy, and breach of contract. ***Id.*** The contract with Wellness contained an arbitration clause, so Wellness filed a Motion to Compel Mediation and (if Necessary) Arbitration. ***Id.*** In response, the community hospital denied any agreement to mediate or arbitrate. ***Id.*** The

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[6] *See* discussion, *infra*, at Section II.

trial court denied Wellness's motion to compel, and Wellness appealed. ***Id.***

¶22. In order to determine whether the Wellness agreement was "sufficiently spread upon the Board's minutes such that the Hospital can be said to have agreed to mediate or arbitrate any disputes with Wellness[,]" ***Wellness, Inc.***, 178 So. 3d at 1290, this Court first examined ***Thompson v. Jones County Community Hospital***, 352 So. 2d 795 (Miss. 1977). In ***Thompson***, a former community-hospital employee sued the hospital for breach of contract based on an unpaid salary. This Court affirmed the trial court's grant of a motion to dismiss because

> the employment contract itself never had been entered upon the minutes of the board of trustees, nor had 'enough of the substance of the contract' been contained therein. The minutes had stated only that a four-year contract as executive director of the hospital had been granted to the plaintiff and that its acceptance had been unanimous after 'appropriate discussions.' The Court stated that because the minutes contained 'no reference to the salary to be paid plaintiff for his services, . . . the Court may not determine the amount of the salary.'

Wellness, Inc., 178 So. 3d at 1291 (quoting ***Thompson***, 352 So. 2d at 795-98) (internal citations omitted). The Court in ***Thompson*** then held that, while the entire contract itself need not be placed on the minutes, "enough of the terms and conditions of the contract" must be "contained in the minutes for determination of the liabilities and obligations of the

contracting parties without the necessity of resorting to other evidence." ***Thompson***, 352 So. 2d at 797. Otherwise, the entire contract will be unenforceable. ***Id.***

¶23. Relying on ***Thompson***, this Court in ***Wellness, Inc.*** then examined the community hospital's board of trustees' minutes in reference to the renovation agreement with Wellness. The portions of the hospital board's minutes concerning the Wellness agreement were summarized as follows:

> In September 2011, the Board discussed the reduction in a financing rate, and that Wellness would renovate twelve rooms 'for a cost of less than $5,000.00 per room.' The Board also discussed a time frame for the renovation and the cost per room at a second meeting in September 2011, and the Board carried a motion to continue with the renovation of four rooms at a time. On May 31, 2012, Trustee Jones 'tendered a motion to accept Wellness Environment's representation that it is a SINGLE/SOLE SOURCE provider for the materials and things' in the Kingsbridge Lease and Contract that had been discussed at a previous Board meeting. The motion was seconded and carried unanimously. A second motion was tendered 'to authorize the Chair of the Board of Trustees to approve for payment the Wellness Environment invoice in the sum of $146,357.00 and to forward the approved invoice to Kingsbridge for payment.' The second motion, too, was seconded and carried unanimously. The

> above-described motions constitute the sole mentions of any contract between the Board of Trustees for Pearl River Community Hospital and Wellness.

Wellness, Inc., 178 So. 3d at 1291-92.

¶24. Based on the aforementioned minutes, this Court unanimously held that it would "not draw an enforceable arbitration clause from such general, imprecise language." ***Id.*** at 1292. This Court found that "[t]he minutes from the Board of Trustees' meetings do not set forth sufficient terms to establish the liabilities and obligations of the parties, and thus the court cannot enforce the contract, much less the mediation or arbitration clauses therein." ***Id.*** at 1291. The hospital's contract with Wellness was only "referenced in broad strokes" in the Board's minutes, with "little detail as to its terms. . . ." ***Id.*** at 1292. The Court then held that Wellness had not carried its burden of establishing the existence of a contract with the hospital, so the trial court did not err in denying the hospital's motion to compel. ***Id.***[7]

¶25. In the instant case, the Board's minutes are exceedingly sparse regarding KPMG's proposals. The Board briefly mentioned KPMG's letters in 2008 and

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[7] In another recent decision, the Court of Appeals unanimously followed ***Wellness, Inc.*** in reiterating the century-old rule that public boards speak only through their minutes and that their actions are evidenced solely by entries on the minutes. ***Dhealthcare Consultants, Inc. v. Jefferson Cty. Hosp.***, 232 So. 3d 192, 193 (Miss. Ct. App. 2017), *cert. denied*, 229 So. 3d 714 (Miss. 2017).

2009 only. In the years 2010, 2011, and 2012, the Board's minutes do not reference KPMG's proposals.

¶26. In 2008, the Board's minutes reflect only that the Board unanimously approved the minutes of the Committee meeting held May 7, 2008, and the fiscal year 2008 engagement letter with KPMG. But the minutes of the Board failed to state a single term or condition of KPMG's proposal letter, including what KPMG was engaged to do and how much KPMG was to be paid. The Board's minutes would be equally uninformative had they been recorded in ancient hieroglyphics. The liabilities and obligations of both parties under KPMG's fiscal year 2008 letter cannot be determined by the Board's minutes.

¶27. The May 7, 2008, Committee minutes that were incorporated by reference into the Board's minutes state that "Mr. Crews reviewed the Engagement Letter for the Fiscal Year 2008 audit by KPMG. Mr. Crews discussed the breakdown of proposed audit fees as stated on the Billing Schedule of the Engagement Letter in detail . . . . [T]he Committee voted unanimously to approve the Engagement Letter, including all proposed audit fees." The Committee's minutes demonstrate, at most, that KPMG was engaged to perform an audit and was to be paid an unknown fee. But the substance of the letter, including the details, terms, and conditions, were not stated with any clarity or specificity. The obligations and liabilities of KPMG and Singing River cannot be determined either by the Board's or by the Committee's minutes. Accordingly, KPMG's 2008 letter cannot be enforced,

nor can the separately attached dispute-resolution provision. ***Wellness, Inc.***, 178 So. 3d at 1291.

¶28. Similarly, in 2009, the Board's minutes concerning the fiscal year 2009 proposal state only that the Board unanimously approved the fiscal year 2009 Engagement Letter and Cost Report Assistance Engagement Letter, which were both approved by the Committee at their meeting on May 7, 2009. As in 2008, the Board omitted all of the terms and conditions of the proposal. The minutes do not reflect that either letter was from KPMG, nor do the minutes reveal any details, liabilities, or obligations of the proposal. While the fiscal year 2009 letter was part of the Board's agenda, "boards of supervisors and other public boards speak *only* through their minutes and their actions are evidenced *solely* by entries on the minutes." ***Thompson***, 352 So. 2d at 796 (citations omitted) (emphasis added). Further, in reviewing the May 7, 2009, Committee minutes that were incorporated into the Board's minutes by reference, the liabilities and obligations under the 2009 proposal cannot be determined. The Committee's minutes state that

> Mr. Crews presented the Engagement Letter from KPMG for the FY 2009 audits, including the Financial Statement Audit, A-133 Audit, and the Benefit Plan Audit. He reviewed the proposed fee schedule, which is identical to the proposed fee schedule on the FY 2008 audit. . . . Mr. Crews also reviewed the Engagement Letter from KPMG for assistance in the preparation of the FY 2009 Medicare Cost Report. He reviewed the proposed fee for the Cost Report assistance,

> which is also identical to the proposed fees included in the Engagement Letter from the prior year. . . . [T]he Committee voted unanimously to approve the Engagement Letters."

¶29. The Committee's minutes failed to identify a single term or condition of KPMG's 2009 proposal. The substance of the letter and its attachments were not stated with any detail, clarity, or specificity. The obligations and liabilities of both parties under the 2009 letter cannot be determined from either the Board's minutes or the Committee's minutes. Thus, the Court cannot enforce the 2009 letter, nor can it enforce the attachment containing the dispute-resolution provision. ***Wellness, Inc.***, 178 So. 3d at 1291.

¶30. In fiscal years 2010, 2011, and 2012, the minutes are completely devoid of any reference to KPMG's letters. The Board's minutes make no mention of any terms or conditions of any such agreement for audit services with KPMG from 2010 to 2012. Simply no minute evidence indicates that Singing River even engaged KPMG to perform audit services in those years; thus, determining the liabilities and obligations of both KPMG and Singing River under the 2010 through 2012 proposal letters is impossible, because the Board's minutes reveal no such discussion, review, or approval.

¶31. Even if the Committee's minutes reflect approval of KPMG's 2010, 2011, and 2012 proposals, the *Committee's* minutes are not admissible evidence of a contract for those years, because the *Board's* minutes do not reflect any action taken concerning the 2010

through 2012 letters. Although the Board has statutory authority to delegate to a Committee "reasonable authority to carry out and enforce the powers and duties of the board of trustees,"[8] the Board "cannot delegate powers [e]ntrusted to that board, to be by that board alone exercised, to any superintending board." ***Dixon***, 25 So. at 666 (citation omitted). The board of trustees of a community hospital—not a committee—is statutorily required to "keep minutes of its official business,"[9] and "speaks and acts only through its minutes." ***Wellness, Inc.***, 178 So. 3d at 1290 (citation omitted). "[W]here a public board engages in business with another entity, 'no contract can be implied or presumed, it must be stated in express terms and recorded on the official minutes and the action of the *board*.'" ***Id.*** at 1291 (alteration omitted) (emphasis added) (citation omitted). Because the Board failed to include any reference to KPMG's 2010, 2011, and 2012 proposals in its minutes, the obligations and liabilities of both parties cannot be determined, and, therefore, the Court cannot enforce KPMG's 2010, 2011, and 2012 proposal letters. ***Wellness, Inc.***, 178 So. 3d at 1291.

¶32. Singing River's counsel does not dispute whether letters were signed at KPMG's urging to conduct audit services; therefore, KPMG argues that the minutes rule should not bar enforcement of the letters, including the attachment containing the dispute-resolution provision. KPMG's argument is unpersuasive, for Singing River cannot stipulate that which is prohibited by law. The

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[8] Miss. Code Ann. § 41-13-35(2).

[9] Miss. Code Ann. § 41-13-35(3).

underlying rationale for the minutes rule provides transparency for the benefit of the public. The purpose of the minutes requirement was previously described by this Court as follows:

> (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, Inc., 178 So. 3d at 1293 (emphasis added) (quoting ***Lee Cty. v. James***, 178 Miss. 554, 174 So. 76, 77 (1937)). Singing River's stipulation that an agreement was entered with KPMG for audit services does not eradicate the legal requirement that "enough of the terms and conditions of the contract" be included in the minutes for a determination of the obligations and liabilities of both parties. ***Thompson***, 352 So. 2d at 797. Because the minutes failed to include any terms or conditions of KPMG's letters from 2008 to 2012, the letters and their attachments are unenforceable.

¶33. KPMG additionally argues that, *if* the trial court's order finding that the "arbitration agreement" was not enforceable singled out the dispute-resolution provision specifically for application of the minutes rule, such an application would be preempted by the Federal Arbitration Act ("FAA").[10] KPMG is correct that the FAA prohibits courts from invalidating agreements to arbitrate under state laws applicable *only* to arbitration provisions. ***Taylor***, 826 So. 2d at 713-14 (emphasis in original). The minutes rule, however, does not subject the attachments containing the dispute-resolution provisions to special scrutiny. The trial court's order is quite clear that "the terms of the *contract* herein were not sufficiently spread across the minutes and, thus, the arbitration agreement is unenforceable." (Emphasis added.) The order clearly applies to KPMG's letters in their entirety. *See* ***Wellness, Inc.***, 178 So. 3d at 1291 ("[T]he minutes from the Board of Trustees' meetings do not set forth sufficient terms to establish the liabilities and obligations of the parties, and thus the court cannot enforce the contract, much less the mediation or arbitration clauses therein."). KPMG's proposals for 2008 through 2012, including the attached dispute-resolution provisions, are unenforceable because the Board's minutes failed to include enough terms and conditions of the KPMG letters and attachments; accordingly, determining the obligations and liabilities of both parties under those agreements is impossible.

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[10] The engagement letters' arbitration provision provided that the FAA would govern arbitration.

II. Burden of Recordation

¶34. "The burden of establishing the existence of an arbitration agreement, in line with the burden of establishing the existence of a contract, rests on the party seeking to invoke it." ***Wellness, Inc.***, 178 So. 3d at 1292 (citing ***Trinity Mission Health & Rehab. of Holly Springs v. Lawrence***, 19 So. 3d 647, 651-52 (Miss. 2009)). "It is the responsibility of the entity contracting with the Board, not the responsibility of the Board itself, to ensure that 'the contract is legal and properly recorded on the minutes of the board.'" ***Wellness, Inc.***, 178 So. 3d at 1291 (citations omitted); *see also* ***Jackson Equip. & Serv. Co. v. Dunlop***, 172 Miss. 752, 160 So. 734, 737 (1935) ("It is incumbent upon persons or corporations making contracts with a county to see that they are legal contracts."). KPMG, the party seeking to invoke the dispute-resolution clause, must first establish the existence of a contract including such a 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.

¶35. The Board's minutes failed to include any terms or conditions referenced in the KPMG letters in 2008 and 2009. The Committee's minutes that were incorporated into the Board's minutes by reference in 2008 and 2009 also failed to identify any of the terms or conditions referred to in KPMG's letters. In 2010, 2011, and 2012, no mention of the KPMG letters can be found in the minutes of the Board. No evidence in the Board's minutes demonstrates that Singing River engaged KPMG to perform audit services in those years. It was

KPMG's folly to rely upon the Board to record the terms and conditions of the letters in its minutes. ***Bridges v. Clay Cty. Supervisors***, 58 Miss. 817, 820 (1881). Because the terms and conditions of KPMG's 2008, 2009, 2010, 2011, and 2012 letters were not spread across the Board's minutes, the obligations and liabilities of the parties cannot be determined, and, therefore, the "court cannot enforce the contract[s], much less the mediation or arbitration clauses [referenced] therein." ***Wellness, Inc.***, 178 So. 3d at 1291.

III. Delegation Clause

¶36. Though KPMG argues in its brief that the Court's first inquiry must be whether the letters are enforceable contracts, KPMG proceeds to argue that the dispute-resolution provisions contain a "delegation clause"; thus, KPMG asserts that an arbitrator, not the Court, must decide "[a]ny issue concerning the extent to which any dispute is subject to arbitration" as well as "any dispute concerning the applicability, interpretation, or enforceability of these dispute-resolution procedures, including any contention that all or part of these procedures is invalid or unenforceable." KPMG asserts that the issue of whether the letters are enforceable under Mississippi's minutes rule is for an arbitrator to decide. We disagree. Pursuant to the minutes rule, the letters signed by Crews are unenforceable in their entirety. Thus, the delegation clause contained in the dispute-resolution provision attached to the engagement letters is unenforceable as well. This issue is without merit.

IV. Collateral Estoppel

¶37. KPMG next argues that the trial court was collaterally estopped from ruling that the dispute-resolution provision in the proposal letters was not valid and enforceable, because a federal district court found that Singing River and KPMG had entered into a valid arbitration agreement. ***Jones v. Singing River Health Serv's Found.***, Nos. 1:14CV447 -LG- RHW, 1:15CV1 -LG- RHW, 1:15CV44 -LG- RHW, 2016 WL 1254385 (S. D. Miss. March 29, 2016).

¶38. Mississippi's doctrine of collateral estoppel "precludes relitigating a specific issue, which was: (1) actually litigated in the former action; (2) determined by the former action; and (3) essential to the judgment in the former action." ***Gibson v. Williams, Williams & Montgomery, P.A.***, 186 So. 3d 836, 845 (Miss. 2016) (citation omitted). These elements are not met here. The federal district court did not consider whether the letters were spread across the Board's minutes. Rather, the district court found only that Singing River was implicitly authorized to enter into an arbitration agreement under Mississippi Code Section 41-13-35(5).[11] Because no element of collateral estoppel is met, this issue is without merit.

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[11] Singing River argues that community hospitals do not have statutory authority to enter into arbitration agreements. The Court declines to address this argument, since the minutes rule bars enforcement of the engagement letters in their entirety.

V. Direct-Benefit Estoppel

¶39. KPMG last argues that the trial court erred by refusing to compel Singing River to the arbitral forum pursuant to the doctrine of direct-benefit estoppel. "Direct-benefit estoppel involve[s] *non-signatories* who, during the life of the contract, have embraced the contract despite their *non-signatory status*, but then, during litigation, attempt to repudiate the arbitration clause in the contract." ***Scruggs v. Wyatt***, 60 So. 3d 758, 767 (Miss. 2011) (emphasis added) (quoting ***Noble Drilling Servs., Inc. v. Certex USA, Inc.***, 620 F.3d 469, 473 (5th Cir. 2010)). The doctrine of direct-benefit estoppel applies to non-signatories. Michael Crews signed the letters "on behalf of Singing River[.]" Furthermore, a public board may not be bound by estoppel unless the agreement at issue is duly and lawfully entered upon its minutes. ***Butler v. Bd. of Supervisors for Hinds Cty.***, 659 So. 2d 578, 582 (Miss. 1995) (quoting ***Colle Towing Co., Inc. v. Harrison Cty.***, 213 Miss. 442, 57 So. 2d 171, 172 (1952)). As such, the doctrine of direct-benefit estoppel does not apply. This issue is without merit.

CONCLUSION

¶40. KPMG's 2008, 2009, 2010, 2011, and 2012 letters were not spread across the Board's minutes. The Court cannot enforce these contracts or the dispute-resolution clauses attached to them. KPMG's additional arguments concerning the delegation clause, collateral estoppel, and direct-benefit estoppel are without merit. The trial court's order denying KPMG's motion to compel arbitration is affirmed. The case is remanded for further proceedings.

¶41. **AFFIRMED AND REMANDED.**

WALLER, C.J., KITCHENS, P.J., KING, COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND ISHEE, JJ., CONCUR.

APPENDIX B

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

Supreme Court Case # 2017-CA-01047-SCT
Trial Court Case # 25CI1:15-cv-00563-WLK

[Filed January 10, 2019]

KPMG, LLP)
)
v.)
)
Singing River Health System)
a/k/a Singing River Hospital System)
)

D. Jeremy Whitmire
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
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January 10, 2019

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 10th day of January, 2019.

Supreme Court Case # 2017-CA-01047-SCT
Trial Court Case # 25CI1:15-cv-00563- WLK

The Motion for Rehearing filed by the Appellant is denied.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found at www.courts.ms.gov under the Quick Links/ Supreme Court/Decision for the date of the decision or the Quick Link/Court of Appeals/ Decision for the date of the decision.

APPENDIX C

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

CAUSE NO. 251-15-563CIV

[Filed July 12, 2017]

SINGING RIVER HEALTH A/K/A SINGING RIVER HOSPITAL SYSTEM PLAINTIFF	)
VS.	)
KPMG LLP DEFENDANT	)

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

THIS CAUSE came on before the Court on the Defendant's Motion to Compel Arbitration and to Stay Proceedings. The Court, after a hearing on this matter, and having been thoroughly advised in the premises, finds that the terms of the contract herein were not sufficiently spread across the minutes and, thus, the arbitration agreement is not enforceable. Accordingly, the motion to compel arbitration is not well taken and should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Defendant's Motion to Compel Arbitration and to Stay Proceedings is hereby denied.

SO ORDERED, and ADJUDGED, this the 12th day of July, 2017.

/s/ Winston L. Kidd
WINSTON L. KIDD
CIRCUIT JUDGE

APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-CA-00071-SCT

[Filed January 17, 2019]

JACKSON COUNTY, MISSISSIPPI	)
	)
v.	)
	)
KPMG, LLP	)
	)

DATE OF JUDGMENT:

12/22/2017

TRIAL JUDGE:

HON. JAMES D. BELL

TRIAL COURT ATTORNEYS:

WILLIAM LEE GUICE, III
MARIA MARTINEZ
R. DAVID KAUFMAN
TAYLOR BRANTLEY McNEEL
AMELIA TOY RUDOLPH
PATRICIA ANNE GORHAM
EDWARD C. TAYLOR
EARL L. DENHAM
WILLIAM HARVEY BARTON
BRETT K. WILLIAMS

A. KELLY SESSOMS, III
HANSON DOUGLAS HORN
KRISTI ROGERS BROWN

COURT FROM WHICH APPEALED:

JACKSON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

WILLIAM LEE GUICE, III
MARIA MARTINEZ

ATTORNEYS FOR APPELLEE:

R. DAVID KAUFMAN
TAYLOR BRANTLEY McNEEL
LAUREN OAKS LAWHORN
AMELIA TOY RUDOLPH
PATRICIA ANNE GORHAM

NATURE OF THE CASE:

CIVIL - CONTRACT

DISPOSITION:

REVERSED AND REMANDED - 01/17/2019

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

BEFORE RANDOLPH, P.J., MAXWELL AND BEAM, JJ.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. Recently, this Court unanimously held that KPMG, LLP, could not enforce arbitration agreements attached

to five annual engagement letters with Singing River Health System (Singing River), a community hospital, because the terms and condition of the letters were not sufficiently spread upon the hospital board's minutes to create an enforceable contract. ***KPMG, LLP v. Singing River Health Sys.***, 2017-CA-1047-SCT, 2018 WL 5291088 (Miss. Oct. 25, 2018), *reh'g denied* Jan. 10, 2019. In the present appeal, KPMG seeks to enforce the *very same* arbitration agreements attached to the *very same* engagement letters with Singing River—but this time the entity against which KPMG seeks arbitration enforcement is Jackson County, Mississippi, which acted as Singing River's bond guarantor. For the same reason we affirmed the trial court's denial of KPMG's motion to compel arbitration in ***KPMG, LLP v. Singing River Health System***, we reverse and remand the trial court's *grant* of KPMG's motion to compel arbitration in this case.

Background Facts and Procedural History

¶2. Jackson County owns Singing River, a community hospital 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). For years, Singing River used the annual auditing services of KPMG. But in 2013, to save costs, Singing River hired Horne, LLP, to conduct the hospital's annual audit. Through Horne, Singing River learned that KPMG's prior annual audits had resulted in an $88,000,000 overstatement of Singing River's accounts receivable. Singing River also claimed KPMG's negligent audits left it unaware that its employee

pension plan was underfunded by approximately $150,000,000.

¶3. In October 2015, Singing River sued KPMG in Hinds County Circuit Court, alleging breach of contract, negligence, and professional malpractice. ***KPMG, LLP***, 2018 WL 5291088, at *3 (¶13). In March 2016, Jackson County filed its own lawsuit against KPMG in Jackson County Circuit Court. According to Jackson County's complaint, "KPMG failed to conduct its audits of [Singing River] pursuant to its contractual and professional duties, proximately causing damage to Jackson County." Specifically, Jackson County asserted "KPMG's actions left [Singing River] with a massive financial deficit, an underfunded pension plan, defending multiple lawsuits brought by members of its pension plan, and out of compliance with its bond covenants which has negatively affected [Singing River]." KPMG's actions also negatively impacted Jackson County, as Singing River's bond guarantor. Had KPMG's statements accurately reflected Singing River's financial status, Jackson County asserts it would have never guaranteed the bonds. But based on KPMG's negligent audit, Jackson County did guarantee certain bond issues to the benefit of Singing River, which led to a downgrade in its bond rating. Jackson County also alleged KPMG's actions led to various federal lawsuits against Singing River. And in order to facilitate a $149,950,000 settlement by Singing River, Jackson County agreed to contribute $13,600,000 to Singing River to support indigent care and prevent bond default by supporting operations.

¶4. KPMG responded to both lawsuits by filing motions to compel arbitration. KPMG asserted that Singing River and Jackson County were respectively "bound to the arbitration provisions, including the delegation clauses, contained in the audit engagement letters between KPMG and Singing River" for the relevant fiscal years—2008 to 2012.[1] Both Singing River and Jackson County responded that the KPMG Engagement Letters were not spread on the hospital board's minutes as required by Mississippi's "minutes rule." So no enforceable contract—and thus no enforceable arbitration clause—ever came into existence.

¶5. The Hinds County Circuit Court agreed with Singing River and denied KPMG's motion to compel arbitration in Singing River's lawsuit, which KPMG appealed to this Court. ***KPMG, LLP***, 2018 WL 5291088, at *5 (¶18). The Jackson County Circuit Court, however, sided with KPMG, finding Jackson County's "minutes rule" argument was for the arbitrator, not the court, to decide. So the court granted KPMG's motion to compel arbitration in Jackson County's suit, which Jackson County appealed. *See*

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[1] Although Jackson County was not a party to the alleged contract created by the engagement letters, Jackson County itself claims the auditing services covered by the engagement letters were partly for its benefit. So if the engagement letters—and thus the arbitration provisions attached to them—were enforceable against Singing River, they would likewise be enforceable against Jackson County. *See* ***Qualcomm Inc. v. Am. Wireless License Grp., LLC***, 980 So. 2d 261, 269 (Miss. 2007) (holding that "a signatory may enforce an arbitration agreement against a non-signatory if the non-signatory is a third-party beneficiary or if the doctrine of equitable estoppel applies").

Sawyers v. Herrin-Gear Chevrolet Co., 26 So. 3d 1026, 1034 (Miss. 2010) (holding that "any final decision with respect to arbitration is appealable to this Court pursuant to Mississippi Rules of Appellate Procedure 3 and 4").

¶6. On October 25, 2018, this Court unanimously resolved KPMG's appeal against Singing River in Singing River's favor, finding the minutes rule applied and prevented an enforceable arbitration agreement ever arising. ***KPMG, LLP***, 2018 WL 5291088, at *5-9 (¶¶18-33). This leaves only the present appeal, which also turns on the minutes rule. Jackson County's primary appellate argument is that the trial court reversibly erred when it failed to recognize and apply the minutes rule to deny arbitration.[2] KPMG counters

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[2] Jackson County raised six alternative arguments "to be considered only if the threshold argument asserted above is rejected":

(1) Section 100 of the Mississippi state constitution prohibits the enforcement of arbitration against Jackson County.

(2) No authority exists for the imposition of arbitration against a political subdivision/Jackson County.

(3) Equitable estoppel is not applicable to Jackson County.

(4) Jackson County's claims are not derivative of Singing River's.

(5) Collateral estoppel is not applicable to Jackson County.

(6) Federal law does not preempt the Mississippi state constitution.

that the trial court correctly applied the arbitration agreement's "delegation clause" to rule that any enforcement issues based on the minutes rule is for the arbitrator, and not the court, to decide.

Discussion

¶7. This Court reviews the grant of a motion to compel arbitration de novo. ***E. Ford, Inc. v. Taylor***, 826 So. 2d 709, 713 (Miss. 2002).

¶8. Despite the de novo review, KPMG asserts Jackson County's minutes-rule argument is off limits. Citing the "delegation clause" contained in the arbitration provisions, KPMG argues any application of the minutes rule goes to enforceability of the contracts containing the arbitration provisions, not the formation. And because Singing River has "stipulated" that it accepted KPMG's engagement letters, according to KPMG, there is no question that contracts containing arbitration provisions were formed. Instead, the only question is whether the contract can be *enforced* based on the minutes rule. And that question, KPMG insists, is for the arbitrator, not the court, to decide.[3]

Because the minutes-rule issue controls, we need not address these alternative arguments.

[3] According to the delegation clause in the arbitration provisions:

> Any issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these dispute resolution procedures, including any contention that all or part of these procedures is invalid or

¶9. This Court, however, has already rejected this argument, holding that "Singing River cannot stipulate to that which is prohibited by law." ***KPMG, LLP***, 2018 WL 5291088, at *8 (¶32). The minutes rule is clear. "[P]ublic boards"—including boards of trustees for community hospitals such as Singing River—"speak only through their minutes, and their acts are evidenced *solely* by entries on their minutes." ***Id.*** at *5 (¶19) (emphasis added) (citations omitted). "And where a public board engages in business with another entity, no contract can be implied or presumed"—or, in this case, stipulated to. ***Id.*** at *5 (¶20) (quoting ***Wellness, Inc. v. Pearl River Cty. Hosp.***, 178 So. 3d 1287, 1291 (Miss. 2015)). Instead, the contract "must be stated in express terms and recorded on the official minutes and the action of the board." ***Id.***

¶10. So Jackson County's minutes-rule argument goes to the issue of whether a contract containing an arbitration provision was ever formed in the first place. Contrary to the trial court's ruling, this was a question of law for the trial court, and not the arbitrator, to decide. ***Wellness, Inc.***, 178 So. 3d at 1290-91 (applying minutes rule to "first determine if there is a contract between the Hospital and Wellness within which the parties agreed to mediate or arbitrate their claims").

¶11. Moreover, this was a question definitely answered by this Court in ***KPMG, LLP***. Under the minutes rule, "the entire contract need not be placed on the minutes." ***Wellness, Inc.***, 178 So. 3d at 1291. But "enough of the

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unenforceable, shall be governed by the Federal Arbitration Act and resolved by the arbitrators.

terms and conditions of the contract [must be] contained in the minutes for determination of the liabilities and obligations of the contracting parties without the necessity of resorting to other evidence." ***Id.*** As this Court recognized in ***KPMG, LLP***, "the Board's minutes are exceedingly sparse as to KPMG's proposals." ***KPMG, LLP***, 2018 WL 5291088, at *7 (¶25). In May 2008, the Board's minutes reflect that the Board approved the 2008 engagement letter, but the minutes failed to contain "a single term or condition of KPMG's proposal letter, including what KPMG was engaged to do, and how much KPMG was to be paid." ***Id.*** at *7 (¶26). In May 2009, the Board minutes reflect that the Board approved two engagement letters, but "[t]he minutes do not reflect that either letter was from KPMG, much less any details, liabilities, or obligations of the proposal." ***Id.*** at *8 (¶28). And "[i]n fiscal years 2010, 2011, and 2012, the minutes are completely devoid of *any reference* to KPMG's letters." ***Id.*** at *8 (¶30) (emphasis added). So this Court cannot enforce the engagement letters, "much less the separately attached dispute-resolution provision."[4] ***Id.*** at *7 (¶27). *See also* ***Wellness, Inc.***, 178 So. 3d at 1291 (holding that the board minutes did "not set forth sufficient terms to establish the liabilities

[4] In ***KPMG, LLP***, this Court also expressly rejected KPMG's argument that the minutes of Singing River's Audit and Compliance Committee contained sufficient reference to the engagement letters and its terms to satisfy the minutes rule. This Court found that the Committee's minutes were not admissible evidence of Board action. Instead, only the Board's minutes can testify to Board action. ***KPMG, LLP***, 2018 WL 5291088, at *8 (¶31).

and obligations of the parties, and thus the court cannot enforce the contract, much less the mediation or arbitration clauses therein").

¶12. Therefore, the trial court erred in granting KPMG's motion to compel arbitration. Consistent with our holding in ***KPMG, LLP***,[5] we reverse the trial court's order and remand the case to the trial court with an instruction to deny the motion to compel arbitration.

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[5] After we handed down ***KPMG, LLP***, the United States Supreme Court issued its opinion in ***Henry Schein, Inc. v. Archer & White Sales, Inc***, No. 17-1272 (U.S. Jan. 8, 2019). While KPMG cites this case as supplemental authority, we find this opinion does not direct a different outcome.

First, ***Henry Schein, Inc.***, dealt specifically with the lower court's application of the "wholly groundless" exception to when parties agree that arbitrability questions will be decided by the arbitrator. ***Id.***, slip op. at 3. And neither ***KPMG, LLP*** nor this appeal turn on the now-rejected "wholly groundless" exception.

Second, in ***Henry Schein, Inc.***, the Supreme Court reaffirmed "that parties may delegate threshold arbitrability questions to the arbitrator, *so long as* the parties' agreement does so by 'clear and unmistakable' evidence." ***Id.***, slip op. at 6 (emphasis added) (citing ***First Options of Chicago, Inc. v. Kaplan***, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)). *See also* ***Rent-A-Ctr., W., Inc. v. Jackson***, 561 U.S. 63, 69 n.1, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (also noting the ***First Options*** caveat that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so"). That particular notion is essentially why KPMG's arbitration argument fails. Under the minutes rule, we find no evidence spread upon the minutes that KPMG and Singing River agreed to arbitrate, let alone delegate arbitrability questions to an arbitrator. ***KPMG, LLP***, 2018 WL 5291088, at *10 (¶¶35-36).

¶13. **REVERSED AND REMANDED.**

WALLER, C.J., RANDOLPH AND KITCHENS, P.JJ., KING, COLEMAN, BEAM, CHAMBERLIN AND ISHEE, JJ., CONCUR.

APPENDIX E

IN THE CIRCUIT COURT OF JACKSON COUNTY STATE OF MISSISSIPPI

CAUSE NO. 2017-00049(3)

[Filed December 20, 2017]

JACKSON COUNTY, STATE OF MISSISSIPPI, PLAINTIFF	)
VS.	)
KPMG LLP, DEFENDANT	)

ORDER GRANTING KPMG LLP'S MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS PENDING ARBITRATION

The captioned case is before the Court on KPMG's Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration and came before the Court for hearing on December 5, 2017. Having considered the pleadings, the submissions of the parties, the cited legal authority, and the argument of counsel, and for the reasons stated at the hearing, the Court finds that Plaintiff's claims arising out of the engagement letter related to the fiscal year 2009 audit must be compelled to arbitration and that the gateway issues of whether

the claims related to KPMG's audits in fiscal years 2008, 2010, 2011, and 2012 should be compelled to arbitration are to be decided in arbitration pursuant to the delegation clauses contained in the engagement letters.

Accordingly, KPMG's Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration is GRANTED. The case will be stayed pending resolution of these issues in arbitration.

IT IS SO ORDERED this 20 day of December, 2017.

/s/ James D. Bell
JAMES D. BELL
Special Judge

PREPARED BY:

/s/ David Kaufman
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APPENDIX F

CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

NO. 2017-00049

[Dated December 5, 2017]

JACKSON COUNTY,	)
STATE OF MISSISSIPPI,	)
Plaintiff,	)
	)
VERSUS	)
	)
KPMG, LLP,	)
Defendant.	)
	)

MOTION TO COMPEL ARBITRATION
BEFORE THE HONORABLE JAMES D. BELL
SPECIAL CIRCUIT COURT JUDGE
DECEMBER 5, 2017

APPEARANCES NOTED HEREIN

REPORTED BY: CONNIE CHASTAIN, RMR, CSR
Freelance Court Reporter

[p.2]

APPEARANCES:

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COUNSEL FOR DEFENDANT

* * *

[p.92]

Kennedy case that she just mentioned?

THE COURT: Say that again.

MR. GUICE: Would Your Honor like the Kennedy case she just mentioned because it discusses Thompson?

THE COURT: Yes.

MR. GUICE: May I present that, Your Honor?

THE COURT: You may. Thank you. I'm going to -- it will take me -- well, I won't predict, but I'll make a ruling today. And so we'll be in recess just like you're waiting on a jury.

MR. GUICE: Yes, Your Honor.

MS. RUDOLPH: Thank you, Your Honor.

(A Brief recess was taken.)

THE COURT: Thank you for your patience with me. I'm going to make a ruling. I have not -- I was not wise

enough to try to sketch out my thoughts, but I'm going to explain briefly the ruling.

KPMG, LLP defends, or seeks to have this case sent to arbitration based upon its engagement letters with Singing River

[p.93]

Hospital, which it says should be binding upon Jackson County because of their close relationship, similar interests and because they believe Jackson County's lawsuit against KPMG is derivative from its engagement letters with Singing River Hospital.

The engagement letter does contain an arbitration agreement and that arbitration agreement contains a delegation provision which delegates to an arbitrator even, I think the term is gateway questions about whether arbitration should apply or whether the case is arbitrable.

And I've considered the DHealthcare and the Kennedy case along with the exhibits, pleadings and the argument of both counsel has been very helpful to me this morning.

And I do agree that DHealthcare -- and of course, we have rulings in similar cases by Judge Guirola, which is persuasive; Judge, Kidd, which is persuasive; opinion by the Attorney General, which is persuasive, all of which I respect and

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admire, and then DHealthcare in which a contract was referred to in minutes but not incorporated in the

minutes and not spread upon the minutes. And then there was some question about where the contract was and whether it was -- whether the public could locate that contract.

And DHealthcare talks about the duty of the contractor to ensure that its contract is spread upon the minutes. And considering DHealthcare, Kennedy and other cases, it appears that the issue of whether a contract is sufficiently on the minutes is quite fact intensive.

It's not nearly a question of law -- obviously it's a question of the law but it's also a question of fact, is it spread upon the minutes, is it referenced in the minutes sufficient for the public to determine what the terms of the contract would be. In Kennedy it was not and DHealthcare it was not.

But it is a fact driven question and I do note that in the 2009 minutes that -- well, first of all, I note -- I do note

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that the Singing River Health System's Board of Directors apparently, and I don't have to make a ruling on this subject at this moment, but apparently delegated to an Audit and Compliance Committee the selection and engagement of external auditors for the purpose of conducting an annual audit.

And other than the selection and engagement of the external auditors for the purpose of conducting the annual audit, the Audit and Compliance Committee does not have the authority to expend funds or

establish policy, which I suppose is a negative way of saying that the Audit and Compliance Committee has the authority to select, engage and pay -- authorize the payment of auditors.

And the Audit Committee minutes show -- for the relevant years show this engagement letter. In two of the relevant years the minutes of the hospital do not make any reference to the engagement letter and other of the relevant years it adopts the engagement letters by reference. But,

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I don't always, and I don't have it every year a copy of the engagement letter in the minutes. But they're referred to in an agenda or they're referred to in -- I do have in 2009 a Board of Trustees meeting, June 24, 2009, with the agenda, the KPMG engagement letter and minutes incorporating that engagement letter by reference.

And as I look at the case law, it would appear to me that at least for the year 2009 there is a contract adopted by the minutes and referred to and findable in the minutes. Here it is.

So the question before the Court today is have the parties; that is, Singing River in this instance and KPMG, declared an intent and power to delegate the enforceability or the arbitrability of this issue to an arbitrator. And at least as of 2009 they did.

So the next question is, is the assertion of arbitrability by KPMG wholly groundless. It is not.

Therefore, the issue of whether 2009 ought to be arbitrated should be cited by the

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arbitrator.

I'll go further in saying that in each of the years, because it is a fact driven question, the finder of fact needs to determine whether these are, in fact -- whether the engagement letter is, in fact, spread upon the minutes sufficient to bind Singing River Hospital.

That's important because -- for several reasons, but it's important for this determination because the claims of Jackson County are derivative of the claims of Singing River Hospital. So whatever happens with the issue of arbitrability with Singing River will apply to Jackson County.

Because it is a fact driven question on each of the other years and the assertion of arbitrability is not wholly groundless, I find that it is up to the arbitrator to determine whether there is sufficient notice in the minutes for a member of the public to determine what the terms of the contract would be.

I note that it is attached to the

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minutes. The engagement letters are attached to and referenced in at least some of the minutes of the Audit and Compliance Committee. And in other cases it's made reference to -- it's referred to as an attachment to the agenda, but I don't have the attachments to the

agenda. It might be that those attachments don't exist. It might be that they do exist.

From what I can gather from DHealthcare and Kennedy, if a member of the public cannot go find it, then it's not sufficiently spread on the minutes. But that's an issues for the arbitrator to determine, and he might determine that after he requires some discovery on production of the entire minutes because I don't know whether I have the entire minute.

And it is clear that the Audit and Compliance Committee considered a contract and approved the contract and in some years the full board of the hospital approved the same contract. But was that contract attached to a minute, is it an exhibit to a

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minute, the exhibit says that it is but the minute doesn't show it, at least that which has been produced. I think that's a fact question. It's either there or it's not. If it's not there, then the arbitrator ought to find that it's not arbitrable. If it is, it is.

Therefore, I'm going to find that at least year 2009 is arbitrable and I'm going to leave the factual question as to the other years up to determination by the arbitrator.

And Ms. Rudolph, you can prepare an order if you can follow my rambling.

MS. RUDOLPH: Thank you, your Honor.

THE COURT: Thank you, we're adjourned.

(Hearing concluded at 12:05 p.m.)

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CERTIFICATE OF COURT REPORTER

I, Connie Chastain, RMR, CSR, Court Reporter and Notary Pubic in and for the County of Jackson, State of Mississippi, hereby certify that the foregoing pages contain a true and correct transcript of the Motion to Compel Arbitration in the above styled cause as taken by me in the aforementioned matter at the time and place heretofore stated, as take by stenotype and later reduced to typewritten form under my supervision to the best of my skill and ability by means of computer-aided transcription.

I further certify that I am not in the employ of or related to any counsel or party in this matter and have no interest, monetary or otherwise, in the final outcome of this matter.

Witness my signature and seal this the 21st day of December, 2017.

/s/ Connie Chastain
CONNIE CHASTAIN, RMR
CSR NO. 1025

[SEAL]