No.

In the Supreme Court of the United States

JUPITER MEDICAL CENTER, INC.,

Petitioner,

v.

VISITING NURSE ASSOCIATION OF FLORIDA, INC.,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, Jupiter Medical Center, Inc. moved to vacate an arbitral award on the ground that, as construed by the arbitrators, the underlying contract required the parties to violate federal and state law. In acknowledged conflict with the decisions of several of the federal courts of appeals, the Florida Supreme Court held that, in cases governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, courts have no authority to refuse to enforce arbitral awards on that or any ground not expressly set forth in Section 10 of the Act.

The question presented is whether, in articulating several specific grounds for vacating an arbitral award in Section 10 of the Federal Arbitration Act, Congress barred courts from vacating arbitral awards on any other ground, including illegality of the underlying contract as construed by the arbitrators.

RULE 29.6 STATEMENT

Jupiter Medical Center, Inc. is a not-for-profit community medical center. It has no corporate parent and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Jupiter Medical Center, Inc. ("JMC") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The revised opinion of the Florida Supreme Court (App., *infra*, 1a-43a) is available at 2014 WL 6463506 and will be published in the Southern Reporter 3d. The opinion of the Fourth District Court of Appeal (App., *infra*, 44a-48a) is published at 72 So. 3d 184. The final judgment of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County confirming the arbitral award (App., *infra*, 49a-51a) is unreported.

JURISDICTION

The Supreme Court of Florida issued its initial decision on July 10, 2014. In response to JMC's timely filed petition for rehearing, the court issued its revised opinion (App., *infra*, 1a-43a) and denied the petition for rehearing (*id.* at 70a) on November 6, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, 2, 10; the federal Anti-Kickback Statute, 42 U.S.C. § 1320a–7b; federal Medicare regulations, 42 C.F.R. § 482.43; and Florida healthcare law, Fla. Stat. §§ 395.0185, 456.054, 817.505, are reproduced at App., *infra*, 71a-83a.

STATEMENT

This case arises out of the arbitration of a dispute between JMC, the owner of a not-for-profit community hospital in Jupiter, Florida, and the Visiting Nurse Association of Florida, Inc. ("VNA"). The dispute involves a contract under which VNA agreed to purchase from JMC a home health agency and to lease from JMC office space for that agency. After determining that VNA had in actuality contracted and paid for preferential Medicare-patient referrals that JMC had failed to provide, the arbitration panel awarded VNA approximately $1.25 million in damages, plus attorneys' fees, costs, and prejudgment interest. JMC sought vacatur of the award on the ground that the panel's construction of the contract converted the purchase and lease into a patient-steering and kickback scheme that violates both the federal Medicare law and state anti-kickback statutes. The Florida Supreme Court held, however, that courts are powerless to vacate an arbitral award on the ground that it requires or condones illegal conduct because that is not among the limited grounds for vacatur specifically enumerated in Section 10 of the FAA.

In reaching that conclusion, the court below refused to apply a long line of authority from this Court recognizing the illegality ground for vacatur. The court below also exacerbated splits of authority in the lower courts both on the narrow question whether the illegality ground for vacatur survived this Court's decision in *Hall Street Associates* v. *Mattel, Inc.*, 552 U.S. 576 (2008), and on the broader question whether *any* judicially created grounds for vacatur survived *Hall Street*.

A. The Regulatory Regime

Healthcare is a highly regulated industry, especially when it comes to serving Medicare patients. Among other restrictions, federal law makes it a felony to offer, solicit, pay, or accept remuneration for a patient referral or for attempting to influence a patient's choice of a healthcare provider. See 42 U.S.C. § 1320a–7b(b). Federal Medicare regulations require that hospitals, "as part of the[ir] discharge planning process," respect patients' "freedom to choose among participating Medicare providers of posthospital care services" and "not specify or otherwise limit the qualified providers that are available to the patient." 42 C.F.R. § 482.43(c)(7). And the State of Florida prohibits "any commission, bonus, kickback, or rebate or * * * split-fee arrangement" for a patient referral. Fla. Stat. § 395.0185; see also *id.* § 456.054 (prohibiting "remuneration or payment * * * as an incentive or inducement to refer patients for past or future [health] services"); *id.* § 817.505 (making it a felony to engage in patient brokering or kickback schemes).

These strict prohibitions against patient steering and kickbacks are designed to ensure that patients are informed of all their healthcare options in a fair, unbiased way. They are thus key components of a systematic regulatory program to prevent fraud and abuse and to protect patients' freedom to choose the healthcare provider that is best suited to their needs. See, *e.g.*, 42 U.S.C. §§ 1320a–7 to –7m.

B. Factual Background

For purposes of deciding the legal issue before it, the Florida Supreme Court accepted JMC's contention that, as construed by the arbitration panel, the parties' contract called for illegal patient steering

and kickbacks. The factual underpinnings for that contention are as follows.

In addition to owning and operating the Jupiter Medical Center (the "Hospital") in Jupiter, Florida, JMC previously owned and operated a home health agency. That agency provided home-based care to Medicare and other patients who had been discharged from the Hospital but required additional medical attention.

In 2004, VNA offered to purchase, and JMC agreed to sell, the home health agency.

1. The purchase agreement

In February 2005, the parties executed a purchase agreement under which VNA agreed to purchase the home health agency's patient accounts and other assets, to lease a small amount of office space in the Hospital's discharge-planning office, and to sublease the larger space at an off-site facility owned by JMC where the home health agency maintained its operations. See App., *infra*, 3a-4a, 84a-85a.

The purchase agreement provides that the Hospital "will follow [certain] discharge planning procedures" when a Medicare patient who is being discharged from the Hospital requires additional, home-based care. App., *infra*, 86a. First, the Hospital "will include in the discharge plan a list of home health agencies that are available to the patient" and that participate in the Medicare program. *Id.* at 100a-101a. The Hospital will then "inform the patient or the patient's family of their freedom to choose among participating Medicare home health agencies," will "respect patient and family preferences," and "will not specify, or otherwise limit the qualified providers that are available to the patient." *Id.* at 99a. If after

having received that information, "the patient expresses no preference, the Hospital will inform the patient of its relationship with the VNA." *Ibid.* (emphasis omitted).

The purchase agreement contains nothing suggesting that the parties understood it to require the Hospital to steer patients to VNA as part of the consideration for either the purchase price or the rent for the office space or off-site facility. On the contrary, the agreement states that "[t]he purpose of establishing a working relationship with the VNA [was] to facilitate the smooth transfer of patients into post-hospital care and thereby reduce the average length of stay for hospitalization." App., *infra*, 101a. The agreement likewise states that the purpose of VNA's lease of the space in the Hospital's discharge-planning office was "[t]o facilitate the efficient discharge of patients from JMC." *Id.* at 85a.

Beyond stating what the purposes of the purchase agreement and lease were, the lease includes a "*Referral Disclaimer*," which specifies that:

> 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.

App., *infra*, 110a.

More generally, the purchase agreement states: "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 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." App., *infra*, 98a.

Additionally, the agreement incorporates any "provision of a statute, rule, regulation, or law [that] is required for the enforcement of this Agreement and is not contained herein." App., *infra*, 97a. And the lease likewise states that "all such accommodations shall be subject to any regulations and governmental guidelines intending to insure freedom of choice for patients." *Id.* at 85a.

In other words, the parties agreed that the contract must be interpreted to comply with the many complex, highly detailed statutes and regulations for the provision of health services to Medicare recipients, and that insofar as a term of the contract can be given a lawful interpretation, it must be given that interpretation.

2. The dispute

In the summer of 2007, JMC's newly hired chief medical officer, Dr. James Ketterhagen, determined that the Hospital was legally prohibited from giving preferential treatment to any particular home health agency when making patient referrals. See App., *infra*, 6a. In September 2007, therefore, Dr.

Ketterhagen informed VNA that the Hospital "would no longer notify patients of its relationship with VNA." *Ibid.* At the same time, he informed VNA that, "due to a shortage of office space, VNA could not continue to maintain office space in the hospital." *Ibid.* That month, VNA failed to pay the rent that it owed for the off-site facility.

JMC filed suit against VNA in state court for back rent, and VNA initiated arbitration pursuant to a clause in the agreement that provides for arbitration of disputes "arising out of or related to th[e] Agreement or the breach thereof" (App., *infra*, 99a).

C. The Arbitration

In the arbitration proceedings, VNA alleged that from the very outset the Hospital had been in breach of the contract because it had consistently failed to notify patients that it had a special relationship with VNA and instead employed a rotation system for recommending home health agencies to patients who did not select one on their own. VNA accordingly sought damages based on the value of patient referrals that it claimed to have purchased from JMC but did not receive.

The arbitration panel issued an "interim award" (App., *infra*, 55a-69a) in VNA's favor, finding that JMC breached the purchase agreement by putting VNA "on equal footing with the myriad of other" home health providers. *Id.* at 65a. The panel ruled that JMC breached its supposed contractual obligation to give preferential treatment to VNA by (i) employing a rotation system rather than favoring VNA when recommending home health providers to Medicare patients and (ii) terminating VNA's lease of office space in the Hospital that afforded VNA

unique "visibility" and access to "doctors and other patient referrers." *Ibid.* The arbitration panel found, in other words, that the sums that VNA paid for the home health agency and for rent were in actuality payments for preferential patient-referral practices and that the Hospital's failure to favor VNA when referring Medicare patients thus deprived VNA of the benefit of its bargain.

JMC filed an application to reopen the arbitration proceedings so that it could present additional evidence and argument that the panel's construction of the contract converted the contract into a patient-steering and kickback scheme that is forbidden by federal and state law. See App., *infra*, 9a-10a. In that submission, JMC offered a competing, lawful interpretation of the contract: that the contract's specification of the patient accounts and other assets that VNA was purchasing, the statement of purpose for the lease of space at the Hospital, the referral disclaimer, and the calculation of rent for the off-site facility together make clear that VNA agreed to pay for the home health agency and for use of the office space, not for patient referrals. JMC pointed to the various anti-kickback and anti-patient-steering provisions of the contract as further support for that interpretation.

The panel denied JMC's request to reopen the proceedings, stating that it had already "considered the matters stated in [the] motion in its deliberations." App., *infra*, 54a. The panel then proceeded to award VNA $1.25 million for three years of referrals lost to competitors, and awarded attorneys' fees, costs, and prejudgment interest, for a total award of approximately $1.6 million plus postjudgment interest. See *id.* at 54a, 68a-69a.

D. Proceedings Below

VNA moved in state court to enforce the arbitral award. JMC opposed that motion and also filed its own motion to vacate, contending in both filings that the arbitration panel had interpreted the contract in a way that rendered it an unlawful patient-steering and kickback scheme. "[W]ithout explanation or analysis" (App., *infra*, 11a), the trial court dismissed JMC's motion and granted VNA's. *Id.* at 49a-51a.

The intermediate appellate court reversed, concluding that "[i]llegality is a compelling reason not to enforce a contract" and therefore 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." App., *infra*, 46a, 48a. The court accordingly remanded for consideration of JMC's illegality argument.

The Florida Supreme Court granted review, reversed the decision of the intermediate appellate court, and reinstated the trial court's order confirming the arbitral award.

At the outset, the court held (correctly) that the FAA applies because referrals of Medicare patients involve interstate commerce. App., *infra*, 15a. Turning to the merits of the issue presented, the court acknowledged this Court's cases holding that "[i]f the contract as interpreted by [the arbitrator] violates some explicit public policy, [courts] are obliged to refrain from enforcing it." App., *infra*, 21a-22a (internal quotation marks omitted). The court stated without explication, however, that these cases did not arise under the FAA and therefore are irrelevant "in cases, such as this one, that are governed by the FAA." *Id.* at 22a.

Deeming itself unconstrained by this Court's cases recognizing the illegality ground for vacatur, the Florida Supreme Court proceeded to focus on case law addressing the more general question whether, after this Court's decision in *Hall Street*, courts may decline to enforce arbitral awards on grounds not specifically identified in the FAA. App., *infra*, 23a-31a. Joining the courts that have held that there is no such authority, the Florida Supreme Court concluded categorically that "courts cannot review the claim that an arbitrator's construction of a contract renders it illegal." *Id.* at 31a.[1]

REASONS FOR GRANTING THE PETITION

Hall Street left open the question whether courts retain any authority to vacate arbitral awards on judicially created grounds or instead whether the only permissible grounds for vacatur are the ones that are specifically listed in Section 10 of the FAA. This case presents a particular version of that question—whether courts have the power under the FAA to vacate an arbitral award that either mandates illegal conduct or imposes damages for a party's failure to engage in such conduct. The Florida Supreme Court answered that question in the negative. Its decision warrants review for three reasons.

First, the decision conflicts with this Court's clear and consistent holding that courts have inherent power to refuse to enforce arbitral awards that would require or condone illegal conduct. See *Eastern Associated Coal Corp.* v. *United Mine Workers of Am.*,

[1] The court also held that vacatur was not available under the Florida Arbitration Code, which, like the FAA, does not include illegality among its enumerated grounds for vacatur. App., *infra*, 33a-39a.

Dist. 17, 531 U.S. 57, 62-63 (2000); *United Paperworkers Int'l Union, AFL–CIO* v. *Misco, Inc.*, 484 U.S. 29, 42 (1987); *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983). Second, the ruling below exacerbates a conflict among the U.S. Courts of Appeals on the precise question whether the illegality ground for vacatur survives *Hall Street*, as well as an even deeper conflict over the broader question whether an arbitral award may be vacated on *any* ground not listed in the FAA. And third, the issue presented is exceptionally important. If allowed to stand, the decision below would leave courts with no choice but to enforce arbitral awards that require illegal conduct—such as price fixing, market splitting, patient steering, race discrimination, and the like. Review is necessary to forestall that pernicious result, to bring the Florida Supreme Court into line with this Court's prior decisions, and to resolve the confusion among the lower courts on this important, recurring issue.

A. The Decision Below Is Irreconcilable With This Court's Precedents Holding That Courts Have Inherent Authority To Refuse To Enforce Contracts That Require Illegal Conduct.

This Court has held that "[i]f [a] contract as interpreted by [an arbitrator] violates some explicit public policy, [courts] are obliged to refrain from enforcing it." *W.R. Grace*, 461 U.S. at 766; see also, *e.g.*, *Eastern Associated Coal*, 531 U.S. at 62-63.[2] The

[2] The members of the Court appear to disagree on the scope of this public-policy exception. Compare *Eastern Associated Coal*, 531 U.S. at 63 ("We agree, in principle, that courts' authority to

Florida Supreme Court concluded, in effect, that the FAA strips courts of this inherent judicial authority.

That conclusion is irreconcilable with this Court's consistent holding that the power not to enforce contracts that are illegal applies to "any contract." *W.R. Grace*, 461 U.S. at 766; see also *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948) (a court's power "to enforce the terms of private agreements is *at all times* exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents") (emphasis added).

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract"—not by enforcing the contract, nor by "enforc[ing] any alleged rights directly springing from such contract." *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899). In short, it is a bedrock principle of American jurisprudence that if "the enforcement of private agreements would be violative of [public] policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd*, 334 U.S. at 35; see, *e.g.*, 5 Williston on Contracts § 12:1 (4th ed. 2009); Restatement (Second) of Con-

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invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.") with *id.* at 68 (Scalia, J., concurring in judgment) (recognizing public-policy exception but rejecting "judicial intuition of a public policy that goes beyond the actual prohibitions of the law"). This case does not require the Court to resolve that disagreement because our position is that the arbitrators interpreted the contract in a way that violates "the actual prohibitions" of federal and state statutes and hence would be subject to vacatur under even the narrowest interpretation of the public-policy exception.

tracts §§ 178 *et seq.* (1981). "'[T]he principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out.'" *McMullen*, 174 U.S. at 663 (citation omitted). "The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." *Coppell* v. *Hall*, 74 U.S. (7 Wall.) 542, 559 (1868).

That the parties may have agreed to arbitrate their disputes does not and should not displace this foundational precept of the common law of contracts. See, *e.g.*, *Eastern Associated Coal*, 531 U.S. at 62-63; *United Paperworkers*, 484 U.S. at 42; *W.R. Grace*, 461 U.S. at 766. A contract with an arbitration clause is still a contract. It follows that courts must be able to exercise the same traditional, inherent authority to ensure that an arbitrator's construction of a contract does not render the contract unlawful or require the parties to engage in unlawful acts. See, *e.g.*, *W.R. Grace*, 461 U.S. at 766 ("*As with any contract*, * * * a court may not enforce a collective bargaining agreement that is contrary to public policy.") (emphasis added).

"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 the common law, that a court may refuse to enforce contracts that violate law or public policy." *United Paperworkers*, 484 U.S. at 42. This "doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of

those interests when it considers whether to enforce such agreements." *Ibid.*

Courts thus have the power and duty not to enforce an arbitral award when the arbitrator's interpretation of the contract violates public policy as "ascertained 'by reference to the laws and legal precedents,'" because they have that power and duty in all circumstances. *W.R. Grace*, 461 U.S. at 766; see also *Eastern Associated Coal*, 531 U.S. at 63 ("courts' authority to invoke the public policy exception" must at the very least cover "instances where the arbitration award itself violates positive law"); *United Paperworkers*, 484 U.S. at 42. See generally *Hurd*, 334 U.S. at 34-35 (a court's power "to enforce the terms of private agreements is *at all times* exercised subject to the restrictions and limitations of the public policy of the United States as manifested in * * * statutes[] and applicable legal precedents") (emphasis added).

The Florida Supreme Court acknowledged the existence of these cases recognizing the illegality ground for vacatur but baldly asserted that they "did not involve arbitration under the FAA and are thus inapplicable to the question of whether extra-statutory grounds for invalidating an arbitration award survived the decision in *Hall Street* in cases, such as this one, that are governed by the FAA." App, *infra*, 21a-22a. That rationale is a patently erroneous basis for refusing to apply this Court's illegality precedents.

The FAA applies to "any * * * contract evidencing a transaction involving commerce" (9 U.S.C. § 2), except for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (*id.* § 1). This Court

has squarely held that the reference to "interstate commerce" in Section 1 of the FAA "exempts from the FAA only contracts of employment of transportation workers." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001). At least two of the illegality cases that the Florida Supreme Court refused to follow did not involve "contracts of employment of transportation workers": *W.R. Grace* involved employees at a plastics-manufacturing facility (461 U.S. at 759), and *United Paperworkers* involved a machine operator at a paper-converting plant (484 U.S. at 31-32). *Ipso facto*, they *did* arise under the FAA, and they are precedential here.[3]

The decision below is thus flatly inconsistent with at least two, and possibly three, decisions of this Court. Review is warranted to bring the Florida Supreme Court back in line with this Court's precedents. See S. Ct. Rule 10(c).

B. The Florida Supreme Court's Decision Conflicts With The Decisions Of Numerous U.S. Courts Of Appeals.

In *Hall Street*, this Court held that private parties that agree to arbitrate disputes may not contractually expand the grounds for vacating an arbitral

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[3] The third case—*Eastern Associated Coal*—involved a truck driver for a mining company. See 531 U.S. at 60. But the applicable collective-bargaining agreement itself covered all mine workers (*id.*), so it is unclear whether Section 1's exception was applicable. In any event, this Court has explained that "precedents applying the FAA * * * employ the same rules of arbitrability that govern [all] labor cases." *Granite Rock Co.* v. *International Bhd. of Teamsters*, 561 U.S. 287, 298 n.6 (2010). Accordingly, the possibility that *Eastern Associated Coal* did not involve the FAA is no reason for deeming it inapplicable in an FAA case.

award beyond those listed in Section 10. The Florida Supreme Court construed *Hall Street* to erect an absolute bar to vacatur on any ground not specified in Section 10—including the long-standing illegality ground. In so holding, the court joined the Eleventh Circuit in departing from the decisions of multiple other federal courts of appeals that have either held or assumed that the illegality ground for vacatur survives *Hall Street*. At the same time, the decision below exacerbated an already deep conflict on the broader question whether courts may vacate arbitral awards after *Hall Street* for any reason other than those specifically listed in Section 10 of the FAA.

1. The Florida Supreme Court's holding that courts may not refuse to enforce arbitral awards on illegality grounds deepens an existing conflict among the federal courts of appeals.

In holding that the illegality ground for vacatur did not survive *Hall Street*, the Florida Supreme Court aligned itself with the Eleventh Circuit. See *Frazier* v. *CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010) (holding that public-policy/illegality exception and all other "judicially-created bases for vacatur are no longer valid in light of *Hall Street*"). In contrast, the Seventh Circuit has expressly held that the authority to vacate an arbitral award on public-policy/illegality grounds survives *Hall Street*; the First Circuit has strongly suggested the same thing; the Second, Eighth, Ninth, and Tenth Circuits have identified and applied the exception since *Hall Street* without mentioning *Hall Street*; and the Third Circuit has assumed without deciding that the exception survives *Hall Street*.

To begin with, in a decision that pre-dated *Hall Street*, the Seventh Circuit had squarely held that "an arbitrator may not direct the parties to violate the law," explaining that "[i]n the main, an arbitrator acts as the parties' agent and as their delegate may do anything the parties may do directly" but may not do what is forbidden to them. *George Watts & Son, Inc.* v. *Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (citing *Eastern Associated Coal*, 531 U.S. at 63). Because the parties may not violate the law, the court reasoned, an arbitration panel may not order them to; and if it tries, the award should be vacated. See *ibid.*

Reaffirming this rationale after *Hall Street*, the Seventh Circuit recognized that "a court may set aside an award that directs the parties to violate the legal rights of third persons who did not consent to the arbitration" or that obligates a contracting party to "violate any rule of positive law designed for the protection of third parties." *Affymax, Inc.* v. *Ortho–McNeil–Janssen Pharms., Inc.*, 660 F.3d 281, 284 (7th Cir. 2011). Accordingly, though holding that *Hall Street* forecloses vacatur of arbitral awards for "manifest disregard of the law" and other grounds not listed in the FAA, the court expressly recognized that courts may continue to vacate arbitral awards on the grounds identified in *George Watts*. *Id*. at 284-285.

The Seventh Circuit has since further explained that *Hall Street* "did not overrule *Eastern Associated Coal* or *W.R. Grace*, both of which recognized a public policy exception to the general prohibition on overturning arbitrator awards," and therefore that "*Eastern Associated Coal* and *W.R. Grace* still control." *Titan Tire Corp.* v. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers*

Int'l Union, 734 F.3d 708, 716-717 & n.8 (7th Cir. 2013).

The First Circuit has similarly stated that federal rules and regulations "are, so far as they are valid, in the nature of sovereign commands representing a public purpose" and accordingly "assume[d] (*arguendo* but with some confidence) that an arbitration award would be vulnerable to the extent that it directed one or both of the parties clearly to violate such a mandate" even after *Hall Street*. *Bangor Gas Co.* v. *H.Q. Energy Servs. (U.S.) Inc.*, 695 F.3d 181, 188 (1st Cir. 2012).

The Second, Eighth, Ninth, and Tenth Circuits have likewise affirmed the continued vitality of the public-policy/illegality exception, albeit without mentioning *Hall Street*. See, *e.g.*, *Matthews* v. *National Football League Mgmt. Council*, 688 F.3d 1107, 1111 (9th Cir. 2012); *Schwartz* v. *Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011); *Burlington N. & Santa Fe R.R.* v. *Public Serv. Co.*, 636 F.3d 562, 567 (10th Cir. 2010); *Williams* v. *National Football League*, 582 F.3d 863, 884-885 (8th Cir. 2009). And the Third Circuit has assumed that the exception survives and applied it, though without conclusively resolving the legal question.[4]

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[4] That court expressly invoked the doctrine in *Remote Solution Co.* v. *FGH Liquidating Corp.*, 349 F. App'x 696 (3d Cir. 2009). More recently, the court described itself as assuming without deciding that the doctrine survives *Hall Street*. See *CD & L Realty LLC* v. *Owens Ill., Inc.*, 535 F. App'x 201, 205 n.3 (3d Cir. 2013); *Rite Aid N.J., Inc.* v. *United Food Commercial Workers Union, Local 1360*, 449 F. App'x 126, 129 & n.3 (3d Cir. 2011).

JMC's argument for vacatur falls squarely within the heartland of the public-policy/illegality exception. JMC contends that the arbitration panel construed the parties' purchase and lease agreement to require preferential patient referrals to VNA in exchange for money. So construed, the agreement would require the parties to violate federal and state laws (including federal and state felony statutes) that are designed to protect the rights of third parties—namely, Medicare patients—to choose their healthcare providers freely and to receive unbiased, untainted medical advice in obtaining health services. Cf. *Bangor Gas*, 695 F.3d at 188; *Affymax*, 660 F.3d at 284. In holding that courts are powerless under the FAA to vacate an arbitral award on illegality grounds, the decision below (along with the decision of the Eleventh Circuit in *Frazier*) thus conflicts with the decisions of at least six federal courts of appeals. This direct conflict is another powerful reason for granting review. See S. Ct. Rule 10(b).

2. The Florida Supreme Court's broader holding that *Hall Street* prohibits vacatur on any judicially created grounds exacerbates an already deep conflict among the federal courts of appeals.

The Florida Supreme Court's broader holding that *Hall Street* precludes vacatur on any judicially created grounds adds to the already deep disagreement and confusion in the lower courts on this issue. In addressing this question—often in the context of determining whether the so-called manifest-disregard doctrine survived *Hall Street*—the courts of appeals have divided into at least "three camps"

(*Wachovia Sec., LLC* v. *Brand*, 671 F.3d 472, 481 n.7 (4th Cir. 2012)), if not more.[5]

To begin with, the Sixth Circuit has held that *Hall Street* applies solely to *parties'* efforts to expand the grounds for judicial review and does not diminish the traditional powers of courts to vacate arbitral awards on *judicially created* grounds. See *Coffee Beanery, Ltd.* v. *WW, L.L.C.*, 300 F. App'x 415, 418 (6th Cir. 2008). Reading *Hall Street* as evidencing "hesitation to reject the 'manifest disregard' doctrine in all circumstances," the Sixth Circuit concluded that "it would be imprudent to cease employing [the] universally recognized principle" that courts have the authority to vacate awards on judicially created grounds that are independent of those identified in the FAA. *Id.* at 419. In other words, *Coffee Beanery* held that, in reviewing arbitral awards, courts retain

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[5] The courts of appeals recognize that public policy (i.e., illegality) is distinct from manifest disregard as a basis for vacatur. See, *e.g.*, *Titan Tire*, 734 F.3d at 716-717 & n.8; *Rite Aid New Jersey*, 449 F. App'x at 129 n.3 ("Rite Aid's argument does not rest on a manifest disregard for the law as much as it does a violation of public policy."); *Air Line Pilots Ass'n Int'l* v. *Trans States Airlines, LLC*, 638 F.3d 572, 579 (8th Cir. 2011) (manifest-disregard and public-policy exceptions are "distinct"); *Hicks* v. *Cadle Co.*, 355 F. App'x 186, 194-197 (10th Cir. 2009); *DMA Int'l, Inc.* v. *Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341, 1345 (10th Cir. 2009); *Saipem Am.* v. *Wellington Underwriting Agencies Ltd.*, 335 F. App'x 377, 380 n.3 (5th Cir. 2009) (per curiam). Nevertheless, to the extent that a decision—like the one below—holds that *Hall Street* categorically forbids *any* judicially created grounds for vacatur, it logically rules out vacatur under both grounds. (As explained in text, however, two courts that otherwise categorically ruled out judicially created grounds for vacatur—the Seventh and Eighth Circuits—nonetheless excluded public-policy/illegality from that seemingly categorical rule.)

their historic powers to decline to interpret or enforce a contract—including, therefore, the power to vacate an award that violates public policy by requiring the parties to violate the law or pay damages for failing to do so.[6]

In contrast, the Fifth, Eighth, and Eleventh Circuits have held that *Hall Street* forecloses any ground for vacatur of an arbitral award that is not expressly listed in the FAA. See *Medicine Shoppe Int'l, Inc.* v. *Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier*, 604 F.3d at 1324; *Citigroup Global Mkts., Inc.* v. *Bacon*, 562 F.3d 349, 350 (5th Cir. 2009). These decisions would appear to allow for no judicial addition, expansion, or interpretation of the grounds for vacatur beyond what the FAA expressly enumerates. Yet as explained above, the Eighth Circuit has nonetheless recognized the continuing validity of the public-policy/illegality exception (see *Williams*, 582 F.3d at 884-885), without rationalizing the two lines of authority.[7]

Meanwhile, the Second and Ninth Circuits have read *Hall Street* to allow for vacatur for manifest dis-

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[6] In a subsequent unpublished decision, a different panel of the Sixth Circuit stated that the question "whether a manifest disregard of the law legitimately forms a basis for vacatur * * * has not been firmly settled," though the court explained that, "[s]ince *Hall Street*, we have continued to acknowledge 'manifest disregard' as a ground for vacatur—albeit not in a published holding." *Schafer* v. *Multiband Corp.*, 551 F. App'x 814, 818-819 & n.1 (6th Cir.), cert. denied, 134 S. Ct. 2845 (2014).

[7] In *Medicine Shoppe*, the Eighth Circuit refused to entertain a public-policy challenge on waiver grounds (see 614 F.3d at 489) rather than rejecting it categorically under *Hall Street*. That approach is in line with the court's subsequent recognition of the illegality exception in *Williams*.

regard of the law, but only insofar as that exception may be characterized as a judicial interpretation of, or gloss on, the FAA's statutory factors. See *Stolt–Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 90-91, 94 (2d Cir. 2008) (holding that manifest-disregard doctrine is properly understood as a judicial interpretation of Section10(a)(3) of the FAA, which allows for vacatur in cases of "misconduct" or "misbehavior" on the part of the arbitrator), rev'd and remanded on other grounds, 559 U.S. 662 (2010) (holding that arbitrators exceeded their authority by imposing their own policy choices about class arbitration rather than enforcing the parties' intent); *Comedy Club, Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (concluding that manifest disregard remains a proper ground for vacatur because, under the Ninth Circuit's long-standing jurisprudence, manifest disregard is "shorthand" for Section 10(a)(4) of the FAA, "which states that the court may vacate 'where the arbitrators exceeded their powers'"). Taking *Stolt–Nielsen* and *Comedy Club* together with these courts' decisions in *Schwartz* and *Matthews* suggests that the Second and Ninth Circuits might regard the public-policy/illegality exception as "shorthand" for the FAA's statutory factors. If so, these circuits would likely constrain that exception more severely than do the First, Seventh, Eighth, and Tenth Circuits.

In addition, the Fourth Circuit has held that "manifest disregard continues to exist as either an independent ground for review or as a judicial gloss" but has declined to "decide which of the two it is." *Wachovia*, 671 F.3d at 483. The court presumably would say the same thing about other long-standing, judicially created grounds for vacatur, like the illegality ground invoked by JMC here. Indeed, in af-

firming a district court's refusal to vacate an arbitral award, the Fourth Circuit recently pointed out that the party challenging the award had not "presented a basis for vacating this portion of the arbitration award on public policy grounds"—thereby implying that such a ground, if proven, would have been a valid basis for vacatur. *Wells Fargo Advisors, LLC* v. *Watts*, 540 F. App'x 229, 231 (4th Cir. 2013) (per curiam), cert. denied, 135 S. Ct. 210 (2014).

Finally, the First, Third, and Tenth Circuits have thrown up their hands on the question whether the manifest-disregard ground survives *Hall Street*. See, *e.g.*, *Bangor Gas*, 695 F.3d at 187-188 (suggesting that manifest-disregard doctrine may no longer be valid but applying it nonetheless); *Abbott* v. *Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 619-620 (10th Cir. 2011) ("in the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned," "modif[ied]" "to follow the Second and Ninth Circuits," or retained as an independent ground for vacatur); *Paul Green Sch. of Rock Music Franchising, LLC* v. *Smith*, 389 F. App'x 172, 176-177 (3d Cir. 2010) (declining to decide "whether manifest disregard of the law remains a valid ground for vacatur" and listing other cases since *Hall Street* in which the court has similarly avoided the issue); *Legacy Trading Co.* v. *Hoffman*, 363 F. App'x 633, 635-636 & n.2 (10th Cir. 2010) ("acknowledg[ing] that the judicially-created public-policy exception *may* permit a court to vacate an arbitration award" and declining to decide "what, if any, judicially-created grounds for vacatur survive in the wake of

Hall Street") (emphasis added).[8] These circuits are plainly waiting for guidance from this Court. And this case will offer an excellent vehicle to provide that guidance, because it squarely presents the question whether judicial interpretations or expansions of the FAA's vacatur factors—whether under the manifest-disregard rubric or under the public-policy/illegality doctrine—are ever permissible.

To compound the confusion further, one court of appeals has determined that this Court *has* decided at least part of the manifest-disregard question left open by *Hall Street*—in a way that forecloses the position adopted by the court below.

In reviewing the Second Circuit's decision in *Stolt–Nielsen*, this Court declined to "decide whether 'manifest disregard' survives our decision in *Hall Street* * * * as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10" because the arbitral award could be vacated directly under Section

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[8] The First Circuit has been particularly inscrutable on this issue. That court initially opined in a non-FAA case that *Hall Street* forecloses vacatur for manifest disregard. See *Ramos-Santiago* v. *United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008). When the court subsequently faced the question in an FAA case, it described this earlier view as "dicta," declared that it had "not squarely determined whether [its] manifest disregard case law can be reconciled with *Hall Street*," and declined to recall its earlier mandate vacating an arbitral award under the manifest-disregard doctrine—thus suggesting that the doctrine is still viable. *Kashner Davidson Sec. Corp.* v. *Mscisz*, 601 F.3d 19, 22-23 (1st Cir. 2010). Most recently, the panel in *Bangor Gas* referred once again to the analysis in *Ramos–Santiago* as dicta but intimated that it may reflect the court's view of the matter after all—after which the court proceeded to apply the doctrine anyway. See *Bangor Gas*, 695 F.3d 187-188.

10(a)(4). *Stolt–Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672-675 & n.3 (2010). In doing so, the Court explained that, under any version of the manifest-disregard doctrine, the requirements for vacatur would have been met for the same reasons that Section 10(a)(4) was satisfied. *Id.* at 672 n.3.

Based on that analysis, the Fourth Circuit has concluded that "[t]he Supreme Court's reasoning in *Stolt–Nielsen* closely tracked the majority of circuits' approach to manifest disregard before *Hall Street*." *Wachovia*, 671 F.3d at 482. Hence, the Fourth Circuit read *Stolt–Nielsen* "to mean that manifest disregard continues to exist either 'as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur.'" *Id.* at 483. And once again, if the manifest-disregard doctrine continues to exist in *any* form, it logically follows that other judicially created or inferred grounds for vacatur are not foreclosed either. Hence, if the Fourth Circuit's reading of *Stolt–Nielsen* is correct, the Florida Supreme Court's decision directly conflicts with this Court's precedents in yet another respect.[9]

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As the foregoing discussion makes clear, the lower courts are mired in confusion and disagree sharply

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[9] None of the circuits that have read *Hall Street* to forbid vacatur for manifest disregard have considered this Court's subsequent treatment of the issue in *Stolt–Nielsen*. *Citigroup* predated that decision. The *Frazier* court considered and rejected the Second Circuit's decision in *Stolt–Nielsen* and noted the grant of certiorari but said nothing about this Court's decision, which issued three days before *Frazier*. *Medicine Shoppe* and *Affymax* both postdated *Stolt–Nielsen* by longer periods, but neither made any mention of it.

over whether and to what extent illegality—or any judicially created ground for vacatur—survives *Hall Street*. Because the illegality exception that JMC invoked is deeply rooted in a long line of this Court's precedent, in foundational principles of contract law, and in the nature of the judicial power, this case presents an excellent vehicle for addressing that question. As we explain in the next section, there is also a compelling need for that review here, in order to preserve the inherent authority of the courts not to facilitate or be complicit in illegal conduct.

C. The Issue Is Exceptionally Important.

Review of the Florida Supreme Court's decision is warranted for the additional reason that the question whether courts have any authority under the FAA to refuse to enforce an arbitral award on illegality grounds is exceptionally important. If the rule adopted by the Florida Supreme Court is allowed to stand, courts would be powerless to refuse to enforce an arbitrator's decision except on the narrow grounds set forth in Section 10 of the FAA. At the same time, arbitrators would be free—and, depending on the contract terms, may be required—not just to enforce contracts to operate unlawful Medicare kickback schemes, but also to order contracting parties to form a cartel (see *Affymax*, 660 F.3d at 284), discriminate on the basis of race or sex, violate wage-and-hour or child-labor laws, or commit any other illegal act. Indeed, even when—as here—arbitrators construe an entirely lawful contract to mandate illegal conduct, notwithstanding explicit contractual language prohibiting such an interpretation, a court confronted with a motion to confirm would have no choice but to "lend its aid" to the "immoral or illegal

act[s]" required by the arbitrator (*United Paperworkers*, 484 U.S. at 42).

These concerns are not hyperbolic. In *Hurd*, this Court reversed a D.C. Circuit decision enforcing racially restrictive covenants in the District of Columbia. The Court explained that "[i]t is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action * * * [that] has been held to be violative of the guaranty of the equal protection of the laws." 334 U.S. at 35. In *W.R. Grace*, the Court extended this logic to the arbitration context, recognizing that because "[v]oluntary compliance with Title VII" of the Civil Rights Act "is an important public policy," it was obliged to review the arbitral award at issue to ensure that the arbitrator's interpretation of a collective-bargaining agreement's seniority rules did not violate the public policy against sex discrimination. 461 U.S. at 766, 770-772; see *United Paperworkers*, 484 U.S. at 43 ("In *W.R. Grace*, we identified two important public policies that were potentially jeopardized by the arbitrator's interpretation of the contract: obedience to judicial orders and voluntary compliance with Title VII of the Civil Rights Act of 1964."). If the decision below were correct, not only would this Court have exceeded its jurisdiction in *W.R. Grace*, but it would have been powerless to act in *Hurd* if the racially restrictive covenants had included an arbitration clause.

Congress enacted the FAA to replace "judicial resistance to arbitration" with a "national policy favoring arbitration and plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443

(2006). In so doing, Congress surely did not intend to make arbitration agreements a mechanism for criminal enterprises to resolve their disputes with the blessing—and the enforcement power—of the judiciary, because contracts to perform unlawful acts would never be enforceable under any other circumstance. Nor did Congress intend for the FAA to allow the substantive terms of private contracts to trump all federal and state law.

Judicial review is, and should be, narrow and carefully constrained under the FAA. But nothing in the legislative history of the FAA suggests that Congress meant to displace either the foundational precept of contract law that contracts for illegal purposes are unenforceable, or the fundamental principle of judicial authority that courts must not be in the business of compelling or facilitating unlawful acts. Nor is there anything in this Court's jurisprudence to suggest that the FAA licenses arbitrators to nullify federal law by ordering parties, on pain of contempt of court, to violate federal statutes and regulations—especially when the parties themselves plainly never intended to do so. It simply cannot be that courts entirely lose their inherent authority and obligation to uphold the law just because there is an arbitration agreement. Certainly such a drastic jurisprudential sea change should occur only on this Court's express say-so, and not as a result of a state supreme court's misreading of this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

No. SC11-2468

VISITING NURSE ASSOCIATION OF FLORIDA, INC.,

Petitioner,

vs.

JUPITER MEDICAL CENTER, INC.,
Respondent.

[November 6, 2014]

REVISED OPINION

LABARGA, C.J.

Visiting Nurse Association of Florida, Inc., seeks review of the decision of the Fourth District Court of Appeal in *Jupiter Medical Center, Inc. v. Visiting Nurse Ass'n of Florida, Inc.*, 72 So. 3d 184 (Fla. 4th DCA 2011), on the ground that it expressly and directly conflicts with a decision of the Fifth District Court of Appeal in *Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc.*, 19 So. 3d 1062 (Fla. 5th DCA 2009), on a question of law. We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const. For the following reasons, we quash the Fourth District's decision holding that a court must determine whether a contract is legal prior to enforcing an arbitral award based on the contract.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Overview

After the conclusion of an arbitration proceeding resolving a contract dispute between Visiting Nurse Association, Inc. (VNA), a home health care agency, and Jupiter Medical Center, Inc. (JMC), a hospital, involving agreed-upon discharge planning procedures and VNA's lease of office space in JMC's hospital, the arbitration panel issued an "interim award," granting VNA damages, prejudgment interest on a portion of the damages, and reserving jurisdiction to consider attorney's fees and costs. In a "Final Award of Arbitrators," the arbitration panel granted VNA attorney's fees, administrative filing fees and expenses, and arbitrators' fees and expenses.

After the "interim award" was issued, JMC filed a motion for reconsideration and a motion to reopen the hearing, alleging that the arbitration panel construed the contract and the discharge planning procedures in violation of federal and state health care laws prohibiting kickbacks for referrals of Medicare patients. The panel summarily denied the motion by e-mail stating that it had already considered those arguments. Jupiter Medical Center subsequently filed a motion to vacate the arbitration award in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, alleging that the arbitration panel interpreted the contract to be an unlawful agreement and that the panel exceeded its powers.[1] Visiting Nurse Association also filed a mo-

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[1] During the arguments on the motion to dismiss, counsel for JMC argued that the contract is legal according to its language, but the arbitration award was based on JMC not making future

tion to enforce the award. At the conclusion of a hearing regarding both motions, the circuit court dismissed the motion to vacate and granted the motion to enforce the award.

On appeal, the Fourth District noted that the trial court did not address the issue of the contract's legality prior to dismissing the action. The Fourth District ultimately reversed the dismissal of the motion to vacate the award and remanded for the trial court to consider the legality of the contract because "a Florida court cannot enforce an illegal contract" and must make that determination prior to enforcing an award based thereon. Visiting Nurse Association then filed a petition to invoke this Court's discretionary jurisdiction, and we granted review. The circumstances leading to the contractual dispute, the arbitration award, and this Court's review of *Jupiter Medical Center* are more fully set forth below.

B. Contractual Relationship and Breach

This action arises from the February 2005 purchase of a hospital-based home health care agency (HHA) by VNA from JMC. In 2004, VNA approached JMC to purchase JMC's in-house HHA believing that if it streamlined JMC's current operations, VNA could generate $1.5 million of revenue due to the volume of Medicare patients serviced by JMC. Visiting Nurse Association's purchase decision was based on the belief that it would receive forty-five to fifty Medicare referrals per month. Despite a purchase evaluation revealing significant competition

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Medicare referrals to VNA, which would have been illegal. Thus, according to JMC's argument below, "it is the method in which the arbitrators construed the agreement" that renders the contract illegal.

from other HHAs, JMC concluded that its in-house HHA's fair market value was $639,000, which VNA ultimately agreed to pay in cash. In exchange for the $639,000, VNA was to obtain all rights and interests in JMC's HHA. The agreement also provided that VNA would have "access to the institution" and "work space" in the hospital. This portion of the agreement was then memorialized in a separate, contemporaneous "office lease" agreement that provided that VNA would occupy space in the discharge planning office until the "dissolution of [VNA]." Further, although VNA did not need the space, it agreed to take over 5,000 square feet of JMC's existing 10-year lease in Jupiter Farms at an expense of $375,000, to purchase "JMC's market share of HHA referrals." Shortly thereafter, VNA noticed a decline in Medicare referrals and attributed it to JMC not divulging information about the agreement's discharge procedures, specifically paragraph five of Exhibit "D" of the agreement, to JMC physicians. In Exhibit "D" of the agreement, the discharge planning procedures were outlined as follows:

> 1. For any patient requiring home health services post discharge, [JMC] 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, [JMC] will update its list at least annually and include home health agencies which have requested to be listed by [JMC] and which meet the requirements stated herein.

> 2. For patients enrolled in managed care organizations, [JMC] indicates the availability of home health agencies to individuals and entities that have a contract with the managed care organization.
>
> 3. [JMC] will document in the patient's medical record that the list was presented to the patient or to an individual acting on the patient's behalf.
>
> 4. [JMC] will inform the patient or the patient's family of their freedom to choose among participating Medicare home health agencies and will, when possible, respect patient and family preferences, when they are expressed to [JMC]. [JMC] 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, [JMC] 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.

(Some emphasis added).

Around November 2006, VNA suspected that a rotation system was being used where each patient who did not express a preference for a particular HHA was simply assigned to the next HHA on JMC's HHA list. Jupiter Medical Center denied there was a rotation system in place. At the evidentiary hearing, however, a former JMC discharge planner said a rotation system had indeed been implemented and

VNA was only mentioned if the patient had previously been provided services by JMC's HHA prior to its sale to VNA. On June 4, 2007, VNA notified JMC that it would not renew the Jupiter Farms lease after its expiration. Approximately a week later, Chief Medical Officer Dr. Ketterhagen was hired, and he directed the discharge planning department to continue its rotation system to ensure equal distribution of HHA referrals. Pursuant to these directions, if a patient did not express a preference for a particular HHA, JMC referred the patient to the next HHA on JMC's list because Dr. Ketterhagen did not believe JMC was allowed to demonstrate a preference to any particular HHA.

On September 10, 2007, Dr. Ketterhagen informed VNA that due to a shortage of office space, VNA could not continue to maintain office space in the hospital. In this notice, Dr. Ketterhagen also informed VNA that JMC would no longer notify patients of its relationship with VNA. In September 2007, in accordance with its previous notice to JMC, VNA did not make a rent payment for the Jupiter Farms office space. Jupiter Medical Center filed suit in circuit court and VNA instituted arbitration proceedings on November 1, 2007. Neither party argued that the contractual arrangement itself was illegal during the arbitration proceedings.

C. Arbitration Awards

The arbitration panel issued an "interim award" in which the panel found that JMC breached the contract in two material respects. First, JMC never made its staff aware of the discharge planning procedures outlined in Exhibit "D" of the agreement; the closest JMC ever came to complying with provision 5 of Exhibit "D" was informing former patients of

JMC's HHA that VNA had purchased the HHA. Further, the facts demonstrated that JMC continued its use of a rotation system, which 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."[2] Notably, the panel did not conclude that JMC breached the agreement by failing to refer patients, but only for failing to follow the discharge procedures. The panel also found that even if JMC's equivocation in following the discharge procedures was not a breach of contract, the September 10, 2007, letter from JMC to VNA terminating the in-house lease agreement and announcing its intention to cease explaining its relationship with VNA to patients did constitute a breach.

Second, JMC breached the agreement by terminating VNA's lease agreement that provided VNA with office space inside JMC and access to the discharge planning staff. The panel concluded that the office space gave VNA visibility and access to doctors and other referrers in the hospital; without the space, VNA was on equal footing with other HHAs, which was not the benefit VNA purchased.

Regarding damages, the panel noted that calculation of damages was difficult because the evidence presented showed a drop in Medicare referrals, increased competition from other HHAs, and that VNA's business plan failed to account for loss of re-

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[2] The panel clarified that the use of the term "nudge" was in reference to the nudge theory that is well known in behavioral economics and defined as the "harmless engineering that attracts a person's attention and alters behavior." The example provided is when vegetables are placed in a more prominent place on a table than junk food.

ferrals due to patient choice or doctor referral to a competitor. Further, the evidence showed that VNA lost a substantial amount of business because of referrals by two surgeons to a competing HHA and the termination of a popular admissions coordinator, which upset many doctors. The panel also recognized that VNA failed to account for the work it would take to establish the relationships that JMC's HHA had acquired with hospital staff over the course of twenty years. Moreover, VNA experienced a similar decline in revenue at another hospital and did not demonstrate that JMC itself would not have experienced the same drop in referrals had it not sold the HHA to VNA. Thus, based on the above, the arbitration panel concluded that VNA's damages should be reduced from VNA's projected revenue of $1.5 million per year to $1.125 million due to the historical 25% drop in Medicare census that would have occurred even if VNA received all of the Medicare referrals. Further, the damages were reduced by the approximately 60% loss of referrals to competitors for a total of $450,000 for three years, which, when reduced to present value, totals $1,251,213.[3] The panel also awarded VNA prejudgment interest on $900,000 and reserved jurisdiction to consider attorney's fees and costs.[4]

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[3] Stated another way, the panel determined that VNA did not purchase a guaranteed amount of referrals because it reduced VNA's projected revenue by the "historical" 25% drop in Medicare census and another 60% to account for losses of referrals due to patient choice or doctor's preference of another HHA. Thus, the panel calculated damages based on what it appears to have considered a more reasonable projection of anticipated patient volume.

[4] The panel further noted that the "Interim Award is in full settlement of all claims on the merits submitted to this arbitra-

Shortly thereafter the panel issued a "Final Award of Arbitrators" in which it granted VNA $214,047.50 in attorney's fees; $16,550 in administrative filing fees and expenses; and $71,780.07 in arbitrators' fees and expenses to be borne entirely by JMC. Jupiter Medical Center was also required to reimburse VNA $49,890.05 for fees and expenses previously incurred by VNA. The arbitration panel later issued an order clarifying the final award to adopt and incorporate the "interim award."

D. Jupiter Medical Center's Challenges to the Arbitration Award

After the "interim award," JMC filed a motion for reconsideration arguing that the arbitration panel did not have a factual basis to reach its decision and did not base its conclusions on the four corners of the agreement. Jupiter Medical Center then filed a formal application and request to reopen the arbitration hearing contending that the proceeding needed to be reopened to allow for testimony and evidence concerning the illegality and serious regulatory concerns resulting from the panel's proposed construction and interpretation of the contract. Specifically, JMC argued that the arbitration panel issued the award based on an erroneous construction of the parties' purchase agreement as an unlawful agreement to make, influence, and steer future patient referrals to VNA in exchange for remuneration in direct violation of multiple state and federal healthcare laws and regulations, including Florida's Anti-Kickback Statutes (§§ 456.054 and 395.0185, Fla. Stat. (2009)); the

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tion. This Award shall remain in full force and effect until such time as a final award is rendered." The panel indicated it would issue a final award within thirty days after a hearing on attorney's fees and costs.

federal Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b)); Medicare Hospital Condition of participation; Discharge planning (42 C.F.R. § 482.43); Florida's Patient Brokering Act (§ 817.505, Fla. Stat. (2009)); and the Federal Civil Monetary Penalties Law (42 U.S.C. § 1320a-7a). Jupiter Medical Center cited examples of how the award construed the contract in an illegal manner, to wit: the arbitration panel found that VNA based its decision to purchase on receiving a certain amount of referrals; VNA agreed to take over the remaining three years of JMC's lease to purchase JMC's market share of referrals; and the damage award was based on a calculation solely involving illegally promised future Medicare patient referrals from JMC. The panel issued an order via e-mail denying JMC's motion to reopen the hearing because the panel "considered the matters stated in the motion in its deliberations."

Jupiter Medical Center then filed a motion to vacate the arbitration award in the United States District Court for the Southern District of Florida asserting that the award should be vacated because the award impermissibly construed the parties' contract in a manner that violated multiple federal laws, regulations, and specific, well-defined public policy; and the panel exceeded its powers by contravening the express contractual limitations imposed by the parties' contract and by issuing an award in violation of federal laws, rules, and regulations. The federal district court issued an order granting VNA's motion to dismiss for lack of subject matter jurisdiction, in which the court noted that JMC's right to relief was not dependent on resolution of federal law, but rather only whether the panel properly interpreted and construed the agreement.

While the motion was pending in federal court and before the panel issued the "Final Award of Arbitrators" and the subsequent clarification order, JMC filed a motion to vacate the arbitration award in the Fifteenth Judicial Circuit Court in and for Palm Beach County. Shortly thereafter JMC filed an amended motion to vacate the arbitration award in the circuit court alleging that the arbitration panel interpreted the contract to be an unlawful agreement and that the panel exceeded its powers. The circuit court dismissed the motion to vacate and granted the motion to enforce the award without explanation or analysis.[5]

On appeal, the Fourth District began its analysis by noting that illegality of a contract is a compelling reason not to enforce a contract, citing several cases from Florida courts indicating a refusal to enforce illegal contracts. The district court then acknowledged that section 682.13(1), Florida Statutes (2009), clearly does not include illegality of a contract as a basis to vacate an arbitral award. Nevertheless, the Fourth District held 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." *Jupiter Med. Ctr.*, 72 So. 3d at 187. The Fourth District reasoned that the arbitral award was based on a breach of contract and that a prior arbitration would not prevent the court

[5] Although the circuit court did not explain its reasoning in the order dismissing the motion to vacate, the court appeared concerned with res judicata principles (the motion to vacate was previously dismissed from federal court) and noted that the agreement regarding the illegality of the award appeared disingenuous because it was only raised after the contract was construed by the arbitration panel.

from vacating an award based on an illegal contract. Visiting Nurse Association then filed a petition to invoke this Court's discretionary jurisdiction arguing that the Fourth District's decision in *Jupiter Medical Center* expressly and directly conflicts with the Fifth District's decision in *Commercial Interiors*.

E. CONFLICT

In *Commercial Interiors*, an arbitrator presided over a dispute involving two subcontracts between Commercial Interiors Corporation of Boca Raton (Commercial Interiors) and Pinkerton & Laws, Inc. (Pinkerton). *Commercial Interiors*, 19 So. 3d at 1063. As part of the subcontracts, which contained an arbitration provision, Commercial Interiors agreed to provide interior painting and other extra work on a hotel being constructed by Pinkerton. *Id.* Commercial Interiors eventually brought suit claiming that Pinkerton had failed to pay it $51,209 for work done according to the subcontracts. Pinkerton filed a motion to compel arbitration and the case moved to arbitration. *Id.*

Once the arbitration proceedings were initiated, Pinkerton filed a motion to dismiss the claim alleging that Commercial Interiors was not entitled to payment because the subcontracts were illegal—Commercial Interiors did not have a contractor's license. The arbitrator ruled that although Commercial Interiors may have violated a local ordinance, it had not violated section 489.128, Florida Statutes (2002), which is titled "Contracts performed by unlicensed contractors unenforceable." Further, the arbitrator ruled that Pinkerton had waived its right to assert the subcontracts were illegal. *Id.* Pinkerton then filed a motion to set aside or vacate the order in the trial court. The trial court entered an order set-

ting aside the arbitrator's order and dismissed the case with prejudice. *Id.* The trial court held that, although it accepted the arbitrator's findings of fact, the subcontracts were not enforceable, and the arbitrator had misapplied section 489.128. *Id.*

On appeal, the Fifth District stated that the issue presented was limited to the standard a trial court should use in reviewing an arbitrator's ruling on illegality. *Id.* at 1064. The Fifth District then noted that if a party failed to establish one of the five grounds for vacating an award provided in section 682.13(1), Florida Statutes (2007), "neither a circuit court nor a district court of appeal has the authority to overturn the award." *Id.* (quoting *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327, 1328 (Fla. 1989)). Applying that rationale to the facts, the Fifth District held that none of the narrow grounds to vacate an award were present in the case and that the trial court's order amounted to a simple disagreement with the arbitrator's application of the law to the facts, which was an insufficient basis to set aside the arbitration proceeding. Thus, the conflict issue presented is whether the legality of a contract is subject to review on a motion to vacate.

Visiting Nurse Association argues before this Court that the Fourth District erred in holding that the trial court must determine whether a contract is legal prior to enforcement of an arbitration award because section 682.13(1) sets forth the only grounds on which a court shall vacate an arbitration award. Jupiter Medical Center argues that contract illegali-

ty is an exception to the statute,[6] and the arbitrators exceeded their powers pursuant to section 682.13(c). For the reasons discussed below, we resolve the conflict by approving *Commercial Interiors* and disapproving *Jupiter Medical Center* because courts cannot review an arbitration award based on a claim of contract illegality. Further, we hold that the arbitrators did not exceed their powers.[7]

II. ANALYSIS

A. Standard of Review

Visiting Nurse Association contends that it is the arbitrator's role to decide the legality of the contract; JMC, however, contends that a court must decide whether a contract is legal prior to enforcement of an arbitral award. Further, JMC contends that the arbitrators exceeded their powers within the meaning of section 682.13(c). Thus, the issues presented are pure questions of law, subject to de novo review. *See Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 461 (Fla. 2011) (citing *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010)). We now turn to the merits.

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[6] We note that JMC does not argue that the contract itself is illegal, but only that the arbitration panel's erroneous construction of the contract rendered it unlawful. In short, JMC disagrees with the arbitrator's application of the law to the facts. Jupiter Medical Center also appears to invite this Court to address the legality of the agreement. However, we do not address the merits of this argument.

[7] Visiting Nurse Association also argued, as a secondary issue, that JMC's motion to vacate was untimely filed and therefore a legal nullity. We find it unnecessary to address this issue in light of our resolution of VNA's other arguments.

B. Federal Arbitration Act

Neither party noted whether the Federal Arbitration Act (FAA) or the Florida Arbitration Code (FAC) applied to this case. Although the FAA controls when a transaction involves interstate commerce, "[i]n Florida, an arbitration clause in a contract involving interstate commerce is subject to the [FAC], to the extent the FAC is not in conflict with the FAA."[8] *See Shotts*, 86 So. 3d at 463-64. An arbitration clause in a contract not involving interstate commerce is subject to the FAC. *O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd.*, 944 So. 2d 181, 184 (Fla. 2006).

To determine if a transaction involved interstate commerce, courts look to whether the transaction in fact involved interstate commerce, even if the parties did not contemplate an interstate commerce connection. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995). Here, both parties to the contract are Florida companies; the purchase agreement involved a home health care agency with operations in Florida; the lease agreements were for office space in Florida; the patients were treated in Florida; and there is no evidence that the patients treated were from outside the state. However, referral of Medicare patients was contemplated and occurred as part of the transaction. Thus, this transaction in fact involved interstate commerce and is subject to the FAA. *See THI of N.M. at Hobbs Ctr., LLC v.*

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[8] The FAA's enactment demonstrates a national policy favoring arbitration, and forecloses state legislative attempts to restrict the enforceability of arbitration provisions in agreements. *Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *see also Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

Spradlin, 893 F. Supp. 2d 1172, 1183-84 (D.N.M. 2012) *aff'd,* 532 Fed. Appx. 813 (10th Cir. 2013) (holding that a disputed transaction involved interstate commerce where Medicare paid for a portion of care and the hospital received payment from the New Mexico Medicaid Program, a substantial portion of which is funded by the federal government); *Canyon Sudar Partners, LLC v. Cole ex rel. Haynie*, CIV. A. 3:10-1001, 2011 WL 1233320 (S.D.W. Va. 2011) (holding that the disputed transaction involved interstate commerce where the plaintiff alleged, among several other factors, that the health care received was paid for by the federal Medicare program and requests for payments were sent to South Carolina); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987-88 (Ala. 2004) (holding that the disputed transaction involved interstate commerce where one of the factors alleged was that 95% of the income received by the nursing home derived from federally funded Medicaid or Medicare); *Miller v. Cotter*, 863 N.E.2d 537, 544 (Mass. 2007) (noting that health care is an activity that in the aggregate would represent a general practice subject to federal control and holding that "accepting payment from Medicare, a Federal program (which there was some evidence of here), constitutes an act in interstate commerce") (citing *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 327 (1991)). Although the FAA provisions control, we also apply the FAC to the facts of this case because, as demonstrated below, the FAC is not in conflict with the FAA. *See Shotts*, 86 So. 3d at 463-64; *Miller*, 863 N.E.2d at 544 (acknowledging that the FAA applies, but applying the Massachusetts Arbitration Act because the FAA only preempts state law on arbitration where the state act seeks to limit the enforceability of arbitration contracts). We first ad-

dress federal case law to determine whether a court reviewing an arbitral award on a motion to vacate can consider the claim that a contract containing an arbitration provision is void for illegality pursuant to the FAA.

1. Whether a Court Can Consider the Claim that a Contract Containing an Arbitration Provision is Void for Illegality

The United States Supreme Court has repeatedly observed that "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.' " *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006)). Section 2 of the FAA "makes contracts to arbitrate 'valid, irrevocable, and enforceable,' so long as their subject involves 'commerce.' " *Id.* at 582 (citing 9 U.S.C. § 2). Under the FAA, questions of arbitrability must be resolved "with a healthy regard for the federal policy favoring arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989). With these principles in mind, in *Buckeye*, the Supreme Court addressed whether "a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality" with regard to section 2 of the FAA. 546 U.S. at 442.

In *Buckeye*, the respondents entered into various deferred-payment transactions with the petitioner, in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge. For each separate transaction they signed a "Deferred Deposit and Disclosure Agreement"

(Agreement), which included arbitration provisions. *Id.* The respondents brought a putative class action, alleging that the petitioner charged usurious interest rates and that the agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face. The petitioner moved to compel arbitration. The trial court denied the motion, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void ab initio. The Fourth District Court of Appeal reversed, holding that because the respondents did not challenge the arbitration provision itself, but instead claimed that the entire contract was void, the agreement to arbitrate was enforceable, and the question of the contract's legality should go to the arbitrator. The respondents appealed, and this Court reversed "reasoning that to enforce an agreement to arbitrate in a contract challenged as unlawful 'could breathe life into a contract that not only violates state law, but also is criminal in nature.' " *Id.* at 443 (quoting *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 870 (Fla. 2005) *rev'd*, 546 U.S. 440 (2006), and *opinion withdrawn*, 930 So. 2d 610 (Fla. 2006)). The United States Supreme Court then granted certiorari review.

The Supreme Court began its analysis by noting that Congress enacted the FAA to overcome judicial resistance to arbitration. *Id.* It then observed that challenges to the validity of arbitration agreements can be divided into two types: challenges to the validity of the agreement to arbitrate within the contract; and challenges to the contract as a whole, either on a ground that directly affects the entire agreement, or on the ground that a provision is illegal, which renders the whole contract invalid. *Id.*

The claim brought by the respondents was identified as one of the second type of challenges. The Supreme Court noted that it previously addressed the question of "who—court or arbitrator—decides these two types of challenges" in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967), where it held that federal courts are not permitted to consider challenges to the contract as a whole. *Buckeye*, 546 U.S. at 444. Further, in *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984), it held that the FAA created a body of substantive law applicable in state and federal courts. Thus, *Prima Paint* and *Southland* answered the question presented by establishing three propositions: "First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, 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*. Third, this arbitration law applies in state as well as federal courts." *Buckeye*, 546 U.S. at 445-46 (emphasis added). Applying those principles to the facts of the case, the Supreme Court held that a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. *Id.* at 446.

Jupiter Medical Center, however, argues that the Supreme Court's use of the phrase "in the first instance" indicates that it anticipated a subsequent proceeding by a court to decide the claim that a contract containing an arbitration provision is void for illegality.[9] We disagree. In *Buckeye*, the issue pre-

[9] Jupiter Medical Center also argues that *Buckeye*, which involved a motion to compel arbitration rather than a motion to enforce or vacate an arbitration award, is inapposite to the cir-

sented was whether a court or arbitrator decides if a contract is void for illegality, not which tribunal has the first opportunity to resolve the claim.[10] The Supreme Court discussed the import of a determination of who—arbitrator or court—has the authority to decide claims arising out of a contract containing an arbitration provision in *First Options of Chicago, Inc. v. Kaplan*:

> Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). *But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, e.g.*, 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427,

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cumstances presented here. Although a motion to compel arbitration is procedurally distinguishable, the determination that the issue of a contract's legality is to be decided by an arbitrator, however, necessarily results in circumscribed court review pursuant to 9 U.S.C. § 10 as we discuss in the analysis.

[10] In addition, the phrase "in the first instance" qualifies the immediately preceding portion of the sentence: "the issue of the contract's validity is considered by the arbitrator. . . ." Thus, in light of the Supreme Court's broadly stated issue and holding, the Supreme Court intended hat the arbitrator would consider legality of the contract before proceeding to the merits of the contractual dispute as opposed to creating an additional layer of review for contract illegality claims.

> 436-437 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), *overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (emphasis added). As *First Options* makes clear, the Supreme Court's determination that an arbitrator "should consider the claim that a contract containing an arbitration provision is void for illegality" limits a party's right to the circumscribed court review provided in 9 U.S.C. § 10. *Buckeye*, 546 U.S. at 442. Thus, we cannot read *Buckeye* as establishing a subsequent de novo court review for contract illegality claims in this context. Such a reading would be inconsistent with the Supreme Court's efforts to avoid interpretations of the FAA that would " 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process. . . .' "*Hall St.*, 552 U.S. at 588 (citations omitted).

Despite this apparent legislative limitation on the authority of the courts to vacate an arbitral award, JMC argues that a court cannot enforce an arbitration panel's interpretation of a contract if it results in the violation of some well-defined, dominant public policy that is to be ascertained by "reference to the laws and legal precedents and not from general considerations of supposed public interests," citing to authority from various federal courts and the Supreme Court of Connecticut. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (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"); *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983) ("If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it."); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, Int'l, 861 F.2d 665 (11th Cir. 1988); *Mercy Hosp., Inc. v. Mass. Nurses Ass'n.*, 429 F.3d 338, 343 (1st Cir. 2005) (noting that an exception to the general rule that the arbitrator has the "last word" is that courts may refuse to enforce illegal contracts); *I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F. Supp. 92, 94-95 (S.D. Fla. 1984) ("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 to public policy . . . the legality of the contract clause at issue here must be determined before the arbitration award can be enforced."); *State v. AFSCME, Council 4, Local 2663*, 777 A.2d 169, 178 (Conn. 2001) (explaining that Connecticut recognizes a public policy exception to section 52-418, Connecticut General Statutes, which mirrors the FAA, because "[w]hen a challenge to the arbitrator's authority is made on public policy grounds . . . the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award."). However, these cases did not involve arbitration under the FAA and are thus inapplicable to the question of whether extra-statutory grounds for invalidating an arbitration award survived the decision in *Hall Street* in cases, such as this one, that are governed by the FAA.

In *Hall Street*, petitioner Hall Street Associates, L.L.C., and respondent Mattel, Inc., initiated litigation in the United States District Court for the District of Oregon, but soon reached an impasse on the parties' indemnification portion of the dispute. The parties offered to submit to arbitration and the District Court was amenable. As a result, the parties drafted an arbitration agreement, approved by the District Court and entered as an order, providing the District Court with the authority to vacate, modify, or correct any award where the arbitrator's findings of fact were not supported by substantial evidence or where the conclusions of law were erroneous. *Hall St.*, 552 U.S. at 579.

Arbitration proceedings took place and the arbitrator ruled that Mattel was not obligated to indemnify Hall Street. Hall Street subsequently filed a motion to vacate, modify, or correct the arbitration decision on the ground that the arbitrator's decision constituted legal error. The District Court vacated the award based on the standard of review provided in the parties' contractual agreement. *Id.* at 580. After the arbitration decision was revised on remand, each party sought modification in the District Court, which largely upheld the award pursuant to the same standard of review provided in the parties' agreement.

On appeal to the Ninth Circuit Court of Appeals, Mattel argued that the arbitration agreement's provision for judicial review of legal error was unenforceable. The Ninth Circuit reversed in favor of Mattel, instructing the District Court to consider the original decision of the arbitrator pursuant to the grounds allowable under 9 U.S.C. § 10, or modified or corrected under 9 U.S.C. § 11. After the District

Court again held for Hall Street, reasoning that the arbitration award rested on an implausible interpretation of the lease and thus exceeded the arbitrator's powers, the Ninth Circuit reversed, holding that implausibility is not a valid basis for vacatur. Thus, the Supreme Court granted certiorari review to consider whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive or whether the statutory grounds may be supplemented by contract. *Id.* at 581.

Title 9 U.S.C. § 10(a) provides in part:

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and defi-

> nite award upon the subject matter submitted was not made.

And Title 9 U.S.C. § 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Hall St., 552 U.S. at 582 n.4.

The Supreme Court began its analysis by recognizing that "[t]he Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions open to expansion by agreement." *Id.* at 583. Hall Street first argued that "ex-

pandable judicial review authority" has been the law since *Wilko v. Swan*, 346 U.S. 427 (1953). The Supreme Court disagreed. It noted that although the "*Wilko* Court . . . remarked . . . that '[p]ower to vacate an [arbitration] award is limited' . . . and . . . 'the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation,' " this statement did not recognize "manifest disregard of the law" as an additional ground for vacatur. *Hall St.*, 552 U.S. at 584 (quoting *Wilko*, 346 U.S. at 436-37). Further, the Supreme Court acknowledged that *Wilko* expressly rejected the concept of general review for an arbitrator's legal errors and noted the vagueness of the *Wilko* Court's reference to "manifest disregard" of the law. *Hall St.*, 552 U.S. at 585. Indeed, the Supreme Court suggested that "manifest disregard" of the law could have been a new ground for review, reference to § 10 collectively, or reference to only §§ 10(a)(3) or 10(a)(4), which are the provisions authorizing vacatur when the arbitrators were guilty of misconduct or exceeded their powers. *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207"); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)).

The Supreme Court then discussed "whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration." *Hall St.*, 552 U.S. at 586. It ultimately concluded that the

> text compels a reading of the §§ 10 and 11 categories as exclusive. To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] . . . powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted"; the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits."

Id. It further reasoned that "it makes more sense to see the three provisions . . . as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. It then concluded that any other reading "opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,'. . . and bring arbitration theory to grief in post arbitration process." *Id.* (citations omitted). Accordingly, the Supreme Court held that the statutory grounds were exclusive and could not be supplemented by contract. *Id.* at 584.

The Supreme Court's decision in *Hall Street*, which addressed the *parties'* ability to expand the statutory bases for vacating an award by contract, but focused on the exclusivity of the categories listed,

has led to a federal circuit court split regarding whether *Hall Street* prohibits all extra-statutory grounds for vacating an award, including judicially created grounds.

In *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009), the Fifth Circuit Court of Appeals concluded that *Hall Street* restricts the grounds for vacating an award to those set forth in section 10 of the FAA and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA. The Fifth Circuit reasoned that "[i]n the light of *Hall Street's* repeated statements that 'We hold that the statutory grounds are exclusive,' " it could not be interpreted as applying only to contractual expansions of section 10 of the FAA. The Seventh Circuit has held that "[s]ome decisions of this circuit . . . have implied that 'manifest violation of law' has some different or broader content. *See, e.g., Edstrom Indus., Inc. v. Companion Life Ins. Co.*, 516 F.3d 546, 552 (7th Cir. 2008). But . . . none survives [*Hall Street*]." *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (holding that manifest disregard of the law is not a ground on which a court may reject an arbitrator's award under the FAA). The Eighth Circuit has also found that claims that the arbitrator disregarded the law are not cognizable under 9 U.S.C. § 10. *Medicine Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) ("Appellants' claims, including the claim that the arbitrator disregarded the law, are not included among those specifically enumerated in § 10 and are therefore not cognizable."). Finally, the Eleventh Circuit agreed with the Fifth Circuit that the categorical language of *Hall Street* compels the conclusion that judicially created bases for vacating

an award are no longer valid. *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010) (citing *Hall Street*, 552 U.S. at 586, 589, 590 ("the text compels a reading of the [sections] 10 and 11 categories as exclusive"; "the statutory text gives us no business to expand the statutory grounds"; "[sections] 10 and 11 provide exclusive regimes for the review provided by the statute")).

The Second and Ninth Circuits, on the other hand, treat manifest disregard of the law as a judicial interpretation of the district court's power under section 10(a)(4) where the arbitrator "exceeded [his] powers" or "so imperfectly executed them that a mutual, final, and definite award . . . was not made." *See Comedy Club, Inc. v. Improv W. Assoc.*, 553 F.3d 1277, 1290 (9th Cir.) (concluding that "manifest disregard of the law remains a valid ground for vacatur" because it is "shorthand for a statutory ground under the FAA. . . ."), *cert. denied*, 130 S. Ct. 145 (2009); *Stolt-Nielsen v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008) (same), *cert. granted, Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 129 S.Ct. 2793 (2009).[11] The Sixth Circuit has concluded in an unpublished opinion that *Hall Street* "did not foreclose federal courts' review for an arbitrator's manifest disregard of the law" because it held only that the FAA prohibits contractual expansion of the statutory grounds for vacating an award, but did not address whether those grounds could be supplemented judicially. *Coffee Beanery, Ltd. v. WW, L.L.C.,* 300 Fed.

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[11] The Supreme Court did not decide whether manifest disregard survived *Hall Street* "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." *Stolt-Nielsen*, 559 U.S. at 672 n.3.

Appx. 415, 418-19 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 81 (2009). The Fourth Circuit Court of Appeals also found that "manifest disregard continues to exist either as 'an independent ground for review or as a judicial gloss.'"[12] *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012).

Like the Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals, we are of the view that the FAA bases for vacating or modifying an arbitral award cannot be supplemented judicially or contractually after *Hall Street*. As the Supreme Court noted in *Hall Street*, "it makes more sense to see the three provisions . . . as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolv-

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[12] The Third and Tenth Circuits have declined to address this issue. *Abbott v. Law Office of Patrick J. Mulligan*, 440 Fed. Apx. 612, 620 (10th Cir. 2011) ("But in the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned."); *Paul Green Sch. Of Rock Music Franchising, L.L.C. v. Smith*, 389 Fed. Appx. 172, 177 (3d Cir. 2010) (unpublished) (citing *Bapu v. Choice Hotels Int'l Inc.*, 371 Fed. Appx. 306 (3d Cir. 2010) (unpublished); *Andorra Servs. Inc. v. Venfleet, Ltd.*, 355 Fed. Appx. 622, 627 (3d Cir. 2009) (unpublished). Further, although the First Circuit briefly addressed the issue in dicta, it chose not to squarely determine whether its case law on manifest disregard of the law could be reconciled with *Hall Street*. *See Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010) (citing *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (acknowledging that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the FAA in light of *Hall Street*, but declining to reach the question of whether *Hall Street* precludes a manifest disregard inquiry in the setting presented)).

ing disputes straightaway."[13] 552 U.S. at 588. Accordingly, courts cannot review the claim that an arbitrator's construction of a contract renders it illegal. We now turn to JMC's argument that the arbitrators exceeded their powers.

2. Whether the Arbitrators Exceeded their Powers

In *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the question presented was whether an arbitrator "exceeded [his] powers" pursuant to 9 U.S.C. § 10(a)(4) by finding that the parties' contract provided for class arbitration. The Supreme Court noted at the outset that "[a] party seeking relief under [9 U.S.C. § 10(a)(4)] bears a heavy burden. 'It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error.'" *Oxford Health*, 133 S. Ct. at 2068 (quoting *Stolt-Nielsen*, 559 U.S. at 671). It further noted that an arbitral decision " 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits" because the parties " 'bargained for the arbitrator's construction of their agreement.' " *Id.* (quoting *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000) (quoting *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987); (internal quotation marks omitted))). Thus, a

[13] Further, the Supreme Court suggested that the enumerated grounds for vacatur in 9 U.S.C. §10 are exclusive in *First Options*. There, the Supreme Court held that if parties contractually agree to submit the question of arbitrability itself to arbitration, then "the court should give considerable leeway to the arbitrator, setting aside his or her decision *only in certain narrow circumstances*," citing 9 U.S.C. §10. *First Options*, 514 U.S. at 943 (emphasis added).

court has the power to overturn an arbitrator's determination only if "'the arbitrator act[s] outside the scope of his contractually delegated authority'—issuing an award that 'simply reflect[s] [his] own notions of [economic] justice' rather than 'draw[ing] its essence from the contract.'" *Id.* (quoting *Eastern Associated Coal*, 531 U.S. at 62 (quoting *Misco*, 484 U.S. at 38)). Effectively, the Supreme Court narrowed the question presented to whether the arbitrator arguably interpreted the parties' contract. Id. Accordingly, because the Supreme Court observed that the arbitrator twice considered the parties' contract and decided whether it reflected an agreement to permit class proceedings, it held that the arbitrator did not exceed his powers.

The Supreme Court also determined whether an arbitrator exceeded his powers in *Stolt-Nielsen*. There, it found that an arbitrator did exceed his powers by ordering a party to submit to class arbitration. The Supreme Court reasoned that the parties had entered into a stipulation stating that they had never reached an agreement on class arbitration, which made clear that the panel's decision could not have been based on the parties' intent. *Stolt-Nielsen* at 673 n.4, 676 ("Th[e] stipulation left no room for an inquiry regarding the parties' intent."). The Supreme Court concluded that "the panel simply imposed its own conception of sound policy" and thus exceeded its powers. *Id.* at 675, 677.

Here, JMC argues that the arbitrators exceeded their powers because the panel interpreted the purchase agreement in a manner that would violate state and federal laws, regulations, and rules resulting in both civil and criminal penalties. Specifically, JMC points to sections 20, 24, and 28 of the purchase

agreement, which expressly state that the parties were not to construe the discharge planning procedures, the purchase price of the home health care agency (HHA), and either of the leases as an illegal agreement to make, influence, and steer future patient referrals to VNA. In short, the parties were to interpret the requirements of the contract in a manner consistent with state and federal health care laws. Thus, JMC essentially argues that the arbitrators exceeded their powers because they *interpreted* the contract in a manner allegedly inconsistent with the contract's terms. It is clear from JMC's argument that it simply disagrees with the panel's construction of the contract rather than alleging that the panel "imposed its own conception of sound policy." Accordingly, the arbitration panel did not exceed its powers pursuant to 9 U.S.C. § 10(a)(4).

Based on the foregoing, JMC's claim that the arbitration panel construed the contract to be an unlawful agreement is not grounds for review pursuant to 9 U.S.C. § 10, and the arbitration panel did not otherwise exceed its powers pursuant to 9 U.S.C. § 10(a)(4). Our review of the provisions of the FAC leads us to the same conclusion.

C. Florida Arbitration Code

1. Whether a Court Can Consider the Claim that a Contract Containing an Arbitration Provision is Void for Illegality

"When construing a statute, this Court attempts to give effect to the Legislature's intent, looking first to the actual language used in the statute and its plain meaning." *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 439 (Fla. 2013) (citing *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005)).

"'Where the statute's language is clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent.'" *Trinidad*, 121 So. 3d at 439 (quoting *Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 234 (Fla. 2009)).

Section 682.13(1), Florida Statutes (2009), provides:

> (1) Upon application of a party, the court shall vacate an award when:
>
> (a) The award was procured by corruption, fraud or other undue means.
>
> (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.
>
> (c) The arbitrators or the umpire in the course of her or his jurisdiction exceeded their powers.
>
> (d) The arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s. 682.06, as to prejudice substantially the rights of a party.
>
> (d) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in

> proceedings under s. 682.03 and unless the party participated in the arbitration hearing without raising the objection.
>
> But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

§ 682.13(1), Fla. Stat. (2009). The unambiguous language of section 682.13(1) does not include the term "illegality" or require a court to vacate an arbitrator's "illegal construction of the underlying contract." Further, the list of circumstances set forth in section 682.13(1) is directed at arbitral misconduct or lack of authority, and not mere errors of law, or errors of construction or interpretation of a contract. Accordingly, although Florida courts are wont to refuse to enforce an illegal contract as noted by the Fourth District, the plain language of the statute constrains the courts' authority to vacate awards to the five grounds set forth in section 682.13(1). *See Jupiter Med. Ctr.*, 72 So. 3d at 186 (noting case law indicates that Florida courts will not enforce an illegal contract). Indeed, we have previously held that section 682.13(1) sets forth the only grounds upon which an award of an arbitrator may be vacated.

In *Schnurmacher*, 542 So. 2d at 1328, a commercial lessor filed a motion to vacate an arbitrator's award finding that the commercial lessor rather than the lessee was obligated to pay sales tax on rental payments. The circuit court confirmed the award and the Third District Court of Appeal reversed. This Court held that "in the absence of one of the five factors set forth in [section 682.13], neither a trial court nor a district court of appeal has the authority to

overturn the award" despite the arbitrator's erroneous interpretation of the statutes governing sales tax obligations. *Id.* This Court specifically observed that "it is well settled that 'the award of arbitrators in statutory arbitration proceedings cannot be set aside for mere errors of judgment either as to the law or as to the facts; if the award is within the scope of the submission, and the arbitrators are not guilty of the acts of misconduct set forth in the statute, the award operates as a final and conclusive judgment.'" *Id.* (quoting *Cassara v. Wofford*, 55 So. 2d 102, 105 (Fla. 1951); and citing *District School Bd. v. Timoney*, 524 So. 2d 1129 (Fla. 5th DCA 1988), *Prudential-Bache Sec., Inc. v. Shuman*, 483 So. 2d 888 (Fla. 3d DCA 1986), *McDonald v. Hardee Cnty. School Bd.*, 448 So. 2d 593 (Fla. 2d DCA), *rev. denied*, 456 So. 2d 1181 (Fla. 1984), and *Newport Motel, Inc. v. Cobin Rest., Inc.*, 281 So. 2d 234 (Fla. 3d DCA 1973)); *see also Felger v. Mock*, 65 So. 3d 625, 626 (Fla. 1st DCA 2011) ("Section 682.13(1), Florida Statutes (2009), sets forth the only grounds upon which an arbitration award in a statutory arbitration proceeding may be vacated. . . ."); *Commercial Interiors*, 19 So. 3d at 1064 ("We have specifically held that in order to vacate an arbitration award a party must establish one of the five section 682.13 grounds."). Accordingly, section 682.13(1) sets forth the only grounds upon which an arbitration award will be vacated and an arbitration panel's alleged construction of a contract to be an unlawful agreement is not one of those five grounds.

Jupiter Medical Center, however, argues that there is a public policy exception to the statute. We decline to adopt a public policy exception to the statute. In reaching this conclusion, we are mindful of the hypothetical possibility that an arbitration panel

could erroneously determine that an agreement is lawful and not void for illegality. Indeed, it was this concern in part that led us to determine in *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005) *rev'd and remanded,* 546 U.S. 440 (2006) and *opinion withdrawn*, 930 So. 2d 610 (Fla. 2006), that a claim that a contract was void for illegality should be decided by the courts and not arbitrators. *See Cardegna*, 894 So. 2d at 862 (quoting *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. 5th DCA 2000) (indicating a concern with submitting a claim that a contract is void for illegality to arbitration because it "could breathe life into a contract that not only violates state law, but also is criminal in nature")).

Parties to an agreement containing an arbitration provision, however, specifically bargained for an arbitrator's construction and interpretation of the agreement as an alternative to litigation in the courts system, as opposed to an additional step in the process. *See B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907 (11th Cir. 2006) (noting that the "laudatory goals of [arbitration] will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest"). This characteristic of arbitration—finality—is perhaps its most prized feature. For instance, in *Schnurmacher*, this Court stated:

> The reasons underlying the need for finality of arbitration awards were expressed in *Johnson v. Wells*, 72 Fla. 290, 297; 73 So. 188, 190-91 (1916):
>
> The reason for the high degree of conclusiveness which attaches to an award made by arbitrators is that the parties have by agreement substituted a tribunal of their own

> choosing for the one provided and established by law, *to the end that the expense usually incurred by litigation may be avoided and the cause speedily and finally determined.* To permit the dissatisfied party to set aside the award and invoke the judgment of the court upon the merits of the cause would be to render it merely a step in the settlement of the controversy, instead of a final determination of it.
>
> These reasons, articulated by this Court over seventy years ago, remain relevant under today's arbitration legislation. As petitioner notes, the *finality and* enforceable *nature of an arbitration award is a characteristic of arbitration that distinguishes it from other forms of alternative dispute resolution.* To allow judicial review of the merits of an arbitration award for any reasons other than those stated in section 682.13(1) would undermine the purpose of settling disputes through arbitration. We find it incumbent to adhere to the *longstanding principle of finality of arbitration awards in order to preserve the integrity of the arbitration process as a means of alternative dispute resolution.*

Schnurmacher, 542 So. 2d at 1328-29 (emphasis added). Here, the parties to the agreement received the benefit of their bargain—arbitral construction of the agreement as opposed to litigation in the courts system.[14] Thus, we decline to adopt a public policy

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[14] We again note that neither party contested the legality of the contract during the arbitration proceedings; only after an adverse arbitration award did JMC raise the issue of the con-

exception under these circumstances because such an exception would evince resistance to arbitration and deprive the parties of perhaps arbitration's ultimate benefit of finality. *See id.* at 1329.

Likewise, we find that the circumstances presented here do not merit relief pursuant to section 682.13(1)(c), Florida Statutes (2009), because the arbitrators did not exceed their powers.

2. Whether the Arbitration Panel Exceeded its Powers

As noted above, JMC argues that the arbitrators exceeded their powers because the panel interpreted the purchase agreement in a manner that would violate state and federal laws, regulations, and rules resulting in both civil and criminal penalties. Because the phrase "exceeded their powers" in section 682.13(1)(c), Florida Statutes (2009), does not encompass misinterpretations of contractual provisions or other errors of law, but is jurisdictional in nature, we disagree.

In *Schnurmacher*, this Court discussed the meaning of "exceeded their powers" as follows:

> Section 682.13(1)(c) declares that an arbitration award may be vacated if it is shown that the arbitrator exceeded his or her power. Respondent now urges us to interpret subsection (c) to include that if an arbitrator de-

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tract's illegality by asserting that the arbitration panel's *construction* of the contract rendered it unlawful. Further, the arbitration panel considered and rejected JMC's arguments. Where, as here, a contract is not patently illegal and criminal in nature, more expansive judicial review of an arbitral decision would amount to simple disagreement with an arbitrator's application of the law to the facts.

> parts from the accepted rule of law, then the arbitrator's award can be vacated on the ground that the arbitrator exceeded his or her power. However, our view is that an arbitrator exceeds his or her power under subsection (c) when he or she *goes beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the resolution of the issue submitted to arbitration. See International Medical Centers, Inc. v. Sabates*, 498 So. 2d 1292 (Fla. 3d DCA), *review denied*, 508 So. 2d 14 (Fla. 1987); *Broward County Paraprofessional Ass'n v. McComb*, 394 So. 2d 471 (Fla. 4th DCA 1981); *Dubbin v. Equitable Life Assurance Society of the United States*, 234 So. 2d 693 (Fla. 4th DCA), *cert. denied*, 238 So. 2d 423 (Fla. 1970).

Schnurmacher, 542 So. 2d at 1329 (emphasis added); *see also Nucci v. Storm Football Partners*, 82 So. 3d 180, 183 (Fla. 2d DCA 2012) (noting that an arbitrator exceeds his power only when he exceeds the authority the parties granted him in their agreement to arbitrate and stating that an arbitrator may very well exceed his authority when he decides an issue that is not pertinent to resolving the issue submitted to arbitration).

The 2009 version of the statute, applicable here, provides that a court shall vacate an award when "[t]he arbitrators or the umpire in the course of her or his jurisdiction exceeded their powers."[15]

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[15] This section was subsequently amended n 2013. It was changed to section 682.13(1)(d) and provides that a court shall vacate an award when "an arbitrator exceeded the arbitrator's

§ 682.13(1)(c) (2009). Thus, a claim that an arbitrator exceeded his or her powers is jurisdictional in nature and is in reference to the scope of authority given to an arbitrator in the arbitration agreement. Moreover, reading this subsection of the statute together with the remainder of the statute, it is clear that the Legislature intended the grounds for vacating an award to be misconduct-oriented or process-oriented. For instance, the statute provides circumstances under which an award could be vacated such as corruption, fraud, undue means, evident partiality, misconduct prejudicing the rights of any party, refusal to postpone the hearing upon sufficient cause being shown or refusal to hear evidence material to the controversy, or that there was no agreement or provision for arbitration. Even the cases cited by JMC to support its proposition demonstrate the jurisdictional quality of this subsection.

In *Soler v. Secondary Holdings, Inc.*, 832 So. 2d 893 (Fla. 3d DCA 2002), the Third District considered the appellant's claim that an arbitrator exceeded the scope of his jurisdiction, which was limited to a determination of whether a joint venture existed between the parties. *Id.* at 894. In holding that the arbitrator exceeded his authority because both the arbitration agreement and the trial court's order limited the arbitration proceeding to a determination of whether a partnership was formed, the Third District noted that "[a]n Arbitrator exceeds his or her power when he or she goes beyond the authority granted by the parties and decides an issue not per-

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powers." It is not clear why the "in the course of her or his jurisdiction" language was stricken from the statute. Nevertheless, the absence of such language from the 2009 statute would not alter the result.

tinent to the resolution of the matter submitted to arbitration." *Id.* at 895.

In *Edstrom Industries*, the Seventh Circuit Court of Appeals held that "the arbitrator cannot disregard the lawful directions the parties have given them. If they tell him to apply Wisconsin law, he cannot apply New York law." *Edstrom Indus.*, 516 F.3d at 552 (holding that manifest disregard of the law is not a ground on which a court may reject an arbitrator's award under the FAA). Thus, *Edstrom* stands for the proposition that an arbitrator exceeds his or her powers if the arbitration clause directs the arbitrator to apply a particular state's laws and the arbitrator chooses to apply a different state's laws, which would be acting outside the scope of authority provided by the parties to the contract.

Here, the parties' arbitration clause authorized the arbitration panel to preside over "[a]ny dispute, controversy or claim arising out of or related to this Agreement or the breach hereof"—the clause did not contain any other limiting language of authority. The arbitration panel presided over a claim for breach of the agreement, awarding damages and attorney's fees and costs. Thus, by awarding damages based on a breach of contract, the arbitration panel "did what the parties had asked" and did not "decide[] an issue not pertinent to the resolution of the issue submitted to arbitration."[16] *See Schnurmacher*, 542 So. 2d at

[16] If JMC's argument did apply, such a construction of section 682.13(1)(c), Florida Statutes (2009), would lead to parties such as VNA contesting an arbitrator's determination that a contract is illegal and unenforceable on the very same grounds. For instance, if the arbitrator were to have held that the contract was unenforceable despite language in the contract stating the parties were to construe the agreement in accordance with the law,

1329; *Oxford Health*, 133 S. Ct. at 2069. Accordingly, the arbitration panel did not exceed its powers.

III. CONCLUSION

Based on the foregoing, the claim that an arbitration panel construed a contract containing an arbitration provision to be an unlawful agreement is an insufficient basis to vacate an arbitrator's decision pursuant to the FAA or the FAC. Further, the arbitration panel did not exceed its powers. Accordingly, we quash the Fourth District's decision in *Jupiter Medical Center, Inc. v. Visiting Nurse Ass'n of Florida, Inc.*, 72 So. 3d 184 (Fla. 4th DCA 2011), because the district court below erred in holding that a court must determine whether a contract is legal prior to enforcing an arbitral award based on the contract.

It is so ordered.

PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal – Direct Conflict of Decisions

Fourth District – Case No. 4D10-1803

(Palm Beach)

[counsel list omitted]

VNA would argue that the arbitrator exceeded his or her powers because the contract constrained the arbitrator from reaching such a determination.

APPENDIX B

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT
July Term 2011

JUPITER MEDICAL CENTER, INC.,
Appellant,

v.

VISITING NURSE ASSOCIATION OF FLORIDA, INC.,

Appellee.

No. 4D10-1803

[September 14, 2011]

THORNTON, JOHN W., JR., Associate Judge

Appellant brought the action below to vacate an arbitral award on the ground that it was based on an illegal contract. Appellee filed both a motion to dismiss and a motion to enforce the award. The trial court did not address the issue of the contract's legality, dismissed Appellant's action and entered an order enforcing the arbitral award. Because a Florida court cannot enforce an illegal contract, we reverse and remand for the trial court to consider the legality of the contract.

Appellee Visiting Nurse Association of Florida, Inc. ("VNA"), a home health care agency, bought community hospital Appellant Jupiter Medical Center, Inc. ("JMC")'s home health care agency business. VNA paid $639,000 to JMC based upon an agreed appraisal. VNA purchased the business pursuant to

a Home Health Care Agreement, which contained a broad arbitration provision.

VNA believed that JMC was not performing its contract obligations and filed an arbitration claim for breach of contract with the American Arbitration Association. The arbitration panel found that JMC breached the contract and awarded VNA $1,251,213 in damages.

JMC filed with the arbitrators a motion to re-open, arguing that the contract, as construed by the arbitrators, violated state and federal laws prohibiting medical care providers form accepting payment in return for home care patient referrals. JMC's motion to re-open the arbitration was denied. JMC then filed a petition with the United States District Court for the Southern District of Florida seeking to vacate the award. The court dismissed the petition for lack of subject matter jurisdiction. JMC then filed the motion to vacate with the Palm Beach County Circuit Court. In response, VNA filed a motion to dismiss and a motion to enforce the arbitration award.

The trial court refused to reach the question of whether the contract was legal. The court denied JMC's motion to vacate and entered final judgment on the arbitration award in favor of VNA. JMC appeals.

The 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.

The standard of review in this case, based on the trial court's decision not to consider the question of the contract's legality, is a decision of law which is reviewed de novo. *See Bosem v. Musa Holidings, Inc.*, 46 So. 3d 42, 44 (Fla. 2010).

Illegality is a compelling reason not to enforce a contract. *See Title & Trust Co. of Fla. V. Parker*, 468 So. 2d 520, 524 (Fla. 1st DCA 1985) (holding that where a "contract contains a clause that is illegal, a court ought not to enforce the illegal term, as a contract cannot give validity to an otherwise illegal act").

Florida cases indicate a broad refusal to aid the enforcement of illegal contracts.

> The principle that courts will not enforce illegal contracts is well established. . . . [T]here 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 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.

Gonzalez *v. Trujillo*, 179 So. 2d 896, 897-98 (Fla. 3d DCA 1965) (citations omitted); *see also Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001) (where a contract is void as violative of Florida law, it "confers no enforceable rights on appellants based upon it"); *Schaal v. Race*, 135 So. 2d 252, 256 (Fla. 2d DCA 1961) ("'[W]hen a contract or agreement, express or implied, 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.'"

(quoting *Local No. 234, etc. v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821 (Fla. 1953))).

VNA attempts to distinguish this case because the parties had gone through arbitration. VNA contends that section 682.13(1), Florida Statutes (2009) provides a list of five circumstances under which a court will vacate an arbitral award. *See Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327, 1328 (Fla. 1989). The list does not include illegality. VNA argues that the trial court therefore lacked the authority to vacate the award.

While 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 b reach of a contract. If the contract is found to be illegal, a prior arbitration will not prevent the trial court from vacating the award. *See Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. 5th DCA 2000) ("A claim that a contract is illegal and, as in this case, criminal in nature, is not a matter which can be determined by an arbitrator. An arbitrator cannot order a party to perform an illegal act.") (citing *Hill v. Norfolk & W.Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987); *I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F.Supp. 92, 94, 95 (S.D. Fla. 1984) ("[A] court may not enforce a contract that is illegal or contrary to public policy. . . .[T]he legality of the contract clause at issue here must be determined before the arbitration award can be enforced.").

VNA also argues that JMC waived the defense of illegality. *Miami Elecs. Ctr., Inc. v. Saporta*, 597 So. 2d 903, 904 (Fla. 3d DCA 1992) ("The defendants did not plead illegality as an affirmative defense, and the

issue was not tried below by consent; accordingly, the defendants have waived this defense."). We disagree. The issue was initially raised with the arbitration panel, though not until after the award was entered. It was raised in federal court, but not decided, because of the dismissal for lack of jurisdiction. And it was raised and argued, though not decided, in the trial court below. JMC did not waive the defense.

When 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.

Reversed and Remanded.

Ciklin and Levine, JJ., concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David E. French, Judge; L. T. Case No. 502009CA028465.

[counsel list omitted]

Not final until disposition of timely filed motion for rehearing.

APPENDIX C

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CIVIL DIVISION
CASE NO: 50 2009 CA 028465 AD
JUDGE: DAVID E. FRENCH

JUPITER MEDICAL CENTER, INC.,

Movant,

v.

VISITING NURSE ASSOCIATION

OF FLORIDA, INC.,

Respondent.

FINAL JUDGMENT

This matter, having come before the Court on Respondent's, VISITING NURSE ASSOCIATION OF FLORIDA, INC. ("VNA"), Petition/Motion to Enforce Arbitration Award and for Entry of Final Judgment against Movant, JUPITER MEDICAL CENTER, INC. ("JMC"), and based upon the Court's review and the argument of counsel, and the Court being otherwise fully advised in the premises, this Court hereby,

FINDS and DETERMINES as follows:

1. A dispute arose between the parties and it was submitted to the American Arbitration Association ("AAA"), in accordance with their Contract.

2. The assigned Arbitration Panel rendered its Interim Award on May 20, 2009 awarding damages to VNA in the amount of One Million Two Hundred Fifty One Thousand Two Hundred Thirteen Dollars ($1,251,213.00), with interest accruing at the statutory rate of eight (8%) percent from the date of the Interim Award on $900,000.00 of the award amount, and reserved jurisdiction to award attorney fees and costs. Subsequently, on October 7, 2009, a final award in favor of VNA, including the award of attorney's fees and costs in the additional amount of $263,937.55, with the attorney's fees and costs to be paid within thirty (30) days.

3. This Court properly has jurisdiction over the parties and the subject matter herein.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

4. Respondent, Visiting Nurse Association of Florida, Inc. shall recover from Movant, JUPITER MEDICDAL CENTER, INC., the sum of $1,251,213.00, in damages, pre-judgment interest through April 16, 2010 in the amount of $64,898.60, attorney's fees in the amount of $263,937.55, pre-judgment interest through April 16, 2010 in the amount of $10,933.65; making a total sum due of $1,590,982.80, that shall bear interest at the rate of eight (8%) percent a year, for which sums let execution issue forthwith.

5. The Court reserves jurisdiction to enter any further post-arbitration orders or awards deemed necessary.

DONE and ORDERED in West Palm Beach, Palm Beach County, Florida on _____, 2010.

[Stamped "Signed & Dated
April 13, 2010
Judge David E. French"]
DAVID E. FRENCH
CIRCUIT COURT JUDGE

[service list omitted]

APPENDIX D

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 32 193 Y 00806 07

Visiting Nurse Association of Florida, Inc.
and
Jupiter Medical Center, Inc.
James P. Ketterhagen, MD

FINAL AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the above-named parties and dated February 28, 2005, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Interim Award dated May 20, 2009 do hereby, AWARD, as follows:

As requested by Claimant and stipulated to by Respondent, Claimant shall recover attorney's fees in the amount of $214,047.50.

The administrative filing and case service fees of the AAA, totaling $16,550.00, shall be borne as follows: entirely by Jupiter Medical Center, Inc.

The fees and expenses of the arbitrators totaling $71,787.07 shall be borne as follows: entirely by Jupiter Medical Center, Inc.

Therefore, Jupiter Medical Center, Inc. shall reimburse Visiting Nurse Association of Florida, Inc. t he sum of $49,890.05, representing that portion of said

fees and expenses in excess of the apportioned costs previously incurred by Visiting Nurse Association of Florida, Inc.

The above sums are to be paid on or before thirty (30) days from the date of this Award.

Claimant's Motion for Status Conference is DENIED.

This Award is in full settlement and satisfaction of all claims and counterclaims submitted in this Arbitration. All claims not expressly granted herein are hereby, denied.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

[arbitrators' signatures omitted]

APPENDIX E

David Earle

From: langbeinpa@bellsouth.net
Sent: Wednesday, June 17, 2009 6:50 PM
To: 'walkerj@adr.org'; jadams; David Earle; maustin@mwe.com

This email constitutes an e-order relating to Respondent's new counsel's request to file a reply. The Panel has considered the request to file a reply and grants it. Respondent's motion to re-open the hearing is denied as the Panel considered the matters stated in motion in its deliberations.

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Leslie W. Langbein, Esq.
Board Certified by the Fla. Bar in
Labor & Employment Law
8181 NW 154th Street, Suite 105
Miami Lakes, FL 33016
Tel: (305) 556-3663
Fax: (305) 556-3647
Email: langbeinpa@bellsouth.net

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[e-mail disclaimer omitted]

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION TRIBUNAL

Case No. 32-193-Y-000806-07

In re:
Matter of the Arbitration Between:

VISITING NURSE ASSOCIATION
OF FLORIDA, INC.

Claimant/Counter-Respondent

and

JUPITER MEDICAL CENTER, INC.

Respondent/Counter-Claimant

Before: Leslie W. Langbein, Arbitrator
Michael Kosnitzky, Arbitrator
Dr. James Schwade, Arbitrator

On behalf of Claimant: David B. Earle, Esq.
Thomas Gallagher, Esq.

On behalf of Respondent: Janet W. Adams, Esq.
Ryan Kopf, Esq.

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated February 28, 2005 and having been duly sworn and having duly heard the proofs and allegations of the Parties, do hereby issue this INTERIM AWARD as follows.

PROCEDURAL BACKGROUND

This proceeding arises out of a purchase/sale agreement dated February 28, 2005 between the parties which provides for arbitration. The undersigned Arbitrators were selected and accepted their appointment. An evidentiary hearing was held in Palm Beach Gardens, Florida on February 3 and 4th, 2009. All parties were afforded the opportunity to call witnesses and present evidence in support of their respective positions. A court reporter was present at the hearing but a transcript of the hearing was not provided to the Panel.

The parties submitted post-hearing briefs. The evidentiary portion of the hearing was declared closed on April 15, 2009. Members of the arbitration panel relied upon their own notes, the affidavits submitted by the parties, the exhibits, pre- and post-hearing briefs and motions to prepare this Award. The Arbitrators have duly considered the proofs, allegations, and evidence of the parties in arriving at the following reasoned Award. The failure to comment on evidence or testimony offered at hearing or in pre- or post-hearing submissions should not be construed as a failure to duly consider it.

FACTUAL BACKGROUND

The Arbitration Panel finds that JUPITER MEDICAL CENTER, INC. ("JMC") operated an in-house home health care agency ("HHA") for many years. JMC housed some of its HHA off-campus in leased office space. VISITING NURSE ASSOCIATION OF FLORIDA, INC. ("VNA") approached JMC in or around 2004 to determine whether the hospital would be willing to sell it the HHA. Upon receiving an affirmative response, VNA performed its due dili-

gence 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.[1] VNA then tendered an offer to JMC to purchase the HHA. JMC contracted for an appraisal to determine a fair asking price. The evaluation report found there was "significant competition" faced by home health agencies in the region and determined that $639,000 was the market value of JMC's HHA.

The parties negotiations culminated in a purchase/sale agreement ("the Agreement") in which VNA purchased JMC's HHA and its goodwill at market value in cash. The salient terms were that in exchange for the purchase price, VNA would obtain JMC's rights and interests in and to the HHA.[2] The Agreement provided that VNA would have:

> "***access to the institution*** and work space consisting of, at a minimum, a desk, telephone access and the ability to temporarily secure patient records, ***but not separate office space,*** provided that all such accommodations shall be subject to any regulations and governmental guidelines intending to insure freedom of choice for patients."

[Emphasis Supplied]. To memorialize VNA's right to occupy space in the hospital, the parties contempo-

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[1] VNA based its determination to purchase on receiving 45-50 referrals per month. There were 240 Medicare referrals during the year 6/05-6/06. That figure fell to 182 for the period 6/06 to 6/07.

[2] JMC discharge planner Mari Bock testified that prior to JMC's sale of its HHA to VNA, JMC had a greater opportunity for market share because of its access to doctors and patients.

raneously entered into an "office lease" agreement which provided, in pertinent part, that VNA might be required to relocate within JMC but always would occupy space "in DC planning office." Importantly, the lease provided that it would terminate only "upon dissolution of Tenant."

The Agreement also contained specific discharge planning procedures in an attached Exhibit D which followed 42 USC § 428.43 but further provided,

> "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 VNA is to facilitate the smooth transfer of patients into post-hospital care and thereby reduce the average length of stay for hospitalization.***"

[Emphasis Supplied].

Another essential term of the deal was that VNA take over 5000 square feet of the Hospital's existing 10 year lease of office space in Jupiter ("Jupiter Farms") where JMC had housed its HHA at an expense of $375,000.[3/4] While VNA did not actually need the space (its operations were consolidated in a building in Stuart), it agreed to carry the remaining

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[3] The lease charged $28 sq. ft. plus CAM expenses. Per the Agreement, VNA was to pay 50% of the rent.

[4] The record establishes that the purchase/sale agreement, the sublease and the office lease were executed simultaneously, constitute the complete understanding of the parties, and meant to be construed as one transaction. As such they will referred to in this opinion as "the Agreement."

three years of JMC's lease just to purchase JMC's market share of HHA referrals. VNA also agreed to hire all of JMC's existing HHA staff.[5] Ms. Bock testified that she was told by JMC's administrators that VNA's purchase of the hospital's HHA would be "seamless" and nothing would change the then current discharge process.[6]

The parties closed their deal on February 28, 2005. Thereafter, JMC turnd in its HHA license and VNA applied for a new license. VNA was issued a key to JMC's discharge planning office on the third floor of the hospital and was provided hospital badges for its employees. VNA assigned Adele Bradley to the discharge planning office to serve as its admissions coordinator. Ms. Bradley was accepted and well-liked by hospital staff.

However, soon VNA began noticing a decline in referrals to its agency. By early 2006, VNA took steps to address the decline with hospital staff. It attributed the decrease to JMC not telling its physicians about the change. VNA met with JMC's case managers and tried to market its services.[7] VNA's Vice President Bill Miller also met with JMC's Di-

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[5] VNA's Clinical Director Laura Graham previously worked for JMC's HHA at the Jupiter Farm's office, not on the campus of the hospital.

[6] Initially, the discharge planners informed patients that VNA had bought JMC's HHA and athat VNA had offices in the hospital. Ms. Bock testified this changed after VNA no longer could access the hospital's discharge planners and its access to the hospital was restricted.

[7] Mr. Crow testified that VNA had experienced a similar decline in referrals when it first took over the HHA at Martin Memorial Hospital.

rector of Discharge Planning Cathy Hamilton to familiarize her with the nature of the parties' relationship and the content of Exhibit "D" to the Agreement.[8] Ms. Hamilton was invited to VNA's quality improvement meetings so she could become more familiar with the agency. However, per Mr. Miller, these efforts did not improve the referral rate to VNA.[9] Around this time, JMC had 20 agencies including VNA receiving HHA referrals.

JMC hired Paul Dell Uomo as its new chief executive officer in or around November, 2006. Mr. Miller

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[8] Mr. Miller did not provide Ms. Hamilton with a copy of Exhibit "D" instead merely informing her what it required. Ms. Hamilton testified she was told that if a patient had no preference, she was to mention VNA. When she was hired in May, 2005, the procedure to be used was not written down.

[9] Ms. Hamilton created a spread sheet for the period of October, 2006 through September, 2007 to determine the distribution of HHA referrals. It showed that VNA received 19 of the 70 referrals to HHAs in 11/06 or 27%. The following month, VNA's share fell to 24% of 79 referrals. In 12/06, VNA received 32% of the 75 referrals. In 1/07, VNA's share of the 85 referrals was 27%. In 2/07 VNA received 12 of the 64 referrals and its market share was 18%. The largest number of referrals made by JMC occurred in March, 2007. VNA received 30% of 122 referrals. (It was one of 40 HHA's registered at JMC at that time.) Referrals to all HHAs significantly declined in 4/07 due to the fact that hospital census dropped during the off-season. VNA got a mere 3% of referrals. VNA's share of referrals rose to 16% in May, 2007 when it received almost double the number of referrals of any other agency. In June, 2007—when Adele Bradley was terminated—VNA's share dropped to 11%. From March through June, 2007, VNA's chief competitor was an HHA called Comprehensive which received numerous referrals from certain surgeons. Per Ms. Hamilton, if a doctor recommends a specific HHA, patients generally accept that recommendation.

met with Mr. Dell Uomo and learned that he was not aware of the relationship between JMC and VNA. Mr. Dell Uomo represented that he would review the Agreement and share it with his hospital staff. At or around the same time, Adele Bradley advised VNA's Clinical Supervisor Laura Graham that she suspected JMC was using a rotation system to assign HHAs. Ms. Graham questioned Ms. Hamilton about this and was told it was not true.[10]

On June 4, 2007, VNA determined that it was not going to renew the Jupiter Farms lease after its expiration and notified JMC of this fact.[11] Four days later it terminated Adele Bradley's employment because it believed she had to been ineffective in cultivating relationships with JMC's discharge planners. Per Ms. Graham, several doctors—who previously had been good referral sources—were angered by Ms. Bradley's termination. When VNA hired an office temp to replace Ms. Bradley, she was given "the cold shoulder." The permanent replacement for Ms. Bradley resigned shortly after she began.

A week later, VNA found a notice posted on the office door advising it of JMC's new vendor policy.[12/13]

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[10] Mari Bock, who worked as a discharge planner during this time, testified that a rotation system was implemented after Ms. Hamilton was hired. It was only if a patient had formerly used JMC's HHA, that he or she was told that VNA had bought the HHA.

[11] VNA's representatives at hearing testified that it vacated the Jupiter Farms office space due to a severe mold problem. Yet no evidence was presented nor testimony adduced of VNA every placing JMC on notice of the problem.

[12] Since 2005, VNA had shared a small office with JMC's discharge planning staff which lacked ventilation. Due to this potential code violation, JMC made arrangements to transfer its

The notice advised that vendors would not be allowed in patient care areas unless invited by a case manager. Vendors were prohibited from visiting patients to solicit referrals. Per Ms. Hamilton, this policy was instituted to control traffic on patient floors, guard patient medical information, and reduce vendor interference with hospital staff. The policy limited VNA's access to patient floors and the discharge planners.

Within days of the posting of JMC's new vendor policy, it hired Dr. Ketterhagen as its Chief Medical Officer. Mr. Miller scheduled a meeting with Dr. Ketterhagen in August, 2007 to discuss the Agreement. Ms. Hamilton also attended. Mr. Miller brought a copy of the Agreement and Exhibit "D". In the meeting, Mr. Miller learned that upon Dr. Ketterhagen's arrival he had directed the Discharge Planning Department to continue its rotation system to ensure equal distribution of HHA referrals. At discharge, each patient was asked if s/he either had an existing relationship or preference for a HHA or accepted a doctor's recommendation for a particular HHA. If the patient did not, the discharge planners assigned the patient next HHA on their lists. 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 insisted

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discharge planning staff to a patient floor in June, 2007. VNA continued to occupy the small office and no longer had direct access to JMC's discharge planning staff unless invited to the patient floor.

[13] Per Mari Bock, JMC always had a strict vendor policy but VNA had been exempted from the policy as a result of its takeover of the hospital's HHA.

that JMC had to assign its patients to VNA if they expressed no preference.

On September 10, 2007, Dr. Ketterhagen notified VNA that because of a dirth of space, it could no longer maintain office space with the hospital. The letter also stated:

> "Please consider this letter our formal notification to you that as of the date of your staffs final department from office space at Jupiter Medical Center, ***we will no longer be informing patients of the previous relationship that existed between Jupier Medical Center_and the Visiting Nurses Association.***"

[Emphasis Added]. When VNA failed to pay rent on the Jupiter Farms office after 9/07, JMC filed suit in circuit court. VNA instituted this arbitration on November 1, 2007.

OPINION

Arbitrators are bound to interpret and apply only language found within "the four corners of an agreement;" they cannot add, delete, change or amend language that is agreed to by the parties. This principle directs arbitrators to uphold the intent of the parties and give effect to the benefits for which they have bargained, regardless of belief in the sagacity of the choices made. Arbitrators should be even more discerning when parties to an arbitration agreement are established business concerns who understand their industry and legal constraints. There is no question here that the parties to the Agreement—two health care companies—understood and appreciated the risks and benefits involved in their transaction and in particular how governmen-

tal regulations might affect the terms of their Agreement.

A preponderance of evidence at hearing established that JMC breached the Agreement in two material respects. JMC never made its Discharge Planning Department staff aware of Exhibit "D" after the closing, much less took steps to train them or require adherence to the negotiated "script."[14] Even after Mr. Miller met with Ms. Hamilton in 2006 to explain the nature of VNA's relationship to the hospital, JMC took no steps to insure that its contractual obligation to VNA in Exhibit "D" was fulfilled. The closest JMC ever came to compliance with Exhibit "D" after that date was by informing ***its former HHA patients*** that VNA had purchased the agency. 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.[15] That JMC's discharge staff may have uttered that the hospital had a good relationship with VNA did not satisfy Exhibit "D" when the phrase "***and all of its registered HHAs***" qualified the

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[14] While JMC argues that the only testimony at hearing supports that the discharge planners followed Exhibit "D", this is illogical since JMC did not even provide its staff with a copy of Exhibit "D".

[15] "Nudge" theory is a concept well known in behavioral economics. Nudge theory is generally defined as the harmless engineering that attracts a person's attention and alters behavior. See, *Nudge*, R. Thaler and C. Sunstein (2008). An example of "nudge" theory is placing vegetables in a more prominent place on a table than junk food.

statement. Even if this equivocation did not violate the Agreement, Dr. Ketterhagen's September 10, 2007 letter informing VNA that JMC "will no longer be informing patients of the previous relationship that existed" between the parties surely did.

The second material breach of the Agreement occurred when JMC terminated VNA's office lease. Occupying an office inside the hospital with access to the discharge planning staff was another material consideration for VNA's $639,000 payment to JMC. Office space in the hospital gave VNA "visability" and the ability to contact doctors and other patient referrers. Without office space in the hospital and the accessibility it provided to hospital staff, VNA would have been on equal footing with the myriad of other agencies registered with the hospital to receive referrals. Testimony established that VNA never would have paid such a substantial sum without this benefit.

Contrary to JMC's position, the office lease did contain a defined lease term—expressed simply as "until dissolution of Tenant." This phrase is not ambiguous nor does it create a lease with a perpetual term. *See, e.g. City of Gainesville v. Board of Control*, 81 So. 2d 513 (Fla. 1955). In fact, this handwritten term is an expression of "the occurrence of an event .... as terminating the lease" permitted in paragraph 10 of the office lease. Moreover, the hand-written term clearly was read and understood by JMC's then Chief Executive Officer Michael Barry who signed the office lease and JMC's attorney who witnessed his signature. The phrase "until dissolution of tenant" comports with the parties' understanding that the relationship was intended to be a long, mutually beneficial one. *City of Homestead v.*

Beard, 600 So. 2d 450 (Fla. 1992) [contract not terminable at will if nature of contract and circumstances surrounding its creation establish the intent of parties].

JMC's position that VNA did not establish a breach of the office lease for lack of proof of its last date of occupancy also has no merit. Dr. Ketterhagen's September 10, 2007 unambiguously notified VNA that it would no longer be able to "maintain an office at Jupiter Medical Center" and had up to sixty (60) days to vacate. Regardless of whether VNA chose to vacate sooner or later, there is no question that it was evicted. And when JMC repudiated the Agreement on September 10, 2007, VNA no longer was obligated to continue paying rent on the Jupiter Farms office lease.

But while VNA has succeeded in establishing JMC's breach of contract, its efforts to prove damages arising from JMC's actions are not as easily achieved. Damages must be causally related to the breach. *MCI Worldcom Network Services, Inc. v. Mastec, Inc.*, 995 So. 2d 221 (Fla. 2008). Here, the record is replete with evidence of factors—other than JMC's rotation system—which impacted VNA's ability to achieve the expected return on its investment.

Foremost, evidence was presented that the number of Medicare referrals dropped from 240 to 182, a 25% decline between 2005/2006 and 2006/2007. Secondly, testimony and evidence established that VNA faced increased competition for a limited number of referrals. A spreadsheet compiled by JMC in or around September, 2007 showed 49 different HHAs were registered with JMC to receive HHA referrals. Third, VNA's business plan failed to account for loss of referrals due to patient ***choice*** or doctor ***referral***

to a competitor.[16] In fact, the only evidence presented at hearing led to the opposite conclusion: VNA lost an enormous amount of business because of referrals made by two surgeons to a competitor. Plus, there was testimony and evidence introduced that VNA may have lost some physician referrals because of its decision to terminate Adele Bradley who was well liked among hospital staff and physicians. The succession of of individuals who replaced Ms. Bradley also may have impacted the development of relationships and VNA's bottom line.

Finally, try or wish as it might, VNA did not step into JMC's shoes after closing the deal. VNA had to work earnestly to establish the relationships that existed for 20 years between JMC and its physicians and staff. VNA admittedly encountered the same problem and decline in revenue after it purchased Martin Memorial Hospital's HHA. It struggled at Martin Memorial to earn back market share. VNA offered no evidence of the time it took to overcome the decline and realize its anticipated revenue stream at Martin Memorial Hospital.

Nor did VNA offer evidence to show that JMC, itself—had the sale never been culminated—would have been immune from the same increased competition and declining Medicare referrals faced in the service area by VNA. Thus, while the rotation system of referrals instituted by JMC may have affected VNA's bottom line, it was by no means the ***only*** negative factor. VNA's expert did not discount his damages calculation by these legitimate factors.

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[16] Evidence established that JMC did not track the source of its HHA referrals.

Given this scenario, the Panel finds that VNA could not have expected to earn a $1.5 million dollar 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. See fn 1. VNA also experienced significant competition due to doctor referrals which further eroded its market share by almost 60% 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, and also by the approximately 60% loss of referrals to competitors to $450,000.00. The Panel declines to find that the nine (9) years VNA has maintained its relationship with Martin Memorial Hospital is the proper measurement of its future damages and finds, instead, that a three (3) year period is more appropriate. The three year period began in September, 2007 and therefore, the only period for which future damages can be reduced to present value is 2009-2010.

The Panel concludes that VNA's damages are $1,350,000 which must be reduced to its present day value of $1,251,213.00.[17] Prejudgment interest will be awarded only on $900,000 of the $1,251,213.00. See *Mission Square v. O'Malley's, Inc.*, 783 So. 2d 1151 (Fla. 1st DCA 2001. [no prejudgment interest on future damages].

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[17] The Panel may determine reduction to present value based on its common experience that "one needs to invest less than a dollar today to insure the return of a dollar in the future." See *Brough v. Imperial Sterling, Ltd.*, 297 F.3d 1172 (11th Cir. 2002).

INTERIM AWARD

Claimant's claim for breach of contract is GRANTED. Claimant is awarded the sum of $1,251,213.00 from Respondent. Prejudgment Interest at the legal rate established by Florida law shall accrue from the date of this Interim award on only $900,000.00 of the $1,25,213.00. The Panel retains jurisdiction to consider an award of Claimant's attorneys fees and costs and directs that a hearing be set to consider attorneys fees and costs. Within thirty (30) days of the close of the hearing on attorneys fees and costs, the Panel will issue a final award. Respondent's counter-claim is DENIED.

All claims not expressly granted in this arbitration are hereby DENIED. This Interim Award is in full settlement of all claims on the merits sub mitted to this arbitration. This Award shall remain in full force and effect until such time as a final award is rendered.

DATED May 20th, 2009.

[arbitrators' signatures omitted]

APPENDIX G

SUPREME COURT OF FLORIDA

THURSDAY, NOVEMBER 6, 2014

CASE NO.: sc 11-2468
Lower Tribunal No(s).: 4D10-1803;
502009CA028465

VISITING NURSE ASSOCIATION
OF FLORIDA, INC., Petitioner

vs.

JUPITER MEDICAL CENTER, INC.,
Respondent

In light of the revised opinion, the Respondent's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, QUINCE, CANADY, and PERRY, JJ., concur.

LEWIS, J., would grant the rehearing and revise the opinion.

POLSTON, J., would deny the rehearing.

A True Copy

Test:

/s/_____ [SEAL]
John A. Tomasino
Clerk, Supreme Court

[service list omitted]

APPENDIX H

STATUTORY AND REGULATORY PROVISIONS

Federal Arbitration Act, 9 U.S.C.A. §§ 1-16

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as

exist at law or in equity for the revocation of any contract.

* * *

§ 10. Same; vacation; grounds; rehearing

Effective: May 7, 2002

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person,

other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Anti-Kickback Statute, 42 U.S.C.A. § 1320a–7b. Criminal penalties for acts involving Federal health care programs

(a) Making or causing to be made false statements or representations

* * *

(b) Illegal remunerations

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or 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, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback,

bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or 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, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to—

(A) a discount or other reduction in price obtained by a provider of services or other entity under a Federal health care program if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under a Federal health care program;

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;

(C) any amount paid by a vendor of goods or services to a person authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services reimbursed under a Federal health care program if—

(i) the person has a written contract, with each such individual or entity, which specifies the amount to be paid the person, which amount may be a fixed amount or a fixed percentage of the value of the purchases made by each such individual or entity under the contract, and

(ii) in the case of an entity that is a provider of services (as defined in section 1395x(u) of this title), the person discloses (in such form and manner as the Secretary requires) to the entity and, upon request, to the Secretary the amount received from each such vendor with respect to purchases made by or on behalf of the entity;

(D) a waiver of any coinsurance under part B of subchapter XVIII of this chapter by a Federally qualified health care center with respect to an individual who qualifies for subsidized services under a provision of the Public Health Service Act [42 U.S.C.A. § 201 et seq.];

(E) any payment practice specified by the Secretary in regulations promulgated pursuant to section 14(a) of the Medicare and Medicaid Patient and Program Protection Act of 1987 or in regulations under section 1395w-104(e)(6) of this title;

(F) any remuneration between an organization and an individual or entity providing items or services, or a combination thereof, pursuant to a written agreement between the organization and the individual or entity if the organization is an eligible organization under section 1395mm of this title or if the written agreement, through a risk-sharing arrangement, places the individual or entity at substantial financial risk for the cost or utilization of the

items or services, or a combination thereof, which the individual or entity is obligated to provide;

(G) the waiver or reduction by pharmacies (including pharmacies of the Indian Health Service, Indian tribes, tribal organizations, and urban Indian organizations) of any cost-sharing imposed under part D of subchapter XVIII of this chapter, if the conditions described in clauses (i) through (iii) of section 1320a-7a(i)(6)(A) of this title are met with respect to the waiver or reduction (except that, in the case of such a waiver or reduction on behalf of a subsidy eligible individual (as defined in section 1395w-114(a)(3) of this title), section 1320a-7a(i)(6)(A) of this title shall be applied without regard to clauses (ii) and (iii) of that section);

(H) any remuneration between a federally qualified health center (or an entity controlled by such a health center) and an MA organization pursuant to a written agreement described in section 1395w-23(a)(4) of this title;

(I) any remuneration between a health center entity described under clause (i) or (ii) of section 1396d(l)(2)(B) of this title and any individual or entity providing goods, items, services, donations, loans, or a combination thereof, to such health center entity pursuant to a contract, lease, grant, loan, or other agreement, if such agreement contributes to the ability of the health center entity to maintain or increase the availability, or enhance the quality, of services provided to a medically underserved population served by the health center entity; and

(J) a discount in the price of an applicable drug (as defined in paragraph (2) of section 1395w-114a(g) of this title) of a manufacturer that is furnished to an

applicable beneficiary (as defined in paragraph (1) of such section) under the Medicare coverage gap discount program under section 1395w-114a of this title.

* * *

42 C.F.R. § 482.43. Condition of participation: Discharge planning.

<In Allina Health Services v. Sebelius, --- F.3d ----, 2014 WL 1284834 (C.A.D.C.,2014), the court held that "the Secretary did not provide adequate notice and opportunity to comment before promulgating its 2004 rule, and so affirm the portion of the district court's opinion vacating the rule".>

The hospital must have in effect a discharge planning process that applies to all patients. The hospital's policies and procedures must be specified in writing.

(a) Standard: Identification of patients in need of discharge planning. The hospital must identify at an early stage of hospitalization all patients who are likely to suffer adverse health consequences upon discharge if there is no adequate discharge planning.

(b) Standard: Discharge planning evaluation.

(1) The hospital must provide a discharge planning evaluation to the patients identified in paragraph (a) of this section, and to other patients upon the patient's request, the request of a person acting on the patient's behalf, or the request of the physician.

(2) A registered nurse, social worker, or other appropriately qualified personnel must develop, or supervise the development of, the evaluation.

(3) The discharge planning evaluation must include an evaluation of the likelihood of a patient needing post- hospital services and of the availability of the services.

(4) The discharge planning evaluation must include an evaluation of the likelihood of a patient's capacity for self-care or of the possibility of the patient being cared for in the environment from which he or she entered the hospital.

(5) The hospital personnel must complete the evaluation on a timely basis so that appropriate arrangements for post-hospital care are made before discharge, and to avoid unnecessary delays in discharge.

(6) The hospital must include the discharge planning evaluation in the patient's medical record for use in establishing an appropriate discharge plan and must discuss the results of the evaluation with the patient or individual acting on his or her behalf.

(c) Standard: Discharge plan.

(1) A registered nurse, social worker, or other appropriately qualified personnel must develop, or supervise the development of, a discharge plan if the discharge planning evaluation indicates a need for a discharge plan.

(2) In the absence of a finding by the hospital that a patient needs a discharge plan, the patient's physician may request a discharge plan. In such a case, the hospital must develop a discharge plan for the patient.

(3) The hospital must arrange for the initial implementation of the patient's discharge plan.

(4) The hospital must reassess the patient's discharge plan if there are factors that may affect continuing care needs or the appropriateness of the discharge plan.

(5) As needed, the patient and family members or interested persons must be counseled to prepare them for post-hospital care.

(6) The hospital must include in the discharge plan a list of HHAs or SNFs that are available to the patient, that are participating in the Medicare program, and that serve the geographic area (as defined by the HHA) in which the patient resides, or in the case of a SNF, in the geographic area requested by the patient. HHAs must request to be listed by the hospital as available.

(i) This list must only be presented to patients for whom home health care or post-hospital extended care services are indicated and appropriate as determined by the discharge planning evaluation.

(ii) For patients enrolled in managed care organizations, the hospital must indicate the availability of home health and posthospital extended care services through individuals and entities that have a contract with the managed care organizations.

(iii) The hospital must document in the patient's medical record that the list was presented to the patient or to the individual acting on the patient's behalf.

(7) The hospital, as part of the discharge planning process, must inform the patient or the patient's family of their freedom to choose among participat-

ing Medicare providers of posthospital care services and must, when possible, respect patient and family preferences when they are expressed. The hospital must not specify or otherwise limit the qualified providers that are available to the patient.

(8) The discharge plan must identify any HHA or SNF to which the patient is referred in which the hospital has a disclosable financial interest, as specified by the Secretary, and any HHA or SNF that has a disclosable financial interest in a hospital under Medicare. Financial interests that are disclosable under Medicare are determined in accordance with the provisions of Part 420, Subpart C, of this chapter.

(d) Standard: Transfer or referral. The hospital must transfer or refer patients, along with necessary medical information, to appropriate facilities, agencies, or outpatient services, as needed, for followup or ancillary care.

(e) Standard: Reassessment. The hospital must reassess its discharge planning process on an on-going basis. The reassessment must include a review of discharge plans to ensure that they are responsive to discharge needs.

* * *

Fla. Stat. § 395.0185. Rebates prohibited; penalties

Effective: July 2, 2013

(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.

(2) The agency shall enforce subsection (1). In the case of an entity not licensed by the agency, administrative penalties may include:

(a) A fine not to exceed $1,000.

(b) If applicable, a recommendation by the agency to the appropriate licensing board that disciplinary action be taken.

* * *

Fla. Stat. § 456.054. Kickbacks prohibited

Effective: July 1, 2006

(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.

(3) Violations of this section shall be considered patient brokering and shall be punishable as provided in s. 817.505.

Fla. Stat. § 817.505. Patient brokering prohibited; exceptions; penalties

(1) It is unlawful for any person, including any health care provider or health care facility, to:

(a) Offer or pay any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage to or from a health care provider or health care facility;

(b) Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for referring patients or patronage to or from a health care provider or health care facility;

(c) Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for the acceptance or acknowledgment of treatment from a health care provider or health care facility; or

(d) Aid, abet, advise, or otherwise participate in the conduct prohibited under paragraph (a), paragraph (b), or paragraph (c).

* * *

(4) Any person, including an officer, partner, agent, attorney, or other representative of a firm, joint venture, partnership, business trust, syndicate, corporation, or other business entity, who violates any provision of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

* * *

(7) The provisions of this section are in addition to any other civil, administrative, or criminal actions provided by law and may be imposed against both corporate and individual defendants.

APPENDIX I

HOME HEALTH CARE AGREEMENT

THIS AGREEMENT is made this 28th day of February, 2005, by and between VISITING NURSE ASSOCIATION OF FLORIDA, INC., a Florida not-for-profit corporation ("VNA") ("Purchaser"), and JUPITER MEDICAL CENTER, INC., a Florida not-for-profit corporation (WC") ("Seller") and effective as of March 14, 2005 ("Effective Date").

WHEREAS, Seller is engaged in the business of owning and operating a home health agency in Palm Beach County, Florida, and Martin County, Florida under the names "Jupiter Medical Center Home Health Agency" and "Jupiter Medical Center Supportive Care Agency," hereinafter referred to as the "Home Health Agency," and

WHEREAS, JMC is the sole stockholder of the Seller and JMC agrees to the terms of this Agreement, including, but not limited to the transaction described herein and the Covenant Not to Compete set forth herein; and

WHEREAS, Purchaser desired to take over servicing of all the accounts of Seller in the Home Health Agency; and

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained in this Agreement, it is agreed as follows:

1. *Recitations.* The recitations set forth above

are incorporated into this Agreement.

2. *Purchase and Other Terms.* Seller agrees to sell to Purchaser and Purchaser agrees to purchase

from Seller, subject to the terms of this Agreement, the following:

All provision of services for patient accounts of the Home Health Agency, a comprehensive list of which is attached as Exhibit "A" and made a part of this Agreement; together with the prevision of services for all such accounts as the Seller may' acquire hereafter between the date hereof and the Closing Date (as defined below), with Seller subject to the Covenant Not to Compete set forth herein.

JMC shall sell, assign and deliver to' VNA all assets owned by JMC as part of the Home Health Agency (the "Home Health Agency Assets") (see Exhibit B). Assets would include all unencumbered equipment on site at the Jupiter Farms office. 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.

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* who shall be provided with reasonable work site accommodations, consisting of access to the institution and work space consisting of, at a minimum, a desk, telephone access and the ability to temporarily secure patient records, *but not separate office space*, provided that all such 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 a 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 mission of community service and not-for-profit status, as funds allow.

3. *Purchase Price.* The purchase price shall be $639,000.00, paid in cash at closing.

4. *Medical Records.* The Buyer shall assume *responsibility* for and retain the original medical records of patients transitioning to Buyer for such periods of time as required to comply with all applicable federal and state statutes and regulations, and for the applicable statute of limitations for professional negligence. The Seller may elect at its expense to make and retain copies of 'all such records. The Buyer shall, in any event, provide Seller with access to all such records during normal business hours and the right to copy such records at its own expense. In the event the Seller receives a subpoena or other request for any records in the possession and custody of the Buyer, the Seller shall notify the Buyer and the Buyer shall provide either the original or a copy of such records, as required to comply with the request.

5. *Name, Prior Contracts, Costs, Taxes and Closing Costs.*

A. The Purchaser shall not, at any time, use the name "Jupiter Medical Center, Inc." nor any derivative thereof, or the name of the Seller, or the names of any affiliates of Jupiter Medical Center,

Inc., for any purpose whatsoever, other than for notification or information purposes to the patients whose accounts are being transferred by the Seller to the Purchaser.

B. The Seller shall remain responsible for and shall hold Purchaser harmless against all of Seller's prior liabilities and contractual obligations both before and after closing. The Purchaser shall only be responsible for those patients (and their accounts) who transfer to the Purchaser following closing and shall not be responsible for any of the Seller's prior liabilities and contractual obligations both before and after closing.

C. The Seller shall continue to be responsible for and shall hold Purchaser harmless against Seller's taxes, insurance premiums, license fees, rents, utilities, and other expenses. None of these expenses shall be assumed by the Purchaser, except as specified in the Sublease (Exhibit "C").

D. The Purchaser shall continue to be responsible for its taxes, insurance premiums, license fees, rents, utilities, and other expenses. None of these expenses shall be assumed by the Seller.

E. With regard to the closing of this transaction, each party shall bear its own attorney's fees.

6. *Assignment of Accounts/Allocation of Reimbursements and Payments.* Seller shall transfer servicing of the accounts described in Paragraph 2, above, to Purchaser. The Seller is not assigning the Seller's accounts receivable and the Purchaser shall have no right to any portion of the Seller's accounts receivable.

In an effort to facilitate the orderly transfer and provision of home health services, the following procedure shall be employed:

> All existing home health care patients of the Seller must be discharged by the Seller no later than March 14, 2005. Those patients will be re-enrolled as new patients of the Purchaser (or such other home health care provider as patient may choose.) Any proration of payment for episodes of care will be handled directly by Medicare based' upon the services provided by the respective home health care provider.
>
> Thus, any new patient enrollments with Purchaser shall be free and clear of any encumbrance and both Seller and Purchaser shall be fully entitled to their respective accounts receivable.

7. *Closing.* This transaction shall be closed on February 28, 2005 (the "Closing Date"), at 9:30 a.m. at the offices of the Seller's attorney, or such other location in Palm Beach County, Florida as may be designated by the Seller. The closing may be held earlier or later by mutual agreement of the parties.

At the closing, the following events shall occur:

A. Purchaser shall deliver to Seller in local certified funds or wired funds the sum of $639,000.00.

B. Any other document reasonable requested by either party to effectuate this transaction shall be executed and delivered, delivery by each of the parties of each of the papers, instruments, and documents enumerated in this paragraph shall be condi-

tions precedent to the obligations of the party to whom they are to be delivered to close under this Agreement.

8. *Transfer, Notification and Employees.* On February 28, 2005, the Seller shall send written notice to all of its Home Health Agency patients informing them of their option to transfer their account to the Purchaser or another home health care agency. This letter to patients shall be subject to prior review and approval by the Purchaser, which approval shall not be unreasonably withheld. On February 28, 2005, the Seller shall send written notice to all of the employees of the Home Health Agency.

Purchaser will offer employment to such of the Seller's employees that there will not be a "mass layoff" or "plant closing" as those terms are defined under the Worker Adjustment Retraining Notification Act of 1988, as amended or any similar federal, state or local statute or ordinance, in connection with the transactions covered by this Agreement.

The Seller shall facilitate the hiring of its employees by the Purchaser, however, the Seller (or any other affiliate of Jupiter Medical Center, Inc.) shall be free to retain such employees of the Seller as it may deem appropriate.

The Seller and the Purchaser acknowledge that patients are not required to continue their care with the Purchaser, however, the Seller shall provide all reasonable and legal facilitation of such patient readmissions to the Purchaser.

9. *Seller's Certificate and License.* The Seller shall relinquish (cancel) its home health care Medicare/Medicaid Certificate' within, a reasonable time following the Effective Date. The Seller shall termi-

nate its Medicare home health care license ninety (90) days following the Closing Date. The Seller is transferring all of its home health care business, and shall not, under any circumstances, provide home health care services except as provided in this Agreement.

10. *Mutual Service Arrangement*. The affiliates of the Seller, Jupiter Medical Center, Inc., and the Purchaser are not-for-profit corporations dedicated to providing high quality cost-effective service to the community. Jupiter Medical Center and the Purchaser *agree to work cooperatively* to utilize those services which each party provides to the community to the extent such services can be provided in a high-quality and cost-effective manner and in compliance and with applicable laws and regulations. Jupiter Medical Center and the Purchaser shall mutually explore opportunities to meet the medical needs of the community together through such programs as community education, public relations, and comprehensive home health care services. Jupiter Medical Center and the *Purchaser agree to use their best efforts to accomplish these goals.*

11. *Covenant Not to Compete.*

A. Covenant. For a period of five (5) years from the date of this Agreement, Seller and JMC, for itself and on behalf of its affiliates, parent corporation (if any), subsidiaries or related companies (hereinafter in this Covenant collectively referred to as "Jupiter Medical"), agree that they, jointly and severally, shall not directly or indirectly own or operate a business which owns or operates a home health care agency nor gives any advice or counsel to not be a creditor of any individual, partnership, corporation

or other entity which owns or operates a home health care business in the State of Florida.

In the event that JMC (or any substantial portion thereof) is acquired by or merges with any other health care provider, then, in such event, this Covenant Not to Compete shall apply only to such counties in the State of Florida as JMC is doing business as of the date of said acquisition or merger.

B. Sale of Business. This restrictive covenant is against Jupiter Medical as the seller of all or a part of the assets of a business under Section 542.335(1)(d)3, *Florida Statutes*.

C. Legitimate Business Interest. Jupiter Medical agrees that the Purchaser has a legitimate business interest justifying the enforcement of this restrictive covenant, consistent with Section 542.335, *Florida Statutes*, which legitimate business interest includes, but is not limited to:

a. Valuable confidential business or professional information that does not otherwise qualify as trade secrets;

b. Substantial relationships specific prospective or existing customers, clients and vendors;

c. Customer and client goodwill associated with:

(1) an ongoing home health care agency business

(2) a specific geographic location

(3) a specific marketing and trade area

(4) a specific marketing clientele, and

d. Extraordinary or specialized training.

D. Necessity of Restrictive Covenant. Jupiter Medical agrees and acknowledges that this restrictive covenant against competition is reasonably necessary to protect the legitimate business interests of the Purchaser, and that the restraint on competition is not overbroad or overlong, and is reasonably necessary to protect the established legitimate business interests of the Purchaser described above. The Seller, the Purchaser and Jupiter Medical agree that, due to the circumstances and facts of this particular transaction and the magnitude of funds being paid from the Purchaser to the Seller, the five (5) year restriction is reasonable and warranted.

E. Compliance and Non-default of Purchaser. The enforceability of this Covenant Not to Compete against Jupiter Medical is subject to the Purchaser's compliance and non-default, as to all material matters, under this Agreement, including, but not limited to the promises and agreements made herein.

F. Status, License, Accreditation and Membership of Purchaser. If all or substantially all of the assets of the Purchaser are sold to a third party or if the Purchaser ceases to be a "community based not-for-profit entity," then, in either such event, this Covenant Not to Compete shall be rendered null and void and unenforceable against the Seller or Jupiter Medical.

If the Purchaser loses its license to operate a home health care agency or if the Purchaser loses its Medicare accreditation then, in either such event, the Purchaser shall have one hundred twenty (120) days within which to cure said loss of license or accreditation, however, during said 120 day cure period, the

Purchaser shall accept placement of all patients of Jupiter Medical who cannot be placed with another agency.

If the Purchaser is unable to cure the loss of said license or accreditation within said 120 day period, then, in either such event, this Covenant Not to Compete shall be rendered null and void and unenforceable against the Seller or Jupiter Medical.

12. *Representations and Warranties of Seller*. Seller represents and warrants the following to Purchaser:

A. Seller is a corporation, duly organized, validly existing, and in good standing under the laws of the state of Florida, and has the corporate power and authority to carry on its business as it is now being conducted.

B. The execution, delivery, and performance of this Agreement by Seller will not constitute a breach or violation of the Articles of Incorporation or By-laws of Seller, or any laws, or any agreement, indenture, deed of trust, mortgage, pledge agreement, loan agreement, or instrument to which Seller is a party or to which Seller is bound.

C. Seller has full corporate power and authority to make, execute, deliver and perform this Agreement, and the execution, delivery, performance and consummation of all documents related to this Agreement have been duly authorized by all necessary corporate action on the part of the Seller.

13. *Representations and Warranties of Purchaser*. Purchaser represents and warrants the following to the Seller:

A. Purchaser is a corporation duly organized, validly existing, and in good standing under the laws of the state of Florida, and has the corporate power and authority to carry on its business as it is now being conducted.

B. The execution, delivery, and performance of this Agreement by Purchaser will not constitute a breach or violation of the Articles of Incorporation or By-laws of purchaser, or any laws, or any agreement, indenture, deed of trust, mortgage, pledge agreement, loan agreement, or instrument to which Purchaser is a party or to which Purchaser is bound.

C. Purchaser has full corporate power and authority to make, execute, deliver and perform this Agreement, and the execution, delivery, performance and consummation of all documents related to this Agreement have been duly authorized by all necessary corporate action on the part of the Purchaser.

14. *Assignment.* This Agreement, and the rights and obligations hereunder, may not be assigned by the Purchaser without the prior written consent of the Seller, which shall not be unreasonably withheld, consonant, however, with the other provisions of this Agreement.

15. *Brokerage.* The Seller and the Purchaser acknowledge and affirm that no brokers of any kind have been used by them in this transaction.

16. *Survival.* All agreements, covenants, representations and warranties of the parties contained in this Agreement or otherwise made in writing in connection with the transaction contemplated by it shall survive the closing and the consummation of the undertakings.

17. *Ambiguities.* In the even that there are any ambiguities in this Agreement, it is agreed that all parties to this Agreement participated in its drafting, and the law construing ambiguities against the drafter shall not be applied.

18. *Applicable Law.* This Agreement shall be governed by and construed in accordance with the law of the State of Florida.

19. *Attorneys Fees/Prevailing Party.* In the event of any litigation over this Agreement or any portion or term thereof, the prevailing party shall be entitled to recover reasonable attorneys fees, costs, and expenses incurred in the litigation, including reasonable attorneys fees, costs, and expenses, incurred in all appellate review proceedings. The term "litigation" shall include all work reasonably performed by or at the direction of counsel for the prevailing party on the dispute leading up to the filing of suit in a court of competent jurisdiction, arbitration panel, or other alternative dispute resolution tribunal, and all work reasonably performed during the course of and until final conclusion of such proceedings. The term "expenses" shall include matters not otherwise awardable as "taxable costs" under applicable law, including, but not limited to, travel expenses, computerized research expenses, postage and transmission expenses, service of process charges, court reporter fees, charges of expert witnesses and consultants, and any other expense incurred by the prevailing party which is reasonably related to the litigation.

20. *Complete Agreement.* This Agreement represents the entire Agreement among the parties, and all negotiations, representations, disclosures and

other statements, written or oral, have been merged into this Agreement and superseded by it.

21. *Execution of Counterparts.* This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

22. *Notices.* All notices or other written communications required to be transmitted to the parties to this Agreement shall be deemed given on the fifth day following the day on which the same was mailed by certified mail, postage prepaid, or, if delivered by courier or overnight service, on the day delivered, or, if transmitted by facsimile, on the day so transmitted, to the parties at the following addresses and facsimile numbers:

Seller:

Ms. Terri Wentz
Chief Operating Officer
Jupiter Medical Center
1210 S. Old Dixie Highway
Jupiter, Florida 33458-7199
Fax No.: 561-748-4147

With a Copy to:

Timothy E. Monaghan, Esq.
Strawn, Monaghan & Cohen, PA
54 NE Fourth Avenue
Delray Beach, Florida 33483
Fax No.: 561-278-9462

Purchaser:

Donald R. Crow
Chief Executive Officer
Visiting Nurse Assoc. of Florida

2400 SE Monterey Road
Suite 300
Stuart, Florida 34966
Fax No.: (772) 286-0738

With a Copy to:

David B. Barle, Esq.
Ross, Earle & Bonam, PA
759 S. Federal Highway
Suite 212
Stuart, Florida 34994
Fax No.: (772) 287-8045

23. *Remedies Not Exclusive.* Unless otherwise specifically provided in this Agreement, no remedy in this Agreement shall be deemed to exclude any or all other available remedies, and all such available remedies shall be deemed to be cumulative and in addition to all other remedies which may exist in this Agreement, at law, in equity or under applicable statutes, rules or regulations.

24. *Parties Intend to be Bound; Incorporation of Language Required by Law.* The parties to this Agreement intend to be fully and legally bound by its terms. In the event that certain language or a provision of a 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.

25. *Severability and Effect of Invalidity.* In the event that any provision of this Agreement shall be held invalid or unenforceable by any court, administrative tribunal, arbitration panel, or other judicial or quasi-judicial body of competent jurisdiction, such

holding shall not invalidate or render unenforceable any other provision of this Agreement.

26. *Successors and Assigns Bound.* This Agreement shall inure to the benefit of .and shall be binding upon all patties to it, their administrators, successors, and assigns.

27. *Waiver.* In the event that any covenant or other term or provision of this Agreement is breached by any party and that breach is waived by any other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach.

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

29. *Execution of Further Documents.* Each party further agrees to execute and deliver such further and additional documents as may be reasonably requested by any party to this Agreement for the purpose of giving effect to and carrying out the meaning, purposes, intent, and actions required by this Agreement. In the event that any party shall fail or refuse to. execute or deliver any such instrument, papers, or documents, then the parties agree that the act of execution and delivery shall be enforced by an order of specific performance from a court of competent jurisdiction, and that such order shall thereafter be enforced in accordance with applicable law.

30. *Compliance and Non-default.* The enforceability of any of the terms of this Agreement against any party, or any parent, subsidiary or affiliate of any party is subject to the compliance and non-default, as to all material matters, under this Agreement of the party seeking to enforce this Agreement.

31. *Modification.* No modification of this Agreement shall be effective unless made in writing, duly executed by or on behalf of the party or parties affected by it. No forbearance by any party to enforce any provision of or any right existing under this Agreement shall constitute a waiver of any such provision or right, or be deemed to effect a modification of this Agreement.

32. *Arbitration.* Any dispute, controversy or claim arising out of or related to this Agreement or the breach hereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) maybe entered in any court having jurisdiction thereof.

33. *Headings.* The headings in this Agree-ment are for convenience of reference only and shall not control or alter the meaning of it.

[SIGNATURE PAGE FOLLOWS]

[parties' signatures omitted]

EXHIBIT "A"

Patient List

* * *

EXHIBIT "B"

Assets

* * *

EXHIBIT "C"

Sublease and Primary Lease

* * *

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 C.F.R. 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.

2. For patients enrolled in managed care organizations, the Hospital indicates the availability of home health agencies to individuals and entities that have a contract with the managed care organization.

3. The Hospital will document in the patient's medical record that the list was presented to the patient or to an individual acting on the patient's behalf.

4. The Hospital will inform the patient or the patient's family of their freedom to choose among participating Medicare home health 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.

OFFICE LEASE AGREEMENT
FACE PAGE

Lease Date:	As of the 1 day of March, 2005
Landlord:	JUPITER MEDICAL CENTER, INC., a Florida Not For Profit corporation 1210 S. Old Dixie Highway Jupiter, Florida 33458
Tenant:	VISITING NURSE ASSOCIATION OF FLORIDA, INC.
Tenant's Address:	2499 S.E. Monterey Road Suite 300 Stuart, Florida 34996
Building:	1210 S. Old Dixie Highway Jupiter, Florida 33458
Leased Premises:	80 square feet of office space located in room, 3rd Floor of the Hospital
Tenant's Use:	Office for agency intake personnel
Lease Term:	From March 1, 2005 ("Commencement Date") and continuing for a term of ___ (__) years, unless sooner terminated as provided herein ("Termination Date")
Monthly Rent:	$28.00 per square foot, plus sales tax. Rent shall include electric and HVAC. Tenant will be responsible fore its telephone expenses.

Deposit:	First month's rent plus one (1) month Security Deposit
Additional Terms:	This Lease will terminate upon dissolution of Tenant

THIS LEASE IS SUBJECT TO AND EXPRESSLY CONDITIONED ON THE TERMS AND CONDITIONS ATTACHED HERETO.

IN WITNESS WHEREOF, the parties have hereunto executed this instrument for the purposes herein expressed, the day and year first above written.

[parties' signatures omitted]

TERMS AND CONDITIONS

1. *Term*. This Lease shall be for the Term set forth in the face page; provided, however, if this Lease is terminated prior to the end of said Term, the parties shall not enter into a Lease with each other for the Leased Premises until after the expiration of said Term.

2. *Rent.* The base rent during the term of this Lease shall be the Monthly Rent set forth on the Face Page of this Lease plus applicable sales tax, which shall he payable in equal monthly installments in advance on the first day of each calendar month. If payment is not made within five (5) days of the date said payment is due, said payment shall be subject to a five percent (5%) late charge computed on the amount due to compensate Landlord for additional administrative costs. In addition, any past due payments shall accrue interest at the rate of One and 25/100 percent (1.25%) Interest per month.

3. *Environmental Contamination.* Tenant shall not cause or permit the release or disposal of any hazardous substances, wastes or materials, or any medical, special or infectious wastes, on or about the Premises or the Building of which they are a part. Hazardous substances, wastes or materials shall include those which are defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 USC Section 9601 at seq; the Resource Conservation and Recovery Act, as amended, 42 USC Section 6901 et seq; the Toxic Substances Control Act, as amended, 15 USC Section 2001 et seq; and medical, special or infectious wastes shall include those which are defined pursuant to the medical waste regulations which have been promulgated by the State of Florida and as further set forth in any state or local laws and ordinances, and their corresponding regulations. Tenant shall comply with all rules and policies set by Landlord, and with all federal, slate and local laws, regulations and ordinances which govern the use, storage, handling and disposal of hazardous substances, wastes or materials and medical, special or infectious wastes. Tenant shall indemnify, defend and hold Landlord harmless from and against any claims or liability arising out of or connected with Tenant's failure to comply with the terms of this Section which terms shall survive the expiration or earlier termination of this Lease.

4. *Condition of the Premises.* Tenant covenants and agrees that it will not make alterations, improvements or additions to the Leased Premises during the term of this Lease without first obtaining the written consent of Landlord, which shall not be unreasonably withheld and shall as soon as practical repair any damage to the Premises caused by Tenant or its employees, invitees or agents.

5. *Use and Operation of Business.* Tenant shall use and occupy the Leased Premises solely and exclusively for Tenant's use (as defined on the Face Page of this Lease).

6. *Insurance.* Tenant shall carry, during the term hereof, general public liability insurance with a carrier and with policy limits reasonably satisfactory to Landlord, but which initially shall be not less than One Million Dollars ($1,000,000) in respect of bodily injury and death and Five Hundred Thousand Dollars ($500,000) for property damage. Said policies shall name the Landlord as additional insured, as its interests may appear, and shall provide that same shall not be canceled except after ten (10) days' prior written notice to Landlord. Tenant shall provide Landlord with proof of such Insurance coverage prior to the Commencement Date of this Lease and immediately upon the renewal or change in any policy provided hereunder.

7. *Relationship of Parties.* Anything contained in this Lease to the contrary notwithstanding, it is specifically agreed that Landlord shall absolutely not be liable for any debts or other liabilities of any kind or sort whatsoever incurred by Tenant in the conduct of its business or otherwise.

8. *Landlord's Remedies and Liability.* Upon Tenant's failure to comply with any obligations under this Lease after receipt of written notice (five (5) days for financial obligations and fifteen (15) days for non-financial obligations), Landlord may immediately terminate this Lease and take such action as is otherwise available under applicable law. Landlord shall not be liable for injury or damage which may be sustained by the person, goods, wares, merchandise or property of Tenant, its employees, invitees or cus-

tomers or any other person in or about the Leased Premises. Tenant, hereby indemnifies and holds harmless Landlord of and from any and all fines, suits, claims, demands, penalties, losses and actions (including attorneys' fees) ("Damages") for any injury to persons or damage or loss of property in or about the Leased Premises, including without limitation any employee related claims whether or not designated as a worker's compensation claim under Florida law, unless due to the negligence or intentional misconduct of the Landlord, its agents or employees. In the instance of Landlord's negligence, as defined herein, Landlord shall indemnify and hold harmless Tenant for any Damages arising therefrom. Landlord shall not be liable to Tenant or any third party for any damages arising from any act or neglect of any other tenant of the Building or any other person.

9. *Security Deposit.* Tenant has deposited with the Landlord the sum set forth on the Face Page of this Lease so a "Security Deposit", receipt of which is hereby acknowledged by Landlord, as security for the payment by Tenant of the rents herein agreed to be paid by Tenant. All sums may, if permitted by law, may be commingled by Landlord with his independent funds and no interest accruing thereon shall belong to Tenant as a result of Landlord's holding of the security deposit.

10. *End of Term.* At the expiration of this Lease, whether according to its terms, or as the result of the occurrence of an event herein stipulated as terminating the Lease, Tenant shall surrender the Leased Premises to the Landlord. Any holding over after the expiration of the Lease term, which is with Landlord's written consent, shall be construed to be a tenancy from month-to-month on terms herein specified

so far as applicable. In the event such holding over is without the consent of Landlord, in addition to all other rights and remedies of the Landlord, Tenant shall be obligated to pay double the Monthly Rent set forth herein.

11. *Assignment or Sublease by Tenant.* Tenant may not assign, sublease, mortgage, encumber or otherwise transfer, in whole or in part, this Lease or any interest of Tenant hereunder, without the advance written consent of Landlord. which consent may be withheld in Landlord's sole discretion.

12. *Attorney's Fees.* In the event of a lawsuit by the Landlord to collect rent, Tenant shall not interpose any counterclaim in such proceeding; provided, however, Tenant may assert such claim in a separate action brought by Tenant. In the event of any litigation to enforce or defend any of the terms or provisions of this Lease (except an action to collect rent), the prevailing party in such litigation, shall be entitled to recover its costs and reasonable attorney's fees at all trial and appellate levels.

13. *Notice.* Whenever notice shall be required or permitted herein, it shall be delivered by certified mail, postage prepaid, with return receipt requested, or hand delivered, and shall be deemed delivered on the date shown as the delivery date on the return receipt or the date shown as the date same was refused or the postal service was unable to deliver same, or the date of hand delivery, and be given to the parties at the addresses shown on the Face Page.

14. *Force Majeure.* Landlord shall not he responsible for delays in completing any work, nor failure to provide water, electric, or sewer service when said delay or failure is due to acts of providence, military

authority, insurrection, riots, civil commotions, strikes, shortages or delays in obtaining materials, intentional and malicious acts of third parties, labor disputes enemies of the government, explosions, flood, windstorm, fire, failure of utility company to provide power source or service, or any other cause beyond the reasonable control of the Landlord. Provided, however, that if as a result of a natural disaster or other occurrence beyond Landlord's control, Tenant is unable to occupy the Premises for a period of more than five (5) consecutive days, thereafter Tenant's rental obligation hereunder shall be abated until Tenant's access to the Promises is reinstated.

15. *Broker*. Each party covenants, warrants and represents to the other that no broker was involved in this transaction or was instrumental in consummating this Lease and each agrees to indemnify and hold the other harmless from and against any and all commissions, damages, costs and attorneys' fees incurred as a result of the inaccuracy of this warranty.

16. *Separability*. Each and every covenant and agreement herein shall be separate and independent from any other and the delay in exercise, waiver or breach of any covenant or agreement shall in no way or manner discharge or relieve the performance of any other covenant or agreement or the future enforcement of the same or similar provision. Each and all of the rights end remedies given to either party by this Lease or by law or equity are cumulative, and the exercise of any such right or remedy by either party shall not impair such party's right to exercise any other right or remedy available to such party under this Lease or by law or equity.

17. *Waiver of Jury Trial*. Landlord, Tenant, and any guarantor of the this lease hereby knowingly,

voluntarily and intentionally waive the right any of them may have to a trial by jury in respect to any litigation based hereon, or arising out of, under or in connection with this lease or any document attached hereto (including any guaranty) and any other documents or instruments heretofore or hereafter executed or delivered or contemplated to be executed in conjunction herewith, or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party. This provision is a material inducement for the Landlord executing this lease.

18. *Radon Disclosure.* RADON GAS: Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and stale guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county public health unit.

At this time, we do not conduct radon testing with respect to the Building. Further, we disclaim any and all representations and warranties as to the absence of radon gas or radon gas producing conditions in connection with the Leased Premises.

19. *Entire Agreement.* This Lease together with any other written agreements entered into contemporaneously herewith constitutes and represents the entire agreement between the parties hereto and supersedes any prior understandings or agreements, written or verbal, between the parties. This Lease may be amended, supplemented, modified or discharged only upon an agreement in writing executed by all of the parties hereto. This Lease shall inure to

the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, subject, however, to the limitations contained herein. If any provision of this Lease shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

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