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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2012-CP-21-01149

Pee Dee Healthcare, P.A., ...Respondent,

v.

Lower Florence County Hospital District d/b/a
Lake City Community Hospital, ...Appellant,

MOTION TO DETERMINE APPEALABILITY
and
HOLD APPELLATE TIMELINES IN ABEYANCE

This is an appeal from an order granting Respondent's (Pee Dee's) motion to compel arbitration. Such orders generally are not immediately appealable. *Heffner v. Destiny, Inc.*, 471 S.E.2d 135 (S.C. 1995); *but see Toler's Cove Homeowner's Ass'n, Inc. v. Trident Constr. Co., Inc.*, 586 S.E.2d 581 (S.C. 2003) (allowing immediate appeal of order granting arbitration because issues needed to be addressed). The Appellant (the District) respectfully submits that the issue presented in this case is immediately appealable for the reasons set forth herein. The District therefore requests that this Court determine whether this immediate appeal is permissible under the particular circumstances of this case. In addition, the District requests that the time limits for perfecting this appeal be held in abeyance pending this Court's determination of this motion. (**Note:** The District has ordered the hearing transcript).

BACKGROUND FACTS & PROCEDURAL HISTORY

Pee Dee sued the District in 2008 for breach of three contracts with the same arbitration clause.[1] The case was removed from the active roster in 2009 and restored in 2012. The mediator declared an impasse in January 2014. Pee Dee did not move for arbitration until January 2020.

The District opposed arbitration, asserting it never entered any of the contracts, because the persons purportedly signing the contracts did not have the authority to do so, and one of the signatures was a forgery. Thus, the contracts and arbitration agreements did not exist. To that end, the District presented affidavits from the persons who purportedly signed the contracts on behalf of the District, and these uncontroverted affidavits established the following:

1. Clarence W. Bowman's signature appears on all three contracts. Joseph Landrum's signature also appears on one of the contracts.

2. Landrum was a member of the District's Board from 1991 to 2007, and he was Chairman at the time of the alleged contracts in 2007. (Exh. 2 at 1, ¶ 2). Bowman was an employee of the District and ultimately CEO before leaving, but he was never a member of the District's Board of Directors (Board). (Exh. 3 at 1, 2).[2]

3. The District's Board never discussed, considered, or approved the contracts. (Exh. 2 at 1, ¶¶ 4-7). Landum did not recall ever seeing the contract bearing his signature and did not believe the signature on the contract is his signature. (Id. at 1-2, ¶ 8).

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[1] Each arbitration agreement had the same language and provided in relevant part as follows:

> The parties agree that any and all disputes or controversies, whatever they may be and however they are defined, in any way or manner, arising out of or related to this agreement or the relationship between the individual and/or corporate signatories to this agreement (a) shall be subject to arbitration in Columbia, South Carolina and shall be governed by rules of reasonableness, civility, and mutual reliance upon the honesty and trust one to the other. It is specifically understood and agreed that this clause is to be interpreted broadly and inclusively by any party, court or tribunal considering the enforceability of this clause. Any decision rendered and made pursuant to any arbitration shall be binding and conclusive upon the parties...
>
> (Order, Exh. 1 at 6-7).

[2] Bowman's affidavit bears the caption in a different but related case. It was also submitted in this case.

Despite these undisputed facts, the circuit court granted Pee Dee's motion to compel arbitration.[3]

ARGUMENT

I. The circuit court erred in compelling arbitration, because there is no contract or agreement of any kind between the parties, and because the circuit court misapplied the proper analytical framework.

A. There is no arbitration agreement between Pee Dee and the District, because the persons purportedly signing the contracts on behalf of the District did not have the authority to do so.

The cornerstone requirement and gateway inquiry for compelling arbitration is a judicial determination that there exists a written arbitration agreement between the parties.[4] An arbitration agreement is not enforceable if signed by a person without authority to enter the agreement on

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[3] By a February 5, 2009 Order of the Supreme Court, the present case was consolidated with four other cases. In the related case Civil Action Number 2008-CP-21-0706, the circuit court granted a temporary restraining order and later partial summary judgment to the District, declaring *void ab initio* the provisions of the March 26, 2007 Lease Purchase Agreement (LPA), Bill of Sale, and January 25, 2008 LPA between the District and Mid-Carolina Hospital Group (MCHG)(a related party to Pee Dee, formed and controlled by Tony Megna), purporting to transfer the assets and properties of the District to MCHG. (See Exh. 4, December 3, 2014 Order by Honorable George C. James, Jr.).

[4] The South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 *et seq.* repeatedly emphasizes the cornerstone requirement and gateway judicial inquiry as shown below:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, *save upon such grounds as exist at law or in equity for the revocation of any contract.* [§ 15-48-10(a) (all emphasis added)]
>
> On application of a party showing an agreement described in Section 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, *but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.* [§ 15-48-20(a) (emphasis added)]
>
> On application, the court may stay an arbitration proceeding commenced or threatened *on a showing that there is no agreement to arbitrate.* Such an issue, when in substantial and bona fide dispute, *shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.* [§ 15-48-20(b) (emphasis added)]
>
> Upon application of a party, the court shall vacate an award where . . . [t]here was *no arbitration agreement* **and** the *issue was not adversely determined in proceedings under Section 15-48-20* **and** the *party did not participate in the arbitration hearing without raising the objection* [§ 15-48-130(a)(5) (all emphasis added)]

behalf of the principal.[5] The District is a special purpose district created by the General Assembly, and can only act through its Board.[6] A governmental entity like the District "is not bound by a contract made in its name by one of its officers or by a person in its employ, although within the scope of its corporate powers, *if the officer or employee had no authority to enter into such a contract in behalf of the* [governmental entity]."[7] Anyone contracting with a governmental entity must verify the authority of the person signing the contract.[8] Here, the persons purportedly signing the contracts on behalf of the District did not have the authority to do so. Thus, there is no contract of any kind between Pee Dee and the District, including any arbitration agreement.

B. The circuit court misapplied the *Prima Paint* doctrine, the framework set forth in *Rent-A-Center*, and the decision in *Damico*.

Despite the undisputed evidence that no one had the authority to enter the contracts for the District, the circuit court enforced the arbitration agreements under the following analysis:

> Similar to the *Damico* case and in line with the *Prima Paint* Doctrine, this Court finds that the arbitration provisions, identical within all three contracts, must be separated from the rest of the contracts in order to determine validity. Under the framework set forth in *Rent-A-Center*, the Court concludes *Defendants' challenge to the agreements, taken as a whole, is not relevant to determining whether the arbitration provisions are enforceable*.
>
> This Court finds the arbitration provisions in question to be valid and enforceable. Defendants' *contentions regarding the validity of the contracts generally are to be decided by an arbitrator, not this Court*. Defendant's *claim*

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[5] *Arredondo v. SNH SE Ashley River Tenant, LLC*, 856 S.E.2d 550, 553-559 (S.C. 2021), *rev'g* Op. No. 2019-UP-293 (S.C. Ct. App. filed Aug. 14, 2019) (Daughter did not have authority to enter arbitration agreement on behalf of Father in executing documents for admission to an assisted-living facility); *Stott v. White Oak Manor, Inc.*, 828 S.E.2d 82, 85-88 (S.C. App. 2019) (Niece did not have authority to enter arbitration agreement on behalf of Uncle in executing documents for admission to a skilled-nursing facility).

[6] Act No. 1095, 1962 S.C. Acts 2683, §§ 2, 3, 5 at 2684-2685, 2687-2688; Act No. 199, 2005 S.C. Acts 1942; see also Exh. 2 at 1, ¶ 7.

[7] See, *e.g.*, *Carolina Power & Light Co. v. Darlington County*, 431 S.E.2d 580, 583 (S.C. 1993) (all emphasis added) (citations omitted) (contracts with a municipality); see also Exh. 2 at 1, ¶ 7.

[8] *Id.* ("person who contracts with a municipality is charged with the knowledge of its limitations and restrictions in making contracts.") (citations omitted).

> *regarding the validity of the contracts, taken as a whole, is insufficient* and its failure to challenge the arbitration provisions specifically does not abrogate its *preexisting contractual commitment to arbitrate*.

(Exh. 1 at 11-12) (emphasis added). As shown below, the circuit court was in error.

In *Prima Paint*,[9] the United States Supreme Court addressed the enforcement of an arbitration clause in a classic "fraudulent inducement" scenario, to-wit:

1. The parties intended to and entered a contract with an arbitration clause.

2. *Thereafter*, one party discovered that the other party had made false representations about a substantive part of the contract to induce the first party to enter the contract.

3. The false representations, however, did not involve the arbitration agreement and did not induce the first party to agree to arbitrate disputes arising from the contract.

Under these circumstances, even though the fraudulent inducement may entitle the first party to rescind the substantive obligations in the contract in part or in their entirety, it does not vitiate the severable agreement to arbitrate absent fraud related directly to the arbitration agreement itself. Therefore, the Supreme Court held that the dispute over fraudulent inducement to enter the substantive obligations of the contract was an issue for the arbitrator, not the courts.

Here, the lack of authority to enter the contracts goes directly to every provision in and every aspect of the contracts, including the arbitration agreements embedded in those contracts. In other words, unlike *Prima Paint*, the District never agreed at any time to arbitrate anything. Severability of the arbitration agreement does not change this – the undisputed evidence shows that the District never agreed to and never entered into any contract or agreement of any kind.

In *Rent-A-Center*,[10] the United States Supreme Court considered whether the arbitrator or the court should resolve the question of an arbitration agreement being unconscionable.

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[9] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801 (1967).

[10] *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772 (2010).

Ordinarily, this would be a question for the court as a challenge to the arbitration agreement itself. The agreement before the Court, however, included the following "delegation" proviso: "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."[11] The Court held that the unconscionability issue was for the arbitrator under the following analysis: (1) the "delegation" proviso was severable from the remainder of the arbitration agreement; (2) the employee did not argue that this proviso itself was unconscionable; (3) the employee's unconscionability arguments went to other parts of the arbitration agreement; and (4) therefore, the delegation proviso remained operative such that the arbitrator was to decide the question of unconscionability.

Here, there is no "delegation" proviso in the arbitration agreements. To the extent that *Rent-A-Center* is relevant here, the undisputed evidence demonstrates that the District never agreed to any proviso in the arbitration agreement or any substantive proviso in the alleged contracts.

In *Damico*,[12] the issue was the enforceability of an arbitration provision embedded in a contract for the construction and purchase of a new home. The circuit court held *inter alia* that the arbitration provision was unconscionable and therefore refused to enforce it. This Court reversed, finding that the circuit court had mistakenly analyzed the issues, leading it to overlook the absence of a challenge to the arbitration clause itself. The Supreme Court reversed this Court in part, finding that there was a challenge to the arbitration clause itself as being unconscionable and therefore reinstated the circuit court's refusal to compel arbitration. Despite this reversal, the

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[11] *Id.*, 130 S. Ct. at 2777 (ellipses by Court).

[12] *Damico v. Lennar Carolinas, LLC*, 844 S.E.2d 66 (S.C. App. 2020), *aff'd in part, rev'd part, and remanded*, Op. No. 28114 (S.C. Ct. App. filed Feb. 1, 2022). **Note:** The Supreme Court issued its opinion after the appealed order and the District's 59(e) motion in December 2021. As of the filing of the instant motion, a petition for rehearing remained pending, with the Reply to the Return to the Rehearing Petition being due on October 24, 2022.

Supreme Court agreed with this Court's explanation of the *Prima Paint* doctrine, which the trial court in this case quoted in support of its decision to compel arbitration:

> In deciding whether the parties have a valid agreement to arbitrate we must therefore *isolate the arbitration clause* from the rest of the contract. If the arbitration agreement is valid, any issues as to the validity of other parts of the contract go to the arbitrator, not the court. Accordingly, a party cannot duck arbitration unless it makes a specific, pinpoint (and successful) challenge to the validity of the arbitration provision itself; *attacking the validity of the contract as a whole is not enough.*

(see also Exh. 1 at 11).[13] Here, "the arbitration agreement is [not] valid," because the persons purportedly signing the agreement on behalf of the District did not have the authority to do so.

The circuit court also cited *Jackson Mills, Inc. v. BT Capital Corp.*, 440 S.E.2d 877 (S.C. 1994) for its adoption of the *Prima Paint* doctrine that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." (Exh. 1 at 10). The circuit court overlooked the far more salient and here-controlling ruling in *Jackson Mills* that "a party may allege that the arbitration agreement was *never entered into* [and,] [u]nder such circumstances, *a challenge to the existence of the arbitration agreement itself becomes a matter to be 'forthwith and summarily tried' by the Court.*" 440 S.E.2d at 879 (emphasis added). Here, rather than determine the existence of the arbitration agreement as directed by *Jackson Mills* and the South Carolina Uniform Arbitration Act (the Act),[14] the circuit court sent

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[13] 884 S.E.2d at 71 (all emphasis added) (citation omitted).

[14] The South Carolina Uniform Arbitration Act twice directs the circuit court to try the issue of whether an arbitration agreement exists if denied by the party opposing arbitration:

> On application of a party showing an agreement described in Section 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, *but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised* and shall order arbitration if found for the moving party, otherwise, the application shall be denied. [§ 15-48-20(a) (emphasis added)]

> On application, the court may stay an arbitration proceeding commenced or threatened *on a showing that there is no agreement to arbitrate.* Such an issue, when in substantial and bona fide dispute, *shall be forthwith and summarily tried* and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration. [§ 15-48-20(b) (emphasis added)]

that issue to arbitration. Thus, the circuit court violated its statutory duty to decide the gateway question of whether the arbitration agreement existed. Accordingly, assuming this appeal is dismissed, this Court should remand with instructions that the circuit court determine the "existence" question and compel arbitration only if the circuit court concludes that the parties actually entered the contracts and embedded arbitration agreements.

The circuit court misapplied the *Prima Paint* doctrine, apparently concluding that a challenge to the entire contract can never also be a challenge to the arbitration clause itself. This Court's opinion in *Simmons, infra* demonstrates the error in this view of the *Prima Paint* doctrine.

The first inquiry is whether there exists an arbitration agreement and then, but only then, there arises the *Prima Paint* question of whether the challenge by the party opposing arbitration goes to the entire agreement or specifically to the arbitration agreement:

> The two-step sequence can be summarized as follows: (1) resolution of any challenge to the formation of the arbitration agreement, consistent with *Granite Rock*, and (2) determining whether any subsequent challenges are to the entire agreement or to the arbitration clause specifically, consistent with *Prima Paint*.

Simmons v. Benson Hyundai, LLC, Op. No. 5900 (S. C. Ct. App. filed Dec. 9, 2021), 2022 S.C. App. LEXIS 37 at pp. 6-7.[15] In *Simmons*, Buyer purchased a car from Seller under a contract with an embedded arbitration agreement. The contract was contingent upon the Seller being able to assign the contract to a suitable lender, and "if the assignment is successful, 'the [contract] shall be deemed delivered and fully binding.'" *Id.* at 9. Seller could not assign the contract, so there was no contract between the parties, and therefore no arbitration agreement: "Because the assignment never occurred, the parties never became bound by any of the other [contract]

[15] Rehearing Denied (S.C. Ct. App. Mar. 25, 2022); Certiorari Pending (reply filed June 29, 2022). In *Granite Rock Co. v. International Bd. of Teamsters*, 561 U.S. 287, 130 S. Ct. 2847, 2855-2856 (2010), the United States Supreme Court held that the question of contract formation was for the courts to decide, not the arbitrator.

documents, including the arbitration provisions of the [contract]." *Id.* at 9. Here, because the persons purportedly signing the contracts for the District did not have authority to do so, the District "never became bound by [the contract], including the arbitration provisions of the [contract]." In short, and contrary to the circuit court's mistaken belief in this case, an attack on the *existence* of the entire contract, if successful, also precludes enforcement of an embedded arbitration agreement.

II. The appealed order is immediately appealable.

The South Carolina Uniform Arbitration Act (the Act) includes a section on appeals. It authorizes appeals from orders denying a motion to compel arbitration but is silent on appeals from an order granting the motion.[16] In *Heffner v. Destiny, Inc.*, 471 S.E.2d 135, 136 (S.C. 1995), the Supreme Court held that a party aggrieved by an order compelling arbitration could not appeal that order immediately. The Court reasoned as follows:

1. "The *policy* of the United States and this State is to *favor arbitration of disputes.* Consistent with this policy, *statutes* at both the federal and state level have been enacted which *restrict the right to appeal orders which favor arbitration over litigation.*" *Id.* at 36 (all emphasis added) (citations omitted).

2. "By application of the rule of statutory construction "expressio unius est exclusio alterius" (the mention of one is the exclusion of another), *all other orders related to arbitration are not immediately appealable.* Therefore, the order in this case, which stays this action and compels arbitration, is not immediately appealable under § 15-48-200." *Id.* (emphasis added).

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[16] Section 15-48-20 provides in full as follows:

(a) An appeal may be taken from:
  (1) An order denying an application to compel arbitration made under Section 15-48-20;
  (2) An order granting an application to stay arbitration made under Section 15-48-20(b);
  (3) An order confirming or denying confirmation of an award;
  (4) An order modifying or correcting an award;
  (5) An order vacating an award without directing a rehearing; or
  (6) A judgment or decree entered pursuant to the provisions of this chapter.
(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

3. "Appellants' assertion that S.C. Code Ann. § 14-3-330 (1976 & Supp. 1994) should be applied to determine the appealability of this order is without merit. To apply the general appealability provisions of § 14-3-330 would conflict with the more specific provisions of § 15-48-200 regarding the appealability of orders relating to arbitration." *Id.* (citation omitted).

Accordingly, the Court dismissed the appeal "*without prejudice*." *Id.* at 137 (emphasis added).

For decades after the enactment of the Act, the guiding principle for interpreting the Act *and* arbitration agreements was the "public policy" that *favored* arbitration *over* litigation. Recently, the Supreme Court disavowed this guiding principle:

> [O]ur statements that the law "favors" arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—"favoring" arbitration.

Palmetto Constr. Group, LLC v. Restoration Specialists, LLC, 856 S.E.2d 150, 153 (S.C. 2021), *aff'g* 834 S.E.2d 204 (S.C. App. 2019). It is unclear whether the demise of the "public policy favoring arbitration" affects the Supreme Court's analysis of appealability in *Heffner, supra.* The Court cited this "public policy" as the first reason for its ruling but also cited two other reasons, *i.e.*, the general statutory interpretation rules of *expressio unius est exclusio alterius* and specific laws control over general laws. It is unclear, however, whether the application of these particular interpretation rules (of which there are many, many more) was driven or even compelled by the initial application of the public policy favoring arbitration over litigation.

For example, absent the "public policy favoring arbitration," § 15-48-20 can be viewed as supplementing rather than supplanting the general appeal provisions in § 14-3-330. Wrongly compelling arbitration would deny the opposing party a mode of trial to which it is entitled as a matter of right, *i.e.*, a circuit court trial. This triggers the requirement that the order be appealed immediately or the right to appeal is forever lost. *E.g., Creed v. Stokes*, 331 S.E.2d 351 (S.C. 1985) (right to jury trial); *Pelfrey v. Bank of Greer*, 244 S.E.2d 315 (S.C. 1978) (right to non-jury trial).

Reading § 15-48-20 as supplementary and allowing immediate appeals under § 14-3-330 of arbitration orders based on a contested finding about the *existence* of an arbitration agreement is logical given the statutory primacy afforded this *judicial* question. See n.4 and accompanying text, *supra*. The Act repeatedly states that this "existence of agreement" question is to be decided by the court. *Id.* It would be logical to allow an immediate appeal of this purely judicial decision, particularly given that public policy does *not* favor arbitration over litigation and that § 15-48-20 does *not* forbid an immediate appeal of an order compelling arbitration.

Finally, and assuming there is no right to an immediate appeal, this Court should nevertheless entertain this appeal "because [the] issues are capable of repetition and need to be addressed." *Toler's Cove Homeowner's Ass'n, Inc. v. Trident Constr. Co., Inc.*, 586 S.E.2d 581, 585 (S.C. 2003). In *Toler's Cove*, the plaintiff sued the defendant for construction defects in a condominium complex. Their contract included an arbitration clause. The defendant impleaded a third party, and their contract also included an arbitration clause. The defendant moved to compel arbitration. All parties except the third party consented to arbitration. The third party opposed arbitration on two grounds: (1) the defendant waived any right to arbitration by participating in the litigation and discovery; and (2) the apportionment of costs in the arbitration agreement was unconscionable. The circuit court compelled arbitration. The third party appealed. The Supreme Court held that the order compelling arbitration was not immediately appealable. Nevertheless, the Court entertained the appeal, because the issues needed to be addressed.

Here, the issues are far more fundamental and more far-reaching than the issues in *Toler's Cove*. This case presents the primary, core statutory question of whether an arbitration agreement exists and, more importantly, the issue of the proper analytical framework for answering that core question. There is far more need for addressing these issues than the issues in *Toler's Cove*.

CONCLUSION

For all of the foregoing reasons, the District respectfully requests the following relief from this Court:

1. Hold the timelines for perfecting this appeal in abeyance pending this Court's decision on the instant motion.

2. A ruling that the appealed order is immediately appealable or, in the alternative, that the issues presented warrant immediate consideration.

3. If the appeal is dismissed, a remand to the circuit court with instructions to decide whether there exists an agreement to arbitrate and compelling arbitration only if there exists such an agreement.

4. In the alternative, if the appeal is dismissed without the remand requested above, a ruling that the dismissal is without prejudice and that the District may appeal the order compelling arbitration and raise the issues addressed herein in an appeal after the arbitration.

Respectfully Submitted,

/s/Robert L. Widener

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Columbia, SC
October 25, 2022

EXHIBIT 1

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	
COUNTY OF FLORENCE)	**Civil Action No.: 2012-CP-21-1149**
)	
Pee Dee Healthcare, P.A.)	**ORDER**
)	**Denying Motion to Dismiss, and**
Plaintiff,)	**Granting Motion to Compel Arbitration**
)	
v.)	
)	
Lower Florence County Hospital)	
District d/b/a Lake City Community)	
Hospital,)	
Defendant.)	
)	

This matter comes before the Court on Defendant Lower Florence County Hospital District's Motion to Dismiss, filed November 11, 2008, and Plaintiff Pee Dee Healthcare's Motion to Compel Arbitration, filed January 27, 2020. The Defendant filed a memorandum in support of its motion to dismiss on February 5, 2009, and a supplemental memorandum to dismiss on February 14, 2020. The Plaintiff submitted a memorandum in opposition to Defendant's motion to dismiss on February 20, 2020, an amended memorandum in opposition on February 21, 2020, and supplemental memorandum in the form of a letter from Counsel dated June 15, 2020.

After careful consideration of the filings, review of the record, and for the reasons set forth herein, the Court denies Defendants' Motion to Dismiss and grants Plaintiffs' Motion to Compel Arbitration.

FACTUAL BACKGROUND

On April 1, 2008, in a distinct but related action, the Defendant (Lower Florence County Hospital District d/b/a Lake City Community Hospital LCCH) served a temporary restraining order suspending the general and ordinary business of its hospital. *See* Rule 65(e), SCRCP. Case

No. 2008-CP-21-0706 was the original case that began the litigation. In that case, Plaintiff LCCH sought rescission of agreements with Mid-Carolina Hospital Group (MCHG) to run the operation of its facilities. On May 1, 2008, LCCH entered into a Preliminary Separation and Unwinding Agreement with MCHG, HTR Management, and Plaintiff in this case, Pee Dee Healthcare, Inc. (PDHC). On May 6, 2008, Judge James held a status conference with the parties and thereafter agreed to an order on May 13, 2008 appointing Pershing Young and Associates to conduct the audit set forth in the May 1, 2008 Preliminary Separation and Unwinding Agreement.

On May 30, 2008, Judge James held a hearing on the appointment of a Trustee to receive and disburse funds. On June 17, 2008, Judge James entered an Order (from the May 30, status conference) appointing the Trustee. This Order specifically incorporated the Preliminary Separation and Unwinding Agreement by reference and became the law of the case when it was signed by Judge James and filed on June 17, 2008. The case was stricken from the active roster pursuant to Rule 40(j), SCRCP, and was restored to the civil roster as *Lower Florence County Hospital District, et al. v. Mid-Carolina Hospital Group, LLC, Tony R. Megna, and Benjamin R. Matthews*, Case No.: 2012-CP-21-1142. Although PDHC was not a party to that action, PDHC was the previous owner of the Darlington and Olanta clinics that were subjects of dispute in that action. There are now several actions pending between the parties.

This action was brought by Plaintiff PDHC on October 13, 2008 under a claim of breach of contract for three contracts between the parties. The contracts in dispute in this case are the following billing and collection agreements between only PDHC and LCCH and do not include other parties in the separate action Case No.: 2012-CP-21-1142:

1. Clinical Operations Agreement – dated March 26, 2007 between LCCH and PDHC for billing and management services of the Darlington office;

2. Clinical Operations Agreement – dated January 31, 2007 between LCCH and PDHC for billing and management services of the Olanta office; and
3. Agreement for the Provision of Medical Billing and Collection Services – dated April 1, 2007 between LCCH and PDHC for Lake City Rural Healthcare.

Each of these contracts contained an identical arbitration provision.

On November 11, 2008 Defendant in this case, LCCH, filed a motion to dismiss, subsequently filed a memorandum in support of its motion to dismiss on February 5, 2009, and a supplemental memorandum to dismiss on February 14, 2020.

Defendant argues that under SCRCP Rule 12(b)(8) and Rule 12(b)(6) that this case should be dismissed, relying on the fact that the May 1, 2008 "Unwinding Agreement" includes PDHC as a signatory and PDHC's participation in a trusteeship of certain funds precludes Plaintiff PDHC from pursuing relief. Furthermore, Defendant argues that the contracts in contest in this case were executed without requisite corporate authority and that the contracts were violative of Section 4-9-82, Code of Laws of South Carolina 1976.

STANDARD OF REVIEW

Motions to dismiss are governed by SCRCP Rule 12(b). The Court must base its decisions on the allegations in the Complaint. *Spence v. Spence*, 358 S.C. 106, 628 S.E.2d 869 (2006). In considering a motion under Rule 12(b)(6), "[i]f the facts and inferences drawn from the facts alleged in the complaint, viewed in light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Id* at 116, 628 S.E.2d at 874. "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory." *Id.* "Pleadings in a case should be construed liberally so that substantial justice is done

between the parties." *H.H. Hunt Corp. v. Town of Lexington*, 389 S.C. 623, 632, 699 S.E.2d 699, 703 (Ct. App. 2010).

Under SCRCP Rule 12(b)(8), a court may dismiss a complaint when there is (1) another action pending, (2) between the same parties, (3) for the same claim. 12(b)(8), SCRCP. "To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in their same capacities." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 322, 701 S.E.2d 39, 44 (Ct. App. 2010). Dismissal under Rule 12(b)(8) is only appropriate if the claim is "precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 104, 674 S.E.2d 524, 531 (Ct. App. 2009).

ANALYSIS

MOTION TO DISMISS

Defendant moved to dismiss this case under SCRCP 12(b)(6) for failure to state facts sufficient to constitute a cause of action. Specifically, Defendant contends the contracts which form the basis for Plaintiffs' causes of action were executed without requisite corporate authority and violative of Section 4-9-82, Code of Laws of South Carolina, 1976. Defendants' motion to dismiss under 12(b)(6) is unfounded and has already been resolved by this Court.

In the case between LCCH and MCGH, Plaintiff LCCH asserted that under Section 4-9-82, Code of Laws of South Carolina 1976 the Hospital District had no authority to enter into the Lease Purchase Agreements (LPAs) of the Hospital with Plaintiffs, and its related entities. This issue was resolved by Court Order filed on December 3, 2014. The Court distinguished the authority of the Board of Directors to enter into Lease-Purchase Agreements of the Hospital (which the Court held LCCH did not possess) for the sale or lease of the Hospital as opposed to the

authority of the Board to employ such personnel as it may deem necessary for the efficient operation of its hospital.

In that case, the Court distinguished the Lease-Purchase Agreements to sell or lease the Hospital, which required a special referendum of voters residing within the district and were *void ab initio*, from the type of agreements in question in this case to operate the facilities of LCCH, which required no referendum and were distinct from the Lease-Purchase Agreement. In the December 3, 2014 Order, Judge James specifically ruled:

> "...the board was permitted to hire MCHG to run the operations of its facilities, and the subject agreements reflect it intended to do so. A referendum was required only to approve transfers of assets and properties. Despite the headings of §4-9-82, and contrary to the plaintiff's contention otherwise, no referendum was required to approve the retention of personnel, i.e., MCGH, to operate the facilities for the plaintiff." [Order of December 3, 2014, page 7]

Based on the foregoing and in accordance with Judge James' December 3, 2014 Order, the Court concludes the Clinical Operations Agreements and Billing and Collections Services Agreement required no referendum and were not violative of Section 4-9-82, Code of Laws of South Carolina 1976.

Defendant also contends that the agreements in question were signed by LCCH personnel lacking requisite corporate authority to do so. The March 26, 2007 Clinical Operations Agreement and the April 1, 2007 Agreement for the Provision of Medical Billing and Collections Services were signed by LCCH CEO Clarence Bowman II, while the January 31, 2007 Clinical Operations Agreement was signed by CEO Bowman and Joe Landrum, the Chairman of the Board of Directors of LCCH. Section V of all three agreements between the parties, titled "REPRESENTATIONS AND WARRANTIES," specifically states:

All parties represent and warrant that:

a. The execution, delivery and performance of this Agreement (a) has been approved by the governing body of each party. See Exhibits X, XX, XXX

By signing these agreements, CEO Bowman and Chairman Landrum represent and warrant that the agreements have been approved by the Board of Directors. Despite claims to the contrary, Defendant has provided no evidence to support its claim for lack of corporate authority. Accordingly, the Court concludes Defendants' claim is without merit. Based on the foregoing, Defendants' Motion to Dismiss under SCRCP 12(b)(6) for failure to state facts sufficient to constitute a cause of action is denied.

Defendant also moved to dismiss this case under SCRCP 12(b)(8) contending Plaintiff was seeking to revisit issues already being litigated and determined in another action. Specifically, Defendant claims that Plaintiff, as a party to the Separation and Unwinding Agreement, is now barred from asserting this claim as a 'party in fact' to the action between LCCH and MCHG. Defendant contends that because Plaintiff was a party to the Separation and Unwinding Agreement, its claim arises under a separate suit, of which it is not a party to.

To prevail on a motion to dismiss pursuant to Rule 12(b)(8), "the movant must show that the actions in question are between the same parties in their same capacities." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 322, 701 S.E.2d 39, 44 (Ct. App. 2010). In the case between LCCH and MCHG, Plaintiff was a party to the Separation and Unwinding Agreement, not to the litigation itself. The Court is not persuaded that Plaintiff was a 'party in fact' to the case between LCCH and MCHG, as its role in the Separation and Unwinding Agreement is distinct from its action in this case. This issue was resolved by Judge James' Order Appointing a Trustee. In the June 17, 2008 Order, Judge James specifically held:

"(14) Nothing in this order shall be construed, in any manner whatsoever;

> (a.) to limit any party from asserting any claims, counterclaims, cross-claims or other claims, however defined, on against the other, as any party deems necessary and/or appropriate." [Order of June 17, 2008, page 6]

As discussed above, Judge James held in his December 3, 2014 Order that the agreements in contention in this case are distinct from those voided in the case between LCCH and MCHG. The South Carolina Court of Appeals has adopted a narrow interpretation of Rule 12(b)(8) stating that, "Accordingly, we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 104, 674 S.E.2d 524, 531 (Ct. App. 2009).

Based on the foregoing and in accordance with Judge James' June 17, 2008 and December 14, 2014 Orders, the Court concludes the, Plaintiff's claim is not barred by Rule 12(b)(8) because its role in the case between LCCH and MCHG does not make it a 'party in fact' to that litigation and its claims in the present action are distinct and preserved as a matter of law. Therefore, Defendants' Motion to Dismiss under SCRCP 12(b)(8) for failure to state facts sufficient to constitute a cause of action is denied.

MOTION TO COMPEL ARBITRATION

Plaintiff moved to compel arbitration of the three agreements at issue in this action pursuant to S.C. Code Section 15-48-10 et. seq., and the Federal Arbitration Act. Specifically, Plaintiff contends the parties expressly agreed to arbitrate any disputes related to the three agreements. The language of each agreement is the same and states in pertinent part:

> The parties agree that any and all disputes or controversies, *whatever they may be and however they are defined, in any way or manner, arising out of or related to this agreement or the relationship between the individual and/or corporate signatories to this agreement* (a) shall be subject to arbitration in Columbia, South Carolina and shall be governed by rules of reasonableness, civility, and mutual

> reliance upon the honesty and trust one to the other. It is specifically understood and agreed that this clause is to be interpreted broadly and inclusively by any party, court or tribunal considering the enforceability of this clause. Any decision rendered and made pursuant to any arbitration shall be binding and conclusive upon the parties…

Defendant contends in its Supplemental Memorandum in Support of Motion to Dismiss and reiterates in its Reply in Support of Motion to Dismiss that its challenge to the validity of the entirety of the contracts is a central issue which must be resolved in Plaintiffs favor before deciding whether to compel arbitration. This Court finds Defendants argument unpersuasive and grants Plaintiffs' motion compelling arbitration.

The South Carolina Uniform Arbitration Act provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration. [Section 15-48-10, S.C. Code]

The Court first examines whether the South Carolina Uniform Arbitration Act (SCUAA) applies to Plaintiffs' claim. The South Carolina Supreme Court has held that "because the terms of section 15-48-10(a) are clear, 'the court must apply those terms according to their literal meaning.'" *Singh v. Singh*, 429 S.C. 10, 19, 837 S.E.2d 651, 656 (Ct. App. 2019) quoting *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996). In this case, the Court finds that the arbitration provisions contained in each agreement meet the statutory requirements of Section 15-48-10(a). Accordingly, the Court finds that the South Carolina Uniform Arbitration Act applies to the three contracts in questions.

The Court must now consider whether the Federal Arbitration Act (FAA) applies to Plaintiffs' claim. The Federal Arbitration Act provides in pertinent part:

> A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9. U.S.C. Section 2.

The FAA applies to any arbitration agreement regarding a transaction that involves interstate commerce. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). "'[I]nvolving commerce' is the same as 'affecting commerce,' which has broadly been interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.3d 565, 568 (Ct. App. 2002). In order to determine whether a transaction involves commerce within the scope of the FAA, "the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

In this case, the contracts in question, the complaint, and the surrounding facts establish that the transactions in dispute involve the delivery of health care services, including the billing and collection for these services from Medicare, Medicaid, and national private insurance carriers. The Court finds these transactions involve commerce squarely within the meaning of the FAA. Accordingly, the FAA applies to the transactions and contracts in question.

Given the SCUAA and the FAA are both applicable to Plaintiffs' claims, the Court must determine which law(s) apply. Generally, a state law which arose to govern issues concerning validity, revocability, and enforceability of all contracts is applicable to claims involving an arbitration clause governed by the FAA. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. "A state law

that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies." *Id.* The SCUAA applies specifically and exclusively to arbitration agreements, and is preempted. *Id* at 540, 542 S.E.2d at 364. Therefore, the SCUAA is preempted and the FAA controls in this case.

Finally, the Court must consider whether the arbitration provision is valid and enforceable under the FAA. The South Carolina Supreme Court has established a framework for determining whether a particular claim is subject to arbitration under the FAA. In *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118, the court stated:

> To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Hinson v. Jusco Co.*, 868 F.Supp. 145 (D.S.C.1994); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993).
>
> Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Towles, supra*. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. *Id.* citing *Great W. Coal*, 312 S.C. at 564, 437 S.E.2d at 25.

Arbitration clauses are separable from the contracts in which they are embedded and a party cannot avoid arbitration by attacking the validity of the contract as a whole. *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994) citing *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). In *Jackson Mills Inc. v. BT Capital Corp.*, the Supreme Court of South Carolina adopted the US Supreme Court reasoning in *Prima Paint Corp v. Flood & Conklin, Prima Paint Corp.*, 388 U.S. 395 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) stating that 'a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause.' *Jackson Mills,*

Inc., 312 S.C. at 403, 400 S.E.2d at 879 quoting *South Carolina Public Service Authority v. Great Western, Inc.*, 437 S.E.2d 22 (Sup.Ct. 1993).

Recently, the South Carolina Court of Appeals invoked the *Primal Paint* doctrine in determining whether an arbitration agreement is valid and enforceable. In *Damico v. Lennar Carolinas, LLC.*, 430 S.C. 188, 198, 844 S.E.2d 66, 71 (Ct. App. 2020), the court stated:

> In deciding whether the parties have a valid agreement to arbitrate we must therefore isolate the arbitration clause from the rest of the contract. If the arbitration agreement is valid, any issues as to the validity of other parts of the contract go to the arbitrator, not the court. Accordingly, a party cannot duck arbitration unless it makes a specific, pinpoint (and successful) challenge to the validity of the arbitration provision itself; attacking the validity of the contract as a whole is not enough. Citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010).

In this case, the Defendant contends the validity of the contracts in question must be settled before the issue of arbitration can be decided. Defendants do not challenge the specific arbitration provisions within the agreements in question and instead choose to posit their argument on the validity of each contract, taken as a whole. In *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70, 130 S.Ct. 2772, 2778, 177 L.Ed.2d 403 (2010), the Supreme Court outlined the framework for challenging to contract validity, stating:

> There are two types of validity challenges under §2: 'one type challenges specifically the validity of the agreement to arbitrate,' and '[t]he other challenges the contract as a whole, either on the ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.' *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S.Ct. 1204 (2006). In a line of cases neither party has asked us to overrule, ***we held that only the first type of challenge is relevant to a courts determination whether an arbitration agreement is enforceable.*** [emphasis added]

Similar to the *Damico* case and in line with the *Prima Paint* Doctrine, this Court finds that the arbitration provisions, identical within all three contracts, must be separated

from the rest of the contracts in order to determine validity. Under the framework set forth in *Rent-A-Center*, the Court concludes Defendants' challenge to the agreements, taken as a whole, is not relevant to determining whether the arbitration provisions are enforceable.

This Court finds the arbitration provisions in question to be valid and enforceable. Defendants' contentions regarding the validity of the contracts generally are to be decided by an arbitrator, not this Court. Defendant's claim regarding the validity of the contracts, taken as a whole, is insufficient and its failure to challenge the arbitration provisions specifically does not abrogate its preexisting contractual commitment to arbitrate. Accordingly, Plaintiffs' Motion to Compel Arbitration is granted.

CONCLUSION

For all of the reasons set forth above, Defendants' Motion to Dismiss is **DENIED** and Plaintiffs' Motion to Compel Arbitration is **GRANTED.**

[Electronic signature of the Hon. Diane S. Goodstein to follow]

Florence Common Pleas

Case Caption:	Pee Dee Healthcare VS Lower Florence County Hospital District , defendant, et al
Case Number:	2012CP2101149
Type:	Order/Other

It is so Ordered!

s/Diane S. Goodstein

EXHIBIT 2

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**TWELFTH JUDICIAL CIRCUIT**
COUNTY OF FLORENCE	)	**CASE NO.: 2012-CP-21-1149**
Pee Dee Healthcare,	)	
Plaintiff,	)	**AFFIDAVIT OF**
vs.	)	**JOSEPH C. LANDRUM**
	)	
Lower Florence County Hospital District d/b/a Lake City Community Hospital,	)	
Defendant.	)	

PERSONALLY APPEARED BEFORE ME, Joseph C. Landrum, who, being duly sworn, deposes and states as follows:

1. My name is Joseph C. Landrum, and I reside at 320 Scotland Road, Lake City, South Carolina. I am over the age of 18 and competent to give this affidavit.
2. I served on the Lower Florence County Hospital District Board from 1991 until July of 2007. During 2006 and 2007 I served as Chairman of the Board.
3. I have reviewed the Complaint and accompanying exhibits in the above-referenced matter.
4. At no time while I served on the Lower Florence County Hospital District Board did the Board discuss, consider, or approve purchasing Pee Dee Health Care's Rural Health Centers in Olanta or Darlington, South Carolina.
5. At no time while I served on the Lower Florence County Hospital District Board did the Board discuss, consider, or approve entering into Clinical Operations Agreements regarding Pee Dee Health Care's Rural Health Centers in Olanta or Darlington, South Carolina.
6. At no time while I served on the Lower Florence County Hospital District Board did the Board discuss, consider, or approve entering into Clinical Operations Agreements with Pee Dee Health Care regarding Lake City's Rural Health Centers in Johnsonville or Lake City, South Carolina.
7. Any such agreements would have required board approval, which was never sought nor received.
8. I have reviewed Exhibit 2 of the Plaintiff's Complaint in the above-referenced matter. I do not recall having ever seen this document prior to the date of this affidavit. Further, I do not believe the

signature on page 14 or page 16 of Exhibit 2 is my signature.

9. I do not recall ever executing any documents with Alexander H. Cohen.

JOSEPH C. LANDRUM

SWORN before me this
30th day of January, 2020.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 12/8/25

EXHIBIT 3

STATE OF SOUTH CAROLINA	)	***IN THE COURT OF COMMON PLEAS***
	)	***TWELFTH JUDICIAL CIRCUIT***
COUNTY OF FLORENCE	)	***CASE NO.: 2012-CP-21-1145***
Mary Megna,	)	
	)	
Plaintiff,	)	
	)	***AFFIDAVIT OF***
vs.	)	***CLARENCE W. BOWMAN, II***
	)	
Lower Florence County Hospital District d/b/a Lake City Community Hospital,	)	
	)	
Defendant.	)	
	)	

PERSONALLY APPEARED BEFORE ME, Clarence W. Bowman, II, who, being duly sworn, deposes and states as follows:

My name is Clarence W. Bowman, II, and I reside at 1517 Johnsonville Highway, Lake City, South Carolina.

I was formerly employed as CEO of the Lake City Community Hospital by its Board of Directors. My date of employment ran from September of 1999 through October of 2008. At that time, I voluntarily resigned to pursue other interests.

Attached hereto as Exhibit I is a copy of a check from Mary Megna made payable to the Lake City Community Hospital in the amount of $100,000.00, dated May 25, 2007. As Exhibit II, I attach hereto a copy of the Promissory Note from Mid-Carolina Hospital Group, LLC to Mary Megna in the amount of $100,000.00, dated May 24, 2007. Also attached as Exhibit III is a is a copy of a Collateral Assignment and Security Agreement from Mid-Carolina Hospital Group, LLC to Mary Megna dated May 24, 2007.

I do not recall ever seeing the check from Mary Megna (Exhibit I). I had no part in negotiating for this loan on behalf of the Lake City Community Hospital and, as far as I know, and to my knowledge, the matter of this loan was never considered by the Board of

CWB

Directors. During this time, Tony Megna and Mid-Carolina Hospital Group, LLC were completely in charge of all operations of Lake City Community Hospital, including the financial affairs of the Hospital, and I seem to recall that the first time I knew that arrangements had been made for this to take place was when I was presented the Promissory Note (Exhibit II) and the Collateral Assignment and Security Agreement (Exhibit III) for my signature. Ben Matthews, on behalf of Mid-Carolina Hospital Group, LLC, actually presented these documents to me, directing that I sign them. I recall telling him that I was not a director, an officer of, or any part of Mid-Carolina Hospital Group, LLC, and did not think that I should be signing it in any capacity, much less as director. Ben Matthews was the attorney for Mid-Carolina Hospital Group, LLC and was present at the Hospital on a daily basis after Mid-Carolina Hospital Group, LLC had completely taken over operations of the Hospital. Ben Matthews said to me, in effect, that this was entirely appropriate and I should go ahead and sign it. He said, "Tony wants you to sign it," or words to that effect.

I was never a director of Lake City Community Hospital or Mid-Carolina Hospital Group, LLC. I was never told that the Board of Directors of the Lake City Community Hospital were aware of what was going on relative to this check (Exhibit I) and I had always understood that this was an agreement between Tony Megna and Dr. Albert Mims. I have no knowledge as to how the check from Mary Megna was processed, if it was, or the purpose for which any such funds were used. Mid-Carolina Hospital Group, LLC was the actual maker of the Promissory Note instead of the Lake City Community Hospital. Mid-Carolina Hospital Group, LLC also executed the Collateral Assignment and Security Agreement (Exhibit III) referring to the above mentioned check. I have today seen a handwritten letter dated May 25, 2007, from Mary Megna to me, attached hereto as Exhibit IV, and I do not recall having seen it prior to today. It could be that I did actually see it, but I don't recall having done so. You will note that it is dated one day after the Collateral Assignment and Security Agreement and Promissory Note.

It will be noted that in the purported letter to me from Mary Megna (Exhibit IV) she indicates that the obligation bears interest at seven (7%) percent per annum, payable monthly. This is different from the interest rate in the Promissory Note, which establishes the rate of eight (8%) percent per annum.

Incidentally, Mary Megna stated in her purported letter to me that the check was not to be negotiated until Dr. Albert Mims had made a loan to the Lake City Community Hospital in a like amount, and until the Promissory Note and Collateral Assignment and Security Agreement were duly executed.

I have read the above and, after first being duly sworn, I do state that the matters set out above are true and correct to my knowledge.

CLARENCE W. BOWMAN, II

SWORN before me this
12th day of November, 2014.

Brenda D. Matthews
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 02/28/22

EXHIBIT 4

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS

Lower Florence County Hospital District d/b/a Lake City Community Hospital; Lower Florence County Hospital District d/b/a Lake City Community Hospital Board; Albert D. Mims, M.D.; Ernest M. Atkinson, M.D.; Benjamin Wade Lamb, M.D.; and David W. Moon, M.D.

Plaintiffs,

v.

Mid-Carolina Hospital Group, LLC; Tony R. Megna; and Benjamin R. Matthews,

Defendants.

Case No.: 08-CP-21-0706

ORDER

This matter is before the court upon motion of the plaintiff Lower Florence County Hospital District ("the District") for summary judgment and upon the District's motion for reimbursement of certain funds now being held by the court-appointed Trustee. The plaintiffs submitted a memorandum in support of its motion, the affidavit of David K. Alford, Director of the Florence County Election Commission, the affidavit of William P. Campbell, Jr., and the affidavit of Kristopher Crawford, M.D. The plaintiffs also submitted a supplemental memorandum in the form of a letter from counsel dated February 26, 2014. Mid-Carolina Hospital Group, LLC (hereinafter "MCHG"), Tony R. Megna (Megna), and Benjamin R. Matthews (Matthews) submitted a memorandum in opposition to the motion for summary judgment, together with the affidavit of Mr. Matthews, to which were attached eighteen exhibits. For the reasons set forth herein, the motion for summary judgment is granted in part and denied in part. The motion for reimbursement is granted as to the defendants named in this action.

MOTION FOR SUMMARY JUDGMENT

A. Facts

All factual recitations set forth herein are taken in the light most favorable to the defendants. The plaintiffs allege and the defendants admit in their answer that the District is a hospital district created by the legislature in 1962 by Act No. 1095, which was subsequently amended in 2000 by Act No. 199. The District is governed by the Lake City Community Hospital Board (the Board). The District does business as Lake City Community Hospital. MCHG is a private, for profit entity formed under Title 33, Chapter 44 of the South Carolina Code of Laws.

The business relationship between the District and the defendants began in 2007. The District entered into an agreement with Pee Dee Health Care, P.A. (PDHC) on February 1, 2007. PDHC is an entity in which Matthews and Megna are principals. Under the agreement, the District purchased from PDHC a facility known as the Olanta Rural Health Center. Under a Clinical Operations Agreement signed January 31, 2007, the District undertook to operate the Olanta RHC. The District leased the land upon which the Olanta RHC sits from HTR Management, LLC, of which Mr. Megna was a member/manager. PDHC also operated the Darlington Rural Health Clinic and wanted the District to operate that clinic as well, but the District's attorney, E. Leroy Nettles, Sr., opined that the District could not operate a facility outside its geographical boundaries. In addition, according to the defendants, some Lake City physicians were interested in opening an RHC in Kingstree, also outside of the District's boundaries. In March 2007, District Board member Albert D. Mims, Jr., M.D., asked for a meeting with Matthews, Megna, and Buddy Watkins. Dr. Mims asked them to form a new entity to acquire the Lake City Community Hospital (Hospital) and operate all aspects of the Hospital

in partnership with several local doctors. On March 26, 2007, the District and MCHG entered into an "Agreement" and Bill of Sale (see Exhibits 7 and 8 to Matthews affidavit), pursuant to which MCHG purchased personal property, leased real property, and assumed liabilities of the District. As specified in the Bill of Sale, the personal property to be acquired consisted of leases, contracts, accounts, inventory, and supplies. The District and MCHG entered into a lease agreement for the real property, improvements, fixtures, and equipment located at the Hospital facilities at 285 Ron McNair Hwy. in Lake City. (See Exhibit 9 to Matthews affidavit).

Within a few days after the execution of the Agreement, Bill of Sale, and lease agreement, the District and MCHG signed a "Clarification to Agreement" (see Exhibit 10 to Matthews affidavit) memorializing their understanding "that various transactions that are the subject matter of the Agreement may require the regulatory approval of agencies of the State of South Carolina and the United States." The District and MCHG stated their intent to comply with "all rules and regulations, state and federal, that govern the operations of the District and MCHG." The parties further agreed that "[a]ll interpretations of the Agreement and all documents required by the Agreement shall incorporate by reference all regulatory requirements of the District and hospital operations." The parties further agreed that "[w]hile the Agreement is binding upon the parties, all components of the Agreement that require governmental approval(s) are conditioned on such approval(s) being granted." Finally, the Clarification to Agreement provided that "[u]ntil all state and federal approvals are obtained, the parties agree that the operations of [the Hospital] shall be operated by MCHG" pursuant to the March 26, 2007 Agreement.

The defendants maintain that based on the recommendations of Mr. Nettles, the District then entered into agreements for the Darlington RHC and began to make plans for an RHC in

Kingstree. The District and PDHC entered into a Clinical Operations Agreement, Asset Purchase Agreement, Bill of Sale, and a lease concerning the Darlington RHC. (See Exhibits11-14, Matthews affidavit).

At some point in late 2007, MCHG became aware that some new members of the District Board were dissatisfied with some provisions of the Olanta agreements. MCHG volunteered to renegotiate those agreements and continued to manage the operations of the Hospital pursuant to paragraph 3 (e) of the March 26, 2007 Agreement; after two months of renegotiation, the District and MCHG entered into a Lease and Purchase Agreement dated January 25, 2008 (see Exhibit 15 of Matthews affidavit). The January 2008 agreement provides that MCHG agrees to operate the Hospital in compliance with all rules and regulations affecting its operations and that both parties agree neither will interfere with the obligations, duties, rights or responsibilities of the other. The January 2008 agreement further provides that at the option of MCHG, all operations of the Hospital will continue under and pursuant to the certificate of need, billing numbers, contracts and authority of the District, actual or implied otherwise, as it existed prior to the signing of the January 2008 agreement and as it existed prior to the signing of the March 26, 2007 original agreement. The January 2008 agreement also provides that this agreement, along with the March 26, 2007 Bill of Sale, constitutes the entire understanding and agreement between the parties and that all prior agreements, representations, warranties, and covenants are merged therein.

The agreements which are the subject of this action were, according to the defendants, modeled after a Purchase Agreement between the District and QHG of Lake City, Inc., a subsidiary of Quorum Healthcare signed May 31, 1995 (see Exhibit 17 to Matthews affidavit).

There is no dispute that the approval of the transfers between the District and MCHG was never submitted to a referendum of voters residing within the boundaries of the District, and there is no dispute that approval of the transfers between the District and QHG of Lake City, Inc. was never submitted to such a referendum.

B. Plaintiffs' Stated Grounds for Summary Judgment

The plaintiffs submit in their motion that they are entitled to an order "declaring that the Lease and Purchase Agreement dated January 25, 2008, the Lease and Purchase Agreement dated March 26, 2007, and the Bill of Sale dated March 26, 2007 are all null and void *ab initio* pursuant to Act No. 1095, 1962 SC Acts 2683-90, as amended by Act No. 199 of 2005, and S.C. Code §4-9-82 and pursuant to S.C. Code §15-53-10 because the transfer by the [District] of assets, properties or responsibilities for the delivery of medical services required a formal referendum by a majority of voters in the district and no referendum occurred."

C. Discussion

S.C. Code §4-9-82 allows the District to transfer its "assets and properties for the delivery of medical services upon assumption by the transferee of the responsibilities of the district for the delivery of medical services...." Section 4-9-82 (B) provides that any such transfer is not complete until the question of the transfer has been submitted to and approved by referendum.

The heading of §4-9-82 in the Lawyers Co-operative Publishing Volume #1A reads "Transfer by hospital public service district of assets, properties **and responsibilities** for delivery of medical services" (emphasis added). The heading is misleading because the text of the statute, specifically subsection (A), does not mention transfer of responsibilities in the context of a transfer and speaks only to the authority of the district to transfer its assets and properties for the delivery of medical services. It is interesting to note that the heading of §4-9-92 in the

Westlaw version of 1999 Act No. 94 (the last amendment to §4-9-82) reads simply "Hospital public service district may transfer assets and properties".

Despite the plaintiff's suggestion to the contrary in its memorandum and follow-up letter of February 26, 2014, the referendum is required only when there is to be a transfer of assets and properties. The court recognizes that §4-9-82 (A) provides that the district is authorized to transfer assets and properties "upon assumption by the transferee of the responsibilities of the district for delivery of medical services", but the transfer of responsibilities is not subject to the referendum requirement. This point is relevant to the issue of severability discussed below.

Section 4-9-82 (B) provides that before the transfer of assets and properties is complete, the question of the transfer must be approved by voters in a referendum. The defendants claim that certain provisions of Title 44 control, or at least should be read *in para materia* with §4-9-82. The defendants claim these provisions of Title 44 allow the transactions to go forward free of a referendum requirement. I disagree, as it is very clear that the enabling legislation and §4-9-82 are the exclusive provisions addressing the formation and activities of this particular Hospital District.

The January 2008 Lease and Purchase Agreement provides that MCHG (a) leases all real property of the District and (b) purchases all other tangible and intangible assets and personal property of the District. As a matter of law, the **purchase** of the tangible and intangible assets and personal property was subject to voter referendum. The defendants argue that the **lease** is not a transfer as contemplated under §4-9-82. The defendants point to §4-9-82 (D), which provides that upon transfer of assets and properties, the District may dissolve itself. The defendants claim the legislature did not intend for leases to be considered as transfers, as it would not make any sense for the District to dissolve when it simply leases its real property. The

court disagrees with that reading and concludes that the legislature, by using the word "may", simply provided an option to the District to dissolve upon a final transfer of all assets and properties. I find that the word "transfer" as employed in 4-9-82 includes any transfer, whether it is a final sale or a lease for a stated term. Therefore, the plaintiff is entitled to a declaration as a matter of law that the lease and asset purchase provisions of the subject agreements are void due to the lack of a voter referendum approving those transfers.

The court finds that the terms of the agreements which address State and Federal regulatory approvals, approvals by State and Federal authorities, etc., do not encompass or contemplate a voter referendum. The voters in a referendum are neither State nor Federal actors, entities, or authorities. They are merely voters residing within the District.

The January 2008 agreement (see pages 5-6) also provides under the heading "OPERATION OF HOSPITAL AND ITS GOVERNING BODY" that "MCHG shall continuously use and occupy the premises herein leased by it for the provision of hospital services and/or such similar usages and services as MCHG, in its sole discretion, determines to be appropriate." As argued by the defendants, Section 5 (8) of the 1962 enabling legislation provides that the board of directors of the District is empowered to employ such personnel as it may deem necessary for the efficient operation of its hospital facilities. In my view, the board was permitted to hire MCHG to run the operations of its facilities, and the subject agreements reflect it intended to do so. A referendum was required only to approve transfers of assets and properties. Despite the heading of §4-9-82, and contrary to the plaintiff's contention otherwise, no referendum was required to approve the retention of personnel, i.e., MCHG, to operate the facilities for the plaintiff.

The question now becomes whether the void provisions of the agreement and the provisions regarding MCHG's operation of the facilities are severable. Case law clearly provides that the issue of severability is an issue of fact. As such, I must determine whether there is any genuine issue of fact regarding the severability of these provisions. The plaintiff cites Columbia Architectural Group, Inc. v. Barker, 274 S.C. 639, 266 S.E. 2d 428 (1980), which recites the general rule that a "contract is entire, and severable, when by its terms, nature, and purposes it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts... not necessarily dependent upon each other, nor is it intended by the parties that they shall be. The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention." 266 S.E. 2d at 429, quoting Packard & Field v. Byrd, 73 S.C. 1, 51 S.E. 678 (1905).

The court cannot conclude as a matter of law that the lease and purchase provisions are not severable from the provisions regarding operation of the facilities by MCHG. There is at least a scintilla of evidence on the issue of severability. The March 26, 2007 Agreement sets forth a formula in paragraph 3(b) detailing certain financial considerations; however, the January 2008 Lease and Purchase Agreement does not incorporate by reference any provisions from the March 26, 2007 Agreement. On the contrary, the January 2008 agreement (see page 11 of 16, "ENTIRE UNDERSTANDING") reflects that only the March 26, 2007 **Bill of Sale** survives the execution of January 2008 agreement. The January 2008 agreement specifically provides that the January 2008 agreement and the March 26, 2007 Bill of Sale constitute the entire

understanding and agreement between the parties and that all prior agreements, discussions, representations, warranties, and covenants are merged herein.

Neither side advances an argument as to whether the March 26, 2007 Agreement survived the execution of the January 2008 agreement. It seems to the court that it did not, as the above-noted merger clause seems to render moot the provisions of the March 26, 2007 Agreement; however, the plaintiffs have requested the court to also rule that the March 26, 2007 Agreement is void pursuant to §4-9-82. Therefore, since the plaintiffs seem to contend there are some potential rights and obligations emanating from the March 26, 2007 Agreement, the court must consider the issues of severability insofar as that instrument is concerned.

Based on the foregoing, the court concludes that the provisions of the January 25, 2008 Lease and Purchase Agreement, the March 26, 2007 Agreement, and the March 26, 2007 Bill of Sale providing for the transfer of assets and properties to MCHG is void *ab initio*. The court concludes there is at this time a genuine issue of fact as to the severability of the provisions calling for MCHG to operate the Hospital.

MOTION FOR REIMBURSEMENT

The District also moves for an order directing the court-appointed Trustee, Wesley Way, to reimburse the District the sum of $311,285.00 currently being held by the Trustee. This sum represents the liability levied by the Centers for Medicare and Medicaid Services (CMS) when the 2007 Medicare cost report was finalized on September 4, 2012.

By order filed November 10, 2008, the court ordered Pershing Yoakley & Associates, P.C. (PYA) to prepare the June 30, 2008 Cost Report and to amend the June 30, 2007 Cost Report filed for the Hospital. These reports relate to the time period in which the parties to that certain Separation and Unwinding Agreement dated May 1, 2008 were operating jointly under

the Hospital provider numbers. As noted above, the 2007 Cost Report was finalized on September 4, 2012 and resulted in a liability due to CMS. The District, dba the Hospital, was forced to pay this sum immediately because federal law mandates that such liabilities are automatically set off against any future payments to be made to the Hospital by CMS. The 2008 Medicare Cost Report was finalized on March 8, 2013 with a receivable due the Hospital in the amount of $338,567.00, of which $307,098.00 related to the Darlington and Olanta RHCs. Pursuant to Consent Order, those funds were forwarded to the Trustee.

The District contends that it is entitled to be paid back for the $311,285.00 it was forced to pay to CMS for the 2007 Cost Report liability. The court agrees with the District's position that the audit/accounting contemplated in the Separation and Unwinding Agreement has no relation to the CMS liability. The court concludes that the District should not be required to continue to carry this liability, especially when there are sufficient funds on deposit with the Trustee to repay that liability. Insofar as the named defendants are concerned, the court concludes the motion should be granted.

CONCLUSION

For the reasons set forth herein, it is

DECLARED as a matter of law that the provisions of the March 26, 2007 Agreement, the March 26, 2007 Bill of Sale, and the January 25, 2008 Lease and Purchase Agreement purporting to transfer assets and properties is void *ab initio;* it is further

ORDERED that the plaintiff's motion for summary judgment as to the provisions of these foregoing instruments purporting to transfer the operations of the facilities to MCHG is denied; it is further

ORDERED that the plaintiff's motion for reimbursement of the sum of $311,285.00 currently held by the Trustee is granted.

AND IT IS SO ORDERED

Sumter, S.C.
December 1, 2014

George C. James, Jr., Circuit Judge

FILED
2014 DEC -3 PM 1:11
CONNIE REEL-SHELTON
CCCP & GS
FLORENCE COUNTY S.C.

CERTIFIED: A TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

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Oct 25 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2012-CP-21-01149

Pee Dee Healthcare, P.A., ...Respondent,

v.

Lower Florence County Hospital District d/b/a
Lake City Community Hospital, ...Appellant,

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of Burr & Forman LLP, certify that, on this 25th day of October, 2022, a copy of Appellant's *Motion to Determine Appealability and Hold Timelines in Abeyance* was served upon all counsel of record in the above-captioned matter via email at the email addresses listed below:

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