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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No.: 2021-001342

Jessica Bennett and Thuy N. Gasser, individually and on behalf of those similarly situated, ...Respondents,

v.

ACS Primary Care Physicians-Southeast P.C., ...Appellant.

FINAL BRIEF OF APPELLANT ACS PRIMARY CARE PHYSICIANS-SOUTHEAST P.C.

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STATEMENT OF THE ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO CORRECTLY APPLY THE DIRECT BENEFITS TEST TO ESTOP RESPONDENT FROM DENYING THAT THE ARBITRATION CLAUSE IN THE PROVIDER AGREEMENT APPLIES TO HER.

2. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO COMPEL RESPONDENT'S CLAIMS TO ARBITRATION UNDER THE FAA.

3. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO COMPEL RESPONDENT'S CLAIMS TO ARBITRATION UNDER THE SCUAA.

4. WHETHER RESPONDENT'S CLAIMS SHOULD BE ARBITRATED ON A BILATERAL BASIS.

5. WHETHER RESPONDENT'S CLAIMS SHOULD BE COMPELLED TO ARBITRATION AND THE COMPLAINT SHOULD BE DISMISSED.

STATEMENT OF THE CASE

This matter is before the Court on appeal from an Order of the Honorable Judge Steven H. John in the Fifteenth Judicial Circuit dated November 23, 2021 (the "Order"). Appellant ACS Primary Care Physicians-Southeast P.C. ("ACS") filed a timely notice of appeal on December 3, 2021.

I. THE PARTIES

Respondent Jessica Bennett ("Respondent") alleges that she is a resident of Myrtle Beach in Horry County, South Carolina, and that she had a health insurance policy through Blue Cross Blue Shield of South Carolina ("BCBS"). (R. p 67 ¶ 7, R. p 68 ¶ 15.) Respondent also purports to represent a class of individuals similarly situated who were covered by BCBS insurance and received services from ACS providers. (R. p. 70 ¶ 28.)

ACS is a professional organization, organized under the laws of the State of Georgia, providing healthcare professionals to various hospitals and healthcare facilities. (R. p 67 ¶ 8.)

II. UNDERLYING FACTS

ACS is an in-network provider for BCBS pursuant to a Provider Agreement with BCBS. (R. p 67 ¶ 18; R.. pp. 182-184; R. pp. 186-197.) Respondent further alleges that, under the agreement between ACS and BCBS (the "Provider Agreement"), BCBS agreed to pay ACS for certain medical services covered under Respondent's BCBS plan in exchange for ACS's agreement to reduce its fees for those services. (R. p 68 ¶ 17; *see also* Provider Agreement.)

As relevant here, the Provider Agreement states that BCBS will pay ACS for "Covered Services in accordance with the benefit allowance of the Member's Benefits Contract." (R. p. 188.) "Covered Services" are defined as "the services a Member is entitled to under the terms and conditions of such Member's Benefits Contract." (R. p. 187.) Under the Provider Agreement, ACS must accept certain fees for Covered Services, subject to the Member's Benefits Contracts. (R. p. 189.) Notably, the Provider Agreement does not require ACS to bill BCBS directly, nor does it create any obligations related to fees charged for services that are not Covered Services.

The Provider Agreement contains a mandatory arbitration clause, stating that BCBS and ACS "agree to arbitrate [any] problem or dispute" that "may arise under this Agreement." (R. p. 195.) Further, the Provider Agreement states, in bold, capitalized, and underlined text at the top of the first page: "**THE TERMS OF THIS AGREEMENT SHALL BE SUBJECT TO ARBITRATION."** (R. p. 186.)

Respondent alleges that, on or about December 9, 2019, she was in an automobile accident. (R. p. 68 ¶ 13.) She went to Grand Strand Regional Medical Center, where ACS physicians rendered medical services to her. (*Id.* ¶ 14.) According to the Complaint, ACS did not submit the claim for its services to BCBSSC, but instead billed Respondent directly. (R. p 69

¶¶ 19, 22.) Further, Respondent alleges that ACS charged her more than the amount specified for her treatment in the Provider Agreement. (*Id.* ¶ 21.)

Based on these allegations, on May 21, 2020, Respondent filed her Complaint in the Court of Common Pleas in Horry County, South Carolina. The Complaint, which is a putative class action, was brought on behalf of Respondent and "all other similarly situated persons. . . insured by BCBS receiving services from [ACS] in any medical facility. . . for whom [ACS] failed to submit the bill for medical services to BCBS." (*Id.* ¶ 28.) Respondent alleges causes of action for breach of contract and unjust enrichment. In Respondent's breach of contract claim, she alleges that she is a third-party beneficiary of the Provider Agreement and that ACS breached that agreement by billing her directly and by failing to honor the rates set forth in the Provider Agreement. (R. p. 71 ¶ 38.) In Respondent's unjust enrichment claim, she alleges that ACS was unjustly enriched by the same actions. (R. p. 72 ¶ 41.) Among other remedies, Respondent seeks both payment of the sums collected by ACS, a constructive trust for the sums collected by ACS, and "further relief as the Court deems necessary and proper." (R. p. 71 ¶ 39, R. p. 71 ¶ 45.)

III. PROCEDURAL HISTORY

Respondent filed the Complaint in May 21, 2020, in the Horry County Court of Common Pleas and ACS timely removed the case to the United States District Court for the District of South Carolina, Florence Division, on or about June 26, 2020. The case was ultimately remanded to Circuit Court on August 13, 2020, where ACS filed a Motion to Compel Arbitration and Dismiss or Stay on August 31, 2020 (the "Motion"). The Circuit Court denied the motion in an Order dated November 23, 2021 (the "Denial Order"). ACS timely filed a notice of appeal on

December 3, 2021. As demonstrated herein, the Order should be vacated and Respondent should be compelled to arbitration and her case should be dismissed.

STANDARD OF REVIEW

The Court should review whether Respondent's claims are subject to arbitration *de novo*. "Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d. 167, 172 (2019).

SUMMARY OF ARGUMENT

Respondent attempts to both enforce the provisions of the Provider Agreement she finds favorable and reject the portions she does not like (the arbitration clause). Under South Carolina law, however, Respondent is estopped from both seeking the benefits of the Provider Agreement and denying the responsibility to arbitrate. In the Denial Order, the trial court erroneously denied the motion to compel and ignored the basic principles of equity under South Carolina law.

In the Denial Order, the Circuit Court denied ACS's motion to compel arbitration and incorrectly concluded that Respondent, who did not sign the Provider Agreement between ACS and BCBS, should not be estopped from denying that the arbitration clause in the Provider Agreement applied to her. Specifically, the Circuit Court agreed that, in order for Respondent to be estopped under the "direct benefits" test, Respondent must either have "actively exploit[ed]" the Provider Agreement or "mislead[] [the other party] to [her] injury." (R. p. 34.) However, the Circuit Court concluded (without evidence) that Respondent could not have actively exploited the Provider Agreement because she "was completely unaware that the [Provider Agreement] existed when she received her medical treatment. . ." (*Id.*)

As ACS explains in Section I of this brief, respectfully, the Denial Order is erroneous as a matter of law and should be overturned. Under South Carolina law, Respondent should be estopped from denying the arbitration clause in the Provider Agreement applies to her because she has brought a claim against ACS for breach of the Provider Agreement attempting to enforce the agreement and alleging that she is a third-party beneficiary of that agreement. ***By alleging that ACS breached the Provider Agreement, Respondent is seeking to actively exploit the Provider Agreement***. Respondent's claim for breach of the Provider Agreement is itself sufficient to establish the "direct benefit" required under the law to estop Respondent from denying that the arbitration clause applies to her. Moreover, any refusal to apply the "direct benefits" test is preempted by the FAA. Under basic principles of contract law, a defendant in a third-party beneficiary claim retains all defenses under the contract. Denying application of the "direct benefits" test here would impermissibly subject arbitration to disfavored status.

In addition, even independent of the fact that Respondent brought a claim for breach of the Provider Agreement, Respondent herself alleges that she received a direct benefit under the Provider Agreement. This allegation alone is sufficient to estop Respondent from denying the arbitration clause in the Provider Agreement applies to her.

Finally, as ACS explains in Sections II-V of this motion, dismissal and an order to compel bilateral arbitration is otherwise proper. First, Respondent's claims are subject to arbitration under the FAA because the Provider Agreement involved interstate commerce. Second, Respondent's claims are subject to arbitration under the SCUAA because the Provider Agreement complies with SCUAA's requirements. Third, arbitration must be on a bilateral basis because ACS did not contract for class based arbitration. And finally, Respondent's claims should be dismissed because all of the claims are subject to arbitration.

As a result, this Court should reverse the Denial Order and require the Circuit Court to enter an order compelling arbitration and dismissing Respondent's claims.

ARGUMENT

I. RESPONDENT IS ESTOPPED FROM DENYING THAT THE ARBITRATION CLAUSE APPLIES TO HER.

The Circuit Court misapplied the direct benefits test and therefore failed to estop Respondent from denying the arbitration clause in the Provider Agreement, while simultaneously seeking to enforce other terms in the same agreement.

A. Respondent seeks a "direct benefit" under the Provider Agreement because she has brought a claim for breach of the Provider Agreement alleging that she is a third-party beneficiary under that agreement.

"The FAA reflects a liberal federal policy favoring arbitration agreements." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2012) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983)). "Underlying this policy is Congress's view that arbitration constitutes a more efficient dispute resolution process than litigation." *Id.* As with the FAA, "[t]he policy of [] South Carolina is to favor arbitration of disputes." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas*, 418 S.C. 1, 6, 791 S.E.2d 128 (2016); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 480, 596, 553 S.E. 2d 110, 118 (2001); *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 884 S.E.2d 66 (Ct. App. 2020).

It is undisputed that Respondent is not a signatory to the Provider Agreement. Regardless, Respondent is bound by the arbitration agreement in the Provider Agreement because ***she seeks to enforce it.*** Respondent must be estopped from denying that the arbitration clause applies to her because she seeks the direct benefits of other provisions of the same contract.

"Equitable estoppel precludes a party from asserting rights [s]he otherwise would have had against another when h[er] own conduct renders assertion of those rights contrary to equity." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295, 733 S.E.2d 597, 604 (Ct. App. 2012); *see also Wachovia Bank N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006) (The "legal principle [of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage." (internal quotation marks and alterations omitted)). Applying this principle to the arbitration context, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a ***direct benefit*** from a contract containing an arbitration clause." *Pearson*, 400 S.C. at 290 (emphasis added) (internal quotations and citations omitted); *see also Am. Bankers Ins. Group v. Long*, 453 F.3d 623, 628 (4th Cir. 2006). A nonsignatory seeks a "direct benefit" under a contract when, among other things, she asserts a claim based on her alleged status as a third-party beneficiary of the contract. *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177 (holding that "direct benefits" estoppel applies "where plaintiffs sue and seek relief based on contracts containing arbitration clauses"); *see also Am. Bankers*, 453 F.3d at 629 (The "direct benefit" test "examine[s] whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, ***assert a breach of duty created by the contract containing the arbitration clause***." (emphasis added)). In such a situation, the nonsignatory who is relying on the contract as the basis for her claim is estopped from denying she is a party to it. *Id.* The direct benefits test is uniquely situated to address just this issue.

Here, Respondent seeks a "direct benefit" under the Provider Agreement because she has alleged she is a third party beneficiary of that agreement and she has sued ACS for breach of the agreement under a third-party beneficiary theory. (R. p. 69 ¶ 26; R. p. 71 ¶ 38 (alleging ACS

"breached its contract with BCBS, Plaintiff, and other class members, as third-party beneficiaries, by refusing to submit claims to BCBS").) Because Respondent is relying on the Provider Agreement as the foundation for her breach of contract claim, she is estopped from denying she is a signatory to that agreement and that the arbitration agreement applies to her under the "direct benefits" test. *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177. Put simply, because Respondent seeks to enforce the Provider Agreement by alleging "a breach of contract created by the contract containing the arbitration clause," (*Am. Bankers*, 53 F.3d at 629), she is subject to all defenses under it, including arbitration.

Moreover, given the strong state and federal public policy in favor of arbitration, this Court should unequivocally apply the direct benefits test to promote consistency in state and federal law. *See In re Kellog Brown & Root*, 165 S.W.3d 723, 739 (Tex. 2005) (noting the importance of consistency in state and federal law). This Court should therefore apply the test that logically aides the Court in determining whether Respondent should be estopped from denying an arbitration clause – the direct benefits test.

B. The Denial Order erroneously concluded that Respondent's third-party beneficiary claim did not satisfy the "direct benefits" test.

1. Respondent "actively exploited" the Provider Agreement by alleging a claim for breach of contract alleging that she is a third-party beneficiary of that agreement.

In its Denial Order, the Circuit Court wrongly concluded that estoppel does not apply here because "estoppel is reserved for instances where a beneficiary of a contract 'actively exploits' the agreement or 'mislead[s] [the other party] to his injury.'" (R. pp. 33-34 (quoting *Weaver v. Brookdale Senior Living*, 431 S.C. 223, 232, 847 S.E. 2d 268, 274 (Ct. App. 2020)). According to the Denial Order, Respondent cannot be estopped from denying the arbitration

clause applies to her because she "was completely unaware that the [Provider Agreement] existed when she received her medical treatment." (*Id.*)

Respectfully, this conclusion is erroneous, and must be corrected. As the South Carolina Supreme Court observed in *Wilson*, direct benefits estoppel applies "where plaintiffs sue and seek relief based on contracts containing arbitration clause." 426 S.C. at 344, 827 S.E.2d at 177. In support of this statement, the court in *Wilson* cited *International Paper Co. v. Schwabedissen Maschinen & Analgen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000). In *International Paper*, the plaintiff purchased an industrial saw from a distributor. *Id.* at 414. The plaintiff was not satisfied with the saw, and sued the manufacturer for breach of various warranties. *Id.* The warranty agreement—which was between the manufacturer and distributor only (and not the plaintiff)—contained an arbitration clause, and the manufacturer sought to compel the plaintiff's claims against it to arbitration. *Id.* at 415. The plaintiff argued that "it had no knowledge of, and so could not be bound by" the arbitration clause. *Id.* Despite plaintiff's lack of knowledge, the Fourth Circuit held that the plaintiff was bound by the arbitration clause because the claims were based on the warranty agreement. Specifically, the court held:

> In its amended complaint, [the plaintiff] alleges that [the manufacturer] failed to honor the warranties in the [contract between the manufacturer and distributor], and it seeks damages, revocation, and rejection "in accordance with" that contract. [The plaintiff's] entire case hinges on its asserted rights under the [contract between the manufacturer and distributor]; it cannot seek to enforce those contractual rights and avoid the contract's requirement that "any dispute arising out of" the contract be arbitrated.

Id. at 418. As the Court in *Wilson* explained, *International Paper* stands for the proposition that the "nonsignatory plaintiff could not bring claims to enforce the guarantees and warranties issued by the defendant in a contract with another party without complying with an arbitration provision contained in that contract." *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177. In other words, a

nonsignatory cannot simultaneously attempt to enforce a contract against a party and also repudiate the arbitration provision in the same contract, regardless of the nonsignatory's "knowledge" of the arbitration clause.

Applying *International Paper* and *Wilson* in this case, Respondent's knowledge of or active exploitation of the Provider Agreement at the time she received the medical treatment at issue is irrelevant to enforcement of the arbitration clause. The crucial point is that Respondent is now asserting a claim against ACS alleging that she is the third-party beneficiary of a contract containing an arbitration clause. Phrased differently, ***Respondent is now seeking to actively exploit the Provider Agreement by asserting a claim for breach of the Provider Agreement as a third-party beneficiary of that Agreement***. Accordingly, the direct benefits test applies in this situation. Indeed, this is textbook direct benefits case. *See Wilson*, 426 S.C. at 344, 827 S.E.2d at 178; *International Paper*, 206 F.3d at 418; *see also See Kiawah Island Util., Inc. v. Westport Ins. Corp.*, No. 2:19-cv-1359-DCN, 2019 U.S. Dist. WL 5394200, at *8-9 (D.S.C. Oct. 2, 2019); *Osborne v. Marina Inn @ Grand Dunes, LLC*, No. 4:08-cv-0490, 2009 U.S. Dist. WL 2009 WL 3152044, at *9 (D.S.C. Sept. 23, 2009). The Circuit Court erred in concluding otherwise, and this Court should overrule that decision and direct the Circuit Court to enter an Order enforcing the arbitration clause.[1]

Indeed, the District Court in *Kiawah Island Util., Inc. v. Westport Ins. Corp.* explicitly rejected the notion that the direct benefits test is limited to an examination of the course and

[1] The trial court also erred in finding that Respondent was "unaware that the [Provider Agreement] existed when she received her medical treatment." (R. pp. 33-34.) There is no evidence in the record to support that finding. In any event, Respondent was clearly aware of the Provider Agreement at the time she filed her lawsuit and, in so doing, she actively exploited the Provider Agreement and thereby satisfied the "direct benefits" test. Moreover, as explained above, the Fourth Circuit has held that previous knowledge of the terms of the agreement is not material. *See International Paper*, 206 F.3d at 415 and 418.

scope of the parties' underlying dealings with one another. 2019 U.S. Dist. WL 5394200, at *9-11. In that case, the plaintiff employed a third party to install underground piping, but delays caused significant expenses and the plaintiff filed suit seeking coverage under the third party's agreement with its insurer. *Id.* The *Kiawah Island* court explained that the nonsignatory's knowledge and exploitation of the agreement containing the arbitration clause can be a factor when the alleged direct benefit arises in the course and scope of the parties' underlying dealings with one another. *Id.* However, an inquiry into knowledge and exploitation is ***not required*** when the party to be estopped is claiming to be a third-party beneficiary of the contract containing the arbitration clause. *Id.* Thus, the court in *Kiawah Island* held that it "need not examine whether [the plaintiff] knew about the Arbitration Clause because that factual question only relates to whether [the plaintiff] is seeking a benefit from the [agreement containing the arbitration clause], and [the plaintiff] is clearly seeking a benefit by seeking coverage." *Id.* at 11.

Here, just like the plaintiff in *Kiawah Island*, Respondent is seeking a direct benefit from the Provider Agreement through her claim for breach of that agreement as a third-party beneficiary. The Circuit Court therefore erred in attempting to examine whether Respondent knew about the arbitration clause in the Provider Agreement. Instead, the Court should focus on Respondent's attempts to seek damages for an alleged breach of the Provider Agreement, a clear attempt to seek benefits thereunder. Thus, Respondent should be estopped from denying that the arbitration clause in the Provider Agreement applies to her.

It appears that the trial court's error in this regard was due to its mistaken reliance on *Weaver v. Brookdale Senior Living, Inc.* In that case, the plaintiff's grandmother signed an agreement with the defendant, a nursing home where the grandmother lived. *Weaver*, 431 S.C. at 227, 847 S.E.2d at 271. The plaintiff found her grandmother's maimed and dismembered

body in a pond after she had been missing from the nursing home overnight, and the plaintiff brought several tort claims against the nursing home (negligence, negligent infliction of emotional distress and intentional infliction of emotional distress). *Id.* at 227-228. The ***defendant / signatory*** was the only party to attempt to use or rely on the contract between the grandmother and defendant to limit the plaintiff's claims to the duties in that contract and compel arbitration. *Id.* at 231.

Unlike the non-signatory in *Weaver*—and like the plaintiff in *Kiawah Island* – Respondent satisfies the direct benefits test because ***she is alleging that she is a third-party beneficiary under the Provider Agreement.*** Respondent is asserting a claim for breach of contract relying ***entirely*** on the Provider Agreement, not on basic tenants of tort law. In *Weaver*, however, the plaintiff did not allege a claim for breach of contract based on the contention that she was a third-party beneficiary under the residential care contract. Instead, she brought only tort claims. Here, because Respondent has sued for breach of the Provider Agreement, *Weaver* is inapposite.

2. A holding that the "direct benefit" test does not apply here would be preempted by the FAA.

Moreover, the Denial Order's conclusion that the "direct benefits" test is not satisfied here is preempted by the FAA because that conclusion subjects arbitration agreements to special rules that apply only to contracts containing arbitration agreements and not to contracts generally.

Under 9 U.S.C. § 2, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Under this provision, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts."

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 116 S.Ct. 1652, 1653 (1996). Thus, "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Id.*; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343, 131 S.Ct. 1740, 1748 (2011) (holding the FAA does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives"). Applying this rule, the South Carolina Supreme Court has held that S.C. Code Ann. § 15-48-10(a)—the statutory provision that requires agreements containing an arbitration clause to contain a header on the first page of the agreement—is preempted by the FAA. *Soil Remediation Co. v. Nu-Way Env't, Inc.*, 323 S.C. 454, 459, 476 S.E.2d 149, 151–52 (1996).

Under general principles of South Carolina contract law, third parties to a contract may sue to enforce the contract if they can demonstrate they were "intended to be the direct beneficiary of the contract." *Touchberry v. City of Florence*, 295 S.C. 47, 48–49, 367 S.E.2d 149, 150 (1988). In such a situation, however, the third-party beneficiary's claim is subject to any defenses that might exist under the contract. *See* Restatement (Second) of Contracts § 309 (Defenses Against the Beneficiary), cmt. c ("The position of a [third-party] beneficiary is comparable to that of an assignee after knowledge of the assignment by the obligor. *His right, like that of an assignee, is subject to limitations inherent in the contract,* and to supervening defenses arising by virtue of its terms." (emphasis added)); 13 Williston, Contracts § 37:57 (4th ed. May 2021 Update) ("[A] third party beneficiary's rights are subject to any contract defense that the promisor could assert against the promisee if the promisee were suing on the contract."); *see also Bakery & Confectionery Union & Indus. Int'l Pension Fund v. Ralph's Grocery Co.*, 118 F.3d 1018, 1021 (4th Cir. 1997) ("Although a third party beneficiary can enforce the terms of a

contract that inure to its benefit, it is subject to defenses that the promisor could assert against the original party to the contract.").

Here, Respondent has alleged a claim for breach of contract against ACS on the theory that it is a third-party beneficiary of the Provider Agreement that contains an arbitration clause. In light of this allegation, the Denial Order is a ruling that arbitration—unlike all other defenses ACS may have to Respondent's third-party beneficiary claim—is unavailable to ACS. Accordingly, the Denial Order is in contravention of the common law rule that a third-party beneficiary's claim is subject to all defenses that might exist under the contract. In other words, the Denial Order singles out arbitration for suspect status. As such, the Denial Order is preempted by the FAA and must be reversed.[2]

C. The Denial Order erred in failing to recognize that Respondent's own Complaint alleges she received a "direct benefit" under the Provider Agreement.

Even putting aside the fact that Respondent is asserting a third-party beneficiary claim based on the Provider Agreement, Respondent's own factual allegations establish that the direct benefits test is satisfied here. Specifically, the Complaint alleges that Respondent was "deprived [] of the benefits of the discounts and other provisions negotiated between BCBS and [ACS]," and thus, alleges that Respondent received direct benefits from the Provider Agreement. (R. p. 71 ¶ 38). Both of the causes of action in the Complaint rely entirely on the alleged breach by ACS of the Provider Agreement and the resulting alleged damages to Respondent. (*See e.g.* R.

[2] In her briefing to the District Court, Respondent argued that there is a presumption against arbitration when a signatory to an arbitration agreement seeks to compel a non-signatory to arbitration. For the reasons set forth in the text, however, any such presumption would be preempted by the FAA. Moreover, even if such a presumption existed (and it does not), as noted, this is a prototypical direct benefit case. Thus, any presumption against arbitration would be overcome.

p. 71 ¶ 37-39; R. p. 72 ¶41, 43.) These allegations are conclusive on the point, and Respondent should not be permitted to speak out of both sides of her mouth in arguing otherwise. The Denial Order erred in failing to hold Respondent to this allegation.

II. RESPONDENT'S CLAIMS ARE SUBJECT TO ARBITRATION UNDER THE FAA.

This case is subject to bilateral arbitration under the FAA because both of Respondent's causes of action are covered by the arbitration clause at issue here. To determine whether to compel arbitration under the FAA, the Court should consider whether: (1) there is a dispute between the parties, (2) there is a written agreement to arbitrate that covers the dispute, (3) the transaction evidenced by the dispute involves interstate commerce, and (4) one party has failed, neglected or refused to arbitrate. *Damico*, 430 S.C. 188, 844 S.E.2d 66; *see also Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2012). In light of the liberal policy favoring arbitration, the party opposing arbitration bears the burden of proving that the dispute should not be arbitrated. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513, 522 (2000).

Here, arbitration should be compelled because all four factors are present:

First. There is plainly a dispute between the parties insofar as Respondent has filed a Complaint against ACS.

Second. The Provider Agreement contains an arbitration clause that covers the dispute. The arbitration clause provides that the parties "agree to arbitrate [any] problem or dispute" that "may arise under this Agreement." (R. p. 195.) Respondent's claim for breach of contract—*i.e.*, breach of the Provider Agreement—is plainly a claim that "arises under" that agreement. In other words, because Respondent has brought a claim for breach of the Provider Agreement, that claim "arises under" the Provider Agreement. *See, e.g.*, *Fleetwood Transp. Corp. v. Packaging*

Corp. of Am., No. 6:10-0129-JMC, 2012 U.S. Dist. LEXIS 31421, at *15 (D.S.C. Mar. 8, 2012) (compelling claim for breach of contract to arbitration under arbitration clause that applies to disputes "arising under the agreement"); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 563, 437 S.E.2d 22 (1993) ("Arbitration is a matter of contract and controlled by contract law."). Further, Respondent's claim for unjust enrichment also "arises under" the Provider Agreement because it has a "significant relationship" to the Provider Agreement. *See American Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996) (holding that the FAA applies to any claims "having a significant relationship to the contract regardless of the label attached to the dispute"); *see also Great W. Coal*, 312 S.C. at 563, 437 S.E. 2d at 23 ("Any doubts concerning the scope of arbitration should be resolved in favor of arbitration"). Thus, the unjust enrichment claim can stand alone without reference to the alleged breach of the Provider Agreement.

Third. The transaction at issue here involves interstate commerce. The FAA defines "commerce" as "commerce among the several States or with Foreign nations . . ." 9 U.S.C. § 1. The Supreme Court has held that the meaning of this provision of the FAA is as broad as the Commerce Clause itself. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1994). Courts regularly hold that the fact that the contract containing the arbitration provision is entered into between parties of different states alone demonstrates that the contract "involve[s] interstate commerce under the Supreme Court's expansive interpretation of the FAA." *Low Country Rural Health Educ. Consortium Inc. v. Greenway Med.*, No. 9:14-cv-00874-DCN, 2014 U.S. Dist. LEXIS 157418, at *15-16 (D.S.C. Nov. 5, 2014) (citing *Allied-Bruce*, 513 U.S. at 281).

Here, Respondent's claims involve citizens of different states and a contract made between citizens of different states, and therefore involve interstate commerce. Specifically,

Respondent is a South Carolina citizen, ACS is a Georgia professional corporation licensed to do business in Georgia, South Carolina, and Florida, and currently does business in Georgia and South Carolina, (*see* R. p. 182 ¶ 5.) and BCBS is based in South Carolina. Moreover, the Provider Agreement applicable to Respondent was negotiated on behalf of ACS from a location other than South Carolina. (R. p. 183 ¶ 13.) Because the transaction at issue here involves agreements between people and entities that cross state lines, the transaction involves interstate commerce.

Moreover, the facts of the transaction clearly demonstrate that interstate commerce is present. Here, ACS contracted with a facility in South Carolina, Grand Strand Regional Medical Center, to provide professional medical services. (R. p. 182 ¶ 6.) After an ACS clinician treats a patient in that facility, the part of the record documenting treatment rendered on that date is transmitted to a third party billing provider, HCFS Healthcare Financial Services, LLC ("HCFS"), located in Alcoa, Tennessee, where it employs coders to interpret the records and produce CPT codes and charges. (R. p. 183 ¶ 8.) A bill is then generated and sent to the payer from billing operations in Florida. (*Id.*) Thus, the conduct involved in the billing of Respondent and / or BCBS on behalf of Respondent clearly involves interstate commerce throughout various southeastern states.

Fourth. Respondent's act of filing the Complaint plainly demonstrates a failure, neglect, or refusal to arbitrate.

For these reasons, the Court should compel arbitration under the FAA.

III. RESPONDENT'S CLAIMS ARE SUBJECT TO ARBITRATION UNDER THE SCUAA.

Even if the Provider Agreement did not involve interstate commerce (and it does), arbitration would still be required under the SCUAA. The SCUAA provides that "[a] written

agreement . . . in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable." S.C. Code. § 15-48-10(a). For the same reasons as already discussed in connection with the FAA, Respondent's claims are also subject to arbitration under the SCUAA. Specifically, Respondent's claims "arise under" the Provider Agreement and, thus, are subject to its arbitration clause. *See Fleetwood Transp. Corp.*, 2012 U.S. Dist. LEXIS 31421, at *15; *Great W. Coal*, 312 S.C. at 563, 437 S.E.2d at 23.

Further, under the SCUAA, "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters . . . on the first page of the contract." S.C. Code. § 15-48-10(a). Here, the agreement to arbitrate appears on the first page of the agreement in bold and underlined capital letters. (*See* R. p. 186.) Accordingly, the Court should also compel arbitration under the SCUAA.

IV. THE ARBITRATION MUST BE ON A BILATERAL BASIS.

Although Respondent has attempted to plead a class action, the arbitration here should be on a bilateral basis only because the Provider Agreement does not authorize class arbitration. (*See* R. p. 195.) Instead, the arbitration clause in the Provider Agreement is written on a bilateral basis only. "[A] party may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party ***agreed*** to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010); *see also Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 873 (4th Cir. 2016) (*Carlson I*) ("[A] party may not be compelled to submit to class arbitration absent express agreement."); *Del Webb Cmtys., Inc. v. Carlson*, No. 9-14-cv-1877-PMD, 2017 WL 1060139 (D.S.C. Feb. 1, 2017) aff'd 698 F. App'x 761 (4th Cir. Oct. 13, 2017) (*Carlson II*) ("The principal reason to conclude that [an] arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it."); *Grant v. Chevrolet*, No.

5757, 2020 S.C. App. LEXIS 79, at *5 (S.C. Ct. App. Aug. 12, 2020) (quotations omitted) ("[A] party *may not be compelled* under the FAA to submit to class arbitration *unless* there is a contractual basis for concluding that the party *agreed* to do so."). Because the Provider Agreement does not authorize arbitration on a class basis, the Court should enforce the arbitration agreement according to its terms and compel Respondent to pursue her claims in bilateral arbitration.

V. RESPONDENT'S CLAIMS SHOULD BE DISMISSED.

Finally, Respondent's claims should be dismissed, rather than stayed, because all of her claims are subject to arbitration. Dismissal is the "proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001). Because all of Respondent's claims are subject to bilateral arbitration, this Court should remand this case to the Circuit Court to enter an order to compel Respondent's claims to arbitration and dismiss the Complaint.

In the alternative to dismissal, this Court should remand to the Circuit Court to enter an order staying any claims that it concludes are not subject to arbitration during the pendency of the arbitration.

CONCLUSION

For the foregoing reasons, the Court should reverse the Circuit Court's denial of the Motion to Compel and remand the claims to the Circuit Court with direction to enter an order compelling all of Respondent's claims to bilateral arbitration and dismissing the Complaint. In the alternative to dismissal, the Court should direct the Circuit Court to stay this matter pending arbitration.

Respectfully submitted,

Dated: June 21, 2022

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Steven H. John, Circuit Court Judge

Appellate Case No.: 2021-001342

Jessica Bennett and Thuy N. Gasser, individually and on behalf of those similarly situated, ...Respondents,

v.

ACS Primary Care Physicians-Southeast P.C., ...Appellant.

CERTIFICATION OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Dated: June 21, 2022

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PROOF OF SERVICE

I certify that I have served Appellant's Final Brief in Gasser on the Respondents, Jessica Bennett and Thuy N. Gasser, individually and on behalf of those similarly situated, via E-mail, upon their respective attorneys of record as properly addressed below this 21st day of June, 2022:

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