IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

LORAYNE AND GENE BARGMAN,

Plaintiffs-Appellees,

vs.

Ct. App. No. 31,088
Dist. Ct. No. D-202-CV-2010-8447

SKILLED HEALTHCARE GROUP, INC. SKILLED HEALTHCARE, LLC, CANYON TRANSITIONAL REHABILITATION CENTER, AND ANMARIE DVORAK, ADMINISTRATOR,

Defendants-Appellants.

On Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Valerie Huling, Presiding

PLAINTIFFS-APPELLEES' ANSWER BRIEF

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Oral argument is requested.

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I. INTRODUCTION

New Mexico law, as set forth in the Supreme Court decisions *Rivera v. American General Finance Corp.,* 2011-NMSC-033, 150 N.M. 378, 259 P.3d 803, and *Cordova v. World General Finance Corp.*, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901, confirms the district court's ruling that an arbitration clause which requires nursing home residents to arbitrate all negligence claims while allowing the facility to litigate all collections claims is substantively unconscionable. New Mexico law unequivocally establishes that an arbitration contract that is unfairly non-mutual in its terms—requiring the arbitration of all of the consumer's claims, while preserving the drafter's ability to bring to court the type of claim it is most likely to pursue—is unenforceable because it is substantively unconscionable. The district court, relying upon long-standing New Mexico unconscionability precedent, as distilled and explained in *Cordova*,[1] correctly determined that the unfair one-sidedness of the arbitration clause rendered it substantively unconscionable and void under New Mexico law.

Plaintiffs, Mrs. Bargman and her husband, Gene, filed suit for the neglect and abuse that LoRayne Bargman suffered as a result of practices and policies at Defendants' nursing home, "Canyon Transitional." Defendants sought to compel

[1] When the Court made its ruling, *Rivera* was on certiorari from the Court of Appeals to the Supreme Court. The district court therefore relied upon *Cordova.*

arbitration of all of Plaintiffs' claims, based on an arbitration clause presented by the nursing home and signed by LoRayne Bargman, on May 20, 2008, over a month into Mrs. Bargman's residency. The district court properly found, after considering the arbitration clause in its entirety, that the arbitration clause could not be enforced because the clause was so one-sided as to be substantively unconscionable. Defendants have failed to provide any compelling rationale for reversal. The district court's ruling is fully supported by New Mexico law and the undisputed facts in the record, and must be upheld.

II. ADDITIONAL FACTS RELEVANT TO ISSUES ON APPEAL

After fracturing her hip and ankle, LoRayne Bargman entrusted her care to Canyon Transitional nursing home on April 17, 2008, for a period of rehabilitation, physical therapy and assistance with her activities of daily living. **[RP 1, 6, 89]** Six weeks later, on May 30, 2008, she was discharged home with a stage IV (the most severe stage) pressure sore on her coccyx. **[RP 89]** Shortly after returning home, she had to be admitted to Kaseman hospital for wound care treatment for the stage IV pressure sore; she stayed at Kaseman for two more months. **[Id.]** The state Department of Health substantiated allegations of neglect against the nursing home for her deficient care. **[Id.]** When she signed the "Arbitration Agreement" on May 20, 2008, Mrs. Bargman had been a resident of the nursing home for over a month, and indeed, left the nursing home a mere ten days later. **[RP 1, 65-67]**

The "Arbitration Agreement" is a three-page, standardized, pre-printed form. **[RP 65-67]** It includes blanks to fill in the facility name, and for the resident to place her initials. **[Id.]** It requires the resident to:

> relinquish [her] right to have any and all disputes associated with this Arbitration Agreement and the relationship created by the Admission Agreement and/or the provision of services under the Admission Agreement (including, without limitation, class action or similar proceedings; claims for negligent care or any other claims of inadequate care provide [sic] by the Facility; claims against the Facility or any of its employees, managers or members) (each a "Dispute," and collectively, the "Disputes") resolved through a lawsuit, namely by a judge, jury or appellate court, except to the extent that New Mexico law provides for judicial action in arbitration proceedings. **[RP 65]**

Significantly, immediately below this definition of arbitration is the nursing home's escape hatch: "This Arbitration Agreement shall not apply to either the Facility or Resident in any disputes pertaining to collections or discharge of residents." **[Id.]**

Mrs. Bargman does not remember signing the "Arbitration Agreement." **[RP 103]** The Defendants produced no evidence from the nursing home's signatory regarding the circumstances of the signing of the "Arbitration Agreement." ***[See, e.g.,* RP 58-74; 114-126]** However, medical records from the nursing home show that on the date Mrs. Bargman signed the "Arbitration Agreement," May 20, she needed assistance with bed mobility, transfers, and using the toilet. **[RP 104]** On that date, she also suffered from weakness, pallor, and pressure sores. **[Id.]**

Significantly, she suffered from constant pain while she was living at the nursing home; per nursing home records, her pain that day rated as "moderate," 5 on a 10-point scale. **[RP 103, 107]** Although she had been prescribed pain medication—Percoset—as needed, she did not receive any Percoset that day. **[RP 106, 108]** Further, on an undated Mini-Mental Status Exam conducted at some point during the 43 days Mrs. Bargman lived at the nursing home, she scored only a 24 out of 30. **[RP 109]** Notably, on that test, she was unable to provide the day, the date and the name of the nursing home; she could not recall two of three items when asked to, several minutes later; and she could not copy a design printed on a page. **[Id.]**

Even today, Mrs. Bargman's understanding of the arbitration clause is incorrect. Her understanding, as set forth in her affidavit, describes a non-binding mediation process instead of the binding arbitration Defendants here seek: "I understand arbitration to be a process where you sit down with your attorneys who have reviewed your case and see if it can get settled. If not, you can go to court." **[RP 103]**

With their Response to Defendants' Motion to Compel Arbitration, Plaintiffs served Defendants with Special Discovery related to the Arbitration Agreement. **[RP 112]** Plaintiffs also included a Rule 1-056 Affidavit in their Response, in support of further discovery. **[RP 110-111]** Plaintiffs' counsel's affidavit noted that the discovery sought related to both procedural and substantive

unconscionability. **[Id.]** Defendants responded in part to these requests, but no depositions took place. Defendants did not request, and the district court did not order, an evidentiary hearing. **[*See* R.P. 129; Tr. 23]**[2]

The district court denied Defendants' Motion to Dismiss and Compel Arbitration after briefing and a hearing. **[RP 130-31; Tr. 29]** The district court found the arbitration clause substantively unconscionable because it required Plaintiffs to arbitrate all of their claims, while reserving to Defendants the ability to litigate the types of actions they were most likely to bring. **[Id.]** Relying on *Cordova*, the Court noted that the Defendants, in the "Arbitration Agreement," were improperly "using the arbitration provision as a sword and a shield." **[Tr. 26:13-16]** The district court's ruling was proper, based on well-settled and established law, and must be upheld.

III. ARGUMENT

A. The District Court Correctly Decided that the Arbitration Agreement Was Substantively Unconscionable.

Statement of Preservation

[2] Included in the Record Proper is a Reply on a Motion for Protective Order that references special discovery pertaining to arbitration; however, this document's inclusion appears to be in error, as the caption is for a wholly different case. *See* RP 75-83, pertaining to D-202-CV-2009-09231.

Plaintiffs preserved this argument in their Response to Defendants' Motion to Dismiss and Compel Arbitration **[RP 89-111]**.

Standard of Review

Whether the parties have agreed to arbitrate is a question of law, and the standard of review is de novo. *See Cordova*, 2009-NMSC-021, ¶ 11 ("[W]e review the applicability and construction of a contractual provision requiring arbitration de novo" (internal citations and quotation marks omitted); *see also Piano v. Premier Distributing*, 2005-NMCA-018, ¶ 4, 137 N.M. 57, 107 P.3d 11. The Court "construe[s] reasonable inferences in the record in favor of the party opposing the motion." *Sisneros v. Citadel*, 2006-NMCA-102, ¶ 12, 140 N.M. 266, 142 P.3d 34 (citing *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 4, 134 N.M. 630, 81 P.3d 573 and *Rummel v. St. Paul Surplus Lines Ins. Co.*, 1997–NMSC–042, ¶ 9, 123 N.M. 767, 945 P.2d 985); *see also Edward Family Limited Partnership v. Brown*, 2006-NMCA-083, ¶ 13, 140 N.M. 104, 140 P.3d 525.

Unconscionability is also reviewed as a matter of law, and also subject to a de novo review. *Cordova*, 2009-NMSC-021, ¶ 11 (citing NMSA 1978, § 55-2-302 (1961) and *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 19, 144 N.M. 464, 188 P.3d 1215).

1. New Mexico Law Regarding the Interpretation of Arbitration Contracts Supports the District Court's Order.

"As with a summary judgment motion, a motion to compel arbitration may only be granted as a matter of law when there is no genuine issue of material fact as to the existence of an agreement." *DeArmond v. Halliburton,* 2003-NMCA-148, ¶ 4, 134 N.M. 630, 81 P.3d 573. However, when a motion to compel arbitration is opposed on the ground that no agreement to arbitrate was made between the parties, "[t]he district court...should give to the opposing party the benefit of all reasonable doubts and inferences that may arise." *Id.* (internal quotation marks and citation omitted). Here, the Court did so, and its ruling should be upheld.[3]

A legally enforceable contract is a prerequisite to arbitration. If the parties dispute the existence of a valid arbitration agreement, any presumption in favor of arbitration disappears, and is in fact reversed. *Heye v. American Golf Corp, Inc.*, 2003-NMCA-138, ¶ 8, 134 N.M. 558, 80 P.3d 495; *see also Piano,* 2005-NMCA-18, ¶ 5. Even if an arbitration clause is placed within a broader contract, a party may properly challenge only the arbitration clause itself. *See Murken v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-080, ¶ 31, 140 N.M. 68, 139 P.3d 864.

The Federal Arbitration Act [FAA], 9 U.S.C. § 2, requires that arbitration provisions be placed upon the same footing as other contracts, with "generally

[3] The same arbitration clause is also before this Court in *Strausberg v. Laurel,* Ct. App. No. 29,238, *Krahmer v. Laurel*, Ct. App. No. 30,868; and *Montoya v. Skilled* (no appellate court number yet; docketing statement submitted on September 24, 2011).

applicable contract defenses, such as fraud, duress, or unconscionability...applied to invalidate arbitration agreements...." *Fiser v. Dell*, 2008-NMSC-046, ¶ 23 (internal citations and quotation marks omitted). Further, the FAA "does not give arbitration provisions special protection..." *Id.*

It is Defendants' burden to establish that the elements of a valid arbitration contract existed. *See Farmington Police Officers Assoc. v. City of Farmington,* 2006-NMCA-077, ¶ 16, 139 N.M. 750, 137 P.3d 1204 ("A party seeking judicial enforcement of a contract bears the burden of persuasion."); *Corum v. Roswell Senior Living,* 2010-NMCA-105, ¶ 3, 149 N.M. 287, 248 P.3d 329 ("[T]he party attempting to compel arbitration carries the burden of demonstrating a valid arbitration agreement."). As demonstrated by the district court's order, and as shown below, Defendants could not and did not prove, as was their burden, that a valid contract to arbitrate existed. The district court properly found that Defendants failed to establish that the contract was enforceable, and correctly denied their motion to enforce the "Arbitration Agreement."

2. New Mexico Law Regarding Unconscionability Supports the District Court's Order.

New Mexico law recognizes the contract defenses of both substantive and procedural unconscionability. The procedural unconscionability analysis "goes beyond the mere facial analysis of the contract and examines the particular factual circumstances surrounding the formation of the contract, including the relative

bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other." *Cordova*, 2009-NMSC-021, ¶ 23. In turn, the substantive unconscionability analysis looks to the terms of the contract itself: "[it] focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns." *Id.*, ¶ 22.

While New Mexico law recognizes both types of unconscionability, it does not require that the Court find that **both** types of unconscionability exist for a contract to be unenforceable due to unconscionability. *Id.*, ¶ 24. Instead, the courts view the two types of unconscionability in totality: a contract may be invalidated due to a combination of the two types of unconscionability, or one type of unconscionability alone may be so extreme as to render the contract unenforceable. *Id.* In both *Rivera* and *Cordova*, the Supreme Court determined that the contracts' substantive unconscionability—the non-mutuality of the agreement to arbitrate—was so extreme as to render the entire contracts unenforceable, and did not examine the question of procedural unconscionability.

Here, although the district court found that the circumstances surrounding the signing of the contract were not procedurally unconscionable, it nonetheless found that the substantive unconscionability was significant enough to invalidate the contract. This was correct; indeed, in light of unequivocal New Mexico

Supreme Court precedent on point, it must stand. Contrary to Defendants' claim that the district court "exclude[ed] from its consideration" "other authorities" and the purported "even-handedness" of the arbitration clause's terms **[BIC 15]**, it is clear that the District Court reviewed and considered all pertinent authorities and all facts regarding the arbitration clause's terms. It was Defendants' burden to establish a valid arbitration clause; thus, to the extent that Defendant now relies upon any authorities not considered by the district court, such failures of consideration may only be attributed to Defendants themselves.

Instead, the district court, when looking at the arbitration clause before it, had the benefit of significant New Mexico case law and well-established precedent guiding its conclusion. *Cordova* did not, as Defendants seem to here suggest, stand alone as an aberration in New Mexico unconscionability law. Rather, the Supreme Court in *Cordova* distilled the holdings and considerations of years of prior appellate court decisions setting forth standards for unconscionability, in light of New Mexico public policy.

Specifically, the *Cordova* Court explicitly overturned the antiquated standard set forth by *Guthmann*, and later frequently disregarded by reviewing courts, that to be unconscionable, an arbitration clause must be one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Cordova*, ¶ 31. Explicitly

disapproving of this language, the *Cordova* Court explained that although this characterization existed in New Mexico case law, "if literally applied it would be inconsistent with all the New Mexico cases that have struck down contracts for unconscionability, as well as most of those from other jurisdictions. Our law has never really required that a person seeking relief from an unconscionable contract must first establish that he or she actually had to have been a madman or a fool to sign it." *Id.*

Second, using long-established principles of contract unconscionability, the *Cordova* Court clarified that a particular type of clause could be substantively unconscionable enough as to render the entire arbitration contract void under New Mexico public policy: a clause which was so one-sided in its description of what disputes would be arbitrated.

Crucially, *Cordova* did not abrogate any other reasons why an arbitration clause may be unenforceable due to substantive unconscionability—excessive initiation fees, a biased tribunal, or other terms that contravened public policy. Instead, using years of settled precedent, the *Cordova* Court held that the clause before it was substantively unconscionable because it was so-one sided regarding the disputes to be arbitrated. *Rivera*'s holding only further served to crystallize this holding, making New Mexico law on this point indisputable. While Defendants claim that "*Cordova* teaches that an impermissible one-sidedness may

manifest itself in an oppressive term or through an overall imbalance," this is clearly not a new concept in New Mexico jurisprudence. Rather, what Defendants attempt to side-step is the fact that "**an** oppressive term"—i.e., one that allows one side to litigate disputes while foreclosing to the other party that same ability—is alone sufficient to invalidate the arbitration clause, no matter what other terms may exist in the contract. *Cordova* and *Rivera* provide an example of one such clause, which is virtually indistinguishable from the one at issue here.

Rivera and *Cordova* both stand bluntly for the proposition that the courts will not enforce a clause that a business has foisted upon a consumer which strips the consumer of her right to litigate future disputes while retaining to the business the ability to pursue the types of claims it is most likely to pursue in court. Despite Defendants' claim to the contrary, in neither *Rivera* nor *Cordova* did the Supreme Court balance the significance of the non-mutual clause in light of the other terms of the arbitration clause. Rather, in both instances, the Supreme Court looked at those non-mutual terms, in isolation, and found them significant enough—despite whatever other terms might exist in the clause—to render the clauses unenforceable due to substantive unconscionability. The district court correctly applied the governing standards in light of all relevant considerations, and the same conclusion is mandated here.

In *Cordova,* the Court examined a clause where the lender had excepted

from arbitration any claims for borrower default, and determined that it was not just the language excepting defaults, but rather the practical effect of excepting defaults which rendered the clause unenforceable. It categorized defaults as "the most likely reason for lenders to take action against their borrowers." 2009-NMSC-021, ¶ 26.

Similarly, in *Rivera*, the Court examined a clause where the auto title loan company, the lender, excepted from arbitration any claims for foreclosure or repossession, while requiring the borrower to arbitrate "any and all claims" involved with the transactions. 2011-NMSC-033, ¶ 4. There, the Court determined that those types of claims—foreclosure and repossession—represented the types of claims the lender was most likely to bring. *Id.*, ¶ 53. In so doing, the Court looked not only to the plain language, but also the desired effect of the one-sided language:

> In its form loan contract, American General unilaterally chose the forum in which it wanted to resolve its disputes, ensuring that it could enforce its rights to Rivera's property in court or as otherwise provided by law while extinguishing Rivera's right to access the courts for any reason. **By excepting foreclosure and repossession from arbitration, American General retained the right to obtain through the judicial system the only remedies it was likely to need.** *Id.* (emphasis added).

Because the lender—the party proffering the contract—chose to except from arbitration the only remedies it was likely to need, the Supreme Court determined

that the arbitration clause was substantively unconscionable and therefore void under New Mexico law.

Similarly, in *Cordova*, the Court looked to the practical effects of the arbitration clause's one-sided terms. The Court noted that the arbitration clause "would limit a borrower to mandatory arbitration as a forum to settle all disputes whatsoever, while reserving for the lender the exclusive option of access to the courts for all remedies the lender is most likely to pursue against a borrower." 2009-NMSC-021, ¶ 1. In its examination, the Court concluded that "such an inherently one-sided agreement is against New Mexico public policy and is therefore void as unconscionable." *Id.*

Complete one-sidedness is not necessary to render an arbitration clause unenforceable. *Rivera*, 2011-NMSC-033, ¶ 42. Rather, as the *Rivera* and *Cordova* courts explained, "contract provisions that unreasonably benefit one party over another are substantively unconscionable." *Id.*, ¶ 46 (quoting *Cordova*, 2009-NMSC-021, ¶ 25). In both *Rivera* and *Cordova*, the courts considered a borrower-lender relationship, and concluded that when the lender "imposes on the borrower a contract that requires the borrower to settle all claims it may have against the lender through arbitration while reserving for the lender the exclusive option of access to the courts for all remedies the lender is most likely to pursue against the borrower, the contract is against New Mexico public policy and is therefore void as

unconscionable." *Id.*, ¶ 46 (quoting *Cordova*, 2009-NMSC-021, ¶ 1).

3. Defendants' Attempts to Distinguish *Cordova* and *Rivera* Fail.

Faced with indisputable New Mexico Supreme Court precedent directly on point, Defendants nonetheless attempt to distinguish *Rivera* and *Cordova*, claiming that those two cases do not control the outcome of this case. As the facts of *Rivera* and *Cordova* establish, Defendants' arguments must fail.

Rivera, relying upon previously established New Mexico Supreme Court case law, explicitly stated that **the contract** "is against New Mexico public policy and is therefore void as unconscionable" when "a lender imposes on a borrower a contract that requires the borrower to settle all claims it may have against the lender through arbitration while reserving for the lender the exclusive option of access to the courts for all remedies the lender is most likely to pursue against the borrower." 2011-NMSC-033, ¶ 46 (quoting *Cordova,* 2009-NSMC-021, ¶ 1, and citing *Padilla v. State Farm Mut. Auto. Ins. Co.,* 2003-NMSC-011, ¶ 10, 133 N.M. 661, 68 P.3d 901).

In both *Cordova* and *Rivera*, as here, because the unconscionable provisions were central to the dispute resolution mechanism, the Court had to strike the contracts in their entirety. *See Rivera*, 2011-NSMC-033, ¶ 56; *Cordova*, 2009-NMSC-021, ¶ 40.

Defendants, however, would have the Court separate the unconscionable clause and isolate it from the other terms of the "Arbitration Agreement," weighing it against the other terms of the "Arbitration Agreement." However, such an analysis is both unnecessary and improper. New Mexico law is clear beyond dispute that a one-sided arbitration clause which allows the business the ability to litigate the claims it is most likely to bring while requiring the consumer to arbitrate all of the claims she is most likely to bring is unconscionable.

No surrounding terms in the arbitration clause may ameliorate that unconscionability; the **only** remedy, in light of the existence of such a clause, is to strike the entire "Arbitration Agreement" as unconscionable. *See Id.* As the *Cordova* court stated, arbitration clauses "should not be used as a shield against litigation by one party while simultaneously reserving solely to itself the sword of a court action." 2009-NSMC-021, ¶ 30 (quoting *Showmethemoney Check Cashers, Inc. v. Williams,* 342 Ark. 112, 27 S.W.3d 361, 367 (2000)). Such a one-sided clause, without any additional circumstances, renders an entire arbitration clause unenforceable.

Defendants argue that the "Arbitration Agreement" before this Court differs substantially from those at issue in *Cordova* and *Rivera*, suggesting that its terms, unlike those in *Cordova* and *Rivera*, are more "reasonable" or "fair" to the nursing home resident than the lenders' terms were to the borrowers. Specifically,

Defendants point to the clause where they establish that the nursing home will pay the arbitrators' fees. **[BIC 24]** However, in *Rivera*, the Court was examining an arbitration contract governed by the National Arbitration Forum ("NAF") Code of Procedure. Rule 44(G) of that Code of Procedure explicitly provides that a consumer bringing a claim may request that the other party pay the arbitrators' fees, and if the other party does not agree, then the consumer may litigate the case rather than arbitrate it.[4]

Thus, clearly, the arbitration clause at issue in *Rivera* could have been viewed in the same terms as this clause before the Court. Had the *Rivera* Court chosen to, it could have examined this offset available to the consumer, and weighed it against the extremely unconscionable term that it found rendered the contract void. Tellingly, however, it did not see the need to do so, because the one-sided arbitration clause was so unreasonable and unfair as to render the entire contract unenforceable. Thus, despite Defendants' claims to the contrary, once this type of clause is found to exist, no further examination of the remaining terms of the arbitration clause is necessary or proper. The district court clearly correctly analyzed the "Arbitration Agreement," found the unconscionable clause rendered the entire contract void, and dutifully ended its inquiry there.

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[4] *See* Rule 44(G), National Arbitration Forum Code of Procedure, available at http://www.adrforum.com/users/naf/resources/20070801CodeOfProcedure.pdf, last visited October 23, 2011

4. The Facts of This Case Support the District Court's Order.

Here, the nursing home, the drafter of the arbitration clause, created a non-mutual arbitration framework, where the resident would have to arbitrate all of her claims against the nursing home, but the nursing home could choose to utilize the Court system when bringing collections claims against its residents.

Here, as in *Cordova* and *Rivera*, the arbitration clause at first broadly stated that the parties must resolve all disputes through binding arbitration:

> the Facility and Resident relinquish their right to have **any and all disputes** associated with this Arbitration Agreement and the relationship created by the Admission Agreement and/or the provision of services under the Admission Agreement (including, without limitation, class action or similar proceedings; claims for negligent care or any other claims of inadequate care provide [sic] by the Facility; claims against the Facility or any of its employees, managers or members) (each a "Dispute," and collectively, the "Disputes") **resolved through a lawsuit, namely by a judge, jury or appellate court**, except to the extent that New Mexico law provides for judicial action in arbitration proceedings. **[RP 65, emphasis added]**

However, crucially, shortly thereafter, the clause carves out an exception for the types of disputes the nursing home is most likely to bring: "This Arbitration Agreement shall not apply to either the Facility or Resident in any disputes pertaining to collections or discharge of residents." **[Id.]**

As the district court did, substituting "nursing home" and "resident" for "lender" and "borrower" mandates the exact same conclusion reached in *Rivera* and *Cordova*: the contract is substantively unconscionable. The district court did

not, and needed not, look any further than this simple syllogism: The nursing home imposed on the resident a contract that requires the resident to settle all claims it may have against the nursing home through arbitration while reserving for the nursing home the exclusive option of access to the courts for all remedies the nursing home is most likely to pursue against the resident. *See Rivera,* 2011-NMSC-033, ¶ 46 ("[W]here a lender imposes on a borrower a contract that requires the borrower to settle all claims it may have against the lender through arbitration "while reserving for the lender the exclusive option of access to the courts for all remedies the lender is most likely to pursue against the borrower, the contract is against New Mexico public policy and is therefore void as unconscionable.")

Clearly, the claims the nursing home excepted from arbitration—collections—are the most likely reason for nursing homes to take action against residents or their representatives. Nursing home residents must pay for their care on a per-day basis, yet as the Defendants acknowledge, when discharging a resident, a nursing home must comply with certain considerations under federal and state law. A nursing home must then occasionally retain, for a period of time, a resident who has not provided payment for his or her care.

Discharges from nursing homes are highly regulated; a nursing home may not summarily evict an individual in need of medical care. Instead, federal

regulations, at 42 C.F.R. 483.12, set forth the very specific conditions and procedure a nursing home must follow to discharge a resident who did not choose to be discharged. In turn, state regulations allow a nursing home resident who did not choose to be discharged a hearing with the state Human Services Division, where the resident may be represented by counsel, is allowed to present her case, and may have the determination subject to judicial review. *See* NMAC 8.354.2.9.

Thus, given these procedures and rights established by both the state and federal government pertaining to the discharge of nursing home residents, the nursing home *could not* require the resident to submit these disputes to arbitration. Defendants did not dispute this fact in their initial briefing ("both federal and state law preclude arbitration of disputes concerning resident discharge."). **[RP 121]** The "Arbitration Agreement's" exclusion of discharges, therefore, is simply a statement that these types of disputes, under federal and state regulations, are subject to a specific procedure outside of litigation or arbitration.[5]

Collections, however, are inextricably intertwined with the heavily regulated discharge procedure required by state and federal regulations. When the facility wants to discharge a resident but cannot yet do so, and must retain the resident even though it is not being paid for the resident's care, the nursing home is then in

[5] To the extent that an arbitrator could stand in the shoes of the Human Services Division to perform a discharge hearing, the arbitration procedure forecloses judicial review, which is guaranteed by the state regulations, and therefore would be unenforceable in any case.

the position of pursuing a claim against the resident or her representative for collection on the outstanding debt to the nursing home. An examination of this nursing home chain's predecessor chain, Laurel Healthcare Systems—the entity that created and first implemented this arbitration clause—established that **every single lawsuit filed by the nursing homes against individual residents or their representatives involved collections.**[6] There simply are not any other types of cases that a nursing home is likely to bring against a resident or former resident.

Defendants claim that the nursing home "is bound...for any claims that it has against the resident which fall outside the exclusions." **[BIC 23]** Yet, despite this assertion, Defendants provide no examples whatsoever of any circumstances where the nursing home would bring claims against the resident that fall outside the exclusions. Given Defendants' silence on this point and the practical considerations in these types of litigation, it is clear that the nursing home would be most likely to bring collections claims against the resident—the subject of the exclusion clause—and this claim must therefore fail. Similarly, Defendants claim that the "Arbitration Agreement" "enables a resident to pursue collections-related claims against Canyon Transitional," **[BIC 26]** yet fail to provide any examples of circumstances when such a scenario might occur. Regardless, the inquiry under

[6] *See* D-202-CV-2006-09692; D-202-CV-2007-00601; D-202-CV-2007-00600; D-202-CV-2006-5409; D-905-CV-2006-00185; M-40-CV-2004-00124; and M-40-CV-2005-00047.

Rivera and *Cordova* is not whether the consumer could *ever* potentially initiate this type of excluded claim. Rather, the inquiry into the excluded terms focuses on what types of claims are the businesses **most likely to bring** against the consumer. *See, e.g., Rivera*, 2011-NMSC-033, ¶ 46 ("remedies the lender is most likely to pursue against the borrower"). Clearly, here, the nursing home is most likely to bring collections claims against the resident, while the resident is most likely to bring negligence claims against the nursing home.

Similarly, Defendants claim that "the party most likely to make use of the exclusion would be a resident," **[BIC 25]**, citing to the governing state and federal regulations regarding the discharge of residents. However, as noted above, as the parties have clearly recognized, and as the district court clearly recognized, the arbitration clause may not and does not affect a resident's right to remedies regarding discharges. As the clause **could not legally limit the resident's recourse in case of proposed discharge,** this portion of the exclusion is simply surplussage, as the parties recognized in their briefing at the district court level.

5. The District Court's Analysis of *Cordova* Applied to the Facts of this Case Was Correct.

Here, the district court logically and correctly relied upon the New Mexico Supreme Court's decision in *Cordova*, to find that the non-mutual arbitration clause was substantively unconscionable. This analysis was thoughtful, well-reasoned, correct, and clearly not done by "autopilot," as Defendants claim it to

have been. **[BIC 22]**

The Tennessee Court of Appeals recently examined an almost identical clause in an almost identical circumstance: the exclusion of collections from "disputes" to be resolved via arbitration between the nursing home and its residents. *McGregor v. Christian Care Center of Springfield*, 2010 WL 1730131 (Tenn. Ct. App., *unpub.*) Significantly, the Tennessee Court used essentially the same standard expressed by the New Mexico courts for substantive unconscionability. (*Compare id. *5* "A contract is substantively unconscionable if the terms of the contract are unreasonably favorable to the other party," *with Rivera*, 2011-NMSC-033, ¶ 46 (quoting *Cordova*, 2009-NMSC-021, ¶ 25) "Contract provisions that unreasonably benefit one party over another are substantively unconscionable.")

The Tennessee Court found the arbitration agreement unconscionable "[b]ecause the terms of the agreement favor the nursing home by giving it a judicial forum..." *McGregor,* *1. It determined that the nursing home's exception of collections from arbitration was unreasonably favorable to the nursing home.

There, as here, the standardized contract required arbitration for nearly any type of claim the resident could bring against the nursing home, but specifically excepted "any legal controversy, dispute, disagreement or claim of any kind between Resident and Facility solely regarding nonpayment by Resident for

payments due to Facility," stating that those types of disputes "may be adjudicated in a court of law." *Id.* at *6.

In both *Cordova*, 2009-NMSC-021, ¶ 29, and *Rivera*, 2011-NMSC-033, ¶ 49, the New Mexico Supreme Court relied in part on the Tennessee Supreme Court case *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004). The *McGregor* Court, also relying upon *Taylor*, determined that the arbitration clause was substantively unconscionable because "[i]t forces Ms. McGregor to go to arbitration for any claims she may have against the nursing home, but it gives the nursing home recourse to the courts for certain claims against her." *McGregor,**7. Clearly, the collections exception—found both here and in *McGregor*—represents, for the nursing home, the analogous exception to the default exception found unconscionable in *Rivera* and *Cordova.*

The issue is not, as Defendants would have it be, this particular exception taken together with the other terms of the arbitration clause. The issue is, rather, that the nursing home, when drafting the arbitration clause, chose to bind the resident to the vast majority of the types of claims the resident is likely to bring—negligence claims, wrongful death claims, and all claims related to her residency—in arbitration. The nursing home could have included in its description of disputes between the parties any collection actions, or simply remained silent on that point. However, it chose to instead explicitly carve out an exception to its description of

"Dispute," allowing itself access and recourse to the courts for the types of claims the nursing home was most likely to bring against residents: collections.

This was not a mistake or aberration on the nursing home's part; it was a concerted effort to shoehorn residents and their families into arbitration, where the defendants believed that any awards would be lower than what a jury might award. It was a specific effort, after years of high verdicts in nursing home abuse and neglect trials, to avoid or reduce liability.

The nursing home determined that, if and when it was ever a plaintiff in a suit, it would be more advantageous for it to have the remedies and powers available through the court system. It carefully, concertedly and knowingly chose to foreclose judicial remedies to nursing home residents while maintaining its own access to the courts for the types of disputes it was most likely to bring. Under **any** reading of *Cordova* and *Rivera,* such one-sidedness is substantively unconscionable.

Cordova suggested, and *Rivera* explicitly clarified, that generally, an arbitrator has the ability and authority to resolve any type of dispute submitted to her. *Rivera*, 2011-NMSC-033, ¶ 51. Thus, any of Defendants' claims of purported inefficiency or other stated rationales for pursuing certain types of claims in court, as opposed to arbitration, simply cannot stand. If an arbitrator is empowered to determine a complex, lengthy negligence dispute regarding a resident's nursing

home stay, then clearly she would be able to also determine a simple collections matter.

6. Defendants' Argument that the Exception is "Not Unreasonable or Unfair" Fails.

Defendants, in their district court briefing, relied upon the Court of Appeals' opinion in *Rivera v. American General Finance Corp.*, 2010-NMCA-046, 148 N.M. 784, 242 P.3d 351. **[RP 116-117]**[7] However, that ruling was since explicitly overturned by the New Mexico Supreme Court. *See Rivera*, 2011-NMSC-033. Now, at the appellate court level, Defendants maintain that the Supreme Court's decision in *Rivera*—which **reversed** the decision they based their argument to the district court on—supports their position. Clearly, this is not the case.

Defendants argue that "excluding collections claims from arbitration is not unreasonable or unfair," **[BIC 27]** and allege "the small sums typically involved." However, in so claiming, Defendants ignore the guiding rationale of both *Cordova* and *Rivera*, which determined that the drafter's retention to pursue its own claims in court while holding the consumer to arbitration for all of her claims was **inherently unreasonable and unfair,** whatever the purported stated rationale. The *Rivera* court specifically looked to the fact that the arbitrators would be

[7] Indeed, at the hearing on Defendants' motion, Defense counsel referred to the (now-overturned) Court of Appeals' opinion in *Rivera* as "[going] back to the roots of where this state has been regarding arbitration agreements." [Tr. 11]

empowered with determining **any** type of dispute to guide its conclusion that the exception of default claims from arbitration was unconscionable. *Id.*, ¶¶ 51-52. In *Rivera*, although the suit was filed in the Second Judicial District Court, and the truck at issue was worth, at best, $15,500, the *Rivera* Court did not consider the availability of Court-annexed arbitration were the lender to file suit in court for default on the loan. *Id.*, ¶ 53. Nor did the district court here, correctly.

Defendants provide no factual basis for their claim of "small sums," and indeed, that rationale is wholly unpersuasive. As no factual basis for this claim exists, it must be dismissed.

Further, Defendants claim on the one hand that arbitration is not a good way to resolve such "small" disputes, yet simultaneously point to the Second Judicial District's mandatory arbitration program for disputes under $25,000. **[BIC 26-27]** Defendants claim that the cost of three arbitrators, under the arbitration clause, would not be "cost-effective" to arbitrate collections claims, yet fail to explain why, if this is the case, an alternative (i.e, single arbitrator) was not set forth in the arbitration clause.

In drafting the arbitration clause, Defendants placed themselves in the position of being able to determine which forum would best suit their needs when they want to sue a resident or her representative. After a collections dispute arises, under the contract, the Defendants may then file the collections case in

Metropolitan Court if it is under $10,000—where it would be litigated, not arbitrated—or in District Court, where if it is under $25,000, it will be subject to free, non-binding court-annexed arbitration, and if it is over $25,000 will be litigated. *See* NMSA § 34-8A-3(2); LR 2-603 §II.

Defendants also fail to note that the court-annexed arbitration system, unlike the mechanism they set forth in their adhesive "Arbitration Agreement," explicitly provides for appeal or relief from the arbitrator's judgment or award—a significant and meaningful difference. *See* LR 2-603§ VI. Indeed, the Court may, under the Second Judicial District's Rules, at any time order that the referral to arbitration be withdrawn and the matter placed back on the Court's docket. *See* LR 2-603§V(A)(10).

As *Rivera* explained, "[a]s a matter of law arbitrators have broad authority and are deemed capable of granting any remedy necessary to resolve a case." ¶ 51. Therefore, there is no rationale for an entity to carve out exceptions from an otherwise generally applicable arbitration clause.

Here, the clause and the law mandate the identical conclusion reached in *Cordova* and *Rivera*. The nursing home, in drafting the contract, chose to except from arbitration the only remedies it was likely to need: collections.

7. Defendants' Requested Relief Is Unnecessary.

Defendants have requested that the Court remand this matter for the creation of an evidentiary record related to the collections exclusion. **[BIC 29]** This is unnecessary, as the substantive unconscionability analysis turns on the terms of the contract, which are plainly before the Court, and the practical effect. Defendants fully briefed this matter, and did not seek an evidentiary hearing. The Court here, as the Court below, has sufficient facts on which to base its determination regarding the substantive unconscionability of the contract's terms.

B. This Court May Affirm on Grounds of Procedural Unconscionability.

Statement of Preservation

This argument was preserved in Plaintiffs' Response to Defendants' Motion to Compel Arbitration. **[RP 89-111]**

Standard of Review

The Court may affirm the district court if "its decision was 'right for any reason,' again as long as 'reliance on the new ground would [not] be unfair to appellant.' *Meiboom v. Watson,* 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154; *Piano*, 2005-NMCA-018, ¶ 17. Indeed, "[e]ven if the issue has not been preserved below, it is established law that our appellate courts will affirm a district court's decision if it is right for any reason, so long as the circumstances do not make it unfair to the appellant to affirm." *Cordova,* 2009-NMSC-021, ¶ 18.

The Court may affirm the district court's ruling on any basis. Even if the Court determines that the lower court's ruling on substantive unconscionability was incorrect, or that the quantum of substantive unconscionability was not so great as to invalidate the arbitration clause, the Court may nonetheless affirm on any of the other bases Plaintiffs initially argued to the trial court. *See Meiboom*, 2000-NMSC-004; *Cordova*, 2009-NMSC-021. The Plaintiffs previously argued that the arbitration clause was procedurally unconscionable. **[RP 89-111]** Defendants responded to this argument in their briefing and at the hearing. **[RP 114-126; Tr. 5-10]**

1. New Mexico Law Supports a Finding of Procedural Unconscionability.

Even if an arbitration clause contains all of the essential elements of a valid contract, it may still be unenforceable as procedurally or substantively unconscionable. *See Cordova,* 2009-NMSC-021, ¶ 11. Procedural unconscionability "goes beyond the mere facial analysis of the contract and examines the particular factual circumstances surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other." *Id.*, ¶ 23.

When assessing a contract for procedural unconscionability, the Court must first determine whether or not it is an adhesion contract. An adhesion contract is

(1) a standardized contract; (2) offered by a party with superior bargaining strength; (3) to a weaker party; (4) on a "take-it-or-leave-it" basis; (5) with no opportunity for bargaining. *Rivera*, 2011-NMSC-033, ¶ 44. As the *Rivera* Court noted, "[a]dhesion contracts generally warrant heightened judicial scrutiny because the drafting party is in a superior bargaining position." *Id.*

Here, the "Arbitration Agreement" is clearly an adhesion contract. It was a standardized contract, offered by the nursing home to the infirm resident, on a take-it-or-leave it basis, with no opportunity for bargaining. Therefore, it warrants heightened judicial scrutiny.

This case is very similar to the *Adkins v. Laurel* case, a 2007 unpublished Court of Appeals Memorandum Opinion, Ct. App. No. 26, 759. In *Adkins*, the Court found that the circumstances surrounding the admission of a prospective nursing home resident were procedurally unconscionable. There, Ms. Painter, the woman signing the arbitration clause, was on oxygen, had some cognitive deficits, and was already living at the nursing home. She was tired, short of breath, and anxious. *Adkins*, ¶ 4. Ms. Painter had various medical conditions and was taking a variety of medications.

2. The Facts of This Case Support a Finding of Procedural Unconscionability.

Here, Mrs. Bargman was in pain, weak, unmedicated, and required nursing home care, and clearly did not understand the terms of the "Arbitration

Agreement." **[RP 103-109]** Because of her physical conditions, she needed help with transferring to and from her bed, and going to the bathroom. **[RP 104]**

Mrs. Bargman was also clearly suffering from some cognitive deficits during her nursing home residency, as evidenced by her poor performance on the Mini-Mental Status Exam, where she could not state the date, day, or even the name of the nursing home. **[RP 109]** She could not remember 2 of 3 stated items, and could not follow simple instructions to complete a design. **[Id.]** On the date she signed the "Arbitration Agreement," she was pale, suffering from a pressure sore, and in pain. **[RP 103, 104, 107]** Indeed, after the fact, she has no recollection whatsoever of ever signing the "Arbitration Agreement." **[RP 103]** Her understanding of what arbitration is clearly does not meet the actual terms of the "Arbitration Agreement"; the process she describes is a non-binding one, more akin to mediation than the arbitration contemplated by the "Agreement." **[Id.]**

In *Guthmann v. La Vida Llena,* 103 N.M. 506, 709 P.2d 675 (1985) (disapproved of on other grounds in *Cordova*, 2009-NMSC-021, ¶ 31), the court analyzed a contract for admission to La Vida Llena, a continuing care retirement center, signed by Mrs. MacKay, the plaintiff's decedent. *Guthmann*, 103 N.M. at 508, 709 P.2d at 677. Mrs. MacKay was **not** initially admitted to the nursing home section of La Vida Llena, but rather the independent living unit. *Id.*

The contract Mrs. MacKay signed was likened to the purchase of a life insurance annuity, with either party able to revoke or terminate the agreement prior to her death. *Id.* at 508, 513, 709 P.2d at 677, 682. Mrs. MacKay died several months after moving into her apartment, and her estate sued to recover the entry fee, claiming that the circumstances surrounding the signing of the admission contract were procedurally unconscionable. *Id.* at 508, 709 P.2d at 677.

The court recognized that Mrs. MacKay fully understood what she was signing. She had read the contract in its entirety; in fact, she took *several weeks* after first seeing La Vida Llena to study the agreement and discuss it with a friend before returning the signed agreement to the facility. *Id.* at 506, 709 P.2d at 675. She also had a lawyer available for consultation, and had engaged in extensive comparison shopping. *Id.* Significantly, she had no "health or financial circumstances" requiring "her immediate admission to the facility or to any other similar facility." *Id.*

Here, the opposite was true of every single factor for Mrs. Bargman. Mrs. Bargman signed the "Admission Agreement" without understanding all of its terms. **[RP 103]** Unlike Mrs. MacKay, Mrs. Bargman was not prospectively shopping around for a new living situation; instead, she was in the midst of a health crisis, and had already been living in the nursing home for over a month.

Additionally, in contrast to Mrs. MacKay, Mrs. Bargman apparently did not discuss the arbitration clause with friends or family and had no family members, and certainly no lawyer, available for consultation. Perhaps most importantly, unlike Mrs. MacKay, Mrs. Bargman's health circumstances **did** require her immediate admission to the nursing home; indeed, she had been living there for a month already. When she signed the arbitration clause, Mrs. Bargman was in a significantly diminished bargaining position and was in absolutely no condition to bargain over the contract's terms. Under New Mexico law, given that this was an adhesion contract, these circumstances clearly meet the standard for procedural unconscionability.

IV. CONCLUSION

The undisputed facts and the applicable law wholly support the trial court's ruling. Plaintiffs respectfully request that this Court DENY Defendants' Appeal, uphold the trial court's ruling, and provide whatever further relief this Court deems just and proper.

V. REQUEST FOR ORAL ARGUMENT

Because issues in this case impact numerous pending cases in New Mexico state courts, oral argument is requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of October 2011 to:

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