IN THE SUPREME COURT OF PENNYSLVANIA
MIDDLE DISTRICT

No. 62 MAP 2014

EVONNE K. WERT, Executrix of the ESTATE OF ANNA E. KEPNER, Deceased, Appellee,

v.

MANORCARE OF CARLISLE PA, LLC, d/b/a MANORCARE HEALTH SERVICES – CARLISLE; HCR MANORCARE, INC.; MANORCARE, INC.; HCR HEALTHCARE, LLC; HCR II HEALTHCARE, LLC; HCR III HEALTHCARE, LLC; HCR IV HEALTHCARE, LLC; GGNSC GETTYSBURG LP, d/b/a GOLDEN LIVING CENTER – GETTYSBURG; GGNSC GETTYSBURG GP, LLC; GGNSC HOLDINGS, LLC; GOLDEN GATE NATIONAL SENIOR CARE, LLC; GGNSC EQUITY HOLDINGS, LLC; and GGNSC ADMINISTRATIVE SERVICES, LLC,

Appeal of GGNSC Gettysburg LP, d/b/a Golden Living Center Gettysburg; GGNSC Gettysburg GP, LLC; GGNSC Holdings, LLC; Golden Gate National Senior Care, LLC; GGNSC Equity Holdings, LLC; and GGNSC Administrative Services, LLC, Appellants.

Appeal from the Opinion and Order of the Superior Court of Pennsylvania entered December 19, 2013, at No. 1746 MDA 2012, affirming the Order of Court entered in this matter on September 13, 2012, overruling Defendants' Preliminary Objections seeking to compel arbitration in the Court of Common Pleas of Cumberland County, Pennsylvania, Civil Division, at No. 12165 CIVIL

BRIEF OF THE AMERICAN ASSOCATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS

The American Association for Justice ("AAJ") is a voluntary national bar association whose member trial lawyers represent those who have been wrongfully injured. Some AAJ members represent plaintiffs in Pennsylvania, including those with claims against nursing homes alleging negligent or abusive treatment. AAJ believes that those seeking legal remedies are entitled to their day in court and that transparency and accountability, which are the hallmarks of the civil justice system, promote investment safety. The outsourcing of health care claims to private arbitrations that are costly to claimants and conducted in secret has been widely and justly criticized.

Many arbitration agreements signed by or on behalf of nursing home residents designate a specific arbitration forum that has announced it will no longer administer such arbitrations. In those circumstances, AAJ feels strongly that justice and good public policy dictates that residents or their families be afforded access to the civil justice system.

SUMMARY OF ARGUMENT

Arbitration programs require not only arbitrators, but also arbitration administrators, entities that provide the scheduling, communication, procedural rules, and other infrastructure that enable an arbitration to proceed. Often the arbitration agreement designates a specific administrator. Amid the widespread

criticism of the use of mandatory arbitration by nursing homes to resolve claims of substandard or abusive care, the arbitration providers most often named in nursing home arbitration agreements have announced they will no longer administer arbitrations involving health care that are based on pre-dispute arbitration agreements. Many courts will face the question presented to this Court: Can a court enforce an arbitration agreement and compel arbitration where the sole administrator named in the agreement is no longer available? In this case, where the Agreement provided that only the National Arbitration Forum ("NAF or Forum") may administer an arbitration of a dispute regarding the health care provided by the nursing home, and the NAF no longer administers such arbitrations, the lower court correctly allowed Ms. Wert her day in court. Several reasons support that decision.

First, the unavailability of the NAF does not trigger the Agreement's severability clause. The Agreement is enforceable because the NAF Rules of Procedure, which are incorporated into the Agreement, make specific provision for the possibility that NAF may decline to administer an arbitration. The Rules do not require the appointment of a substitute for NAF, but rather permit the parties to pursue their remedies in court. Alternatively, the unavailability of NAF renders the contract voidable due to mistake of fact under Pennsylvania law, not unenforceable. In addition, a brief overview of the Code of Procedure reveals that the NAF would be deeply and actively involved in any arbitration conducted in accordance with the

Code. Severance of that requirement and enforcement of the remainder of the Agreement would require the court to extensively rewrite the Agreement to make an arbitration possible. The resulting arbitration would be far different from the arbitration the parties intended.

Second, the Federal Arbitration Act ("FAA"), which authorizes federal courts to appoint an arbitrator, does not authorize a Pennsylvania court to appoint a substitute for NAF. Although section 2 of the FAA provides the parties with a substantive right, binding on state courts, to enforce their arbitration agreement, procedural rules, including the appointment of an arbitrator under section 5 do not apply in state courts. Even if section 5 authorized the state court to appoint an arbitrator, it does not provide authority to appoint an arbitration administrator, nor to require an arbitrator to perform the duties of an administrator.

Finally, the requirement that any arbitration be conducted in accordance with the NAF Code of Procedure is integral to the Agreement, and therefore not severable. The text of the Agreement determines the intent of the parties at the time the contract was made. The fact that one party did not read the contract at that time does not render the contract unenforceable, nor does it make any particular provision severable. Where the terms of the Agreement expressly required NAF to administer any arbitration and expressly provided that if NAF declined the parties could pursue their remedies in court, that provision is integral to the Agreement. The FAA

expresses federal policy favoring enforcement of arbitration agreements according to their terms, including enforcement of terms that result in resolving a particular dispute by litigation, rather than arbitration.

INTRODUCTION

Numerous American consumers have placed their signatures on contracts that include provisions requiring that any disputes be decided by private arbitration. *See* Public Citizen, *Forced Arbitration: Unfair and Everywhere* (2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf.

One highly controversial use of such contracts is in connection with health care, including care at nursing homes. As early as 1997, a study commission formed by the American Arbitration Association, the nation's largest arbitration administrator, the American Medical Association, and the American Bar Association concluded that pre-dispute arbitration agreements are not appropriate in such circumstances. *See* Paul Bland, *AAA Breaks Its Promise Not to Hear Pre-Dispute Arbitrations in Health Care Cases*, Public Citizen Consumer Law & Policy Blog (Feb. 22, 2007, 12:35 pm), http://pubcit.typepad.com/clpblog/2007/02/aaa_breaks_its_.html (last visited Oct. 29, 2014). Legal commentators have likewise argued against the use of such "agreements," which are often included in the paperwork presented to nursing home residents and their families at the stressful time of admission. *See, e.g.*, Jana Pavlic, *Reverse Pre-Empting the Federal*

Arbitration Act: Alleviating the Arbitration Crisis in Nursing Homes, 22 J.L. & Health 375 (2009); Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263 (2004). Congress has considered, but has not enacted, legislation that would exempt long-term care facilities from the FAA. *See* Anthony P. Torntore, *". . . and justice for all": An Analysis of the Fairness in Nursing Home Arbitration Act of 2008 And Its Potential Effects on the Long-Term Care Industry*, 34 Seton Hall Legis. J. 157, 164 (2009) (suggesting that allowing patients access to courts "could potentially have a positive effect" in reducing nursing home neglect and abuse).

Arbitration providers that are frequently designated as arbitration administrators have announced that they will no longer serve as administrators in nursing home arbitrations that are based on pre-dispute agreements. Consequently, the question presented to the Court in this case will be faced by courts across the nation: Shall the plaintiff be afforded her day in court, as the court in *Stewart v. GGNSC Canonsburg, L.P.*, 9 A.3d 215 (Pa. Super. Ct. 2010), properly held? Or must the court rewrite the parties' agreement in order to compel an arbitration? *See Id*. at 221.

The court in *Stewart* decided correctly. Moreover, because there are important factual differences between *Stewart* and the case at bar, AAJ suggests that several

alternative grounds support the lower court's decision that are distinguishable from, but not inconsistent with the rationale in *Stewart*.

ARGUMENT

I. THE SEVERANCE CLAUSE OF THE AGREEMENT IS NOT TRIGGERED BY THE UNAVAILABILITY OF THE NATIONAL ARBITRATION FORUM.

Predispute arbitration agreements often designate a specific arbitration administrator.[1] A survey of North Carolina nursing home arbitration agreements found that about half named a particular arbitration provider. The most popular choices were the National Arbitration Forum ("NAF or Forum"), 36.59%; the American Health Lawyers Association ("AHLA"), 10.98%; and the American Arbitration Association ("AAA"), 2.44%. Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of* AT&T Mobility v. Concepcion, 35 Am. J. Trial Advoc. 87, 97 (2011). The Agreement in this case expressly required that any arbitration be conducted in accordance with the Code of Procedure of the National Arbitration Forum, which requires arbitrations under the Code be administered by the NAF. National Arbitration Forum, *Code of Procedure*,

[1] "Arbitration administrator" reflects the usage of NAF, AAA, and similar entities in describing their activities. *See* National Arbitration Forum, http://www.adrforum.com/main.aspx?itemID=324&hideBar=False&navID=178&news=3 (last visited Oct. 29, 2014) ("The National Arbitration Forum (FORUM) is the administrator of the arbitration process, ensuring that cases proceed quickly and smoothly according to the rules of the arbitration agreement."). *See also* American Arbitration Association, https://www.adr.org/aaa/faces/s/about (last visited Oct. 29, 2014) ("The AAA role in the dispute resolution process is to administer cases"). Such an entity may also be referred to as an "arbitration provider" or "arbitral forum."

Rule 1A (2008), *available at* http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf (hereinafter "Rule x").

In July 2009, ten months before Ms. Wert signed the Agreement, NAF entered into a consent decree in a case brought by the attorney general of Minnesota.[2] As part of the settlement, NAF announced that it would no longer administer consumer arbitrations, including claims against nursing homes.[3] NAF acknowledged the increasing resistance to arbitration of consumer disputes and specifically noted the Fairness in Nursing Home Arbitration Act pending in Congress. National Arbitration Forum, *National Arbitration Forum to Cease Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges* (July 19, 2009), *available at* http://www.adrforum.com/newsroom.aspx?itemID=1528.

In addition, both the AHLA and the AAA have announced that they, too, will no longer administer arbitrations of consumer claims against health care providers, including nursing homes, that are based on pre-dispute arbitration agreements. *See* Edward Brunet, *et al.*, *Arbitration Law in America: A Critical Assessment* 173

[2] The Complaint alleged that NAF violated the state Consumer Fraud Act, Deceptive Trade Practices Act, and False Statements in Advertising Act in connection with credit card debt arbitrations due to its concealed connections with the creditors who were parties to arbitrations. *See* Compl., *State v. National Arbitration Forum*, No. 27-cv-09-18550 (Minn. D. Ct. July 14, 2009), *available at* http://www.ag.state.mn.us/pdf/pressreleases/signedfiledcomplaintarbitration company.pdf.

[3] Consent Decree, *State v. National Arbitration Forum*, No. 27-cv-09-18550 (Minn. D. Ct. July 17, 2009), *available at* http://pubcit.typepad.com/files/nafconsentdecree.pdf.

(2006), and American Arbitration Association, *Healthcare Policy Statement*, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_011014 (last visited Oct. 29, 2014). *See also* Krasuski, *supra*, at 291.

Defendants in this case moved the trial court to compel arbitration of plaintiff's wrongful death and survival claim, relying on the parties' signed arbitration agreement, which provides:

> It is understood and agreed by Facility and Resident that any and all claims . . . in connection with . . . any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement, and not by a lawsuit or resort to court process. This agreement shall be governed and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16 [(the "FAA")].

Appellants' Br. 9 (emphasis and footnote omitted).

Defendants acknowledge that the National Arbitration Forum Code of Procedure expressly requires that the Code "shall be administered only by the National Arbitration Forum." Rule 1A; *see* Appellants' Br. 18. Defendants, however, invoke the Agreement's severance clause:

> In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective.

Appellants' Br. 10.

Defendants contend that the italicized portion of the Agreement—*in accordance with the National Arbitration Forum Code of Procedure*—may be excised and the remainder of the Agreement enforced by court appointment of an arbitrator pursuant to section 5 of the FAA. Appellants' Br. 19. They argue that the *Stewart* court erred in failing to do so. *Id*. The AAJ respectfully submits that the severance clause is not applicable in this case; nor does section 5 authorize the court to appoint a substitute for NAF.

A. The Arbitration Agreement Is Not "Unenforceable" Because the Parties Provided for the Possible Unavailability of the National Arbitration Forum.

By its terms, the severance clause permits a court to remove a provision of the Agreement only if the court finds that provision "unenforceable." However, the requirement in this case that the arbitration be conducted in accordance with the NAF Code of Procedure is not rendered unenforceable by the unavailability of NAF.

In fact, the Code, which is incorporated into the Agreement, expressly provides for the eventuality that NAF might refuse to conduct an arbitration or otherwise become unavailable to administer the Code. Rule 48D states that the NAF "may decline the use of arbitration for any dispute." In that event, "the Parties *may seek legal and other remedies in accord with applicable law*." *Id*. (emphasis added). Contrary to Defendants' assertion, the Agreement specifically does *not* express an

overriding intent "that disputes be arbitrated, period," that litigation be avoided, and that the designation of the NAF Code was inconsequential. Appellants' Br. 27. Rule 48D makes clear that if NAF became unavailable to administer an arbitration, the parties did not intend the appointment of a substitute. Rather, the Agreement provides a Plan B: That the parties be free to seek their legal remedies in court. The Agreement may be enforced by allowing Ms. Wert to do so.[4]

Similarly, the designation of the NAF Code is not rendered unenforceable by the fact that, in the absence of the NAF, the Code is no longer in effect. Rule 48E provides: "In the event of a cancellation of this Code, any Party may seek legal and other remedies regarding any matter upon which an Award or Order has not been entered." As one federal district court explained, because only NAF can administer the NAF Code and the NAF has ceased administering consumer arbitrations, "after July 24, 2009, there are simply no NAF rules currently in effect for such arbitrations." *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 WL 3485933, at *5 (W.D. Wash. Oct. 26, 2009). In short, "*the NAF Code has in effect been canceled*, [and] Rule 48 of the Code authorizes the parties to pursue other remedies." *Sunbridge Retirement Care Assoc. LLC v. Smith*, 757 S.E.2d 157, 160 (Ga. App.

[4] This reading of the Code is also supported by Rule 44G, which provides that a consumer "who asserts that arbitration fees prevent the Consumer Party from effectively vindicating the Consumer's case in arbitration," may file a Request with the Forum "that the arbitration provision be declared unenforceable, *permitting the Consumer to litigate the case instead of arbitrating the case.*" Rule 44G (emphasis added).

2014) (emphasis added). As another state court observed, "Rules 48(D) and (E) make clear that if the parties cannot arbitrate pursuant to the NAF Code . . . they are not obligated to arbitrate in an alternate forum. Rather, if the NAF is unavailable, the parties are free to seek legal remedies—*i.e*., to file a traditional lawsuit." *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 687 (Ga. App. 2013).

The requirement that arbitrations be conducted in accordance with the NAF Code can be enforced by allowing Ms. Wert to pursue her legal remedies in court, as Rule 48 specifically provides. Because this provision is not unenforceable, the severability clause is not applicable.

B. The Unavailability of NAF Renders the Arbitration Agreement Voidable, Not Unenforceable.

Alternatively, if the Court finds that the NAF Code designation in the Agreement cannot be carried out, that failure is clearly due to a mistake of fact on the part of at least one of the parties. NAF announced that after July 24, 2009, it would no longer administer such arbitrations. Defendants knew or had reason to know that fact when the Agreement was signed on March 24, 2010.[5] Indeed, several

[5] In this respect, the present case differs from *Stewart*, where the consent decree occurred *after* the Agreement was signed. Under those circumstances, the court could have applied the doctrine of intervening impossibility as set forth in the *Restatement (Second) on Contracts* § 261 and adopted by Pennsylvania courts. *In re Land Conservancy of Elkins Park, Inc.*, Civ. A. No. 12-1653, 2013 WL 504888, at *3 (E.D. Pa. Feb. 11, 2013). Thus, "[w]hen people enter into a contract which is dependent for the possibility of its performance on the continual availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved." *Hart v. Arnold*, 884 A.2d 316, 335 (Pa. Super. Ct. 2005) (citing *Restatement* § 261).

Defendants in this case were also parties in *Stewart* when on Dec. 17, 2009, the trial court entered an order denying arbitration under essentially the same agreement because the NAF was no longer available. *See Stewart*, 9 A.3d at 217. Under Pennsylvania law, a mistake of fact may render a contract voidable, but not unenforceable.

Pennsylvania courts have adopted the position set forth in the *Restatement (Second) of Contracts*:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is *voidable* by him if . . . (b) the other party had reason to know of the mistake or his fault caused the mistake.

Restatement (Second) of Contracts § 153 (1981) (emphasis added). *See, e.g.*, *Lapio v. Robbins*, 729 A.2d 1229, 1233-34 (Pa. Super. Ct. 1999) (citing *Restatement (Second) of Contracts* § 153) ("[I]f a party to a contract knows or has reason to know of a unilateral mistake by the other party, . . . the mistaken party may void the contract if the mistake is regarding a material term or the mistaken party may enforce the contract."); *Lanci v. Metro. Ins. Co.*, 564 A.2d 972 (Pa. Super. Ct. 1989) (similar).

Likewise, if the mistake is mutual, the contract provision is voidable, rather than unenforceable. Pennsylvania law is in accord with *Restatement (Second) of Contracts* § 152, which states: "Where a mistake of both parties at the time a contract

was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is *voidable by the adversely affected party*." (emphasis added). *See, e.g.*, *Travelers Indem. Co. v. Ballantine*, 436 F. Supp. 2d 707, 711 (M.D. Pa. 2006); *Hart*, 884 A.2d at 333.

The distinction between a contract that is unenforceable and one that is voidable is sharp and significant. For example, an agreement that violates law or public policy or is too vague to convey what, if anything, the parties agreed to is deemed "unenforceable" and is treated as if there were no contract at all. *See TruePosition, Inc. v. LM Ericsson Tel. Co.*, 977 F. Supp. 2d 462, 470 (E.D. Pa. 2013) (no enforceable contract is formed where terms are so vague or ambiguous that it is '"impossible to understand' what the parties agreed to"); *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 569 (3d Cir. 2002) ("A contract term or condition that violates public policy is void and is thus unenforceable."); *United States v. Baird*, 218 F.3d 221, 230-31 (3d Cir. 2000) (Void contracts "are not contracts at all and any promise therein is unenforceable.") (internal quotes and citation omitted).

By contrast, a "voidable" contract *is* a valid contract. It may be avoided or ratified at the election of one party. As the Restatement explains, a "voidable" contract defined in § 7 "is distinguished from the 'unenforceable contract' defined in § 8 by the existence of a power of ratification." *Restatement (Second) of Contracts* § 85 cmt. a (1981); *see also Mente Chevrolet Oldsmobile Inc. v. GMAC*, 728 F. Supp.

2d 662, 676 n.31 (E.D. Pa. 2010), *aff'd*, 451 F. App'x 214 (3d Cir. 2011) ("An 'unenforceable contract' differs from a 'voidable contract.' The latter may be adopted by ratification, while the former may not.").

Justice Thomas, whose concurrence in *AT&T Mobility LLC v. Concepcion*, --- U.S. ----, 131 S. Ct. 1740 (2011), provided the fifth vote for reversal, indicated that the FAA itself distinguishes between contracts that are voidable, or revocable, and those that are unenforceable. Under section 2 a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Justice Thomas stated that the FAA's use of "revocation" preserves only those "defense[s] concerning the formation of the agreement to arbitrate, such as . . . mutual mistake," but does not preserve the defense that the provision is unenforceable. *Concepcion*, 131 S. Ct. at 1754-54 (Thomas, concurring).

Because the unilateral or mutual mistake concerning the availability of NAF to serve as arbitration administrator would render the NAF Code designation voidable, but not "unenforceable," the severance clause by its terms is not applicable.

C. Severance of the NAF Code Designation Would Require the Court to Revise and Rewrite the Rules of Procedure to be Applied in this Dispute.

Defendants recognize that the Arbitration Agreement in this case requires that NAF administer the arbitration. Appellants' Br. 18. *See* Rule 1A ("This Code shall be administered only by the National Arbitration Forum."). Defendants nevertheless argue that the arbitration can go forward, based entirely upon their distinction between "administering" the Code and "applying" it. Having promulgated its Code of Procedure, they argue, NAF's administrative role is at an end, and it may leave application of the Code to others. According to Defendants, NAF "merely provides a code of procedure to be followed by neutral arbitrators who may also provide arbitration for numerous other forums." Appellants' Br. 36. *See also id*. at 18 ("Although NAF sets the rules, any neutral arbitrator may apply them.") Defendants fault the *Stewart* court for failing to draw this distinction. *Id*. at 34-35.

In fact, the role of arbitration administrator demands active participation of NAF at every stage of the arbitration. Its responsibilities are separate from those of the arbitrator, and some cannot be carried out by the arbitrator. A brief overview of an arbitration of a large consumer claim under the Code highlights the active and essential role of the NAF ("Forum") as arbitration administrator.

An arbitration under the Code commences when an Initial Claim is filed with the Forum. (Rule 5A). The Initial Claim must include the requirements set forth in

Rule 12, and must be accompanied by the appropriate filing fee. (Rule 5A). Filing fees and processing fees for orders, requests, and other procedures are set forth in the Fee Schedule supplement to the NAF Code and are paid to the Forum at the time of filing. (Rules 2R & 5J). The Forum may establish fees for proceedings not covered by the Fee Schedule. (Rule 44L). The separate fee for the arbitrator is also paid by the parties to the Forum. (Rule 44F). The Forum shall issue a full or partial waiver to an eligible indigent consumer party and may order another party to pay all or part of the waived fees. (Rule 45). The Forum may determine that "arbitration fees prevent the Consumer Party from effectively vindicating the Consumer's case in arbitration." (Rule 44G). In that case, the Forum may declare "that the arbitration provision [is] unenforceable, *permitting the Consumer to litigate the case instead of arbitrating the case.*" (Rule 44G) (emphasis added).

After filing, "The Forum reviews the Claim, opens a file, assigns a file number, and notifies the Claimant, who then serves the Respondent(s) in accordance with Rule 6." (Rule 5A). The Forum issues an arbitration schedule to the parties. (Rule 5C). Parties may file counterclaims, cross-claims, or third-party claims by filing the claim and proof of service with the Forum, accompanied by the appropriate filing fee. (Rules 14, 15 & 16). The Forum may order consolidation of arbitrations that involve the same parties and common issues, (Rule 19C) or may require

severance of claims into separate hearings to promote fairness or efficiency. (Rule 19D).

The defendant must respond in 30 days, but the Forum may grant one extension. (Rule 13B). A party may serve its Response by filing it with the Forum. (Rule 6B). If the party does not do so, "the Forum shall mail to Respondent the Second Notice of Arbitration." (Rule 7C). The arbitration shall not proceed until the Forum has received proof of service of the initial claim or a Response. (Rule 12C). In addition, every Claim, Response, and all other Documents must be filed with the Forum (Rule 7A), which may distribute copies of such Documents to the parties. (Rule 7D). A filing is not complete "until all required Documents are received together with all applicable fees." (Rule 7E).

The Forum shall schedule a Document Hearing or Participatory Hearing upon written request of a party, accompanied by the appropriate fee. (Rules 25 & 26). The Forum may "conduct a conference with a Party or Parties to discuss procedural matters." (Rule 8B). Extensions of time, adjournments, and stays may be granted by the Forum upon request, accompanied by the appropriate fee. (Rule 9). The Forum verifies the status of parties (for example, executor or guardian or trustee) based on affidavits obtained by the Forum from the party. (Rule 11E). Parties are *prohibited from communicating directly with the arbitrator* except at Participatory Hearings,

providing documents, and at conferences scheduled by the Forum. (Rule 24) (emphasis added).

The Forum oversees the selection of an arbitrator from a list of candidates provided by the Forum. (Rule 21B). In addition, the Forum shall rule upon motions to disqualify an arbitrator for reasons of bias or conflict of interest. (Rule 23C). If the Forum disqualifies the arbitrator, the Forum shall designate a new arbitrator. (Rule 23E).

At the completion of the arbitration, the Code requires the Forum to deliver a copy of the arbitration award or order to all parties. (Rule 39C). Voluntary dismissal by the Claimant or voluntary dismissal upon settlement by the parties must be filed with the Forum. (Rule 40).

These procedures parallel, but differ in important respects from those used by the AAA. *See* James R. Deye & Lesly L. Britton, *Arbitration by the American Arbitration Association,* 70 N.D. L. Rev. 281, 283-87 (1994). The fact that the parties chose these rules, with their own specific procedures and fee schedule, indicates that they are integral to the Agreement. As a state court observed:

> [T]he NAF Code differs in many significant respects from the special rules promulgated by both the AAA and JAMS for use in arbitrations involving consumer disputes, and which would apply to an arbitration arising out of treatment of a resident in a nursing home. These unique features of the NAF Code further support our conclusion, discussed *infra*, that arbitration before the NAF is an integral term of the contract at issue.

Miller v. GGNSC Atlanta, LLC, 746 S.E.2d at 686.

It is obvious from this overview that in an arbitration conducted under the NAF Code, the NAF is no mere passive entity whose role ends with the promulgation of its Code of Procedure. To the contrary, NAF is actively involved in every stage of the arbitration.

The court's appointment of an arbitrator would not fill the void left by NAF. Defendants' suggestion that the arbitrator could conduct an "arbitration outside the [NAF's] auspices, but using its rules of procedure," Appellants' Br. 36, simply is not feasible, unless the court substantially rewrites those rules and orders the parties to submit to an arbitration that is far different from that described by their agreement. Some of the tasks assigned to the Forum as administrator cannot be carried out by the arbitrator, such as hearing and deciding motions to disqualify arbitrators under Rule 23. Other tasks are assigned to the Forum because the rules expressly prohibit direct contact between the parties and the neutral arbitrator except in defined circumstances. (Rule 24). Still other tasks might be untaken by the arbitrator, but fall outside the usual scope of the arbitrator's role and would result in a far different arbitration than the parties expressly intended.

Similarly, the procedure outlined in Rule 47E, which addresses the situation where the Forum is a party to an arbitration, is unhelpful. That Rule calls for a panel of three arbitrators: one selected by the Forum, one by all the other parties, and a

third selected by the other two to serve as chair. The court would need to revise Rule 47E to adapt it for use in this case, and it would result in a different—and significantly more expensive—proceeding than intended in the Agreement. Although the chair "shall have the powers of the Forum and perform the responsibilities of the Director" it is unknown how the detailed work of administering the arbitration can be accomplished without the participation of any staff or employees of the Forum. Because the NAF Code of Procedure was drafted with administration by NAF in mind, the court would be obliged to comb through the Code's 74 pages, including Appendices, and rewrite it for use in this case. Some alterations would be minor; others would be more significant or might not be apparent at this time. Additionally, section 5 of the FAA only authorizes appointment of an arbitrator. It does not authorize the court to appoint an arbitration administrator, nor to assign to an arbitrator the duties of an administrator.

In any event, the arbitrator/administrator charged with applying the NAF Code would be required to rule under Rule 48D that the Forum has declined to arbitrate the dispute and that the parties have been "denied the opportunity to arbitrate . . . before the Forum" so that either party "may seek legal and other remedies" in state court.

In *Stewart*, the trial court correctly pointed out that defendants were, in effect, demanding that the court "dust off its blue pencil" and rewrite the NAF Code so as

to "devise a new form and mode of arbitration for the parties". 9 A.3d at 217. The superior court properly refused to rewrite the parties' agreement. *Id*. at 221. The Supreme Court of Florida similarly rejected a nursing home's suggestion that the agreement provision requiring use of AHLA rules be severed and the remainder of the agreement be enforced. "If the provision were to be severed, the trial court would be forced to rewrite the agreement and to add an entirely new set of procedural rules and burdens and standards, a job that the trial court is not tasked to do." *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 478 (Fla. 2011).

II. THE FEDERAL ARBITRATION ACT DOES NOT AUTHORIZE THE COURT TO APPOINT AN ARBITRATOR OR ADMINISTRATOR IN PLACE OF THE NAF.

In addition to urging the Court to sever the provision that arbitration be conducted under the NAF Code, Defendants ask that an arbitrator be appointed pursuant to section 5 of the Federal Arbitration Act. That section states:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or *if for any other reason there shall be a lapse in the naming of an arbitrator* or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy *the court shall designate and appoint an arbitrator* or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5 (emphasis added).

AAJ submits that section 5 does not authorize Pennsylvania courts to appoint a substitute for NAF in this case.

A. Section 5 Is a Procedural Rule That Does Not Apply in State Courts.

1. Congress intended 9 U.S.C § 5 to apply only in federal courts.

In 1926 Congress enacted section 2 of the FAA to place arbitration agreements "upon the same footing as other contracts." *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (citation omitted); *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). *See also Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 118-19 (Pa. 2007). Congress also prescribed procedures for enforcing such agreements. *See, e.g.*, *IFC Interconsult, AG v. Safeguard Int'l Partners, LLC*, 438 F.3d 298, 308 (3d Cir. 2006) (noting "the procedural requirements of the FAA").

For many years, it was widely accepted that Congress designed the FAA to apply only in federal courts. *See* Ian R. MacNeil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 102-21 (1992) (the legislative history and the expressed views of all who participated in the enactment of the FAA clearly indicate that the FAA was to be limited to federal courts); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 649 (1996) ("[V]irtually all those who

have studied the history of the Act in its context have concluded that the FAA was viewed at the time as a procedural and remedial statute governing only federal courts."); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 Law & Contemp. Probs. 5, 8 (2004) ("The historical record clearly shows that the FAA was intended to be a procedural statute for the federal courts."); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 100 & 101-03 (2006) (drafters of the FAA in 1925 presented the bill to Congress as "a simple procedural statute enacted to require enforcement of arbitration agreements in federal court"); *See also Southland Corp.*, 465 U.S. at 25 (O'Connor, J., dissenting) (The legislative history "establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts.").

In *Southland*, however, the Court held that section 2 of the FAA was a substantive right enacted by Congress under its Commerce Clause power. Section 2 therefore required enforcement of arbitration agreements in state as well as federal court. 465 U.S. at 12. *See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (section 2 of the FAA "create[s] a body of federal substantive law of arbitrability"). The Court in *Southland* was careful to limit its holding to section 2, stating, "we do not hold that §§ 3 [stay of court proceedings

where issue is referrable to arbitration] and 4 [procedural requirements for court orders to compel arbitration] of the Arbitration Act apply to proceedings in state courts." 465 U.S. at 16 n.10. The Court reemphasized this limitation in *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) ("[W]e have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, . . . [are] applicable in state court.").

In short, the Supreme Court held that only section 2 of the FAA is substantive and applicable in state court. Section 5, like sections 3 and 4, is procedural and not applicable in state courts. Hence, section 5 does not authorize the courts of Pennsylvania to appoint substitute arbitrators.

This interpretation is reinforced by the text and context of section 5, which states that "the court" shall designate and appoint an arbitrator. The "court" clearly refers to those "courts" of sections 3 and 4 which are explicitly identified as federal district courts. MacNeil, *American Arbitration Law*, *supra*, at 103 ("[R]eferences [in section 5] to courts are to 'the court,' meaning federal court referred to in section 4."). Surely it would make little sense for Congress, immediately after prescribing two procedural rules clearly directed only to federal courts, would intend that "court" in section 5, which is also procedural includes state courts.

2. Congress lacks authority to impose procedural requirements on state courts hearing state law claims.

Quite apart from congressional intent, this Court should not construe section 5 of the FAA as applicable in Pennsylvania courts because such an enactment would exceed the constitutional authority of Congress.

A cornerstone of our federalism is the proposition that state courts must enforce federal *substantive* rights. *Testa v. Katt*, 330 U.S. 386, 392-93 (1947). But Congress' power to establish rules of *procedure* is limited to those "inferior" tribunals it may establish under the Constitution. U.S. Const. art. I, § 8, cl. 9 (authorizing Congress to "constitute tribunals inferior to the Supreme Court"). The Constitution nowhere grants Congress any general power to require state courts to apply federal rules of procedure to state law claims. *See Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916) (Supremacy Clause requirement that state courts hear federal cases "in no sense implied . . . the state court was to be treated as a Federal court."); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 Or. L. Rev. 541, 595 (2004) ("[T]he Supremacy Clause and preemption of state law are limited to substantive law. As a corollary, preemption of state law does not imply the imposition of federal procedural codes.").

Thus, when Congress creates a federal substantive right, it does not "'enlarge or regulate the jurisdiction of state courts or . . . control or affect their modes of

procedure.'" *Howlett v. Rose*, 496 U.S. 356, 373 (1990) (quoting *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 56 (1912)). Instead, the Supreme Court has recognized "the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." *Felder v. Casey*, 487 U.S. 131, 138 (1988). *See also Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 465 (2003) ("[W]e need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts").

A rule prescribing the appointment of a substitute arbitrator where the parties' chosen arbitrator has become unavailable or the selection process has failed is clearly procedural. Procedural rules, "speak to the power of the court rather than to the rights or obligations of the parties" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (internal citations and quotations omitted). A rule that "takes away no substantive right but simply changes the tribunal that is to hear the case," is quite obviously procedural. *Id*. Thus, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the Court specifically referred to the selection of an arbitral forum versus a judicial forum as "procedural," and merely "a specialized kind of forum selection clause." *Id*. at 482-83. *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002). *See also Am. Express Co. v. Italian Colors Rest.*, --- U.S. ----, 133 S. Ct. 2304, 2314 (2013) (A party who agrees to claim "resolution in an arbitral, rather than a judicial,

forum" "does not forgo . . . substantive rights."). Hence, a rule for the appointment of an arbitrator to take the place of another arbitrator is clearly a rule of procedure.

Indeed, even as the Supreme Court held that state courts must enforce the substantive right of arbitrability in section 2 of the FAA, the Court also emphasized that the "Federal Rules [of Civil Procedure] do not apply in such state court proceedings." *Southland Corp.*, 465 U.S. at 16 n.10. Nor do the procedural rules set out in the FAA, such as the appointment of an arbitrator under section 5, apply in state courts.

B. Section 5 Authorizes the Court to Appoint an Arbitrator, Not an Administrator.

Even if Pennsylvania courts were obliged to follow section 5, that section authorizes only the appointment of an arbitrator. In cases where an arbitrator has resigned or died during the course of an arbitration, federal courts have held that section 5 of the FAA authorizes the court to fill the void by appointing a substitute arbitrator. *See, e.g.*, *WellPoint, Inc. v. John Hancock Life Ins. Co*., 576 F.3d 643, 647 (7th Cir. 2009); *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co*., 328 F.3d 462, 464 (8th Cir. 2003). Section 5 does not authorize the court to select an arbitral forum to administer the arbitration.

Defendants have actually placed a great deal of emphasis on the distinction between "administration" by the NAF and the actual resolution of the dispute by the arbitrators conducting the arbitration. Appellants' Br. 35-36. Section 5 addresses

only arbitrators. For example, in *Martinez v. Master Protection Corp*., 12 Cal. Rptr. 3d 663 (Cal. Ct. App. 2004), where an employment arbitration agreement specified that arbitration be conducted in accordance with AAA procedures and the AAA refused to administer the arbitration, the employee sought to assert his claim in court. The California Court of Appeal held that California arbitration law, which is substantially the same as section 5, "does not permit the trial court to choose an alternative forum when the chosen forum refuses to hear the case." *Id*. at 675.

Nor may the court appoint an arbitrator and assign to that arbitrator, in addition to the responsibilities usually carried out by arbitrators in resolving the dispute, the tasks assigned by the NAF Code to the NAF as the administrator. *See In re Salomon Inc. S'holders' Derivative Litig. 91 Civ. 5500*, 68 F.3d 554, 561 (2d Cir. 1995) (The unavailability of an arbitral forum does not constitute a "lapse" in the naming of an arbitrator, and district courts may not "use § 5 to circumvent the parties' designation of an exclusive arbitral forum.").

III. THE DESIGNATION OF THE NAF CODE OF PROCEDURE AND OF THE NAF AS ARBITRATION ADMINISTRATOR WAS AN INTEGRAL PART OF THE ARBITRATION AGREEMENT.

A. The Text of the Arbitration Agreement Provides the Basis for Determining Whether the Designation of NAF Was Integral to the Agreement.

Notwithstanding the severability clause, if the provision relating to the NAF "was 'integral' to the arbitration provision" rather than "merely an ancillary

consideration," the provision is not severable and the entire agreement must fail. *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012). *See, e.g.*, *Ranzy v. Tijerina*, 393 F. App'x 174, 176 (5th Cir. 2010) (where the parties' agreement plainly stated "that the procedural rules of the NAF 'shall' govern the arbitration" of claims, that provision was integral to the parties' agreement and section 5 does not "permit a district court to circumvent the parties' designation of an exclusive arbitration forum.").

Significantly, the weight of authority among state courts holds that, where the parties have agreed to arbitration in accordance with a specific administrator's code, such provisions are integral to the agreement and therefore are not severable. *See, e.g.*, *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 686 (Ga. Ct. App. 2013) ("[T]he language of the Arbitration Agreement indicate[s] that the parties intended to arbitrate their claims only if the NAF was available to administer that arbitration."); *Carr v. Gateway, Inc.*, 944 N.E.2d 327, 336-37 (Ill. 2011) (because it was speculative whether any entity other than NAF could apply NAF Code, designation of NAF Code was "integral" to agreement); *Licata v. GGNSC Malden Dexter LLC*, No. SUCV2011-02815-A, 2012 WL 1414881, at *8 (Mass. Super. Ct. Mar. 14, 2012) (similar, based on the "emphatic language identifying NAF and incorporating the NAF Code of Procedure"); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 815 (N.M. 2011) (designation of NAF Code was integral to

agreement); *Grant v. Magnolia Manor-Greenwood*, 678 S.E.2d 435, 438-39 (S.C. 2009) (provision that arbitration be administered by AHLA was integral to agreement, which became unenforceable when AHLA became unavailable); *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds*, 14 So. 3d 695, 709 (Miss. 2009) (nursing home arbitration agreement calling for arbitration administered by AAA was integral to agreement and unenforceable after AAA stopped administering such arbitrations).

Defendants' argument to the contrary rests almost entirely on Ms. Wert's testimony that she did not read the agreement before signing it. *See* Appellants' Br. 22-33. In this case, the inquiry focuses on what the parties intended when the contract was signed.[6] This Court has emphasized that "[t]he fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. In cases of a written contract, the intent of the parties is the writing itself." *Lesko v. Frankford Hosp.-Bucks Cnty.*, 15 A.3d 337, 342 (Pa. 2011). Thus, as the superior court has stated, "[w]hen construing agreements involving clear and unambiguous terms, this Court need only examine the writing itself to give effect to the parties'

[6] Defendants contend that parol evidence that Ms. Wert failed to read the contract is admissible because the question here is not one of contract interpretation, but "whether the whole Agreement may be rescinded or revoked." Appellants' Br. 29 (citing *Frankford Trust Co. v. Stainless Steel Servs., Inc.*, 475 A.2d 147, 151 (Pa. Super. Ct. 1984)). However, the cited portion of the *Frankford Trust* opinion makes clear that the superior court was referring to whether a party *later* revoked the contract, noting that the "parol evidence rule does not apply to matters subsequent to the contract." *Id.* In this case, the issue is the meaning of the terms at the time the Agreement was made.

understanding." *Acme Markets, Inc. v. Fed. Armored Express, Inc*., 648 A.2d 1218, 1220-21 (Pa. Super. Ct. 1994) (internal citations omitted). In this case, the language of the NAF designation is not ambiguous.

Nor does Ms. Wert's failure to read the agreement preclude a provision from being "integral" to the contract. *See, e.g.*, *Stein-Sapir v. Stein-Sapir*, 382 N.Y.S.2d 799, 801 (N.Y. App. Div. 1976) ("If defendant, as a lawyer, did not read or understand the agreement, or have any explanation of the same, his conduct evidenced a degree of carelessness or negligence not to be expected of a sophisticated and mentally brilliant person. The agreement was an integral part of the marriage contract." *Miller v. Lykes Bros. S.S. Co., Inc.*, 467 F.2d 464, 466 (5th Cir. 1972) (Provision limiting carrier's liability "was an integral part of the contract of passage . . . binding on appellants irrespective of their failure to read it."); *Hycel, Inc. v. Am. Airlines, Inc.*, 328 F. Supp. 190, 193 (S.D. Tex. 1971) (limitation on liability was "an integral part of the contract between the carrier and the shipper or the passenger . . . even though the passenger or shipper may be unaware of the provisions."). The superior court in *Stewart* properly looked to cases from other jurisdictions as "persuasive because these cases emphasized the plain language of the arbitration agreement as the sole evidence of the parties' intent." 9 A.3d at 221.

Moreover, limiting the judicial inquiry to the written text of the agreement without regard to the subjective views of the parties "best complies with the

admonition of the United States Supreme Court that a fundamental purpose of the FAA is to require that courts enforce arbitration agreements 'according to their terms.'" *Rivera*, 259 P.3d at 812 (quoting *Volt*, 489 U.S at 479).

B. The Specific Requirement that Arbitrations Be Conducted in Accordance With the NAF Code of Procedure Indicates That NAF's Availability Was Integral to the Arbitration Agreement.

The Agreement in this case specifically required that arbitrations be conducted in accordance with the NAF Code which, in turn, expressly requires that the NAF act as administrator. Many arbitration agreements impose no such requirement. One survey found that "Forty percent of the arbitral clauses either did not address the issue of who would conduct the arbitration or stated that the parties would later determine the provider." Michael L. Rustad, *et al.*, *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. Ark. Little Rock L. Rev. 643, 655 (2012). In addition, many agreements specifically allow the party filing a claim to select among several arbitration administrators. *See*, *e.g.*, *Burris v. Beneficial Delaware, Inc.*, No. S11A-01-002, 2011 WL 2420423, at *2 (Del. Super. Ct. June 9, 2011) (Agreement stated: "The party initiating the arbitration proceeding shall have the right to select one of the following three arbitration administrators," naming AAA, NAF, and JAMS/Endispute); *Miller v. Dell Fin. Servs., L.L.C.*, No. 5:08-CV-01184, 2010 WL 424658, at *1 (S.D.W. Va. Feb. 4, 2010) (same). The very fact that the parties

specifically required that NAF serve as the arbitration provider strongly indicates that they viewed the participation of NAF as integral to their arbitration agreement. *See Rivera*, 259 P.3d at 812-13 ("[A]n arbitration agreement's express designation of a single arbitration provider weighs in favor of a finding that the designated provider is integral to the agreement to arbitrate.").

Moreover, the parties incorporated into their Agreement Rules 48D and 48E. Those rules expressly provide that if the NAF is not available to administer an arbitration or if the NAF Code is cancelled, the parties do not select an alternate administrator, but instead may pursue their rights in court. *See* Part IA, *supra*. Defendants, as drafters of the Agreement, could easily have provided for an alternative administrator in the event NAF became unavailable. The fact that they did not indicates that the parties viewed the availability of the NAF as integral to the Agreement.

C. Denying Arbitration in This Case Does Not Offend the Federal Policy Favoring Arbitration.

Finally, AAJ submits that Defendants' heavy reliance on "an emphatic federal policy in favor of arbitral dispute resolution" is of no avail in this case. *See* Appellants' Br. 40-43. Congress sought to enforce only those arbitrations that the parties agreed to by placing "[a]n arbitration agreement . . . upon the same footing as other contracts." *Southland Corp.*, 465 U.S. at 15-16 (internal quotation omitted);

Salley v. *Option One Mortg. Corp.*, 925 A.2d at 118-19. *See* Part IIA, *supra*. Defendants do not disagree. *See* Appellants' Br. 41.

Indeed, the U.S. Supreme Court's FAA jurisprudence has repeatedly emphasized that "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, --- U.S. ----, 130 S. Ct. 2772, 2776 (2010), and has required courts to enforce arbitration agreements "according to their terms." *Id*. *See also Concepcion*, 131 S. Ct. at 1748 (same).

Because arbitration under the FAA "is a matter of consent, not coercion, . . . parties are generally free to structure their arbitration agreements as they see fit." *Volt* , 489 U.S. at 479. Those parties' agreements must be enforced, even if the result in the particular case is that a particular dispute will be decided by a court, rather than by an arbitrator. Thus, in *Volt*, the Court held that where "the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, *even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward*." *Volt*, 489 U.S. at 479 (emphasis added).

Similarly, in this case, the parties agreed that arbitrations be governed by the NAF Code, which is incorporated into the Agreement. The provisions of that Code provide that it be administered by the National Arbitration Forum. If the NAF is not available, the Code provides that the parties may seek their legal remedies in court.

This Court should not order an arbitration on terms not agreed to by the parties and which would require the court to rewrite the Code of Procedure for use by an appointed arbitrator/administrator in this case. Instead, the court should enforce the Agreement according to its terms, even if the outcome is that Ms. Wert is allowed to pursue her remedies in court, as the Agreement provides.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm the order entered by the superior court below and uphold the superior court's decision in *Stewart*.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October 2014, two copies of the **Brief of the American Association for Justice as *Amicus Curiae* in Support of Appellee**, were served via United Postal Service, two day delivery to the Clerk of the Pennsylvania Supreme Court and the following counsel of record:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Pennsylvania Code 2135 because this brief contains 8,647 words, excluding the parts of the brief exempted by the rules.

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