APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2022 Term

No. 20-0794

FILED
March 22, 2022
released at 3:00 p.m.
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHANCELLOR SENIOR MANAGEMENT, LTD.
Defendant Below, Petitioner,

v.

LOUISE MCGRAW, by and through her Daughter,
NANCY REUSCHEL as Power of Attorney, and
CHARLOTTE RODGERS, by and through her
Daughter, LORETTA HOLCOMB as Power of
Attorney, on their own behalf and all others
similarly situated,
Plaintiffs Below, Respondents.

Appeal from the Circuit Court of Raleigh
The Honorable Andrew G. Dimlich, Judge
Civil Action No. 16-C-698-D

AFFIRMED

Submitted: February 8, 2022
Filed: March 22, 2022

Avrum Levicoff, Esq.
The Levicoff Law Firm, P.C.
Pittsburgh, Pennsylvania
Counsel for Petitioner

Debra Tedeschi Varner, Esq.
Varner & Van Volkenburg, PLLC
Clarksburg, West Virginia

Christa L. Collins, Esq.
Collins Law PL
St. Petersburg, Florida

Jonathan R. Mani, Esq.
Mani, Ellis & Layne, PLLC
Charleston, West Virginia

Martha Geron Gadd, Esq.
Elizabeth Aniskevich, Esq.
AARP Foundation
Washington, D.C.
Counsel for Respondents

JUSTICE WOOTON delivered the Opinion of the Court.

CHIEF JUSTICE HUTCHISON, having been disqualified, did not participate in the decision of this

case.

JUSTICE ALAN D. MOATS sitting by temporary assignment.

JUDGE BALLARD sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013).

2. "When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is *de novo*." Syl. Pt. 1, *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W. Va. 465, 796 S.E.2d 574 (2017).

3. "When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010).

4. "Nothing in the Federal Arbitration Act, 9

U.S.C. § 2, overrides normal rules of contract interpretation." Syl. Pt. 9, in part, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *overruled in part on other grounds by Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

5. "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

6. "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. Pt. 3, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

7. "It is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning." Syl. Pt. 4, *Williams v. S. Penn Oil Co.*, 52 W. Va. 181, 43 S.E. 214 (1903), *overruled in part on other grounds by Ramage v. S. Penn Oil Co.*, 94 W. Va. 81, 118 S.E.162 (1923).

8. "Where an arbitration agreement names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to section 5 of the Federal Arbitration

Act, 9 U.S.C. § 5 (1947) (2006 ed.), only if the choice of forum is an ancillary logistical concern. Where the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable." Syl. Pt. 3, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013).

WOOTON, Justice:

The petitioner, Chancellor Senior Management, Ltd. (sometimes referred to as "Chancellor"), appeals the order entered by the Circuit Court of Raleigh County, West Virginia, on October 2, 2020, denying the petitioner's motion to compel arbitration. The petitioner's only assignment of error is that the circuit court refused to enforce a clear and comprehensive written agreement to arbitrate all disputes, which agreement is contained in the "Assisted Living Residency Agreement(s) The Villages at Greystone Senior Living Community (West Virginia)" ("Residency Agreement") signed by the respondents Nancy Reuschel and Loretta Holcomb on behalf of their mothers, the respondents Louise McGraw and Charlotte Rodgers, respectively. *See* text *infra*. Upon our careful review of the briefs, the arguments of counsel, the appendix record, the applicable law, and all other matters before the Court, we affirm the circuit court's decision.

I. Facts and Procedural Background

On March 27, 2013, Ms. McGraw was admitted

to The Villages at Greystone ("The Greystone"),[1] an assisted living facility located in Beckley, West Virginia. A Residency Agreement was executed on behalf of Ms. McGraw by her daughter, Ms. Reuschel. Likewise, on July 4, 2014, Ms. Rodgers was admitted to The Greystone under a Residency Agreement executed by her daughter, Ms. Holcomb.[2] Both Residency Agreements contained the following arbitration provision, which provided, in pertinent part:

> X. RESOLUTION OF LEGAL DISPUTES
>
> A. NONPAYMENT OF CHARGES
>
> Any legal controversy, dispute, disagreement or claim of any kind arising out of, or related to this Agreement, or the breach thereof, regarding nonpayment by you for payments due to the Community shall be adjudicated in a court of law, or arbitrated if mutually agreed to by the parties.

---

[1] On May 27, 1998, Chancellor entered into an "Agreement to Manage an Assisted Living Community" ("Management Agreement") with Beckley Health Partners, Ltd ("Beckley Health"), which is the owner of The Greystone, to manage the facility.

[2] Both daughters were acting under durable powers of attorney.

B. RESIDENT'S RIGHTS Any legal controversy, dispute, disagreement or claim arising between the parties after the execution of this Agreement in which you or a person on your behalf alleges a violation of any right granted you under law shall be settled exclusively by binding arbitration as set forth in Section X.D. below. This provision shall not limit in any way your right to file formal or informal grievances with the Community or the State of West Virginia or Federal government.

C. ALL OTHER DISPUTES

Any legal controversy, dispute, disagreement or claim of any kind arising out of, or related to this Agreement, or the breach thereof (other than those actions addressed in Sections X.A. and X.B. of this Agreement), shall be settled exclusively by binding arbitration as set forth in Section X.D. below. This arbitration clause is meant to apply to all controversies, disputes, disagreements or claims including, but not limited to, all breach of contract claims, all negligence and malpractice claims, all tort claims, and all allegations of fraud in the inducement or requests for revision of the contract.

D. CONDUCT OF BINDING ARBITRATION

You understand that by hereby agreeing to arbitrate legal disputes means that you are waiving your right to sue in a court of law and to a trial by jury. You agree to arbitrate disputes by signing this Agreement. The decision of the arbitrator(s) shall be final and binding and may not be appealed nor may it be stayed. The arbitration will be conducted as follows: *Any arbitration conducted pursuant to this Section X shall be conducted in Cabell County, West Virginia in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration*. The award rendered by the arbitrator(s) shall be final, and judgment on the award shall be entered in accordance with applicable law in any court having jurisdiction thereof. The parties understand that arbitration proceedings are not free and that any person requesting arbitration will be required to pay a filing fee to AHLA and other expenses; however, the parties agree to divide the arbitration expenses equally. If you would like information regarding AHLA's Alternative Dispute Resolution Service, you may contact AHLA at (202)

> 833-1100 or Suite 600, 1025 Connecticut Avenue NW, Washington, DC 20036-5405.

(Emphasis added). The AHLA "Rules of Procedure for Consumer Arbitration" ("AHLA Rules"), applicable to claims received on or after September 15, 2019, set forth certain requirements that must be met in order for a claim to be arbitrated in accordance with the AHLA Rules. In "Section 2: Filing a Claim," it is specified that:

> **2.1 Requirements**
>
> To file a claim, a party must complete and submit the claim form on the AHLA website, pay the applicable fees listed in **Exhibit 3** and on the form, provide a statement describing the issue(s) to be arbitrated, and either provide a copy of an agreement to arbitrate or a court order requiring arbitration of the claim under the Rules or cite a statute or regulation authorizing or requiring arbitration under the Rules.
>
> If the agreement to arbitrate was signed before the events giving rise to the claim occurred, the agreement must:
>
> (1) be a separate document conspicuously identified as an agreement to arbitrate;

(2) include the following notice, or substantially similar language, in a conspicuous location:

> Voluntary Agreement to Arbitrate
>
> **THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ IT CAREFULLY BEFORE SIGNING.**
>
> **This is a voluntary agreement to resolve any dispute that may arise in the future between the parties under the American Health Lawyers Association's Rules of Procedure for Arbitration. In arbitration, a neutral third party chosen by the parties issues a final, binding decision. When parties agree to arbitrate, they waive their right to a trial by jury and the possibility of an appeal.**
>
> (3) state conspicuously that the health care entity will provide the same care or treatment, without delay, if the agreement is not signed; and
>
> (4) explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it (unless a state law applicable to contracts generally grants a longer period for revocation). (Emphasis added).

The AHLA Rules also includes the following provision:

2.4 Hearing on Administration of Arbitration

> (a) SCHEDULING. If a Consumer claims the agreement to arbitrate fails to comply with the requirements listed in Rule 2.1, the arbitrator, once appointed, will promptly schedule a preliminary hearing on this issue. The arbitrator may conduct the hearing by telephone, by video conference, and/or by submission of briefs.
>
> (b) DETERMINATION. Within ten (10) days after the preliminary hearing is closed, the arbitrator will issue an award determining whether the agreement to arbitrate satisfies the requirements set forth in Rule 2.1. If the arbitrator determines that *the agreement does not satisfy the requirements, the arbitrator will issue a Final Award terminating the arbitration without prejudice to any claims or defenses.* The Final Award may order the Health Care Entity to pay all the costs and fees of arbitration, including the filing fee. If the arbitrator determines the agreement satisfies the requirements, the arbitrator will issue an interim award to that effect. Any determination under this section not to administer the arbitration shall not be

> considered a determination on the validity of the arbitration agreement, and the parties may arbitrate in another forum if their agreement so provides or if they otherwise agree.

(Emphasis added).

On November 29, 2016, the respondents, Louise McGraw, by and through her Daughter, Nancy Reuschel, as power of attorney, and Charlotte Rodgers, by and through her Daughter, Loretta Holcomb, as power of attorney, on their own behalf and all others similarly situated, filed an amended complaint[3] against the petitioner.[4] The respondents alleged that the petitioner defrauded their respective mothers[5] by making misrepresentations and misleading statements, and concealing material facts, all of which led them to believe the petitioner would assess its residents' needs and provide staffing sufficient to meet those needs. The amended complaint alleged that the petitioner's actions or inactions violated the West Virginia Consumer Credit and Protection Act ("WVCCPA"). *See generally* W. Va. Code §§ 46A-1-101 to -8-102 (2015 & Supp. 2021).

---

[3] The original complaint was filed on October 25, 2016.

[4] The respondents filed this action as a putative class action. However, there are no issues in regard to class action status before the Court in this appeal as a class has not yet been certified.

[5] Both Ms. McGraw and Ms. Rodgers are now deceased.

The petitioner answered the amended complaint[6] on January 24, 2017, raising twenty-nine separate defenses, none of which involved a demand for arbitration. Thereafter, the petitioner filed pleadings and motions, including a motion to amend its amended answer, again without any mention of the arbitration provision found in the Residency Agreements. Not until July 11, 2017, when it again sought leave to amend its answer, did the petitioner seek to add arbitration as a defense to the respondents' claims.[7] By order entered March 11, 2019, the circuit court allowed the amended answer to be filed.

On June 5, 2019 – more than two and one-half years after the filing of the original complaint – the petitioner moved to compel arbitration based upon the arbitration provision set forth in the Residency

---

[6] The circuit court's order entered October 2, 2020, indicates that the petitioner answered the original complaint on December 5, 2016; however, the appendix record does not contain a copy of this answer.

[7] The respondents opposed the petitioner's motion to amend its answer in regard to arbitration, arguing that the petitioner waived that defense by failing to raise it in its initial pleadings and actively litigating the case for six months. In support of their waiver argument, the respondents pointed to numerous filings by the petitioner including responding to discovery and filing a "Motion for Judgment on the Pleadings, or in the Alternative Motion for Summary Judgment" which was based on an argument that the deceptive trade practice claims asserted by the respondents did not survive their mothers' deaths. However, the circuit court never ruled on the waiver issue, and because the respondents fail to assert any assigned error in regard to waiver, the issue is not properly before the Court.

Agreements. In response thereto, the respondents filed a "Motion for Partial Summary Judgment Concerning Arbitration of Plaintiffs' Claims and Memorandum of Law in Support," seeking a determination that the arbitration provision was invalid as a matter of law because it did not comply with the rules the petitioner incorporated into the agreement, the application of which would result in dismissal of any arbitration. Specifically, the respondents argued that the arbitration provision adopted the AHLA Rules, which required that the arbitration provision: 1) be labeled as a "voluntary agreement;" 2) be presented in a "separate document conspicuously identified as an agreement to arbitrate;" 3) state that the provision of care is not contingent on signing the arbitration provision; and 4) allow for revocation of the agreement for thirty days after execution. According to the AHLA Rules, if the arbitration agreement failed to satisfy the foregoing requirements, the arbitrator was "required to issue a Final Award terminating the arbitration...." Here, the respondents argued, the arbitration provision in the Residency Agreements failed to comply with any of the foregoing requisite provisions of the AHLA Rules and this failure precluded arbitration. The respondents further argued that the provision not only requires application of the AHLA Rules but also clearly designates the AHLA as the arbitration forum by requiring that the arbitration fee be paid to the AHLA and directing the parties to the AHLA's Dispute Resolution Service. In this latter regard, the respondents contended that because the provision required the use of a particular arbitration forum, the forum is an integral term of the agreement;

and therefore, because the forum was unavailable, the arbitration provision is invalid.

In its amended brief in support of arbitration, the petitioner argued, among other things, that the arbitration provision did not require the AHLA to conduct or administer the arbitration, and thus the unavailability of the AHLA to conduct the arbitration was irrelevant. According to the petitioner, even if the provision could be read to require that the AHLA conduct the arbitration, the unavailability of an arbitration forum did not render the agreement to arbitrate unenforceable.

By order entered October 2, 2020, the circuit court found that while the claims asserted by the respondents would otherwise be subject to arbitration, the arbitration provision could not be enforced because it was contained in the admissions documentation, i.e., the Residency Agreements, rather than in a separate document, and therefore the agreement could not be enforced as written. In short, the court found that the petitioner "made a *prima facie* showing of the existence of an arbitration agreement. [The respondents], however, have met their burden of proof by demonstrating that the subject agreement cannot be enforced as written because it does not comply with its own stated standards." As a result, the court denied the petitioner's motion to compel arbitration. It is from this order that the petitioner appeals.

II. Standard of Review

"An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013). Further, "[w]hen an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is *de novo*." Syl. Pt. 1, *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W. Va. 465, 796 S.E.2d 574 (2017); *accord Credit Acceptance*, 231 W. Va. at 525, 745 S.E.2d at 563. Under this standard of review, we address the issue before us.

III. Discussion

The sole issue before this Court is whether the circuit court erred in refusing to enforce the arbitration provision contained in the Residency Agreements. The petitioner contends that the arbitration provision does not require the AHLA to administer the arbitration because it only requires that the arbitration be conducted "in accordance with" the AHLA Rules of Procedure for Consumer Arbitration. According to the petitioner, Rule 2.1 of the AHLA "only imposes certain requirements that an arbitration agreement must meet in order for the AHLA to administer the arbitration.[8] It does not create

[8] We reject the petitioner's argument that the "[t]he drafter and parties could not have intended that the requirements

a standard of enforceability of the arbitration agreement." (Footnoted added). The petitioner further argues that the language "in accordance with" means that the requirements of Rule 2.1 are not integrated into the arbitration agreement. Instead, pursuant to AHLA Rule 2.4(b) which the petitioner contends was ignored by the circuit court, any determination that the arbitration agreement does not satisfy the requirements of the Rule 2.1, "shall not be considered a determination on the validity of the arbitration agreement, and the parties may arbitrate in another forum if their agreement so provides or if they otherwise agree . . . ." Thus, the petitioner claims that Rule 2.1 is not a "procedural rule" but is merely a rule relating to the administration of arbitration. In other words, the petitioner argues that Rule 2.1 "has absolutely no bearing on the enforceability of an

---

of Rule 2.1 create standards of enforceability of the arbitration" because Rule 2.1 was not enacted by the AHLA until 2019, "well after the subject Residency Agreements were entered into." Significantly, the AHLA Rules expressly provide that "[a] claim will be arbitrated in accordance with the version of these Rules posted on the website of the American Health Lawyers Association (AHLA) on the date a claim is filed." Further, the petitioner's argument was not raised before the circuit court and expressly relies upon certain exhibits containing prior versions of the AHLA Rules that the petitioner affixed to its petition for appeal. These exhibits constitute new evidence and were not part of the record considered by the circuit court. In this regard, by order entered July 15, 2021, we granted the respondents' motion to strike exhibits attached to the petitioner's brief because the exhibits and this evidence, as well as the petitioner's arguments inextricably connected thereto, are not properly considered in this decision.

agreement to arbitrate, and represents nothing more than an internal operating administrative requirement." We disagree.

We have held that

> [w]hen a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.

Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). In *Certegy Check Services, Inc. v. Fuller*, 241 W. Va. 701, 828 S.E.2d 89 (2019), we recognized that "[t]he threshold issue—'whether a valid arbitration agreement exists'— is really two intertwined issues. First, is there an agreement? Second, if there is an agreement, is it valid (i.e., in the sense of being enforceable)?" *Id*. at 704, 828 S.E.2d at 92. In this case, both parties agree that an arbitration provision exists. The issue is whether it is a valid arbitration agreement.

In addressing the validity of the arbitration provision, it is well established that "[s]tate law

governs the determination of whether a party agreed to arbitrate a particular dispute." *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 673, 724 S.E.2d 250, 277 (2011), *overruled in part on other grounds, Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012). Further, "[n]othing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation." *Id*. at 657, 724 S.E.2d at 261, Syl. Pt. 9, in part. Thus, "the issue of whether an arbitration agreement is a *valid* contract is a matter of state contract law and capable of state judicial review." *State ex el. Clites v. Clawges*, 224 W. Va. 299, 305, 685 S.E.2d 693, 699 (2009). Arbitration agreements are "to be treated by courts like any other contract, nothing more, and nothing less." *Brown ex rel. Brown,* 228 W. Va. at 671, 724 S.E.2d at 275.

The parties agree that the language that comprises the arbitration provision in the Residency Agreements is clear and unambiguous. Because of this, we do not need to interpret the arbitration provision but simply to apply it. This Court held that

> [a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.
>
> . . . .
>
> It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as

> expressed in unambiguous language in their written contract or to make a new or different contract for them.

Syl. Pts. 1 and 3, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962); *accord* Syl. Pts. 6 and 7, *Ascent Res. - Marcellus, LLC v. Huffman*, 244 W. Va. 119, 851 S.E.2d 782, 788 (W.Va. 2020). "It is also well settled that the words of an agreement should be given their natural and ordinary meaning, because the parties presumably used the words in the sense in which they were generally understood." *Bennett v. Dove*, 166 W. Va. 772, 774, 277 S.E.2d 617, 619 (1981). In this regard, we previously held that "[i]t is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning." Syl. Pt. 4, *Williams v. S. Penn Oil Co.*, 52 W.Va. 181, 43 S.E. 214 (1902), *overruled in part on other grounds by Ramage v. S. Penn Oil Co.*, 94 W. Va. 81, 118 S.E.162 (1923).

First, the language of the arbitration provision found in the Residency Agreements provides that "[t]he arbitration will be conducted as follows: Any arbitration conducted pursuant to this Section X shall be conducted in Cabell County, West Virginia *in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration*."[9] (Emphasis

[9] The petitioner's argument that Rule 2.1 is merely an administrative rule and not a procedural rule is disingenuous. Rule 2.1 is found in the AHLA's "Rules of Procedure for Consumer

added). The petitioner focuses upon the words "in accordance with" in arguing that this language neither integrates the AHLA Rules into the arbitration agreement nor "create[s] a standard of enforceability of the arbitration agreement." In other words, the petitioner contends that "[t]he plain and unambiguous language of the arbitration provision reflects only one requirement, that the arbitration be conducted 'in accordance with' the AHLA Rules of Arbitration" but does not require that any of the other procedures in the AHLA Rules be followed or that AHLA conduct the arbitration – despite express contractual language to the contrary.

The petitioner's logic and piecemeal selection of only certain words from both the arbitration agreement and the AHLA Rules are both misguided and misleading. Inasmuch as the parties agree that the arbitration provision is unambiguous, basic principles of contract construction, *see id.*, require us to give the phrase "in accordance with" its ordinary meaning, which is: "in a way that agrees with or follows." *In accordance with*, Merriam-Webster, https://merriam-webster.com, (last visited February 21, 2022). Hence, the language "*in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of*

Arbitration" and there is nothing in the rule to suggest that it is purely administrative. Instead, the language of the rule set forth *supra* and discussed in greater detail *infra* sets forth the procedural requirements which must be met for filing a claim to arbitrate.

Procedure for Arbitration[,]" means that the arbitration will be conducted in a way that agrees with or follows the AHLA Rules.

In this regard, pursuant to the arbitration provision found in the Residency Agreements, an arbitration must follow or agree with AHLA Rule 2.1, "Requirements." This rule provides that "[i]f the agreement to arbitrate was signed before the events giving rise to the claim occurred, the agreement must:" 1) be set forth in a separate document conspicuously identified as an agreement to arbitrate; 2) include the express notice set forth *supra* in greater detail or substantially similar language in a conspicuous location; 3) provide conspicuously that the facility will provide the same care or treatment, without delay, if the agreement is not signed; and 4) grant the resident or his or her representative the right to rescind the agreement within thirty calendar days of signing it. Further, any arbitration must follow Rule 2.4, which provides that "[*i]f the arbitrator determines that the agreement does not satisfy the requirements, the arbitrator will issue a Final Award terminating the arbitration* without prejudice to any claims or defenses." (Emphasis added).

Even a cursory examination of the arbitration provision at issue reveals that it fails to "comply with its own stated standards" set forth in the AHLA Rules; indeed, the arbitration provision is internally inconsistent with the requirements of Rule 2.1. Specifically, the arbitration provision is not contained in a separate agreement as required by Rule 2.1, but

rather is buried in the Residency Agreements. Additionally, it fails to contain any language specifying that it is a "voluntary agreement," which is also required by Rule 2.1. The arbitration provision further fails to advise residents that the provision of health care is not contingent on their signing the agreement to arbitrate, and it does not provide a thirty-day period to rescind the agreement after it has been signed. According to Rule 2.4, if an arbitration provision fails to comport with the requirements of Rule 2.1, the arbitrator "will issue a Final Award terminating the arbitration." Thus, the circuit court did not err in determining that the arbitration agreement was not valid.

Additionally, the petitioner argues that the arbitration provision's reference to the AHLA to the effect that the arbitration is to be conducted "in accordance with" the AHLA Rules, "is merely an ancillary logistical concern and is not a forum selection integral to the agreement to arbitrate." The petitioner argues that "[h]ad the parties desired that the AHLA conduct or administer the arbitration, they could have specifically stated this in the arbitration agreement." Conversely, the respondents argue that "selecting the AHLA as the arbitral forum is clear and mandatory" and while the petitioner could have provided for an alternative forum, it failed to do so.

We held the following in syllabus point three of *Credit Acceptance*:

> Where an arbitration agreement

> names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to section 5 of the Federal Arbitration Act, 9 U.S.C. § 5 (1947) (2006 ed.), only if the choice of forum is an ancillary logistical concern. *Where the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable*.

231 W. Va. at 519, 745 S.E.2d at 557-58, Syl. Pt. 3 (emphasis added).

We easily dispense with the petitioner's argument that arbitration can occur in a forum other than the AHLA. First, and critically, even if the arbitration provision provided a different forum for the arbitration, any non-AHLA arbitrator would be required to apply Rule 2.1 and, as discussed *supra* in greater detail, the failure of the arbitration provision to comport with the Rule 2.1 would mandate a dismissal of the arbitration.

Second, a review of the language of the arbitration provisions demonstrates clearly that the parties agreed to the AHLA conducting the arbitration and made the AHLA an integral part of the agreement, to wit:

> [t]he parties understand that arbitration proceedings are not free and *that any*

> *person requesting arbitration will be required to pay a filing fee to AHLA and other expenses*; however, the parties agree to divide the arbitration expenses equally. *If you would like information regarding AHLA's Alternative Dispute Resolution Service, you may contact AHLA . . . .*[10]

(Emphasis and footnote added). Succinctly stated, the AHLA is the only arbitrator designated in the arbitration provision; the provision requires the parties to pay a filing fee to the AHLA. The petitioner's contention that the arbitration can occur in a different forum simply is not contemplated by the arbitration provision. Therefore, the circuit court did not err in its determination that the arbitration agreement "cannot be enforced as written because it does not comply with its own stated standards."

IV. Conclusion

For the foregoing reasons, the circuit court's order denying the petitioner's motion to compel arbitration is affirmed.

Affirmed.

---

[10] *See also* AHLA Rule 2.1 set forth *supra*.

APPENDIX B

/s/ Andrew G. Dimlich
Circuit Court Judge
Ref. Code: 203G016J

E-FILED | 10/2/2020 11:01 AM
CC-41-2016-C-698
Raleigh County Circuit Clerk
Paul H. Flanagan

IN THE CIRCUIT COURT OF
RALEIGH COUNTY, WEST VIRGINIA

LOUISE MCGRAW, by and through her daughter, NANCY RESUSCHEL as power of attorney; and CHARLOTTE RODGERS, by and through her daughter LORETTA HOLCOMB as power of attorney, on their own behalf and all others similarly situated,
Plaintiffs,

v.

CHANCELLOR SENIOR MANAGEMENT, LTD,
Defendant.

Civil Action No: 16-C-698-D
Judge Andrew G. Dimlich

ORDER RE: ARBITRATION

I. ISSUES TO BE DETERMINED

The parties have elected different procedural approaches to resolving this question: Is this case to be heard by this court or will it be resolved by binding arbitration?

A. DEFENDANT'S MOTION TO COMPEL ARBITRATION

On June 5, 2019 Defendant filed a Motion to Compel Arbitration. On May 8, 2020, Defendant filed its Memorandum of Law in support of the Motion to Compel Arbitration. On May 19, 2020 Defendant filed an Amended Brief in Support of Motion to Compel Arbitration. Thereafter, Defendant filed a Supplemental Brief in Support of Motion to Compel Arbitration on May 28, 2020. On June 15, 2020 Plaintiffs filed their Response in Opposition to Defendant's Brief in Support of Motion to Compel. Defendant replied June 26, 2020.

B. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT CONCERNING ARBITRATION OF PLAINTIFFS' CLAIMS

On May 15, 2020 Plaintiffs filed a Motion for Partial Summary Judgment Concerning Arbitration of Plaintiffs' Claims and a Memorandum of Law in Support of plaintiffs' motion. On June 15, 2020 Defendant filed it's Response to Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs filed a Reply in Support of Plaintiffs' Motion for Partial Summary

Judgment Concerning Arbitration of Plaintiffs' Claims on July 2, 2020. Defendant filed a Surreply to Plaintiffs' Motion for Partial Summary Judgment July 16, 2020.

I. FINDINGS OF FACT

1. Plaintiffs in their representative capacities of former residences of Greystone an assisted living facility located in Raleigh County, West Virginia file this case on October 25,2016.

2. Thereafter, Plaintiffs filed an Amended Complaint November 29, 2016.

3. Defendant answered the complaint December 5, 2016.

4. Defendant answered the amended complaint January 24, 2017.

5. Defendant filed its motion to compel arbitration June 5, 2019.

6. Plaintiffs filed their motion for partial summary judgment May 15, 2020.

7. The admissions papers do not contain a valid and enforceable compulsory arbitration agreement.

II. CONCLUSIONS OF LAW

The court notes that the law applicable to each

of the pending motions provides a different standard of proof for the moving party to maintain. Defendant urges a bright line application of *Bluestone Brands, Inc. v. Shade,* 239 W.Va.694, 805 S.E.2d 805 (2017). The fundamental threshold on a motion to compel is twofold: 1. Whether a valid arbitration agreement exists between the parties; and 2. Whether the claims averred by Plaintiff fall within the substantive scope of that arbitration agreement.

The standard for the granting of a motion for summary judgment is that there is no material issue of fact to be determined and therefore movant is entitled to judgment as a matter of law. *Hines v. Hoover,* 156 W.Va. 242, 192 S.E.2d 485 (W.Va. 1972).

An in depth reading of the parties' positions results in the conclusion that they actually agree on the appropriate standard. The court believes this issue should be determined on the granting or denying of defendant's motion to compel. This is because in essence Plaintiffs' primary argument is one of enforceability of the arbitration agreement that is clearly contained within the admissions papers executed on behalf of the parties both Plaintiffs represent. With this overview, the court makes the following conclusions of law.

1. Summary judgment is designed to effect a prompt disposition of a controversy without resort to a lengthy trial. *Williams v. Precision Coil, Inc.* 194 W.Va. 52, 459 S.E.2d 329 (W.Va. 1995).

2. The burden is on the moving party to demonstrate that as a matter of law, there is no genuine issue of material fact to be tried. *Hines v. Hoover,* 156 W.Va. 242, 192 S.E.2d 485 (W.Va. 1972).

3. When reviewing a motion to compel arbitration under an arbitration agreement a court must consider the validity of the agreement and whether the claims asserted are covered by the arbitration agreement. *New v. GameStop, Inc.,* 232 W.Va.564, 753 S.E.2d 62 (W.Va. 2013).

4. When a movant makes a *prima facie* initial showing that an agreement to arbitrate exist, the burden shifts to the opposing party to provide evidence that the agreement should not be mandated. *State ex rel. TD Ameritrade v. Shade,* 239 W.Va. 694, 804 S.E.2d 805 (2010).

III. DISCUSSION

In summary the parties seek a determination by the court of the same issue: Is this court to hear the matter and the case proceed to trial, or do the terms of the admission document of both prior residents of Graystone require that plaintiffs' claims be determined by alternative dispute resolution.

It is properly noted by Defendant in its memorandum that historically arbitration agreements were initially viewed with disfavor by most courts. Also as Defendant properly points out U.S. Supreme Court rulings changed that posture. The West Virginia

legislature followed the U.S. Supreme Court lead and in 2015 enacted West Virginia Code §55-10-2:

> The Legislature finds that:
>
> (1) Arbitration, as a form of alternative dispute resolution, offers in many instances a more efficient and cost-effective alternative to court litigation.
>
> (2) The United States has a well-established federal policy in favor of arbitral dispute resolution, as identified both by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.,* and the decisions of the Supreme Court of the United States.
>
> (3) Arbitration already provides participants with many of the same procedural rights and safeguards as traditional litigation, and ensuring that those rights and safeguards are guaranteed to participants will ensure that arbitration remains a fair and viable alternative to court litigation and guarantee that no party to an arbitration agreement is unfairly prejudiced by agreeing to an arbitration agreement or provision.

Defendant submitted the agreements executed by or on behalf of Ms. McGraw and Ms. Rogers upon admission to Greystone. The relevant portion of the

admissions materials are found on P. 13 Parts C and D. Those provisions are clear that the types of issues brought by Plaintiffs (complaint and amended complaint) would be subject to arbitration. Without more, the inquiry would end there.

Plaintiffs note in their motion for partial summary judgment and their response to defendant's motion to compel arbitration that the arbitration agreement is not enforceable because of its internal inconsistencies. What Defendant seeks to avoid by noting that the unavailability of the American Health Lawyers Association's Rules of Procedures. This is because the agreement does not require the organization to administer the arbitration. (Defs. Reply to Plaintiffs' Response p.4) The court does not understand Plaintiffs' argument to raise that issue. What the court perceives Plaintiffs' position to be is that the Rules of Procedure of the American Health Lawyers Association require is that the arbitration agreement be a separate and conspicuous document. (Rule 2.1 AHLA). Without reaching the issue of conspicuous, it is clear to the court that by Defendant's own exhibit the arbitration agreement is a part of the admissions documentation and is in no way a separate document.

Defendant made a *prima facie* showing of the existence of an arbitration agreement. Plaintiffs, however, have met their burden of proof by demonstrating that the subject agreement cannot be enforced as written because it does not comply with its own stated standards. *State ex rel. TD Ameritrade v.*

Shade, 239 W.Va. 694, 804 S.E.2d 805 (2010).

The court cannot find that given this state ofthe evidence that the agreement is valid. *New v. GameStop, Inc.,* 232 W.Va.564, 753 S.E.2d 62 (W.Va. 2013).

The parties have raised other matters concerning arbitration. Given the court's analysis, those need not be addressed.

IV. CONCLUSION

For the above stated reasons Defendant's Motion to Compel Arbitration is DENIED.

Plaintiffs' Motion for Partial Summary Judgment is DENIED as moot.

The OBJECTION of both parties to the court's findings and ruling are noted.

/s/
JUDGE ANDREW G. DIMLICH
10TH JUDICIAL CIRCUIT

APPENDIX C

[Excerpt from Petitioner's Brief, page 27,
filed February 1, 2022]

* * *

arbitration agreement be a separate agreement in order to be enforceable. If there were such statutory or case authority, arbitration provisions contained within contracts would not be enforceable. Thus it is clear that an arbitration agreement which includes a standard that it must be a separate agreement is antithetical to West Virginia law and the FAA. Section 2 of the FAA provides:

> Under the Federal Arbitration Act, 9 U.S.C. §2, a written provision to settle by arbitration, a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists ***at law or in equity*** for the revocation of any contract." (Emphasis added).

There are no conceivable grounds at law or in equity that support that an arbitration provision must be a separate agreement. The circuit court misconstrued Respondents' burden of proving that the

arbitration agreement is not enforceable based upon law or equity. In order to meet their burden, Respondent had to produce evidence to legally *avoid the agreement. See State ex rel. Troy Grp., supra.* at 265, 277, citing *Begonja v. Vornado Realty Tr.,* 159 F.Supp.3d 402, 409 (S.D.N.Y. 2016) ("The party moving to compel arbitration 'must make a prima facie initial showing that an agreement to arbitrate existed before *the burden shifts to the party opposing arbitration to put the making of that agreement "in issue.'" Hines v. Overstock.com, Inc.,* 380 Fed. Appx. 22, 24 (2d Cir. 2010) (summary order). Subsequently, the party 'seeking to avoid arbitration generally bears the *burden of showing the agreement to be inapplicable or invalid."' Harrington v. Atl. Sounding Co., Inc.,* 602 F.3d 113, 124 (2d Cir. 2010) (Emphasis added.).

Respondents failed to submit any evidence that would invalidate the arbitration provision as a matter of law. The only evidence proffered by Respondents for the purpose of invalidating the agreement are the AHLA rules which became effective in September 2019. However, the AHLA

* * *

APPENDIX D

[Excerpt from Defendant's Amended Brief in Support of Motion to Compel Arbitration, pages 30-38, filed May 19, 2020]

* * *

unavailability and/or refusal of the AHLA to conduct the arbitration renders the arbitration provision substantively unconscionable. As fully discussed below, Plaintiffs' anticipated argument in this regard is entirely without merit.

A. The Arbitration Provision Is Not Substantively Unconscionable Based Upon The Unavailability Of A Designated Arbitration Forum.

1. The Arbitration Provision Does Not Designate A Specific Arbitration Forum

The arbitration provision in the Residency Agreements sets forth, in part, that "The arbitration shall be conducted . . . in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration." Plaintiffs are expected to claim that the arbitration provision is unenforceable because the AHLA is unavailable to conduct the arbitration, as the arbitration provision does not

comply with the current AHLA requirements.[6] The current version of the AHLA Rules of Procedure sets forth that the arbitration agreement must meet the following prerequisites specified at Section 2 entitled, "Filing a Claim" which provides, in part, as follows:

> **2.1 Requirements:**
>
> * * * *
>
> If the agreement to arbitrate was signed before the events giving rise to the claim occurred, the agreement must:
>
> (1) be a separate document conspicuously identified as an agreement to arbitrate;
>
> (2) include the following notice, or substantially similar language, in a conspicuous location:
>
> **Voluntary Agreement to Arbitrate**

---

[6] The current AHLA Rules became effective on March 11, 2019, and govern claims on the date the claim is filed with the AHLA. *See* Section 1: Policies, Rule 1.1. Section 2.1 contains various requirements that an Arbitration provision must meet before the AHLA will conduct an arbitration of a claim. Such requirements were not contained in the AHLA Rules for Dispute Resolution that were in effect at the time the Residency Agreement was executed on behalf of Louise McGraw on March 27, 2013, but became effective shortly before the Residency Agreement was executed on behalf of Charlotte Rogers on July 14, 2014.

> **THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ IT CAREFULLY BEFORE SIGNING.**
>
> **This is a voluntary agreement to resolve any dispute that may arise in the future between the parties under the American Health Lawyers Association's Rules of Procedure for Arbitration. In arbitration, a neutral third party chosen by the parties issues a final, binding decision. When parties agree to arbitrate, they waive their right to a trial by jury and the possibility of an appeal.**
>
> (3) state conspicuously that the health care entity will provide the same care or treatment, without delay, if the agreement is not signed; and
>
> (4) state conspicuously that the agreement to arbitrate may be revoked within ten (10) days after being signed (unless a state law applicable to contracts generally grants a longer period for revocation).

Contrary to Plaintiffs' anticipated position, the arbitration provision does not require that the AHLA itself conduct or administer the arbitration. The arbitration provision only states that "The arbitration

shall be conducted . . . **in accordance with** the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration." Thus, the unavailability or refusal of the AHLA to conduct the arbitration is irrelevant where the agreement does not require it to administer the arbitration proceeding, but only requires that the arbitration be conducted in accordance with the AHLA rules. "A majority of courts recognize a distinction between agreements requiring a proceeding "administered by" a particular arbitral forum and those providing for a proceeding conducted "in accordance with" the named forum's rules. ." *Jose Evenor Taboada v. AmFirst Insurance Co.,* Civ. No. 3: 18 CV83, WL 3604613 (S.D. Miss. 2019), *citing Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 383, 759 S.E.2d 727, 733 (2014). (arbitration agreement was enforced even though the AAA was not available to conduct the arbitration, where the agreement provided that the arbitration would be administered "in accordance with the AAA's Commercial Arbitration Rules", but not that it be administered by the AAA.)

Meskill v. GGNSC Stillwater Greenley, LLC, 682 F.Supp.2d 966 (D. Minn. 2012) is squarely on point. There, a representative of an estate brought an action against a defendant nursing facility claiming that plaintiff's decedent received negligent care. Defendants moved to compel arbitration pursuant to an arbitration agreement that was executed at the time of decedent's admission to the facility. The arbitration agreement provided that plaintiff's claims

would be resolved "exclusively by binding arbitration . . . *in accordance with* the National Arbitration Forum Code of Procedure . . . ." Plaintiff opposed the defendant's motion to compel arbitration on the basis that the arbitration agreement was not enforceable because the National Arbitration Forum was not an available forum. The Court found the arbitration agreement to be enforceable, stating that, "The Agreement here provides that disputes will be submitted to Arbitration 'in accordance with the National Arbitration Forum Code of Procedure.' On its face, this provision does not mandate that the NAF actually *conduct* the arbitration—it requires only that the NAF Code be *applied* by the arbitrator." *Id*. at 972. In support of this determination, the Court observed, "[S]everal Courts have recognized that when an arbitration clause selects an arbitral forum's rules but does not expressly designate that forum to hear the matter, arbitration may be compelled notwithstanding the forum's unavailability. *Reddman v. KPMG LLP*, 457 F.3d 1054, 1059-61 (9th Cir. 2006), *abrogated on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010); *Jones v. GGNSC Pierre LLC*, 684 F.Supp.2d, 1161, 1167 (D.S.D. 2010) (compelling arbitration and noting that the arbitration clause "does not mandate the NAF *per se*".)" *Id*. at 972. The Court rejected plaintiff's argument that the NAF Rules themselves mandated that the arbitration be conducted specifically by the NAF. Instead, the Court aptly noted that "If the parties had contemplated the NAF would be their exclusive arbitral forum, they could have easily said so—there would be no need for them to do so obliquely by "specifying that the

arbitration must be conducted by the NAF's Rules." *Id.* at 973, *citing Brown v. Delfre*, 212 Ill.App (2d) 111086, 360, Ill. Dec. 2008, 268 N.E.2d 696, at 703 (Ill. App. Ct. 2012). The Court went on to state that, "Indeed, by invoking only the Code and not the NAF itself, the Agreement suggests that the parties anticipated an entity *other than* the NAF might conduct the arbitration." *Id.*, at 973. *See also, Clerk v. Cash Cent of Utah, LLC*, Civ.A.No. 09- 4964, 211 WL 3739549, at *5-6 (E.D.Pa. August 25, 2011) (arbitration clause requiring "arbitration by and under the Code of Process of the NAF" did not mandate that the NAF actually conduct the arbitration). The *Meskill* Court went on to conclude that "[D]esignation of the NAF Code of Procedure did not require an "NAF arbitrator"; a substitute arbitrator could apply common law procedural rules like those found in the NAF Code of Procedure . . . ." *Id.*, at 974. The Court thus rejected plaintiff's argument that "agreeing to use the NAF Codes is the same as agreeing to arbitrate before the NAF". *Id.* at 974.

The Court in *Dean v. Heritage Healthcare of Ridgeway*, 759 S.E.2d 727 (S.C.App. 2014), likewise ruled that an arbitration agreement was not rendered unenforceable by the unavailability of an arbitration forum, the AAA, where the agreement provided that the arbitration "shall follow the rules" of the AAA. In *Dean*, defendant nursing home moved to compel arbitration of claims brought by a resident's estate alleging negligent care by the defendant nursing home. In determining whether the arbitration agreement was enforceable, where the AAA was an unavailable forum,

the court followed the majority rule, that "[I]n the case of proceedings conducted "in accordance with" a named forum's rules most courts view that forum "selection," if it was intended to serve as such, as an ancillary consideration to the parties' primary intent of arbitrating, in front of any arbitrator, or using a set of pre-specified rules; therefore, if the forum is unavailable, courts nonetheless uphold the arbitration agreement and compel arbitration in an alternate forum, so long as the alternate forum follows the agree-upon rules." *Id*. at 733 *citing Blue Cross Blue Shield of Alabama v. Rigas*, 23 So.2d 1077 (Ala. 2005); *Westmoreland v. High Point Healthcare Inc.*, 721 S.E.2d 712 (N.C. Ct. App. 2012). The Court further observed that "[L]ooking at the plain language of the arbitration agreement, there is no reason any potential arbitration proceeding between the parties cannot "follow the rules" of the AAA in a different arbitral forum". *Id*. at 734, *citing Deeds v. Regence Blue Shield of Idaho*, 141 P.3d 1079, 1081-82 (2006). "[B]y invoking only the AAA's rules, and not the AAA itself, the Agreement suggests that the parties anticipated an entity *other than the AAA* might conduct the arbitration." *Id*. at 735 [Emphasis in original]. "[G]iven the Agreement's mere passing reference to the AAA's rules, we find that the parties' intentions in selecting the rules were to set forth, prior to a dispute, common procedural rules, such as those concerning service." *Id*. at 735.

As the arbitration agreement in the present case does not require that the AHLA conduct the arbitration, but only that the arbitration be conducted

"in accordance with" the rules of the AHLA, the arbitration agreement is not rendered unenforceable by virtue of the unavailability of the AHLA to conduct the arbitration. The arbitration agreement reflects the parties' intent that any arbitrator may conduct the arbitration, but must follow the AHLA rules in doing so.

2. The Unavailability of the AHLA to Conduct the Arbitration Does Not Render the Arbitration Provision Unenforceable

Even if the arbitration provision can somehow be read so as to require that the arbitration be conducted or administered by the AHLA, the unavailability of the AHLA to conduct the arbitration does not preclude the enforcement of the arbitration provision. The West Virginia Supreme Court of Appeals has held that an arbitration agreement is not inherently unreasonable by virtue of the existence of a forum selection clause, nor does the unavailability of the arbitration forum identified in an arbitration agreement render the agreement unenforceable. In *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556 (W.Va. 518) (2013), a retail installment contract contained an arbitration clause that permitted either party to elect arbitration under the rules and procedures of either of two different arbitration forums. However, one arbitration forum eventually became unavailable due to a consent decree prohibiting it from conducting consumer arbitrations and the second arbitration forum issued a moratorium

placing limitations on the forum's availability to conduct arbitrations. Although the circuit court ruled that the arbitration provision was substantively unconscionable due to the unavailability of the designated arbitration forums, on appeal, the Supreme Court of Appeals stated that an analysis of whether the arbitration provision is substantively unconscionable "is not applicable to the determination of whether the unavailability of a selected arbitration forum renders a contract unenforceable. There is nothing inherently unreasonable about a contract term in which the parties choose to select one or more forums to conduct arbitration…The subsequent unavailability of a selected forum does not automatically render the contract unconscionable." *Id.* at 566. In finding that the arbitration provision was not unenforceable due to the unavailability of the selected arbitration forums, the Court looked to Section 5 of the FAA [9 U.S.C. §5], which requires a Court to designate an arbitrator under certain circumstances.[7] The Court observed that, "Federal

[7] Section 5 of the FAA provides, "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed: but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or 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 may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single

Courts have concluded that Section 5 of the FAA may be applied when a chosen arbitrator is unavailable." *Id.* at 566 *citing Khan v. Dell, Inc.*, 669 F.3d 350, 354 (3d Cir. 2012) ("[S]ection 5 of the FAA . . . provides a mechanism for substituting an arbitrator when the designated arbitrator is unavailable."); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11 Cir. 2000) ("Where the chosen forum is unavailable, however, or has failed for some reason, §5 applies and a substitute arbitrator may be named."); *Astra Footwear Indus. v. Harwyn Int'l., Inc.*, 442 F.Supp. 907, 910 (S.D.N.Y.), *aff'd* 578 F.2d 1366 (2d Cir. 1978) ("The Court finds that 9 U.S.C. §5 was drafted to provide a solution to the problem caused when the arbitrator selected by the parties cannot or will not perform.").

The Court in *Credit Acceptance* observed, however, that Section 5 of the FAA does not warrant the automatic appointment of a substitute arbitrator when the chosen arbitration forum is unavailable. Applying principles adopted by the Third Circuit Court of Appeals, the Court stated,

> "[O]nly if the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern, will the failure of the chosen forum preclude arbitration . . . . In other words, a court will decline to appoint a substitute arbitrator, as

---

arbitrator."

> provided in the FAA, only if the parties' choice of forum is so central to the arbitration agreement that the unavailability of that arbitrator brings the agreement to an end . . . . In this light, the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable."

Id. at 567, *quoting Kahn*, 669 F.3d at 354. This formulation of the application of Section 5 of the FAA is the majority rule, which is founded upon the "liberal federal policy in favor of arbitration articulated in the FAA." *Credit Acceptance*, at 567-58 *citing Khan* at 356. Although the Court in *Credit Acceptance* did not decide the issue of whether the choice of forum in the arbitration agreement was ancillary to or an integral part of the arbitration agreement, due to its determination that one of the arbitration forums was indeed available, other Courts have addressed whether the choice of forum set forth in an arbitration agreement is an ancillary logistical concern or an integral part of the arbitration provision.

Numerous courts have held that where an arbitration agreement provides that arbitration is to be conducted "in accordance with" a named forum's rules, this reflects that the forum referenced therein was an ancillary consideration to the parties' primary intent to arbitrate their disputes in front of an arbitrator pursuant to the specified rules. "In the case

of proceedings "administered by" a named forum, most courts view the forum selected as an integral term of the agreement because it is an express statement of the parties' intent to arbitrate exclusively before that forum; therefore, if the forum is unavailable, a material term of the agreement has failed, rendering the entire arbitration agreement invalid. Conversely, in the case of proceedings conducted "in accordance with" a named forum's rules, most courts view that forum "selection," if it was intended to serve as such, as an ancillary consideration to the parties' primary intent of arbitrating, in front of any arbitrator, while using a set of pre-specified rules; therefore, if the forum itself is unavailable, courts nonetheless uphold the arbitration agreement and compel arbitration in an alternate forum, so long as the alternate forum follows the agreed-upon rules." *Jose Evenor Taboada A. v. AmFirst Ins. Co.*, No. 3:18CV883TSL-RHW, 2019 WL 3604613, at *5 (S.D. Miss. Aug. 6, 2019); *see also Clerk v. Cash Central of Utah, LLC*, *supra.*, at *6 ("If an arbitration clause requires application of the rules of a particular arbitral forum, but does not require that arbitration occur in any particular forum, then the arbitral forum is an ancillary logistical concern, rather than an integral part of the arbitration clause, and the arbitration clause remains enforceable despite the unavailability of the designated arbitral forum.", *citing Reddam,* 457 F.3d at 1060.); *see also Meskill*, *supra.* at 974 (An arbitration agreement providing for arbitration "in accordance with" the rules of the NAF did not constitute a forum selection integral to the arbitration provision.); and *Dean v. Heritage Healthcare of Ridgeway*, 408 S.C. 371, 384 (S.C.App.

2015) ("[w]e find that the named arbitral forum is not a material term to the agreements in which the parties agreed to arbitrate "in accordance with" the named forum's rules, absent other evidence to the contrary.")

Even if the subject arbitration agreement's requirement that the arbitration be conducted "in accordance with" the AHLA rules can be construed as a forum designation, such designation is merely an ancillary logistical concern and is not integral to the agreement to arbitrate. *See Jose Evenor Taboada*, *supra*.; *Meskill*, *supra*. Had the parties desired that the AHLA conduct or administer the arbitration, they could have specifically stated this in the arbitration agreement. Further, there is nothing in the agreement which evidences an intent of the parties that administration of the arbitration by the AHLA is integral to the arbitration agreement. The agreement is devoid of any language that would void the arbitration agreement should the AHLA be unavailable to conduct the arbitration. Consequently, the unavailability of the American Health Lawyers Association to conduct the arbitration in this matter does not render the arbitration provision unenforceable or commercially unreasonable.

As Plaintiffs have failed to establish that the arbitration agreement is substantively unconscionable, there is no need for the Court to conduct a fact-finding hearing on the issue of procedural unconscionability, as there must be a finding of both substantive and procedural unconscionability in order for the Court to conclude that the arbitration provision is

unconscionable. *Ellis* at 616; *See also Nationstar Mortgage, LLC v. West*, 237 W. Va. 84, 88, 785 S.E.2d 634, 638 (2016) *quoting Brown I*, 228 W. Va. at 658, 724 S.E.2d at 262, Syl. Pt. 20, in part.

* * *

APPENDIX E

[Excerpt from Defendant's Reply to Plaintiffs' Response to Defendant' s Brief in Support of Motion to Compel Arbitration, page 6, filed June 26, 2020]

* * *

rules, and did not require that the AHLA administer the arbitration. The Court essentially assumed that the arbitration agreement required that the arbitration be conducted by the AHLA and did not consider the important distinction that has been recognized by a majority of Courts, which overwhelmingly enforce arbitration agreements where the agreement only provides that the arbitration shall be conducted "in accordance with" the rules of a certain forum, but does not require that the forum itself conduct the arbitration. *See* Defendant's Amended Brief in Support of Motion to Compel Arbitration at pp. 31-40 for an extensive discussion and analysis of the numerous decisions of courts which enforce arbitration agreements containing such language on the basis that any other forum or entity may conduct the arbitration by applying the rules of the forum referenced in the arbitration agreement, such as *Jose Evenor Taboada v. AmFirst Insurance Co.,* Civ. No. 3: 18 CV83, WL 3604613 (S.D. Miss. 2019), *citing Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 383, 759 S.E.2d 727, 733 (2014). (arbitration agreement was enforced even though the AAA was not available to conduct the arbitration,

where the agreement provided that the arbitration would be administered "in accordance with the AAA's Commercial Arbitration Rules", but not that it be administered by the AAA.) "[S]everal Courts have recognized that when an arbitration clause selects an arbitral forum's rules but does not expressly designate that forum to hear the matter, arbitration may be compelled notwithstanding the forum's unavailability." *Meskill v. GGNSC Stillwater Greenley, LLC*, 682 F.Supp.2d 966 (D. Minn. 2012), *citing*, *Reddman v. KPMG LLP*, 457 F.3d 1054, 1059-61 (9th Cir. 2006), *abrogated on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010); *Jones v. GGNSC Pierre LLC*, 684 F.Supp.2d, 1161, 1167 (D.S.D. 2010) (compelling arbitration and noting that the arbitration clause "does not mandate the NAF *per se*".)" *Id.* at 972.

* * *

APPENDIX F

[Excerpt from Surreply to Plaintiffs' Motion
for Partial Summary Judgment,
pages 1-3, filed July 16, 2020]

**IN THE CIRCUIT COURT OF
RALEIGH COUNTY, WEST VIRGINIA**

LOUISE MCGRAW, by and through her Daughter NANCY REUSCHEL as power of attorney; and CHARLOTTE ROGERS, by and through her Daughter LORETTA HOLCOMB as power of attorney, on their own behalf and all others similarly situated,
Plaintiffs,

v.

CHANCELLOR SENIOR MANAGEMENT, LTD.,
Defendant.

Civil Action No.: 16-C-698
The Honorable Andrew Dimlich

**SURREPLY TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

The American Health Lawyers Association ("AHLA") is unavailable as an arbitration forum because the arbitration agreement is embedded in a

Residency Agreement rather than contained in a separate agreement. Plaintiffs continue to insist, despite clear and recent West Virginia authority to the contrary, that the agreement is unenforceable because the AHLA is unavailable as a forum. Plaintiffs continue to make that error, because they persist in ignoring that the language of the agreement provides that arbitration is to be conducted "in accordance with" the rules of a specific forum, but does not require that the AHLA conduct the arbitration.[1] Courts uniformly find that when the arbitration agreement uses the "in

---

[1] *Jose Evenor Taboada v. AmFirst Insurance Co.,* Civ. No.3: 18 CV83, WL 3604613 (S.D. Miss. 2019), *citing Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 383, 759 S.E.2d 727, 733 (2014). (arbitration agreement was enforced even though the AAA was not available to conduct the arbitration, where the agreement provided that the arbitration would be administered "in accordance with the AAA's Commercial Arbitration Rules", but not that it be administered by the AAA.); *citing Meskill v. GGNSC Stillwater Greeley, LLC,* 682 F.Supp.2d 966 (D. Minn. 2012) (enforcing arbitration agreement where the NAF was unavailable to conduct the arbitration. where the arbitration agreement provided that the arbitration will be conducted "in accordance with" the National Arbitration Forum code of procedure, as "this provision does not mandate that the NAF actually *conduct* the arbitration–it requires only that the NAF Code be *applied* by the arbitrator."). "[S]everal Courts have recognized that when an arbitration clause selects an arbitral forum's rules but does not expressly designate that forum to hear the matter, arbitration may be compelled notwithstanding the forum's unavailability. *Reddman v. KPMG LLP,* 457 F.3d 1054, 1059-61 (9th Cir. 2006), *abrogated on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.,* 621 F.3d 931 (9th Cir. 2010); *Jones v. GGNSC Pierre LLC,* 684 F.Supp.2d, 1161, 1167 (D.S.D. 2010) (compelling arbitration and noting that the arbitration clause "does not mandate the NAF *per se".*)" *Id.* at 972.

accordance with" language in an arbitration agreement, instead of the "administered by" wording, the choice of the forum is not "integral to the agreement". Thus, all courts find that under the "in accordance with" wording, the unavailability of the forum does not impair the enforceability of the arbitration agreement. Rather, the arbitration may be conducted by a substitute arbitrator. In effect. the fact that the agency referenced in the arbitration agreement is unwilling and/or unavailable to conduct the arbitration is of no moment. *Dean v. Heritage Healthcare of Ridgeway,* 759 S.E.2d 727, 773 (S.C.App. 2014) *citing Blue Cross Blue Shield of Alabama v. Rigas,* 23 So.2d 1077 (Ala. 2005); *Westmoreland v. High Point Healthcare Inc.,* 721 S.E.2d 712 (N.C. Ct. App. 2012).

Recognizing the lack of judicial support for its position, Plaintiffs advance the weak argument that "Chancellor drafted the arbitration provisions of the Plaintiffs' Residency Agreements and could have done so in a manner that complied with the AHLA Rules. but did not do so." Plaintiffs contend that the arbitration agreement should not be enforced because Chancellor should have drafted the arbitration agreement so as to comply with the Section 2.1 of the AHLA rules. Plaintiffs' argument is woefully flawed, as Plaintiffs incorrectly assume that Chancellor Senior Management was the scrivener of the arbitration provision. Chancellor is not a party to the Residency Agreements, as it only contracted with the owners of the assisted living facilities, who are the parties to the agreements, to provide management services. Such

services do not include drafting the residency agreements. Additionally, Chancellor had no obligation to assure that the arbitration agreement met the requirements of Section 2.1 of the AHLA rules. as the agreement states that the arbitration shall be conducted "in accordance with" the AHLA rules. The overwhelming majority of Courts interpret such language in an arbitration agreement to mean that there is no requirement that the forum itself administer the arbitration, only that the arbitration be conducted pursuant to the forum's rules.

Section 2.1 of the AHLA Rules concerns only whether the AHLA itse1fwill administer the arbitration as a matter of AHLA policy and has no bearing on the procedures for administration by substitute arbitrator. This is supported by the fact that Section 2.1 of the AHLA rules is found under the title, "Section 2: Filing a Claim" which provides a party with instructions as to how to file a claim for arbitration with the AHLA. Specifically, Section 2 instructs a party seeking to file a claim for arbitration with the AHLA to submit a claim form and pay the applicable fees in addition to providing a copy of the agreement to arbitrate, *inter alia.* Clearly, the Section 2.1 prerequisites that an arbitration agreement must meet only apply to claims filed with the AHLA for administration of the arbitration. Plaintiffs' focus on the Section 2.1 requirements as a basis for the Court to not enforce the arbitration provision is clearly misguided. Section 2.1 does not deal with the arbitration process itself, such as procedural rules for discovery, the exchange of information, prehearing

procedures and the hearing process. Section 2.1 only deals with the requirements for administration of the arbitration *by the AHLA*. These requirements are not applicable here, where the arbitration is to be conducted "in accordance with" the AHLA rules by a substitute arbitrator.

The arbitration provision's language requiring that the arbitration be conducted "in accordance with" the AHLA rules clearly reflects an intent that the arbitrator apply the AHLA rules concerning the procedural rules for administration of the arbitration, such as rules concerning

* * *

APPENDIX G

[Excerpt from Petitioner's Reply Brief,
pages 13-15, filed April 6, 2021

* * *

was made. The AHLA is not free to enact an internal operating Rule which would in substance vitiate an existing agreement to arbitrate that both state and federal law would absolutely enforce.[18] The AHLA may elect which disputes it will and will not adjudicate, but it has no power to adopt a Rule that would in practical effect void an otherwise valid and enforceable arbitration agreement.

Because Rule 2.4 on its face contemplates arbitration in another forum, the Respondents state that "[t]he simple fact is that Petitioner's arbitration provision *does not* provide for an alternate forum ... " Respondents' Brief, p. 19 (emphasis in original). That misses the point. The circuit court itself correctly acknowledged that "the agreement does not require the [AHLA] organization to administer the

---

[18] *See TD Auto Fin. LLC v. Reynolds,* 243 W.Va. 230, 842 S.E.2d 783, 787 (2020) ("[T]he issue of whether an arbitration agreement is a *valid* contract is a matter of state contract law and capable of state judicial review." (emphasis in original)); *GameStop, supra* at 572 ("The FAA 'places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms.'"); 9 U.S.C. §2, Section 2 of the Federal Arbitration Act.

arbitration," going as far as to say that the court "does not understand Plaintiffs' argument to raise that issue." A.1394. The lower court presumably did so in recognition of well-settled law that unless the choice of a designated forum is an integral part of the agreement to arbitrate, then the court should simply appoint a different arbitrator where the chosen forum is unavailable. *See* Petitioner's Brief, pp. 32-34, citing *Credit Acceptance, supra* at 569. And finally, the law is also clear that where the agreement includes no language demonstrating the parties' intent that a given forum is integral, and instead states only that arbitration shall be conducted "in accordance with" a given forum's rules, then the chosen forum should be regarded as merely an ancillary logistical concern and a substitute forum should be appointed. *See* Petitioner's Brief, pp. 35-36, citing *Jose Evenor, supra* at *5; *Clerk v. Cash Central of Utah, LLC,* 2011 WL 3739549 at *6 (E.D. Pa. 2011); *Reddman, supra* at 1060; *Dean, supra* at 733; *Meskill, supra* at 974. The Respondents cannot carry their burden of demonstrating that selection of the AHLA was integral.[19]

To counter this settled jurisprudence, the Respondents rely upon inapposite decisions dealing with the enforcement of mandatory jurisdictional forum-selection clauses in garden variety contracts. For example, the Respondents cite *Caperton v. A.T. Massey Coal Co.,* 225 W.Va. 128, 143, 690 S.E.2d 322, 334 (2009). The case is clearly distinct. In *Caperton,*

[19] *State ex rel. Troy, supra* at 276.

the contract required that any lawsuits "shall be filed in 'the Circuit Court of Buchannan County, Virginia.'" The Court concluded the language was mandatory, rather than permissive. Here, by contrast, while the agreement states that "any arbitration shall be conducted in Cabell County, West Virginia," it requires only that it be conducted *"in accordance with"* the AHLA Rules. It conspicuously does not say the arbitration "shall be conducted by the AHLA." Again, courts construing the "in accordance with" language have readily acknowledged this distinction. *Jose Evenor, supra; Dean, supra; Meskill, supra; Reddman, supra.*

The point is made clear by *Grant v. Magnolia Manor-Greenwood, Inc.,* 678 S.E.2d 435 (S.C. 2009), a decision relied upon by the Respondents. Unlike the language contract here, the the arbitration agreement in *Grant* provided that all disputes between the parties "shall be resolved by binding arbitration *administered by the National Health Lawyers Association (the "NHLA")." Id.* at 437 (emphasis added). The case is clearly distinguishable, as the arbitration provision *sub judice* does not say that arbitration "shall be administered by the AHLA." The provision states only that the arbitration would be conducted "in accordance with" the AHLA Rules. Nor does *Rudolph, supra* aid the Respondents, since the arbitration provision in that case specifically incorporated the AHLA Rules, which were therefore deemed to be integral to the

arbitration agreement. *Id.* at 8.[20] As discussed above, the instant agreement does not do so. Finally, *Shotts v. OP Winter Haven, Inc.,* 83 So.3d 458 (Fla. 2011) is of no relevance. *Shotts* addressed whether a clause in an arbitration agreement precluding an award of punitive damages was severable from the remainder of the arbitration agreement, which provided that the arbitration would be conducted in accordance with AHLA Rules. *Id.* at 478. That issue is obviously not before this Court.

Contrary to the trial court's erroneous conclusion, the agreement can be "enforced as written".[21] Under West Virginia law, it must be.[22]

B. The Respondents Cannot Sustain Their Burden Of Demonstrating That Chancellor Waived Arbitration

---

[20] The *Rudolph* Court also incidentally decided to apply the 2014 AHLA Rules that were in effect when the arbitration agreement was made, despite that the AHLA Rules were subsequently amended twice. *Id.* at 3, n.l.

[21] A.01394. "In accordance with" the AHLA Rules, where Rule 2.1 prohibits the AHLA from hearing a given dispute, that finding "shall not be considered a determination on the validity of the arbitration agreement, and the parties may arbitrate in another forum if their agreement so provides or if they otherwise agree." *See* AHLA Rule 2.4. In other words, where the AHLA will not hear a matter, the AHLA Rules themselves acknowledge that another forum may do so.

[22] *Hardin, supra; Stacy, supra.*

Chancellor did not waive arbitration, and the Respondents should be estopped from so contending. The gravamen of the Respondents' lawsuit is that their decedents were allegedly misled as to the care and services they contracted for. Yet the Respondents elected not to sue the owners/operators of the facilities with whom they contracted. With full knowledge of the existence of arbitration provisions within the Residency Agreements, the Respondents elected instead to sue in court against Chancellor, a nonsignatory to the Residency Agreements with whom the Respondents had no direct dealings at all. Although Chancellor introduced defenses in its First Amended Answer suggesting that the owners/operators were the proper defendants or at least

* * *