

is its Vice-President, Secretary and Treasurer. Langford and Adams are the only, and equal, shareholders of Staxxring, and they are Staxxring's only directors.

Plaintiffs Staxxring and Langford *ex rel* Staxxring, Inc., filed their Original Petition in this case on June 22, 2009, claiming, among other things, that Defendant Adams, as an officer and director of Staxxring, breached his fiduciary duties to the company, tortiously interfered with its operations, and converted its assets. The claims are based upon statute and common law. The plaintiffs do not assert claims against Adams in his capacity as a shareholder.

The plaintiffs seek damages for Adams' alleged conduct detrimental to the company. They also requested interim injunctive relief against Adams. Specifically, the plaintiffs sought and continue to seek to enjoin Adams from interfering in a variety of ways with the normal and reasonable operations of Staxxring. They claim, among other things, that Adams has impeded shipments to and from vendors or customers, and that he has interfered with the company's ability to pay ongoing business expenses through a variety of maneuvers.

On June 23, 2009—one day after the petition was filed—Adams voluntarily answered the suit, without being served with process, and counterclaimed against Langford seeking damages and more. Adams sued Langford individually, so his counterclaim is more appropriately denominated a third-party claim. Adams claimed and continues to claim that Langford is herself culpable for breach of fiduciary duties, breach of contract, conversion and other impermissible acts. He, too, sought and seeks injunctive relief of his own, as well as other affirmative relief described below.

In his pleadings, Adams sought and continues to seek to restrain the plaintiffs from transferring, disposing of, or encumbering any asset of Staxxring without the express written consent of the company's board of directors; spending Staxxring's money for anything other than

reasonable and ordinary business expenses; expending funds for legal fees on behalf of the company or Langford without board consent; withdrawing funds from Staxxring's bank account without approval of the directors; entering into any transaction outside the company's ordinary course of business; committing any act that would render it impossible to carry on the ordinary course of business of Staxxring; opening or closing any bank account on behalf of the company without approval of the board; increasing the salary of company employees or officers without director approval; and entering into a material contract on behalf of the business, absent the board's approval.

At the time he filed his pleading, Adams took the independent step of joining Robert Swift as a third-party defendant to this action. Swift was the sales manager for the company. In addition, Adams requested expedited discovery and, additionally, submitted a Rule 194 Request for Disclosure going to the merits of the parties' disputes. Significantly, at the same time Adams asked this Court to "appoint a receiver to take control and manage the assets and business of Staxx."

By letter of June 24, 2009, Adams' counsel asked the Court to set aside two to three hours for a hearing on his requests and to "entertain Adams' motion for expedited discovery on an expedited basis." Two days later, the Court held a conference call with the parties' attorneys, during which this Court ordered the plaintiffs, at Adams' request, to provide the books and records of Staxxring to Adams no later than July 2, 2009.

On July 1, 2009, Adams filed his First Amended Answer, First Amended Counterclaim, Original Third-Party Petition, Application for Injunctive Relief and Application for Appointment of Receiver against Staxxring, Langford and Swift.² In this pleading, Adams added Bank of

² Adams sued Langford and Swift jointly for breach of fiduciary duties in this pleading.

America to the litigation as yet another third-party defendant. Bank of America was at the time the depository for Staxxring's operating funds. It is essentially undisputed on the current record that his purpose in doing so was to shut down the operations of Staxxring. It is undisputed that his actions relating to the Staxxring bank accounts damaged the company.

On July 2, 2009, Adams and Langford appeared in this Court on Adams' affirmative request for a temporary restraining order. On that same date, after presentations to the Court by the parties' counsel, the Court granted Adams' request in part and set a hearing date on the parties' dueling applications for temporary injunctive relief. Adams posted a bond on the temporary restraining order and secured formal service on Langford on July 7, 2009. At the same time, Adams formally served Langford with a Notice to Show Cause why the temporary injunctive relief he sought in his request for injunctive relief should not be granted at a hearing he had set for July 17, 2009.³

The next day, Adams filed his Supplement to First Amended Counterclaim and Application for Injunctive Relief. Therein, Adams added an affirmative claim against Staxxring for indemnification, which effectively constituted another counterclaim. In addition, he reiterated his request that this Court award him actual damages; exemplary damages; attorney fees; prejudgment and post-judgment interest; costs of court; injunctive relief; expedited discovery; appointment of a receiver; and "[s]uch other and further relief, both at law and in equity, to which [Adams] may be justly entitled."

Thereafter, on July 17, 2009, Adams, Langford and Staxxring appeared and announced ready to proceed on their cross-requests for temporary injunctions. The matter was tried at length

³ In anticipation of this hearing, Adams issued a subpoena duces tecum for Langford to appear at Adams' counsel's office on July 16, 2009, and produce a variety of documents. This subpoena was served on July 14.

to the Court and concluded on July 22, 2009. Substantial testimonial and documentary evidence was presented. Counsel for Third-Party Defendant Bank of America participated by phone during a portion of the proceedings. Swift, added by Adams when he filed his answer, had not yet been served with Adams' lawsuit.

After consideration of the evidence and the arguments of counsel, the Court, by Temporary Injunction dated July 25, 2009, found and ordered as follows:⁴

The Court finds that a Temporary Injunction is necessary to prevent immediate and irreparable harm to Adams, Staxxring and Langford, for which they have no adequate remedy at law.

The Court finds that Counter-Plaintiff Adams is likely to prevail on the merits of at least one of his claims and that temporary injunctive relief is available as an equitable remedy in order to protect his rights and to preserve the status quo pending a trial on his causes of action.

The Court finds that Plaintiffs Staxxring and Langford are likely to prevail on the merits of at least one of their claims and that temporary injunctive relief is available as an equitable remedy in order to preserve their rights and the status quo pending a trial on their claims.

Specifically, the Court finds that the imminent and irreparable harm to Adams consists of an ongoing denial of, or other limitation on, his reasonable participation, as a shareholder, director and officer, in the legitimate affairs of Staxxring, and the possible, if not probable harm to his investment in and advances to Staxxring for which a legal remedy appears inadequate.

As to Langford and Staxxring, the Court finds that the imminent harm to these parties, all of it of an irreparable nature, results in the inability of Langford, in the face of conduct by Adams, to effectively and reasonably exercise the powers of her office as Staxxring president for the ultimate good of the corporate plaintiff, all of which, in fact, clearly jeopardizes the continued operation of a currently viable business concern.

⁴ The Court sets out most of the Order here not only to add perspective to the current motion, but to demonstrate that the Order was by no means a pro forma, party-tendered Order, but hand-crafted, and that much of the relief granted was in Adams' favor and in accordance with his request.

The Court further finds and concludes, based upon the evidence, that the harm that will occur if the parties are not restrained as provided herein will be irreparable because these parties cannot be adequately compensated in damages, their damages are not presently ascertainable, and damages will not be as practical, available, and effectual as the equitable relief of a temporary injunction. Accordingly,

It is **ORDERED**, pending a trial on the merits or further Order of the Court, that Plaintiff Langford, her agents, servants, employees and attorneys, and all those in active concert of participation with them who receive actual notice of the Court's Order, are hereby restrained and enjoined from:

- (a) transferring, disposing of, or encumbering any asset of Staxxring without the express written consent of the Staxxring Board of Directors;
- (b) spending any monies of Staxxring for any expense other than an ordinary, reasonable, and necessary business expense benefitting Staxxring;
- (c) entering into any transaction that is outside the ordinary course of business of Staxxring;
- (d) committing any act which would make it impossible to carry on the ordinary course of business of Staxxring, including the failure to pay rent for the offices of Staxxring on a commercially timely basis;
- (e) knowingly committing any act that would jeopardize the ability to carry on the ordinary course of business of Staxxring;
- (f) entering into or terminating a material contract on behalf of Staxxring without prompt notice of the occurrence of said action to all directors of Staxxring;
- (g) failing to provide prompt notice to all directors of Staxxring following the opening or closing of any bank account on behalf of Staxxring, together with information disclosing the identification number(s) of any such account(s), and the name(s) and

address(es) of the institution(s) holding any such account(s);

- (h) denying Adams reasonable access to Staxxring's books and records;
- (i) disparaging Adams in any manner that is likely to result in harm to the business operation of Staxxring.

It is further **ORDERED**, pending a trial on the merits or further Order of the Court, that Defendant Adams, his agents, servants, employees and attorneys, and all those in active concert of participation with them who receive actual notice of the Court's order, are hereby restrained and enjoined from:

- (a) transferring, disposing of, or encumbering any asset of Staxxring without the express written consent of the Staxxring Board of Directors;
- (b) interfering with the ongoing business operations of Staxxring, including interference with Staxxring's bank accounts, contracts, repositories, depositories, vendors or customers;
- (c) committing any act which would make it impossible to carry on the ordinary course of business of Staxxring;
- (d) knowingly committing any act that would jeopardize the ability to carry on the ordinary course of business of Staxxring;
- (e) disparaging Langford or Staxxring in any manner that is likely to result in harm to the business operation of Staxxring.

To effectuate the purposes of this injunctive relief, Plaintiff Molly Langford, as president of Staxxring and to the exclusion of any other officer of Staxxring, is hereby afforded all rights to establish, maintain, utilize, control and/or terminate the Staxxring bank account currently held with Third-Party Defendant Bank of America. In the event of an actual or imminent termination of the Bank of America account, Langford is hereby afforded the exclusive right, on her signature alone, to open another account on behalf of, in the name of, and for the benefit of Staxxring. It is further **ORDERED** that all actions taken by

Langford in this regard must adhere to all orders and directives contained in this Temporary Injunction.

* * * *

It is further **ORDERED** that as there are now no competing interests to the Staxxring bank account maintained by Third-Party Defendant Bank of America, said third-party defendant's request for expedited consideration of its cross claim for interpleader is **DENIED**.

It is further **ORDERED** that trial on the merits of this matter is set for January 11, 2010, at 8:30 a.m. in this Court.

On the last day of the hearing on the temporary injunctions, but before an injunction was issued, Adams presented to the Court his Second Supplement to First Amended Counterclaim and Application for Injunctive Relief. In that supplement, he added a claim for breach of contract against Staxxring and Langford jointly, and he re-asserted his claims for injunctive relief, attorney fees, indemnification and receivership.

On August 5, 2009, Adams moved to clarify or modify the temporary injunction. His motion also effectively sought to challenge any action by Staxxring to pay for legal representation, and to otherwise contest the major aspects of that part of the injunction upon which he was not successful. Third-Party Defendant Bank of America also moved for reconsideration of the Court's order denying its interpleader request.⁵ The matter was heard on August 20, 2009. Four days later, the Court issued its Order denying the requested relief. The Order is attached hereto because it adds what the Court believes is important context to the currently pending motion.

⁵ In the meantime, various discovery disputes occurred. In addition, Adams requested from this Court an order for substituted service on Third-Party Defendant Swift. The Court signed the order on August 20, 2009. Swift thereafter appeared in the litigation through his own counsel.

Somewhere amid the legal fury and flurry, the parties mediated this case twice, without result.

On September 17, 2009, after the Court questioned the legitimacy of the claims he asserted against Bank of America, Adams non-suited those claims, but he continued to press claims against Langford, Staxxring and Swift. Roughly 10 days later, Adams moved to compel responses to production requests he had directed to the plaintiffs.

On October 9, 2009, Adams demanded, pursuant to Tex. R. Civ. P. 12, that plaintiffs' counsel show authority to represent Staxxring. On October 27, 2009, Adams filed an amended motion relating to opposing counsel's authority. Two days later, Adams filed a Supplemental Motion to Compel responses to Adams' Second Request for Production of Documents. One day later, Adams filed his Second Amended Answer, Second Amended Counterclaim, Amended Third-Party Petition, Application for Injunctive Relief, and Application for Appointment of Receiver.⁶

On November 14, 2009, following a November 6 hearing that Adams requested, this Court denied Adams' motion for plaintiffs' counsel to show authority. At the same hearing, the Court compelled plaintiffs to provide information in response to Adams' motions to compel discovery responses. During this same time period, Adams was moving to quash discovery sought by plaintiffs.

On November 20, 2009, Adams invoked the jurisdiction of the Fifth Court of Appeals at Dallas, seeking a writ of mandamus directing this Court to overturn its order that denied Adams' Rule 12 motion to show authority. *See In re William Adams*, No. 05-09-01406-CV (Tex.

⁶ Throughout his pleadings and during various hearings, dating from June 23, 2009, forward, Adams has cited to and relied extensively on the Staxxring By-Laws as a basis for much of the relief he continues to request.

App.–Dallas, filed Nov. 20, 2009). In a separate motion, Adams asked the appellate court for emergency temporary relief pending its determination of his mandamus petition. The emergency request asked the appellate court to stop plaintiffs' discovery, "including depositions noticed for Monday, November 23, 2009 and Tuesday, November 24, 2009 . . . because the attorney taking those depositions is without authority to represent StaxxRing, Inc." The two depositions plaintiffs sought to take were Adams' and one of two other persons. The Fifth Court denied Adams' request on December 8, 2009.

On November 23, 2009, Adams demanded a trial by jury and paid the statutory jury fee in the trial court.⁷

On December 8, 2009, the same day the Fifth Court of Appeals denied his emergency requests for extraordinary relief, Adams filed a Motion for Civil Contempt against Langford, claiming that she had violated a portion of this Court's Temporary Injunction that awarded Adams relief that he had specifically requested from this Court. A hearing was had on the motion and the request was denied. Shortly thereafter, a continuance was sought and granted, and the case was reset for jury trial on April 5, 2010. The continuance was occasioned by an injury to one of Adams' then-counsel.

On January 29, 2010, with the new trial date less than 90 days away, Adams filed an involuntary petition in bankruptcy against Staxxring in the United States Bankruptcy Court for

⁷ Adams has never sought to revoke his demand for a trial by a jury of his peers. Even if he had tried to do so, plaintiffs have made clear that they would not agree to it.

the Northern District of Texas. *See* Case No. 10-30668-SGJ-11. On February 15, 2010, Adams filed a Suggestion of Bankruptcy here.

A few days later, this Court, as required, stayed the proceedings as they related to Staxxing and Langford, but refused to stay the case as to Adams' affirmative claims against Third-Party Defendant Swift. On March 9, 2010, less than 30 days before trial, Adams abruptly non-suited his claims against Swift.

The United States Bankruptcy Court dismissed Adams' bankruptcy filing with prejudice on May 28, 2010.

During the pendency of the bankruptcy case, Adams filed a State Bar grievance against the plaintiffs' lawyer on the same grounds he relied on in his Rule 12 motion—the ones this Court and the appeals court decided against Adams.

On July 8, 2010, this Court, *at the behest of Adams* and the plaintiffs, signed an *agreed order* lifting the stay and re-opening the case in this Court, following the dismissal of the bankruptcy action. The Court reset the case on the Court's jury trial docket for November 29, 2010, where it remains. This constitutes the third trial setting of the case, the previous two settings having been rescinded at Adams' request or because of his actions.⁸

After the case was reinstated, Adams changed lawyers. His previous counsel moved to withdraw and two other law firms agreed to take control. The Court signed the withdrawal and substitution order on July 23, 2010. Less than a week after switching his legal team, and less than two weeks after Adams agreed to reinstate this case on the jury docket, Adams moved to compel arbitration, latching onto a provision in the company By-Laws—the same By-Laws he had used from the outset to argue his position on the merits of the claims.

⁸ Had these continuances not occurred, this case would have been concluded by now.

At this time, this case had been pending 13 months in this Court and had dominated significant portions of the Court's docket—most all of which was attributable to Adams.

Also by this time, Adams had acquired significant discovery under the Texas Rules of Civil Procedure. At the same time, Adams had successfully blocked every attempt (through motions to quash, mandamus, emergency appellate motion, injury, bankruptcy, and the like) to forestall discovery by the plaintiffs. Plaintiffs responses to Adams' multiple production requests numbered in the thousands of pages, many acquired as a result of Adams' pleas to this Court. Three or four times Adams has had his lawyers call Langford to the witness stand in this Court, for repeated and effectively free depositions.

According to the testimony of plaintiffs' counsel, which this Court credits:

Adams . . . engaged in substantial discovery in this lawsuit particularly given the narrow facts and limited issues in the case. Adams served a subpoena on Langford. He also requested her deposition, served requests for disclosure, and served a total of four sets of requests for production . . . for a total of 196 requests. Plaintiffs answered and/or objected to each and every request as well as the subpoena. Plaintiffs also produced a substantial amount of documents in this case. To date, well over 5,000 pages of documents have been produced by Plaintiffs in response to Defendants' discovery requests and the Court's orders. Plaintiff also dealt with at least one Motion to Compel from Adams on each of the subpoena and each of the four requests for production. In some instances, Adams filed more than one motion to compel on a particular set of discovery. Plaintiffs incurred substantial time and attorneys fees responding to each such Motion and in responding to discovery in this case. Adams, however, has still refused to even appear for deposition after repeated requests. The AAA Commercial Arbitration Rules do not provide for any such discovery and merely provides that the "arbitrator may direct the production of documents and other information, and the identification of any witness to be called."

By the time he moved to compel arbitration, Adams had the benefit of his vigorous use of the discovery tools of the Texas Rules of Civil Procedure, thereby putting the plaintiffs at a distinct and prejudicial disadvantage—particularly in light of Adams' ability to dodge responding to discovery by the plaintiffs.

In the meantime, Staxxring and Langford spent thousands and thousands of dollars in attorney fees. According to plaintiffs' counsel, the amount of legal fees and costs resulting from discovery efforts initiated by Adams is some \$21,000. Yet another \$35,000 in fees were incurred responding to Adams Rule 12 motion and Adams' appellate requests. This is an enormous sum for a small business like Staxxring that, the evidence shows, struggles to survive against the litigious Adams, who is himself a lawyer.

On June 16, 2010, an entity called BA Acquisitions, LLC (BAA), filed suit against Staxxring and Molly Langford in the 116th District Court of Dallas County, Texas, being cause number DC-10-07365. The evidence before the Court shows that the plaintiff there is a company that was set up by Adams for the sole purpose of buying the now-defaulted Fidelity note (the so-called line of credit for Staxxring) that Adams had persuaded his banker friend to cancel, despite this Court's order to Adams that he not interfere with Staxxring. The note at issue played a significant role in the proceedings that resulted in this Court's order of August 24, 2009, attached, and the circumstances mentioned therein. Surprisingly, the *bank's* attorneys at the time the note came to prominence in this case signed on to represent Adams' new company in the proceedings in the 116th District Court.

The 116th District case was apparently filed without the mandatory certification required by the local rules with respect to the disclosure of related litigation. Because of the relationship, Staxxring and Langford answered, filed a third-party claim against Adams, and moved to transfer the case to this Court.

A hearing was set on the transfer motion for August 24, 2010. However, it now appears that a Notice of Non-Suit was filed by BAA on August 12, 2010, and that the judge of the 116th District Court dismissed the primary case several days later. On August 23, 2010, with the third-

party claim still pending, BAA's lawyer (who was Fidelity Bank's lawyer in this case) sent a letter to the 116th District Court stating: "Due to the fact that BAA is no longer a party to the lawsuit, please be advised that I do not plan on attending said [transfer motion] hearing tomorrow."⁹ The Court takes judicial notice of these filings.

Earlier, on August 16, 2010, one of Adams' new law firms in the lawsuit here—on the case for about a month—moved to withdraw from representing him.

In the meantime, Adams filed a response to plaintiffs' second motion to compel Adams' deposition. In that response, Adams acknowledges that he "has requested dates for Plaintiff Langford's deposition since at least November of 2009 and again recently." Adams further concedes that "[f]ollowing the hearing on the Motion to Compel Arbitration . . . counsel for [Adams] offered counsel for [Staxxring and Langford] several dates in September when Bill Adams and his counsel will be available for deposition." Moreover, Adams admits that his long-sought deposition "was not directed to any arbitrability issue . . . but was scheduled as a deposition on the merits of the litigation." Adams also asserts that "the discovery period in this case actually closed on June 17, 2010. . . ." The Court notes here that the Motion to Compel Arbitration was filed some 30 days after Adams says that discovery closed, and while the case was headed directly to trial. And, in further response to the plaintiffs' motion to compel Adams' deposition, Adams says: "[Adams] also brings to the Court's attention that his counsel has repeatedly requested the deposition of Plaintiff Molly Langford. . . ." The plaintiffs' second motion to compel was heard by the Court on August 27, 2010.

⁹ A year ago, following a hearing Adams requested, this Court observed that Adams' conduct "has begun to take on the appearance of a vendetta—one more readily calculated to put an end to Staxxring as a result of his disdain for Langford than promote or save it or Adams' own interests and investments" in the business. Order of August 24, 2009, at 2.

II.¹⁰

Adams moves to compel arbitration under Article II, §13, of the Staxxing By-Laws, which provides as follows:

All claims, disputes, demands or disagreements relating to or arising out of, directly or indirectly, this Article II among the shareholders of the Corporation shall be settled by arbitration in Dallas, Texas. Such arbitration shall be subject to the Texas General Arbitration Act and the rules of the American Arbitration Association, in accordance with this Section 13. After the initiation of arbitration, the shareholders shall attempt to agree upon one arbitrator. In the absence of such agreement, there shall be three arbitrators, one designated in writing by each shareholder of the Corporation which shall be designated within thirty days after arbitration has been initiated. The third arbitrator shall be chosen by the two designated arbitrators within ten days after the latest of their respective designations. Any determination by such arbitrator(s) shall be a conclusive determination of the matter, shall be binding upon the shareholders and shall not be contested by them. Neither the pendency of arbitration as provided in this Section 13 nor the existence of any dispute shall effect [*sic*] the rights of the shareholders under this Article II.

(A)

Plainly, this agreement is limited in its scope to those items that are the subject matter of Article II. It is also obviously limited to matters relating to shareholders. The pleadings and the testimony disclose that plaintiffs do not bring suit against Adams in his capacity as a shareholder. More importantly, a review of Article II shows that it primarily relates to formalities, mostly of a run-of-the-mill variety, affecting shareholders (annual meeting time; special shareholder meetings; place of meetings; notice of meetings; closing of transfer books; fixing record dates; shareholder voting lists; quorum of shareholders; proxies; voting of shares; telephone meetings). These matters do not even remotely touch upon the claims of wrongdoing lodged against Adams

¹⁰ In its analysis, the Court does not distinguish between federal and state case law or between the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code § 171.001, *et seq.*, because there is essentially no difference.

in his capacity as an officer and director. The arbitration provision relied on by Adams does not cover the disputes at issue.

Adams argues that the arbitration provision must be read to apply to the entirety of the By-Laws (and more), not just Article II, even though the provision says otherwise. When questioned by the Court, Adams' counsel acknowledged that Adams' position is that the Court should excise from section 13 any reference to Article II. (RR, vol. II, pp. 19-20.) Apparently, according to Adams, the phrase "relating to or arising out of, directly or indirectly, this Article II" somehow entirely transforms the By-Laws to require arbitration of anything associated with the business.¹¹

But that is only the first step. Once freed from the shackles of Article II and made applicable to any and all disputes through Adams' bootstrap predicate, Adams next argues the provision also must be read to incorporate a specific set of rules of the American Arbitration Association that would allow the arbitrator, not this Court, to determine if an arbitration agreement existed and, if it did, to then determine to which claims it would apply. Quite apart from the crenelated argument employed to reach this destination, section 13 cites no specific set of rules.

In support of his freewheeling approach to contract interpretation, Adams cites *Saxa, Inc. v. DFD Architecture, Inc.*, 312 S.W.3d 224, 2010 Tex. App. LEXIS 3137 (Tex. App.-Dallas 2010, pct. denied). *Saxa* is no comfort to Adams. In *Saxa*, the arbitration language specifically

¹¹ Unanchored as it is through Adams' tortured interpretation, the phrase "relating to" becomes meaningless. Courts have noted this in other contexts. *See Doricent v. American Airlines, Inc.*, Civil Action No. 91-12084Y, 1993 U.S. Dist. LEXIS 15143, at *21-22 (D. Mass. Oct. 19, 1993) ("as all life, like law, is a seamless web, . . . employment of the phrase "relating to" is essentially meaningless. The 'relating to' rubric of itself mandates nothing and explains nothing."). *See also Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989)(vague, overly broad and ambiguous).

applied to the agreement as a whole and, perforce, the disputes there at issue. Unlike here, the provision in *Saxa* was not limited to a specific section of the parties' agreement, let alone to a specific class of parties. Furthermore, in *Saxa* the parties "explicitly incorporated[d] rules that empower an arbitrator to decide issues of arbitrability. . . ." 2010 Tex. App. LEXIS 3137, at *13 (emphasis added). That is not the case here.

What is applicable in this proceeding is the appellate court's interpretive restraint and its ultimate admonition, well-founded in precedent, that "a court must examine the arbitration agreement to decide if, when construed under the relevant state law, the agreement evidences a *clear and unmistakable* intention that the arbitrators will have the authority to determine the scope of arbitration." *Id.* (emphasis added), citing *ODL Servs., Inc. v. ConocoPhillips Co.*, 264 S.W.3d 399 at 413 (Tex. App.–Houston[1st Dist.] 2009, no pct.).

If this were not enough, only recently the Dallas Court of Appeals, in a case not cited by any party to this proceeding, re-emphasized the narrowness of the concept that an arbitrator has authority to interpret matters of substantive arbitrability. *Roe v. Ladymon*, ___ S.W.3d ___, 2010 Tex. App. LEXIS 6087 (Tex. App.–Dallas, July 30, 2010, n.p.h.). In *Roe*, the court noted that,

[T]he foundational principle [is] that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 648 (1986)(quoting *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). The United States Supreme Court "has repeatedly emphasized that arbitration 'is a matter of consent, not coercion,' that the [FAA] 'does not require parties to arbitrate when they have not agreed to do so,' and its purpose is to make arbitration agreements 'as enforceable as other contracts, but not more so.'" *In re Merrill Lynch Trust Co.*, FSB, 235 S.W.3d 185, 192 (Tex. 2007)

A person seeking to compel arbitration must first establish the existence of an arbitration agreement subject to the FAA and show that the claims raised fall within the scope of that agreement. . . .

* * *

[A]bsent “clear and unmistakable evidence” that the parties agreed to the contrary, the primary power to decide such issues lies with the courts—not an arbitrator. See *First Options*, 514 U.S. at 944; *Howsam [v. Dean Witter Reynolds, Inc.]*, 537 U.S. [79] at 84.

2010 Tex. App. LEXIS 6087, at *12, *24 (footnotes, some citations omitted).

Assessing the facts here against the holdings of *Saxa*, *Ladymon* and the other numerous authorities can result in no conclusion but that Adams’ motion to compel must be denied.

This Court cannot rewrite an unambiguous provision of the Staxxring By-Laws. The arbitration requirement applies solely to the specific matters set forth in Article II of the By-Laws, nothing more. The matters in this case are not Article II matters. When pressed, Adams is quick to say that the provision is not ambiguous (RR, vol. II, pp. 9, 21). Yet, to sustain his rump argument, this Court must scissor-out specific language of section 13 and hold that section 13 means something other than it says. Clearly, to do this the Court must first determine there is ambiguity. To the extent that Adams himself implicitly argues ambiguity, and he appears to do so, he is foreclosed from success for the additional and alternative reason that the sole evidence of record establishes that there was no intent that section 13 would cover disputes like those presented in this Court. Adams’ muscular conduct in this litigation confirms the Court’s conclusion.¹²

Before Adams is entitled to compel plaintiffs to arbitrate, he is required to prove the existence of a valid and enforceable arbitration agreement between the parties in accordance with state contract law principles, and that plaintiffs’ claims are within the scope of any such

¹² Even if Article II, § 13, could be read to apply to the entire By-Laws, as Adams suggests, that still would not result in the arbitration of these claims, as there was no agreement to arbitrate such claims and, in any event, those claims are not within the scope of any agreement.

agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); *Roe v. Ladymon, supra*.

Contrary to Adams' position here, until he proves the existence of an arbitration agreement applicable to the disputes, there is no presumption in favor of arbitration. *See, e.g., American Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537-38 (5th Cir. 2003)(policy favoring arbitration “does not apply to the determination of whether there is a valid agreement to arbitrate between the parties’ or to ‘the determination of who is bound’ by the arbitration agreement”), quoting *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073-74 (5th Cir.2002)); *J.M. Davidson, Inc. v. Webster, supra*, 128 S.W.3d at 227 (no presumption in favor of arbitration until “after the party seeking to compel arbitration proves that a valid arbitration agreement exists”). This is so because the purpose of the Federal Arbitration Act (as well as the state Act) is “to make arbitration agreements as enforceable as other contracts, *but not more so.*” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)(emphasis added). In other words, the presumption to which Adams refers does not, as he essentially argues, *create* an agreement to arbitrate where one does not exist.

Accordingly, the motion to compel arbitration should be denied on these grounds.

(B)

Further, and in the alternative, plaintiffs have proved that Adams waived any right he may have had to arbitrate the claims in this case. Not only has Adams substantially invoked the judicial process, both at the trial and appellate levels, he has done so with a vengeance, to the clear detriment and prejudice of the plaintiffs, as the foregoing factual rendition amply demonstrates. A few matters previously mentioned bear special note.

First, Adams immediately and voluntarily threw himself into this case, without awaiting service and only one day following the filing of the plaintiffs' original petition. The evidence and common sense tell anyone this was a race to the courthouse. Had Langford not beat Adams to the punch, Adams would have been here first.

Second, once here Adams demanded his right to a jury trial—a right that our constitution dictates “shall remain inviolate.” Adams, a highly educated lawyer and businessman who has relied on and been the beneficiary of the By-Laws throughout this litigation when pressing his own claims, can hardly be said to have not known of his alleged right to arbitrate until after more than a year of vigorous litigation. Standing alone, Adams' jury demand—a deliberate, voluntary and knowing action wholly at odds with a demand for arbitration—should result in a waiver of his purported right to arbitrate. But the Court need not base its determination on that single fact, given the overabundance of evidence that Adams has substantially invoked the legal process on many other fronts.

Third, there is Adams' voluntary agreement to reinstate this case on this Court's jury docket.

In this case, Adams has enjoyed “substantial direct benefits by gaining an advantage in the pretrial litigation process [and he] should be barred from turning around and seeking arbitration with the spoils.” *Perry Homes v. Cull*, 258 S.W.3d 580, 593 (Tex. 2008).

As the Court has noted, Adams has known about the By-Laws' arbitration provision since the outset of this litigation and most certainly even before. (The By-Laws were adopted at least by February 2005). He has conducted substantial discovery and has taken other actions coupled directly to the merits of this case. He has likewise initiated independent actions against third parties, and he has aggressively presented his own requests for relief and for the judgment of this

Court, including repeated requests that this Court appoint a receiver to take control of Staxxring. Adams has sought and received injunctive relief from this Court on at least two occasions. Both of these requests, one of which involved a days-long evidentiary hearing, fully engaged the merits of his claims, for this Court could not have possibly determined his pleas without assessing his probable success on the merits.

Adams has invoked this Court's contempt power and prayed that this Court "fine Ms. Langford . . . and confine her in the county jail by order of the Court" *See* Adams' Motion for Civil Contempt, filed Dec. 8, 2009. Adams has forced the plaintiffs to expend enormous sums of money, and, while he has availed himself of the liberal discovery rules under the Texas Rules of Civil Procedure, he has successfully thwarted the plaintiffs' attempts to gain rightful discovery. As noted above, on more than one occasion, he has repeatedly reaffirmed his desire to litigate here, primarily, although not solely, through his voluntary appearance, his jury trial demand, and his agreement to reinstate the case on this Court's jury docket following the on-the-merits dismissal of his involuntary bankruptcy petition against Staxxring. On two prior occasions, the plaintiffs were prepared to go to trial. Those attempts failed through no fault of the plaintiffs, but solely because of Adams. The result of all of these things, and more, has occasioned substantial detriment and prejudice to the plaintiffs, and Adams' actions constitute much, much more than "[m]erely taking part in litigation" *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex 2006)(emphasis added).¹³

¹³ "Waiver involves substantial invocation of the judicial *process*, not just judgment on the merits." *Perry Homes, supra*, 258 S.W.3d at 592 (emphasis in original).

Pursuant to Tex. R. Evid. 201, the Court hereby takes judicial notice of its ample file in this case. *See Perry Homes*, 258 S.W.3d at 595. The Court further notes that the majority of the file was generated by Adams' own vigorous litigation of this case.

Adams' conduct here is comparable to that of the plaintiffs in *Perry Homes v. Cull*. There, the Texas Supreme Court held that the plaintiffs, who, like Adams, made an 11th-hour motion to compel arbitration, had substantially invoked the judicial process to such an extent that it prejudiced the defendants and they thus waived their right to arbitrate. *Perry Homes*, 258 S.W.3d at 584.¹⁴

In so holding, and significantly, the supreme court noted that the plaintiffs' conduct in that case "far exceed[ed] anything [it] ha[d] reviewed before." *Id.* at 595. Like Adams, prior to their late motion to compel arbitration, the plaintiffs in *Perry Homes* vigorously availed themselves of this Court's liberal discovery rules. *Id.* Like the plaintiffs here, the defendants in *Perry Homes* were prejudiced as a result of the plaintiffs' manipulation of the litigation process to their benefit and to the detriment of the defendants. *Id.*, 596-97. Accordingly, like the *Perry Homes* court, this Court finds that "[h]aving gotten what [he] wanted from the litigation process, [Adams can] not switch to arbitration at the last minute like this." *Id.*, at 584.

¹⁴ Considering the totality of the circumstances, as this Court has done here, it is worth noting for purposes of this case that the non-exclusive factors that the supreme court used to so conclude in *Perry Homes* were: "(1) when the movant knew of the arbitration clause; (2) how much discovery has been conducted; (3) who initiated it; (4) whether it related to the merits rather than arbitrability or standing; (5) how much of it would be useful in arbitration; and (6) whether the movant sought judgment on the merits." *Id.* at 591-92 (internal citations and footnotes omitted). The court also went on to note that whether or not a party requests judgment on the merits—as Adams did here—is another factor to consider when deciding whether a party has substantially invoked the judicial process. *Id.* at 592.

Considering the totality of the circumstances, the Court determines that Adams has waived any right he may have had to arbitrate the disputes at issue. If he has not, then there is no longer any concept of waiver associated with arbitration contracts.¹⁵

(C)

Finally, even if an arbitration agreement covered the disputes at issue and any right to arbitrate had not been waived, the Court finds that arbitration of the type demanded will not provide the plaintiffs with an accessible and equivalent forum for them to redress their grievances.

The parties assume for argument that the Commercial Arbitration Rules of the American Arbitration Association will apply to any arbitration of the claims presented. Although the Court is not convinced that those rules will necessarily apply, it cannot be disputed that those rules exact an immense cost from the parties—not merely with respect to filing fees, but with respect to arbitrator fees, administrative fees, and a whole host of other costs, including charges for room

¹⁵ This case presents yet another example of a party exploiting a late-filed arbitration demand after utilizing the courtroom at full throttle, while strategically denying his opposition access to the same playing field. This sort of “manipulation of litigation for one party’s advantage and another’s detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law.” *Perry Homes* at 597. Courts have at times seemed to provide a generous allowance to litigants who appear to have abused the process—an allowance that comes at incredible costs to taxpayers and litigants—because of a stated (and now seemingly exalted) policy favoring arbitration. Reality and common sense say there oughta be a rule. Presumably, the same or higher deference would likewise apply to constitutional and legislative enactments, as well as to similar matters of contract law affecting forum selection. For example, in cases of constitutionally based special appearances under Tex. R. Civ. P. 120a (14th Amendment due process “minimum contacts” analysis), statutorily based venue transfer motions (*see* TEX. R. CIV. P. 86-89), and contract-based forum-selection clauses, the rules and the case law provide that a failure to expeditiously assert these rights results in their waiver. Why contractual arbitration provisions should enjoy more deference than the Constitution, state law, or other contractual provisions, is objectively inexplicable. Equally inexplicable is the basis for the oft-repeated refrain that arbitration is a fast and inexpensive way to settle disputes. In cases comparable to the present one, it is neither. Notably, federal law has recently departed from a pro-arbitration stance with the passage of Public Law 111-203, the Dodd-Frank Wall Street Reform and Consumer Protection Act, effective July 15, 2010. The Act voids pre-dispute arbitration agreements that purport to subject claims under the Sarbanes-Oxley Act to arbitration.

rental and other items. If a record is to be made, it is obtained at the expense of the parties. In this case, there is also the possibility, if not the probability, that a three-member arbitration panel would be required—effectively tripling the costs. The record is undisputed at this point in time that neither Staxxring nor Langford can afford to pay these costs. In fact, those costs would prove ruinous. Nor has Adams agreed to pay the costs on Staxxring's behalf or reimburse it for the amount of money his affirmative actions have cost. Additionally, the rules cited do not guarantee access to the merits-based discovery that the Texas rules provide and that Adams has so vigorously and fruitfully exploited to his benefit and to the detriment of the plaintiffs. "Such manipulation of litigation for one party's advantage and another's detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law." *Perry Homes*, 258 S.W.3d at 597.

For an arbitration agreement to stand, it must in the last analysis provide a forum in which a party "effectively may vindicate [his or her] statutory cause of action." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Our Texas Supreme Court has recognized the soundness of this proposition in *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002), where the Court favorably cited *Cole v. Burns Int'l Security Servs., Inc.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997), and other similar cases, on what it considered a question of substantive unconscionability. For its part, federal case law is replete with examples of courts refusing to enforce, as written, arbitration agreements that would deprive a party, because of a lack of financial wherewithal, of a forum to resolve a legal dispute.

If such were not the case, then those of few or modest means would often and certainly be shut out of any way to redress their legal injuries, with all of the stark constitutional implications such a notion brings.


To force this case to arbitration in the circumstances presented means one thing: the plaintiffs will be deprived of their right to have their legal case heard.

III.

The Defendant's Motion to Compel Arbitration, as later supplemented, is DENIED.¹⁶

It is further ORDERED that Defendant Adams submit to deposition on September 28, 2010, at the offices of his counsel. Following that deposition, Langford shall submit herself to deposition at her counsel's office. These depositions shall be completed by September 29, 2010. Upon the completion of Langford's deposition, plaintiffs shall take the depositions of the two other witnesses sought, which depositions shall be completed by September 30, 2010. If no agreement can be reached as to the time and location of the latter two depositions, they shall occur in this Court's conference room on the afternoon of September 29, 2010, and shall be completed by no later than September 30, 2010, unless otherwise ordered. Plaintiffs' request for sanctions on their second motion to compel is CARRIED with the case.

Signed this 28th day of August, 2010.



KEN MOLBERG
Judge, 95th District Court

¹⁶ This Court is under no illusions. The decision here is just a way-stop on the road to the appeals court and, if needed, the supreme court. *See* Adams' response to plaintiffs' second motion to compel depositions, filed August 25, 2010, Exh. A ("If the motion [to compel arbitration] is denied, then we will review our options including an appeal and related motion to stay the lawsuit pending appeal"). Remarkably, in the next paragraph, Adams says, with emphasis supplied by this Court: "In the interim, *we would like to avoid the time and expense for all parties and the Court* Mr. Adams is available for deposition [listing six dates]." If ultimately successful, Adams will effectively deprive the plaintiffs of not merely an otherwise expeditious and less costly resolution of this matter, but from quick and effective access to the various extraordinary writs and relief that he himself has demanded (restraining order, injunction, receivership).

01:277

On July 25, 2009, following several days of testimony, the Court issued a Temporary Injunction, the salient parts of which need not now be repeated.

By his motion, Adams seeks, among other things, greater input into the affairs of the company and broader access to company information than this Court's current Order purports to allow. For its part, Bank of America continues to press the Court for expedited consideration of its request to interplead the funds contained in Staxxring's bank account into the registry of the Court. It argues that it must do so because there are, according to Adams, competing claims among the parties to those funds. The plaintiffs simply request that the Court deny all pending motions.

On multiple occasions over the course of these proceedings, the Court has had the opportunity to review the evidence and controlling case law. It has also had the opportunity to keenly observe the in-court demeanor of the parties (as witnesses and participants) and their actions since the filing of this lawsuit.

The Court is concerned that Adams' mission has begun to take on the appearance of a vendetta—one more readily calculated to put an end to Staxxring as a result of his disdain for Langford than promote or save it or Adams' own interests and investments therein.

For example, while not conclusive, the unchallenged evidence before the Court indicates that Adams only recently deliberately used his personal relationships to interfere with and influence the termination of a company line of credit at Fidelity Bank that evidently had been routinely renewed on a year-to-year basis in prior times.¹ The fallout from this has clearly

¹ On August 11, 2009, counsel for the bank informed Staxxring that it was calling the Fidelity note, demanding payment of more than \$200,000 within seven days. Fidelity retroactively canceled a draw against the credit line after those funds had already been deposited into the Staxxring operating account.

U:278

jeopardized the ability of Staxxring to carry on the ordinary course of its business. Remarkably, this was done at a time when recent testimony showed that the company's financial future was improving.

Similarly, Adams continues to vigorously press claims against Bank of America, the admitted purpose of which is to force a termination of (or "fecze," as Adams puts it) the company's bank account, all to the obvious detriment of the business.² This is done in the absence of any evidentiary indication that Langford has somehow mismanaged that account or that her actions in establishing the account have caused injury to Adams or the company, at the time the Bank is maintaining this account as operational under a specific Order of this Court that gave Langford, on behalf of the company, and "to the exclusion of any other officer of Staxxring, [all] rights to establish, maintain, utilize, control and/or terminate the Staxxring bank account [with] Bank of America." Adams' conduct comes in spite of this Court's Order that enjoined him from:

* * * *

- (b) interfering with the ongoing business operations of Staxxring, including interference with Staxxring's bank accounts, contracts, repositories, depositories, vendors or customers;

² Adams joined Bank of America in this case, alleging claims of conversion and negligence. The Court is not currently aware of any legitimate basis for the conversion claim and questions whether such an assertion is viable under Texas law in the instant circumstances. Adams claims the bank was negligent in establishing the account for failure to follow appropriate procedures. Given that a negligence cause of action requires proof of injury, the Court inquired as to same. At this point, the Court has been presented with no such proof and, as it now stands, the negligence case is at best akin to suing someone for crossing the center line without running into anybody. As to the claims of conversion and negligence, assuming they are viable, the Court is not advised how the Staxxring account balance is implicated by such claims. Nevertheless, the apparent formal basis of Bank of America's interpleader request is Adams' bald assertion that he somehow enjoys a claim to the funds in the Staxxring operating account. The legal underpinnings of this allegation are not apparent.

- (c) committing any act which would make it impossible to carry on the ordinary course of business of Staxxring;
- (d) knowingly committing any act that would jeopardize the ability to carry on the ordinary course of business of Staxxring;
- (e) disparaging Langford or Staxxring in any manner that is likely to result in harm to the business operation of Staxxring.

For her part, Langford can be accused of being less than forthcoming with financial information due Adams. In its previous Order, this Court directed Langford to provide Adams "reasonable access to Staxxring's books and records." Assuredly, this requires providing Adams most such information (e.g., bank statements, balance sheets, income statements, information relating loans or notes with third parties, and similar financial records) on a monthly basis. The Court also prohibited Langford from "entering into or terminating a material contract on behalf of Staxxring without prompt notice of the occurrence of said action to [Adams]." A fair reading of this provision requires Langford to provide promptly information regarding Staxxring's financial obligations and undertakings with third parties.

Without strict adherence to these directives by Langford, Adams will not be in a position to adequately monitor the conduct of the business and take appropriate action should such be warranted.

Having considered the evidence and the arguments of counsel on the pending motions, it is the opinion of the Court that Bank of America's Motion for Reconsideration and Defendant Adams' Motion to Clarify or Modify should be denied.

It is the Court's further opinion that at any future hearings at which he is present, Defendant Adams must seek advance approval of the Court before leaving the courtroom.

280

IT IS SO ORDERED.

Signed this 24th day of August, 2009.



KEN MOLBERG
Judge, 95th District Court