IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION Angela Carter, ) Case No. 6:17-cv-02457-DCC-JDA

Plaintiff, )

v. ) REPORT AND RECOMMENDATION

OF THE MAGISTRATE JUDGE Brookdale Senior Living Communities, Inc., )

Defendant. ) _____)

This matter is before the Court on a motion to compel arbitration and to stay or dismiss filed by Defendant Brookdale Senior Living Communities, Inc. ("Brookdale"). [Doc. 5.] Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), the undersigned magistrate judge is authorized to review all pretrial proceedings in this employment discrimination case and to provide a report and recommendation to the District Court.

PROCEDURAL HISTORY Plaintiff Angela Carter ("Car ter") commenced this action by filing a Complaint in the Greenville County Court of Common Pleas on August 16, 2017, alleging Brookdale discriminated against her on the basis of her race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). [Doc . 1-1.] Thereafter, Brookdale removed the case to this Court based upon federal question jurisdiction. [Doc. 1.] On September 19, 2017, Brookdale filed a motion to stay litigation and compel arbitration or, in the alternative, to dismiss the action. [Doc. 5.] Carter filed a response in opposition on October 3, 2017 [Doc. 7], and Brookdale filed a reply on October 10, 2017 [Doc. 9]. Brookdale's motion is now ripe for review.



BACKGROUND 1. Factual Allegations This matter stems from Brookdale's terminat ion of Carter from employment. [Doc. 1-1.] Brookdale operates an assisted living facility, Brookdale Cleveland Park, in Greenville, South Carolina. [Doc. 1-1 ¶ 6.] Carter began working for Brookdale at the Cleveland Park facility as a Resident Care Coordinator (an "RCC") on February 1, 2016. [Id. ¶ 9.] Carter is an African American female and is therefore a member of a protected class. [Id. ¶ 8.] At the time she was hired, Carter had an LPN diploma and had been a nurse since 2005. [Id. ¶ 10.]

Carter supervised the team of caregivers from 9 a.m. to 5 p.m. [Id. ¶ 11.] Tienka Campbell ("Campbell") was also an RCC, was equal on the chain of command to Carter, and was not African American. [Id. ¶ 12.] Despite being equals, Campbell treated, ordered, and reprimanded Carter as though she were an inferior. [Id. ¶ 29.] Carter made a complaint to Brookdale's "Integrity Line" and to her immediate supervisor, Bridget Morehouse ("Morehouse"). [ Id. ¶¶ 30-31.] However, no action was taken and nothing changed. [Id. ¶ 33.]

Carter complained again directly to Morehouse in her office, while executive director Joel Childers ("Childers") was present. [ Id. ¶ 34.] Carter was frustrated, but did not use profanity or threatening language. [Id.] After Carter finished speaking, Childers told her that the way in which she made the report required disciplinary action, which Carter said she would accept, even though she did not understand the reason for it. [Id. ¶ 35.] The next morning, Carter was called into Childers' office to m eet with Childers and Morehouse. [Id. ¶ 36.] Carter asked human resources representative April Sanders to attend the



meeting with her as a witness. [Id.] Childers discontinued the meeting without discussing the incident, and Carter went back to work. [Id.]

At the end of the day, Morehouse asked Carter to come to Childers' office, where Childers read her a termination letter. [Id. ¶ 37.] The letter stated she was being terminated for communicating in an insubordinate and disrespectful manner to her supervisor. [Id.] Childers told Carter she was being terminated because of the way she talked to her supervisor, but did not elaborate on the reason for her termination. [Id. ¶ 38.] Carter contends that the reason given by Brookdale for her termination was pretext and that Brookdale actually terminated her from employment on the basis of her race in violation of Title VII. [Id. ¶¶ 42, 55-60.]

Following her termination from employment, Carter filed a charge of discrimination with the United States Equal Employment Opportunity Commission, who transferred the charge to the South Carolina Human Affairs Commission ("SCHAC"). [ Id. ¶ 50.] On June 23, 2017, SCHAC issued a Notice of Right to Sue. [Id. ¶ 51.] Carter then initiated this action by filing a Complaint in the state court within 120 days from the date of issuance of the SCHAC's Notice of Right to Sue. [ Id. ¶ 53.]

2. The Arbitration Agreement In her declaration submitted in opposition to Brookdale's motion, Carter states that on February 1, 2016, her first day of work, she was given paperwork to fill out and sign. [Doc. 7-1, ¶¶ 3-4.] This paperwork included a copy of the Brookdale Associate Handbook ("handbook"), and Carter signed an Acknowledgment and Receipt page after reviewing the handbook. [Id.] Carter states in her declaration that she does not have a copy of the signed Acknowledgment and Receipt page. [Id. ¶ 3.] Carter further states she does not

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have a copy of the handbook she was given when she was hired, but she has a copy of the current handbook, which she attached to her declaration. [Id. ¶¶ 8-9.] The copy of the current handbook attached to Carter's declara tion outlines Brookdale's Binding Arbitration Procedure. [Id. at 50-52.] Brookdale notes in reply that the handbook submitted with Carter's declaration contains an introduction by Brookdale's former Chief Executive Officer ("CEO"), who retired as CEO in 2013, and, therefore, the handbook submitted by Carter could not have been the one provided to her at the start of her employment. [Doc. 9 at 2-3]; see SEC Filing Form 8-K (Feb. 12, 2013) at https://www.sec.gov/Archives/ edgar/data/1332349/000133234913000006/form8-k.htm; see also Phillips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) ("court may take judicial notice of matters of public record").

Carter states that the paperwork also "i ncluded an arbitration agreement (Brookdale Dispute Resolution Agreement)," but that she does not have any specific recollection of reviewing or signing that document. [Id. ¶ 5.] Brookdale submitted a copy of the Brookdale Dispute Resolution Agreement (the "Agreement") signed by Carter on February 1, 2016. [Doc. 5-2.] While Carter states in her declaration that she does not recall signing the Agreement [Doc. 7-1 ¶ 4], she concedes that she did actually sign it [Doc. 7 at 6].

The Agreement provides in pertinent part:

Covered disputes. Brookdale and I agree that any legal dispute arising out of or related to my employment (including, without limitation, those arising from the Application for Employment, my employment, or the termination of my employment) must be resolved using final and binding arbitration and not by a court or jury trial. This includes any legal dispute that has to do with any of the following: wage and hour law, seating, expense reimbursement, trade secrets, unfair competition, compensation, breaks or rest periods,

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uniform maintenance, training, discipline, termination (including defamation after my termination), discrimination, harassment retaliation, transfer, demotion, or promotion. It also includes any claims that come about through the Uniform Trade Secrets Act, Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, Equal Pay Act, Americans with Disabilities Act, Family and Medical Leave Act, Fair Labor Standards Act, Employment Retirement Income Security Act – ERISA (not including claims for benefits under any Brookdale benefit plan covered by ERISA or funded by insurance), Genetic Information Non-Discrimination Act, and any federal, state or local laws or regulations covering the same or similar matters. [Doc. 5-2 at 2 (emphasis in original).] The Agreement further provides:

Entire Agreement. This is the whole agreement between Brookdale and me relating to resolving legal disputes between us. This Agreement supersedes and replaces any other agreements between us regarding the resolution of legal disputes. . . . [Id. at 3.]

Brookdale also submitted the affidavit of Steve Martinez, Brookdale's Regional Human Resources Director. [Doc. 5-2 at 9-11.] Mr. Martinez states that the Brookdale is a national senior living solutions company with locations across the United States, and the employees of the defendant's Cleveland Park location where Carter worked make use of equipment and supplies shipped from around the country, they interact with medical and healthcare providers or resident family members from across the country, they communicate with the Brookdale's other communiti es or corporate offices outside of South Carolina, and they accept payments from customers and insurance providers throughout the country. [Id. ¶¶ 4-5.]

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APPLICABLE LAW 1. Motion to Compel Arbitration Brookdale moves to compel arbitration under the Federal Arbitration Act ("FAA"), which establishes a "strong federal public policy in favor of enforcing arbitration agreements" and is designed to "ensure judicial enforcement of privately made agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217, 219 (1985). The FAA was enacted "in 1925 in order 'to reverse the l ongstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts.'" Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 639 (4th Cir. 2002) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)). "Underlying this policy is Congress's view that arbitration constitutes a more efficient dispute resolution process than litigation." Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002) (citation omitted).

The FAA provides that arbitration clauses in contracts involving interstate commerce "shall be valid, irrevocable, and enforceable, sa ve upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. U nder the FAA, a district court must compel arbitration and stay court proceedings if the parties have agreed to arbitrate their dispute. Id. §§ 2, 3. But, if the validity of the arbitration agreement is in issue, a district court must first decide if the arbitration clause is enforceable against the parties. Id. § 4. "'[A]s a matter of f ederal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" Drews Distrib., Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 349 (4th Cir. 2001) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)). "A court should not deny a request to arbitrate an issue

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'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" Id. at 349–50 (quoting United Steelworkers of Am. v.

Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960)). Nevertheless, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Warrior & Gulf Navigation Co., 363 U.S. at 582.

A party seeking to compel arbitration must do so by establishing the following four elements: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision purporting to cover the dispute; (3) the relationship of the transaction, as evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal of a party to arbitrate the dispute. Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005); see also Whiteside v. Teltech Corp., 940 F.2d 99, 102 (4th Cir.1991); Energy Absorption Sys. v. Carsonite Int'l , 377 F. Supp. 2d 501, 504 (D.S.C. 2005). "[E]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate." Adkins, 303 F.3d at 501 (internal quotations and citation omitted). "Whether a party agreed to arbi trate a particular dispute is a question of state law governing contract formation." Id. (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 81 (2000). Thus, where a valid arbitration agreement exists and covers the claims at issue, this Court has "no choice but to grant a motion to compel arbitration." Adkins, 303 F.3d at 500 (4th Cir. 2002).

2. Motion to Stay or Dismiss

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The FAA requires a court to stay "any su it or proceeding" pending arbitration of "any issue referable to arbitration under an agreement in writing for such arbitration, and "[t]his stay-of-litigation provision is mandatory." Adkins, 303 F.3d at 500; see also 9 U.S.C. § 3. But, the Fourth Circuit has also held that if all of the claims asserted in a complaint are subject to arbitration, dismissal of the complaint is "an appropriate remedy." Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709–10 (4th Cir. 2001). Although the Fourth Circuit has acknowledged the inconsistency between its opinions on this issue, see Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 376 n.18 (4th Cir. 2012) ("There may be some tension between our decision . . . indicating that a stay is required when the arbitration agreement 'covers the matter in dispute'—and Choice Hotels—sanctioning dismissal 'when all of the issues presented . . . are arbitrable.'"), pres ently in this Circuit, a district court must stay an action pending arbitration of any arbitrable claims, with the exception that it may instead dismiss an action if all claims asserted are arbitrable. See Weckesser v. Knight Enterprises S.E., LLC, 228 F. Supp. 3d 561, 564 (D.S.C. 2017).

DISCUSSION Brookdale seeks to compel arbitration of the claims alleged in Carter's Complaint. [Doc. 5-1 at 3.] Brookdale also asks the Court to stay this action or, in the alternative, to dismiss Carter's claims. [ Id.] The Court will separately address each issue below.

1. Motion to Compel Arbitration Brookdale argues Carter is subject to the terms of the Agreement. [Doc. 5-1 at 5.] Brookdale contends the Agreement requires mandatory arbitration over all of the claims asserted by Carter in her Complaint. [Id.] Carter, on the other hand, counters that she should not be compelled to arbitration. [Doc. 7 at 1.] Specifically, Carter contends that she

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was required to sign two arbitration agreements–the Brookdale Dispute Resolution Agreement and the Brookdale Associate Handbook–and that these two agreements contradict each other on essential terms and were subject to change or revocation by Brookdale. [Id.] Carter also contends both agreements are invalid because they are one- sided, oppressive, unfair, and were signed under threat of immediate termination, depriving her of a meaningful choice. [Id.] The Court will evaluate these arguments and apply each of the elements of the four-part test to compel arbitration outlined above.

As noted by Carter, "[t]her e is unquestionably a dispute between the parties," and she has refused to arbitrate. [Doc 7 at 9.] Accordingly, the first and fourth elements of the test are met.

A. Existence of an Agreement to Arbitrate. As to the second element requiring a written agreement that includes an arbitration provision that purports to cover the dispute, Brookdale has submitted a copy of the Agreement in which, as detailed above, the parties agreed that " any legal dispute arising out of or related to [Carter's] employm ent . . . must be resolved using final and binding arbitration." [Doc. 5-2 at 2.] Carter conc edes that she signed this Agreement. [Doc. 7 at 6.] The Agreement further contains an unambiguous merger clause providing that it is the whole agreement between Carter and Brookdale and that it "s upersedes and replaces any other agreements between [the parties] regarding the resolution of legal disputes . . ." [Doc. 5-2 at 3.] "A merger clause expresses t he intention of the parties to treat the writing as a complete integration of their agreement." Wilson v. Landstrom, 315 S.E.2d 130, 134 (S.C. Ct. App.1984); see also Integration Clause, Black's Law Dictionary (10th ed. 2014)

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(also termed a "merger clause," which is defined as "[a] cont ractual provision stating that the contract represents the parties' comp lete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract"). The Agreement further provides that legal disputes arising from Carter's employment or termination from employment must be resolved through arbitration and specifically includes claims under Title VII. [Doc. 5-2 at 2.]

Carter argues that there are two arbitration agreements at issue, the Brookdale Associate Handbook that is attached to her declaration [Doc. 7-1] and the Agreement [Doc. 5-2]. She further argues that it is unclear which of these two agreements is controlling because she does not know which agreement

she signed first, or whether she signed them contemporaneously. [Doc. 7 at 6.] Carter argues that the handbook she received on her first day of work contained an arbitration agreement. [Id. at 4.] Nevertheless Carter's own declaration states that, while she recalls information in the handbook she was given about the facility, the attendance policy, tardiness, and the call in policy, she does not recall the arbitration agreement in the handbook, and she does not have a copy of that handbook anymore. [Doc. 7-1 ¶¶ 3, 9.] Carter also states that the handbook she submitted with her declaration is different from a handbook that a colleague let her review. [Id. ¶ 9.] To the extent Carter argues that the arbitration provisions in the handbook attached to her declaration constitutes an arbitration agreement between the parties, as noted above, that handbook contains an introduction by the defendant's former CEO who retired in 2013. [Doc. 7-1 at 7 and Doc. 9 at 2.] Thus, it appears to the Court that there is no real dispute as to whether that handbook was issued prior to or in 2013 and therefore predates the 2016 Agreement, which was signed by Carter on February 1, 2016. Further, Carter



concedes that she no longer has the handbook she was given at the start of her employment and that the two copies of the handbooks she has reviewed contain different provisions. Thus, there is no way to determine whether the handbook received by Carter and purportedly signed by Carter on her first day of employment contained an arbitration provision. The undersigned finds that Brookdale has met its burden of showing that a written agreement exists that includes an arbitration provision that purports to cover the dispute: the Agreement signed by Carter on February 1, 2016. This Agreement is the most recent agreement before the Court, and it contains a provision stating that it is the whole agreement relating to resolving legal disputes and that it supersedes and replaces any other agreements. [Doc. 5-2 at 3.] Further, there is no indication that a more recent superseding agreement between the parties exists.

B. Dispute Within Scope of the Agreement. In her Complaint, Carter asserts a cause of action for wrongful termination in violation of Title VII. [Doc. 1-1 ¶¶ 54-61.] As noted above, the Agreement provides that legal disputes arising from Carter's employment or terminat ion from employment must be resolved through arbitration and specifically includes claims under Title VII. [Doc. 5-2 at 2.] Accordingly, the parties' dispute is clearly within the scope of the Agreement.

C. Relationship to Interstate Commerce. Carter argues that her employment in an assisted living facility does not have a sufficient relationship with interstate commerce to come under the FAA. [Doc. 7 at 9-10.] The FAA defines "commerce" to include "co mmerce among the several States." 9 U.S.C. § 1. "[T]he term 'involving commerce' in the F AA [is] the functional equivalent of the more



familiar term 'affecting commerce'–words of art that ordinarily signal the broadest permissible

exercise of Congress' Commerce Clause power." Citizens Bank v. Alafabco, 539 U.S. 52, 56 (2003). The Agreement states that "this is a matter involving commerce." [Doc. 5-2 at 2.]

Carter relies on Timms v. Greene, 427 S.E.2d 642 (S.C. 1993), in which the Supreme Court of South Carolina determined that a contract between a nursing facility and a resident did not involve interstate commerce, despite the fact that many of the facility's goods, equipment, and supplies came from out of state. Id. at 643-44. However, Timms was overruled in its entirety by Dean v. Heritage Healthcare of Ridgeway, LLC, 759 S.E.2d 727 (S.C. 2014), in which the Supreme Court of South Carolina found that an agreement between a resident and a nursing facility did implicate interstate commerce because the agreement required the facility to provide meals and medical supplies, which the facility shipped across state lines from out-of-state vendors. Id. at 732–33. The Court in Dean referred to Timms as "a relic of the past, decided befor e the broad definition of interstate commerce set forth in Allied–Bruce Terminix Cos., Inc. v. Dobson , 513 U.S. 265 (1995)." Dean, 759 S.E.2d at 733. "Since Allied–Bruce and Dean, it is clear that an otherwise intrastate transaction involves interstate commerce when the parties perform their agreement using supplies acquired through interstate commerce." Swane Co. v. Berkeley Co. S.C., No. 2:15-2586-DCN, 2015 WL 6688072, at *3 (D.S.C. Oct. 30, 2015) (citations omitted).

This Court has previously held that a nursing home's receipt of food and supplies from out-of-state vendors is sufficient to meet the FAA's interstate commerce requirement. See McCutcheon v. THI of S.C. at Charleston, LLC, C.A. No. 2:11-CV-02861, 2011 WL

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6318575, at *5 (D.S.C. Dec. 15, 2011). As noted above, Brookdale's Regional Human Resources Director, Steve Martinez, states in his declaration that the Brookdale facility where Carter worked received equipment, supplies, and insurance payments from different locations across the country. [Doc. 5-2 ¶¶ 4-5.] Therefore, the undersigned finds that the Agreement involves interstate commerce and is subject to the FAA.

D. Enforceability of the Agreement. Carter contends that the Agreement is unenforcable because it is indefinite, illusory, and unconscionable. [Doc. 7 at 11.] Because Carter challenges the validity of the Agreement, the Court must determine if the arbitration clause is enforceable against the parties. See 9 U.S.C. § 4. To determine whether a valid agreement to arbitrate exists between the parties, this Court must look to state contract law. The Supreme Court of South Carolina has held, "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intenti ons as determined by the contract language." McGill v. Moore, 672 S.E.2d 571, 574 (S.C. 2009) (citing Schulmeyer v. State Farm Fire and Cas. Co., 579 S.E.2d 132, 134 (S.C. 2003)). "If the language is clear and unambiguous, the language alone determines the contract's force and effect." United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 413 S.E.2d 866, 868 (S.C. Ct. App. 1992) (citing Connor v. Alvarez, 328 S.E.2d 334 (S.C. 1985)). "When a cont ract is unambiguous, clear and explicit, it must be

construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." C.A.N. Enters., Inc. v. S.C. Health and Human Servs. Fin. Comm'n , 373 S.E.2d 584 (S.C. 1988) (citing Warner v. Weader, 311 S.E.2d 78, 79 (S.C. 1983)).

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Carter first argues that she should not be compelled to arbitrate because the Agreement and Brookdales's handbook contain contradictory terms rendering them indefinite. [Doc. 7 at 6-7, 11-14.] Carter's argument that there is no way to determine which agreement governs [id. at 12] fails because Carter concedes that she signed the Agreement [id. at 6]; Brookdale submitted the signed and dated copy of the Agreement [Doc. 5-2]; and Carter has failed to submit a signed handbook containing any arbitration provision. Moreover, as noted above, the Agreement contains a provision stating that it is the entire agreement between the parties and that it supersedes all prior arbitration agreements. [Doc. 5-2 at 3.] Accordingly, the terms of the Agreement control.

Similarly, Carter's argument that the agreement to arbitrate is illusory because it is subject to change also fails. [Doc. 7 at 14-16.] The handbook attached to Carter's declaration states that Brookdale "reserves . . . the right to unilaterally revise, interpret or discontinue any of the policies, procedures, rules or benefits set forth in this Handbook, and all other policies, procedures, benefits and programs of Brookdale, with or without notice." [Doc. 7-1 at 9; see also id. at 17 ("The provisions of the Handbook may be amended or cancelled at any time at Brookdale's sole di scretion, with or without notice.").] In support of her argument, Carter relies on a Maryland Court of Appeals, in which the court rejected an employer's attempt to compel arbitrati on on the basis that the arbitration agreement itself gave the employer unilateral discretion to alter or amend the agreement. Cheek v. United Healthcare of the Mid-Atlantic, Inc., 835 A.2d 656, 662 (Md. 2003) (finding that the employer's reservation of "'the right to alte r, amend, modify, or revoke the [Arbitration] Policy at its sole and absolute discretion at any time with or without notice' creates no real promise, and therefore, insufficient consideration to support an enforceable agreement to

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arbitrate"). Here, however, the Agreem ent does not give Brookdale the power to unilaterally alter or amend its terms or its agreement to arbitrate disputes with Carter. [See generally Doc. 5-2.] This Court has held that the reservation of such discretion did not invalidate an arbitration agreement where, like here, the reservation was contained in a separate policy and was not directed specifically to the arbitration agreement. See Noffz v. Austin Maint. & Constr., Inc., No. 8:16-208-MGL-KFM, 2016 WL 4385872, at *5 (D.S.C. July 25, 2016), adopted by 2016 WL 4269498 (D.S.C. Aug. 15, 2016); see also Martinez v. Utilimap Corp., No. 3:14-310-JPG-DGW, 2015 WL 3932151, at *5 (S.D. Ill. June 25, 2015) (finding arbitration agreement was separate and distinct from handbook and was not illusory based upon provision in handbook stating the policies described therein could be unilaterally changed by the employer).

Carter further argues that the Agreement is unconscionable. [Doc. 7 at 16-19.] "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007). Carter contends that the Agreement is unenforceable because it was offered as a condition of her employment. [Doc. 7 at 16-17.] Such a provision does not necessarily render an arbitration agreement unconscionable. See e.g. O'Neil v. Hilton Head Hosp. , 115 F.3d 272, 276 (4th Cir. 1997) (upholding arbitration agreement presented to employee as a condition of continued employment). "[A] n adhesion contract is a standard form contract offered on a 'take-it-or-leav e-it' basis with terms t hat are not negotiable." Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 669 (S.C. 2007) (citing Munoz v. Green Tree Fin.

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Corp., 542 S.E.2d 360, 365 (S.C. 2001)). "Adhesi on contracts, however, are not per se unconscionable." Id.; see also Towles v. United HealthCare Corp., 524 S.E.2d 839, 845-46 (S.C. Ct. App. 1999) (upholding arbitration agreement that conditioned employee's continued employment on acceptance of arbitration policy).

Next, Carter argues that she lacked sophistication or legal understanding of the effects of signing the Agreement. [Doc. 7 at 17-18.] Such arguments are insufficient to avoid a binding arbitration agreement. See Munoz, 542 S.E.2d at 365 ("[A] person who can read is bound to read an agreement before signing it."); Regions Bank v. Schmauch, 582 S.E.2d 432, 440 (S.C. Ct. App. 2003) ("A pers on signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."); Towles, 524 S.E.2d at 845 ("[T]he la w does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document.").

Additionally, Carter argues that the Agreement would deny "her significant substantive rights that she would have in a court of law." [Doc. 7 at 17-18.]

1 Carter points out that the Agreement provides that the arbitration and the results will be confidential. [Doc. 7 at 18 (citing Doc. 5-2 at 3).] Carter argues that "t his harms [her]," but provides absolutely no support for her position. She further argues that the Agreement does not "provide for the prevailing party to obtain an award of costs, which would be available in a

1 Carter makes several arguments that are directed to the provisions in the handbook. As discussed throughout this Report, the undersigned finds that the Agreement controls, and, therefore, Carter's arguments as to the handbook will not be further addressed herein.

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court of law." [Doc. 7 at 18.] Contrary to her assertion, the Agreement specifically provides that "[t]he Arbitrator can award anything to eit her party to which [the plaintiff or defendant] may be entitled by law." [Doc. 5-2 at 3.] Ba sed upon the foregoing, Carter's arguments fail.

Carter acknowledges that she signed the Agreement. The language of the Agreement is clear and unambiguous on its face and provides, among other things, that: (1) either party may request arbitration; (2) the parties will select an arbitrator by mutual agreement; (3) arbitration proceedings will be held not more than 20 miles from where the employee last worked; (4) both parties are entitled to conduct reasonable discovery as directed by law or the arbitrator; (5) the cost of the arbitrator shall be borne by the employer. [Doc. 5-2 at 2-3.] These terms are reasonable and apply mutually to both parties. The Agreement here is not one-sided, nor is it oppressive to Carter.

Lastly, Carter argues that Brookdale has failed to meet the Agreement's condition precedent to starting arbitration. [Doc. 7 at 19.] The Agreement provides that "[t]o start an Arbitration, either Brookdale or [Carter] must deliver a written demand by hand or certified mail to the other party within the applicable statute of limitations period." [Doc. 5-2 at 2.] Carter contends, "Neither party has made a written demand for starting arbitration as required by [the Agreement]." [Doc. 7 at 19.] As argued by Brookdale, this argument "stretches the very bounds of cr edulity." [Doc. 9 at 9.] After Carter filed her Complaint in state court, defense counsel wrote to Carter's attorney about the parties' mutually-binding arbitration agreement and requested that Carter consent to refer the matter to arbitration. [Doc. 5-2 at 5.] To the extent Carter argues that the demand should have been sent to her last known address rather than to her attorney, such argument fails as Carter was represented by an attorney and the parties were already involved in litigation at that point.

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Based on the clear and unambiguous language of the Agreement, the Agreement is enforceable and Carter's claims are expre ssly covered by its mandatory requirement to arbitrate. Furthermore, Brookdale has demonstrated all of the required elements for compelling arbitration. Therefore, it is recommended that the District Court find that the Agreement is valid and enforceable under general principles of contract law and grant Brookdale's motion to compel arbitration. See Adkins, 303 F.3d at 500-01.

2. Motion to Dismiss or Stay Having concluded that arbitration is proper in this case, the Court must now consider whether to dismiss or stay this action. Brookdale has requested that the Court dismiss this case or, in the alternative, stay this case pending resolution of the disputed claims in arbitration. "When an order to arbitrate has been issued for all claims brought before a court, courts are split on whether the filed action should be dismissed or stayed pending the outcome of the arbitration." Richard A. Bales & Melanie A. Goff, An Analysis of an Order to Compel Arbitration: To Dismiss or

Stay?, 115 Penn St. L. Rev. 539, 541 (2011) (collecting cases). The FAA requires a district court, upon motion by any party, to stay judicial proceedings involving issues covered by written arbitration agreements. 9 U.S.C. § 3. However, the FAA is silent as to whether a court may dismiss a case when all issues involved are covered by the applicable arbitration agreement.

As stated, the Fourth Circuit has concluded that, while the FAA requires judges to stay a case involving issues covered by a written arbitration agreement, dismissal without prejudice is the proper remedy when all of the issues presented in a lawsuit are subject to arbitration. See Choice Hotels, 252 F.3d at 709–10 ("Notwithstandi ng the terms of § 3 [of the FAA], however, dismissal is a proper remedy when all of the issues presented in a



lawsuit are arbitrable."); Greenville Hosp. Sys. v. Emp. Welfare Ben. Plan for Emps. of Hazelhurst Mgmt. Co., 628 F. App'x 842, 845-46 (4th Cir. 2015) (affirming dismissal and holding that when "a court determines, afte r applying this presumption in favor of arbitration, that all of the issues presented are arbitrable, then it may dismiss the case, as the district court did here").

Courts in this District have routinely held that dismissal is the proper remedy when all claims asserted in a case fall within the scope of an arbitration agreement. See, e.g., Cox, 2014 WL 1094394, at *7 (D.S.C. Mar. 18, 2014); Fleetwood Transp. Corp. v. Packaging Corp. of Am., No. 6:10–cv-1219-JMC, 2012 WL 761737, at *5 (D.S.C. Mar. 8, 2012); Thomas v. Santander Consumer USA Inc., No. 0:15-cv-04980-CMC-PJG, 2016 WL 5956279, at *4 (D.S.C. Oct. 14, 2016) ("Dismissal is appropriate when, as here, all claims fall within the scope of an enforceable arbitration provision"); Patterson v. Asbury SC Lex, L.L.C., No. 6:16-cv-1666-MGL, 2016 WL 7474377, at *4 (D.S.C. Dec. 29, 2016) (compelling arbitration and dismissing case where the "only issue in Plaintiff's suit is arbitrable"); Carmichael v. Hilton Head Island Dev. Co., LLC, No. 9:16-cv-1641-PMD, 2016 WL 4527194, at *4 (D.S.C. Aug. 30, 2016) ("the pr oper course of action is to dismiss the case" when all claims are arbitrable); St. Denis v. OneMain Fin., Inc., No. 8:12-cv-01669-TMC, 2012 WL 6061022, at *3 (D.S.C. Dec. 6, 2012) (dismissing action and compelling arbitration where plaintiff's sole § 41-1-80 workers' compensation retaliation claim was subject to arbitration); St. Andrews Townhomes Homeowners' Ass'n, Inc. v. Beazer Homes USA, Inc., No. 4:09-cv-00382-TLW-TER, 2010 WL 985385, at *2 (D.S.C. Mar. 12, 2010); Willard v. Dollar Gen. Corp., No. 3:17-cv-00675-JMC, 2017 WL 4551500, at *4 (D.S.C. Oct. 12, 2017). Based on the foregoing, and because the Court finds that all



claims in this dispute are subject to arbitration, it is recommended that the Complaint be dismissed.

CONCLUSION AND RECOMMENDATION Accordingly, for the reasons explained above, it is recommended that Brookdale's motion to compel arbitration [Doc. 5] be GRANTED and that the case

be DISMISSED.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin United States Magistrate Judge March 15, 2018 Greenville, South Carolina

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