THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No.: 2021-001342

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

v.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The core issue on appeal is whether Respondents seek a direct benefit under the respective Provider Agreements[1] such that they are subject to the arbitration provision therein. As is required to assert a third-party beneficiary claim, Respondents seek a direct benefit from the contracts. Nothing in either Respondents' brief calls this into question. In order to make a claim for breach of contract as a third-party beneficiary of the contract, Respondents must (and did) allege that they receive a direct benefit from the contracts at issue. Moreover, both Respondents seek to actively exploit the Provider Agreements by filing a lawsuit to attempt to ***enforce*** them. There should be no debate, therefore, that Respondents seek a direct benefit from the Provider Agreements and are thus subject to the arbitration provisions therein. Respondents cannot now amend their pleadings or retract their own assertions made in prior briefing to avoid the arbitration provisions of the contracts they seek to enforce.

As demonstrated in ACS's initial briefs, dismissal and an order to compel bilateral arbitration is also proper for at least four other reasons, none of which Respondents convincingly challenge. Respondents' misguided attempts to invalidate the arbitration clauses fall decidedly flat.

STATEMENT OF FACT

ACS rests upon the statement of fact set forth in ACS's initial briefs and specifically objects to the portions of Respondents' "Statement of the Facts" that lack citation to the record and those portions that mischaracterize the record. ACS further objects to Respondent Bennett's improper assertion that ACS failed to deny her allegations in the briefing and motions in the underlying

[1] Respondents' claims are based on slightly different versions of a Provider Agreement, both of which are included in the respective Matters to be Included in the Record on Appeal. For the purposes of this brief, any reference to "Provider Agreements" is a reference to the respective agreements and any discrepancies between the contracts will specified.

matter and that doing so was an admission. (Bennett Br. at 7.)

ARGUMENT

The premise of the Denial Order and Respondents' arguments suffer from a fatal flaw – equitable estoppel prevents Respondents from seeking to enforce some, but avoid other clauses of the same contract.

I. RESPONDENTS ARE ESTOPPED FROM DENYING THAT THE ARBITRATION CLAUSE APPLIES TO THEM.

As demonstrated in ACS's initial briefs, the Circuit Court misapplied the direct benefits test in finding that Respondents were not estopped from avoiding arbitration. Respondents' initial briefs only further demonstrate the irony and logical inconsistencies in the denial of the motion to compel arbitration.

A. Respondents seek a "direct benefit" under the Provider Agreement because they brought claims for breach of the Provider Agreements alleging they are third-party beneficiaries under those agreements.

Respondents are bound by the Provider Agreements, including the arbitration clauses therein, because ***they seek to enforce those agreements by filing these lawsuits***. Respondents now deny that they seek benefits under the Provider Agreements (for which they alleged a breach) by contradicting their own allegations and attempting to create a distinction without a difference as to the timing of the benefit sought or received.

The purpose of equitable estoppel "is to preclude[] a party from asserting rights [s]he otherwise would have had against another when h[er] own conduct renders assertion of those rights contrary to equity." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295, 733 S.E.2d 597, 604 (Ct. App. 2012); *see also Wachovia Bank N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006). In the context of an arbitration clause, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a ***direct benefit*** from a contract containing an arbitration

clause." *Pearson*, 400 S.C. at 290 (emphasis added) (cleaned up). South Carolina law defines a "direct benefit" under a contract to include the assertion of a third-party beneficiary claim based on that contract. *Wilson v. Willis*, 426 S.C. 326, 344, 827 S.E.2d 167, 177 (2019) (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Analgen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000)); *see also Am. Bankers Ins. Group v. Long*, 453 F.3d 623, 629 (4th Cir. 2006). The nonsignatory who relies on the contract as the basis for her claim is estopped from denying she is a party to it. *Id.*

Both Respondents argue in error that they seek only an "indirect benefit" under the Provider Agreements because they did not knowingly benefit from the contract or because they received only an indirect benefit. (Gasser Br. at 6; Bennett Br. at 13.) Unsurprisingly, Respondents cannot point to a single case where any court (let alone one in South Carolina) has held that a party making a claim for breach of contract seeks an "indirect benefit" under the contract the plaintiff seeks to enforce.[2] A nonsignatory cannot both allege that they directly benefit from a contract in asserting the breach and also turn around and deny any direct benefit when confronted with an arbitration clause in the same contract. In fact, Respondents themselves ***admit*** (because they have no other choice) that they benefit from the Provider Agreement in the form of the negotiated rate for medical services. (Gasser Br. at 6; Bennett Br. at 14.) The Court should deny Respondents' attempts to distance their claims from the very contracts upon which they are exclusively based.[3]

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[2] *See Wilson*, 426 S.C. 326, 827 S.E.2d 167 (no breach of contract action asserted); *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020) (alleging negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress); *S.C. Pub. Serv. Auth. v. Ocean Forest Inc.*, 275, S.C. 552, 554 (1981) (equitable estoppel was asserted to justify the asserting party's own actions, not as a defense to a breach of contract action).

[3] Respondent Bennett also unsuccessfully attempts to distinguish *Pearson* based on the fact that the plaintiff in that matter reaped the benefits of the contract at issue prior to filing the lawsuit. This is a distinction without a difference. In fact, the Court in *Pearson* specifically reasoned that because "[plaintiff] is seeking [] to receive damages under [the third-party contract] . . ., he is []

Respondent Bennett also argues that the Court should apply the traditional elements of estoppel—false representation or concealment, intent, and knowledge of the true facts – as opposed to the direct benefit test. This argument is inconsistent with South Carolina law. To be clear, a party seeking to estop another from denying that an arbitration clause applies ***may*** invoke the traditional elements of equitable estoppel. *See Zabinski v. Bright Acres Associates*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). But a party may ***also*** prevail on an estoppel argument under the direct benefits test, especially where, as here, the party seeking to repudiate the arbitration clause also seeks damages under the agreement containing the arbitration clause.

In 2019, the Supreme Court of South Carolina demonstrated this choice in *Wilson v. Willis*. In *Wilson*, the Court applied the direct benefit test—***not*** the traditional equitable estoppel test—in order to determine whether the plaintiffs were estopped from denying that the arbitration clause applied to them. *Wilson*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Despite Respondents' arguments to the contrary, the *Wilson* Court did not focus on the lack of knowledge of the party seeking to avoid enforcement of the arbitration clause, but rather on the tortious (rather than contractual) nature of the actions brought. *Id.* at 342, 827 S.E.2d at 176.

In her brief, Respondent Bennett argues that *Thompson v. Pruitt Corp*., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), held that the traditional equitable estoppel test is the only applicable test for determining whether equitable estoppel exists. (Bennett Br. at 16.) *Thompson* says nothing of the kind. Instead, *Thompson* merely questioned specific language in *Pearson* suggesting that federal—and not state—law applied. Regardless, the South Carolina Supreme Court resolved the

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seeking a benefit under the [third-party] contract." *Pearson*, 400 S.C. at 297, 733 S.E.2d at 605. In other words, *Pearson* stands for the proposition that a plaintiff seeking damages under an agreement is seeking a direct benefit under that agreement.

issue in 2019 by applying direct benefits estoppel in *Wilson.*[4] There is no support for the proposition that the direct benefits estoppel test is not applicable under South Carolina law. Moreover, Plaintiff's argument that knowledge / knowing acceptance is required in the application of the direct benefits test was expressly rejected in *Kiawah Island Util., Inc. v. Westport Ins. Corp.*, No. 2:19-cv-1359-DCN, 2019 U.S. Dist. WL 5394200, at *9-10 (D.S.C. Oct. 2, 2019) (rejecting the notion that the direct benefits test is limited to an examination of the course and scope of the parties' underlying dealings with one another).

For all of these reasons, direct benefits estoppel is applicable and perfectly suited to address the issue at hand by preventing Respondents from attempting to enforce the terms of the Provider Agreements that suit them, but denying those that do not.

B. The Denial Orders erroneously concluded that Respondents' third-party beneficiary claims did not satisfy the "direct benefits" test.

1. Respondents "actively exploit" the Provider Agreements by alleging claims for breach of contract alleging that they are third-party beneficiaries of those agreements.

Contrary to the Circuit Court's interpretation, the South Carolina Supreme Court has provided that direct benefits estoppel applies "where plaintiffs sue and seek relief based on contracts containing arbitration clause." *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177. In the Denial Orders, the Circuit Court incorrectly found that estoppel does not apply because estoppel requires that the contract beneficiary actively exploit the contract or "mislead [the other party] to his injury." (Bennett Denial Order at 3; Gasser Denial Order at 3.) The Circuit Court further erred by concluding that Respondents were unaware of the existence of the Provider Agreements at the time they received the medical treatment at issue and that this suggested lack of knowledge prohibits

[4] In *Wilson*, the South Carolina Supreme Court also noted that citation to *Pearson* and federal case law was necessary to interpret the direct benefits tests because of "the scarcity of state precedent in this regard." *Wilson*, 426 S.C.at 340.

ACS from invoking estoppel. (*Id.*).

Even if direct exploitation was a requirement for the application of direct benefits estoppel (and it is not), Respondents actively exploit the Provider Agreements by filing the instant matters in an attempt to enforce the Provider Agreements. Both Respondents parrot the erroneous finding by the Circuit Court that Respondents were unaware of the Provider Agreements at the time of their medical treatment and that lack of knowledge somehow precludes the application of estoppel. (Gasser Br. at 6.) Both are wrong.

As an initial matter, the Circuit Court erred in concluding that Respondents were unaware of the Provider Agreement at the time of medical treatment, as neither Respondent has provided any such evidence or allegations of lack of knowledge. For this reason alone, any holding based on that knowledge requires reversal.

Second, even if Respondents were unaware at the time of treatment (and nothing in the record establishes that they were), that lack of knowledge has no bearing on the application of direct benefits estoppel. What matters is that Respondents initiated litigation and alleged breaches of the Provider Agreements in their complaints, actively exploiting the Provider Agreements in doing so. As demonstrated in ACS's initial brief, filing of a lawsuit alleging breach of the Provider Agreements alone constitutes active exploitation of the contract sufficient to apply direct benefits estoppel. *See Wilson*, 426 S.C. at 344, 827 S.E.2d at 177; *Int'l Paper*, 206 F.3d at 418. In any event, previous knowledge of the terms of an agreement is not material to the application of direct benefits estoppel. *Int'l Paper*, 206 F.3d at 418.[5]

[5] Respondent Bennett cites three additional cases in support of her argument, but these cases do not remotely help her.

First, in *Int'l Paper*, the plaintiff non-signatory sought damages under the contract at issue, which contained an arbitration clause. 206 F.3d at 418. The Fourth Circuit held that the plaintiff was estopped under the direct benefits test from denying that it was a signatory to that contract. *Id.* In arriving at this holding, the Fourth Circuit ***did not*** base its holding on any particular

Respondent Bennett makes great fanfare of the fact that she paid for her health insurance in order to exploit the benefits of agreements like the Provider Agreement applicable in her matter. (*See* Bennett Br. at 14.) This argument further highlights the spurious logic Respondents apply to their claims. Respondents cannot have it both ways – they are either exploiting the agreement in attempts to reap the benefits of the Provider Agreements (and are therefore subject to the arbitration provisions therein), or they seek no benefit and they have failed to sufficiently state a claim for breach of contract.

Accordingly, even if application of equitable estoppel requires that Respondents actively exploited the contract at issue, Respondents are still estopped from avoiding arbitration because their claims fall squarely within the definition of active exploitation.

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

The Denial Order's conclusion that the "direct benefits" test is not satisfied here is preempted by the FAA because that conclusion subjects arbitration agreements to special rules

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knowledge of the plaintiff or even suggest that knowledge was relevant. *Id.*

Second, in *MAG Portfolio Consult., GmbH v. Merlin Biomed Group, LLC*, the plaintiff signatory attempted to enforce an arbitration clause against the non-signatory defendants. No. 00-9502, 2001 U.S. App. LEXIS 21693, at *60 (2d Cir. Oct. 10, 2001). The defendants, however, were not alleging they were third-party beneficiaries under any contract, and they had no relationship to the signatories other than as competitors in business. *Id.* Instead, the plaintiff was alleging the defendants were alter egos of the signatories. *Id.* at *63. *MAG Portfolio* simply has no application here.

Third, in *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, the plaintiff non-signatory attempted to enforce its right to the use of a company name. 9 F.3d 1060, 1062 (2d Cir. 1993). The plaintiff claimed that she sought the benefit under an earlier agreement with defendant (without an arbitration clause). The Court held that a more recent agreement (with an arbitration clause) superseded the first, in part because plaintiff had knowledge of the second agreement and continued to use the name. *Id.* Thus, the court held the plaintiff was bound by the arbitration clause because the benefit she sought, use of the company name, was governed by the second agreement. *Id. Deliotte*'s discussion of the plaintiff's knowledge was only to determine under which contract the plaintiff benefited—not as an element of the direct benefits test.

that apply only to contracts containing arbitration agreements. Respondents misunderstand preemption. Both ignore the text of the FAA and Congress's clear intention that States be prohibited from "singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 682, 116 S.Ct. 1652, 1653 (1996).

Under 9 U.S.C. § 2, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Supreme Court has explained that this prevents States from "singling out arbitration provisions for suspect status." *Doctor's Associates*, 517 U.S. at 682, 116 S.Ct. at 1653; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343, 131 S.Ct. 1740, 1748 (2011) (holding the FAA does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives"). Thus, although the law of South Carolina applies, the FAA preempts South Carolina law to the extent that it singles out arbitration provisions for suspect status – precisely as the Circuit Court did here. This Court should not be fooled by Respondents obtuse oversimplification of the issue, but should follow the clear rule set forth by the Supreme Court – South Carolina law applies, ***so long as the law does not single out arbitration provisions for suspect treatment***. The Denial Order did just that. The Denial Order contravenes the common law rule that a third-party beneficiary's claim is subject to all defenses that might exist under the contract including equitable estoppel. The Circuit Court's conclusion is preempted and requires reversal.

C. The Denial Order erred in failing to recognize that Respondents' own Complaints alleged they received "direct benefits" under the Provider Agreements.

Respondents alleged in their respective Complaints that they received a direct benefit from the Provider Agreements, further foreclosing any argument that they do not seek a direct benefit.

(Bennett Compl. ¶¶ 62-3 (alleging ACS "breached its Provider Agreement" and that Respondent is a third party beneficiary of the Provider Agreement.); Gasser Compl. ¶¶ 26, 38 (alleging ACS "breached its contract with BCBS, Plaintiff, and other class members, as third-party beneficiaries, by refusing to submit claims to BCBS").)

Neither Respondent has provided any reason why the Court should ignore these allegations. Respondents' claims—all of which are based on the third-party beneficiary breach of contract claim—require that they derive a direct benefit from their respective Provider Agreement in order to state a cause of action. In order to state a claim for breach of contract by a third party beneficiary, a plaintiff must allege a "direct, rather than an incidental or consequential, benefit to such person." *Bob Hammond Const. Co., Inc. v. Banks Const. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Any misguided attempt to disclaim the allegations in their complaints through briefing at the appellate stage should not be considered by this Court and if Respondents removed those allegations from their claims (as they purport to do in their briefs) the claims would be subject to dismissal for failure to state a claim.

II. RESPONDENTS' CLAIMS ARE SUBJECT TO ARBITRATION UNDER THE FAA.

As demonstrated in ACS's initial brief, the FAA requires bilateral arbitration of Respondents' claims because: (1) there is a dispute between the parties, (2) there is a written agreement to arbitrate that covers the dispute, (3) the transaction evidenced by the dispute involves interstate commerce, and (4) one party has failed, neglected or refused to arbitrate. *Damico v. Lennar Carolinas LLC*, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020); *see also Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2012). Moreover, the parties opposing arbitration—here, Respondents—bear the burden of proving that the dispute should not be arbitrated. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513, 522 (2000). Respondents

unsuccessfully argue that the broad arbitration clauses somehow do not cover their claims, that a condition precedent precludes arbitration, that AAA is not available to resolve the dispute, and finally that the arbitration clause is unconscionable. None of these arguments deserve serious consideration from the Court.

A. Respondents' claims are covered under the respective arbitration clauses.

Respondents argue in error that their claims are not covered under the respective arbitration clauses because the clauses are not broad enough and because a condition precedent was not met. Neither argument is serious.

Respondents argue that the fact the arbitration clauses state that they apply to the "parties" to the Provider Agreements—and not to third-parties—means that the arbitration clause does not apply to Respondents. This argument, however, misapprehends the scope of the equitable estoppel doctrine. That doctrine also precludes Respondents from arguing that the Provider Agreements' arbitration clauses ***do not apply to them***. *Swane Co. v. Berkeley Cnty. S.C.*, No. 2:15-cv-2586, 2015 U.S. Dist. LEXIS 147235, at *17 n.4 (D.S.C. Oct. 30, 2015) (holding, in a case involving arbitration agreement that applied only to the "parties" to the agreement, that a non-signatory was nevertheless bound by it under the theory of equitable estoppel). If the law were otherwise, because contracts generally only bind the parties thereto, the equitable estoppel doctrine would only apply in a narrow set of cases in which the language of the arbitration clause did not specify who was bound by it. That is not the state of the law.

In any event, Respondents' argument ignores the clear language of the Provider Agreements. The arbitration clause on the first page of the Provider Agreement related to Bennett's claim provides in bold, capitalized, and underlined letters that, "**THIS [] AGREEMENT IS SUBJECT TO ARBITRATION. . .**" (Bennett Provider Agreement attached to Bennett Mot. to Dismiss as Ex. 1 to Ex. A.) Similarly, the first page of the Provider Agreement

in Gasser's matter provides in bold, capitalized, and underlined letters that, **"THE TERMS OF THIS AGREEMENT SHALL BE SUBJECT TO ARBITRATION.**" (Gasser Provider Agreement attached to Gasser Mot. to Dismiss as Ex. 1 to Ex. A.) This language contains no limitation whatsoever on the parties who ae bound by the arbitration provision.

B. Questions regarding the existence and satisfaction of conditions precedent to an arbitration clause are for the arbitrator, not the Court, to decide.

Respondents also argue that the arbitration provisions contain conditions precedent to filing arbitration – namely a meet-and-confer. This is not a serious argument. Respondents may not openly violate the arbitration provision—an arbitration provision they are estopped from denying they are party to—and then claim, based on their own violation of the contract, that the claim may not be arbitrated. The law does not aid parties in their own breaches of contract. *See, e.g., Champion v. Whaley*, 280 S.C. 116, 121, 311 S.E.2d 404, 407 (Ct. App. 1984) ("Where a party's repudiation contributes materially to the nonoccurrence of a condition precedent to his duty of performance, the nonoccurrence of the condition is excused."). Respondents claims that they were somehow unable to meet and confer with ACS is not serious.

More importantly, the issues of (1) whether a contractual provision is, in fact, a condition precedent to arbitration and (2) if a condition precedent, whether it is fulfilled, are questions for the arbitrator, not the court, to decide. As the Fourth Circuit recently held, "arbitrators—not courts—must decide whether a condition precedent to arbitrability has been fulfilled." *Chorley Enters. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d. 553, 565 (4th Cir. 2015) (citing *BG Group PLC v. Republic of Arg.*, ___ U.S. ___, 134 S. Ct. 1198, 1207-1208 (2014)). Notably, in *Chorley*, the Fourth Circuit noted that ***every single case*** that Respondent Bennett cites in her brief, and many cited by Respondent Gasser, has been overruled by the Supreme Court of the United States. *Id.* at 565 n.14 (noting that *Perdue Farms, Inc. v. Design Build Contr. Corp.*, No. 07-1056, 2008 U.S.

App. LEXIS 2861 (4th Cir. Feb. 8, 2008), *HIM Portland LLC v. Devito Builders Inc.*, 317 F.3d 41 (1st Cir. 2003), and *Kemiron-Atl. Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002), have all been overruled). Respondent Gasser cites to two other cases generally addressing conditions precedent, but neither involved the application of a condition precedent to arbitration. *See M&M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (Ct. App. 2008) (financing as a condition precedent to purchase of business); *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571 (2009) (condition precedent that all landowners sell interest for sale of one). Accordingly, Respondents' argument regarding the alleged existence of a condition precedent is for the arbitrator—not the Court—to resolve.[6]

C. The AAA is available to resolve this dispute.

Respondent Bennett also attempts to argue that the arbitration provision in her Provider Agreement is unenforceable because the arbitration forum is unavailable. (Bennett Br. at 23.) This argument, however, misreads just how narrow the AAA pronouncement on this point actually is, and ignores the fact that the AAA will arbitrate (1) disputes between providers and their patients involving billing issues and (2) disputes that are compelled to arbitration pursuant to a court order.

It is true, as Respondent Bennett claims, that the AAA announced in 2003 that it would not voluntarily "administer healthcare arbitrations between individual patients and healthcare service providers that relate to medical services, such as negligence and medical malpractice disputes,

[6] In support of her argument that the arbitration clause in the Provider Agreement applies only to the "parties" of that Agreement, Respondent Gasser also cites an older case from the Supreme Court of Idaho, *Rath v. Managed Health Nework, Inc.*, but that case did not involve the application of the doctrine of equitable estoppel. Instead, the court in *Rath* merely held that the plaintiffs were not bound by an arbitration agreement in a contract they were not a party to. 844 P.2d 12 (Idaho 1992). Here, by contrast, because ACS is invoking the doctrine of equitable estoppel, *Rath* is inapposite. *See, e.g.*, *Detroit Edison Co. v. Burlington N. & Santa Fe Ry. Co.*, 442 F. Supp. 2d 387, 392 (E.D. Mich. 2006) (distinguishing *Rath* because it did not involve application of the doctrine of equitable estoppel).

unless all parties agreed to submit the matter to arbitration after the dispute arose." *See* AAA Healthcare Policy Statement, American Arbitration Association, https://www.adr.org/sites/default/files/document_repository/AAA_Healthcare_Policy_Statement.pdf (last visited May 2, 2022), attached to ACS's Reply in Support of its Mot. to Dismiss Bennett's Complaint as Exhibit A). As the text of this provision reveals, however, the pronouncement applies only to disputes that "relate to ***medical services***, such as ***negligence and medical malpractice disputes***." *Id.* (emphases added). To make this limitation clear, the AAA further specified that it "will continue to administer arbitrations that involve solely ***billing or collections matters*** between an individual and a . . . healthcare provider." *Id.* (emphasis added). Moreover, the AAA also clarified that it "will administer disputes between patients and healthcare providers to the extent a ***court order directs such a dispute to arbitration*** where the parties' agreement provides for the AAA's rules or AAA administration." *Id.* (emphasis added).[7]

This case falls squarely within both exceptions noted by the AAA in the Healthcare Policy Statement. For one thing, these are disputes between an individual (each Respondent) and a healthcare provider (ACS) that "involve[s] solely billing or collections matters." Respondents do not allege a medical malpractice or related negligence claim against ACS; instead, the crux of Respondents' Complaints are allegations that ACS improperly billed them. Thus, this is indisputably a "billing . . . matter." In addition, the AAA will arbitrate any case that is compelled to them by a court, as this case should be. Therefore, the AAA policy provides no impediment to arbitration.

[7] Respondent Gasser ignores the language of the Policy Statement and instead focuses on broad protocols referenced in that statement to attempt to argue that broad statements about dispute resolution generally should overrule the clear and unambiguous language of the statement itself. To do so would subvert the clear intent of the AAA's Policy Statements that clearly explains it is open for arbitrations between patients and providers involving billing or collection matters.

Moreover, even if the AAA were actually unavailable (and it is not), the proper remedy is ***not*** to hold the arbitration clause unenforceable. Instead, the Court should simply appoint a substitute arbitrator. Indeed, the FAA specifically provides for the manner in which to name an arbitrator in this situation. Section 5 of the FAA provides in relevant part:

> [i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy, the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case my require…

9 U.S.C. § 5. Thus, even if the AAA were unavailable, the remedy would simply be for the Court to appoint a substitute arbitrator.

Respondent Bennett argues that *Grant v. Magnolia Manor-Greenwood, Inc.*, is analogous to this case, but that case is easily distinguishable. In *Grant*, the arbitration provision provided in relevant part: "any action, dispute, claim, or controversy of any kind . . . shall be resolved by binding arbitration ***administered by*** the National Health Lawyers Association (the "NHLA")." 383 S.C. 125, 128, 578 S.E.2d 435, 436-37 (2009) (emphasis added). After the parties entered into the arbitration agreement, but before the dispute arose, the NHLA amended its rules to provide that it would only honor arbitration agreements entered into after the dispute arose. *Id.* The Court denied enforcement of the arbitration provision, reasoning that, because the parties' agreed-upon exclusive forum was unavailable, section 5 of the FAA did not permit the court to enforce the arbitration provision by appointing a substitute arbitrator. *Id.* at 132.

Here, by contrast, the arbitration provision invokes the AAA—not the NHLA—and, as noted, the AAA Healthcare Policy Statement carves out clear exceptions for billing disputes or to cases compelled to arbitration by a court. The AAA is clearly available as an arbitration forum.

For this reason alone, *Grant* is inapposite. Moreover, the arbitration provision at issue here does not state that the arbitration will be "administered" by the AAA, as was the case in *Grant*. Instead, the Provider Agreements provide only that the AAA will "appoint" an arbitrator and that the AAA "commercial rules" will apply. (Bennett Provider Agreement at 11; Gasser Provider Agreement at 10.) Thus, even if the AAA were unavailable to appoint an arbitrator (and it is not), the Court should appoint a substitute arbitrator under section 5 of the FAA, and the parties can arbitrate under the AAA rules. Indeed, the Supreme Court of South Carolina has held exactly that. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 384, 729 S.E.2d 727, 734 (2014) (holding that arbitration service is integral to arbitration clauses that provide the arbitration service shall be "administered by" a particular arbitration service, and, conversely, arbitration service is not integral to arbitration clauses that provide the arbitration shall be conducted "in accordance with" the selected arbitration service's rules). The court's reasoning in *Dean* was based on the lack of the term requiring that the arbitral forum "administer" the arbitration. *Id.* Neither Provider Agreement in this case require that the AAA "administer" the arbitration.

For these reasons, the fact that the arbitration clause here provides that the AAA will select an arbitrator and that the AAA commercial rules apply is no impediment to arbitration.

D. The arbitration clause is not unconscionable.

Respondent Gasser also argues that the arbitration clause is unconscionable because she classifies the terms as oppressive and unreasonable. To the contrary, the arbitration clause at issue is the height of neutrality and is enforceable.

"Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 339, 404, 427 S.E.2d 242, 245 (1996).

"In analyzing claims of unconscionability of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *One Belle Hall Property Owners Association, Inc. v. Trammell Crow Residential Company*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) (internal quotations and citations omitted). In evaluating unconscionability of an arbitration clause, the only relevant terms are those relating to the arbitration. *Id.* at 64, 791 S.E. at 293. An arbitration clause is not unconscionable as to third-party beneficiaries merely because the third-party beneficiary did not negotiate the contract. *See McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *4 (D.S.C. 2011) (arbitration clause in contract to which claimant was a third-party beneficiary was not unconscionable when it provided procedures for an unbiased and neutral decision-maker).

Here, the arbitration clause provides for a neutral and unbiased decision-maker. Indeed, the Provider Agreement calls for the application of AAA rules, which are the paradigm of neutrality. The terms in the arbitration clause are the only terms relevant to this determination. Respondent Gasser cannot point to any aspect of the arbitration clause that is unreasonable, oppressive, or one-sided because none exists.

Citing *Aiken v. World Fin. Corp. of S.C.*, Respondent Gasser argues that the arbitration clause does not apply because ACS's alleged actions were unforeseeable. (Gasser Br. at 19.) *Aiken*, however, has no application here. In *Aiken*, the plaintiff applied for a loan with the defendant, a consumer finance company. 373 S.C. 144, 146, 644 S.E.2d 705, 707 (2007). In connection with the loan, the plaintiff provided personal information to the defendant, including his social security number. *Id.* at 146-47, 644 S.E.2d at 707. The plaintiff later discovered that certain of the defendant's employees had conspired together to use his personal information to

obtain sham loans and he sued the defendant alleging claims for outrage, negligent hiring / supervision, and unfair trade practices. *Id.* at 147, 644 S.E.2d at 707. The plaintiff had signed an arbitration agreement with the defendant, and the defendant argued that the dispute was arbitrable. The Supreme Court of South Carolina disagreed, holding that, as a matter of contract interpretation, it would not interpret an arbitration agreement to apply to "outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Id.* at 151, 644 S.E.2d at 709. According to the Supreme Court, this rule recognizes that parties to even broadly worded arbitration agreements do not anticipate that outrageous and unforeseeable torts will be subjected to arbitration. *Id.* at 152, 644 S.E.2d at 710.

The rule of *Aiken* does not apply here. As the language of *Aiken* reveals, that rule is limited to "outrageous and unforeseeable ***torts***" – not to contract-based claims. Indeed, the Court in *Aiken* drew this very distinction:

> In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration. For instance, the parties in the instant case stipulate that a tort claim which essentially alleges a breach of the underlying contract (e.g., breach of fiduciary duty, misappropriation of trade secrets), would be within the contemplation of the parties in agreeing to arbitration. We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are ***legally distinct from the contractual relationship between the parties***.

Id. at 152, 644 S.E.2d at 709 (emphasis added). Indeed, consistent with this limitation, the ***Supreme Court of South Carolina has never applied Aiken to contract-based claims***. *See, e.g.*, *Partain v. Upstate Auto. Group*, 386 S.C. 488, 689 S.E.2d 601 (2009) (applying *Aiken* to non-contract-based claim premised on alleged "bait and switch" in connection with the sale of a car); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007) (applying *Aiken* to non-contract-based tort claims arising out of defendant's employee's harassment and stalking of customer); *Simpson v. World Fin. Corp. of S.C.*, 373 S.C. 178, 644 S.E.2d 723 (2007) (applying

Aiken to non-contract-based claims arising out of defendant's employee's use of the plaintiff's personal information for fraudulent loans). Because Respondents assert claims for breach of contract and other claims based on ACS's alleged non-performance of its duties under the Provider Agreements, *Aiken* has no application here. *See, e.g.*, *Parsons v. John Weiland Homes & Neighborhoods of the Carolina, Inc.*, 418 S.C. 1, 14, 79 S.E. 2d 128, 135 (2016) (Hearn, J., concurring opinion) (holding *Aiken* does not apply where home seller allegedly failed to disclose hazardous waste on property because the buyers "could not bring their claim against [the seller] absent the sales contract, as the claim is entirely reliant on the parties' statuses under the contract").[8]

There can be no doubt that the arbitration clauses in the Provider Agreements come nowhere close to meeting the standard of unconscionability.

III. RESPONDENTS' CLAIMS ARE SUBJECT TO ARBITRATION UNDER THE SCUAA.

As demonstrated in ACS's initial brief, SCUAA also demands that these matters be subject to arbitration. Respondents argue in vain that S.C. Code Ann. § 15-48-10(b)(4) precludes arbitration, despite clear language in the statute to the contrary. (*See* Bennett Br. at 20; Gasser Br. at 14.)

It is true that S.C. Code Ann. § 15-48-10(b)(4) provides that arbitration clauses are unenforceable insofar as they apply to "any insured or beneficiary under any ***insurance policy*** or ***annuity contract***." (emphasis added). The problem for Respondents is that this provision only

[8] Even if *Aiken* applied (and it does not), *Aiken* is preempted by the FAA. *See Parsons*, 418 S.C. at 10-12, 79 S.E. 2d at 133 (Pleicones, J., minority opinion) (concluding that *Aiken* is preempted by the FAA because it is a unique rule, applicable only in the arbitration context, that disfavors arbitration). Although the Supreme Court of South Carolina in *Parsons* concluded, 3-2, that the FAA does not preempt *Aiken*, the Supreme Court of the United States has the final say on that issue. Under federal case law, the rule announced in *Aiken* is preempted by the FAA.

applies "when a litigant seeks to enforce an arbitration agreement contained ***in an insurance policy*** governed by South Carolina law." *Walden v. Harrelson Nissan Inc.,* 399 S.C. 205, 210, 731 S.E. 2d 324, 326 (Ct. App. 2012) (emphasis added).

In *Walden,* the plaintiff urged the Court to read § 15-48-10(b)(4) to include contracts related to insurance policies, but the Court rejected this expansive reading of the statute. *Id.* at 209, 731 S.E.2d at 326. Instead, the Court held that the contract at issue—a lease agreement containing a provision that the defendant would secure insurance for the plaintiff—was not exempt from arbitration because it itself was not an insurance policy. *Id.* at 210, 731 S.E.2d at 327; *see also Cox v. Woodmen of World Ins. Co.,* 347 S.C. 460, 468, 556 S.E.2d at 402 (Ct. App. 2001) (holding that S.C. Code. Ann. § 15-48-10(b)(4) is a "specific exemption limited to entities ***within the insurance industry")*** (emphasis added). For these reasons, the court in *Walden* held:

> we reject [the plaintiff's] expansive interpretation of the statute and conclude the General Assembly did not intend for the arbitration exception of section 15-48-10(b)(4) to apply to automobile lease agreements that have only a tangential relationship to an insurance policy, but was instead ***intended to apply directly to an insurance contract.***

399 S.C. at 210, 731 S.E. 2d at 326 (emphasis added); *see also Blue Ridge Emergency Physicians, P.A. v. Emergency Physicians Ins. Co.,* RRG C/A no. 6:10-cv-00428-JMC, at *5-6 (D.S.C. Mar. 5, 2011) (noting that "S.C. Code Ann. § 15-48-10(b)(4) prohibits the enforcement of arbitration clause in ***insurance policies*** under South Carolina law" (emphasis added)).

By their arguments, Respondents ask the Court to make the same mistake the plaintiff in *Walden* made—they ask the Court to expand § 15-48-10(b)(4) to preclude the arbitration of claims that are merely ***related to*** a contract for insurance (and tangentially so, at that). This is not the "close call" that Respondent Bennett leads the Court to believe. In fact, Bennett specifically and repeatedly represented that this matter was not one involving insurance in her Motion to Remand

filed with the United States District Court for the District of South Carolina.[9] By Respondent Bennett's own account, this is not an insurance matter and the Provider Agreements are not and could never be construed to be insurance contracts. This argument is as unpersuasive here as it was in *Walden* for the simple reason that the Provider Agreement is not an insurance policy.[10]

Thus, even if Respondents' claims might be related to her insurance policy, the claims made against ACS, a healthcare provider, are clearly not claims under an insurance policy.

IV. THE ARBITRATION MUST BE ON A BILATERAL BASIS.

Gasser agrees that the Provider Agreement does not specifically provide for class arbitration, but asks the Court to require ACS to respond to class arbitration regardless based on a spurious textual argument. (Gasser Br. at 19.) It appears that Respondent Gasser argues that if she is subject to arbitration, then the Court's reading of the arbitration clause must be so broad so as to permit class arbitration. This argument is without support or logic.

As demonstrated in ACS's initial briefs, the arbitration clauses in the Provider Agreements do not authorize class arbitration. In order to compel class arbitration, the parties must expressly agree to submit to class arbitration. *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 873 (4th Cir. 2016) (*Carlson I*) ("[A] party may not be compelled to submit to class arbitration absent express

[9] In her argument in briefing on the motion to remand, Respondent Bennett claimed "she is not suing to recover benefits [under her health insurance plan]." (Bennett Mot. to Remand at 6.) Moreover, in her brief, Respondent Bennett attempts to argue that her claims "specifically relate to Respondent's attempts to receive benefits under her health insurance policy." (Bennett Br. at 22.)

[10] Respondent Bennett also argues that S.C. Code Ann. § 15-48-10(b)(4) would apply to any lawsuit she filed against her insurance company, Blue Cross Blue Shield of South Carolina. (Bennett Br. at 23.) But she did not make a claim against her insurance company and she did not assert a claim based on an insurance contract, she filed this claim based on an agreement between ACS and their insurer under which no insurance is provided.

agreement."). The lack of any reference to class arbitration is the "principle reason to conclude than [an] arbitration clause not authorize classwide arbitration." *Del Webb Cmtys., Inc. v. Carlson*, No. 9-14-cv-1877-PMD, 2017 WL 1060139 (D.S.C. Feb. 1, 2017) aff'd 698 F. App'x 761 (4th Cir. Oct. 13, 2017) (*Carlson II*). Respondent Gasser's claim that the Provider Agreement's silence on class arbitration is somehow an implied consent to class arbitration should be of no consequence. Even if there were implied consent (and clearly there is not), the law requires that consent to class arbitration be express. Arbitration of these matters, therefore, must be bilateral.[11]

V. RESPONDENTS' CLAIMS SHOULD BE DISMISSED.

Respondents' claims require dismissal, rather than a stay, because all of Respondents' claims are based on and rely entirely upon the Provider Agreements and so are subject to the arbitration clause therein. Neither Respondent purports to make any argument that any of their claims are sufficiently divorced from the others so as to require a different outcome for some of the claims.

CONCLUSION

For the foregoing reasons, as well as those set forth in ACS's Initial Brief and those brought forth at oral argument (if any), the Court should reverse the Circuit Court's denial of the Motion to Compel and remand the claims to the Circuit Court with direction to enter an order compelling all of Respondents' claims to bilateral arbitration and dismissing the Complaint. In the alternative to dismissal, the Court should direct the Circuit Court to stay this matter pending arbitration.

[11] Respondent Bennett makes no argument that the claims are subject to class arbitration and thus waives any argument to the contrary.

Respectfully submitted,

Dated: May 2, 2022

By *s/A. Victor Rawl, Jr.*

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No.: 2021-001342

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

v.

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

PROOF OF SERVICE

I certify that I have served Appellant's Consolidated Reply Brief on the Respondents, Jessica Bennett and Thuy N. Gasser, individually and on behalf of those similarly situated, via E-mail and/or U.S. Mail, upon their respective attorneys of record as properly addressed below this 2nd day of May, 2022:

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May 2, 2022

VIA ELECTRONIC FILING

The Honorable Jenny Abbott Kitchings
Clerk of Court
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Re: *Jessica Bennett and Thuy N. Gasser, individually and on behalf of those similarly situated v. ACS Primary Care Physicians-Southeast, P.C.*
Appellate Case No.: 2021-001342

Dear Ms. Kitchings:

Please find enclosed for filing, Appellant's Consolidate Reply Brief with Proof of Service and Appellant's Designation of Matters to be Included in the Record on Appeal in regards to the above referenced matters. Please file all and forward a file-stamped copy for our records.

We appreciate your assistance in this matter and please do not hesitate to contact me should you need anything further.

Sincerely,

GORDON REES SCULLY MANSUKHANI, LLP

Stacey A. Smith
Paralegal

SAS:
Enclosures