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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2468

L.T. CASE NO. 4D10-1803, 502009-CA-028465XXXXMB

VISITING NURSE ASSOCIATION OF FLORIDA, INC.,

Appellant,

vs.

JUPITER MEDICAL CENTER, INC.,

Appellee,

ANSWER BRIEF ON THE MERITS OF APPELLEE JUPITER MEDICAL CENTER, INC.

On Discretionary Review Of An Opinion
from the Fourth District Court of Appeals

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STATEMENT OF USAGE

The Respondent/Appellee in connection with the instant request for discretionary review is Jupiter Medical Center, Inc. referred to herein as "JMC" or "Respondent."

The Petitioner/Appellant in connection with the instant request for discretionary review is Visiting Nurses Association of Florida, Inc. referred to herein as "VNA" or "Petitioner."

The Record on Appeal is cited herein as "R.v.x (z)," with "v" representing the volume, "x" representing the page number(s), and in selected citations, "z" further describing the material cited. The portions of the Supplemental Record on Appeal are cited herein as "R.Supp.v.x (z)," with "v" representing the volume of the supplemental record, "x" representing the page number(s), and in selected citations, "z" further describing the material cited.

The term "Award" will be used herein to collectively refer to the Interim Award issued by the arbitrators on or about May 20, 2009 (R.1.145-158), the Final Award of Arbitrators entered by the arbitrators on October 7, 2009 (R.1.159-162), and the Clarification/Modification of Award entered by the arbitrators on November 5, 2009 (R.1.163-165). R.1.145-165.

The "4th DCA Opinion" will be used herein to refer to the Fourth District Court of Appeals' September 14, 2011 opinion and decision in Jupiter Medical Ctr. Inc. v. Visiting Nurse Assn. of Florida, Inc. 72 So. 3d 184 (Fla. 4th DCA 2011).

The term "Initial Brief" will be used herein to refer to Appellant's Initial Brief on the Merits filed with this Court on or about April 1, 2013.

STATEMENT OF THE CASE AND FACTS

A. Introduction And Brief Statement Of Case.

This matter is before the Supreme Court based upon VNA's request for discretionary review of the 4th DCA Opinion dated September 14, 2011, wherein the 4th DCA properly refused to confirm or judicially condone the facially illegal Award, and found that the trial court must determine the issue regarding the illegality of the contract and the Award prior to judicial *enforcement* of such Award. See 4th DCA Opinion.

B. The Parties, The Asset Purchase Agreement, The Relevant Contractual Provisions And The Specific Incorporation Of The State And Federal Laws, Regulations And Rules Governing Healthcare Transactions.

JMC is a non-profit hospital located in Florida focused on delivering high quality and compassionate healthcare services to the Jupiter community, and JMC provides medical services to a substantial number of patients covered by federal and state healthcare programs, including Medicare and Medicaid. R.1.119. VNA

is a corporation engaged providing certain home health care services within a patient's home after the patient is discharged from the hospital setting. Id.

In or around 2004, VNA approached JMC to inquire about the possibility of VNA purchasing the home health agency business that was being operated by JMC in the Palm Beach County and Martin County areas. R.1.121 (*Amd. Mot. to Vacate* at pg. 4), R.1.146 (*Award* at pg. 2). Given the fact that the proposed transaction involved state and federal Medicare and Medicaid programs within the highly regulated healthcare industry, there were multiple state and federal laws, regulations and rules implicated by the proposed transaction.[1] As part of the efforts to comply with the regulatory laws, in connection with the proposed purchase price for the acquisition, JMC commissioned a ***fair market value appraisal*** of JMC's ***existing*** home health agency business.[2] R.1.121, R.1.147 (*Award* at pg. 3). Based on the "evaluation report," the amount of $639,000 was found to be the fair market

[1] The state and federal healthcare fraud and anti-kickback laws implicated, include: (i) Fla. Stat. § 456.054 ("Kickbacks prohibited"); (ii) Fla. Stat. § 817.505 ("Florida Patient Brokering Act"); (iii) Fla. Stat. § 395.0185 ("Rebates prohibited"); (iv) 42 USC § 1320a-7b(b) (the "Federal Anti-Kickback Statute"); (v) 42 USC § 1320a-7a (the "Civil Monetary Penalties Law"); and (vi) 42 C.F.R. § 482.43, relating to Medicare Hospital Conditions of Participation: Discharge Planning. (collectively, these statutes, laws and regulations are referred to herein as the "Governing Healthcare Laws/Regulations").

[2] Fair market value determinations are obtained in healthcare transactions to help ensure compliance with federal fraud and abuse laws by establishing the purchase price as the actual reasonable value of the assets being purchased, and not disguised remuneration for improper future referrals.

value of JMC's ***existing*** home health agency business. R.1.121, R.1.147 (*Award* at pg. 3).[3] JMC and VNA proceeded to enter into a purchase/sale agreement for JMC's ***existing*** home health agency business for the amount of $639,000, and the parties' agreement was memorialized in the Home Health Agreement entered into on February 28, 2005. (the "Purchase Agreement"). R.1.41-66; R.1.121-122; R.1.147 (*Award* at pg. 3); R.1.166-182.

The Purchase Agreement provides that VNA was seeking to purchase certain existing *assets* relating to JMC's home health agency, and that "[t]he purchase price shall be $639,000, paid in cash at closing." R.1.122, R.1.166-167 (*Purchase Agreement* at pgs. 1-2). The Purchase Agreement further specified that VNA was only purchasing JMC's ***existing*** patient accounts (as reflected on Exhibit A to the Purchase Agreement) along with any other patient accounts obtained ***before the Closing Date***. R.1.122; R.1.166 (*Purchase Agreement* at § 2, pg. 1) (emphasis added). The language does not include any reference or suggestion that JMC was promising to sell, make or influence any ***future home health agency patient referrals to VNA***. Id.

The Purchase Agreement further provided that it was an asset purchase transaction, and that JMC was merely selling "***all assets owned by JMC*** as part of

[3] The evaluation report also stated there was "significant competition" faced by home health agencies in the region. Id.

the Home Health Agency." R.1.122-123; R.1.166-167 (*Purchase Agreement* at § 2, pgs. 1-2) (emphasis added).[4] This provision specifies that the only assets that were part of the purchase/sale transaction and, consistent with the governing state and federal laws and regulations, it does not include any reference or suggestion that JMC was promising to sell, make or influence any future home health agency patient referrals. Id.

With respect to patient discharge planning issues, the Purchase Agreement contained the following language as part of its terms:

> ***To facilitate the efficient discharge of patients from JMC***, the Purchaser shall provide on-site home health discharge planning personnel located in the discharge planning department[5] . . . ***provided that all accommodations shall be subject to any regulations and governmental guidelines intending to insure freedom of choice for patients.***
>
> JMC will follow the ***discharge planning procedures*** described in **Exhibit "D"** attached hereto and made part hereof.
>
> VNA will accept ***appropriate patient referrals*** from Jupiter Medical Center facilities, and, when necessary, care for those patients notwithstanding their ability to pay for services in keeping with our

[4] Section 2 of the Purchase Agreement also provided that "VNA will also sub-lease for three (3) years, paying a pro-rata share (50%) of the rent specified in the attached Lease (see Exhibit "C" containing Sublease and primary Lease) for the space the Home Health Agency now occupies in Jupiter Farms." Id.

[5] As referenced in the Award, in connection with the purchase transaction, the "parties contemporaneously entered into an 'office lease' agreement." R.1.147 (*Award* at pg. 3). A copy of the parties' Office Lease Agreement ("Office Lease Agreement") was also attached to the Amended Petition to Vacate as Exhibit 5. R.1.183-185.

> mission of community service and not-for-profit status, as funds allow.

R.1.123; R.1.167 (*Purchase Agreement* at § 2, pg. 2) (emphasis added). This provision acknowledges the direct implication of the state and federal laws and regulations "intending to insure freedom of patient choice," and to prevent illegal patient referrals, and it does not include any suggestion that JMC was promising to sell, make or influence any future home health agency patient referrals. Id.

Exhibit "D"[6] to the Purchase Agreement provides as follows:

> **EXHIBIT "D"**
>
> Discharge Planning Procedures
>
> 1. For any patient requiring home health services post discharge, the Hospital will include in the discharge plan a list of home health agencies that are available to the patient, that are participating in the Medicare program and that serve the geographic area in which the patient resides, consistent with the requirements of 42 CFR 42.43, Hospital will update its list at least annually and include home health agencies which have requested to be listed by the Hospital and which meet the requirements stated herein.
>
> . . .
>
> 4. ***The Hospital will inform the patient or the patient's family of their freedom to chose among participating Medicare home health***

[6] VNA's primary claims for relief (and the Arbitration Panel's primary grounds for the Award) were based upon an ***illegal construction*** of the "Discharge Planning Procedures" set forth in Exhibit "D" of the Purchase Agreement. As further explained herein, the Arbitration Panel "exceed its powers" and illegally construed paragraph 5 of Exhibit D to require JMC to illegally make, influence and steer ***future home health agency patient referrals*** to VNA. This is a direct violation of the Governing Healthcare Laws/Regulations.

> ***agencies and will, when possible, respect patient and family preferences, when they are expressed to the Hospital. The Hospital will not specify or otherwise limit the qualified providers that are available to the patient.***
>
> 5. ***If after following the foregoing procedures, the patient expresses no preference, the Hospital will inform the patient of its relationship with the VNA.*** The purpose of establishing a working relationship with the VNA is to facilitate the smooth transfer of patients into post-hospital care and thereby reduce the average length of stay for hospitalization.

R.1.66; R.1.124-125; R.1.147-148 (*Award* at pgs. 3-4) (emphasis added).

Notably, the language of Exhibit D was derived from the governing federal laws and regulations 42 CFR § 482.43[7] ("Condition of Participation; Discharge Planning") which were specifically enacted *to protect and ensure freedom of patient choice*, and to avoid improper "steering" of patients by hospitals to home health agencies. See 42 C.F.R. § 482.43(c)(7) ("[t]he hospital, as part of the discharge planning process, must inform the patient or the patient's family of their freedom to choose among participating Medicare providers of posthospital care services" and "[t]he hospital must not specify or otherwise limit the qualified

[7] The Arbitration Panel expressly acknowledged that "[t]he Agreement also contained specific discharge planning procedures in an attached Exhibit D which followed ***42 USC § 428.43*** [sic] . . ." R.1.147 (*Award* at pg. 3). The Arbitration Panel incorrectly cited the federal law because "42 C.F.R. § 482.43" actually provides the specific federal requirements for discharge planning, not 42 U.S.C. § 428.43 which is a non-existent statutory provision.

providers that are available to the patient.")[8] R.1.125; R.1.186-188. Despite the purpose for the regulations set forth in 42 CFR § 482.43, as explained below, in the underlying arbitration proceeding, VNA argued (and the Arbitration Panel ultimately determined) that paragraph 5 of Exhibit D to the Purchase Agreement somehow contractually obligated JMC *to illegally make, refer, influence and steer future patient referrals to VNA's home health agency business*.[9] R.1.147-148, 151-153 (*Award* at pgs. 3-4, 7-9).

C. The Contractual Provisions Expressly Limiting The Arbitration Panel's Power To Construe The Parties' Contract In A Manner That Would Violate State Or Federal Laws And Regulations.

Given the fact that the transaction involved the highly regulated healthcare industry, and implicated state and federal Medicare and Medicaid programs (programs which are subject to industry specific state and federal laws, regulations and rules), Section 28 of the Purchase Agreement provides as follows:

> 28. Compliance with Laws and Regulations. ***The parties hereto agree that it is their intent that all activities contemplated under this Agreement shall comply with all applicable state and Federal laws***

[8] As detailed below, the Federal Register specifically explains that this provision "***prohibits hospitals from limiting or steering patients to any specific HHA*** or qualified provider that may provide posthospital home health services." See 69 Fed. Reg. 48916, 49223 (emphasis added); R.1.191-196.

[9] Notably, during the underlying evidentiary hearing in the arbitration proceeding, JMC was not arguing that paragraph 5 of Exhibit D, as drafted, was illegal because JMC was relying upon what it thought was the plain meaning of the contractual language which was required to be construed to comply with the governing federal and state laws and regulations.

> ***and regulations***. ***Under no circumstances shall any provision of this Agreement be construed by the parties in a manner that would violate any such laws or regulations***.

R.1.125-126; R.1.174 (*Purchase Agreement* at § 28) (emphasis added). This contractual provision expressly limits the authority and ability to construe the parties' agreement in a manner that would violate any state or federal laws or regulations relating to the parties' transaction or corresponding activities. Id.

To further expressly limit the authority to construe or enforce the parties' Purchase Agreement in an illegal or unlawful manner, Section 24 provides that "[i]n the event ***that certain language or a provision of statute, rule, regulation, or law is required for the enforcement of this Agreement and is not contained herein, the parties agree that such provision shall be deemed to have been incorporated into this Agreement at the time of its execution***." R.1.126; R.1.174 (*Purchase Agreement* at § 24) (emphasis added). Finally, in express recognition that the state and federal anti-kickback statutes applied to the parties' transaction, in Paragraph 20 of the Office Lease Agreement (which the Arbitration Panel determined was part of the parties' purchase transaction), provides that:

> 20. Referral Disclaimer. The amounts paid by Tenant hereunder have been determined by the parties through good faith and arms-length bargaining to be the ***fair market value*** for the lease of the Premises. ***The lease amounts have not been determined in any manner that takes into account the volume or value of any potential referrals between the parties. The amount charged hereunder does not include any discount, rebate, kickback or other reduction in charge, and no amount charged or paid hereunder is intended to be, nor***

shall it be construed to be an inducement or payment for referral of patients or other business generated between the parties.

R.1.126; R.1.185 (*Office Lease Agreement* at pg. 3, ¶ 20) (emphasis added). This provision directly acknowledges the applicability of the state and federal anti-kickback statutes to the parties' transaction, and the strict prohibition on providing any remuneration or payments to induce future patient referrals. Id.

D. VNA's Misguided Claims Against JMC For Purported Breach of The Purchase Agreement By Failing To Make "Future" Medicare Patient Referrals To VNA.

Despite the fact that VNA only paid the modest purchase price of $639,000 for the existing assets of JMC's home health agency business, VNA evidently had lofty expectations of immediately generating millions of dollars from this newly acquired business. R.1.146-147 (*Award* at pgs. 2-3) (stating that VNA "determined" that "it could realize $1.5 million in revenue yearly due to the large number of Medicare patients that JMC serviced.") After having less success and profitability in operating the purchased home health agency than expected, VNA commenced the underlying arbitration proceeding against JMC (in the matter of *Visiting Nurses Association of Florida, Inc., and Jupiter Medical Center, Inc.*, AAA Case. No. 32-193-Y-000806-07), and VNA brought its breach of contract claims. R.1.126-127; R.1.145-165 (*Award*).

In pertinent part, VNA's claims against JMC were based upon allegations that JMC somehow breached of the Purchase Agreement by failing to ensure that

VNA received a guaranteed flow of *future Medicare patient referrals* from JMC by virtue of JMC purportedly failing to comply with paragraph 5 of the Discharge Planning Procedures set forth in Exhibit D to the Purchase Agreement.[10] R.1.126-127; R.1.146, 149, 155 (*Award* at pgs 1, 5, 11). Furthermore, despite the modest purchase price paid for the assets, for its purported damages, VNA sought multi-millions of dollars from JMC based upon the purported "***loss of future Medicare patient referrals***" from JMC's hospital to VNA's home health agency. R.1.127; R.1.146, 149, 155 (*Award* at pgs 1, 5, 11).

E. The Underlying Arbitration Proceeding And The Arbitration Panel's Facially Illegal Written Arbitration Award Based Upon Illegal Contractual Obligations.

In connection with the arbitration proceeding, on February 3rd and 4th, 2009, the Arbitration Panel conducted a two (2) day evidentiary hearing in Palm Beach Gardens, Florida. R.1.146 (*Award* at pg. 2). After the hearing, the parties each submitted post-hearing briefs, and written closing arguments, and on April 15, 2009, the Arbitration Panel declared that the evidentiary portion of the hearing was closed. Id. As indicated above, based upon JMC's understanding of paragraph 5 of Exhibit D to the Purchase Agreement, and based upon the fact that

[10] JMC also asserted several breach of contract counter-claims against VNA relating to VNA's multiple material breaches of the parties' contract, however, the Arbitration Panel did not grant JMC any affirmative relief, and those claims are therefore not discussed in this brief.

Sections 24 and 28 of Purchase Agreement expressly limited the Arbitration Panel's power to construe any terms of the Purchase Agreement in a manner that would violate the applicable federal and state laws and regulations, during the course of the underlying arbitration proceeding and evidentiary hearing, JMC was not directly challenging the legality of the parties' Purchase Agreement, and there was no direct evidence presented in the arbitration hearing regarding the current "illegality" issue. R. Supp. 1.544, 542-43, 545-56.

After the hearing, the Arbitration Panel proceeded to draft its written interim award without actually receiving (or reviewing) the transcript of the evidentiary hearing. R.1.127; R.1.146 (*Award* at pg. 2). On May 20, 2009, the Arbitration Panel initially issued its written Interim Award (R.1.145-158),[11] and, on October 7, 2009, the Arbitration Panel entered its Final Award of Arbitrators (R.1.159-162), and on November 5, 2009, the Arbitration Panel entered the Disposition for Application of Clarification/Modification of Award (R.1.163-165).[12]

In the Award, the Arbitration Panel granted VNA's breach of contract claims, and awarded VNA monetary damages in "the sum of $1,251,213.00" from

[11] The Interim Award provided that after "the close of hearing on attorneys fees and costs, the Panel ***will issue a final award***." R.1.157 (*Award* at pg. 13).

[12] In connection with VNA's request for a clarification of Final Award, the Arbitration Panel stated that "[t]he Final Award dated October 7, 2009 is hereby clarified to adopt and incorporate the Interim Award issued on May 20, 2009." R.1.163-165.

JMC. R.1.156-157; R.1.163. The Arbitration Panel also awarded pre-judgment interest in the amount of $900,000 on the monetary award, and the Panel retained jurisdiction to consider an award of attorneys' fees to VNA. Id. The Arbitration Panel also found that VNA "shall recover attorney's in the amount of $214,047.50" and that JMC "shall reimburse [VNA] the sum of $49,890.05" for "[t]he fees and expenses of the arbitrators totaling $71,780.07." R.1.159.

As detailed in the legal argument below, the face of the Award and the underlying Purchase Agreement, as construed by the Arbitration Panel, are illegal and in direct violation of multiple state and federal laws and regulations, and the entire $1,251,213.00 damage award is based upon an illegal contractual obligation purportedly requiring JMC to make or influence illegal future Medicare patient referrals to VNA's home health agency. R.1.128-130. Specifically, the Arbitration Panel exceeded their powers and illegally construed the parties' Purchase Agreement (and Exhibit "D" in particular) as an ***illegal agreement*** for JMC to make, refer, steer and/or influence future home health agency patient referrals to VNA in exchange for the direct monetary remuneration (in the form of the $639,000 acquisition purchase price and the assumption of the purportedly over-priced Jupiter Farms lease payments) from VNA. R.1.145-158 (*Award*).

The Award contains the following direct (and problematic) statements about the purported nature and intent of the parties' Purchase Agreement:

- "While VNA did not actually need the space . . . ***it agreed to carry the remaining three years of JMC's lease just to purchase JMC's market share of HHA referrals***." R.1.148 (*Award* at pg. 4) (emphasis added).

- "Dr. Ketterhagen instituted this system because he believed that the Center for Medicare Services did not permit any one agency to be given a preference. Per Ms. Hamilton, ***Mr. Miller [of VNA] insisted that JMC had to assign its patients to VNA if they expressed no preference***." R.1.151 (*Award* at pg. 7) (emphasis added).

- "VNA performed its due diligence and determined that by streamlining the HHA's operations it could realize ***$1.5 million in revenue yearly due to the large number of Medicare patients that JMC serviced.***" R.1.146-147 (*Award* at pgs. 2-3) (emphasis added).

- "VNA based its determination ***to purchase on receiving 45-50 referrals per month***." R.1.147 (*Award* at pg. 3) (emphasis added).

- "And, while initially the transition from JMC to VNA was 'seamless', ***JMC's decision to institute (or continue) a rotation system – ostensibly to comply with Medicare regulations—deprived VNA of what it had paid $639,000 for: the ability to subtly 'nudge' JMC's patients to select its agency from among a host of choices***." R.1.153 (*Award* at pg. 9) (emphasis added).

- In granting VNA the damage award, "the Panel finds that VNA could not have expected to earn $1.5 million profit in 2005—Year 1 of the Agreement, and would have experienced a 25% drop in revenue ***even if it had received every Medicare referral in Year 2*** . . . Thus, its projection of $1.5 Million per year must be reduced by the historical 25% drop in Medicare census to $1,125,000 . . ." R.1.156 (*Award* at pg. 12) (emphasis added).

Thus, as further detailed below, against the backdrop of the Governing Healthcare Laws/Regulations, which strictly prohibit unlawful patient referrals and patient steering, the Award and the Purchase Agreement, as construed by the Arbitration Panel, are blatantly illegal and directly violate the Governing Healthcare Laws/Regulations.

F. JMC's Timely Challenge To The Illegal Arbitration Award.

After receiving a copy of the facially illegal Interim Award, JMC promptly filed a Motion for Reconsideration and a formal Application and Request to Reopen the Arbitration Hearing with the Arbitration Panel, wherein JMC raised the issue that the proposed Award was illegal and that the Arbitration Panel exceeded their powers by illegally construing the Purchase Agreement in direct violation of multiple state and federal laws and regulations. R.1.127-128; R.1.189. After accepting JMC's motion as filed, the Arbitration Panel issued an e-mail order summarily denying JMC's requested relief. R.1.189.

In light of the fact that the Arbitration Panel grossly exceeded their powers by issuing the illegal Award, and were attempting to impose illegal contract obligations upon the parties, JMC thereafter promptly began its efforts to obtain judicial relief from the illegal interim Award and then from the subsequent illegal final Award. R.1.1-116; R.1.118-144.

JMC challenged the validity of the illegal Award by timely filing its comprehensive Amended Motion to Vacate Arbitration Award (R.1.118-200; R.2.201-233), and also by filing its formal opposition to VNA's proposed request for confirmation in the form of JMC's Answer and Response to VNA's Petition/Motion to Enforce Arbitration Award (R.2.350-400; R.3.401-476). From a procedural perspective, JMC's challenge to the proposed Award is based upon

both a formal motion to vacate, and a formal opposition to VNA's motion for judicial confirmation/enforcement of the illegal Award. Id.

G. The Lower Court's Erroneous Rulings Regarding The "Illegality" Of The Arbitration Award And Its Failure To Consider The Illegality Issue.

A special set hearing was held before the lower court to address the issues raised in: (i) JMC's Amended Motion to Vacate the Arbitration Award (and VNA's corresponding response in opposition); and (ii) VNA's Motion to Enforce the Arbitration (and JMC's corresponding response in opposition). R.Supp.1.515, 518. During the hearing, VNA's counsel conceded that "the essence of the hearing is illegality." R.Supp.1.519 (*Transcript* pg. 5:5-6). The lower court made several erroneous legal rulings resulting in the entry of its judgment and order. With respect to JMC's concerns regarding the illegality issue, JMC explained that:

> the panel comes up with one point two five million dollar award against Jupiter Medical Center wholly based upon the failure of Jupiter Medical Center to make future Medicare referrals to VNA. Now, you cannot have a damage award based upon something which would be illegal. You can't pay six hundred and thirty-nine thousand dollars . . . to influence or to make JMC push, steer, nudge – whatever the arbitrators want to call it—nudge Medicare patient referrals to a home health agency being VNA . . . That's illegal. That's blatantly illegal.

R.Supp.1.542 (*Transcript* pg. 28:1-16). Counsel for JMC further explained that:

> the contract itself has provisions saying this has to be construed in accordance with the federal laws and the state laws and any applicable regulations. Cannot be construed in a manner that violates those requirements. So, even if there is some ambiguity about whether Exhibit D mandated that JMC make future Medicare referrals to VNA

> or be in breach of the agreement, that had to be construed by the arbitration panel in a manner consistent with the stark anti-kickback laws, with the Patient Brokering Act, with the litany of the federal and state regulations and laws with criminal penalties that I have set forth our amended petition to vacate the arbitration award.
>
> Now, they did not construe it that way; they construed it to say . . . the main reason that VNA . . . took over the overpriced lease and paid their purchase price was to receive forty to fifty referrals per month . . . [and] the ability to subtly nudge JMC's patients to select its agency [VNA] from among a host of choices.

R.Supp.1.543-544 (*Transcript* at pg. 29:10-30:18).

When the lower court raised concerns about JMC potentially having "waived" the defense/issue regarding the illegality of the Award and the illegality of the underlying contract, counsel for JMC explained as follows:

> MR. AUSTIN: . . . We cannot have something out there saying that we are now obligated to pay one point two five million dollars for failure to . . . make illegal referrals based upon an[] illegal contract. This is a serious issue that we need the judiciary to look at . . . And the body of case law that I elaborated on in my supplemental memorandum to you explained that . . . the judge, the judiciary, has the obligation to actually look at this contract and look at this situation to see if it is a legal award and a legal contract . . . This isn't something that can be waived. It is a non-waiveable issue. In fact, the question regarding the legality of the underlying contract and the underlying contract as construed by the arbitrator is an issue that cannot be waived.
>
> HONORABLE FRENCH: So I understand, you want this Court to declare that the underlying contract was illegal?
>
> MR. AUSTIN: Yes, if you're going to accept the arbitrator's construction of the contract, then the answer is absolutely yes.

R.Supp.1.555-556 (*Transcript* at pg. 41:20-42:24).

To stress the importance of the judiciary deciding the "illegality" issue, counsel for JMC further explained that:

> this is the first time that anyone other than the arbitration panel themselves is looking at this arrangement, is looking at the award and making a determination whether or not (a) the contract and the arbitration award is illegal under the well-established statutory criminal liability out there, and (b) whether they exceeded their powers.

R.Supp.1.568-569 (*Transcript* at pg. 54:25-55:8). Significantly, notwithstanding the well-established Florida law which dictates that the "illegality" defense cannot be waived, the lower court ruled that JMC had waived the right to raise the illegality defense, and stated "I am going to go ahead and confirm the arbitration award and let the powers to be at the 4th DCA decide to take a closer look at this issue, okay?" R.Supp.1.569-571 (*Transcript* at pg. 55:15-57:4). Thus, the lower court denied JMC any relief from the illegal Award, and "let the powers to be at the 4th DCA decide to take a closer look at this issue." R.3.505-508.

H. The 4th DCA's Well Founded Decision Regarding The Illegal Arbitration Award.

The 4th DCA Opinion provides that "[b]ecause a Florida court cannot enforce an illegal contract, we reverse and remand for the trial court to consider the legality of the contract." See 4th DCA Opinion at 185. The 4th DCA explained that "JMC . . . [was] arguing that the contract, as construed by the arbitrators, violated state and federal laws prohibiting medical care providers from accepting

payment in return for home care patient referrals." Id. The 4th DCA further explained that "[t]he sole issue before this court is *whether the trial court erred in not considering the contract's legality before ordering enforcement of the arbitral award*. JMC argues that Florida courts should not enforce an arbitrator's award based on an illegal contract and therefore the trial court erred in refusing to consider the issue. We agree." Id. (emphasis added).

The 4th DCA Opinion explained that: "Florida cases indicate ***a broad refusal to aid the enforcement of illegal contracts.***" Id. (emphasis added). The 4th DCA proceeded to set forth the deeply rooted legal principle that: "courts will not enforce illegal contracts" and that "there rests upon the courts the affirmative duty of refusing to sustain that which by the valid laws of the state, statutory or organic, has been declared repugnant to public policy. To do otherwise would be for the law to aid in its own undoing." Id. (emphasis added).

With respect to the application of this firmly established legal principle in the context of resisting the enforcement of an arbitration award, the 4th DCA explained that "[w]hile it is clear that section 682.13(1) does not include illegality, ***the issue as to whether a court will enforce an arbitral award on a contract that is allegedly illegal should be treated no differently***. The arbitral award was based on the breach of a contract. If the contract is found to be illegal, a prior arbitration will not prevent the trial court from vacating the award." Id. (emphasis added).

Thus, the 4th DCA explained that "[w]hen the issue of a contract's legality is raised, the trial court must make that determination prior to deciding whether to enforce an arbitral award based thereon. Consequently, we reverse and remand for proceedings consistent with this opinion." Id. at 187. With respect to the argument that JMC purportedly waived the illegality defense, the 4th DCA expressly held that "JMC did not waive the defense." Id. at 186-87.

VNA filed a Motion for Rehearing and Rehearing En Banc which was denied by the 4th DCA. On December 6, 2011, VNA sought discretionary review from this Court. This Court accepted discretionary jurisdiction on March 8, 2013 to resolve the question of whether there exists a conflict with the 4th DCA's Opinion and other applicable precedence.

SUMMARY OF ARGUMENT

The well founded 4th DCA Opinion in the instant case does not conflict with the U.S. Supreme Court decision in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). Contrary to VNA's arguments regarding the purported scope and application of the Buckeye decision, the actual holding in Buckeye was that where a party is attempting to avoid the arbitration process at the ***inception*** of a case by challenging the "validity of the contract as a whole, and not specifically to the arbitration clause," then it is the arbitrator (not the court) who must consider the challenge to the validity of the contract "***in the first instance***." See Buckeye, 546

U.S. at 445-446 (emphasis added). The Buckeye decision does not stand for the sweeping proposition that Florida courts will always be compelled to automatically judicially confirm, enforce and condone an arbitrator's facially illegal arbitration award based upon an illegal construction of the underlying contract. Likewise, the Buckeye decision does not stand for the proposition that Florida courts are barred from ever considering the "illegality" of an arbitration award prior to the judicial confirmation/enforcement of such an award.

As acknowledged in the 4th DCA Opinion, based upon deeply rooted and firmly established legal principles, "Florida cases indicate a broad refusal to aid the enforcement of illegal contracts," and "courts will not enforce illegal contracts." See 4th DCA Opinion at 186. Thus, since arbitration is a "creature of contract," the Buckeye decision clearly did not eliminate a Florida court's inalienable powers, rights and obligations to refuse to judicially enforce illegal arbitration awards based upon illegal contractual obligations. VNA erroneously suggests that Florida courts are essentially powerless to address serious illegality issues once an arbitrator issues the arbitration award, however, the governing law dictates that Florida courts have the power and ability to properly address legitimate illegality issues, and to avoid judicially condoning/enforcing illegal arbitration awards based on illegal contracts.

First, as set forth in the 4th DCA Opinion, based upon unalienable and deeply rooted legal principles in both state and federal law, Florida courts will not enforce illegal arbitration awards based on an arbitrator's illegal construction of the underlying contract in violation of well-defined and specified laws. The face of the Award in the instant case illustrates that it is in direct violation of multiple state and federal healthcare fraud and anti-kickback laws and regulations, and cannot be judicially enforced.

Second, the illegal Award must also be vacated because the Arbitration Panel "exceeded their powers" under Fla. Stat. 618.13(1)(c) by construing the contract in violation of the Governing Healthcare Laws/Regulations.

Finally, the record is clear that there was no procedural defect with respect to JMC's timely filed motion to vacate the illegal Award.

LEGAL ARGUMENT

I. THE WELL FOUNDED RULINGS IN THE 4TH DCA OPINION DO NOT CONFLICT WITH THE MORE LIMITED RULINGS IN THE HIGHLY DISTINGUISHABLE BUCKEYE DECISIONS.

As the primary argument for this appeal, VNA attempts to rely upon the U.S. Supreme Court decision in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) to erroneously contend that a Florida court may never (at any point in the process) address or rectify the fundamental *illegality* of an arbitration award based upon an arbitrator's facially illegal construction of an underlying

contract and the imposition of illegal contractual obligations upon the parties. According to VNA's overly simplistic and non-nuanced argument, regardless of the unique legal and factual circumstances in a specific case, Florida courts will *always* be compelled to automatically confirm, enforce and condone a *facially illegal arbitration award* based upon an illegal construction of the underlying contract and which seeks to impose illegal contractual obligations upon the parties.

Contrary to VNA's arguments, the U.S. Supreme Court decision in Buckeye does not stand for that sweeping, illogical and draconian proposition, and such a proposition is entirely inconsistent with the actual governing law and with some of the most fundamental and bedrock legal principles in our judicial system. In fact, the law is clear that the judiciary *cannot* simply turn a blind eye to an illegal contract or illegal arbitration award as VNA suggests, and the judiciary has an "affirmative duty" to refuse to enforce any illegal arbitration award based on illegal contractual obligations.[13]

As reflected in the Initial Brief, the core of VNA's misguided argument is that the 4th DCA purportedly "failed to consider *Buckeye* and its progeny" by ruling that the trial court must determine the illegality issue "before enforcing an arbitration award." See Initial Brief at 18 (citing Buckeye Check Cashing, Inc. v.

[13] See Gonzalez v. Trujillo, 179 So. 2d 896, 897 (Fla. 3d DCA 1965); Robineau v. De Long, 109 So. 636, 640 (Fla. 1926); Local No. 234 v. Henley & Beckwith, Inc., 66 So. 2d 818, 821 (Fla. 1953)

Cardegna, 546 U.S. 440 (2006); Cardegna v. Buckeye Check Cashing, Inc., 930 So. 2d 610 (Fla. 2006) (these two related decisions are referred to herein as the "Buckeye Decisions")). In attempting to advance its argument, VNA inaccurately summarizes (and mischaracterizes) the holdings of the Buckeye Decisions as follows: "[t]he United States Supreme Court, the Florida Supreme Court, and various appellate courts in Florida have held that the decision as to legality of the contract, as a whole, is for the arbitrator." See Initial Brief at 18. While this recitation of the holding from the Buckeye Decisions is partially correct, it is incomplete, inaccurate and inherently misleading for purposes of the relevant issues in instant dispute.

In actuality, the holding in Buckeye was that where a party is attempting to avoid the arbitration process at the *inception* of a case by challenging the "validity of the contract as a whole, and not specifically to the arbitration clause," then it is the arbitrator (not the court) who must consider the challenge to the validity of the contract "***in the first instance***." See Buckeye, 546 U.S. at 445-446 (emphasis added) (explaining that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator ***in the first instance***.") (emphasis added).[14] Of critical importance here, a review of the

[14] See also Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 463 (Fla. 2012) ("[t]he Court in Buckeye articulated three key principles to guide courts in reviewing (continued…)

Buckeye Decisions illustrate that they do not stand for the sweeping proposition that a Florida court is barred from ever considering the "illegality" of an arbitration award prior to the judicial confirmation/enforcement of such an award (i.e., in the "second instance" or at some point after the award is issued before confirmation), nor do they stand for the proposition that a trial court must automatically condone and enforce an illegal arbitration award based upon an illegal contract and illegal contractual obligations. The Buckeye Decisions simply do not support such propositions, and VNA's reliance upon the Buckeye Decisions is misplaced.

Unlike the instant case where the 4th DCA was considering the issue of the illegality of the Award *after the completion* of the arbitration process, and after the issuance of the facially illegal arbitration Award which VNA was asking the Court to judicially condone and enforce, the Buckeye Decisions were dealing with the highly distinguishable and inapposite situation where one party was opposing the other party's motion to compel arbitration at the *inception* of the dispute (i.e., pre-arbitration)[15] by arguing that the underlying contracts and/or certain provisions of

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challenges to arbitration agreements . . . unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in ***the first instance***.") (emphasis added).

[15] The other cases relied upon by VNA to support a purported "conflict" argument are also clearly inapposite dealing with motions to compel arbitration, and they do not deal with situations, such as the instant case, where the illegality issue is being raised after the completion of the arbitration process. CFC of Delaware LLC v. Santalucia, 91 So. 3d 899 (Fla. 4th DCA 2012) (addressing trial court's denial of a (continued…)

the contracts (other than the arbitration provisions) were invalid, unconscionable or otherwise unenforceable.[16]

The Buckeye Decisions did not deal with a situation, such as the instant case, where *after* the completion of the arbitration process, a party (such as JMC) is properly challenging the proposed ***judicial enforcement*** of the facially illegal arbitration Award based upon a contract which, as construed by the arbitrators, is illegal/criminal in nature. See 4th DCA Opinion at 185 ("the issue before this court is whether the trial court erred in not considering the contract's legality ***before ordering enforcement of the arbitral award***.") (emphasis added). The Buckeye Decisions likewise did not deal with a situation where the arbitrators were purporting to impose illegal/criminal contractual obligations upon the parties to the contract, and one party (VNA) was asking a Florida court to judicially condone and enforce an illegal arbitration award based upon an illegal contract and illegal contractual obligations. As explained in the extensive case law set forth below and

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motion to compel arbitration); ATP Flight School, LLC v. Sax, 44 So. 3d 248 (Fla. 4th DCA 2012) (same); Charles Boyd Construction, Inc. v. Vacation Beach, Inc., 959 So. 2d 1227 (Fla. 5th DCA 2007) (same); Roman v. Atlantic Coast Construction and Development, Inc., 44 So. 3d 222 (Fla. 4th DCA 2010) (same); Alterra Healthcare Corp v. Bryant, 937 So. 2d 263 (Fla. 4th DCA 2006) (same).

[16] See Buckeye Check Cashing, 824 So. 2d. 228, 232 (Fla. 4th DCA 2002) ("we reverse the trial court's order denying appellant's ***motion to compel arbitration*** and remand this cause for further proceedings" because "appellees did not argue that they did not enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement.") (emphasis added).

as acknowledged in the 4th DCA Opinion, arbitration is a "creature of contract," and the Buckeye Decisions did not eliminate a Florida court's inalienable powers, rights and obligations to refuse to judicially enforce *illegal* arbitration awards based upon *illegal* contractual obligations (which cannot be lawfully enforced or judicially condoned by a Florida court).

The fundamental flaw in VNA's argument can be illustrated by use of a simple hypothetical. Specifically, based upon the logical extension of VNA's argument regarding the scope and implications of the Buckeye Decisions, unscrupulous parties could knowingly enter into contracts involving illegal and unlawful subject matter (such as contracts for the sale/purchase of illegal drugs or for illegal gambling arrangements), and the parties could include an arbitration provision along with a provision restricting either party from challenging the legality of the contract and restricting the arbitrator from invalidating the contract based upon illegality grounds. The parties could then utilize the contractually agreed upon arbitration process to insulate themselves from any judicial accountability, and to obtain judicially enforceable arbitration awards relating to the unlawful subject matter of the illegal contract. After the issuance of the arbitration award, given the absence of any specific statutory basis under Fla. Stat. § 682.13 to serve as the basis to vacate the illegal arbitration award, the parties could then move for immediate confirmation/enforcement of the illegal arbitration

award, and thereby force a Florida court to become directly complicit in the wrongdoing by entering a judicial order confirming/enforcing the illegal arbitration award (which would result in the arbitration award having full force and effect of the laws of Florida). Under such a hypothetical, while there would be no specific statutory basis under Fla. Stat. § 682.13 to rely upon to vacate the illegal arbitration award, it is clear that a Florida court must have the power to refuse to judicially condone and enforce such an illegal arbitration award based upon an illegal contract. In addition to the arguments above, the Buckeye Decisions also did not impact a trial court's power to determine whether an arbitration panel "exceeded their powers" by issuing an illegal award based upon an illegal contractual construction and/or mandating the performance of an illegal act. Accordingly, contrary to VNA's self-serving arguments, the well founded 4th DCA Opinion is completely consistent with and fully reconcilable with the Buckeye Decisions.

II. VNA'S RELIANCE UPON THE *COMMERCIAL INTERIORS* AND *FELGER* DECISIONS IS MISPLACED.

In the Initial Brief, VNA also attempts to rely upon several post-Buckeye decisions including Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc., 19 So. 3d 1062 (Fla. 5th DCA 2009), and Felger v. Mock, 65 So. 3d 625 (Fla. 1st DCA 2011). Despite VNA's misplaced reliance on these purportedly similar cases, a review of Commercial Interiors and Felger demonstrate such cases are materially distinguishable, and are not instructive in the instant case.

The Commercial Interiors case dealt with an entirely different factual and procedural situation, and the limited analysis provided by the Fifth District Court of Appeals is not instructive. In Commercial Interiors, the parties had entered into "two subcontracts" relating to the provision of certain basic design and construction work for a property, and the plaintiff was seeking to recover $51,209 from the defendant "for work done under the subcontracts." Commercial Interiors, 19 So. 3d at 1063. The parties submitted their dispute to arbitration, and in the arbitration proceeding, the defendant filed a motion to dismiss "asserting that [plaintiff] was not entitled to recover any amount under the subcontracts because the subcontracts were themselves illegal," and "[defendant] alleged accordingly that it was relieved of the obligation to pay any amount to [plaintiff] because [plaintiff] ***did not have a contractor's license***." Id. at 1063 (emphasis added). Thus, with respect to the limited "illegality" defense raised in the Commercial Interiors case, the defendant was seeking to avoid paying for services rendered by making an argument that the plaintiff "did not have a contractor's license" which should invalidate the underlying subcontracts. Id.

Unlike the illegality issue raised in Commercial Interiors, JMC is not merely contending that VNA did not have some type of requisite license which could invalidate the parties' otherwise lawful contract. To the contrary, JMC's illegality argument relates to entire foundation of the parties' contractual relationship as set

forth in the Arbitration Panel's illegal Award, itself, and the fundamental illegality issues raised in the instant case relate to potential serious criminal violations of numerous federal and state healthcare laws and regulations. In the instant case, the Panel's illegal Award imposes illegal contractual obligations upon the parties, which is a circumstance that was not present in Commercial Interiors. Furthermore, unlike the defendant in Commercial Interiors, JMC is not attempting to evade contractually agreed upon payment obligations for services rendered and work done. To the contrary, JMC has raised the illegality issue to ensure that it is not unlawfully penalized for having complied with the governing healthcare laws and regulations, and to prevent the Panel from imposing illegal/criminal contractual obligations upon the parties.

Additionally, in Commercial Interiors, the limited defense of the potential illegality of the parties' underlying contract was the *direct* subject of the underlying arbitration proceeding, and the parties had a specific "evidentiary hearing" where "the arbitrator properly considered the illegality of the subject contract in the 'first instance.'" Id. at 1064. In the instant case, the serious illegality issue did not arise until *after* the Arbitration Panel illegally construed the language of the parties' Purchase Agreement in such a manner to create an illegal and unlawful contractual relationship, and to impose blatantly illegal contractual obligations upon the parties. Because JMC was relying upon its understanding of

the language in the Exhibit D of Purchase Agreement, and because the Purchase Agreement had an express provision limiting the Panel's power and ability to construe the terms of the contract in an illegal manner, JMC was not directly arguing the illegality issue in the underlying arbitration proceeding. Thus, unlike Commercial Interiors, the illegality issue was not the direct subject matter of the underlying arbitration proceeding between the parties.

Finally, in the Commercial Interiors case, the Court acknowledged that there was "no assertion that the arbitrator exceeded his powers." Id. at 1064. On the other hand, in the instant case, the record is clear that JMC has expressly argued and asserted that the Arbitration Panel clearly "exceeded their powers" by ignoring the express limitations on their powers, and by issuing the facially illegal and unlawful Award. Accordingly, for these reasons and based upon the actual governing law, VNA's reliance upon the Commercial Interiors case is misplaced, and the 4th DCA Opinion is proper.

VNA's reliance upon Felger v. Mock, 65 So. 3d 625 (Fla. 1st DCA 2011) is likewise unavailing because Felger is inapposite, and addresses entirely different factual and legal issues. In Felger, the plaintiff had brought a medical malpractice claim against the defendant surgeons, and the malpractice dispute was submitted to arbitration before a three-member arbitration panel. Id. at 626. After the merits of the plaintiff's malpractice claim were arbitrated, the arbitration panel "found in

favor of Surgeons and against [plaintiff]," and the arbitration award recited that "according to the evidence presented, none of the witnesses could say with certainty how the injury occurred." Id. at 626.

The plaintiff sought to vacate the arbitration ruling by "arguing the arbitration panel exceeded its powers under the arbitration agreement *by applying an incorrect burden of proof*." Id. at 627 (emphasis added). The trial court granted the plaintiff's motion to vacate, and "ordered that the dispute be submitted to another arbitration panel for a second arbitration." Id. at 626. On appeal, the First District Court of Appeals reversed the trial court's order, and explained that "[a]pplication of an incorrect standard, however, has consistently been rejected as a basis for vacating an award under section 682.13(1)(c)." Id. at 627. The court explained that "[t]here is no indication in this case . . . that the arbitration panel went beyond the authority granted by the parties or the Agreement or decided issues that were not pertinent to the resolution of the issues submitted."[17] Id.

In the instant case, unlike Felger, JMC did not seek to vacate the Award by arguing that the Arbitration Panel applied "an incorrect burden of proof." To the contrary, JMC is challenging the Award on the grounds that it is an illegal and

[17] In the Felger decision, the Court did acknowledge that an arbitration panel will be deemed to have exceed their powers if "the arbitrator went beyond the authority granted by the parties or the operative documents and decided issues not pertinent to the resolution of the issue submitted to arbitration." Id. at 627.

unlawful Award based upon a blatantly illegal construction of the underlying contract. JMC has argued both that the illegal Award should be vacated, and that a Florida court cannot lawfully confirm, condone or enforce such an illegal Award. The Felger case did not even purport to deal with a situation where the arbitration panel issued an *illegal* arbitration award based upon a blatantly illegal construction of the parties' underlying contract, and where the arbitration panel imposed illegal contractual obligations upon the parties. The Felger decision is therefore not instructive for purposes of resolving the issues in the instant case.

III. THE 4TH DCA'S REFERENCE TO THE *PARTY YARDS* DECISION WAS PROPER AND CONSISTENT WITH THE LAW.

VNA also challenges the validity of the 4th DCA Opinion by arguing any reliance on the language from Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. 5th DCA 2000) was purportedly improper because the decision "has been indirectly disapproved by this [Supreme] Court" See Initial Brief at pg. 26. To support the "indirect" disapproval argument, VNA refers to this Court's holding in Cardegna v. Buckeye where this Court stated that the case of Fastfunding the Company, Inc. v. Betts, 758 So. 2d 1143 (Fla. 5th DCA 2000) was no longer "good law." See Initial Brief at pg. 26. Notably, the aspect of the Fastfunding case that was disapproved by this Court was the finding that it was proper for the trial court to refuse to compel arbitration at the early stages of the dispute, and that the "trial court must determine the usury question ***before ordering the parties to***

arbitration." See Fastfunding, 758 So. 2d at 1144 (emphasis added). This was the specific issue addressed in the Buckeye Decisions as explained above.

In the instant case, the 4th DCA Opinion does not rely upon the Party Yards decision for purposes of the legal issues and matters from the Fastfunding case which were disapproved. To the contrary, the 4th DCA Opinion generally cites the Party Yards case along with several other relevant cases for certain basic and inalienable propositions, including that: "[a]n arbitrator cannot order a party to perform an illegal act," and "[a] court may not enforce a contract that is illegal or contrary to public policy." See 4th DCA Opinion at 186; see also I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp., 600 F. Supp. 92, 94, 95 (S.D. Fla. 1984). These basic principles have not been overruled, overturned or disapproved, and VNA's argument regarding the purported indirect disapproval of Party Yards is without merit.

IV. THE 4TH DCA OPINION CORRECTLY RELIES UPON THE FUNDAMENTAL LEGAL PRINCIPLE THAT COURTS HAVE THE POWER TO REFUSE TO ENFORCE ILLEGAL ARBITRATION AWARDS BASED ON ILLEGAL CONTRACTUAL OBLIGATIONS.

In challenging the validity of the 4th DCA Opinion, VNA erroneously suggests that Florida courts are essentially powerless to address serious illegality issues once an arbitrator issues the arbitration award. However, as detailed below, while an arbitrator may have the right to determine the legality of a contract in the "first instance," the governing law dictates that Florida courts still have the power

and ability to properly address legitimate illegality issues, and to avoid judicially condoning/enforcing illegal arbitration awards based on illegal contracts. First, as set forth in the 4th DCA Opinion, Florida courts cannot (and will not) enforce *illegal* arbitration awards based on an arbitrator's illegal construction of the underlying contract in violation well defined laws. Second, an arbitrator will also be deemed to have "exceeded their powers" under Fla. Stat. 618.13(1)(c), and an arbitration award will be properly vacated when the arbitrator issues an illegal award based upon an illegal construction of the parties' contract and imposes illegal contractual obligations upon the parties. The illegal Award issued by the Arbitration Panel in the instant case is unlawful and subject to being stricken down under both of these legal concepts.

A. The Deeply Rooted And Established Legal Principles Which Dictate That Florida Courts Cannot And Will Not Enforce Or Otherwise Condone Illegal Arbitration Awards Based Upon Illegal Contracts.

As set forth herein, the well-established law in Florida (and throughout the nation) is clear that a court cannot (and will not) enforce an illegal arbitration award based upon an illegal contract and illegal underlying contractual obligations. With respect to this deeply rooted principle, Florida courts have explained that:

> ***The principle that courts will not enforce illegal contracts is well established***. . .there can be no legal remedy for that which is itself illegal. ***Indeed, there rests upon the courts the affirmative duty of refusing to sustain that by which the valid laws of the state, statutory or organic, has been declared repugnant to public policy. To do otherwise would be for the law to aid in its own undoing***.

See Gonzalez, 179 So. 2d at 897 (emphasis added). This Court has likewise explained that:

> ***The law refuses to enforce illegal contracts, as a rule*** . . . [w]henever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, ***it is fatal to the case***. ***That defect cannot be gotten rid of either by failure to plead it or by agreeing to waive it in the most solemn manner***. ***The law will not enforce contracts founded in its violation.***

Robineau, 109 So. at 640 (Fla. 1926) (emphasis added); Local No. 234, 66 So. 2d at 821 (Fla. 1953) ("an agreement which cannot be performed without violating such a constitutional or statutory provision, is ***illegal and void***" and "[w]hen a contract . . . is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice."); Schaal v. Race, 135 So. 2d 252, 256 (Fla. 2d DCA 1961).

Importantly, as acknowledged in the 4th DCA Opinion, this deeply rooted legal principle applies equally with respect to efforts to enforce illegal arbitration awards based upon illegal contracts which cannot be judicially condoned.[18] See I.U.B.A.C. Local Union #31, 600 F. Supp. at 94 ("While there are sound reasons for requiring parties to adhere to the procedures governing arbitration, ***it is also well-established that a court may not enforce a contract that is illegal or contrary***

[18] Arbitration is a "creature of contract," and the law regarding the refusal of courts to judicially enforce illegal contracts is applicable in the arbitration context.

to public policy . . . the ***legality of the contract clause at issue here must be determined before the arbitration award can be enforced***.") (emphasis added); United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42-43 (1987) (explaining that "[a] court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in common law, that a court may refuse to enforce contracts that violate law"); Mercy Hosp., Inc. v. Massachusetts Nurses Assn., 429 F.3d 338, 343 (1st Cir. 2005) ("There are . . . a few exceptions to the general rule that the arbitrator has the last word . . . [and] [o]ne such exception traces its roots to the common law doctrine that courts may refuse to enforce illegal contracts."); Party Yards, 751 So. 2d at 123 (explaining that "***[a]n arbitrator cannot order a party to perform an illegal act***," and "[l]egal authorities from the earliest time have unanimously held that ***no court will lend its assistance in any way towards carrying out the terms of an illegal contract***.") (emphasis added). This concept has been explained by a sister court as follows:

> A challenge that an award is in contravention of public policy is premised on the fact that ***the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them***. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, ***the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award.*** . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to

> enforce an arbitrator's interpretation of [agreements] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests . . .

State v. AFSCME, Council 4, Local 2663, 777 A.2d 169, 178 (2001).

Consistent with this principle, the U.S. Supreme Court has made it clear that an arbitration award is properly vacated where the award is illegal or violates state laws, federal laws, regulations and/or explicit and well defined public policy. See W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757 (1983) (articulating specific grounds for a court to vacate an arbitration award where the arbitrator construes a contract in a manner that violates a federal law or some well-defined public policy); see also Misco, 484 U.S. at 42-43; Delta Air Lines, Inc. v. Air Line Pilots Association, International, 861 F.2d 665 (11th Cir. 1988) (affirming district court's decision to vacate arbitration award); Iowa Elec. Light & Power v. Local Union 204, 834 F.2d 1424, 1427 (8th Cir. 1987) (vacating arbitration award because "[i]f the contract as interpreted by the arbitrator violates some explicit public policy, we are obliged to refrain from enforcing it."). Courts have further stated that the question regarding illegality or public policy "is ultimately one for resolution by the courts," and "[o]nce the public policy question is raised, we must answer it by taking the facts as found by the arbitrator, ***but reviewing his conclusions de novo***." Iowa Elec. Light, 834 F.

2d at 1427 (emphasis added); see also Harris v. Gonzalez, M.D., 789 So. 2d 405, 409 (Fla. 4th DCA 2001) ("[a] contract which ***violates a provision of the constitution or a statute is void and illegal***, and, ***will not be enforced*** in our courts.").

B. The Arbitration Award In The Instant Case Is Facially Illegal And Based Upon An Illegal Construction of The Parties' Contract In Direct Violation of The Well Defined Florida And Federal Healthcare Laws.

As set forth in factual section above, and as detailed in JMC's appellate brief, this is a truly unique factual scenario where the Arbitration Panel issued the illegal Award based upon a construction of the parties' Purchase Agreement as an unlawful agreement to make, influence and steer future illegal patient referrals to VNA in exchange for remuneration in direct violation of multiple state and federal healthcare laws, including Florida's Anti-Kickback Statutes (Fla. Stat. § 456.054 and Fla. Stat. § 395.0185); the Federal Anti-Kickback Statute (42 USC §1320a 7b(b)); Medicare Hospital Conditions of Participation: Discharge Planning (42 CFR § 482.43); Florida's Patient Brokering Act (Fla. Stat. § 817.505) and the Federal Civil Monetary Penalties Law (42 USC § 1320a-7a).

Specifically, in the written Award, the Arbitration Panel makes the following telling statements: (i) "VNA based its determination to purchase ***on receiving 45-50 referrals per month***" (R.1.147 (*Award* at pg. 3)); (ii) "[w]hile VNA did not actually need the space . . . ***it agreed to carry the remaining three***

years of JMC's lease just to purchase JMC's market share of HHA referrals" (R.1.148 *Award* at pg. 4)); (iii) "Mr. Miller [from VNA] ***insisted that JMC had to assign its patients to VNA if they expressed no preference***" (R.1.151 (*Award* at pg. 7)); and (iv) "while initially the transition from JMC to VNA was 'seamless', ***JMC's decision to institute (or continue) a rotation system – ostensibly to comply with Medicare regulations—deprived VNA of what it had paid $639,000 for: the ability to subtly 'nudge' JMC's patients to select its agency from among a host of choices***." R.1.153 (*Award* at pg. 9) (emphasis added for all quotes). The Arbitration Panel also made it clear that the damage award was based on a calculation solely involving illegal promised future Medicare patient referrals from JMC. See R.1.146-147 (*Award* at pgs. 2-3) ("VNA . . . determined that . . . it could realize $1.5 million in revenue yearly ***due to the large number of Medicare patients that JMC serviced***"); R.1.156 (*Award* at pg. 12) ("the Panel finds that VNA . . . would have experienced a 25% drop in revenue ***even if it had received every Medicare referral in Year 2***") (emphasis added).

Florida's legislature and the federal legislature has enacted statutes strictly prohibiting the type illegal patient referral arrangements described in the Award in connection with the parties' Purchase Agreement. See Fla. Stat. §§ 395.0185, 456.054. For instance, Fla. Stat. § 456.054 ("Kickbacks prohibited") provides:

> (1) As used in this section, the term 'kickback' means a remuneration or payment, by or on behalf of a provider of health care

> services or items, to any person as an incentive or inducement to refer patients for past or future services or items, when the payment is not tax deductible as an ordinary and necessary expense.
>
> (2) It is ***unlawful*** for any health care provider or any provider of health care services ***to offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients***.

See Fla. Stat. § 456.054 (emphasis added); R.2.223. With respect to hospitals and other licensed facilities, Fla. Stat. § 395.0185 provides as follows:

> (1) It is ***unlawful*** for any person ***to pay or receive any commission, bonus, kickback***, or rebate or engage in any split-fee arrangement, in any form whatsoever, with any physician, surgeon, organization, or person, ***either directly or indirectly, for patients referred to a licensed facility***.

See Fla. Stat. § 395.0185(1) (emphasis added); R.2.224.[19] Likewise, the corresponding Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (the "Federal AKS") provides that: "[w]hoever knowingly and willfully solicits or receives ***any remuneration*** . . . directly or indirectly, overtly or covertly, in cash or in kind . . . ***in return for referring an individual to a person for the furnishing or***

[19] Significantly, in the case of Harris v. Gonzalez, M.D., the 4th DCA explained that "[t]he Legislature enacted a statute that prohibited kickbacks" and that Florida statutory law expressly provides that "[i]t is unlawful for any health care provider or any provider of health care services to offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients." 789 So. 2d at 408-409. Furthermore, as reflected in the holding of the Harris case, the court recognized the importance of not enforcing or otherwise judicially condoning such illegal and unlawful contractual arrangements which violate the anti-kickback statutes.

arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . . shall be guilty of a felony and . . . shall be fined not more than $25,000 or imprisoned for not more than five years, or both." [20] See 42 USC § 1320a-7b(b); R.1.197-200; R.2.201-202. In the context of home health agencies, the Office of Inspector General ("OIG") has specifically warned against illegal arrangements and potential fraudulent actions that violate the Federal AKS:

> *Paying Or Receiving Kickbacks In Exchange For Medicare or Medicaid Referrals*
>
> ***Kickbacks in exchange for the referral of reimbursable home health services is another type of fraud that OIG has observed***. The Medicare program guarantees freedom of choice to its beneficiaries in the selection of health care providers. Because kickbacks violate that principle and also increase the cost of care, they are prohibited under the Medicare and Medicaid programs. ***Under the anti-kickback statute, it is illegal to knowingly and willfully solicit, receive, offer or pay anything of value to induce, or in return for, referring, recommending or arranging for the furnishing of any item or service payable by Medicare or Medicaid.***
>
> ***OIG is aware of home health providers offering kickbacks to physicians, beneficiaries, hospitals, and rest homes in return for referrals***. Kickbacks have taken the following forms:
>
> …

[20] See also Polk County v. Peters, 800 F. Supp. 1451, 1454 (E.D. Tex 1992) ("if one purpose of the payment was to induce future referrals, the Medicare statute has been violated."); United States v. Kats, 871 F. 2d 105, 108 (9th Cir. 1989) (explaining that "the Medicare fraud statute is violated if 'one purpose of the payment was to induce future referrals.'").

> ***Parties that violate the anti-kickback statute may be criminally prosecuted, and also may be subject to exclusion from the Medicare and Medicaid programs.***

See 60 Fed. Reg. 40847, 40848-40849 (emphasis added); R.2.203-205; see also 63 Fed. Reg. 42410, 42414 (emphasis added); R.2.206-222; BNA's Health Law & Business Series, Federal Anti-Kickback Law, Working Papers at 1500:3710 ("If any portion of the price paid for the lab is intended to induce the continued referral of patients or is in return for such referrals, the anti-kickback statute would be violated.") Based upon these well-defined and specific anti-kickback laws, an agreement (as set forth in the Award) for VNA to pay a direct monetary payment to JMC (i.e., the $639,000 purchase price) and to take over payments on an "over market priced" lease, in exchange for JMC to make, influence and steer future patient referrals from the hospital is clearly illegal and directly violates these anti-kickback statutes.

The federal legislature also enacted 42 CFR § 482.43 ("Condition of participation; Discharge planning") to protect and ensure freedom of patient choice, and to avoid illegal and improper "steering" of patients to home health agencies. See 42 C.F.R. § 482.43(c)(7). This Section requires that "[t]he hospital, as part of the discharge planning process, must inform the patient or the patient's family of their freedom to choose among participating Medicare providers of posthospital care services" and that "[t]he hospital must ***not*** specify or otherwise

limit the qualified providers that are available to the patient." Id. (emphasis added); see also 69 Fed. Reg. 48916, 49223; R.1.191-196.[21] The Federal Register expressly provides that "***section 4321(a) prohibits hospitals from limiting or steering patients to any specific HHA or qualified provider that may provide posthospital home health services***" Id. (emphasis added).

Notwithstanding these specific laws and regulations, the face of the Award establishes that the Arbitration Panel ruled that paragraph 5 of Exhibit "D" to the Purchase Agreement *illegally* obligated JMC to influence, steer and "nudge" the referral of future Medicare patients to VNA's home health agency. R.1.153.

Finally, the Award and the Purchase Agreement, as construed by the Arbitration Panel, are also illegal because they violate Florida's Patient Brokering Act (Fla. Stat. § 817.505) and the corresponding federal Civil Monetary Penalties Law 42 U.S.C. § 1320a-7a ("CMPL").[22] R.2.225-233.

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[21] This regulation was enacted "to protect patient choice and enable Medicare beneficiaries to make more informed choices about the providers from which they receive certain Medicare services" and that "this provision was intended to address concerns that some hospitals were referring patients only to HHAs in which they had a financial interest, and that shared financial relationships were influencing referrals to other entities." 69 Fed. Reg. 48916.

[22] Fla. Stat. § 817.505 is a criminal statute that prohibits any person, including any health care provider or health care facility, to offer, pay, solicit or receive, inter alia, any bonus, kickback or bribe, directly or indirectly in return for referring patients or patronage to or from a health care provider or facility. The CMPL authorizes the Secretary of the Department of Health and Human Services to seek Civil Monetary Penalties for a variety of conduct, including alleged violations of

(continued…)

In the instant case, the Arbitration Panel clearly issued an illegal ruling by expressly finding that parties' Purchase Agreement required JMC to make, influence, refer and steer future Medicare patient referrals to VNA in exchange for the direct remuneration from VNA in the form of the acquisition purchase price and other consideration. The Arbitration Panel also issued a $1,251,213.00 monetary damage award to VNA solely based upon Medicare patient referrals that JMC did not make to VNA (patient referrals which would have clearly been illegal kickbacks had they been made). Accordingly, based upon the law set forth herein, the 4th DCA Opinion was correct, and a court cannot enforce such an illegal Award.

C. Arbitration Awards Cannot Be Enforced Where Arbitrators "Exceed Their Powers."

In addition to the fact that the Award is properly vacated and cannot be enforced, the illegal Award should also be vacated under Fla. Stat. § 682.13(1)(c) because the Arbitration Panel "exceeded their powers" by disregarding the express limitations in the contract and by issuing the illegal Award based upon an illegal construction of the Purchase Agreement. See Soler v. Secondary Holdings, Inc., 832 So. 2d 893, 895 (Fla. 3d DCA 2002); Edstrom Industries, Inc. v. Companion

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the Federal AKS. Since it is an administrative proceeding, there is a potential that a violation that may not result in a criminal conviction could nonetheless result in liability under the CMPL.

Life Ins. Co., 516 F.3d 546, 552 (7th Cir. 2008) ("***precisely because arbitration is a creature of contract, the arbitrator cannot disregard the lawful directions the parties have given them***") (emphasis added).

Courts have explained that an arbitrator will be deemed to have "exceeded his powers" where the arbitrator issues an "illegal" arbitration award or enforces an "illegal" contract. Advanced Medical Resources, Inc. v. Inland Empire Outpatient Surgery Center, Inc., 2005 WL 3007980, at *2 (Cal. App. 4th Dist Nov. 10, 2005) ("An arbitrator exceeds his powers if he enforces an illegal contract.") (emphasis added); Jackson Purchase Rural Electric Co-Operative Assoc. v. Local Union 816, 646 F. 2d 264, 268 (6th Cir. 1981) (vacating arbitration award and explaining that "illegal acts are without legal effect, ***the arbitrator exceeded his authority by incorporating the [illegal] practice or agreement into the collective bargaining agreement here***.") (emphasis added); Nature's 10 Jeweler v. Gunderson, 648 N.W. 2d 804, 807 (S.D. 2002) ("While there may be a policy favoring arbitration when a contract provides for it, ***you cannot arbitrate a felony***" and that "[a]n unlawful contract is void.") (emphasis added).

In the instant case, as set forth above, Sections 24 and 28 of the Purchase Agreement (and Section 20 of the corresponding Office Lease Agreement)[23]

[23] The Arbitration Panel determined the Office Lease Agreement was part of the same purchase transaction.

contain specific language expressly ***limiting the Arbitration Panel's authority, power and discretion*** in connection with the arbitrators' authority to construe and enforce the parties' agreement. R.1.125-126; R.1.174 (*Purchase Agreement* at §§ 24, 28); and R.1.126; R.1.185 (*Office Lease Agreement* at § 20). Section 28 provides that: "all activities contemplated under this Agreement shall comply with all applicable state and Federal laws and regulations," and "[u]nder no circumstances shall any provision of this Agreement be construed . . . in a manner that would violate any such laws or regulations." R.1.125-126; R.1.174 (*Purchase Agreement* at § 28); see also R.1.125-126; R.1.174 (*Purchase Agreement* at § 24). Likewise, Paragraph 20 of the parties' Office Lease Agreement had the limiting instruction that: "[t]he amount charged hereunder does not include any . . . kickback . . . and no amount charged or paid hereunder is intended to be, ***nor shall it be construed to be an inducement or payment for referral of patients or other business generated between the parties.***" R.1.126; R.1.185 (*Office Lease Agreement* at pg. 3, ¶ 20) (emphasis added).

Despite these express contractual limitations on the Arbitration Panel's authority to construe the parties' agreement as illegal or to impose illegal obligations upon the parties, by issuing the facially illegal Award and by construing the Purchase Agreement in direct violation of the Governing Healthcare

Laws, the Arbitration Panel grossly "exceeded their powers," and the unlawful Award may also be vacated under Fla. Stat. § 682.13(1)(c).

IV. THERE WAS NO PROCEDURAL DEFECT WITH RESPECT TO JMC'S TIMELY FILED MOTION TO VACATE.

VNA's suggestion that there was a procedural defect with JMC's motion to vacate is entirely without merit. With respect to the timing for a motion to vacate, Fla. Stat. 682.13(2) provides that "[a]n application under this section shall be made within 90 days after delivery of a copy of the ***award*** to the applicant." Id. (emphasis added). This 90 day time period for filing motions to vacate does not even begin to run until after the delivery of the ***final*** arbitration award. Air Conditioning Equipment, Inc. v. Rogers, 551 So.2d 554, 556 (Fla. 4th DCA 1989). Further, Florida courts have explained that "[w]here the dispute involves a claim of money. . .the award should finally determine the amount due between the parties." Id. at 557. Here, the "Final Award of Arbitrators" was issued on October 7, 2009 (R.1.159-162);[24] therefore, the ninety (90) day time period under Section 682.13(2) would not have expired until January 7, 2010, at the earliest. JMC undisputedly

[24] On November 5, 2009, the Arbitration Panel expressly stated that "[t]he Final Award dated October 7, 2009 is hereby clarified ***to adopt and incorporate the Interim Award issued on May 20, 2009***." See Final Arbitration Award and Clarification Order.

filed its Amended Motion to Vacate on December 8, 2009 (63 days after the Final Award's issuance), and well within the time period for filing a motion to vacate.[25]

On its face, the partial award issued by the Arbitration Panel on May 20, 2009, was only an "Interim Award," and it was not a final award. The Arbitration Panel expressly manifested their intent that the May 20th Interim Award was only an interim award and not a "final" award by expressly stating that at "the close of hearing on attorneys' fees and costs, the Panel ***will issue a final award***." R.1.157 (*Award* at pg. 13). Thereafter, the Arbitration Panel further confirmed that the Interim Award was not a final award by issuing the "Final Award of Arbitrators" on October 7, 2009 (R.1.159-162), and by issuing Disposition for Application of Clarification/Modification of Award (R.1.163-165) on November 5, 2009, wherein the Arbitration Panel stated that "[t]he Final Award dated October 7, 2009 is hereby clarified to adopt and incorporate the Interim Award issued on May 20, 2009." R.1.163-165. By expressly incorporating the May 20th Interim Award into the October 7th Final Award, it is clear that the October 7th Final Award supersedes and supplants the prior interim award, and that all challenges must be properly directed at the October 7th Final Award. Despite VNA's current

[25] In order to formally challenge the improper "Final Award of Arbitrators," on December 8, 2009, less than 63 days after the issuance of the October 7th Final Award, and less than 33 days after the Arbitration Panel issued its November 5th Clarification Order, JMC timely filed its Amended Motion to Vacate requesting that the Final Award be vacated in its entirety.

disingenuous argument, it must be noted that VNA strenuously objected to JMC's prior action on the grounds that the action was ***"premature"*** because the actual "Final Arbitration Award" had not yet been issued by the Arbitration Panel. VNA actually made the following express assertions which completely undermine their instant argument regarding the purported untimely filing of the motion to vacate:

> As a matter of law, JMC's Motion to Vacate is premature. The motion to vacate should be directed solely toward arbitration awards which are "mutual, final and definite." Here, JMC's own arguments . . . succinctly recognize the Interim Award is not final . . . To be "final," an arbitration award must conclude all claims submitted to them . . . Here, the issues before the Arbitration Panel have not been concluded. In addition to an outstanding motion for attorney fees, VNA has requested a status conference . . . But, until such time as the Arbitration Panel has an opportunity to consider any remaining issues and render a final award, the Panel's assignment is truly not complete and JMC's Motion to Vacate should be dismissed.

See R.3.501-502 (*VNA's Motion to Dismiss in original action*). Accordingly, JMC has clearly filed its Motion to Vacate in a timely manner, and VNA's arguments are meritless. JMC is also entitled to relief based upon its timely filed opposition to VNA's effort to obtain a judicial confirmation/enforcement of the illegal Award.

CONCLUSION

For the reasons set forth above, this Court should affirm the 4th DCA's Opinion, and enter judgment in favor of JMC, and for such other and further relief as this Court deems appropriate.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via U.S. Mail and electronic mail to counsel for Appellant, David B. Earle, Ross, Earle & Bonan, P.A., P.O. Box 2401, Stuart, Florida 34995 (dbe@reblawpa.com) this 22nd day of April 2013.

/s/ Michael G. Austin
Michael G. Austin

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Answer Brief complies with (i) the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, and (ii) the filing requirements set forth in AOSC13-7.

/s/ Michael G. Austin
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