IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COPY

EDWARD R. FLEMMA,

Plaintiff-Appellee,

vs. **No. 29,933**

HALLIBURTON ENERGY SERVICES, INC., RICK GRISINGER, RICHARD MONTMAN, and KARL E. MADDEN,

Defendants-Appellants

On Appeal from the First Judicial District Court, Santa Fe County

Honorable James A. Hall, District Judge, Division II

Case No. D-0101-CV-2008 03590

APPELLANTS' BRIEF IN CHIEF

Respectfully submitted:

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STATEMENT OF COMPLIANCE

This brief complies with the type volume limitations of Rule 12-213(F)(3) because the body of the brief, as defined by Rule 12-213(F)(1) NMRA, contains 8,744 words. This brief complies with the typeface requirements of Rule 12-213(F)(3) and Rule 12-305(C)(1) NMRA because this brief was printed in 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Office Word 2007.

TABLE OF AUTHORITIES

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APPELLANTS' BRIEF IN CHIEF

Defendants/Appellants Halliburton Energy Services, Inc., Rick Grisinger, Richard Montman, and Karl Madden (collectively referred to herein as "HES"), through their counsel, hereby submit their Brief in Chief.

STATEMENT OF THE ISSUES

1. Where a dispute is encompassed by a valid arbitration agreement, the Federal Arbitration Act, which applies in state courts, requires a trial court to stay a pending action and direct the parties to arbitrate. The evidence submitted below in support of HES's motion to compel arbitration and motion to reconsider established that (1) the parties entered into a valid agreement to arbitrate and (2) Plaintiff Edward Flemma's claims were within the scope of the agreement. Did the District Court err in refusing to compel Flemma's claims to arbitration?

2. Under New Mexico choice-of-law rules applicable to contract disputes, a court must apply the law of the state in which a contract was formed. The arbitration agreement in issue was formed, and repeatedly reaffirmed, between Flemma and HES while Flemma was employed in Texas and Louisiana. Did the District Court err in evaluating the validity and enforceability of the parties' arbitration agreement under New Mexico law?

3. HES moved the District Court for reconsideration of its order denying arbitration based on additional evidence—a Secondment Agreement signed by

Flemma which contains an express acceptance and assent to arbitration—that establishes manifest error in the District Court's initial determination that Flemma had not affirmatively assented to the arbitration agreement. Did the District Court err in denying HES's motion to reconsider?

STATEMENT OF FACTS AND SUMMARY OF PROCEEDINGS

I. Flemma's Employment with HES and Agreement to Arbitrate.

Edward Flemma was an HES employee for approximately twenty-six years until he retired effective April 18, 2008. [RP 57, 64]. His last position with HES was District Manager in Farmington, New Mexico. [RP 64].

On four separate occasions during his employment, HES mailed to Flemma materials notifying him that his continued employment with the company would constitute his acceptance of and assent to the terms of the Halliburton Dispute Resolution Program ("DRP"), which obligates the company and its employees to resolve their disputes through binding arbitration. After receiving these materials, Flemma continued to work for HES until his retirement.

In December 1997, while Flemma was working for HES in Texas, HES notified him in writing of its adoption of the DRP, effective January 2, 1998, by mailing a copy of the DRP and its Rules, a brochure describing the DRP's basic components, a tri-fold summary of the DRP, and a transmittal letter (the "DRP documents") to him at his address of record in Tomball, Texas. [RP 66-68, 72-73,

91-92]. In the spring of 1998, HES again mailed materials describing the DRP and a transmittal letter to Flemma at his address of record in Tomball. [RP 67, 73, 91-92]. In the summer of 1999, while he was working for HES in Louisiana, HES mailed to him at his address of record in Belle Chasse, Louisiana a package containing the DRP and its Rules, the descriptive brochure, and a transmittal letter addressed to all employees of Halliburton-related companies again notifying him of the DRP's arbitration requirement and its binding effect. [RP 67, 93-94, 107]. And in October 2001, while Flemma was once again working for HES in Texas, HES mailed to him at his business office in Halliburton's Bellaire, Texas facility another copy of the DRP and its Rules, the descriptive brochure, and a transmittal letter addressed to all employees notifying him – for the fourth time – of the DRP's binding effect. [RP 67-68, 108-09, 135]. None of these mailings to Flemma were returned to HES as undeliverable. [RP 68]

The documents mailed in 1997, 1998[1], 1999 and 2001 were essentially identical. In each mailing, the materials clearly and expressly conveyed that continuing employment with HES would constitute agreement to abide by the DRP's terms and that, under the DRP, employees of Halliburton-related companies must submit any and all employment-related disputes, regardless of when they arose, to arbitration rather than filing a lawsuit in court. For example, the 2001

[1] The 1998 mailing included only a cover letter and copy of the formal DRP rules. [RP 86-90].

Plan Rules explain that "[e]mployment or continued employment after the Effective Date of this Plan constitutes consent by both the Employee and the Company to be bound by this Plan, both during the employment and after termination of employment." [RP 124]. The 2001 Rules also explain the DRP's final and binding arbitration obligation: "Proceedings under the Plan [are] the exclusive, final and binding method by which Disputes are resolved." [RP 123]. The DRP Rules mailed to Flemma in 1997, 1998, and 1999 contained substantially similar notices. [RP 84, 90, 106].

Similarly, the summary DRP brochure mailed to Flemma in 1997, 1999 and 2001 clearly and expressly notified him that continuing employment with HES would constitute his agreement to abide by the DRP's terms and that among those terms was the requirement to submit all disputes with HES related to his employment, regardless of when they arose, to arbitration, rather than the courts, for resolution. For example, the 2001 DRP brochure states:

> Halliburton has adopted this four-option program as the exclusive means of resolving workplace disputes for legally protected rights. ... [A]n employee who accepts or continues employment at Halliburton, by accepting compensation for employment, agrees to resolve all legal claims against Halliburton or any other Halliburton entity ... through this process rather than through the court system. If an employee files a lawsuit against Halliburton or any of the parties listed above, Halliburton will ask the court to dismiss the lawsuit and refer it to the Dispute Resolution Program. This provision applies to any

> workplace dispute, regardless of when it arises, including disputes that arise after an employee leaves Halliburton.
>
> ...
>
> If an employee accepts or continues employment with any Halliburton company, the employee and Halliburton thereby agree to all provisions of the Dispute Resolution Program. This includes the requirement that any legal dispute not resolved through Options 1, 2, or 3 be submitted to final and binding arbitration rather than through the courts or to a jury.

[RP 112, 118]. The DRP summary brochures mailed to Flemma in 1997 and 1999 contained substantially similar notices. [RP 78, 99]

Moreover, even the cover letters accompanying the materials mailed in 1997, 1999 and 2001 notified Flemma that his continuing employment with HES would constitute his agreement to be bound by the terms of the DRP and that, under the terms of the DRP, he was required to submit workplace disputes to arbitration rather than filing a lawsuit in court. For example, the 1997 cover letter explained that:

> [Halliburton's adoption of the Dispute Resolution Program] means that, after January 1st, both you and the Halliburton company by which you are employed will be bound to use the Dispute Resolution Program as the primary and sole means of dispute resolution. If you are unable to resolve a dispute related to your employment in-house, ... under the terms of the Program the dispute will be submitted to mediation and/or binding arbitration instead of through the courts. If legal action is instituted, the court will be requested to refer the matter back to the Dispute Resolution Program for final resolution.

[RP 74]. Likewise, the 1999 cover letter states that

> Your decision to accept employment or continue employment after August 15, 1999 will mean that you have agreed to and are bound by the terms of this Program as contained in the Dispute Resolution Plan and Rules (enclosed). ... While you and Halliburton retain all substantive legal rights and remedies under the Program, you and Halliburton are both waiving all rights which either may have with regard to trial by jury for employment related legal disputes (including, for example, discrimination, wrongful discharge or harassment claims) in state or federal court.

[RP 95-96]. Additionally, the 2001 cover letter states that "[a]s a reminder, each Halliburton employee [subject to U.S. law] has agreed (along with the company itself) that all workplace disputes will be resolved utilizing the DRP." [RP 110]

Further, the materials mailed to Flemma clearly notified him that his obligation to arbitrate employment-related disputes extended to any claims against subsidiaries of Halliburton or "officers, directors, employees, and agents" of Halliburton or its subsidiaries. [RP 82, 88, 98, 105, 112, 120]

Thus, HES gave Flemma clear and express notice—not just once but four times—that by continuing his employment he was manifesting his assent to be contractually bound by the DRP's terms, including the requirement to resolve disputes with HES and its employees through binding arbitration instead of the court system.

II. The Halliburton Dispute Resolution Program.

Halliburton's Dispute Resolution Program is an effective and fair means of finally resolving any dispute that relates to the employment relationship. As its final step, it requires binding arbitration before an independent and neutral arbitrator appointed by the American Arbitration Association or another independent dispute resolution association. [RP 115, 116, 118]. The DRP facilitates resolution of disputes without the expense and delay of court litigation. It permits representation of the employee and the company by legal counsel, provides for discovery in accordance with the Federal Rules of Civil Procedure, and authorizes an award of attorney's fees to employees who prevail in arbitration even in the absence of a statute authorizing such award. [RP 123, 125]. In addition, Halliburton and all Halliburton-related companies maintain an Employment Legal Consultation Plan that provides employees up to $2,500 in fees and expenses for legal services used to resolve a work-related complaint under the Program, regardless of the outcome of the proceeding. [RP 115]. Other than a minimal initiation fee which is generally less than a court filing fee, Halliburton pays all administrative fees and expenses of the arbitration proceedings. [RP 113].

The DRP does not restrict or modify an employee's substantive legal rights under any law or statute and places no limitation on available remedies. [RP 122-23]. Rule 30 of the Dispute Resolution Rules makes this clear:

> The arbitrator's authority shall be limited to the resolution of legal Disputes between the Parties. As such, the arbitrator shall be bound by and shall apply applicable law including that related to the allocation of the burden of proof as well as substantive law. The arbitrator shall not have the authority either to abridge or enlarge substantive rights available under applicable law.

[RP 126-27]. Similarly, the Program brochure explains that, "in arbitration, it's possible for you to seek or receive any award you might seek through the court system." [RP 117].Thus, all employees of Halliburton-related companies can obtain the same relief in arbitration that they can in court.

III. Flemma's Breach of his Agreement to Arbitrate.

On December 22, 2008, Flemma violated his arbitration agreement by filing a lawsuit against HES and several of its employees. [RP 1-7]. Flemma refused HES's demand that he submit his claims to arbitration.

IV. District Court Proceedings on HES's Motion to Compel Arbitration

On February 16, 2009, Defendants moved the trial court to enforce the parties' agreement to arbitrate. [RP 56-160]. Defendants argued that Texas and Louisiana law, rather than New Mexico law, control the validity and enforceability of Flemma's agreement to arbitrate because the agreement was formed initially in Texas, and subsequently reaffirmed in Texas and Louisiana.

After an oral hearing, the District Court denied Defendants' motion on two grounds. [Transcript of May 29, 2009 Hearing ("Tr1"). 19]. First, the Court found that the parties' arbitration agreements lack consideration under New Mexico law

because they do not sufficiently restrict HES's right to amend or terminate the DRP, including HES's obligation to arbitrate. [Tr1. 19-20]. Second, the Court refused to determine the validity of the arbitration agreements under Texas or Louisiana law because it found that applying the law of those states would offend New Mexico public policies in favor of the right to trial by jury and the requirement of affirmative proof of acceptance and mutual assent in contract cases. [Tr1. 20-21]. The Court then found the parties' arbitration agreements unenforceable under New Mexico law because Defendants did not establish with affirmative proof Flemma's acceptance of, or mutual assent to, the DRP as a condition of his employment. [Tr1. 20-21]

V. HES Moves for Reconsideration Based on an Arbitration Agreement Expressly Accepted and Assented to by Flemma.

Following entry of the order denying arbitration [RP 184-85], based in part on the District Court's refusal to apply the law of the states where the arbitration agreement was formed and reaffirmed, thus imposing on HES a higher standard of proof on the issue of acceptance and assent, HES located a Secondment Agreement ("Agreement") executed by Flemma on November 4, 2003 in conjunction with the commencement of an international assignment in Angola, which lasted until 2006. [RP 162, 245-46]. The Agreement provided that Flemma's employment with HES in the United States continued, uninterrupted, during his secondment to Halliburton International, Inc. in Angola. [RP 245-46]. The Agreement also expressly

reaffirmed that any claims or disputes between Flemma and HES related to his employment were to be resolved under the DRP, including if necessary by binding arbitration:

> [Flemma] understands and **agrees to be bound by and accepts as a condition of [his] employment in the US the terms of the Halliburton Dispute Resolution Program applicable to all employees from or working in the US**, which is herein incorporated by reference.
>
> ...
>
> [Flemma] understands that the Dispute Resolution Program requires, as its last step, binding Arbitration to resolve any and all claims or disputes. **[Flemma] understands that any and all claims or disputes that [he] might have against HES** or its benefit plans for benefits or employment related matters **including termination** and/or any or all personal injury claims arising in the workplace but not already covered by workers compensation insurance, **must be submitted to and are therefore subject to binding Arbitration instead of any local or federal court system in the US.**

[*See id.* (emphasis added)].

Based on this additional evidence, HES moved the District Court to reconsider its order denying arbitration. [RP 219]. After an oral hearing, the Court denied Defendants' motion. [RP 261-62]. The Court considered the Agreement submitted with the motion, but concluded it applied only to the period during which Flemma was seconded to Angola.[2] [Transcript of August 20, 2009 Hearing

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[2] While the order entered by the Court states only that the motion for reconsideration was being denied, it is clear from the transcript of the hearing that

("Tr2"). 12]. As additional grounds for denying the motion for reconsideration, the Court reiterated its opinion that the arbitration agreement lacked consideration based on the company's right to amend or terminate the DRP. [Tr2. 13].

On September 23, 2009, Defendants timely noticed this appeal of the District Court's orders denying arbitration and reconsideration. [RP 290-95]

SUMMARY OF ARGUMENT

This appeal arises from Edward Flemma's refusal to abide by his contractual obligation to submit his disputes with HES to arbitration pursuant to the DRP. The Federal Arbitration Act ("FAA" or "Act"), which applies in state courts, provides that an agreement to arbitrate that is valid under generally applicable principles of contract law and involves interstate commerce is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The Act further provides that, where a party to such an enforceable agreement files suit, on application by another party to the agreement, the court in which the action is pending "shall ... stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement ...." 9 U.S.C. § 3. Thus, section 3 of the Act leaves no room for discretion. Where a dispute is encompassed by a valid arbitration agreement, the trial court must stay the pending action and direct the parties to arbitrate. *Id.*

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the Court did reconsider its initial decision to the extent that it considered the significance of the Secondment Agreement and determined that its application was limited to the period during which Flemma was working in Angola. [Tr2. 12 ("I do deny the Motion for Reconsideration on the substantive grounds.")]

During his employment, Edward Flemma agreed – five times – that he would submit his disputes with HES to arbitration rather than filing a lawsuit in court. The agreement was formed initially in Texas, and subsequently reaffirmed in Texas and Louisiana, and, consequently, under New Mexico choice-of-law rules, Texas and Louisiana law control its validity and enforceability. While the agreement need be valid under only the law of either Texas or Louisiana to be enforceable, it is valid under both. Further, one of the agreements is signed by Flemma and, thus, even if New Mexico law were applied, there can be no genuine dispute that he affirmatively manifested his acceptance and assent to the DRP and arbitration.

The trial court erred in finding that no valid arbitration agreement exists between the parties. Accordingly, this Court has the authority, and the obligation, to correct the trial court's error by reversing its order denying arbitration and ordering that Flemma must pursue his claims in arbitration pursuant to the terms of the DRP.

STANDARD OF REVIEW

This Court reviews a district court's denial of a motion to compel arbitration de novo. *Piano v. Premier Distributing Co.*, 2005-NMCA-018 ¶ 4, 137 N.M. 57, 107 P.3d 11 (filed 2004); *Heye v. Am. Golf Corp.*, 2003-NMCA-138 ¶ 4, 134 N.M. 558, 81 P.3d 495. Similarly, whether the parties have agreed to arbitrate presents a

question of law, and this Court reviews de novo the applicability and construction of a contractual provision requiring arbitration. *Piano*, 2005-NMCA-018 ¶ 4; *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030 ¶ 51, 131 N.M. 772, 42 P.3d 1221 (filed 2001).

A district court's determination of the applicable law is a question of law that this Court reviews de novo. *Fowler Bros., Inc. v. Bounds*, 2008-NMCA-091 ¶ 7, 144 N.M. 510, 188 P.3d 1261; *Fiser v. Dell Computer Corp.*, 2008-NMSC-046 ¶ 6-18, 144 N.M. 464, 188 P.2d 1215 (applying de novo standard of review to district court's choice-of-law decision).

ARGUMENT

I. The District Court Erred in Refusing to Compel Arbitration Under the Federal Arbitration Act.

The Federal Arbitration Act ("FAA") mandates the enforcement of all arbitration agreements that (1) involve interstate commerce and (2) are valid under general principles of contract law. 9 U.S.C. § 2; *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687-88 (1996). The evidence submitted to the trial court establishes as a matter of law that the arbitration agreements between Flemma and HES satisfy both requirements and are, therefore, enforceable under the Act. Moreover, the dispute between Flemma and HES indisputably falls within the scope of the parties' arbitration agreements. Consequently, the trial court erred in denying HES's motion to compel arbitration.

A. Flemma's Employment Relationship With HES Involved Commerce.

"Commerce" in the context of the FAA is defined as commerce among the several states, and is to be broadly construed to effectuate Congress' goal of encouraging alternative dispute resolution mechanisms. *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995) (holding that the determination, in the context of the FAA, of whether a contract involves interstate commerce requires the most expansive construction of the term). Thus, a contract or transaction is covered by the Act if it merely "affects" interstate commerce. *Id.*; *see Collins v. Prudential Ins. Co. of Am.,* 752 So. 2d 825, 827 (La. 2000).

Flemma has not disputed that his employment relationship with HES involved interstate commerce. Moreover, the evidence submitted below establishes this fact. In his position as District Manager in Farmington, New Mexico, Flemma provided services to HES's customers in New Mexico, Colorado, Arizona, and Utah. [RP 64-65, 137-38].His responsibilities included supervision of a completions-fluids-production facility in Cortez, Colorado. [*Id.*]. HES sells the fluids produced at the facility, as part of its hydrocarbon extraction and production services, to customers in New Mexico, Colorado, Utah, and Arizona. [*Id.*]. Accordingly, the facts related to Flemma's employment satisfy the FAA's requirement that the transaction underlying the arbitration agreement involve interstate commerce.

B. The Arbitration Agreement Between the Parties Is Valid and Enforceable Under General Principles of Contract Law.

The validity of an arbitration agreement is determined by reference to general principles of contract law. *Doctor's Assocs. Inc. v. Casarotto,* 517 U.S. 681, 686-87 (1996); *see also Perry v. Thomas,* 482 U.S. 483, 492, n.9 (1987) (noting that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning validity, revocability, and enforceability of contracts generally" (emphasis in original)). However, to the extent that state law carves out special rules for arbitration agreements that do not apply generally to all contracts, it is "inconsonant with, and is therefore preempted by, the federal [act]." *Doctor's Assocs.,* 517 U.S. at 688.

When Flemma received the DRP documents in 1997, 1998, and 2001, he was living and working for HES in Texas. [RP 58-59, 69, 71]. When he received the 1999 mailing of the DRP documents, he was living and working for HES in Louisiana. [RP 58-59, 70]. Because the arbitration agreement at issue was formed in Texas, initially, and subsequently reaffirmed in Texas and Louisiana, its validity and enforceability is determined under the contract law of those states.[3] *Shope v.*

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[3] The major terms of the DRP, including those related to arbitration, did not change over time. Halliburton mailed the DRP materials to employees on these several occasions—upon and following its adoption of the plan for HES employees effective January 1998—to insure that then current employees, such as Flemma, received notice of its terms and that those terms, especially arbitration, would be binding after January 1998. Thus, the initial formation of the arbitration

State Farm Ins. Co., 1996-NMSC-052, ¶ 10, 122 N.M. 398, 925 P.2d 515; *Reagan v. McGee Drilling Corp.*, 1997-NMCA-014 ¶ 5, 7, 123 N.M. 68, 933 P.2d 867; *Sandoval v. Valdez*, 91 N.M. 705, 707, 580 P.2d 131, 133 (Ct. App. 1978).

1. Flemma Accepted and Assented to the DRP as a Condition of His Employment with HES Under Both Texas and Louisiana Law.

In Texas and Louisiana, a person employed for an indefinite term is an at-will employee. LA. CIV. CODE ANN. art. 2747; *In re Halliburton Co.*, 80 S.W.3d 566, 568-69 (Tex. 2002); *Brannan v. Wyeth Labs.*, 526 So. 2d 1101, 1103 (La. 1988). Flemma was an at-will employee of HES while employed in Texas and Louisiana.[4] [RP 65, 139]. If the employment relationship is at-will, either party is free to terminate it at any time and for any lawful reason. LA. CIV. CODE ANN. art. 2747; *In re Halliburton Co.*, 80 S.W.3d 566, 568-69 (Tex. 2002); *Brannan v. Wyeth Labs.*, 526 So. 2d 1101, 1103 (La. 1988); *Whipple v. McDonald's Restaurant Managers*, 971 So. 2d 431, 433-34 (La. Ct. App. 2007). Since the

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agreements with HES employees occurred in January 1998 (following the December 1997 notice), and the subsequent mailings are best viewed as reaffirmations of the initial arbitration agreements for those employees, such as Flemma, who received earlier mailings of the DRP materials.

[4] Though the agreement between HES and Flemma need only be valid under *either* Texas *or* Louisiana contract law, HES cites both Texas and Louisiana authorities since Flemma was working in both states at various times when he was put on notice of the applicability of the DRP to his employment and because the agreement is valid under the contract law of *both* jurisdictions.

employer enjoys the legal right to terminate the relationship at any time, it also can alter the binding terms and conditions of the relationship, prospectively, at any time. *In re Halliburton*, 80 S.W.3d at 568-69; *Wall v. Tulane Univ.*, 499 So. 2d 375, 376 (La. Ct. App. 1986). Once an employer provides unequivocal notice of changes in the terms of employment, an employee who continues working is deemed, as a matter of law, to have accepted them. *In re Halliburton*, 80 S.W.3d at 568-69; *Fairbanks v. Tulane Univ.*, 731 So. 2d 983, 988 (La. Ct. App. 1999).

The Texas Supreme Court explained:

> Generally, when the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues to work with knowledge of the changes, he has accepted the changes as a matter of law.

Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986), *cited in In re Halliburton*, 80 S.W.3d at 568. The Texas Supreme Court, in *In re Halliburton,* held that notice to the plaintiff via the same or similar mailings sent to Flemma here was sufficient to create a binding arbitration contract under at-will employment principles. *See id.*

Likewise, in *Wall*, a Louisiana case, a former employee of Tulane University sued the University, alleging that he had been damaged when Tulane revised its tuition-waiver policy for employees so that fewer courses could be taken tuition-free. *Wall*, 499 So. 2d at 375. Tulane responded that, because Wall was an at-will

employee, it was free to terminate his employment or modify (prospectively) the benefits associated with his employment at any time. *Id.* The trial court agreed and the appellate court affirmed. *Id.* at 376. The court noted that Wall was free to continue working, thereby accepting the changes in his terms and conditions of employment, or (unless he could convince Tulane to rescind the changes) to resign. *Fairbanks*, 731 So. 2d at 988 (discussing *Wall*). This principle of acceptance by continued employment is simply an application of the black-letter contract law principle that a party may accept an offer by conduct, rather than words. *See, e.g.,* La. CIV. CODE ANN. art. 1927; *In re Halliburton*, 80 S.W.3d at 569; *Chaisson v. Chaisson,* 690 So. 2d 899, 901 (La. Ct. App. 1997).[5]

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[5] Courts in New Mexico, as well as other jurisdictions, have recognized the same principle. The consensus among states that have addressed this issue is that, as a fundamental matter of contract law, the terms of an at-will employment relationship can be modified prospectively where the employee continues to work after the employer provides notice of the impending change. *See Stieber v. Journal Publ'g Co.,* 120 N.M. 270, 901 P.2d 201, 204 (Ct. App. 1995); *see also Cotter v. Desert Palace, Inc.,* 880 F.2d 1142, 1145 (9th Cir. 1989) (applying Nevada law); *DiGiacinto v. Ameriko-Omserv Corp.,* 69 Cal. Rptr. 2d 300, 303 (1997); *Ferrerra v. A.C. Nielsen,* 799 F.2d 458, 460 (Colo. Ct. App. 1990); *Martin v. Golden Corral Corp.,* 601 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1992); *Parker v. Boise Telco Fed. Credit Union*, 923 F.2d 493, 499 (Idaho Ct. App. 1996); *In re Certified Question (Bankey v. Storer Broad. Co.),* 443 N.W.2d 112, 120 (Mich. 1989); *Tousaint v. Blue Cross & Blue Shield,* 292 N.W.2d 880 (Mich. 1980); *Pine River State Bank v. Mettille,* 333 N.W.2d 622, 627 (Minn. 1983); *Fraver v. N. C. Farm Bureau Mut. Ins. Co.*, 318 S.E.2d 340, 344 (N.C. Ct. App. 1984); *Sadler v. Basin Elec. Power Coop.*, 431 N.W.2d 296, 298 (N.D. 1988); *Langdon v. Saga Corp.,* 569 P.2d 524, 527-28 (Okla. Ct. App. 1977); *Fish v. Trans-Box Sys., Inc.,* 914 F.2d 1107, 1108-09 (Or. Ct. App. 1996); *Fleming v. Borden, Inc.,* 450 S.E.2d 589, 595 (S.C. 1994); *Hathaway v. Gen. Mills*, 711 S.W.2d 227, 229 (Tex. 1986); *Trombley*

The evidence HES submitted to the trial court in support of its motion to compel arbitration establishes that notices of the DRP's adoption and its application to Flemma were mailed, postage prepaid, to Flemma's correct address and were never returned by the United States Postal Service. This creates a presumption that Flemma received the mailings. *Westco Distrib., Inc. v. Westport Group, Inc.*, 150 S.W.3d 553, 561 (Tex. App. – Austin 2004, no pet.); *Conoco, Inc. v. Tarver, II*, 600 So. 2d 889, 889-90 (La. Ct. App. 1992); *see also Davis v. United States Postal Serv.*, 142 F.3d 1334, 1340 (10th Cir. 1998). Having thus been apprised of the modification of the terms and conditions of his employment, and having continued to work thereafter, Flemma, under general principles of contract law, accepted and is bound by his agreement to arbitrate.

Flemma cannot escape this result by claiming he did not read the DRP materials that he received. Even were he to make such a claim – which would be incredulous on its face since he received the DRP materials four times – he is charged with constructive knowledge of written notice provided to him by his employer. *See Burlington N. R.R. Co. v. Akpan*, 943 S.W.2d 48 (Tex. App. – Fort Worth 1996, writ denied) (finding that a party cannot deny knowledge of a fact when notice of the fact is given but the party fails to "read it or remember it, either

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v. Vt. Med. Ctr., 738 A.2d 103, 109 (Vt. 1999); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087 (Wash. 1984).

by his own negligence or by his conscious choice."). Significantly, in the evidence that he submitted to the court below, Flemma stops short of denying that he received the DRP mailings. [RP 48]. Instead, his affidavit testimony states only that he does not remember receiving the DRP materials or being aware of his obligation to arbitrate employment-related disputes. [*Id.*]. Such equivocal "evidence" does not overcome the presumption that Flemma received the materials. *Hemperly v. Aetna Cas. & Sur. Co.*, 516 So. 2d 1202, 1204 (La. Ct. App. 1987) (requiring more proof than "mere denial" of receipt to rebut the presumption); *Wemberly Investment Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999) (requiring affirmative denial of receipt to rebut the presumption). Further, in a later, supplemental affidavit, Flemma provides contradictory testimony that undermines the credibility of his initial statement that he was unaware of his obligation to arbitrate under the DRP. In that supplemental affidavit he admits that as early as 2003 he was aware of the DRP and the fact that it requires the parties to submit their disputes to binding arbitration. [RP 239-40].

Thus, under Texas or Louisiana law, Flemma is charged with notice of HES' adoption of the DRP and that he would be bound by its arbitration provisions if he continued his employment after January 1, 1998. Having received this notice on four separate occasions, and having even signed an agreement expressly assenting to arbitration on a fifth occasion, Flemma cannot credibly deny that he was aware

that the DRP was a condition of his employment, and the District Court erred in holding, on these facts, that HES had not sufficiently established his acceptance and assent.

2. The District Court Erred In Refusing to Determine the Validity of the Parties' Agreement to Arbitrate Under Texas and Louisiana Law.

New Mexico adheres to the traditional conflicts-of-law rules of the First Restatement of Contracts. *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 469, 775 P.2d 233, 235 (1989). In contract disputes, New Mexico courts apply the law of the jurisdiction in which the contract was formed. *Shope*, 1996-NMSC-052, ¶ 10; *Reagan v. McGee Drilling Corp.*, 1997-NMCA-014 ¶ 5, 7; *Sandoval*, 91 N.M. at 707, 580 P.2d 131, 133 (Ct. App. 1978).

New Mexico law does recognize an exception to the place-of-formation rule under which a court may decline to apply the law of another state if such application would offend a fundamental New Mexico public policy. *Shope*, 1996-NMSC-052, ¶ 10; *United Wholesale Liquor Co.*, 108 N.M. at 471; *Reagan*, 1997-NMCA-014 ¶ 9. However, the New Mexico Supreme Court and Court of Appeals have recognized that the public-policy exception is extremely narrow. *Shope*, 1996-NMSC-052, ¶ 10-11; *Reagan*, 1997-NMCA-014 ¶ 9; *see also Tucker v. R.A. Hanson Co.*, 956 F.2d 215, 218 (10th Cir. 1992) (applying New Mexico law).

Mere differences between New Mexico law and that of another state do not warrant its invocation. *See, e.g., Shope*, 1996-NMSC-052. If this was not the case, the exception would swallow the rule; every New Mexico law is an expression of the state's public policy and absent restrained application of the public-policy exception, New Mexico's law would always prevail against a foreign law unless the foreign law was identical. *See Tucker*, 956 F.2d at 218. Thus, a New Mexico court should not invoke the exception unless application of the law of a foreign state would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal." *Reagan*, 1997-NMCA-014 ¶ 9 (quoting *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198 (N.Y. 1918) (Justice Cardozo)).

Here, the District Court invoked the public-policy exception to the place-of-formation rule and judged the validity of the parties' arbitration agreements under New Mexico law. [Tr1. 20-21]. The District Court's refusal to apply Texas and Louisiana law based on a "mere difference" between the law of those states and that of New Mexico was legal error.

There is no true conflict between the laws of Texas, Louisiana, and New Mexico with respect to the elements for formation of a valid contract. In each of the states, the elements of a contract are the same: offer, acceptance,

consideration,[6] and mutual assent. *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029 ¶ 9, 121 N.M. 728, 918 P.2d 7; *Matl Construction Co. v. Jim Connelly Masonry, Inc.*, No. 03-08-0059-CV, 2009 WL 2341891, at *4 (Tex. App. – Austin July 31, 2009) (citing *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007); *McPherson v. Cingular Wireless, LLC*, 967 So.2d 573, 577 (La. App. 2007). In each of the states, a party who alleges the existence of a contract must present evidence of each of the elements. *Garcia*, 1996-NMSC-029 ¶ 9; *Matl Construction Co.*, 2009 WL 2341891, at *4; *McPherson, LLC*, 967 So.2d at 577. The states' laws differ only with respect to the evidentiary showing a party must make to establish certain of the elements. Specifically, in Texas and Louisiana, a party may establish acceptance and mutual assent by showing that an offeree received notice of an offer and, following receipt, tendered performance. *See, e.g., In re Halliburton Co.*, 80 S.W.3d 566, 568-69 (Tex. 2002) (finding that an employee accepted and manifested assent to the Halliburton DRP as a condition of his employment by continuing to work for Halliburton after receiving mailed notice of the implementation of the DRP); *Chaisson v. Chaisson*, 690 So. 2d 899, 900-901 (La. App. 1997) (holding that son accepted and assented to his parents' offer to loan him money for college expenses, subject to repayment, by accepting money that his parents sent to him for particular purposes even when there was no

[6] As described in Section I.B.3, *infra*, "lawful cause" is Louisiana's consideration-like contract element.

explicit agreement to this arrangement). This Court has, however, disagreed, holding that a party cannot establish acceptance and mutual assent by merely presenting evidence that an offeree received notice and tendered performance. Instead, New Mexico requires proof of "actual knowledge," *i.e.* that the offeree was conscious of the disputed terms of the offer before acceptance can be manifested through performance. *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148 ¶ 11; 134 N.M. 630, 81 P.3d 573.

Significantly, the difference in the law of Texas and Louisiana, on one hand, and that of New Mexico, on the other, does not stem from conflicting state public policies. Indeed, the public policy of each of the three states strongly favors freedom of contract and requires enforcement of contracts. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008); *CDI Corp. v. Hough*, 9 So. 3d 282, 286 (La. Ct. App. 2009); *United Wholesale Liquor Co.*, 108 N.M. at 471, 775 P.2d at 237. Thus, rather than a clash of irreconcilable and fundamental state public policies, the "conflict" presented in this case is a narrow difference regarding the manner by which a party must prove acceptance and mutual assent, elements of a contract under the law of each state. New Mexico has chosen to promote its public policy favoring contracts in a modestly different manner than Texas or Louisiana. These differences, involving technical legal requirements of proof, do not invoke "fundamental principles of justice," or

"prevalent conceptions of good morals." Rather, this Court and the New Mexico Supreme Court have determined that such technical or narrow conflicts are "mere differences" in state law and insufficient to warrant invocation of the public-policy exception to the place-of-formation rule. *See Shopes*, 1996-NMSC-052, ¶ 9 (holding that applying Virginia law, which permits stacking of uninsured motorist insurance coverage, did not violate any fundamental New Mexico public policy even though New Mexico law prohibits stacking); *Reagan*, 1997-NMCA-014, ¶ 9 ("Texas' statutes are therefore simply another route to achieving a similar policy goal to New Mexico's. Thus, while a Texas indemnity contract covered by insurance is contrary to the letter of New Mexico law, it does not promote a policy at odds with New Mexico policy.").

Further, New Mexico public policy strongly favors resolution of disputes through arbitration. *See Lisanti v. Alamo Title Ins.*, 2002-NMSC-032, ¶ 17, 132 N.M. 750, 55 P.3d 962. In New Mexico, arbitration is encouraged as a means of relieving congestion in the court system, speeding up resolution of disputes, and making the resolution of cases more economical to all parties. *See Stinbrink v. Farmers Ins. Co.*, 111 N.M. 179, 182, 803 P.2d 664, 667 (1990). While the parties to an arbitration agreement relinquish, by entering into such agreement, the right to trial by jury, it does not follow that the enforcement of an arbitration agreement offends New Mexico public policy in favor of jury trials, particularly in light of the

state's policy in favor of alternative dispute resolution. The District Court's finding to the contrary was error. [Tr1. 21]. Moreover, state public policy, no matter what its source, cannot serve to invalidate an arbitration agreement that is otherwise valid under generally applicable principles of contract law. *Doctor's Assocs.*, 517 U.S. at 688.

Additionally, refusal to enforce the arbitration agreement between the parties has negative policy implications both in and beyond this case. When Flemma agreed, on multiple occasions, to arbitrate his disputes with HES, he was living and working for HES in Texas and Louisiana. The arbitration agreement between the parties was valid and enforceable in both states where it was formed. New Mexico's interest in invalidating a Texas or Louisiana contract that was valid, enforceable, and had no connection whatsoever to New Mexico when formed is minimal, particularly where the parties performed pursuant to the terms of the contract for over ten years. Further, allowing Flemma to escape his obligations under the agreement simply because he was working in New Mexico when his claim arose would be inconsistent with contractual expectations of the parties as stated in the agreement to arbitrate. The plain language of the DRP makes clear that, once the parties agreed to arbitrate, they intended to be bound by their agreement at all times during and after the employment relationship, without respect to the state in which Flemma was living or working. [RP 120-21]. The New

Mexico Supreme Court has recognized that in cases like this one, where a court is presented with no real conflict of fundamental state public policies, the contractual expectations of the parties are important in determining the applicable law. *See Shope*, 1996-NMSC-052 at ¶ 7 ("The Shopes, as Virginia residents purchasing a home, cars, and insurance in Virginia, should have expected that the laws of Virginia would have applied to their various transactions."); *United Wholesale Liquor Co.*, 108 N.M. at 471, 775 P.2d at 237 ("Great damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties." (quoting *City of Artesia v. Carter*, 94 N.M. 311, 610 P.2d 198, 201 (Ct. App. 1980)).

The application of Texas and Louisiana law in this case does not offend a fundamental New Mexico public policy. The parties' agreement was valid when entered into – over a decade ago – in Texas. The District Court's refusal to apply the law of the state in which the agreement was formed would appear to be a back-door, results-oriented invalidation of Halliburton's DRP. No matter how well intended, that was error which this Court should correct.

3. The Parties' Arbitration Agreement Is Supported by Consideration and Cause.

In Texas, a contract must be supported by consideration. The DRP binds both Halliburton and Flemma to arbitrate employment-related disputes. [RP 118, 122]. This mutuality of obligation is, by definition, sufficient consideration for a contract. *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991); *see also, In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (enforcing the Halliburton DRP and holding that the parties' mutual promises to arbitrate were sufficient consideration for their agreement).

Moreover, Halliburton provided additional consideration in the form of the Legal Consultation Plan, through which it agrees to reimburse employees up to $2,500 per twelve-month period for legal fees incurred in connection with pursuing claims through the DRP and, also, its agreement to pay all administrative expenses associated with arbitration except for a $50 processing fee.[7] [RP 113, 115]

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[7] The Louisiana Civil Code defines a contract as "an agreement by two or more parties whereby obligations are created, modified, or extinguished." La. Civ. Code Ann. art. 1906. Under Louisiana law, the will of the parties to act for a "lawful cause" will bind them. *Rogers v. Brown*, 986 F. Supp. 354, 360 (M.D. La. 1997) (quoting *Sound/City Recording Corp. v. Solberg*, 443 F. Supp. 1374, 1380 (W.D. La. 1978)). No obligation can exist without a lawful cause, which is defined as "the reason why a party obligates himself." La. Civ. Code Ann. art. 1966-67. Under Louisiana law, Flemma's continued employment was a valid cause for the agreement to arbitrate. *See Rogers*, 986 F. Supp. at 360 (finding that continued employment is valid cause for an arbitration agreement); *Cellular One, Inc. v. Boyd*, 653 So. 2d 30, 34 (La. Ct. App. 1995) (rejecting defendant's argument that a noncompetition agreement which was conditioned on continued employment was unenforceable because of insufficient cause). Because the parties' agreement was formed for a lawful cause under Louisiana law, it is not illusory or unenforceable. *See Rogers*, 986 F. Supp. at 360.

Flemma argued below that HES's promise to arbitrate is illusory, and therefore unenforceable, because HES can avoid its promise by amending the arbitration agreement. [RP 152-55]. Flemma's argument lacks legal and evidentiary merit.

Under Texas law, a party may reserve the right to unilaterally amend or terminate an agreement so long as the right is restricted. *See In re Halliburton Co.*, 80 S.W.3d at 569-70 (Tex. 2002). Such restriction is adequate consideration for the agreement, and the promises exchanged in the agreement are not illusory. *Id.*; *see also J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 228 (Tex. 2003) (discussing *In re Halliburton* and explaining that Halliburton's promise to arbitrate under the DRP is not illusory because Halliburton is restricted from avoiding its promise by the DRP's express contractual provisions).

Further, the evidence that HES submitted to the trial court below establishes that the parties' arbitration agreements are not illusory because HES's right to amend or terminate the agreements is restricted. The DRP provides that:

> 6. Amendment
>
> A. This Plan may be amended by Sponsor at any time **by giving at least 10 days notice to current Employees.** However, **no amendment shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules.**

> B. Sponsor may amend the Rules at any time by serving notice of the amendments on AAA, JAMS, and CPR. **However, no amendment of the Rules shall apply to a Dispute for which a proceeding has been initiated pursuant to the Rules.**

[RP 122]. Under this provision, HES is restricted from amending the DRP in two important ways: First, it must notify employees at least ten days prior to any modification or termination of the Plan, and second, no modification of the Plan or the procedural rules governing arbitration can apply to a proceeding that has been initiated pursuant to the Rules. [*Id.*]. These restrictions are consideration for the parties' agreements to arbitrate. Consequently, HES's promise is not illusory or unenforceable. *See In re Halliburton Co.,* 80 S.W.3d at 569-70.

Moreover, every court, other than the District Court, that has addressed this issue has concluded that the Halliburton DRP is supported by consideration. *See, e.g., In re Halliburton, supra; Dodds v. Halliburton Energy Servs., Inc.*, [RP 178-83].("We agree with the district court that the DRP agreement is supported by consideration – the mutual promise to arbitrate ...."); *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F.Supp.2d 1212, 1215 (E.D. Okla. 2003) ("Thus, the court concludes that the amendment and termination provisions of the DRP do not render the parties' agreement to arbitrate illusory ...."); *see also In re Champion Technologies, Inc.*, 222 S.W.3d 127, 131-34 (Tex. App. – Eastland 2006) (finding that a provision worded nearly identically to the one at issue in this case restricted

the employer's right to amend or terminate its promise to arbitrate such that the promise was not illusory).

Moreover, the District Court erred in finding that the DRP is illusory *under New Mexico law* [Tr1. 19-20].because, as explained in Section I.B.2, *supra*, New Mexico choice-of-law rules dictate that the validity of the parties' arbitration agreements must be determined under Texas or Louisiana law. But even if New Mexico law were controlling here, the District Court's determination was error because, like Texas law, New Mexico law recognizes that a restriction on a right to amend or terminate a promise is valid consideration for a contract.

In *Salazar v. Citadel Comm'ns Corp.*, the New Mexico Supreme Court implicitly recognized that a party may reserve the right to unilaterally amend an arbitration agreement so long as the right is restricted. *See Salazar,* 2004-NMCA-013, ¶ 16, 135 N.M. 447, 452, 90 P.3d 466 ("The party that reserves the right to change the agreement unilaterally, **at any time**, has not really promised anything at all and should not be permitted to bind the other party." (emphasis added)). Thus, *Salazar* is consistent with the Texas Supreme Court's holding in *In re Halliburton* that a restriction on the right to unilaterally amend an arbitration agreement constitutes consideration for the agreement; the promises exchanged in such an agreement are not illusory. *Id.*; *see, e.g., Sisneros v. Citadel Broadcasting Co.*, 2006-NMCA-102, ¶ 33, 140 N.M. 266, 142 P.3d 34 ("However, this case may be

distinguished from *Salazar* because the annexed arbitration policy and procedure in the present case restricted [defendant's] right to terminate or amend the agreement to arbitrate."). As discussed *supra*, the DRP significantly restricts HES's right to amend or terminate its promise to arbitrate. Consequently, the DRP does not lack consideration under New Mexico law.

Further, the District Court's evaluation of the DRP's amendment provision as inadequately restricting HES's right to amend or terminate its promise [Tr1. 19-20].is contrary to general principles of New Mexico contract law, which prohibit a court from invalidating an agreement on grounds of adequacy of consideration. *See Hughes v. Betenbough*, 70 N.M. 283, 287-88, 373 P.2d 318, 322-23 (1962) ("[T]his court has on numerous occasions refused to find contracts invalid or deny specific performance for a mere inadequacy of consideration when they have been openly and fairly made without any taint of fraud or mistake."); *Bivians v. Denk*, 98 N.M. 722, 731, 652 P.2d 744, 753 (Ct. App. 1982) ("However, in the case of transactions entered into between unmarried parties, inadequacy of consideration alone, in the absence of fraud or a showing of other existing fiduciary relationship, will not void contracts or conveyances consummated between them.").

Thus, the arbitration agreement contained in the DRP is supported by consideration and is enforceable under Texas and Louisiana law. And while it is

not proper here, application of New Mexico law would compel the same conclusion.

C. Flemma Must Arbitrate His Claims Because They Fall Within The Scope of the Arbitration Agreements.

A court must compel a dispute to arbitration under the FAA if it falls within the scope of a valid arbitration agreement. 9 U.S.C. § 2. Flemma's claims in this case fall squarely within the scope of the parties' agreement to arbitrate employment-related claims.

When determining whether a particular controversy is within the scope of an agreement to arbitrate, courts within the Tenth Circuit first examine the nature of the agreement and then determine whether plaintiffs' claims fall within the agreement's scope. *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004). In *Cummings v. Fedex Ground Package Sys., Inc.*, the Tenth Circuit described the inquiry as follows:

> First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim

> alleged implicates issues of contract construction or the parties' rights and obligations under it.

404 F.3d 1258, 1262 (10th Cir. 2005).

Here, the parties' arbitration agreement is broad. It encompasses *all* claims or disputes arising from or related to the employment relationships between HES and its workforce, regardless of whether they arise during, or after the termination of, the employment relationship. [RP 121]. Such broad language gives rise to a presumption of arbitrability. *Cummings*, 404 F.3d at 1262.

Even absent this presumption, however, Flemma's claims would clearly fall within the scope of the agreement to arbitrate because the dispute is over an issue that is on its face within the purview of the agreement. Flemma asserts against HES and three HES employees claims related to the termination of his employment with HES. [RP 1-7]. The DRP expressly encompasses claims against Halliburton (the DRP's "Sponsor") "and every subsidiary" of Sponsor. [RP 120]. HES is a subsidiary of Halliburton. [RP 64].Similarly, the DRP expressly encompasses claims against any "officers, directors, employees, and agents" of Halliburton or its subsidiaries. [RP 120]. The individual defendants (Rick Grisinger, Richard Montman, and Karl Madden) are employees of HES. Further, the DRP includes within its scope "all legal and equitable claims ... whether in contract, tort, under statute or regulation, or some other law" including those relating to "the employment ... of an Employee, including the terms, conditions, **or**

termination of such employment with the Company ...." [RP 121 (emphasis added)]. Thus, this dispute clearly falls within the scope of the DRP and its arbitration provisions.

Moreover, even if there was uncertainty as to whether Flemma's claims are covered by the DRP, the United States Supreme Court has held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ...." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983). Given the DRP's broad definition of "Dispute," which expressly encompasses claims related to the termination of the employment relationship, and the general presumption favoring arbitration, it was error for the trial court to deny Halliburton's motion to compel arbitration.

II. The District Court Committed Error, or Abused Its Discretion, By Refusing to Reconsider Its Order Denying Arbitration.

Following the District Court's denial of HES's motion to compel arbitration, which was based in part on its refusal to apply the law of the states in which the arbitration agreement was formed, HES located and submitted to the Court a signed agreement which clearly establishes, even under New Mexico law, Flemma's acceptance of and mutual assent to the DRP as a condition of his employment. It was error, or alternatively an abuse of discretion, for the trial court to refuse to reconsider and to reverse its order denying arbitration based on this additional evidence.

On November 4, 2003, Flemma signed a Secondment Agreement ("Agreement") in conjunction with the commencement of his international assignment in Angola. [RP 245-46].The Agreement provided that Flemma's employment with HES in the United States continued, uninterrupted, during his secondment to Halliburton International, Inc. [*See id.*]. The Agreement also incorporated the DRP and expressly required that any dispute between Flemma and HES be submitted to arbitration:

> [Flemma] understands and **agrees to be bound by and accepts as a condition of [his] employment in the US the terms of the Halliburton Dispute Resolution Program applicable to all employees from or working in the US**, which is herein incorporated by reference.
>
> * * *
>
> [Flemma] understands that the Dispute Resolution Program requires, as its last step, binding Arbitration to resolve any and all claims or disputes. **[Flemma] understands that any and all claims or disputes that [he] might have against HES** or its benefit plans for benefits or employment related matters **including termination** and/or any or all personal injury claims arising in the workplace but not already covered by workers compensation insurance, **must be submitted to and are therefore subject to binding Arbitration instead of any local or federal court system in the US.**

[*See id.* (emphasis added)].

Flemma's execution of the Agreement is positive and indisputable proof that he accepted and assented to the DRP and arbitration "as a condition of [his] employment in the US" and understood that the DRP is "applicable to all

employees from or working in the US." Thus, Flemma was indisputably on notice that by working for HES, either in Angola during his international assignment or in the United States at any time, he was accepting the DRP as a binding term and condition of his employment. By executing and acknowledging his understanding of the terms of the Agreement, Flemma affirmatively manifested his assent to arbitration under the DRP as the exclusive method for resolving disputes between him and HES. The express language of the Agreement explains that the DRP requires "binding Arbitration to resolve any and all claims or disputes" and that such arbitration is the exclusive method for resolving disputes "instead of any local or federal court system." The provision also reflects that the DRP's scope is broad, covering any and all claims or disputes including those related to termination of the employment relationship.

The Agreement establishes beyond dispute that Flemma (i) accepted the DRP, including its arbitration obligation, as a condition of his employment with HES and (ii) assented to be contractually bound to submit his disputes with HES and HES's employees, including those related to the termination of his employment relationship, to arbitration.[8] The District Court, while it considered

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[8] Flemma submitted an affidavit below in which he testified that he did not understand the import of the Secondment Agreement. [RP 239-41]. This testimony is unavailing. Flemma cannot feign ignorance of the Agreement's arbitration provision; New Mexico law imposed on him the duty to read and familiarize himself with the contents of the Agreement before he signed it. *See Ballard v.*

this evidence, rejected its applicability, concluding that it was restricted to the period during which Flemma was working in Angola. [Tr2. 12]. This conclusion was contrary to the plain, unambiguous language of the Agreement, which expressly incorporated the DRP and stated that its arbitration provisions would apply to Flemma's "employment in the U.S." [RP 245-46]. The Court's dismissal of the Agreement, particularly in view of its prior pronouncement that HES had failed to show acceptance and assent under New Mexico law, was error. In the alternative, it was not justified by reason and was, as a result, an abuse of discretion.

CONCLUSION

Edward Flemma and HES entered into an agreement to arbitrate all disputes related to Flemma's employment. This agreement was initially formed in Texas, and subsequently reaffirmed three times in Texas and Louisiana, when Flemma elected to continue employment with HES after he was provided clear and unambiguous notice that his continuing employment would constitute agreement to be bound by the terms of the Halliburton Dispute Resolution Program. Flemma again agreed to arbitration on a fifth occasion when he executed the Secondment Agreement. Having thus agreed, five times, to abide by the written program that

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Chavez, 117 N.M. 1, 3, 868 P.2d 646, 648 (1994); *Smith v. Price's Creameries*, 98 N.M. 541, 545 650 P.2d 825, 829 (1982).

provides for arbitration of all employment-related disputes, which explicitly includes within its scope his pending claims, Flemma is now in breach of his contractual obligations. Under the FAA, HES is entitled to enforcement of its arbitration contract and the trial court erred and abused its discretion by denying, initially, HES's motion to compel arbitration and, thereafter, its motion for reconsideration.

For the foregoing reasons, Appellants Halliburton Energy Services, Inc., Rick Grisinger, Richard Montman, and Karl Madden respectfully request that this Court: (i) reverse and vacate the First Judicial District Court's Order of June 17, 2009 denying Appellants' motion to compel arbitration; and (ii) remand this case to the District Court with an instruction that it enter an order granting Appellants' motion to compel arbitration and directing that Flemma, if he is to further prosecute his claim, must do so in arbitration pursuant to the Halliburton Dispute Resolution Program and the Federal Arbitration Act; and stay all other proceedings pending conclusion of the arbitration. Appellants also request such other relief to which they may show themselves entitled.

CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing pleading, Appellants' Brief in Chief, was served by mail, properly addressed and postage prepaid upon the following opposing counsel of record this 25th day of March, 2010:

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