2011 WL 12695868 (Ark.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Arkansas.
Pulaski County

Etta S. STRANGE, et al.,

v.

GGNSC NORTH LITTLE ROCK, LLC, et al.

No. CV2010006225.
February 15, 2011.

Response to Defendants' Motion to Compel Arbitration and for Dismissal

Melody H. Piazza (AR 86108), Deborah T. Riordan (AR 93231), Wilkes & McHugh, P.A., One Information Way, Suite 300, Little Rock, Arkansas 72202, Telephone: (501) 371-9903, Facsimile: (501) 371-9905, for plaintiff Etta S. Strange, as Special Personal Representative of the Estate of Etta M. Strange, Deceased, and on behalf of the wrongful death beneficiaries of Etta M. Strange.

COMES NOW, the Plaintiff, by and through counsel of record, Wilkes & McHugh, P.A., and for her Response to Defendants' Motion to Compel Arbitration and for Dismissal, states:

INTRODUCTION

This matter is a personal injury suit involving injuries Etta M. Strange incurred in a North Little Rock nursing home owned and operated by Defendants. Plaintiffs Complaint was filed on November 2, 2010, against GGNSC North Little Rock LLC d/b/a Golden Living Center - North Little Rock n/k/a Premier Health and Rehabilitation, LLC; GGNSC Administrative Services LLC d/b/a Golden Ventures; GGNSC Holdings LLC d/b/a Golden Horizons; Golden Gate National Senior Care LLC d/b/a Golden Living; GGNSC Equity Holdings LLC; Golden Gate Ancillary LLC d/b/a Golden Innovations; GPH North Little Rock LLC; and GGNSC Clinical Services LLC d/b/a Golden Clinical Services.

In their Answer served on November 23, 2010, Defendants asserted the contractual defense of an arbitration agreement. (See Defs. [1] Answer, 162.) On February 1, 2011, Defendants filed a Motion to Compel Arbitration and for Dismissal seeking to enforce an Arbitration Agreement signed by Sheila Strange on February 29, 2008, Etta Strange's daughter, upon Etta Strange's admission to Golden LivingCenter-North Little Rock. The agreement provides in relevant part,

It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a “claim” or collectively as “claims”) arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement,1 and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

See Exhibit A to Separate Defendants' Motion. Plaintiff submits that no valid, enforceable arbitration agreement exists. Accordingly, Defendants' Motion should be denied.

LAW & ARGUMENT

I. The Arbitration Agreement is Unenforceable under Arkansas Law.

A party seeking to compel arbitration "must present evidence sufficient to demonstrate an enforceable arbitration agreement." Stein v. Burt-Kuni One, LLC, 396 F. Supp. 2d 1211, 1213 (D. Colo. 2005) (citing SmartText Corp. v. Inter, Inc., 296 F. Supp. 2d 1257, 1262 (D. Kan. 2003)); see also Ark. Code Ann. § 16-108-202. Thus, as in summary judgment proceedings, the burden of proving a- valid, enforceable agreement to arbitrate falls upon the party seeking to compel arbitration, in this case Defendants. See Ark. Diagnostic Cen. P.A.Tahiri, 370 Ark. 157, 257 S.W.3d 884 (2007). Not until the moving party meets its initial burden does the burden shift to the non-moving party "to raise a genuine issue of material fact as to the making of the agreement, using evidence comparable to that identified in [Rule] 56." Stein, 396 F. Supp. 2d at 1213. If the non-moving party "demonstrates a genuine issue of material fact, then a trial on the existence of the arbitration agreement is required." Id. (citing Avedon Eng'g, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997)). To compel arbitration, Defendants must prove a valid, enforceable agreement to arbitrate Plaintiff's claims exists.

Defendants have failed to meet their initial burden. To begin, Defendants merely attach the purported agreement to their motion without any supporting affidavit or admissible testimony as to its authenticity. Defendants have failed to authenticate the agreement pursuant to Rule 901 of the Arkansas Rules of Evidence, and, for this reason alone, Defendants' motion must fail. Further, Defendants have failed to establish Sheila Strange's authority to bind her mother to the arbitration agreement, instead asserting that there is no evidence that authority is lacking. No evidence that authority is lacking? Authority to act on behalf of another is not presumed. Instead, it must be affirmatively proven by the party asserting authority exists, Defendants here. See Pierce v. Smith, 103 S.W.2d 353, 355 (Ark. 1937). Defendants have not met their burden of proving authority. Because Defendants have failed to meet their burden of proof, the burden of proof does not shift to Plaintiff to assert any defense.

However, to the extent that defenses are necessary to defeat this agreement, Plaintiff asserts the defenses of lack of jurisdiction, lack of authority, unconscionability, and impossibility of performance. The Federal Arbitration Act ("FAA") provides that a written provision in a contract involving commerce to arbitrate a controversy arising out of that contract is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000)(emphasis added). Indeed, if the validity of an arbitration agreement is challenged, a court should "apply ordinary state-law principles that govern the formation of contracts." Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir.2002) (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

> The construction and legal effect of an agreement to arbitrate are to be determined by this court as a matter of law. Tyson Foods, 349 Ark. at 141; see also E-Z Cash Advance, Inc. v. Harris, 347 Ark. 132, 60 S.W.3d 436 (2001).

Asbury Automotive Used Car Center, L.L.C. v. Brosh, 2005 WL 3436652 (Ark.).

Congress enacted the Federal Arbitration Act (FAA) in 1925 to address the perceived disparity in treatment of arbitration agreements 9 U.S.C. § 2. Prior to 1925 courts were viewed as hostile toward arbitration agreements and rarely enforced them. According to the United States Supreme Court, the FAA was intended to "overcome courts' refusals to enforce agreements to arbitrate" and to "place such agreements upon the same footing as other contracts." Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 270-71 (1995); see also, Volt Information Sciences, Inc. v. Board of Trustees, 488 U. S. 468 (1989). The Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). The FAA's policy of favoring arbitration applies only after a valid arbitration agreement has been found. See Fleetwood Enters., Inc. v. Garkamp, 280 F. 3d 1069, 1070 & 1070 n.5 (5th Cir. 2002).

Treating the instant arbitration agreement like any other contract, without employing any policy favoring arbitration in the initial assessment of its validity, it is clear that the arbitration agreement fails to meet the requirements of a valid contract under applicable Arkansas law.

A. Sheila Strange Lacked Authority to Bind Etta Strange.

The essential elements of an enforceable arbitration agreement, as with contracts in general, are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. Alltel Corp. v. Sumner, 360 Ark. 573, 203 S.W.3d 77(2005); Cash in a Flash Check Advance of Arkansas, LLC v. Spencer, 348 Ark. 459 (2002); Foundation Telecommunications v. Moe Studio, 341 Ark. 231 (2000); Showmethemoney Check Cashers, Inc. v. Williams, 342 Ark. 112 (2000). It is axiomatic that parties cannot be forced into binding arbitration on claims which they did not agree to arbitrate. See Baldwin Co. v. Weyland Mach. Shop, 14 Ark. App. 118, 685 S.W.2d 537 (1985).

The arbitration agreement submitted by Defendants purport to cover disputes between Etta Strange and Golden LivingCenter-North little Rock. However, Etta Strange did not sign the agreement. Instead, her daughter, Sheila Strange, signed the arbitration agreement as her mother's "Authorized Representative." There is no indication in the agreement that Sheila Strange had any authority to bind her mother other than pursuant to any authority she may have had as her "daughter." See "Admission Agreement Signature Page, p. 15" and page 2 of the arbitration agreement, collectively attached hereto as Exhibit 1. Although Defendants' contend in their motion that "[t]here are no facts to indicate that Ms. Sheila Strange was not authorized to enter into agreements such as the Admissions Agreement or the Arbitration Agreement on behalf of Etta Strange," agency is not presumed. See Defendants' Motion to Compel Arbitration, para. 2. Instead, it is Defendants' burden to establish the existence of an agency relationship between Etta Strange and Sheila Strange. See Pierce v. Smith, 103 S.W.2d 353, 355 (Ark. 1937).

> In Evans v. White, 284 Ark. 376. 682 S.W.2d 733 (1985), our supreme court announced: We have adopted the definition of agency contained in the Second Restatement of the Law of Agency, § 1, comment a, which provides that the relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. Crouch v. Twin City Transit, 245 Ark. 778, 434 S.W.2d 816 (1968). The two essential elements of the definition are authorization and right to control. Id. at 378, 682 S.W.2d at 378.

Dumontier v. Ray Lower & Associates, Inc., 2001 WL 167877, 3 (Ark. App. 2001)(emphasis added). Further, "a person dealing with a known agent is not authorized under any circumstances to blindly trust the agent's statements as to the extent of his power; such person must not act negligently, but must use reasonable prudence to ascertain whether the agent is acting within the scope of his powers." White v. Thomas, 1991 WL 31212, *2 (Ark.App. 1991)(citing First Pentecostal Church v. Koppers Co., inc., 280 Ark. 101, 655 S.W.2d 403 (1983)). Here, there is no evidence that Etta Strange held out her daughter as possessing authority to bind her to an optional arbitration agreement. Further, there is no evidence that Defendants used "reasonable prudence" to ascertain the scope of any authority Sheila Strange might have had. Instead, they blindly relied on her status as the "daughter" of Etta Strange in accepting her signature to the agreement.

1. Sheila Strange's Status as Etta Strange's Daughter Is Not Sufficient to Bind Etta Strange to Arbitration.

As evidenced by the arbitration agreement itself, the sole source of Sheila Strang's authority manifested to Defendants was that Sheila Strange was Etta Strang's daughter. The Arkansas Supreme Court has clearly stated that,

> mere relationship or family ties, unaccompanied by any other facts or circumstances, will not justify an inference of agency-but such relationship is entitled to great weight, when considered with other

> circumstances, as tending to establish the fact of agency. Braley v. Arkhola Sand and Gravel Co., 203 Ark. 894,159 S.W.2d 449 (1942)

In McMahan v. Berry, 319 Ark. 88, 890 S.W.2d 242 (1994Xreversed on other grounds)

On this very issue, the Arkansas Court of Appeals more recently held that, notwithstanding the daughter's payment of her mother's bills and handling of her banking, a daughter does not have authority to bind her incompetent mother to an arbitration agreement absent a valid power of attorney or some conduct by the mother while she was competent that held the daughter out as her agent. See Waverly-Arkansas, Inc. v. Keener, 2008 WL 316149, 4 (Ark.App. 2008). Similarly, there is no here evidence of Etta Strange holding Sheila Strange out as her agent. Plaintiff submits that the Keener decision controls this issue. Sheila Strange did not have authority to bind her mother to an arbitration agreement.

Decisions from neighboring states are also instructive. In Thornton v. Allenbrooke Nursing and Rehabilitation Center, LLC, TT2008 WL 2687697T (Tenn. Ct. App. 2008)T, the Tennessee Court of Appeals considered a question that is strikingly similar to the issue presented in this case: “Whether a daughter with no documented authority whatsoever may waive he[r] mother's constitutional right to access to the courts and a trial by jury.” Id.

The facts of Thornton were that Ira Jones was admitted to Allenbrooke Health Care Center in December 2004. Ms. Jones was competent at the time of her admission- capable of reading, understanding and signing the documents required for her admission. Yet, the Admission Agreement containing an arbitration agreement was signed by her daughter, Patricia Raybon. Patricia Raybon did not have a power of attorney and was not a court-appointed guardian or conservator over her mother's affairs.

Even though the nursing home's admission representative knew that Patricia Raybon did not have a power of attorney, he did nothing to determine Ms. Jones' competence and “made no effort whatsoever to have her execute the documents for herself.” Slip. Op. at 5.

> Nursing Home contends that Daughter's participation in handling Decedent's medical matters is proof of a principal/ agent relationship between Decedent and Daughter. As support for its argument, Nursing Home argues that Daughter made medical decisions with the doctors during Decedent's hospital stay in 2004, signed paperwork admitting Decedent to another nursing home prior to Decedent's admittance to Defendant Nursing Home, met with Mr. Wells, and signed Nursing Home's admissions paperwork.

Slip Op. at 8.

On appeal, the Court of Appeals rejected the nursing home's argument and, instead, wrote that, “[r]egardless of the extent of Daughter's involvement in Decedent's personal matters, Nursing Home simply cites no single action by Decedent where she indicated to Nursing Home or to Daughter that Daughter was her agent for the purpose in question.” Slip Op. at 10 (emphasis added).

The Court of Appeals also rejected the nursing home's argument that Ms. Jones ratified her daughter's actions through her own inaction. Following her mother‘s admission to the nursing home, Ms. Raybon told her mother that she had signed admissions documents for her. Ms. Jones did not protest, dissent or otherwise disaffirm her daughter's acts. However, because Ms. Jones did not have “full knowledge of all material facts and circumstances” regarding the arbitration agreement, the appellate court held that she could not have ratified or assented to her daughter's actions. Slip Op. at 12.

Similarly, Cabany v. Mayfield Rehabilitation and Special Care Center, 2007 WL 3445550 (Tenn.Ct.App.) is instructive. In Cabany, the resident suffered from Parkinson‘s. Mr. Cabany's wife executed an arbitration agreement upon his admission pursuant to a healthcare power of attorney that, by its terms, only became effective upon Mr. Cabany's inability to make decisions

for himself. Mr. Cabany experienced periods of severe mood and behavior changes and his condition dramatically deteriorated over time. Still, the Court of Appeals recognized that,

Personal autonomy—an adult's right to live independently and in accordance with his or her own personal values—is a fundamental right. The right is of sufficient importance that the law presumes that adults have the capacity to be autonomous. Tennessee's General Assembly has explicitly stated that, '[a]n individual is presumed to have capacity to make a health care decision, to give or revoke an advance directive, and to designate or disqualify a surrogate. The force of this presumption does not wane as a person ages, and the burden is on the party seeking to rely on an individual's incapacity.

Id. at *5. The Cabany Court held that because there was no evidence in the record as to Mr. Cabany's mental capacity at the time the admission contract was executed, the trial court erred in relying on a springing healthcare power of attorney as evidence of authority to execute the arbitration agreement. The Cabany Court further criticized the facility for failing to make "any efforts to determine and then record whether Mr. Cabany had capacity to make this decision for himself." Id. at *6.

Under comparable circumstances, in Hendrix v. Life Care Centers of America, Inc., Case No. E2006-02288-COA-R3-CV, 2007 WL 4523876 (Dec. 21, 2007), a daughter presented a power of attorney to a nursing home upon her mother's admission to the facility. The daughter represented that she had authority to bind her mother pursuant to the power of attorney. The power of attorney provided that the daughter could act on her mother's behalf only in the event of her mother's mental incapacity. The Court of Appeals determined that there was not sufficient evidence of the mother's mental incapacity at the time of her admission to the facility to make the power of attorney effective. The Court further stated that the daughter's belief, representations and understanding about her authority could not create apparent agency because those beliefs and representations were those of the purported agent, not those of the principal.

Daughter's 'understanding' of the POA does not alter its legal effect, and her erroneous beliefs about the scope of her attorney-in-fact powers certainly cannot create an independent agency relationship, separate and apart from the very document she was testifying about.

Nursing Home is not entitled, as it suggested on oral argument, to simply 'rely upon someone who comes in and says, 'I' the POA. I have the authority. Here's the Power of Attorney. Let me sign the documents.' By signing the arbitration agreement, Daughter sought to bind Mother to a course of action that altered her legal rights. Unless Mother's power of attorney documents were in effect at the time-- and we have already affirmed the trial court's ruling that they were not- Daughter did not have power to do this. That her retrospective powerlessness now accrues to her own benefit is an odd quirk of the case's facts, and is undoubtedly frustrating to Nursing Home, but it does not alter the pertinent legal doctrines nor the proper outcome of this case.

Hendrix, slip op. at Sec. IV.

The Alabama Supreme Court considered strikingly similar circumstances in its decision in Noland Health Services, Inc. v. Wright, 2007 WL 1300721 (Ala. May 4, 2007). In Noland, the Alabama Supreme Court held that a daughter-in-law could not bind her mother-in-law to an arbitration provision in a nursing home admission agreement if the mother-in-law did not bestow her with authority to do so. Id. (Vicky's signatory role was effectively that of "next friend"... 'It has long been established in this State, however, that one who purports to act merely as a "next friend" of a "noncomposment's" is "wholly without authority to make any contract that would bind her or her estate."') Id. Just as in Noland, the absence of authority conferred by the resident, in this case Etta Strange, precludes enforcement of the arbitration agreement at issue here.

Likewise, the Georgia Court of Appeals held in Ashburn Health Care Center, Inc. v. Poole, 2007 WL 1764217 (Ga. App. June 20, 2007) that where the resident of a nursing facility did not sign or authorize the execution of an arbitration agreement, the facility cannot demonstrate the existence of a contract binding the representative plaintiff or the decedent to an arbitration provision. In Ashburn, Mrs. Poole was admitted to Ashburn Health Care Center, by her husband. Her husband signed all of the admission documents even though her son held her power of attorney. Poole's son was present, assisting the family in the

admission process and failed to object to the arbitration agreement. The son testified that he did not review the admissions documents or discuss them with his father.

The Georgia appellate court held that under these circumstances, an agency relationship cannot be found to exist between Mr. and Mrs. Poole. Mrs. Poole was not present when her husband executed the arbitration agreement, and the mere fact that he signed on the "authorized representative" line cannot establish agency. Id. Moreover, although the son was present when his father signed the document, Ashburn Health Care asserts that they did not then know that the son held a durable power of attorney for his mother. The son's failure to object to the arbitration agreement, therefore, could not have led Ashburn Health Care to believe that Poole had given his father apparent authority to execute the document.

These decisions are consistent with the Arkansas decisions that hold that the principal must in some manner indicate that the agent is to act for him before an agency can be found. See Crouch v. Twin City Transit, 245 Ark. 778, 434 S.W.2d 816 (1968). There is no evidence in this case that Etta Strange directed her daughter to sign an arbitration agreement on her behalf. Moreover, as evidenced by the boxes of possible sources of authority on the Admission Agreement signature page, Defendants knew that such authority was necessary. Their agreement expressly requires that evidence of authority be given. See Exhibit 1. Yet, they allowed Sheila Strange to sign an arbitration agreement for her mother even though she was unauthorized to do so. The evidence is undisputed that the purported arbitration agreement was executed without proper authority. Thus, it is not binding on the estate of Etta Strange.

2. There Is No Evidence That Etta Strange Took Any Action to Convey to Sheila Strange Authority to Bind Her to An Optional Arbitration Agreement.

It has long been the rule in Arkansas that "neither agency nor the scope of agency can be established by declarations or actions of the purported agent." B.J. McAdams, Inc. v. Best Refrigerated Exp., Inc., 265 Ark. 519, 526, 579 S.W.2d 608, 611 (1979) (citing Mark v. Maberry, 222 Ark. 357, 260 S.W.2d 455 (1953); Zullo v. Alcoatings, Inc., 237 Ark. 511, 374 S.W.2d 188 (1964); and Smith v. Hopf, 219 Ark. 127, 240 S.W.2d 2 (1951)); see also Waverly-Arkansas, Inc. v. Keener, 2008 WL 316149, 4 (Ark.App. 2008). Thus, in the absence of any manifestation, or action indicating manifestation, on behalf of Etta Strange to be bound by the terms of this optional arbitration agreement, none of the actions or declarations of Sheila Strange establish either an agency or the scope of any purported agency. More specifically, pursuant to the rule of B.J. McAdams, Sheila Strange's signature on the arbitration agreement as the "Authorized Representative" in no way bound Etta Strange thereto. Signing as the "Authorized Representative" does not make it legally so.

The Arkansas Court of Appeals in Harrison v. Benton State Bank, 6 Ark.App. 355, 359-360, 642 S.W.2d 331,334 (1982) recognized the Arkansas Supreme Court's analysis of capacity in Kelly's Heirs v. McGuire, 15 Ark. 555, 597 (1854) as still controlling in Arkansas:

> [T]he party to be charged in a contract, must not only express his assent that he will be bound, but he must be endowed with such degree of reason and judgment as to enable him to comprehend the subject. The assent, which is requisite to give validity to a promise, supposes a free, fair, and serious exercise of the reasoning faculty.

Simply put, there is no evidence before this Court to support a finding that Etta Strange gave to Sheila Strange authority to execute the optional arbitration agreement. Therefore, Sheila Strange did not bind the estate of Etta Strange when she executed the arbitration agreement. See generally, Henslin v. Hamilton1987 WL 11587 (Ark. App. 1987)("neither the agency nor the scope of the agency can be established by the declarations or actions of the purported agent"). Accordingly, Defendants' Motion must be denied.

B. The Agreement is Impossible to Perform.

The FAA provides that a written provision in a contract involving commerce to arbitrate a controversy arising out of that contract is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). Defendants have failed to meet their burden of proving a valid and enforceable arbitration agreement here. Specifically, as written and through no fault of the Plaintiff, the arbitration agreement Defendants seek to enforce is impossible to perform. As such, Plaintiff submits that the parties are discharged from any duties they might otherwise have under the agreement.

The arbitration agreement calls for binding arbitration between the contracting parties to be conducted "in accordance with the National Arbitration Forum Code of Procedure." The agreement then goes on to adopt and incorporate the terms of the NAF Code into the agreement:

> [a]ny and all claims, disputes and controversies... shall be resolved exclusively by binding arbitration to be conducted... in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement....

See Defendants' Exhibit A.

The terms of the NAF Code are the terms of the agreement. NAF Code Rule 1, in turn, provides that arbitrations conducted pursuant to the NAF Code "shall be administered only by the National Arbitration Forum or by any entity or individual providing administrative services by agreement with the National Arbitration Forum." See NAF Code of Procedure attached hereto as Exhibit 2. The NAF Code provides further that the arbitration claims procedure may begin only with the filing of a claim with the NAF: "A party begins an arbitration by filing with the Forum a properly completed copy of the Initial Claim described in Rule 12, accompanied by the appropriate filing fee which appears in the Fee Schedule. The Forum reviews the Claim, opens a file, assigns a file number, and notifies the claimant, who then serves the Respondent in accord with Rule 6." NAF Code Rule 5. Both the Initial Claim and any response thereto must be filed with the NAF. NAF Code Rule 7. The selection of an arbitrator is from a list provided by the NAF. NAF Code Rule 21. All fees, including fees for filing an Initial Claim, Response, Request, Objection, or any other document, as well as hearing fees, must be paid to the NAF in U.S. Dollars and are non-refundable. NAF Code Rule 44.

Through adoption and incorporation of the NAF Code of Procedure, the terms of the agreement specifically and expressly call for arbitration to be conducted by and through the NAF, but that is no longer possible. On July 14, 2009, the Attorney General of the State of Minnesota filed suit against the NAF "alleging that it misrepresented its independence and hid from consumers and the public its extensive ties to the collection industry." See Press Release of Minn. Attorney General, dated July 14, 2009, attached hereto marked as Exhibit 3. According the Minnesota Attorney General, Lori Swanson, "[t]his is a classic case of the little guy getting stepped on by fine print contracts." Id. The complaint alleged that, in an effort to turn a profit, the NAF told "consumers, the public, courts, and the government that it is independent and operates like an impartial court system" while also wooing corporations into naming the NAF as the arbitrator in pre-dispute arbitration agreements. Id.

> The lawsuit alleges that the National Arbitration Forum, while holding itself out as impartial, works behind the scenes-along side creditors and against the interests of ordinary consumers-to convince credit card companies and other creditors to insert arbitration provisions in their customer agreements and then appointing the Forum to decide the disputes. The lawsuit alleges that the Forum pays commissions to executives whose job it is to convince creditors to put mandatory arbitration clauses in their customer agreements. The suit alleges that the Forum does this to generate arbitration filings in the Forum-and hence, revenue-for itself.

Id.

Five days after the Minnesota suit was filed, the NAF settled with the Minnesota Attorney General and agreed to no longer conduct any arbitrations pursuant to pre-dispute consumer agreements:

> Under the settlement, the National Arbitration Forum will, by the end of the week, stop accepting any new consumer arbitrations or in any manner participate in the processing or administering of new consumer arbitrations. The company will permanently stop administering arbitrations involving consumer debt, including credit cards, consumer loans, telecommunications, utilities, health care, and consumer leases.

See Press Release of Minn. Attorney General, dated July 20, 2009, attached hereto as Exhibit 4 (emphasis added); see also Press Release of NAF, National Arbitration Forum to Cease Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges, dated July 19, 2009, attached hereto as Exhibit 5; and Arbitration **Abuse**: an Examination of Claims Files of the National Arbitration Forum, July 20, 2009 Report of the Domestic Policy Subcommittee Majority Staff Oversight and Government Reform Committee House of Representatives, Dennis J. Kucinich, Chairman, attached hereto as Exhibit 6.

The arbitration agreement Defendants seek to enforce is a consumer, pre-dispute contract calling for arbitration to be conducted by and pursuant to the rules of the NAF. But through no fault of the Plaintiff, the forum chosen by Defendants in their agreement no longer permits the administration of pre-dispute agreements in the present context.

It is black letter law in Arkansas that, to be enforced, contracts must be valid as written. Arkansas courts will not re-write a contract for the parties- "to do so would mean that the court would be making a new contract and it has consistently held that this will not be done." Bendinger v. Marshalltown Trowel! Co., 338 Ark. 410, 419, 994 S.W.2d 468, 473 (Ark. 1999). Instead, it is the duty of the Court to enforce agreements only as written by the parties thereto. See Seidenstricker Farms v. Doss Family Trust, 372 Ark. 72, 78, 270 S.W.3d 842, 847 (2008) (holding that Court will "read into the contract words that are not there"); Curry v. Commercial Loan & Trust Co., 241 Ark. 419, 407 S.W.2d 942 (1966); Morrilton Sec. Bank v. Kelemen, 70 Ark. App. 246, 248, 16 S.W.3d 567, 569 (2000); Restatement (Second) of Contracts, § 261. The Arkansas Supreme Court has made it clear that it will not make an invalid contract valid by rewriting it. See Rector-Phillips-Morse v. Vroman, 253 Ark. 750, 489 S.W.2d 1 (1973).

In the context of an arbitration agreement, the Court's duty is the same, to only construe and enforce the terms of the contract as written by the parties. Alltel Corp. v. Sumner, 360 Ark. 573, 576, 203 S.W.3d 77, 80 (2005) ("a court cannot make a contract for the parties but can only construe and enforce the contract that they have made"). Moreover, as held by the United States Supreme Court, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."' AT & T Techs., Inc. v. Commcns. Workers of Am., 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Because the arbitration agreement in issue specifically incorporates the NAF rules, which require administration of the arbitration by the NAF, and the NAF now refuses to arbitrate these claims, this agreement cannot be enforced pursuant to its express terms.

Other courts have similarly ruled that arbitration agreements are unenforceable where application of the NAF rules or designation of the NAF as the arbitral forum is an integral term of the arbitration agreement. In fact, a nearly identical version of Defendants' arbitration agreement was held unenforceable by a Pennsylvania appellate court in Stewart v. GGNSC-Canonsburg, L.P., 2010 PA Super. 199 (Nov. 4, 2010), slip op. and arbitration agreement collectively attached hereto as Exhibit 7. In Stewart, the Pennsylvania appellate court analyzed the integral nature of the NAF Code of Procedure to GGNSC's arbitration agreement. Under § 5 of the Federal Arbitration Act, an arbitration agreement "will not fail because of the unavailability of the chosen arbitrator unless the parties' choice of forum is an 'integral part' of the agreement to arbitrate, rather than an ancillary logistical concern.'" Id. In Stewart, the Pennsylvania court found that the designation of the NAF Code of Procedure was integral and that it could not take NAF, the forum, out without completely rewriting the rules for arbitration. Therefore, it deemed the agreement unenforceable. Id.

A recent decision by the United States District Court for the Western District of Washington provides further guidance. See Carideo v. Dell, Inc., 2009 WL 3485933 (W.D. Wash. Oct. 26, 2009). There, as in the present matter, Dell sought to enforce an arbitration agreement calling for binding consumer arbitration to be administered by the NAF. Recognizing that the NAF was an integral part of the agreement and no longer available, the District Court held that Dell was not entitled to compel arbitration of the plaintiffs claims:

Finally, the court is mindful that the arbitration clause not only selects NAF as arbitrator, but designates NAF's code of procedure as the applicable rules. This both underscores NAF's importance to the arbitration clause and raises concerns regarding whether any NAF rules remain "in effect" that could be applied by a substitute arbitrator. Dell notes that while NAF stopped accepting new consumer arbitrations after July 24, 2009, it continues to arbitrate previously-filed matters under its rules. (Def. Supp. at 6.) Dell argues that, as a consequence, NAF rules are in effect and may be applied by a substitute arbitrator. (Id.) The court disagrees. While NAF may continue to apply certain rules to previously-filed consumer arbitrations, it does not follow that these rules remain "in effect" for arbitrations filed after July 24, 2009. Rather, because NAF does not arbitrate consumer disputes filed after July 24, 2009, there are simply no NAF rules currently in effect for such arbitrations. Therefore, even were the court to appoint a substitute arbitrator, the court is not persuaded that there would be applicable NAF rules "in effect" for the substitute arbitrator to apply.

In sum, the court concludes that the selection of NAF is integral to the arbitration clause. The unavailability of NAF as arbitrator presents compounding problems that threaten to eviscerate the core of the parties' agreement. To appoint a substitute arbitrator would constitute a wholesale revision of the arbitration clause. In addition, this type of substitution would pose additional problems on the facts of this case because putative class members would have no knowledge that potential claims would be arbitrated by a substitute arbitrator. Like the Appellate Court of Illinois in Carr, the court finds that the selection of NAF is neither logistical nor ancillary to the arbitration clause. The court therefore declines to appoint a substitute arbitrator pursuant to § 5 of the FAA.

Carideo, 2009 WL 3485933, at *5.

Likewise, an Illinois Appellate Court held the specific designation of the NAF as the exclusive arbitration forum to be an integral part of the arbitration clause in Carr v. Gateway 395 III. App. 3d 1079, 918 N.E. 2d 598 (Nov. 24, 2009)(appeal allowed, 235 II.2d 586, (Il. Jan 27, 2010)). Carr involved a class action dispute alleging that Gateway, Inc. had engaged in conduct that was likely to mislead, and had misled, the public by making or disseminating misleading statements regarding the power and speed of the Pentium 4. Gateway filed a motion to compel arbitration arguing that the class representative's computer purchase was subject to a "Limited Warranty Terms and Conditions Agreement," and that the Agreement contained an arbitration clause which would encompass the complaint at issue. That arbitration clause specifically provided that, "You agree that any Dispute between You and Gateway will be resolved exclusively and finally by arbitration administered by the National Arbitration Forum (NAF) and conducted under its rules." Following the trial court's decision that the arbitration agreement was not enforceable, the NAF ceased administering consumer arbitrations. Because circuit court's orders can be affirmed on any basis in the record, the appellate court evaluated the impact of NAF's unavailability on the validity of the arbitration clause.

First, the appellate court declined to hold that section 5 of the Federal Arbitration Act can be used to reform the arbitration provision. Instead, it determined that the specific designation of the NAF as the exclusive arbitration forum is an integral part of the arbitration clause:

The NAF has a very specific set of rules and procedures that has implications for every aspect of the arbitration process. "[T]he designation of a [specific arbitral] forum such as the [NAF] 'has wide-ranging substantive implications that may affect, inter alia, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration.' "Grant, 383 S.C. at 132, 678 S.E.2d at 439 (quoting Singleton v. Grade A Market, Inc., 607 F.Supp.2d 333, 340 (D.Conn.2009)). In addition, the language of the Agreement makes clear that Gateway intended for the selection of the NAF to be integral to the arbitration provision, when it provided, "Should either party bring a Dispute in a forum

other than NAF, the arbitrator may award the other party its reasonable costs and expenses, including attorneys' fees, incurred in staying or dismissing such other proceedings or in otherwise enforcing compliance with this dispute resolution provision."

Carr v. Gateway 395 III. App. 3d 1079, 1085-86, 918 N.E. 2d 598, 603 (Nov. 24, 2009)

A federal district court in Texas also held the selection of NAF to be an integral part of an arbitration agreement in Ranzy v. Extra Cash of Texas, 2010 WL 936471 (S.D. Texas). In Ranzy, Cheryl Ranzy borrowed $500.00 in the form of a payday loan from defendant Extra Cash of Texas. When Ranzy initially borrowed the money from Extra Cash, she signed a promissory note and a Credit Services Organization Agreement, which provided that all disputes "shall be resolved... by and under the Code of Procedure of the [NAF]." Additionally, "all claims shall be filed at any NAF office," or on the NAF web site.

As it turns out, Ms. Ranzy was unable to pay back the loan and Extra Cash made attempts to collect. When those attempts to collect did not succeed, a "collector" began calling her husband, her **elderly** mother, and her supervisor, representing to them that the caller was investigating a fraudulent check Ranzy had written to Extra Cash. Ranzy brought this suit against Extra Cash and others alleging violations of the Texas **Finance** Code, the Federal Debt Collection Practices Act, and RICO. Defendants sought to compel arbitration and to stay the action pending arbitration.

The district court found that the NAF was an integral part of the arbitration provision: "This is mandatory, not permissive language and evinces a specific intent of the parties to arbitrate before the NAF. In light of the plain meaning of the arbitration provision, the court cannot appoint another arbitrator even though the NAF is an unavailable forum-the parties 'cannot be compelled to arbitrate a dispute if [they have] not agreed to do so.' The motion to compel arbitration is, therefore, denied." Ranzy v. Extra Cash of Texas, Inc, 2010 WL 936471, *5 (S.D.Tex., March 11, 2010Xcitations omitted). On appeal to the United States Court of Appeals for the Fifth Circuit, the appellate court affirmed the district court's decision, holding:

> Here, the arbitration agreement plainly states that Ranzy "shall" submit all claims to the NAF for arbitration and that the procedural rules of the NAF "shall" govern the arbitration. Put differently, the parties explicitly agreed that the NAF shall be the exclusive forum for arbitrating disputes... a federal court need not compel arbitration in a substitute forum if the designated forum becomes unavailable...Therefore, we hold that the district court properly denied the motion to compel arbitration.

Ranzy v. Tijerina, 2010 WL 3377235 (5th Cir. 2010).

On two occasions the Mississippi Supreme Court has held nursing home arbitration agreements to be unenforceable based on this same doctrine. On August 7, 2008, the Mississippi Supreme Court considered the enforceability of an arbitration agreement executed on February 19, 2003, which contained strikingly similar language to that contained in this agreement regarding the application of AHLA rules. Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby, 994 So.2d 159, 161 -162 (Miss. 2008). The language in the Barnes contract provided:
It is understood and agreed by the Facility and Resident and/or Responsible Party that any legal dispute, controversy, demand or claim (hereinafter referred to as "claim" or "claims") that arises out of or relates to the Admission Agreement or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration... in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, which are hereby incorporated into this agreement*....

*Information regarding AHLA and/or its arbitration services and rules is available at: American Health Lawyers Association, 1025 Connecticut Avenue NW, Suite 600, Washington, D.C. 20036-56405, Phone: (202) 833-1100/ Fax: (202) 833-1105, www. healthlawyers. org or American Health Lawyers Association Alternative Dispute Resolution Service, 1666 Connecticut Avenue NW, Washington, DC 20009, Phone (202)-387-4176/Fax (202) 478-5155, e-mail: adr@ healthlawyers. org.

Magnolia Healthcare, Inc. v. Barnes ex rel Grigsby, 994 So.2d 159, 161 - 162 (Miss. 2008).

Like the NAF, though in a narrower context, AHLA ceased administering pre-dispute agreements to arbitrate consumer health care liability claims in 2004. Because the arbitration agreement considered in Barnes was a pre-dispute health-care liability claim, the Mississippi Supreme Court reached "the inescapable conclusion is that there was no valid agreement to arbitrate" under AHLA rules. Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby, 994So.2d 159, 161 -162 (Miss.2008).

On August 6, 2009, the Mississippi Supreme Court again declined to enforce a nursing home arbitration agreement on the basis of impossibility of performance under the arbitral forum's rules. See Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds, 14 So.3d 695 (Miss. 2009). The agreement sought to be enforced in Moulds selected the American Arbitration Association as the arbitrator of any disputes between the parties. As recognized by the Moulds Court, "The AAA announced nearly seven years ago that it 'no longer accept[s] the administration of cases involving individual patients without a post-dispute agreement to arbitrate."' Id. at 706.

Because the AAA rules, adopted by the arbitration agreement in Moulds precluded the service, or anyone following those rules, from enforcing the agreement absent a post-dispute agreement to arbitrate, the Mississippi Supreme Court found the agreement to be unenforceable.

> [A] court should not become a party to redrafting or reforming agreements. A court should not be used to reform a contract to select a forum not anticipated by either of the parties. To do so, the court must become involved and assume powers over parties. Courts' involvement is limited to determining whether to compel agreed-upon arbitration vel non. As the court's participation and involvement increase, the reason for arbitration in the first place becomes greatly diminished, and its purpose defeated.

Id. at 707.

In so holding, the Supreme Court reaffirmed the rationale of Barnes stating,

> The rules of the organization referenced in the agreement, the AAA, require that it refuse to administer arbitrations of this type of case, unless the parties agree post-dispute to be bound by arbitration. Thus, not only are our courts being asked to rewrite the agreement in favor of the drafter, but also now to select a forum not anticipated by either party. We decline. The whole purpose of arbitration is to avoid dispute resolution in a court of law. In declining, we follow the rationale espoused by a plurality of this Court in Barnes, 994 So.2d at 161-62.

Id. at12.

Like the Mississippi Supreme Court, the South Carolina Supreme Court has also applied the doctrine of impossibility of performance in construing a nursing home arbitration agreement. In Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009), the nursing home-defendant sought to compel arbitration of the plaintiff's claims of wrongful death, survival, and loss of consortium for injuries sustained by a resident at the facility. The arbitral forum chosen by the agreement in Grant—the American Health Lawyers Association—was no longer conducting arbitration pursuant to pre-dispute arbitration agreements. Notwithstanding the state's public policy in favor of arbitration, the high Court held that the parties to the agreement had designated a specific forum for resolution of disputes and, because that forum was no longer available, the parties were discharged from their obligations under the agreement, and the agreement was unenforceable.

Faced with "mounting legal and legislative challenges," the NAF has resolved that it, too, will no longer administer consumer-related arbitration claims based upon a pre-dispute agreement. See the NAF Press Release. Yet, by the very terms of this

agreement, the NAF Rules and the NAF as a forum are the essence of the bargain. It is not the place of this Court to re-write Defendants' agreement for them, particularly when fundamental rights are at stake. Moreover, the parties cannot be forced into binding arbitration on claims which they did not agree to arbitrate. See Baldwin Co. v. Weyland Mach. Shop, 14 Ark. App. 118, 685 S.W.2d 537 (1985). For this reason, Defendants' Motion must be denied.

1. Designation of the NAF Code of Procedure and NAF as the Arbitral Forum Cannot be Severed.

By incorporating the NAF Code of Procedure into the arbitration agreement, Defendants' agreement requires that the NAF serve as the arbitral forum over any arbitration involving the parties. Specifically, the NAF Code provides that arbitrations conducted pursuant to the NAF Code "shall be administered only by the National Arbitration Forum or by any entity or individual providing administrative services by agreement with the National Arbitration Forum." NAF Code Rule 1. Not only does the selected NAF arbitrator enforce the rules, but NAF staff is also imposed with the duty to administer the arbitrations that take place under the Code. NAF Code Rule 2N. The NAF Code further provides that an arbitration claims procedure may begin only with the filing of a claim with the NAF: "A party begins an arbitration by filing with the Forum a properly completed copy of the Initial Claim described in Rule 12, accompanied by the appropriate filing fee which appears in the Fee Schedule. The Forum reviews the Claim, opens a file, assigns a file number, and notifies the claimant, who then serves the Respondent in accord with Rule 6." NAF Code Rule 5. Both the Initial Claim, any response thereto, and all other documents and proof of service must be filed with the NAF. Filing with the NAF may be completed in a variety of different manners—by mail, fax, email, or online. NAF Code Rule 7.

Once the claim is filed, NAF's involvement continues. NAF issues the scheduling notices. NAF Code Rule 5C, 8C. The NAF maintains a dispositive list of all party addresses for service. NAF Code Rule 6.

NAF is intimately involved in the arbitrator selection process. The selection of an arbitrator is submitted to the NAF from a list provided by the NAF. NAF Code Rule 21. All arbitrator resumes must be fielded by NAF. Further, NAF reserves the right to declare any listed arbitrator disqualified. NAF Code Rule 23. NAF, not the parties, selects arbitrators for expedited proceedings. NAF Code Rule 21. Moreover, NAF selects the chair of any panel of arbitrators. NAF Code Rule 22. Parties are not allowed to communicate with their arbitrator directly but must direct all communications through NAF. NAF Code Rule 24.

NAF retains the right to request the dismissal of any claim it deems is not supported by the evidence or existing law. NAF Code Rule 41. Moreover, NAF may dismiss any claim if all fees have not been paid or if a case has been inactive for more than 60 days. NAF Code Rule 41. Any request submitted to NAF is decided, not by the arbitrator, but by NAF. NAF Code Rule 18.

NAF selects the location for a participatory hearing under certain circumstances. NAF Code Rule 32. All requests for extension of time and for adjournment must be filed with the NAF. NAF Code Rule 9. All fees, including fees for filing an Initial Claim, and every document filed thereafter, including the Response, any Request, Objection, and any other document, and copies of documents, as well as hearing fees, must be paid to the NAF in U.S. Dollars and are non-refundable. NAF Code Rules 9, 12, 13,14, 15, 16, 17, 18,19, 26, 27, 39, 44. Fees are specific. Claims that exceed $30,000 pay for a 180 minute hearing. Any hearing beyond that amount of time is subject to additional fees. NAF Code Rule 34. If the parties want the award to contain findings of fact and conclusions of law, there is a fee. NAF Code Rule 37. Arbitrators are prohibited from entering any award or order if NAF has not received all fees to which it is entitled. NAF Code Rule 39. Further, the arbitrator may award fees to NAF if any are unpaid. NAF Code Rule 44. The amount of fees for filing, commencement of cases, administrative fees, request fees, objection fees, hearing fees, expedited hearing fees, and other fees are all set by NAF, the most common of which are specifically set forth in the NAF Fee Schedule.

The Rules further specify that the arbitrator is not bound by the rules of evidence. NAF Code Rule 28, 35. Limits on discovery are listed with specification. NAF Code Rule 29, 31. No record is kept of any hearing unless the parties agree or the arbitrator orders otherwise. NAF Code Rule 35. Arbitrators must render awards within 20 days. If arbitration is by a panel, the majority rules. NAF Code Rule 37.

It is clear that the NAF Code of Procedure cannot be separated from NAF itself. While the arbitration agreement may not, on its face, specify that NAF must administer any arbitration, the agreement does incorporate the Code of Procedure, which sets forth in detail how the selection process, led and directed by NAF, works. Moreover, those Rules mandate that the arbitrator be an NAF approved arbitrator and that NAF will administer all claims. This Court cannot sever the NAF Code of Procedure from this document without gutting it of very specific timeframes, fees, procedures, and a necessary forum.

Where a contract contains terms later held to be invalid, Arkansas courts will not make a new contract for the parties by altering those terms. As the Arkansas Supreme Court has held, "We are firmly convinced that parties are not entitled to make an agreement, as these litigants have tried to do, that they will be bound by whatever contract the courts may make for them at some time in the future. Such a doctrine would confer upon the courts the power to make private agreements-a matter certainly not within the judicial province as it has been traditionally understood in our law." Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, 753, 489 S.W.2d 1, 4 (Ark. 1973).

Other courts also recognize that where a severance would amount to a court rewriting an arbitration agreement, severing is not a viable option. Applying Washington law, the Washington Supreme Court stated in McKee v. AT & T Corp., 164 Wash.2d 372, 402-03, 191 P.3d 845 860 -61 (Wash 2008)

> AT & T would have us strike the unconscionable provisions from the dispute resolution section and enforce the rest of the dispute resolution section. However, when unconscionable provisions so permeate an agreement, we strike the entire section or contract.

See Zuver, 153 Wash.2d at 320,103 P.3d 753 (quoting Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir.2003); Alexander v. Anthony Int'l LP, 341 F.3d 256, 271 (3d Cir.2003)).

Likewise, the North Carolina Supreme Court declined to sever unconscionable provisions of an arbitration clause that effectively deprived plaintiffs of a forum in which they could effectively vindicate their rights- 'Severing the unenforceable provisions of the arbitration clause at issue in the instant case would require the Court to rewrite the entire clause, and we decline to do so here." Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 108-109, 655 S.E.2d 362, 373 - 374 (N.C. 2008).

In Place at Vero Beach, Inc. v. Hanson, 953 So.2d 773, 774 -776 (Fla.App. 4 Dist. 2007), declined to sever from an arbitration agreement an arbitral forum's rules that created a different legal standard than was permitted under Florida law.
The Place argues further that the trial court, using the severability clause in the agreement, should have severed the portion of the arbitration agreement which detailed that the AHLA and its rules should be used in arbitrating any disagreement. "As a general rule, contractual provisions are severable, where the illegal portion of the contract does not go to its essence, and, with the illegal portion eliminated, there remain valid legal obligations." Fonte v. AT & T Wireless Servs., Inc., 903 So.2d 1019, 1024 (Fla.2005).The trial judge determined, unlike the agreement addressed in Fonte, he would have to rewrite the terms of the Agreement to give it effect.

We find the trial court correctly refused to sever portions of the arbitration clause. While the Agreement did contain a severability clause, the clause allows provisions, not portions of provisions, of the Agreement to be severed. See Voicestream Wireless Corp. v. U.S. Comm., Inc., 912 So.2d 34 (Fla. 4th DCA 2005) (limitation of liability clause and exclusion of right to appeal arbitrator's decision were separate from the arbitration agreement and severable from the agreement). While in some cases offending sentences can be severed from a provision, these are instances in which there is no "interdependence between the arbitration clause and the remaining clauses of the agreement which would [require] the trial court to rewrite or 'blue pencil' the agreement." Healthcomp Evaluation Serv. Corp. v. O'Donnell, 817 So.2d 1095, 1097 (Fla. 2d DCA 2002). In this case, the arbitration clause is built around the Place's intent that the AHLA and its rules would control the arbitration. The trial judge

correctly determined that he would be unable to simply sever a sentence from the provision, but would be forced to add the requirements that Chapter 400 and the Florida rules of arbitration would apply.

Another example is from the Eastern District of Pennsylvania, which wrote,
severance of these unlawful terms would not be sufficient since replacing the agreement's provisions on arbitration-related fees and discovery with the rules of JAMS and/or AAA "would be in effect to rewrite the agreement. Courts cannot cure contracts by reformation or augmentation." (Fitz, supra, 118 Cal.App.4 th at p. 727, 13 Cal.Rptr.3d 88; accord, Armendariz, supra, 24 Cal.4 th at pp. 124-125, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Bluelining in this case will require the redrafting of the agreement. The Court declines to rewrite the agreement, at Linden's request, to save an unconscionable arbitration provision which Linden itself drafted and now seeks to enforce. Rather than provide a reasonable alternative for dispute resolution, this agreement compels a one-sided resolution of disputes between the parties.

Bragg v. Linden Research, Inc. 487 F.Supp.2d 593, 612(E.D.Pa.,2007)

These cases, which address severance of unconscionable arbitration provisions, are consistent with Arkansas precedent regarding contracts generally- a court should not rewrite a contract for parties under the guise of construction. See Alltel Corp. v. Sumner, 2005 WL 318679 (Ark.)("a court cannot make a contract for the parties but can only construe and enforce the contract that they have made"); see also 17 Am.Jur.2d Contracts section 242 (1964):

> It is a fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction. In other words, the interpretation or construction of a contract does not include its modification or the creation of a new or different one. It must be construed and enforced according to the terms employed, and a court has no right to interpret the agreement as meaning something different from what the parties intended as expressed by the language they saw fit to employ. A court is not at liberty to revise, modify, or distort an agreement while professing to construe it, and has no right to make a different contract from that actually entered into by the parties.

If the contractual designation and incorporation of the NAF Code of Procedure were severed from this arbitration agreement, this Court would have to step in and rewrite the terms for the parties. New procedures for selecting an arbitrator would have to be determined. A new fee structure would have to be imposed. Rules regarding discovery would have to be set forth. A time frame for decisions and actions by the parties would have to be set forth. In the end, the agreement would not be the same as the document before the Court today. This Court cannot force the parties to arbitrate other than pursuant to the terms in the agreement. See Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby, 994 So.2d 159, 162 (Miss. 2008)(quoting AT & T Techs., Inc. v. Commcns. Workers of Am., 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Because those terms are impossible to perform, the agreement is unenforceable.

ventat te specific forum required by the agreement that Defendants drafted is no longer available, the agreement is not valid and enforceable against Etta Strange. Plaintiff is not willing to agree to new terms at this juncture. Accordingly, the parties are discharged from any obligations they may have had under the agreements pursuant to the doctrine of impossibility. It is not the place of this Court to re-write Defendants' agreement for them, particularly when fundamental rights are at stake. Accordingly, Defendants' Motion should be denied.

C. The NAF Fees are Unconscionable.

In Arkansas, "choice-of-forum clauses in contracts have generally been held binding, unless it can be shown that the enforcement of the clause would be unreasonable and unfair." RMP Rentals v. Metroplex, Inc., 356 Ark. 76, 80,146 S.W.3d 861, 864 (Ark. 2004). In assessing whether a particular contractual provision is unconscionable, the court must review the totality of the circumstances surrounding the negotiation and execution of the contract. National Union, supra (citing State v. R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299 (1999)). Two important considerations include, 1 there is a gross inequality of bargaining power between the parties, and 2) whether the aggrieved party was made aware of and comprehended the provision in question. Id.

In this case, the totality of the circumstances render this arbitration agreement unfair, unreasonable, and unconscionable. Even without discovery, Plaintiff submits that there obviously was a gross disparity in bargaining power and education between the parties. It cannot fairly be claimed that the parties to the purported agreement enjoyed equal bargaining power. Defendants are aware that the admissions process can be, and often is, an overwhelming experience for families. Yet, Defendants continue to ask residents and their families to sign at one sitting, not just those documents "necessary" for admission, but a whole host of documents that experience has shown are too lengthy and cumbersome for an average family member to have the time or energy to read in one sitting. Indeed, Defendants cleverly reserve the arbitration agreement for the end of this exhausting process. There can be no knowing and voluntary waiver of the right to trial by jury under these circumstances because the horrific mistreatment and **abuse** that later occurs cannot be comprehended upon the admission of a loved one to a long-term care facility.
Attorneys litigating nursing-home cases on both sides say arbitration has quickly become the rule rather than the exception. Critics say the binding agreements are determining the outcome of high-stakes cases of vulnerable patients that should instead be handled by the courts. Too often, they say, people don't understand whether the clauses are mandatory, or that they are signing away their rights to sue. "It is an unfair practice given the unequal bargaining position between someone desperate to find a place for their loved ones and a large corporate entity like a nursing home," said Sen. Mel Martinez, a Florida Republican who introduced legislation along with Democratic Sen. Herb Kohl of Wisconsin.

The biggest arbitration provider, the American Arbitration Association, frowns on agreements requiring arbitration in disputes over nursing-home care and generally refuses such cases. Some patients "really are not in an appropriate state of mind to evaluate an agreement like an arbitration clause," says Eric Tuchmann, the association's general counsel. A second group, the American Health Lawyers Association, also avoids them. Other arbitration groups say they generally accept the cases if the agreements comply with the law.

Koppel, Nathan, Nursing homes, in bid to cut costs, prod patients to forgo lawsuits, Wall Street Journal, April 11, 2008.

Further, Defendants do not disclose in their arbitration agreement that the daily fees for pursuing arbitration are substantially higher than those necessary to simply file a claim in Arkansas Circuit Courts, where the parties do not pay the judge by the day to hear the case, read the pleadings and reach a decision. Defendants should not be allowed to impose upon a nursing home resident, with unequal bargaining power, rules of procedure that require exorbitant up-front fees without disclosing to the resident what those rules and fees are. According to the NAF Large Claim Schedule, the Claimant must pay up front filing and commencement fees, which, according to the Fee Schedule will equal or exceed $5000. Further, additional fees are assessed by the Forum for motions filed and for the Arbitrator's time spent on the case. The fee schedule, found at Exhibit 2, provides as follows:

FEES FOR LARGE CLAIMS (Claims $75,000 or more)

Filing Fee: The fee paid by the Claimant for filing a Claim.

Commencement Fee: The fee assessed when the arbitration is commenced. under

Rule 10B. The Claimant pays the Commencement Fee, unless otherwise provided by the agreement of the Parties or the law.

Administrative Fee: The fee assessed by the Forum for its case work.

Hearing Fee: The fee for the Arbitrator(s) services.

Claim Amount	Filing Fee	Commencement Fee	Administrative Fee
$75,000 -125,000	$300	$300	$500
$125,001-250,000	$400	$400	$750
$250,001-500,000	$500	$500	$1,000
$500,001-1,000,000	$1,000	$1,000	$1,250
$1,000,001-5,000,000	$1,750	$1,750	$1,500

See Exhibit 2.

Compared to the cost of filing a complaint in Pulaski County Circuit Court, the fees Plaintiff would incur as a result of submitting her claim to arbitration are clearly unreasonable. Moreover, they would prohibit Etta Strange from being able to bring her personal injury claims against Defendants. These terms go beyond selecting a forum. Instead, they affect the very ability of an **elderly** individual to even bring her claims against this corporate nursing home giant.

The United States Supreme Court recognized in Green Tree v. Randolph, 531 U.S. 79 (2000), that the existence of high arbitration costs could preclude a litigant from effectively vindicating her rights in the arbitral forum. As to the potentially burdensome costs of arbitration, the party resisting arbitration has the burden of showing the likelihood that arbitration would be prohibitively expensive. Burden v. Check into Cash of Ky., LLC, 267 F.3d 483 (6th Cir. 2001)(cert. denied, 535 U.S. 970 (2002)). The appropriate inquiry for determining whether an arbitration clause is unenforceable due to costs is "a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether the cost differential is so substantial as to deter the bringing of claims." Rosenberg v. BlueCross BlueShield of Tennessee, Inc., 219 S.W.3d 892 (Tenn.Ct.App. 2006). Specific, concrete proof of costs is required, and not speculation. Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003).

The selection of the NAF Rules in this arbitration agreement amounts to more than just choosing a set of procedural rules—it is an attempt by Defendants to deter residents from bringing claims for injuries. If the selection of arbitration were benign, one would think Defendants would disclose the unusually high fees a resident would incur in arbitration. Instead, the agreement drafted by Defendants is silent as to the oppressive fees associated with pursuing any significant claim against them. Under similar circumstances, the Tennessee Court of Appeals held that a mandatory arbitration agreement contained within a nursing home admissions package is unconscionable where the facility gains an unfair advantage under its terms. Hill v. NHC/Nashville, LLC et al., 2008 Tenn. App. LEXIS 265 (Tenn. Ct. App. 2008). Indeed, very similar fee schedules to those that rendered the arbitration agreement in Hill unconscionable are adopted by the arbitration agreement here. The Hill court noted that, "A party who has been damaged by the actions of NHC cannot seek redress in the courts if the arbitration agreement is enforced, but may, due to expense that would not accompany the initiation of litigation, be precluded from seeking relief in the arbitral forum." Id. Enforcement of the instant arbitration agreement would, likewise, be unconscionable.

II. There Is No Jurisdictional Authority To Enforce The Arbitration Agreement Under the Federal Arbitration Act.

Defendants seek to compel arbitration of this matter pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. But the FAA, under its express terms, applies only to "a written contract evidencing a transaction involving commerce." 9 U.S.C. §

2 (emphasis added). Commerce is defined under the Act as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." 9 U.S.C. § 1.

As with the burden of proving a valid, enforceable arbitration agreement, the burden of proving that the contract "evidences a transaction involving commerce" falls squarely upon the party seeking to compel arbitration, in this case the Separate Defendants. See Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884, 892 (Ark. 2007) (affirming the circuit court's denial of motion to compel arbitration agreement contained in an employment contract because the movant failed to prove the contract evidences a transaction involving commerce). Said the Arkansas Supreme Court:

A review of the employment agreement reveals that Dr. Tahiri contracted with ADC to provide medical services, not to purchase interstate goods, nor to receive payment from out-of-state insurance companies. No testimony was presented as to how much, if any, of the out-of-state supplies purchased by ADC were used by Dr. Tahiri. Nor was any evidence presented as to whether Dr. Tahiri was required to attend out-of-state conferences to continue his medical education. Most specific to the employment contract at issue is that ADC was a local clinic, which contracted *167 with Dr. Tahiri to provide medical services to its local patients. Based on these factors, we hold that Dr. Tahiri's employment agreement did not facilitate ADC's alleged interstate business activities and did not evidence a transaction involving commerce. See, e.g., Lehman Props., LTD. P'ship v. BB & B Constr. Co, Inc., 81 Ark.App. 104, 98 S.W.3d 470 (2003) (holding that where the appellee purchased construction supplies locally, where all of the parties were situated in Arkansas, where the work was done in Arkansas, and where the contract itself to construct a subdivision did not evidence a transaction involving interstate commerce, the circuit court was correct in finding that the FAA did not apply).

Were this court to hold otherwise, it would equate to a finding that the FAA is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce, i.e., use of interstate telephone lines or of interstate mail. We do not interpret the jurisprudence concerning the FAA to include any and every contract. See, e.g., Volt Info. Scis., Inc. v. Board of Trustees of Leland, [489 U.S. 468 (1989) (observing that the FAA contains no express preemptive provision). Instead, the question is simply whether the contract evidences a transaction involving commerce. And further, as already stated, it is the burden of the party seeking to compel arbitration to prove that the contract at issue involves commerce. See, e.g., Potts v. Baptist Health Sys., Inc., 853 So.2d 194, 199 (Ala. 2002) ("The burden of proof was on the defendants to provide evidence demonstrating that Potts's employment contract, or the transaction it evidenced, substantially affected interstate commerce."). Because we do not consider Dr. Tahiri's employment with ADC a transaction involving commerce and because ADC failed to meet its burden of demonstrating that the contract evidenced a transaction involving commerce, we hold that the matter does not fall within the ambit of the FAA. Thus, we affirm the circuit court's denial of the motion to compel arbitration

Tahiri, 257 S.W.3d at 892.

It matters not, said the Tahiri Court, that one of the parties to the agreement clearly engages in interstate commerce, purchasing supplies, et cetera from outside of the forum state. The crucial analysis is whether the contract itself evidences a transaction involving commerce.

In the present matter, Defendants have not proven that this arbitration agreement evidences a transaction involving commerce. Because the terms of the arbitration agreement provide that it "is not a precondition to admission or to the furnishing of services to the Resident by the Facility," and the agreement constitutes a separate, optional agreement regarding arbitration, the arbitration agreement cannot piggy-back its way to "involving commerce" by pointing to the admissions agreement as a whole, as it purports to do. See Defendants' Exhibit A. As in Tahiri, the arbitration agreement is a contract between two intrastate individuals, within the borders of the State of Arkansas, purportedly to arbitrate future disputes that would necessarily arise in Arkansas.

The fact that Defendants may engage in interstate commerce does not impact the analysis. Under the FAA, the crucial question is whether the contract itself evidences a transaction involving commerce. In this case, it clearly does not. The arbitration agreement does not call for the purchase of goods from out of state. In fact, the agreement does not call for the purchase of anything at all. Instead, it simply calls for any arbitration to take place "at the Facility." The FAA, therefore, does not apply to the arbitration agreement.

The only other avenue to enforce Defendants' motion would be under Arkansas law. However, the Arkansas Uniform Arbitration Act, Arkansas Code Annotated §16-108-201(b), specifically excludes the application of arbitration agreements to tort claims:

> (b) A written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that this subsection shall have no application to personal injury or tort matters, employer-employee disputes, nor to any insured or beneficiary under any insurance policy or annuity contract.

Id. (emphasis added).

As the Arkansas Supreme Court wrote,

> Under Arkansas law, certain matters are not arbitrable, regardless of the language used in an arbitration agreement. Written agreements to arbitrate have no application to tort matters, Ark.Code Ann. § 16-108-201 (1987) (in effect at the time these contracts were executed); see also Lancaster v. West, 319 Ark. 293, 891 S.W.2d 357 (1995); Jim Halsey Co. v. Bonar, 284 Ark. 461, 683 S.W.2d 898 (1985), and the complaint in effect at the time of the hearing stated a cause of action in tort rather than contract. In the absence of objection by an opposing party asserting prejudice or undue delay, a party may amend his complaint at any time without leave of the court. ARCP 15(a). Additionally, we have recognized that the existence of a contractual relationship between parties does not preclude the institution of a tort action. A party to a contract may sue on an independent tort claim. Quinn Cos. v. Herring-Marathon Group, Inc., 299 Ark. 431, 773 S.W.2d 94 (1989). That is not to say that we will declare a matter non-arbitrable merely because of the manner in which a party chooses to characterize his action. The claim must legitimately sound in tort.

Terminix Int'l. Co. v. Stabbs, 326 Ark. 239, 242, 930 S.W.2d 345, 347 (1996). Plaintiffs claims clearly sound in tort. The Complaint alleges causes of action for negligence, medical malpractice, and for violation of Etta Strange's residents' rights. Because Plaintiffs allegations sound in tort, the Court does not have the jurisdiction under Arkansas law to entertain Defendants' motion to compel arbitration. Defendants' Motion should be denied, and Plaintiff should be allowed to present her case to a jury.

III. In the Alternative, Discovery is Necessary to Resolve the Enforceability of the Arbitration Agreement.

In the alternative, Plaintiff requests that the Court direct the parties to proceed with discovery related to the enforceability of the arbitration agreement. Plaintiff further requests the ability, following completion of discovery, to supplement her response to Defendants' Motion with evidence supporting the defenses that are outlined herein

.It is well-established that a trial court has broad discretion in matters pertaining to discovery, and the exercise of that discretion will not be reversed absent an **abuse** of discretion that is prejudicial to the appealing party. Bennett v. Lonoke Bancshares, Inc., 356 Ark. 371, 376, 155 S.W.3d 15, 19 (2004); Ballard v. Martin, 349 Ark. 564, 79 S.W.3d 838 (2002); Loghry v. Rogers Group, Inc. 348 Ark. 369, 72 S.W.3d 499 (2002); Alexander v. Flake, 322 Ark. 239, 910 S.W.2d 190 (1995); Rankin v. Farmers

Tractor & Equipment Co., Inc., 319 Ark. 26, 888 S.W.2d 657 (1994); Jenkins v. International Paper Co., 318 Ark. 663, 887 S.W.2d 300 (1994).

Both the Federal Arbitration Act and the Arkansas Arbitration Act expressly hold that a court, in reviewing the enforceability of an arbitration agreement, may inquire into "such grounds as exist at law or in equity for the revocation of any contract." See 9 U.S.C. §2; See also, Ark. Code Ann. § 16-108-201 -224. Plaintiff has raised various contract defenses to Defendants' agreement, including lack of authority, unconscionability, and impossibility of performance. Unconscionability is an equitable defense that demands a highly fact-intensive inquiry into the "totality of circumstances surrounding the negotiation and execution of the contract." Jordan v. Diamond Equip. & Supply Co., 362 Ark. 142, 156, 207 S.W.3d 525, 535 (2005) (emphasis added). "Two important considerations are whether there is a gross inequality of bargaining power between the parties and whether the aggrieved party was made aware of and comprehended the provision in question." Id. There are no facts before this Court as to the circumstances surrounding the agreement's execution. Clearly, discovery of facts is warranted in order to test the reasonableness of this transaction.

Leading authority from other jurisdictions is in accord that discovery Is required before various factual matters relating to the enforceability of an arbitration clause can be decided. See Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003)(evidence of surveys conducted by AT&T as to the most advantageous place to insert an arbitration provision was relevant on the issue of enforceability). A federal court in West Virginia discussed the importance of discovery in disclosing whether there will be likely bias on the part of the arbitral form. See Toppings v. Ameritech Mortgage Services, Inc., 140 F. Supp. 2d 683 (S.D. WV 2001). The Missouri Supreme Court recognized the usefulness of participating in discovery to determine the underlying merits of a motion to compel arbitration in Nitro Distributing, Inc. v. Dunn, 194 S.W.3d 339 (Mo. 2006). Likewise, the Kentucky Supreme Court affirmed the trial court's broad discretion in allowing parties to conduct discovery on the enforceability of an arbitration agreement. Kindred Healthcare, Inc. v. Peckler, 2006 WL 1360282 (KY). As noted by the Kentucky Supreme Court in Peckler, "an arbitration agreement may be unconscionable, and therefore unenforceable, if the arbitral forum is biased or the terms of the arbitration are so one that no reasonable person would willingly enter into such agreement...." Some of the evidence that should be considered in addressing whether the arbitration agreement is enforceable includes "factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, ... [and] whether the terms were explained to the weaker party...." Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 666 (6th Cir. 2003)(en banc). The same holds true with regard to examination of the costs of arbitration, which may make it impossible for a plaintiff to pursue her claim in that forum.

In the Sixth Circuit opinion in Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370 (6th Cir. 2005)(Walker), the court struck down an arbitration agreement that employees were required to sign as part of their application process. The Walker Court held that the plaintiffs could not be compelled to arbitrate their claims because they did not "knowingly and voluntarily waive their constitutional right to a jury trial." The court provided the following factors for determining if a plaintiff knowingly and voluntarily waived her right to a jury trial:

> (1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the [plaintiff] had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; and well as (5) the totality of the circumstances.

Id. at 381.

The holding in Walker reinforces the need for comprehensive discovery prior to ruling on an arbitration provision. The Court recognized that, while not readily apparent on the face of the agreement, the arbitral forum was not neutral and, therefore, the agreement was unenforceable. The Court further acknowledged that the limited discovery provided in the arbitral forum could significantly prejudice the complaining party:

> We acknowledge that the opportunity to undertake extensive discovery is not necessarily appropriate in an arbitral forum, the purpose of which is to reduce the costs of dispute resolution... But parties to a valid arbitration agreement also expect that neutral arbitrators will preside over their disputes regarding both the resolution on the merits and the critical steps, including discovery, that precede the arbitration award.

Id. at 383-84. Had the parties proceeded under the arbitration agreement in Walker, the inherent prejudice of the agreement would not have been revealed. Instead, it was through the court's discovery process in determining whether the arbitration agreement was enforceable that the inherent unconscionability of the arbitration clause was determined. Indeed, much evidence was presented to the court that the arbitral forum was not neutral. For instance, Ryan's annual fee accounted for more than 42 percent of the forum's gross income and there was no process in place to prevent signatory companies from improperly influencing its employee adjudicators. Evidence was presented that the managers explained the arbitration provisions inaccurately to the employees. The evidence in the case revealed that Ryan's stated consideration was, in fact, illusory. Thus, the comprehensive discovery permitted by the Court prior to ruling on the enforceability of the arbitration agreement proved to be critical. It is equally critical here.

Defendants' arbitration agreement bears all of the markings of unconscionability. Clearly, discovery of facts is needed in order to test the reasonableness of this transaction. Before Etta Strange is deprived of her constitutional right to a trial by jury, these questions should be answered in discovery and placed in the calculus in this case.

CONCLUSION

Making the decision to enter a nursing home is perhaps one of the hardest and emotionally-charged decisions a person can make. It is a decision often reached only after a pivotal event clearly reveals the inability of a person to independently provide for her own physical well being. At that point, a nursing home, designed to provide nursing, rehabilitative, and medical support services 24-hours a day, becomes the only available option that many have for ensuring their dignity and physical comfort. Unfortunately, not all nursing homes fulfill their obligations to the frail and vulnerable residents, who are often too mentally impaired and physically dependent to exercise meaningful choices or to protest poor care. When such **abuses** occur, the infirm must rely on others to champion their cause and see that justice is done. The civil justice system, presided over by an unbiased judiciary and twelve people who reflect the community's values of right and wrong, is one of the few avenues the citizens of this State have for holding nursing home corporations responsible for the pain and suffering that stems from such negligence. Because of the unique circumstances inherent in the long-term care setting, access to the civil justice system is necessary in order to effect positive change and social reform. Nevertheless, Defendants herein seek to remove Plaintiff's claims against them from the justice system and submit these matters before an arbitrator.

For each of the reasons set forth herein, Defendants' Motion to enforce the arbitration agreement must be denied. In the alternative, Plaintiff requests that the Court direct the parties to engage in discovery regarding the enforceability of the arbitration agreement.

Respectfully submitted,

Etta S. Strange, as Special Personal Representative of the Estate of Etta M. Strange, deceased, and on behalf of the wrongful death beneficiaries of Etta M. Strange

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Footnotes

1 The footnote on the first page of the arbitration agreement provides: “Information about the National Arbitration Forum, including a complete copy of the Code of Procedure, can be obtained from the Forum at 800-474-2371, by fax at 651-604-6778, or toll-free fax at 866-743-4517, or on the internet at http://www.arb-forum.com.”

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