THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master-In-Equity

Case No. 2014-CP-07-2779
Appellate Case No. 2015-002363

RECEIVED
MAY 25 2016
SC Court of Appeals

Mary Beth Marzulli, ... Respondent,

v.

Tenet South Carolina, Inc., Hilton Head Health System, LP d/b/a/ Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., ... Appellants.

RECORD ON APPEAL

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Certificate of Counsel .....

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-2779
MARY BETH MARZULLI,	)	
	)	
Plaintiff,	)	ORDER
	)	
vs.	)	
	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
	)	
Defendants.	)	

FILED
BEAUFORT COUNTY, SC
2015 OCT 23 PM 3:33

This matter was before the Court on the Defendants' Motion to Compel Arbitration pursuant to the Federal Arbitration Act.[1] The Court received memoranda and supplemental memoranda, numerous affidavits and exhibits, and held two hearings. The matter was given considerable deliberation, and for the reasons detailed below, the Court denies Defendants' motion.

Factual Background

Plaintiff Marzulli is a physical therapist with over forty (40) years of professional experience. She specializes in pediatric physical therapy and treats children with special needs and disabilities. Marzulli obtained a Bachelor of Science Degree from the University of Alabama in Birmingham and studied at the graduate level. She was issued a South Carolina license to perform her work on September 14, 2011, and has been licensed in other states. She has held several positions, including the Chief Physical Therapist at Ashton Hall Nursing Home in

[1] The Defendants' Motion asserts arbitration only on federal grounds. Defendants also moved pursuant to SCRCP 12 (b)(1) and (6) but effectively abandoned that motion. Therefore, that motion is denied.

Philadelphia, at Imperial Point Hospital in Fort Lauderdale, Fla., and at Carraway Methodist Medical Center in Birmingham, Alabama. Marzulli also worked, among many other positions, with Mercy Catholic Medical Center Foundation and the Shiners Hospital for Children. She has held teaching positions and clinical teaching appointments as well. She has served on the Board of Directors of the American Hippotherapy Association and Quest Therapeutic Services. Marzulli has been a member of the American Physical Therapy Association, and has been published. The Plaintiff is a care-giver to young people afflicted with significant physical afflictions, including neurological maladies.

Hilton Head Regional Medical Center (a/k/a Hilton Head Hospital) is a local hospital which markets itself as a regional medical center serving and a part of the local Hilton Head Island community.

According to the Second Affidavit of Darlene Nester, the Chief Human Resources Officer for Hilton Head Hospital, Mary Beth Marzulli's first date of employment was September 19, 2011. Marzulli was hired as a pediatric physical therapist. She had purchased a home in South Carolina in 2008, and that home has become her permanent residence. The Plaintiff began leasing a second home in Hilton Head establishing two residences in South Carolina on September 5, 2011. She obtained her South Carolina physical therapist license on September 14, 2011. Marzulli got a South Carolina driver's license on September 16, 2011.

Well after her start date, in October 2011, the Plaintiff was required to sign several administrative documents at a required orientation. One of the documents was titled an "*Acknowledgement.*"[2] Upon receiving the *Acknowledgement* the Plaintiff was told by the Defendants' human resource representative that the document simply acknowledged that she had

[2] The Court notes that the document at issue titled, "*Acknowledgement*" contained an incorrect spelling of the word "Acknowledgment" in its title.

received the employee handbook. However, the Plaintiff did not receive the employee handbook contemporaneously with the *Acknowledgement.* Buried nondescriptly within the fourth of five paragraphs in this single spaced, small font document is the disputed language attempting to impose arbitration. The document was signed October 10, 2011.

Mrs. Marzulli's employment as a physical therapist consisted of her treating local patients at a local hospital by providing them with one on one physical therapy services.

The Plaintiff's theory in this defamation action is that Defendants committed a false accusation that a 40-year physical therapist veteran, married professional, sexually and physically abused a minor of the same sex, a patient who had special needs.

Standard of Review

Both federal and state policy favors arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995) ("The policy of the United States and this State is to favor arbitration of disputes.") Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration. *Volt Inf. Scis. Inc. v. Board of Trs.*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d. 488 (1989). Stated simply, every purported arbitration agreement is not enforceable.

"[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.*, at 478, 109 S.Ct. at 1255. While the federal policy favoring arbitration as expressed in the Federal Arbitration Act is now binding in state courts and supersedes inconsistent state law, the act nonetheless requires *a contract evidencing a transaction involving commerce* to settle a controversy by arbitration.

Zabinsksi v. Bright Acres Associates, 346 S.C. 580, 553 S.E. 2d 110 (2001), citing *Allied-Bruce Terminix Co. V. Dobson*, 513 U.S. 265, 115 S.CT. 834, 130 L.Ed.2d 753 (1995).

Analysis

A. Ms. Marzulli's work did not require her to perform actions related to interstate commerce.

Mrs. Marzulli was a South Carolina resident and her employment as a physical therapist consisted of her treating local patients at a local hospital by providing them with one on one physical therapy services. The Defendants ask the court to rule that all employment in the health care field involves interstate commerce. However, Defendants' position is without any support of the jurisprudence of South Carolina. Further, it is in direct contradiction with *Flexon v. PHC ("Flexon I")*[3]

In determining whether a transaction is inside or outside of the scope of the FAA, the court determines "whether *the contract* require[s] [a party] to administer anything related to interstate commerce." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. App. 2003) (quoting *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 SE2d 880, 882 (2001))(emphasis added). Pursuant to the Federal Arbitration Act, "A written provision in any *contract* evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such [ ]contract* . . . shall be valid, irrevocable and enforceable, save

[3] Defendants further argue that, because the Plaintiff at times used "props" or devices that are shipped from across state lines while providing physical therapy to patients, her work involved in interstate commerce. This argument is without merit. Under this same theory, a South Carolina History teacher, teaching South Carolina students in a South Carolina classroom would be engaging in interstate commerce when he used chalk that was manufactured in another State to write on a chalkboard that was manufactured outside of South Carolina. If the Court were to accept the Defendant's argument, it would be hard to imagine any work which could exist that would not involve interstate commerce. Likewise, Defendant's argue that, because some of the Plaintiff's patients' bills were at times paid by out-of-state insurers or Medicare or Medicaid, that her work involved interstate commerce. This argument is unpersuasive. Even if the Court assumes *per arguendo* that the act of paying a bill across State lines involves interstate commerce, the Plaintiff did not personally submit bills to insurance providers for payment. That job would be a task assigned to other employees of the Defendant. The Plaintiff's job was to provide a medical service, physical therapy, to local patients.

upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. 2 (2009) (emphasis added). Courts must "focus upon what the terms of *the contract* specifically require for performance in determining whether interstate commerce is involved. Our courts consistently look to the essential character of *the contract* when applying the FAA." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. App. 2003) (emphasis added). "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

Compare the *Acknowledgement* signed by Ms. Marzulli to the recruiting agreement and employment contract signed by the Plaintiff in *Thornton*. In *Thornton* the Court looked to what the contract between the parties required the parties to *perform*. The Court noted in *Thornton* that the entire contract that was subject to the arbitration provision "was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines." *Thornton*, 357 S.C. at 98. Indeed, in *Thornton* "[t]he express purpose of the recruiting agreement was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.* Again, the entire agreement in Thornton, the recruiting agreement and contract for employment which was part and parcel to it, was the *contract* that the court interpreted.

Here, the only purported contract for the Court to consider is the "*Acknowledgement.*" The terms of the *Acknowledgement* have nothing to do with Mrs. Marzulli's move to South Carolina.[4] She signed the *Acknowledgement* as a South Carolina resident.

[4] Paragraph four of the *Acknowledgement*, beginning on the final word of line two of the paragraph states, in small, single spaced nondescript font, "I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration of any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet."

Also compare the nature of Mrs. Marzulli's work to the work of the Plaintiff in *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999). In that case, the Plaintiff was required to attend out-of-state conferences, participated in conferences with the Defendant's office in Minnesota, reviewed claims from out-of-state providers and specialty providers located in North Carolina and Georgia, and participated in Sales Presentations in South Carolina and Georgia, and, reviewed proposals from out-of-state medical and ancillary service providers. The court found those activities provided "sufficient evidence to invoke the FAA." Here, Ms. Marzulli's work had no similar requirements. She was a local physical therapist providing physical therapy services to local patients at a local facility.

South Carolina jurisprudence is dispositive to the issue. *Flexon v. PHC-Jasper, Inc.*, a 2012 Court of Appeals decision, dictates that Defendants' motion to compel arbitration be denied. Flexon was a South Carolina resident licensed to practice medicine as a physician. He was to practice at sites in Jasper County. There was an arbitration agreement. The trial court found the employment agreement called for local medical services to be performed at a medical facility in Hardeeville, and as such denied the motion to compel arbitration since it didn't involve interstate commerce. *See Flexon, supra*, 309 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012).

Flexon is analytically analogous to the present case before the Court. Here, the Plaintiff provided physical therapy services exclusively in South Carolina. She did not travel out of state for her work. (By contradistinction, *see Lucey v. Meyer*, 201 S.C.C 122, 736 S.E. 2d 274 (Ct. App. 2012), in which employment *contract* detailed at least one specific matter which required out of state travel, triggering the commerce clause.)

Flexon resurfaced to the Court of Appeals and a different panel ruled again in favor of the physician. *Flexon v. PHC-Jasper, Inc.*, Op. No. 5336, Filed July 29, 2015 ("*Flexon II*"). Thus, this case is binding and controlling jurisprudence.

The Court also looks to the terms of the "*Acknowledgement*" to determine whether *it* requires Mrs. Marzulli to administer anything related to interstate commerce. Here, the "*contract*" that the court must examine is the "*Acknowledgement.*" Thus, the Court must determine whether its terms require Ms. Marzulli to specifically perform anything related to interstate commerce. See *Thornton, supra.* No other contemporaneous or subsequent contract exists. The FAA only requires arbitration of "*a controversy thereafter arising out of such contract,*" not controversies or acts arising before the contract was entered into. 9 U.S.C. 2 (2009).

Ms. Marzulli was a South Carolina resident when she signed the "*Acknowledgement*" for nearly one month. This dispels and relevancy to the fact that she established permanent residency in South Carolina approximately one month before signing the alleged contract at issue. Her act of signing the *Acknowledgement* on October 10, 2011 as a South Carolina resident in no way evidences the involvement of interstate commerce. Further, an agreement to arbitrate—the only purported contract at issue here—standing alone does not involve interstate commerce.

Finally, even if the Court looks beyond the four corners of the *Acknowledgement* to determine what the agreement required her to perform, as detailed above, Marzulli's work did not involve interstate commerce. Marzulli performed all her work in South Carolina, it did not involve interstate commerce and thus, arbitration should not be compelled. Given that

Defendants move only on the basis of the federal act, the South Carolina Act is inapplicable as well.[5]

B. The "Agreement" is Unconscionable

The Plaintiff began leasing a second home in Hilton Head establishing two residences in South Carolina on September 5, 2011. She obtained her South Carolina physical therapist license on September 14, 2011. Marzulli got a South Carolina driver's license on September 16, 2011. According to Tenet's records, the Plaintiff was to begin work on September 19, 2011 and for her first pay period, she received her first direct deposit from Defendants on October 21, 2011. She unquestionably was a South Carolina resident no later than September 16, 2011, and began employment prior to the document at issue was required to be signed by her.

Marzulli began work at Tenet weeks before October 11, 2011, the date she was required to sign the "*Acknowledgement*", requiring Ms. Marzulli to submit "any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment with Tenet." She had no meaningful choice in the matter; she had no negotiating leverage. There was no bargaining for the clause.

General contract principles of state law demonstrate that the arbitration clause is not enforceable. *See Simpson, supra.* In that Marzulli had already established her residency in South Carolina and had in fact begun work before being required to sign the "*Acknowledgement*" at a subsequent orientation, the purported agreement lacks a component so axiomatic no citation is necessary–consideration. Without consideration, there can be no contract. Without a contract, arbitration cannot be compelled. Even if there were consideration, and there is not, the "agreement" is unconscionable.

[5] Further, the "*Acknowledgement*" signed by the Plaintiff does not meet the notice requirements of the South Carolina Uniform Arbitration Act, and was made a condition of employment, which also violates the SCUAA; Thus, under the SCUAA, the document titled "Acknowledgement" is unenforceable.

In determining unconscionability, the Court considers whether a contract provision is absent of meaningful choice and contains oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F. 2d 287 (4th Cr. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *Id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293.

Here, the alleged defamation is actionable per se, meaning that she suffered presumed damages; the Plaintiff is an individual, not a substantial business concern; she had no bargaining power as she had already begun work and was required to sign the agreement; the Defendants are very sophisticated business and health care companies; and the clause is unquestionably inconspicuous, buried in a document which is single-spaced in small font, which bears a misspelled title (that in no way gives notice of the substantive right that the Defendants argue the Plaintiff relinquished by signing the same). The Agreement was offered on a "take it or leave it" basis. The context of the inclusion of the clause and the circumstances of her being required to sign it disturb the court.

The terms of the agreement are oppressive and one-sided. They strip her right to a jury trial. According to the Defendant's arguments, it requires the Plaintiff to arbitrate a criminal act. The document also requires a "Fair Process" procedure that curiously, the Defendants did not employ in this matter. They seek to invoke one clause, the one concerning arbitration, while

eschewing the procedural mechanism supposedly designed to protect the process rights of the employee.

These factors in sum considered, the Court is convinced that the Plaintiff had no meaningful choice but to sign the document titled *Acknowledgement*. She had already begun her job. Additionally, the Defendants ask the court to enforce an agreement which, according to the Defendants, allows them to report the other bound party to law enforcement without probable cause, thereby filing a criminal "claim" against that party which would be subject to a jury trial, but which bars the Plaintiff from seeking redress by way of jury trial for that very act of unlawful reporting which may itself be a crime. Such terms patently are oppressive and one-sided.

C. The intentional tort of defamation is not contemplated by the "agreement."

Defamation is a false and defamatory statement about the plaintiff published by the defendant to others. It is an intentional tort. The cause of action in this case is not founded on employment or termination grounds; it is not a breach of contract action, discrimination suit or payment of wages claim. The defamation suit is not pendent to employment causes of action, as they often are in "shotgun" approaches to pleading numerous causes of actions. Instead, this intentional tort is not grounded upon employment issues. The alleged publication of the defamation was not made to individuals exclusively within the Plaintiff's employment, but to individuals outside of and unaffiliated with Plaintiff's employment. Consequently, the libel and slander are not "related" to her employment or termination. What is more, in South Carolina, commission of slander or libel is a violation of the criminal code. *See,* S.C. Code Ann. §16-7-150. One cannot consent to a criminal act, nor agree to arbitrate a criminal act. Utilizing contractual principles, it is difficult to see that a defamation claim would be contemplated and negotiated in this case.

There is a slim cache of legal authorities on the issue of whether the tort of defamation is contemplated by an arbitration agreement, but cases exist. The Second Circuit, under different facts, has found that defamation and related claims are not necessarily bound by arbitration provisions. *See, Coudert v. Paine Webber Jackson & Curtis*, 705 F. 2d 78 (1983); *McMahon v. RMS Electronics, Inc.*, 618 F. Supp. 189 (1985).

This court finds, holds and rules that the Defendant's Motion to Compel Arbitration is DENIED, consistent with the findings and conclusions above.

AND IT IS SO ORDERED.

Presiding Judge

October 22, 2015
Beaufort, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)

MARY BETH MARZULLI,)
Plaintiff(s)) CIVIL ACTION COVERSHEET
vs.)
TENET SOUTH CAROLINA, INC., et al.,)
Defendant(s))

2014-CP - 07- 2779

2014 OCT 30 AM 2:12

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NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☒ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

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- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
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- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** October 27, 2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT MARY BETH MARZULLI, Plaintiff, vs. TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC., Defendants.	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2014-CP-07- 2779 SUMMONS (Jury Trial Demanded)

2014 OCT 30 AM 2:12
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at his office located at 35 Hospital Center Common, Suite 200, Post Office Box 24005, Hilton Head Island, South Carolina 29925-4005, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for a judgment by default for the relief demanded in this Complaint.

FINGER & FRASER, P.A.

Benjamin T. Shelton
PO Box 24005
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(843) 681-7000
Attorney for Plaintiff

October 27, 2014
Hilton Head Island, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-
MARY BETH MARZULLI,	)	
Plaintiff,	)	COMPLAINT
vs.	)	(Jury Trial Demanded)
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
Defendants.	)	

2014 OCT 30 AM 2:12
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Plaintiff Mary Beth Marzulli ("Marzulli"), complaining against Defendants Tenet South Carolina, Inc. ("Tenet SC"), Hilton Head Health System, LP, d/b/a/ Hilton Head Regional Medical Center ("Hilton Head Regional"), and Tenet Physician Services–Hilton Head, Inc. ("Tenet Services"), alleges and says:

1. That Plaintiff is a citizen and resident of the County of Beaufort, State of South Carolina.

2. That Defendant Tenet SC, upon information and belief, is a for-profit corporation organized and existing under the laws of the State of Delaware and doing business in the County of Beaufort, State of South Carolina.

3. That Defendant Hilton Head Regional, upon information and belief, is a for-profit limited partnership organized and existing pursuant to the laws of the State of South Carolina and doing business as Hilton Head Regional Medical Center, also known as Hilton Head Hospital, in Beaufort County, South Carolina.

4. That Defendant Tenet Services, upon information and belief, is a for-profit corporation organized and existing pursuant to the laws of the State of South Carolina and doing business in the County of Beaufort, State of South Carolina.

5. That Plaintiff Marzulli is a physical therapist with over forty (40) years of professional experience. She worked for Defendants from September 2011 through July 2014. Marzulli specialized in pediatric physical therapy and treated children with special needs and disabilities. Marzulli obtained a Bachelor of Science Degree from the University of Alabama in Birmingham, and studied at the graduate level. She has a South Carolina license to perform her work, and has been licensed in other states. She is dedicated to continuing education and has received advanced training in several areas of pediatric therapy skills. She has held several positions, including the Chief Physical Therapist at Ashton Hall Nursing Home in Philadelphia, at Imperial Point Hospital in Fort Lauderdale, Fla., and at Carraway Methodist Medical Center in Birmingham, Ala. Marzulli also worked, among many other positions, with Mercy Catholic Medical Center Foundation and the Shiner Hospital for Children, both in Philadelphia. She has held teaching positions, and clinical teaching appointments as well. She has served on the Board of Directors of the American Hippotherapy Association and Quest Therapeutic Services. Marzulli is a member of the American Physical Therapy Association, and has been published. The Plaintiff is a committed care-giver, a specialist in her field, dedicated to the betterment of young people afflicted with significant physical afflictions, including neurological maladies. Her integrity is unmatched, and her reputation is beyond reproach. She is a consummate professional.

7. That Defendants, recognizing her credentials, were attracted to hiring Plaintiff. Consequently, as part of their hiring protocol, they completed a thorough background check on Marzulli before hiring her to fill a need for an experienced children's physical therapist. Defendants

vetted references and Plaintiff's background. Naturally, the vetting process uncovered nothing that prohibited Defendants from hiring her. Thus, Defendants had actual knowledge of her stellar record, professionalism, integrity and specialized skill in her field.

8. That on or about May 13, 2014, Defendants' administrative employee, the Director of Risk Management, a lawyer, communicated and published to the Beaufort County Sheriff's Office that Plaintiff physically and sexually abused a nine (9) year old female patient.

9. That Defendants did not discuss the preposterous allegation with Plaintiff before making the disgusting, inflammatory and defamatory communication to law enforcement.

10. That when she learned of the allegation, Mary Beth Marzulli immediately broke down in tears in disbelief, despondent from the patently false, fabricated, and derogatory statement.

11. That Defendants repeated the defamation that Mary Beth physically and sexually assaulted a nine-year old female patient.

12. That Mary Beth was immediately suspended from her employment without pay and was subjected to over a nearly two month criminal investigation and the stress and humiliation of multiple interrogations and the prospect of criminal charges carrying up to 25 years in prison.

13. That in the course of the police investigation, the authorities were told by Mary Beth's supervisor that she was surprised by the allegations because Mary Beth Marzulli was very dedicated to pediatric physical therapy.

14. That upon information and belief, Defendants instructed their employees not to speak with Plaintiff while Mary Beth was suspended. Further, upon information and belief, Defendants threatened employment action against employees of Tenet if they spoke to Mary Beth Marzulli about her suspension, even after the Sheriff's Office's investigation was complete.

15. That Defendants refused to allow Mary Beth to work on patient charts or other

administrative functions during the course of her suspension.

16. That the Beaufort County Sheriff's Office investigation of the incident revealed that no evidence existed to support the criminal allegations communicated and repeated by Defendants. Further, the Sheriff's Office investigation's found that the assertions communicated and repeated by Tenet are "unfounded."

17. That, even after Mary Beth Marzulli was absolved of any charge and the statements were affirmed as unfounded, Defendants refused to allow Mary Beth Marzulli to return to work and demanded she sign a "performance plan" as a condition precedent for her to return as an employee. This action by Defendants was a coercive attempt by Defendants to change the facts "after-the fact".

18. That when Mary Beth Marzulli refused to sign the questionable and improper "performance plan", Defendants informed Mary Beth Marzulli a compliance officer already had been notified as to her alleged poor performance. Thus, the defamation was a subterfuge to get Plaintiff fired.

19. That less than one month prior to the false statement published by Defendants, Mary Beth Marzulli did in fact have her employment review that concluded her job performance to be good.

20. That despite the positive conclusion to the performance review, Defendants terminated Mary Beth on July 30, 2014.

21. That when Mary Beth went to Tenet to retrieve her personal belongings, the receptionist told her that she was not allowed at the facility without a security escort.

22. That when she returned to the facility at a scheduled time after being initially turned away by Defendants, an administrator escorted Mary Beth in view of other individuals while she retrieved her belongings. When she asked if she could retrieve items from another facility, she was

refused access. Defamation can occur from actions. These actions by Defendants communicated that Plaintiff was unfit for her profession, and that she was guilty of a criminal charge.

23. That the Defendants' defamation communicated that Plaintiff had been adjudged to have committed crimes, ethical violations, and that she was unfit for her profession.

24. That at all pertinent times, the Plaintiff was a private figure. Therefore, Plaintiff is not required to specially plead, prove, and make a constitutional case under the standards of New York Times v. Sullivan and its following cases.

25. That the communications made by the Defendants were false and defamatory, and *actionable per se*.

26. That the said defamation was made with actual knowledge of the falsity, reckless disregard of the truth, and common law malice.

27. That the Defendants acted deliberately, out of ill-will and malice, when they made the statements concerning Plaintiff.

28. That the falsities communicated by the Defendants were defamatory and subjected the Plaintiff to hatred, ridicule and contempt. The defamatory statements were made with serious implications that Plaintiff was unfit for her profession and had committed unspeakable crimes against a challenged, vulnerable, female minor, behavior that if true, would be intolerable in our society. Plaintiff suffered an injury to reputation, loss of income, mental suffering, personal injury, hurt feelings and other similar types of injuries which our Supreme Court recognizes as being incapable of a definite money evaluation.

29. That the statements and actions made by the Defendants are *actionable per se*, communication the commission of crimes and conduct constituting unfitness in one's profession, and deviant, immoral conduct. These allegations give rise to a general presumption of damages that

by law are not required to be proved by evidence.

30. That the Defendants were negligent, grossly negligent, willful and wanton in publishing the said statements and actions referenced herein.

31. That the Defendants purposely avoided the truth. The Defendants communicated the falsities and defamation with actual knowledge of its falsity and/or reckless disregard for the truth and malice, actual or implied. Therefore, Plaintiff is entitled to punitive damages.

32. That the Plaintiff is entitled to general damages, special damages and substantial punitive damages.

WHEREFORE, the Plaintiff, having fully complained against the Defendants above-named, prays for judgment against the Defendants in an amount to be determined by the trier of fact, for actual and punitive damages, plus costs, and for what other relief the Court deems just and proper.

DeANTONIO LAW FIRM, LLC

BTS, for

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Attorney for Plaintiff

Oct. 27, 2014
Charleston, South Carolina

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BTS

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Attorneys for Plaintiff

Oct. 27, 2014
Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli, Plaintiff, v. Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., Defendants.	Civil Action No. 2014-CP-07-2779 ANSWER

2015 NOV 10 PM 12:48
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Defendants state the matter should be compelled to binding arbitration pursuant to the parties' agreement and Defendants' motion. Defendants rely on and restate arbitration as an affirmative defense and do not waive that right by filing this Answer pursuant to the rules. Defendants will appeal the trial court's order denying arbitration.

Denying each allegation not specifically admitted or explained herein, Defendants answer the allegations set forth in the Complaint as follows:

FOR A FIRST DEFENSE

1. Defendants admit Paragraph 1 upon information and belief.

2. Defendants deny Paragraph 2.

3. Defendants deny Paragraph 3.

4. Defendants deny Paragraph 4.

5. Defendants deny Paragraph 5.

6. There is no Paragraph 6 included in the Complaint.

7. Defendants deny Paragraph 7.

8. Defendants deny Paragraph 8.

9. Defendants deny Paragraph 9.

10. Defendants deny Paragraph 10.

11. Defendants deny Paragraph 11.

12. Defendants deny Paragraph 12.

13. Defendants deny Paragraph 13.

14. Defendants deny Paragraph 14.

15. Defendants deny Paragraph 15.

16. Defendants deny Paragraph 16.

17. Defendants deny Paragraph 17.

18. Defendants deny Paragraph 18.

19. Defendants deny Paragraph 19.

20. Defendants deny Paragraph 20.

21. Defendants deny Paragraph 21.

22. Defendants deny Paragraph 22.

23. Defendants deny Paragraph 23.

24. Defendants deny Paragraph 24.

25. Defendants deny Paragraph 25

26. Defendants deny Paragraph 26.

27. Defendants deny Paragraph 27.

28. Defendants deny Paragraph 28.

29. Defendants deny Paragraph 29.

30. Defendants deny Paragraph 30.

31. Defendants deny Paragraph 31.

32. Defendants deny Paragraph 32.

FOR A FIRST DEFENSE
TO THE PRAYER FOR RELIEF

33. Responding to the paragraph beginning with "WHEREFORE," Defendants deny all allegations and requests for relief.

FOR A SECOND DEFENSE

34. The Complaint fails to state facts sufficient to constitute a cause of action against any Defendant.

FOR A THIRD DEFENSE

35. The only Defendant properly named in this action is Hilton Head Health System, L.P., the owner and operator of Hilton Head Regional Medical Center, where Plaintiff was employed and performed her work.

FOR A FOURTH DEFENSE

36. The Court should compel arbitration and dismiss this case.

FOR A FIFTH DEFENSE

37. The Federal Arbitration Act applies and requires arbitration of all issues in this case.

FOR A SIXTH DEFENSE

38. Damage to Plaintiff, if any, as a result of any alleged defamation is reduced by mitigating circumstances.

FOR A SEVENTH DEFENSE

39. The alleged defamatory representations were privileged or qualifiedly privileged.

FOR AN EIGHTH DEFENSE

40. The alleged defamatory representations were not published by any Defendant.

FOR A NINTH DEFENSE

41. Any alleged defamatory communications or representations made by any Defendant were true.

FOR A TENTH DEFENSE

42. None of the communications or representations alleged in the Complaint are defamatory *per se*.

FOR AN ELEVENTH DEFENSE

43. None of the communications or representations alleged in the Complaint are actionable *per se*, and Plaintiff has failed to properly plead actual malice and special damages.

FOR A TWELFTH DEFENSE

44. Communications by employees of a corporation made in the course of their employment are deemed not to be publication. Therefore, the statements made in the course of employment in this case are not actionable.

FOR A THIRTEENTH DEFENSE

45. Slanderous statements that are the result of Plaintiff's invitation to comment or respond are not actionable.

FOR A FOURTEENTH DEFENSE

46. Self-publication of allegedly slanderous statements by Plaintiff is a bar to recovering damages.

FOR A FIFTEENTH DEFENSE

47. Permitting general damages without guidelines or proof of special damages for slander *per se* or otherwise is unconstitutional and violates Defendants' substantive and procedural Due Process rights under the United States Constitution, and similar provisions in the South Carolina Constitution. Instead, the law requires that Plaintiff must prove damages within a reasonable certainty.

FOR A SIXTEENTH DEFENSE

48. Generally, relieving Plaintiff's burden of proof in a defamation action is unconstitutional and violates Defendants' substantive and procedural Due Process rights under the United States Constitution, and similar provisions in the South Carolina Constitution.

FOR A SEVENTEENTH DEFENSE

49. The common law rules regarding the presumption of falsity and the presumption of damage to reputation are inconsistent and fatally flawed. As a result, the presumptions are arbitrary and capricious. Therefore, the presumptions are unconstitutional under the United States and South Carolina Constitutions and should be reversed.

FOR A EIGHTEENTH DEFENSE

50. Allowing Plaintiff to seek aggravation of damages when a defendant pleads truth as a defense is unconstitutional pursuant to the South Carolina Constitution because a court's decision to allow aggravation of damages upon a failure of the defense of truth effectively deprives a defendant of a trial by jury.

FOR A NINETEENTH DEFENSE

51. Presumed damages for the slander cause of action are unconstitutional and violate Defendants' substantive and procedural Due Process rights under the United States Constitution, and similar provisions in the South Carolina Constitution.

FOR A TWENTIETH DEFENSE

52. All other presumed damages, other than nominal damages for the actual cost incurred or suffered by the plaintiff, are unconstitutional and violate Defendants' substantive and procedural Due Process rights under the United States Constitution, and similar provisions in the South Carolina Constitution.

DEFENDANTS' PRAYER FOR RELIEF

WHEREFORE, having fully answered Plaintiff's Complaint, Defendants respectfully request that the Court:

(1) Compel arbitration of this case;

(2) Dismiss Plaintiff's' claims with prejudice in their entirety;

(3) Grant judgment to Defendants on all defenses and affirmative defenses;

(4) Award all costs and fees to Defendants and against Plaintiff; and

(5) Award such other and further relief as the Court may deem just and proper.

[SIGNATURE BLOCK ON NEXT PAGE]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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November 6, 2015

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

ANSWER

Counsel Served:

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Hilton Head Island, SC 29225

Stephen F. DeAntonio, Esquire
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2015 NOV 10 PM 12:48
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Lillian Stowe
Administrative Assistant

November 10, 2015

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)))	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT

Mary Beth Marzulli, Plaintiff, v. Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., Defendants.	)	Civil Action No. 2014-CP-07-2779 DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO DISMISS OR STAY

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Defendants Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center ("Hospital"), and Tenet Physician Services-Hilton Head, Inc. (collectively "Defendants"[1]), submit this motion to compel arbitration and to dismiss[2] or stay pursuant to the Federal Arbitration Act and the South Carolina Rules of Civil Procedure.

[1] By filing this Motion, no Defendant is waiving its right to contest the propriety of being named as a party.

[2] The motion to dismiss is based upon Rule12(b)(1) and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, as well as the Federal Arbitration Act and case law decided under that statute. Aside from the arbitration agreement, there are other grounds for dismissal under Rule 12 also. For example, the Complaint does not allege all elements of defamation under the South Carolina law. "The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct.App.2001).

In *McNeil v. S. C. Dept. of Corrections*, 404 S.C. 186, 743 S.E.2d 843 (S.C. App.

There is no question that two recent South Carolina appellate decisions, the Supreme Court's opinion in *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013) and the Court of Appeals' opinion in *Pearson v. Hilton Head Hospital*, 400 S. C. 281, 733 S. E. 2d 597 (S.C. App. 2012), require this Court to apply federal arbitration law, to dismiss this case, and to compel arbitration of all claims. This Motion is supported by the affidavits of Beth Gasiorowski, Ruth Hyde, Darlene Nester, and Anita Propst, attached to and filed with this Motion. A memorandum of law will also be submitted to the Court before the matter is heard.

UNDISPUTED FACTS

Plaintiff was a pediatric physical therapist who was employed at Hilton Head Hospital (Nester Aff. ¶ 6). The father of a nine-year-old patient Plaintiff had been treating called the Hospital to report that his daughter had complained that Plaintiff had engaged in inappropriate conduct with her; the person he spoke to was Anita Propst, Office Manager of the Rehabilitation Department at the Hospital (Propst Aff. ¶¶ 2-18). Ms. Propst believed the father was conveying a complaint that Plaintiff had sexually abused and/or physically abused his daughter. (Propst Aff. ¶ 17).

2013), the Court of Appeals, citing *Murray, supra,* upheld dismissal of the Complaint because the plaintiff

> did not allege any of [the defendant's] statements were unprivileged, and she did not set forth with any specificity what the alleged false statements were. She also did not allege any of the statements were published to a third party or that [the defendant] made the alleged statements. Additionally, she did not assert to whom [the defendant] made the alleged statements. Therefore, we find [the plaintiff]'s allegations do not support an action for defamation, and the trial court did not err in dismissing her cause of action."

Id.

The Complaint here suffers from many of the same deficiencies that were set forth in *McNeil*. Issues other than the parties' agreement to arbitrate, however, are properly decided by the arbitrator, and thus are not before the Court at this time.

After she received the father's complaint, Ms. Propst reported it to Beth Gasiorowski, the Hospital's Director of Risk Management and Patient Safety (Gasiorowski Aff. ¶¶ 2-4). As required by law,[3] Ms. Gasiorowski reported the complaint to the Beaufort County Sheriff's Department (Gasiorowski Aff. ¶ 5). Plaintiff was suspended during subsequent investigations conducted by the Sheriff's Department and the Hospital (Gasiorowski Aff. ¶ 8).

The investigation by the Sheriff's Department concluded that there was a lack of evidence to support criminal activity (Gasiorowski Aff. ¶ 12). While the Hospital's investigation did not find evidence of criminal activity, it did reveal serious shortcomings in the medical records Plaintiff was required to keep for the patient in question (Hyde Aff. ¶¶ 4-11). The Hospital notified Plaintiff she would be reinstated to her former position and paid her

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[3] The requirements of S. C. CODE § 63-7-310 are:

"(A) A physician, nurse, dentist, optometrist, medical examiner, or coroner, or an employee of a county medical examiner's or coroner's office, or any other medical, emergency medical services, mental health, or allied health professional, member of the clergy including a Christian Science Practitioner or religious healer, school teacher, counselor, principal, assistant principal, school attendance officer, social or public assistance worker, substance abuse treatment staff, or childcare worker in a childcare center or foster care facility, foster parent, police or law enforcement officer, juvenile justice worker, undertaker, funeral home director or employee of a funeral home, persons responsible for processing films, computer technician, judge, or a volunteer non-attorney guardian ad litem serving on behalf of the South Carolina Guardian Ad Litem Program or on behalf of Richland County CASA must report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 63-7-20 [Section 63-7-20 defines "child abuse or neglect" or "harm" in terms of actions of "the parent, guardian, or other person responsible for the child's welfare"].

(B) If a person required to report pursuant to subsection (A) has received information in the person's professional capacity which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect if committed by a parent, guardian, or other person responsible for the child's welfare, but the reporter believes that the act or omission was committed by a person other than the parent, guardian, or other person responsible for the child's welfare, the reporter must make a report to the appropriate law enforcement agency."

Id. § 63-7-310(A) & (B)(1976)

for the period during which she had been suspended (Nester Aff. ¶¶ 9 & 13). Plaintiff, however, declined to return to work (Nester Aff. ¶ 13) and subsequently brought this defamation suit against the Hospital.

When Plaintiff was employed at the Hospital, she signed a document in which she agreed to arbitrate "any and all claims and disputes that are related in any way to my employment or the termination of my employment . . .." (Nester Aff. ¶ 4 & Ex. A). Despite that arbitration agreement and Defendants' recent request that she abide by it and dismiss this lawsuit, Plaintiff has refused to arbitrate her claims. Under well-settled South Carolina law, this Court is obliged to enforce her agreement to arbitrate.

Specifically, this Court is required to compel arbitration and dismiss or stay this suit because there is no question that:

- Plaintiff signed the agreement to arbitrate (Nester Aff. ¶ 4 & Ex. A);
- The arbitration agreement was a broad one, in which Plaintiff agreed she would submit to " final and binding arbitration of any and all claims and disputes that are related in any way to my employment or the termination of my employment" (Nester Aff. ¶ 4 & Ex. A); and
- Plaintiff's allegations --- that the Hospital defamed her
    - By reporting to law enforcement authorities (as required by state law) that a nine-year-old patient claimed Plaintiff, while on the job at the Hospital, had touched her inappropriately and otherwise engaged in improper conduct (Complaint ¶ 8);
    - By "repeat[ing] the defamation" (the specifics of which are not alleged in the Complaint) (Complaint ¶ 11);

- By telling her she could not retrieve her belongings without an escort when she came to the Hospital for that purpose (Complaint ¶ 21); and
- By escorting her when she returned to the Hospital to retrieve her belongings and refusing her access to another facility when she asked if she could retrieve items located there (Complaint ¶ 22);

--- all bear a significant relationship to her employment or its termination.

LEGAL ANALYSIS

In the Agreement Plaintiff signed, she promised she would "submit to final and binding arbitration . . . any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment" (emphasis added). She claims that she was defamed by some of the Hospital's actions after it received the father's complaint (Nester Aff. ¶ 4 & Ex. A).

Tort claims between employee and employer are routinely held to be arbitrable when the arbitration agreement is broad and includes claims "arising out of or relating to" employment. *Gilmer* v. *Interstate/Johnson Lane, Corp.*, 500 U.S. 20 (1991) (registered securities representatives' age discrimination claim[4] was subject to arbitration.). "[C]ourts may not deny a party's request to arbitrate an issue unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Long v. Silver,* 248 F.3d 309, 316 (4th Cir. 2001) ("'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]'" arbitration must generally be ordered," *Id.* at 316 (citations omitted));

[4] An age discrimination claim is a statutory tort. *Staub v. Proctor Hosp.*, 131 S. Ct. 1136 (2011).

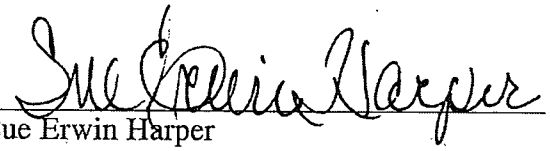
see also Landers. No such "positive assurance" can possibly be found here because Plaintiff's claims relate in every way to her employment or its termination.

In fact, the claims here are so steeped in the parties' employment relationship that it is difficult to imagine what issues in the case, if any, could not be related to their employment relationship. Because the claims asserted in the Complaint clearly "relate to" Plaintiff's "employment or the termination of [her] employment," they are encompassed by the broad arbitration agreement she signed when she began working at the Hospital.

Plaintiff's claims and the Hospital's defenses to those claims involve significant aspects of the employment relationship and thus must be arbitrated under the standards and rules our appellate courts articulated in *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013) and *Pearson v. Hilton Head Hospital*, 400 S. C. 281, 733 S. E. 2d 597 (S.C. App. 2012).

Accordingly, this Court should dismiss this case with prejudice and issue an order compelling Plaintiff to arbitrate her claims in accordance with the parties' agreement.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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Columbia, South Carolina

December 4, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli.,	)	Civil Action No. 2014-CP-07-2779
Plaintiff,	)	
v.	)	
Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc.,	)	
Defendants.	)	

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

AFFIDAVIT OF BETH GASIOROWSKI

Beth Gasiorowski, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

2. I am currently Director of Risk Management and Patient Safety Officer for Hilton Head Hospital ("Hospital"), and have held this position since August 2008.

3. On the morning of May 13, 2014, Gay Propst, Office Manager of the Hospital's Physical Therapy Department, reported a telephone complaint she had received the previous evening from the father ("Father") of a nine-year-old patient ("Daughter").

4. The Father had reported what Ms. Propst indicated was an incident involving sexual abuse or physical abuse of his Daughter by the Hospital's pediatric physical therapist Mary Beth Marzulli.

5. As required by South Carolina statute, I reported the Father's complaint to the Beaufort County Sheriff's Office ("Sheriff's Department").

6. The Sheriff's Department prepared an initial incident report; that initial report listed the date of the incident as May 5, 2014, and described the incident type as "assault with intent to commit" on the premises of a hospital. The Father was listed under "witness/other."

7. I telephoned the Father and explained that a law enforcement officer would be contacting him regarding the complaint.

8. I then met with Ms. Marzulli and informed her of the Daughter's accusations. Ms. Marzulli was placed on unpaid suspension pending the outcome of the criminal investigation.

9. The investigator for the Sheriff's Department told me, and also indicated in his notes, that Daughter made a number of allegations against Ms. Marzulli, including a claim that Ms. Marzulli fondled Daughter's breasts, that Ms. Marzulli asked Daughter to touch Ms. Marzulli's breasts, and that Ms. Marzulli pinched Daughter's "butt."

10. The Sheriff's Department investigator also told me that Father and his wife indicated they wished to press criminal charges against Ms. Marzulli.

11. The investigator for the Sheriff's Department requested a site inspection for the areas of the Physical Therapy Department where Daughter's therapy sessions were held. I was present for that site inspection and the investigator was shown where Daughter's physical therapy sessions took place.

12. The Sheriff's Department investigator completed his investigation on or about July 1, 2014 and advised me of his assessment that there was a lack of evidence to support criminal activity. He also told me the Solicitor had decided not to go further with their investigation based on a lack of evidence.

FURTHER AFFIANT SAYETH NOT.

Beth Gasiorowski

SWORN AND SUBSCRIBED before me
this 3rd day of December 2014

Kathy L. Carter

Notary Public for South Carolina
My Commission Expires: My Commission expires July 20th, 2017

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)))	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli., Plaintiff, v. Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., Defendants.	)))))))))))	Civil Action No. 2014-CP-07-2779

2014 DEC -5 PM 2:33

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

AFFIDAVIT OF RUTH HYDE

Ruth Hyde, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

2. I am currently Director of the Rehabilitation Department of Hilton Head Hospital ("Hospital"), and have held this position since October 28, 2012.

3. During the period Mary Beth Marzulli was employed at the Hospital, I was her supervisor.

4. As a licensed Occupational Therapist, I am familiar with what is required of a therapist who is treating a patient at the Hospital.

5. For example, for each session with a patient, the therapist is required to document, on a pre-printed form called Pediatric Daily Notes ("PDN"), changes in medication or diagnosis, subjective activities, objective goals, the assessment and plan of treatment.

6. As part of the Hospital's investigation into allegations made against Ms. Marzulli, in May 2014 I reviewed Ms. Marzulli's files on the nine-year-old patient who had complained about her. I found that Ms. Marzulli's files on this patient were missing notes for twenty seven (27) dates in 2012, and thirteen (13) dates in 2013. In other words, the patient had been charged for Ms. Marzulli's services during sessions with her on those dates but Ms. Marzulli apparently had not prepared any notes for those sessions. Where there should have been notes on the PDN, Plaintiff had entered only dates.

7. These were serious shortcomings because she failed to adhere to Tenet's corporate policy COMP-RCC 4.20. "Outpatient Therapy in hospital provider based settings." This policy references CMS guidelines that can be found at the end of the policy.

8. I had previously counseled Ms. Marzulli about shortcomings in her documentation and patient files.

9. I completed a Performance Improvement Plan ("PIP") for Ms. Marzulli, a copy of which is attached to this affidavit as Exhibit A.

10. After the investigations were complete, I met with Ms. Marzulli and offered her reinstatement to her position and back pay for the period during which she had been suspended.

11. At that time I counseled Ms. Marzulli again on the shortcomings and gaps in her documentation and medical records. I gave her a copy of the Performance Improvement

Plan concerning this performance problem that I had prepared. I asked that she acknowledge receipt of the copy of the PIP, which she declined to do.

12. On August 1, 2014, I received an email from Ms. Marzulli in which she declined to return to work at the Hospital. A copy of that email is attached to this affidavit as Exhibit B.

FURTHER AFFIANT SAYETH NOT.

Ruth Hyde

SWORN AND SUBSCRIBED before me
this 3 day of December 2014

Notary Public for South Carolina
My Commission Expires: Aug 9, 2015

Exhibit A

Performance Management
Record of Conference

☐ Verbal (To document conversations only; no employee signature is required) ☑ Conference ☐ Suspension ☐ DML ☐ Termination

Name of Employee: Mary Beth Marzuli Today's Date: 7/15/14

Position: Physical Therapist Date of Hire: 9/11

Department: Pediatric Rehab department

Name/Title of Supervisor: Ruth Hyde, Director of Rehabilitation

REASON FOR CONFERENCE:
(To be completed by supervisor. Indicate if there has been previous counseling.)

During a recent review of some of Marybeth's charts, it was determined that her documentation was not consistently meeting the requirements of Policy RB-11-03 – Medical Records – Documentation of Medical Records. To date, the initial review revealed a non-compliance rate of approximately 40%. This is unacceptable. Further review of the charts is being facilitated by the Hospital's Compliance Officer and the results are pending.

ACTION PLAN FOR IMPROVEMENT:
(To be completed by employee and supervisor at time of conference. Identify specific solutions, expectations, and timeframes.)

Marybeth will have consistent compliance with all documentation requirements effective immediately. Her charts will be audited by the department director or her designee at the end of each week during the pendency of this plan to determine compliance with this requirement. Missing or incomplete documentation found as a result of these audits will result in further corrective action, up to and including termination. This review plan is expected to be in place for at least four weeks, and may be continued at the discretion of the department director. In addition, further action might be required as a result of the on-going review being performed by the Hospital's Compliance Officer.

EMPLOYEE COMMENTS:

I understand that my failure to improve my performance as set forth above may result in further corrective action, up to and including the termination of my employment. I acknowledge receipt of a copy of this record.

Employee Signature _____ Date _____

Supervisor Signature _____ Date _____

Ruth Hyde _____ 7/16/14

Department Head Signature (optional) Date

Exhibit B

Hyde, Ruth

From: Marzulli, Mary
Sent: Friday, August 01, 2014 12:23 AM
To: Hyde, Ruth

Dear Ruth,

Thank you for your phone call. I love my patients and their families and have so enjoyed working with them, however I cannot resume my position with any confidence after the horrific experience caused by the Hospital's unbelievable acts. The harm to me and my family caused by Tenet is immeasurable and cannot be undone. Thoughts of what occurred still bring me to tears. I cannot return to a position working for a company that did this to me and now wishes to punish me further. No one in their right mind could or would. I have appreciation for you as an individual and co-worker, but Tenet's actions force me to not return to work for them.

Sincerely,

Mary Beth

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli.,	)	Civil Action No. 2014-CP-07-2779
Plaintiff,	)	
v.	)	
Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc.,	)	
Defendants.	)	

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

AFFIDAVIT OF DARLENE NESTER

Darlene Nester, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

2. I am currently the Chief Human Resources Officer for Hilton Head Hospital (the "Hospital"), and have held this position since 2004.

3. Plaintiff Mary Beth Marzulli was employed by the Hospital from September 19, 2011, until August 1, 2014.

4. When Mary Beth Marzulli became employed by the Hospital, she signed the document entitled "Acknowledgement," a copy of which is attached to this affidavit as Exhibit

A. This document is maintained in Ms. Marzulli's personnel file, a file for which I am responsible and which is maintained under my custody and control.

5. The Acknowledgment that is Exhibit A to this Affidavit references the Tenet Fair Treatment Process ("FTP"). The FTP is described in detail in the document attached to this affidavit as Exhibit B. Exhibit B is Policy No. HR.ERW.05 in Tenet's Human Resources Policies and Procedures Manual ("Manual"). This policy is located in the section of the Manual entitled "Employee Relations and Workplace Expectations," and is available to all Tenet employees on the company's intranet.

6. During the period she was employed by the Hospital, Ms. Marzulli held the position of pediatric physical therapist.

7. On May 13, 2014, Ms. Marzulli was suspended pending the investigation of a complaint the Hospital had received on May 12, 2014 from the father of a nine-year-old female patient she had been treating.

8. The complaint lodged by the father involved his nine-year-old daughter's allegations of inappropriate conduct by Ms. Marzulli during a period in which she was treating his daughter at the Hospital.

9. After the Hospital and the Beaufort County Sheriff's Department completed their investigations of the allegations the nine-year-old patient had made, the Hospital paid, and Ms. Marzulli accepted, full compensation for the period her employment had been suspended while the investigations were pending.

10. During the course of its investigation, the Hospital discovered shortcomings in Plaintiff's recordkeeping.

11. In connection with its discovery of those shortcomings, the Hospital prepared a Performance Improvement Plan ("PIP") to address and to correct those shortcomings. A copy of this PIP is attached hereto as Exhibit C.

12. Ms. Marzulli refused to acknowledge receipt of the PIP by signing it as the Hospital requested.

13. Ms. Marzulli also declined the Hospital's offer of reinstatement as is set forth in her email of August 1, 2014, attached hereto as Exhibit D.

FURTHER AFFIANT SAYETH NOT.

Darlene Nester

SWORN AND SUBSCRIBED before me
this 3 day of December 2014

Notary Public for South Carolina
My Commission Expires: Aug 9 2015

Exhibit A

ACKNOWLEDGEMENT

I acknowledge that I have received information about how to access an electronic copy of the Employee Handbook via the Company's intranet. I understand that I may print all or parts of the Handbook for my use and I may also receive a hard copy of the Handbook from Human Resources. I further understand that the Handbook contains important information about the Company's general personnel policies and about my privileges and obligations as an employee. I further understand and acknowledge that I am governed by the contents of the Employee Handbook *(to the extent that they are not inconsistent with any collective bargaining agreement that may otherwise govern my employment)* and that I am expected to read, understand, familiarize myself with and comply with the policies contained in it.

I also understand that the Company may change, rescind or add to any of the policies, benefits or practices described in the Employee Handbook, except the employment-at-will policy and the Mutual Agreement to Arbitrate referred to below, in its sole and absolute discretion, with or without prior notice. I also understand that the Company will advise employees from time to time of material changes to the policies, benefits or practices described in the Employee Handbook.

Furthermore, I understand, acknowledge and agree that the Employee Handbook is not a contract of employment, that my employment with the Company is not for a specified term and that employment with the Company is at the mutual consent of the employee and the Company. Therefore, I hereby acknowledge that either I or the Company can terminate my employment relationship at will, with or without cause or notice, *except to the extent that any applicable collective bargaining agreement provides otherwise.*

In addition, I acknowledge that I have received a hard copy of the Tenet Fair Treatment Process. *Except to the extent that any applicable collective bargaining agreement provided otherwise,* I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration of any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy of any such claim or dispute against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that, by agreeing to the use of arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the Fair Treatment Process. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association ("AAA").

I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-of-pocket expenses for the arbitrator and the administrative cost of the AAA will be an amount equal to one day's pay (if I am an exempt employee) or eight times my hourly rate of pay (if I am a non-exempt employee) or a mandated cap, if lower, and that the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except in writing by both me and the Company.

Employee Signature: Mary Elizabeth Marcelli, PT Date 10/10/11

Employee Name (please print) : Mary Elizabeth Marcelli (Mary Beth)
Electronic Handbook – https://secure.etenet.com/eTenetContent/Departments/HumanResources/

Exhibit B

tenet HEALTH	Human Resource Policy Employee Relations & Workplace Expectations	No. HR.ERW.05[1]
	Title: OPEN DOOR POLICY AND FAIR TREATMENT PROCESS	Page: 1 of 14
		Effective Date: 06-25-14
		Retires Policy Dated: 12-10-13
		Previous Versions Dated: 11-21-13; 09-27-11; 01-22-07; 08-01-00; 01-01-93

I. SCOPE:

This policy applies to (1) Tenet Healthcare Corporation and its wholly-owned subsidiaries and affiliates (each, an "Affiliate"); (2) any other entity or organization in which Tenet Healthcare Corporation or an Affiliation owns a direct or indirect equity interest greater than 50%; and (3) any hospital or healthcare facility in which an Affiliate either manages or controls the day-to-day operations of the facility (each, a "Tenet Facility") (collectively, "Tenet" or "Company").

II. PURPOSE:

To provide leaders and employees with appropriate directions for addressing and resolving employee problems, concerns and disputes.

III. POLICY:

Tenet believes that positive employee relations can be best achieved and maintained in a working environment that promotes ongoing and open communication between leaders and employees, including open and candid discussions of employee problems, concerns and disputes. Tenet utilizes an Open Door Policy designed to encourage our employees to openly express their problems, concerns and opinions on any issue related to their employment.

Tenet sincerely hopes that our employees will never have a dispute relating to their employment with the Company. However, Tenet recognizes that disputes sometimes arise between the Company and our employees relating to the employment relationship. Tenet believes that it is in the best interests of both our employees and the Company to resolve employment-related disputes in a forum that provides the fastest and fairest method for resolving such disputes. Therefore, in addition to the Open Door Policy, Tenet has established the Fair Treatment Process (FTP), a comprehensive mechanism for resolving employment-related disputes between the Company and its employees. The FTP is a multiple-step process that ultimately provides for final and binding arbitration of such disputes if they are not resolved in any of the previous steps in the process. Tenet employees can use the Open Door Policy and the FTP without fear of retaliation or reprisal.

IV. GENERAL

A. Applicability and Coverage

The FTP applies to all employees, regardless of length of service or status, and covers all disputes relating to or arising out of an employee's employment with the Company or the termination of employment. The only disputes or claims not covered by the FTP are those listed in the "Exclusions and Restrictions" section below. Examples of the type of disputes or claims covered by the FTP include,

[1]Prior to June 1, 2013, the policy number was HR-110.

but are not limited to, claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments or any state or local discrimination laws, tort claims or any other legal claims and causes of action recognized by local, state or federal law or regulations. An employee's decision to accept employment or to continue employment constitutes his or her agreement to be bound by the FTP. Likewise, the Company agrees to be bound by the FTP. This mutual agreement to arbitrate claims means that both the employee and the Company are bound to use the FTP process as the only means of resolving employment-related disputes, and thereby agree to forego any right they each may have had to a jury trial on issues covered by the FTP. However, no remedies that otherwise would be available to either party in a court of law will be forfeited by virtue of their agreement to use and be bound by the FTP.

B. The Dispute Resolution Process

1. Open Door Policy

Employees are encouraged to first use the Company's informal Open Door Policy to discuss any problems, concerns or disputes they may have with their leader. If this informal method does not resolve the issue, then employees are encouraged to initiate the more formal Fair Treatment Process described below to resolve the issue.

2. Fair Treatment Process

The FTP consists of the following five steps that an employee generally must follow to obtain a resolution of a problem, concern or dispute:

a. Step 1: Leader

If an informal discussion with the leader did not resolve an employee's problem, concern or dispute, the employee should promptly contact the Human Resources Department to obtain an FTP Dispute Resolution Form. The employee should complete the form and submit it to his or her leader to initiate the FTP. The leader will investigate the problem and will attempt to resolve it. The leader will respond to the employee in writing on the form as soon as possible, usually within seven working days from the date the employee raised the issue. However, in situations where the employee's problem relates to the supervisor, and/or the employee

does not feel comfortable talking to the leader about the problem, the employee may consult with a representative of the Human Resources Department for guidance and go directly to Step 2 in the process.

b. Step 2: Department Head

If the employee is not satisfied with the leader's response to the problem or dispute, then the employee may take the problem or dispute to the Department Head usually within seven working days of receipt of the response. If the employee wishes to pursue this second step in the FTP, he or she should complete the Section marked "Step 2" on the FTP Dispute Resolution Form and submit that completed form to the Human Resources Department to request that the form be submitted to the Department Head. The Human Resources Department then will submit the FTP Dispute Resolution Form to the Department Head for consideration and response. The Department Head may discuss the problem with both the employee and the employee's leader, and will attempt to resolve it. A written response will be provided to the employee as soon as possible, usually within seven working days of the date the Department Head receives the completed FTP Dispute Resolution Form from the Human Resources Department.

c. Step 3: Administration

If the response of the Department Head in Step 2 does not resolve the employee's problem or dispute, the employee may take the problem or dispute to a member of the Facility's Administration office for reconsideration. If the employee wishes to pursue this third step in the FTP, he or she should complete the section marked "Step 3" on the FTP Dispute Resolution Form and submit the completed form to the Human Resources Department, usually within seven working days from receipt of the response, and request that his or her FTP Dispute Resolution Form be submitted to Facility Administration for consideration and response. The Human Resources Department will submit the FTP Dispute Resolution Form to the appropriate member of Facility Administration for consideration and response. A written response from Administration will be provided to the employee as soon as possible, usually within seven working days of the date the employee requests review under Step 3.

d. Step 4: FTP Committee

If the response of Facility Administration in Step 3 does not resolve the employee's problem or dispute, the employee may request that the problem or dispute be submitted to the FTP Committee, usually within seven working days of receipt of the Facility Administration response. The FTP Committee will be convened and administered by the Facility Human Resources Department as well as regional human resources, and usually is the final step in the internal dispute resolution process that is utilized only when the problem could not be resolved during Steps 1, 2, or 3. When the matter is submitted to the FTP Committee, the FTP Committee will meet as soon as possible, usually within 30 days of the employee's request. The FTP Committee will promptly, objectively and confidentially decide the issue(s) presented to it for consideration. The FTP Committee is discussed in more detail in the "FTP Committee Process" section, below.

Once the problem or dispute has been submitted to the FTP Committee, the Committee will review the facts and make a decision based on the application of Company policy and procedures. The FTP Committee can recommend (1) denial of the remedy the employee has requested, (2) granting of the remedy the employee has requested, or (3) an alternative remedy or resolution consistent with Company policies and procedures. After a recommendation is rendered by the FTP Committee and is approved by the facility CEO/Outpatient Services Division (OSD) Regional Operator, the Human Resources Department will ensure that action(s) required to implement the recommendation of the FTP Committee are initiated promptly. The FTP Committee also has the authority to overturn or modify a corrective or discharge action consistent with Company policies or procedures, and may award back pay, where appropriate; it also has the authority to decide whether or not a Company policy or procedure has been followed. However, the FTP Committee does not have the authority to discipline employees, modify benefit plans, establish or change Company policies or procedures, or award monetary (compensatory or punitive) damages, nor does the decision of the FTP Committee have the effect of setting precedent. The decision of the FTP Committee is subject to review by the Chief Executive Officer/OSD Regional Operator of the facility.

The grievances of facility management employees at the Department head level or above and Corporate management employees are not subject to the FTP Committee process in Step 4. Those grievances are processed according to the steps set forth in the "Exclusions and Restrictions" section, below.

e. Step 5: Final and Binding Arbitration

If the employee does not accept the decision of the FTP Committee in Step 4, then the employee has the right to submit the problem or dispute to final and binding arbitration. The arbitration process is limited to disputes, claims or controversies that a court of law would be authorized or have jurisdiction over to grant relief and that in any way arise out of, relate to or are associated with an employee's employment with the Company or the termination of employment. The employee understands and agrees that to the extent permitted by law, his or her claim will not be joined with any claim or dispute of another employee in a class, collective, representative or group action. Arbitration under the FTP is limited to individual disputes, claims or controversies that a court of law would be authorized or have jurisdiction over to grant relief. In cases that proceed to arbitration, an impartial and independent arbitrator - chosen by agreement of both parties - will be retained to make a final decision on the employee's dispute or claim, based on application of Company policies and procedures and applicable law. The arbitrator's decision is final and binding. The arbitration process is discussed in detail in the "Arbitration Process" section, below.

3. The FTP Committee Process

a. Committee Composition

The FTP Committee will consist of five facility employees, and will be chaired by a Human Resources Representative appointed by the regional Human Resources Director. The Chairperson will convene the FTP Committee meeting and will serve as the facilitator for the meeting. The Chairperson is not a voting member of the FTP Committee.

In smaller locations, FTP Committee members may be appointed from local Tenet hospitals or other facilities.

b. Committee Selection

Five facility employees will be randomly selected jointly by the employee and the facility representative with the assistance of the Human Resources Department to serve on the FTP committee. Three of the Committee members must be non-management employees, and two must be management employees. To ensure objectivity, the FTP Committee members should not be in the same department as the affected employee, should not be familiar with the dispute or have a close relationship with any of the parties or personnel involved in the dispute.

c. Proceedings

The proceedings of the FTP Committee will be informal and conducted in accordance with the following guidelines:

(1) The Chairperson will convene the meeting, introduce the parties, state the issues to be decided and present any pertinent information, including an explanation of the Company policies and procedures involved, if necessary.

(2) Each party, beginning with the facility representative, will be permitted to present his or her case to the FTP Committee in accordance with such guidelines as to duration and manner of presentation as the Chairperson has established and communicated to the parties before the hearing. The employee may begin the process with the agreement of both parties.

(3) Any party may present evidence in support of its position, including relevant documents and the testimony of witnesses; but a party may not present the testimony of more than three witnesses unless the Committee decides that there is good cause to allow additional witnesses. The Committee chairperson will determine what evidence will be given. The Committee may permit a party to submit a written statement at the FTP Committee meeting setting forth his or her position and the evidence supporting it. The witnesses must have direct knowledge of the events associated with the grievance.

(4) At any time during the FTP Committee meeting, after the initial opening statement by both parties, the Committee members may ask questions or request information from the parties or from the witnesses.

(5) Immediately following the FTP Committee meeting, the Committee members will convene in private to discuss the case and vote by secret ballot or by an open vote on the issues presented. The Committee decision shall be determined by a majority vote (3 of 5). The Committee's responsibility shall be to carefully evaluate the facts presented and reach a recommendation based on those facts.

(6) If the FTP Committee decides that it needs additional information during its deliberation in order to reach a decision, it may hear additional testimony and/or consider additional documents.

(7) Once a recommendation has been reached by the FTP Committee, the FTP Committee meeting may be reconvened and, with the parties present, the Chairperson will announce the recommendation. Alternatively, at the option of the Committee Chairperson, the recommendation of the Committee may be communicated to the affected employee by telephone or mail without reconvening the Committee. The Human Resources Department will ensure that all actions required to implement the recommendation of the FTP Committee are carried out promptly.

d. Responsibilities of FTP Committee Members: The FTP Committee process is an opportunity to participate in a process intended to ensure that employee issues are resolved in a prompt, fair and equitable manner. Employees who serve as FTP Committee members are required to accept the important responsibilities of Committee membership. The issues presented may have serious and long lasting consequences for all persons involved. All employees selected to serve on a FTP Committee must acknowledge their solemn responsibility to (1) render an objective and unbiased decision that is based only on the facts presented and the application of Company policies and procedures, (2) maintain strict confidentiality and not disclose any of the information

learned during the process, and (3) participate fully in the FTP Committee process.

4. The Arbitration Process

If the affected employee wants to appeal the decision of the FTP Committee reached in Step 4 of the process, he or she must obtain and complete a "Request for Arbitration Form" from the Human Resources Department. That form also will serve to confirm the employee's and the Company's prior mutual agreement to submit the employee's dispute to final and binding arbitration. The arbitration will be heard by an independent and impartial arbitrator chosen by the employee and the Company. By deciding to arbitrate the dispute, the affected employee also agrees that the remedy, if any, ordered by the arbitrator will be the only remedy as to all matters that are or could have been raised by the employee in the arbitration.

The arbitrator's responsibility is to determine whether Company policies and procedures and applicable laws have been complied with in the matter submitted for arbitration. In fulfilling this responsibility, the arbitrator may interpret Company policies and procedures, but will not have any power to change them. The arbitrator will be requested to render a decision on the matter within 30 days after the arbitration hearing is concluded and post-hearing briefs, if any, are submitted.

The arbitration will be typically administered by the American Arbitration Association (AAA). The Company and the employee will share the cost of the filing fee and the arbitrator's fees and costs, but the employee's share of such costs shall not exceed an amount equal to one day's pay (for exempt employees) or eight times the employee's hourly rate (for non-exempt employee) or the local filing fee, whichever is less. The employee and the Company will be responsible for the fees and costs of their own legal counsel, if any, and for their own other expenses and costs, such as costs associated with witnesses or obtaining copies of hearing transcripts.

5. Exclusions and Restrictions

Certain issues may not be submitted for review (or exclusive review) under the FTP ("Excluded Issues") or may be subject to special restrictions ("Restricted Issues").

a. Excluded Issues:

Workers' Compensation Claims, any claim involving the construction or application of a benefit plan covered by ERISA, and claims for unemployment benefits are excluded from the FTP. In addition are any non-waivable statutory claims, which may include claims or charges within the jurisdiction of the National Labor Relations Board, wage claims, including those within the jurisdiction of a local or state labor commissioner, or administrative agency charges before the Equal Employment Opportunity Commission or similar local or state agencies, are not subject to exclusive review under the FTP. This means that employees may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if they wish, (but not in a court) regardless of whether they decide to use the FTP to resolve them. However, if such agency completes its processing of an employee's claim and the employee decides to pursue further remedies on such claims in a civil action against the Company, the employee must use the FTP (although Steps 1 through 4 may be skipped). In addition, the FTP does not apply to employees covered by a collective bargaining agreement, unless otherwise agreed to by such employees and their representative(s).

b. Restricted Issues:

(1) Sexual harassment Complaints

Due to the sensitive nature of claims of sexual harassment, employees are not required to use Step 1 of the FTP to raise sexual harassment claims if they do not wish to do so. Instead, they should follow the steps in the Company's policy prohibiting sexual or other unlawful harassment. If the employee is not satisfied with the Company's response to a claim for sexual harassment, then the employee must use the FTP to resolve the claim or dispute.

(2) Grievances of Management Employees

Facility management employees at the Department Head level or above will use the following FTP steps to submit their grievances for review: Step 1: Immediate Supervisor; Step 2: Chief Executive Officer/OSD Regional Operator of

the facility; Step 3: Regional Vice President; Step 4: Request for Arbitration. Facility Chief Executive Officers/OSD Regional Operators and management employees in the regional or corporate offices will use the following FTP steps to submit their grievances for review unless the parties agree otherwise: Step 1: Immediate leader; Step 2: Next level in the chain of command; Step 3: Next level in the chain of command; Step 4: Request for Arbitration.

6. Other Important Information

a. Applicable Law and Procedural Rules: The Federal Arbitration Act, 9 U.S.C. § 1, et seq., will govern arbitrations under the FTP. The applicable Employment Dispute Resolution rules of the AAA will govern the procedures to be used in such arbitrations, unless the parties have agreed otherwise.

b. Discovery and Amendment of Claims: All discovery shall be conducted in accordance with the Employment Dispute Resolution rules of the AAA. The arbitrator shall have the authority to order discovery sufficient to enable a full and fair exploration of the issues in dispute consistent with the expedited nature of arbitration.

c. Limitations Periods: Any request for arbitration under the FTP must be made within one year after the event giving rise to the dispute. If the claim was submitted to a federal, state or local agency, then a request for arbitration of that claim must be made within 90 days of the receipt of the agency's decision. However, if a longer limitations period is provided by a statute governing the claim, then the claim will be subject to the longer limitations period provided by the statute.

d. Authority of Arbitrator: The arbitrator has the authority to award any remedy that would have been available to the individual employee had the employee litigated his or her dispute in court under applicable law, including but not limited to prevailing party attorney's fees if appropriate.

e. Representation by Counsel: During Steps 1 through 4 of the FTP, neither the employee nor the Company may be represented by legal counsel, although both the employee and the Company have

the right to consult privately with their own counsel at any time at their own expense. Both the employee and the Company may be represented by counsel at arbitration during Step 5 at their own expense. Generally, the Company will be represented by legal counsel at arbitration. The Company will not provide legal advice to employees, but it strongly encourages employees to consult with independent legal counsel of their own choosing if they have any questions about whether they should be represented by legal counsel at arbitration or any other issue related to the arbitration.

f. Confidentiality: All statements and information made or revealed during the FTP are confidential, and neither the employee nor the Company may reveal any such statements or information, except on a "need to know" basis or a permitted or required by law.

g. At-Will Employment: Nothing in the FTP shall be construed to create a contract of employment, express or implied, nor does the FTP in any way alter the at-will nature of the employment relationship between the Company and our employees.

h. Modification to the FTP: The Company will not modify or change the agreement between the Company and our employees to use final and binding arbitration to resolve employment-related disputes, without notifying and obtaining the consent of employees to such changes. However, the Company may change or modify the FTP procedures from time-to-time without advance notice and without the consent of employees.

V. FTP ADMINISTRATIVE PROCEDURES:

A. Leaders/Facility Management

1. Investigate the complaint to attempt to resolve it, and communicate a written decision (via Human Resources) to the current or former employee usually within seven working days from receipt of the written complaint.

   NOTE: If the employee's complaint is one concerning allegations of sexual harassment about the immediate leader, the employee may discuss the complaint with the next level in the reporting chain.

2. The department head may discuss the matter with the current or former employee and the leader, and then will make a disposition concerning the

complaint usually within seven working days. The department head's disposition will be noted, together with the reasons for the decision, and the decision will be communicated in writing to the current or former employee.

3. A representative of facility administration may discuss the matter with the current or former employee after reviewing the documented facts and the decisions of the leader and the department head. A written decision by facility administration will be communicated to the current or former employee usually within seven working days.

4. The immediate leader or department head will serve as the Facility Representative spokesperson during a Committee Hearing and should prepare relevant materials for presentation.

B. Facility/Divisional Human Resources Department

1. Explain the FTP to every employee at orientation. At exit interviews, remind the individual of the FTP if they state he/she was unfairly treated.

2. Provide Fair Treatment Forms to employees. Review employee's first draft if requested. Assist employee with presentation of facts and clear stipulation of remedy.

3. Serve as advisor to leaders, department heads and administration.

4. Serve as administrator for receiving and forwarding responses between employee and management.

5. Notify Regional/Divisional Human Resources upon receipt of a request for the FTP. Review the complaint with the Regional/Divisional Human Resource Director on an ongoing basis and prior to an FTP Committee hearing.

6. Ensure management has investigated and reviewed the complaint and that there is a timely response.

7. Facilitate selection of the Committee as follows:

   a. The committee will be an ad hoc group of five employees who have completed 90 days of employment.

b. The employee and the leader will randomly select ten or more employees in the presence of the HR representative to serve as potential members of the Committee, hear the complaint and make a final decision.

c. The employee and the leader will alternately choose a member (the employee will choose the first) until there are five out of the ten or more initially chosen. Two of the five must be leaders.

d. Each Fair Treatment complaint which reaches the final stage will be reviewed by Regional/Divisional Human Resources, which will designate the FTP Committee chairperson. The Chairperson will serve without a vote. His/her function is exclusively to ensure an orderly, comprehensive and fair hearing.

e. The actual complaint will be heard within a reasonable time, usually not to exceed 30 calendar days

f. If there is a finding in the employee's favor, the committee will recommend what relief is appropriate, if any. Awards will not exceed actual losses.

g. The Committee decision is subject to final review by the Chief Executive Officer/OSD Regional Operator of the facility.

8. Ensure management and the employee are prepared to present their position at the FTP Committee hearing and that written materials from the facility and employee are organized.

9. Distribute packets of exhibits and materials to the FTP Committee members and employee at least one day prior to the hearing.

10. Notify the Regional/Divisional Human Resources Director immediately when a Request for Arbitration Form is submitted and provide a complete copy of the affected employee's FTP file to the Regional/Divisional Human Resources Director by electronic mail. Copies of personnel files can be requested as needed.

C. Regional/Divisional Human Resources Director

1. Provide guidance and assistance to facility Human Resources personnel in administering Steps 1 through 4 of the FTP, particularly the FTP Committee process (Step 4).

2. Notify the Corporate Law Department immediately when a Request for Arbitration Form is submitted and provide a complete copy of the affected employee's FTP and personnel files to the Corporate Law Department by electronic mail, overnight mail or courier.

D. Corporate Law Department

1. Provide advice and counsel as requested on any step in the FTP.

2. Coordinate and administer all arbitrations under Step 5 of the FTP, including all contacts with the AAA, and the selection and supervision of outside counsel for the Company; coordinate with facility and Regional/Divisional Human Resource Director personnel as appropriate.

E. Enforcement

All employees whose responsibilities are affected by this policy are expected to be familiar with the basic procedures and responsibilities created by this policy. Failure to comply with this policy will be subject to appropriate performance management pursuant to all applicable policies and procedures, up to and including termination. Such performance management may also include modification of compensation, including any merit or discretionary compensation awards, as allowed by applicable law.

VI. REFERENCES:

FTP Dispute Resolution Form (Management Personnel)
FTP Dispute Resolution Form (Non-management Personnel)
FTP Request for Arbitration Form

Exhibit C

Performance Management
Record of Conference

☐ Verbal (To document conversations only; no employee signature is required) ☑ Conference ☐ Suspension ☐ DML ☐ Termination

Name of Employee: Mary Beth Marzuli Today's Date: 7/15/14

Position: Physical Therapist Date of Hire: 9/11

Department: Pediatric Rehab department

Name/Title of Supervisor: Ruth Hyde, Director of Rehabilitation

REASON FOR CONFERENCE:
(To be completed by supervisor. Indicate if there has been previous counseling.)

During a recent review of some of Marybeth's charts, it was determined that her documentation was not consistently meeting the requirements of Policy RB-11-03 – Medical Records – Documentation of Medical Records. To date, the initial review revealed a non-compliance rate of approximately 40%. This is unacceptable. Further review of the charts is being facilitated by the Hospital's Compliance Officer and the results are pending.

ACTION PLAN FOR IMPROVEMENT:
(To be completed by employee and supervisor at time of conference. Identify specific solutions, expectations, and timeframes.)

Marybeth will have consistent compliance with all documentation requirements effective immediately. Her charts will be audited by the department director or her designee at the end of each week during the pendency of this plan to determine compliance with this requirement. Missing or incomplete documentation found as a result of these audits will result in further corrective action, up to and including termination. This review plan is expected to be in place for at least four weeks, and may be continued at the discretion of the department director. In addition, further action might be required as a result of the on-going review being performed by the Hospital's Compliance Officer.

EMPLOYEE COMMENTS:

I understand that my failure to improve my performance as set forth above may result in further corrective action, up to and including the termination of my employment. I acknowledge receipt of a copy of this record.

Employee Signature _____ Date _____

Supervisor Signature _____ Date _____

Ruth Hyde
Department Head Signature (optional) _____ Date 7/16/14

Exhibit D

Hyde, Ruth

From: Marzulli, Mary
Sent: Friday, August 01, 2014 12:23 AM
To: Hyde, Ruth

Dear Ruth,

Thank you for your phone call. I love my patients and their families and have so enjoyed working with them, however I cannot resume my position with any confidence after the horrific experience caused by the Hospital's unbelievable acts. The harm to me and my family caused by Tenet is immeasurable and cannot be undone. Thoughts of what occurred still bring me to tears. I cannot return to a position working for a company that did this to me and now wishes to punish me further. No one in their right mind could or would. I have appreciation for you as an individual and co-worker, but Tenet's actions force me to not return to work for them.

Sincerely,

Mary Beth

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)))	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli., Plaintiff, v. Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., Defendants.	))))))))))))	Civil Action No. 2014-CP-07-2779

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

AFFIDAVIT OF ANITA "GAY" PROPST

Anita "Gay" Propst, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

2. I am currently the office manager for the Rehabilitation Department at Hilton Head Hospital, a position I have held since December 8, 2007.

3. On May 12, 2014, at approximately 5:00 p.m., I received a phone call from the father of a patient ("Father").

4. During our conversation the Father stated that he had concerns about Ms. Marzulli.

5. The Father's daughter ("Daughter") was a patient who was receiving physical therapy treatment from Ms. Marzulli at the Hospital.

6. The Father stated that he was not sure he was going to bring his Daughter back in for therapy.

7. The Father also stated that Daughter told him that Ms. Marzulli had put his Daughter in her lap in a way that made his Daughter uncomfortable.

8. The Father also stated that he did not understand why that would need to be done as part of his Daughter's therapy.

9. The Father also stated that his Daughter, for the first time, was using the word "vagina;" Daughter told him she had learned the word from Ms. Marzulli.

10. The Father intimated that these actions had occurred on May 5, 2014.

11. The Father also stated that when he and his wife had dropped his Daughter off for her therapy session on May 5, 2014, they did not see anyone upstairs in the Physical Therapy Department other than Ms. Marzulli.

12. The Father also stated that when he and his wife returned, their Daughter was upset.

13. The Father also stated that his Daughter told him and his wife that Ms. Marzulli had pushed her and had slapped or removed his Daughter's hands from a railing while she was practicing walking up and down stairs.

14. The Father also stated that he thought Ms. Marzulli's actions were dangerous and he questioned whether she should be treating children.

15. I told the Father that the Physical Therapy Director, Ruth Hyde, was out of the country and asked whether he would like to speak with someone now or whether he would like to wait and speak with Ms. Hyde when she returned.

16. The Father indicted he would wait for Ms. Hyde to return and would discuss his concerns with her then.

17. While the Father did not use the terms "sexual abuse" or "physical abuse," I am confident he was conveying complaints of this nature.

18. The following morning, I reported my conversation with the Father the previous evening to Beth Gasiorowski, Patient Safety Officer and Director of Risk Management for the Hospital.

FURTHER AFFIANT SAYETH NOT.

Anita "Gay" Propst

SWORN AND SUBSCRIBED before me
this 3 day of December 2014

Notary Public for South Carolina
My Commission Expires: Aug 9, 2015

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Defendant's Motion to Compel Arbitration and to Dismiss or Stay

Counsel Served:

Stephen F. DeAntonio, Esquire
545 Packwood Estates Drive
Charleston, SC 29407

Benjamin T. Shelton
Post Office Box 24005
Hilton Head Island, SC 29925

Lillian D Stowe

Administrative Assistant

December 4, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-2779
MARY BETH MARZULLI,	)	
	)	
Plaintiff,	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION TO COMPEL ARBITRATION
	)	
vs.	)	
	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
	)	
Defendants.	)	
	)	

Concise Summary

The Defendants' Motion to Compel Arbitration should be denied because:

* **The Federal Arbitration Act does not apply, and application of the South Carolina Act is not asserted**

* **The intentional tort of defamation is not contemplated by the so-called "arbitration agreement"**

* **The document titled "Acknowledgement" which the Defendants claim to be a valid arbitration agreement is unenforceable**

Factual Background

Plaintiff Marzulli is a physical therapist with over forty (40) years of professional experience. She specializes in pediatric physical therapy and treats children with special needs and disabilities. Marzulli obtained a Bachelor of Science Degree from the University of Alabama in Birmingham and

studied at the graduate level. She has a South Carolina license to perform her work, and has been licensed in other states. She has held several positions, including the Chief Physical Therapist at Ashton Hall Nursing Home in Philadelphia, at Imperial Point Hospital in Fort Lauderdale, Fla., and at Carraway Methodist Medical Center in Birmingham, Ala. Marzulli also worked, among many other positions, with Mercy Catholic Medical Center Foundation and the Shiner Hospital for Children. She has held teaching positions, and clinical teaching appointments as well. She has served on the Board of Directors of the American Hippotherapy Association and Quest Therapeutic Services. Marzulli has been a member of the American Physical Therapy Association, and has been published. The Plaintiff is a committed care-giver, a specialist in her field, dedicated to the betterment of young people afflicted with significant physical afflictions, including neurological maladies. Her integrity is unmatched, and her reputation is beyond reproach.

Marzulli was hired by Defendants as a pediatric physical therapist in September 2011. Marzulli had purchased a home in South Carolina in 2008, and that home has become her permanent residence. At orientation in October 2011 she was required to sign several administrative documents in order to begin work. One of the documents was an acknowledgment that she received the employee handbook. No employment document received by Marzulli from Defendants purports to be a contract and Defendants' handbook and other materials affirm that Ms. Marzulli's employment was "at will."

The document titled "acknowledgement"[1] does not contain any reference to the South Carolina Uniform Arbitration Act. The document contains no words in bold, all capital letters and contains no underlined text stating that it is subject to arbitration pursuant to the South Carolina Uniform Arbitration Act. Marzulli was required to sign the document titled "acknowledgement" as

[1]The document at issue misspells acknowledgment as "acknowledgement."

a condition of her employment.

One particular patient, who had a severe affliction, cerebral palsy, hated required physical therapy. The patient would have rather have played. The patient, who had been seeing Marzulli for three years, told her father at most that the therapist had touched her inappropriately. According to police records, the father called the hospital and wanted to sit down with the family and talk about the incident before reporting it to anyone else. The report said the father was not sure to what extent or what exactly happened. Physical therapy, naturally, involves modalities involved in touching, and Marzulli details these modalities in her affidavit (Affidavit, attached as Exhibit A). The father's call was fielded by Gaye Propst, an office manager/secretary.

Defendants incorrectly claim the report to the police authorities was a mandatory reporting. It was not. The reporter was an individual not so required to report mandatorily.[2] Also, the alleged acts reported by the father to Gayle Propst do not begin to constitute "abuse or neglect" as defined by S.C. Code Ann. § 63-7-20, et seq.[3] What resulted was a vicious character assassination of the worst proportions: a devastating, false accusation that a 40-year physical therapist veteran, married professional, sexually and physically abused a minor of the same sex, a patient who had special needs. (See Exhibit B, CAD Dispatch Recording; Exhibit C, CAD Record; Exhibit D, Beaufort County Sheriff's Office Original Report).

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[2]Gayle Propst is an office manager/secretary who spoke with the father who made the initial complaint to the Defendants. Beth Gasiorowski, the individual who called law enforcement, is an administrator holding the title a "Director of Risk Management." Neither individual holds a position wherein they are a mandatory reporter as defined by S.C. Code § 63-7-310, et seq.

[3]Here, the father made a complaint that Marzulli forced his daughter to "sit on her lap" during physical therapy exercises and slapped *or removed* her hands from railing during step climbing exercises. None of these acts may begin to constitute a "mental injury" or "physical injury" as defined by the Child Protection Act, or a sexual offense as defined by the laws of this State. This is particularly true given inherent nature of the work of a physical therapist.

Beth Gasiorowski, an administrator with Tenet, called the Beaufort County Sheriff's Office and reported something much different that what the patient's father told Tenet. Gasiorowski called "about an allegation of abuse of a minor child", and said "it occurred a couple of times." When asked if it involved sexual or physical abuse, the administrator replied it involved "a little bit of both–inappropriate touching." (See Exhibits B–D)

On the morning of May 13, 2014, Marzulli was called away from completing an evaluation report and was informed she needed to go the office of Patrick Phillips, an administrator, because he needed help with a project. That was not true. The Plaintiff was taken into a conference room where she was told there was an allegation of inappropriate touching and that they were waiting for the police to arrive.

Marzulli waived her Miranda rights and gave the authorities written and verbal statements. The investigating officer noted that "Marzulli was noticeably upset and crying throughout the duration of the interview." (See Exhibit D, BCSO Original Report). The Sheriff's Office eventually concluded that the claim was "unfounded". The police records describe the reported crime as "CSC (criminal sexual conduct): Aslt (assault) w/Intent to Commit".

Standard of Review

While the federal policy favoring arbitration as expressed in the Federal Arbitration Act is now binding in state courts and supercedes inconsistent state law, the act nonetheless requires *a contract evidencing a transaction involving commerce* to settle a controversy by arbitration. *Zabinsksi v. Bright Acres Associates*, 346 S.C. 580, 553 S.E. 2d 110 (2001), citing *Allied-Bruce Terminix Co. V. Dobson,* 513 U.S. 265, 115 S.CT. 834, 130 L.Ed.2d 753 (1995).

Analysis

A. Since this case does not involve interstate commerce, the FAA does not apply.

South Carolina jurisprudence is dispositive to the issue. *Flexon v. PHC-Jasper, Inc.*, a 2012 Court of Appeals decision, dictates that Defendants' motion to compel arbitration be denied. Flexon was a South Carolina resident licensed to practice medicine as a physician. He was to practice at sites in Jasper County. There was an arbitration agreement. The trial court found the employment agreement called for local medical services to be performed at a medical facility in Hardeeville, and as such denied the motion to compel arbitration since it didn't involve interstate commerce. *See Flexon, supra*, 309 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012).

Flexon is analytically analogous to the present case before the Court. Here, the Plaintiff provided physical therapy services exclusively in South Carolina. She did not travel out of state for her work. (By contradistinction, *see Lucey v. Meyer*, 201 S.C. 122, 736 S.E. 2d 274 (Ct. App. 2012), in which employment contract detailed at least one specific matter which required out of state travel, triggering the commerce clause.) Since Marzulli performed all her work in South Carolina rendering services for patients at a local hospital, as in *Flexon*, there is no interstate commerce and thus, arbitration should not be compelled. Given that Defendants move only on the basis of the Federal Act, the South Carolina Act is inapplicable as well.

Indeed, the "acknowledgement" at issue here presents even less of a nexus to interstate commerce than the employment contract in *Flexon*. The Plaintiff in *Flexon* had an employment agreement and the arbitration agreement at issue purported to cover any controversy arising from the Plaintiff's employment agreement. The Plaintiff in *Flexon* closed a practice in Georgia before joining *PHC* and then left and went back to work Georgia–the act that triggered the litigation. Here, Marzulli is an at-will employee and the only purported agreement for the court to consider is the actual "acknowledgment" which the Defendants stridently maintain to be a binding arbitration

contract.[4] The "acknowledgement"is not a part of a relocation contract and was signed after Marzulli already moved to South Carolina to begin work. (*Compare with Thornton v. Trident Medical Center, L.L.C.*, 357 S.C. 91, 592 S.E.2d 50 (Ct.App. 2003) where the parties agreed to arbitrate in the event of a dispute arising from a *relocation agreement* wherein the Plaintiff doctor agreed to relocate his practice from Michigan to South Carolina). Thus, in order to preempt state requirements and trigger the FAA, the "acknowledgement" itself must be *a contract evidencing a transaction involving commerce.*" *See Zabinsksi v. Bright Acres Associates*, 346 S.C. 580, 553 S.E. 2d 110 (2001). Clearly, a purported agreement to arbitrate disputes relating to Marzulli's employment as a physical therapist treating local patients at a local hospital does not affect interstate commerce. *See Flexon, Supra.*

Since Marzulli performed all of her work in South Carolina treating local patients at a local facility, there is no interstate commerce and thus, arbitration should not be compelled. Given that Defendants move only on the basis of the Federal Act, the South Carolina Act is inapplicable as well.[5]

B. The intentional tort of defamation is not contemplated by the "Acknowledgement"

Defamation is a false and defamatory statement about the plaintiff published by the defendant to others. It is an intentional tort. The present action is not founded on employment grounds; it is not a breach of contract action, discrimination suit or payment of wages claim. The defamation suit is not pendent to an employment claim, as they often do. Libel and Slander are such a heinous acts S.C

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[4]Marzulli notes that Tenet Healthsystems, Inc. was a party to *Flexon v. PHC-Jasper, Inc.* and the Defendants' motion and brief does not cite nor bring mention to the facts or analysis contained in *Flexon.*

[5]The "Acknowledgement" lacks mandatory notice requirements of the South Carolina Uniform Arbitration Act and is unenforceable under the Act. It also is unenforceable because the purported arbitration provision is made a condition of employment by Defendants.

Code Ann. § 16-7-150 (1976) (as amended) makes such acts a crime punishable by up to 30 days in jail. Marzulli did not and could not contemplate nor consent to her *employer* committing defamation against her. Consequently, the libel and slander are not "related" to the employment.

C. The document titled "Acknowledgment" is unenforceable.

Marzulli was handed the document entitled "Acknowledgement" by a human resource officer during a mandatory orientation. The HR officer stated that the document merely acknowledged that Marzulli received the employee handbook. Marzulli was not given a handbook contemporaneously upon receipt of the "acknowledgement." The title of the document is spelled incorrectly, immediately giving the impression that its contents are of no importance or consequence. The document contains writing in small font on single spaced lines. It contains five paragraphs. No text contained within the "acknowledgement" is bold or underlined. The first sentence of the document states, "I acknowledge that I have received information about how to access an electronic copy of the Employee Handbook via the Company's intranet." This language in no way indicates gravity of the importance the Defendants give to the document. The "acknowledgement" was not even accompanied by an actual Employee Handbook. While certain portions of the text are in italics, those portions only highlight the new employee's potential rights under a collective bargaining agreement. This document was a part of a number of documents which Marzulli was required to sign as a condition of starting employment at a mandatory orientation. The document titled *"Acknowledgement"* does not mention arbitration until the fourth line of the fourth paragraph (the fourth paragraph out of five).

Marzulli already had moved to and leased a house on Hilton Head as a part-time residence (her permanent residence is in Greenville County) and had no choice but to sign the agreement in

order to work for the Defendants. Instead of being truthful as to how the Defendants would use the document in attempt to have Marzulli waive a substantive, meaningful right of a jury trial for work related disputes, the Defendants' agent told Marzulli it merely acknowledged that Marzulli had a copy of the handbook. The Defendants negligently (at best) or purposefully (at worst) misspelled the title of the document so as to diminish its importance. Nothing on the face of the document gives any indication, whatsoever, that the signer would be purportedly waiving precious individual rights. For these reasons, Marzulli did not knowingly bind herself to the terms of the document and her signature was a result of deceit and coercion. It is therefore void ab initio, unconscionable, and therefore, unenforceable. -The motion should be denied.

DeANTONIO LAW FIRM, LLC

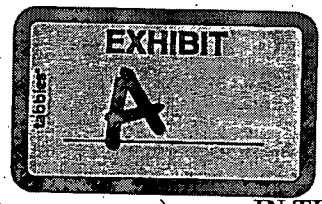
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Attorneys for Plaintiff

April 10, 2015

Hilton Head Island, South Carolina



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-02779
MARY BETH MARZULLI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**AFFIDAVIT OF MARY BETH MARZULLI**
	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
	)	
Defendants.	)	
	)	

PERSONALLY appeared before me, Mary Elizabeth Marzulli who being duly sworn, deposes and says that:

1. My name is Mary Elizabeth Marzulli and I was employed at Hilton Head Regional Medical Center, a/k/a Hilton Head Hospital a/k/a Tenet as a Pediatric Physical Therapist from October 2011 through July 2014. I go by the name of Mary Beth. I had 39 years of experience in physical therapy before beginning work with Tenet. During those 39 years in a variety of practice settings and several States, I had never had any complaints filed against me. The focus of my work has been helping children with special needs.

2. I purchased real estate in South Carolina in 2008 to use as my permanent residence.

3. Before beginning work as an at-will employee at Hilton Head Regional Medical Center, and after already having moved to South Carolina, I was required to come to the Hospital on October 10, 2011 for a mandatory orientation. At the orientation, a human resources officer produced several documents which I was required to sign in order to begin work at Hilton Head Regional Medical Center.

It was clear that signing the documents was mandatory in order for me to begin work. I signed several documents that day, including all basic employment documents including tax and benefit forms.

a. One of the documents which the human resource officer informed me that I must sign on October 10, 2011 was an "Acknowledgement" that I have received the "Employee Handbook." I was told by the human resource officer when she handed me the "Acknowledgment" that the document in question simply said that I acknowledged being able to access the handbook. Based on this assertion, I did not read the document carefully and nothing on the face of the document stood out to me as having any significance whatsoever. I did not receive an actual Employee Handbook with the Acknowledgment.

4. I started fulltime work as an at-will employee at Hilton Head Regional Medical Center as a pediatric physical therapist—an Allied Health Professional—approximately one week after the orientation. My job as a pediatric physical therapist wholly involved providing personal physical therapy services to pediatric patients from the Hilton Head Island, South Carolina and Bluffton, South Carolina communities. Physical therapy services, which involve hands-on, person to person communication and treatment, were done at the outpatient rehabilitation facility of Hilton Head Regional Medical Center. In addition to providing pediatric physical therapy services to local patients at Hilton Head Regional Medical Center, I also provided some coverage during 2013 at the Oaktie, South Carolina out-patient pediatric center. The services provided at each facility were the same: I provided personalized, individual physical therapy services to pediatric patients from the Hilton Head and Bluffton, South Carolina area. I did not travel out of state for work and only served South Carolina residents. All of my pediatric patients had some type of developmental delay or physical disability. All treatments were performed exclusively in South Carolina.

5. Pediatric physical therapist incorporate a variety of hands on techniques (which incorporate physical handling involving tactile techniques), and therapeutic exercise with play and recreational activities to assist children with physical challenges to maximize their independence and improve their mobility, self care and other functional skills necessary for daily living. Many of the

evaluations and treatments I use, all of which are common to pediatric physical therapists, require that I place my hands on the child. For example, Myofascial Release involves applying gentle sustained pressure, with my hands, into the myofascial connective tissue restrictions to restore motion. Another example is Neurodevelopmental Treatment Technique, which involves manual handling skills to modify or facilitate a movement pattern. Therapists may use their body to assist in stabilizing a patient or body part. The utilization of various techniques, and the physical contact required to perform them, are common knowledge to any licensed physical therapist. However, an individual who is not trained in the practice may not know, recognize, or understand the nature of or necessity for certain treatments which require hands on manipulation. Many treatments performed by physical therapy are uncomfortable for patients, and necessary treatments may even be painful. Naturally, some patients, especially children, do not enjoy certain treatments and would rather perform activities which are "fun" rather than the treatments that require physical work or that may be uncomfortable to them.

6. On the morning of May 13, 2014, I was called away from completing an evaluation report and informed that I needed to go to the office of Patrick Phillips, an administrator at the hospital, because he needed help with a project.

7. Upon arrival, Mr. Phillips took me into a conference room and explained that we were waiting for Darlene Nester, the Human Resource Manager and Beth Gasiorowski, the Director of Risk Management. It immediately became apparent that I had been lied to and that there was no such project, as mentioned. Once the Human Resource manager, Darlene Nestor, and the Director of Risk Management, Beth Gasiorowski, arrived they told me that an allegation of inappropriate touching had been made against me by one of my patients and that they had called the police and were waiting for them to arrive. Darlene Nester then informed that I was being suspended effective immediately without pay until the police investigated the charges and I was either cleared or charged. I was shocked at this false allegation and immediately broke into tears of disbelief and horror I then asked who had made the complaint and what was said. Beth told me it was a certain 9 year old female patient and that she said I

made her sit in my lap and that I pinched her on the but to make her walk faster. The report to Beth had been made by Gay Propst, the pediatric office manager, who had either spoken or received a message from the patient's father that morning. No one would tell me what the specific allegation was or what was said to the office manager, an administrative employee and not a physical therapist or medical professional that could further inquire about the nature of the touching and whether it was part of routine practice. During this conversation, Beth Gasiorowski told me she was a lawyer and confirmed to Darlene Nestor and Patrick Phillips that Tenet had completed a thorough background check of me before my hire and nothing indicated that I was capable of anything like the allegation. Patrick Phillips asked him to give me a little of my background which I did. They also told me that Propst, the office manager had defended me. A deputy from the Beaufort County Sheriff's Department arrived to question me. Darlene Nester, Beth Gasiorowski, and Patrick Phillips were all present for this interrogation. After the deputy finished questioning me, he asked would I sign a statement. I asked to speak to Beth privately before I agreed and he left the room. I then asked Beth, since she was a lawyer should I sign a statement or get an attorney? I explained that I had nothing to hide as I was telling the truth, but didn't know if I should get a lawyer or what. She told me it would be okay to sign a statement which I did. After I gave the officer my statement, I was told that I was not allowed to go back to my office, to complete paperwork, or to return to work. I said I had things I needed to get and was told one of them would get it for me. I declined that offer as they would not know what to get or where it was. They finally agreed I could go back and get my things after rehab closed at 6 p.m. I spoke with Propst, the Office Manager a day or two later to talk about cancelling a particularly challenging patient for the inexperienced PT that was covering my patients. She expressed to me how upset she was about what had happened. I asked her to tell me exactly what was said by the father. She told me she wasn't allowed to talk with me and that she could lose her job if she did. She offered to call the Director of Risk Management for permission. I spoke with Patrick Phillips the next day and asked permission to talk with Propst in order to hear exactly what was said by the father, but was told absolutely not that Propst was out of the picture and I was not allowed to talk with

her. After expressing that I had a right to know the exact allegation, Patrick Phillips told me he would talk with Beth. Beth called me later and told me that I supposedly made the patient sit in my lap, that I had touched the 9 year old patient's breasts, and that I had pinched her on the butt to make her walk faster. She also stated that the Father relayed that the patient had said the word vagina and that the only way the 9 year old patient would know that word is if it had been from me. I was subjected to a two month long criminal investigation for alleged criminal sexual contact with a minor. I was in constant fear for my livelihood, my freedom, my family's wellbeing, and subjected to incomprehensible humiliation, shame, and torment for the false allegations made against me by Tenet for sexually and physically abusing a minor female patient. These false allegations were completely alien to the standards which I have always strived to uphold and which I have dedicated my professional, personal, and moral life to. It was during this time that I learned that Beth Gasiorowski, in her role as "Risk Assessment" and "Victim Safety Officer", had reported to emergency dispatch and the Beaufort County Sheriff's Office that I committed physical and sexual abuse to a child.

8. My immediate supervisor, who is a licensed Occupational Therapist, was out of the country and not at work the day that the alleged allegation was made, nor the day the hospital reported me to emergency services dispatch and the Sheriff's Office for physical and sexual abuse of a minor. Obviously, she did not and could not have made the report to the authorites.

9. I did not know what was actually said to Propst by the father until I received the affidavit of Propst which was contained within the Hospital's motion to compel arbitration. I was shocked when I learned what the father had actually reported to Propst, and that he did not complain of "inappropriate touching" or "physical and sexual abuse". I was especially shocked when I learned that the father wished to speak with Ruth Hyde my supervisor regarding his concerns before speaking with anyone else, and that the Hospital defamed me and falsely alleged that I committed physical and sexual abuse to a child to law enforcement instead. I was shocked when I learned that no medical professional or Allied Health

professional made the false allegation and that the false allegation instead was made by an office manager and a lawyer, who encouraged me to make a statement under the false pretense of trust.

10. Propst is not a trained medical professional and not a physical therapist; she is an office manager.

11. Propst reported the father's report to the Director of Risk Management and "Patient Safety Officer," Beth Gasiorowski—who is a lawyer and not an allied health or medical professional.

12. Beth Gasiorowski called emergency dispatch and the Beaufort County Sheriff's Office saying that I committed acts of physical and sexual abuse to a minor patient.

13. The allegation of physical and sexual abuse by the hospital was unfounded. The official finding of the Sheriff's Office report was, "UNFOUNDED."

14. Even after I was cleared, the hospital would not allow me to come back to work, and prevented me to come to work, even to complete patient paperwork during the two month investigation.

15. Several days passed after I was cleared of all charges before the Hospital contacted me and informed me that before I could return to work I would need to meet with Ruth Hyde, my supervisor, and Darlene Nester, Director of Human Resources the following week. At that meeting, I was informed that I would have to sign onto a "performance plan" in order to start back at work. The performance plan was based upon my alleged failure to complete paperwork in a timely fashion. The hospital disallowed me to complete paperwork on my time off, refused to allow me to catch up on paperwork during my suspension without pay, and the lack of adequate time to complete paperwork is an issue I had raised repeatedly during performance reviews, including a review that occurred in March, 2014 before the hospital made the allegation against me.

16. I never dreamed that an employer would create false allegations of such an inflammatory nature against me and falsely report it to law enforcement. My work at Hilton Head Regional Medical Center consisted of treating patients. I never contemplated or considered the fact that my employment at Hilton Head Regional Medical Center could possibly include my employer defaming my character and

profession, and communicating that I committed crimes. The false allegation made by Hilton Head Regional Medical Center had nothing to do with events that occurred during my employment.

Mary Elizabeth Marzulli, PT

Mary Elizabeth Marzulli

April 8, 2015

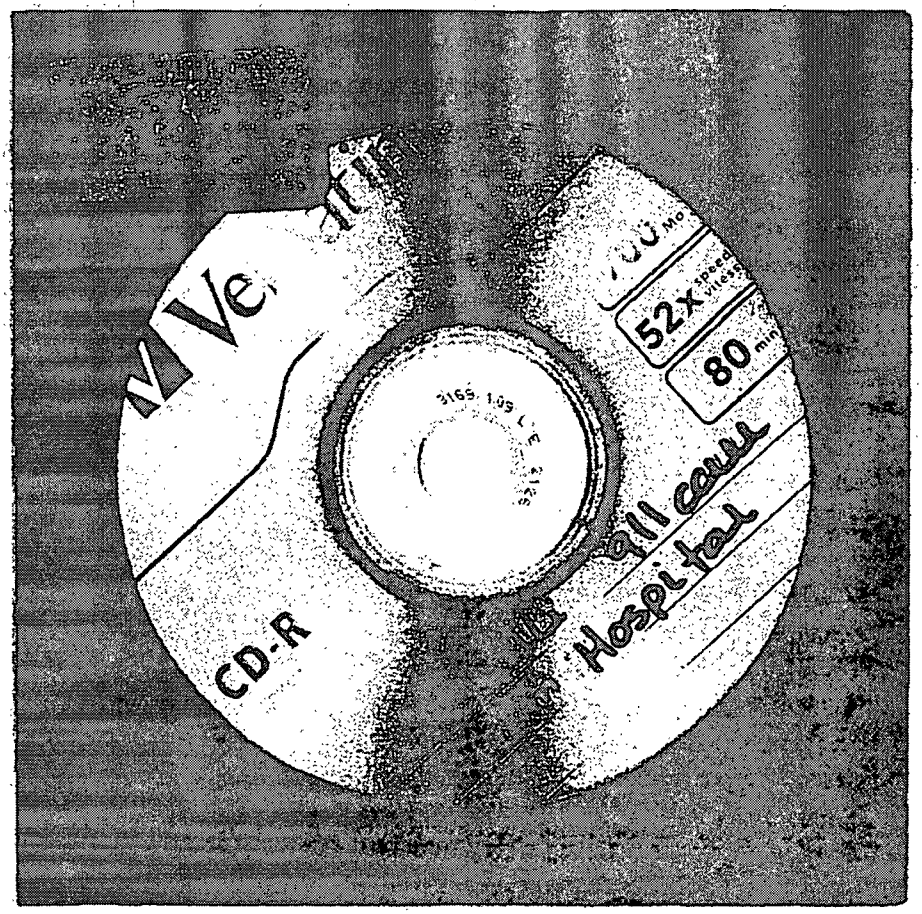
Hilton Head Island, South Carolina

SWORN TO BEFORE ME THIS
8th day of April 2015

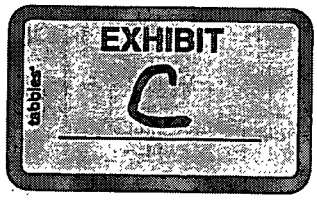
Kelly A Reiden

Notary Public for the State of South Carolina

My commission expires: 6/27/16



A copy of the CD is being submitted to the Court with the Record on Appeal.



FINGER & FRASER, P.A.

ATTORNEYS AT LAW

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DENSON H. FRASER, JR.
ANNE C. MARSCHER *o
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* Georgia
† New York

o Court Certified Mediator
• Court Certified Arbitrator / Mediator

July 3, 2014

Tasha Haupt
NCIC Terminal Agency Coordinator
Beaufort County Sheriff's Office
P.O. Drawer 1228
2001 Duke Street
Beaufort, S.C. 29901

RE: FOIA Request for Records

Dear Ms. Haupt,

Under the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 et seq., I am requesting copies of public records, to wit:

> A recording of the 911 dispatch call made on or about 11:43am on May 13, 2014 by Beth Gasirowski, DOB: 08/15/1966, an employee of Hilton Head Hospital at 25 Hospital Center Blvd., regarding an alleged complaint involving employee Ms. Mary Elizabeth Marzulli, as well as any CAD report created regarding the incident.

If there are any fees for searching or copying these records, please inform me of the cost.

The South Carolina Freedom of Information Act requires a response time within 15 business days. If access to the records I am requesting will take longer than this amount of time, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

RECEIVED
JUL 03 2014
BY: TH

With high regards, I am

Most sincerely,

Benjamin T. Shelton

FINGER & FRASER, P.A.

CFS33 - Run By: HAUPT,TASHA

C A P S

AGENCY: 00 CALLS FOR SERVICE BY EVENT NUMBER

Event Number: 201405130352 Date Reported: 05/13/2014

How Recvd: PHONE Dispatched As: RAPE / CRIMINAL SEXUAL CONDUCT
Report No: 201405130352 Call On-Scene: RAPE / CRIMINAL SEXUAL CONDUCT

Name Type: Per/Bus Name: GASIOROWSKI,BETH

House #: 0000025 Str: HOSPITAL CENTER BOULEVARD Apt #:

City: St: Zip: Ph #: (843) 689-8412

Complainant Address:

Patrol: NORTH FOREST BEACH DRIVE Grid: MAIN STREET NORTH / HOSPITAL

Addl Unit Asgn: 0 Shift: Ent From: ECAD

Comp Taker: REEVES,LORI Dispatcher: CHARLTON,MARSHINA

Response: EMERGENCY Disposition: REPORT

Comments: 24 8

Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM A ND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT

Reportable: Tag No:

Tag State: Make: Model: Year: 0000

Color: Bus Name: HOSP HH MED CTR (BCSO)

Race: Sex: No Occupants: 00 Probable Cause:

Responding Unit Info

Unit:B51 Type:
Id:RESTO,L Action:
Responded From: Date:05/13/2014
Times:

Alarm	11:27:57	Dispatch	11:43:01	Responded	12:02:14	Arrived	12:02:14
AtPatient	00:00:00	Trauma Al	00:00:00	Enr Hosp	00:00:00	Enr Jail	00:00:00
At Jail	00:00:00	Enr City	00:00:00	At City	00:00:00	At Hosp	00:00:00
Enr Sta	00:00:00	Clear	13:06:37	Determined	11:28:18	Action	11:30:40

========== Narrative Number: 0 ==========

CFS33 - Run By: HAUPT,TASHA

C A D S

AGENCY: 00 CALLS FOR SERVICE BY EVENT NUMBER

Event Number: 201405130352 Date Reported: 05/13/2014

Created By: REEVES,LORI Date: 05/13/2014 Time: 11:30:24
BLDG)..x17 is patient safety advocate for the hospital
========== Narrative Number: 1 ==========
Created By: CHARLTON,MARSHINA Date: 05/13/2014 Time: 11:31:04
adv b10 of call pending
========== Narrative Number: 2 ==========
Created By: CHARLTON,MARSHINA Date: 05/13/2014 Time: 11:35:48
per b10 give to the next avail unit
========== Narrative Number: 3 ==========
Created By: CHARLTON,MARSHINA Date: 05/13/2014 Time: 11:43:08
Unit: B51 Notify Message: 76
========== Narrative Number: 4 ==========
Created By: CHARLTON,MARSHINA Date: 05/13/2014 Time: 12:02:06
Unit: B51 Notify Message: 23 ABOUT 5MINS AGO
========== Narrative Number: 5 ==========
Created By: CHARLTON,MARSHINA Date: 05/13/2014 Time: 12:02:11
Unit: B51 Notify Message: 61 AFFRM
========== Narrative Number: 6 ==========
Created By: CHARLTON,MARSHINA Date: 05/13/2014 Time: 12:23:23
Unit: B51 Notify Message: 61 NO ANS POSS X1 AREA
========== Narrative Number: 7 ==========
Created By: REEVES,LORI Date: 05/13/2014 Time: 12:28:15
Unit: B51 Notify Message: 61 4 VIA X21
========== Narrative Number: 8 ==========
Created By: REEVES,LORI Date: 05/13/2014 Time: 12:28:20
Unit: B51 Notify Message: OCA ISSUED VIA X21
========== Narrative Number: 9 ==========
Created By: CHARLTON,MARSHINA Date: 05/13/2014 Time: 13:06:34
Unit: B51 Notify Message: 24 8

CAD01 - Run By: HAUPT,TASHA

C A D

Dispatch Actions for Event Number: 00 - 201405130352

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000R1460 05
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:30:40 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: O
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000R1460 05
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:30:40 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000C3649 04
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:31:01 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000C3649 04
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:31:01 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000C3649 04
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:31:11 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000C3649 04
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:31:11 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000J1290 00
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:34:04 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000J1290 00
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:34:04 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000C3649 04
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:35:57 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000C3649 04
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:35:57 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000C3649 04

C A D

Dispatch Actions for Event Number: 00 - 201405130352

Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:35:57 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05B Precinct: 01 ID: 00000C3649 04
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:36:03 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: P
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Reason:

Unit: B43 Status: % Time: 11:42:35 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRIMI Prsnl: 00000W5542 ID: 00000C3649 04
Unit: B43 Status: Z Time: 11:42:35 Loct: BFF TRAINING Type: Prsnl: 00000W5542 ID: 00000C3649 04
Unit: B51 Status: % Time: 11:42:35 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRIMI Prsnl: 00000R0636 ID: 00000C3649 04
Unit: B51 Status: D Time: 11:43:01 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRI Prsnl: 00000R0636 ID: 00000C3649 04

Ag: 00 Inc #: 201405130352 Loct: 25 HOSPITAL CENTER BOULEVARD Grid: 5G02 Area: 05D Precinct: 01 ID: 00000C3649 04
Call Type: RAPE / CRIMINAL SEXUAL CONDUCT Priority: 1 Source: P Business: HOSP HH MED CTR (BCSO)
Date: 05/13/2014 Time: 11:43:03 Name: GASIOROWSKI,BETH Address: Phone: (843) 689-8412 Status: C
Remarks: N31..REF TO 9 YOF..INAPPROPRIATELY TOUCHED BY PHYSICAL THERAPIST AT HH HOSPITAL..INC
OCCURRED AT PEDIATRIC REHAB CENTER..VICTIM AND SUSP NOT X23..12 25 ADMIN BLDG (LAMONT
Disposition: Disposition Remarks:

Unit: B51 Time: 11:43:08 Notification: 76 ID: 00000C3649 04
Unit: B51 Time: 12:02:06 Notification: 23 ABOUT 5MINS AGO ID: 00000C3649 04
Unit: B51 Time: 12:02:11 Notification: 61 AFFRM ID: 00000C3649 04
Unit: B51 Status: A Time: 12:02:14 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRI Prsnl: 00000R0636 ID: 00000C3649 04
Unit: B51 Status: V Time: 12:02:15 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRI Prsnl: 00000R0636 ID: 00000C3649 04
Unit: B51 Status: P Time: 12:09:16 Loct: ** EMD-34538 ** Type: RAPE / CRI Prsnl: 00000R0636 ID: ********** 00
Unit: B51 Status: V Time: 12:14:27 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRI Prsnl: 00000R0636 ID: 00000C3649 04
Unit: B51 Status: P Time: 12:21:28 Loct: ** EMD-34538 ** Type: RAPE / CRI Prsnl: 00000R0636 ID: ********** 00
Unit: B51 Time: 12:23:23 Notification: 61 NO ANS POSS X1 AREA ID: 00000C3649 04
Unit: B51 Status: V Time: 12:24:08 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRI Prsnl: 00000R0636 ID: 00000C3649 04
Unit: B51 Time: 12:28:11 Notification: Assigned Report Number: 201405130352 ID: 00000R1460 05
Unit: B51 Time: 12:28:15 Notification: 61 4 VIA X21 ID: 00000R1460 05
Unit: B51 Time: 12:28:20 Notification: OCA ISSUED VIA X21 ID: 00000R1460 05
Unit: B51 Status: V Time: 12:28:34 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRI Prsnl: 00000R0636 ID: 00000R1460 05
Unit: B51 Status: P Time: 12:35:36 Loct: ** EOC-81627 ** Type: RAPE / CRI Prsnl: 00000R0636 ID: ********** 08
Unit: B51 Time: 13:06:34 Notification: 24 8 ID: 00000C3649 04
Unit: B51 Status: O Time: 13:06:37 Loct: 25 HOSPITAL CENTER BOULEVA Type: RAPE / CRI Prsnl: 00000R0636 ID: 00000C3649 04
Disposition: OR Disposition Remarks: 24 8

Narrative Number: 0
Date: 05/13/2014 Time: 11:30:24 Created By: REEVES,LORI
BLDG)..x17 is patient safety advocate for the hospital

Narrative Number: 1
Date: 05/13/2014 Time: 11:31:04 Created By: CHARLTON,MARSHINA
adv b10 of call pending

Narrative Number: 2
Date: 05/13/2014 Time: 11:35:48 Created By: CHARLTON,MARSHINA
per b10 give to the next avail unit

Narrative Number: 3
Date: 05/13/2014 Time: 11:43:08 Created By: CHARLTON,MARSHINA
Unit: B51 Notify Message: 76

Narrative Number: 4
Date: 05/13/2014 Time: 12:02:06 Created By: CHARLTON,MARSHINA
Unit: B51 Notify Message: 23 ABOUT 5MINS AGO

Narrative Number: 5
Date: 05/13/2014 Time: 12:02:11 Created By: CHARLTON,MARSHINA
Unit: B51 Notify Message: 61 AFFRM

Narrative Number: 6
Date: 05/13/2014 Time: 12:23:23 Created By: CHARLTON,MARSHINA
Unit: B51 Notify Message: 61 NO ANS POSS X1 AREA

Narrative Number: 7
Date: 05/13/2014 Time: 12:28:15 Created By: REEVES,LORI
Unit: B51 Notify Message: 61 4 VIA X21

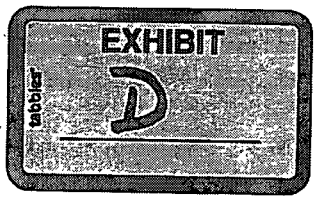
Narrative Number: 8
Date: 05/13/2014 Time: 12:28:20 Created By: REEVES,LORI
Unit: B51 Notify Message: OCA ISSUED VIA X21

Narrative Number: 9
Date: 05/13/2014 Time: 13:06:34 Created By: CHARLTON,MARSHINA
Unit: B51 Notify Message: 24 8

20140513035 2-00 PSS 25 Hospital Center Boulevard 051314

NICE Inform Reconstruction - Results Table
Printed by: Haupt, Tasha
Printed on: Monday, July 07, 2014 2:45:56 PM

Resource	IndividualAlias	Start Time	Stop Time	Duration	DTMF
524-2777-1		5/13/2014 11:26:44.8 AM	5/13/2014 11:29:12.0 AM	00:02:27.2	



Is this report a General Sessions Case which needs to go to the G/S Court Coordinator? ○ YES ○ NO

INCIDENT REPORT

Agency ID: SC 0070000 Case Number 201405130352

Available for Records Section ☑ 05/13/2014 Section: Patrol (S) Juvenile: YES

Incident Type	Completed	Forced Entry	Premise Type	# Units
CSC: Asslt w/Intent to Commit	◉ Yes ○ No	○ Yes ◉ No	Drug Store/Dr's Office/Hospital	

INCIDENT LOCATION:

Victim Type	Latitude	Longitude	NCIC Inq	NCIC Ent'd
Individual	32.223947	-80.714522		

St #	Street Name	Unit	Subdivision/Complex	City	State	Zip	Grid #
25	Hospital Center Blvd			Hilton Head	SC	29926	5G02

Incident Date	Incident Time		Incident Date	Incident Time
05/05/2014	17:00	TO		

Dispatch Date	Dispatch Time	Arrival Time	Departure Time	Weapon Type
05/13/2014	11:43	12:02	13:06	None

Reporting Officer	Date	Unit #	Shift Supervisor	Date	Unit #
Resto, Luis	05/13/2014	R0636	Faucett, Andrew	05/13/2014	P0105
Division Supervisor	**Date**	**Unit #**	**Reviewed By Investigator**	**Date**	**Unit #**
Viens, Angela	05/19/2014	V3613	Calendine, Eric	05/13/2014	C2538

Case Dispo.	Reason for Ex-Clear	Follow Up Inv.	Officer Assigned	Unit #
Active		◉ Yes ○ No	Nelson, Derek	N1375

Provided by: Beaufort County Sheriff's Office
Criminal Records Division
Released by: [signature] Date 06.24.14
OK to release per
Lt. Nelson.

Certified to be a true and correct copy of the original document on file with the Office of Sheriff for Beaufort County,
[signature]
Chief Deputy, Beaufort County Sheriff's Office

COMPLAINANT/VICTIM/SUSPECT:

Person Type	Last Name	First Name	Middle Name	Suffix	DOB	Sex	Race
Complainant	Gasirowski	Beth			[redacted]	F	W

Age	Eth	Ht	Wt	Hair	Eyes	J/S/O/U	Relationship to Suspect	#1	#2	#3
47	N	503	150	BRO	BRO	J				

* J-This Jurisdiction/S-State/O-Out of State/U-Unknown

Facial Hair/Scars/Tattoos/Etc

St #	Street Name	Unit	Subdivision/Complex	City	State	Zip
25	Hospital Center Blvd.			Hilton Head	SC	29926

Home Phone	Work Phone	Cell Phone
	843-689-8412	

FOR VICTIMS	Visible Injury	Explain	Complaint Non-Visible Injury
	☐ Yes ☐ No		☐ Yes ☐ No
	Victim Using	Alcohol: ☐ Yes ☐ No ☐ Unknown	Drugs: ☐ Yes ☐ No ☐ Unknown
	Subst. Type		

FOR SUSPECTS	Type	☐ Suspect ☐ Runaway ☐ Wanted ☐ Warrant ☐ Arrest ☐ Jail ☐ Summons		
Identified	Arrested Near Scene	#Arrested	Date/Time of Incident	Date/Time of Arrest
☐ Yes ☐ No	☐ Yes ☐ No			
Located	Suspect Using	Alcohol: ☐ Yes ☐ No ☐ Unknown	Drugs: ☐ Yes ☐ No ☐ Unknown	
☐ Yes ☐ No	Subst. Type			

Person Type	Last Name	First Name	Middle Name	Suffix	DOB	Sex	Race
Suspect	Marzulli	Mary			[redacted]	F	W

Age	Eth	Ht	Wt	Hair	Eyes	J/S/O/U	Relationship to Suspect	#1	#2	#3
64	N	502	150	BRO	GRN	J				

* J-This Jurisdiction/S-State/O-Out of State/U-Unknown

Facial Hair/Scars/Tattoos/Etc

St #	Street Name	Unit	Subdivision/Complex	City	State	Zip
41	Fairway Wind Place		Palmetto Dunes	Hilton Head	SC	29926

Home Phone	Work Phone	Cell Phone
[redacted]		[redacted]

FOR VICTIMS	Visible Injury	Explain	Complaint Non-Visible Injury
	☐ Yes ☐ No		☐ Yes ☐ No
	Victim Using	Alcohol: ☐ Yes ☐ No ☐ Unknown	Drugs: ☐ Yes ☐ No ☐ Unknown
	Subst. Type		

FOR SUSPECTS	Type	☑ Suspect ☐ Runaway ☐ Wanted ☐ Warrant ☐ Arrest ☐ Jail ☐ Summons		
Identified	Arrested Near Scene	#Arrested	Date/Time of Incident	Date/Time of Arrest
☑ Yes ☐ No	☐ Yes ☐ No			
Located	Suspect Using	Alcohol: ☐ Yes ☑ No ☐ Unknown	Drugs: ☐ Yes ☑ No ☐ Unknown	

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☒ Yes ☐ No	Subst. Type	

Person Type	Last Name	First Name	Middle Name	Suffix	DOB	Sex	Race
Victim							

Age	Eth	Ht	Wt	Hair	Eyes	J/S/O/U	Relationship to Suspect	#1	#2	#3

*J-This Jurisdiction/S-State/O-Out of State/U-Unknown

Facial Hair/Scars/Tattoos/Etc

St #	Street Name	Unit	Subdivision/Complex	City	State	Zip

Home Phone	Work Phone	Cell Phone

FOR VICTIMS	Visible Injury	Explain	Complaint Non-Visible Injury
	☒ Yes ☒ No		☐ Yes ☒ No
	Victim Using	Alcohol: ☐ Yes ☒ No ☐ Unknown	Drugs: ☐ Yes ☒ No ☐ Unknown
	Subst. Type		

FOR SUSPECTS	Type	☐ Suspect ☐ Runaway ☒ Wanted ☒ Warrant ☐ Arrest ☒ Jail ☐ Summons		
Identified	Arrested Near Scene	#Arrested	Date/Time of Incident	Date/Time of Arrest
☐ Yes ☐ No	☐ Yes ☒ No			
Located	Suspect Using	Alcohol: ☐ Yes ☒ No ☐ Unknown	Drugs: ☐ Yes ☒ No ☐ Unknown	
☐ Yes ☒ No	Subst. Type			

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Michael M. Hatfield

Chief Deputy, Beaufort County Sheriff's Office

WITNESSES/OTHER:

Person Type	Last Name	First Name	Middle Name	Suffix	DOB	Sex	Race
Other	[redacted]	[redacted]			[redacted]	M	W

Age	Eth	Ht	Wt	Hair	Eyes	J/S/O/U	Relationship to Suspect	#1	#2	#3
42	H	505	190	BLK	BRO	J				

Facial Hair/Scars/Tattoos/Etc

* J-This Jurisdiction/S-State/O-Out of State/U-Unknown

Father of Victim

St #	Street Name	Unit	Subdivision/Complex	City	State	Zip
[redacted]				[redacted]		

Home Phone	Work Phone	Cell Phone
[redacted]		[redacted]

Certified to be a true and correct copy of the original document on file with the Office of Sheriff for Benton County
Chief Deputy Benton County Sheriff's Office

Interview of Beth Gasirowski: (Complainant / Hilton Head Regional Hospital Patient Safety Advocate)

Gasirowski contacted the Beaufort County Sheriff's Office after she was informed of a complaint filed by the father of a patient. The complaint was made against one of the physical therapist (Marzulli) in the hospital in the afternoon of May 12, 2014. The complaint was place by [redacted] regarding his daughter [redacted], whose physical therapist is a Mary E. Marzulli. She was told the father told her employees the therapist touched his daughter inappropriately as the child sat on her lap. According to the complaint the incident occurred on May 5,2014 (last visit) which was at 1700 hrs. As soon as she found out she contacted the father of the victim to advise him she was contacting law enforcement as required by hospital policy. She also pulled the suspect Mary E. Marzulli from the schedule, and she will not be working with patients until the conclusion of the investigation.

Interview of Mary E. Marzulli:(Suspect)

Marzulli was verbally advised of her Miranda Right's which she acknowledge and waived providing a verbal and written statement. She has worked in the physical therapy field for over 40 years and never been the subject of any patient abuse investigation. She has worked with the victim for several years, since approximately September 2011. All the sessions are conducted in the South Campus Rehabilitation facility which has two levels. She did provide a physical therapy session to on May 5, 2014. The session was normal and nothing unusual occurred. never complianed to her during the physical therapy session. She as part of her sessions, at times she does touch her patients to assist them with posture, stretches and correct placement while conducting exercises. She remembers the last session with but she does not remember asking her to sit on her lap.

Note: Mary E. Marzulli was noticeably upset and crying throughout the duration of the interview.

Interview of [redacted] (Victim's Father)

[redacted] stated he made the complaint to the hospital after his daughter told him that during the last physical therapy session the therapist touched her inappropriately. He is not sure to what extent or what exactly happened. He wanted the hospital personnel and his family to sit down and talk about the incident. His daughter mentioned to him the therapist asked her to sit on her lap on one occasion and to grab her during one of the exercises. He was not in the room with his daughter at the time of the incident. He would like the incident to be investigated and dealt with appropriately. If after the investigation, if there are findings of any criminal acts against his daughter, he will pursue criminal charges. He wanted to speak with the hospital staff before speaking with law enforcement.

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Chief Deputy Beaufort County Sheriff's Office

6/24/2014

Col. Resto
843-255-3300

Date 5/13/11 Page No. ____

STATEMENT OF:

Name: Amy Beth Magnotti DOB: [redacted] H: [redacted]

Add: 416 Pinckney Woods Rd. SSN: C:

Hilton Head, SC 29928 W:

[redacted] is a 9 and 10 yr old girl with Hemiplegic Cerebral palsy resulting in Right sided weakness. She has been seen by Rhodes Physical Therapy since Sept of 2011. She was initially seen 2x week but was reduced to 1x wk [redacted] has decreased strength on her right side and impaired balance and coordination. She also has tight and lower extremity tightness and poor posture. She typically work with [redacted] on stretching, balance, and coordination activities. We also work on increasing posture and gait and stretching of tight muscles. As a therapist I do have my hands on her for stretches, alignment for muscles and for posture, but have NEVER touched her inappropriately! She has never expressed discomfort with me or any activity we do.

[redacted] is seated in the gym area, doors are almost always open and other people around. Occasionally we go downstairs and use some of the equipment in the adult gym.

I received a copy of this.

Amy Beth Magnotti, PT

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli, Plaintiff, v. Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., Defendants.	Civil Action No. 2014-CP-07-2779 DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO DISMISS OR STAY

This is a defamation case brought against Hilton Head Regional Medical Center by a pediatric physical therapist who was employed there from September 2011 through July 2014 (Complaint ¶5). This memorandum is offered in support of the previously filed motion of Defendants[1] (hereafter "Hospital") to compel arbitration and to dismiss or stay the case. The motion is premised on an acknowledgment Plaintiff signed during her employment in which she agreed she would submit to arbitration "any and all claims and disputes that are related in any way to my employment or the termination of my employment . . ..." ("Agreement"). Two recent decisions, one from the South Carolina Supreme Court and one from the Court of Appeals, as well as an earlier Court of Appeals decision, all hold former employees'

[1] Three Defendants are named in the Complaint: (1) Tenet South Carolina, Inc., (2) Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and (3) Tenet Physician Services-Hilton Head, Inc. Hilton Head Regional Medical Center, Plaintiff's employer, is owned and operated by Hilton Head Health System, L.P. Healthcare Network South Carolina, Inc., formerly known as Tenet South Carolina, Inc., is the managing partner of Hilton Head Health System, L.P. The Complaint does not explain why Tenet South Carolina, Inc. and Tenet Physician Services-Hilton Head, Inc. are named as Defendants. By filing this motion, Defendants do not waive their right to contest the status of any entity other than Hilton Head Health System, L.P. as a proper Defendant.

defamation claims are arbitrable when the arbitration agreement is a broad one, as the Agreement here is, and the claims "touch matters" relating to employment. *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013) (**TAB 5**); *Pearson v. Hilton Head Hospital*, 400 S. C. 281, 733 S. E. 2d 597 (S.C. App. 2012) (**TAB 6**); *see also Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (S.C. App. 1999) (defamation claim against the plaintiff's former employer, premised on a co-worker's statement to a third party that the plaintiff had been terminated for sexual harassment, was arbitrable pursuant to the plaintiff's acknowledgment of receipt of the employee handbook providing that all employment-related disputes must be arbitrated).[2]

The Complaint alleges only one cause of action, a defamation claim. Specifically, Plaintiff alleges the Hospital defamed her:

- by making a mandatory report to law enforcement that a nine-year-old Hospital patient claimed Plaintiff had sexually abused her at the Hospital;
- by "repeat[ing] the defamation;"
- by escorting her when she returned to the Hospital retrieve her belongings; and
- by refusing her access to another part of the Hospital when she asked if she could retrieve items she said were located there.

Tort claims between employee and employer are routinely held to be arbitrable when the parties have agreed they will arbitrate all claims "arising out of or relating to" employment. *See, e.g., Gilmer* v. *Interstate/Johnson Lane, Corp.*, 500 U.S. 20 (1991). Given recent South Carolina case law on the subject of such "broad" arbitration agreements, as detailed below, none of which Plaintiff mentions or distinguishes in her memorandum opposing

[2] In a brief received from Plaintiff today, counsel argues that defamation is "not contemplated" in the arbitration agreement. Plaintiff does not mention *Landers, Pearson* or *Towles*, all three of which held that defamation claims are arbitrable.

the motion, it is clear Plaintiff's position that her claims are not subject to arbitration is tenuous, at best.[3]

The two recent South Carolina appellate decisions mentioned above offer the most compelling proof that Plaintiff's claims are arbitrable and that the Federal Arbitration Act applies.[4] In *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013) (**TAB 5**) and *Pearson v. Hilton Head Hospital*, 400 S. C. 281, 733 S. E. 2d 597 (S.C. App. 2012) (**TAB 6**), the Supreme Court and the Court of Appeals, respectively, held that the issue of arbitrability is one for the court. Only two questions need to be answered affirmatively to find that arbitration

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[3] Plaintiff's counsel declined a request early on to provide an explanation for the apparent belief that the case was not subject to arbitration; it was only in a brief filed April 11 and received by Defendant today, that Plaintiff provides the bases for her contention that her claims are not arbitrable.

[4] In her brief that defense counsel received today, Plaintiff cites *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (S.C. App. 2012) for the proposition that this case does not involve interstate commerce, and thus, she argues, the Federal Arbitration Act ("FAA") does not apply. *Flexon* is not controlling for several reasons: *Landers* and *Pearson,* both of which held the FAA did apply, were both decided after *Flexon* --- *Landers* by the Supreme Court --- and thus call into serious question the Court of Appeals' decision in *Flexon*. Moreover, *Pearson* involved the very same hospital that is a defendant here. Additionally, in the performance of her job, Plaintiff used hospital equipment that had been shipped across state lines, thus demonstrating the same kind of interstate commerce that the Court cited as dispositive proof that the FAA applied in *Dean v. Heritage Healthcare of Estill*, Op. No. 27401 (S.C. Sup. Ct., filed June 18, 2012) Shearouse Adv. Sh. No. 24 at 40 (noting that interstate commerce was involved because medical supplies and the food used to prepare meals was shipped across state lines). Finally, unlike this case, the plaintiff in *Flexon* who had agreed to, but resisted, arbitration resided in South Carolina and the agreement stated that South Carolina law applied. This case is more like *Thornton*, which the *Flexon* case distinguishes, where the employee moved to South Carolina from out of state and the contract provided for him to be compensated for the expenses incurred in moving to South Carolina.399 S.C. at 88, 731 S.E.2d at 3, citing *Thornton v. Trident Medical Center, L.L.C.*, 357 S.C. 91, 592 S.E.2d 50 (S.C. App. 2003). See Second Affidavit of Darlene Nester, **TAB 8** (offering evidence that Plaintiff applied for the job over the internet from an address in Pennsylvania; the hospital mailed her offer letter to her at that address in Pennsylvania; she signed and returned the offer, assumedly from Pennsylvania where it had been sent; and the offer letter included a promise to reimburse her moving expenses).

is required: Does the arbitration agreement exist? Does the dispute have a significant relationship to the arbitration agreement?

As it was in *Landers* and *Pearson*, the answer to both questions here is unquestionably "yes." First, the existence of the broad arbitration agreement is not in dispute. Second, the defamation claim here is arbitrable for the same reasons the courts in *Landers* and *Pearson* held the defamation claims there were arbitrable, *i.e.*, proof of the truth or falsity of the statements giving rise to the plaintiff's defamation claim will require the presentation of evidence integrally related to Plaintiff's job performance (*Landers v. FDIC*, 402 S.C. at 111 739 S.E.2d at 214-15)(**TAB 5**)), and "[t]he causes of action against the Hospital arose as a result of [the plaintiff] being placed" there (*Pearson v. Hilton Head Hospital*, 400 S. C. at 297, 733 S. E. 2d at 605)(**TAB 6**). Two South Carolina appellate courts held these reasons were sufficient to find that the defamation claims in those cases fell within the scope of the broad arbitration clauses presented there.

The same logic applies to the broad "related in any way to my employment or the termination of my employment with Tenet" language of the arbitration agreement here. Add to the analysis the South Carolina Supreme Court's instructions in *Landers* that "arbitration agreements are liberally construed in favor of arbitrability," and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," and it is impossible to conclude anything other than that Plaintiff's claims here must be arbitrated under applicable law. *Landers v. FDIC*, 402 S.C. at 108, 739 S.E.2d at 213)(**TAB 5**).

UNDISPUTED FACTS

The Agreement

On October 10, 2011, Plaintiff signed a written agreement with the Hospital ("Agreement") (Affidavit of Darlene Nester (hereafter "Nester Aff."), **TAB 3**, Exhibit A), wherein she agreed, in pertinent part, to use Tenet's Fair Treatment Process ("FTP")(Nester Aff., **TAB 3**, Exhibit B.) The FTP is a dispute resolution process that applies to all non-union employees of Tenet facilities and their affiliates, of which Plaintiff was one. The FTP consists of five steps that the employee generally must follow to resolve a problem at work. The fifth and final step is "final and binding arbitration;" it is this final step that is pertinent here.

In the Agreement she signed, Plaintiff agreed "to submit to final and binding arbitration"[5]

> any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy of any such claim or dispute against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that, by agreeing to the use of arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial . . ..

(Nester Aff. **TAB 3**, ¶ 4 & Ex. A.)

The Report that Plaintiff Abused a Patient

On May 12, 2014, the father of a 9-year-old female patient lodged a complaint with the Physical Therapy Department of the Hospital. (Probst Aff., **TAB 4**, ¶¶ 3-14.) He said his daughter told him that on May 5, 2014, at their physical therapy session, Plaintiff held his daughter in her lap in a way that made her uncomfortable, and that Plaintiff pushed her and

[5] The Agreement also requires the Hospital to submit any claims it had against Plaintiff to arbitration. *Id.*

slapped her hand (Probst Aff., **TAB 4,** ¶¶ 7 & 13.) The father also stated that his daughter was using the word "vagina" for the first time, and had told him she learned the word from Plaintiff. (Probst Aff., **TAB 4,** ¶ 9.)

As required under S. C. CODE § 63-7-310,[6] the Hospital reported the child's father's complaint to the Beaufort County Sheriff's Department. (Gasiorowsky Aff., **TAB 1,** ¶¶ 3-5.) The Hospital also notified Plaintiff of the complaint and suspended her from all job duties pending completion of investigations by the Sheriff's Department and the Hospital. (Nester Aff., **TAB 3,** ¶ 7; Gasiorowsky Aff., **TAB 1,** ¶8.)

The Investigations and Afterward

During the Sheriff Department's investigation, the investigator told the Hospital's Director of Risk Management Beth Gasiorowsky that the 9-year old patient made a number of allegations against Plaintiff, including an assertion that Plaintiff fondled the child's breasts, that she asked the child her to touch Plaintiff's breasts, and that Plaintiff had pinched the child on her "butt." (Gasiorowsky Aff., **TAB 1,** ¶ 9.) The parents of the child also indicated they wanted to press criminal charges against Plaintiff. (Gasiorowsky Aff., **TAB 1,** ¶ 10.) After investigating the matter for approximately six weeks, however, on or about July 1, 2014, the

[6]Under S.C. Code § 63-7-310(A), certain persons, including "medical, emergency medical services, mental health, or allied health professional(s)," are required to report when they have received, in their professional capacity, information which gives them reason to believe that a child has been or may be abused or neglected as defined in South Carolina Code § 63-7-20 (defining abuse or neglect of a child as actions of "a parent, guardian, or other person responsible for the child's welfare.") Code 1976 § 63-7-20(4). If a person with a duty to report believes a "child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect if committed by a parent, guardian, or other person responsible for the child's welfare, but the reporter believes that the act or omission was committed by a person other than the parent, guardian, or other person responsible for the child's welfare, the reporter must make a report to the appropriate law enforcement agency." S. C. CODE § 63-7-310(B).

Sheriff's Department dismissed the Complaint, reportedly because there was a lack of evidence to support criminal activity. (Gasiorowsky Aff., **TAB 1**, ¶ 12.)

During the six-week period that Plaintiff was suspended, the Hospital also conducted its own investigation. In the course of examining Plaintiff's patient records during that investigation, the Hospital discovered significant inadequacies and gaps in Plaintiff's documentation. The Hospital had previously counseled Plaintiff about this same deficiency in her job performance.[7] (Hyde Aff., **TAB 2**, ¶¶ 6-8.)

After both investigations were completed, the Hospital notified Plaintiff that it would reinstate her to her position (Hyde Aff., **TAB 2**, ¶ 10.) It paid her for the period she had been suspended. (Nester Aff., **TAB 3**, ¶ 9.) The Hospital also gave her a copy of a Performance Improvement Plan ("PIP") that her supervisor had prepared to address the deficiencies in her recordkeeping that had been discovered during the Hospital's investigation. (Hyde Aff., **TAB 2**, ¶¶ 9-11 & Ex. A.) Plaintiff accepted the back pay the Hospital offered, but refused to acknowledge receipt of the PIP; she also declined the Hospital's offer of reinstatement. (Hyde Aff., **TAB 2**, ¶¶ 9- 12 & Ex. B.)

After refusing reinstatement, Plaintiff filed this suit alleging that the Hospital had defamed her during her employment and upon its termination as follows: (1) when it

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[7] For each session with a patient, a physical therapist is required to document, on a pre-printed form called Pediatric Daily Notes ("PDN"), changes in medication or diagnosis, subjective activities, objective goals, the assessment and plan of treatment in the form of. . (Hyde Aff., **TAB 2**, ¶ 5.) In conducting its investigation, the Hospital found Plaintiff's files on the child in question were missing notes for eleven sessions appearing on charge records from June until August 2013; where there should have been notes on the PDN, Plaintiff had entered only dates. There were two other sessions in April 2014 that appeared on the charge record but which were missing notes. Three appointments were left blank on the PDN in March and April 2014, but these are not dated. (Hyde Aff., **TAB 2**, ¶ 6.) These were serious shortcomings and violated Tenet policy. (Hyde Aff., **TAB 2**, ¶ 7.)

"communicated and published to the Beaufort County Sheriff's Office that Plaintiff physically and sexually abused a nine (9) year old female patient" (Complaint ¶8), as the child's father had reported; (2) when "Defendants repeated the defamation" (Complaint ¶9), at an unspecified time and place and to unidentified individual(s);[8] (3) when an administrator escorted Plaintiff "in view of other individuals" after she came to the Hospital to retrieve her belongings, and (4) when she was allegedly refused access to another unidentified Hospital facility after she asked if she could retrieve items that were located there. Complaint ¶¶ 8, 11 & 22.

LEGAL ANALYSIS

As both of the appellate courts recognized in *Landers* and *Pearson*, substantive federal arbitration law applies even when an arbitration issue is pending in South Carolina state court. *Landers v. FDIC*, 402 S.C. at 108, 739 S.E.2d at 213)(**TAB 5**),; *Pearson v. Hilton Head Hospital*, 400 S. C. at 287, 733 S. E. 2d at 600 (**TAB 6**). The existence and applicability of an agreement to arbitrate is an issue for the Court. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). And "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 625-26 (1985).

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[8] The allegations in paragraph 9 of the Complaint do not identify who allegedly repeated the defamation, or when the defamation was allegedly repeated, or exactly what the alleged defamation was, or if and when it was published to a third party. Indeed, the Complaint fails to allege any publication at all, other than alleged "publication" to the Sheriff's Department. Defendants are not aware of any alleged publication of the child's complaint other than its making the statutorily-required report of the allegations to the Beaufort County Sheriff's Department. (Gasiorowsky Aff., **TAB 1**, ¶ 5.)

I. An employee's tort claims against a former employer are arbitrable when the agreement is a broad one, *i.e.*, the language of it covers disputes "arising out of or relating to" employment.

Courts routinely hold that tort claims between employee and employer are arbitrable when the arbitration agreement is a broad one requiring arbitration of all claims "arising out of or relating to" employment. *Gilmer* v. *Interstate/Johnson Lane, Corp.*, 500 U.S. 20 (1991) (registered securities representatives' age discrimination claim[9] was subject to arbitration.). *See Fleck* v. *E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir. 1989) (employee's claim against employer applies to tort claims that involve significant aspects of employment relationship); *see also Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 262, 743 S.E.2d 868, 875 (App.,2013) (In response to argument that arbitration clause did not cover tort claims against a contractor, the Court held "we find the Carlsons' tort claims fall within the scope of the arbitration clause in the instant case. The arbitration clause in the purchase agreement executed by the Carlsons applies to "every controversy or claim arising out of or relating to this Agreement, or the breach thereof....").

The same broad language that is in the agreement here was held to include an employee's claims for battery, as well as her claims for sexual harassment, retaliation, and breach of contract, in *Gillespie v. Colonial Life & Accident Ins. Co.*, 2009 U. S. Dist. LEXIS 26310 (W.D. Pa. 2009). In *Gillespie*, an arbitration clause like the one here was also held to include claims for intentional infliction of emotional distress that arose in the employment setting. This claim was found to be inextricably intertwined with the claimant's breach of contract claim because "it arises from Defendant's allegedly wrongful treatment of [the

[9] An age discrimination claim is a statutory tort. *Staub v. Proctor Hosp.*, 562 U.S. ___, 131 S. Ct. 1136 (2011).

plaintiff] during the course of their business relationship." *Id.* at *7; *see also Stanton v. Prudential Life Ins. Co.,* 1999 U.S. Dist LEXIS 5547 (E.D. Pa. 1999); *Huong Le v. Gentle Dental of Ore.*, 2010 U.S. Dist. LEXIS 88521 *29 (D. Or. 2010) (identical language of arbitration clause, requiring "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration," included former employee's claims of lost wages, severe emotional distress, and other general and consequential damages claimed against former employer as well as similar claims the plaintiff made against the employer's president); *see also Orcutt v. Kettering Radiologist, Inc.,* 199 F. Supp. 2d 746, 753 (S. D. Ohio 2002) (intentional infliction of emotional distress, False Claims Act, and various other claims by former employee against her former employer and co-workers were arbitrable under identical language wherein the plaintiff agreed to arbitrate "any controversy or claim arising out of or relating to this Agreement or the breach thereof," because this and other claims arose "during the course of her employment" and thus "clearly arise out of or relate to her employment agreement" with her employer); *Richardson v. Virgin Islands Port Authority,* 2010 U.S. Dist. LEXIS 40787 (D.V.I. 2010) (Agreement provided parties would arbitrate "any controversy, dispute or claim arising out of or relating to this Agreement, or its interpretation, application, implementation, breach or enforcement . . . ," thus plaintiff's claim for intentional infliction of emotional distress was "inextricably intertwined with her discrimination and breach of contract claims, as it arises from Defendant's allegedly wrongful treatment of Plaintiff during the course of her employment"); *see also Zandford v. Prudential-Bache Sec.,* 112 F.3d 723 (4th Cir. 1997).

Federal courts have consistently held slander claims arising in the workplace to be arbitrable under broad arbitration clauses. "[N]on-contractual tort claims for wrongful

termination and post-termination defamation respecting an employee's job performance have been held arbitrable under Rule 347[10] because they necessarily involve an evaluation of the employer's or the employee's performance during their employment relationship." Zandford 112 F.3d at 729 (citations omitted). The South Carolina Supreme Court recently adopted this rationale in compelling arbitration of a former employee plaintiff's tort claims, including a claim for defamation, in *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013) **(TAB 5)**.

II. The South Carolina Supreme Court's Decision in *Landers v. FDIC* (TAB 5), compelling arbitration of a defamation claim on facts comparable to those presented here, requires this Court to compel arbitration in this case.

In *Landers,* the Supreme Court reversed a trial court's refusal to compel arbitration of tort claims, including a defamation claim, by a former bank president against the bank that had employed him and its CEO. **(TAB 5)** Because the facts of *Landers* are on all fours with the facts here, the Supreme Court's decision in that case is critical to an understanding why this court must compel arbitration of the claims presented here. In dismissing the suit and compelling arbitration of all of the plaintiff's claims, both contract and tort, the Supreme Court in *Landers* set forth three compelling reasons that arbitration is equally appropriate here.

First, as the plaintiff in *Landers,* Plaintiff here signed what is known as a "broad" arbitration agreement. The *Landers* Court explained: "A clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 398 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). Courts have held that such broad clauses are "capable of an expansive reach."

[10] This is a reference to Rule 347 of the New York Stock Exchange which declares arbitrable disputes "arising out of . . . employment or termination of employment."

Am. Recovery Corp., 96 F.3d at 93. Both the Fourth Circuit Court of Appeals and the South Carolina Supreme Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir.1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Thus, the scope of the clause does "not limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship to the contract." *J.J. Ryan*, 863 F.2d at 321.

Second, the *Landers* Court held that courts should lean strongly in favor of arbitration where the parties have agreed to it. "[A]rbitration agreements are liberally construed in favor of arbitrability." citing *Am. Recovery v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir.1996). It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 92 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24–25, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983)); *accord Zabinski*, 346 S.C. at 598, 553 S.E.2d at 118. "'The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.' " *Am. Recovery*, 96 F.3d at 94 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir.1989)). Such a presumption is strengthened when an arbitration clause is broadly written. *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986). Therefore, "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]' " arbitration must generally be ordered. *Am. Recovery, 96 F.3d at 92* (quoting *Warrior & Gulf*

Navigation Co., 363 U.S. at 582–83, 80 S. Ct. 1347); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119.

Third, the *Landers* court found a significant relationship between the defamation alleged and the plaintiff's employment, and this was connection was sufficient to compel arbitration of that claim. The same kind of significant relationship between employment and the alleged defamation exists in this case.

In *Landers*, the defamation claim was held to be significantly related to his employment because it related to the plaintiff's ability to perform his job duties. The *Landers* Court endorsed the Tenth Circuit's ruling in *Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir.2000), which held that arbitration of the defamation claim in that case was required by the parties' agreement. *Brown* involved a defamatory explanation which dealt with termination of the plaintiff's employment and his supposed violation of his employment contract, and the explanation was found to be within the scope of a broad arbitration clause because of its significant relationship to his employment.

The *Landers* Court also cited with approval *Fleck v. E. F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir. 1989), a case in which the court held that a statement that the plaintiff stockbroker was "basically a criminal" was relevant to job performance and within the scope of an arbitration clause providing for arbitration of claims arising out of employment or termination of employment because "[p]roving the truth or falsity of those statements will require the presentation of evidence integrally related to [the plaintiff]'s performance as a broker." *Id.* at 215, 111.

The *Fleck* court also cited another case, *Aspero v. Shearson American Express, Inc.*, 768 F. 2d 106, 108-09 (6th Cir.), *cert. denied*, 474 U.S. 1026 (1985), a case with facts

mirroring those in this case. In *Aspero*, the Court of Appeals for the Sixth Circuit held that a tort claim for post-termination conduct is arbitrable under an agreement to arbitrate claims arising out of employment or its termination if "resolution of the claim depends upon evaluation of a party's performance either as a broker or as an employer of brokers during the time of the contractual relationship." 768 F.2d at 109. Thus a stockbroker's claim that her employer made false statements that she was fired for violating trading rules was arbitrable because resolution of the claim--evaluation of the statement's falsity--depended on evaluation of the broker's performance during employment. *Id.* Of course, whether or not the statement alleged in this case is defamatory involves an evaluation of Plaintiff's actions during the course of her employment providing physical therapy to a patient at the Hospital.

It is impossible to understand how the alleged defamation here --- *i.e.*, a report the employer is required to make under state law and which was made to law enforcement officials pursuant to that mandate --- presents a closer question of job relatedness than the "basically a criminal" language in *Fleck* or the "violated trading rules" statement in *Aspero*.[11] Because there exists here an analogous, significant relationship between the alleged defamation and her employment, arbitration of Plaintiff's defamation claim should be compelled and this case should be dismissed under the reasoning the Supreme Court applied in *Landers*.

Given the recent declarations by the South Carolina Supreme Court and our Court of Appeals --- that arbitration is favored, that a court should resolve all doubts in favor of arbitration, and that an order compelling arbitration properly includes arbitration of torts bearing a significant relationship to employment ---- the court should compel arbitration of the

[11] The statements in these two cases were voluntarily published to the plaintiffs' customers (*Fleck*) and potential employers (*Aspero*), not, as in this case, to law enforcement in accordance with a statutory mandate.

claims in this case. Here the only allegedly wrongful acts of the Hospital as set forth in the Complaint are based upon actions Plaintiff was accused of taking while she was treating a patient in connection with her employment at the Hospital. There is no question that the Supreme Court's *Landers* decision requires that the issues presented in this case be arbitrated in accordance with Plaintiff's agreement to arbitrate "any and all claims and disputes that are related in any way to my employment or the termination of my employment."

III. The Court of Appeals decision in *Pearson v. Hilton Head Hospital* (TAB 6) also compelled arbitration of a defamation claim made by a physician against this same Hospital.

In *Pearson v. Hilton Head Hospital* **(TAB 6)**, a doctor at Hilton Head Hospital sued the Hospital for, among other things, defamation. The trial court denied the Hospital's motion to compel arbitration. On the Hospital's appeal from that denial, the Court of Appeals reversed, dismissing the case and compelling arbitration of all claims.

The doctor's contract in *Pearson* provided that "[a]ny controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement ... shall be resolved by binding arbitration." The Court reversed the trial court and compelled arbitration of, *inter alia*, the doctor's defamation claim because "[t]he causes of action against the Hospital arose *as a result of Dr. Pearson's being placed*" in the Hospital. 400 S.C. at 297, 733 S.E.2d at 605 (emphasis added) **(TAB 6)**.

The same analysis the Court of Appeals applied in *Pearson* applies here: the alleged defamation in this case arose because Plaintiff was present and treating the child at the Hospital pursuant to her employment there. It is difficult to imagine how the defamation alleged in this case could be anything other than a "claim[ ] [or] dispute[ ] that [is] related . . . to [her] employment or the termination of [her] employment" as set forth in the broad arbitration

agreement, thus the allegations of defamation in connection with her employment and its termination are subject to "final and binding arbitration" under the express terms of the parties' agreement. *Pearson* is dispositive of the issue that the defamation claim here is arbitrable, particularly when it is read in conjunction with the holding in *Landers*.

If that were not enough, there are numerous decisions, including one from a federal district court in South Carolina, in which courts have granted Tenet's motions to compel arbitration of employment-related claims under circumstances essentially the same as those here. (See Alphabetical Index, "Cases Compelling Arbitration Pursuant to Tenet's Employee Acknowledgment Form and Fair Treatment Process," including cases, attached at **TAB 7**.) In each of those cases, an employee of a Tenet-affiliated facility signed basically the same Acknowledgment ("Acknowledgment") that Plaintiff signed here, the employee's employment ended, the employee sued the Tenet-affiliated facility by which he or she had been employed, and Tenet moved to compel arbitration pursuant to the Acknowledgment and the company's Fair Treatment Process ("FTP") referenced there. Although the plaintiffs in those cases offered almost every imaginable challenge to the arbitration agreement,[12] in each case, the court granted Tenet's motion to compel arbitration and either dismissed or stayed the action. *See id.*

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[12] Some of the challenges to the Tenet arbitration agreement that the plaintiffs in these cases offered (and the courts rejected) were as follows: the plaintiff was not aware of or did not understand the arbitration provisions (**TAB 7**, ## 2 & 16); Tenet had waived its right to compel arbitration (**TAB 7**, #7); Tenet had not signed the arbitration agreement (**TAB 7**, #8); the arbitration agreement was unconscionable (**TAB 7**, ##8, 10, 11, 12, 16 & 19); there was no consideration for the agreement to arbitrate (**TAB 7**, # 8); Tenet's right to make unilateral changes in the arbitration policy made the promise illusory (**TAB 7**, #10); and statutory claims are not arbitrable (**TAB 7**, ## 11 & 19). The court rejected each of these challenges in the cases cited (as numbered in the index to cases included at **TAB 7**).

IV. Enforcement of the arbitration agreement is not discretionary.

When an arbitration agreement governed by the FAA covers claims that have been asserted in a lawsuit, enforcement of the arbitration agreement is not discretionary. 9 U.S.C. § 4; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The court having jurisdiction over the case must compel arbitration and either dismiss the action or stay further judicial proceedings until the arbitration has been held. 9 U.S.C. §§ 3 and 4; *Shearson/American Express,* 482 U.S. at 226. As the U.S. Supreme Court has explained it:

> By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.

Dean Witter Reynolds, Inc., 470 U.S. at 218. Under sections 3 and 4 of the FAA, motions to compel arbitration and to stay or to dismiss pending litigation are to be summarily granted. *See Moses H. Cone,* 460 U.S. at 22-23. Courts are required to give full effect to "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Id.* at 22.

As the South Carolina Supreme Court recently declared in *Landers*: "[A]rbitration agreements are liberally construed in favor of arbitrability. . .. [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .. The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. ... " 402 S.C. at 109, 739 S.E.2d at 213 (**TAB 5**) (citations omitted). Courts may not deny a party's request to arbitrate an issue "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.*(citations omitted).

Furthermore, where all of the claims pleaded by a plaintiff are subject to an arbitration agreement, the court should dismiss the claims against the defendant, rather than merely stay further judicial proceedings. *See Choice Hotels International v. BSR Tropicana Resort,* 252 F.3d 707, 710 (4th Cir. 2001) ("Notwithstanding the terms of § 3, however, dismissal is proper remedy when all of the issues presented in a lawsuit are arbitrable.").

CONCLUSION

Plaintiff agreed in the Agreement that she would "submit to final and binding arbitration . . . any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment." (Nester Aff., **TAB 3**, Exhibit A) (emphasis added). "[C]ourts may not deny a party's request to arbitrate an issue unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Long v. Silver,* 248 F.3d 309, 316 (4th Cir. 2001); *see also Landers* ("unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration must generally be ordered." 402 S.C. at 109, 739 S.E.2d at 213 (**TAB 5**) (citations omitted)). Because Plaintiff's claims here relate in every way to her employment, or to its termination, or to both, positive assurance that her claims are not arbitrable simply does not exist.

The defamation claim asserted in the Complaint "relate[s] to" Plaintiff's "employment or the termination of [her] employment," in the same way those claims did in *Landers* and *Pearson.* Those claims are thus are encompassed by the arbitration clause Plaintiff signed. Accordingly, as the Supreme Court and Court of Appeals held in *Landers* and *Pearson,* and as so many other courts have held in cases involving the very same "Employee Acknowledgment"

and Fair Treatment Policy (Nester Aff., **TAB 3**, Exhibits A & B.) Plaintiff must arbitrate her claims, and this case should be dismissed with prejudice pursuant to section 3 of the FAA.

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April 13, 2015

H

Supreme Court of South Carolina.

Christopher T. LANDERS, Respondent,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Atlantic Bank and Trust, Atlantic Banc Holdings, Inc., and Neal Arnold, Appellants.

No. 27223.

Heard March 20, 2012.

Decided Feb. 27, 2013.

Background: Executive employee brought action against employer and co-executive, alleging claims including breach of contract, constructive termination, and slander. Employer and co-executive moved to compel arbitration. The Circuit Court, Charleston County, J.C. Nicholson, Jr., J., denied motion in part. Employer and co-executive appealed.

Holding: The Supreme Court, Kittredge, J., held that employee's tort claims bore significant relationship to employment agreement, and therefore claims fell within scope of agreement's arbitration clause.

Reversed.

West Headnotes

[1] Alternative Dispute Resolution 25T ⚿200

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 k. Arbitrability of dispute. Most Cited Cases

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise.

[2] Alternative Dispute Resolution 25T ⚿213(5)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and standards of review. Most Cited Cases

The determination of whether a claim is subject to arbitration is subject to de novo review.

[3] Alternative Dispute Resolution 25T ⚿203

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk203 k. Merits of controversy. Most Cited Cases

In deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.

[4] Alternative Dispute Resolution 25T ⚿114

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25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and statutory provisions and rules of court. Most Cited Cases

Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases

Generally, any arbitration agreement affecting interstate commerce is subject to the Federal Arbitration Act (FAA). 9 U.S.C.A. §§ 1, 2.

[5] Alternative Dispute Resolution 25T ⚿116

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk116 k. What law governs. Most Cited Cases

Once it is determined that the Federal Arbitration Act (FAA) applies to a dispute, federal substantive law regarding arbitrability controls. 9 U.S.C.A. § 1.

[6] Alternative Dispute Resolution 25T ⚿112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or consensual basis. Most Cited Cases

Whether a party has agreed to arbitrate an issue is a matter of contract interpretation, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

[7] Alternative Dispute Resolution 25T ⚿138

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk138 k. Liberal or strict construction. Most Cited Cases

Alternative Dispute Resolution 25T ⚿139

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 k. Construction in favor of arbitration. Most Cited Cases

Although the intention of parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability.

[8] Alternative Dispute Resolution 25T ⚿139

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 k. Construction in favor of arbitration. Most Cited Cases

Alternative Dispute Resolution 25T ⚿210

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for

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Enforcement in General
25Tk210 k. Evidence. Most Cited Cases

The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration; such a presumption is strengthened when an arbitration clause is broadly written.

[9] Alternative Dispute Resolution 25T 139

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 k. Construction in favor of arbitration. Most Cited Cases

Unless it may be said with positive assurance that an arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration must generally be ordered.

[10] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases

The scope of an arbitration clause does not limit arbitration to the literal interpretation or performance of the contract but embraces every dispute between the parties having a significant relationship to the contract.

[11] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases

In determining whether a dispute has a significant relationship to a contract, as would support arbitrability of dispute under contract's arbitration clause, court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim.

[12] Alternative Dispute Resolution 25T 146

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk146 k. Employment disputes. Most Cited Cases

Under the Federal Arbitration Act (FAA), executive employee's tort claims of slander and intentional infliction of emotional distress bore significant relationship to employment agreement, and therefore claims fell within scope of agreement's arbitration clause, in case in which employee alleged that employer and co-executive acted to interfere with employee's work and to undermine employee's ability to perform job; alleged tortious conduct and defamatory statements directly related to employee's ability to perform his duties, and agreement articulated the duties and obligations of employee. 9 U.S.C.A. § 1.

[13] Alternative Dispute Resolution 25T 146

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25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk146 k. Employment disputes. Most Cited Cases

Under Federal Arbitration Act (FAA), executive employee's illegal proxy solicitation claim against employer, alleging proxy statement issued by employer was materially misleading as to effect recapitalization could have had on employee as shareholder, bore significant relationship to employment agreement, and therefore claim fell within scope of agreement's arbitration clause; agreement contemplated employee's status as shareholder by requiring employer to grant employee stock purchase option, and employee alleged in pleading a link between being forced out of employment and questioning of proxy statement. 9 U.S.C.A. § 1.

[14] Alternative Dispute Resolution 25T 146

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk146 k. Employment disputes. Most Cited Cases

Under Federal Arbitration Act (FAA), executive employee's claim against employer for wrongful expulsion as director bore significant relationship to employment agreement, and therefore claims fell within scope of agreement's arbitration clause, where employee alleged in pleadings that he was wrongfully expelled because he filed suit for breach of agreement. 9 U.S.C.A. § 1.

****210** C. Mitchell Brown and Sue E. Harper, both of Columbia, of Nelson Mullins Riley & Scarborough, LLP, and Amy L. Gaffney of Columbia, of Gaffney Lewis and Edwards, LLC, for Appellants.

Clayton B. McCullough, of McCullough Khan, LLC, of Charleston, for Respondent.

Justice KITTREDGE.

***103** This case concerns the scope of an arbitration clause under the Federal Arbitration Act (FAA). Respondent Christopher Landers served as Appellant Atlantic Bank & Trust's executive vice president pursuant to an employment contract. The contract contained a broad arbitration provision, requiring arbitration of "any controversy or claim arising out of or relating to this contract, or breach thereof." In the underlying action, in which Landers alleges five causes of action, Landers claims he was constructively terminated from his employment as a result of Appellant Neal Arnold's tortious conduct towards him. Appellants moved to compel arbitration pursuant to the employment contract. The trial court found that only Landers' breach of contract claim was subject to the arbitration provision, while his other four causes of action comprised of several tort and corporate claims were not within the scope of the arbitration clause. We disagree.

Landers' pleadings provide a clear nexus between his claims and the employment contract sufficient to establish a significant relationship to the employment agreement. We find the claims are within the scope of the agreement's broad arbitration provision. Thus, we reverse the trial court's order and hold that all of Landers' causes of action must be arbitrated.

I.

In 2005, Landers and two other individuals founded Atlantic Bank & Trust (Bank).[FN1] ****211** Landers purchased 50,000 shares of ***104** common stock of Bank's holding company, Atlantic Banc Holdings, Inc. (Holding Company). On February 20,

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2007, Landers and Bank entered into a written employment agreement (Agreement). The Agreement contained an arbitration provision which stated: "Except matters contemplated by Section 17 below [Applicable Law and Choice of Forum], *any controversy or claim arising out of relating to this contract, or the breach thereof,* shall be settled by binding arbitration ...." (emphasis added).

> FN1. Bank is a federally-chartered savings bank with branches in South Carolina and Georgia. In June 2011, the Office of Thrift Supervision (OTS), a former federal agency under the United States Department of Treasury, took possession of the business and property of Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as its receiver. In April 2012, the **FDIC** disallowed **Landers'** claim he submitted pursuant to 12 U.S.C. § 1821(d)(5) (2006). However, subsection (d)(6) permits a claimant, as a matter of right, to continue an action commenced before the appointment of the receiver. Neither the FDIC nor Appellants oppose the action's continuation before this Court.

The Agreement provided for an initial term of three years' employment for Landers as Executive Vice President and Chief Mortgage Officer and automatic extensions for successive one-year terms unless either party gave written notice of an intent not to extend the contract. The Agreement also stated that after Holding Company established a stock incentive plan, Landers was to receive an option to purchase 65,000 shares of common stock of Holding Company and provided for a lump-sum payment of 2.99 times Landers' base pay in the event his employment was terminated within one year after a change of control. FN2

> FN2. Under the Agreement, a reorganization that results in current stockholders of Bank or Holding Company immediately prior thereto owning less than fifty percent (50%) of the combined voting power constitutes a change of control.

Pursuant to the Agreement, Landers was to perform his duties "subject to the direction of the [CEO]" and "diligently follow and implement all reasonable and lawful management policies and decisions communicated to him by the [CEO]." Landers was required to "devote substantially all of his time, energy and skill during regular business hours to the performance of the duties of his employment ... and faithfully and industriously perform such duties." Finally, the Agreement expresses what constituted termination for "cause" and Landers was authorized to terminate the Agreement for cause based upon "a material diminution in the powers, responsibilities, duties or compensation of [Landers]" thereunder.

Bank, like most, suffered financial hardship as a result of the economic collapse in the fall of 2008. In May 2009, Bank's ***105** Board of Directors (Board) hired Neal Arnold to serve as CEO and Landers voluntarily accepted the position of president.[FN3] Thereafter, Arnold began soliciting out-of-state investors to recapitalize Bank. Landers claims he was assured by Arnold that his job was safe despite the impending recapitalization. According to Landers, however, since Arnold's arrival, he was "systematically and deliberately stripped of his authority" as president. Landers contends Arnold began a campaign to "discredit, belittle, demean, and constructively terminate" him. Arnold and other executives stated "Landers had ADD [Attention Deficit Disorder] and was incompetent to perform his job" and "incapable of effectively communicating with anyone in performing his job."

> FN3. Landers began serving as Bank's Chief Executive Officer (CEO) in October of 2008.

Landers alleges that these and other statements were made in front of numerous coworkers. He also

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claims Arnold's behavior towards him was verbally abusive, demeaning, and generally unprofessional and improper. According to Landers, Arnold routinely called him offensive names and used unseemly language towards him in front of upper-level management and other co-workers. In one instance, Landers contends Arnold even threatened him in a highly aggressive and volatile manner when Landers came to the defense of a junior co-worker. Beginning in September 2009, Landers alleges he was forced to sign in and out whenever he left the office and was required by Arnold to enlist the help of other management personnel when communicating with a certain client because Arnold asserted he was not capable of handling these discussions.

Additionally, Landers contends Arnold steadily and purposefully provided incorrect information to him about the status of Bank's management. Landers claims he was not permitted to see documentation regarding the recapitalization or takeover despite repeatedly asking for such information. The **212 pertinent documents revealed a new management team and Board, neither of which listed Landers as a member. Landers also asserts Arnold repeatedly assured him that he would be entitled to receive payment for the "Change in Control" pursuant to the Agreement, which Appellants now *106 refuse. According to Landers, Appellants also refuse to offer him stock options to which he is entitled under the Agreement.

On December 18, 2009, Landers sent a letter to Arnold "recognizing his constructive termination." Landers expressed he was writing the letter "as a result of [Arnold's] actions over the past six months, especially those over the last 30 days." In the letter, Landers claims Arnold "acted to effectively destroy [his] authority and ability to perform [his] job." In one section, the letter states:

> You have made a concerted effort to undermine my authority, removed much of my authority, changed my duties, have defamed me in front of co-workers, and generally made it impossible for me to perform as President. You continue to withhold vital information and misrepresent facts. As a result, you have effectively terminated me from my position as President of Atlantic Bank.

Arnold accepted Landers' letter of constructive termination several days later.

In January of 2010, Bank and Holding Company sent a Notice of Special Meeting and Proxy to their shareholders. The Notice contained information regarding new investors and proposed amendments to the Articles of Incorporation. According to Landers, the Notice and Proxy Statement contained incomplete and misleading information concerning the effect the recapitalization would have on shareholders of common stock.[FN4] Landers alleges he was "forced out" of Bank as a result of the concerns that he expressed regarding Arnold's campaign to provide incorrect information about the recapitalization. In his complaint, Landers states: "As a result of Landers' concerns, and in an effort to eliminate Landers as a potential problem, he was stripped of much of his authority as President, defamed, and then terminated by Atlantic Bank."

> FN4. Landers contends the proposed transaction and amendments to the Articles of Incorporation would allow the takeover company, through appointed directors, to pay dividends on its preferred stock but not the common stock. It would also allow directors to take other actions detrimental to the common shareholders, including Landers, and force their share values to zero.

Lastly, Landers contends he was excluded from his role as a director on the Board in "an ongoing effort to freeze [him] out *107 and strip him of his authority." According to Landers, when he was not permitted to call in to a special Board meeting in May

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2010, he went to the meeting in person and was asked to recuse himself. Landers refused to recuse himself and claims he was ejected from the meeting. Landers alleges he is no longer provided necessary information or authority to serve in his capacity as a director.[FN5]

FN5. Appellants admit Landers was asked to recuse himself from the Board meeting due to the ongoing litigation and the potential conflict of interest. Appellants contend Landers tendered his resignation from the Board in June 2010.

Landers commenced this action in January 2010. In his complaint, Landers' asserted five causes of action: (i) breach of contract/constructive termination; (ii) slander/slander per se; (iii) intentional infliction of emotional distress; (iv) illegal proxy solicitation pursuant to S.C. Code Ann. § 33–7–220(i) (Supp. 2011);[FN6] and (v) wrongful expulsion as a director. Appellants moved to compel arbitration pursuant to the arbitration clause contained in the Agreement and to dismiss or stay the action. The trial court ordered arbitration for Landers' breach of contract/constructive termination claim. However, the trial court denied Appellants' motion to compel arbitration as to the remaining causes of action. In doing so, the court found there was not a significant**213 relationship between the claims and the Agreement. Alternatively, the court found the allegations underlying the claims were unforeseeable at the time the parties entered into the Agreement. Thus, the trial court stayed the breach of contract claim and ordered that the remaining four claims proceed to court.

FN6. The text of the statute reads:

> A proxy may not be solicited on the basis of any proxy statement or other communication, written or oral, containing a statement which, at the time and in light of the circumstances under which it was made, was false or misleading with respect to a material fact or which omits to state a material fact necessary to make the statements made not false or misleading.

S.C.Code Ann. § 33–7–220(i).

II.

[1][2][3] "The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise."**108 *Partain v. Upstate Automotive Group,* 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). "The determination of whether a claim is subject to arbitration is subject to de novo review." *Id.* (citing *Gissel v. Hart,* 382 S.C. 235, 240, 676 S.E.2d 320, 323) (2009). However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

III.

[4][5] Generally, any arbitration agreement affecting interstate commerce, such as the one at issue, is subject to the FAA. *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (holding that in the employment context, only transportation workers' employment contracts are exempted from the FAA's coverage); *see also* 9 U.S.C. §§ 1, 2. Once it is determined that the FAA applies to a dispute, federal substantive law regarding arbitrability controls. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA].").

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[6][7] Whether a party has agreed to arbitrate an issue is a matter of contract interpretation and "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter ... courts generally ... should apply ordinary state-law principles that govern the formation of contracts."). Although the intention of parties is relevant, as a matter of ***109** policy, arbitration agreements are liberally construed in favor of arbitrability. *Am. Recovery*, 96 F.3d at 94.

[8][9] It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 92 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)); *accord Zabinski*, 346 S.C. at 598, 553 S.E.2d at 118. " 'The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.' " *Am. Recovery*, 96 F.3d at 94 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir.1989)). Such a presumption is strengthened when an arbitration clause is broadly written. *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Therefore, " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]' " arbitration must generally be ordered. *Am. Recovery, 96 F.3d at 92* (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83, 80 S.Ct. 1347); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119.

[10][11] A clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly. *See, e.g.*, ****214***Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). Courts have held that such broad clauses are "capable of an expansive reach." *Am. Recovery Corp.*, 96 F.3d at 93. Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir.1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Thus, the scope of the clause does "not limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship***110** to the contract." *J.J. Ryan*, 863 F.2d at 321. In applying this standard, this Court "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *Id.* at 319; *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

It is within this framework that we must determine whether Landers' claims are within the scope of the Agreement's arbitration clause.

A.

[12] Landers contends that the tort claims of slander and intentional infliction of emotional distress are not within the scope of the arbitration clause.[FN7] Specifically, Landers asserts they are not subject to arbitration because they do not require reference to or construction of the Agreement. We disagree and find Landers' tort claims bear a significant relationship to the Agreement, such that they must be arbitrated.

FN7. Because Landers expressly states in his complaint that the slanderous statements

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were encompassed in his claim of intentional infliction of emotional distress, we find it appropriate to analyze the related claims together.

In support of his contention, Landers suggests the situation before us is indistinguishable from *McMahon v. RMS Electronics, Inc.*, 618 F.Supp. 189 (S.D.N.Y.1985). In that case, after McMahon's employment was terminated by RMS, he brought a lawsuit alleging eight causes of action, including three defamation claims. McMahon alleged that one week before his termination, the president of RMS stated to another employee that McMahon was the "company drunk" and was "interfering with the president's operation of the company." The New York district court denied RMS's motion to compel arbitration as to this defamation claim. The court stated "although the statements regarding McMahon's drinking habits may be relevant to his claim of wrongful termination, the resolution of the defamation claim does not require reference to the underlying contract" and "does not require an interpretation of the contractual agreement between the two parties." *Id.* at 193. The court further stated "the defamation claim is ***111** not arbitrable simply because the statements were made during the term of McMahon's employment." *Id.*

We find *McMahon* unpersuasive. Certainly, arbitration is only required where the parties have contracted for it, and "the exact content of the allegedly defamatory statement must be closely examined to see whether it extends to matters beyond the parties' contractual relationship." *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir.1995); *see also Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir.2000) (finding that a defamatory explanation which dealt with the termination of plaintiff's employment and his supposed violation of his employment contract was within the scope of a broad arbitration clause). However, under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause. *See J.J. Ryan*, 863 F.2d at 321 (finding that under the significant relationship test, broad arbitration clause does not limit arbitration to literal interpretation or performance of the contract).

Moreover, the allegedly defamatory statements made in *McMahon* related to the employee's****215** general character, whereas here, Landers asserts that the alleged tortious conduct and defamatory statements of Arnold directly related to Landers' ability to perform his duties with Bank. *Cf. Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir.1989) (statements that broker had lost his license and was "basically a criminal" were relevant to job performance and within the scope of arbitration clause arising out of employment or termination of employment, but not statement that broker was disbarred by lawyer). Landers alleges outrageous statements and conduct that "generally made it impossible for [him] to perform as President." He asserts the alleged tortious conduct of Arnold "discredit[ed], belittle[d], demean[ed], and constructively terminate[d]" him. Furthermore, he claims the statements were intended to create an impression he was "incapable of performing his job effectively."

We find Landers' tort claims bear a significant relationship to the Agreement. The Agreement contains not only monetary rights and obligations, but also articulates the duties and ***112** obligations of Landers and provides that Landers is subject to the direction of the employer, requiring him to diligently follow and implement all policies and decisions of the employer. Furthermore, the Agreement contemplates what constitutes cause for termination, including a "material diminution in [ ] powers, responsibilities, duties or compensation."

Thus, in light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort

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claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract.[FN8] Even assuming the arbitrability of the claims was in doubt, which it is not, we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that Landers' slander and intentional infliction of emotional distress claims are covered by the clause. Thus, we reverse the trial court's order denying Appellants' motion to compel the causes of action of slander and intentional infliction of emotional distress.

FN8. *See Gillespie v. Colonial Life & Accident Ins. Co.*, No. 08–689, 2009 WL 890579 (W.D.Pa. March 30, 2009) (finding broad arbitration clause applied to claims of sexual harassment and retaliation because the claims related to employee's business relationship with Colonial, not merely disputes relating to specific provisions of the contract in accordance with South Carolina law); *Smith v. Cato*, No. 3:05CV99, 2006 WL 1285521 (W.D.N.C. May 9, 2006) (finding plaintiff's defamation claim, which was based on allegations of employee's gross negligence and misconduct as the grounds for termination, bore a significant relationship to the employment agreement); *Orcutt v. Kettering Radiologists, Inc.*, 199 F.Supp.2d 746 (S.D.Ohio 2002) (finding claims based on discrimination, harassment, and retaliation that occurred during the course of employment clearly arose out of or related to plaintiff's employment agreement); *Stanton v. Prudential Ins., Co.*, No. 98–4989, 1999 WL 236603 (E.D.Pa. April 20, 1999) (noting that tort claim of intentional infliction of emotional distress was arbitrable since it arose directly from the circumstances leading to plaintiff's termination from employment).

B.

Landers also contends that his corporate claims of illegal proxy solicitation and wrongful expulsion as director are not within the scope of the arbitration provision. Certainly, the question of whether Landers' corporate claims are within the ***113** scope of the arbitration clause is admittedly closer than his tort claims discussed above. However, we find untenable Landers' assertion that these corporate claims do not bear a significant relationship to the terms and conditions of his employment contract or any breach thereof. In any event, we cannot say with positive assurance that such claims are not within the scope of the arbitration clause within the Agreement. Thus, we hold these claims are also subject to arbitration.

Illegal Proxy Solicitation

[13] The essence of Landers' illegal proxy solicitation claim is that the proxy statement issued by Bank was materially misleading as to the effect the recapitalization could have on the common shareholders, including Landers.

Although Landers' status as a shareholder did not originally derive from the ****216** Agreement,[FN9] the Agreement does in fact contemplate his status as a shareholder. By Landers' own allegation, Appellants were required to grant him an option to purchase 65,000 additional shares of common stock pursuant to the Agreement.[FN10]

FN9. According to the Record, Landers purchased 50,000 shares of stock when he founded Bank, not pursuant to any provision in the Agreement.

FN10. Landers alleges Appellants have refused to grant him such option.

Furthermore, the Agreement's arbitration clause mandates arbitration of "any controversy or claim arising out of relating to this contract, or the *breach thereof*." (emphasis added). Landers' allegations provide a direct link between his status as a shareholder

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and the purported breach of the Agreement. Specifically, Landers claims that "because [he] stated his concerns and sought complete, accurate information regarding the transactions [including recapitalization and amendments to the Articles of Incorporation] and its potentially adverse effects, *he was forced out of Atlantic Bank* causing him further injury." Landers further states, "*But for* the proxy solicitation and other misleading information, [he] would not have questioned the material omissions leading to his termination." (emphasis added).

***114** *Oldroyd v. Elmira Sav. Bank, FSB,* 134 F.3d 72 (2d Cir. 1998) is instructive here. In *Oldroyd,* the plaintiff, a former vice president of a bank, alleged he was wrongfully discharged because he informed the United States Treasury Department of illegal loan activity occurring at the bank. In finding the plaintiff's retaliatory discharge subject to arbitration, the Second Circuit Court of Appeals stated:

> In alleging retaliatory discharge, Oldroyd asserts that he was unlawfully terminated by his employer because he informed [the Treasury Department] of the illegal loan activity occurring at ESB. Inasmuch as more than half of Oldroyd's employment contract relates to the subject of termination from employment, there can be no doubt that a retaliatory discharge claim touches matters covered by the employment contract. For example, the contract addresses such matters as what constitutes "cause" for termination, benefits to be provided after termination, notice requirements for termination, termination upon change of control, and related matters. Accordingly, we conclude that since Oldroyd alleges that he was terminated under circumstances giving rise to a retaliatory discharge claim, such claim touched matters covered by the employment agreement and therefore is clearly within the scope of the agreement's arbitration clause.
>
> 134 F.3d at 77.

Similarly here, Landers' pleadings link the alleged illegal proxy solicitation to his wrongful termination and the resulting breach of the Agreement. Thus, we conclude his illegal proxy solicitation claim is significantly related to the Agreement. Moreover, this Court cannot say with positive assurance that the proxy cause of action is not within the scope of the arbitration clause. Because any doubt must be resolved in favor of arbitration, we reverse the trial court and find Landers' illegal proxy solicitation claim must be arbitrated.

Wrongful Expulsion as Director

[14] With regard to his wrongful expulsion claim, Landers asserts that he was "frozen out" of and improperly excluded from his role as a member of the Board since filing the initial summons and complaint on January 21, 2010. He contends his position has materially changed, such that he has suffered ***115** a reduction in duties and authorities in his capacity as director.

Landers' pleadings do not inform the Court how he came to be a director and nothing in the Agreement contemplates Landers' position as a director. Thus, we are compelled to conclude that his status as a director does not derive from the Agreement. Nonetheless, Landers asserts that he was wrongfully expelled because he filed suit for breach of the Agreement. As we previously referenced, the Agreement mandates arbitration of any claim arising out of or relating to the breach of the Agreement. By Landers' own contention, the breach of the Agreement ****217** resulted in his expulsion as a director. Similar to Landers' proxy solicitation claim, we find the wrongful expulsion claim bears a significant relationship to the Agreement or breach thereof. *See Oldroyd,* 134 F.3d at 77 (finding that because plaintiff alleged he was terminated under circumstances that gave rise to a retaliatory discharge claim, the claim touched matters covered by the employment contract and thus was within the scope of the contract's arbitration clause). Thus, we

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reverse the trial court's order denying Appellants' motion to compel arbitration of the wrongful expulsion as director claim.

We stress that our decision today is driven by the strong policy favoring arbitration, the nature of the Agreement, and Landers' underlying factual allegations. Certainly, we recognize that even the broadest of clauses have their limitations. However, Landers has essentially pled himself into a corner with respect to each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement. Thus, we reverse the trial court with respect to Landers' remaining four causes of action and hold that each is to be arbitrated.[FN11] In doing so, we also reject the trial court's ***116** alternative ruling that the claims are not subject to arbitration because they were not foreseeable.

> FN11. We find it unnecessary to address Appellants' remaining argument regarding the propriety of the potential stay of any non-arbitrable claims. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

C.

We take this occasion to revisit federal jurisprudence regarding the analytical framework to determine whether a broad arbitration clause encompasses certain claims. In the last several decades, two terms—supposedly synonymous—have emerged as leading phraseologies in the analysis. Some jurisdictions, including this Court and the Fourth Circuit, utilize the "significant relationship" term, which we have employed today. Others have preferred the "touch matters" phrase, holding that broad arbitration clauses encompass all claims that "touch matters" covered by the contract or agreement. *See, e.g., 3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir.2008) (noting the liberal federal policy favoring arbitration requires that a court send a claim to arbitration "when presented with a broad arbitration clause ... as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision"); *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622, 626 (3d Cir.2003) ("[I]f the allegations underlying the claims 'touch matters' covered by an arbitration clause in a contract, then those claims must be arbitrated, whatever the legal labels attached to them.").

In theory, the two terms are interchangeable. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir.1999) (broad clause reaches every dispute having a significant relationship to the contract and all disputes having their genesis in the contract and the allegations only need "touch matters" covered by the contract); *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061 (5th Cir.1998) (discussing that broad arbitration clauses embrace all disputes between the parties having a significant relationship to the contract and holding it is only necessary that the dispute touch matters covered by the agreement to be arbitrable).

Yet, over time and in the context of certain cases, it appears a tension has developed regarding interpretations of the two terms. The phrase "significant relationship" has arguably evolved to impose an enhanced burden on the party seeking to compel arbitration. Conversely, "touch matters" has been increasingly***117** construed as requiring a lesser showing on the party desiring arbitration. This tension surrounding the tests for arbitrability and the policy favoring arbitration has been candidly acknowledged by the Fourth Circuit Court of Appeals. "We recognize that requiring a *significant* relationship in order to compel arbitration ... appears****218** to be at odds with the language of the [ ] arbitration clause, which only

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requires that the [ ] claims "*relate to*" the [agreement]. We recognize as well that to require such a significant relationship may appear to be in tension with the Supreme Court's mandate that we apply the ordinary tools of contract interpretation in construing an arbitration agreement, and resolve any ambiguities in favor of arbitration." *Wachovia Bank Nat'l Assoc. v. Schmidt,* 445 F.3d 762, 767 n. 5 (4th Cir.2006) (emphasis in original).

We believe that these terms—"significant relationship" and "touch matters"—were never intended to be separate and independent tests for analyzing the scope of a broad arbitration clause. We employ the "significant relationship" term today only because it is in keeping with our jurisprudence. We merely observe that the two terms were not intended to differ in any meaningful way. Nonetheless, we note that if ever there did appear to be an appreciable conflict between the two phraseologies in the future, given the text of the FAA, the United States Supreme Court's interpretation of such, and the strong policy favoring arbitration, we would necessarily find that the "touch matters" term hues more closely to Congressional intent concerning the FAA.

IV.

In conclusion, we reverse the trial court with respect to each of Landers' remaining four causes of action and hold that each is subject to arbitration.

REVERSED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

S.C.,2013.
Landers v. Federal Deposit Ins. Corp.
402 S.C. 100, 739 S.E.2d 209, 163 Lab.Cas. P 61,330, 35 IER Cases 213

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C

Court of Appeals of South Carolina.
William F. **PEARSON**, M.D., Respondent,
v.
HILTON HEAD HOSPITAL a/k/a Hilton Head Health System, L.P., Tenet Healthsystem Medical, Inc., Tenet Physician Services–Hilton Head, Inc. and LocumTenens.com, LLC, Defendants,
Of whom Hilton Head Hospital a/k/a Hilton Head Health System, L.P., Tenet Healthsystem Medical, Inc., Appellants.

No. 5036.
Heard May 9, 2012.
Decided Oct. 3, 2012.

Background: Physician filed a complaint against hospital and medical professional placement company requesting relief under the South Carolina Payment of Wages Act and alleging retaliatory discharge, defamation, and breach of contract. Hospital and placement company filed separate motions to compel arbitration. The Circuit Court, Beaufort County, Marvin H. Dukes, III, Special Circuit Court Judge, granted placement company's motion, but denied hospital's motion. Hospital appealed.

Holding: The Court of Appeals, Konduros, J., held that doctrine of equitable estoppel applied to preclude physician from asserting that, as a nonsignatory, he was not bound by arbitration clause in contract between hospital and placement company.

Reversed.

West Headnotes

[1] Alternative Dispute Resolution 25T 200

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 k. Arbitrability of dispute. Most Cited Cases

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination.

[2] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and standards of review. Most Cited Cases

Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, appellate court will not overrule those findings.

[3] Alternative Dispute Resolution 25T 182(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General

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25Tk182 Waiver or Estoppel
25Tk182(1) k. In general. Most Cited Cases

Doctrine of equitable estoppel applied to preclude physician from asserting that, as a nonsignatory, he was not bound by arbitration clause in contract between hospital and medical professional placement company; physician received a benefit due to the contract, in that he was able to work at hospital and receive payment for his work, and if not for that contract, physician would have had to make separate arrangements with hospital in order to work there.

[4] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases

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.

[5] Alternative Dispute Resolution 25T 139

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 k. Construction in favor of arbitration. Most Cited Cases

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

[6] Alternative Dispute Resolution 25T 112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or consensual basis. Most Cited Cases

Arbitration rests on the agreement of the parties.

[7] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases

A party cannot be compelled to arbitrate a particular dispute unless his agreement expressly encompasses the subject matter of the dispute.

[8] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases

Unless a court can say with positive assurance that an arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.

[9] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration

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25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases

A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.

[10] Alternative Dispute Resolution 25T 116

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk116 k. What law governs. Most Cited Cases

Commerce 83 80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases

Unless the parties have contracted to the contrary, the Federal Arbitration Act (FAA) applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction. 9 U.S.C.A. § 1 et seq.

[11] Alternative Dispute Resolution 25T 114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and statutory provisions and rules of court. Most Cited Cases

Commerce 83 80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases

To ascertain whether a transaction involves commerce within the meaning of the Federal Arbitration Act (FAA), the court must examine the agreement, the complaint, and the surrounding facts. 9 U.S.C.A. § 1 et seq.

[12] Alternative Dispute Resolution 25T 112

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or consensual basis. Most Cited Cases

Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

[13] Alternative Dispute Resolution 25T 133(2)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk133 Formal Requisites
25Tk133(2) k. Writing, signature, and acknowledgment. Most Cited Cases

Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII Arbitration

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25TII(B) Agreements to Arbitrate
25Tk141 k. Persons affected or bound. Most Cited Cases

While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, it does not follow that under the Federal Arbitration Act (FAA) an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision; rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause. 9 U.S.C.A. § 1 et seq.

[14] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 k. Persons affected or bound. Most Cited Cases

Alternative Dispute Resolution 25T 179

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk179 k. Persons entitled to enforce. Most Cited Cases

In an appropriate case, a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.

[15] Alternative Dispute Resolution 25T 116

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk116 k. What law governs. Most Cited Cases

Alternative Dispute Resolution 25T 511

25T Alternative Dispute Resolution
25TV Foreign Dispute Resolution Proceedings
25Tk511 k. What law governs. Most Cited Cases

State law determines questions concerning the validity, revocability, or enforceability of contracts generally, but the Federal Arbitration Act (FAA) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the FAA; these statutes constitute a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. 9 U.S.C.A. §§ 1 et seq.,201 et seq.

[16] Estoppel 156 52(7)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel in Pais
156k52(7) k. Effect of estoppel. Most Cited Cases

"Equitable estoppel" precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.

[17] Alternative Dispute Resolution 25T 182(1)

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25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) k. In general. Most Cited Cases

In the arbitration context, the doctrine of equitable estoppel recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

[18] Alternative Dispute Resolution 25T 182(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk182 Waiver or Estoppel
25Tk182(1) k. In general. Most Cited Cases

A nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.

[19] Estoppel 156 92(2)

156 Estoppel
156III Equitable Estoppel
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A party may not rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage.

[20] Alternative Dispute Resolution 25T 182(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
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25Tk182(1) k. In general. Most Cited Cases

When a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine of equitable estoppel estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

**598 C. Mitchell Brown and Sue Erwin Harper, both of Columbia, for Appellants.

Anne Louise Peterson–Hutto, of Charleston, for Respondent.

**599 KONDUROS, J.

*285 Hilton Head Hospital a/k/a Hilton Head Health System, L.P.; Tenet HealthSystem Medical, Inc.; and Tenet Physician Services–Hilton Head, Inc. (collectively the Hospital) appeal the circuit court's denial of its motion to compel arbitration against Dr. William F. Pearson. It contends because the circuit court granted a co-defendant's motion to compel, the

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court also should have granted the Hospital's motion because the claims are intertwined and based upon the same facts. It further argues because Dr. Pearson has received the benefit of the contract between it and the co-defendant, which contains an arbitration clause, and because it received a benefit under Dr. Pearson and the co-defendant's contract, which also contained an arbitration clause, he should be forced to arbitrate with it when his causes of action against the Hospital included breach of contract. We reverse.

FACTS/PROCEDURAL HISTORY

LocumTenens.com, LLC (Locum) is an online medical professional placement corporation, headquartered in Georgia, that recruits medical professionals online and through electronic mail and places them throughout the United States, particularly in South Carolina. The Hospital and Locum entered into a contract in 2006 in which Locum would place temporary physicians at the Hospital to work as independent contractors. In 2007, Locum entered into a contract with Dr. ***286** Pearson to place him at the Hospital as an anesthesiologist for forty days in July, August, and September of 2007.

The contract between the Hospital and Locum provided, "Any controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement or the relationship between the parties hereto shall be resolved by binding arbitration in accordance with the Commercial Arbitration Rules for the American Arbitration Association...." The contract between Dr. Pearson and Locum contained the same clause.

On August 27, 2007, Dr. Pearson was the anesthesiologist on call at the Hospital when complications occurred in a delivery of twins. The Hospital and Locums fired Dr. Pearson on August 28, 2007. Dr. Pearson filed a complaint on August 28, 2009, against the Hospital and Locum requesting relief under the South Carolina Payment of Wages Act and alleging retaliatory discharge, defamation, and breach of contract. On October 22, 2009, the Hospital filed a motion to compel arbitration. On December 8, 2009, Locum also filed a motion to compel arbitration. The circuit court granted Locum's motion to compel arbitration but denied the Hospital's motion to compel arbitration. The court stated the contract between Locum and the Hospital was a general one, not specific to Dr. Pearson and predated the contract between Locum and Dr. Pearson. It found Dr. Pearson did not sign an agreement with the Hospital to arbitrate any claims arising out of their relationship. The court found the case of *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411 (4th Cir.2000), unpersuasive as it involved only one contract. This appeal followed.

STANDARD OF REVIEW

[1][2] Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.,* 351 S.C. 606, 609–10, 571 S.E.2d 711, 713 (Ct.App.2002).

*287 LAW/ANALYSIS

[3] The Hospital contends the circuit court erred in denying its motion to compel arbitration because (1) Dr. Pearson's claims fall within the arbitration agreement he signed with Locum; (2) federal law recognizes the right to compel non-signatories to arbitrate and for non-signatories to compel signatories to arbitrate; (3) Dr. Pearson is relying on the terms in the agreement between Locum and the Hospital and Dr. Pearson sought to benefit from it; and (4) the ****600** Hospital is a third-party beneficiary to Dr. Pearson and Locum's contract. We agree.

[4][5][6][7][8][9] "To decide whether an arbitration agreement encompasses a dispute, a court must

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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." *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* However, "[a]rbitration rests on the agreement of the parties.... A party cannot be compelled to arbitrate a particular dispute unless his agreement expressly encompasses the subject matter of the dispute." *Simmons v. Lucas & Stubbs Assocs.,* 283 S.C. 326, 332–33, 322 S.E.2d 467, 470 (Ct.App.1984). However, "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." *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 118. "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Id.* at 597, 553 S.E.2d at 118–19.

[10][11] "Unless the parties have contracted to the contrary, the [Federal Arbitration Act (FAA)] applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (footnote omitted). "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly ***288** 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.2d 565, 568 (Ct.App.2002) (citing *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski,* 346 S.C. at 594, 553 S.E.2d at 117.

[12][13] "Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 416 (4th Cir.2000) (citation and internal quotation marks omitted). "While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow ... that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.' " *Id.* (quoting *Fisser v. Int'l Bank,* 282 F.2d 231, 233 (2d Cir.1960)) (alterations by court). "Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause." *Id.* South Carolina has recognized "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint ... because this would nullify the rule requiring arbitration." *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.,* 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) (citing *Arnold v. Arnold Corp.,* 920 F.2d 1269 (6th Cir.1990)). The rule in the Fourth Circuit is that "a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Long v. Silver,* 248 F.3d 309, 316 (4th Cir.2001).

[14] "Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Int'l Paper Co.,* 206 F.3d at 416–17. A parent company has been forced to arbitrate even though not a party to the agreement when the subsidiary was a party to ***289** the agreement under a theory of equitable estoppel. *Id.* at 417 (quoting *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.,* 863 F.2d 315, 320–21 (4th Cir.1988)) (citing ****601***Sunkist Soft Drinks, Inc. v. Sunkist*

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Growers, Inc., 10 F.3d 753, 757 (11th Cir.1993) (holding that because claims against nonsignatory parent were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 840–41 (7th Cir.1981) (finding signatory equitably estopped from repudiating arbitration clause in agreement on which suit against nonsignatory was based)). "Moreover, the Second Circuit recently noted that it had recognized that five theories 'aris[ing] out of common law principles of contract and agency law' could provide a basis 'for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.' " *Id.* (citing *Thomson–CSF, S.A. v. Am. Arbitration Ass'n,* 64 F.3d 773, 776 (2d Cir.1995); *Bel–Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 440–43 (3d Cir.1999); *Amoco Transport Co. v. Bugsier Reederei & Bergungs, A.G. (In re Oil Spill by the "Amoco Cadiz"),* 659 F.2d 789, 795–96 (7th Cir.1981)) (alteration by court).

[15] "[S]tate law determines questions 'concerning the validity, revocability, or enforceability of contracts generally,' ... but the Federal Arbitration Act, 9 U.S.C. § 2 (1994), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforced by 9 U.S.C. §§ 201–08 (1994), 'create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.' " *Id.* at 417 n. 4 (quoting *Perry v. Thomas,* 482 U.S. 483, 493 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). "These statutes constitute a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* (citation and quotation marks omitted). Because the determination of whether a nonsignatory is bound by a contract presents no state law question of contract formation or validity, the court *290 looks to the federal substantive law of arbitrability to resolve the question. *Id.*

[16][17] "Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Id.* at 417–18 (citation and quotation marks omitted).

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*

Id. at 418 (emphasis added). " 'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.' " *Id.* (quoting *Avila Grp., Inc. v. Norma J. of Cal.*, 426 F.Supp. 537, 542 (S.D.N.Y.1977)) (alteration by court).

[18] "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.' " *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir.1999)) (citing *Deloitte Noraudit A/S v. Deloitte Haskins & Sells,* 9 F.3d 1060, 1064 (2d Cir.1993) (holding nonsignatory bound to arbitrate when it knew of the arbitration agreement and "knowingly accepted the benefits of" that agreement)) (comparing *Hughes Masonry Co.*, 659 F.2d at 838–39 ("[I]t would be manifestly inequitable to permit Hughes to both claim that J.A. [a nonsignatory] is liable to Hughes for its failure to perform the contractual duties described in the [arbitration agreement] and at the same time deny that J.A. is a party to that agreement in order to avoid

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arbitration of claims clearly within the ambit of the arbitration clause.") (alterations by court)).

> Some courts have, at a nonsignatory's instance, required a signatory of an arbitration agreement to arbitrate with the nonsignatory because of "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties **602 in the contract ... and [the fact that] the claims were intimately *291 founded in and intertwined with the underlying contract obligations."

Id. at 418 n. 6 (quoting *Sunkist,* 10 F.3d at 757) (alterations by court). The *International Paper Co.* court recognized that the Second Circuit has held that "a 'close relationship' and 'intimate [ ]' factual connection provide no independent basis to require a nonsignatory of an arbitration agreement to arbitrate with a signatory, and therefore that a nonsignatory cannot be bound without receiving a 'direct benefit' from or pursuing a 'claim ... integrally related to the contract containing the arbitration clause.' " *Id.* (quoting *Thomson–CSF,* 64 F.3d at 778–80) (alterations by court). The court determined it did not need to reach that question "because International Paper clearly does seek a 'direct benefit' from the Wood–Schwabedissen agreement and makes a 'claim ... integrally related to' that contract." *Id.* (alteration by court).

In Jackson v. Iris.com, the court summarized *International Paper Co.*:

> International Paper bought an industrial saw from Wood Systems, a distributor. The saw was manufactured by Schwabedissen pursuant to a contract between Wood Systems and Schwabedissen containing an arbitration clause. International Paper was not a signatory to the contract. The industrial saw was defective, and International Paper sued Schwabedissen for breach of the terms and warranties of the contract. The Fourth Circuit found that International Paper was equitably estopped from denying the applicability of the arbitration clause to its claims against Schwabedissen because International Paper could not both accept the contract's benefits (the warranty provisions) and, at the same time, reject the contract's burdens (the arbitration provisions).

524 F.Supp.2d 742, 750 (E.D.Va.2007) (citing *Int'l Paper Co.*, 206 F.3d at 414, 416–19).

"Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187, 200 (3d Cir.2001) (citing ***292** *Tencara Shipyard,* 170 F.3d at 353 (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). The Third Circuit has noted:

> many of these cases resemble the third party beneficiary cases. In *Tencara Shipyard,* for example, the non-signatory was the intended third party beneficiary of the contract containing the arbitration clause. The two theories of liability are, however, distinct. Under the third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot this Court examines under equitable estoppel is much later in time than the snapshot for third party beneficiary analysis.

Id. at 200 n. 7.

In *E.I. DuPont de Nemours & Co.,* the court was troubled

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that a close examination of the Amended Complaint reveals that, at bottom, DuPont's claims against the subsidiary, Rhodia Fiber, arise, at least in part, from the underlying Agreement. Parenthetically, it is difficult to decipher exactly what DuPont claims *each* appellant has done giving rise to liability because in its Amended Complaint DuPont lumps them together as "the Rhodia Group," just as in the Complaint, it lumped them together as "RP."

Id. at 200–01. The court further noted:

The Amended Complaint does not allege only that Rhodia, the parent, breached its oral agreement to provide loan guarantees to its subsidiary. If this were DuPont's only claim in this case, the Amended Complaint would have named one, and only one, defendant-Rhodia. Instead, the Amended Complaint also named Rhodia Fiber, the subsidiary, as a defendant because, DuPont alleges, Rhodia Fiber breached its oral promise to DuPont that it would continue to abide by its obligations ****603** in the Agreement, *i.e.*, securing loan guarantees for the joint venture. To the extent that DuPont presses a claim against Rhodia Fiber for breaching its oral commitment to perform under the Agreement, DuPont alleges a claim which can well be argued (a) embraces the underlying Agreement and (b) requires proof that Rhodia Fiber ultimately breached the underlying Agreement. ***293** The question, then, is whether having alleged that it entered into a separate oral agreement with Rhodia Fiber binding Rhodia Fiber to the very obligations it undertook in the Agreement, DuPont is now equitably estopped from avoiding another provision of the Agreement, *i.e.*, the arbitration clause. This is a close call.

On the one hand, we must be careful about disregarding the corporate form and treating a non-signatory like a signatory. On the other hand, by alleging, albeit by virtue of a separate oral agreement, that Rhodia Fiber failed to secure loan guarantees, DuPont's claim against Rhodia Fiber implicates, at least in part, the very Agreement which DuPont repudiates to avoid arbitration. It is, however, that separate oral agreement that saves the day for DuPont because, wholly apart from whether Rhodia Fiber breached the Agreement, what is at the core of this case is the conduct and the statements of appellants' representative in January of 1998.

With reference to the second theory of equitable estoppel, appellants rely on a series of cases in which signatories were held to arbitrate related claims against parent companies who were not signatories to the arbitration clause. In each of these cases, a signatory was bound to arbitrate claims brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations.... Appellants recognize that these cases bind a *signatory* not a *non-signatory* to arbitration, but argue that this is a distinction without a difference. They are wrong.

Id. at 201–02.

The court noted that the Second Circuit had rejected the "distinction without a difference" argument:

"As these cases indicate, the circuits have been willing to estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. As the district court pointed out, however, '[t]he situation here is inverse: E & S, as ***294** signatory, seeks to compel Thomson, a non-signatory.' While E & S suggests that this is a non-distinction, the nature of arbitration makes it important. Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the

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courts have no authority to mandate that they do so. In the line of cases discussed above, the courts held that the parties were estopped from avoiding arbitration because they had entered into written arbitration agreements, albeit with the affiliates of those parties asserting the arbitration and not the parties themselves. Thomson, however, cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists. At no point did Thomson indicate a willingness to arbitrate with E & S. Therefore, the district court properly determined these estoppel cases to be inapposite and insufficient justification for binding Thomson to an agreement that it never signed."

Id. at 202 (quoting *Thomson–CSF, S.A.*, 64 F.3d at 779) (alteration by court). The court found "[t]he distinction between signatories and non-signatories is important to ensure that short of piercing the corporate veil, a court does not ignore the corporate form of a non-signatory based solely on the interrelatedness of the claims alleged." *Id.* A non-signatory cannot be "required to arbitrate unless its conduct falls within one of the accepted principles of agency or contract law that permit doing so." *Id.* "In sum, the thrust of the claims in the Amended Complaint are far enough removed from the ****604** Agreement such that DuPont should not be equitably estopped from repudiating the arbitration clause contained in the Agreement." *Id.*

In *Ellen v. A.C. Schultes of Maryland, Inc.*, 172 N.C.App. 317, 615 S.E.2d 729, 733 (2005), the court found

> plaintiffs are not seeking any direct benefits from the contracts containing the relevant arbitration clause, nor are they asserting any rights arising under the ACCU–AC Schultes contracts. Neither plaintiffs' allegations of unfair and deceptive trade practices nor plaintiffs' allegations of tortious interference depend upon the contracts containing the arbitration clause. Both of the claims are dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law.

***295** The court determined "because plaintiffs are not seeking a direct benefit from the provisions of the ACCU–AC Schultes contracts, we conclude that the doctrine of equitable estoppel cannot be used to force plaintiffs to arbitrate their individual claims[, and] the trial court did not err in denying defendants' motions to compel arbitration." *Id.*

A South Carolina district court has noted the Eleventh Circuit's position on the ways nonsignatories could compel arbitration against signatories:

> Existing case law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two different circumstances. *First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.* When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. *Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.* Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Goer v. Jasco Indus., Inc., 395 F.Supp.2d 308, 314 n. 9 (D.S.C.2005) (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999)) (emphases added by court).

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[19][20] "[A] party may not 'rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.' " *Jackson,* 524 F.Supp.2d at 749 (quoting *Hughes Masonry Co.,* 659 F.2d at 839). When "a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a 'direct benefit' from a contract containing an arbitration clause." *Id.* at 749–50 (citing *Int'l Paper Co.,* 206 F.3d at 417–18; ***296***Am. Bankers Ins. Group v. Long,* 453 F.3d 623, 628 (4th Cir.2006); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n,* 384 F.3d 157, 162 (4th Cir.2004); *Tencara Shipyard S.P.A.,* 170 F.3d at 353 (holding non-signatory was estopped from denying applicability of arbitration clause when nonsignatory received "direct benefits" from contract including lowered insurance rates and the ability to sail under the French flag)).

In *Jackson,* the court found:

> Jackson seeks to have his cake and eat it too. Iris paid G*Town $550,000 pursuant to the G*Town Contract. No other sums were paid by Iris. G*Town then paid $450,000 to ATA, Jackson's undisputed agent. ATA then paid $150,000 to Jackson and $75,000 to Elliot. Jackson concedes that he retained the $150,000 payment. The $150,000 ultimately retained by Jackson was a "direct benefit" of the G*Town Contract executed by Iris and G*town. Pursuant to the test outlined by the Fourth Circuit, Jackson is therefore equitably estopped from denying the applicability of the arbitration clause, even though, allegedly, neither he nor his agents signed the G*Town Contract. Iris' $150,000 payment to Jackson, albeit indirect, was intended to be partial consideration**605 for his performance in Africa pursuant to the G*Town Contract. It would be inequitable to permit Jackson to retain the direct benefits of the G*Town Contract (the $150,000 paid by Iris) while, at the same time, permitting him to deny the contract's burdens (the arbitration provision).
>
> *Id.* at 750 (citations and footnote omitted).

The Hospital argues that Dr. Pearson is bound by the arbitration clause both as a nonsignatory to the Hospital and Locum's agreement and as a signatory to his and Locum's agreement. Although some courts have been more inclined to compel arbitration when the person or entity to be compelled was a signatory because they actually consented to arbitration, the Fourth Circuit has recognized the right to compel a nonsignatory.

Here, looking at Dr. Pearson as a nonsignatory in the contract between Locum and the Hospital, he received a benefit due to the contract, in that he was able to work at the Hospital and receive payment for his work. If not for that ***297*** contract, then Dr. Pearson would have had to make separate arrangements with the Hospital in order to work there. He knowingly accepted benefits of the contract between the Hospital and Locum. Accordingly, Dr. Pearson benefitted from that contract and should not be able to disclaim the arbitration agreement contained in it.

Additionally, looking at the Hospital as a nonsignatory in the contract between Dr. Pearson and Locum, Dr. Pearson has to rely on his contract or the Hospital's to have a breach of contract action against the Hospital. Because both of those contracts have arbitration clauses, he should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions. Dr. Pearson's contract stated that the Hospital was the client.

Further, in Dr. Pearson's complaint, he makes no distinction between the Hospital and Locum. He lumps them together as defendants and states they are jointly and severally liable. Additionally, the lawsuit arose against Locum and the Hospital from the same

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set of facts. Further, he raises a cause of action for breach of contract against the defendants, not just Locum. Accordingly, he is seeking either to receive damages under Locum and the Hospital's contract, or to hold the Hospital accountable under his and Locum's contract. Therefore, he is either seeking a benefit under the Hospital's contract or attempting to hold the Hospital accountable under his.

Lastly, the contract between Locum and Dr. Pearson further states that "[a]ny controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement ... shall be resolved by binding arbitration." The causes of action against the Hospital arose as a result of Dr. Pearson's being placed there by Locum, which was the purpose of the contract. Based on all the forgoing, the circuit court's denial of the Hospital's motion to compel arbitration is

REVERSED.

PIEPER and GEATHERS, JJ., concur.

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Pearson v. Hilton Head Hosp.
400 S.C. 281, 733 S.E.2d 597

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CASES COMPELLING ARBITRATION PURSUANT TO TENET'S EMPLOYEE ACKNOWLEDGMENT FORM AND FAIR TREATMENT PROCESS

1. Burris v. Tenet Healthcare	Cal. Superior Ct.	1999	Compelled arbitration & stayed	Summary order.
2. Dercueil v. Parkway Regional Medical Center	USDC-SDFla.	2002	Compelled arbitration & stayed	RN sued for discrimination bypassing arbitration process. Motion to compel arbitration made by Defendant. Plaintiff moved to strike affidavit affirming she would have received handbook with FTP in it, but never denied receiving it. Just denies being aware of arbitration provisions. Continued working for 3 years after handbook distribution. Held: valid agreement to arbitrate.
3. Flowers v. Tenet Healthcare	Cal. Superior Ct.	2000	Compelled arbitration & stayed	Court summarily compelled final and binding arbitration based on Employee Acknowledgement Form of 5/15/97 and Tenet's Fair Treatment Process (FTP). On subsequent motion by Plaintiff for protection from arbitration order, court sanctioned Plaintiff's counsel for frivolous, bad faith motion designed to harass or delay unnecessarily.
4. Gutierrez v. Western Medical Center	Cal. Superior Ct.	2002	Compelled arbitration & stayed	Summary order.
5. Hooper & Evins v. Mullikan Medical Centers	Cal. Superior Ct.	1999	Compelled arbitration & stayed	Summary order.
6. Howard v. Amisub of SC	USDC-DSC	2007	Compelled arbitration & dismissed	Arbitration compelled and case dismissed. Notes Fourth Circuit states that when All claims are arbitrable, it is proper to dismiss rather than stay (citing Choice Hotels. V. BSR Tropicana Resort (2001))

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7. Hurt v. St. Francis Hospital	USDC-WDTn	2010	Compelled arbitration & dismissed	Plaintiff sued for discrimination. Court ruled had signed agreement agreeing to "submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet." Plaintiff argued motion to arbitrate came too late and Tenet had waived any right to compel arbitration, but court held this issue was for arbitrator. Court held that where all claims were arbitrable, "no useful purpose is served by leaving the action pending, and dismissal of the action is appropriate."
8. Ito v. Tenet	Cal. Superior Ct.	2009	Compelled arbitration & stayed	Defendant Syndicated Office Systems is a Tenet subsidiary and arbitration agreement covers Tenet subsidiaries. Under FAA, agreement to arbitrate must be in writing, but needn't be signed by any party. Consideration was that both parties giving up their right to jury trial. To find an arbitration agreement unconscionable, unconscionability must be procedural (contract of adhesion) *and* substantive (so one sided as to shock the conscience). *Armendariz* (Cal. Supreme Court 2000 case) factors were satisfied.
9. May-Opstad v. US Healthwords	Cal. Superior Ct.	2008	Compelled arbitration & stayed	Summary order.
10. McElroy v. Tenet	Cal. Court of Appeal	2013	Compelled arbitration &dismissed	Appeal from trial court ruling denying motion to compel arbitration. That ruling was reversed. Agreement to arbitrate existed. AAA rules properly incorporated by reference; company's right to make unilateral changes in FTP policy did not make promise illusory; once agreement is found to exist, burden shifts to party opposing arbitration to show why it should not be enforced, *e.g.*, unconscionable. She was not required to sign; given opportunity to decline (and did decline to sign earlier version presented to her).

11. Mercado v. Doctors Medical Center of Modesto	Cal. Court of Appeal	2013	Compelled arbitration & stayed	Numerous arguments against Tenet arbitration agreement are addressed in this opinion. Trial court held arbitration agreement was unconscionable; this ruling was reversed. There was an agreement to arbitrate (Acknowledgment quoted in full.) Employee agreed she was employed by Tenet and did not dispute she signed the agreement. No evidence contents were misrepresented or that she was prevented from reading. Tenet is bound, so mutually binding. Not procedurally unconscionable (requires oppression or surprise): not take it or leave it, but it was adhesive. But evidence of procedural unconscionability does not mean it will not be enforced. Substantive unconscionability means overly harsh or shocks the conscience. Court rules was not substantively unconscionable. References *Armendariz* (binding in California) decision to determine had all elements showing it was not unconscionable and points out *Concepcion* was decided after that and may have overruled *Armendariz*. Also references *American Express v. Italian Colors* , US Sup. Ct. 2013, arbitration agreements must be enforced according to their terms even when claims allege violation of a federal statute.
12. Miller v. Lakewood Regional Med. Center	Cal. Superior Court	2003	Compelled arbitration & stayed	Held arbitration agreement existed and plaintiff contracted with Tenet to arbitrate. Not unfair or procedurally or substantively unconscionable.
13. Morales v. Queen of Angelo Hollywood Presbyterian Medical Center	USDC-Central Cal.	2002	Compelled arbitration & dismissed	Enforces agreement to arbitrate pursuant to FTP

ROA 148

14. Patterson v. Tenet	US Court of Appeals 8th Cir.	1997		Court held FAA applied (as US Sup Ct. subsequently held in *Circuit City v. Adams*)
15. Pratcher v. Tenet	Cal. Superior Court	2005	Compelled arbitration and stayed	Summary order.
16. Quilloin v. Tenet	US Ct. App. 3d Cir.	2012	Compelled arbitration & stayed	RN signed Employee Acknowledgment form (2006 and 2009 versions), but said she didn't' understand that it meant she had to arbitrate all claims. FTP was not substantively unconscionable or procedurally unconscionable (had a meaningful choice to sign or not)
17. Rodriguez v. Fountain Valley Regional Hospital	Cal. Superior Ct.	2009	Compelled arbitration & stayed	Movant showed valid agreement to arbitrate existed and plaintiff had not demonstrated ground to deny enforcement.
18. Smithhisler v. Tenet	Cal. Superior Ct.	2000	Compelled arbitration & stayed	Summary order
19. Swaim v. Creighton St. Joseph Regional	USDC-DNeb.	2006	Compelled arbitration & stayed	Quotes entire Employee Acknowledgment form and then sets forth FTP Step 5 provisions verbatim. Plaintiff terminated and filed suit for age and disability discrimination. Parties agreed to arbitration. Not unconscionable. Statutory claim can be subject to arbitration. *Gilmer v. Interstate/Johnson Lane* (1991). Court need only determine if there is an arbitration agreement and dispute falls within its terms.

ROA 149

20. In re Tenet Healthcare	Tex. Ct. App.	2002	Directed trial court to compel arbitration	Appeal from denial of motion to compel arbitration. Employee sued claiming filed for filing worker's comp claim. Court quotes Employee Acknowledgment Form at length. FAA applies: Relationship involved interstate commerce because hospital treated out of state patients, received goods and services from out of state, received payments from out of state insurance carriers and received federal funds such as Medicaid and Medicare. Agreement itself references FAA. Agreement encompasses the dispute here because agreement contemplates a dispute relating to the termination of employment
21. Varallo v. Elkins Park Hospital	US Ct. App. 3d Cir.	2003	Compelled arbitration	Reverses trial court's refusal to compel arbitration. Although claim was she was not "rehired," Plaintiff's claims were inextricably intertwined with termination of employment and court cannot say with positive assurance that not susceptible of an interpretation that arbitration agreement covers failure to rehire claim. Discrimination action based upon failure to rehire employee after FMLA leave ended.

ROA 150

FILED
ORANGE COUNTY SUPERIOR COURT
AUG 19 1999
ALAN SLATER, Executive Officer/Clerk
BY P.HERBEL

RECEIVED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
JUL 28 1999
ALAN SLATER, Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

LUANNA BURRIS, Plaintiff, v. TENET HEALTHCARE CORPORATION, a Nevada corporation; JOSEPH DONALD EPPS, JR., an individual; and DOES 1 through 10, inclusive, Defendants.	CASE NO. 807536 COMPLAINT FILED: 3/31/99 ASSIGNED FOR ALL PURPOSES TO: Judge Ronald C. Kline Dept. C7 [Proposed] ORDER GRANTING DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND STAYING ACTION Date: July 16 1999 Time: 2 p.m. Dept.: C7 No Trial Date Set

This matter came on regularly for hearing on July 16, 1999, before the Honorable Ronald C. Kline, judge presiding in Department C7 of the above-entitled court. Robert C. Robinson of Robinson & Campbell appeared for plaintiff Luanna Burris, Raymond Thomas of McDermott, Will & Emery appeared for defendant Tenet Healthcare Systems, Inc., and Gary Scalabrini of Gibbs, Giden, Locher & Turner LLP appeared for defendant Joseph D. Epps, Jr.

This matter having been fully argued and considered and proof being made to the satisfaction of the court, it is hereby ordered that the motion by defendant Tenet to compel

EXHIBIT 9

arbitration and the motion by defendant Epps to compel arbitration are hereby granted with respect to all causes of action except the Seventh Cause of Action for Slander, which is against defendant Epps only, and the entire action is stayed until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.

DATED: AUG 19 1999, 1999

JUDGE RONALD C. KLINE

Ronald C. Kline, Judge of the
Orange County Superior Court

SUBMITTED BY:

DATED: 7/23/99 ROBINSON & CAMPBELL

By: Robert C. Robinson
Robert C. Robinson
Attorneys for Plaintiff Luanna Burris

APPROVED AS TO FORM AND CONTENT:

DATED: 7/21/99 MCDERMOTT, WILL & EMERY

By: RD Thomas
Raymond Thomas
Attorneys for Defendant
Tenet Healthcare Corporation

DATED: _____ GIBBS, GIDEN, LOCHER & TURNER LLP

By: _____
Gary Scalabrini
Attorneys for Defendant Joseph D. Epps, Jr.

[illegible]:\docs\[illegible].349

ORDER

EXHIBIT 9

TOTAL P.04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 01-4911-CIV-MIDDLEBROOKS

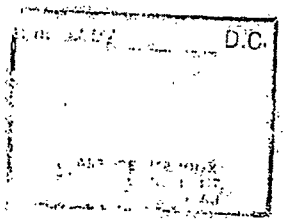
ANDREA DERCUEIL,

Plaintiff,

v.

PARKWAY REGIONAL MEDICAL CENTER,

Defendant.
_____/



ORDER ON MOTION TO COMPEL ARBITRATION AND MOTION TO STRIKE DECLARATION

THIS CAUSE comes before the Court upon the defendant's Motion to Compel Arbitration and Stay Judicial Proceedings or for Alternative Relief, filed January 11, 2002 (DE#7); and the plaintiff's Motion to Strike the Declaration of Eddie Carmenate, filed January 25, 2002 (DE#10). The motions have been responded to, one has been replied to, and accordingly they are now ripe for disposition. The Court has reviewed the record and is fully advised in the premises.

A brief statement of the pertinent facts, as culled from the original complaint and the submissions of counsel, is as follows. Defendant Parkway Regional Medical Center ("Parkway") hired plaintiff Andrea Dercueil ("Dercueil") on February 6, 1995 as a Registered Nurse. Approximately two years later, sometime in 1997, Parkway issued and distributed to its employees a new Employee Handbook. One chapter of this Handbook is entitled "Tenet [Parkway's parent company] Open Door Policy and Fair Treatment Process." That chapter describes the then newly enacted Fair Treatment Process ("FTP"), which is "a comprehensive mechanism for resolving employment-related disputes between [the employee] and the company. The FTP is a multiple-step process that ultimately provides for final and binding arbitration of employment-related disputes if they are not resolved in any of the previous steps in the process." Emp'ee Hbk., attached as Ex. 2 to Def.'s Mem. of Law in Support of Mot. to Compel Arb., at 81 (hereinafter "Handbook"). The

13/we

chapter goes on to state,

> The FTP applies to all employees, regardless of length of service or status, and covers all disputes relating to or arising out of an employee's employment with the company or the termination of employment. ... Examples of the type of disputes or claims covered by the FTP include claims for ... employment discrimination, harassment or retaliation under ... Title VII of the Civil Rights Act of 1964 and its amendments or any state or local discrimination laws, ... Your decision to accept employment or to continue employment with the company constitutes your agreement to be bound by the FTP. Likewise, the company agrees to be bound by the FTP. This mutual agreement to arbitrate claims means that both you and the company are bound to use the FTP as the only means of resolving employment-related disputes and to forego any right either may have to a jury trial on issues covered by the FTP. However, no remedies that otherwise would be available to you or the company in a court of law will be forfeited by virtue of the agreement to use and be bound by the FTP.

Handbook, at pp. 81-82. When Dercueil began to feel that she was being unlawfully discriminated against, she went to the Human Resources department and was instructed to fill out a FTP Dispute Resolution Form, the first step in the FTP process. Then, on December 5, 2001, bypassing the remainder of the FTP process, Dercueil filed a complaint in this Court, alleging violations of Title VII and 42 U.S.C. § 1981. In short, Dercueil avers in her complaint that she, as an African-American employee, was subject to racial discrimination in her workplace by being paid less than nonminority workers for the same job and not being given as much vacation time as these nonminority workers.

Based on the language of the FTP, Parkway has filed the instant motion, seeking a stay of these judicial proceedings and compelling Dercueil to arbitrate her claims. Parkway's motion argues in seriatim (1) that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), applies to the FTP; (2) that Dercueil's claims are arbitrable under the law; and (3) that Dercueil has refused to arbitrate these claims, such that the Court should enter an Order directing her to do so.[1] In response, the *only* issue that Dercueil argues is that, under applicable state-law contract principles, Dercueil never entered

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[1] *Cf. Hightower v. GMRI, Inc.*, 272 F.3d 239 (4th Cir. 2001):

> In order for a court to compel arbitration, the court must first find that an arbitration agreement exists between the parties. If an agreement is found to exist, the court must then decide whether the dispute at issue falls within the scope of the agreement. To determine whether the parties agreed to arbitrate, courts apply state law principles governing contract formation.

Id. at 242.

into a valid agreement with Parkway.[2] After briefly disposing of a discreet issue, the Court shall turn to this question.

Along with her response to the motion to compel, Dercueil includes a motion to strike the declaration of Eddie Carmenate, Parkway's Human Resources Generalist since 1996, which is attached as Exhibit 1 to Parkway's motion to compel arbitration. In this declaration, Carmenate states that the Parkway Regional Medical Center Employee Handbook was distributed in 1997. Carmenate also states that Dercueil "was an employee at that time and thus would have received a copy of the Employee Handbook." Dercueil moves to strike this declaration as "not based upon personal knowledge." It appears, however, that the statement is based on personal knowledge: Carmenate was the Human Resources person at Parkway during 1997, a time when Dercueil was employed there and when the Handbook was distributed. Dercueil proffers little argument, and no caselaw, supporting her position. Therefore, the Court shall deny Dercueil's motion to strike. Further, although Dercueil submits that "there has been no evidence that Dercueil was given a copy of the handbook," she never *denies* this aside from attempting to strike Carmenate's declaration. Carmenate's declaration establishes that in the normal course of business, Dercueil received the Handbook in her capacity as a Parkway employee in 1997.[3] Dercueil's own declaration states that she "did not have any discussion with anyone" about arbitrating her Title VII claim, was "never informed" that her employment was conditioned on the agreement to arbitrate, and that "no offer was ever communicated" to her concerning such an agreement. Granting that Dercueil never saw the specific provisions relating to the FTP arbitration process, notably *absent* from her declaration is any denial that she received the Handbook itself. This shall be significant in the discussion that follows.

The issue, then, is whether the FTP represents a valid agreement to arbitrate as entered into between Dercueil and Parkway. "When deciding whether the parties agreed to arbitrate a certain

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[2] Dercueil states that she "do[es] not have any opposition to Defendant's reference to the Federal Arbitration Act (FAA) and the policy favoring arbitration." Pl.'s Opp. to Def.'s Mot. to Compel Arb. at 2. "The sole issue before this Court is whether or not there was a valid agreement." *Id.* at 3.

[3] A declaration made under penalty of perjury pursuant to 28 U.S.C. § 1746 does have substantive evidentiary value, as such a declaration may be used as an affidavit in a court's consideration of a motion for summary judgment. *See, e.g., United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1444 n.36 (11th Cir. 1991) (en banc).

matter ..., courts generally ... should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citing cases); *see also Perez v. Globe Airport Sec. Svcs., Inc.*, 253 F.3d 1280, 1285 (11th Cir. 2001); *Hightower*, 272 F.3d at 242; *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 19 (1st Cir. 1999); *Lewis v. Haskell Co., Inc.*, 108 F. Supp.2d 1288, 1290 (M.D. Ala. 2000) ("[In] determin[ing] whether an agreement to arbitrate exists between parties ... the court should apply ordinary state common law governing the formation of contracts, with due regard for the federal policy favoring arbitration." (citations omitted)). The validity of the agreement to arbitrate is essential, because it is axiomatic that "[t]he FAA does not 'require parties to arbitrate when they have not agreed to do so ....' " *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1057 (11th Cir. 1998) (quoting *American Express Fin. Advisors, Inc. v. Makarewicz*, 122 F.3d 936, 940 (11th Cir. 1997)).

In Florida, as well as in hornbook contract law, the three essential elements of contract formation are offer, acceptance, and consideration. *See Med-Star Central, Inc. v. Psychiatric Hospitals of Hernando Cty., Inc.*, 639 So.2d 636, 637 (Fla. 5th DCA 1994) (describing these as "all the elements of a contract"); *Knight v. Palm City Millwork & Supply Co.*, 78 F. Supp.2d 1345, 1347 (S.D. Fla. 1999). Here, Dercueil appears not to dispute that Parkway made an "offer," as that term is used in contract law, but rather argues that there was no acceptance of the offer. She argues that there was no acceptance because there was never any "mutual assent" to the arbitration provisions–the material provisions here at issue.

"Mutual assent is an absolute condition precedent to the formation of a contract. Absent mutual assent, neither the contract nor any of its provisions come into existence." *State v. Family Bank of Hallandale*, 623 So.2d 474, 479-80 (Fla. 1993). This is because "[w]hether a contract is oral or written, it is essential that the parties mutually agree upon the material terms." *B.S. Holloway v. Gutman*, 707 So.2d 356, 357 (Fla. 5th DCA 1998).

The Court concludes that based on Florida contract law, the parties did enter into a binding agreement as reflected in the Handbook. First, Dercueil was working at Parkway in 1997 when that company distributed the updated Handbook, containing the FTP arbitration language set forth above. Although Dercueil vigorously disputes that she was aware of the specific arbitration provisions, or that she had a conversation with anyone about these provisions, she *never denies that she received the Handbook.* Having received the Handbook, Dercueil had a duty to read its provisions and

understand its contents. There is no indication that Dercueil was not provided with enough time to examine the Handbook. Rather, she simply did not choose to inform herself fully of what the Handbook said. Again, the Court stresses that in her declaration, Dercueil does not deny that she received the Handbook, but denies that she was aware of the particular arbitration provisions. The Court finds it an unremarkable submission that an employee has a duty of inquiry to read a handbook distributed to employees. The duty of inquiry is a principle "that a person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will suffice the law to remain willfully ignorant of a thing readily ascertainable ... when the means of knowledge is at hand." *Anjems, Inc. v. F.R. Orr Constr. Co., Inc.*, 617 F. Supp. 273, 278 (S.D. Fla. 1985) (quoting *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932)); *see also Symons v. State, Dept. of Banking & Fin.*, 490 So.2d 1322, 1324 (Fla. 1st DCA 1986). Such a duty is especially important when considered in the context of the present action: Dercueil was a Registered Nurse with Parkway, obviously involved in caring for others. It is of paramount importance that such an employee be intimately familiar the procedures and protocols of her workplace, for the health and well-being of others could be implicated as well if, for example, the employee did not follow proper emergency procedures set forth in such a handbook.

After receiving this Handbook, Dercueil continued working at Parkway for approximately three years. This continuance of her employment constituted acceptance of the agreement. *Cf. H.W. Gay Enters., Inc. v. John Hall Elec. Contracting, Inc.*, 792 So.2d 580, 581 (Fla. 4th DCA 2001) (concluding that "the parties' assent to the terms of the written contract was established by their words and conduct."). Thus, having impliedly known of the provisions contained in the Handbook, Dercueil continued to work for Parkway, thus evidencing mutual assent to the terms thereof and accepting her employer's offer.[4] A contract was formed, and Dercueil's ignorance of the Handbook's terms does not negate this conclusion.

The Court is quick to point out that this conclusion does not in any way signify that Dercueil has lost her rights as afforded by the duly enacted and salutary laws of the United States. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the

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[4] It is important to note here that the "FAA does not require that the parties sign written acknowledgments of an arbitration agreement; it mandates only that the agreement itself be in writing." *Chanchani v. Salomon/Smith Barney, Inc.*, 2001 WL 204214, at *3 (S.D.N.Y. Mar. 1, 2001); *see also* 9 U.S.C. § 3.

statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Aside from the issue of whether a contract was formed under Florida law, which the Court has answered in the affirmative, Dercueil does not refute any of Parkway's other arguments in support of its motion to compel arbitration. Therefore, based on the above analysis, it is hereby

ORDERED AND ADJUDGED that Dercueil's motion to strike the declaration of Eddie Carmenate (DE#10) is DENIED. Parkway's motion (DE#7) is GRANTED. Pursuant to Section 4 of the FAA, the parties are COMPELLED to ARBITRATE these claims. Further, pursuant to Section 3 of the FAA, this action is STAYED pending arbitration of Dercueil's claims.

DONE AND ORDERED in Chambers in Miami, Florida, this 6 day of March 2002.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

copies to counsel of record

HILL, FARRER & BURRILL LLP
RAYMOND W. THOMAS (Bar No. 072916)
MICHAEL S. TURNER (Bar No. 130101)
300 South Grand Avenue
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Attorneys for Defendants CVHS HOSPITAL CORP. dba CENTINELA HOSPITAL MEDICAL CENTER and TENET HEALTHCARE CORP.

ORIGINAL FILED
FEB 23 2000
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

GLENDA FLOWERS,

Plaintiff,

vs.

TENET HEALTHCARE CORPORATION, CENTINELA HOSPITAL, and DOES 1 to 100, INCLUSIVE,

Defendants.

CASE NO. BC 219851

[Case Assigned to Judge Kenneth R. Freeman, Dept. 64]

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO STAY ACTION AND COMPEL ARBITRATION

Date: February 23, 2000
Time: 8:15 a.m.
Dept: 64

The motion of defendants CVHS HOSPITAL CORP. dba CENTINELA HOSPITAL MEDICAL CENTER and TENET HEALTHCARE CORP. to compel arbitration of plaintiff's claims and stay the action came on for hearing on February 23, 2000 in Department 64 before the Honorable Kenneth R. Freeman, judge presiding. Michael S. Turner of Hill, Farrer & Burrill LLP appeared on behalf of defendants and moving parties. Mark Weidmann appeared on behalf of plaintiff.

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EXHIBIT 6

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY ACTION

Having considered the papers submitted by the parties and the arguments of counsel, and good cause appearing therefor, IT IS HEREBY ORDERED as follows:

1. Defendants' motion is GRANTED;

2. This action is stayed pending resolution of the issues raised herein through binding arbitration;

3. Plaintiff, in accordance with the Employee Acknowledgment Form executed on May 15, 1997, and the Fair Treatment Process, will resolve any and all issues raised in her Complaint in this action through final and binding arbitration.

IT IS SO ORDERED.

DATED: FEB 23 2000

JUDGE OF THE SUPERIOR COURT
KENNETH R. FREEMAN

EXHIBIT 6

HILL, FARRER & BURRILL LLP
RAYMOND W. THOMAS (Bar No. 072916)
MICHAEL S. TURNER (Bar No. 130101)
300 South Grand Avenue
37th Floor - One California Plaza
Los Angeles, CA 90071-3147
Telephone: (213) 620-0460

Attorneys for Defendants CENTINELA HOSPITAL MEDICAL CENTER and TENET HEALTHCARE CORP.

ORIGINAL FILED
JUN 29 2001
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

GLENDA FLOWERS,

Plaintiff,

vs

TENET HEALTHCARE CORPORATION, CENTINELA HOSPITAL, and DOES 1 to 100, INCLUSIVE,

Defendants

CASE NO. BC 219851

[Case Assigned to Judge Kenneth R. Freeman, Dept 64]

[redacted] ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE ORDER COMPELLING ARBITRATION AND IMPOSING SANCTIONS

Date: June 5, 2001
Time: 8:15 a.m.
Dept: 64

Plaintiff's Motion to Set Aside Order Compelling Arbitration came on for hearing on June 5, 2001 at approximately 9:30 a.m., before the Honorable Kenneth Freedman, Judge Presiding. Defendants appeared by Michael S. Turner of Hill, Farrer & Burrill, LLP. There was no appearance made on behalf of the plaintiff.

After considering plaintiff's motion, defendants' opposition, plaintiff's reply thereto, and hearing argument of counsel, the court rules:

1. Plaintiff's motion is DENIED;

2. Defendants' request for sanctions pursuant to Code of Civil Procedure section 1008(d) in the sum of $2,250.00 is GRANTED as against plaintiff's counsel, Mark

EXHIBIT 7

Weidmann, only. No sanctions are issued against the plaintiff personally. Sanctions are warranted for the reasons stated in defendants' opposition, namely because plaintiff's motion was frivolous, brought in bad faith and designed to harass or cause unnecessary delay, based on the following:

a. Defendantd engaged in no conduct that in good faith could arguably be viewed as a waiver of the right to arbitrate plaintiff's claims. Indeed, it was the plaintiff who waited for almost a year to try to commence the arbitration process, and then it was the plaintiff who refused to pay her portion of the arbitration filing fee.

b. Plaintiff's skeletal motion is an improper and baseless request for this court to reconsider its order entered February 24, 2000. Plaintiff's citation to, and reliance on Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83 (2000), is frivolous. First, the motion lacks any analysis whatsoever of the Armendariz case or how it supports plaintiff's waiver theory. Second, the Armendariz case clearly does not stand for the proposition that plaintiff states – that defendant must bear all of the costs of arbitration. Armendariz holds that an arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were to bring the action in court. Id. at 110-111. Armendariz specifically endorses an arbitration agreement, such as the instant agreement, that requires the claimant to bear only the same costs she would bear if she filed her claim in court. Here, the undisputed evidence shows that the only arbitration cost that plaintiff must bear is equivalent to one day's pay, which the undisputed evidence here shows is $72.44 ($9.056/hour x 8 hours). The undisputed evidence therefore shows that plaintiff's sole obligation for the cost of the arbitration was $72.44, which is substantially less than the $192.00 Superior Court filing fee. Such a provision is consistent with the holding in Armendariz. It was frivolous and in bad faith for the plaintiff to bring the instant motion contending that defendants must bear all of the arbitration costs and that defendants waived their right to arbitration by refusing to pay the entire arbitration filing fee.

EXHIBIT 7

c. The Court also observes that when plaintiff opposed defendants' motion to compel arbitration in January, 2000, she did not object to the provision of the arbitration agreement that required her to bear $72.44 of the costs of the arbitration. Plaintiff therefore waived any argument regarding the alleged unconscionability of the arbitration agreement insofar as it requires her to bear a small portion of the arbitration costs.

d. Plaintiff's motion is also patently untimely. This Court granted defendants' motion to compel arbitration on February 24, 2000. Plaintiff inexplicably waited 11 months to take steps to initiate arbitration and then refused to pay her portion of the arbitration fee. The Court finds that plaintiff's motion is an untimely motion for reconsideration and that the motion and the motion lacks merit and is frivolous. Code of Civil Procedure section 1008 provides the exclusive method by which a court may reconsider a ruling on a prior motion. C.C.P. §1008(c); Garcia v. Hejmadi, 58 Cal.App.4th, 674, 691 (1997). Section 1008 sets forth the court's jurisdiction to reconsider prior rulings. Id. Under section 1008(a), a party must bring a motion for reconsideration within 10 days of the date of the order. Plaintiff's motion was first served on March 20, 2001, almost 13 months after the Court issued the order compelling this case to be arbitrated.

e. Plaintiff persisted with this motion after being told in writing by opposing counsel that the motion was frivolous and that defense counsel would seek sanctions if defendants had to oppose the motion. Michael Turner, counsel for the defendants, in his letter to attorney Weidmann dated April 5, 2001, (Exhibit D to defendants' opposition to the motion), described plaintiff's motion as frivolous and urged Mr. Weidmann to take plaintiff's motion off calendar. Mr. Turner explained what plaintiff needed to do to commence arbitration, calculated plaintiff's portion of the arbitration filing fee, discussed the Armendariz case, and warned Mr. Weidmann that defendants would seek sanctions if plaintiff proceeded with the motion.

EXHIBIT 7

f. Although the motion was originally noticed by plaintiff for April 19, 2001, the motion did not make it onto the Court's calendar for that day. Instead of abandoning the instant motion and commencing arbitration at that time, Mr. Weidmann chose to re-notice the instant motion for hearing on June 5, 2001.

3. The sanctions shall be paid within 30 days of service of this order.

IT IS SO ORDERED.

DATED: JUN 29 2001

JUDGE OF THE SUPERIOR COURT
KENNETH R. FREEMAN

EXHIBIT 7

HILL, FARRER & BURRILL LLP
MICHAEL S. TURNER (Bar No. 130101)
300 South Grand Avenue
37th Floor - One California Plaza
Los Angeles, CA 90071-3147
Telephone: (213) 620-0460

Attorneys for Defendants UWMC HOSPITAL CORPORATION, dba WESTERN MEDICAL CENTER-SANTA ANA erroneously sued as WESTERN MEDICAL CENTER HOSPITAL AND TENET HEALTH CORPORATION, erroneously sued as TENET HEALTHSYSTEMS

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

AUG 09 2002

ALAN SLATER Clerk of the Court
BY C. FALKENBERG

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

VICTOR CABRERA GUTIERREZ,

Plaintiff,

vs

WESTERN MEDICAL CENTER HOSPITAL, a business organization form unknown, TENET HEALTHSYSTEM, a business organization form unknown, and Does 1 through 100, inclusive,

Defendants.

CASE NO. 02CC04139

[Case Assigned to Judge Thierry P. Colaw, Dept. C21]

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION

Date: July 18, 2002
Time: 3:30 p.m.
Dept: C21

[Internet Ruling; No Appearance Required]

Discovery Cut-off: None
Motion Cut-off: None

Trial Date: None
Action Filing Date: March 12, 2002

The motion of Defendants UWMC HOSPITAL CORPORATION, dba WESTERN MEDICAL CENTER-SANTA ANA erroneously sued as WESTERN MEDICAL CENTER HOSPITAL AND TENET HEALTH CORPORATION, erroneously sued as TENET HEALTHSYSTEMS, which was set for internet ruling on July 18, 2002 by the Honorable Thierry P. Colaw, Department 21, judge presiding, was ruled upon that date. After considering the papers filed in support of and opposition to

EXHIBIT 3

the motion, the court issued the an internet tentative ruling, which became the order of the court because no party requested oral argument by 4:00 pm of the third court day (Tuesday) after the scheduled Thursday hearing, as required by the court's rules. Accordingly, the Court orders as follows:

1. Motion by defendants to compel arbitration is GRANTED.

2. The matter is stayed.

3. The Court denies compelling any other dispute resolution process other than binding arbitration. The parties are free, of course, to mediate any dispute they wish or stipulate to any ADR they wish.

4. An evaluation conference is set for October 11, 2002 at 9:30 a.m. in Department C-21 re status of arbitration.

IT IS SO ORDERED.

Dated: AUG 09 2002

THIERRY PATRICK COLAW

Hon. Thierry P. Colaw
Judge of the Orange County Superior Court

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EXHIBIT 3

McDERMOTT, WILL & EMERY
RAYMOND W. THOMAS, ESQ. (Bar No. 072916)
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TENET HEALTHCARE CORPORATION

ORIGINAL FILED
MAY 04 1999
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LUCY HOOPER and GLORIA JEAN EVINS,

Plaintiffs,

v.

MULLIKAN MEDICAL CENTERS (or Mullikan Med Partners), a Corporation; PIONEER HOSPITAL; TENET; and DOES 1 THROUGH 100, Inclusive,

Defendants.

CASE NO. BC 195503
(Filed: August 6, 1998)

Assigned to Dept. 48 -
Hon. John W. Ouderkirk

NOTICE OF RULING ON DEFENDANT TENET HEALTHCARE CORPORATION'S MOTIONS TO STAY ACTION AND COMPEL ARBITRATION OF DISPUTE AGAINST PLAINTIFFS LUCY HOOPER AND GLORIA JEAN EVINS

DATE: May 3, 1999
TIME: 9:00 a.m.
DEPT: 48
TRIAL: Sept. 7, 1999

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTE that the motions of Defendant Tenet Healthcare Corporation ("Tenet") to Stay Action and Compel Arbitration of Dispute against Plaintiffs Lucy Hooper and Gloria Jean Evins ("Plaintiffs") came on regularly for hearing in Department 48 of the above-referenced court, Hon. John W. Ouderkirk presiding. Arya Towfighi of McDermott, Will & Emery

EXHIBIT 10

appeared on behalf of Tenet; Bill Stein of Foley & Lardner appeared on behalf of Defendant MedPartners, Inc.; and Alvin Pittman of the Law Offices of Alvin L. Pittman appeared on behalf of Plaintiffs.

After due consideration of the parties' moving, opposing, and reply papers, including the evidence and arguments submitted therein, and the oral arguments of counsel at the hearing, the Court granted Tenet's motions and ordered that Plaintiffs' action be stayed against all parties until November 3, 1999, and ordered Plaintiffs to pursue final and binding arbitration of their claims against Tenet. The Court set November 3, 1999, as the arbitration completion date, and set a status conference for that date in Department 48 at 8:30 a.m.

DATED: May 5, 1999

McDERMOTT, WILL & EMERY

By _____
ARYA TOWFIGHI
Attorneys for Defendant
TENET HEALTHCARE CORPORATION

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ROCK HILL DIVISION

Anita C. Howard, Plaintiffs, vs. Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center a/k/a Piedmont Healthcare System, Defendants.	Civil Action No. 0:06-1744-MJP ORDER

This matter is before the Court pursuant to a motion to dismiss made by Tenet Healthcare Corporation ("Tenet") and AMI Sub of South Carolina, Inc. ("AMI Sub") pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiff filed a Complaint on June 8, 2006, alleging that Tenet, the sole defendant named, violated the Americans With Disabilities Act ("ADA") by not accommodating her alleged disability and by terminating her employment. Plaintiff alleged she received a "Notification of Right to Sue" from the EEOC on March 16, 2006. (Complaint ¶ 5(b).) Plaintiff did not serve Tenet with the Summons and Complaint.

On October 17, 2006, with no proof of service and no notice of Defendant's appearance on file, the Magistrate Judge recommended to this Court that the action be dismissed without prejudice for Plaintiff's failure to serve the Summons and Complaint. (*See* Magistrate Judge's Report and Recommendation.) The next day, October 18,

Plaintiff filed a response to the Report and Recommendation; that response claimed that the Clerk of Court's office had advised that it would effect service. Accordingly, Plaintiff requested additional time to serve the original Summons and Complaint. (Plaintiff's Reply.)

On October 31, 2006, Plaintiff filed an Amended Complaint, changing the name of the defendant named from Tenet to AMI Sub. The allegations of the Amended Complaint mirrored those of the original Complaint, and Plaintiff again averred that she received a Notice of Right to Sue from the EEOC on March 16, 2006. (Amended Complaint ¶ 2(a).)

Tenet and AMI Sub moved to dismiss the Complaint and the Amended Complaint on four grounds:

- Tenet was not served with the Summons and Complaint within 120 days of the latter's filing. Because 120 days is the maximum time allowed for service under Rule 4(m), the Court should affirm the Magistrate's recommendation and dismiss the Complaint against Tenet.

- The Amended Complaint against AMI Sub could not relate back to the time the original Complaint was filed against Tenet. For an amended pleading to relate back to the date of the original pleading, Rule 15(c)(3) requires, *inter alia,* that the party to be brought in with the amended pleading (here, AMI Sub) has received notice of the action and knew or should have known that but for the mistake in identity (*i.e.*, that AMI Sub was Plaintiff's employer, not Tenet), the action would have been brought against it (AMI Sub). Plaintiff admittedly never served the Complaint on Tenet or any other entity. Thus the only defendant named in the Complaint, Tenet, was never put on

notice of those claims. AMI Sub was not named in the Complaint at all. Thus, it could neither have received notice of the claim, nor could it have known that, but for the mistake in naming Tenet, the suit would have been brought against it. The Amended Complaint cannot relate back to the time the original Complaint was filed, as Plaintiff satisfied neither of the two requirements for relation back under Rule 15(c)(3).

- With no relation back to the date the original Complaint was filed, the Amended Complaint against AMI Sub must be dismissed because the ADA claim in it was not timely filed under 42 U.S.C § 2000e-5(f)(1). This section of Title VII, made applicable also to suits brought under the ADA, requires that such suits be filed within 90 days of the plaintiff's receipt of a Notice of Right to Sue from the Equal Employment Opportunity Commission. In both the Complaint and the Amended Complaint, Plaintiff alleges she received the EEOC's Notice of Right to Sue on March 16, 2006. AMI Sub was served with an Amended Summons and the Amended Complaint on November 8, 2006, over four months after this 90-day deadline expired.

- Plaintiff agreed in writing to submit all claims arising out of her employment to binding arbitration, and binding Fourth Circuit precedent requires this Court both to compel arbitration and to dismiss the case.

Plaintiff opposed both of Defendants' contentions, arguing that the Court should not dismiss and compel arbitration, and also arguing that the case should not be dismissed on the basis of untimely service under Rule 4. Plaintiff asserted, for a number of reasons, that it was unfair to force her to arbitrate the ADA claim. Plaintiff also argued that faulty information allegedly obtained from the Clerk of Court's office led to an erroneous belief that she was not required to serve the Complaint, and this led to her

failure to effect timely service.

During the hearing of this motion, the Court suggested to the parties that Defendants' arguments were valid and that Plaintiff's bases for opposing the motion were insufficient. The Court went on to express serious doubts about Plaintiff's ability, under the circumstances, to avoid dismissal of the Complaint on the basis of Plaintiff's failure to timely serve it. "[P]arties who invoke the jurisdiction of the Court must act in accordance with the rules . . .., [a]nd, of course, the operative rules are the Federal Rules of Civil Procedure." Thereafter Plaintiff withdrew both grounds for opposing Defendants' motion to dismiss.

Thereafter the Court turned to the issue of whether to compel arbitration. In the employment agreement Plaintiff signed, she promised "to submit to final and binding arbitration any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment . . .." Where, as here, all claims pleaded by a plaintiff are subject to an arbitration agreement, the Fourth Circuit has held it is proper for the trial court to dismiss all claims, rather than mere stay further judicial proceedings. *See Choice Hotels Int'l v. BSR Tropicana Resort*, 252 F.3d 707, 710 (4th Cir. 2001).

Therefore, Plaintiff having withdrawn all opposition to Defendants' motion to dismiss based on untimely service and untimely commencement of an action against her employer AMI Sub, this case is hereby dismissed with prejudice. Plaintiff is ordered, as the employment agreement requires, to submit to final and binding arbitration any justiciable claims that are in any way related to her employment or its termination.

AND IT IS SO ORDERED.

s/MATTHEW J. PERRY, JR.
UNITED STATES DISTRICT JUDGE

February 12, 2007

Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CARENDA HURT, Plaintiff, vs. SAINT FRANCIS HOSPITAL, et al. Defendants.	X X X X X X X X X X X	No. 08-2858-STA-tmp

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
AND TO REFER MATTER TO BINDING ARBITRATION
ORDER DENYING PLAINTIFF'S MOTION
TO HAVE CLAIMS REFERRED TO MEDIATION
OR PROCEED TO FEDERAL JURY TRIAL
ORDER OF DISMISSAL
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

On December 12, 2008, Plaintiff Carenda Hurt, a resident of Memphis, Tennessee, filed a pro se complaint pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., along with a motion seeking leave to proceed in forma pauperis and appointment of counsel. (Docket Entries ("D.E.") 1 & 2.) The Court issued an order on June 30, 2009, that, inter alia, granted leave to proceed in forma pauperis, denied appointment of counsel, and

directed the Clerk to issue process for, and the marshal to effect service on, Saint Francis Hospital ("SFH"). (D.E. 3.)[1]

On June 30, 2009, Defendant filed a motion, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq., to dismiss the action and refer Plaintiff's claims to final and binding arbitration pursuant to a written arbitration agreement. (D.E. 7.) Plaintiff did not file a timely response to the motion. On August 28, 2009, Plaintiff filed a motion, entitled "Plaintiff's Motion to Have Claims Referred to Mediation or Proceed to Federal Jury Trial" (D.E. 11), which appears to be, in part, a response to Defendant's motion.[2] Defendant filed a response in opposition to that motion on September 10, 2009. (D.E. 12.)

Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, provides as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being

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[1] Plaintiff was employed by St. Francis Hospital-Memphis. Defendant's legal name is AMISUB (SFH), Inc. (Declaration of Everett Liddell, dated June 30, 2009 ("Liddell Decl."), ¶ 1.)

[2] At the scheduling conference on August 20, 2009, United States Magistrate Judge Tu M. Pham granted Plaintiff's oral motion to extend the time to respond to Defendant's motion to August 28, 2009. (D.E. 10.)

> satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

"[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." Equal Employment Opportunity Commission v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 459-60 (6th Cir. 1999)(quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625-26 (1985)). The existence and applicability of an agreement to arbitrate is a matter for the courts to decide. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); John Wiley & Sons, Inc. v. Livingstone, 376 U.S. 543, 546-47 (1964).

> Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a "question of arbitrability" for a court to decide. . . . Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court.

Howsam, 537 U.S. at 84 (citations omitted).

Until her termination on June 28, 2007, Plaintiff was employed by SFH as a Registered Respiratory Therapist in the Respiratory Therapy Department. (Liddell Decl., ¶ 2.) Defendant is a Tennessee corporation in a chain of subsidiary corporations ultimately owned by Tenet Healthcare Corporation ("Tenet"). (Id., ¶ 1.) On June 12, 2006, Plaintiff signed the following Employment Acknowledgment Form:

> I acknowledge that I have received a copy of the Tenet Employee Handbook and Standards of Conduct and that I understand that they contain important information about the company's general personnel policies and about my privileges and obligations as an employee. I further understand and acknowledge that I am governed by the contents of the Employee Handbook and Standards of Conduct and that I am expected to read, understand, familiarize myself with and comply with the policies contained in them.
>
> I also understand that the company may change, rescind or add to any of the policies, benefits or practices described in the Employee Handbook, except the employment-at-will policy and the Mutual Agreement to Arbitrate referred to below, in its sole and absolute discretion, without or without prior notice. I also understand that the company will advise employees from time to time of material changes to the policies, benefits or practices described in the Employee Handbook.
>
> Furthermore, I understand, acknowledge and agree that the Employee Handbook is not a contract of employment, that my employment with the company is not for a specified term and that employment with the company

> is at the mutual consent of the employee and the company. Therefore, I hereby acknowledge that either I or the company can terminate my employment relationship at will, with or without cause or notice.
>
> In addition, I acknowledge that I have received a copy of the Tenet Fair Treatment Process brochure. I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that by agreeing to use arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the Fair Treatment Process. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association ("AAA").
>
> I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-of-pocket expense will be an amount equal to one day's pay (if I am an exempt employee)[,] eight times my hourly rate of pay (if I am a non-exempt employee), or the local civil filing fee, whichever is less and that the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except by a written statement signed by both me and the Company.

(D.E. 7-3.)

The document setting forth the Tenet Open Door Policy and Fair Treatment Process (D.E. 7-4) states, in pertinent part, as follows:

> The [Fair Treatment Process ("FTP")] applies to all employees, regardless of length of service or status, and covers all disputes relating to or arising out of an employee's employment with the company or the termination of employment. The only disputes or claims not covered by the FTP are those listed in the "Exclusions and Restrictions" section below. Examples of the type of disputes or claims covered by the FTP include claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments or any state or local discrimination laws, tort claims, or amendments or any state or local discrimination laws, tort claims, or any other legal claims and causes of action recognized by local, state or federal law or regulations. Your decision to accept employment or to continue employment with the company constitutes your agreement to be bound by the FTP. Likewise, the company agrees to be found by the FTP. This mutual agreement to arbitrate claims means that both you and the company are bound to use the FTP as the only means of resolving employment-related disputes and to forego any right either may have to a jury trial on issues covered by the FTP. However, no remedies that otherwise would be available to you or the company in a court of law will be forfeited by virtue of the agreement to use and be bound by the FTP.

(Id. at 2-3; see also id. at 9 (exclusions and restrictions.)

The FTP establishes a five-step process for resolving disputes, with the fifth step being arbitration. (Id. at 3-6.) However, an employee can bypass the first four steps of the process by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"):

> [A]ny non-waivable statutory claims, which may include . . . administrative agency charges before the Equal Employment Opportunity Commission or similar local or state agencies, are not subject to exclusive review under the FTP. This means that you may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether

> you decide to use the FTP to resolve them. However, if such an agency completes its processing of your action against the company, you must use the FTP (although Steps 1 through 4 may be skipped).

(Id. at 9.)[3]

Plaintiff filed a charge of discrimination with the EEOC on an unspecified date, and a right to sue letter was issued on September 29, 2008. (D.E. 1 at 4.) The factual allegations of Plaintiff's complaint are as follows:

> After filing complaints of discrimination with the EEOC, Company coerced several employees to make false statements about me in order to terminate my employment. Witnesses denied allegations against me to the EEOC and stated that the [sic] were forced by company and jobs were threatened.

(Id. at 3.) Plaintiff also checked boxes in the form complaint indicating that her employment was terminated due to her color. (Id. at 2.) Thus, construed liberally, Plaintiff has alleged that she was discriminated against on the basis of her color and retaliated against for engaging in protected activity under Title VII. These claims are covered by Defendant's Fair Treatment Plan and, therefore, Plaintiff has agreed to arbitrate them.

Although Plaintiff does not dispute that her claim against Defendant is covered by the arbitration agreement, she contends that Defendant has waived or, sub silentio, modified the

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[3] The FTP also requires that any request for arbitration be made within one year of the event giving rise to the dispute or, "[i]f the claim was submitted to a federal, state or local agency, then a request for arbitration of that claim must be made within 90 days of the agency's decision." (Id. at 11.)

arbitration agreement by its conduct prior to the filing of her EEOC charge:

> The First [sic] issue being that I filed my first dispute via the Fair Treatment Process (FTP) with the company in January 2007. The company did not allow for me to follow the 5-step process, the defendants gave me a constant run around to refrain from investigating and resolving my internal disputes. I wrote the Human Resource VP on several occasions and called many times to adhere to my end of the contract in question. The defendants refused to address my grievances by way of the FTP by simply ignoring my requests to move to the next step within the process. Therefore, I was forced to present my claims to the EEOC (4/16/2007 and 5/6/2007). Following my filing charges of discrimination with the EEOC I was terminated on 6/28/2007 for supposedly making a racially divisive comment, that was later revealed during the EEOC investigation to be false. . . .
>
> . . . .
>
> Last but not least, the FTP agreement confirmed that the company would not modify or transform the agreement between the company and me to use final binding arbitration. Due to the defendant's failure to follow through with the fair treatment process the binding arbitration clause was breached primarily due to modification.

(D.E. 11 at 1-2.)[4] Plaintiff also contends that the time for submitting a dispute to arbitration has expired. (Id. at 2.) Defendant contends that these issues must be resolved by the arbitrator. (Id. at 2.)

Section 2 of the FAA, 9 U.S.C. § 2, provides in relevant part as follows:

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[4] As Defendant has pointed out, Plaintiff's assertions about Defendant's failure to follow its FTP are not sworn to under penalty of perjury. (D.E. 12 at 2.)

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

"Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." John Wiley & Sons, Inc., 376 U.S. at 557. It is also presumed that the arbitrator should decide "allegation[s] of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

Applying that standard, the Supreme Court has held that the applicability of a time limit for submitting a matter to arbitration is a matter for the arbitrator to decide. Howsam, 537 U.S. at 85. Therefore, it is for the arbitrator, not this Court, to decide whether Plaintiff timely invoked her rights under the arbitration agreement. This Court is not free to relieve her from that agreement because of a concern that she may be time barred from arbitrating her claims.

The question whether the type of pre-litigation conduct alleged by Plaintiff is resolved by the court or an arbitrator is less clear-cut.

> Courts examine whether a litigant has acted in a manner "'completely inconsistent' with any reliance [on an arbitration agreement." Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 573 (6th Cir. 2003); see also Khan v. Parsons Global Servs., 521 F.3d 421, 428 (D.C. Cir. 2008) (filing a motion for summary judgment waives the right to invoke arbitration). Though we have declined to sharply define what conduct suffices, it typically involves a defendant's failure to timely invoke arbitration after being sued or its interference with a plaintiff's pre-litigation efforts to arbitrate. Highlands, 350 F.3d at 574. The strong presumption in favor of arbitration works against finding waiver in cases other than those with the most compelling fact patterns. Highlands, 350 [F.3d] at 573.

JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 393 (6th Cir. 2008). In JPD, for example, the plaintiff claimed that the defendant frustrated its ability to invoke the pre-arbitration process by asserting that its objection "was not 'sufficient for purposes of initiating the [dispute resolution] procedures." Id. The Sixth Circuit stated that, "[u]nlike contractually-based waiver, courts have long decided whether conduct inconsistent with reliance on an arbitration agreement waives a defendant's ability to seek an arbitration referral." Id. at 394. Therefore, the Court will address whether Defendant waived its right to seek arbitration through its pre-litigation conduct.

To find that Defendant waived its right to compel arbitration, the Court must conclude that its pre-litigation conduct was "completely inconsistent" with its later reliance on the arbitration agreement." Id. at 394 (citing Highlands, 350 F.3d at 573). In JPD, the Sixth Circuit held that the defendant's

actions, which it characterized as "typical posturing," id. (quoting Highlands, 350 F.3d at 574), was, at most, ambiguous and did not satisfy the "completely inconsistent test, id.

In this case, the allegations in Plaintiff's unsworn response are too vague to permit the Court to ascertain precisely what Defendant did in response to Plaintiff's earliest complaints of discrimination. Plaintiff asserts that she "wrote the Human Resources VP on several occasions and called many times" but Defendant "refused to address [her] grievances by way of the FTP by simply ignoring my requests to move to the next step within the process." (D.E. 12 at 1.) Plaintiff further avers that, "[a]lthough I was terminated in an underhanded manner I still attempted to follow through with the FTP process. I sent a letter via certified mail and called the CEO Dave Archer but never got a response." (Id. at 2.) It is not possible, from this description, to determine whether Plaintiff ever submitted a FTP Dispute Resolution Form on any issue, as required by Step 1 (D.E. 7-4 at 4) and, if so, at what step of the process the alleged stonewalling occurred.

It is unnecessary to hold a hearing to develop the factual record on this issue because, even if Plaintiff's version of events is accepted, Defendant did not act "completely inconsistent" with its agreement to arbitrate. This lawsuit does not involve the previous acts of discrimination set forth in Plaintiff's January, 2007, attempt to invoke the FTP process;

instead, she has sued only on the allegedly retaliatory discharge. Moreover, although Defendant's grievance policy does not set a time limit on completion of each of the pre-arbitration steps, and does not permit an aggrieved employee to bypass any intermediate step in the event of undue delay (see D.E. 7-4 at 4-6), an employee complaining of a violation of Title VII can bypass the first four steps of the process entirely by filing a charge of discrimination with the EEOC and, upon receipt of a right to sue letter, submitting the matter to arbitration. See supra pp. 6-7. Any posturing or stonewalling by Defendant did not interfere with Plaintiff's filing of at least three EEOC charges, and she has not argued that Defendant prevented her from commencing an arbitration after her receipt of the right to sue letter. Therefore, Defendant has not waived its right to insist on arbitration of this dispute.

The next matter to be considered is whether the action should be dismissed or, instead, whether it should be stayed pending the outcome of the arbitration. Where all claims are referable to arbitration, no useful purpose is served by leaving the action pending, and dismissal of the action is appropriate. See Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992); Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988) (holding that 9 U.S.C. § 3 does not preclude dismissal).

Therefore, the Court GRANTS Defendant's motion to dismiss this lawsuit and refer the matter to binding arbitration.

Plaintiff's motion to have her claims referred to mediation or, in the alternative, to proceed to a jury trial before this Court, is DENIED. The action is DISMISSED WITHOUT PREJUDICE and Plaintiff's claims are REFERRED TO ARBITRATION. Judgment shall be entered for Defendant.

The Court must also consider whether Plaintiff should be allowed to appeal this decision in forma pauperis, should she seek to do so. The United States Court of Appeals requires that all district courts in the circuit determine, in all cases where the appellant seeks to proceed in forma pauperis, whether the appeal is frivolous. Floyd v. United States Postal Serv., 105 F.3d 274, 277 (6th Cir. 1997). Twenty-eight U.S.C. § 1915(a)(3) provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

Pursuant to the Federal Rules of Appellate Procedure, a non-prisoner desiring to proceed on appeal in forma pauperis must obtain pauper status under Fed. R. App. P. 24(a). See Callihan v. Schneider, 178 F.3d 800, 803-04 (6th Cir. 1999). Rule 24(a)(3) provides that if a party was permitted to proceed in forma pauperis in the district court, he may also proceed on appeal in forma pauperis without further authorization unless the district court "certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis." If the district court denies pauper status, the party may file a

motion to proceed in forma pauperis in the Court of Appeals. Fed. R. App. P. 24(a)(4)-(5).

The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). The test under 28 U.S.C. § 1915(a) for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any non-frivolous issue. Id. at 445-46. The same considerations that lead the Court to grant Defendant's motion to dismiss the complaint and to refer the matter to binding arbitration also compel the conclusion that an appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by Plaintiff would not be taken in good faith and Plaintiff may not proceed on appeal in forma pauperis. Leave to proceed on appeal in forma pauperis is, therefore, DENIED. If Plaintiff files a notice of appeal, she must also pay the full $455 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the United States Court of Appeals for the Sixth Circuit within thirty (30) days.

IT IS SO ORDERED this 17th day of March, 2010.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
MINUTE ORDER

Date: 02/24/2009 Time: 01:30:00 PM Dept: C21

Judicial Officer Presiding: Judge David T. McEachen
Clerk: Nora O'Bryan

Bailiff/Court Attendant: Joe Betancourt

Reporter: Arlene Marie Ferraro-12035,

Case Init. Date: 05/09/2008

Case No: 30-2008-00106466-CU-WT-CJC Case Title: Ito vs. Tenet Healthcare Corp.

Case Category: Civil - Unlimited Case Type: Wrongful Termination

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Event Type: Motion to Compel Arbitration
Moving Party: Laura Olson, Michael Sweet, Syndicated Office Systems, Inc., Tenet Healthcare Corporation
Causal Document & Date Filed:Motion to Compel Arbitration, 11/13/2008

Appearances:

Plaintiff present by counsel Deane Shanander of Charles T. Mathews & Associates.
Defendant present by counsel Amy Findley of Allen Matkins.

The Court heard oral argument on its tentative ruling as posted on the internet and took the matter under submission.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

Date: 02/25/2009 Time: 02:22:29 PM Dept: C21

Judicial Officer Presiding: Judge David T. McEachen
Clerk: Nora O'Bryan

Bailiff/Court Attendant:

Case Init. Date: 05/09/2008

Case No: 30-2008-00106466-CU-WT-CJC Case Title: Ito vs. Tenet Healthcare Corp.

Case Category: Civil - Unlimited Case Type: Wrongful Termination

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Causal Document & Date Filed:

Appearances:

MOTION TO COMPEL ARBITRATION

No appearances.

The Court, having taken this matter under submission on 2/24/09, now rules as follows:

Defendant's Motion to Compel Arbitration and Stay is **GRANTED** pursuant to CCP 1281.2, because defendants have now presented evidence that Syndicated Office Systems is a Tenet subsidiary, and the arbitration agreement covers Tenet subsidiaries. (Rabe Declaration, paras. 3, 4, 5, 6, and 7, Plaintiff's Supplemental Brief, Ex. F, Bat SOS 787.) The arbitration agreement does not require the signatures of both parties, and written arbitration agreements generally do not have to be signed. Valero Refining Inc. v. M/T Lauberhorn (5th Cir. 1987) 813 F.2d 840, 846. Further, the mutual waiver of any right to jury trial by plaintiff and defendants constitutes sufficient consideration. Civil Code 1605. Finally, while this agreement is procedurally unconscionable it has not been shown to be substantively unconscionable, and is thus enforceable. Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal.App. 4th 1267, 1280. In addition, GRANT defendants' request that this civil action be stayed pending completion of arbitration. The Court will set a post arbitration Review Hearing on August 24, 2009 at 9:00 a.m. in Dept. C21.

Defendants Presented Evidence that Syndicated Office Systems, Inc., is a Subsidiary/Affiliate of Tenet and the Arbitration Agreement Includes Tenet Subsidiaries.

Defendants' initial motion to compel arbitration was denied, without prejudice, for lack of evidence of an arbitration agreement between plaintiff and Syndicated Office Systems, Inc. Unlike their initial motion, defendants have now presented evidence that Syndicated Office Systems is a subsidiary/affiliate of Tenet Healthcare Corporation. (Rabe Declaration, paras. 3, 4, 5, 6, and 7.) The arbitration agreement between plaintiff and SOS, as a Tenet subsidiary/affiliate.

Plaintiff Ito contends that there is no agreement between her and defendant SOS to arbitrate. Plaintiff

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concedes that the acknowledgment form includes Tenet, or its parent, subsidiaries or affiliated companies and entities, but claims that this clause was not explained to her. Plaintiff further contends that defendant SOS has not been shown to be a subsidiary of Tenet Healthcare Corporation. Plaintiff contends that in the absence of agreement, a party cannot be forced to arbitrate. Chang-Canindin v. Renaissance Hotel Associates (1996) 50 Cal.App.4th 676, 683.

But the Employee Acknowledgment Form includes both subsidiaries of Tenet and Tenet affiliated companies. Defendants have presented evidence that defendant SOS is a Tenet subsidiary/affiliate. Also, plaintiff correctly cites Chang-Canindin for the proposition that a defendant must first establish an agreement to arbitrate, but in that case the court noted that "...neither the alleged agreement nor the literature describing the Hotel's review committee procedure employs the term arbitration." Id., at 683. In contrast the Employee Acknowledgment Form and Tenet Open Door Policy both discuss arbitration, and the Employee Acknowledgment set forth that arbitration will be under the FAA and AAA rules.

Supplemental Briefing on Issue of Whether SOS is a Subsidiary/Affiliate of Tenet Healthcare Corp.

On 12-16-08, the court continued this matter so that plaintiff could conduct discovery as to the corporate relationship between Tenet Healthcare Corp and Syndicated Office Systems. The court's minute order provides that: "On the Court's own motion the hearing is continued to allow additional briefing on the subsidiary/affiliate issues."

Plaintiff was provided with the Tenet Subsidiaries List. The Tenet Subsidiaries List provides that: "All of the subsidiaries are 100% owned by Tenet Healthcare Corporation unless otherwise indicated." Syndicated Office Systems (SOS) is listed as a subsidiary, with no indication that it is not 100% owned by Tenet Healthcare Corporation. Thus, ikn addition to the declaration of Douglas E. Rabe, defendant has presented additional evidence that SOS is a subsidiary of Tenet Healthcare Corporation.

Plaintiff cites various provisions of the Corporations Code. Corporations Code 189 provides that: "(a) Except as provided in subdivision (b), 'subsidiary' of a specified corporation means a corporation shares of which possessing more than 50 percent of the voting power are owned directly or indirectly through one or more subsidiaries by the specified corporation. (b) For the purpose of Section 703, 'subsidiary' of a specified corporation means a corporation shares of which possessing more than 25 percent of the voting power are owned directly or indirectly through one or more subsidiaries as defined in subdivision (a) by the specified corporation." Corporations Code 150 provides that: "A corporation is an 'affiliate' or, or a corporation is 'affiliated' with, another specified corporaltion if it directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the other specified corporation." Sections 150 and 189 do not require that SOS be a direct subsidiary of Tenet Healthcare Corporation as indirect control through intermediaries is sufficient. Defendants have presented further evidence that defendant SOS is a subsidiary of defendant Tenet Healthcare Corporation.

The arbitration agreement covered Tenet, its subsidiaries and affiliated entities. Tenet has provided further evidence that SOS is one of its subsidiaries. Thus defendants have carried their burden of establishing an arbitration entered into between plaintiff Ito and defendant SOS as a subsidiary of Tenet.

Plaintiff's Claims that the Arbitration Agreement Must Be Signed by All Parties to Be Enforceable and Lack of Consideration.

Plaintiff also contends that no representative of defendants signed the arbitration agreement and thus it is not enforceable.

An arbitration agreement must be in writing to be enforceable under either the Federal Arbitration Act of the California Arbitration Act. CCP 1281, and Law Offices of Ian Herzog v. Law Offices of Joseph M. Frederics (1998) 61 Cal.App.4th 672, 677. The arbitration statutes require a writing, but not a signature, thus even an unsigned arbitration agreement is enforceable. Valero Refining Inc. v. M/T Lauberhorn (5th Cir. 1987) 813 F.2d 840, 846. Thus the arbitration agreement in the present case was not required to be signed.

Plaintiff's cases are distinguishable. As defendants contend, the agreements in those cases provided for both parties to signed. In Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co. (1998) 68 Cal.App.4th 83, the court was dealing with a real estate purchase agreement, that provide

r initials by both seller and buyer, and stated: "...it is clear the terms of the purchase agreement in this case contemplate both buyer and seller must be bound before either is bound to arbitrate." Id., at 91. There is a signature line on the employee in this case. Similarly, in Banner Entertainment Inc. v. Superior Court (1998) 62 Cal.App.4th 348, the court noted that: "When it is clear, both from a provision that the proposed written contract would be operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created." Id., at 358. The evidence in this case indicates that the Employee Acknowledgment Form needs to be signed by the employee, and that Tenet, its subsidiaries and affiliates agree to be bound. There is no signature line for a representative of Tenet on the Employee Acknowledgment Form. Thus the signature of plaintiff Ito as employee is sufficient, and generally a written arbitration agreement does not require any signatures unless the agreement so contemplates.

Next, plaintiff contended that there was a lack of consideration. The Employee Acknowledgment Form clearly provides that both plaintiff Ito and Tenet, its subsidiaries and affiliates, were giving up their right to a jury trial. A mutual exchange of promises to arbitrate and waive any right to jury trial constitutes sufficient consideration. Civil Code 1605, and Scottsdale Ins. Co. v. Essex Ins. Co. (2002) 98 Cal.App.4th 86, 94 to 95. Thus the arbitration agreement in the present case is supported by sufficient consideration.

Armendariz Factors and Unconscionability

A. Procedural Unconscionability

In Nyulassy v. Lockheed Martin Corp (2004) 120 Cal.App.4th 1267, the court noted that the procedural element of unconscionability generally takes the form of a contract of adhesion, which is imposed by a party of superior bargaining strength and relegates the subscribing party to only the opportunity to adhere to the contract or reject it. Id., at 1280 to 1281. In this case, the standard employee acknowledgment form was presented on a take or leave it basis as a condition for employment. Thus the arbitration agreement in this case was procedurally unconscionable. Id., at 1286.

But an agreement must be both procedurally and substnatively unconscionable to permit the court to refuse to enforce the agreement or a given clause as unconscionable. Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1533.

B. Substantive Unconscionability

Substantive unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience. Nyulassy, at 1281, citing Kinney v. United Healthcare Services, Inc. (1999) 70 Cal.App.4th 1322, 1330. Substantive unconscionability has been found in cases where: (1) the employer retained the right to appeal of arbitration awards in excess of $50,000, (2) where the employer imposed forum costs on the employee, (3) where the employee's damage remedy was limited, the employee was to pay all costs, and the forum was selected by the employer, and (4) where the contract provided that, pending the arbitration heaing, the employee lost his job, salary and benefits. Nyulassy, at 1281.

In this case, plaintiff contends that the agreement is substantively unconscionable because: (1) the agreement does not adequately identify the parties to the agreement, (2) the agreement was not signed by any Tenet or SOS representative, (3) the agreement does not provide for adequate discovery, and 94) the agreement references documents that were not provided to plaintiff Ito.

As to Items 1 and 2, whether the agreement includes defendant SOS and the alleged need for signatures by defendants to be enforceable, the arbitration agreement is not substantively unconscionable on these two grounds.

Next, Item 3 is that the agreement does not provide for adequate discovery. A.A.A. rules provide that: "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary for a full and fair determination of the issues in dispute." A.A.A. rules provide for adequate discovery.

Finally, Item 4 is that plaintiff contends that she was not given the A.A.A. rules to review at the time she signed the acknowledgment form. Plaintiff relies on the case of Adajar v. RWR Homes, Inc. (2008) 160 Cal.App.4th 563. The Adjar court first noted that: "As a general rule, a party is bound by the provisions of an agreement which he signs, even though he does not read them and signs unaware of their existence." Id., at 571, citing Chan v. Drexel Burnham Lamber, Inc. (1986) 178 Cal.App.3d 632, 641. But there is an exception if the incorporated provisions are not reasonably available. Id. The Adajar court further commented on the variations in the warranty books rendering which was applicable to plaintiff uncertain. Id., at 570. The Adajar court thus held that arbitration could not be compelled because the builders failed to prove the existence of an arbitration contract, since which warranty booklet applied could not be determined.

In contrast, in this case the A.A.A. rules are avilable. These rules are even available on-line. Hence the A.A.A. rules are reasonably available if a party wishes to review them. Therefore the general rule that party is bound by the provisions of an agreement, even if he or she does not read them and it unaware of their existence, applies in this case.

Plaintiff Ito has not established that the arbitration agreement is unconscionable. The A.A.A. arbitration rules satisfy the Armendariz factors for employment law cases. Thus, while the arbitration agreement in this case is procedurally unconscionable, it is not substantively unconscionable, and since both are required to permit a court not to enforce an agreement on the grounds of unconscionability, the arbitration agreement in this case is enforced.

C. The *Armendariz* Factors

In Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 831, the Supreme Court set forth several factors as to the enforceability of arbitration agreements involving employment and statutory claims. These factors include that such agreement: 1. Provide for a neutral arbitrator; 2. Impose no limit on the employee's otherwise available remedies; 3. Provide for adequate discovery; 4. Provide for a written arbitration award permitting some level of judicial review of the same, and; 5. Impose no costs on the employee.

The A.A.A. arbitration rules provide for all of these employment cases. A.A.A. provides for a neutral arbitrator. A.A.A. rules provide that the arbitrator "...grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law." A.A.A. rules also provide that: The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary for a rull and fair determination of the Issues in dispute." A written arbitration award is required within 30 days. Further, the rules vary somewhat based on the nature of the employer arbitration agreement, but a section of the A.A.A. rules provides that: "All expenses of the arbitrator, including required travel and other expenses, in any AAA expenses, as well as costs relating to proof of witnesses produced at the direction of the arbitrator, shall be borne by the employer." Finally, the Employee Acknowledgment Form sets forth limits on any costs to be borne by the employee. Thus the Armendariz factors are satisfied under the present Tenet arbitration agreement.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Central Justice Center
700 W. Civic Center Drive
Santa Ana, CA 92702

SHORT TITLE: Ito vs. Tenet Healthcare Corp.

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **30-2008-00106466-CU-WT-CJC**

I certify that I am not a party to this cause. I certify that a true copy of the attached was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at Santa Ana, California, on 02/26/2009.

Clerk of the Court, by: Nora O Bryan _____, Deputy

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
501 W Broadway-15th Floor
San Diego, CA 92101-3541

CHARLES T. MATHEWS & ASSOCIATES
2596 Mission Street # 204
San Marino, CA 91108

☐ Additional names and address attached.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

Date: 02/15/2008 Time: 09:00:00 AM Dept: C29
Judicial Officer Presiding: Judge W. Michael Hayes
Clerk: Kathy Peraza

Bailiff/Court Attendant: M Aguilar

Reporter: , Wendi J. Vallarino-9337

Case Init. Date: 06/26/2007

Case No: 07CC07284

Case Title: MAY-OPSTAD VS US HEALTHWORKS MEDICAL GROUP

Case Category: Civil - Unlimited

Case Type: Other employment

Event Type: Motion to Compel Arbitration

Moving Party: FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER, TENET HEALTHCARE CORPORATION

Causal Document: Motion to Compel Arbitration

Appearances:

NO APPEARANCES

Warren Higgins, counsel for moving party, called to submit to the tentative ruling.

The tentative ruling posted on the internet this date becomes the final ruling as follows:

Motion 1: Motion of Fountain Valley Regional Hospital and Medical Center and Tenet Healthcare Corporation for an order to compel Arbitation.

Ruling:

Motion 1: The unopposed motion to compel arbitration is granted as to the moving defendants Fountain Valley Regional Hospital and Medical Center and Tenant Healthcare Corporation. The action is stayed as to those defendant and shall continue as to the remaining defendant U.S. Healthworks Medical Group a Professional Corporation. The Court will set an Order to Show Cause re dismissal as to the moving parties for August 12, 2008. If the case is dismissed before that day as to the stayed defendants, the obviously no appearance is necessary.

The Order to Show Cause re: Dismissal is scheduled for 08/12/2008 at 09:00 AM in Department C29.

Filed 8/21/13 McElroy v. Tenet Healthcare CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KRISTIANE McELROY, Plaintiff and Respondent, v. TENET HEALTH CARE CORPORATION, et al., Defendants and Appellants.	G047300 (Super. Ct. No. 30-2012-00543205) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Steven L. Perk, Judge. Reversed and remanded.

Littler Mendelson, Elizabeth Staggs-Wilson, Keith A. Jacoby, Henry D. Lederman and Anthony G. Ly for Defendants and Appellants.

Capstone Law, Miriam Schimmel, Glenn A. Danas, Robert K. Friedl and Katherine Den Bleyker for Plaintiff and Respondent.

INTRODUCTION

Tenet Healthcare Corporation, Tenet California, Inc. (collectively, Tenet), and Fountain Valley Regional Hospital and Medical Center appeal from an order denying their petition to compel arbitration of a wage-and-hour lawsuit brought by one of the hospital's nurses, Kristiane McElroy, and framed as a potential class action. McElroy had signed an arbitration agreement seven years before filing her lawsuit and Tenet's petition sought to enforce that agreement. The trial court denied the petition on several grounds, going both to the existence and the enforceability of the agreement.

We reverse. The agreement was enforceable under both federal and California law, and McElroy presented insufficient evidence to support her claim it was unconscionable, so the trial court should have granted the petition. In addition, the court should have entered an order dismissing the class action allegations from the complaint, because, as the court observed, "[c]lass arbitration cannot be 'inferred' from an agreement silent on the issue."

FACTS

McElroy has worked as a nurse at Fountain Valley Hospital since 1995.[1] In February 2012, she became the named plaintiff in a wage-and-hour class action against Tenet and the hospital.[2] Appellants moved to compel arbitration pursuant to an employee handbook acknowledgement form McElroy signed in December 2004. In 2001, Tenet had sought to obtain her signature on an acknowledgement form containing an identical arbitration agreement, but McElroy refused. She continued to work at the hospital

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1 McElroy was covered by collective bargaining agreements between the hospital and the United Nurses Associations of California/Union of Health Care Professionals.

2 The relationship between Tenet and the hospital is not explained. Presumably one of the Tenet defendants has some kind of employment relationship with hospital personnel; the hospital's employees were subject to the Tenet Open Door Policy and Fair Treatment Process (FTP), which referred to "dispute[s] relating to your employment with the company," identified as "Tenet." The document McElroy signed in 2004 acknowledged receipt of the "Tenet Healthcare Corporation Employee Handbook and Standards of Conduct."

notwithstanding her refusal. And in 2004, she signed the employee handbook acknowledgement.

The signed acknowledgement form had several provisions bearing on this appeal. McElroy acknowledged that she had received the Tenet employee handbook and standards of conduct and that she was bound by them, to the extent they did not conflict with her collective bargaining agreement. The acknowledgement also informed McElroy that Tenet could change the policies, benefits, and practices described in the handbook at its discretion, except for the company's at-will employment policy and the arbitration agreement. McElroy also acknowledged and agreed that the handbook did not constitute a contract of employment, and that her employment was at-will.

The last two paragraphs of the form dealt with arbitration. The first paragraph acknowledged the receipt of Tenet's Fair Treatment Process (FTP) brochure. McElroy then agreed to submit all employment-related disputes to binding arbitration and to use the FTP.[3] She also agreed to have the arbitration conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association (AAA). The second paragraph limited her arbitration expenses to one day's pay and prohibited any change in the arbitration agreement except by mutual consent in writing. The acknowledgement occupies one page, is dated December 27, 2004, and is signed Kristiane McElroy. The two paragraphs regarding arbitration occur immediately above this signature.

The court denied the petition to compel arbitration on multiple grounds. It held that the agreement to arbitrate did not exist because the employer's ability to make unilateral changes rendered the contract illusory, because the AAA's procedural rules were not shown to have been provided or readily available, and because the

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3 The FTP outlines a five-step process for dispute resolution, culminating in binding arbitration. The other steps are submission to a supervisor, submission to a department head, submission to the administration, and submission to the FTP committee.

accompanying handbook specifically disclaimed the creation of a contract. The court also found the agreement procedurally unconscionable because of the lack of McElroy's signature, the renaming of the form between 2001 and 2004, the "take it or leave it" nature of the agreement, and the "burial" of the arbitration agreement in the handbook. The agreement was substantively unconscionable because of the employer's unilateral ability to alter its terms and the lack of any reference in the arbitration provisions to the requirement of the employee to share arbitration fees. The court also held, "Class arbitration cannot be 'inferred' from an agreement silent on the issue. The [collective bargaining agreement] does not affect the enforceability of existing employee agreements to be bound by the FTP."

DISCUSSION

Congress enacted the Federal Arbitration Act (9 U.S.C. § 1 et seq.) to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." (*Moses H. Cone Memorial Hospital v. Mercury Construction Corporation* (1983) 460 U.S. 1, 24.) "[T]his body of . . . law is enforceable in both federal and state courts." (*Perry v. Thomas* (1987) 482 U.S. 483, 489.) A conflicting state law is pre-empted. (*AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1749-1650; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10.) State procedural rules relating to arbitration apply, so long as they do not interfere with the purpose of the federal law, and California courts use California motion procedure to determine whether to compel arbitration. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409-410 (*Rosenthal*).)

On appeal, we review the enforceability of the arbitration agreement de novo, under general principles of California contract law. (*Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761, 764); see also *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 475-476 [state contract formation law applies].) Unconscionablity is a question of law unless

there are factual conflicts in the evidence. If, however, the extrinsic evidence is entirely written, the reviewing court subjects the contract to independent review. (*Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1663.)

In *Rosenthal*, our Supreme Court stated, "[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists .... Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal, supra,* 14 Cal.4th at p. 413.) Once the moving party has established the agreement's existence, the burden shifts to the party opposing arbitration to establish, by a preponderance of the evidence, the factual basis for any defense to enforcement. (*Ibid.*)

I. Existence of the Arbitration Agreement

The trial court identified three reasons for finding the agreement to arbitrate non-existent. First, the AAA's procedural rules were not shown to have been provided or readily accessible.[4] Second, the handbook disclaimed the formation of a contract. Finally, the agreement was illusory because the employer reserved the right to make unilateral changes in FTP policy.

A. Incorporation by reference

Under California law, a contract may include the provisions of a document that is not physically part of the basic contract. "'For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily

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[4] The last sentence of the first paragraph dealing with arbitration states, "I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association ('AAA')."

available to the contracting parties.'" (*Williams Constr. Co. v. Standard-Pacific Corp.* (1967) 254 Cal.App.2d 442, 454, quoting *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.* (1947) 81 Cal.App.2d 437, 447, *Scott's Valley Fruit Exchange* disapproved on other grounds in *Hischemoeller v. National Ice & Cold Storage Co. of Cal.* (1956) 46 Cal.2d 318, 328; see also *Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, 790-791 [arbitration clause in separate title insurance policy incorporated into preliminary report].)

Although appellants disputed the trial court's finding on this issue, McElroy did not argue in this court that not getting a copy of the AAA rules rendered the arbitration agreement non-existent.[5] Accordingly, the issue is submitted on appellants' brief. (See *County of Butte v. Bach* (1985) 172 Cal.App.3d 848, 867.)

We agree with appellants that the reference to the AAA rules meets the requirements under California law for incorporation by reference. The rules are clearly and unequivocally identified in the arbitration provision, and they are readily accessible on the AAA Web site. McElroy cannot claim unfamiliarity with the arbitration process and its implications; she stated in her opposition that she refused to sign the arbitration agreement in 2001 because it would force her to relinquish her rights. Finally, McElroy's consent to the incorporation of the AAA rules is indicated by her signature on the form.

McElroy has not directed us to a published opinion finding an arbitration agreement non-existent because procedural rules were not provided along with the contract, and we have found none.[6] Any such blanket finding would single out arbitration agreements for special treatment and thus would be contrary to both federal

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5 McElroy argued instead that the failure to include a copy of the AAA rules rendered the arbitration agreement procedurally unconscionable, a finding the trial court did not make. The courts that have found incorporation of rules by reference unconscionable have done so because of some defect or unfairness in the rules themselves. (See *Ruhe v. Masimo Corp.* (C.D.Cal. Sept. 16, 2011, SACV 11-00734-CJC) 2011 U.S. Dist. Lexis 104811, pp. *9-*10; *Lucas v. Gund, Inc.* (C.D. Cal. 2006) 450 F.Supp.2d 1125, 1131.) McElroy has not made this argument.

6 The AAA rules for employment arbitration are 36 pages long. One can imagine the contrary argument if a copy of the rules was provided – the employee was overwhelmed by too much paper.

and state law. (See *Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 235 (*Pinnacle*).) California law permits incorporation by reference into contracts so long as certain conditions are met, as they were here.

B. Illusoriness

Another reason that the trial court articulated for finding a contract non-existent was "FTP language reserved in employer's favor, unilateral right to changes in FTP policy makes it illusory." Contract provisions reserving to one party the power to vary performance do not render the contract illusory, so long as principles such as the covenant of good faith and fair dealing limit the exercise of this power. (See *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214 and cases cited therein; see also *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 705-708 and cases cited therein.) Thus, even if the acknowledgment had reserved to Tenet the right to make changes in the arbitration agreement, the agreement would not necessarily have been illusory.

But the acknowledgment and the FTP brochure actually did not reserve this right. The acknowledgement provided, "I also understand that the Company may change, rescind or add to any of the policies, benefits or practices described in the Employee Handbook, *except the employment-at-will policy and the Mutual Agreement to Arbitrate referred to below*, in its sole and absolute discretion . . . ." (Italics added.) The second of the arbitration paragraphs provided, "I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except in writing by both me and the Company." The FTP brochure stated, "The company will not modify or change the agreement between you and the company to use final and binding arbitration to resolve employment-related disputes without notifying you and obtaining your consent to such changes. However, the company may change or modify FTP procedures from time-to-time without advance notice and without consent of employees. Additionally, the parties

agree that the FTP procedures may be modified by the company as needed to comport with applicable state or federal law." What Tenet reserved was the unilateral right to change the FTP procedures, but not the FTP policy or the underlying agreement to arbitrate. Any changes made in the procedures would be governed by the implied covenant of good faith and fair dealing. (See *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 15-16.) The agreement to arbitrate was not illusory.

C. Disclaimer

The final obstacle to finding the existence of an agreement to arbitrate was the lack of contract formation. The trial court stated, "Receipt of the Handbook does not create a contract especially when the Handbook disclaims formation of a contract."

This conclusion is erroneous for at least two reasons. First, the employee handbook was not in evidence, so there is no way of knowing what it claimed or disclaimed. Second, if the trial court meant the *acknowledgement* disclaimed contract formation, the court misread the document. The acknowledgement stated, "I understand, acknowledge and agree that the Employee Handbook is not a contract of employment, that my employment with the Company is not for a specified term and that employment with the Company is at the mutual consent of the employee and the Company. Therefore, I hereby acknowledge that either I or the Company can terminate my employment relationship at will, with or without cause or notice, except to the extent that any applicable collective bargaining agreement provides otherwise."[7] In the next paragraph, McElroy "voluntarily agree[d]" to use the FTP and to submit employment-related disputes to arbitration.

What the acknowledgement disclaimed was any basis for asserting the employee was something other than an at-will employee, one who could be terminated

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7 The FTP brochure reinforced this message: "Nothing in the FTP shall be construed to create a contract of employment, express or implied, not does the FTP in any way alter the at-will nature of the employment relationship between you and the company."

without cause. (Cf. *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389-390.) It did not repudiate or cancel out the separate arbitration agreement formed in the last two paragraphs before McElroy's signature. (See *Patterson v. Tenet Healthcare* (8th Cir. 1997) 113 F.3d 832, 835; see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 399, 402-404.)

Under well established principles of contract interpretation, the existence of an agreement to arbitrate was established. As courts have repeatedly held, arbitration agreements must be analyzed as all contracts are. They cannot be subjected to special requirements, such as no incorporation by reference or no unilateral changes.

II. Unconscionability

Once an agreement to arbitrate has been found to exist, the burden shifts to the party opposing arbitration to show why it should not be enforced. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) In this case, the trial court ruled that the agreement could not be enforced because it was unconscionable.

Unconscionability has both a procedural and a substantive element. Procedural unconscionability focuses on oppression or surprise. Substantive unconscionability looks to whether contract terms are one-sided or overly harsh. (*Pinnacle, supra,* 55 Cal.4th at p. 246.) Both procedural and substantive unconscionability must be present to preclude enforcement of a contract, although they need not be present in equal proportions. (*Armendariz v. Foundation Health Care Psychcare Servicec, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).)

A. Procedural Unconscionablity

The court identified the indicators of procedural unconscionability as follows: "plaintiff's lack of signature, the [form] was renamed in 2004, and [McElroy's] understanding that she had to sign because 'take it or leave it' and no opportunity to negotiate and the arbitration clause was buried in the handbook." The record supports none of these grounds for finding unconscionability.

The acknowledgement bears McElroy's signature, and she did not maintain otherwise in her opposition. It is not clear where, or even if, the arbitration paragraphs appeared in the employee handbook, because the handbook is not in the record.[8] What is clear, however, is that McElroy's signature appears directly below the two paragraphs dealing with arbitration. Most of the text dealing with arbitration in the first of the two paragraphs is in bold type. The arbitration clauses were not "buried." The fact that the 2004 form bears a somewhat different name from the one McElroy refused to sign in 2001[9] is hardly misleading, and McElroy has not explained in her brief why the difference in title should preclude enforcement.[10]

The trial court also expressed concern that this was a contract of adhesion and McElroy had to sign the agreement. A contract of adhesion is a standardized contract imposed by the party with superior bargaining strength and offered to the other party on a "take-it-or-leave-it" basis, with no opportunity for negotiating the terms. (*Armendariz, supra,* 24 Cal.4th at p. 113.) There is no question in this case that the arbitration agreement was adhesive, giving McElroy no chance to negotiate before she signed.

Whether McElroy had to sign the agreement is, however, a different issue. Unlike the usual adhesion contract, which an employee must sign to get or keep a job, this contract could be refused without penalty. McElroy could elect to "leave it" and still work at the hospital. McElroy had refused to sign the identical arbitration agreement in 2001 without any apparent effect on her employment. The collective bargaining

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8 The copy of the employee handbook acknowledgement in the record has the number 11 at the bottom of the page and "Section V" in the top right-hand corner.

9 The 2001 form was entitled "Employee Acknowledgement Form." The 2004 form was entitled "Employee Handbook Acknowledgment." Both documents acknowledge receipt of the employee handbook, and both contain an arbitration agreement.

10 McElroy claims that the difference between the 2001 acknowledgement, which was evidently a stand-alone document, and the 2004 form, which was incorporated into a handbook, means that Tenet was trying to trick its employees into signing the arbitration agreement. Assuming the arbitration agreement was incorporated into the handbook – which McElroy did not introduce into evidence – the agreement itself appeared directly above her signature, and a substantial part of the first paragraph was in bold-faced type. Even if McElroy did not read the entire handbook, she cannot be excused from reading the one page she signed. (See *Rosenthal, supra,* 14 Cal.4th at p. 423.)

agreements in force between 2007 and 2013 specifically provided that "[n]o retaliation or adverse action may be taken against anyone who exercises the option not to sign the FTP." The only opposing evidence McElroy presented on this issue was talks with unnamed colleagues and her own "observations," which led her to believe she would be terminated if she did not sign the acknowledgement.[11] McElroy did not explain what had happened after 2001 – when she refused to sign an identical arbitration agreement because it would "force [her] to relinquish [her] rights" – that could lead her to believe she would now lose her job if she did not sign.[12] "[W]here a party to an arbitration agreement is given an opportunity to decline that agreement, no finding of unconscionability is possible." (*Swarbrick v. Umpqua Bank* (E.D.Cal., Aug. 4, 2008, 2:08-CV-00532-MCE) 2008 U.S. Dist. Lexis 73678, at p. *12.)

It was McElroy's burden to show procedural unconscionability. She did not present the evidence needed to carry this burden.

B. Substantive Unconscionability

Finally, the court found substantive unconscionability in the ability of the employer to unilaterally change the terms of the agreement and the absence of any reference to fee-sharing in the acknowledgment, although it was mentioned in the policy brochure itself.[13]

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11 What her colleagues said and what she observed were not specified.

12 McElroy argues that the compulsory aspect of the agreement is established by the provision in the FTP brochure stating, "Your decision to accept employment or to continue employment with the company constitutes your agreement to be bound by the FTP." (Italics omitted.) This provision might be relevant if McElroy had refused to sign the acknowledgement and Tenet had tried to enforce the arbitration agreement anyway. But she did sign, so whether her continued employment constituted acceptance of the FTP is immaterial. More to the point, the brochure did not say she would lose her job if she did not sign. On the contrary, the brochure stated that the FTP did not apply to a union member unless the employee agreed to it.

13 McElroy argued on appeal, although she did not do so in the trial court, that the agreement is unconscionable because the FTP's five-step process put obstacles in the way of arbitration. If the goal is to reach arbitration quickly, then the intervening steps could be considered obstacles. If, however, the goal is to resolve disputes, then the process gives the aggrieved employee multiple chances to reach it before wheeling out the cumbersome and expensive arbitration machinery. McElroy, for example, complained about unpaid overtime and unpaid off-the-clock hours. Surely it would be possible to determine whether she was owed additional money, by examining documents such as payroll records, without involving an arbitrator.

We have already dealt with the employer's discretion to change the terms of the agreement and, in any case, the arbitration clause specifically prohibits any change in the arbitration agreement without mutual consent in writing. Tenet did not have the discretion to change the arbitration provisions unilaterally.

The court was also mistaken about the fee-sharing. The agreement states, "[I]f I submit a request for binding arbitration, my maximum out-of-pocket expenses for the arbitrator and the administrative cost of the AAA will be an amount equal to one day's pay (if I am an exempt employee) or eight times my hourly rate of pay (if I am a non-exempt employee), and that the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA."[14] The fee-sharing arrangement was spelled out in the acknowledgment, and McElroy presented no evidence that any such requirement was "overly harsh" or "one-sided." The trial court erred when it refused to enforce the agreement because it was substantively unconscionable.

III. Class Allegations

Although appellants asked the trial court to dismiss McElroy's class claims with prejudice, the court did not explicitly rule on this request. Nevertheless, it agreed with appellants' position that consent to arbitrating class claims cannot be inferred from an agreement that is silent on the subject. This ruling comports with both federal and state law.

In *Stolt-Nielsen S.A. v. Animalfeeds International Corp.* (2010) 559 U.S. 662 [130 S.Ct. 1758] (*Stolt-Nielsen*), the United States Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (*Id.* at p. __ [130 S.Ct. at p. 1775].) "An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate.

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14 In the FTP brochure itself, the provision is slightly different. The employee's fees are one day's pay, eight hours' pay, or the local civil filing fee, whichever is less.

This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." (*Ibid.*)

In *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506 (*Kinecta*), the court followed *Stolt-Nielsen* in a wage-and-hour case that the plaintiff was attempting to bring as a class action. (*Id.* at pp. 511-512.) Because the language of the arbitration agreement authorized only individual claims, class-action arbitration between employer and employee could not be compelled. (*Id.* at pp. 518-519; see also *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1130-1131.) The court therefore dismissed the class action claims. (*Kinecta, supra,* 205 Cal.App.4th at p. 519.)

Like the agreements in *Kinecta* and *Nelsen*, the arbitration agreement in this case unmistakably contemplates a two-party arbitration. The agreement throughout uses "I," "my," and "me" to refer to McElroy as one contracting party and "the Company" as the other. (See *Kinecta, supra,* 205 Cal.App.4th at p. 517.) Nothing indicates that either party consented to class arbitration. The court should have formally dismissed the class allegations of the complaint.

DISPOSITION

The court's order denying appellants' petition to compel arbitration is reversed, and the court is directed to enter an order granting the petition to compel arbitration of respondent's individual claims and dismissing the class action allegations from the complaint. Appellants are to recover their costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.

Filed 7/26/13 Mercado v. Doctors Med. Center of Modesto CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SUSAN MERCADO,

Plaintiff and Respondent,

v.

DOCTORS MEDICAL CENTER OF MODESTO, INC.,

Defendant and Appellant.

F064478

(Super. Ct. No. 670116)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus. Timothy W. Salter, Judge.

Horvitz & Levy, David S. Ettinger, James A. Sonne, Jeremy B. Rosen; Fox Rothschild and Jeffrey D. Polsky for Defendant and Appellant.

Rancaño & Rancaño and David C. Rancaño for Plaintiff and Respondent.

-ooOoo-

Defendant appeals from the order denying its petition to compel arbitration of the disability discrimination claims asserted in plaintiff's complaint. The trial court denied

the petition on the ground the arbitration agreement was unconscionable. We conclude the agreement was not substantively unconscionable and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a complaint against her employer, Doctors Medical Center of Modesto, Inc., alleging three causes of action sounding in disability discrimination. In response, defendant filed a petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2. Defendant asserted plaintiff agreed to arbitrate employment disputes by signing an employee acknowledgement form, which stated that she acknowledged receipt of the employee handbook and that she voluntarily agreed to submit all employment related disputes, with specified exceptions, to binding arbitration in accordance with the employee handbook. Plaintiff opposed the petition, arguing there was no enforceable agreement to arbitrate because defendant did not sign the acknowledgement, plaintiff was not aware when she signed the acknowledgement that it included an arbitration provision, and the arbitration agreement was unconscionable. After hearing, the trial court denied the petition to compel on the ground the arbitration agreement was unconscionable and therefore unenforceable. Defendant appeals, arguing the arbitration agreement is not unconscionable and a recent United States Supreme Court case, *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __, 131 S.Ct. 1740 (*Concepcion*), held that the Federal Arbitration Act (FAA) preempted the state authorities on which the trial court's reasoning was based.

DISCUSSION

I. Burden of Proof and Standard of Review

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it

determines that [¶] ... [g]rounds exist for the revocation of the agreement." (Code Civ. Proc., § 1281.2, subd. (b).) The party seeking arbitration bears the burden of proving by a preponderance of the evidence the existence of an arbitration agreement; the party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense to enforcement of the agreement, including unconscionability. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*); *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) "Absent conflicting extrinsic evidence, the validity of an arbitration clause, including whether it is subject to revocation as unconscionable, is a question of law subject to de novo review." (*Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 702 (*Serpa*).) Where the trial court's decision is based on resolution of disputed facts, however, the substantial evidence standard of review applies to the factual findings. (*Amalgamated Transit Union Local 1277 v. Los Angeles County Metropolitan Trans. Authority* (2003) 107 Cal.App.4th 673, 685.)

II. Effect of *Concepcion*

The decision in *Concepcion* did not preclude the trial court from relying on unconscionability as a ground for invalidating an arbitration agreement. In *Concepcion*, the court overruled *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), which had held that class action waivers in certain adhesive consumer contracts were per se unconscionable when the party with the superior bargaining power engaged in a scheme to defraud large numbers of consumers out of individually small sums of money; *Discover Bank* reasoned such waivers had the practical effect of exempting the wrongful party from responsibility for its own fraud. (*Concepcion, supra*, 131 S.Ct. at p. 1746.) *Concepcion* held that the rule set out in *Discover Bank* was preempted by the FAA. (*Concepcion*, at p. 1753.) The FAA, which was enacted in response to widespread judicial hostility to arbitration agreements, provides that arbitration agreements are

"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. § 2.) The final provision, the "saving clause," "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Concepcion,* at p. 1746.) The *Concepcion* court concluded the FAA did not permit a state to rely on categorical rules prohibiting arbitration of a particular type of claim. (*Id.* at p. 1747.) Although California's general unconscionability doctrine was not such a categorical rule, because the *Discover Bank* rule would apply to most consumer contracts, it stood "as an obstacle to the accomplishment of the FAA's objectives, " one of which was to "'ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.'" (*Concepcion,* at p. 1748.) Allowing a party to a consumer contract to demand class wide arbitration notwithstanding an express class arbitration waiver in the arbitration agreement "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Ibid.*) Further, imposing class wide arbitration on a party who did not agree to it is inconsistent with the FAA. (*Id.* at pp. 1750–1751.)

Concepcion does not "preclude[] a court from relying on unconscionability as a ground for invalidating an arbitration provision ... for three reasons. First, our Supreme Court's decision in *Pinnacle*, which was handed down more than a year after *Concepcion*, applied California's traditional unconscionability principles in concluding that an arbitration provision governing a condominium complex was not unconscionable. Second, *Concepcion* itself recognized the continuing validity of the doctrine of unconscionability as a basis for declaring an arbitration agreement unenforceable. [Citation.] Third, the California Courts of Appeal have recognized that '*Concepcion* did

not eliminate state law unconscionability as a defense to the enforcement of arbitration agreements subject to the Federal Arbitration Act.' [Citations.]" (*Vargas v. SAI Monrovia B, Inc.* (2013) 216 Cal.App.4th 1269, 1287–1288.)

Accordingly, unconscionability remains a valid basis for refusing to enforce an arbitration agreement when it does not interfere with the fundamental attributes of arbitration.

III. Agreement to Arbitrate

Plaintiff's complaint alleges she was employed by defendant. Defendant presented evidence that plaintiff entered into an agreement to arbitrate disputes arising out of her employment with defendant. The agreement was headed "EMPLOYEE ACKNOWLEDGMENT," bore plaintiff's signature, and was dated April 23, 2007. It contained the following language:

> "I acknowledge that I have received a copy of the Tenet Fair Treatment Process brochure. *Except to the extent that any applicable collective bargaining agreement provided otherwise*, I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes except 'Excluded Issues' that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy of any such claim or dispute against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that, by agreeing to use of arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the Fair Treatment Process. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of American Arbitration Association ('AAA').
>
> "I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-or pocket [*sic*] expenses for the arbitrator and the administrative cost of the

> AAA will be an amount equal to one day's pay (if I am an exempt employee) or eight times my hourly rate of pay (if I am a non-exempt employee), and that the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except in writing by both me and the Company."

In support of its petition to compel arbitration, defendant presented evidence that defendant is a subsidiary of Tenet. It also presented an excerpt from its employee handbook setting out the provisions of the Fair Treatment Process (FTP). The FTP included five steps for resolving employment disputes, the last of which was final and binding arbitration. It provided that the FTP applied to all employees and covered "all disputes relating to or arising out of an employee's employment with the company or the termination of employment." It stated: "Your decision to accept employment or to continue employment with the company constitutes your agreement to be bound by the FTP. Likewise, the company agrees to be bound by the FTP. This mutual agreement to arbitrate claims means that both you and the company are bound to use the FTP as the only means of resolving employment-related disputes and to forego any right either may have to a jury trial on issues covered by the FTP."

Plaintiff admitted she was employed by defendant; she did not dispute that she signed the arbitration agreement submitted by defendant. Rather, she declared that she "was under the impression" the employee acknowledgment she signed on April 23, 2007, "was a code of ethics agreement" between herself and defendant. She stated: "Since my hire in 2001 I have had to sign a code of ethics agreement every year in order to keep my employment." Plaintiff asserted she "believed [she] had no choice but to sign it in order to keep [her] employment with DMC."

Plaintiff, who bore the burden of proving any defense to enforceability of the arbitration agreement, presented no evidence of the circumstances under which she signed the agreement. There was no evidence that defendant, or anyone connected with

it, misrepresented the nature of the document she signed or deceived her in any way about the content of the acknowledgment form. She presented no evidence defendant prevented her from reading the document before signing it, or denied her sufficient time to read it. Apparently, she simply signed the employee acknowledgment without reading it to determine its content. A party who fails to read a contract, but objectively manifests assent by signing it, may not avoid its effect by claiming he or she did not agree to its terms. (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1589 (*Stewart*).) "'It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.' [Citations.]" (*Id.* at pp. 1588–1589.)

Plaintiff argues that the arbitration agreement is not enforceable because it is not mutually binding on plaintiff and DMC. She asserts the Employee Acknowledgment was an agreement between plaintiff and Tenet only, concerning her employment with Tenet (which did not exist), and she had no dispute with Tenet (which was not a party to her action against DMC). She points to language in the Employee Acknowledgment stating that she voluntarily agreed "to submit to final and binding arbitration any and all claims and disputes ... related in any way to my employment or the termination of my employment *with Tenet*." (Italics added.) From this she concludes DMC was not a party against whom she could enforce the arbitration agreement; consequently, it was not mutually binding or mutually enforceable.

The Employee Acknowledgment, however, contains provisions mentioning Tenet and numerous other provisions concerning "the Company." The first paragraph contains an acknowledgment of the receipt of the Tenet Healthcare Corporation Employee Handbook and Standards of Conduct, which contain "important information about the Company's general personnel policies and about my privileges and obligations as an employee." The Employee Acknowledgment reflects plaintiff's understanding that her

"employment with the Company is not for a specified term" and "either I or the Company can terminate my employment relationship at will." The arbitration agreement reflects plaintiff's voluntary agreement to use "the Company's Fair Treatment Process" and to submit to arbitration her claims or disputes related to her employment or termination of her employment with Tenet, including claims against Tenet or its subsidiary. The agreement also states that she and "the Company" agree to forego the right to a jury trial, and will mutually choose the arbitrator. It states that, in exchange for plaintiff's agreement to arbitrate, "the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration."

Plaintiff conceded in her declaration that DMC was her employer. She did not dispute defendant's evidence that DMC was a subsidiary of Tenet. Although neither party submitted any provision of the agreement or the FTP that defined the term "the Company," in context, it is clear the references to "the Company" in the arbitration agreement meant plaintiff's employer, DMC. Plaintiff offers no explanation why, if the term "the Company" referred to Tenet and she was not employed by Tenet, as she contends, she signed an acknowledgment of her at will employment with Tenet.

The trial court found that "although there is an apparent agreement to arbitrate any disputes or claims that are related in any way to employment or termination of employment with Defendant medical center, other grounds exist for the revocation of such agreement." Thus, it found that an arbitration agreement existed between plaintiff and DMC, but that it was revocable, or unenforceable, because it was unconscionable. To the extent this finding was based on factual evidence, such as the identity of plaintiff's employer, it is supported by substantial evidence. To the extent it is based on interpretation of the terms of the Employee Acknowledgment and the FTP, we agree that the agreement was between plaintiff and DMC and concerned her employment with DMC, although it also included some provisions concerning disputes she might have with

DMC's parent, Tenet. Plaintiff's claim that the agreement lacked mutuality because DMC was not bound by it is without merit.

The trial court correctly found there was "an apparent agreement to arbitrate any disputes or claims that are related in any way to employment or termination of employment with Defendant medical center." The remaining question is whether the unconscionability of that agreement justified the trial court's refusal to enforce it.

IV. Unconscionability

Under California law, unconscionability is a defense against enforcement of contracts in general: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Civ. Code, § 1670.5, subd. (a).) "Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citation.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."' [Citation.]" (*Pinnacle, supra*, 55 Cal.4th at p. 246.)

"Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' [Citation.] '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the

term is unenforceable, and vice versa.' [Citation.]" (*Pinnacle, supra*, 55 Cal.App.4th at p. 247.)

A. Procedural unconscionability

"[P]rocedural unconscionability requires oppression or surprise. '"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."' [Citation.]" (*Pinnacle, supra*, 55 Cal.4th at p. 247.) "The procedural element of an unconscionable contract generally takes the form of a contract of adhesion. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071 (*Little*).) A contract of adhesion is "'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.]" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113.) "It is well settled that adhesion contracts in the employment context, that is, those contracts offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability." (*Serpa, supra*, 215 Cal.App.4th at p. 704.)

Plaintiff presented no evidence of the circumstances under which she signed the Employee Acknowledgment, so there was no specific evidence it was presented to her on a take-it-or-leave-it basis. The FTP, however, which plaintiff agreed to use to resolve any employment disputes, included provisions that the FTP applied to all employees and that accepting or continuing employment with defendant "constitutes your agreement to be bound by the FTP." These provisions suggest plaintiff would not have been permitted to opt out of the arbitration agreement or to negotiate terms other than those contained in the FTP. Thus, the arbitration agreement was adhesive.

Plaintiff asserts surprise was established because the Employee Acknowledgment was located on page 103 of the employee handbook and did not conspicuously advise that

it contained an arbitration provision. There is no evidence in the record demonstrating that the acknowledgment appeared on page 103 of the employee handbook. The declaration of Michele Bava, submitted by defendant in support of the petition to compel arbitration, merely states that exhibit A to her declaration is "a true and correct copy of an Employee Acknowledgment Form signed by" plaintiff. Exhibit A to her declaration consists of the one-page Employee Acknowledgment and a second one-page employee acknowledgment, which acknowledges receipt of an employee handbook supplement. Plaintiff's declaration in opposition to the petition says nothing about the form being part of the employee handbook.

The Employee Acknowledgment, as presented, is a one-page document, containing five paragraphs, with the heading "Employee Acknowledgment" at the top and an employee signature line and date at the bottom. The first three paragraphs acknowledge receipt of a copy of the employee handbook and standards of conduct, express an understanding that the employee is "expected to read, understand, familiarize [himself or herself] with and comply with the policies contained in them," and acknowledge the employment is at will. The last two paragraphs of the document set out the arbitration agreement. There is no separate heading identifying it as an arbitration agreement, and it does not appear in larger or darker typeface. It does, however, take up half of the page, immediately above plaintiff's signature.

The Employee Acknowledgment provided that the arbitration "will be conducted under the Federal Arbitration Act and the procedural rules of American Arbitration Association ('AAA')." Plaintiff asserts that the failure to furnish her a copy of the AAA procedures at the time she signed the arbitration agreement is further evidence of procedural unconscionability. Cases have held that incorporating procedural rules into the arbitration agreement without providing a copy of those rules to the employee is an aspect of procedural unconscionability. (See, e.g., *Trivedi v. Curexo Technology Corp.*

(2010) 189 Cal.App.4th 387, 393; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 721.) Defendant did not present the AAA rules as part of the arbitration agreement between the parties. Plaintiff, however, presented no evidence the AAA rules were not provided to her at the time she signed the arbitration agreement.

The evidence presented in the trial court, including evidence of the adhesive nature of the agreement and the lack of a prominent heading or bold print to highlight the arbitration provision itself, established at least some degree of procedural unconscionability. However, "a finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 469.) Accordingly, we must examine the agreement for substantive unconscionability.

B. Substantive unconscionability

Substantive unconscionability exists when the terms of an agreement are overly harsh or so one-sided as to shock the conscience. (*Pinnacle, supra*, 55 Cal.4th at p. 246.) In the employment context, substantive unconscionability may be found "when the arbitration agreement is 'one-sided' in favor of the employer without sufficient justification, for example, when 'the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration.' [Citations.]" (*Serpa, supra*, 215 Cal.App.4th at p. 703.) The arbitration agreement provided that both plaintiff and defendant agreed to arbitrate their claims against the other. It stated: "I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration." The FTP reiterated that both parties agreed to be bound by the FTP "as the only means of resolving employment-related disputes" and to waive their right to a jury trial of those disputes. The only claims excluded from the arbitration agreement were those listed in

the "Excluded Issues" section of the FTP: "Workers' Compensation Claims, any claim involving the construction or application of a benefit plan covered by ERISA, and claims for unemployment benefits." Thus, the agreement was bilateral and not unfairly one-sided.

The trial court, however, found the agreement to be substantively unconscionable because of "the general nature of the terms, i.e. without specific reference to the nature and extent of discovery and that findings of fact and conclusions of law must be included in the written decision; the ambiguity surrounding the provisions concerning the right to recover attorney's fees and costs; and the absence of any provision for limited judicial review." Plaintiff had argued in her opposition to the petition to compel arbitration that the arbitration agreement was substantively unconscionable because the discovery provision lacked guidance as to exercising the arbitrator's discretion, the agreement provided that the employee was entitled to legal representation at her own expense, contrary to the statutory provision for an award of attorney fees to a successful employee plaintiff under the FEHA (Gov. Code, § 12965), and the agreement failed to provide for limited judicial review of the arbitrator's decision.

Plaintiff's contentions and the trial court's conclusions regarding what the agreement should have included and what it lacked appear to be based on *Armendariz*. In discussing an agreement to arbitrate claims involving "unwaivable statutory rights," the *Armendariz* court concluded there were 5 minimum requirements necessary in order for such an arbitration agreement to be enforceable: the agreement "is lawful if it '(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.'" (*Armendariz, supra*, 24 Cal.4th at p. 102.)

We question whether the *Armendariz* test survives recent United States Supreme Court decisions. *Concepcion* determined "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable,'" nor may it enforce "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," including the objective of "'ensur[ing] that private arbitration agreements are enforced according to their terms.' [Citations.]" (*Concepcion, supra*, 131 S.Ct. at pp. 1747, 1748.) Refusing to enforce an arbitration agreement according to its terms because the claims involve unwaivable statutory rights and the agreement does not contain specific provisions the court believes are necessary to vindicate those statutory rights appears contrary to the decision in *Concepcion*. *Armendariz* carved out a class of claims— those involving unwaivable statutory rights— and applied a special rule to agreements to arbitrate those claims—requiring them to meet its five minimum requirements—in order for them to be enforceable. That appears to be the type of state rule *Concepcion* condemned. More recently, the decision in *American Express Co. v. Italian Colors Restaurant*, __U.S.__, 133 S.Ct. 2304, 2013 U.S. Lexis 4700, narrowed the ability of courts to invalidate arbitration agreements on the ground they inhibit or preclude vindication of statutory rights. There, the court held arbitration agreements must be "'rigorously enforce[d]' ... according to their terms," even when the claims to be arbitrated allege a violation of a federal statute. (*Id.* at pp. *8–10.) The parties to an arbitration agreement sought to invalidate the agreement's prohibition of class arbitration on the ground individual arbitration of the claims would be prohibitively expensive. The court rejected application of a judge-made exception to the FAA, which permitted courts to invalidate arbitration agreements that prevented the effective vindication of a federal statutory right. (*Id.* at pp. *11–17.) It concluded the exception applied only "to prevent 'prospective waiver of a party's *right to pursue* statutory

remedies,'" not to prevent the economic infeasibility of proving the claim and obtaining the remedy. (*Id.* at pp. *12–13.)

Although these cases cast doubt on the continued validity of the *Armendariz* requirements for arbitration agreements that apply to claims of violation of unwaivable statutory rights, *Armendariz* has not been overruled and is not clearly abrogated by these decisions; we are still bound by it. Even if *Armendariz* remains good law, however, the arbitration agreement before us meets its requirements and therefore is not substantively unconscionable.

Armendariz determined that an employee who is required to arbitrate FEHA claims is entitled to sufficient discovery to vindicate those claims. (*Armendariz, supra*, 24 Cal.4th at p. 106.) "[W]hen parties agree to arbitrate statutory claims, they also implicitly agree, absent express language to the contrary, to such procedures as are necessary to vindicate that claim." (*Ibid.*) The court held that "the employer, by agreeing to arbitrate the FEHA claim, has already impliedly consented to such discovery. Therefore, lack of discovery is not grounds for holding a FEHA claim inarbitrable." (*Ibid.*)

The parties agreed to arbitrate according to the procedural rules of the AAA; the FTP provided that "[a]ll discovery shall be conducted in accordance with the Employment Dispute Resolution Rules of the AAA." Additionally, "[t]he arbitrator shall have the authority to order discovery sufficient to enable a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." Plaintiff has not demonstrated that the AAA discovery rules are inadequate to vindicate her FEHA rights. We note that at least one court has found the discovery provisions of those rules to be fair. (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1130, fn. 21.) The provision of the FTP expressly granting the arbitrator authority to order discovery also permits the arbitrator to adjust the scope of discovery to whatever is

necessary, in the particular case, "to enable a full and fair exploration of the issues in dispute." The provisions for discovery do not make the arbitration agreement harsh or one-sided.

The trial court also found substantive unconscionability because "findings of fact and conclusions of law must be included in the written decision." *Armendariz* concluded that "an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based." (*Armendariz, supra*, 24 Cal.4th at p. 107.) The arbitration agreement considered by the *Armendariz* court did not contain a requirement of written findings and conclusions. The court concluded, however, that "nothing in the present arbitration agreement precludes such written findings, and to the extent it applies to FEHA claims the agreement must be interpreted to provide for such findings." (*Ibid.*) The FTP requires that the arbitrator render a written decision. Nothing precludes the arbitrator from setting out findings and conclusions in the written decision. In fact, the requirement of a written decision implies that it include some explanation of the reasons for the decision. Pursuant to *Armendariz*, the arbitration agreement and FTP should be interpreted to require the essential findings and conclusions in the written decision. Consequently, the arbitration agreement is not unconscionable for failing to include a requirement that the arbitrator's written decision include the essential findings and conclusions on which the decision is based.

The trial court also based its finding of substantive unconscionability on ambiguity in the provisions regarding recovery of attorney's fees and costs. The FTP provides that plaintiff and defendant "will be responsible for the fees and costs of [their] own respective legal counsel, if any." Plaintiff contends this provision denies her the right under the FEHA to recover attorney fees from defendant if she prevails in her FEHA claims. The FTP also provides, however, that "[t]he arbitrator has the authority to award

any remedy that would have been available to you had you litigated the dispute in court under applicable law." Further, "no remedies that otherwise would be available to you or the company in a court of law will be forfeited by virtue of the agreement to use and be bound by the FTP." Thus, although each party is initially responsible for that party's attorney fees and costs, the arbitrator may include an award of attorney's fees and costs to one party where such an award is authorized or required by applicable law; neither party forfeits any statutory right to recover attorney fees by agreeing to arbitration. The provisions relating to attorney's fees are neither ambiguous nor one-sided. They do not support a finding of substantive unconscionability.

Finally, the trial court found the absence of any provision for limited judicial review contributed to the substantive unconscionability of the arbitration agreement. *Armendariz* did not require that an arbitration agreement applicable to statutory claims include a provision for limited judicial review. Indeed, "the fact that an arbitration agreement does not explicitly provide for judicial review is no basis for invalidating it. [Citation.]" (*Little, supra*, 29 Cal.4th at p. 1075, fn. 1.) Sections 10 and 11 of the FAA (9 U.S.C. §§ 10, 11) and sections 1286.2 and 1286.6 of the California Arbitration Act (Code Civ. Proc., §§1286.2, 1286.6) provide for limited judicial review of arbitration awards governed by their respective provisions. Nothing in the arbitration agreement denies either party the benefit of that review. Consequently, there is nothing unconscionable in the lack of a provision for review in the arbitration agreement.

We conclude that, although there were elements of procedural unconscionability in the presentation of the arbitration agreement, the terms of the agreement were not substantively unconscionable. Because both procedural and substantive unconscionability must be found in order to invalidate an arbitration agreement, the trial court erred in refusing to enforce the arbitration agreement and denying defendant's

petition to compel plaintiff to arbitrate her employment-related claims in accordance with the arbitration agreement.

DISPOSITION

The judgment is reversed and remanded with instructions to the trial court to vacate its order denying defendant's petition to compel arbitration and to enter a new order granting that petition and staying the litigation while the arbitration proceeding is pending. Defendant is entitled to its costs on appeal.

_____
HILL, P. J.

WE CONCUR:

_____
WISEMAN, J.

_____
LEVY, J.

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LAKEWOOD REGIONAL MEDICAL CENTER, INC. and BOB TURNER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

DARLENE MILLER,

Plaintiff,

vs.

LAKEWOOD REGIONAL MEDICAL CENTER, INC., a California Corporation, BOB TURNER, an individual, and DOES 1-20, inclusive,

Defendant.

CASE NO. VC 037191

[PROPOSED] ORDER RE DEFENDANTS' MOTION TO STAY ACTION AND COMPEL ARBITRATION

Date: February 5, 2003
Time: 8:30 a.m.
Dept: C
Judge: ~~Patricia Schnegg~~ John A Torribio

The motion of Defendants, LAKEWOOD REGIONAL MEDICAL CENTER, INC. and BOB TURNER ("Defendants"), to stay this action and compel arbitration came on regularly for hearing on February 5, 2003 at 8:30 a.m. in Department C of the above-entitled Court. After considering the moving and opposing papers, and all other matters presented to the Court, the Court ruled as follows:

"Moving party submits telephonically on the motion.

Defendants' petition to compel arbitration of plaintiff's claims against them is GRANTED. CCP Section 1281.2. Plaintiff is ORDERED to arbitrate her claims against moving defendants Plaintiff's court action against these defendants is STAYED. CCP Section 1281.4. There will be a status conference held on May 7, 2003, at 8:30 a.m. in Dept SE F.

EXHIBIT 1

Defendants' request for judicial notice is DENIED.

Plaintiff's ancillary requests are denied.

The court shall order parties to arbitrate a controversy if it determines an agreement to arbitrate exists. CCP Section 1281.2. If it does so, the court shall stay any court action involving the controversy. CCP Section 1281.4.

Here, plaintiff contracted with Tenet to arbitrate her claims against Lakewood and Turner. The contract is neither unfair not procedurally or substantively unconscionable. Plaintiff's arguments with respect to not knowing the import of what she signed are without merit.

The court finds plaintiff is bound by the arbitration agreement.

Therefore, the motion is granted.

Moving party to give notice and prepare the order."

DATED: MAR -18 ~~February ___ 2003~~

By: JOHN A. TORRIBIO
The Honorable ~~Patricia P. Meyers~~
JUDGE OF THE SUPERIOR COURT
John A. Torribio

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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Dated: October 25, 2002

Case No. CV 02-5915 AHM (FMOx)

Title: Morales v. Queen of Angels-Hollywood Presbyterian Medical Center, et al.

DOCKET ENTRY

ENTERED
CLERK, U.S. DISTRICT COURT
OCT 25 2002
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

PRESENT: THE HONORABLE A. HOWARD MATZ, JUDGE

Stephen Montes
Courtroom Clerk

NONE
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

No Appearance

ATTORNEYS PRESENT FOR DEFENDANTS:

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

PROCEEDINGS: In Chambers

Having received Plaintiff's Notice of Non-Opposition filed October 21, Defendants' Petition to Compel Arbitration is hereby GRANTED. The Court notes that Plaintiff's Notice of Non-Opposition purports to request that arbitration be administered by an arbitration company other than the American Arbitration Association ("AAA"). However, Defendants' "Fair Treatment Process" explicitly provides that arbitration will be administered by the AAA. Plaintiff provides no authority sufficient to support its request that the Court ignore this term of the parties' agreement. Therefore, Plaintiff's request is DENIED.

Having compelled arbitration, the Court DISMISSES Plaintiff's claims but retains jurisdiction to enforce the arbitration agreement. In addition,

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//

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14

EXHIBIT 2

parties are ORDERED to file a status report with the Court not later than 7 days after the arbitration has taken place and, if there is no ruling by then, another report within 10 days after the ruling.

IS SO ORDERED.

Initials of Deputy Clerk

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EXHIBIT 2

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Deborah Patterson v. Tenet Healthcare, Inc.

Court of Appeals for the Eighth Circuit, Case No. 96-2587

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73 Fair Empl.Prac.Cas. (BNA) 1822,
70 Empl. Prac. Dec. P 44,677, 65 USLW 2733,
12 IER Cases 1434

Deborah PATTERSON, Appellant,

v.

TENET HEALTHCARE, INC., Appellee.

No. 96-2587.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 15, 1997.
Decided May 12, 1997.

Ronald F. Bunn, Columbia, MO, argued, for appellant.

Rowdy Meeks, Kansas City, MO, argued (Toni H. Blackwood, on the brief), for appellee.

Before WOLLMAN and FLOYD R. GIBSON, Circuit Judges, and MONTGOMERY,[1] District Judge.

WOLLMAN, Circuit Judge.

1

Deborah Patterson appeals from the district court's[2] order dismissing her employment discrimination claims against her former employer, Tenet Healthcare, Inc. (Tenet). We affirm.

I.

2

Patterson became employed in 1989 as a medical technologist at Columbia Regional Hospital, which is owned and operated by Tenet. On March 5, 1993, she received a copy of Tenet's employee handbook and signed an arbitration clause set forth on the last page of the handbook.

3

On July 26, 1993, and again on January 18, 1994, Patterson filed charges with the Equal Employment Opportunities Commission (EEOC) and Missouri Commission on Human Rights (MCHR) after receiving treatment she believed to be discriminatory and retaliatory. On December 8, 1994, Patterson filed a grievance through Tenet's internal grievance apparatus, the "Fair Treatment Procedure." Patterson's grievance proceeded through investigation and discussion to a hearing before the Fair Treatment Committee. Patterson was terminated nine days prior to the hearing, and she amended her grievance to include her termination. Her grievance was ultimately denied.

4

Patterson did not submit her claim to the final step of the Fair Treatment Procedure, binding arbitration, and instead filed suit in the district court, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Title VII), and the Missouri Human Rights Act, Mo.Rev.Stat. § 213.010 et seq. (MHRA). Finding that Patterson had agreed to arbitrate, that the Federal Arbitration Act (FAA) governed Patterson's claims arising out of her employment with Tenet, and that these claims were arbitrable, the district court dismissed Patterson's complaint. On appeal, Patterson argues that she did not agree to arbitrate and that the FAA does not govern her claims.

II.

5

We first consider whether Patterson and Tenet agreed to arbitrate. Under the FAA, ordinary contract principles govern whether parties have agreed to arbitrate, see Daisy Mfg. Co., Inc. v. NCR Corp., **29 F.3d 389**, 392 (8th Cir.1994), principles that in this case are derived from Missouri law. See First Options of Chicago, Inc. v. Kaplan, **514 U.S. 938**, 943-45, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995). Two portions of the handbook are at issue in determining whether such a contract exists. Page 3 provides:

6

[This handbook] is not intended to constitute a legal contract with any employee or group of employees because that can only occur with a written agreement executed by a facility Executive Director and an AMI [3] Senior Executive Officer. As regards the Fair Treatment Procedure, AMI is committed to accepting the obligation to support and assure access to the binding arbitration procedure for solving disputes, if necessary. Situations may arise from time to time which, in the Company's judgement require procedures or actions different than those described in this document or other written policies. Since the Company maintains the sole and exclusive discretion to exercise the customary functions of the management in all areas of employment and Company operations, the judgement of management shall be controlling in all such situations. Employees have access to a grievance procedure described in this document that affords the opportunity to have any employment related disputes submitted to binding arbitration.

7

Page 31 of the handbook contains the following heading:

8

IMPORTANT!

Acknowledgment Form

9

Upon receipt, please sign and present the acknowledgment form of this handbook to the Human Resources Department.

10

....

11

... No written agreement concerning employment terms or conditions is valid unless signed by a facility executive director, and senior officer of AMI, and no written statement or agreement in this handbook concerning employment is binding, since provisions are subject to change, and as all AMI employees are employed on an "at will" basis.... The company reserves the right to amend, supplement, or rescind any provisions of this handbook as it deems appropriate in its sole and absolute discretion.

12

I understand AMI makes available arbitration for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the final decision of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.

13

The district court found that this arbitration clause, which Patterson signed, created a binding contract to arbitrate.

14

Under Missouri law, employee handbooks generally are not considered contracts, because they normally lack the traditional prerequisites of a contract. See Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo.1988) (en banc). An employer's unilateral act of publishing a handbook is not a contractual offer to the employee. See id. Rather, a contract is only formed with the traditional elements of offer, acceptance, and consideration. See id. at 662-63.

15

Patterson points to the statement on page 3 of the handbook that "[the handbook] is not intended to constitute a legal contract," and to the statement on page 31 that "no written statement or agreement in this handbook concerning employment is binding," as evidence that the handbook did not create a binding contract.

16

We conclude, however, that the arbitration clause is separate from the other provisions of the handbook and that it constitutes an enforceable contract. See Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., **274 F.2d 805**, 808-09 (2d Cir.1960) (citing Robert Lawrence Co. v. Devonshire Fabrics, Inc., **271 F.2d 402** (2d Cir.1959)) (arbitration clause may constitute separate and enforceable contract). First, the arbitration clause is separate and distinct. It is set forth on a separate page of the handbook and introduced by the heading, "IMPORTANT! Acknowledgment Form." This page is removed from the handbook after the employee signs it and is stored in a file. In addition, there is a marked transition in language and tone from the paragraph preceding the arbitration clause to the arbitration clause itself. Although the preceding paragraph discusses the company's reservation of its "right to amend, supplement, or rescind" any handbook provisions, the arbitration clause uses contractual terms such as "I understand," "I agree," I "agree to abide by and accept," "condition of employment," "final decision," and "ultimate resolution." We believe that the difference in language used in the handbook and that employed in the arbitration clause would sufficiently impart to an employee that the arbitration clause stands alone, separate and distinct from the rest of the handbook. The reservation of rights language refers to the handbook provisions relating to employment, not to the separate provisions of the arbitration agreement.

III.

17

The next question is whether the FAA governs the agreement to arbitrate. The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., **500 U.S. 20**, 24, 111 S.Ct. 1647, 1651, 114 L.Ed.2d 26 (1991). The FAA provides that an agreement to arbitrate disputes arising out of contracts involving maritime or interstate commerce "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. § 2. Section 1 of the FAA, however, exempts from FAA enforcement "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The district court held that section 1 exempts only those employees directly engaged in the movement of maritime or interstate commerce and therefore found that the FAA governed Patterson's claims.

18

We have not heretofore addressed the question whether section 1 of the FAA should be interpreted broadly or narrowly. We are persuaded by the reasoning of those circuits which have held that section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce. See Great Western Mortgage Corp. v. Peacock, **110 F.3d 222**, 227 (3d Cir.1997) (reaffirming Tenney Engineering, Inc. v. United Elec. Radio & Mach. Workers of Amer., Local 437, **207 F.2d 450**, 452 (3d Cir.1953) (en banc)); Cole v. Burns Int'l Sec. Servs., **105 F.3d 1465**, 1472 (D.C.Cir.1997); Rojas v. TK Communications, Inc., **87 F.3d 745**, 748 (5th Cir.1996); Asplundh Tree Expert Co. v. Bates, **71 F.3d 592**, 600-601 (6th Cir.1995); Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO, **739 F.2d 1159**, 1162 (7th Cir.1984); Erving v. Virginia Squires Basketball Club, **468 F.2d 1064**, 1069 (2d Cir.1972); Dickstein v. duPont, **443 F.2d 783**, 785 (1st Cir.1971). Only the Fourth Circuit has interpreted section 1 broadly. See United Elec. Radio & Machine Workers of Amer. v. Miller Metal Prods., **215 F.2d 221**, 224 (4th Cir.1954). That ruling, however, was explicitly limited to the collective bargaining context. See id.

19

As the District of Columbia Circuit has explained, two well-established canons of statutory construction compel a narrow interpretation. See Cole, 105 F.3d at 1470. The first canon counsels avoiding a reading which would render some words entirely redundant. See id. A broad reading of section 1 would run counter to this canon, for if the phrase " 'any other class of workers engaged in foreign or interstate commerce'--extended to all workers whose jobs have any effect on commerce, the specific inclusion of seamen and railroad workers would have been unnecessary." Id. See also Rojas, 87 F.3d at 748 (quoting Albert v. National Cash Register Co., 874 F.Supp. 1324, 1327 (S.D.Fla.1994)) (" '[i]t is quite impossible to apply a broad meaning to the term "commerce" in Section 1 and not rob the rest of the exclusion clause of all significance.' ").

20

The second applicable canon is the rule of ejusdem generis, which " 'limits general terms which follow specific ones to matters similar to those specified.' " Cole, 105 F.3d at 1471 (quoting Gooch v. United States, **297 U.S. 124**, 128, 56 S.Ct. 395, 397, 80 L.Ed. 522 (1936)). Applying this rule, the phrase "any other class of workers engaged in foreign or interstate commerce" is modified by the preceding terms "seamen" and "railroad employees," and therefore the phrase includes "only those other classes of workers who are likewise engaged directly in ... the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." Tenney, 207 F.2d at 452.

21

Moreover, as the Cole court pointed out, the Supreme Court's decision in Allied-Bruce Terminix Cos., Inc. v. Dobson, **513 U.S. 265**, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), supports a narrow interpretation of the exclusionary clause in section 1. There, the Court, construing section 2 of the FAA, compared the words "involving commerce" used in section 2 with the words "in commerce." It concluded that the words "involving commerce" are broader than "in commerce" and that "[t]hey therefore cover more than ' "only persons or activities within the flow of interstate commerce." ' " Id. at 273, 115 S.Ct. at 839 (emphasis in original) (quoting United States v. American Bldg. Maintenance Indus., **422 U.S. 271**, 276, 95 S.Ct. 2150, 2154, 45 L.Ed.2d 177 (1975) (in turn quoting Gulf Oil Corp. v. Copp Paving Co., Inc., **419 U.S. 186**, 195, 95 S.Ct. 392, 398, 42 L.Ed.2d 378 (1974))). This analysis suggests that for the words "in commerce" as used in section 1, the converse is true--that the latter words of art describe only those workers actually involved "within the flow" of interstate commerce. See Cole, 105 F.3d at 1471-72.

22

Patterson argues that the legislative history of section 1 reveals that Congress intended to exempt all employment contracts from the FAA. Even assuming that the legislative history may be so read, see Gilmer, 500 U.S. at 39-40, 111 S.Ct. at 1659-60 (Stevens, J., dissenting), we agree with the D.C. Circuit that "In a case such as this, where the statutory text does not admit of serious ambiguity, and where firmly established case law is absolutely clear on the meaning of the statute, legislative history is, at best, secondary, and, at worst, irrevelant." Cole, 105 F.3d at 1472 (citing Davis v. Michigan Dep't of Treasury, **489 U.S. 803**, 808-09 n. 3, 109 S.Ct. 1500, 1504 n. 3, 103 L.Ed.2d 891 (1989)).

23

Accordingly, we hold that section 1 does not exclude the arbitration agreement between Patterson and Tenet from the coverage of the FAA and that the arbitration agreement is thus enforceable.

IV.

24

Finally, we determine whether Patterson's discrimination claims are arbitrable. Our analysis on this point is controlled by Gilmer, in which the Supreme Court held that arbitration of a stock broker's claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., is not inconsistent with the statute's framework or purposes. "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." 500 U.S. at 26, 111 S.Ct. at 1652.

25

The Court distinguished its holding in Alexander v. Gardner-Denver Co., **415 U.S. 36**, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), that arbitration procedures under a collective bargaining agreement (CBA) do not preclude a civil remedy for a violation of Title VII. See Alexander, 415 U.S. at 59-60, 94 S.Ct. at 1025. One concern with enforcing arbitration under a CBA is that the arbitration agreement is obtained by a union that represents the majority's interests rather than the individual's interests, which creates "tension between collective representation and individual statutory rights." Gilmer, 500 U.S. at 35, 111 S.Ct. at 1657; see Alexander, 415 U.S. at 51, 94 S.Ct. at 1021; Pryner v. Tractor Supply Co., **109 F.3d 354**, 364 (7th Cir.1997). Another concern is that labor arbitrators are generally only authorized under CBAs to resolve contractual, and not statutory, claims. Gilmer, 500 U.S. at 34, 111 S.Ct. at 1656. Accordingly, we have held that arbitration agreements contained within a CBA do not bar civil claims under Title VII. See Varner v. National Super

Markets, Inc., **94 F.3d 1209**, 1213 (8th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 946, 136 L.Ed.2d 835 (1997); Stacks v. Southwestern Bell Yellow Pages, Inc., **27 F.3d 1316**, 1326 n. 3 (8th Cir.1994).

26

In contrast, an arbitration agreement such as the one Patterson entered into represents the interests of the individual. See Gilmer, 500 U.S. at 35, 111 S.Ct. at 1657; Pryner, 109 F.3d at 363 ("[W]orkers' statutory rights .... are arbitrable if the worker consents to have them arbitrated."). In addition, the arbitration agreement in the present case does not limit the arbitrator solely to interpretation of the contract. See Gilmer, 500 U.S. at 35, 111 S.Ct. at 1657. The CBA cases, therefore, "provide no basis for refusing to enforce [an individual consentual] agreement to arbitrate." Id.

27

Thus, we agree with those post-Gilmer decisions which have ruled that Title VII claims, like ADEA claims, are subject to individual consensual agreements to arbitrate. See Cole, 105 F.3d at 1481-82; Austin v. Owens-Brockway Glass Container, Inc., **78 F.3d 875**, 882 (4th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 432, 136 L.Ed.2d 330 (1996); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., **39 F.3d 1482**, 1487 (10th Cir.1994); Bender v. A.G. Edwards & Sons, Inc., **971 F.2d 698**, 700 (11th Cir.1992) (per curiam); Mago v. Shearson Lehman Hutton, Inc., **956 F.2d 932**, 935 (9th Cir.1992); Willis v. Dean Witter Reynolds, Inc., **948 F.2d 305**, 308 (6th Cir.1991); and Alford v. Dean Witter Reynolds, Inc., **939 F.2d 229**, 230 (5th Cir.1991) (after remand for reconsideration in light of Gilmer). Gilmer necessarily rejected " '[a]ny broad public policy arguments against such a conclusion.' " Metz, 39 F.3d at 1487 (quoting Alford, 939 F.2d at 230). " 'Congress closely modeled the ADEA upon Title VII,' " and " '[t]he statutes are similar both in their aims and in their substantive prohibitions.' " Metz, 39 F.3d at 1487 (quoting Cooper v. Asplundh Tree Expert Co., **836 F.2d 1544**, 1553-54 (10th Cir.1988)). Moreover, the arbitrability of Title VII claims finds support in the Civil Rights Act of 1991, which states that "the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title." Pub.L. No. 102 -166, § 118, 105 Stat. 1071, 1081 (1991).

28

In Swenson v. Management Recruiters Int'l, Inc., **858 F.2d 1304** (8th Cir.1988), we held that an employee was not bound by an arbitration agreement with respect to her Title VII claims. We were concerned that the arbitral forum was unable to adequately "assist[ ] victims of discrimination" or to "pay sufficient attention to the transcendent public interest in the enforcement of Title VII." Id. at 1307. Gilmer, however, instructs us that both of these goals will be met through arbitration. First, resolution of a claim in an arbitral forum must " 'effectively ... vindicate [the employee's] statutory cause of action.' " Gilmer, 500 U.S. at 28, 111 S.Ct. at 1653 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., **473 U.S. 614**, 637, 105 S.Ct. 3346, 3359, 87 L.Ed.2d 444 (1985)). This vindication must be accomplished through the use of neutral arbitrators, adequate discovery, adequate types of relief, and the reassurance that coercion which would allow the revocation of any contract would likewise relieve an employee from an arbitration agreement. See Gilmer, 500 U.S. at 30-33, 111 S.Ct. at 1654-56; see also Cole, 105 F.3d at 1482. Second, the public policy of the statute will be carried out through suits of employees who are not parties to arbitration agreements, through EEOC actions, and through the vindication of individual claims through arbitration. See Gilmer, 500 U.S. at 31-32, 111 S.Ct. at 1654-55. So long as such vindication takes place, " 'the statute will continue to serve both its remedial and deterrent function.' " Id. at 28, 111 S.Ct. at 1653 (quoting Mitsubishi, 473 U.S. at 637, 105 S.Ct. at 3359).

29

Although one panel of this court ordinarily cannot overrule another panel, this rule does not apply when the earlier panel decision is cast into doubt by a decision of the Supreme Court. See City of Timber Lake v. Cheyenne River Sioux Tribe, **10 F.3d 554**, 557 (8th Cir.1993). Gilmer has effectively overruled our holding in Swenson, and thus we hold that Patterson's Title VII claims are subject to arbitration. Similarly, Patterson's claims under the MHRA are arbitrable. State anti-discrimination laws that parallel Title VII are explicitly made a part of Title VII's enforcement scheme, and therefore the FAA has the same application to claims under these state laws as to claims under Title VII. See Prudential Ins. Co. of Amer. v. Lai, **42 F.3d 1299**, 1303 at n. 1 (9th Cir.1994), cert. denied, **516 U.S. 812**, 116 S.Ct. 61, 133 L.Ed.2d 24 (1995).

30

The judgment is affirmed.

1

The HONORABLE ANN D. MONTGOMERY, United States District Judge for the District of Minnesota, sitting by designation

2

The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri

3

AMI was the predecessor of Tenet

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MEDICAL CENTER; and MARLEEN HAFER

ORIGINAL
MAR 23 2005
LOS ANGELES
SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

AVONN PRATCHER,

Plaintiff,

vs.

TENET HEALTHCARE,; ENCINO TARZANA REGIONAL MEDICAL CENTER; MARLEEN HAFER et al.,

Defendants.

CASE NO. BC 322 055

~~[PROPOSED]~~ **ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO STAY ACTION PENDING ARBITRATION**

Date: March 3, 2005
Time: 8:30 a.m.
Dept.: 62
Judge: Hon. Michael L Stern

On March 3, 2005, on the 8:30 a.m. calendar of Department 62 of this Court, the Honorable Michael L. Stern presiding, the Defendants' ~~petition~~ and motion to compel arbitration and to stay this action ~~under the Federal Arbitration Act~~ was heard. Michael S. Turner and Sean McLoughlin of Hill, Farrer & Burrill LLP appeared on behalf of petitioners and defendants Tenet Healthcare Corporation; AMI/HTI Tarzana Encino Joint Venture, d/b/a Encino-Tarzana Regional Medical Center; and Marleen Hafer ("Defendants"). Loyst P. Fletcher appeared on behalf of plaintiff Avonn Pratcher. Having considered the ~~Petition, the absence of any response to the Petition by the plaintiff, and the moving, opposition and reply papers submitted by the parties, and the oral arguments of counsel for the parties, as well as the Court's previous orders and those matters subject to~~ Motion judicial notice, and good cause appearing ~~therefore,~~ the Court now enters the

following order pursuant to the Federal Arbitration Act:

1. Defendants' ~~Petition and subsequent~~ motion to compel arbitration and to stay this action ~~pending arbitration pursuant to the Federal Arbitration Act are~~ IS GRANTED;

2. Plaintiff Pratcher is ordered to submit her claims and causes of action against Defendants, including all those alleged in this action, to arbitration before the American Arbitration Association, ~~pursuant to the terms of the defendant Tenet's Fair Treatment Process;~~ ~~this action~~ is STAYED pending the completion of the arbitration so ordered;

3. The Court shall retain such jurisdiction as is necessary to enforce the terms of this Order, and to vacate, confirm or modify any award entered by the arbitrator, ~~as required by the Federal Arbitration Act, and if necessary and as proper under the Federal Arbitration Act, to adjudicate any claims against defendant Hafer that the arbitrator finds inarbitrable as outside the course and scope of her employment by Defendants~~. A status conference to monitor the parties compliance with this Order shall be held on October 26, 2005 at 8:30 a.m. in this Department. Defendants' Counsel is ordered to file a Status report re: Arbitration by October 17, 2005

IT IS SO ORDERED:

DATED: March 23, 2005

MICHAEL C. STERN
JUDGE OF THE SUPERIOR COURT

HFB 579292.1 T2443444

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673 F.3d 221
United States Court of Appeals,
Third Circuit.

Janice QUILLOIN, an individual, on behalf of herself and others similarly situated
v.
TENET HEALTHSYSTEM PHILADELPHIA, INC., d/b/a Hahnemann University Hospital; Tenet Healthcare Corporation; Tenet HealthSystem Hahnemann, LLC, Appellants.

No. 11–1393. | Argued Sept. 21, 2011. | Filed: March 14, 2012.

Synopsis

Background: Employee brought action against employer. Employer moved to compel arbitration. The United States District Court for the Eastern District of Pennsylvania, Anita B. Brody, J., 763 F.Supp.2d 707, denied motion. Employer appealed.

Holdings: The Court of Appeals, Fisher, Circuit Judge, held that:

[1] district court's decision to address arbitrability was proper;

[2] ambiguity in arbitration agreement regarding award of attorneys' fees was a question for the arbitrator;

[3] issue of whether arbitration agreement contained implied class action waiver was a question for the arbitrator;

[4] time limitations set forth in arbitration agreement were not substantively unconscionable; and

[5] arbitration clause in employment contract was not rendered procedurally unconscionable based on parties' allegedly unequal bargaining positions.

Reversed.

West Headnotes (38)

[1] **Alternative Dispute Resolution**
⇦ Dismissal

A stay, rather than a dismissal, is the required course of action when compelling arbitration.

4 Cases that cite this headnote

[2] **Alternative Dispute Resolution**
⇦ Decisions reviewable; finality

Under the Federal Arbitration Act (FAA), the Court of Appeals has authority to review an appeal from a district court order denying a motion to compel arbitration, irrespective of whether the order was denied without prejudice. 9 U.S.C.A. § 16.

7 Cases that cite this headnote

[3] **Alternative Dispute Resolution**
⇦ Scope and standards of review

Court of Appeals exercises plenary review over questions regarding the validity and enforceability of an agreement to arbitrate.

2 Cases that cite this headnote

[4] **Alternative Dispute Resolution**
⇦ Scope and standards of review

Motions to compel arbitration are reviewed under the Federal Rules of Civil Procedure summary judgment standard. Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.

1 Cases that cite this headnote

[5] **Alternative Dispute Resolution**
⇦ Unconscionability

Employee challenging arbitration agreement made with employer was not required to direct her challenge at a specific clause of the arbitration agreement in order for district court to consider employee's claim that agreement was unconscionable.

4 Cases that cite this headnote

[6] **Federal Courts**
⇦ Alternative dispute resolution

Questions of arbitrability are governed by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[7] **Alternative Dispute Resolution**
⇦ Evidence

Questions of arbitrability, including challenges to an arbitration agreement's validity, are presumed to be questions for judicial determination.

7 Cases that cite this headnote

[8] **Alternative Dispute Resolution**
⇦ Evidence

Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.

1 Cases that cite this headnote

[9] **Alternative Dispute Resolution**
⇦ Validity of assent

Alternative Dispute Resolution
⇦ Unconscionability

Federal Arbitration Act (FAA) places arbitration agreements on an equal footing with other contracts and thus, like any other contract, a plaintiff may bring a challenge to court claiming that an agreement to arbitrate is unenforceable based on any of the generally applicable contract defenses, such as fraud, duress, or unconscionability. 9 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[10] **Alternative Dispute Resolution**
⇦ Disputes and Matters Arbitrable Under Agreement

A challenge to the validity of the contract as a whole, as opposed to the arbitration clause in particular, does not present a question of arbitrability.

1 Cases that cite this headnote

[11] **Alternative Dispute Resolution**
⇦ Severability

Regardless of whether a contract as a whole is valid, agreements to arbitrate are severable from a larger contract, and may therefore be separately enforced and their validity separately determined.

1 Cases that cite this headnote

[12] **Alternative Dispute Resolution**
⇦ Arbitrability of dispute

In order to qualify as a question of arbitrability that the court may consider under Federal Arbitration Act (FAA), a challenge to an arbitration agreement must relate to the making and performance of the agreement to arbitrate. 9 U.S.C.A. § 1 et seq.

7 Cases that cite this headnote

[13] **Alternative Dispute Resolution**
⇦ Arbitrability of dispute

District court's decision to address arbitrability was proper, where employee and employer did not agree to arbitrate arbitrability and employee claimed arbitration agreement was unconscionable.

1 Cases that cite this headnote

[14] **Alternative Dispute Resolution**
⇦ Preemption

Federal Courts
⇦ Alternative dispute resolution

States
⇦ Particular cases, preemption or supersession

Court of Appeals generally applies state contract principles to determine whether an arbitration agreement is unconscionable under the Federal

Arbitration Act (FAA); however, the FAA preempts conflicting state rules that either prohibit arbitration outright, or that stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 9 U.S.C.A. § 2.

5 Cases that cite this headnote

[15] **Contracts**
⇦ Procedural unconscionability

Contracts
⇦ Substantive unconscionability

To prove unconscionability under Pennsylvania law, a party must show that the contract was both substantively and procedurally unconscionable.

6 Cases that cite this headnote

[16] **Contracts**
⇦ Substantive unconscionability

Under Pennsylvania law, a contract or provision is substantively unconscionable where it unreasonably favors the party asserting it.

1 Cases that cite this headnote

[17] **Contracts**
⇦ Substantive unconscionability

Under Pennsylvania law, substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.

1 Cases that cite this headnote

[18] **Alternative Dispute Resolution**
⇦ Unconscionability

Under Pennsylvania law, an arbitration agreement cannot be construed as substantively unconscionable where it does not alter or limit the rights and remedies available to a party in the arbitral forum.

2 Cases that cite this headnote

[19] **Alternative Dispute Resolution**
⇦ Unconscionability

Arbitration provisions requiring parties to be responsible for their own expenses, including attorneys' fees, are generally unconscionable because restrictions on attorneys' fees conflict with federal statutes providing fee-shifting as a remedy.

1 Cases that cite this headnote

[20] **Alternative Dispute Resolution**
⇦ Matters to Be Determined by Court

Ambiguity in arbitration agreement regarding award of attorneys' fees was a question for the arbitrator, not the district court; such preliminary question was not truly a question of arbitrability.

5 Cases that cite this headnote

[21] **Alternative Dispute Resolution**
⇦ Matters to Be Determined by Court

Federal courts should not, on the basis of mere speculation that an arbitrator might interpret ambiguous agreements in a manner that casts their enforceability into doubt, take upon themselves the authority to decide the antecedent question of how the ambiguity is to be resolved.

1 Cases that cite this headnote

[22] **Alternative Dispute Resolution**
⇦ Unconscionability

Contracts
⇦ Agreements relating to actions and other proceedings in general

Under Pennsylvania law, class action waivers are substantively unconscionable where class action litigation is the only effective remedy such as when the high cost of arbitration compared with the minimal potential value of individual damages denies every plaintiff a meaningful remedy.

4 Cases that cite this headnote

[23] **Alternative Dispute Resolution**

⇦ Matters to Be Determined by Court

Issue of whether arbitration agreement contained implied class action waiver was a question for the arbitrator, and was not a question of arbitrability.

12 Cases that cite this headnote

[24] **Alternative Dispute Resolution**
⇦ Matters to Be Determined by Court

Silence regarding class arbitration generally indicates a prohibition against class arbitration, but the actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator.

11 Cases that cite this headnote

[25] **Alternative Dispute Resolution**
⇦ Preemption

States
⇦ Particular cases, preemption or supersession

Pennsylvania law finding class arbitration waivers substantively unconscionable where class action litigation is the only effective remedy was preempted by the Federal Arbitration Act (FAA), where state law requiring the availability of classwide arbitration created a scheme inconsistent with the FAA. 9 U.S.C.A. § 2.

13 Cases that cite this headnote

[26] **Federal Courts**
⇦ Mootness

Mootness implicates Court of Appeals' jurisdiction and is thus determined based on Article III justiciability principles. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[27] **Federal Courts**
⇦ Nature of dispute; concreteness

Federal Courts
⇦ Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

Under Article III, judicial power extends only to actual cases and controversies and an actual controversy must be extant at all stages of review. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[28] **Alternative Dispute Resolution**
⇦ Unconscionability

Under Pennsylvania law, fact that employee tolled the statute of limitations by bringing a federal action against employer did not abrogate or in any way moot her claim that arbitration agreement with employer was unconscionable at its formation. 13 Pa.C.S.A. § 2302(a).

Cases that cite this headnote

[29] **Alternative Dispute Resolution**
⇦ Unconscionability

Time limitations set forth in employment arbitration agreement, which allowed employee the full amount of time permitted under law were not substantively unconscionable under Pennsylvania law; such limitations were not clearly unreasonable and did not unduly favor employer.

Cases that cite this headnote

[30] **Alternative Dispute Resolution**
⇦ Unconscionability

Time limitations in employment arbitration agreements are substantively unconscionable if they are clearly unreasonable and unduly favorable to the employer.

Cases that cite this headnote

[31] **Contracts**
⇦ Procedural unconscionability

A contract is procedurally unconscionable under Pennsylvania law where there was a lack of meaningful choice in the acceptance of the challenged provision.

2 Cases that cite this headnote

[32] **Contracts**
⇦ Procedural unconscionability

Under Pennsylvania law, a contract will be deemed procedurally unconscionable when formed through oppression and unfair surprise.

Cases that cite this headnote

[33] **Contracts**
⇦ Adhesion contracts; standardized contracts

Contracts
⇦ Procedural unconscionability

Under Pennsylvania law, a contract is generally considered to be procedurally unconscionable if it is a contract of adhesion.

4 Cases that cite this headnote

[34] **Contracts**
⇦ Adhesion contracts; standardized contracts

Under Pennsylvania law, a "contract of adhesion" is a standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms.

2 Cases that cite this headnote

[35] **Contracts**
⇦ Unconscionable Contracts

Contracts cannot be deemed unconscionable simply because of a disparity in bargaining power.

Cases that cite this headnote

[36] **Alternative Dispute Resolution**
⇦ Unconscionability

More than a disparity in bargaining power is needed in order to show that an arbitration agreement was not entered into willingly.

Cases that cite this headnote

[37] **Contracts**
⇦ Procedural unconscionability

Factors Court of Appeals must consider in determining whether a contract rises to the level of procedural unconscionability under Pennsylvania law include: the take-it-or-leave-it nature of the standardized form of the document, the parties' relative bargaining positions, and the degree of economic compulsion motivating the adhering party.

4 Cases that cite this headnote

[38] **Alternative Dispute Resolution**
⇦ Unconscionability

Arbitration clause in employment contract was not rendered procedurally unconscionable under Pennsylvania law based on parties' allegedly unequal bargaining positions; while employee was the weaker party to the agreement, employee had a college degree and chose to agree to the arbitration agreement on more than one occasion.

1 Cases that cite this headnote

Attorneys and Law Firms

*224 James N. Boudreau (Argued), Christina Tellado–Winston, Greenberg Traurig, Philadelphia, PA, for Appellants.

Gary F. Lynch (Argued), Carlson Lynch, New Castle, PA, Gerald D. Wells, III, Faruqi & Faruqi, Jenkintown, PA, for Appellee.

Before: FISHER, HARDIMAN and GREENAWAY, JR., Circuit Judges.

OPINION OF THE COURT

FISHER, Circuit Judge.

Tenet Healthcare Corporation, along with two of its subsidiaries, appeals from *225 the District Court's denial without prejudice of its motion to compel arbitration. The central issue is whether the District Court erred in finding genuine disputes of material fact that might render the

arbitration agreement unconscionable and unenforceable. Finding no such disputes, we will reverse.

I.

Plaintiff and Appellee Janice Quilloin ("Quilloin") is a registered nurse with an associate's degree, who began working at Hahnemann University Hospital in October of 2006. In February 2008, Quilloin resigned to take another job. Later that year, she reapplied for a position at Hahnemann, and was rehired in December 2008. She continued working at Hahnemann until November 2009. Hahnemann University Hospital is owned by Tenet HealthSystem Hahnemann, LLC and managed by Tenet HealthSystem Philadelphia, both subsidiaries of Tenet Healthcare Corporation, a health care services company with subsidiaries operating 55 hospitals with over 14,000 beds, as of December 31, 2008. Tenet Healthcare Corporation, Tenet HealthSystem Hahnemann, LLC and Tenet HealthSystem Philadelphia (collectively "Tenet"), are all Defendants and Appellants in the present action.

On or around the time that Quilloin began her employment, both on October 9, 2006 and on January 5, 2009, she signed the "Employee Acknowledgment" form, which acknowledged receipt of the "Fair Treatment Process" brochure ("FTP"). Quilloin at first claimed that she did not sign a form in October 2006, but only signed in January 2009. However, when Tenet subsequently produced an "Employee Acknowledgement" form signed by Janice Quilloin on October 9, 2006, Quilloin filed a supplemental submission " 'acknowledging signing that document' but emphasizing her 'lack of recall' of that act." *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 763 F.Supp.2d 707, 712 n. 4 (E.D.Pa.2011). Quilloin does not now dispute that she signed the Employment Acknowledgement or whether she received the FTP.

Quilloin alleges that she was not informed that she would have to commit to arbitration in order to be employed by Tenet. She also alleges that when she was rehired, she did not remember being previously required to sign the "Employee Acknowledgement" form, and thus, was not expecting to sign it a second time.

The "Employee Acknowledgment" forms that Quilloin signed are only one page long. Although a few words were altered between 2006 and 2009, the differences are minor and not material to this case. Following three paragraphs regarding the employee handbook and standard of conduct, the 2009 Employee Acknowledgement reads:

> "I acknowledge that I have received a copy of the Tenet Fair Treatment Process brochure.... I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes except 'Excluded Issues' that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that, by agreeing to use arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the Fair Treatment Process. I also agree that ***226** such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association ('AAA').
>
> I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-of-pocket expenses for the arbitrator and the administrative costs of the AAA will be an amount equal to one day's pay (if I am an exempt employee) or eight times my hourly rate of pay (if I am a non-exempt employee), and that the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except by a written agreement signed by both me and the Company."

The FTP brochure outlines the internal grievance process culminating in arbitration, as well as the parameters of the arbitration agreement itself. The FTP does not state that claims regarding the validity of the arbitration agreement itself must be arbitrated. Under "Application and Coverage" the brochure states that "[t]he FTP ... covers all disputes relating to or arising out of an employee's employment with the company or the termination of employment.... [except for] those listed in the 'Exclusions and Restrictions' section[.]" Notably, neither party argues that one of the enumerated exclusions or restrictions is applicable here.

The FTP outlines the steps employees are required to follow to resolve disputes, and explains approximately how long Tenet would take to respond to each step in the process:

1. "Submit Dispute to Supervisor[,]" who will "respond ... as soon as possible, usually within seven calendar days from the date you raised the issue"

2. "Appeal Supervisor's Decision to Department Head[,]" who will "respon [d] ... as soon as possible, usually within seven calendar days of the date the Department Head receives your completed FTP Dispute Resolution Form"

3. "Appeal Department Head's Decision to Administration[,]" which will "respon[d] ... as soon as possible, usually within seven calendar days of the date you request review under Step 3"

4. "Appeal administration's decision to FTP Committee[,]" which will "meet as soon as possible, usually within 30 days of your request.... [and] promptly ... decide the issue(s)"

5. "Final and Binding Arbitration"

A limitations clause states that "[a]ny request for arbitration under the FTP must be made within one year after the event giving rise to the dispute.... [or], if a longer limitations period is provided by a statute governing your claim, then your claim will be subject to the longer limitations period provided by the statute."

The FTP also includes provisions for fees and remedies. In one clause, the FTP states that "[y]ou and the company will be responsible for the fees and costs of your own respective legal counsel, if any, and any other expenses and costs, such as costs associated with witnesses or obtaining copies of hearing transcripts." In another provision, entitled "*Authority of Arbitrator,*" the FTP states that "[t]he arbitrator has the authority to award any remedy that would have been available to ***227** you had you litigated the dispute in court under applicable law." Elsewhere, the FTP states that "no remedies that otherwise would be available to you or the company in a court of law will be forfeited by virtue of the agreement to use and be bound by the FTP."

On December 4, 2009, Quilloin filed suit in the United States District Court for the Eastern District of Pennsylvania, asserting a collective action against Tenet under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19, as well as several state-based class action and common law claims. [1] *See Quilloin,* 763 F.Supp.2d at 711. In its Answer filed on February 19, 2010, Tenet asserted the existence of an arbitration agreement as an affirmative defense.

[1] On June 10, 2010, Tenet filed a motion to compel compliance with the agreement to arbitrate. [2] On July 2, 2010, Quilloin responded, claiming, among other things, that the agreement to arbitrate was unconscionable. Quilloin did not file a motion to dismiss or for summary judgment. [3]

The District Court issued an order on January 20, 2011, *see id.* at 735, finding that genuine disputes of material fact remained as to whether the arbitration agreement was enforceable, [4] and denying the motion to compel. On February 9, 2011, Tenet filed a timely notice of appeal, commencing the present action.

II.

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331. We have jurisdiction under 9 U.S.C. § 16 to review the District Court's order denying a motion to compel arbitration.

[2] Our jurisdiction is not affected by the fact that the order was denied without prejudice. The Federal Arbitration Act ("FAA") clearly "provides for interlocutory appeals from a District Court's refusal to compel arbitration" regardless of whether the appeal is from a final decision. *Sandvik AB v. Advent Int'l Corp.,* 220 F.3d 99, 102–03 (3d Cir.2000) (construing the FAA, as codified at 9 U.S.C. § 16). In *Sandvik,* the district court denied a motion to compel ***228** arbitration, "conclud[ing] that it could not order arbitration until it determined the validity of the underlying contract," 220 F.3d at 102. Sandvik challenged our jurisdiction, claiming that the "refusal to order arbitration was not final[.]" *Id.* However, we held that "[t]he language of [9 U.S.C.] § 16 provides for appeals of orders denying arbitration, and it makes no distinction between orders denying arbitration and 'final orders' that accomplish the same end." *Id.* The structure of Section 16 is consistent with this interpretation, because otherwise, "the provision providing for appeals from denials of orders to arbitrate [under § 16(a)(1)] would become surplusage in light of the more expansive language in § 16(a)(3) [providing for appeals from final decisions with respect

to arbitration]." *Id.* at 103. Finally, we found it significant "that Congress decided to use the word 'final' in one part of the statute, but declined to do so in the section that declares that orders denying motions to compel arbitration are indeed appealable." *Id.* Under *Sandvik,* there can be no doubt that we have the authority to review an appeal from the District Court's order denying a motion to compel arbitration, irrespective of the fact that the order was denied without prejudice.

[3] [4] "We exercise plenary review over questions regarding the validity and enforceability of an agreement to arbitrate." *Puleo v. Chase Bank USA, N.A.,* 605 F.3d 172, 177 (3d Cir.2010). Specifically, motions to compel arbitration are reviewed under the Federal Rules of Civil Procedure summary judgment standard, *Par–Knit Mills, Inc. v. Stockbridge Fabrics Co.,* 636 F.2d 51, 54 & n. 9 (3d Cir.1980), permitting judgment where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Furthermore, "[i]n reviewing the record, we are required to view the facts and draw inferences in the light most favorable to the nonmoving party." *Ray v. Twp. of Warren,* 626 F.3d 170, 173 (3d Cir.2010) (citation omitted).

III.

A.

[5] Tenet argues as a threshold matter that the District Court erred in considering Quilloin's claim that the arbitration agreement was unconscionable, because Quilloin failed to direct her challenge at a specific clause within the arbitration agreement. Essentially, Tenet claims that without a challenge to some specific clause, the District Court may not inquire into issues of arbitrability. We disagree.

[6] [7] [8] [9] "Because this is a question of arbitrability it is governed by the [FAA]." *Khan v. Dell, Inc.,* 669 F.3d 350, 354 (3d Cir.2012) (citing *Puleo,* 605 F.3d at 180). The FAA manifests "a congressional declaration of a liberal federal policy favoring arbitration agreements...." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). However, questions of arbitrability, including challenges to an arbitration agreement's validity, are presumed to be questions for judicial determination. *Puleo,* 605 F.3d at 178 (quoting *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chi., Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of America,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). This is because the FAA places arbitration agreements on "an equal footing *229 with other contracts" and thus, like any other contract, a plaintiff may bring a challenge to court claiming that an agreement to arbitrate is unenforceable based on any of the "generally applicable contract defenses, such as fraud, duress, or unconscionability...." *AT&T Mobility LLC v. Concepcion,* —— U.S. ——, 131 S.Ct. 1740, 1745–46, 179 L.Ed.2d 742 (2011) (construing the FAA as codified at 9 U.S.C. § 2) (citation and internal quotation marks omitted).

[10] [11] [12] On the other hand, a challenge to "the validity of the contract as a whole, as opposed to the arbitration clause in particular, does not present a question of arbitrability." *Puleo,* 605 F.3d at 180 n. 4 (citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)); *accord Rent–A–Center v. Jackson,* ——U.S. ——, 130 S.Ct. 2772, 2778, 177 L.Ed.2d 403 (2010). This is because regardless of whether a contract as a whole is valid, agreements to arbitrate are severable from a larger contract, and may therefore be separately enforced and their validity separately determined. *Rent–A–Center,* 130 S.Ct. at 2778. Thus, in order to qualify as a question of arbitrability that the court may consider, the challenge must "relat[e] to the making and performance of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

In *Rent–A–Center, West, Inc. v. Jackson,* the Supreme Court found that the plaintiff failed to challenge the validity of the arbitration agreement at issue. The contract containing the general agreement to arbitrate disputes also contained a specific agreement to arbitrate questions of arbitrability. 130 S.Ct. at 2777. To eliminate the confusion caused by an agreement to arbitrate nested within another agreement to arbitrate, the *Rent–A–Center* Court found it necessary to distinguish between the overall arbitration agreement (the "contract"), and the agreement to arbitrate arbitrability (the "delegation clause"). *Id.* at 2778–79. The problem was that the plaintiff "challenged only the validity of the contract as a whole" rather than the validity of the delegation clause. *Id.* at 2779. Because the delegation clause was severable from

the contract, it was unaffected by the contract's validity; thus, the Supreme Court held that in accordance with the valid delegation clause, questions of arbitrability (including the arbitrability of the overall agreement to arbitrate) must go to an arbitrator. *Id.* at 2778–79.

[13] Tenet argues that, like the plaintiff in *Rent–A–Center,* Quilloin should have challenged some specific clause within the FTP and Employee Acknowledgement, rather than challenging the arbitration agreement as a whole. However, *Rent–A–Center* is inapposite. First, it is important to note that unlike the agreement in *Rent–A–Center,* the FTP and Employee Acknowledgement constitute an agreement to arbitrate employment issues generally; they do not purport to contain an agreement to arbitrate arbitrability. *Cf. Rent–A–Center,* 130 S.Ct. at 2777. Because the parties have not indicated otherwise, the question of arbitrability is one for the court. *See Puleo,* 605 F.3d at 178.

Additionally, *Rent–A–Center* did not require Quilloin to challenge a specific clause. In *Rent–A–Center,* identification of a specific clause was necessary merely because there were two arbitration agreements, and the one at issue (the agreement to arbitrate arbitrability) was specifically located within the "delegation clause." Here, unlike the contract in *Rent–A–Center,* the FTP and Employee Acknowledgement contained only one agreement to arbitrate. There was no need to distinguish ***230** between multiple agreements to arbitrate; all that Quilloin needed to do was challenge the validity of the only agreement to arbitrate. *See Rent–A–Center,* 130 S.Ct. at 2778; *Prima Paint,* 388 U.S. at 404, 87 S.Ct. 1801.

Because Quilloin did not agree to arbitrate the issue of arbitrability, and because she claims that the arbitration agreement, specifically, is unconscionable, the District Court did not err in addressing the validity of the agreement to arbitrate. Thus, we turn to the merits of Quilloin's claims to determine whether the District Court properly denied Tenet's motion to compel arbitration.

B.

[14] We generally apply state contract principles to determine whether an arbitration agreement is unconscionable. *Concepcion,* 131 S.Ct. at 1746 (construing the FAA, as codified at 9 U.S.C. § 2). However, the FAA preempts conflicting state rules that either prohibit arbitration outright, *id.* at 1747, or that "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress...." *Id.* at 1753 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Thus, in determining unconscionability, we must use principles of Pennsylvania law, to the extent that such law is not displaced by the FAA.

[15] To prove unconscionability under Pennsylvania law, a party must show that the contract was both substantively and procedurally unconscionable. *Salley v. Option One Mortg. Corp.,* 592 Pa. 323, 925 A.2d 115, 119 (2007). In examining these two prongs, the Pennsylvania Supreme Court has indicated that it might be appropriate to use a "sliding-scale approach" so that "where the procedural unconscionability is very high, a lesser degree of substantive unconscionability may be required" and presumably, vice-versa. *Id.* at 125 & n. 12. We turn first to the District Court's finding that the arbitration agreement might be substantively unconscionable.

1. Substantive Unconscionability

[16] [17] [18] A contract or provision is substantively unconscionable where it "unreasonably favors the party asserting it." *Salley,* 925 A.2d at 119. Put another way, "[s]ubstantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent." *Harris v. Green Tree Fin. Corp.,* 183 F.3d 173, 181 (3d Cir.1999) (citing *Germantown Mfg. Co. v. Rawlinson,* 341 Pa.Super. 42, 491 A.2d 138, 145–47 (1985); *Denlinger, Inc. v. Dendler,* 415 Pa.Super. 164, 608 A.2d 1061, 1068 (1992)). An arbitration agreement cannot be construed as substantively unconscionable where it "does not alter or limit the rights and remedies available to [a] party in the arbitral forum...." *Edwards v. HOVENSA, LLC,* 497 F.3d 355, 364 (3d Cir.2007) (construing *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).

In denying Tenet's motion to compel arbitration, the District Court found three bases on which the arbitration agreement might be substantively unconscionable: (1) a potential prohibition against recovery of attorneys' fees and costs, (2) potential inclusion of a class action waiver, and (3) the possibility that Tenet could "run out the clock" on the statute of limitations. We disagree with the District Court's conclusions, and find no basis for substantive unconscionability.

a. Attorneys' Fees

[19] Provisions requiring parties to be responsible for their own expenses, including *231 attorneys' fees, are generally unconscionable because restrictions on attorneys' fees conflict with federal statutes providing fee-shifting as a remedy. *See Spinetti v. Serv. Corp. Int'l,* 324 F.3d 212, 216 (3d Cir.2003) (Where called for by statute, "arbitrators ... must ordinarily grant attorney fees to prevailing claimants rather than be restricted by private contractual language." (internal citation and quotation marks omitted)); *accord Nino v. Jewelry Exch., Inc.,* 609 F.3d 191, 203 (3d Cir.2010); *Alexander v. Anthony Int'l, L.P.,* 341 F.3d 256, 267 (3d Cir.2003); *Parilla v. IAP Worldwide Servs., VI, Inc.,* 368 F.3d 269, 278–79 (3d Cir.2004).

Tenet and Quilloin dispute whether the arbitration agreement allows the prevailing party to recover attorneys' fees. The agreement contains no clear prohibition against fee-shifting; the District Court wrote that "it is unclear whether the contract deprives employees of the right to recover attorney's fees and costs." *Quilloin,* 763 F.Supp.2d at 725. In one clause, the FTP states that "[y]ou and the company will be responsible for the fees and costs of your own respective legal counsel, if any, and any other expenses and costs, such as costs associated with witnesses or obtaining copies of hearing transcripts." However, another provision in the FTP could be read as giving the arbitrator authority to grant attorneys' fees to the prevailing party: "*Authority of Arbitrator:* The arbitrator has the authority to award any remedy that would have been available to you had you litigated the dispute in court under applicable law." It also states that "no remedies that otherwise would be available to you or the company in a court of law will be forfeited by virtue of the agreement to use and be bound by the FTP."

[20] [21] We agree with the District Court that the arbitration agreement is ambiguous regarding the award of attorneys' fees, but find that the District Court erred in determining that it could not compel arbitration before resolving the issue. The Supreme Court has clearly established that ambiguities in arbitration agreements must be interpreted by the arbitrator. *PacifiCare Health Sys., Inc. v. Book,* 538 U.S. 401, 406–07, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003); *accord Puleo,* 605 F.3d at 179. It explained that "we should not, on the basis of mere speculation that an arbitrator might interpret ... ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved." *PacifiCare,* 538 U.S. at 406–07, 123 S.Ct. 1531 (citation and internal quotation marks omitted); *see also Alabama State Fed'n of Labor v. McAdory,* 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945) ("It has long been [our] considered practice not to decide abstract, hypothetical or contingent questions....").

In *PacifiCare Health Systems v. Book,* respondents challenged the enforceability of arbitration agreements on the basis that the agreements could "be construed to limit the arbitrator's authority to award damages...." 538 U.S. at 402, 123 S.Ct. 1531. The United States Court of Appeals for the Eleventh Circuit denied petitioners' requests to compel arbitration, on the basis that this potential limitation rendered the arbitration agreements unenforceable. *Id.* at 403, 123 S.Ct. 1531. The Supreme Court reversed, noting that such a "preliminary question" is not truly a question of arbitrability for the court to decide, *id.* at 407 n. 2, 123 S.Ct. 1531, and holding that "since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to *232 decide enforceability in the first instance are unusually abstract." *Id.* at 407, 123 S.Ct. 1531. Rather than speculate as to whether a certain interpretation of an ambiguity might render an arbitration agreement unenforceable, "the proper course [in such a case] is to compel arbitration." *Id.*

The issue presented here is virtually indistinguishable from the issue in *PacifiCare.* Like the *PacifiCare* respondents, Quilloin challenges the enforceability of the arbitration agreement based on speculation that the agreement might be interpreted to limit the arbitrator's authority to fashion a remedy. Quilloin's claim would require the District Court to decide a "preliminary question" before addressing the issue of unconscionability, and as *PacifiCare* noted, such a "preliminary question" is not truly a question of arbitrability. *Id.* at 407 n. 2, 123 S.Ct. 1531. Under *PacifiCare,* we are required to find that the ambiguity regarding attorneys' fees is a question for the arbitrator.

b. Class Action Waiver

[22] Under Pennsylvania law, class action waivers are substantively unconscionable where "class action litigation is the only effective remedy" such as when "the high cost of arbitration compared with the minimal potential value of individual damages denie[s] every plaintiff a meaningful remedy." *Thibodeau v. Comcast Corp.,* 912 A.2d 874, 883–84 (Pa.Super.Ct.2006).

[23] [24] Here, the arbitration agreement does not contain an express class action waiver. Silence regarding class arbitration generally indicates a prohibition against class arbitration, but the actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator. *Stolt–Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, — U.S. —, 130 S.Ct. 1758, 1775, 176 L.Ed.2d 605 (2010). The District Court acknowledged that the determination was for the arbitrator, but proceeded to analyze whether a class action waiver would render the arbitration agreement substantively unconscionable, if the arbitrator were to determine that the agreement contained such a waiver. *Quilloin*, 763 F.Supp.2d at 727 & n. 22.

As with the issue of attorneys' fees, the District Court erred in addressing the hypothetical situation that might or might not arise depending on the arbitrator's interpretation of the arbitration agreement. *See PacifiCare*, 538 U.S. at 406–07, 123 S.Ct. 1531. Furthermore, even if the agreement explicitly waived Quilloin's right to pursue class actions, the Pennsylvania law prohibiting class action waivers is surely preempted by the FAA under *Concepcion*, 131 S.Ct. at 1740.

After the District Court denied Tenet's motion to compel, the Supreme Court ruled in *Concepcion* that a California law deeming certain class action waivers to be unconscionable was an "obstacle to the accomplishment and execution" of the FAA, and was therefore "inconsistent with" and preempted by the FAA. 131 S.Ct. at 1750–51, 1753. Specifically, the *Concepcion* Court found that "[a]rbitration is poorly suited to the higher stakes of class litigation" because: (1) "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality[,]" (2) it is "at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied[,]" and (3) "class arbitration greatly increases risks to defendants." *Id.* at 1751–52. California's law did not deem class action waivers to be *per se* unconscionable, but was based in part on the reasoning that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. *233 The Supreme Court dismissed this reasoning, ruling that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.*

Following and relying on *Concepcion*, we found a similar New Jersey law to be preempted. The New Jersey law held that "a waiver of class-wide dispute resolution would be improper in the context of either litigation or arbitration [,]" and unconscionability thus "provide[d] a defense against '*all* waivers of class-wide actions, not simply those that also compel arbitration [.]' " *Litman v. Cellco P'ship*, 655 F.3d 225, 229 (3d Cir.2011) (citation and internal quotation marks omitted) (construing *Muhammad v. County Bank of Rehoboth Beach*, 189 N.J. 1, 912 A.2d 88 (2006)). Our *Litman* ruling is directly applicable here:

> "We understand the holding of *Concepcion* to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration is desirable for unrelated reasons."

Litman, 655 F.3d at 231 (internal citation and quotation marks omitted).

[25] The Pennsylvania law at issue here is clearly preempted under *Concepcion* and *Litman*.[5] The Pennsylvania law is not substantively different from the California law, which is unquestionably preempted by the FAA. Like the California law, Pennsylvania law does not render class action waivers *per se* unconscionable. Rather, Pennsylvania finds such waivers substantively unconscionable where "class action litigation is the only effective remedy" such as when "the high cost of arbitration compared with the minimal potential value of individual damages denie[s] every plaintiff a meaningful remedy." *Thibodeau*, 912 A.2d at 883–84.

Like the law in *Litman*, the Pennsylvania law "seeks to impose class arbitration despite a contractual agreement for individualized arbitration" and is therefore preempted. *See id.* at 231. In fact, the Pennsylvania law is even more egregious than the New Jersey law. *See Litman*, 655 F.3d at 229 n. 5. The New Jersey rule against class action waivers applied to litigation and arbitration alike, *id.* at 229, while Pennsylvania law has often prohibited class action waivers based on their arbitration-specific context. *Id.* at 229 n. 5 (citing *Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir.2007)). Thus, the Pennsylvania law presents an even greater obstacle to the fulfillment of the FAA's purposes than does the New Jersey law, because it is exactly the type of law that "single[s] out the provisions of arbitration agreements [,]" *Harris*, 183 F.3d at 183, and that "derive[s] [its] meaning from the fact that an

agreement to arbitrate is at issue." *Concepcion,* 131 S.Ct. at 1746.

c. Running Out the Clock

Finally, Quilloin claims that the arbitration agreement is unconscionable because it would permit Tenet to "run out the clock" on the statute of limitations. The FTP requires employees to follow several internal steps and procedures before submitting *234 a claim to arbitration; because the FTP only gives Tenet approximate time limits to respond to each step in the procedure, Quilloin argues that the FTP allows Tenet to delay until claims have expired under the statute of limitations.

Tenet first responds that any claim regarding the possibility for delay has been mooted because Quilloin tolled the statute of limitations by filing this claim. Tenet contends that there is now no danger of delays running out the clock because Quilloin will be able to bring her claim through either arbitration or litigation with no danger of exceeding the statute of limitations.

[26] [27] Mootness implicates our jurisdiction and is thus determined based on Article III justiciability principles. *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 537, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978); *Jersey Cent. Power & Light Co. v. Lacey Twp.,* 772 F.2d 1103, 1108 n. 8 (3d Cir.1985). Under "Article III[,] judicial power extends only to actual cases and controversies" and "[a]n actual controversy must be extant at all stages of review...." *Turner v. Rogers,* —U.S.—, 131 S.Ct. 2507, 2514, 180 L.Ed.2d 452 (2011) (internal citations and quotation marks omitted).

[28] Here, the controversy pertains to unconscionability under Pennsylvania law, which measures unconscionability at the time of the contract's making. 13 Pa. Cons.Stat. Ann. § 2302(a). Although Tenet claims that the arbitration agreement's provision for delay can no longer be unconscionable, it mistakenly measures unconscionability in the present moment, based on what has happened since the contract was signed, rather than based on whether the contract was unconscionable at the time of its formation. Thus, the fact that Quilloin has tolled the statute of limitations in the present instance does not abrogate or in any way moot her claim that the contract was unconscionable at its formation.

[29] [30] Turning to the substance of the claim, time limitations in arbitration agreements are substantively unconscionable if they are "clearly unreasonable and unduly favorable" to the employer. *See Nino,* 609 F.3d at 202 (quoting *Alexander,* 341 F.3d at 266). Quilloin contends that the time limits in *Nino v. Jewelry Exchange, Inc.,* presented "the mirror image of the time limits" here. However, we find *Nino* to be inapposite. In *Nino,* the employee was provided with only a five-day window within which to file and preserve a complaint, a window which the court found substantively unconscionable because it was "clearly unreasonable...." 609 F.3d at 202–03 (quoting *Alexander,* 341 F.3d at 266); *see also Alexander,* 341 F.3d at 266 (finding a time limit of thirty days to be "clearly unreasonable and unduly favorable" to the employer). These cases involved "clearly unreasonable" time limits placed on the employee, rather than estimated time limits placed on the employer's response. **Quilloin** fails to explain how a process allowing an employee the full amount of time permitted under law is unconscionable, even if the employer is given guidelines, rather than strict parameters, within which it may respond.

Even if **Tenet** tried to delay and failed to move forward with proceedings within a reasonable time, **Quilloin** could have filed a motion to compel arbitration. *See, e.g., Allen v. Apollo Group, Inc.,* No. Civ.A.H–04–3041, 2004 WL 3119918, at *9 (S.D.Tex. Nov. 9, 2004).

Given the existence of reasonable time guidelines for **Tenet** to act, paired with the fact that **Tenet** could not preclude **Quilloin's** claim because she always had the option to motion to compel arbitration, the time guidelines are not "clearly unreasonable and unduly favorable" to **Tenet**. *See* *235 *Nino,* 609 F.3d at 202 (quoting *Alexander,* 341 F.3d at 266). We fail to see how, even considering the facts in the light most favorable to **Quilloin**, there is any genuine dispute of material fact regarding this claim of substantive unconscionability.

We find that **Quilloin** raised no genuine dispute of material fact regarding substantive unconscionability; therefore, the District Court erred by denying **Tenet's** motion to compel arbitration.

2. Procedural Unconscionability

Even if **Quilloin** had raised a genuine dispute of material fact as to substantive unconscionability, we would nonetheless find that the District Court erred in denying **Tenet's** motion to compel arbitration because **Quilloin** did not raise a genuine dispute of material fact as to whether the arbitration agreement was procedurally unconscionable. **Quilloin** argues that procedural unconscionability arises because she was not informed that she would have to commit to arbitrate disputes

in order to be employed by Tenet, that no one explained to her the terms of the agreement, and that she had little time or choice but to accept its terms and sign.

[31] [32] A contract is procedurally unconscionable where "there was a lack of meaningful choice in the acceptance of the challenged provision [.]" *Salley,* 925 A.2d at 119. A contract will be deemed procedurally unconscionable when formed through "oppression and unfair surprise." *Witmer v. Exxon Corp.,* 495 Pa. 540, 434 A.2d 1222, 1228 n. 16 (1981) (citation and quotation marks omitted). Courts "should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer,* 500 U.S. at 32–33, 111 S.Ct. 1647 (internal citation and quotation marks omitted).

[33] [34] Under Pennsylvania law, a contract is generally considered to be procedurally unconscionable if it is a contract of adhesion. *McNulty v. H & R Block, Inc.,* 843 A.2d 1267, 1273 & n. 6 (Pa.Super.Ct.2004); *but cf. Salley,* 925 A.2d at 125–26; *id.* at 128 (suggesting that not all contracts of adhesion are procedurally unconscionable). A contract of adhesion is a "standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms." *Chepkevich v. Hidden Valley Resort, L.P.,* 607 Pa. 1, 2 A.3d 1174, 1190 (2010) (internal citation and quotation marks omitted).

[35] [36] However, contracts cannot be deemed unconscionable "simply because of a disparity in bargaining power." *Witmer,* 434 A.2d at 1228; *accord Gilmer,* 500 U.S. at 32–33, 111 S.Ct. 1647. "[T]he Supreme Court ... made clear in *Gilmer v. Interstate/Johnson Lane Corp.* [that] more than a disparity in bargaining power is needed in order to show that an arbitration agreement was not entered into willingly." *Great W. Mortg. Corp. v. Peacock,* 110 F.3d 222, 229 (3d Cir.1997). Parties frequently possess varying degrees of bargaining power, and there is a "range of ordinary and acceptable bargaining situations[.]" *Salley,* 925 A.2d at 120 n. 3. Our role is to distinguish acceptable bargaining situations from those which violate "strong public policy[.]" *Id.*

[37] Factors we must consider in determining whether the contract rises to the level of procedural unconscionability include: "the take-it-or-leave-it nature of the standardized form of the document[,]" "the parties' relative bargaining positions," and "the degree of economic compulsion motivating ***236** the 'adhering' party[.]" *Salley,* 925 A.2d at 125 (quoting *Delta Funding Corp. v. Harris,* 189 N.J. 28, 912 A.2d 104, 111 (2006)).

In *Zimmer v. CooperNeff Advisors, Inc.,* we considered the plaintiff's educational background and "the context in which the 'take-it-or-leave-it' ultimatum was issued" in determining that the contract did not rise to the level of procedural unconscionability. 523 F.3d 224, 229 (3d Cir.2008). Zimmer was a highly educated economist and willingly accepted an offer of employment, knowing that the formal employment agreement had not yet been finalized, and further, he did not allege that he lacked an opportunity to negotiate. *Id.; see also Gilmer,* 500 U.S. at 32–33, 111 S.Ct. 1647 (no procedural unconscionability where experienced businessman was neither coerced nor defrauded when he complied with his employer's requirement that he register—and sign an included arbitration agreement—with the New York Stock Exchange).

Similarly, in *Great Western Mortg. Corp. v. Peacock,* the appellant argued that she accepted the arbitration agreement "only because she was the weaker of the two parties to the employment contract." *Peacock,* 110 F.3d at 229. Peacock was undoubtedly the weaker party. *Id.* Additionally, her employer notified her that she would be required to sign an agreement to arbitrate upon beginning her employment, but she did not sign the actual arbitration agreement until several weeks after she began working. *Id.* at 224, 228. Nevertheless, we found that the agreement was not procedurally unconscionable because Peacock agreed to arbitration on three different occasions, she was a college graduate with a Business Administration degree, and she did not contend that she failed to read the document containing the arbitration agreement, or that she was coerced into signing it. *Id.* at 228–30.

At the other end of the spectrum, we found procedural unconscionability in an employment agreement where the employee, though college educated, was told to read and sign an employment contract, and was dependent on the employer, one of the world's largest jewelry retailers, for his immigration status and his "very capacity to work in St. Thomas[.]" *Nino,* 609 F.3d at 196–97, 202. Similarly, we held unconscionable an arbitration agreement between a multi-national business and minimally-educated crane operators. *Alexander,* 341 F.3d at 266. [6]

[38] **Quilloin's** situation is nothing like that of the plaintiffs in *Nino* or *Alexander v. Anthony Intern., L.P.* The District Court acknowledged that **Tenet** had less bargaining power than the multinational corporations in both of those cases. More importantly, **Quilloin** was neither a minimally-educated crane operator as were the plaintiffs in *Alexander*, nor dependent on her employer for her immigration status as was the plaintiff in *Nino*.

Although **Quilloin** did not possess the same level of education or specialized skills as the plaintiff in *Zimmer*, her situation appears to be much like the plaintiff's situation in *Peacock*. Like Peacock, **Quilloin** argues that she was in an unequal bargaining position because she was just an employee signing a form agreement. Like ***237** Peacock, **Quilloin** might not have seen or signed the actual arbitration agreement until after beginning her employment. As in *Peacock*, we acknowledge that the employee is the weaker party to the agreement, *Peacock*, 110 F.3d at 229; however, like Peacock, **Quilloin** did not lack a meaningful choice. She had a college degree, and chose to agree to the arbitration agreement on more than one occasion. Even if she was not initially informed of the agreement at either time she was hired, the fact remains that she quit her employment at **Tenet** to work for another employer, and then chose to go back and work once again for **Tenet**, subject to the Employment Agreement and the FTP. When **Quilloin** went back to her job at **Tenet**, the question of whether she actually remembered the arbitration agreement is of no consequence; we must presume that she was rehired knowing about the arbitration agreement which she had already signed, because parties are presumed to have knowledge of contracts they have signed. *See, e.g., Morales v. Sun Constr., Inc.*, 541 F.3d 218, 221–22 (3d Cir.2008); *Denlinger*, 608 A.2d at 1069–70.

Under such circumstances, we reject **Quilloin's** argument that there was unfair surprise or a lack of time to consider or learn the meaning of the terms of the agreement. We find that **Quilloin** did not lack a meaningful choice in agreeing to arbitrate, and she thus raised no genuine dispute of material fact with regard to procedural unconscionability.

IV.

For the foregoing reasons, we hold that the District Court erred in denying **Tenet's** motion to compel arbitration. We will therefore reverse the order of the District Court and remand with instructions to stay litigation proceedings and compel arbitration.

Parallel Citations

18 Wage & Hour Cas.2d (BNA) 1563

Footnotes

1 The details of this underlying action are not relevant to the claims we are asked to examine on appeal, which solely address the denial of a motion to compel arbitration.

2 Technically, Tenet filed a motion to dismiss, or, in the alternative, to stay proceedings and compel compliance with the agreement to arbitrate; however, as the District Court noted, "a stay, rather than a dismissal, is the required course of action when compelling arbitration." *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 763 F.Supp.2d 707, 711 n. 2 (E.D.Pa.2011) (citing *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269 (3d Cir.2004)).

3 We note this here because on appeal, Quilloin asks that we affirm the District Court's denial of the order, or in the alternative, that we find the arbitration agreement unconscionable and unenforceable as a matter of law. We have no such alternative. Only "final decisions of the district courts" are appealable, 28 U.S.C. § 1291, and because Quilloin neither filed nor claims to have filed a motion to dismiss or for summary judgment, the District Court issued no corresponding order. Thus, we cannot now find that Quilloin is entitled to a judgment finding the agreement unenforceable as a matter of law. *See also* 9 U.S.C. § 16 (discussing the appealability of arbitration decisions). At most, we would have the authority to affirm the district court's finding that a genuine dispute of material fact remained.

4 Technically, the District Court found that genuine "issues" of material fact remained. *See Quilloin*, 763 F.Supp.2d at 735. However, in 2010, the Federal Rules of Civil Procedure were amended, and the wording for the summary judgment standard was changed to require review for genuine "dispute[s]" of material fact. Fed.R.Civ.P. 56(a).

5 On this, we agree with numerous district courts. *See Brown v. TrueBlue, Inc.*, No. 1:10–cv–0514, 2011 WL 5869773, at *5 (M.D.Pa. Nov. 22, 2011); *King v. Advance Am.*, Nos. 07–237, 07–3142, 2011 WL 3861898, at *5–6 (E.D.Pa. Aug. 31, 2011); *Black v. JP Morgan Chase & Co.*, No. 10–848, 2011 WL 3940236, at *22 n. 25 (W.D.Pa. Aug. 25, 2011); *Clerk v. Cash Central of Utah, LLC*, No. 09–4964, 2011 WL 3739549, at *3–5 (E.D.Pa. Aug. 25, 2011).

6 Although *Great Western Mortgage Corp. v. Peacock*, *Nino v. Jewelry Exchange, Inc.*, and *Alexander v. Anthony Intern., L.P.*, apply New Jersey and Virgin Islands law, the cases provide useful reference points because the principles of procedural unconscionability are substantially similar under the laws of those jurisdictions. *See Salley*, 925 A.2d at 125 (drawing procedural unconscionability principles from New Jersey law); *Zimmer*, 523 F.3d at 228–29 (analogizing to case applying Virgin Islands law).

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

APR 22 2009

ALAN CARLSON, Clerk of the Court
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

BY FAX

CEASAR RODRIGUEZ,

Plaintiff,

vs.

FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER, et al.,

Defendants.

CASE NO. 30-2008-00108241

[Assigned for all purposes to Hon. Gregory Munoz, Dept. C08]

~~[Proposed]~~ **ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION**

Hrg Date: March 25, 2009
Time: 2:00 p.m.
Dept.: C08

Defendant Fountain Valley Regional Medical Center's motion to compel arbitration, which was originally set for hearing on March 18, 2009, which, on the court's own motion was continued to March 25, 2009 at 2:00 p.m., came on for hearing in Department C08 before the honorable Gregory Munoz, judge presiding. Lisa Maki appeared for the plaintiff. Michael S. Turner of Hill, Farrer & Burrill appeared for the defendant and moving party.

After considering the papers submitted in support and in opposition to the motion, and hearing the argument of counsel, the court ordered as follows:

1. Defendant's motion to compel arbitration is GRANTED. Regardless of whether federal or state law applies, moving party has shown the existence of a valid agreement to arbitrate which applies to the claims asserted in this action, and plaintiff has not demonstrated

grounds to deny enforcement of the agreement.

2. Plaintiff Rodriquez is ordered to arbitrate all claims against the moving party.

3. The action is stayed as to moving party pending completion of arbitration between these parties.

IT IS SO ORDERED.

Dated: APR 22 2009

HON. GREGORY MUNOZ

Judge of the Orange County Superior Court

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MAR 10 2000
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JOHN E. SMITHHISLER,

Plaintiff,

vs

TENET HEALTHSYSTEM MEDICAL, INC., a corporation, DOES 1-20,

Defendants

CASE NO. BC 219243

~~[PROPOSED]~~ ORDER GRANTING MOTION OF TENET HEALTH SYSTEM MEDICAL, INC. TO STAY ACTION AND COMPEL ARBITRATION

Date: February 24, 2000
Time: 9:45 a.m.
Dept.: 71

[Honorable Soussan Bruguera]

The motion of Defendant Tenet Healthsystem Medical, Inc. to stay the action and compel arbitration came on regularly for hearing on February 24, 2000, in Department 71 of the above-entitled Court, with the Honorable Soussan Bruguera presiding. Warren J. Higgins of Hill, Farrer & Burrill LLP appeared on behalf of Tenet, and Robert C. Rosen appeared on behalf of Plaintiff John E. Smithhisler.

Having considered the papers submitted by the parties and the arguments of counsel, and good cause appearing therefor, IT IS HEREBY ORDERED as follows:

1 Tenet's motion is GRANTED;

2 This action is stayed pending resolution of the issues raised herein through binding arbitration;

EXHIBIT 4

3. Plaintiff will resolve any and all issues raised in his First Amended Complaint in this action through final and binding arbitration.

IT IS SO ORDERED.

DATED: 3-10, 2000

THE HONORABLE SOUSSAN BRUGUERA
SUPERIOR COURT JUDGE

F:\CLIENTS\ATT241\001\ORDER

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SUE E. SWAIM,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CREIGHTON SAINT JOSEPH REGIONAL HEALTH CARE SYSTEM, L.L.C., A Limited Liability Company d/b/a CREIGHTON UNIVERSITY MEDICAL CENTER, and TENET AMISUB (SAINT JOSEPH HOSPITAL) INC., A Nebraska Corporation,	)	**8:06CV58**
	)	
	)	**MEMORANDUM AND ORDER**
	)	
	)	
	)	
	)	
Defendants.	)	

This matter is before the magistrate judge by consent of the parties on DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION OR, ALTERNATIVELY, TO DISMISS (Filing 11). Having carefully considered the parties' arguments and evidentiary submissions (Filings 11, 12, 13, 17, 18, 19 and 20), I find that the motion to compel arbitration should be granted and the case should be stayed pending the completion of arbitration.

FACTUAL BACKGROUND

Creighton Saint Joseph Regional Health Care System, L.L.C., d/b/a Creighton University Medical Center ("Medical Center") is owned and operated by Tenet Amisub (Saint Joseph Hospital) Inc. ("Tenet"). Tenet owns and operates hospitals in 13 states. The Medical Center is engaged in interstate commerce in that it regularly treats out-of-state patients; receives payments through multi-state insurance carriers and/or Medicare or Medicaid Funds; and regularly receives goods and services from out-of-state vendors.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

On December 11, 2001, plaintiff applied for employment with the defendant and signed an application (Filing 12, Exhibit 2A) which stated, in part:

> I understand that any and all disputes regarding my employment with Tenet, including any disputes relating to the termination of my employment [are] subject to the Tenet Fair Treatment Process, which includes final and binding arbitration, and I also understand and agree, as a condition [of] employment and continued employment, to submit any such disputes for resolution under that process, and I further agree to abide by and accept [the] decision of the Arbitration panel as the final and binding decision and resolution of any such disputes I may have.

Plaintiff was hired on February 18, 2002 as Director of Post Operative Services. As part of the hiring process, plaintiff signed an "Employee Acknowledgment Form" (filing 12, Exhibit 2B) on February 4, 2002 which states, among other things:

> [I] acknowledge that I have received and reviewed a copy of the Tenet Fair Treatment Process brochure. I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that, by agreeing to use arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the Fair Treatment Process. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association ("AAA").
>
> I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-of-pocket expenses for the arbitrator and the administrative costs of the AAA will be an amount equal to one day's pay (if I am an exempt employee) eight times my hourly rate of pay (if I am a non-exempt employee), or the local civil filing fee, whichever is less and that the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. I further acknowledge that this mutual agreement to

> arbitrate may not be modified or rescinded except by a written statement signed by both me and the Company.

Upon her employment with defendant, plaintiff received a copy of the "Tenet Open Door Policy and Fair Treatment Process" (Filing 12, Exhibit 2C). The Fair Treatment Process includes a grievance and arbitration agreement for final and binding arbitration under the auspices of the AAA. The Fair Treatment Process ("FTP") applies to all disputes relating to or arising out of a person's employment with Tenet. (Filing 12, Exhibit 2C). The only issues excluded from the FTP are workers' compensation claims, claims involving ERISA benefit plans, claims for unemployment benefits, "non-waivable statutory claims," and claims of employees covered by certain collective bargaining agreements.

The FTP is a five-step procedure for reviewing employee complaints throughout the defendants' chain of command. If an employee is not satisfied with the resolution of his or her complaint in Steps 1 through 4 of the process, and the employee still believes the complaint has merit, the FTP provides:

> **Step 5: Final and Binding Arbitration**
>
> If you do not accept the decision reached in Step 4, then you have the right to submit the problem or dispute to final and binding arbitration. The arbitration process is limited to disputes, claims or controversies that a court of law would be authorized or have jurisdiction over to grant relief and that in any way arise out of, relate to or are associated with your employment with the company or termination of your employment. In such cases, an impartial and independent arbitrator - chosen by agreement of both you and the company - will be retained to make a final decision on your dispute or claim, based on application of Company policies and procedures and applicable law. The arbitrator's decision is final and binding on you and the Company. The arbitration process is discussed in more detail in the "Arbitration Process" section below[.]

* * * *

The Arbitration Process

If you want to appeal the decision reached in Step 4 of the process, you must obtain and complete a "request for Arbitration Form" from the Human Resources Department in order to initiate the arbitration process. That form also will serve to confirm your and the company's prior mutual agreement to submit the dispute to final and binding arbitration. The arbitration will be heard by an independent and impartial arbitrator chosen by you and the company. By deciding to arbitrate the dispute, you also agree that the remedy, if any, ordered by the arbitrator will be the only remedy as to all matters that are or could have been raised by you in the arbitration.

The arbitrator's responsibility is to determine whether company policies and procedures and applicable law have been complied with in the matter submitted for arbitration. The arbitrator shall render a written decision on the matter within 30 days after the arbitration hearing is concluded and post-hearing briefs, if any, are submitted.

The arbitration will be administered by the American Arbitration Association ("AAA"). The company and you will share the cost of the AAA's filing fee and the arbitrator's fees and costs, but your share of such costs shall not exceed an amount equal to one day's pay for exempt employees or eight times your hourly rate for non-exempt employees or your local court civil filing fee, whichever is less. You and the company will be responsible for the fees and costs of your own respective legal counsel, if any, and any other expenses and costs, such as costs associated with witnesses or obtaining copies of hearing transcripts.

Filing 12, Exhibit 2C.

Plaintiff's employment with the defendant was terminated on October 6, 2003. Plaintiff did not pursue any remedy under the defendant's Fair Treatment Process but, instead, filed a complaint with the Nebraska Equal Opportunity Commission and brought this lawsuit alleging claims for age and disability discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e, et seq., as amended (Title VII), the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-634 (ADEA), and the Americans With Disabilities Act of 1990 (ADA).

ISSUES PRESENTED

Defendants argue that the employment relationship between the plaintiff and the Medical Center is a "transaction involving commerce" and is within the scope of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2. They contend the arbitration agreement should be enforced, based on the plaintiff's signing the documents discussed, *supra*, and that this action be either dismissed or stayed pursuant to 9 U.S.C. § 3.

The plaintiff contends the FAA does not apply to disputes between an employer and employee; that the employment relationship between the plaintiff and the Medical Center does not involve commerce; the arbitration agreement is unconscionable; and her claim for punitive damages is a "statutory claim" excluded from the scope of the FTP (assuming without conceding there is a valid agreement).

LEGAL ANALYSIS

"[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)." In this regard, "[s]ection 2 of the [Federal Arbitration Act ("FAA")] provides that written arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (quoting 9 U.S.C. § 2; emphasis by Supreme Court); *see also Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 790 (8th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). Thus, "[b]efore a party may be compelled to arbitrate under the [FAA], the district court must engage in a limited inquiry to determine whether a valid agreement to arbitrate exists

between the parties and whether the specific dispute falls within the scope of that agreement." *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, 695-96 (8th Cir. 1994) (citing *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994)).

"The court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). When deciding whether the parties agreed to arbitrate the dispute in question, "courts generally ... should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995). Generally applicable contract defenses, such as fraud[1], duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2; however, courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. *Casarotto*, 517 U.S. at 687 (emphasis in original). The court must stay the proceeding and compel arbitration if the court determines that the parties' dispute falls within the scope of a valid arbitration agreement. *Houlihan*, 31 F.3d at 696; 9 U.S.C. §§ 3 & 4.

A. Did the Parties Agree to Arbitrate?

The FAA, 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

[1]In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967), the Supreme Court held that a claim of fraud in the inducement of a contract as a whole must go to an arbitrator, but issues which go to the making of the agreement to arbitrate should be decided by a court. In the case at bar, the plaintiff does not argue that she was fraudulently induced to agree to the arbitration clause.

> arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Under the FAA, ordinary contract principles govern whether parties have agreed to arbitrate." *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834 (8th Cir. 1997) (citing *Daisy Mfg. Co., Inc. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994)). Under Nebraska law, "[t]o create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract." *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 751, 626 N.W.2d 472, 498 (2001); *accord Gerhold Concrete Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 269 Neb. 692, 700, 695 N.W.2d 665,672 (2005).

Plaintiff states in her brief (Filing 18) that she signed "many forms" provided by the defendants and has no recollection of signing an arbitration agreement. She further notes that she signed the documents, which ware labeled "Application for Employment" and "Employee Acknowledgment Form" before the date her employment started and contends no arbitration agreement could exist because there was no employment relationship when the documents were signed. Plaintiff states in her affidavit (Filing 19) that she did not sign the documents knowing them to be arbitration contracts.

Here, the plaintiff does not deny signing an application for employment (Filing 12, Exhibit 2A) requiring her, as a condition of employment and continued employment, to utilize the Tenet Fair Treatment Process, which includes final and binding arbitration, to resolve any

and all disputes regarding her employment with Tenet. Plaintiff also signed the "Employee Acknowledgment Form" (filing 12, Exhibit 2B) in which she "voluntarily agree[d] to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment with Tenet."

"As a general rule, every person of mature age able to read and write, who has an opportunity to read an instrument, and executes the same is presumed to know the contents of the instrument signed and is estopped from denying the contents thereof." *Kramer v. Eagle Eye Home Inspections, Inc.*, --- N.W.2d ----, 14 Neb. App. 691, 2006 WL 1071972 at *11 (Neb. Ct. App. April 25, 2006). Here, the plaintiff accepted and continued with her employment with Tenet on the condition that she agreed to utilize the FTP, including its arbitration requirement, to resolve any and all disputes regarding her employment with Tenet. I find that plaintiff is estopped from denying the contents of the arbitration agreement and that the parties did agree to arbitrate.

B. Does the Federal Arbitration Act Apply?

The plaintiff contends the FAA does not apply to disputes between an employer and employee and the employment relationship between the plaintiff and the Medical Center does not involve "commerce." It appears that the Eighth Circuit's decision in *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834 (8th Cir. 1997), essentially governs this issue.

In *Patterson*, the plaintiff received a copy of Tenet's employee handbook and signed an arbitration clause set forth on the last page of the handbook. The court held that the arbitration

clause was separate from the other provisions of the handbook and constituted an enforceable contract. 113 F.3d at 835. The court next considered whether the FAA governed the agreement to arbitrate, and rejected the plaintiff's argument that, by enacting Section 1 of the FAA[2], Congress intended to exempt all employment contracts from the FAA. The court held that Section 1 should be interpreted narrowly, the arbitration agreement between Patterson and Tenet was governed by the FAA, and the arbitration agreement was enforceable. 113 F.3d at 836-37. Subsequently, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001), the Supreme Court held that "Section 1 exempts from the FAA only contracts of employment of transportation workers." *See also Farber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004) (the FAA extends to most arbitration agreements covering employment disputes).

Here, plaintiff signed an Employee Acknowledgment Form agreeing to be bound by the Federal Arbitration Act, and the defendants have shown that the Medical Center is engaged in interstate commerce. Accordingly, I find that the arbitration agreement in this case is governed by the FAA and is not governed by Nebraska's Uniform Arbitration Act, Neb. Rev. Stat. §§ 25-2601 to 25-2622. Compare *Kramer v. Eagle Eye Home Inspections, Inc.*, 2006 WL 1071972 at *10-11 (Nebraska's Uniform Arbitration Act does not mention "commerce" at all and is not preempted by the FAA). Since the arbitration agreement at bar is governed by the FAA, it is immaterial that the documents signed by the plaintiff documents do not bear the notice "THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES"

---

[2]Section 1 exempts from FAA enforcement "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

that is required by Neb. Rev. Stat. § 25-2602.02. Compare *Kramer*, 2006 WL 1071972 at *11 (under the Nebraska Uniform Arbitration Act, when a contract which attempts to establish binding arbitration as the sole remedy fails to strictly comply with § 25-2602.02, the arbitration clause is voidable and unenforceable).

Turning to the plaintiff's argument that the agreement is unconscionable,

> An unconscionable agreement is defined as "[a]n agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept." Black's Law Dictionary 68 (7th ed.1999). Unconscionability is determined in light of all the surrounding circumstances, including (1) the manner in which the parties entered into the contract, (2) whether the parties had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print.

Parizek v. Roncalli Catholic High Sch. of Omaha, 11 Neb. App. 482, 486, 655 N.W.2d 404, 408 (Neb. Ct. App. 2002) (citing *Adams v. American Cyanamid Co.*, 1 Neb. App. 337, 498 N.W.2d 577 (1992)). The plaintiff has offered no evidence tending to show that the arbitration agreement is "unconscionable" and the court finds her argument to be without merit.

C. Are Plaintiff's Claims Excluded from the Scope of the FTP?

Plaintiff contends her claim for punitive damages pursuant to 42 U.S.C. § 1981a(b) is a "statutory claim" excluded from the scope of the FTP, which provides:

> [A]ny non-waivable statutory claims, which may include wage claims within the jurisdiction of a local or state labor commissioner or administrative agency charges before the Equal Employment Opportunity Commission or similar local or state agencies, are not subject to exclusive review under the FTP. This means that you may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether you decide to use the FTP to resolve them. However, if such an agency completes its processing of your action against the company, you must use the FTP (although Steps 1 through 4 may be skipped).

"[S]tatutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA," and the Supreme Court has "recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because '"so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,"' the statute serves its functions." *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

"[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1210 (2006). The arbitrator will determine the extent of its procedural and remedial authority as limited by contract. The arbitrator may determine if a party has waived statutory rights, and may choose to enforce substantive statutory rights even in the face of contractual limitations. *Faber v. Menard, Inc.*, 367 F.3d at 1052.

The arbitration agreement in this case reflects that the employee must use the FTP even if non-waivable statutory claims are filed with the appropriate agency. I find that plaintiff's argument is without merit, and all of her claims are subject to review under the FTP.

CONCLUSION

When reviewing an arbitration clause, the court asks only

> (1) whether there is a valid arbitration agreement and (2) whether the particular dispute falls within the terms of that agreement. "We have described this narrow scope of review as addressing 'only such issues as are essential to defining the

> nature of the forum in which a dispute will be decided.' .... We will not extend that review 'to the consideration of public policy advantages or disadvantages resulting from the enforcement of the agreement.' .... Questions about remedy are also outside our scope of review because they do not affect the validity of the agreement to arbitrate."

Faber v. Menard, Inc., 367 F.3d at 1052 (citations omitted). In this instance, the court finds there is a valid arbitration agreement and the parties' dispute falls within the terms of the arbitration agreement. Pursuant to the FAA, 9 U.S.C. § 3, on the application of either party, the court must stay the suit until arbitration has occurred.

IT THEREFORE IS ORDERED:

1. DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION (Filing 11) is granted. The alternative motion for dismissal is denied. All claims are stayed pending binding arbitration in accordance with the Federal Arbitration Act and under the procedures of the American Arbitration Association.

2. The parties shall electronically file written status reports concerning the progress of the arbitration proceedings. The first status report shall be filed by **October 1, 2006.** Subsequent status reports are due **every 90 days thereafter** until all arbitration proceedings are completed.

DATED June 28, 2006.

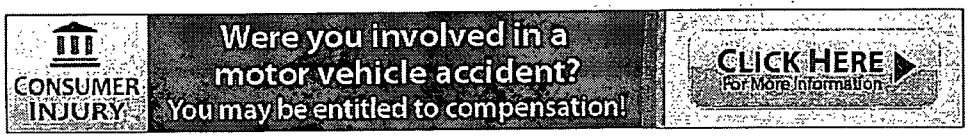
BY THE COURT:

s/ F.A. Gossett
United States Magistrate Judge

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IN RE: TENET HEALTHCARE

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Court of Appeals of Texas, Houston (1st Dist.).

IN RE: TENET HEALTHCARE, LTD. d/b/a Park Plaza Hospital, Relator.

No. 01-02-00286-CV.

Decided: August 15, 2002

Panel consists of Justices HEDGES, JENNINGS, and KEYES. Chris A. Scherer, Haynes and Boone, L.L.P., San Antonio, for Relator. Thomas N. Thurlow, Thurlow & Associates, Houston, for Real Party in Interest.

OPINION

By petition for writ of mandamus, relator, Tenet Healthcare, Ltd. d/b/a Park Plaza Hospital (Tenet), challenges the trial court's January 4, 2002 order denying its motion to compel arbitration between it and real party in interest, Vonessa Valyan. We conditionally grant the petition.1

Background

Tenet hired Valyan on May 22, 2000 as a distribution clerk. During employee orientation, Valyan was given a copy of Tenet's Employee Handbook. Valyan signed and returned the Employee Handbook Acknowledgment Form, which contained an arbitration agreement. The Acknowledgment Form provided as follows:

I acknowledge that I have received a copy of the Tenet Employee Handbook and Standards of Conduct and that I understand that they contain important information about the company's general personnel policies and about my privileges and obligations as an employee. I further understand and acknowledge that I am governed by the contents of the Employee Handbook and Standards of Conduct and that I am expected to read, understand, and familiarize myself with and comply with the policies contained in them.

I also understand that the company may change, rescind or add to any of the policies, benefits or practices described in the Employee Handbook, except the employment-at-will policy and the Mutual Agreement to Arbitrate referred to below, in its sole and absolute discretion, with or without prior notice. I also understand that the company will advise employees from time to time of material changes to the policies, benefits or practices described in the Employee Handbook.

Furthermore, I understand, acknowledge and agree that the Employee Handbook is not a contract of employment, that my employment is at the mutual consent of the employee and the company. Therefore, I hereby acknowledge that either I or the company can terminate my employment relationship at will, with or without cause or notice.

In addition, I acknowledge that I have received a copy of the Tenet Fair Treatment Process brochure. I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and that, by agreeing to use arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the Fair Treatment Process. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association. ("AAA").

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I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-of-pocket expenses for the arbitrator and the administrative costs of the AAA will be an amount equal to one day's pay (if I am an exempt employee) or eight times my hourly rate of pay (if I am a non-exempt employee), and that the Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except by a written statement signed by both me and the Company.

(Emphasis added.)

Valyan was terminated on April 17, 2001 for violating Tenet's attendance and punctuality policy. Valyan then filed suit alleging she was terminated in retaliation for filing a worker's compensation claim. See Tex. Lab.Code Ann. § 451.001 (Vernon Supp.2002). Tenet filed a motion to compel arbitration and dismiss the lawsuit, which the trial court denied on October 2, 2001.

The October 2, 2001 order expressly denied Tenet's motion to compel arbitration. Tenet submitted to the trial court a draft of the order, which was written to grant Tenet's motion to compel arbitration and dismiss Valyan's suit with prejudice. The trial court crossed out the word "granted" on Tenet's draft order, wrote in the word "DENIED," initialed the change, and signed the order. However, the following paragraph of the order provides that the parties "will arbitrate all of the claims" and purported to dismiss the suit "with prejudice." Valyan subsequently filed a "Motion for Nunc Pro Tunc Order." On January 4, 2002, after a hearing, the trial court granted Valyan's motion and amended its original order, denying Tenet's motion to compel arbitration with no conflicting ruling ordering the parties to arbitration.

Nunc Pro Tunc Order

Tenet initially argues that the trial court abused its discretion by granting a "judgment nunc pro tunc to correct a judicial error after its plenary power expired." (Emphasis added.) Tenet mischaracterizes the October 2, 2001 order as a "judgment" and the January 4, 2002 amended order as a "judgment nunc pro tunc." A dismissal with prejudice is a final determination on the merits. Mossler v. Shields, 818 S.W.2d 752, 754 (Tex.1991). However, a trial court may not dismiss a suit without giving the plaintiff notice of its intent to dismiss, and failure to provide adequate notice of the trial court's intent to dismiss requires reversal. See Tex.R. Civ. P. 165a(1); see also Villarreal v. San Antonio Truck & Equip., 994 S.W.2d 628, 630 (Tex.1999).

Here, no such notice was given because the trial court never intended to dismiss Valyan's suit. The trial court, clearly intending to deny Tenet's motion to compel arbitration, crossed out the word "granted" on Tenet's draft order, and wrote in the word "DENIED." Neither the October 2, 2001 order nor the January 4, 2002 amended order had the effect of a final judgment. See Lehmann v. Har-Con Corp., 39 S.W.3d 191, 200 (Tex.2001) ("The intent to finally dispose of the case must be unequivocally expressed in the words of the order itself."). Thus, Tenet's initial argument is without merit.

Federal Arbitration Act

The Supreme Court of Texas has observed that, "litigants who allege entitlement to arbitration under the Federal Arbitration Act (FAA), and in the alternative, under the Texas General Arbitration Act (TGAA), are burdened with the need to pursue parallel proceedings-an interlocutory appeal of the trial court's denial under the Texas Act, and a writ of mandamus from the denial under the Federal Act." Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266, 272 (Tex.1992).

Tenet asserts that the FAA applies in this case because the arbitration agreement involves interstate commerce and the agreement expressly provides that arbitration will be conducted under the FAA. The trial court did not specify in its order whether the FAA or TGAA governed the arbitration provision of the parties' contract. Accordingly, Tenet has filed both an interlocutory appeal and a petition for writ of mandamus. We first consider whether the FAA or the TGAA applies to the instant dispute to determine the proper procedural disposition of the case.

The FAA applies to an arbitration agreement in a contract evidencing a transaction involving "commerce." Belmont Constructors, Inc. v. Lyondell Petrochemical Co., 896 S.W.2d 352, 355 (Tex.App.-Houston [1st Dist.] 1995, no writ). Under the FAA, the term "commerce" is broadly construed, and whether the agreement is covered by the FAA is determined by whether the contract relates to interstate commerce. Id. Here, Tenet's first amended motion to compel arbitration alleged that Park Plaza Hospital, where Valyan worked, treated patients who lived out-of-state; received goods and services from out-of-state; received payments from out-of-state insurance carriers; and received federal funds such as Medicaid and Medicare. Valyan does not challenge these allegations.

Additionally, the arbitration agreement itself specifically refers to the FAA. Thus, we hold the employer/employee relationship which existed between Tenet and Valyan related to interstate commerce, and the FAA applies to this dispute. See id. at 356. Therefore, Tenet may seek relief by petition for writ of mandamus. Cantella & Co., Inc. v. Goodwin, 924 S.W.2d 943, 945 (Tex.1996); Anglin, 842 S.W.2d at 272.

The Arbitration Agreement

In determining whether to compel arbitration, a court must decide two issues: (1) whether a valid, enforceable arbitration agreement exists and, (2) if so, whether the claims asserted fall within the scope of the agreement. In re Oakwood Mobile Homes, Inc., 987 S.W.2d 571, 573 (Tex.1999). A court has no discretion and must compel arbitration if the answer to both questions is affirmative. Dalton Contractors, Inc. v. Bryan Autumn Woods, Ltd., 60 S.W.3d 351, 353 (Tex.App.-Houston [1st Dist.] 2001, no pet.).

At-Will Employment and Arbitration Agreement

Valyan disputes the existence of a binding contract containing an arbitration clause. She notes that the Acknowledgment Form provides that the Employee Handbook is not a contract of employment, employment is at the mutual consent of the employee and the company, and employment can be terminated at-will, with or without cause, by either the employee or the company. Valyan further notes that the Fair Treatment Process plan states that nothing in it shall be construed as creating an employment contract. Essentially, Valyan asserts that because Tenet drafted the Acknowledgment Form and the Fair Treatment Process stating that neither constituted a contract of employment, Tenet cannot now argue that the arbitration agreement is a contract. In support of her argument, Valyan relies on Tenet Healthcare Ltd. v. Cooper, 960 S.W.2d 386, 388 (Tex.App.-Houston [14th Dist.] 1997, writ dism'd w.o.j.). However, we distinguish Cooper because the court (1) specifically declined to address whether an enforceable contract existed, because no precedent was cited necessitating such a determination, and (2) the lack of consideration for the agreement was dispositive of the case. Id.

Furthermore, and contrary to Valyan's assertion, merely re-affirming that an employment relationship is "at will" does not negate the existence of an arbitration agreement. In re Jebbia, 26 S.W.3d 753, 757 (Tex.App.-Houston [14th Dist.] 2000, orig. proceeding). Other employer-employee agreements can be formed without limiting either parties' ability to terminate employment at will:

[A]t-will employment does not preclude the formation of other contracts between employer and employee. At -will employees may contract with their employers on any matter except those which would limit the ability of either employer or employee to terminate the employment at-will. Consideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent on a period of continued employment.

Id. (quoting Light v. Centel Cellular Co. of Texas, 883 S.W.2d 642, 644 (Tex.1994)). Thus, otherwise enforceable agreements may emanate from at-will employment so long as the consideration for any promise is not illusory. Light, 883 S.W.2d at 644.

The existence of a valid agreement is determined by the substantive contract law of Texas. See Cooper, 960 S.W.2d at 388. Consideration is a fundamental element of any valid contract. Copeland v. Alsobrook, 3 S.W.3d 598, 604 (Tex.App.-San Antonio 1999, pet. denied).

Mutual promises to give up the right to litigate can constitute consideration supporting an agreement to arbitrate. In re Jebbia, 26 S.W.3d at 758 ("The language of the arbitration agreement indicates it is binding upon both parties."); see In re Alamo Lumber Co., 23 S.W.3d 577, 579-80 (Tex.App.-San Antonio 2000, orig. proceeding) ("Since the parties surrendered their rights to trial by jury, these mutual promises supply valid consideration.").

Here, the arbitration agreement provides as follows:

I also understand that the company may change, rescind or add to any of the policies, benefits or practices described in the Employee Handbook, except the employment-at-will policy and the Mutual Agreement to Arbitrate referred to below, in its sole and absolute discretion, with or without prior notice.

I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except by a written statement signed by both me and the Company.

(Emphasis added.)

Tenet expressly agreed that, in exchange for Valyan's agreement to arbitrate, it would submit all claims and disputes it had with Valyan to final and binding arbitration. Neither the employment-at-will policy nor the Mutual Agreement to Arbitrate could be changed by Tenet. Moreover, neither Tenet nor Valyan could modify or rescind the arbitration agreement without the written agreement of the other to do so. Similar to the agreements in Jebbia and Alamo Lumber Co., the language of the parties' agreement created mutual promises by both to forego their right to a jury trial, which could not be unilaterally rescinded by either party.

We hold that the arbitration agreement in this case was supported by consideration and, therefore, the arbitration agreement is enforceable and binding on both parties. See In re Jebbia, 26 S.W.3d at 758; see also In re Alamo Lumber Co., 23 S.W.3d at 579-80.

Scope of Arbitration Agreement

We next consider whether Valyan's claim for retaliatory discharge falls within the scope of the arbitration agreement. We note that an order to arbitrate under the FAA should not be denied unless it can be said with positive assurance that the arbitration agreement is not susceptible of an interpretation that covers the asserted dispute. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409, (1960); Hou-Scape, Inc. v. Lloyd, 945 S.W.2d 202, 205 (Tex.App.-Houston [1st dist.] 1997, orig. proceeding). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Hou-Scape, 945 S.W.2d at 205.

Arbitration is a creature of contract, and an arbitration provision must be interpreted under contract principles. Belmont Constructors, Inc., 896 S.W.2d at 356. In determining whether an arbitration provision encompasses a claim, courts focus on the facts alleged, not the causes of action asserted. Hou-Scape, 945 S.W.2d at 205. We consider whether the facts alleged "touch matters" covered by the underlying agreement. Id.

Here, Valyan "voluntarily agree[d] to use the Company's Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet." (Emphasis added.) The plain language of the clause explicitly contemplates a dispute relating to the termination of employment.

Thus, we hold that Valyan's worker's compensation retaliation claim lies within the scope of the arbitration provision and is subject to arbitration.

Texas General Arbitration Act and Texas Public Policy

Valyan argues that the arbitration provision in this case is unenforceable because it violates the Texas General Arbitration Act and is contrary to Texas public policy.

Valyan first argues that arbitration should not be enforced because the Texas General Arbitration Act specifically excepts claims for "worker's compensation benefits" from arbitration. See Tex. Civ. Prac. & Rem.Code Ann. § 171.002 (Vernon Supp.2002). Valyan asserts that her claim for retaliatory discharge is a claim for worker's compensation benefits and it should thus be excepted from arbitration. However, Valyan's suit against Tenet is not for denied worker's compensation benefits, but for retaliatory discharge. She cites no authority for the proposition that a claim for retaliatory discharge is a claim for benefits under the Texas Workers' Compensation Act. Thus, Valyan's contention that Tenet is attempting to arbitrate "worker's compensation benefits" is without merit.

Valyan next argues that Texas public policy, as manifested in the Texas Workers' Compensation Act, prohibits the arbitration of her claim. See Tex. Lab.Code Ann. § 406.033(c) (Vernon Supp.2002). She claims generally that the Legislature has shown there is a strong public policy in favor of protecting injured workers. While this may be true, Valyan cites to no authority for the proposition that public policy, as manifested by the Workers' Compensation Act's non-waiver provisions regarding benefits, applies to an arbitration agreement.2

It is well-settled that federal and Texas law strongly favor arbitration. See Cantella, 924 S.W.2d at 944. Moreover, we have noted that "there is a strong presumption in Texas public policy favoring arbitration." Pepe Int'l Dev. Co. v. Pub Brewing Co., 915 S.W.2d 925, 930 (Tex.App.-Houston [1st Dist] 1996, no writ). Valyan's argument that arbitration in this case is prohibited by Texas public policy is without merit.

Conclusion

Because Tenet established the existence of an arbitration agreement and demonstrated that Valyan's claims are within the scope of that agreement, we conclude the trial court abused its discretion in denying Tenet's motion to compel arbitration. See Oakwood Mobile Homes, 987 S.W.2d at 573.

A party erroneously denied the right to arbitrate under the FAA has no adequate remedy on appeal, and mandamus relief is appropriate. See Anglin, 842 S.W.2d at 272-73. Accordingly, we conditionally grant the writ of mandamus. Tex.R.App. P. 52.8(c). We are confident the trial court will grant Tenet's motion to compel arbitration in accordance with this opinion, and we instruct the clerk of this Court to issue the writ only if the trial court fails to do so.

FOOTNOTES

1. In a parallel proceeding, Tenet has also filed an interlocutory appeal, based on the Texas General Arbitration Act, challenging the trial court's January 4, 2002 order denying Tenet's motion to compel arbitration. See Tex. Civ. Prac. & Rem.Code Ann. § 171.021(a) (Vernon Supp.2002). Because, as discussed

below, we conclude the Federal Arbitration Act applies to this case, we dismiss Tenet's appeal for lack of jurisdiction. See Tenet Healthcare, Ltd. d/b/a Park Plaza Hosp. v. Valyan, 01-02-00109-CV, 2002 WL 1869625 (Tex.App.-Houston [1st Dist.] August 15, 2002, no pet. h.) (not designated for publication).

2. Valyan cites only to section 406.033(e) of the Labor Code, which provides that a cause of action described in subsection (a) may not be waived by an employee before the employee's injury or death. Tex. Lab.Code Ann. § 406.033(e) (Vernon Supp.2002). Subsection (a) refers to causes of action for personal injury or death against a non-subscriber. Id. § 406.033(a) (Vernon Supp.2002).

TERRY JENNINGS, Justice.

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United States Court of Appeals,Third Circuit.
Lee A. VARALLO,
v.
ELKINS PARK HOSPITAL; **Tenet** Healthcare Corporation, Appellants.
No. 02-1944.

Argued March 4, 2003.
Decided March 26, 2003.

Employee who was not rehired after her position was eliminated while she was on maternity leave brought discrimination action against employer for failure to rehire and wrongful termination. The United States District Court for the Eastern District of Pennsylvania, James T. Giles, Chief Judge, 2002 WL 437956, denied employer's motion to compel arbitration. Employer appealed. The Court of Appeals, Barry, J., held that employee was required to arbitrate claims against employer under arbitration agreement which required arbitration of any and all claims and disputes that were related in any way to employment or the termination of employment.

Reversed.

West Headnotes

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25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk146 k. Employment Disputes. Most Cited Cases
(Formerly 33k7.5 Arbitration)
Employee who was not rehired after her position was eliminated while she was on maternity leave was required to arbitrate discrimination claims against employer for failure to rehire and wrongful termination, under arbitration agreement which required arbitration of any and all claims and disputes that were related "in any way" to employment or the termination of employment; factual bases for claims of lost employment and prospective employment were inextricably intertwined and it was virtually impossible to allege a factual bases for unlawful discrimination for failure to rehire without invoking events that occurred within context of employment and its termination.

*602 Appeal from the United States District Court for the Eastern District of Pennsylvania. D.C. Civil No. 01-CV-00785. District Judge: The Honorable James T. Giles.

W. Thomas McGough, Jr., (Argued), Reed Smith, Pittsburgh, PA, and Michael D. Jones, Ryan J. Cassidy, Reed Smith, Philadelphia, PA, and Jerald R. Cureton, Michael J. Wietrzychowski, Cureton Caplan, Delran, NJ, for Appellants.
Alan B. Epstein (Argued), Nancy Abrams, Spector, Gadon & Rosen, Philadelphia, PA, for Appellee.

Before: ROTH, BARRY, and FUENTES, Circuit Judges.

OPINION

BARRY, Circuit Judge.
**1 We will dispense with a full recitation of the facts in this case, as we write primarily for the parties and the District Court who are familiar with them.

Suffice it to say, plaintiff Lee Varallo filed suit against Elkins Park Hospital and Tenet Healthcare Corporation (collectively, "the Hospital") when, after she took Family and Medical leave following the birth of her child, her position was eliminated and the Hospital failed to rehire her into another position. Varallo alleged a failure to rehire, as well as wrongful termination in violation of the Civil Rights Act of 1964, 42 U.S.C. § § 2000e, et seq., the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k), the Family Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § § 2601, et seq., and the Pennsylvania Human Relations Act ("PHRA"), 42 P.S. § § 951, et seq.

The Hospital filed a Motion to Dismiss or Stay Action and Compel Arbitration pursuant to the Federal

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Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq, in light of a concededly broad and undisputedly valid arbitration agreement between Varallo and the Hospital.[FN1] The District Court denied*603 this motion, holding that while it was "undisputed that plaintiff's wrongful termination claims fall within the scope of the arbitration clause," 2002 WL 437956, at *3, it was also "undisputed that plaintiff cannot be compelled to submit to arbitration claims that are not covered by the arbitration agreement." *Id.* at *4. The District Court went on to find that Varallo's "failure to hire claims are not within the scope of her employment contract, and thus not subject to arbitration," because "[n]othing in the employment agreement can be construed to bind plaintiff past the termination of her employment," and she "cannot be bound by an employment contract beyond the termination of her employment, thereby putting her in a worse position, for failure-to-hire purposes, than applicants who had never worked for defendants." *Id.* The District Court then concluded that the arbitrable claims were "inextricably intertwined" with the non-arbitrable claims, and denied the motion to compel in its entirety, holding that "[a]lthough arbitration upon demand is the general rule, it has been held that where a party's arbitrable and non-arbitrable claims cannot be practically separated, it may be appropriate to deny arbitration of any of the claims," and, citing a handful of more than twenty-year old cases, that "[w]here arbitral claims are 'inextricably intertwined' with nonarbitrable federal claims, arbitration should not be permitted." *Id.* at *2, *6.

> FN1. It is undisputed that Varallo's employment was governed by the Hospital's Fair Treatment Process ("FTP"), and that she signed a valid "Employee Acknowledgment Form," which obligated her "to submit to final and binding arbitration any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment with Tenet." (App. at 33). Varallo further acknowledged "that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tenet or its parent, subsidiary, or affiliated companies or entities, and each of its/or their employees, officers, directors, or agents, and that, by agreeing to use arbitration to resolve [her] dispute, both the Company and [she] agree[d] to forego any right [they] each may have had to a jury trial on issues covered by Fair Treatment Process." (*Id.*).

The standard of review in a case that calls upon us to address ourselves to the applicability and scope of an arbitration agreement is plenary. *See, e.g., Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 176 (3d Cir.1999). A motion to compel arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Medtronic Ave, Inc. v. Advanced Cardiovascular Systems, Inc.*, 247 F.3d 44, 55 (3d Cir.2001) (internal quotations omitted). This is so because the legislative goal of the Federal Arbitration Act ("FAA") was ostensibly to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

**2 When determining whether a given claim falls within the scope of an arbitration agreement, a court must "focus on the factual allegations in the complaint rather than the legal causes of action asserted." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir.1987). "If these factual allegations 'touch matters' covered by the parties' contract, then those claims must be arbitrated, whatever the legal labels attached to them." *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624-25 n. 13, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Moreover, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

The District Court essentially found that the date of termination was, without more, *604 or at least without much more, the point of demarcation between what was arbitrable and what was not. But Varallo was concededly bound to submit to arbitration "any and all claims and disputes that are related *in any way* to [her] employment or the termination of [her] employment ...." (emphasis supplied). It would be virtually impossible for her to allege a factual basis for unlawful discrimination in the Hospital's failure to rehire her without invoking events that occurred against the backdrop of and within the context of her employment and its termination. Stated somewhat differently, the factual underpinnings of all of

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Varallo's claims, are, in the words of the District Court itself, "inextricably intertwined." Indeed, she repeatedly alleges in her Complaint that the Hospital's "discriminatory intent [in eliminating her position] is *further evidenced* by the fact that plaintiff was not allowed the option of taking any other open pharmacist position so that she could continue employment with defendants." (App. at 44-46) (emphasis supplied). Clearly, then, even she believes that her lost employment is factually intertwined with her prospective employment and, thus, that the factual bases for her claims of wrongful termination and failure to rehire are linked. We simply cannot say with the "positive assurance" that we require before a motion to compel arbitration can be denied that the agreement here "is not susceptible of an interpretation" that covers the failure to rehire claim. *Medtronic Ave, Inc.*, 247 F.3d at 55.

Furthermore, the alleged severability and distinctiveness of the failure to rehire claim from the wrongful termination claims are undercut by the fact, and fact it be, that only a job application of a former Hospital employee could accurately be termed an application for "*Re* hire" or "*Re* instatement" which, of course, are subjects explicitly covered by the arbitration agreement. It goes without saying that an applicant with no employment history with the Hospital would, by definition, have no claim whose factual premise could be anchored to anything that occurred during a previous employment.

**3 For the aforementioned reasons, we conclude that all of Varallo's claims were covered by the arbitration agreement.[FN2] The judgment of the District Court will be REVERSED, and this case remanded to the District Court with instructions to compel arbitration of all of Varallo's claims.

> FN2. We note, moreover, that even if the failure to rehire claim had not fallen under the arbitration agreement, the District Court should have ordered the arbitrable claims to go forward before an arbitrator. *See Dean Witter v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

C.A.3 (Pa.),2003.
Varallo v. Elkins Park Hosp.
63 Fed.Appx. 601, 2003 WL 1889074 (C.A.3 (Pa.))

Briefs and Other Related Documents (Back to top)

• 2002 WL 32817133 (Appellate Brief) Reply Brief of Appellants (Nov. 22, 2002) Original Image of this Document (PDF)
• 2002 WL 32817134 (Appellate Brief) Brief of Appellee (Nov. 08, 2002) Original Image of this Document (PDF)
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• 2002 WL 32817136 (Appellate Brief) Brief of Appellants and Appendix, Volume I. Pages la - 34a (Oct. 07, 2002) Original Image of this Document (PDF)
• 02-1944 (Docket) (Apr. 09, 2002)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli.,	)	Civil Action No. 2014-CP-07-2779
Plaintiff,	)	
v.	)	
Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc.,	)	
Defendants.	)	

STATE OF SOUTH CAROLINA)
) **SECOND AFFIDAVIT OF DARLENE NESTER**
COUNTY OF BEAUFORT)

Darlene Nester, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

2. I am currently the Chief Human Resources Officer for Hilton Head Hospital (the "Hospital"), and have held this position since 2004.

3. Plaintiff Mary Beth Marzulli was employed by the Hospital from September 19, 2011, until August 1, 2014.

4. Mary Beth Marzulli obtained employment at the Hospital by applying on line via the Tenet website on June 14, 2011. A copy of the first page of the application she submitted at that time is attached here as Exhibit E. The complete document is maintained in Ms.

Marzulli's personnel file, a file for which I am responsible and which is maintained under my custody and control.

5. On or about September 15, 2011, MaryAlice Meyer, Employment Manager at Hilton Head Hospital sent a letter offering Mary Beth Marzulli employment; she accepted by signing the second page of that letter on September 19, 2011. A copy of the offer letter is attached here as Exhibit F. This document is maintained in Ms. Marzulli's personnel file, a file for which I am responsible and which is maintained under my custody and control.

6. Both her application and the letter offering her employment indicate that Mary Beth Marzulli was a resident of Lancaster, Pennsylvania, at the time she applied for and was offered employment at Hilton Head Hospital.

FURTHER AFFIANT SAYETH NOT.

Darlene ~~Nester~~

SWORN AND SUBSCRIBED before me
this 13th day of April 2015

Notary Public for South Carolina
My Commission Expires: 5-20-20

Exhibit E

Marzulli, Mary Elizabeth (7440203)

Application **1105008227 - Physical Therapist - Pediatrics**

Step	**Hiring Manager Review**	Medium	**Online**	Recruiter	**M. Meyer**
Status	**To Be Reviewed**	Source	**Tenet Web Page**	Hiring Manager	**R. Hudson**
Application Date	**Jun 14, 2011**	Application Type	**External**		

General Information

Resume

Information provided by the candidate on June 14, 2011.

Attached Files

Job-specific Attachments

Name	Date	Size	Comment
Resume for Mary E Marzulli, PT.doc	6/14/11	51 KB	This file includes a resume from which basic candidate information has been extracted.
Reference letter.docx	6/14/11	14 KB	
Hippotherapy reference.doc	6/14/11	25 KB	

Other Attachments

Name	Date	Size	Comment
No Information Available			

Pasted Cover Letter

No information available

Pasted Resume

No information available

Candidate Personal Information

Marzulli, Mary Elizabeth (7440203)

Employee Number: **Not Applicable**

Social Security Number: REDACTED

Date of Birth: **Not Specified**

Address: **127 E. Vine St. Lancaster, Pennsylvania United States, 17602**

Home Phone Number: **717 299 5314**

Cellular Number: [redacted]

Work Phone Number: **717 299 4829**

Pager Number: **Not Specified**

Region: **US>PA>Lancaster**

Email Address: **mbmarzulli@aol.com**

Fax Number: **Not Specified**

Web Page Address: **Not Specified**

Primary Number: **Cellular Phone**

Driver's License Expiration Date: **Not Specified**

Are you willing to relocate? **Yes**

Do you speak, read, or write in any language(s) other than English? **No**

If yes, please list other languages. **Not Specified**

Were you previously employed by Tenet, National Medical Enterprises, Inc., American Medical International, Inc., or one of its subs **No**

Exhibit F



HILTON HEAD
HOSPITAL

extraordinary care
right here at home

September 15, 2011 Revised

Mary Beth Marzulli
127 East Vine Street
Lancaster, PA 17602

Dear Mary Beth,

On behalf of Hilton Head Hospital, I am pleased to offer you Full time (40 hours per week) employment as a Physical Therapist in our Pediatric Rehab Department. All offers are contingent upon satisfactory completion of a pre-employment drug screen, employee physical, background investigation and reference check. The position will report to Ruth Hyde, Manager of Physical Rehab. She can be reached at 843-682-7322. This letter outlines the terms and conditions of your employment with Hilton Head Hospital.

Your start date will be Monday, September 19, 2011. Your rate of pay will be $38.50 per hour, payable biweekly. You will be eligible to receive shift differentials of $1.50 per hour for evenings, $2.25 per hour for nights and an additional $2.00 per hour for weekends.

Relocation: Tenet's goal is to make your relocation process as smooth as possible. To assist you with your moving expenses, the company will reimburse you up to $2500 for (1) the cost of transporting your household goods and (2) final move expenses from your old location to your new location. Final move costs include one-way transportation and lodging when you move from your old home to your new home. Lodging is restricted to one day in the former location and the day of arrival in the new location. As long as you are moving 50 miles further than your present commute, reimbursements for these purposes are excluded from your income so you bear no tax consequences.

Any unused monies remaining after the above expenses are incurred will be paid to you in a single lump sum payment to assist you with any other moving expenses. Taxes will be withheld on this payment.

It is important that you contact Tenet's Relocation Department at 469-893-2947 to initiate your relocation benefits.

If you voluntarily terminate your employment, alter your full time status or are terminated for cause within 24 months of your start date in the new location all monies paid to you or on your behalf are subject to reimbursement. After your first full year of employment, the amount owed will be reduced by 50%. Upon completion of your second year of employment, the remaining balance will be forgiven. If payback is required, you will be advised in writing of the exact amount and payment will be due and payable within 90 days of your last day worked.

Your employment with Hilton Head Hospital will be on an at-will basis, which means that either you or the company may terminate the employment relationship with or without notice, and with or without cause, at any time.

Orientation is required for all new employees. You are scheduled to attend **Orientation** on **Monday, October 10, 2011 from 8:00 a.m. to 5:00 p.m.** Please report to Human Resources promptly at 8:00 a.m. on Monday. Lunch will be provided for you on Monday. **You are also scheduled to complete your educational requirements on Monday, September 26th in the Human Resources department. Please come to HR at 8:00 a.m.**

Benefits will be explained in Orientation. If you are classified as a full time or part-time-1 employee, you are eligible to receive all Health and welfare employee benefits. Benefits become effective on the 31st day of employment. You must complete the online enrollment process within the first 30 days of employment. **Failure to do so will require you to wait until the next open enrollment period with the benefits becoming effective the following January 1st.**

After orientation, you will be working your normally scheduled work week and hours. Please contact your supervisor to determine your schedule following hospital orientation.

Please contact Marsha Delaney in Employee Health at (843) 682-7345 to schedule your employee health appointment, which will include pre-employment drug screening, PPD, and a pre-employment physical. Be sure to bring a photo ID with you to this appointment, along with your immunization record, if available.

Please drop by Human Resources so that we may photocopy your South Carolina Physical Therapist license and current BLS card.

On the first day of employment you will be asked to present proof of your eligibility to work in the United States. Attached is the list of applicable documents. Please have the proper documents with you on your first day. You will be receiving an email from Red Carpet Onboarding prior to orientation requesting you to initiate your I-9 verification. **Please follow the link to complete Section 1 of the I-9 verification prior to the first day of orientation.**

Please return this letter signed and dated. I am enclosing a copy for your records. If you have any questions, please do not hesitate to contact me at (843) 689-8249. I am looking forward to having you on our team!

Sincerely,

MaryAlice Meyer
Employment Manager

Acknowledged and accepted: Mary Beth Marzulli Date: 9/19/2011

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Defendants' Memorandum in Support of Motion to Compel Arbitration and to Dismiss or Stay

Counsel Served:

Benjamin T. Shelton, Esquire
Finger & Fraser, PA
35 Hospital Center Commons #300
Hilton Head Island, SC 29926

Lillian Stowe
Administrative Assistant

April 13, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-2779
MARY BETH MARZULLI,	)	
	)	
Plaintiff,	)	SUPPLEMENTAL MEMORANDUM IN
	)	OPPOSITION TO MOTION TO COMPEL
	)	ARBITRATION
	)	
vs.	)	
	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
	)	
Defendants.	)	
	)	

Concise Summary

Plaintiff reiterates that Defendants' Motion to Compel Arbitration should be denied because[1]:

* **The "Acknowledgement" *is* the purported contract which must be examined by the Court, it does not require the performance of anything related to interstate commerce, Ms. Marzulli was a SC resident when she signed the *Acknowledgement*; Thus, the FAA does not apply.**

* **The intentional tort of defamation is not contemplated by the so-called "arbitration agreement"**

[1]The Plaintiff Mary Beth Marzulli respectfully submits this supplemental memorandum in opposition to the Defendants' motion to compel in response to the arguments contained within the Defendants' voluminous memorandum and exhibits that was not received by one of Plaintiff's counsel, Mr. Stephen DeAntonio, before the initial hearing date. It was only received by Plaintiff's other counsel on the eve of the hearing date. The Plaintiff hereby incorporates by reference herein the factual background and legal analysis contained within its original memorandum in opposition to motion to compel arbitration. Further, these supplemental filings also clarify the Plaintiff's start date.

*** The document titled "Acknowledgement" which the Defendants claim to be a valid arbitration agreement is unenforceable.**

Supplemental Factual Background

The Plaintiff began leasing a second home in Hilton Head establishing two residences in South Carolina on September 5, 2011. (See Supplemental Affidavit, "Exhibit F"). She obtained her South Carolina physical therapist license on September 14, 2011 (see "Exhibit G"). Marzulli got a South Carolina driver's license on September 16, 2011 (see "Exhibit H"). According to Tenet's records, the Plaintiff began work on September 19. For her first pay period, she received her first direct deposit from Defendants on October 21, 2011, approximately one week after her first pay period ended (See Supplemental Affidavit, "Exhibit F"). She unquestionably was a South Carolina resident no later than September 16, 2011, and began employment prior to when the document at issue was required to be signed by her.

The Plaintiff's October bank statement shows that she was paid by Tenet $2,005.14 on October 21, 2011 for the pay period of that ended approximately one week prior to the posting date (on or about October 14, 2011). (See "Exhibit F" and "Exhibit I" (Plaintiff's Oct.–Nov. 2011 Bank Statement)). She was paid by Tenet biweekly as an hourly employee. Her November 4, 2011 bank statement–a period for which she unquestionably worked a full two weeks–shows that she was paid $2,270.45 by Tenet (See "Exhibit F" and "Exhibit I"). Because $2,005.14 is more than one week's pay for the Plaintiff, she began work at Tenet before October 10, 2011, the date she was required to sign the *"Acknowledgement"*. It is important to note that Defendant's affidavit and correspondence state that Plaintiff began work in September, 2011 (See Defendant's "Exhibit 8" and Plaintiff's "Exhibit E").

Law/Analysis

I. **The Court should look only to the terms of the "*Acknowledgement*" in determining whether *it* requires Mrs. Marzulli to administer anything related to interstate commerce**

In determining whether a transaction is inside or outside of the scope of the FAA, the court determines "whether *the contract* require[s] [a party] to administer anything related to interstate commerce." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. App. 2003) (quoting *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 SE2d 880, 882 (2001))(emphasis added). Pursuant to the Federal Arbitration Act, "A written provision in any [ ] *contract* evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such 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. 2 (2009) (emphasis added). Courts must "focus upon what the terms of *the contract* specifically require for performance in determining whether interstate commerce is involved. Our courts consistently look to the essential character of *the contract* when applying the FAA." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. App. 2003) (emphasis added). "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

A. **Here the only purported contract for the court to consider is the "*Acknowledgement.*"**

Here, the "*contract*" that the court must examine is *"Acknowledgement"* and determine

whether its terms require Ms. Marzulli to specifically perform anything related to interstate commerce. See *Thornton, supra.* No other contemporaneous or subsequent contract exists. The FAA only requires arbitration of "*a controversy thereafter arising out of such contract,*" not controversies or acts arising before the contract was entered into. 9 U.S.C. § 2 (2009).

B. Because Ms. Marzulli signed the "*Acknowledgement*" after being a South Carolina resident for nearly a month, her relocation has no part in the analysis of whether the terms of the "*Acknowledgement*" signed on Oct. 10, 2011 require her to administer anything involving interstate commerce.

Ms. Marzulli was a South Carolina resident when she signed the "*Acknowledgement*" for approximately one month. This dispels any relevancy of her relocation in the interstate commerce analysis. Her act of signing the Acknowledgement on October 10, 2011 as a South Carolina resident in no way evidences the involvement of interstate commerce. Further, the FAA only applies to controversies arising *after* the arbitration provision is signed. 9 U.S.C. § 2 (2009). Ms. Marzulli was an at will employee–the only purported contract she signed having anything to do with arbitration was the "*Acknowledgement*" on October 10, 2011.

C. Defendants' exhibits and Plaintiff's Second Affidavit show that Marzulli started work before October 10, 2011.

Next, as the Defendant's own affidavits and correspondence show, Ms. Marzulli already started employment by Defendants as a physical therapist before she signed the "*Acknowledgment.*" There was no arbitration agreement involved with Ms. Marzulli's agreement with Defendants for

Defendants to compensate her for *some* of her relocation expenses signed nearly a month prior to the *"Acknowledgement"*.

D. Ms. Marzulli's work did not require her to perform actions related to interstate commerce.

The *Acknowledgement* would require Ms. Marzulli to submit "any and all claims and disputes that are related in any way to [her] employment or the termination of [here] employment with Tenet." Mrs. Marzulli was a South Carolina resident and her employment as a physical therapist consisted of her treating local patients at a local hospital treating by providing them with one on one physical therapy services. The Defendants ask the court to rule that all employment in the health care field involves interstate commerce. This is an argument without any support of the jurisprudence of South Carolina and is in direct contradiction with *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (S.C. Ct. App. 2012).

Compare the *Acknowledgement* signed by Ms. Marzulli to the recruiting agreement and employment contract signed by the Plaintiff in *Thornton.* In *Thornton* the Court looked to what the contract between the parties required the parties to *perform*. The Court noted in *Thornton* that the entire contract that was subject to the arbitration provision "was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines." *Thornton*, 357 S.C. at 98. Indeed, "[t]he express purpose of the recruiting agreement was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.* Again, the entire agreement in Thornton, the recruiting agreement and contract for employment which was part and parcel to it, was the *contract* that the court interpreted. *See Id.*

Here, as argued in the Plaintiff's previous Memorandum and at Bar, the only purported contract for the Court to consider is the "*Acknowledgement*." The terms of the *Acknowledgment* have nothing to do with Mrs. Marzulli's move to South Carolina. She signed the *Acknowledgement* as a South Carolina resident.

Also compare the nature of Mrs. Marzulli's work to the work of the Plaintif in *Towles v. United Healthcare Corp*, 338 S.C. 29, 524 S.E.2d 839 (1999). There, the Plaintiff attended out-of-state conferences, participated in conferences with the Defendant's office in Minnesota, and reviewed claims from out-of-state providers and specialty providers located in North Carolina and Georgia, and, participated in sales presentations in South Carolina and Georgia, reviewed proposals from out-of-state medical and ancillary service providers. These facts found those activities provided "sufficient evidence to invoke the FAA." Here, Ms. Marzulli's work had no similar requirements. She was a local physical therapist providing physical therapy services to local patients at a local facility.

E. *Flexon* is good law, controlling, and dispositive of Defendants' arguments.

Of all cases in South Carolina's jurisprudence, this case is most similar to, and indeed nearly mirrors, the facts in Flexon v. PHC. Ms. Marzulli was a South Carolina resident when she signed the alleged arbitration agreement. Her work consisted of providing physical therapy services to local patients at a local facility. The Defendants would have the Court rule contrary to established South Carolina precedent in ruling that Ms. Marzulli's work involves interstate commerce.

II. Ms. Marzulli already was working for Tenet when she was forced to sign the *"Acknowledgement"* and the purported contract is void.

A. The *Acknowledgement* was forced upon Ms. Marzulli after she already was working at will and therefore lacks consideration.

The effect and consequence of the fact that Ms. Marzulli already was working for the Defendants when she signed the "*Acknowledgement*" is that it renders the attempt to contractually bind Marzulli to arbitration void.

In the present matter a review of general contract principles of state law demonstrate that the arbitration clause is not enforceable. *See Simpson, supra.* In that Marzulli had already established her residency in South Carolina and had in fact begun work before being required to sign the "*Acknowledgement*" at a subsequent orientation, the purported agreement lacks a component so axiomatic no citation is necessary–consideration. Without consideration, there can be no contract. Without a contract, arbitration cannot be compelled.

B. The *Acknowledgement* is unconscionable–Ms. Marzulli had no meaningful choice whether or not to sign the agreement and it contains oppresive, one-sided terms.

Even if there were consideration, and there is not, the adhesion "agreement" is unconscionable as previously argued. Contrary to Defendants arguments, Ms. Marzulli was compelled to sign the *"Acknowledgement"* in order to keep working for the Defendants. (See Marzulli First Affidavit ¶ 3). She was forced to sign the *"Acknowledgement"* as an at-will employee.

Thus, the test for unconscionability in a contract is met: 1. Ms. Marzulli had no meaningful choice in signing the contract; and, 2. The contract, which the Defendants interpret to allow them to lodge a criminal complaint against Ms. Marzulli without probable cause while forcing Ms.

Marzulli to resolve their same wrongful act by "valid and binding arbitration," contains oppressive and one-sided terms. *See Lucey v. Meyer*, 401 S.C. 122, 142, 736 S.E.2d 274 (S.C. App., 2012).

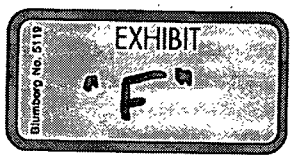
CONCLUSION

Because Ms. Marzulli was a South Carolina resident at the time she signed the *Acknowledgement* and interstate commerce is not involved in her work as a Physical Therapist at a locat facility, *Flexon* and the South Carolina Uniform Arbitration Act compel the court to render the "*Acknowledgement*" unenforceable. The *"Acknowledgement"* also lacks consideration and is unconscionable; therefore, it is void and unenforceable.

DeANTONIO LAW FIRM, LLC

/s Stephen F. Deantonio
Stephen F. DeAntonio
PO Box 30069
Charleston, SC 29417
(843) 577-8080
FINGER, MELNICK & BROOKS, PA

Benjamin T. Shelton
Post Office Box 24005
Hilton Head Island, South Carolina 29925
(843) 681-7000
Attorneys for Plaintiff
April 27, 2015
Hilton Head Island, South Carolina



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-02779
MARY BETH MARZULLI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	SECOND AFFIDAVIT OF MARY BETH MARZULLI
	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
	)	
Defendants.	)	
	)	

PERSONALLY appeared before me, Mary Elizabeth Marzulli who being duly sworn, deposes and says that:

1. My name is Mary Elizabeth Marzulli. I purchased real estate in South Carolina in 2008 with the intention of making it my permanent residence. I considered South Carolina to be my domicile since purchasing that residence.

2. I moved permanently to South Carolina in September 2011 and obtained my South Carolina Driver's License on September 16, 2011.

3. I became licensed as a Physical Therapist in South Carolina on September 14, 2011.

4. I was an hourly employee and approximately one week would pass between the end of a pay period and the date when my pay check would be automatically deposited into my bank account. I was paid biweekly.

5. Based on my best recollection at the time, in my first affidavit I stated that I was required to come to Hilton Head Regional Medical Center on October 10, 2011 for a mandatory orientation before starting work. After reviewing a hospital letter stating that my first day of work would be September 19,

2011, my bank statement showing that I was paid nearly my full regular biweekly rate by Tenet on October 21, 2011, and my date of physical therapist licensure of September 14, 2011, I realized the statement in my previous affidavit is not fully correct. I was required to come to the hospital on October 10, 2011 to sign paperwork at an orientation, but I must have started work before October 10, 2011. I would defer to Tenet's correspondence and wage records for the exact start date.

6. After reviewing hospital employment records, my driver's license, October bank statement showing that I was paid nearly my normal biweekly pay for the period ending in early October, and Physical Therapist License issued on September 14, 2011, it is clear that on October 10, 2011 I was a South Carolina resident already employed by and working for the Defendants.

Mary Elizabeth Marzulli

Mary Elizabeth Marzulli

April 24, 2015

Hilton Head Island, South Carolina

SWORN TO BEFORE ME THIS
24th day of April 2015

Notary Public for the State of South Carolina

My commission expires: 4-4-24

The State of South Carolina

Board of Physical Therapy Examiners

This is to certify that

Mary Elizabeth Marzulli

having satisfactorily met the statutory requirements
is hereby licensed as a

Physical Therapist

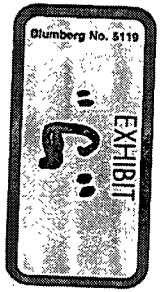
In witness whereof the undersigned has caused this certificate of licensure
to be issued and seal of said Board to be affixed.
September 14, 2011

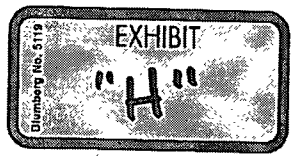
License Number 6541

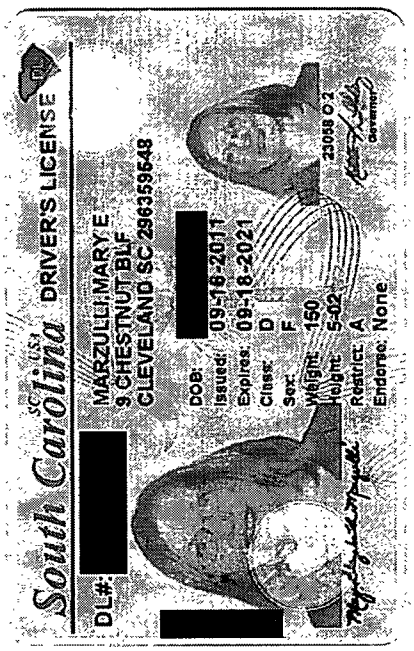
Marilyn McCay Sargent PT
Chairperson

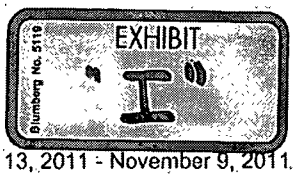
Administrator

ROA 298




Plumberg No. 5119
EXHIBIT
"H"


South Carolina
DRIVER'S LICENSE
DL#: [redacted]
MARZULLI,MARYE
9 CHESTNUT BLF
CLEVELAND SC 296359648
DOB: [redacted]
Issued: 09-18-2011
Expires: 09-18-2021
Class: D
Sex: F
Height: 5-02
Restrict: A
Endorse: None
23059 01



WELLS FARGO

Activity summary

Beginning balance on 10/13	$3,612.38
Deposits/Additions	4,275.67
Withdrawals/Subtractions	- 5,175.13
Ending balance on 11/9	**$2,712.92**

Account number: [redacted]
MARY BETH MARZULLI
VINCENT MARZULLI
South Carolina account terms and conditions apply
For Direct Deposit and Automatic Payments use Routing Number (RTN): 053207766

Overdraft Protection
This account is not currently covered by Overdraft Protection. If you would like more information regarding Overdraft Protection and eligibility requirements please call the number listed at the top of your statement or visit your Wells Fargo branch.

Interest summary

Interest paid this statement	$0.08
Average collected balance	$1,941.94
Annual percentage yield earned	0.05%
Interest earned this statement period	$0.08
Interest paid this year	$0.13

Transaction history

Date	Check Number	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
10/13	1001	Check		2,000.00	1,612.38
[redacted]					
10/21		Tener Phy Sv Hlt ACH Entry 111021811 Marzulli, Mary E.	2,005.14		
[redacted]					

WELLS FARGO

Transaction history (continued)

Date	Check Number	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
[redacted]					
11/4		Tenet Phy Sv HII ACH Entry 111104 811 Marzulli, Mary E	2,270.45		
[redacted]					
Ending balance on 11/9					
Totals			**$4,275.67**	**$5,175.13**	

The Ending Daily Balance does not reflect any pending withdrawals or holds on deposited funds that may have been outstanding on your account when your transactions posted. If you had insufficient available funds when a transaction posted, fees may have been assessed.

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli, Plaintiff, v. Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., Defendants.	Civil Action No. 2014-CP-07-2779 DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO DISMISS OR STAY

2015 APR 23 P 2:59

This supplemental memorandum and the four additional affidavits offered in support of Defendants' Motion to Compel Arbitration are submitted in response to Plaintiff's argument at the initial hearing of that motion[1] that the Federal Arbitration Act ("FAA") does not apply because interstate commerce is not involved in this case. Plaintiff based that argument primarily on *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (S.C. App. 2012). Not only can that case be distinguished on its facts,[2] but since it came out in early 2012, the Supreme Court and the Court of Appeals have issued opinions at odds with it, calling into

[1] That hearing began on April 15, 2015; it was continued until April 30, 2015.

[2] Even if later cases like *Dean* and *Lucey, infra,* did not cast doubt on *Flexon*'s holding that the FAA did not apply, the facts of *Flexon* that the court expressly relied on there are easily distinguished from the facts of this case. The *Flexon* court focused attention on the following facts, none of which exist in this case: the employee who signed the arbitration agreement in *Flexon* was already a South Carolina resident and thus did not move to South Carolina to take the job as Plaintiff here did; the small Hardeeville clinic where Dr. Flexon was employed treated only local patients and was not located in a resort area where treatment of patients from outside the state is routine, as it is at the Hospital; the agreement in *Flexon* expressly provided that South Carolina law applied, and the exclusive venue for resolution of disputes in that case was South Carolina, whereas there are no such choice of law or venue provisions in the agreement here.

question *Flexon*'s holding. *See Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C.371, 759 S.E.2d 727 (2014) and *Lucey v. Meyer,* 401 S.C. 122, 736 S.E.2d 274 (S.C. App. 2012). Under the analysis applied in *Dean* and *Lucey*, as well as previously in *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (S.C. App. 1999)(Hearn, J.)(cited with approval by the Supreme Court in numerous other cases), it is clear that the employment relationship to which the arbitration clause applies here does "in fact" involve interstate commerce, thus the FAA applies and the Court should compel arbitration of all issues in this case.

Applicability of the FAA: "A Transaction Involving Commerce"

The FAA provides, in pertinent part:

> A written provision in any . . .contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such 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. 2 (2010).

Following the lead of the United States Supreme Court in *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995), the South Carolina Supreme Court has held the language "evidencing a transaction involving commerce" is the "functional equivalent of 'affecting commerce,' which typically indicates Congress' intent to exercise its commerce power in full." *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001), *citing Allied-Bruce v. Terminix Co.*, 513 U.S. at 277 and *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839.

South Carolina appellate courts have consistently held that the FAA's "involving commerce" language is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause. *Zabinski v. Bright Acres Associates*, 346 S.C.

at 591, 553 S.E.2d at 115; *Towles v. United Healthcare Corp.*, 338 S.C. at 36, 524 S.E.2d at 843. The FAA has an "expansive view of interstate commerce" (*Zabinski* 346 S.C. at 591, 553 S.E.2d at 115), so broad that some authorities have suggested that the FAA rather than state arbitration laws applies to nearly all contracts.[3] Isham R. Jones III, *Federal Arbitration Act and Section 2's Involving Commerce Requirement: The Final Step towards Complete Federal Preemption over State Law and Policy-Allied-Bruce Terminix v. Dobson* (1995 J. DISP. RESOL. (1995), http://scholarship.law.missouri.edu/jdr/vol1995/iss2/5 ("Given the broad definition of commerce, . . . proving a contract does not affect interstate commerce in any way is no easy feat." *Id.* at 349). In fact, here the parties expressly agreed that the FAA would apply. Nester Aff., EX. A.

The Proper Focus is Whether the "Surrounding Facts" Indicate Interstate Commerce is "In Fact" Involved in Performance of the Job

Plaintiff has suggested that the Court should look only within the four corners of the arbitration agreement to determine whether interstate commerce is involved in the transaction. But the parties' agreement is just one of three elements of the analysis set forth in the well-settled case law. The South Carolina Supreme Court and the Court of Appeals have repeatedly held that a court must examine not only the agreement,[4] but also the complaint[5] and "the

[3] The principal exception would when the parties expressly agree that the arbitration agreement will be governed by state law, something that did not occur in this case. *Volt Info. Scis. Inc. v. Board of Trs.*, 489 U.S. 468 (1989).

[4] Here the arbitration agreement expressly provides that the Federal Arbitration Act will apply, as does the Fair Treatment Policy that is referenced in the arbitration agreement. Nester Aff. , Exs. A & B.

[5] In the Complaint, Plaintiff alleges that Tenet South Carolina, Inc. (now known as "Healthcare Network, SC, Inc.") is incorporated in Delaware. Complaint ¶2. She also alleges that before she was hired, the Hospital "vetted references and Plaintiff's background;" doing so

surrounding facts" to determine whether there is sufficient evidence of interstate commerce in the transaction to invoke the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 759 S.E.2d 727 (2014); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001); *MBNA Bank v. Christianson,* 377 S.C. 213, 659 S.E.2d 209 (S.C. App. 2008); *Thornton v. Trident Medical Center, LLC,* 357 S.C. 91, 592 S.E.2d 50 (S.C. App. 2003); *Blanton v. Stathos,* 351 S.C. 534, 570 S.E.2d 565 (S.C. App. 2002); *Towles, v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (S.C. App. 1999)(Hearn, J.).

In analyzing those "surrounding facts," our appellate courts have instructed trial courts to look at whether the "underlying transaction" between the parties "in fact involves commerce" *Towles,* 338 S.C. at 36, 524 S.E.2d at 843. In this case the underlying transaction is the Hospital's employment of Plaintiff and Plaintiff's attendant agreement to submit to arbitration "any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet."

In *Towles,* as here, the arbitration agreement was contained in a form the plaintiff signed that acknowledged receipt of the employee handbook. To determine the requisite involvement of interstate commerce in the transaction, *i.e.*, Towles' employment, the Court of Appeals examined what Towles actually did during the period he was employed. The Court noted that his employment-related activities included attending out-of-state conferences, dealing with out-of-state insurers, talking on the phone with his employer's management that was located out of state, *etc.*, and found that those activities "in fact" were sufficient evidence of interstate commerce to invoke the FAA in Dr. Towles' dispute with his employer.

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involved interstate investigation and inquiries in other states where plaintiff had lived and worked. Complaint ¶7.

The South Carolina Supreme Court's very recent decision in *Dean* is an even stronger indicator that the FAA applies in a case that involves a transaction --- here, Plaintiff's employment --- in the health care field. *Dean* was a negligence claim made on behalf of a South Carolina resident who died in a South Carolina nursing. Two agreements were involved in that case, a resident agreement and a separate agreement to arbitrate all claims arising under that agreement, both of which had been signed in South Carolina. In analyzing whether the FAA applied, the *Dean* court focused on "what the terms of the [resident] contract specifically require for performance." *Dean* held that the FAA applied because the nursing home provided meals, as well as medical supplies shipped across state lines from out-of-state vendors even though the meals and medical supplies "were irrelevant to the current dispute." *Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C.at 381, 759 S.E.2d at 732.

Thus *Dean* instructs that the court's focus should be on what is required for performance of the underlying transaction --- here, Plaintiff's employment --- and whether such performance involves interstate commerce. *Id.* (citation omitted).

Equally significant here is the proposition cited in *Dean* that "**health care in general is an activity subject to federal control under the Commerce Clause and thus involves interstate commerce.**" 408 S.C. at 379-382, 759 S.E.2d at 731-733, *citing Miller v. Cotter,* 448 Mass. 671, 863 N.E.2d 537 (2007)(emphasis added). The *Miller* opinion, cited by the South Carolina Supreme Court with approval in *Dean*, held that the FAA applied "if in the aggregate the economic activity in question would represent '**a general practice ... subject to federal control.**'" *Id.* (emphasis added). Citing a decision of the United State Supreme Court decision, the *Miller* court found that "**Healthcare is such an activity.**" *Summit Health, Ltd. v. Pinhaus*, 500 U.S. 322 (1991) (hospital's purchase of out-of-State medicines and acceptance of

out-of-State insurance establish interstate commerce) (emphasis added). The court continued: "In addition, and more specifically, accepting payment from Medicare, a Federal program . . . constitutes an act in interstate commerce." *Id.* at 327.

Applying to this case the logic of the Supreme Court in *Dean* and the cases cited therein, and that of the Court of Appeals in *Towles* and, more recently *Lucey*, makes it clear that the subject of the transaction in this case, Plaintiff's employment at the Hospital, should be viewed in the aggregate to determine its effect on interstate commerce. It is equally clear that because the *Dean* court recognized that healthcare is an activity that represents "a general practice . . . subject to federal control," the factual circumstances in this case, arising as they do in the healthcare setting, require this Court to apply the FAA in reaching its decision.

"Surrounding Facts" Show Interstate Commerce Was Involved in Plaintiff's Employment

Here the Hospital agreed to employ Plaintiff and she agreed to work there. Thus, under the analysis applied by our appellate courts in *Dean, Towles,* and *Lucey*, the court should focus its inquiry on what was involved in performing the work she was employed to do ---- *i.e.*, her job as a pediatric physical therapist and the Hospital's work in general ---to determine the requisite involvement of interstate commerce. The affidavits of MaryAlice Meyer, Cassie Ball, Ruth Hyde Pelletier, and John Ross, attached hereto and filed herewith, evidence the various ways in which Plaintiff's work as an employee of the Hospital involved interstate commerce, beginning from the moment she applied for an open position until the last day she was employed there.

- Recruitment: The Hospital recruits across the United States to fill job vacancies at its facility in South Carolina. (Ball Aff. ¶8.) The open pediatric physical therapist position that Ms. Marzulli applied for and ultimately filled was advertised across state lines on the internet at Tenet's web site. (Hyde Aff. ¶6, Second Nester Aff. ¶4, and Meyer Aff.

¶4.) When a job opening is posted on the Hospital's web site, it is automatically downloaded to the Tenet web site, as well as to the Careerbuilder Job Board and the Allhealthjobs.com Job Board that are distributed throughout the United States. (Meyer Aff. ¶5.)

- Job Application: Ms. Marzulli applied for the open position from her home in Pennsylvania. (Second Nester Aff. ¶4 & Ex. F.) The Hospital's Rehabilitation Department coordinated a visit by Plaintiff to the Hospital; in connection with that visit, she traveled from her home in Pennsylvania to Hilton Head for interviews in late June 2011. (Meyer Aff. ¶7.)

- Interviews: When Plaintiff interviewed at the Hospital on June 29, 2011, she said she wanted to move in September 2011 and that she was tired of the winters in Pennsylvania, her family was in Atlanta, and she had a daughter that was going to school in Savannah, Georgia. Plaintiff told the Hospital's Employment Manager that she needed to have a job before she could move from Pennsylvania. (Meyer Aff. ¶¶ 8 & 9.)

- Background Check: In the course of checking her references, the Hospital's Employment Manager communicated with two of Plaintiff's former colleagues in Pennsylvania. (Meyer Aff. ¶6.)In conjunction with the background verification of Ms. Marzulli that the Hospital conducted, the Hospital communicated with HireRight, a California-based service that conducts background checks for Tenet. (Meyer Aff. ¶10.)

- Offer and Acceptance of the Job: Plaintiff received and accepted the written job offer from her home in Pennsylvania. (Second Nester Aff. ¶5 & Ex. F.)

- Reimbursement of Plaintiff's Moving Expenses: The Hospital reimbursed Ms. Marzulli $2,500.00 of the costs of her move from Pennsylvania to South Carolina. (Meyer Aff. ¶12.)

- Plaintiff Attended Out-of-state Conference. While employed at the Hospital, Plaintiff attended a continuing education conference in North Carolina; the Hospital reimbursed her for the expense of her travel to that conference. (Hyde Pelletier Aff. ¶21.)

- Equipment Required for Plaintiff to do her Job: Pediatric physical therapists use specialized medical equipment designed to help treat and promote mobility. Some examples of the equipment Ms. Marzulli used in treating her patients were exercise mats, treadmills, trampolines, and toys; she would also have used specialized equipment adapted for use by children such as walkers and wheelchairs. All of this equipment is in use at the Hospital in the Rehabilitation Department where Plaintiff worked. (Hyde Pelletier Aff. ¶¶ 9-12.) The equipment Plaintiff used in the course of her work as a pediatric physical therapist was, for the most part, manufactured outside of South Carolina and shipped here after the Hospital purchased it. (Hyde Pelletier Aff. ¶13; Ross. Aff. ¶¶6-9.) Plaintiff could not have performed her job or properly treated her patients without using this equipment. (Hyde Pelletier Aff. ¶12.)

- Out-of-state Procurement of Equipment Required to do her Job: MedAssets, Inc. provides procurement services to the Hospital pursuant to a written contract between the two. MedAssets, Inc. is a Delaware corporation and is headquartered in Alpharetta, Georgia. (Ross Aff. ¶¶4 & 5.) The Materials Management department, managed by MedAssets, purchases all equipment and materials used in the Rehabilitation Department, as well as that used in other departments of the Hospital. (Ross Aff. ¶6.) The Materials Management department has purchased for use by employees and patients of the Hospital's Rehabilitation Department exercise mats, treadmills, trampolines, as well as specialized equipment adapted for use by children such as walkers and wheelchairs. (Ross Aff. ¶7.) The Medical Management department purchased these pieces of equipment from sources outside of South Carolina. (Ross Aff. ¶8). The sellers of this equipment shipped their products from outside South Carolina to the Hospital on Hilton Head Island, South Carolina. (Ross Aff. ¶9.) The Materials Management department paid for this equipment by sending payment to the sellers at their various locations outside of South Carolina. (Ross Aff. ¶10.) If a piece of equipment in the Rehabilitation department must be replaced, that department notifies the Hospital's Materials Management Department which then arranges for the purchase and shipment of the equipment to the department. (Hyde Pelletier Aff. ¶14.)

- Application of Out-of-state Insurance Standards: All physical therapists at the Hospital are required to adhere to the treatment and billing standards of all insurance companies that reimburse for their services to patients. Some of these insurers are outside South Carolina. (Hyde Pelletier Aff. ¶15.)

- Out-of-state Insurance Payments to Hospital: The Hospital accepts and receives reimbursement from out-of-state insurers and multi-state insurers such as Cigna, Aetna, and Blue Cross & Blue Shield-affiliated insurers that are not located in South Carolina. (Ball Aff. ¶4.)

- Medicare/Medicaid Standards and Payments: If there are no written treatment standards for a particular insurer, then physical therapists at the Hospital follow the federal standards and regulations adopted by Medicare with respect to documentation, medical necessity and the like. (Hyde Pelletier Aff. ¶16.) For example, Medicare requires a physical therapist to prepare a plan of care every 90 days and to complete a progress note for each visit. (Hyde Pelletier Aff. ¶16.) The Hospital accepts payment from Medicare and Medicaid, both of which are highly regulated by the Federal government. (Hyde Pelletier Aff. ¶17.) The patient whose father made the complaint against Ms. Marzulli was a Medicaid patient and the services Ms. Marzulli provided to the patient were paid for by Medicaid. (Hyde Pelletier Aff. ¶18.) The Hospital accepts payment from Medicare, a Federal program. (Ball Aff. ¶5.)

- Hospital's Treatment of Out-of-State Patients: Because it is located at a resort that is a major tourist destination, the Hospital often provides services to individuals who are not South Carolina citizens and who do not reside in South Carolina. (Ball Aff. ¶3.)

- The Hospital is Owned by Out-of-State Shareholders: Tenet Health Care Corporation, the ultimate owner of Hilton Head Hospital, is owned by its shareholders, most of whom reside outside the state of South Carolina. (Ball Aff. ¶9.) The Hospital regularly enters into contracts with individuals and entities that are not South Carolina citizens. (Ball Aff. ¶7.)

- Out-of-State Contractors and Service Providers: In addition to those of South Carolina origin, the Hospital utilizes out-of-state materials, equipment, and contractors; payments are made out-of-state to out-of-state sellers and providers of those materials and services . (Ball Aff. ¶6.) The following essential services that the Hospital provides for its in-patients and out-patients involve interstate commerce in the following manner: Meals are prepared from food shipped into South Carolina from out-of-state; medical supplies are shipped across state lines from out-of-state vendors; the hospital receives and pays for goods and services provided by out-of-state vendors and insurers (Ball Aff. ¶10.)

Cases in South Carolina and elsewhere indicate the facts underlying the parties' relationship as set forth in the attached affidavits are highly relevant to a determination of whether the requisite interstate commerce exists. For example, in *Towles,* as here, the plaintiff attended out-of-state conferences. In *Zabinski*, noting that although the partnership was a South Carolina entity with its principal place of business on Hilton Head, the heart of the partnership was the development of real property on Hilton Head Island, the only property the partnership owned was at Hilton Head, and that the development of property within the state's borders "is the quintessential example of purely interstate activity," the Supreme Court nevertheless found that the partnership's utilization of out-of-state materials, lenders, contractors and investors meant the partnership was involved in interstate commerce and thus the FAA applied. Specifically, the Court held that because the Hilton Head land the partnership was going to develop was purchased from a Minnesota based group of investors, the purchase was financed through mortgage with a bank in Georgia and a second mortgage from the Minnesota investors; the partnership used out-of-state subcontractors and materials form other states; the condominiums were advertised across state lines (analogous to the Tenet web site); the second

mortgage was sold to a lender in Pennsylvania; extensive soil tests were conducted by a Georgia firm; land was financed by a Chicago bank which took a mortgage; the partnership attempted to enter into a contract with a Pennsylvania developer for a golf course. The partnership in *Zabinski* is analogous to the Hospital here, and the same analysis referenced above applies to the surrounding facts as set forth in the attached affidavits.

The FAA was held to apply in *Blanton v. Stathos,* 351 S.C. 534, 570 S.E.2d 565 (S.C. App. 2002), a case where a South Carolina architect agreed to provide design, drawing and architectural services to a South Carolina defendant for construction of a restaurant in Seneca, South Carolina. Even though construction had not begun, after examining "the agreement, the complaint and the surrounding facts," the court held the dispute was covered by FAA because of the architect's activities in performing duties of drafting and designing the plans for the restaurant. She communicated with various technicians outside of SC; she consulted with an HVAC subcontractor in Georgia, a truss manufacturer in Georgia, and a hood and exhaust manufacturer in North Carolina; all drafting and designs were done to meet national building codes and specifications; the nature of the project (like Plaintiff's job here) and the actual work to be performed were sufficient to give notice that material, equipment and supplies from outside South Carolina would be required; plans contemplated the use of materials manufactured outside South Carolina, and the project could not be constructed without the use of materials in interstate commerce

Cases in other jurisdictions have included receipt of Medicare payments, payments from out-of-state insurance companies, and utilization of equipment obtained in interstate commerce as sufficient involvement of interstate commerce in arbitration agreements in the healthcare field. *See, e.g., Fosler v. Midwest Care Center II, Inc.*, 398 Ill.App.3d 563, 578,

928 N.E.2d 1, 14 (2nd Dist. 2010) (arbitration agreement involved interstate commerce sufficiently for FAA purposes because the facility received Medicare and Medicaid payments as well as out-of-state insurance payments and purchased medical equipment and supplies from outside of Illinois); *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 327 (1991) ("The provision of [medical services] affects interstate commerce because both physicians and hospitals serve nonresident patients); *GGNSC Louisville Hillcreek, LLC v. Warner*, No 3:13-cv-751, 2013 WL 6796421, at *8 (W.D. Ky. Dec. 19, 2013) ("The receipt of Medicare and Medicaid funds are transactions involving commerce and may by themselves establish the appropriate interstate commerce nexus. [The facility] has a nexus with interstate commerce through their and their patients' participation in Medicare and Medicaid." (citing *Summit Health Ltd.*, 500 U.S. at 327)); *Glover ex rel. Glover v. Darway Elder Care Rehab. Ctr.*, No. 4:13-CV-1874, 2014 WL 931459, at *6 (M.D. Pa. Feb. 4, 2014) (observing receipt of Medicare payments alone "would appear to satisfy that 'involving interstate commerce' requirement, and indeed numerous courts have found that this very payment activity satisfies the requirement" (listing cases)); *Visiting Nurse Ass'n of Florida, Inc. v. Jupiter*, No. SC11-2468, 2014 WL 3360314, at *7 (Fla. 2014) ("[R]eferral of Medicare patients was contemplated and occurred as part of the transaction. Thus, this transaction in fact involved interstate commerce and is subject to the FAA."); *Miller v. Cotter*, 863 N.E.2d 537, 544 (Mass. 2007) ("In addition, and more specifically, accepting payment from Medicare, a Federal program (which there was some evidence here), constitutes an act in interstate commerce;" *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) ("Because 'commerce' is broadly construed, the evidence of Medicare payments . . . is sufficient to establish interstate commerce and the FAA's application in this case.").

When Plaintiff Signed the Arbitration Agreement is Irrelevant

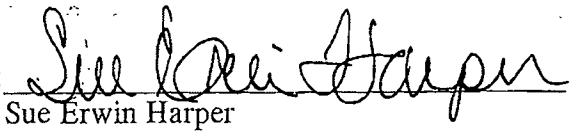
At the initial hearing, the Court also expressed an interest in whether when Plaintiff signed the arbitration agreement was relevant -- before or after she started work at the Hospital. In *Towles*, the plaintiff began working as a medical director for the defendant employer in September 1995, but did not sign the code of conduct and employee handbook acknowledgment containing the arbitration clause until February 1996. Finding continued at-will employment was sufficient consideration for the agreement to arbitrate, the court enforced the agreement and compelled arbitration in *Towles;* thus whether Plaintiff signed the arbitration agreement before or after she began work is irrelevant to any analysis of the question presented here. In fact, the agreement to arbitrate must merely exist; it need not have been signed by Plaintiff for the court to compel arbitration. *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002) ("Although § 3 of the FAA requires arbitration agreements to be written, it does not require them to be signed."); *see also Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (S.C. App. 2012).

Conclusion

"South Caroline policy favors arbitrating disputes." *Ashley River Properties II, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 648 S.E.2d 295 (2007) (*citing Towles*). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *Bradley v. Brentwood Homes, Inc.,* 398 S.C. 447, 730 S.E.2d 312 (2012) (*citing Towles*). Given this presumption in favor of arbitration, and the myriad ways in which interstate commerce was involved in the performance of the Hospital's employment of Plaintiff, there is no real question that the FAA applies in this case.

If the FAA applies, then for all the reasons set forth above and in the Hospital's initial memorandum in support of its motion, the defamation claims Plaintiff asserts against Defendants here are arbitrable. Accordingly, the Court should compel arbitration and dismiss or stay this case.

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April 26, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT

Mary Beth Marzulli.,	)	Civil Action No. 2014-CP-07-2779
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc.,	)	
	)	
Defendants.	)	

STATE OF SOUTH CAROLINA)
) ~~THIRD~~ **AFFIDAVIT OF CASSIE BALL**
COUNTY OF BEAUFORT)

Cassie Ball, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

2. I am currently the Chief Financial Officer of Hilton Head Hospital (the "Hospital"), and have held this position since 2010.

3. The heart of the business of the Hospital is providing health care and health services to individuals; because it is located at a resort that is a major tourist

destination, the Hospital often provides services to individuals who are not South Carolina citizens and who do not reside in South Carolina.

4. The Hospital accepts and receives reimbursement from out-of-state insurers and multi-state insurers such as Cigna, Aetna, and Blue Cross & Blue Shield-affiliated insurers that are not located in South Carolina.

5. The Hospital accepts payment from Medicare, a Federal program.

6. In addition to those of South Carolina origin, the Hospital utilizes out of state materials, equipment, and contractors; payments are made out of state to out of state sellers and providers of those materials and services .

7. The Hospital regularly enters into contracts with individuals and entities that are not South Carolina citizens.

8. The Hospital recruits across the United States to fill job vacancies at its facility in South Carolina.

9. Tenet Health Care Corporation, the ultimate owner of Hilton Head Hospital, is owned by its shareholders, most of whom reside outside the state of South Carolina.

10. The following essential services that the Hospital provides for its in-patients and out-patients involve interstate commerce in the following manner:

(a) Meals are prepared from food shipped into South Carolina from out of state;

(b) Medical supplies are shipped across state lines from out of state vendors;

(c) The hospital receives and pays for goods and services provided by out of state vendors

FURTHER AFFIANT SAYETH NOT.

Cassie Ball

Cassie Ball

SWORN AND SUBSCRIBED before me
this 23 day of April 2015

Stacie A. Mirabella
Notary Public for South Carolina
My Commission Expires: Aug 9, 2015

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli., Plaintiff, v. Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., Defendants.	)	Civil Action No. 2014-CP-07-2779

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF BEAUFORT)

SECOND AFFIDAVIT OF RUTH HYDE PELLETIER

Ruth Hyde Pelletier, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I previously went by the name Ruth Hyde; my name has been legally changed to Ruth Pelletier. To clarify the record, I am using both surnames in the body of this affidavit.

2. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

3. I am currently Director of the Rehabilitation Department of Hilton Head Hospital ("Hospital"), and have held this position since October 28, 2012.

4. During the period Mary Beth Marzulli was employed at the Hospital, I was her supervisor.

5. I am familiar with Plaintiff's job responsibilities and work-related activities while she was employed at the Hospital.

6. In June of 2011, Ms. Marzulli applied over Tenet Healthcare's web site for an open pediatric physical therapist position in my department.

7. Before she was hired, I interviewed Ms. Marzulli for the job she ultimately took as a pediatric physical therapist in my department. She traveled from out of state to that interview.

8. As a licensed Occupational Therapist myself, I am familiar with what is required of a pediatric physical therapist treating a patient at the Hospital.

9. Pediatric physical therapists specialize in treating and caring for patients who are toddlers, babies, children, teenagers and young adults. They treat conditions related to genetic, neurological and orthopedic disorders. Techniques like functional training, manual techniques and exercise are used.

10. Additionally, pediatric physical therapists use specialized medical equipment designed to help treat and promote mobility. Some examples of the equipment Ms. Marzulli would have used in treating her patients were exercise mats, treadmills, trampolines, and toys; she would also have used specialized equipment adapted for use by children such as walkers and wheelchairs. All of this equipment is in use at the Hospital in my department.

11. Having been a physical therapist for a number of years, Ms. Marzulli would have been familiar with the equipment described in the preceding paragraph and

would have known that it was necessary for her to use this equipment to properly perform her job.

12. In fact, Ms. Marzulli could not have performed her job or properly treated her patients without using the equipment described in paragraph 10 above.

13. The equipment described in paragraph 10 was, for the most part, manufactured outside of South Carolina and shipped here after the Hospital purchased it.

14. If a piece of equipment in our department must be replaced, we notify the Hospital's Materials Management Department which then arranges for the purchase and shipment of the equipment to our department.

15. Another thing that all physical therapists at the Hospital are required to do is to adhere to the treatment and billing standards of all insurance companies that reimburse for their services to patients. Some of these insurers are outside South Carolina.

16. Additionally, if there are no written treatment standards for a particular insurer, then we follow the federal standards and regulations adopted by Medicare with respect to documentation, medical necessity and the like. For example, Medicare requires a physical therapist to prepare a plan of care every 90 days and to complete a progress note for each visit.

17. The Hospital accepts payment from Medicare and Medicaid, both of which are highly regulated by the Federal government.

18. The patient whose father made the complaint against Ms. Marzulli was a Medicaid patient and the services Ms. Marzulli provided to the patient were paid for by Medicaid.

19. The heart of the work of the Hospital, work in which Plaintiff participated, was providing health care and health services to patients; because the Hospital is located in a

resort area that is a major tourist destination, the Hospital often provides those services to individuals who are not South Carolina residents.

20. The nature of Plaintiff's job and the actual work she was to and did perform were sufficient to give notice that material, equipment, supplies and performance standards from outside SC would be required to do the work.

21. Plaintiff's job responsibilities and work-related activities during her employment included her attending at least one continuing education program outside of South Carolina; she applied for reimbursement, and was reimbursed, for the cost of the course which she attended in Raleigh, North Carolina.

FURTHER AFFIANT SAYETH NOT.

Ruth Pelletier

SWORN AND SUBSCRIBED before me
this 23 day of April 2015

Notary Public for South Carolina
My Commission Expires: July 25, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli.,	)	Civil Action No. 2014-CP-07-2779
Plaintiff,	)	
v.	)	
Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc.,	)	
Defendants.	)	

STATE OF SOUTH CAROLINA)
) **AFFIDAVIT OF MARYALICE MEYER**
COUNTY OF BEAUFORT)

MaryAlice Meyer, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

2. I was the Employment Manager for Hilton Head Hospital (the "Hospital") from April, 2002 until August, 2013.

3. I was the Employment Manager who was responsible for overseeing the application, interview and employment of Plaintiff Mary Beth Marzulli after she applied for a position as a pediatric physical therapist at the Hospital in 2011.

4. The open pediatric physical therapist position that Ms. Marzulli applied for and ultimately filled was advertised across state lines on the internet at Tenet's web site.

5. When a job opening was posted on the Hospital web site, that opening was automatically download to the national Tenet website. The Tenet website then downloaded to the CareerBuilder Job Board and Allhealthcarejobs.com Job Board.

6. After Mary Beth Marzulli applied for a job opening announced on line via the Tenet and other websites, it was I who conducted a check of her references. In doing so I communicated with two former colleagues, with whom she worked closely, in Pennsylvania.

7. The Rehab Department coordinated a visit to the Hospital by Ms. Marzulli; in connection with that visit, she traveled from her home in Pennsylvania to Hilton Head for interviews. She visited the Hospital and was interviewed in late June 2011.

8. I interviewed Ms. Marzulli on June 29, 2011; during that interview she told me she was wanted to move in September 2011. She told me she was tired of the winters in Pennsylvania, had family in Atlanta, and she had a daughter going to school in Savannah, Georgia.

9. Ms. Marzulli told me she needed a job before she could move from Pennsylvania.

10. In conjunction with the employment verification of Ms. Marzulli that I conducted, the criminal background check was conducted by HireRight, located in Irvine, California. This Company conducts background checks for Tenet.

11. Ms. Marzulli was supposed to have started work on September 12, 2011, and was to have undergone orientation on September 12 and 13, 2011. However, because she did not have her South Carolina Physical Therapy license in time to undergo orientation on

September 12, and the next orientation was not scheduled to occur until mid-October, I completed a "Request for an Off-Orientation Hire" so that she could begin work immediately after she received her South Carolina license but before the next orientation in October. The request was approved and this permitted Ms. Marzulli to begin work on September 19, 2011, and to undergo orientation thereafter during the next session of orientation which was held in October 2011.

12. The Hospital reimbursed Ms. Marzulli $2,500.00 of the costs of her relocation from Pennsylvania to South Carolina.

FURTHER AFFIANT SAYETH NOT.

Mary Alice Meyer

SWORN AND SUBSCRIBED before me
this 24 day of April 2015

Kristin Eaker
Notary Public for South Carolina
My Commission Expires: 8/6/23

KRISTIN EAKER
Notary Public, State of South Carolina
My Commission Expires 8/6/2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli.,	)	Civil Action No. 2014-CP-07-2779
Plaintiff,	)	
v.	)	
Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc.,	)	
Defendants.	)	

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

AFFIDAVIT OF JOHN ROSS

John Ross, being duly sworn, deposes and states, under penalty of perjury, as follows:

1. I am at least eighteen (18) years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matters stated herein. This Affidavit is based on my personal knowledge.

2. I am currently the Senior Director of Materials Management for Hilton Head Hospital (the "Hospital"), and have held this position since 2014.

3. I am not employed by the Hospital; the Hospital is a client of the company that employs me, MedAssets, Inc.

4. MedAssets, Inc. is a Delaware corporation and is headquartered in Alpharetta, Georgia.

5. MedAssets, Inc., provides procurement services to the Hospital pursuant to a written contract between the two.

6. On behalf of the Hospital, my department purchases all equipment and materials used in the Rehabilitation Department, as well as that used in other departments of the Hospital.

7. Examples of the equipment and materials my department has purchased for use by employees and patients of the Hospital's Rehabilitation Department have been the following: exercise mats, treadmills, trampolines, as well as specialized equipment adapted for use by children such as walkers and wheelchairs.

8. My department purchased these pieces of equipment from sources outside of South Carolina.

9. The majority of sellers of these pieces of equipment shipped their products from outside South Carolina to the Hospital on Hilton Head Island, South Carolina.

10. My department paid for the majority of this equipment by sending payment to the sellers at their various locations outside of South Carolina.

FURTHER AFFIANT SAYETH NOT.

John Ross

SWORN AND SUBSCRIBED before me
this 23 day of April 2015

M. [illegible]
Notary Public for South Carolina
My Commission Expires: July 25th, 2023

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by electronic mail, to the following address(es):

Pleadings:

Defendants' Supplemental Memorandum in Support of Motion to Compel Arbitration and to Dismiss or Stay

Counsel Served:

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Stephen de Antonio, Esquire
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Lillian Stowe
Administrative Assistant

April 27, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-2779
MARY BETH MARZULLI,	)	
	)	
Plaintiff,	)	PLAINTIFF'S SECOND SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL ARBITRATION
	)	
	)	
	)	
vs.	)	
	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
	)	
Defendants.	)	
	)	

For the FAA to apply, an agreement must "evidence a transaction involving commerce," specifically interstate commerce. 9 U.S.C.A. § 2 (1999). Even assuming for the sake of argument there was a "transaction", and the same is denied, the said transaction didn't *involve* interstate commerce. *See Towles v. United Healthcare Corporation*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999). First, as to the "Acknowledgment" that contains the attempt to arbitrate, there was no transaction involving commerce: The Plaintiff had already established residency in South Carolina and began work before being presented with the document, and worked exclusively in South Carolina even though other employees at the hospital might have been involved in interstate commerce. Her work was exclusively performed in this state, unlike the medical director in *Towles*.

Further, the employee in *Towles* work required,

> Helping to establish medical policy, overseeing utilization review and quality management for plan participants, attending out of state conferences, participating in telephone conferences with United's corporate medical affairs staff in Minnesota, and reviewing claims from out-of-state providers and specialty providers located in North Carolina and Georgia. Towles participated in sales presentations in South Carolina and Georgia and worked with officials from national companies in resolving questions of utilization review and medical necessity for PHP participants. Towles also reviewed proposals for services from out-of-state medical and ancillary service providers. We find Towles's activities provide sufficient evidence of interstate commerce to invoke the FAA.
>
> *Towles*, 338 S.C. 29, 36.

Ms. Marzulli's work had no such requirements. Instead, the only involvement that the Defendants' numerous affidavits attempt to show is that Ms. Marzulli on her own accord attended *one* out of state conference in North Carolina and applied for and received reimbursement after the fact. She was not required to perform the act. Further, no evidence exists showing that act alone affected interstate commerce. The Court in *Towles* did not rely on one, single outlier of an act which *was not a requirement* of the job when ruling acts the job required the Plaintiff to perform involved interstate commerce. Instead the *Towles* court looked to the *several requirements* of the Plaintiff's job that involved interstate activity. As such, *Towles*, a case involving a plaintiff who worked for a company that managed health care plans, is clearly distinguishable from the present matter. As previously asserted and reitterated, the facts here mirror *Flexon v. PHC, Inc.*

What is more, while the motion should be denied, "a trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference". *Small v. Springs Indus., Inc.*, 292 S.C.C 481, 357 S.E. 2d 454 (1987). Here, a material question of fact exists as to whether the *"Acknowledgement"* constitutes a contract. It is an issue which must be submitted to a jury under this State's law and the FAA.

The "Acknowledgment" is also unconscionable. In the present case, the Defendants have cherry-picked what documents to implement and which ones to ignore. For example, Defendants totally eschewed the "Fair Treatment Plan" by utilizing the procedures contained therein when the patient's father called and wanted to meet with staff. Instead, an administrator–a non-mandatory reporter–defamed the Plaintiff. Yet, the Defendants selectively attempt to exploit employment documents to deprive Plaintiff her right to a jury trial. That inequality is both oppressive and one-sided such that the instant Court should find the arbitration provision unconscionable. *See Simpson v. MSA of Myrtle Beach, Inc,* 644 S.E. 2d 663 (2007).

In Simpson, the Supreme Court of South Carolina stated that

> Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, determining whether a contract was "tainted by an absence of meaningful choice." *id.* at 295, courts Should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. At 293. See also *Holler*

v. Holler, 364 S.C. 256, 269, 612 S.E. 2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.")

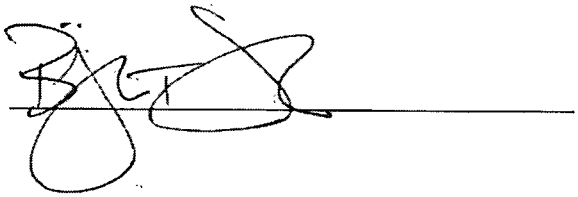
In the present case, Plaintiff's injuries are not employment related damages; they are defamation injuries to her reputation after being accused of physically and sexually assaulting her own minor patient. The Plaintiff is an individual; not a sophisticated business concern with no bargaining power. After she moves, establishes residency and licensure, and begins work at that, is she given a document entitled "Acknowledgment" to sign, with a buried, not conspicuous provision. According to Marzulli, as found in her first affidavit, she was required to sign the document at orientation. The hospital misled her when she was handed the document, stating it merely acknowledged that she received the employee handbook.

The Plaintiff reiterates her request to the Court that the motion be denied.

DeANTONIO LAW FIRM, LLC

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Attorneys for Plaintiff

May 4, 2015

Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Mary Beth Marzulli, Plaintiff, v. Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., Defendants.	Civil Action No. 2014-CP-07-2779 DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND SUPPLEMENTAL MEMORANDUM OPPOSING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO DISMISS OR STAY

2015 MAY 11 PM 3:58
BEAUFORT COUNTY, S.C.

Plaintiff has not shown the agreement is unconscionable.

In a final attempt to avoid the agreement to arbitrate that she voluntarily entered into when she became employed at the Hospital, Plaintiff now declares that agreement to be unconscionable. "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Plaintiff provides little or no analysis of exactly why she contends the arbitration agreement is unconscionable. While she does offer a modicum of evidence that she was required to sign the agreement,[1] she does not suggest that she had no meaningful choice other than to sign it or that the arbitration process itself is in any way one-sided or oppressive.

[1] Plaintiff's affidavit asserts the Hospital "produced several documents which I was required to sign," and "it was clear that signing the documents was mandatory;" however, she does not state how it was made "clear" to her that signing the arbitration agreement was a

Like the plaintiff in *Carlson v. South Carolina State Plastering, LLC,* 404 S.C. 250, 743 S.E.2d 868 (S.C. App. 2013), Plaintiff here offers no real evidence that the arbitration agreement she entered into was an adhesion contract, *i.e.*, that it was presented to her on a "take it or leave it" basis. As in *Carlson,* where the arbitration agreement was found not to be unconscionable,

> the arbitration clause . . . does not waive any rights or remedies otherwise available by law. . .. [and] does not lack mutuality and applies to [the defendants] as well as the [plaintiffs].

Id. at 260, 743 S.E.2d at 874.

Plaintiff's failures of proof --- her failure to show that the arbitration agreement required her to waive remedies otherwise available to her by law, her failure to show that the arbitration agreement was not equally binding on the Hospital (despite the agreement's express provision that it was), and her failure to provide any real evidence that the Hospital offered it to her on a "take it or leave it" basis --- prevent any finding by this Court that the arbitration agreement was unconscionable. *Id.*

Flexon's facts are different and turned on a failure of proof.

Her second point, Plaintiff's "assert[ion] and reiterat[ion]" that "the facts here mirror *Flexon v. PHC, Inc.",* is erroneous. Plaintiff's Memo at 2. As proof that the facts the court relied on in *Flexon* are quite different than those before the Court here, and thus that case should not be the basis for a finding of the FAA's inapplicability, the Court need only review the attached Order of the trial court in *Flexon.*

That Order makes it clear that one primary basis for the court's holding that the FAA did not apply in *Flexon* was that the parties had "specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina." Order at 5.

---

requirement. The agreement does not state that it is mandatory, nor does Plaintiff assert anyone from the Hospital told her she was required to sign it.

The trial court reiterated the fact that the agreement provided that South Carolina law applied, that the "parties expressly waive[d] the right to bring any legal action or claims in any other courts," and that venue was set "in any state or federal court within the State of South Carolina having jurisdiction." Order at 1 and 4. There are no such choice of law or venue provisions in the agreement here, and this alone distinguishes the facts of *Flexon* from those presented here.

Equally, if not more, important is that the trial court's Order in *Flexon* makes it clear that the party who bore the burden of proving there was no evidence of interstate commerce failed to present sufficient evidence on that point.[2] All that was on the record before the trial court in *Flexon* were the allegations of the Complaint and vague references in plaintiff's interrogatory answers that the defendant claimed constituted involvement of interstate commerce. The trial court, holding that "[t]he party seeking to compel arbitration has the burden to prove that the contract at issue involves interstate commerce," concluded that "[o]n the record before this Court, Defendant fails to meet this burden." *Id.* at 6 (emphasis added).

In stark contrast, the Hospital here has produced abundant evidence that interstate commerce was involved in Plaintiff's employment: for example, she moved from Pennsylvania to South Carolina to take the job; the Hospital reimbursed her for moving expenses; she utilized equipment in her job as a physical therapist that was purchased and shipped from out-of-state into South Carolina; and Plaintiff was required to adhere to practices required by Medicare and out-of-state insurers.

---

[2] It is not clear that this is in fact the defendant's burden. In *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974 (4th Cir. 1985), the Fourth Circuit held that the FAA does not impose any burden on the party invoking the Act to put forth evidence, by affidavit or other specific evidence, documenting the interstate aspect of the transaction. "Where, as here, the party seeking arbitration alleges that the transaction is within the scope of the Act, and the party opposing application of the Act does not come forward with evidence to rebut jurisdiction under the federal statute, we do not read into the Act a requirement of further proof by the party invoking the federal law. *Id.* at 978, n. 4.

Whether arbitration should be compelled is a question for the Court, not a jury.

The question of arbitrability is one for the court. *See, e.g., Landers v. FDIC*, 402 S.C. 100, 107, 739 S.E.2d 209, 213 (2013)(and cases cited therein). Therefore Plaintiff's third argument, that it is for the jury to determine the meaning of the parties' agreement to submit all disputes to arbitration, is completely without merit.

The Court should compel arbitration and dismiss or stay this case.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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May 5, 2015

STATE OF SOUTH CAROLINA COUNTY OF JASPER	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO. 2009-CP-27-331
Phillip Flexon, M.D., Plaintiff, v. PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc., Lifepoint Hospitals, Inc., and Tenet Healthsystems, Inc., Defendants.	ORDER DENYING MOTION TO COMPEL ARBITRATION

2010 JUL -7 AM 9:15
CLERK OF COURT
JASPER COUNTY, S.C.

This case came before me for a hearing on June 9, 2010, on the motion by Defendant Coastal Carolina Medical Center, Inc. (CCMC) to stay this action and for an order compelling arbitration. All parties were represented. For the reasons set forth herein, the Court denies this motion.

This controversy arises out of an employment agreement between the Plaintiff and Coastal Carolina Medical Center. Contained in this agreement are the following provisions:

> 13.4 This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts.
>
> 13.5 Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located, any controversy or claim arising out

of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

Under South Carolina law, an arbitration provision is unenforceable unless the contract states in capitalized, underlined typeface, on the first page of the contract that the agreement is subject to arbitration. S.C. Code Ann. §15-48-10. The parties stipulate that the arbitration provision in the Agreement at issue fails to comply with the South Carolina statute. They further agree that this provision is enforceable only if it falls under the Federal Arbitration Act, 9 U.S.C.§2. When a contract affects interstate commerce, the FAA preempts a state arbitration act's requirements. *Doctor's Assocs. V. Casarotto*, 517 U.S. 681, 683 S.Ct. 1652 (1996). South Carolina recognizes that the FAA preempts the notice requirements of the South Carolina Arbitration Act when interstate commerce is involved. *Thornton v. Trident Medical Center*, 357 S.C.91, 592 S.E.2d 50 (Ct. App. 2004).

#2
PmB

In its brief, CCMC argues that *Thornton* mandates that the court grant it's motion. To ascertain whether a transaction involves commerce within the FAA, the court must examine the agreement, the complaint, and the surrounding facts. "In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Thornton, supra*, 592 S.E.2d at 52. I find *Thornton* to be distinguishable from the present case.

Thornton involved a "recruiting agreement" in which the plaintiff agreed to relocate his medical practice as a surgeon from Michigan to Charleston, SC. The agreement expressly provided that Thornton was being recruited from out of state to an existing medical practice. The South Carolina Court of Appeals noted that an essential requirement for performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. Thornton was a resident of Michigan when the contract was entered. *Thornton v. Trident Medical Center, supra*, 592 S.E.2d at 53. The Court further noted the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. "The express purpose of the recruiting agreement was to provide a monetary incentive to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.*

#3
PMB

In distinguishing its decision from the United States Supreme Court's decision in *Bernhardt v. Polygraphic Co.*, 350 U.S.198, 76 S.Ct. 273, 100 L.Ed. 199, the Court of Appeals in *Thornton* stated:

> Unlike the recruiting agreement in the case *sub judice*, the agreement in Bernhardt did not contemplate any actions affecting commerce outside of Vermont. Performance under the contract in Bernhardt was-by its terms-confined to a single state. 592 S.E.2d at 53.

It is this analysis that similarly distinguishes *Thornton* from the present case. The agreement in question is clearly and expressly denominated an employment agreement, not a recruiting agreement. Secondly, nowhere in the plaintiff's employment agreement is there any mention of inducement or financial reward depending upon out-of-state activity. At the

hearing, the parties stipulated that, unlike the plaintiff in *Thornton* who was a resident of another state, Plaintiff Phillip Flexon was a resident of Jasper County at the time he entered into this Employment Agreement. As an example, on page 9 of the Employment Agreement, it states that notice to the physician is to be given at his home address at 2712 Levy Road, Hardeeville, South Carolina. The contract in question calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville.

Additionally, unlike the Recruiting Agreement in *Thornton*, the Employment Agreement at issue contains, at paragraph 13.4, the following language:

> **Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts.** The parties hereby consent to venue in any state or federal court within the State of South Carolina, having jurisdiction over the county for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement. (emphasis added)

#4
Pab

This case is more closely aligned with the facts of the recent case of *Arkansas Diagnostic Center, P.A., v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884 (2007). The contract in question in *Tahiri* was an employment agreement to provide medical services similar to the contract at issue herein. Indeed, in specifically distinguishing the case of *Thornton v. Trident Medical Center, supra.*, the Arkansas Supreme Court stated as follows:

> The [South Carolina] court observed that an essential requirement for the performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. It then noted that the contract "was

> denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. (592 S.E.2d at 53.) We note that, here, it is only an employment agreement at issue which obligates Dr. Tahiri to perform medical services, and not a recruiting agreement.
> 257 S.W.3d at 891.

Like Plaintiff Phillip Flexon, the defendant in *Tahiri* was a resident of the community where the medical clinic was located. In ruling that the F.A.A. was not applicable, the Arkansas Supreme Court ruled as follows:

> Most specific to the employment contract at issue is that A.D.C. was a *local* clinic which contracted with Dr. Tahiri to perform medical services to its *local* patients. Based upon these factors, we hold that Dr. Tahiri's employment agreement did not facilitate A.D.C.'s alleged interstate business activities and did not evidence a transaction involving commerce. ...(emphasis in original)
>
> Were this Court to hold otherwise, it would equate to a finding that the F.A.A. is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce, *i.e.* use of interstate telephone lines or of interstate mail. We do not interpret the jurisprudence concerning the F.A.A. to include any and every contract.
> 257 S.W.3d at 892.

#5
P.6

There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton*. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. The employment agreement at

issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina.

The party seeking to compel arbitration has the burden to prove that the contract at issue involves interstate commerce. *See, Arkansas Diagnostics Center, P.A., v. Tahiri, supra.* On the record before this Court, Defendant fails to meet this burden.

Defendant's Motion to Stay and to Compel Arbitration is therefore **DENIED.**

AND IT IS SO ORDERED.

Perry Buckner
Presiding Judge, 14th Judicial Circuit

Walterboro, South Carolina

Dated: June 30, 2010

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for , do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by electronic mail, to the following address(es):

Pleadings:

Defendants' Response to Plaintiff's Second Supplemental Memorandum Opposing Defendants' Motion to Compel Arbitration and to Dismiss or Stay

Counsel Served:

Benjamin T. Shelton, Esquire
Bshelton@fingerlaw.com

Stephen de Antonio, Esquire
sdeantonio@deanlawfirm.com

2015 MAY 11 PM 3:58
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Lillian Stowe
Administrative Assistant

May 5, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-02779
MARY BETH MARZULLI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	THIRD AFFIDAVIT OF MARY BETH MARZULLI
	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
	)	
Defendants.	)	

PERSONALLY appeared before me, Mary Elizabeth Marzulli who being duly sworn, deposes and says that:

1. My name is Mary Elizabeth Marzulli. As a licensed physical therapist in South Carolina I am required to complete a certain number of continuing education classes every two years. I am responsible as a professional for maintaining my license and the requirement to complete continuing education requirements in order to retain my physical therapist license is a separate and distinct responsibility from any requirements of my job while I worked for the Defendants. While working for the Defendants, the Defendants did not require me to attend certain continuing education courses. Instead, I had to find programs on my own. After finding a program I could then apply for approval and reimbursement after I personally paid for the courses. Whether or not to approve and reimburse me for the courses was totally within the Defendants' discretion.

2. In March of 2014, on my own time, I found and located a particular continuing education conference that I was personally interested in. It was held in Raleigh, North Carolina. I paid for the attending the conference out of my own pocket. (See Exhibit "J")

3. I was not required to attend this conference as a part of my job. None of the Defendants required me or asked me to attend this particular conference. I did attend the conference on my own initiative and my own accord.

4. After I attended the conference and after I already had paid for the conference, I applied for reimbursement for the costs of the conference.

5. I did not receive reimbursement for the conference while I was working for the Defendants. In fact, I did not receive reimbursement until October of 2014, several months after I was terminated by the Defendants. (See Exhibits "K" and "L").

6. The Defendants reimbursed me, a South Carolina resident, and did not pay the conference organizers directly. This is the case whenever the Defendants would reimburse me for any continuing education class or conference.

7. I did not receive reimbursement for any travel, lodging, or board related to me attending the conference.

8. To the best of my recollection and knowledge, while working for the Defendants I never once treated a single patient who was not a South Carolina resident or did not live in the local community. I knew all of my patients and their families and if someone was from another state or travelling I would have been aware of it. I was not required by my employment to make any phone calls across state lines and I was not required to send any of my patients' Medicare, Medicaid or other insurance paperwork to providers across state lines. Some other employee may be tasked and required to fulfill those responsibilities but those responsibilities were not a part of my employment. I was not required to conference with any individuals across state lines. I was not required to attend any seminars or conferences across state lines. My work had nothing to do with consuming or being personally prescribed medications that were shipped from other States. As a physical therapist, I do not issue prescriptions for medicine or products. At all times working for the Defendants, I was a South Carolina resident and

provided one on one physical therapy services to local pediatric patients at Hilton Head Regional Medical Center, a local facility.

Mary Elizabeth Marzulli

Mary Elizabeth Marzulli

May 15, 2015

Hilton Head Island, South Carolina

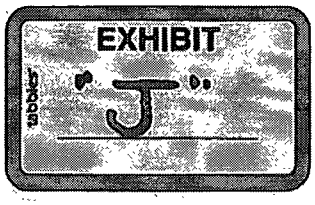
SWORN TO BEFORE ME THIS
15 day of ~~April~~ MAY 2015

Notary Public for the State of South Carolina

My commission expires: 5.1.24

STATE OF SOUTH CAROLINA
WENDY HABERSHAM
NOTARY PUBLIC, STATE OF SOUTH CAROLINA
My Commission Expires 5/1/2024

mbmarzulli@aol.com
Sent: Monday, June 02, 2014 3:07 PM
To: Marzulli, Mary



-----Original Message-----
From: Sam Ghosh <tmr.soros@gmail.com>
To: Mary Marzulli <mbmarzulli@aol.com>
Sent: Sun, Mar 23, 2014 8:44 pm
Subject: Total Motion Physical Therapy, Inc. Customer Receipt/Purchase Confirmation

Thank you for your order!

Order Information

Merchant:	Total Motion Physical Therapy, Inc.
Description:	Order#1085
Invoice Number:	1085
Customer ID:	670

Billing Information
Mary Marzulli
PO Box 7047
Hilton Head Island, SC 29938
US

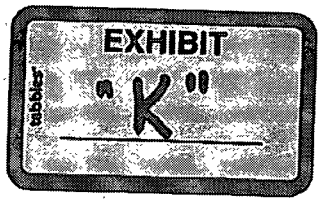
Shipping Information

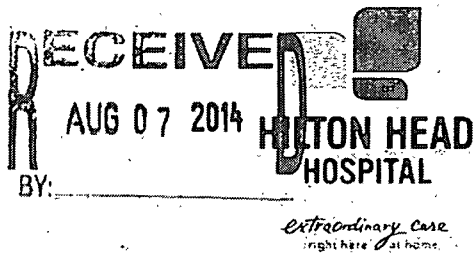
Item	Description	Qty	Taxable	Unit Price	Item Total
9	All 3 Tots Seminar Package	1	N	US $995.00	US $995.00
	All 3 Tots Seminar Package				

Total: US $995.00

MasterCard

Date/Time:	23-Mar-2014 18:44:54 MDT
Transaction ID:	6033984009





July 30, 2014

MaryBeth Marzulli
P.O. Box 7047
Hilton Head, SC 29938

Re: Return to Work

Dear MaryBeth:

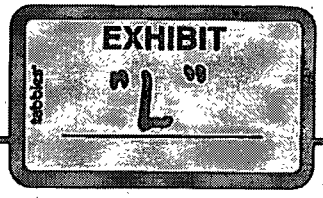
I am writing as a follow-up to the meeting we had on July 16th with Ruth Hyde. During that meeting we discussed the issues with your documentation and reviewed the performance management plan for your return to work. Although you did not sign the paperwork at that meeting, it was agreed that you would review it and meet with Ruth the following day to turn in the document and to discuss the scheduling of your patients, starting with your return date of July 21st.

Ruth received an e-mail from you on the 17th stating that you would not sign the form. Ruth contacted you and requested that you meet with her for a follow-up meeting to review the plan for your return on the 21st. A time was set for July 18th at 11:30am, which would then allow the office to contact your patients and get them on the schedule. Ruth received a text from you the morning of the 18th stating that you would need to cancel the meeting. At this time, Ruth was still under the impression that you intended to return to work on Monday, the 21st. Ruth attempted to contact you on the 18th and on the 23rd and has left you messages but has not yet heard back from you.

Since we have not heard back from you in over a week, and you have now failed to appear for your scheduled shifts, under the terms Tenet's Employee Handbook – Attendance and Punctuality – we are accepting your voluntary resignation, effective immediately.

Sincerely,

Darlene Nester
Chief Human Resources Officer



Benjamin Shelton

From: mbmarzulli@aol.com
Sent: Wednesday, May 13, 2015 5:34 AM
To: Benjamin Shelton; sdeantonio@deanlawfirm.com
Subject: Fwd: Reimbursement for course

-----Original Message-----
From: Mary Beth Marzulli <mbmarzulli@aol.com>
To: Hyde, Ruth <RUTH.Hyde@tenethealth.com>
Sent: Thu, Oct 2, 2014 9:44 pm
Subject: Re: Reimbursement for course

Thanks Ruth I appreciate it

Sent from my iPhone

On Oct 2, 2014, at 2:20 PM, Hyde, Ruth < RUTH.Hyde@tenethealth.com> wrote:

> Mary Beth – The check should be here tomorrow – I will let you know as soon as it is and you can pick it up from Barbara Williams in Finance. That is in the main hospital corridor. It will be on the right on your way from the main lobby. You will just need to bring a photo ID for her to release it to you. I will text you when it is there if that is okay – Thanks Ruth
>
> Ruth Hyde OTR/L
> Director Rehabilitative Services
> Hilton Head Hospital,
> South Carolina,
> 843-682-7322
>
> **From:** mbmarzulli@aol.com [mailto:mbmarzulli@aol.com]
> **Sent:** Monday, September 29, 2014 10:45 PM
> **To:** Hyde, Ruth
> **Subject:** Re: Reimbursement for course
>
> Thanks Ruth I appreciate you looking into it. I will be glad to pick it up, but it would have to be on a Friday.
>
> Mary Beth
>
> -----Original Message-----
> From: Hyde, Ruth <RUTH.Hyde@tenethealth.com>
> To: mbmarzulli <mbmarzulli@aol.com>
> Cc: Nester, Darlene <Darlene.Nester@tenethealth.com>
> Sent: Mon, Sep 29, 2014 3:43 pm
> Subject: FW: Reimbursement for course
>
> Mary Beth – Our finance department has canceled the previous check and are issuing another one that should be here by Wednesday afternoon. I will let you know when it is here and if you want to pick it up or I can mail it to you return receipt – Thanks Ruth
>
> Ruth Hyde OTR/L
> Director Rehabilitative Services
> Hilton Head Hospital,

South Carolina,
843-682-7322

From: Hyde, Ruth
Sent: Monday, September 29, 2014 10:42 AM
To: 'mbmarzulli@aol.com'
Cc: Nester, Darlene
Subject: RE: Reimbursement for course

Mary Beth – I have asked our finance to check into this, as it was supposed to have been mailed to your home the end of August. Unfortunately you submitted the request for reimbursement August 1st, after you had received your last pay check. Normally the reimbursements is included on your pay check. So this was not the normal process to receive reimbursement. I will hopefully have an answer for your today about what happened and where the check is.
Thanks Ruth

Ruth Hyde OTR/L
Director Rehabilitative Services
Hilton Head Hospital,
South Carolina,
843-682-7322

From: mbmarzulli@aol.com [mailto:mbmarzulli@aol.com]
Sent: Saturday, September 27, 2014 6:56 PM
To: Hyde, Ruth
Subject: Reimbursement for course

Dear Ruth,
I am writing to find out why I was never reimbursed for the course I took in March. It was approved for reimbursement and I submitted the information, but never received a check. I would appreciate it if you would get back to me on this. Thank you.

Sincerely,

Mary Beth

State of South Carolina) Court of Common Pleas
) 14th Judicial Circuit
County of Beaufort) No.: 2014-CP-07-2779

Mary Beth Marzulli,

Plaintiff,

vs.

Tenet South Carolina, Inc., Hilton Head Health System, LP d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc.,

Defendants.

HEARING

COPY

April 15, 2015

Hearing reported by Deborah S. Thomas, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina; said hearing held before the Honorable Marvin H. Dukes, III, Beaufort County Master in Equity and Special Circuit Court Judge in accordance with the South Carolina Rules of Civil Procedure, at the Beaufort County Courthouse, 102 Ribaut Road, Room 212, Beaufort, South Carolina, on April 15, 2015, at the hour of 1:24 p.m.

THOMAS REPORTING SERVICES
156 Argent Way
Bluffton, South Carolina 29909
(803) 206-7390

Appearances

Representing the Plaintiff:

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bshelton@fingerlaw.com

and

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corky.harper@nelsonmullins.com

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* * * * *

EXHIBIT INDEX

Exhibits: Marked at Page

(Copy of exhibits attached to each copy of transcript.)

Plaintiff's Exhibits

1 (9/15//11 Letter)

* * * * *

This hearing is taken in accordance with the South Carolina Rules of Civil Procedure.

JUDGE DUKES: Good afternoon. We are here on 14-CP-07-2779. We are here on Defendant's motion to compel arbitration and to dismiss free stay. Happy to hear from you.

MS. HARPER: Thank you, Your Honor. This is a defamation case that has been brought against Hilton Head Hospital by a pediatric physical therapist who was employed there in -- from 2011 to 2014.

When she became employed she signed an acknowledgment wherein she agreed to submit to arbitration any and all claims that are related in any way to my employment or the termination of my employment.

The Federal Arbitration Act we believe applies because it governs any transaction involving commerce. Now, the Plaintiffs' in their brief, and I just think -- I'll briefly address their arguments.

Their first argument is that the federal act doesn't apply because there is no interstate commerce. To find that commerce was not involved in this case, however, would require the court to

ignore numerous cases that have been decided since the Court of Appeals -- a 2012 Court of Appeals case, Flexon, that the Plaintiff cites and offers really as the sole support for her argument that this doesn't involve commerce.

In 2014, the Supreme Court in Dean versus Heritage Healthcare Bridgeway held that the Federal Arbitration Act's breach is coextensive with the broad reach of the commerce clause. And in that case health care in general was held to be an activity that is subject to Federal control.

Here we have a hospital that is providing health care. This pediatric physical therapist was providing health care. So -- and that was held by the Supreme Court to be an activity that is subject to Federal control under the commerce clause and therefore involved interstate commerce and the F.A.A. applied.

Now, the Dean court distinguished an earlier case that involved another nursing home which predated Allied Bruse which was a United States Supreme Court case that talked about the breadth of interstate commerce in terms of arbitration and application of the F.A.A.

In that case the Plaintiff argued that

arbitration couldn't be compelled because the contract was for the provision of patient resident services at a local nursing home and therefore didn't involve interstate commerce.

In Dean the Supreme Court overruled that case, overruled Timms, and said although Timms might compel us to hold to the contrary, we find Timms is a relic of the past decided before the broad definition of interstate commerce that has been set forth by the United States Supreme Court in Allied Bruce.

Consequently, we explicitly overrule Timms in its entirety and find that the residency agreement here does, in fact, involve interstate commerce and therefore the F.A.A. applies.

As I mentioned, the only case that Plaintiff cites in support of her claim that the F.A.A. does not apply, that is Flexon versus T.H.C. Jasper, Inc., is less like the facts in this case and more like the facts of the case of Thornton versus Trident Medical Center which is distinguished in that opinion by the Court of Appeals.

Thornton held that the F.A.A. applied because the Plaintiff doctor there had relocated from Michigan to take the job at Trident in South

Carolina. And the contract provided for him to be reimbursed for expenses incurred in moving to South Carolina.

Plaintiff here relocated from Pennsylvania. And the offer she received in Pennsylvania included a term that the hospital would reimburse her for medical expenses -- for moving expenses.

Since the same two elements in Thornton were the basis for a finding of -- that the F.A.A. applied, this means the F.A.A. applies in this case also, but what is most surprising about Plaintiff's briefing of the issue, that she doesn't even -- she doesn't distinguish or even mention two cases that have been decided since the Flexon case.

One is Landers, cited in our materials and actually attached to our materials. The other is Pierson versus Hilton Head Hospital. And Pierson involved the same hospital that is the movant here.

So those two cases without much ado at all, in Landers the Supreme Court held that the Federal Arbitration Act applied. And in Pierson the Court of Appeals summarily found that the Federal Arbitration Act applied. Both of those cases were also defamation cases, interestingly enough.

That is what this case is. There is one claim for defamation. And finally as the Supreme Court noted when it found in a very written about case, Zabinski versus Bright Acres Associates, that is a South Carolina Supreme Court case decided in 2001, there are sufficient facts to show that interstate commerce is involved here because here as in Zabinski -- these are analogous facts as those that are cited in Zabinski as supporting application of the F.A.A.

The Plaintiff applied from Pennsylvania over the internet at the Tenet website. The offer the hospital made to her was communicated from South Carolina to her address in Pennsylvania. The offer was signed assumingly in Pennsylvania and returned to South Carolina. Moving expenses were included in that offer as was the case in Thornton which the Flexon case distinguished.

And the offer or Tenet Healthcare has its principal place of business and is incorporated outside of South Carolina. And finally, the hospital's equipment the Plaintiff would have used in her job, much like the food that was held to be the hook for interstate commerce in the Dean case, the hospital's equipment that she used in her job

came from outside of South Carolina and thus her job involved interstate commerce.

Also, in Dean the court held that health care in general was held to be an activity that was subject to Federal control. So the cases since Flexon prove that this case involves commerce and therefore the F.A.A. applied.

The second argument Plaintiff makes is that the arbitration clause doesn't contemplate a defamation claim. Well, that flies in the case -- it flies in the face of Landers and Pierson, both of which were defamation cases, one of which was decided by the Supreme Court and one by the Court of Appeals since the case that the Plaintiff relies on.

So there is no question that a defamation claim, and the defamation claim here, is the same as the claims that were held in those cases to be arbitrable.

Toals also was a case that actually preceded the other two. And I have a copy of -- because if we didn't attach that case, but Toals was also a defamation case. And in that case the Plaintiff agreed that he would arbitrate all employment related claims.

And interestingly enough the claim that he

made was that he had been -- he had been defamed after his employment was over when someone from his prior employer told a new employer that he had been terminated for sexual harassment. And that was held to be arbitrable under the broad arbitration clause that is much like the one here.

And so long as there is a broad arbitration clause and it's clear in Landers -- and it's very clear in Landers, and the Supreme Court's opinion in Landers, that I recommended to the court that as long as the claims touch matters that relate to her employment, then they are covered by a broad arbitration clause.

In Landers, the court held the defamation was related to employment because the truth or falsity of the statements that gave rise to defamation there would require the presentation of evidence that was integrally related to the Plaintiff's job performance. And therefore it was related to employment and arbitrable.

And in Pierson the Court of Appeals noted that the defamation claim and the other causes of action arose as a result of the doctor being placed in the hospital, the same hospital, and therefore was related to employment and was arbitrable.

In Toals the defamation, as I pointed out, occurred after the employment ended and was held to be related to the Plaintiff's employment and thus arbitrable under the broad arbitration agreement.

So the claims -- the claims here arise from the hospital's allegedly wrongful treatment of the Plaintiff during the course of their business relationship, while she was still employed by them, by the hospital. And thus the claims are related to her employment.

The third and final argument the Plaintiff makes is that she didn't read or acknowledge or get a hard copy of the handbook. She didn't read the acknowledgment. She didn't know that it had an arbitration clause in it. And the Court of Appeals actually addressed this very same argument in the Toals case and with this language.

After receiving and signing the acknowledgment Toals cannot legitimately claim United failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document's content to an individual when the individual can learn the content from simply reading the document.

In citing First Baptist Church of

Timmonsville versus George A. Creel which held that in the absence of a showing of fraud, mistake, unfair dealing or belied the party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring that I did not read the whole agreement.

Numerous courts across the country -- and these cases are attached in the appendix at Tab 7. Numerous cases across the country, including a Federal District Court case here in South Carolina, have ruled that this very same Tenet arbitration clause is enforceable and has compelled -- all of these courts have compelled arbitration in cases involving many of the same challenges that the Plaintiff offers here.

For example, that the Plaintiff wasn't aware of or didn't understand the arbitration provisions. That is Cases Number 2 and 16 at Tab 7. That statutory claims are not arbitrable. That is Tab 7 and Numbers 11 and 19.

There was also a case that there was no interstate commerce so the F.A.A. doesn't apply. That was at Number 20 at Tab 7. And the court properly rejected each of these challenges in those cases as should the court reject those challenges

here.

Now, moreover, there is an overriding presumption in favor of arbitration. In Greentree Financial Corp versus Rudolph the United States Supreme Court said in 2000 that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.

When an arbitration agreement governed by the F.A.A. covers claims that have been asserted in a lawsuit, enforcement of the arbitration agreement is not discretionary. That is the United States Supreme Court in Moses Cone Memorial hospital versus Mercury Construction.

And as the South Carolina Supreme Court recently declared in Landers, quote, arbitration agreements are liberally construed in favor of arbitrability. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. That is our Supreme Court in 2013.

Courts may not deny a party's request to arbitrate an issue unless it -- quote, unless it may

be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. That is also Landers, our Supreme Court.

The defamation claim asserted in the complaint relates to Plaintiff's employment or the termination of the employment in the same way that the defamation claim is related to the Plaintiff's employment in Landers and Pierson.

Those claims thus are encompassed by the arbitration clause that Plaintiff signed. Accordingly as the Supreme Court and the Court of Appeals have held in Landers and Pierson and as so many other courts have held in cases involving the very same employee acknowledgment, Plaintiff must arbitrate her claims. Arbitration should be compelled and this case should be dismissed with prejudice.

It is simply impossible to read Pierson, Landers, Dean, and other South Carolina cases that have been decided after Flexon as requiring anything other than arbitration of the issues in this case.

JUDGE DUKES: All right. Thank you so much.

MS. HARPER: Thank you.

MR. SHELTON: Thank you, Your Honor.

JUDGE DUKES: Happy to hear from you.

MR. SHELTON: Thank you. First of all, may I sit down?

JUDGE DUKES: Sure.

MR. SHELTON: I think it's important for the court first to look at the actual alleged arbitration agreement that is at issue. And you have it there in front of you obviously. Thank you.

Without stating anything further at this time, the acknowledgment that is spelled incorrectly in front of you, we do not believe --

JUDGE DUKES: I believe it is spelled incorrectly.

MR. SHELTON: We do not believe that it is enforceable, period. And particularly to this claim. However, our principal argument is that the cases relied on by the Defendants are completely inapplicable to this factual scenario and to the controlling issue in front of Your Honor which is whether interstate commerce is involved in this agreement that you have right in front of you, the acknowledgment, spelled incorrectly.

Ms. Marzulli is an at will employee. Let's go through the cases cited by the defense.

Landers -- the Plaintiff in Landers was an executive vice president, a founder, of Atlantic Bank and Trust, a Federally chartered savings bank with offices in South Carolina and Georgia.

Obviously as chief mortgage officer and executive vice president and a founding member of a bank his work involved interstate commerce. Landers doesn't even touch on whether the South Carolina Uniform Arbitration Act is controlling because of interstate commerce. That is not an issue before the court in that case.

The issue before the court is whether the claims were subject to the employee agreement, the employee's contract with the employer. Here there is no contract with the employer. The only agreement that may or may not be enforceable, which we -- is the acknowledgment before Your Honor.

Secondly, here the Plaintiff is a physical therapist at a local facility providing services to local patients with no employment contract. The acknowledgment, spelled incorrectly, was signed after she moved to South Carolina. It must stand on its own to determine whether it touches interstate commerce.

No arbitration provision is attached to

Tenet's agreement to recompensate her for part of her moving expenses. That brings me to Pierson. Your Honor is probably very familiar with Pierson because you were the circuit court judge who first heard the matter, but for the sake of the record I will go into the facts of that case a little bit.

Arbitration agreement attached to Pierson was attached to a physician relocation contract with a professional placement company that was based out of Georgia. Pierson relocated from another state. He signed an agreement to relocate with a Georgia company that relocated him to South Carolina. This agreement itself was part of the physician's contract to work for Tenet eventually.

That contract, the relocation contract itself, had an arbitration agreement. The relocation contract he signed with a Georgia company that found the position for him in South Carolina. The issue before Your Honor in that case initially was whether because Hilton Head Hospital wasn't a party to the actual contract, whether they are still bound by the arbitration. And you remember that. I don't need to get into those facts.

JUDGE DUKES: I remember the reversals much better than the affirmations.

MR. SHELTON: And the reversal said that, yes, they can be charged with that agreement, but the agreement itself is an agreement to relocate the physician from another state that had an arbitration agreement attached to his employment contract.

Here there is a standard agreement that was sent to Ms. Marzulli that applied to anyone that was more than 50 miles away from the facility. There is nothing specially tailored for Ms. Marzulli. And that agreement was -- is signed -- if you look at their Exhibit Number 8 in the very back of that there is an affidavit by Darlene Nester. It's actually in the very last exhibit of their -- attached. It is a reply affidavit.

JUDGE DUKES: Am I in the wrong -- oh, another eight?

MS. HARPER: Another eight, yes.

MR. SHELTON: Right. You will see there that Ms. Nester says that she was sent an agreement to sign paying Ms. Marzulli for part of her relocation. Part of her relocation expenses up to $2,500. She was relocated -- and then -- however, she did not sign this acknowledgment until after she had moved to South Carolina.

She has owned property and it was her domicil -- considered her domicile since 2008. That is supported by our affidavit from Ms. Marzulli. And then it was a contract of adhesion that she must sign on an orientation day on October the 10th, 2011, after that agreement was signed.

So that agreement has no arbitration provision. The only agreement in front of you, Your Honor, to determine whether it affects interstate commerce is the quote, unquote, acknowledgment with the "d" inserted into it.

In Pierson those facts just aren't applicable to the facts here. Again, it's an arbitration agreement attached to an actual contract to relocate. And that is not what we have here. We have an acknowledgment that you have access to an employee handbook which I'll touch on later.

Next, Defense has kind of inferred that Flexon may not be good law anymore, however, it is. The cases they cite are good law. The facts are just different. The factual scenarios are different. The application is different.

Landers and Pierson don't even address the issue of interstate commerce and whether the South Carolina Arbitration Act applies in their holdings.

If you want to review the Defendant's brief, really the only part of it that you -- I submit to Your Honor that you need to look at is Footnote Number 4 of the Defendant's brief as to this first issue where it actually -- where they speak of interstate commerce.

Flexon was not cited in the Defendant's initial brief despite Tenent being a party to Flexon. Let's talk about Flexon. It is good law. It was cited and compared with a holding -- within the holding of Lucey vs. Meyer which is 401 SC 122, South Carolina Court App. (2012).

That rehearing was after the hearing in Pierson was ordered -- after the order of the case of Pierson was issued by the South Carolina Court of Appeals. They compared the facts in Flexon stating that these are facts where it shows that no interstate commerce is involved whereas in Meyer interstate commerce was involved.

So not only has it been cited, it's actually been cited in a holding on this very issue.

JUDGE DUKES: Do you have Flexon handy?

MR. SHELTON: I do right here, Your Honor. Thank you.

JUDGE DUKES: While you are --

MR. SHELTON: Here is a copy for defense counsel?

MS. HARPER: I don't need it.

MR. SHELTON: Okay. Thank you.

MS. HARPER: Thank you.

MR. SHELTON: I also have Lucey v. Meyer here for Your Honor if you would like to see it.

JUDGE DUKES: All right. Thanks. I'm listening.

MR. SHELTON: Thank you. Flexon involved an employment contract, again a contract, where as here we don't have a contract. This is an at will employee. All we have in front of us is just this bear bones acknowledgment. Where a doctor performed health care services at a local facility on local patients. It happened to be in Hardeeville, South Carolina at Coastal.

Here the Plaintiff is a physical therapist at a local facility providing services to local patients with no employment contract, period. In our brief we bring up the fact that in Flexon the physician actually closed an office in Savannah, in Georgia, in order to come to work in South Carolina.

Quit his job and then went back to work in Georgia, but even in that scenario there was not -- interstate commerce wasn't involved.

The court clearly states that because he -- his contract called for a local physician to provide services to local patients it's controlling on the issues. It's controlling on the issue here. Interstate commerce is not involved. Therefore any arbitration contract, any arbitration, perputed arbitration acknowledgment must comply with the South Carolina Uniform Arbitration Act.

I think we can stipulate that it doesn't comply with the notice requirements of that. It's also a contract of adhesion wherein she must sign it in order to complete -- to keep being employed which is also a violation of the act.

Now, Flexon importantly cites Thoreson. I think it's important to look at Thoreson as well, Your Honor. In Thornton the arbitration provision attached to a recruiting agreement and an employment contract. The recruiting agreement was signed part and parcel to the recruiting relocation agreement. That arbitration agreement was signed part and parcel to the relocation and employment contract.

It is not comparable to the facts here

wherein there is no arbitration provision to any relocation contract. There is no relocation contract at all. In fact, the relocation recompensation of up to $2,500 for Ms. Marzulli specifically states that she is an at will employee subject to being terminated at any time.

Now, this relocation agreement in Thornton also guarantees the Plaintiff have a net collectable income for 24 months, gave him a signing bonus, plus moving expenses. Agreed that he was being recruited by the hospital according to the case and that Plaintiff promised in return to maintain a practice for four years. Those are all part and parcel to the same contract and relocation contract that was at issue in Thoreson. I have a copy of Thornton if Your Honor would like it.

JUDGE DUKES: Great. And have you got your client's affidavit?

MR. SHELTON: I do. I can hand you this, and it is attached there --

JUDGE DUKES: Okay. Great. Thank you.

MR. SHELTON: -- as Exhibit Number 1. I have Thornton here somewhere, I know.

MS. HARPER: Do you have an extra one

of those?

MR. SHELTON: Yes. You want the affidavit or --

MS. HARPER: No. No. No. I'm sorry. The Thornton case.

MR. SHELTON: Yes.

MS. HARPER: If you don't have it, that's all right.

MR. SHELTON: I do. I do. I have one for you, actually.

MS. HARPER: Thank you.

MR. SHELTON: You are welcome. Here is the Thornton case. I would like to point out in Thornton if you look at it you see that all of these guarantees were involved in the relocation contract.

The relocation contract had an arbitration provision. That was what the court relied upon in stating that it touched on interstate commerce on the degree that the Federal Arbitration Act was applicable and not the State Arbitration Act.

Now, Thornton is -- does determine the issue that is the -- the principal issue before Your Honor. Here we have a physical therapist at a local facility providing services to local patients with no employment contract. There is no relocation

contract with an arbitration provision.

The acknowledgment was signed after she moved to South Carolina, a month after she relocated, approximately. It must stand on its own. There is no arbitration provision attached to Tenet's agreement to recompensate her for some of her moving expenses. And, in fact, that agreement specifically says and states that she is an at will employee.

There is no -- the acknowledgment itself here has no incentives whatsoever. Let's look at Dean v. Heritage Healthcare Bridgeway. That is another case that has been cited, and that is Footnote 4 of the Defendant's brief.

That is a case that answered a very narrow question of whether a nursing home residency agreement involved interstate commerce. Nursing home contracts provide residents with meals and med supplies. That is a significant part of their contracts that are shipped across state lines inherent in the contract.

The home was -- the Defendant in that case was contractually required to provide meals and medical supplies, which are instrumentalities of interstate commerce. It specifically required that

in the residency agreement.

Again, here there is no agreement to look at except the acknowledgment. Our courts consistently look to the essential character of the contract when applying the F.A.A. that is cited in Thornton. No evidence in the record that I have knowledge of, it may be in the affidavit that I didn't see until today, and if it's so I apologize. I am not -- my knowledge establishes that Plaintiff's work required her to provide goods or supplies to anyone, much less goods or supplies that are transported over state lines. That would clearly distinguish it from the nursing home case. And the nursing home case did not overrule Flexon which is clearly on point here.

In Flexon it cites Arkansas Diagnostic Center, which I encourage Your Honor to look at if you are so inclined. And it relies heavily on this cases. This is 370 Arkansas 157, 257 S.W. 3d 884 (2007). There Arkansas Diagnostic Center argued interstate commerce wasn't involved because evidence existed to show that it as a hospital deals with out-of-state patients, received goods from out-of-state vendors, and paid for the doctor in that case, Dr. Tahiri -- I could be pronouncing that

incorrectly. I apologize. To travel to seminars outside of Arkansas.

In that case, which Flexon heavily relied, that was not sufficient to illustrate involvement of interstate commerce. A.D.C., Arkansas Diagnostic Center, was a local clinic which contracted with Dr. Tahiri to provide medical services to local patients.

And this is directly from the case, from the Arkansas case, were we to hold otherwise it would equate to a finding that the F.A.A. is applicable to any contract containing an arbitration clause as it could be argued that every contract involves some nexus to interstate commerce.

Instead, the question is simply whether the contract evidences a transaction involving commerce. Flexon quotes A.D.C. with that specific quote.

Clearly here we have an acknowledgment where the Defendant is holding out to be a binding arbitration agreement. There is no employment contract. The acknowledgment standing on its own, in her work if you even incorporate that into the acknowledgment in no way touches on interstate commerce. It is completely similar to the facts in

Flexon and also the Arkansas case which Flexon cites Flexon is still good law and is controlling in this situation.

Moving on to our second argument, unless Your Honor would like to hear a little bit more on the first argument or take some time to look over?

JUDGE DUKES: No. Go ahead.

MR. SHELTON: Thank you. The second argument is not precisely what Defense counsel stated it was with respect to -- astute Defense counsel in this case which I'm privileged to stand -- be across from.

It's not on point with the other cases where defamation wasn't applied. It's distinguishable for a few reasons. First of all, none of those cases brought to bear, to my knowledge, that defamation is actually a criminal act in South Carolina.

And there is one thing that I cite in my brief, and I cite incorrectly, it carries up to instead of 30 days I cited, it carries up to one year under South Carolina law and/or up to $5,000 fine.

The Plaintiff's complaint is defamation for per se, malice is implied. Under the law in

South Carolina, defamation is a crime when you maliciously publish false information concerning another without citing all the elements for defamation.

That is what happened here. That is what we are alleging. In order -- for that reason there is no way that Ms. Marzulli, if the acknowledgment is even enforceable, could have contemplated consenting to her employer committing a criminal act and whether that criminal act could be somehow related to her employment.

Secondly, in this case we've alleged that the employer itself, Tenet itself, has committed defamation against Ms. Marzulli, not a co-worker. Defamation also, if you look at the Landers case, does not involve her stating that she's not good at her job or that she's incompetent. It is a vile, vile accusation of the most horrible kind.

They took a complaint which should be fielded and determined. They did not comply with South Carolina law when -- with the mandatory reporting statute when taking in this complaint and ensuring that that law is complied with.

And instead of repeating the actual complaint, even though the father wanted to come in

and meet with hospital representatives before reporting it to anyone else, they took the words of the father and changed them and stated that this, our client, had inappropriately touched a nine-year-old physically disabled young woman and sexually and physically abused her.

The father said no such words. This is an assault on her character. This is -- she is a child molester of the worst kind. This is not her not being adequate at her job as in Landers. Landers cites a case out of New York. I can't remember it off the top of my head, where the accusation was about a co-worker being drunk.

Because him being drunk did not have to do with this -- pertain to his rather character, and not to his job performance and his ability to do his job, it was not subject to the arbitration agreement concerning employment. That is our argument as to the defamation not being part of the arbitration agreement.

And, again, she can't consent to a criminal act. She cannot consent to her employer committing a crime against her. They did not submit this to arbitration. They called the Sheriff's Office.

Finally our third prong to our argument is that the acknowledgment, spelled incorrectly that you've seen in there as Exhibit Number 1 to the Defendant's motion, is completely unconscionable and unenforceable.

It's a contract of adhesion. If you look at Lucey v. Meyer it sets out the test for what isn't -- in all arbitration -- excuse me. I want to back up a little bit. All arbitration agreements are determined whether to be enforceable or not based on standard principles of contract law.

The test of whether a contract is unconscionable is first an absence of meaningful choice, and second it has only one-sided terms, whether it has one-sided terms that are oppressive, unfair.

This -- in Lucey v. Meyer they make -- the court goes to great length to show that the Plaintiff in that case had an opportunity to have input into what the arbitration agreement constituted.

They made a point to state that it was not a contract of adhesion. Here we clearly have a contract of adhesion. She had to sign it in order to be employed, in order to keep employment after

she already had relocated.

She had no choice. She must have signed it along with all the other employment documents including her tax forms, all the other documents that Tenet makes employees sign. It clearly meets that prong. There is one -- there is no meaningful choice in this acknowledgment.

In our brief we set out all the other facts where as you see this in front of you and the first sentence says nothing of arbitration. The top of the agreement says nothing of arbitration. It misspells acknowledgment.

Arbitration I believe is not even in the document until buried into the fourth paragraph. It's single spaced, small font. When she was -- if you look at Ms. Marzulli's affidavit, she states that when she was handed the acknowledgment the H.R. representative, which was not Darlene Nester, stated that this just acknowledges that you received the employee handbook. It doesn't state anything about arbitration. And she was not handed an employee handbook along with it.

The argument is not that she wasn't handed the handbook with it. The argument is that the actual agreement itself is unconscionable. The

second prong is that it has one-sided terms. Here the hospital is asking the court to enforce an acknowledgment, spelled incorrectly, which allows it to call law enforcement and defame an employee per our allegations committing a criminal act against the employee with no due process. They don't have to comply with the fair treatment process. Well, they do not even comply with the mandatory reporting statute. No mandatory reporter fielded the complaint. No mandatory reporter actually made the call to law enforcement. There is an office manager who fielded the complaint, reported it to a lawyer who happens to be titled the risk management officer or risk director, risk management director, risk director.

She called law enforcement. No physical therapist spoke with the client -- with the patient's father. No one who was an allied health professional or medical professional spoke with the father. So they don't have to comply with that.

They did not abide by wishes of the patient to actually speak with hospital personnel before reporting the allegation to anyone else. They expanded upon the allegation as to what was actually said putting in their own interpretation,

expanding upon what the actual clear meaning of the words that he said are.

And yet now they are asking the court to force the patient to enter into a fair treatment process that involves at least four different layers of bureaucracy before she is even able to attempt to arbitrate the matter.

It does not require the hospital to arbitrate its wrongful conduct. It does not require the hospital to -- the hospital not comply with its own terms in the fair treatment process when lying to Ms. Marzulli, bringing her into a director's office, calling law enforcement against a patient's wishes, and suspending her for indefinitely without pay immediately and not even allowing her to go back to get her personal items. No fair treatment process was complied with there.

And now they are asking the court to strictly uphold this fair treatment process and all the onion layers to that onion. By my calculation in order for her to comply with this fair treatment process, months and months would take place before she was even able to possibly -- would pass rather before she was able to possibly appeal and then eventually arbitrate the matter.

The entire process is nothing more than subterfuge to delay from our client's perspective. The fair treatment process is impossible, furthermore, as Marzulli is no longer an employee. Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays. That is Lucey v. Meyer.

Our client's position is that is precisely what this entire exercise is. We believe it's very clear that on its face we don't have to -- Your Honor does not have to get to the second and third prongs of our arguments. It's only the first prong that you need to rule on which is the Defense only replies and addresses truly in its Footnote Number 4 which is our principal argument that interstate commerce is not involved in this acknowledgment. That acknowledgment stands on its own.

That is the only real agreement that the hospital had with the employee. There is no contract. She is an at will employee. That acknowledgment, nothing therein touches on interstate commerce per Flexon and per our established case law clearly distinguishable from the cases, doesn't -- that which the Defense relies

so heavily upon which have actually nothing to do with the actual issue of this case, whether the South Carolina Arbitration Act applies or whether the Federal Arbitration Act applies because of interstate commerce is involved.

I believe that is everything. Thank you, Your Honor.

JUDGE DUKES: All right.

MS. HARPER: If I could have just one minute, Your Honor?

JUDGE DUKES: Yes. Take your time.

MS. HARPER: Flexon is -- the Flexon case is a thin rule upon which to rest this argument. First of all, there are two differences in the facts. Mr. Flexon lived in Hardeeville. The clinic was in Hardeeville when he signed this agreement to arbitrate.

Here she didn't live -- the Plaintiff didn't live in Hilton Head. She lived in Pennsylvania. She found the job on Tenet's website. She applied online. She put online -- in her Pennsylvania address. They offered her the job in Pennsylvania. She accepted it and sent back her acceptance to South Carolina.

So there are key differences in the facts

between Flexon and this case. Flexon was a panel of three judges of the Court of Appeals. You have almost -- you have the almost opposite decision from a panel of three others in the Lucey case holding that the F.A.A. applied, but to trump all of that we've got Landers decided by the Supreme Court since this Flexon case where the Supreme Court has spoken clearly that the F.A.A. applies.

And in Dean where the court said this whole argument about it not impacting interstate commerce which was held in the Timms case is a relic of the past. This whole idea that there is not -- this doesn't involve interstate commerce is similarly a relic. That argument just simply doesn't hold water anymore, especially after the Alex Chambers decision as the Supreme Court has noted -- our Supreme Court has noted.

In fact, in the Dean case, the Supreme Court said that health care is an activity -- is an activity that is peculiarly governed by Federal law. So here we've got health care. And if you then consider -- I don't want to just briefly touch on this idea that this was an unconscionable contract. There is nothing in the record to indicate that it was mandatory that she sign it. The agreement

doesn't say that it was mandatory that she sign it.

In fact, she didn't have to sign it. And, in fact, there are a number of cases that are cited or included there at Tab 7, Number 8, Number 10, 11, 12, 16, and 19 all of which say that this particular acknowledgment form is not an unconscionable arbitration agreement.

And finally, over all of this we have the Supreme Court's very clear language in Landers saying that arbitration is favored. If there is -- you know, the Plaintiff in this case bears the burden of showing that there is -- this is not properly arbitrable. Arbitration clauses are liberally construed in favor of arbitration.

And unless the court can say with positive assurance that it's not arbitrable then it is. And so all doubts are supposed to be resolved in favor of arbitration. And all of these issues that the Plaintiff has raised about what occurred in this case are all properly decided by the arbitrator.

JUDGE DUKES: All right.

MR. SHELTON: Brief response, Your Honor? I know we've been here for a long time.

JUDGE DUKES: That's all right.

MR. SHELTON: First of all, Plaintiff

has established in her affidavit, there is evidence she actually moved to South Carolina. She had planned to move to South Carolina since 2008. Moved to South Carolina in September. She already had signed a lease. She was already there. Then signed the arbitration agreement on October 10th, 2011, when she was already in South Carolina.

JUDGE DUKES: But she moved here for the job?

MR. SHELTON: Moved here for the job, but there was no arbitration provision of her moving here. After she already actually started work and then this was a mandatory orientation that she signed this agreement, this acknowledgment during.

So that is clearly different from the Thornton case where he signed a contract to move to South Carolina for the job and also signed a contract where he was going to stay there for four years. They are all the same contract that had an arbitration provision attached to it. Here the only agreement is the actual acknowledgment.

Secondly, there is evidence in the record that she was forced to sign it, that she had to sign it. It's in her affidavit. I think it's paragraph number three.

MS. HARPER: I believe -- sorry, Your Honor. I'll address it later on.

MR. SHELTON: But we believe if the court looks carefully at Thornton, looks carefully at Flexon, this is not an arbitration provision that is attached to a larger contract. This is a separate arbitration provision that she only signed after she was already here, starting work here.

JUDGE DUKES: Well, it wasn't after she was employed though, right? I mean, as far as I understand the affidavit she had to do an orientation prior to starting her first day. So she had actually signed this before she saw the first patient?

MR. SHELTON: Well, per the -- per the actual letter that she received previous to this, it said that her first day was September 15th. So --

JUDGE DUKES: So for whatever reason they changed that and --

MR. SHELTON: For whatever reason the day that she came in to first start work or whatever day that -- and I don't know if the record is clear as to whether she actually appeared at work before, but in order to continue employment she had to sign

thing at this orientation. There are only so many orientations is my understanding during that year. It's not like there is an orientation specifically to her.

So she had already moved to South Carolina, already owned real estate in South Carolina. Once she was already here, that is when she signed this acknowledgment. And the acknowledgment has nothing to do with relocation. The acknowledgment has absolutely nothing to do -- all it has to do with is her work after she had already started work at Tenet.

And her work at Tenet involved -- she was a local physical therapist treating local patients at a local facility.

JUDGE DUKES: All right. You've got something you wanted to add?

MS. HARPER: I was simply going to say that I believe the Plaintiff's affidavit said she believed that she had to sign it, but there is nothing in the record. And, in fact, she didn't have to sign it. In some of the cases, the Tenet cases that are attached there make -- note that.

I just wanted to give the Dean case, the Zabinski case. And I think the Dean case is really

important here, and that is because that there you had a local nursing home. There you had a local patient. There you had all kinds of local things going on. And they said that the fact that nursing homes serve food that had been brought in from out of state was sufficient to make it proper to apply the F.A.A. That is all, Your Honor. And those two I can --

(Discussion off the record.)

MR. SHELTON: Again, we just believe that the acknowledgment must stand on its own. There is no doubt that she signed it on Hilton Head Island.

JUDGE DUKES: But I'm still unclear. Maybe you all can help me out with this. Did she start work first and then sign it or did she --

MR. SHELTON: If you look at -- I have the letter, right here. And I can make it -- it's not an affidavit. It's a letter. We'll make it Exhibit Number E to our brief. Do you have any exhibit markings, Madam Court Reporter?

COURT REPORTER: Judge?

JUDGE DUKES: Uh-huh?

COURT REPORTER: Do you want this marked E or do you want it a 1 or --

JUDGE DUKES: Oh, let's make it -- why would it be E?

MR. SHELTON: We have four. We have A, B, C, D to our memorandum.

JUDGE DUKES: Oh. Just make it E. E is fine.

(MARKED PLAINTIFF'S EXHIBIT E.)

JUDGE DUKES: I'm sorry. Just trying to read the acknowledgment spelling.

MS. HARPER: I can clarify it, Your Honor, but I am confident that the orientation was held before her first day of work, but I will confirm that.

JUDGE DUKES: I guess I'm just curious. The affidavit's today, are they unclear?

MR. SHELTON: This is going to be our Exhibit E. This is the letter she actually received which states when her first day of work is.

MS. HARPER: But it just states that in the future. It doesn't establish that that was, in fact, her first day.

MR. SHELTON: It says, your start date will be Monday, September 19th, 2011. Your rate of pay will be. And then it actually states that she will have a mandatory arbitration --

mandatory orientation on October 10, 2011, from 8:00 a.m. to 5:00 p.m. Please report to Human Resources promptly at 8:00 a.m. on Monday. Lunch will be provided. It states that you will eventually be working full time after the orientation, but it clearly states by this document from Hilton Head Hospital that you will be starting -- your first day will be Monday, September 19.

And if you look at this document, all employees who move 50 miles get the moving expenses. This isn't something specifically to Ms. Marzulli. And, again, this also demonstrates that there is no arbitration agreement to this document. If Ms. Marzulli signed that acknowledgment when she signed this document we would have -- it would be a completely different scenario here. However, that's not the case.

Once she moved here, after she moved here then started work, then she signed the acknowledgment.

MS. HARPER: Well, I would say her own affidavit indicates that she didn't start in September. She didn't start on the September date that is noted in the offer letter because she says

here that she started -- in Paragraph 1 of her affidavit that she was employed from October 2011 through July 2014. And I'm fairly certain that, as I said, the orientation was -- predated her first day of work, but I can find that out. If the court would like that confirmed, I can get an affidavit to that effect.

JUDGE DUKES: Let me ask you this. Assume we've been operating under the assumption that she -- I think, least the arguments have been, that she moved here and that her first day before she did anything she signed all of these things. And then off she went to work.

But I suppose there is the possibility, although maybe it's not true, I guess we've got to determine that, that she moved here. She is working. She is seeing patients. And then one day they present her with this agreement. And I can't remember if you said her affidavit indicates she thought she would have to sign it. I mean, it seems like a little bit different situation if she signs it -- she's already working there. They hand her something she believes she has to sign for continued employment versus her first day. And I just wanted to get your take on that.

MS. HARPER: I think it's a distinction without a difference really because she didn't -- for an arbitration agreement to be effective under the F.A.A. it doesn't even have to be signed. There just has to be a written -- a written arbitration clause.

JUDGE DUKES: I think that was the lesson I learned the hard way in what was the case?

MR. SHELTON: Pierson.

MS. HARPER: The Pierson case?

JUDGE DUKES: Yeah, Pierson case.

MR. SHELTON: It has to be signed by a party.

JUDGE DUKES: But in this particular one they wanted to bind her to this -- well, I guess we don't know what the story is on when she started, so maybe it doesn't matter.

MR. SHELTON: And we would argue that it's a distinction without a difference as well because obviously she had already moved to South Carolina. At that point she is in South Carolina. She is in South Carolina when she signs the agreement. She didn't sign the agreement from Pennsylvania. She signed the agreement after she had already come to South Carolina. At that point

she's a South Carolina resident. She is here.

JUDGE DUKES: But she signed it and is, you know, assumed to have read every word of it. I understand she says maybe she didn't, but -- so she did sign it. So then the question becomes, I suppose, is it binding if she had read every word of it? And your argument would be, what, it's unconscionable I suppose or --

MR. SHELTON: Well, the first argument is that there is nothing -- there is no meeting of the minds as to her agreeing to the hospital committing a criminal act against her, defamation.

And the second argument would be it's unconscionable. But, again, our principal argument is, is that this does not involve interstate commerce. It is squarely on point with Flexon.

JUDGE DUKES: But, I mean the State allows arbitration agreements, but you are saying in that case it doesn't have the bold print and all of that stuff?

MR. SHELTON: Correct, Your Honor.

MR. DeANTONIO: Your Honor, they haven't even moved under the State act. They have moved solely under the Federal act.

MR. SHELTON: And the State act requires that it be all capital letters, underlined on the first-page rubber stamped on the front of the agreement.

MS. HARPER: But if the F.A.A. applies all of those requirements are --

JUDGE DUKES: Right. So I've got to read all of these cases and figure out what the story is. So maybe what we ought to do is you all leave me with all of this. And I guess I'm going to get you to swap this one out. Unfortunately you may have drawn a line in it, but you said you sent one to Heather?

MS. HARPER: I sent one. It's addressed to --

JUDGE DUKES: Me?

MS. HARPER: -- you. And I don't know that we had the room number, but we had the street address.

JUDGE DUKES: Well, since they repainted, they took the room number off the room anyway.

MS. HARPER: I noticed that. I thought how are you supposed to find the rooms?

JUDGE DUKES: It's very confusing,

but as long as we get one filed and one to me, I don't care which one it is. But I may just try to get you all to stack everything up and to the extent that maybe you could -- do you have this P.D.F. also?

MS. HARPER: I do have that in a P.D.F. I don't have it right here. I can send it to you.

JUDGE DUKES: I would like to, but I mean at some point but if you could send it P.D.F. And then I will gather all of this. And then maybe on the way out if you all wouldn't mind a couple of weeks of now, let's do a phone conference. By then I will have had a opportunity to look at it. I don't know if I will have any further questions, but at least it will also keep a fire under me to take a look at all of this. So anything else for this record?

MS. HARPER: No, sir.

JUDGE DUKES: All right. That will complete the record.

(Whereupon, the hearing was concluded at 2:21 p.m.)

Certificate of Reporter

I, Deborah S. Thomas, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina, do hereby certify that I reported the hearing of Marzulli v. Tenet, et al, on the 15th day of April, 2015: and that the foregoing 50 pages constitute a true and correct transcription of the said hearing.

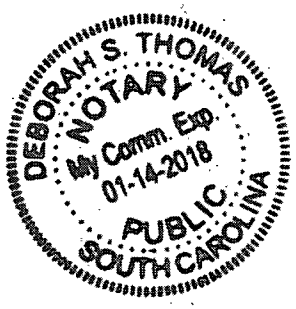
I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript shall be hereafter delivered to Sue E. Harper, Nelson Mullins Riley & Scarborough, LLP, 320 Main Street, Columbia, South Carolina 29201

In witness whereof I set my hand and seal this 21st day of December, 2015.

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina

My Commission
expires 1/4/18



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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Case No. 2014-CP-07-2779

Mary Beth Marzulli, ... Respondent,

v.

Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., ... Appellants.

NOTICE OF APPEAL

The Appellants appeal the Order of the Honorable Marvin H. Dukes III dated October 23, 2015 (attached as Exhibit A). Appellants received written notice of entry of this Order on October 23, 2015.

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Exhibit A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO. 2014-CP-07-2779
MARY BETH MARZULLI,	)	
	)	
Plaintiff,	)	ORDER
	)	
vs.	)	
	)	
TENET SOUTH CAROLINA, INC., HILTON HEAD HEALTH SYSTEM, LP d/b/a HILTON HEAD REGIONAL MEDICAL CENTER, and TENET PHYSICIAN SERVICES–HILTON HEAD, INC.,	)	
	)	
Defendants.	)	

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This matter was before the Court on the Defendants' Motion to Compel Arbitration pursuant to the Federal Arbitration Act.[1] The Court received memoranda and supplemental memoranda, numerous affidavits and exhibits, and held two hearings. The matter was given considerable deliberation, and for the reasons detailed below, the Court denies Defendants' motion.

Factual Background

Plaintiff Marzulli is a physical therapist with over forty (40) years of professional experience. She specializes in pediatric physical therapy and treats children with special needs and disabilities. Marzulli obtained a Bachelor of Science Degree from the University of Alabama in Birmingham and studied at the graduate level. She was issued a South Carolina license to perform her work on September 14, 2011, and has been licensed in other states. She has held several positions, including the Chief Physical Therapist at Ashton Hall Nursing Home in

[1] The Defendants' Motion asserts arbitration only on federal grounds. Defendants also moved pursuant to SCRCP 12 (b)(1) and (6) but effectively abandoned that motion. Therefore, that motion is denied.

Philadelphia, at Imperial Point Hospital in Fort Lauderdale, Fla., and at Carraway Methodist Medical Center in Birmingham, Alabama. Marzulli also worked, among many other positions, with Mercy Catholic Medical Center Foundation and the Shiners Hospital for Children. She has held teaching positions and clinical teaching appointments as well. She has served on the Board of Directors of the American Hippotherapy Association and Quest Therapeutic Services. Marzulli has been a member of the American Physical Therapy Association, and has been published. The Plaintiff is a care-giver to young people afflicted with significant physical afflictions, including neurological maladies.

Hilton Head Regional Medical Center (a/k/a Hilton Head Hospital) is a local hospital which markets itself as a regional medical center serving and a part of the local Hilton Head Island community.

According to the Second Affidavit of Darlene Nester, the Chief Human Resources Officer for Hilton Head Hospital, Mary Beth Marzulli's first date of employment was September 19, 2011. Marzulli was hired as a pediatric physical therapist. She had purchased a home in South Carolina in 2008, and that home has become her permanent residence. The Plaintiff began leasing a second home in Hilton Head establishing two residences in South Carolina on September 5, 2011. She obtained her South Carolina physical therapist license on September 14, 2011. Marzulli got a South Carolina driver's license on September 16, 2011.

Well after her start date, in October 2011, the Plaintiff was required to sign several administrative documents at a required orientation. One of the documents was titled an "*Acknowledgement.*"[2] Upon receiving the *Acknowledgement* the Plaintiff was told by the Defendants' human resource representative that the document simply acknowledged that she had

[2] The Court notes that the document at issue titled, "*Acknowledgement*" contained an incorrect spelling of the word "Acknowledgment" in its title.

received the employee handbook. However, the Plaintiff did not receive the employee handbook contemporaneously with the *Acknowledgement.* Buried nondescriptly within the fourth of five paragraphs in this single spaced, small font document is the disputed language attempting to impose arbitration. The document was signed October 10, 2011.

Mrs. Marzulli's employment as a physical therapist consisted of her treating local patients at a local hospital by providing them with one on one physical therapy services.

The Plaintiff's theory in this defamation action is that Defendants committed a false accusation that a 40-year physical therapist veteran, married professional, sexually and physically abused a minor of the same sex, a patient who had special needs.

Standard of Review

Both federal and state policy favors arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995) ("The policy of the United States and this State is to favor arbitration of disputes.") Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration. *Volt Inf. Scis. Inc. v. Board of Trs.*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d. 488 (1989). Stated simply, every purported arbitration agreement is not enforceable.

"[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.*, at 478, 109 S.Ct. at 1255. While the federal policy favoring arbitration as expressed in the Federal Arbitration Act is now binding in state courts and supersedes inconsistent state law, the act nonetheless requires *a contract evidencing a transaction involving commerce* to settle a controversy by arbitration.

Zabinsksi v. Bright Acres Associates, 346 S.C. 580, 553 S.E. 2d 110 (2001), citing *Allied-Bruce Terminix Co. V. Dobson*, 513 U.S. 265, 115 S.CT. 834, 130 L.Ed.2d 753 (1995).

Analysis

A. Ms. Marzulli's work did not require her to perform actions related to interstate commerce.

Mrs. Marzulli was a South Carolina resident and her employment as a physical therapist consisted of her treating local patients at a local hospital by providing them with one on one physical therapy services. The Defendants ask the court to rule that all employment in the health care field involves interstate commerce. However, Defendants' position is without any support of the jurisprudence of South Carolina. Further, it is in direct contradiction with *Flexon v. PHC ("Flexon I")*[3]

In determining whether a transaction is inside or outside of the scope of the FAA, the court determines "whether *the contract* require[s] [a party] to administer anything related to interstate commerce." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. App. 2003) (quoting *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 SE2d 880, 882 (2001))(emphasis added). Pursuant to the Federal Arbitration Act, "A written provision in any *contract* evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such [ ]contract* . . . shall be valid, irrevocable and enforceable, save

[3] Defendants further argue that, because the Plaintiff at times used "props" or devices that are shipped from across state lines while providing physical therapy to patients, her work involved in interstate commerce. This argument is without merit. Under this same theory, a South Carolina History teacher, teaching South Carolina students in a South Carolina classroom would be engaging in interstate commerce when he used chalk that was manufactured in another State to write on a chalkboard that was manufactured outside of South Carolina. If the Court were to accept the Defendant's argument, it would be hard to imagine any work which could exist that would not involve interstate commerce. Likewise, Defendant's argue that, because some of the Plaintiff's patients' bills were at times paid by out-of-state insurers or Medicare or Medicaid, that her work involved interstate commerce. This argument is unpersuasive. Even if the Court assumes *per arguendo* that the act of paying a bill across State lines involves interstate commerce, the Plaintiff did not personally submit bills to insurance providers for payment. That job would be a task assigned to other employees of the Defendant. The Plaintiff's job was to provide a medical service, physical therapy, to local patients.

upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. 2 (2009) (emphasis added). Courts must "focus upon what the terms of *the contract* specifically require for performance in determining whether interstate commerce is involved. Our courts consistently look to the essential character of *the contract* when applying the FAA." *Thornton v. Trident Medical Center, LLC*, 357 S.C. 91, 96, 592 S.E.2d 50 (S.C. App. 2003) (emphasis added). "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

Compare the *Acknowledgement* signed by Ms. Marzulli to the recruiting agreement and employment contract signed by the Plaintiff in *Thornton*. In *Thornton* the Court looked to what the contract between the parties required the parties to *perform*. The Court noted in *Thornton* that the entire contract that was subject to the arbitration provision "was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines." *Thornton*, 357 S.C. at 98. Indeed, in *Thornton* "[t]he express purpose of the recruiting agreement was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.* Again, the entire agreement in Thornton, the recruiting agreement and contract for employment which was part and parcel to it, was the *contract* that the court interpreted.

Here, the only purported contract for the Court to consider is the "*Acknowledgement.*" The terms of the *Acknowledgement* have nothing to do with Mrs. Marzulli's move to South Carolina.[4] She signed the *Acknowledgement* as a South Carolina resident.

[4] Paragraph four of the *Acknowledgement*, beginning on the final word of line two of the paragraph states, in small, single spaced nondescript font, "I hereby voluntarily agree to use the Company's Fair Treatment Process and to submit to final and binding arbitration of any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet."

Also compare the nature of Mrs. Marzulli's work to the work of the Plaintiff in *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E. 2d 839 (Ct. App. 1999). In that case, the Plaintiff was required to attend out-of-state conferences, participated in conferences with the Defendant's office in Minnesota, reviewed claims from out-of-state providers and specialty providers located in North Carolina and Georgia, and participated in Sales Presentations in South Carolina and Georgia, and, reviewed proposals from out-of-state medical and ancillary service providers. The court found those activities provided "sufficient evidence to invoke the FAA." Here, Ms. Marzulli's work had no similar requirements. She was a local physical therapist providing physical therapy services to local patients at a local facility.

South Carolina jurisprudence is dispositive to the issue. *Flexon v. PHC-Jasper, Inc.*, a 2012 Court of Appeals decision, dictates that Defendants' motion to compel arbitration be denied. Flexon was a South Carolina resident licensed to practice medicine as a physician. He was to practice at sites in Jasper County. There was an arbitration agreement. The trial court found the employment agreement called for local medical services to be performed at a medical facility in Hardeeville, and as such denied the motion to compel arbitration since it didn't involve interstate commerce. *See Flexon, supra*, 309 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012).

Flexon is analytically analogous to the present case before the Court. Here, the Plaintiff provided physical therapy services exclusively in South Carolina. She did not travel out of state for her work. (By contradistinction, *see Lucey v. Meyer*, 201 S.C.C 122, 736 S.E. 2d 274 (Ct. App. 2012), in which employment *contract* detailed at least one specific matter which required out of state travel, triggering the commerce clause.)

Flexon resurfaced to the Court of Appeals and a different panel ruled again in favor of the physician. *Flexon v. PHC-Jasper, Inc.*, Op. No. 5336, Filed July 29, 2015 ("*Flexon II*"). Thus, this case is binding and controlling jurisprudence.

The Court also looks to the terms of the "*Acknowledgement*" to determine whether *it* requires Mrs. Marzulli to administer anything related to interstate commerce. Here, the "*contract*" that the court must examine is the *"Acknowledgement."* Thus, the Court must determine whether its terms require Ms. Marzulli to specifically perform anything related to interstate commerce. See *Thornton, supra.* No other contemporaneous or subsequent contract exists. The FAA only requires arbitration of "*a controversy thereafter arising out of such contract,*" not controversies or acts arising before the contract was entered into. 9 U.S.C. 2 (2009).

Ms. Marzulli was a South Carolina resident when she signed the "*Acknowledgement*" for nearly one month. This dispels and relevancy to the fact that she established permanent residency in South Carolina approximately one month before signing the alleged contract at issue. Her act of signing the *Acknowledgement* on October 10, 2011 as a South Carolina resident in no way evidences the involvement of interstate commerce. Further, an agreement to arbitrate—the only purported contract at issue here—standing alone does not involve interstate commerce.

Finally, even if the Court looks beyond the four corners of the *Acknowledgement* to determine what the agreement required her to perform, as detailed above, Marzulli's work did not involve interstate commerce. Marzulli performed all her work in South Carolina, it did not involve interstate commerce and thus, arbitration should not be compelled. Given that

Defendants move only on the basis of the federal act, the South Carolina Act is inapplicable as well.[5]

B. The "Agreement" is Unconscionable

The Plaintiff began leasing a second home in Hilton Head establishing two residences in South Carolina on September 5, 2011. She obtained her South Carolina physical therapist license on September 14, 2011. Marzulli got a South Carolina driver's license on September 16, 2011. According to Tenet's records, the Plaintiff was to begin work on September 19, 2011 and for her first pay period, she received her first direct deposit from Defendants on October 21, 2011. She unquestionably was a South Carolina resident no later than September 16, 2011, and began employment prior to the document at issue was required to be signed by her.

Marzulli began work at Tenet weeks before October 11, 2011, the date she was required to sign the "*Acknowledgement*", requiring Ms. Marzulli to submit "any and all claims and disputes that are related in any way to [her] employment or the termination of [her] employment with Tenet." She had no meaningful choice in the matter; she had no negotiating leverage. There was no bargaining for the clause.

General contract principles of state law demonstrate that the arbitration clause is not enforceable. *See Simpson, supra.* In that Marzulli had already established her residency in South Carolina and had in fact begun work before being required to sign the "*Acknowledgement*" at a subsequent orientation, the purported agreement lacks a component so axiomatic no citation is necessary–consideration. Without consideration, there can be no contract. Without a contract, arbitration cannot be compelled. Even if there were consideration, and there is not, the "agreement" is unconscionable.

[5] Further, the "*Acknowledgement*" signed by the Plaintiff does not meet the notice requirements of the South Carolina Uniform Arbitration Act, and was made a condition of employment, which also violates the SCUAA; Thus, under the SCUAA, the document titled "Acknowledgement" is unenforceable.

In determining unconscionability, the Court considers whether a contract provision is absent of meaningful choice and contains oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F. 2d 287 (4th Cr. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *Id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293.

Here, the alleged defamation is actionable per se, meaning that she suffered presumed damages; the Plaintiff is an individual, not a substantial business concern; she had no bargaining power as she had already begun work and was required to sign the agreement; the Defendants are very sophisticated business and health care companies; and the clause is unquestionably inconspicuous, buried in a document which is single-spaced in small font, which bears a misspelled title (that in no way gives notice of the substantive right that the Defendants argue the Plaintiff relinquished by signing the same). The Agreement was offered on a "take it or leave it" basis. The context of the inclusion of the clause and the circumstances of her being required to sign it disturb the court.

The terms of the agreement are oppressive and one-sided. They strip her right to a jury trial. According to the Defendant's arguments, it requires the Plaintiff to arbitrate a criminal act. The document also requires a "Fair Process" procedure that curiously, the Defendants did not employ in this matter. They seek to invoke one clause, the one concerning arbitration, while

eschewing the procedural mechanism supposedly designed to protect the process rights of the employee.

These factors in sum considered, the Court is convinced that the Plaintiff had no meaningful choice but to sign the document titled *Acknowledgement*. She had already begun her job. Additionally, the Defendants ask the court to enforce an agreement which, according to the Defendants, allows them to report the other bound party to law enforcement without probable cause, thereby filing a criminal "claim" against that party which would be subject to a jury trial, but which bars the Plaintiff from seeking redress by way of jury trial for that very act of unlawful reporting which may itself be a crime. Such terms patently are oppressive and one-sided.

C. The intentional tort of defamation is not contemplated by the "agreement."

Defamation is a false and defamatory statement about the plaintiff published by the defendant to others. It is an intentional tort. The cause of action in this case is not founded on employment or termination grounds; it is not a breach of contract action, discrimination suit or payment of wages claim. The defamation suit is not pendent to employment causes of action, as they often are in "shotgun" approaches to pleading numerous causes of actions. Instead, this intentional tort is not grounded upon employment issues. The alleged publication of the defamation was not made to individuals exclusively within the Plaintiff's employment, but to individuals outside of and unaffiliated with Plaintiff's employment. Consequently, the libel and slander are not "related" to her employment or termination. What is more, in South Carolina, commission of slander or libel is a violation of the criminal code. *See,* S.C. Code Ann. §16-7-150. One cannot consent to a criminal act, nor agree to arbitrate a criminal act. Utilizing contractual principles, it is difficult to see that a defamation claim would be contemplated and negotiated in this case.

There is a slim cache of legal authorities on the issue of whether the tort of defamation is contemplated by an arbitration agreement, but cases exist. The Second Circuit, under different facts, has found that defamation and related claims are not necessarily bound by arbitration provisions. *See, Coudert v. Paine Webber Jackson & Curtis*, 705 F. 2d 78 (1983); *McMahon v. RMS Electronics, Inc.*, 618 F. Supp. 189 (1985).

This court finds, holds and rules that the Defendant's Motion to Compel Arbitration is DENIED, consistent with the findings and conclusions above.

AND IT IS SO ORDERED.

Presiding Judge

October 22, 2015
Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Circuit Court Judge

Case No. 2014-CP-07-2779

Mary Beth Marzulli, ... Respondent,

v.

Tenet South Carolina, Inc., Hilton Head Health System, L.P., d/b/a Hilton Head Regional Medical Center, and Tenet Physician Services-Hilton Head, Inc., ... Appellants.

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MAY 25 2016
SC Court of Appeals

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas
Marvin H. Dukes, III, Master In Equity

Case No. 2014-CP-07-2779
Appellate Case No. 2015-002363

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Marvin H. Dukes, III, Master In Equity

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Record on Appeal complies with Supreme Court Order dated August 13, 2007 regarding personal identifiers and sensitive information.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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