

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. **2017-CP-40-03750**
Appellate Case No. **2018-001494**

RECEIVED
FEB 14 2019
SC Court of Appeals

Capital City OB-GYN Associates, P.A.,Respondent,

v.

Medorizon, Inc.Appellant.

RECORD ON APPEAL

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provision in a contractor's bond, which had the effect of limiting the time for filing claims was in contravention of the statute of limitations, and was therefore ineffective); *see also Lyerly v. Am. Nat. Fire Ins. Co.*, 343 S.C. 401, 540 S.E.2d 469 (Ct. App. 2000)(holding that a suit limitations clause was unenforceable in light of the state statute invalidating suit limitations clauses for periods shorter than the statute of limitations).

In this instance, the Service Agreement's notice of intent to pursue arbitration provision would attempt to limit Plaintiff's ability to bring suite if notice is not given within 90 days following the date of the event giving rise to the dispute. This provision has the effect of shortening the period of time in which to bring suit, to a period shorter than the applicable statute of limitations, and would not even allow for a reasonable discovery period. South Carolina statutory and case law is clear that such a contract provision is unenforceable. As such, I find that the 90-day notice provision is unenforceable pursuant to S.C. Code §15-3-140, and such provision should not prevent Plaintiff from recovering damages caused by the Defendant. Further, that clause is in Paragraph 14 of the Service Agreement which is in direct conflict with Paragraph 21 as discussed below.

I also conclude that the venue selection provision within the arbitration clause of the Service Agreement (Paragraph 14) is unenforceable. South Carolina law applies to any disputes arising under the Service Agreement. Paragraphs 14 and 21 of the Service Agreement are in direct conflict with each other. Paragraph 14 provides that arbitration will be within 15 miles of the Defendant's principal place of business unless otherwise agreed upon by the parties and that Illinois law will apply. Alternatively, Paragraph 21 provides that South Carolina law will govern and jurisdiction will be in South Carolina. Paragraph 14's venue selection of Illinois is in conflict with the jurisdiction selection of South Carolina in Paragraph 21. Similarly, Paragraph

14's choice of Illinois law is incompatible with Paragraph 21's choice of South Carolina law. Additionally, Paragraph 21 is apparently a clause the parties negotiated for, as it stands in sharp contrast to the standard provisions found within Paragraph 14. In light of the conflicting choice of South Carolina law in Paragraph 21, the arbitration provision of Paragraph 14 cannot be compelled. Paragraph 14 is also in conflict with S.C. Code Ann. § 15-7-120(B) which provides:

A provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in the courts of this State. The enforceability of the remaining provisions of the arbitration agreement and the method of selecting a forum for the conduct of the arbitration proceedings is as provided in this title, the Federal Arbitration Act, and any applicable rules of arbitration.

S.C. Code Ann. § 15-7-120(B) (1995). The court in *Insurance Products* found that, by enacting S.C. Code Ann. § 15-7-120, the "legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect." *Ins. Prods. Mktg., Inc. v. Indianapolis Life Ins. Co.*, 176 F.Supp.2d 544, 550 (D.S.C.2001); *see also Spinks v. Krystal Co.*, No. 6:07-2619-HMH, 2007 WL 2822788 (D.S.C. Sept. 26, 2007).

Although, the South Carolina Court of Appeals held in *Tritech* that the FAA preempts S.C. Code §15-7-120 in certain circumstances, I find that the circumstances at issue in *Tritech*, are distinguishable from the facts of this case. *Tritech Electric, Inc., v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000). In this instance, S.C. Code §15-7-120 does not void the entire arbitration clause but rather the venue selection provision within the arbitration clause.

The possible application of the arbitration provision in that same conflicted Paragraph 14 raises the underlying issue of whether the Federal Arbitration Act would apply under any circumstances. While the Court recognizes the premise that the Act is liberally construed and

that arbitration is often favored over litigation that is only the beginning of any analysis. The Act, by its very terms, does not apply except to disputes arising in interstate commerce which is unclear in this case. The record reflects that Defendant's offices are in Illinois and that the Defendant agreed to help Plaintiff with its billings, all of which arise from services rendered in Columbia, South Carolina. The record is void of other evidence which would explain any interstate commerce connection. Further, Paragraph 21 of the contract addresses this issue specifically when it provides, "this Agreement shall be governed by the internal laws of the State of South Carolina, applicable to agreements made and to be performed entirely within such State,..." Since the parties agreed that the contract was to be construed as one involving intra-state services only, this Court is hesitant to reach the exact contrary result in considering this Motion. I do not conclude on the record before me that the Federal Arbitration Act would apply in this case.

Finally, in consideration of the general principles surrounding forum and venue selection clauses, it would be nonsensical, to force the parties to physically arbitrate in Illinois when: (1) the contract and any disputes arising out of the contract are to be governed by South Carolina law, (2) the contract was for services to be rendered in South Carolina, (3) the Defendant approached and contracted with a South Carolina business; and (4) the entire transaction has no connection to Illinois other than the fact that the Defendant, which sought out business in South Carolina, was incorporated in Illinois. To require the parties to arbitrate in Illinois would, pursuant to Paragraph 21, require Illinois arbitrators to apply South Carolina law. This is neither efficient nor practicable.

Based on the South Carolina code provision §15-7-120, South Carolina's general disfavor of forum selection provisions, and the specific bargained for requirements of Paragraph 21 within the contract, South Carolina law should govern.

Defendant's Motion is denied.

AND IT IS SO ORDERED.

L. Casey Manning
Judge, Fifth Judicial Circuit

Columbia, South Carolina

April ____, 2018



Richland Common Pleas

Case Caption: Capital City OB GYN Associates P A vs Medorizon Inc
Case Number: 2017CP4003750
Type: Order/Alternative Dispute Resolution

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2018-04-11 15:33:35 page 6 of 6

ELECTRONICALLY FILED - 2018 Apr 11 3:38 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4003750

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

CAPITAL CITY OB GYN)
ASSOCIATES, P.A.,)
)
Plaintiff,)
)
vs.)
)
Medorizon, Inc.,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2017-CP-40-03750

ORDER

This matter initially came before the Court for hearing of Defendant's Motion on January 8, 2018. This Court issued its Order on April 11, 2018, and Defendant filed a 59(e) Motion to Reconsider on April 23, 2018. The court allowed Defendant to orally present its arguments on June 26, 2018 seeking to have this Court reconsider the decisions previously made.

Having heard arguments from counsel and reviewed my previous Order and the arguments made in connection therewith, I conclude that Defendant's Motion to Reconsider should be denied. I am not convinced that there is any error in the position of the Court.

First, I briefly addressed those matters which were decided in the April 11, 2018 Order which are not seemingly challenged by Defendant's current motion. The Court there determined that a ninety day notice requirement was invalid under existing South Carolina law. The Court also determined that the venue selection clause which was included in paragraph 14 of the Service Agreement was unenforceable. Defendant's current motion to reconsider is not directed at either of those determinations. In fact, my initial order from the beginning down through the last full paragraph on page 3 is reaffirmed.

It is significant to the Court in considering Defendant's motion that at no time within the Motion did defendant ever address the implications of Paragraph 21 of the Service Agreement in spite of the fact that the Court had on nine separate occasions mentioned that paragraph as significant in its Order of April 11, 2018. The Defendant's complete unwillingness to address that most significant finding in the Order raises questions about the merits of Defendant's current presentation to the court. The Court also finds it significant that during oral argument counsel for Defendant Medorizon acknowledged that paragraph 21 was operative in that it directed that South Carolina law was to be applied in considering this matter. Yet, Defendant repeatedly argued that paragraph 14 of the Service Agreement which was in absolute conflict with that paragraph 21 trumped all of Plaintiff's arguments. This Court is mindful that Defendant's initial Motion was one to dismiss the action before any discovery or development of operative the facts could be had.

In the Order of April 11, 2018, this Court recited the portion of the record which had been urged upon it to convince the Court that Federal Arbitration Act was operative under the facts of this case. This Court's determination that the facts were not sufficiently presented to this Court to make such a decision is the primary focus of Defendant's further arguments in this Rule 59(e) Motion. The Court's recitation of facts in its initial Order is not challenged. The Defendant simply argues that the Court overlooked the existence of the contract itself in determining whether there was sufficient implication of the interstate commerce to require enforcement of the Federal Arbitration Act. The eight page contract describes the duties of the two parties but does not address the logistics involved. The record before us indicates that all of the patients seen by the Plaintiff were in Columbia, South Carolina where Plaintiff's office was maintained. Any details about a procedure, personnel, location, or practices of the parties is

completely missing from the record before the Court, so this Court will not read into the contract sufficient interstate commerce connections to determine that the Federal Arbitration Act applies. This is particularly true in light of the fact that Paragraph 21, which is apparently a provision which was specifically negotiated between the parties, provides that this is to be treated as an INTRASTATE contract. While the Defendant does not agree with the Court's interpretation of that proviso, that is the only meaning which makes sense to this Court.

Therefore, having reconsidered the original arguments and those additionally made in connection with Defendant's current motion, this Court sees no reason to alter its decision. Defendant's motion is denied.

FIFTH JUDICIAL CIRCUIT

July _____, 2018.

L. Casey Manning, Judge



Richland Common Pleas

Case Caption: Capital City OB GYN Associates P A vs Medorizon Inc
Case Number: 2017CP4003750
Type: Order/Other

So Ordered

s/L. Casey Manning, 2061

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ELECTRONICALLY FILED - 2018 Jul 17 10:45 AM - RICHLAND - COMMON PLEAS - CASE#2017CP4003750

STATE OF SOUTH CAROLINA)
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 COUNTY OF RICHLAND)
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 Capital City OB-GYN Associates, P.A.,)
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 Plaintiff,)
)
 vs.)
)
 Medorizon, Inc.,)
)
 Defendant.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 Civil Action No. 2017-CP-40-_____

**COMPLAINT
 (JURY TRIAL DEMANDED)**

2017 JUN 16 PM 12:20
 JEANETTE W. MCBRIDE
 C.C.P. & S.S.
 RICHLAND COUNTY
 FILED

Plaintiff Capital City OB-GYN Associates, P.A. ("Capital City") alleges and would show unto the Court as follows.

INTRODUCTION

Plaintiff bring this action against Defendant Medorizon, Inc. ("Medorizon") seeking to remedy Medorizon's breach of contract, negligence, negligent supervision, negligent training, and negligent misrepresentation in connection with medical billing services provided to Plaintiff which caused substantial losses to Plaintiff.

PARTIES

1. Capital City is a professional corporation, organized and existing pursuant to the laws of the State of South Carolina.
2. Medorizon is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of Illinois and regularly conducts business in the State of South Carolina.

JURISDICTION AND VENUE

RECEIVED
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BY: _____

3. The medical billing services at issue in this action were performed most substantially in Richland County, South Carolina.
4. The Parties to this action are subject to the jurisdiction of the Court, and venue is proper in Richland County.

SUBSTANTIVE ALLEGATIONS.

5. Capital City was engaged in operating a medical practice specializing in obstetrics and gynecology.
6. Medorizon is a comprehensive medical billing outsourcing service that operates throughout the United States.
7. On approximately October 1, 2014, Capital City retained Medorizon to handle all of its medical billing needs (the "agreement").
8. Pursuant to the terms of the agreement, Medorizon provided billing services to Capital City, including, but not limited to, billing all medical services, following up on denied claims and accounts receivable, and billing account balances to patients.
9. The agreement was terminated before November 1, 2016.
10. Capital City then retained another medical billing firm to manage Capital City's medical billing.
11. After termination of the agreement it was discovered that during 2013, Medicare put a freeze on Capital City's account thereby preventing Capital City from receiving payments for services rendered to Medicare patients.
12. Medorizon failed to identify the reason for the denial of Medicare claims or take any other action to address the denial.

13. Medorizon failed to notify Capital City of Medicare's payment freeze, and Capital City was first advised of the same after termination of the agreement.
14. Due to Medorizon's failure to file Capital City's Medicare revalidation necessary for billing Medicare that was due in April 2016, Capital City was terminated as a provider.
15. As a direct result of the Medicare termination, Capital City was unable to collect for services rendered to Medicare patients from April 2016 until Capital City was re-credentialed in November 2016.
16. Medorizon failed to notify Capital City of the Medicare termination, and Capital City was first advised of the same after termination of the agreement.
17. Capital City discovered that Medorizon failed to revalidate Capital City with Medicaid after termination of the agreement.
18. Due to Medorizon's failure to revalidate with Medicaid, Capital City was dis-enrolled in September 2016, and Capital City was unable to collect for services rendered to Medicaid patients.
19. Medorizon failed to notify Capital City of the Medicaid dis-enrollment, and Capital City was first advised of the dis-enrollment after termination of the agreement.
20. Medorizon failed to timely file claims for services rendered by Capital City to patients with insurance coverage.
21. The carriers have denied the claims and as a result of Medorizon's failure to timely file or follow-up claims with patients' insurance carriers Capital City was unable to collect for services rendered.
22. As a result of Medorizon's failure to properly manage Capital City's medical billing, Capital City was unable to collect the sums due and payable for services rendered and

Capital City seeks to recover damages as a direct result of Medorizon's actions and failure to act.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

23. Plaintiff restates and incorporates by reference each and every allegation contained preceding paragraphs of this Complaint as if fully restated herein.
24. As a result of the special relationship between Medorizon and Capital City, Medorizon had a duty to exercise reasonable care with respect to the management and billing of Capital City's accounts receivable.
25. Medorizon breached its duty to Capital City by, among other things, failing to bill insurance carriers, failing to monitor and follow up on denied claims, and failing to properly bill and administer Capital City's medical billing.
26. Medorizon carelessly failed to properly manage Capital City's medical billing. Medorizon's conduct amounted to complete indifference and it failed to exercise even slight care as to their duty to Capital City.
27. As a direct and proximate result of the negligence and gross negligence and carelessness of Medorizon, as set forth above, Capital City has been damaged in an amount to be proven at trial plus punitive damages.

FOR A SECOND CAUSE OF ACTION
(Negligent Supervision and Negligent Training)

28. Plaintiff restates and incorporates by reference each and every allegation contained preceding paragraphs of this Complaint as if fully restated herein.
29. Medorizon knew or had reason to know that it had the ability to direct and control its agents, servants, or employees.

30. Medorizon knew or should have known of the necessity of exercising control over its agents, servants, or employees and had the opportunity to exercise control over them.
31. Medorizon had a duty to exercise reasonable care to control its agents, servants, or employees actions and to prevent injury to Capital City.
32. Medorizon failed to exercise reasonable care to control its agents, servants, or employees and to prevent injury to Capital City.
33. Medorizon was, at the time and place aforementioned, negligent, grossly negligent and careless in one or more of the following particulars:
 - a. In hiring, appointing, and training its agents, servants, or employees;
 - b. In failing to monitor its employees;
 - c. In failing to supervise its customers' billing accounts;
 - d. In failing to establish protocol to prohibit the failure to timely file insurance claims;
 - e. In failing to establish protocol to prohibit the failure to collect legitimate fees due and payable;
 - f. In failing to require employees to follow the procedures and processes implemented;
 - g. In failing to use the degree of care and caution that a reasonable and prudent person would have used under the circumstances then and there prevailing;
34. As a direct and proximate result of Medorizon's negligent supervision of its agents, servants, or employees and gross negligence, as set forth above, Capital City has been damaged in an amount to be proven at trial plus punitive damages.

35. These actions were the direct and proximate cause of the damages and injuries suffered by Capital City, said acts being in violation of the statutory and common laws of the State of South Carolina.

FOR A THIRD CAUSE OF ACTION
(Negligent Misrepresentation)

36. Plaintiff restates and incorporates by reference each and every allegation contained preceding paragraphs of this Complaint as if fully restated herein.
37. Medorizon made representations, statements, communicative actions, and conduct (including silent conduct) to Capital City regarding the services provided.
38. The representations were false.
39. Medorizon had a pecuniary interest in making the representations, statements, communicative actions, and conduct (including silent conduct) to Capital City.
40. Medorizon owed a duty of care to Capital City to see that truthful and accurate information was communicated to Capital City.
41. Medorizon breached the duty by failing to exercise due care.
42. Capital City justifiably relied on the representations made by Medorizon.
43. Capital City suffered a pecuniary loss and damages as a direct and proximate result of the breach of duty by Medorizon and reliance on those representations by Medorizon.
44. Capital City is entitled to judgement against Medorizon, for these actual damages in an amount to be determined at trial, incidental and consequential damages, together with the costs of this action, and any other and further relief as this Honorable Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(South Carolina Unfair Trade Practices Act)

45. Plaintiff restates and incorporates by reference each and every allegation contained preceding paragraphs of this Complaint as if fully restated herein.
46. The acts of Medorizon, as set forth above, constitute an unfair and deceptive act or practice in/or affecting commerce in violation of S.C. Code Ann. § 39-5-20 (the "UTPA").
47. Medorizon willfully and knowingly violated the UTPA;
48. As a direct and proximate result of Medorizon's violation of the UTPA, Capital City has been damaged and Plaintiff is entitled to recover treble damages, together with an award of attorney's fees.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract)

49. Plaintiff restates and incorporates by reference Paragraphs 1-22 of this Complaint as if fully restated herein.
50. The agreement is a valid and enforceable contract between Medorizon and Capital City.
51. Capital City has performed and fulfilled its duties and obligations under the agreement, including payment fees in accordance with the terms of the agreement.
52. Medorizon failed to properly manage and bill Capital City's medical billing and otherwise failed to fulfill its duties and obligations in breach of the agreement.
53. Medorizon's failure constitutes a material breach of the agreement.
54. As a direct and proximate result of Medorizon's breach of the agreement, Capital City has suffered damages in an amount to be proven at trial.

WHEREFORE, Plaintiff prays for relief as follows:

(a) That this Court award damages to Plaintiff including but not limited to, actual, consequential, compensatory, special and punitive damages in an amount to be proven at trial;


(b) That Plaintiff be awarded attorneys' fees and the costs of this action as well as other general and equitable relief as the law and facts may warrant, and such other and further relief as this court deems just and proper;

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury as to all issues triable by jury.

TURNER PADGET GRAHAM & LANEY P.A.

By:


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ATTORNEYS FOR THE PLAINTIFF

June 15, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Capital City OB-GYN Associates, P.A.,)
)
 Plaintiff,)
)
 vs.)
)
 Medorizon, Inc.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT
 Civil Action No. 2017-CP-400-3750

**MOTION TO DISMISS AND TO COMPEL
 ARBITRATION**

2017 AUG 30 AM 11:17
 JERONETTE W. HOSBRIDE
 CLERK, C.C.P. & C.S.
 RICHLAND COUNTY
 FILED

Defendant Medorizon, Inc. (“Defendant”) by and through its undersigned counsel, hereby moves this Court for an order dismissing this action pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16, as well as the arbitration requirement set forth in the Service Agreement between Plaintiff and Defendant dated November 1, 2014 (the “Service Agreement”). Through the Service Agreement, Plaintiff is bound to seek resolution of the matters asserted in Plaintiff’s complaint through binding arbitration. In support of its motion, Defendant relies upon the affidavit of Tim Tobin (**Exhibit A**), pleadings, applicable law, this memorandum of law, and such oral argument as may be heard by the Court. As explained more fully below, Defendant is entitled to an order dismissing this case with prejudice and compelling this dispute to be resolved by arbitration.

STATEMENT OF FACTS

Plaintiff is a professional corporation operating a medical practice specializing in obstetrics and gynecology, organized and existing pursuant to the laws of the State of South Carolina. See Plaintiff’s Complaint, ¶¶ 1, 5. Defendant is a comprehensive medical billing

healthcare service organization organized and existing pursuant to the laws of the State of Illinois. *See* Exhibit A, ¶ 3.

Plaintiff and Defendant entered into a Service Agreement dated November 1, 2014 whereby Defendant agreed to provide various services to Plaintiff incidental to billing insurance carriers, including Medicare/Medicaid, and to third-party payers for professional and facility charges. *See* Exhibit A, ¶¶ 6-7; *Service Agreement attached hereto as Exhibit B*. This Service Agreement included an arbitration provision in which the Plaintiff and Defendant agreed that any dispute between them related to the Service Agreement shall be submitted to binding arbitration. *See* Exhibit A, ¶8. Specifically, paragraph 14 of the Service Agreement states, in pertinent part, as follows:

14) ***Dispute Resolution.*** *The parties hereby irrevocably and unconditionally agree that any dispute between them arising out of or relating in any way to this Agreement or the transactions arising hereunder or contemplated hereby shall be settled by binding arbitration in accordance with the Federal Arbitration Act and the then current commercial arbitration rules of the American Arbitration Association. Arbitration hereunder shall be held within 15 miles of MED's principal business location or such other place as the Parties may agree. The substantive and procedural law of the State of Illinois shall apply to the arbitration proceedings.... With the exception of suits seeking injunctive relief, CLIENT and MED are prohibited from filing any action in law or equity with respect to the dispute before an arbitration award is made. Notice of intent to pursue arbitration must be provided to the other party no later than 90 days following the date of the event giving rise to the dispute. Failure to provide such notice within that time frame shall bar that party from pursuing any damages, claim, or suit.* (emphasis added).

See Exhibit B, ¶14. As of November 1, 2014, Defendant provided medical billing services to Plaintiff pursuant to the terms of the Service Agreement. *See* Plaintiff's Complaint, ¶8; Exhibit A, ¶9. However, by letter dated September 29, 2016, Plaintiff notified Defendant that it would not be renewing the Service Agreement with Defendant. *See* Plaintiff's Complaint, ¶9; Exhibit A, ¶10. Thereafter, on June 16, 2017, Plaintiff filed the above-referenced action,

asserting causes of action against Defendant including: negligence, gross negligence, negligent supervision, negligent training, negligent misrepresentation, violation of South Carolina Unfair Trade Practices Act and breach of contract. *See generally*, Plaintiff's Complaint.

Prior to filing this action, Plaintiff did not make any attempt to submit its claims to binding arbitration pursuant to the arbitration provision in the Service Agreement outlined above. *See* Exhibit A, ¶ 11. Additionally, Plaintiff made no efforts to satisfy the 90-day notice of intent provision in Paragraph 14 of the Service Agreement, which requires that "[N]otice of intent to pursue arbitration must be provided to the other party no later than 90 days following the date of the event giving rise to the dispute." *See* Exhibit A, ¶ 12. According to Paragraph 14, because Plaintiff failed to provide such notice within that time frame, Plaintiff is barred from "pursuing any damages, claim, or suit" related to the Service Agreement against Defendant. Therefore, by filing this lawsuit, Plaintiff directly violated the terms of the Service Agreement and, accordingly, Plaintiff's Complaint should be dismissed.

ARGUMENTS

I. The Arbitration Provision in the Service Agreement is Enforceable Under the Federal Arbitration Act.

The policy of the United States and South Carolina is to favor arbitration of disputes. Arbitration is a matter of contract, and ... rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 585, 553 S.E.2d 110, 112 (2001). Under South Carolina law "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* Similarly, Section 2 of the FAA provides in relevant part: "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 ... 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.

Therefore, the first question to be answered by this Court is whether the arbitration clause is enforceable. South Carolina law applies a strong presumption in favor of the validity of arbitration agreements based on a policy favoring arbitration. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). General contract principles of state law apply to arbitration clauses governed by the Federal Arbitration Act (FAA). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 535, 542 S.E.2d 360, 362 (2001). Therefore, the Court must consider state law regarding contract interpretation and enforcement.

Unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce. *See* FAA at 9 U.S.C. § 2; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). The transaction must “involve interstate commerce, even if the parties did not contemplate an interstate commerce connection.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268; 115 S. Ct. 834, 836 (1995). The United States Supreme Court has interpreted the words “involving commerce” broadly. *Id.*, 346 S.C. 580.

The contractual relationship between Plaintiff and Defendant in this matter establishes that the FAA’s interstate commerce requirement is met. In this case, the clear and unambiguous mandate to arbitrate is found in Paragraph 14 of the Service Agreement signed by Plaintiff and

Defendant. See Exhibit B, ¶14. The Service Agreement expressed from the outset that Defendant's services would involve interstate commerce, as Plaintiff's practice is located in Columbia, South Carolina and Defendant is located in the State of Illinois. See Exhibit B, p. 1; Exhibit A, ¶ 4. Defendant's main corporate offices are in Illinois, but it provides services to various clients nationwide. See Exhibit A, ¶ 5. Accordingly, Defendant's business in and of itself crosses state lines and invokes interstate commerce. Because the parties' transaction contemplated by the Service Agreement involves interstate commerce, the FAA requires enforcement of the arbitration clause.

Therefore, based on state law contract principles, the arbitration clause in the Service Agreement is valid, binding, and enforceable against Plaintiff.¹

II. Plaintiff's Claims are Within the Scope of the Arbitration Provision in the Service Agreement.

Once an enforceable agreement to arbitrate is shown to exist, the court must determine whether the plaintiff's claims fall within the scope of the arbitration clause. 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. *Id.*, 346 S.C. 580. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is

¹ Pursuant to S.C. Code Ann. § 15-48-10(a), [a] written agreement to submit any existing controversy to arbitration ... shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration. However, because section 15-48-10(a) singles out arbitration agreements, it directly conflicts with section 2 of the FAA. Therefore, the FAA preempts section 15-48-10(a). *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593-94, 553 S.E.2d 110, 117 (2001); *citing Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 476 S.E.2d 149 (1996). ("In *Munoz, supra*, we recently stated the result in *Soil Remediation* hinged on the fact that application of state law would have rendered the arbitration agreement completely unenforceable under section 15-48-10(a). *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363 n.2. State law was therefore preempted to the extent it would have invalidated the arbitration agreement." *Id.*).

not susceptible to any interpretation which would cover the asserted dispute. *Wilson v. Willis*, 416 S.C. 395, 404, 786 S.E.2d 571, 575 (Ct. App. 2016).

Paragraph 14 of the Service Agreement requires that the parties:

...irrevocably and unconditionally agree that *any dispute between them arising out of or relating in any way to this Agreement* or the transactions arising hereunder or contemplated hereby *shall be settled by binding arbitration* in accordance with the Federal Arbitration Act. (emphasis added).

See Exhibit B, ¶ 14. Plaintiff alleges the following causes of action against Defendant in its Complaint: negligence, gross negligence, negligent supervision, negligent training, negligent misrepresentation, violation of South Carolina Unfair Trade Practices Act and breach of contract. See generally, Plaintiff's Complaint. All of Plaintiff's factual allegations and causes of action in its Complaint fall squarely within the scope of the arbitration provision in the Service Agreement, as Plaintiff's claims clearly arise from matters directly connected with the Service Agreement with Defendant. Accordingly, the claims fall within the scope of the arbitration clause and are required to be arbitrated by the clear and unambiguous language of the arbitration clause in the Service Agreement. Therefore, due to the parties' agreement to arbitrate, Plaintiff's Complaint allegations that arise out of the Service Agreement, and South Carolina courts' strong presumption of arbitrability, this Court should conclude that Plaintiff's causes of action are encompassed by the arbitration clause in the Service Agreement and as such, Plaintiff's Complaint should be dismissed and compelled to submit its claims to arbitration.

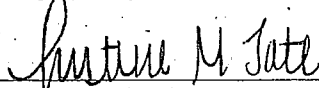
CONCLUSION

By entering into the Service Agreement, Plaintiff agreed to abide by the terms and requirement regarding disputes related to the Service Agreement. Plaintiff cannot simply ignore the contractual terms it freely agreed to be bound by and, instead, bring a civil suit to enforce

certain claims arising out of the Service Agreement. Consistent with state and federal law favoring arbitration and declaring arbitration agreements to be enforceable, the Court should dismiss Plaintiff's Complaint, with prejudice, and compel Plaintiff to submit its claims to binding arbitration.

WHEREFORE, Defendant respectfully requests an order dismissing the Plaintiff's Complaint, with prejudice, and compel Plaintiff to submit its claims to binding arbitration.

Respectfully submitted,



Kirby D. Shealy III

Justine M. Tate

ADAMS AND REESE LLP

1501 Main Street, Fifth Floor

Columbia, South Carolina 29201

Telephone: (803) 254-4190

Facsimile: (803) 779-4749

kirby.shealy@arlaw.com

justine.tate@arlaw.com

Attorneys for Defendant

August 30, 2017.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Capital City OB-GYN Associates, P.A.,)
)
 Plaintiff,)
)
 v.)
)
 Medorizon, Inc.,)
)
 Defendant.)

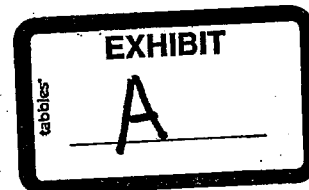
IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-400-3750

AFFIDAVIT OF TIMOTHY E. TOBIN

PERSONALLY appeared before me Timothy E. Tobin, who deposes and states that the following is based upon his own personal knowledge, except those matters stated upon information and belief, and as to those matters he believes them to be true:

1. My name is Timothy E. Tobin. I am over the age of 21 years, of sound mind, and have personal knowledge of matters set forth herein. I am authorized to make this Affidavit and have reviewed the allegations of Capital City OB-GYN Associates, P.A.'s ("Plaintiff") Complaint, the Answer filed by Medorizon, Inc. ("Medorizon") and Medorizon's Motion to Dismiss and Compel Arbitration in connection with the above-captioned action.
2. I am the President and CEO of Medorizon. I have held this position for 28 years. I have worked in the medical billing industry for 28 years.
3. Medorizon is a comprehensive medical billing healthcare service organization organized and existing pursuant to the laws of the State of Illinois.
4. Medorizon's main corporate offices are located in Plainfield, Illinois.
5. Medorizon contracts with and provides services for clients nationwide.



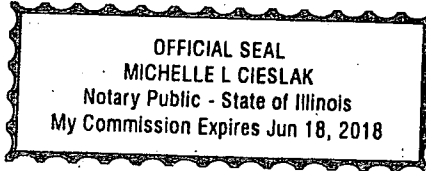
6. Plaintiff and Medorizon entered into a Service Agreement dated November 1, 2014. *See* Service Agreement attached to Medorizon's Motion to Dismiss and Compel Arbitration as **Exhibit B**.
7. Pursuant to the Service Agreement, Medorizon agreed to provide various services to Plaintiff incidental to billing insurance carriers, including Medicare/Medicaid, and to third-party payers for professional and facility charges.
8. The Service Agreement included an arbitration provision whereby the Plaintiff and Medorizon agreed that any dispute between them related to the Service Agreement shall be submitted to binding arbitration. *See* Exhibit B, ¶ 14.
9. As of November 1, 2014, Medorizon provided medical billing services to Plaintiff pursuant to the terms of the Service Agreement.
10. By letter dated September 29, 2016, Plaintiff notified Medorizon that it would not be renewing the Service Agreement with Medorizon.
11. Plaintiff did not make any attempt to submit its claims to binding arbitration pursuant to the arbitration provision in the Service Agreement.
12. Plaintiff made no efforts to satisfy the 90-day notice of intent provision in the Service Agreement, which requires that "[N]otice of intent to pursue arbitration must be provided to the other party no later than 90 days following the date of the event giving rise to the dispute." *See* Exhibit B, ¶ 14.

FURTHER AFFIANT SAYETH NAUGHT.

Timothy E. Tobin 8/25/17
Timothy E. Tobin

SWORN BEFORE ME THIS
25th of August 2017.

Michelle L Gieslak (Seal)
Notary Public for Illinois
My Commission Expires: 6/18/18





1 George J. Michas Drive
Romeoville, IL 60446
Phone 815.834.7200 • Fax 815.834.2600
www.medorizon.com

SERVICE AGREEMENT
BETWEEN MEDORIZON, INC. AND CAPITAL CITY OB-GYN ASSOCIATES, P.A.
Service to commence on November 1, 2014

This Service Agreement ("the Agreement") is made between Medorizon, Inc., an Illinois corporation ("MED") with an address of 1 George Michas Drive, Suite 200, Romeoville, IL 60446 and Capital City OB-GYN Associates, P.A. ("CLIENT") with an address of 1301 Taylor Street, Columbia, SC 29201 and doing business under Tax Identification Number 57-0965137. In consideration of the covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:


1) Services Provided by MED. During the term of this agreement, MED shall provide CLIENT with various services necessary or incidental to billing to commercial insurance, workers compensation carriers, Medicare/Medicaid, BCBS and to third party payers for professional and facility charges provided by CLIENT including:

- (a) Within 3 (three) business days following receipt of complete and accurate billing documents from CLIENT, preparing and issuing to applicable payer, a bill for all services then due and payable. All such bills shall direct the patient or insurance carrier to make payment directly to the CLIENT lock-box remittance address, of which MED will have access to receive remittance advice or to submit payments to MED PO Box 189, Plainfield, IL, 60544 for same.
- (b) The following process will be adhered to for denied claims: upon receipt of the Explanation of Benefits ("EOB"), MED will identify payment denials; and correct the claim by whatever means is appropriate. Based on the denial, MED may request CLIENT to provide additional information, such as; operative notes, patient insurance information, proof of medical necessity and/or coding changes required to resubmit the initial claim. If corrections need to be made, within contractual guidelines, MED will make the appropriate corrections and resubmit the initial claim. This process will be repeated for any denials which were not resolved.

If MED receives no response or payment from the payer within thirty (30) days of claim submission, MED will contact payer via phone or online and take action as described above.

- (c) MED will adhere to the EOB when applying the payment to the patient account and balance bill patients where indicated. Where balanced billing is performed, an additional statement will be issued to patient once monthly, until the balance is paid, for a total of two (2) statements and a final payment letter.

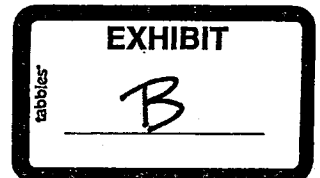
11/6/2014



MED



CLIENT



- (d) CLIENT reserves the option to request additional efforts by MED to collect unpaid patient balances, at the cost of three dollars (\$3) per claim for each additional phone call, letter or statement that exceeds the efforts outlined in the preceding paragraph.
- (e) MED agrees to submit all claims in compliance with CLIENT's existing contracts, which will be supplied by CLIENT to MED. In the event contracts are not supplied, MED will adhere to industry standard billing protocols.
- (f) With respect to Workers Compensation claims, MED shall submit statements to patients' attorney, provided CLIENT has identified the attorney as a payer on the registration form, beginning no sooner than charge statements received, the first business day after CLIENT identifies such attorney to MED. MED may send statements to patients' attorneys at the request of the patient. If CLIENT or patient request MED to forward statements for the time period prior to attorney identification by CLIENT, MED reserves the right to charge its usual and customary fees for such services. MED will not balance bill patients for any unpaid or partially paid workers compensation claims. MED will post payments according to the EOB received and appeal any service not paid according to published workers comp fee schedule.
- (g) MED shall provide CLIENT with monthly electronic account summary reports. MED shall make them available to CLIENT no later than ten (10) business days after the end of the preceding calendar month. MED reserves the right to change the manner in which it distributes or makes such reports available to CLIENT at MED's sole discretion.
- (h) MED shall comply with the Office of Inspector General's Compliance Plan for Third Party Billing Companies ("Compliance Plan") including appropriate balance billing and adequate notice of overpayments, exclusive of any requirements, which are the responsibility of CLIENT.

CLIENT recognizes and agrees that changes to the description of services provided by MED under this Agreement, even small changes, can dramatically increase the time and effort required to perform the Services. All changes to the scope, goals, target dates or other aspects of the engagement, must be proposed by CLIENT in writing, where practical. Within thirty (30) days of receipt of such written proposed change, MED shall submit to CLIENT a written impact statement describing additional costs, if any, for the change. If CLIENT agrees to pay the additional costs, then the parties may execute an addendum to this agreement.

2) Responsibilities of CLIENT. CLIENT shall be responsible for:

- (a) Within ten (10) business days of the date of service, CLIENT shall forward to MED, by HIPAA compliant secure portal, all information required for claim submission and payment including but not limited to: registration data, correctly coded compliant procedure charge codes, service and diagnosis codes, referrals and any other required data. Additionally, CLIENT shall provide to MED where necessary or requested, any additional data, including but not limited to patient notes and operative notes. Such additional data shall be provided via a written format approved by MED within ten (10) business days of service. CLIENT agrees to pre-certify patients and provide other patient information as outlined in the agreement.
- (b) Providing a complete and accurate listing of all contracted providers and CLIENT's current terms with each contracted provider. Any additions or deletions to the list of contracted providers, or changes in contracted terms shall be provided to MED within ten (10) business

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 CLIENT

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days of said change. CLIENT is responsible for all provider enrollment and credentialing functions unless mutually agreed upon with MED.

- (c) Establishing a lock-box account with a bank for use by MED, in the name of CLIENT. CLIENT shall use the lock-box address or MED's PO Box 189 as the submission address for all payors. CLIENT shall be responsible for all bank charges. CLIENT shall authorize MED to receive reports of receipts from the account.
- (d) Utilizing MED's billing services for all medical services provided by CLIENT during the term of this Agreement.
- (e) All matters relating to medical billing and collection for services CLIENT renders prior to the commencement date of this Agreement, including without limitation billing, collections, accounts receivable, refunding overpayments and any reimbursements due to third parties.
- (f) Complying with the Office of Inspector General's Compliance Plan for Third Party Billing Companies ("Compliance Plan"), including without limitation:
 - (i) Coding, sequencing and documentation guidelines;
 - (ii) appropriate assignment of CPT (Current Procedural Terminology) and ICD (International Classification of Disease) codes to all services;
 - (iii) performance of annual coding audits;
 - (iv) non-employment of sanctioned individuals;
 - (v) ensuring that services are provided by qualified and licensed personnel

CLIENT shall comply with all state and federal statutes rules and regulations, including, but not exclusive, Stark Law and Anti-Kickback state statues.

3) Fees Payable to MED. For services rendered hereunder, CLIENT shall pay to MED the following based on cost data information received in CLIENT Profile (See Exhibit A):

- (a) Monthly billing fee of 5.5% of net reimbursements or \$500 minimum monthly (effective ninety (90) days after implementation) payment, whichever is greater
- (b) 7.5% of old A/R (services prior to Oct 1, 2014) for a 90 days period
- (c) \$.65 per patient statement and patient collection letters generated and mailed
- (d) Projects pertaining to 'old' accounts receivable will be subject to a separate contractual agreement. Fee has several determining factors: AR prior to MED service, labor involved, available EOB's, etc.
- (e) If no claims are received from CLIENT in a monthly billing cycle, a fee of \$500 monthly will be charged due to contractual processing of previous claims.

MED reserves the right to re-negotiate billing fee based on a one hundred twenty (120) days average of actual volume figures/net cash vs. what is expressed per CLIENT profile.

Additional value added services: services rendered hereunder shall be reimbursed at an additional fee outside of the monthly net reimbursement percentage. Services include the following:

Service	Fee
Non-par eligibility	\$.35 per eligibility verification
Pre-certification	\$10 per patient
Custom Reports (ie: IClops, UDS, etc)	\$250 per report

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CLIENT

Custom Forms (ie: Superbill, etc))	\$150 per initial custom form
Call for cash via e-call	\$.15
Court appearance	\$250 per court appearance based on court hours
Coding audit	\$25 per chart for comprehensive coding audit
Provider credentialing	TBD dependent upon payer
Coding of operative reports (outsourced)	\$10.00 per operative report
Data storage	No charge up to 1 GB, TBD above 1 GB of storage
Additional training	On-site: \$100 per hour, Webinar: \$25 per hour

MED reserves the right to adjust above fees with proper notification to CLIENT

For the purpose of this Agreement, Net Reimbursements shall be defined as the aggregate payment amount posted to the information system during the respective month or billing period, which was received from all third party payers and patients of previous charges processed by MED. The systems-generated *Revenue by Provider Report* will be used to extract the financial data to derive at the monthly billing fee or use of the CLIENT Profile information with new accounts. Promptly following the last day of each month, MED shall provide CLIENT with a statement setting forth the net reimbursements for the preceding month and the amount of the fee payable by CLIENT or charging CLIENT the minimum monthly fee, whichever is greater. Fees shall be paid by CLIENT by establishing an ACH (Automated Check Handling) account with MED (Exhibit B). CLIENT has seven (7) days to dispute any fee charged on statements, after that time, the charge will be processed through the ACH. In special arrangement circumstances, statements mailed to CLIENT are due upon receipt.

MED may, in its discretion, charge CLIENT a late payment fee equal to one and one-half percent (1.5%) per month for any fee not paid and received by MED within thirty (30) days from date of current invoice.

The Monthly fee shall be fixed for the duration of this Agreement with the following exceptions:

- (a) MED discovers within ninety (90) days of commencement of this Agreement that CLIENT failed to disclose a material fact at the time of execution of this Agreement, and such material fact materially increases the costs of billing and collection efforts required of MED.
- (b) The figures stated in the CLIENT Profile (Exhibit A) differ from actual claims/reimbursements submitted by CLIENT.
- (c) There is a change in market conditions due to factors beyond the control of MED or CLIENT which materially increases the costs of billing and collection efforts required of MED.
- (d) MED reserves the right to review agreed fee percentage after five (5) years of service which may result in a fee increase for services rendered due to MED normal business expense increases.
- (e) MED reserves the right to increase costs on miscellaneous items as: postage involved costs, statement costs, data base fee increases, etc., with proper sixty (60) day notice to client.

In any of the above named instances, MED shall provide CLIENT with sixty (60) days notice of its revised fee. If CLIENT objects to the revised fee within fifteen (15) days of receipt of notice, then the contract shall be terminated as of the date that the revised fee would have gone into effect per the notice provided by MED. In settlement, MED shall be entitled to the termination fee as provided under paragraph 6 below.

- 4) **Resolving Errors or Omissions.** The parties agree to the following process for identifying and resolving claims of errors or omissions. CLIENT will proactively review the reports provided by MED under paragraph 2 above and shall have sixty (60) calendar days from the receipt of said reports

11/6/2014

MED

CLIENT

to give notice to MED of errors or omissions. CLIENT's failure to identify and provide notice of an error or omission within this time frame will bar any future claim by CLIENT. Upon receipt of said notice, MED shall have fifteen (15) business days to cure such error or omission or to provide evidence that no error or omission occurred. If the parties have not reached satisfactory resolution within thirty (30) calendar days following the expiration of the cure period, either party may elect to terminate the agreement upon ten (10) days written notice to the other party. Failure of CLIENT to comply with the terms of this paragraph shall bar CLIENT from seeking any further damages, claim or suit. In the event the parties fail to reach agreement, then either party may proceed to binding arbitration within 90 days of the date of the first occurrence of the alleged error or omission. The terms of this Section, shall survive the termination or expiration of this Agreement for any reason. UNDER NO CIRCUMSTANCES DOES MED GUARANTEE COLLECTION OR ASSUME THE RISK OF PAYMENT BY PROVIDERS, PATIENTS, THIRD PARTY PAYERS, OR ANY OTHER INDIVIDUAL OR ENTITY, TO CLIENT.

- 5) **Confidentiality.** CLIENT agrees not to disclose the terms and conditions of this agreement, nor the systems or processes utilized by MED, to third parties, except for CLIENT's accountant or attorney, without express written approval of MED.
- 6) **Term and Termination.** This Agreement shall commence on November 1, 2014 for a twenty-four (24) month period, and will automatically renew unless written notice is submitted to MED by CLIENT thirty (30) days prior to the expiration date. Upon termination of the Agreement for any reason, no further services will be provided by MED unless mutually agreed in writing. If Agreement should be terminated by either party, MED will release and make available CLIENT paper documents, final reports and any and all correspondence within five (5) business days of paid termination fee
MED will be paid a termination fee as follows:
 - a) 5.5% of net receipts for 90 days on all claims generated by MED efforts.

Either party reserves the right to terminate this agreement with sixty (60) days notice without cause or fifteen (15) days with just cause. Adherence to the termination agreements will be followed.

- 7) **Non-Solicitation.** During the term of this Agreement, and for a period of one (1) year following the termination of this Agreement, neither CLIENT nor MED, shall, directly or indirectly, hire any current or former employee of the other or induce such employee to terminate his or her relationship with such party.
- 8) **Independent Contractors.** The Parties hereto are contractors independent of one another. This Agreement does not in any way create the relationship of partnership, or principal and agent between the Parties, except as explicitly provided elsewhere in this Agreement. Neither Party shall act, or represent itself, directly or by implication, a partner or an agent of the other Party or in any manner assume or create any obligation on behalf of or in the name of the other Party, except as explicitly authorized by this Agreement.
- 9) **Limitation of Liability.** Damages arising under a material breach of this agreement shall be limited to the value of the fees that would have been due to MED under Paragraph 3 of this Agreement, had the breach not occurred but in no cases greater than the previous three months of fees actually paid to MED during the period in question, except that MED shall be entitled to recover the cost of collecting on past due fees owed by CLIENT, including but not limited to attorney fees. UNDER NO CIRCUMSTANCES DOES MED ASSUME THE RISK OF PAYMENT BY PROVIDERS,

11/6/2014

MED

CLIENT

PATIENTS, THIRD PARTY PAYERS, OR ANY OTHER INDIVIDUAL OR ENTITY, TO CLIENT. NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES SUFFERED BY SUCH PARTY OR ANY THIRD PARTY.

- 10) **Indemnification.** With respect to third parties, CLIENT and MED shall indemnify, defend and hold the other harmless from and against all liabilities, actions, causes of action, claims, rights, controversies, damages and costs (including, without limitation, reasonable attorney's fees and costs) arising out of, based upon, or resulting from such party's own failure to perform any of its material obligations under this Agreement. The indemnified party shall have the right to participate in such litigation with counsels of its own choosing, at its own cost. This Section shall survive the termination of this agreement for any reason.
- 11) **HIPAA Compliance.** MED and CLIENT agree to confidentiality and HIPAA compliance based Business Associate Agreement incorporated as a part of this Agreement. The terms of this Section and Exhibit B shall survive the termination or expiration of this Agreement for any reason
- 12) **Waiver of Warranty.** MED MAKES NO REPRESENTATION OR WARRANTY WITH RESPECT TO ITS ABILITY TO COLLECT ANY CLAIMS IT PROCESSES. CLIENT EXPRESSLY ACKNOWLEDGES THAT THE TIMING AND AMOUNT OF COLLECTIONS ACHIEVED IS SUBJECT TO NUMEROUS VARIABLES OUTSIDE THE CONTROL OF MED, WHICH INCLUDE WITHOUT LIMITATION, THE INABILITY OF THIRD PARTIES TO ACCURATELY PROCESS DATA, PROVISION OF INCOMPLETE, INACCURATE OR UNTIMELY DATA BY CLIENT OR PATIENT; REFUSALS TO MAKE REIMBURSEMENTS BY PAYERS, BANKRUPTCIES, AND CONTRACTUAL DISPUTES BETWEEN CLIENT AND PAYERS.
- 13) **Power of Attorney.** CLIENT extends a limited power of attorney only as necessary to implement the terms of this agreement to MED where signatures are needed in order to secure payment on healthcare claims and provider issues.
- 14) **Dispute Resolution.** The parties hereby irrevocably and unconditionally agree that any dispute between them arising out of or relating in any way to this Agreement or the transactions arising hereunder or contemplated hereby shall be settled by binding arbitration in accordance with the Federal Arbitration Act and the then current commercial arbitration rules of the American Arbitration Association. Arbitration hereunder shall be held within 15 miles of MED's principal business location or such other place as the Parties may agree. The substantive and procedural law of the State of Illinois shall apply to the arbitration proceedings. Equitable remedies shall be available in any arbitration; provided, however, that the institution of arbitration proceedings shall not prevent either Party from seeking injunctive relief in a court of competent jurisdiction and provided further. The substantially prevailing party shall not be entitled to collect from the other party reasonable attorney's fees and costs, unless specifically provided for in this agreement and in the arbitration award. Judgment upon the award rendered in any arbitration may be entered in any Court having jurisdiction thereof, or application may be made to such court for a judicial acceptance of the award and enforcement thereof, as the law of such jurisdiction may require or allow. With the exception of suits seeking injunctive relief, CLIENT and MED are prohibited from filing any action in law or equity with respect to the dispute before an arbitration award is made. Notice of intent to pursue arbitration must be provided to the other party no later than 90 days following the date of the event giving rise to the dispute. Failure to provide such notice within that time frame shall bar that party from pursuing any damages, claim, or suit.

11/6/2014


 MED


 CLIENT

- 15) **Partial Invalidity.** If any provision in this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions of this Agreement shall nevertheless continue in full force without being impaired or invalidated in any way.
- 16) **Waiver.** The failure of either Party to insist on strict compliance with any of the terms, covenants, or conditions of this Agreement by the other Party shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for all or any other times.
- 17) **Modification.** No waiver, modification, amendment, discharge or change of this Agreement shall be valid unless the same is in writing and signed by the party against which the enforcement of such modification, waiver, amendment, discharge or change is sought.
- 18) **Notices.** All notices under this Agreement shall be effective upon personal delivery to the respective Party, or upon transmission by facsimile, or forty-eight (48) hours either after deposit in the United States mail, certified mail/return receipt requested, First Class postage prepaid, or after delivery to an aviation express delivery service, and addressed to the respective Party at the number or address set forth immediately below the signature of that Party at the end of this Agreement. Notwithstanding the foregoing, either Party may change its address or number by giving written notice in any manner set forth above.
- 19) **Entire Agreement.** This Agreement and the incorporated exhibits and schedules hereto constitute the entire agreement between CLIENT and MED as to the subject matter hereof, superseding all previous communications and negotiations, whether written or oral. The terms and conditions of this Agreement shall prevail over any additional or conflicting terms of any payment invoice or memorandum submitted to CLIENT by MED. Except as otherwise provided in this Agreement, no modification of this Agreement shall be binding unless it is in writing and signed by an authorized representative of both Parties.
- 20) **Captions.** The captions in this Agreement are inserted for convenience of reference only and in no way define, describe or limit the scope or intent of this Agreement or any of the provisions hereof.
- 21) **Choice of Law.** This Agreement shall be governed by the internal laws and not the conflict of laws provisions of the State of South Carolina, applicable to agreements made and to be performed entirely within such State, without regard to the conflicts of law principles of such State, and federal laws governing copyright, patent and trademark. The parties hereby agree to jurisdiction of the state of South Carolina.

IN WITNESS WHEREFORE, the parties have caused this Service Agreement to be executed and delivered as of this day and year as signed below.

MED: Medorizon, Inc.

Client: Comp City UB - FYL

By: [Signature]

By: [Signature]

11/6/2014

[Signature]
MED

[Signature]
CLIENT

Name(Print): Timothy E. Tobin

Name(Print): M. J. JONEK

Title: President and CEO

Title: PRESIDENT

Date: 11/6/14

Date: 11/6/14


Phone: 815.834.7200

Phone: 803.622.2342



EXHIBIT A

11/6/2014



 MED



 CLIENT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Capital City OB-GYN Associates, P.A.,)
)
 Plaintiff,)
)
 v.)
)
 Medorizon, Inc.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-400-3750

**DEFENDANT’S MOTION TO
 ALTER OR AMEND
 ORDER DENYING
 MOTION TO DISMISS AND TO COMPEL
 ARBITRATION**

Defendant Medorizon, Inc. (“Medorizon”), by and through its undersigned counsel, hereby moves for an Order pursuant to Rule 59(e), SCRPC, altering and/or amending this Court’s order denying Medorizon’s Motion to Dismiss and to Compel Arbitration. Medorizon received written notice of the Court’s order on April 11, 2018.

STANDARD

“A party may wish to file a S.C. R. Civ. P. 59(e) motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam v. SCDOT*, 361 S.C. 9, 13, 602 S.E.2d 772, 774 (2004). “It is proper to view a S.C. R. Civ. P. 59(e) motion not only as a vehicle to request the trial court “alter or amend the judgment,” but also as a vehicle to seek “reconsideration” of issues and arguments.” *Id. See also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) (“The purpose of Rule 59(e), SCRPC, to alter or amend the

judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits.”).

ARGUMENT

Medorizon respectfully submits that the Court never addressed the gravamen of its motion—that this case should be dismissed and sent to arbitration in accordance with the parties’ Service Agreement. Instead, the Court focused upon peripheral issues in its order—the 90-day notice, choice of law and forum selection clauses in the Service Agreement. The Court would not have had to address any of these issues if it had properly addressed the central question of whether the lawsuit should be dismissed in the first instance. Ultimately, as discussed more fully below, the Court should have determined that the Federal Arbitration Act applies to the parties’ Service Agreement, the arbitration provision it contains is valid and enforceable and the Plaintiff is required to submit all of its claims to binding arbitration. Medorizon respectfully requests that the Order should be altered or amended in this regard.

I. The Federal Arbitration Act applies to the parties’ Service Agreement and preempts S.C. Code Ann. § 15-7-120(B).

Unless the parties specifically contract otherwise, the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”), applies whenever an arbitration agreement involves interstate commerce. *See* 9 U.S.C. § 2; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014); *Landers v. Federal Dep. Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013). Case law regarding interpretation of arbitration clauses is so favorable that if the transaction touches interstate commerce the FAA is to apply, “even if the parties did not contemplate an interstate commerce connection.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268, 115 S. Ct. 834, 836 (1995). The United States Supreme Court has interpreted the words “involving

commerce” broadly. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 585, 553 S.E.2d 110, 112 (2001). The Court’s order completely ignores these rules.

The order incorrectly states that “[t]he record is void of other evidence which would explain any interstate commerce connection.” Order, p. 4. This conclusion disregards the contractual relationship between Plaintiff and Medorizon, which establishes that the FAA’s interstate commerce requirement is met. The Service Agreement that forms the predicate for this lawsuit expressed from the outset that the parties’ relationship would involve interstate commerce, as Plaintiff’s practice is located in Columbia, South Carolina and Medorizon is located in the State of Illinois, from which it was to perform the services spelled out in the Service Agreement. This arrangement necessarily crosses state lines and unquestionably involves interstate commerce. The FAA must therefore apply.

This case is factually similar to *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 535, 542 S.E.2d 360, 362 (2001) in many respects. In *Munoz*, both the Petitioners and Defendant Builder were domiciled in South Carolina, but Builder assigned all of its rights under the agreement between it and the Petitioners to Creditor, a Delaware corporation with its principal place of business in Minnesota. “Creditor prepared the agreement in Minnesota and forwarded it to Builder in South Carolina. The proceeds of the loan were disbursed from a bank in Minnesota.” *Id.* Based on only these simple factors, the Supreme Court of South Carolina found that, even though the Petitioners may not have contemplated an interstate transaction when they entered into an agreement with Builder, the “contractual relationship with Creditor in fact involves interstate commerce and therefore the FAA applies.” *Id.* For similar reasons, the Service Agreement in the matter at bar involves interstate commerce, and the FAA applies. *See, e.g., Soil Remediation Co. v. Nu-Way Env’tl.*, 323 S.C. 454, 460, 476 S.E.2d 149, 152 (1996) (“For the

Federal Act to apply, the commerce involved in the contract must be interstate). Because the FAA applies, S.C. Code Ann. § 15-7-120(B) is preempted. *Tritech Electric, Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000); *see also Albemarle Corp. v. Astrazenica UK Ltd.*, 628 F.3d 643 (4th Cir. 2010).

II. The Court failed to address whether Plaintiff's claims are within the scope of the arbitration provision in the Service Agreement.

"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." *Zabinski*, 346 S.C. 580. "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." *Wilson v. Willis*, 416 S.C. 395, 404, 786 S.E.2d 571, 575 (Ct. App. 2016).

Paragraph 14 of the Service Agreement reflects that the parties:

...irrevocably and unconditionally agree that *any dispute between them arising out of or relating in any way to this Agreement* or the transactions arising hereunder or contemplated hereby *shall be settled by binding arbitration* in accordance with the Federal Arbitration Act.

(Emphasis added).

Plaintiff's complaint alleges the following causes of action against Medorizon: negligence, gross negligence, negligent supervision, negligent training, negligent misrepresentation, violation of South Carolina Unfair Trade Practices Act and breach of contract. All of Plaintiff's factual allegations and causes of action fall squarely within the scope of the arbitration provision in the Service Agreement, as Plaintiff's claims clearly arise from matters directly connected with Medorizon's performance, or alleged failure to perform, under the Service Agreement.

III. The Court failed to address whether the arbitration provision is enforceable.

The policy of the United States and South Carolina is to favor arbitration of disputes. Arbitration is a matter of contract, and ... rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement. *Zabinski* at 112. South Carolina law applies a strong presumption in favor of the validity of arbitration agreements based on a policy favoring arbitration. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). Under South Carolina law “[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Zabinski*, 346 S.C. 580. Similarly, Section 2 of the FAA provides in relevant part: “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 ... 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. Although the Court’s order rejected the application of the FAA, it never addressed the question of whether the arbitration clause must be enforced. It clearly should, as South Carolina favors arbitration in the same way that federal law does.

CONCLUSION

For the foregoing reasons, Medorizon respectfully requests that the Court revisit its prior order and amend it so that it addresses the central questions presented by Medorizon’s motion. Medorizon further requests that the Court dismiss this case in favor of binding arbitration.

s/Kirby D. Shealy III
Kirby D. Shealy III

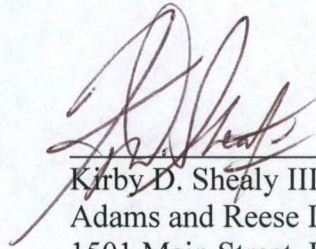
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Certificate of Counsel

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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FEB 14 2019
SC Court of Appeals

February 14, 2019.

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