2016-CA-01739

IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

TANYA DALE WRIGHT SANDERSON, APPELLANT

v.

HOBSON L. SANDERSON, JR., APPELLEE

On Appeal from Decision on Remand to the Chancery Court of Monroe County, Mississippi
(Cause No. 2008-0627-48-L)

Honorable John A. Hatcher, Chancellor

APPELLEE'S BRIEF

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Hobson L. Sanderson, Jr., Appellee ("Hob");

2. Tanya Dale Wright Sanderson, Appellant ("Tanya");

3. Sanderson Construction, Inc. and Sanderson Redi-Mix, Inc., owned by Hob before and during marriage;

4. Hon. Steve Stubblefield, attorney who prepared the prenuptial agreement;

5. Hon. Jimmy Doug Shelton, attorney who advised Tanya regarding prenuptial agreement;

6. Hon. D. Michael Crowder, C.P.A., Mitchener Crowder & Stacy, certified public account who prepared Hob's tax returns, including the joint tax returns;

7. Hon. James Koerber, C.P.A., court-appointed valuation expert;

8. Hon. Charles Simmons, Tanya's accountant;

9. Hon. Richard C. Roberts, III, and the Hon. David Bridges, trial counsel for Hob;

10. Hon. Jak M. Smith, and the Hon. Gregory M. Hunsucker, trial and appellate counsel for Hob; and,

11. Hon. Roy O. Parker, Sr., trial and appellate counsel for Tanya.

/S/GREGORY M, HUNSUCKER, MBN 10309
Lead Attorney of Record for Hob L. Sanderson, Jr., Appellee

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The following abbreviations are used herein:

(1) Trial Record—**R**;

(2) Hob Sanderson, Jr.'s Record Excerpts—**HRE**; and,

(3) Tanya's (Appellant's) Brief—**TB**.

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

This matter commenced in 2008, more than 9 years ago, and is now before this Court on Tanya's second appeal. Tanya seeks a decision from this Court requiring lower courts to measure substantive conscionability of prenuptial agreements by weighing the benefit of the bargain at the conclusion of the marriage, rather than employing standard contractual analysis, which would disrupt the contractual expectations of at least one party to every prenuptial agreement now existing in Mississippi.

Tanya's request was rejected by this Court when it articulated the test to be applied to prenuptial agreements as to substantive unconscionability in the first appeal of this matter, reaffirming that prenuptial agreements are to be construed by the same canons applicable to contracts and holding that substantive conscionability of prenuptial agreements is to be measured at the time of execution:

> [A] prenuptial agreement is a contract like any other contract that is subject to the same rules of construction and interpretation applicable to contracts.

Sanderson v. Sanderson, 170 So.3d 430, 436, ¶18 (Miss. 2014) (citations omitted) (sometimes referred to hereinafter as *Sanderson I*).

> We hold that substantive unconscionability feasibly could be measured at the time the prenuptial agreement is made; measuring it at the time the agreement is made would maintain consistency in the law. It also would ensure that the Court does not "relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated."

Sanderson, 170 So.3d at 437, ¶22 (citations omitted).

The Court should reject Tanya's request to reverse this Court's prior decision and impose a "results" paradigm on the enforcement of prenuptial agreements. If the Court disregards stare decisis, the law of this case, and considers such a drastic change in the law, this matter should be orally argued before the entire Court. If not, there is no reason to incur further expense and further

delay to reject the spurious arguments made by Tanya with respect to the plain test annunciated by the Court in this case, which incorporates the body of contract law, treating prenuptial agreements like any other contract. Nor is there any reason to entertain oral argument on the vacuous contentions made by Tanya which were rejected previously by this Court, conflict with this Court's prior ruling, or go far beyond the scope of this Court's remand.

M.R.A.P. 28 STATEMENT REGARDING APPELLANT'S BRIEF

Tanya's brief should be stricken pursuant to M.R.A.P. 28 for those reasons set forth in Hob's Motion to Strike Appellant Brief, filed contemporaneously herewith and incorporated herein by reference.

STATEMENT OF THE CASE

Tanya second appeal is of the lower court's decision after this Court's decision in *Sanderson v. Sanderson*, 170 So.3d 430 (Miss. 2014). (Hob did not cross appeal.) This Court initially rendered its decision on December 11, 2014. After review of this Court's initial decision, Hob realized that the lower court's *Classification of Assets* had been omitted from the initial record.

Hob filed his Motion for Rehearing on March 15, 2015,[1] and caused the *Classification of Assets* to be made a part of the record on March 20, 2015. Order Granting Motion to Correct and Supplement Record.**HRE67-85; R376-394** Although this Court denied Hob's Motion for Rehearing, it modified its December 11, 2014 decision on August 13, 2015, specifically paragraph 24, as follows (the modified language is italicized):

December 11, 2014 Opinion:

> ¶24. Tanya argues the chancellor improperly found certain assets not commingled for purposes of making an equitable distribution of marital property. Included in

[1] https://courts.ms.gov/appellate_courts/docket/sendPDF.php?f=dc00001_live.SCT.12.CA.1153.29550.0.pdf&c=76228&a=N&s=2.

> the charge of error is a joint bank account. The chancellor found that the joint bank account was a clearinghouse for Hobson's money and could be traced back to Hobson. *He accordingly held that, under the prenuptial agreement which provided that property that could be traced to one spouse belonged to that spouse, the money traceable to Hobson was not commingled and not a marital asset.*[2]
>
> ***August 13, 2015 Opinion***
>
> ¶ 24. Tanya argues the chancellor improperly found certain assets not commingled for purposes of making an equitable distribution of marital property. Included in the charge of error is a joint bank account. The chancellor found that the joint bank account was a clearinghouse for Hobson's money and could be traced back to Hobson. *While the chancellor labeled the account as marital property in his classification of assets, he treated it as separate property under the terms of the prenuptial agreement during his equitable distribution of the marital estate.*

Sanderson, 170 So.3d at 437, ¶24.

1. **Remand Instructions.**

In this Court's 6-3 decision in *Sanderson I* it affirmed the lower court on all issues except two: (1) the issue of substantive conscionability review of the Sanderson prenuptial agreement[3] and (2) the issue of certain funds kept in a joint bank account. This Court's specific remand instructions were as follows:

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[2]https://courts.ms.gov/Images/HDList/..%5COpinions%5CCO99825.pdf.

[3]The lower court did not initially perform a substantive conscionability review because it was then generally accepted by the Family Law Bar of the State of Mississippi that Mississippi courts were to review prenuptial agreements for procedural unconscionability only. Indeed, prior to *Sanderson I*, it did not appear that any Mississippi appellate court had ever held, in 197 years of Mississippi jurisprudence, or rendered a decision continuing language that was part of the *ratio decidendi* of a decision, that substantive unconscionability of a prenuptial agreement must be judicially reviewed. The Honorable Deborah H. Bell, Professor of Family Law at the University of Mississippi, had presumably taught this basic principle to hundreds of Mississippi law students for years. DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW, §14.02[6] (2d ED. 2011) (The Mississippi Supreme Court has declined to address the substantive fairness of prenuptial agreements). This Court corrected the general misapprehension and clarified the matter in *Sanderson I* and held that prenuptial agreements are to be considered as any other contract, using the same judicial canons of construction. *Sanderson*, 170 So.3d at 436, ¶18, 170 So.3d at 437, ¶22. *See* Hob's Motion for Rehearing, *supra*, n.1, at pages 3-8 (extensively discussing the cases and authorities giving rise to the general misapprehension).

> We affirm the trial court on its finding that the prenuptial agreement is not procedurally unconscionable. We reverse and remand for further proceedings on whether the prenuptial agreement is substantively unconscionable. We also hold that certain funds, used for familial purposes, **kept** in a joint bank account created after the marriage began, do not fall within the parameters of the prenuptial agreement.

Sanderson, 170 So.3d at 432, ¶1 (emphasis supplied).

2. The lower court decisions on remand.

The lower court rendered two decisions pursuant to this Court's remand instructions; one on the substantive conscionability of the Sanderson prenuptial agreement, the other on the funds kept in the joint account. The lower court adhered to this Court's remand instructions, considered the voluminous court record, consisting of eleven folders, more than 200 exhibits, the briefs of the parties, the arguments of the parties' respective counsel on June 21, 2016, **HRE1, 3; R196, 198**, and extensively examined the authorities offered by the parties and other authorities.

a. The lower court's decision on substantive conscionability.

On June 22, 2016, the lower court entered a 13-page opinion and judgment rejecting Tanya's contention that that it should apply a "results, post-trial based test" to find the Sanderson prenuptial agreement substantively unconscionable. **HRE1-13; R196-208** After extensively examining the authorities offered by the parties, including those offered by Tanya on this appeal, and other authorities, the lower court applied the test announced by this Court in *Sanderson I* (quoted *supra* page 1) and concluded as follows:

> Based on all of the foregoing, this Court finds as a matter of fact and law the parties' Prenuptial Agreement was a result of at best of Tanya's personal negligence and improvidence, freely and against advice of her own legal counsel, but neither it, nor its terms were so harsh, fundamentally unfair, oppressive or one-sided as to render the Prenuptial Agreement in whole or part substantively unconscionable. Plainly put, Tanya has failed to prove with sufficient evidence, authority or argument the Prenuptial Agreement was substantively unconscionable, but merely improvident.
>
> It is, therefore, the ORDER, JUDGMENT AND DECREE of this Court that:

> 1. The Prenuptial Agreement of the parties in whole and in part was not substantively unconscionable when entered into.

Opinion and Judgment on Remanded Issue of Substantive Conscionability (as restyled by the lower court) at page 12, paragraph IX. **HRE12; R207**

b. The lower court's decision on equitable distribution of the joint bank account.

On October 19, 2016, the lower court entered an even more extensive 30-page opinion and judgment on the issue of the funds kept in the joint account. The lower court recognized that Tanya was attempting to reargue many aspects of the case that had been affirmed by this Court and that Tanya's "positions, claims and arguments . . . have extended and compounded this case's complexity, would require this Court to disregard and reclassify non-marital property to marital, gut the parties' valid and enforceable prenuptial agreement and inequitably distribute same." **HRE42; R497** The lower court rejected Tanya's contention "as an open-ended claim to completely undo the parties' prenuptial agreement", **HRE32; R487** and as "extreme" and "overreaching". **HRE28; R483**

The lower court likewise rejected Hob's contention that this Court's opinion on the meaning of the contract (i.e., that the broad contractual language of the Sanderson prenuptial agreement did not cover commingled or family use) was merely advisory (because no court had then determined whether the contract was enforceable) and that this Court had imposed a requirement of "magic words", adhering to this Court's ruling that the language of the Sanderson prenuptial agreement did not cover commingling or familial use. **HRE16-17, 22; R471-472, 476**

The lower court found that the funds outside the joint account at separation were part of the marital/nonmarital classification affirmed by this Court and focused its analysis on the funds kept in the joint account. **HRE19; R474** The lower court adopted the parties' final separation date, October 10, 2008, as the line of demarcation to equitably distribute the funds kept in the joint

account. **HRE22; R477** The court found that Tanya's 8.05 did not list or mention the joint account.**HRE21; R476**

The lower court extensively examined Trial Exhibit F65 and found as follows:

> Trial Exhibit F65 consists of three (3) folders, of which the undersigned Chancellor has reviewed each and every page and finds that the history of that account is incomplete, containing statements in a number of years with copies of checks, debits and deposits; copies of Security Bank checks without statements; Registers of Tanya Sanderson with entries not in statements in evidence; copies of statement envelopes; a listing of November 9, 2010, by Community Bank of checks, debits and deposits from August 9, 1994, to October 17, 2008. Some of the documents in evidence go back as far as 1994. With all of Trial Exhibit F65 considered, the transactions of the joint account are most likely incomplete and certainly confusing.

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at page 8. **HRE21; R476**

The lower court then conducted a *Hemsley* and extensive *Ferguson* analysis. The court reviewed the parties' respective contributions, etc., and found *Ferguson* factors 1, 4 and 5 to be neutral, favoring neither party. With respect to *Ferguson* factor 2, the lower court found:

> The parties, prior to marriage, with eyes wide open, entered into their Prenuptial Agreement which has been upheld as procedurally conscionable by the Supreme Court and substantively conscionable by this Court, thus enforceable and binding on both parties, the intent of which was to keep separate their respective estates, which at the time it was entered into was a net worth of the Defendant of $135,500.00, or 4% of the total, and a net worth of the Plaintiff of $3,581,130.56 or 96% of the $3,716,630.56 total.
>
> Chancellor Littlejohn, as stated by the Defendant in her Brief on this issue, made an equitable determination and distribution of the marital property, except, as determined by the Supreme Court, the funds kept in the joint account and also made a HEMSLEY marital/non-marital analysis finding.
>
> The Defendant also argues in her Brief that $20,000.00 deposited on September 9, 2004, from the Plaintiffs savings, should drag the savings account into the Court's equitable distribution. This savings account was adjudged non-marital by Chancellor Littlejohn, which was not overturned by the Supreme Court. To pull this savings account into this Court's equitable distribution would violate the Prenuptial Agreement, a contract that the parties intended to be enforced, which rebuts the presumption of commingled familial asset, and would be inequitable, as

those sums were spent by both parties in their day-to-day living, and not "kept" in the joint account.

Additionally, the timber sales from the homestead during the marriage, which was allocated to the Defendant in Mississippi State Tax Returns, were put into a maintenance account in the Plaintiff's name, which had been adjudged non-marital by Chancellor Littlejohn, and as such, the Defendant argues the entire maintenance account should be deemed commingled familial, and marital. Likewise, dividend and interest income shown in joint tax returns is deemed to be joint, bringing in all lands and monies. To do so would be inequitable as the land and investment accounts were owned prior to marriage by the Plaintiff, and all were traceable entirely to the Plaintiff, and as such, would violate the Prenuptial Agreement, which rebuts the presumption of commingling. These were not monies "kept" in the joint account, but tax avoidance mechanisms that did not constitute actual commingling or familial use.

Additionally, the Defendant argues that $750,000.00 is marital by familial use or commingling from $50,010.00 in funds of the Plaintiff deposited in the joint account that were soon withdrawn and ultimately were placed after numerous transfers and with funds from other accounts into the Herring Bank Church Bonds totalling $750,000.00. Those funds $50,010.00 were not "kept" in the joint account, just placed there; had they been left there, they would have been commingled, but were instead **withdrawn by consent then of both parties and by such they were withdrawn from familial use and commingled and never bootstrapped into joint $750,000.00 church bonds.** This claim is extreme, overreaching.

Before the parties married, the Defendant had a daughter by another man, who paid the Defendant child support throughout the parties' marriage, which the Plaintiff allowed the Defendant to keep, which Chancellor Littlejohn ruled as non-marital, for the use of the child, being Renasant Bank Account No. X6987, totalling $209,913.27, but which the Defendant has used for her own benefit in paying her attorney's fees. During the marriage, from the joint account, the Plaintiff solely supported the Defendant's child. The joint account records are incomplete but all sources in the record and from Exhibit F65 enabled and led this Court to discern without problem that the Defendant spent from the joint account for her child: $26,432.09 on private school tuition and expenses; $3,734.57 social expenses; $370.07public school expenses; $903.99 clothes; and $397.00 medical, totalling $31,837.72, which this Court finds as non-familial as to the Plaintiff.

From the joint account, checks cashed for non-accounted cash by the Defendant totaled $3,226.00.

None of these expenditures from the joint account were for monthly credit card familial-use expenses that the Court could ascertain.

The Defendant contends, and it is not disputed, that the parties lived out of their credit card purchases, business and personal, that she paid the personal credit card amounts in full, as billed, from the joint account, which seemed to run around

> $5,000.00 per month; this also covered herself, her child and the Plaintiff. General household expenses, such as taxes, insurance, maintenance and utilities were paid separately from the joint account.
>
> All sums deposited in the joint account came from funds or income of the Plaintiff. The Defendant handled the deposits, and at the time the monthly of deposit, as reflected in Exhibit F65, and stated in the Defendant's Brief $600.00 to $800.00 cash was withheld every month and used by her, her daughter and the Plaintiff (Exhibit F65). As the records for that account are incomplete, this Court extrapolates that as the marriage lasted 171 months, with the Defendant getting $700.00 cash each month from the deposits, she would have gotten $119,700.00 cash from those withdrawals in addition to $2,226.00 in checks she cashed for cash, as stated above. Those were funds taken by the Defendant intended to be kept in the joint checking account and used by the parties. Hereafter, the Court shows one-half (1/2) of the $119,700.00 for the Defendant as a credit set-off.
>
> The sums placed in the joint account complained of and claimed as familial for equitable distribution, as stated above, were not intended for familial use, were not of familial use and withdrawn, as intended by the Plaintiff, so as to take them from commingling or familial use and reacquiring their previous, non-marital station.
>
> This factor favors the Plaintiff.

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at pages 13-16. **HRE26-29; R481-484** (emphasis supplied).

With respect to *Ferguson* factor 3, the lower court found:

> As the sole issue is money, there is no direct emotional value attached to it. The face market value at the parties' final separation, absent commingling or familial use subject to equitable distribution, is $537.42. That which the Defendant claims is subject to equitable distribution by commingling or familial use through said account is not directly specified by the Defendant, so as to be readily ascertainable by the Court but as best can be determined by the Court is $1,449,663.44, as set forth hereinbefore, which is disputed in its entirety by the Plaintiff. This factor, as claimed by the Defendant, favors the Defendant.
>
> The Defendant argues in her Brief, as this Court concludes, that monies placed into the joint account, used in improvements to the marital home, particularly a swimming pool, which totaled no more than $32,000.00, increased the value of the marital home from $500,000.00 to $1,174,500.00, as determined by Chancellor Littlejohn, and in essence, the increase in value should be considered as a part of the equitable distribution of funds from the joint account. Frankly, this is in the opinion of this Court the only one of the assets, which this Court could reasonably consider as martial by familial use or commingling from funds "kept" in the joint account, of which one-half (1/2) of the $674,500.00 increase, if divided equally to each party would be $337,250.00 to the Defendant, but when the Plaintiff is given credit on a set-off of $306,741.39, as set forth hereafter, the Defendant would

receive $30,508.61, but that would require this Court to disregard the intent of the parties to keep separate their estates, as set forth in their Prenuptial Agreement, and be inequitable. If the Court applied the same percentage of ownership to the $674,500.00 marital home increase that each party had in the total assets at marriage, the Defendant's share would be 4% of $674,500.00 or $26,980.00, but when set off by $306,741.39 would be zero dollars, which would be inequitable. If this Court only looked at the $32,000.00, which was paid from the joint account going to the renovation of the marital home instead of the $674,500.00 appreciated value at the time of the divorce, then the disparity after the $306,741.39 set-off credit would be markedly worse for the Defendant. The Defendant also argues that the $2,350.00 paid for installation of a 400 gallon underground gas tank to heat the swimming pool should be considered by the Court in its equitable distribution; the Court does so, as it does and as a part of the $32,000.00 marital home improvements.

As found by the Court hereafter and as argued by the Plaintiff, this factor favors the Plaintiff.

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at pages 16-17. **HRE29-30; R484-485**

With respect to *Ferguson* factor 7, the lower court found:

The Defendant in her Brief claims she is destitute, showing as evidence thereof in Volume I of her Trial Transcript and Record Excerpts her Uniform Chancery Court Rule 8.05 Financial Disclosure of July 26, 2011, (Trial Exhibit F-223) showing her with a negative net worth of ($341,361.26) with assets totalling $156,836.57 [This contention was rejected by the initial chancellor and current chancellor]. Subsequent thereto, Chancellor Littlejohn ruled the parties' Final Decree of Divorce the Defendant was "granted her separate property valued at approximately $424,597.01 and received approximately $211,827.67 temporary support while the case was pending. Therefore, the Court also finds that Tanya Sanderson has failed to prove a need or an inability to pay in regard to alimony and attorney's fees." This was affirmed on appeal by the Supreme Court. This factor favors the Plaintiff.

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at page 18. **HRE31; R486**

With respect to *Ferguson* factor 8, the lower court found:

This Court concludes the Defendant's intent and position in regard to familial use and commingling consideration and analysis by this Court in its equitable distribution of the parties' joint account as an open-ended claim to completely undo the parties' prenuptial agreement, which this Court will not do and cannot legally do; the prenuptial agreement is procedurally and substantively conscionable and enforceable, though improvidently entered into by the Defendant.

This Court, though, is mandated to make an equitable distribution of "certain funds, used for familial purposes kept in a joint bank account created after the marriage began," recognizing and accepting such "kept" funds " . . . do not fall within the parameters of the prenuptial agreement." Supreme Court Opinion of December 11, 2014, SANDERSON v. SANDERSON, 170 So.3d 430 (Miss. 2014).

This Court does consider the Defendant's argument that funds placed in the joint account and flowing therefrom, as set forth herein, were gifts. Some were, some were not, and the Court distinguishes the non-gifts elsewhere herein, referring to gifts placed in the joint account making them marital, and then withdrawn, being deposited elsewhere in one party's name, reverting to a non-marital status, such as the investment accounts in the Defendant's name found to be non-marital by Chancellor Littlejohn and not changed by this Court.

As stated in FERGUSON Factor 7, there is such a disparity in what the Defendant claims her financial condition was in comparison to what the lower Court found and what the Supreme Court affirmed. The Defendant has not listed in her Uniform Chancery Court Rule 8.05 Financial Disclosures of November 17, 2008, and July 26, 2011, as an Asset the joint account in question. Likewise, the Defendant's claims of a negative net worth, found to be not so by Chancellor Littlejohn, not reversed on appeal, and the Brief statement, "The Chancellor did not award Tanya any money," when he had awarded her $211,827.67 temporary support, which was paid, challenge her credibility. All of the above raises a serious question of the Defendant's credibility and moreso her character, both to her detriment in the eyes of this Court.

Each and every one of the funds claimed by the Defendant as subject by familial use or commingling through the joint account if they did go through the account at all, were not funds "kept" in the account, but merely placed, which if they had stayed there would have remained subject to equitable distribution, **but by virtue of those that were transferred out for the sole provider thereof, the Plaintiff, to his other accounts, with the acquiescence and/or assistance of the Defendant reconverted same back to non-marital and unable to be equitably distributed.**

Had all of said funds been "kept" in the joint account, then their equitable distribution would be subject to this Court's equitable consideration, but which would be subject to the credit of Plaintiff set offs thereto of:

1	Private school tuition and expenses paid out of the joint account for the Defendant's child	$26,432.09
2	Social expenses paid out of the joint account for the Defendant's child	3,734.57
3	Public school expenses paid out of the joint account for the Defendant's child	370.07

4	Clothes paid out of the joint account for the Defendant's child	903.99
5	Medical expenses paid out of the joint account for the Defendant's child	397.00
6	Checks for Cash written by and paid to the Defendant out of the joint account	3,226.00
7	½ $119,700.00 extrapolated cash withholdings from the joint account deposits made by the Defendant	59,850.00
TOTAL CREDIT SET-OFF EXPENDITURES FROM JOINT ACCOUNT		$94,913.72
8	TEMPORARY SUPPORT CREDIT/SET-OFF Further, this Court could and does give as a credit set-off to Plaintiff in its equitable distribution the temporary Court-ordered support paid by the Plaintiff to the Defendant	211,827.67
	Further, this Court could but does not now give as a credit set-off to Plaintiff in its equitable distribution: 1/4 of the alleged $200,000.00 given to the Defendant's Father, a pastor, for his church construction; nor to the $209,913.27 child support accumulated by the Defendant in the marriage; nor to the years from October 10, 2008, when the parties separated until Chancellor Littlejohn's Final Decree of Divorce of June 15, 2012, when the Defendant with her daughter lived in the Plaintiffs home rent free; and reclassify investment accounts of the Defendant being Tmico-Trust Management, Inc., Account Number 9681 valued at $8,415.79 and Smith-Barney Account 61070-17058 valued at $17,501.22; the marital status and equitable distribution of the Defendant's home valued at $175,000.00 and the 26.6 acre subdivision valued at $74,350.00. This Court, however, declines to do so, based upon its analysis for equitable distribution of the funds "kept" in the parties' joint account. This Court would do so if it took the broad view argued by the Defendant and would be justified in doing so (see LAURO v. LAURO, 847 So.2d 843 (Miss. 2003)).	0.00

TOTAL MONETARY CREDIT/SET-OFFS FOR PLAINTIFF IN JOINT ACCOUNT EQUITABLE DISTRIBUTION	$306,741.39

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at pages 20-21.**HRE33-34; R488-89** (emphasis supplied)

After further exhaustive consideration of the authorities offered, and arguments made, by Tanya and Hob, the lower court concluded:

> As stated before, this Court's Opinion and Final Judgment of June 22, 2016, (restyled Opinion and Judgment on Remanded Issue of Substantive Conscionability) pursuant to this Court's Order of July 5, 2016, found the parties' Prenuptial Agreement to be substantially conscionable, having been previously found procedurally conscionable by the Opinion of the Supreme Court, thus valid and enforceable, the terms of which should be and are hereafter considered as a part hereof by and through incorporation by reference, as if copied fully herein and therein in words and figures, so that this Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. shall be final.
>
> It is, therefore, the ORDER, JUDGMENT AND DECREE of this Court that:
>
> l. The terms of this Court's Opinion and Final Judgment of June 22, 2016, restyled Opinion and Judgment on Remanded Issue of Substantive Conscionability be and they arc hereby considered as a part of this Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Account, Etc. and vice versa, by and through incorporation by reference, as if copied fully herein and therein in words and figures.
>
> 2. In an equitable distribution of Community Bank Account Checking Account Number 900390393 in the names of Hobson L. Sanderson, Jr. and Tanya D. Sanderson, as it existed on the day of the parties' final separation on or about October 10, 2008, with a balance on October 9, 2008, of $53 7.42, the Defendant Tanya Dale Wright Sanderson be and she is hereby awarded a Judgment against the Plaintiff Hobson L. Sanderson, Jr. in the sum of $537-42, which he shall pay in full to her on or by December 1, 2016, and if not so paid in full by said date, then the Judgment may be enrolled, interest will then accrue at eight percent (8%) per annum on the unpaid balance, and execution may thereafter issue.
>
> 3. All other relief sought by the parties be and the same is hereby denied.

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at pages 29-30. **HRE42-43; R488-89**

3. This matter has been heard on 28 separate court days below.

Hob, now nearly 86 years old, filed this action on October 3, 2008. The initial chancellor heard this matter on November 25, 2008, December 16, 2008, February 18, 2009, April 28, 2009, May 1, 2009, May 27, 2009, June 5, 2009, June 12, 2009, June 23-24, 2009, July 20, 2009, November 18-19, 2009, November 30, 2009, January 13, 2010, February 17, 2010, February 18, 2010, April 5, 2010, November 8, 2010, November 16-17, 2010, February 17, 2011, March 23, 2011, March 24, 2011, July 25-26, 2011, and October 17, 2011. The subsequent chancellor heard this matter on remand on June 21, 2016. The lower court considered more than 200 exhibits just in the financial phase of the bifurcated proceeding.

4. Statement of Additional Relevant Facts from Initial Proceedings Below.

The Sanderson prenuptial agreement was affirmed in *Sanderson I* as being procedurally conscionable. Although the following facts are not particularly relevant to this appeal, because Tanya misstated the facts in her brief, ***see,* e.g., TB4-5**, Hob provides the following succinct statement of facts as found by the initial chancellor, which were not disturbed by this Court in *Sanderson I*.

On July 21, 1994, Tanya, a 28-year old former deputy court clerk, and Hob, a 62-year old general contractor, entered a prenuptial agreement.**HRE 56, 57, 59; R77, 78, 80** Final Decree of Divorce, p.1 at ¶¶2-3, p.4. The parties married the next day. **HRE 56; R77** Final Decree of Divorce, p.1 at ¶3. The initial chancellor found that Tanya read the prenuptial agreement before signing it, **HRE 59; R80** consulted an attorney before signing it, **HRE 58-59; R79-80** discussed the prenuptial with Hob 2-3 weeks before the wedding,**HRE58; R79** and had the necessary education and sophistication to enter the prenuptial agreement.**HRE91; R73** Although the initial chancellor did not resolve the conflicting testimony about whether the financial disclosures were attached to the prenuptial agreement at the time it was signed, it did find that Tanya had extensive knowledge of Hob's assets, had been in a

relationship with him for 2 years at the time of the marriage, had lived with him in a nice home for at least 6 months before the wedding, had admitted knowing that Hob was affluent, owned Sanderson Construction, Inc. and Sanderson Redi-Mix, Inc., and had travelled with him to Africa on several trips before the marriage.**HRE59; R80, HRE89; R71** The prenuptial agreement disclosed Hob's assets of $3.581 Million Dollars (with no liabilities) and Tanya's assets of $185,500.00 (with $50,000 in liabilities). **HRE 52-55; R64-67**

The initial chancellor awarded Tanya two separate retirement accounts that were funded by Hob, *id.*, and awarded her separate property, including various items that had been given to her by Hob such as furniture, guns, jewelry, a 2006 Harley Davidson, and 3 hunting trophies for animals that she killed, among other items.[4] In total, the initial chancellor awarded Tanya items and accounts valued at $424,587.01 (which did not include $211,827.67 in temporary support she received during the pendency of the case, or include any value for her rent-free occupation of Hob's home and 320 acres during the case).**HRE64-65; R85-86**[5] When compared to her assets at the time of the marriage, and without adjusting for the time value of money or liabilities in either case, Tanya's assets increased by over 200% (from assets of $185,500.00 to $424,587.01) whereas Hob's assets decreased by 1% (from $3,581,130.56 to $3,544,806.00).

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[4]During the marriage Hob gave Tanya a 26.6 acre subdivision that the initial chancellor awarded to her.**HRE61; R82** 17 days after Hob filed divorce, Tanya deeded a home and lot to her mother and father valued at $175,000. **HRE61-62; R82 83** (inadvertently mislabeling the $175,000 piece of property transferred by Tanya as the "Lot 49 Ridgeway" property).

[5]The $424k also does not include the $209,913.27 that Tanya had accumulated as of July 22, 2008, in a separate account comprised of child support payments from her former ex-husband during her marriage to Hob.**HRE65; R86** Nor does it include the value of services paid for wholly by Hob for the valuation experts in this case.

STANDARD OF REVIEW

Except for questions of law subject to de novo review, the limited abuse of discretion standard governs review of the Chancery Court's findings. *McNeil v. Hester*, 753 So. 2d 1057, 1063 (Miss. 2000) (findings of a chancellor will not be disturbed "unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard").

SUMMARY OF THE ARGUMENT

With respect to the first issue remanded by this Court, i.e., whether the Sanderson prenuptial agreement is substantively conscionable, Tanya's argument that this court should do a "results based analysis" to "weigh what Tanya would receive as far as distribution of marital assets if the prenuptial agreement is enforced versus what she would receive if the prenuptial agreement did not exist" is meritless for several reasons. First, in *Sanderson I* this Court reaffirmed its long-standing commitment to the undergirding principle inherent in the freedom of contract, i.e., that Mississippi courts may not weigh the benefit of the bargain, i.e., consider post-execution events and effects of any contract, including a prenuptial contract, to determine its enforceability. Moreover, notwithstanding Tanya's request that this Court rewrite the mirror-provisioned prenuptial agreement, *Sanderson I* specifically limited the scope of substantive conscionability review to time of execution of the agreement and circumstances existing at that time, period, to the exclusion of post-execution effects. Second, the Sanderson prenuptial agreement was negotiated and executed prior to the Sanderson's marriage, i.e., at a time when there were no marital rights, inchoate or otherwise. At the time of execution of the prenuptial agreement, neither Hob nor Tanya had any legal or equitable interests in the assets of the other party. The consideration given by both Hob and Tanya was identical—the marriage itself. Without the marriage, which would not have occurred absent the prenuptial agreement, Tanya would not have

received anything, much less the years of lavish living during the marriage, or the $424,587.01 initially awarded to Tanya by the lower court (plus the additional sum of $537.42 awarded on remand), the property she transferred to her parents ($175,000.00), the temporary support she received during the pendency of the case ($211,827.67), and the child support she saved during the marriage ($209,913.27),and the more than $200,000.00 Hob gave to her father in constructing his church. Third, Tanya's reliance on *In the Matter of Johnson's Will*, 351 So.2d 1339 (Miss. 1977) is misplaced. *In the Matter of Johnson's Will* considered a post-nuptial contract arising in a marital relationship with evidence of procedural unconscionability, and held that a spouse's surrender of marital rights in the post-nuptial contract was substantively unconscionable. 351 So.2d at 1342. Tanya's argument disregards the vast difference between surrendering vested marital rights in a post-nuptial contract versus surrendering potential future (but non-existent) rights in the context of a prenuptial agreement or simply choosing not to marry. Following Tanya's "logic" the courts of Mississippi would have to weigh the benefit of the bargain under every prenuptial agreement to determine whether that agreement was "fair", which is simply not the test announced in *Sanderson I*, which instead focuses on one-sided, oppressive contractual provisions at the time of execution. With one exception that favored Tanya, the provisions of the Sanderson prenuptial agreement are mirrored. Tanya is asking this Court to rewrite the prenuptial agreement to relieve her from what she now considers to be a bad bargain.

With respect to the second issue remanded by this Court, i.e., equitable distribution of the funds kept in the joint account, Tanya's arguments are grossly overreaching, making the same "kitchen-sink" arguments she made in *Sanderson I* that were rejected, and again seeks to swallow the prenuptial agreement whole. Tanya's attempts to relitigate facts disregards the extensive proceedings already having occurred in this matter that have now found the prenuptial agreement

fully enforceable, and disregards the narrow scope of the mandate from this Court. The lower court's factual findings have been made over the course of 28 hearings that span more than 2,370 pages of transcripts, and after considering more than 200 exhibits. With the exception of correctly identifying some inadvertent labeling errors, Tanya disregards the applicable standard of review and simply argues that her interpretation of the record and testimony should be accepted over the findings made by the lower court.

ARGUMENT

I. The lower court correctly found the mirrored Sanderson prenuptial agreement to be substantively conscionable, correctly rejected Tanya's contention that it should relieve her from what she now considers to be a bad bargain, correctly rejected Tanya's contention that it should do a post-execution "results-based" analysis and effectively rewrite the prenuptial agreement, and correctly rejected Tanya's contention that it should ignore Mississippi law in favor of the law of foreign jurisdictions.

Fairly executed prenuptial agreements have long been favored by the laws of Mississippi, *Gorin v. Gordon*, 38 Miss. 205, 210 (Miss. 1859), are treated like any other contract, and are subject to the same rules of construction and interpretation. *Estate of Hensley v. Estate of Hensley*, 524 So.2d 325, 327 (Miss. 1988); *Mabus v. Mabus*, 890 So.2d 806 (Miss. 2003). The cardinal rule of construction of contracts applies with equal force to the enforcement of prenuptial agreements; i.e., Mississippi courts must follow the intent of the parties as expressed within the four corners of the contract. *Hensley*, 524 So.2d at 327; *Smith v. Smith*, 656 So.2d 1143, 1147 (Miss. 1995); *see also Newell v. Hinton*, 556 So.2d 1037, 1042 (Miss. 1990) (post-nuptial), *Roberts v. Roberts*, 381 So.2d 1333, 1335 (Miss. 1980); *see generally Pfisterer v. Noble*, 320 So.2d 383, 384 (Miss. 1975); *Pursue Energy Corp. v. Perkins*, 558 So.2d 349, 352 (Miss. 1990).

Hensley stated the court's task with respect to prenuptial agreements as follows:

> [The Court's] concern is not nearly so much what the parties may have intended as it is with what they said, for the words employed are by far the best resource for ascertaining intent and assigning meaning with fairness and accuracy.

Hensley, 524 So.2d at 327 (citation omitted).

Mississippi courts may not "create for the parties a contract to which they themselves have not agreed to". *Hensley*, 524 So.2d at 328 (citing *Glantz Contracting Co. v. General Electric Company*, 379 So.2d 912, 916 (Miss. 1980)). Stated another way, "[i]t is not now and never has been the function of [Mississippi] Court[s] to relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated." *Hensley*, 524 So.2d at 328 (citing *Transcontinental Gas v. State Oil and Gas Board*, 457 So.2d 1298, 1322 (Miss. 1984), *reversed on other grounds*, 474 U.S. 409, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986)); *Citizens National Bank of Meridian v. Glascock, Inc.*, 243 So.2d 67, 70 (Miss. 1971) ("Courts do not have the power to make contracts where none exist, nor to modify, add to, or subtract from the terms of one in existence."); *Jemison v. McDaniel*, 3 Cushm. 83, 1852 WL 2073 (Miss. 1852) (reversing jury verdict as against the law and the evidence where it varied the terms of the parties' contract).

In *Mabus,* the dissatisfied spouse argued that the prenuptial agreement was substantively unfair and should have been set aside because "the separate estates [were] so disparate that fundamental fairness must be questioned." *Id*. at 809, ¶9, 819, ¶54. This Court flatly rejected the spouse's invitation to relieve her from the benefit of a bad bargain:

> The chancellor also acknowledged that Julie's estate is smaller than Ray's and that she gave up her rights to alimony in the agreement. However, the chancellor determined that Julie freely negotiated the agreement, and the chancery court would not relieve her of the obligation, even if it was a bad bargain. The claim that the estates of the parties are so disparate that it questions fundamental fairness is of no consequence. An antenuptial agreement is as enforceable as any other contract in Mississippi.

Mabus, 890 So.2d at 821, ¶64.

Tanya's arguments that *Sanderson I* left Mississippi law "unsettled" and therefore this Court "should look to other jurisdictions for guidance on what the trends in prenuptial agreements", [TB13], to do a "results based analysis" to "weigh what Tanya would receive as far as distribution of marital assets if the prenuptial agreement is enforced versus what she would receive if the prenuptial agreement did not exist" are meritless for several reasons.

First, *Sanderson I* settled the law on Mississippi prenuptial agreements. *Sanderson I* stated its *ratio decidendi* with absolute clarity: because prenuptial agreements are "contracts like any other, substantive unconscionability must be considered." *Sanderson*, 170 F.3d at 436, ¶¶19-20.

Second, *Sanderson I* reaffirmed this Court's long-standing commitment to the undergirding principle inherent in the freedom of contract, i.e., that Mississippi courts may not weigh the benefit of the bargain, i.e., consider post-execution events and effects of any contract, including a prenuptial contract, to determine its enforceability. Tanya's request that this Court disregard *Sanderson I* and treat a prenuptial agreement like a special contract, i.e., one in which the Court applies special rules, is without foundation in Mississippi law. (One of the dissenting justices in *Sanderson I*, not the majority opinion, would have adopted Tanya's approach in part, carving out particular areas of prenuptial agreements for isolated review.) Moreover, notwithstanding Tanya's request that this Court rewrite the mirror-provisioned prenuptial agreement, *Sanderson I* specifically limited the scope of review to time of execution of the agreement and circumstances existing at that time, period, to the exclusion of post-execution effects.

Second, the Sanderson prenuptial agreement was negotiated and executed prior to the Sanderson's marriage, i.e., at a time when there were no marital rights, inchoate or otherwise. At

the time of execution of the prenuptial agreement, neither Hob nor Tanya had any legal or equitable interests in the assets of the other party. The consideration given by both Hob and Tanya was identical—the marriage itself. Without the marriage, which would not have occurred absent the prenuptial agreement, Tanya would not have received anything, much less the years of lavish living during the marriage, or the $424,587.01 initially awarded to Tanya by the lower court (plus the additional sum of $537.42 awarded on remand), the property she transferred to her parents ($175,000.00), the temporary support she received during the pendency of the case ($211,827.67), and the child support she saved during the marriage ($209,913.27),and the more than $200,000.00 Hob gave to her father in constructing his church.

Third, Tanya's reliance on *In the Matter of Johnson's Will*, 351 So.2d 1339 (Miss. 1977) is misplaced. *In the Matter of Johnson's Will* considered a post-nuptial contract arising in a marital relationship with evidence of procedural unconscionability, and held that a spouse's surrender of marital rights in the post-nuptial contract was substantively unconscionable. 351 So.2d at 1342. [6]

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[6] *In the Matter of Johnson's Will* considered a *post-nuptial* contract arising in a *marital relationship* with evidence of procedural unconscionability, and held that a spouse's surrender of marital rights in the *post-nuptial* contract was substantively unconscionable. *Id.*, 351 So.2d at 1342. *West v. West*, 891 So.2d 203 (Miss. 2004) considered a *property settlement agreement* initially approved by the chancery court as part of a divorce which was abided by the parties for over five years. *West*, 891 So.2d at 207, ¶2. The principal issues before the Court in *West* were (a) whether the chancery court erred in holding that there was no meeting of the minds on the *property settlement agreement* provisions governing alimony and division of marital assets, *id.* at 209, ¶5, and (b) whether the chancery court's conclusion that the provisions of the *property settlement agreement* were unconscionable was correct. *West*, 891 So.2d at 213, ¶25. *West* held that the parties' 5-year compliance with the agreement manifested the clarity of the agreement, *id.* at 211, ¶18, that that the husband's vague allegations of procedural unconscionability, in light of his sophistication and representation by counsel, were unconvincing, and, that while the provisions of the *property settlement agreement* "were less than desirable", they were not substantively unconscionable. *West*, 891 So.2d at 213, ¶27. *Estate of Hensley v. Estate of Hensley*, 524 So.2d 325 (Miss. 1988) and *Smith v. Smith*, 656 So.2d 1143 (Miss. 1995), mentioned the issue of procedural unconscionability of prenuptial agreements in *dictum*. Neither case addressed substantive unconscionability. Although *Estate of Hensley* noted the general law regarding procedural unconscionability and prenuptial agreements, *Estate of Hensley*, 524 So.2d at 327, n.1, and noted that there was "no inference that the parties did not deal honestly and fairly with each other", *id.* at 328, *Estate of Hensley* presented the straightforward task of interpreting a prenuptial agreement. *Id.*

Tanya's argument disregards the vast difference between surrendering vested marital rights in a post-nuptial contract versus surrendering potential future (but non-existent) rights in the context of a prenuptial agreement or simply choosing not to marry. Following Tanya's "logic" the courts of Mississippi would have to weigh the benefit of the bargain under every prenuptial agreement during a divorce proceeding to determine whether that agreement was "fair", which is simply not the test announced in *Sanderson I*, which instead focuses on one-sided, oppressive contractual provisions at the time of execution. With one exception that favored Tanya, the provisions of the Sanderson prenuptial agreement are mirrored. Tanya is again asking this Court to rewrite the prenuptial agreement to relieve her from what she now considers to be a bad bargain.

Tanya then bootstraps her legally-foundationless arguments that *Sanderson I* leaves Mississippi law on the substantively conscionability of prenuptial agreements "unsettled", and mischaracterization of *In the Matter of Johnson's Will*, to ask this Court to disregard well-established Mississippi law on the issue of substantively conscionability of contracts and instead follow the law of foreign jurisdictions.

Mississippi law on the substantive conscionability of contracts is well-settled: "Under 'substantive unconscionability, we look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross

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at 326 (holding that the chancellor failed to apply proper rules of construction and interpret the agreement as written). *Estate of Hensley* contains *dictum* related to the benevolence of the husband, which is wholly irrelevant because the *dictum* related to *post-execution activities*, not substantive unconscionability *at the time of execution*. *Smith* involved numerous proceedings and issues, including the wife's withdrawal from a joint checking account containing the husband's funds (during a time the wife was authorized to do so), however, the lower court ultimately denied both a divorce and separate maintenance. *Smith*, 656 So.2d at 1147. Although the Court expounded on an "overview of antenuptial contracts", the entire discussion was *dictum* because the Court did not reach the issue. *Smith* instead *held* that because "no divorce was granted, the chancellor was without authority to order any division of property", or to enforce the prenuptial agreement until "the time of dissolution of the marriage." *Smith*, 656 So.2d at 1147.

disparity between, the contracting parties'" and that "[s]ubstantive unconscionability is proven by oppressive contract terms such that 'there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach.'" *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So.3d 1026, 1034, n.10 (Miss. 2010) (internal citations omitted, internal quotations modified, emphases supplied) (rejecting the claim).[7] The issue of substantive unconscionability must be raised as to specific *clauses*. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 517 (Miss. 2005) (holding a one-sided limitation of liability and punitive damages clause in an arbitration agreement substantively unconscionable).[8]

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[7]The same rationale was expressed by the Supreme Court of Iowa in *Shanks v. Shanks*, 758 N.W.2d 506, 516 (2008):

> At the outset, we acknowledge premarital agreements are typically financially one-sided in order to protect the assets of one prospective spouse. Courts must resist the temptation to view disparity between the parties' financial circumstances as requiring a finding of substantive unconscionability.

The Court quoted with approval the ruling of the Supreme Court of Georgia, when it explained in *Adams v. Adams*, 603 S.E.2d 273, 275 (2004):

> That the antenuptial agreement may have perpetuated the already existing disparity between the parties' estates does not in and of itself render the agreement unconscionable. . ...

The same rationale was expressed by the Massachusetts Supreme Judicial Court in *DeMatteo v. DeMatteo*, 762 N.E.2d 797, 809 (2002):

> An antenuptial agreement may be most desired when a wealthy individual contemplating marriage seeks to ensure that, if the marriage is not successful, his or her own assets will not accrue to the spouse. Many valid agreements may be one-sided, and a contesting party may have considerably fewer assets and enjoy a far different lifestyle after divorce than he or she may enjoy during the marriage.

In *McLeod v. McLeod*, 145 So. 3d 1246 (Miss. Ct. App. 2014), the Mississippi Court of Appeals reversed a chancery court decision finding a prenuptial agreement to be substantively unconscionable because one of the parties had "no meaningful choice" and the terms of it were "wholly unfavorable" to that party. *Id.* at 1252. Although the appellate court purportedly reviewed the issue of substantive unconscionability, it concluded that because the wife knew what she was signing and understood she would relinquish all claims to the husband's property in the event of divorce, the agreement was not unconscionable. *Id.* In other words, while purportedly reviewing the issue of substantive unconscionability, the court's reasoning addressed the elements of procedural unconscionability only.

[8]*Overruled on other grounds by Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel.*

"One example of a one-sided agreement is one that allows one party to go to court, but restricts the other to arbitration." *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So.3d 695, 700 (Miss. 2009) (quoted case omitted).

Here, Tanya failed during the trial, failed during the appeal, failed during remand proceedings (except an oral argument as to the after-acquired clause, arguing its language covered commingling and familial use, an argument this Court rejected when Hob made it during *Sanderson I*[9]), and failed during this appeal to point to a single contract term that is one-sided,

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Braddock, 14 So. 3d 695 (Miss. 2009). *Terre Haute Cooperage v. Branscome*, 35 So.2d 537 (Miss. 1948), the first case in which this Court stated the now 250-year old postulate, involved a timber contract. In *Terre Haute*, this Court refused to relieve a timber company from its unilateral mistake, and equated unconscionability with fraud arising in the context of equitable estoppel. *Id.* at 541 (citations omitted). In *York v. Georgia-Pacific Corp.*, 585 F. Supp. 1265 (N.D. Miss. 1984), the district court, applying Mississippi law, including *Terre Haute* and other authorities, defined "substantive unconscionability" as a contract in which (1) "the terms […] are of such an oppressive character as to be unconscionable" or in which (2) "where there exists a large disparity between the cost of an item and the price paid for it." *York*, 585 at 1278 (N.D. Miss. 1984) (citations omitted); *accord Myers v. GGNSC Holdings, LLC*, 2013 U.S. Dist. LEXIS 65628, 13 (N.D. Miss. 2013); *Bank of Indiana, Nat'l Ass'n. v. Holyfield*, 476 F. Supp. 104, 110 (S.D. Miss. 1979).

[9]Specifically, at the June 21, 2016 hearing Tanya, through her counsel, argued that the prenuptial agreement was substantively unconscionable because the "after-acquired" provision on page 2 of the prenuptial agreement "takes away any rights that Tanya could have ever had in which would traditionally be considered marital property":

> The main contractual term that we believe is substantively unconscionable applies equally to both parties on its face. However, the language in the agreement that any property shall be separately maintained and property hereinafter acquired shall be the separate property takes away any rights that Tanya could have ever had in what would traditionally be considered marital property.
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> That clause, Your Honor, is found in the Sanderson Prenuptial Agreement, Page 2, Paragraph 3. It states as follows:
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> > Each of them shall separately retain all rights in his or her own property, whether now owned or hereafter acquired, and each of them shall have and maintain, regardless of circumstances or change of circumstances, the absolute and unrestricted right to dispose of and maintain use and retain the use and ownership of such separate property.
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> > ***

June 21, 2016 Remand Hearing Transcript at p. 3 (emphases supplied). Tanya's counsel's solemn statements to the lower court were not vague or ambiguous. The statements reference the joint account

oppressive, or which renders the Sanderson prenuptial agreement substantively unconscionable.

Instead, Tanya argues that this Court should wholly disregard the prenuptial agreement's mirrored terms (and Mississippi law) and impermissibly view the post-execution effects to determine whether the Sanderson prenuptial agreement is substantively conscionable. Under *Sanderson I* however, the views of the parties, the parties' attorneys, or with the utmost respect, the views of any court, as to the fairness of the substantive effects of enforcing a prenuptial agreement, are not relevant under Mississippi law. The question is whether, at the time of execution of the Sanderson agreement, the agreement contained a one-sided, oppressive term that

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specifically, unambiguously advocate that the specific language of the prenuptial agreement appearing on page 2 (the "after-acquired" provision) precludes any marital rights in the "traditional sense" from arising as a result of the marriage and therefore rendered the prenuptial unconscionable, and were undisputedly made in an attempt to influence the lower court to find in Tanya's favor of their mistaken view of the doctrine of substantive unconscionability. Indeed, Tanya went so far as to argue that the appellate court "set aside that after-acquired property clause" and "read it out of the contract." This Court, however, did no such thing (the issue of enforceability of the prenuptial agreement was not decided on appeal, but rather in the lower court). Stated another way, on remand Tanya admitted and indeed advocated that the prenuptial agreement contains language addressing commingling and familial use. An attorney's solemn statements to the Court with the intent to influence the Court are binding upon his or her client. *Sears, Roebuck & Co. v. Devers*, 405 So.2d 898, 900 (Miss. 1981) (client bound by attorney's representation to court as to cause of action limited to negligence) (Explaining that "[w]hen, during the course of a trial an attorney, with intent to influence the ruling or decision by the court on a point in issue, makes a solemn statement to the court committing his client to some legal position on the issue before the court, the client is bound thereby.") *overruled on other grounds by Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736 (Miss.1999); *Noxubee County v. Long*, 141 Miss. 72, 106 So. 83, 84 (Miss. 1925) (county bound by legal admission by attorney as to issue of abandonment); *Pace v. Financial Sec. Life of Mississippi*, 608 So.2d 1135, 1138 (Miss. 1992) (attorney's admission in response to motion for summary judgment binding on client); *but compare Lane v. Woodland Hills Baptist Church,* 285 So.2d 901, 905 (Miss. 1973) (explaining that an attorney can only surrender substantial legal rights of the client if the admission or stipulation is a proper step in the accomplishment of the purpose for which the attorney is employed). Tanya's solemn statements and admissions to the lower court regarding the language of the prenuptial agreement covering the alleged commingled joint account were a proper tactical decision made in her effort to set aside the prenuptial agreement in toto. Hob contended below that said statements and admissions, attributable to and binding upon Tanya, also constituted a material change that removed the effect of the law of the case doctrine, however, the lower court rejected Hob's argument. It is mentioned here for completeness and to demonstrate yet another example of the gamesmanship engaged in by Tanya to avoid what she now considers to be a bad bargain.

rendered the agreement substantively unconscionable without regard to post-execution effects. Here, it is logically impossible to reach that conclusion because Hob and Tanya (with one exception favoring Tanya[10]) received the identical benefits and burdens under the prenuptial agreement, and entered it receiving the same consideration, i.e., the marriage itself.

Tanya's attempt to re-litigate the facts existing at the time of her voluntary and knowing entry into the prenuptial agreement, an agreement found procedurally conscionable by this Court is impermissible and meritless. This Court affirmed the lower court's conclusions that the prenuptial agreement was procedurally conscionable because it was voluntarily entered into with fair disclosure of assets, and, with both having the advice of independent counsel, they both chose to proceed. *Sanderson*, 170 F.3d at 435, ¶ ¶14-16. The lower court's findings, contrary to Tanya's arguments and misstatements of fact, **TB4-5, 17-18, 22-23**, are as follows:

> Tanya Sanderson was presented the contract on July 21, 1994, the day before her marriage to Hob Sanderson. Mrs. Sanderson admitted in her testimony that she read the agreement. She was also advised to seek the advice of counsel, which she did. The "Prenuptial Agreement" was taken to then-attorney, Jimmy Doug Shelton, who advised Tanya Sanderson <u>*not*</u> to sign it. Given that advice of counsel is not required, this Court would be hard-pressed to find that this contract was not voluntarily entered into by a party who did have advice of independent counsel and chose to ignore it. Also, since Tanya Sanderson admits she read the "Prenuptial Agreement", as she was obligated to do by the *Ware* case, the Court notes that she would have known her rights as to the assets involved in this case. Therefore, the Court finds that the "Prenuptial Agreement" entered into by Hob Sanderson and Tanya Sanderson was fair in the execution.
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> In the present case, the parties had been in a relationship for about two (2) years at the time of the marriage. Tanya Sanderson lived with Hob Sanderson prior to the marriage. Mrs. Sanderson testified that Mr. Sanderson seemed affluent. She knew he owned Sanderson Construction, Inc. and Sanderson Redi-Mix, Inc. The couple lived in a nice home, and Hob Sanderson drove a nice car. Lastly, Tanya Sanderson

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[10]The sole provision in the Sanderson prenuptial agreement that is not mutual is the "premature death clause", which favored Tanya, not Hob. **HRE46; R58**

> testified that Hob Sanderson took her to Africa on trips before the marriage. Therefore, the Court finds that Mrs. Sanderson knew Mr. Sanderson had accumulated significant assets. The Court also finds that there was no evidence to support a finding that the "Prenuptial Agreement" was in any way fraudulent or that Hob Sanderson failed to disclose any assets. Therefore, the Court finds that there was a full and fair disclosure of assets.

Final Decree of Divorce.[HRE 58-59; R79-80]

The lower court also found, in its July 22, 2009 Judgment regarding the prenuptial agreement, in pertinent part as follows:

> At the time of the execution of this document, Tanya Sanderson was twenty-eight (28) years old. She had one year of college and clerical work experience. Mrs. Sanderson worked in a Chancery Clerk's office and worked for an attorney for about a month. Mrs. Sanderson testified that she reviewed a copy of a friend's prenuptial agreement with Hob Sanderson and knew that these agreements are attempts to protect the assets of the parties. Mrs. Sanderson read the prenuptial agreement presented to her on July 21, 1994, but never asked questions regarding the terms of the agreement even while in the office of her attorney, Jimmy Doug Shelton. Therefore, Tanya Sanderson had the necessary education and sophistication to execute the "Prenuptial Agreement."

July 22, 2009 Judgment.[HRE91; R77]

The lower court's findings of fact were based upon multiple hearings: November 25, 2008, December 16, 2008, February 18, 2009, April 28, 2009, May 1, 2009, May 27, 2009, June 5, 2009, June 12, 2009, June 23-24, 2009, July 20, 2009, November 18-19, 2009, November 30, 2009, January 13, 2010, February 17, 2010, February 18, 2010, April 5, 2010, November 8, 2010, November 16-17, 2010, February 17, 2011, March 23, 2011, March 24, 2011, July 25-26, 2011, and October 17, 2011, which span more than 2,370 pages of transcripts, and more than 200 exhibits in the financial phase of the bifurcated proceeding.

Hob's net worth of 3,581,130.56 at the time of execution of the prenuptial agreement versus Tonya's net worth of $135,500.00 is immaterial to this Court's inquiry as to the substantive unconscionability of the prenuptial agreement. If anything, the disparity in net worth between Hob

and Tanya at the time of entry into the prenuptial agreement (and their children from prior marriages) demonstrates its valid and essential purpose because it is precisely this factual scenario, an elderly spouse seeking to protect assets acquired long before the contemplated marriage to a much younger spouse, in which the need and desire for a prenuptial agreement most particularly arises.

At the time of execution of the prenuptial agreement, Tanya was 28 years old, while Hob was 62 years old. At the time of execution of the prenuptial agreement, both Hob and Tanya had been married and previously divorced. At the time of execution of the prenuptial agreement, both Hob and Tanya had children from their former marriages with whom they had ongoing ties and commitments. At the time of execution of the prenuptial agreement, both Hob and Tanya had assets: Hob's reflecting 62 years of life, many of which were spent as a general contractor, Tanya's reflecting 28 years of life, many of which were spent working or married to someone else.

Execution of the prenuptial agreement did not affect Tanya's $135,500.00 net worth, did not render her unemployable, did not render her incapable of pursuing any type of educational degree she could have freely chosen to pursue, and did not render her incapable of accumulating whatever assets she chose to accumulate in the future years, including the $209,913.27 in child support that she deposited into her own account and used as she saw fit.

At the time of execution of the prenuptial agreement, Tanya had one year of college, including clerical experience in an attorney's office and as a deputy clerk in the Chancery Clerk's office. Prior to execution of the prenuptial agreement, Tanya sought the advice of independent counsel and chose to disregard that counsel. Tanya had extensive knowledge of Hob's assets, which he earned over the course of his life as a general contractor, before execution of the prenuptial agreement. There is not a scintilla of evidence of overreaching, fraud, or sharp dealing

in the execution of the prenuptial agreement. There is not a single provision in the Sanderson prenuptial agreement that burdened Tanya, at the time of execution, any more than it burdened Hob. Not a single provision in the Sanderson prenuptial agreement places a one-sided obligation on Tanya that was not identically placed upon Hob.

Hob and Tanya's prenuptial agreement reflects the bargain freely struck between Tanya and Hob prior to their marriage, creating the substantive financial rules of their marital contract, and preserving the status quo of their assets at the time of execution and going forward in the marriage, which was, and remains, their constitutionally-protected right inherent in the freedom of contract. Tanya was not denied any meaningful choice by entering the prenuptial agreement—she was free to choose to marry Hob or not. What she is not free to do is to ask this Court to relieve her from the bargain she struck, even if she (or anyone else) now considers that bargain to be unfair.

Under *Sanderson I*, viewing the circumstances at the time of execution and the specific provisions contained within the "four corners" of the contract—not a single one of which Tanya has argued on appeal is one-sided—rather than the alleged post-execution effects of enforcement of the prenuptial agreement, Tanya has failed to carry her burden of demonstrating that the Sanderson agreement is substantively unconscionable.

II. The lower court correctly followed this Court's remand instructions with respect to the funds kept in the joint account, correctly considered the more than $200k received by Tanya as temporary support under *Ferguson* factor 8, correctly considered the prior chancellor's classification of assets, and correctly concluded that Tanya's overreaching, extreme and conflicting positions, seeking to swallow the prenuptial agreement, along with misrepresentations in her filings, raised a serious question as to her credibility.

Sanderson I's specific remand instructions were as follows:

> We affirm the trial court on its finding that the prenuptial agreement is not procedurally unconscionable. We reverse and remand for further proceedings on

> whether the prenuptial agreement is substantively unconscionable. We also hold that certain funds, used for familial purposes, **kept** in a joint bank account created after the marriage began, do not fall within the parameters of the prenuptial agreement.

Sanderson, 170 So.3d at 432, ¶1 (emphasis supplied).

The lower court not only followed the foregoing remand instructions, but also this Court's holding that "the chancellor erred by failing to address the familial use of the funds and Tanya's contribution in helping to disburse the funds for the familial purposes" and direction that "Mississippi's jurisprudence clearly establishes that property is presumed to be marital property *unless* it can be shown to have been exchanged for a separate, and not a familial, asset or function." *Sanderson*, 170 So.3d at 437, ¶25. The lower court properly interpreted this Court's mandate, stating in pertinent part:

> This Court, in its equitable distribution analysis, cannot overlook the enforceability of the prenuptial agreement, finds its decision must and does consider same, as part of its balancing the affirmed marital and non-marital findings of Chancellor Littlejohn, the Opinion of the Supreme Court, and this Court's analysis for commingling and familial use of funds "kept" in the joint account.
>
> As this Court interprets the Supreme Court's Opinion, the equitable distribution is to be for funds that did not just pass through the joint account, if they did not continue to be commingled or of familial use.

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at pages 3-4. **HRE16-17; R471-472**

The lower court also rejected Hob's arguments that this Court had erred by imposing a "magic words" requirement with respect to prenuptial agreements:

> The Plaintiff argues that the Supreme Court's Opinion is wrong, requiring exclusion of the "magic words" familial use or commingling that are not in the prenuptial agreement, such that it does not specifically exclude from equitable distribution that which ordinarily would be subject thereto by virtue of familial use or commingling. This Court, though, considers the Supreme Court's requirement of such specificity as applicable to this Court's analysis such that unless the funds in the joint account were not "kept" in the joint account for familial use or commingling therein, but were placed there as a conduit to what the prenuptial

> agreement controlled, then those non-"kept" funds transferred out of the joint account regained their separate status under the terms of the valid and enforceable prenuptial agreement.

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at page 5. **HRE18; R473**

The lower court then compared the language of the prenuptial agreement in *Long v. Long*, 928 So.2d 1001 (Miss. Ct. App. 2006) [11] (prenuptial agreement controlling notwithstanding commingling of assets) with the language of the Sanderson prenuptial agreement, and found the Sanderson language to be even broader and more specific, and accordingly made "its distribution under the terms of the prenuptial agreement, as procedurally and substantively conscionable determined, with the affirmed marital classifications made by Chancellor Littlejohn and mandated by the Supreme Court. . .." Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at page 6. **HRE19; R474**

The lower court then correctly found that:

> The funds outside the joint account at separation, which the Defendant seeks to have brought into the Court's equitable distribution, were part of the marital/non-marital classification made by Chancellor Littlejohn, which the Supreme Court affirmed in its Opinion, subject to this Court's determination of the substantive unconscionability of the parties' prenuptial agreement, which is, as the Supreme Court referred to in its Opinion, a " ... contractual provision ... ," which this Court has ruled as substantively conscionable, thus precluding further consideration for equitable distribution by this Court of those funds no longer "kept" in the joint account, just leaving those funds in the joint account at the parties' separation for equitable distribution.

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[11] In *Long*, the wife argued that the marital home, built with proceeds from the sale of the husband's premarital home, was marital property—the chancery court agreed. The Court of Appeals, giving effect to the parties' intent in their prenuptial agreement, reversed and rendered the chancery court and held that it was clearly erroneous to fail to enforce the prenuptial agreement. The clear import of *Mabus*, *Long*, and other Mississippi cases is that a valid prenuptial agreement is controlling. *Mabus*, 890 So.2d at 822 ("the prenuptial agreement is controlling") (emphasis supplied); *accord Kitchens v. Estate of Kitchens*, 850 So.2d 215 (Miss. Ct. App. 2003).

Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at page 6. **HRE19; R474**

The lower court then applied the same level of analytical scrutiny to this Court's remand instructions as this Court applied to the Sanderson prenuptial agreement, correctly focusing intently on this Court's specific language. The lower court examined the plain meaning of the word "kept" as set forth in Webster's and Black's Law Dictionary and conducted an extensive review and analysis of the proof in the record with respect to the joint account, which it determined to be "most likely incomplete and certainly confusing." The court adopted the date of the parties' separation, October 10, 2008, as the line of demarcation, and found the balance in the joint account to be $537.42. The court rejected Tanya's request to disregard the prenuptial agreement and redistribute the assets under the former chancellor's classification and likewise rejected Hob's contention that it should disregard this Court's view of the language of the contract as merely advisory (because Hob contended that the contract had not been deemed enforceable at that time by any court).

The lower court then conducted an extensive 20-page analysis under *Hemsley* and *Ferguson*, examining each factor in detail, considering the arguments of, and authorities offered, by each party, and other applicable authorities. Tanya's contention that the lower court did not follow this Court's mandate is belied by the erudite and extensive analysis conducted by the lower court.

Tanya's arguments are grossly overreaching. For example, Tanya argues that the lower court should "have classified and divided the marital assets pursuant to [the initial chancellor's] Classification of Assets", **TB44** which is another way of stating that the lower court should have simply ignored the prenuptial agreement. The lower court, however, balanced the valid prenuptial

agreement with this Court's remand instructions, awarding the monies that were "kept" in the joint account, while applying the prenuptial agreement's plain terms with respect the various and sundry claims by Tanya.

Moreover, the lower court properly found that monies were withdrawn from the joint account with the "consent then of both parties and by such they were withdrawn from familial use", Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at pages 14-15. **HRE27-28; R482-483**, and by "[Hob], to his other accounts, with the acquiescence and/or assistance of [Tanya] [which] reconverted same back to non-marital and unable to be equitably distributed." Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at page 20.**HRE33; R488** The lower court thus rejected, based upon the factual finding of consensual withdrawal, acquiescence and/or assistance of Tanya, Tanya's contentions that the church bonds were commingled assets subject to division in contravention to the terms of the prenuptial agreement (read estoppel and waiver[12]). The lower court's conclusion is consistent with Mississippi law.

As this Court reaffirmed in *Mabus*, a prenuptial agreement is controlling in the *distribution* of assets. *Mabus*, 890 So.2d at 823, ¶71. When construing an unambiguous contract,[13] Mississippi courts must ascertain the parties' intent from the "four corners" of the instrument, *Cooper v. Crabb*,

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[12]*See Chapman v. Chapman*, 473 So.2d 467, 470 (Miss. 1985) (reversing chancellor and awarding relief based upon estoppel); *see also Mariana v. Hennington*, 90 So.2d 356, 362, 229 Miss. 212, 226 (Miss. 1956) ("A party to a contract may waive provisions for his benefit; and likewise there may be a waiver of conditions precedent or severable stipulations.") (quoted authority and citations omitted); *id.* (A waiver may be inferred from the actions and conduct of the parties."). Moreover, Tanya and Hob expressly waived such rights in their prenuptial agreement. *See infra* page 33.

[13]The initial chancellor found the prenuptial agreement to be unambiguous.**R315** Plain meaning controls in an unambiguous contract. *Ferrara v. Walters*, 919 So.2d 876, 882 (¶13) (Miss. 2005); *see also Harrison County Commer. Lot, LLC v. H. Gordon Myrick, Inc.*, 107 So.3d 943, 960 (Miss. 2013).

587 So.2d 236, 239, 241 (Miss. 1991), reading the contract as a whole so as to give effect to all of its clauses. *Brown v. Hartford Ins. Co.*, 606 So.2d 122, 126 (Miss. 1992).[14] Courts must ascribe contractual terms their ordinary meaning unless employed in a technical sense, or doing so would be contrary to the intentions of the parties as manifested in the contract. *See Williams v. Batson*, 187 So. 236, 238 (Miss. 1939) (*en banc*).[15] Courts may not infer intent contrary to the contractual term at issue, *Cooper*, 587 So.2d at 241, and are not concerned with parties may claim they intended, but rather with what they actually stated in their contract. *Simmons v. Bank of Mississippi*, 593 So. 2d 40, 42-43 (Miss. 1992). So, what did Hob and Tanya actually state in their prenuptial agreement?

> . . . all property now owned by each and set forth herein . . . or any property hereafter acquired by each that shall be traceable to proceeds or appreciation from their separate property . . . shall for testamentary, intestate succession, and for their lifetimes and for any and all other purposes, be free from any claim of the other that may arise by reason of the . . . marriage, notwithstanding any and all State laws to the contrary. . . . **HRE44; R56**
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> After the . . . marriage between the parties, each . . . shall separately retain all rights in his or her own property, real and/or personal, whether now owned or hereafter acquired, and each . . . shall have and maintain, regardless of circumstances or change of circumstances, the absolute and unrestricted right to dispose of and maintain use and retain the use and ownership of such separate property, free from any claim that may be made by the other by reason of or as a result of their marriage, and with the same effect as if no marriage had been consummated between them, notwithstanding any State laws to the contrary. . . . **HRE45; R57**
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> [Each party] hereby further waives and releases all rights and interest, statutory or otherwise, including but not limited to widow's allowance, alimony, statutory allowances, distribution of intestacy, and the statutory right of election to

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[14]*See also McKee v. McKee*, 568 So.2d 262, 266 (Miss. 1990); *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981).

[15]*See also Miller v. Fowler*, 28 So.2d 837, 838 (Miss. 1947) (contractual terms prevail over custom); *Citizens National Bank of Meridian v. L.L. Glascock, Inc.*, 243 So.2d 67, 70 (Miss. 1971) (same); *see generally* RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a); *Smith v. Little*, 834 So.2d 54, 58 (Miss. Ct. App. 2002) (citations omitted); *see also Blain v. Sam Finley, Inc.*, 226 So.2d 742, 745-46 (Miss. 1969)

> renounce or take against the will of [the other party] which [they] might acquire as [spouse], widow [or widower, etc.] of [the other party] in [the other party's] property, real and personal, owned by [the other party] at the time of the marriage or acquired by [the other party] at any time thereafter by any and all sources and means including, but not limited to return on investments, earnings, gifts or inheritance. *** **HRE47; R59**

For comparison, the *Mabus* prenuptial agreement provided as follows:

> This agreement . . . cover[s] and appl[ies] to all property now owned by each party and to all property which each may acquire in his or her sole and separate right, and to any property acquired by an exchange, lease, mortgage or otherwise, to any property vesting by purchase, reinvestment, substitution, increase, descent, gift, bequest, or devise, and to proceeds derived from any sale. The agreement does not apply to property as to which title is taken after their marriage in the names of both parties as joint tenants or tenants by the entirety.

Mabus, 890 So.2d 806, 823.

For further comparison, the *Long* prenuptial agreement provided as follows:

> ... whereas, the parties desire that all property now owned by each of them shall be free from any claim of the other that may arise by reason of their contemplated marriage ...
>
> ... 1. After the solemnization of the marriage between the parties, all property now separately owned by each of them, whether real or personal, shall remain the separate property of each of them free from any claim that may be made by the other by reason of their marriage, and with the same effect as if no marriage had been consummated between them.
>
> Each of the parties expressly waives any and all rights or interest which he/she may hereafter be entitled as wife or husband, in and to any property, real or personal, which the parties now own separately.

Long, 928 So.2d at 1002, ¶8.

Remembering that one of the essential purposes of a contract is to allow private parties to order their affairs under their own rules to avoid the default statutory and common law rules that might otherwise apply, let us briefly examine, through the lens of the expressed intentions of the parties in the instrument at issue, why the lower court's conclusions regarding the joint account are correct, in light of this Court's remand instructions and this Court's determination that the parties failed to address familial use and commingling in the Sanderson prenuptial agreement.

First, the expressed intention of the parties was to address all property in existence at the time of the prenuptial agreement or at any time in the future: "[a]ll property now owned . . . or any property hereafter acquired . . .." **HRE44; R56** (Prenuptial Agreement, p.1). "All" means "the whole of", "the greatest possible", "any; any whatever", "the whole quantity or amount", "one's whole interest", "every". WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE at 38 (1989 ED.) (hereinafter "WEBSTER'S"). "All" modifies "property". "Property" means "that which a person owns", "ownership", "right of possession", "something at the disposal of a person". WEBSTER'S at 1153. "All property" thus embraces the whole quantum of tangible and intangible property.

Second, the expressed intention of the parties was that if property (as broadly defined above, including proceeds from the property) were traceable, it would remain free from any claim arising from the marriage: "[a]ll property now owned . . . or any property hereafter acquired . . . that shall be traceable to proceeds or appreciation from their separate property . . . shall . . . for any and all other purposes, be free from any claim of the other that may arise by reason of the contemplated marriage, notwithstanding any and all State laws to the contrary." **HRE44; R56** (Prenuptial Agreement, p.1). Thus, if property or proceeds therefrom were traceable,[16] the parties, having specifically chosen to contract around the default rules of State law, expressly declared their mutual intentions that such property and proceeds would be free from any claim of the other.

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[16]"Traceable" simply means that which is "capable of being traced", WEBSTER'S at 1500, or to "determine the course or line of, esp. by going backward from the latest evidence." *Id.*; *see also* BLACK'S LAW DICTIONARY 1629 (9th ED. 2009) (hereinafter "BLACK'S LAW DICTIONARY") ("[t]he process of tracking property's ownership or characteristics from the time of its origin to the present"). Here, the task is simple: even though Tanya banked over $200,000.00 of child support she received from a former husband in a separate account, it is undisputed that all of the money in the joint account came from Hob.

Third, if the intentions of the parties were not clear enough, the parties further expressed their intentions by agreeing that each "**shall** separately retain all rights in his or her own property, real and/or personal, whether now owned or **hereafter acquired**, and each of them **shall have and maintain**, ***regardless of circumstances or change of circumstances***, the **absolute and unrestricted** right to dispose of and maintain use and retain the use and ownership of such separate property, **free from any claim that may be made by the other** . . . **as a result of their marriage, and with the same effect as if no marriage had been consummated between them**. . .. **HRE45; R57** (Prenuptial Agreement, ¶2, p.2) (emphasis supplied). The word "shall" is used in its mandatary sense: "shall separately retain all rights in his or her property", "shall have and maintain". There is no rational, contextual interpretation under which one can find anything permissive about the use of the term "shall". Retain means to "keep possession of", "continue to hold or have". WEBSTER'S at 1223. "Circumstances" means "a condition, detail, part, or attribute, with respect to time, place, manner . . . which modifies a fact or event" and "the condition or state of a person with respect to income and material welfare." WEBSTER'S at 269.

Hob's act of using the joint checking account was a circumstance, a convenience through which he continued to exercise dominion and control over his money by withdrawing it as he desired and transferring to various other accounts. Hob did exactly what he had "the absolute and unrestricted right",**HRE45; R57** (Prenuptial Agreement, ¶1, p.2), to do under the controlling prenuptial agreement: "dispose of and maintain use and retain the use and ownership of [his] separate property." *Id.*; *see* BLACK'S LAW DICTIONARY at 7 (Absolute means "free from restriction, qualification, or condition" and "[c]onclusive and not liable to revision"). Moreover, the lower court has now found that Tanya consented to, acquiesced in, and assisted in, the withdrawals of

the monies from the joint account, thus removing them from familial use because they were no longer "kept" in the account.

There is not a single case that can be found by the undersigned in published Mississippi case law that stands for the proposition that deposit of separate monies into a joint account constitutes, *as a matter of law*, commingling, irrevocably converts those monies into marital property, effects an *inter vivos* gift, or trumps the plain language of a controlling prenuptial agreement. Indeed, case law authority supports the opposite conclusion.[17] Moreover, this Court did not make such a ruling—it remanded this case to the lower court for consideration of the familial use doctrine, which the lower court extensively reviewed and considered and correctly applied.

No one has ever suggested that when Hob's money was in the joint account that Tanya could not use it. Once Hob withdrew the money (read "exercised dominion over") and deposited it into his accounts, particularly since the lower court has now found such withdrawals were with Tanya's consent, acquiescence and assistance, said money being solely *traceable* to him, it regained its separate status under the controlling terms of the prenuptial agreement. This was undisputedly the parties' practice throughout the marriage, Hob exercising dominion and control over his money as he desired, with Tanya's consent, acquiescence and assistance, withdrawing

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[17]*See McDonald v. McDonald*, 115 So. 3d 881, 886 (Miss. Ct. App. 2013) (rejecting contention that mere deposit of funds into joint account constituted commingling, noting that an appellate court is "restrained from substituting [its] own judgment for that of a chancellor, even if [it] disagrees with his or her findings of fact and would arrive at a difference conclusion.") (quoted case omitted); *Carter v. State Mutual Federal Savings & Loan Ass'n*, 498 So. 2d 324 (Miss. 1986) (rejecting contention of gift where depositor made deposits in accounts owned by other parties on which depositor retained signatory authority to withdraw deposits); *Leverette v. Ainsworth*, 23 So.2d 798 (Miss. 1945) (*en banc*) (same).

from the joint account and depositing it into his own investments, as was his "absolute and unrestricted right" to do under the prenuptial agreement. **HRE45; R57** (Prenuptial Agreement, ¶1, p.2).

Fifth, each party further broadly "**waive[d] and release[d] all rights and interest**. . .[in the other party's] **property, real and personal,** . . . **acquired by** [the other party] **at any time thereafter by any and all sources and means including, but not limited to return on investments, *earnings*, gifts or inheritance.** **HRE47-48; R59-60** (Prenuptial Agreement, ¶6, pp.4-5 (emphases supplied). "Waive" means to "abandon, renounce, or surrender (a claim, privilege or right, etc.)". BLACK'S LAW DICTIONARY at 1717. "Release" means to "libera[te] from an obligation, duty, or demand." *Id.* Hence, Hob and Tanya mutually expressed their intentions, and mutually agreed, to abandon, renounce and surrender all rights and interest in, while mutually releasing each other from any obligation or demand to, the other's real and personal property acquired at "any time" from any and all sources, to include "return on investments [and] earnings." *Id.* Except for whatever familial use the money was put to, the money Hob deposited into the joint account was always his to exercise such dominion and control over as he desired, including the dominion and control to withdraw it and deposit it into his own investments in accordance with the prenuptial agreement.

Once Hob removed his money from the joint account and placed it into his separate assets, it regained its separate status under the prenuptial agreement. Further linguistic analysis is not necessary to give effect to the parties mutually expressed intentions that all property and proceeds therefrom, including earnings and income, owned at the time and acquired thereafter, traceable to one party or the other, would remain a separate asset under the prenuptial agreement, free from any claim of the other, regardless of the change in circumstances, just as if the parties had never married. The parties expressly contracted around default rules of law that might otherwise apply.

Tanya's arguments would render basic terms of the prenuptial agreement such as "all", "traceable", "property", "hereafter", "free", "income", "earnings", and other terms meaningless and of no effect,[18] and contravenes a most basic principle by effectively rewriting, or rendering nugatory, the Sanderson prenuptial agreement.[19]

Tanya's contentions that paper allocations of interest received on investments and reported on tax returns prepared by the certified public accountant for the companies and the Sandersons (David Michael Crowder, C.P.A.) constituted commingling, again disregards the plain language of the prenuptial agreement regarding traceability and other terms which render the concept irrelevant in this case. Moreover, C.P.A. Crowder clearly explained in his testimony that the allocation complained of by Tanya was a software allocation, that neither Hob nor anyone in the Sanderson organization authorized such an allocation, and that the software allocation was his error, though insubstantial from a tax perspective. Furthermore, the same arguments were made by Tanya in the previous appeal of this case and rejected when this Court affirmed the lower court in *Sanderson I*. Finally, the lower court found that the prenuptial agreement rebutted any presumption of commingling as to the reported taxes, that the monies were not "kept" in the joint account, and that they were simply used as tax avoidance mechanisms. Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at page 14.**HRE27; R482**

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[18]Mississippi courts must construe contracts so that no word or provision is rendered "repugnant, senseless, ineffective, meaningless, or incapable of being carried out in the overall context of the transaction consistently with all of the other provisions of the contract." *Wilson Indus., Inc. v. Newton County Bank*, 245 So. 2d 27, 30 (Miss. 1971).

[19]"Courts do not have the power to make contracts where none exist, nor to modify, add to, or subtract from the terms of one in existence." *Citizens National Bank of Meridian*, 243 So.2d 67, 70 (Miss. 1971).

Tanya's contention that the lower court erred by including the $211,827.67 she received in temporary support (which does not include any value for her rent-free occupation of Hob's home and 320 acres during the multi-year trial proceedings or any consideration that Hob alone bore all of the valuation expert's fees) under the eighth *Ferguson* factor is not well taken. Tanya misled the lower court by representing that *Bowen v. Bowen*, 982 So.2d 385 (Miss. 1998) held "that a husband was not entitled to credit" for payment of temporary support—it did not—it simply refused to address the issue by raising the familiar procedural bar resulting from failure to cite authority.

The issue of whether a chancery court may factor temporary support in the equitable distribution analysis is not a difficult concept to grasp under the broad equitable powers of the chancery court and the Gestaltian logic a chancery court must necessarily apply in resolving the financial aspects of a divorce. The eighth factor in *Ferguson vs. Ferguson*, 639 So.2d 921, 928-29 (Miss. 1994) plainly encompasses any "other factor that in equity should be considered".

In *Wells v. Wells*, 35 So.3d 1250 (Miss. Ct. App. 2010) the Court of Appeals affirmed a chancery court that did just that—it properly factored the $80,000.00+ in temporary support received by the wife in its equitable distribution analysis under the *Ferguson* "other factor" prong:

> ¶ 41. Since the time of the temporary order, Forrest has paid Reyna's living expenses in excess of $80,000 per year. He has paid Reyna $1,500 a month in alimony and $650 a month for groceries. He has done so even though he and Reyna have alternated custody of the twins weekly. Despite this, Reyna has incurred debt.
>
> ¶ 42. After considering the foregoing factors, the chancellor determined that the marital estate should be split equally. After dividing the property, the chancellor made Forrest responsible for the marital debt. In order to maintain an equitable result, the chancellor awarded Forrest the marital checking account, the interest in the 401(k), and his interest in his life-insurance policy.
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> ¶ 43. We cannot find that the chancellor's division was clearly erroneous. The Ferguson factors were thoroughly considered, and the division was made in such a way as to eliminate alimony.

Wells, 35 So.3d at 1259, ¶¶41-43.

Similarly, in *Rhodes v. Rhodes*, 52 So.3d 430 (Miss. Ct. App. 2011) the Court of Appeals affirmed a chancery court's decision regarding rehabilitative alimony in which the chancery court considered temporary support paid by the husband and child support received by the wife from a former spouse:

> ¶ 75. The chancellor also considered the relatively short marriage and the above average standard of living enjoyed during the marriage. He also noted Stacey's minor child from a previous marriage and her receipt of $350 per month in child-support payments. And he considered Stacey's receipt of $2,000 monthly in temporary support from Rocky since the temporary order was entered.

Rhodes, 52 So.3d at 448.

The foregoing authorities recognize (as a matter of common sense and logic) the broad equitable power of the chancery court to consider temporary support under the eighth *Ferguson* factor. The lower court properly applied the credit under the eighth *Ferguson* factor. The lower court also correctly noted that if it took the broad view advocated by Tanya (it did not), that under *Lauro v. Lauro*, 847 So.2d 843 (Miss. 2003), it could have included credit offsets for ¼ of the $200,000.00 provided to Tanya's father to construction, the $209,913.27 that Tanya banked in child support from her former husband during the marriage (because Hob paid all of his daughter's expenses),[20] the Tmico-Trust Management, Inc., Account Number 9681 valued at $8,415.79 and Smith-Barney Account 61070-17058 valued at $17,501.22; the marital status and equitable distribution of the Defendant's home valued at $175,000.00 and the 26.6 acre subdivision valued

[20]Although referred to as the so-called "child support account", Tanya used the account as her own personal account, paying attorney's fees of $20,000.00 (10/15/2008), $6,956.61 (12/4/2008), $9,365.35 (1/6/2009), $8,487.19 (2/2/2009), $21,719.35 (3/3/2009), $4,628.88 (4/2/2009), totaling $71,157.38 from the so-called "child support" account).

at $74,350.00. The lower court, however, maintained consistency in its analysis based upon its equitable distribution of funds "kept" in the parties' joint account. Opinion and Judgment on the Remanded Issue of Equitable Distribution of a Joint Bank Account, Etc. at page 21.**HRE34; R489**

Tanya's arguments about the lower court's ruling on a complaint for cutting timber that she filed after remand, a complaint that was neither consolidated with this case, heard in this case, or ruled upon in this case, are nonsensical and beyond the record.

Likewise, Tanya's arguments about alleged dissipation are the identical arguments she made during the *Sanderson I* appeal, which this Court rejected in affirming the lower court in all respects except substantive conscionability review and funds kept in the joint account. Tanya apparently cannot refrain and constrain her arguments to the scope of remand, but instead simply states in as many ways as she can possibly imagine that the prenuptial agreement should be disregarded, and, notwithstanding this Court's prior ruling and the law of the case doctrine,[21] insists that she should have a yet another bite of the apple because she wants relief from what she now considers to be a bad bargain. This Court should resoundingly reject her duplicitous efforts.

In this case, the essence of parties' respective mutual intentions as expressed in the prenuptial agreement between the then 62-year old Hob and 28-year old Tanya is clear: unless the

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[21]This Court has explained the law of the case doctrine as follows:

> The doctrine of the law of the case is similar to that of former adjudication, relates entirely to questions of law, and is confined in its operation to subsequent proceedings in the case. Whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts. This principle expresses the practice of courts generally to refuse to reopen what has previously been decided. It is founded on public policy and the interests of orderly and consistent judicial procedure.

Simpson v. State Farm Fire and Cas. Co., 564 So.2d 1374, 1376-1377 (Miss. 1990) *abrogated on unrelated grounds* by *Upchurch Plumbing, Inc. v. Greenwood Utilities Com'n*, 964 So.2d 1100 (Miss. 2007) (quoting *Mississippi College v. May*, 241 Miss. 359, 366, 128 So.2d 557, 558 (1961)).

parties' gifted an asset to the other party, all assets, income, salary of the parties owned at the time of the marriage, all increases on same, and all assets, income, salary of the parties acquired thereafter were to remain the separate property of the parties. The then 28-year old Tanya received precisely what she bargained for when she married the then 62-year old Hob, a lavish and opulent lifestyle for herself and her daughter by a previous marriage. Finally, regardless of whether this Court agrees with the lower court's reasoning, it reached the right result and should be affirmed. *See Green v. Cleary Water, Sewer & Fire Dist.*, 17 So.3d 559, 572 (Miss. 2009) (citations omitted) ("[i]t is well established in our jurisprudence that the right result reached for the wrong reason will not be disturbed on appeal") (quoted cases omitted).

CONCLUSION

The lower court properly found the prenuptial agreement to be substantively conscionable and correctly performed an extensive *Hemsley*/*Ferguson* analysis in reaching its conclusions regarding the funds kept in the joint account. For the reasons set forth herein and to be set forth subsequently, i.e., at oral argument if the Court deems it necessary, Hob respectfully requests that the lower court's decision on remand be affirmed, that Tanya be assessed all costs of this appeal, and that he be granted such additional relief as he may be entitled to under the premises.

Respectfully submitted, this the 4th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December 2017, I electronically filed the foregoing Appellee's Brief with the Clerk of the Court using the MEC system, which upon belief will automatically send notification of such filing to the following counsel of record for the Appellant:

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I further certify that I have deposited the foregoing document in the U.S. Mail, postage prepaid, and addressed to the following non-MEC participant:

Honorable John A. Hatcher,
Chancellor
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This the 4th day of December 2017.

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CERTIFICATE OF FILING

The undersigned hereby certifies that on December 4, 2017, he electronically filed the foregoing original Appellee's Brief with the Clerk of the Court using the MEC system:

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