THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court Of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case Nos. 2010-CP-25-491 and 2010-CP-25-492
South Carolina Court of Appeals No. 2012-207308

CHERRY SCOTT, as Personal Representative of the Estate of ELIZABETH JONES, Respondent,

v.

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Care of the Lowcountry, UNITED CLINICAL SERVICES, INC., UNITED REHAB, INC., and UHS-PRUITT CORPORATION, Appellants.

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INTRODUCTION

The parties are in agreement regarding much of the law governing the "Resident and Facility Arbitration Agreement" ("Arbitration Agreement"), including:

- that Ellen Jenkins executed the Arbitration Agreement on behalf of Elizabeth Jones (*see* Appellants' Brief at 2-3; Respondent's Brief at 5);
- that federal and state legislative and judicial policies favor arbitration of disputes (*see* Appellants' Brief at 8-9; Respondent's Brief at 8); and
- that ordinary principles of State contract law govern formation and interpretation of the Arbitration Agreement (*see* Appellants' Brief at 11, 25; Respondent's Brief at 9-10).

Defendants seek to enforce the Arbitration Agreement according to its precise terms and the provisions of the Federal Arbitration Act ("FAA"), the law that the parties agreed would govern enforcement of the Arbitration Agreement. Plaintiff seeks to avoid her contractual obligation to arbitrate by:

- ignoring the parties' agreement that their transaction involved interstate commerce and that the FAA applied and Plaintiff's own allegations of interstate commerce (*see* Appellants' Brief at 4-8; Respondent's Brief at 30-32);
- challenging Ms. Jenkins's authority to execute the Arbitration Agreement on behalf of Ms. Jones despite Plaintiff's own testimony that Ms. Jones expressly authorized Ms. Jenkins to admit her to Heritage of the Lowcountry and that Ms. Jones accepted the benefits of the contracts entered into by Ms. Jenkins on her behalf (*see* Appellants' Brief at 11-15; Respondent's Brief at 27-30);
- arguing that there was no "meeting of the minds" despite the existence of an unambiguous written contract, the Arbitration Agreement, setting forth the respective contractual obligations of the parties (*see* Appellants' Brief at 15-17; Respondent's Brief at 24-27);
- using the AAA Healthcare Policy Statement to suggest an interpretation of the Arbitration Agreement that is contrary to the plain meaning of the Arbitration Agreement and that cannot be reconciled with the express terms of the Arbitration Agreement or the rules for interpretation of contracts; arguing that the effect of the AAA Healthcare Policy Statement is to render the AAA "unavailable" despite the absence of any evidence

that the AAA has refused or would refuse to accept Plaintiff's claims for arbitration and language in the AAA Healthcare Policy Statement indicating that the AAA would administer an arbitration of Plaintiff's claims; and arguing that Section 5 of the FAA would not require the appointment of a replacement arbitrator even though there is no evidence that the AAA was integral to the Arbitration Agreement (Appellants' Brief at 17-25; Respondent's Brief at 11-22); and

- arguing that Defendants have waived their right to enforce the Arbitration Agreement simply by responding to Plaintiff's use of the court system and engaging in limited discovery targeted solely at enforcement of the Arbitration Agreement, even though Defendants asserted the Arbitration Agreement as a defense in their initial pleadings (Appellants' Brief at 26-29; Respondent's Brief at 22-24).

For these reasons, and as shown more fully below, the arguments raised by Plaintiff should be rejected, and the trial court's order should be reversed.

ARGUMENTS

I. The Federal Arbitration Act applies because the transaction involved interstate commerce.

Plaintiff contends that "there is no evidence of interstate commerce in the actual Arbitration Agreement between the parties." (Respondent's Brief at 31.) Contrary to Plaintiff's assertion, the parties specifically acknowledged in the Arbitration Agreement that their transaction involved interstate commerce and would be governed by the FAA:

> The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law.

(R. p. 654, ¶ 5) This agreement is sufficient evidence of a transaction between the parties involving interstate commerce. (*See* Appellants' Brief at 5-6.) Moreover, Plaintiff's Complaint, on its face, establishes interstate commerce in that Plaintiff contends that

entities outside of South Carolina were involved with and responsible for care delivered at the nursing facility in South Carolina. (*See* Appellant's Brief at 7-8.)

Plaintiff seeks to equate the acknowledgment of a transaction involving interstate commerce to a stipulation regarding subject matter jurisdiction. (Respondent's Brief at 31, n.5.) Plaintiff makes no attempt to explain how an acknowledgment of interstate commerce is the equivalent to a stipulation of subject matter jurisdiction or to distinguish the numerous cases in which courts have relied upon a stipulation of interstate commerce to determine that the FAA applies. (*See* Appellants' Brief at 6, notes 4-5.) Rather, Plaintiff offers the conclusory assertion that:

> Similarly, parties cannot "stipulate" to interstate commerce that would invoke the FAA and deprive the Courts of jurisdiction over disputes. "Like the construction of a contract, it is improper subject for stipulation and any attempted stipulation is not binding on a court." *Morris v. Beacham*, 274 S.C. 320, 262 S.E.2d 921 (1980).

(Respondent's Brief at 31, n.5.) *Morris* does not hold that whether a transaction involves interstate commerce or whether the FAA applies "is improper subject for stipulation" as Plaintiff suggests; rather, the "improper subject for stipulation" there was whether "the instrument in question created enforceable charitable trusts." *Morris*, 274 S.C. at 322, 262 S.E.2d at 922. *Morris* is inapposite to the issue of whether the FAA applies and in no way contradicts the numerous decisions in which courts have relied on the parties' acknowledgment of interstate commerce to determine that the FAA applies.

II. Ms. Jenkins was authorized to execute the Arbitration Agreement on behalf of Ms. Jones.

Plaintiff argues that Ms. Jenkins lacked "standing" to execute the Arbitration Agreement on behalf of Ms. Jones, arguing that "[t]here is no evidence that Ms. Jenkins had the authority to bind her sister to the Arbitration Agreement." (Respondent's Brief at

27.) This assertion ignores the evidence that Ms. Jones specifically authorized Ms. Jenkins to negotiate her admission to Lowcountry without placing any limitation on this authority, including Plaintiff's own testimony that Ms. Jones authorized Ms. Jenkins to act on her behalf. (*See* Appellants' Brief at 11-12.)

Plaintiff further seeks to avoid Ms. Jones's ratification of the agreements entered into on her behalf by Ms. Jenkins and her status as an intended third-party beneficiary of these contracts by arbitrarily seeking to divorce the Arbitration Agreement from the remainder of the contracts signed by Ms. Jenkins under the express authority granted her by Ms. Jones. (Respondent's Brief at 28-30.) Plaintiff's contention, in essence, is that Plaintiff can accept the benefits of a contractual relationship and unilaterally reject those portions of the contractual relationship that she later finds disadvantageous. The Arbitration Agreement was entered into in connection with Ms. Jones's admission to Lowcountry and explicitly references the Admissions Agreement. (R. p. 653) There was no reason for the parties to enter into an Arbitration Agreement outside of this admission. The Arbitration Agreement does not become wholly unrelated to the Admission Agreement simply because it was optional.[1] *See McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 at *7 (D.S.C. 2011) ("Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were

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[1] A rule that an arbitration agreement becomes unrelated to the underlying transaction simply because the company offers its consumers a choice of whether to elect arbitration will likely result in less voluntary arbitration agreements and more mandatory arbitration agreements, depriving consumers of choice in dispute resolution options. Moreover, a rule that an arbitration agreement becomes unrelated to the underlying transaction because it is offered in a separate document rather than as a clause within the underlying contract will likely result in companies moving arbitration agreements into clauses within the underlying contract, potentially making it more difficult for consumers to learn that they are agreeing to arbitration of disputes.

executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties.") (citing *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20, 24 (S.C. 1977) ("The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract.")). Ms. Jones (and those acting on her behalf) cannot accept the benefits of the Admission Agreement executed by Ms. Jenkins and then unilaterally ignore the Arbitration Agreement that was executed by Ms. Jenkins in connection with the Admissions Agreement. (*See* Appellants' Brief at 13-14.)

Plaintiff contends that she should not be equitably estopped from disavowing the Arbitration Agreement because "Appellant HHE can point to no benefit derived from the Arbitration Agreement by the decedent or her representatives." (Respondent's Brief at 30.) Again, Plaintiff's arguments conveniently ignore that the Arbitration Agreement was not entered into independently of the other admission contracts and would serve no purpose outside of the context of the other admissions contracts. Ms. Jones received the benefits of the Admissions Agreement that was the transaction underlying the Arbitration Agreement and, for that reason alone, should not be permitted to avoid the Arbitration Agreement. It is not necessary that Ms. Jones avail herself of the Arbitration Agreement in order to have ratified the Arbitration Agreement or to be bound as a third-party beneficiary or to be estopped from disavowing the Arbitration Agreement, so long as she accepted the benefits of the underlying transaction. *See Southern Bell Telephone &*

Telegraph Co. v. WRNO, Inc., 216 S.C. 533, 535-36, 59 S.E.2d 146, 147-48 (1950) ("If the appellant ratifies in part, it ratifies the whole."); *McCutcheon*, 2011 U.S. Dist. Lexis 144288 at *8-9 (enforcing separate arbitration agreement under equitable estoppel and third-party beneficiary theories based on benefits conveyed under separate admissions agreement); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. Lexis 103638 at *16-21 (D.S.C. 2011) (enforcing arbitration provision under equitable estoppel and third-party beneficiary theories); *Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1171-72 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under third-party beneficiary principles); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004) (same); *Trinity Mission Health & Rehab. v. Scott*, 19 So. 3d 735 (Miss. Ct. App. 2008) (same). Moreover, in addition to the benefits to Ms. Jones flowing from the Admissions Agreement, Ms. Jones and her representatives received the benefit, under the Arbitration Agreement, of being able to enforce the Arbitration Agreement to compel Defendants to arbitrate.

III. The unambiguous written terms of the Arbitration Agreement demonstrate a "meeting of the minds."

Plaintiff contends that Sally Dobson, Lowcountry's admissions director, "admitted that there could be no meeting of the minds as to an integral part of the contract." (Respondent's Brief at 27.) Plaintiff focuses on Ms. Dobson's lack of familiarity with the rules applicable to any arbitration which might take place under the Arbitration Agreement (Respondent's Brief at 25-27.) even though it is undisputed that Ms. Dobson did not discuss the applicable rules with Ms. Jenkins or Ms. Jones (R. p. 634, page 11, lines 10-22; R. p. 640, page 14, lines 13-18) Plaintiff ignores that Ms.

Dobson explained that the information that she does provide to individuals signing the Arbitration Agreement is wholly accurate and consistent with the written Arbitration Agreement: "When they sign the Arbitration Agreement, that [waives] their right to a jury trial or, you know, having it in court.... They are informed of this whenever they are there to sign." (R. p. 633, page 8, lines 9-14)

There is no evidence of a failure of the parties to agree to essential contractual terms. To the contrary, the Arbitration Agreement is a written contract that fully sets forth the parties' respective rights and obligations. There are no essential terms missing. Accordingly, there was a meeting of the minds with respect to the Arbitration Agreement. (*See* Appellants' Brief at 15-17.)

IV. The AAA Healthcare Policy Statement does not render the parties' agreement unenforceable.

The requirement in the Arbitration Agreement that any arbitration "shall follow the rules of the American Arbitration Association ('AAA')" does not render the Arbitration Agreement unenforceable because: (i) this provision does not require administration by the AAA (*see* Appellants' Brief at 18-21);[2] (ii) even if it did require administration by the AAA, the AAA is not "unavailable" (*see* Appellants' Brief at 21-23); and (iii) if AAA administration is required and the AAA is unavailable, a substitute arbitrator must be appointed pursuant to Section 5 of the FAA (*see* Appellants' Brief at 23-25).

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[2] Plaintiff mistakenly claims that "[t]here is *no dispute* that the agreement at issue that the agreement at issue was prepared by HHE and calls for any 'claim or claims' between the resident and HHE to be handled *under the auspices of the American Arbitration Association (AAA).*" (Respondent's Brief at 11 (emphasis added).) The Arbitration Agreement requires that "any arbitration ... shall follow the rules of the [AAA]." (R. p. 653, ¶ 2) It does not require that any arbitration be administered by or "under the auspices of" the AAA.

A. Application of ordinary contract principles requires enforcement of the Arbitration Agreement.

Plaintiff relies upon *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 425 (2009), in which the Supreme Court affirmed a trial court's refusal to enforce an arbitration agreement based on the unavailability of the designated forum. However, as that case indicates, arbitration agreements are matters of contract and, therefore, each arbitration agreement must be interpreted according to its own terms. *Grant*, 383 S.C. at 130, 678 S.E.2d at 438. The Arbitration Agreement here is significantly different from the agreement in *Grant*. Interpreted in accordance with general principles of contract interpretation, the Arbitration Agreement does not mandate the use of an exclusive forum and is enforceable in accordance with the precise terms used by the parties.

"The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997). "Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). "Common sense and good faith are the leading touchstones of construction of provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail. [Cit.] In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the

parties. [Cit.] When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. [Cit.] Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible. [Cit.]" *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission*, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988).

The Arbitration Agreement provides, in pertinent part, as follows:

> It is hereby understood and agreed by Heritage of the Low Country and Ellen Jenkins and or "Authorized Representative," together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration.**

(R. p. 653) (emphasis in original) The Arbitration Agreement further declares the parties' intention to resolve any dispute solely by arbitration by stating: "This means that the parties are waiving their right to a trial before a jury or a judge." (R. p. 653) This language is clear and unambiguous and susceptible of no interpretation other than that the parties agreed to resolve any claims "exclusively by **binding arbitration**" and to "waiv[e] their right to a trial before a jury or a judge." (R. p. 653) This language differs significantly from the language used by the parties in *Grant*. In *Grant*, there was no general statement of the parties' agreement to arbitrate exclusively by binding arbitration or to waive the right to trial by jury or judge. The parties in *Grant* agreed only to resolve any claims "by binding arbitration administered by the [American] Health Lawyers Association (the ['AHLA'])." *Grant*, 383 S.C. at 128, 678 S.E.2d at 436-37. Therefore, in *Grant*, when the AHLA became unavailable, there was no separate general statement of

intent to arbitrate to demonstrate the parties' agreement to arbitrate in the event the AHLA became unavailable.

The Arbitration Agreement in the present case provides that "[a]ny arbitration proceeding that takes place under this Arbitration Agreement shall *follow the rules of* the American Arbitration Association ('AAA') and any resulting decision shall be enforceable by a court of competent jurisdiction." (R. p. 653, ¶ 2) (emphasis added) Again, this language is clear and unambiguous and susceptible of only one interpretation: The arbitration will "follow the rules of the [AAA]." In *Grant*, the parties had specifically agreed to "binding arbitration *administered by* the [AHLA]," allowing an inference that administration of the arbitration by the AHLA (rather than simply pursuant to its rules) was important to the parties under the very terms of their agreement. In the present case, however, the Arbitration Agreement did not require that any arbitration be *administered by* the AAA. This distinction alone makes *Grant* inapplicable to this case. (*See* Appellants' Brief at 18-21.)

Despite the clear language and intent of the Arbitration Agreement, Plaintiff attempts to use the AAA Healthcare Policy Statement to invalidate the Arbitration Agreement. (*See* Respondent's Brief at 11-22.) Plaintiff relies on AAA Rule R-2 which, by its very terms, does not *require* the AAA to administer the parties' arbitration, but merely "*authorizes*" it to do so. (*See* Respondent's Brief at 14-15; AAA Rule R-2.) Additionally, the Rule acknowledges that the "authorities and duties of the AAA are prescribed *in the agreement of the parties* and in these rules, and *may* be carried out through such of the AAA's representatives as it may direct." (*Id.*) This language is consistent with well-settled authority that arbitration is a matter of contract and the

designated arbitrator may not exceed the powers designated to the arbitrator by the parties. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001); *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). However, nothing in Rule R-2, nor in any of the other AAA Rules, "directly appointments [sic] the AAA as the arbitral forum" as Plaintiff contends. (Respondent's Brief at 15.) Nor is there any prohibition against use of the AAA Rules in an arbitration administered outside of the AAA. Moreover, the Arbitration Agreement does not grant to the AAA the authority to alter or invalidate the Arbitration Agreement or to decide that claims covered by the Arbitration Agreement cannot be arbitrated. The rules cited by Plaintiff are insufficient to overcome the parties' express agreement to resolve any disputes "exclusively by **binding arbitration**." (R. p. 653)

Notwithstanding the clear and unambiguous agreement to arbitrate, Plaintiff seeks to avoid arbitration by arguing that the AAA Healthcare Policy Statement renders the Arbitration Agreement invalid. The Arbitration Agreement does not mention the AAA Healthcare Policy Statement (which is not a part of the AAA Rules) and does not require administration by the AAA. Rather, the Arbitration Agreement requires only that any arbitration "*follow the rules of* the [AAA]." (R. p. 653, ¶ 2) (emphasis added) Plaintiff interprets this language to preclude any arbitration, even though such interpretation directly contradicts every other provision, and indeed the entire purpose, of the Arbitration Agreement. Plaintiff's interpretation leads to the result that the parties entered into a stand-alone arbitration agreement, the sole purpose of which was to agree to resolve all disputes "exclusively by **binding arbitration**," but intended that the AAA

Healthcare Policy Statement (not referenced anywhere in the Arbitration Agreement) would preclude arbitration.

It cannot seriously be contended that the parties, by entering into an Arbitration Agreement, actually intended not to arbitrate. At least two other interpretations are possible which comport with the language used in the Arbitration Agreement and avoid the absurd result that follows from Plaintiff's proposed interpretation:

(1) The parties meant what they said when they agreed that any arbitration would merely *"follow the rules of* the American Arbitration Association ('AAA')." In other words, the parties intended that the arbitration, which they agreed would be the exclusive means of resolving any disputes between them, would be conducted in accordance with the AAA Rules, but not necessarily administered by the AAA; or

(2) The parties, recognizing that the AAA Healthcare Policy Statement would not prevent them from submitting their dispute to the AAA (because the AAA will administer consumer healthcare disputes if the parties choose to submit this dispute there), intended to perform the ministerial task of confirming their binding agreement to arbitrate with a submission agreement so that the AAA would administer their arbitration.

"Common sense and good faith are the leading touchstones of construction of provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail." *C.A.N. Enterprises*, 296 S.C. at 377-78, 373 S.E.2d at 586. To say the least, interpreting a provision which merely requires application of the AAA Rules to wholly invalidate the entire Arbitration Agreement in which that provision is located would be unusual and extraordinary. Defendants' construction, which comports with the parties' agreement to resolve all disputes exclusively by arbitration, is much more reasonable than the

construction proposed by Plaintiff, which leads to the result that the parties' agreement to arbitrate is, and was from the outset, an agreement not to arbitrate.

B. Section 5 requires appointment of a substitute arbitrator in the event of a vacancy or lapse in naming an arbitrator.

Once a valid and enforceable arbitration agreement is found to exist, Section 4 of the FAA mandates that the matter be submitted to arbitration. 9 U.S.C. § 4. Congress contemplated the possibility that an arbitrator designated by the parties may not be available to the parties for any host of reasons. Therefore, it enacted Section 5 of the FAA, which provides that

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or *if for any other reason there shall be a lapse in the naming of an arbitrator* . . . , or in filling a vacancy, then upon application of either party to the controversy *the Court shall designate and appoint an arbitrator* . . . who shall act under the same force and effect as if he . . . had been specifically named therein.

9 U.S.C. § 5 (emphasis added). The parties expressly agreed that the Arbitration Agreement would be governed by the FAA. Therefore, they have a right to expect that all relevant provisions of the FAA (including Section 5) will be applied. *See Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012) (finding that Section 5 of the FAA required appointment of a substitute arbitrator where the designated forum (NAF) had ceased arbitration of consumer claims and was therefore no longer available).

In an effort to avoid the Arbitration Agreement, Plaintiff argues that an arbitrator cannot be appointed as required by Section 5 because the AAA was "integral" to the Arbitration Agreement. However, as noted above, the Arbitration Agreement does not require that the AAA administer any arbitration, but merely requires arbitration to take

place pursuant to the AAA Rules. As the Arbitration Agreement does not even designate the AAA as the administrator of any arbitration, the AAA's administration of arbitration cannot be integral to the Arbitration Agreement. In *Grant*, the parties had agreed to "binding arbitration administered by the [AHLA]." *Grant*, 383 S.C. at 128, 678 S.E.2d at 437. The parties' decision in the present case not to require administration by the AAA demonstrates that administration by the AAA was not integral to the Arbitration Agreement.

Grant indicates that "[t]here is a dispute in the case law as to whether Section 5 applies in cases where, as here, the parties have specified an *exclusive* arbitral forum, but that forum is *no longer available*." *Grant*, 383 S.C. at 130, 678 S.E.2d at 438 (emphasis added). Unlike the arbitration agreement at issue in *Grant*, the parties here did not designate any arbitral forum (much less an exclusive one), but merely agreed to follow the AAA Rules. (R. p. 653, ¶ 2) Moreover, the AAA is available. Thus, *Grant* is inapposite.

Plaintiff further relies on the cases of *In Re Salomon*, 68 F.3d 554 (2d Cir. 1995); *Smith Barney v. Critical Health Systems in North Carolina, Inc.*, 212 F.3d 858 (4th Cir. 2000); and *Buice v. WMA Securities, Inc.*, 380 S.C. 149, 668 S.E.2d 430 (Ct. App. 2008). However, none of these cases stands for the proposition that mere reference to a particular arbitral forum or arbitral rules automatically renders the forum or rules "integral" to the parties' arbitration agreement. Moreover, the AAA Rules can be applied by any arbitrator pursuant to the Arbitration Agreement. Additionally, the AAA will administer the parties' dispute if the parties so choose.

In *In Re Salomon*, the defendants "had signed an agreement to arbitrate (under the Constitution and rules of the NYSE) any dispute arising out of their employment by Salomon Brothers." *In Re Salomon*, 68 F.3d at 556. The trial court ordered shareholder derivative claims to arbitration before the NYSE. The NYSE determined that "shareholder controversies were not appropriately within the mandatory provisions of its Constitution" and that "jurisdiction must be based on the consent of the parties to arbitrate, and neither the shareholders who initiated the derivative action nor Salomon have consented to arbitration." *Id.* (internal punctuation omitted). The Second Circuit noted that "under the arbitration agreements, all disputes were to be arbitrated by the NYSE and only the NYSE, 'in accordance with the [NYSE] Constitution and rules.' The NYSE Constitution clearly permits the NYSE to refuse the use of its facilities for the arbitration for any particular dispute. NYSE Const. Art. XI, Sec. 3. When the NYSE so refuses, there is no further promise to arbitrate in another forum." *Id.* at 557. The Second Circuit noted that "we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate disputes *only* before the NYSE and the NYSE, in turn, exercising its discretion under its Constitution, has refused the use of its facilities to arbitrate the dispute in question." *Id.* at 558. Notably, the arbitration agreements at issue in *In Re Salomon* allowed the NYSE to decline jurisdiction in particular cases, did not specify that they covered shareholder derivative claims, and did not contain a general statement requiring all disputes to be resolved "exclusively by binding arbitration" or waiving the right to trial by jury or judge. The Second Circuit "read the agreements here as providing for arbitration *only* before the NYSE." *Id.* at 561 (emphasis added). It further held that "whether the NYSE would arbitrate the dispute

'was *central* to the parties' agreement to arbitrate.'" *Id.* (emphasis added). The court also held that "the '*dominant intent*' of the parties was 'to arbitrate before particular arbitrators.'" *Id.* (emphasis added). Also, the NYSE refused to arbitrate based on concerns over "the problems shareholder derivative suits pose." *Id.* at 560. Thus, *In Re Salomon* involved a unique circumstance in which the identity of the arbitrator was at least as important to the parties as whether to arbitrate. As the language in the Arbitration Agreement in the present case differs significantly from the language at issue in *In Re Salomon*, this case is inapposite.

In *Smith Barney*, the Court held that the claimant was required to pursue its arbitration before one of the three specified fora (NYSE, NASD, or AMEX) and could not pursue its claims before another forum (AAA) because "the NASD, NYSE, and AMEX arbitration rules provide that claims based on transactions that occurred more than six years before arbitration was filed are not eligible for arbitration [and] Smith Barney was entitled to rely upon [these rules]." *Smith Barney*, 212 F.3d at 862. There was no claim that the NYSE, NASD, or AMEX was unwilling to arbitrate the dispute. Therefore, *Smith Barney* did not involve a failed forum as Plaintiff contends is the case here. *Id.* ("Here Critical Health has the choice of three fora. We can see no reason to pass over the three specified fora and allow arbitration to proceed in a fourth unspecified arena."). This case does not support Plaintiff's position.

In *Buice*, the Court of Appeals found that a claimant was not required to arbitrate a securities dispute against a firm whose membership in the NASD had been terminated, suspended, canceled, or revoked. In reaching its decision, the Court of Appeals found significant the legislative history of NASD Rule 10301 which indicated that the reason

the NASD refused to enforce pre-dispute arbitration agreements in such situations was that "terminated, suspended, barred or otherwise defunct firms have a significantly higher incidence of nonpayment of arbitration awards than do active firms." *Buice*, 380 S.C. at 155-56, 668 S.E.2d at 433. Thus, NASD Rule 10301 which assured a customer that it would only be required to arbitrate if the respondent member remained in good standing with the NASD was integral to the arbitration agreement. Thus, *Buice* involved specific facts demonstrating that the designated forum was important to the parties' agreement to arbitrate and does not support Plaintiff's position.

As in the previous cases, the Court in *Grant* did not merely presume that the designated forum was integral, but relied on evidence indicating the importance of that forum to the parties. *Grant*, 383 S.C. at 131, 678 S.E.2d at 438-39. The Court noted that "[t]o determine whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern, courts look to the 'essence' of the arbitration agreement." *Id.* The Court noted that

> [u]nder AHLA policy, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. In our view, the parties' waiver of this set of rights in agreeing to arbitrate before the AHLA reflects their specific intent to arbitrate *exclusively* before that body. Furthermore, the designation of a forum such as the AHLA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration.

Id. The present case differs from *Grant* in that the parties indicated only that the AAA Rules would apply, and these rules can be applied by any arbitrator. The parties agreed to resolve all disputes "exclusively by binding arbitration," but did not agree to arbitrate exclusively in an AAA forum. Accordingly, submitting the parties' dispute to arbitration

pursuant to the AAA Rules—whether administered by the AAA or someone else—does not contradict any provision of the parties' Arbitration Agreement. Moreover, if Plaintiff truly believes that the Arbitration Agreement requires her to arbitrate exclusively in an AAA forum, this forum is available.[3]

V. Defendants did not waive the right to enforce the Arbitration Agreement.

Plaintiff contends that the Defendants have waived the right to arbitration simply by responding to Plaintiff's use of the court system and engaging in limited discovery targeted solely at enforcement of the Arbitration Agreement, even though Defendants asserted the Arbitration Agreement as a defense in their initial pleadings. Plaintiff's argument fails to demonstrate any action of Defendants that could constitute a voluntary and intentional abandonment of the right to arbitrate. Rather, Plaintiff seeks to deprive Defendants of their contractual right to arbitration simply because Defendants defended against Plaintiff's use of the court system and obtained discovery necessary to enforce the Arbitration Agreement. (Respondent's Brief at 22-24.) Plaintiff has failed to cite any authority in support of its contention that Defendants waived the right to enforce the Arbitration Agreement merely by defending themselves in litigation initiated by Plaintiff,

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[3] Plaintiff's suggestion that Defendants have argued "that the FAA would somehow force the Personal Representative of Ms. Jones' Estate to now execute a 'post-injury' arbitration agreement" (Respondent's Brief at 22) is a misstatement of Defendants' argument and misses the point. Plaintiff seeks to avoid the Arbitration Agreement on the false premises that the Arbitration Agreement requires the AAA to administer the parties' arbitration and that the AAA is "unavailable" to her. Defendants have shown that the AAA is not "unavailable" and that the Arbitration Agreement can be enforced in accordance with Plaintiff's purported preferred interpretation (administration by the AAA) if Plaintiff simply submits her dispute to the AAA. (Appellants' Brief at 21-23.) If Plaintiff's interpretation of the Arbitration Agreement as requiring arbitration administered by the AAA is a serious construction of the language of the contract rather than a contrived attempt to avoid her contractual obligations, then it defies logic that she would not simply submit her claims to the AAA as she claims the contract requires.

responding to discovery, and engaging in discovery limited to enforcement of the Arbitration Agreement. Such limited engagement in the litigation process (caused by Plaintiff's failure to abide by the Arbitration Agreement) is insufficient to establish a knowing and voluntary waiver of the right to compel arbitration, particularly where Defendants immediately raised arbitration in their Answers; challenged the Plaintiff's Motion to Strike the arbitration defenses; and conducted limited discovery for the express purpose of enforcing the Arbitration Agreement. Defendants have not waived their right to enforce the Arbitration Agreement. *See Carlson v. S.C. State Plastering, LLC*, Ct. App. Opinion No. 5143 (June 12, 2013) (finding no waiver despite two-year delay while defendants pursued a motion to dismiss on the merits where defendants raised the issue of arbitration since the inception of the case). (*See also* Appellants' Brief at 26-29.)

CONCLUSION

The parties entered into an arbitration agreement which covers Plaintiff's claims. The parties agreed that their transaction involved interstate commerce and that the FAA applies. Defendants asserted the issue of arbitration in their Answers and have consistently maintained their position that Plaintiff's claims belong in arbitration. Plaintiff asserts no fault with the substance of the Arbitration Agreement other than the purported unavailability of the AAA. The Arbitration Agreement, by its own express terms, requires only that arbitration proceed under the AAA Rules, not necessarily in an AAA forum. Therefore, there is no reason that the present dispute cannot be resolved in an arbitration under the AAA Rules as required by the parties' Arbitration Agreement. Moreover, the AAA is available and willing to arbitrate Plaintiff's claims with a submission agreement. Therefore, if arbitration in an AAA forum is truly important to Plaintiff, that forum is available to her. Given these available alternatives, federal and

State policies favoring arbitration, and provisions of the FAA mandating enforcement of the Arbitration Agreement, the Arbitration Agreement must be enforced rather than invalidated.

For the reasons set forth herein and in Appellants' Brief, Defendants respectfully request that the Court reverse the trial court's Order Denying Defendants' Motion To Compel Arbitration and Stay Proceedings and remand this matter for an Order compelling Plaintiff to pursue her claims in arbitration and staying the litigation.

Counsel for Appellants certifies that the Final Reply Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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August 30, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492
Court of Appeals Case No. 2012-207308

Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones .... Respondent,

v.

Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation........... Appellants.

PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Final Reply Brief of Appellants by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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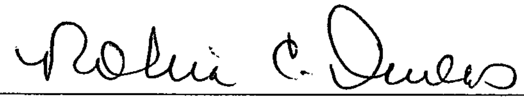

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8/30, 2013