UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Jonathan J. Hamdorf,

Plaintiff/Petitioner,

vs.

United Healthcare Services, Inc., and UnitedHealth Group Incorporated,

Defendants/Respondents.

Case No. __________________

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE ARBITRATION AWARD UNDER 9 U.S.C. § 10(a)(4) AND TO STAY ARBITRATION PROCEEDINGS

Plaintiff/Petitioner Jonathan Hamdorf ("Hamdorf" or "Plaintiff") brings this Motion to Vacate Arbitration Award ("Motion") to vacate the Interim Arbitration Award and Temporary Injunctive Relief ("Interim Award") granted by an American Arbitration Association ("AAA") arbitrator ("Arbitrator") against him on August 30, 2023, in favor of United Healthcare Services, Inc. and UnitedHealth Group, Inc. (collectively, "United") and states as follows:

INTRODUCTION

This Motion concerns the Interim Award issued in an arbitration proceeding initiated by United against Hamdorf. The problem is that there is no arbitration agreement that governed the dispute. Although Hamdorf signed United's arbitration policy in July 2020, later contracts signed in 2021 and 2022—which form the entire bases of the relief United seeks from Hamdorf—contain no such arbitration provision and, instead, require that disputes be heard *exclusively* in the state or federal courts of Minnesota. Despite this exclusivity provision, United filed claims against Hamdorf in an arbitration wherein the Arbitrator found that the subsequent agreements did not supersede the arbitration policy, even though the question of whether an arbitration policy has been superseded or revoked by a later agreement is a question for a court, not an arbitrator. *Field Intel. Inc v. Xylem Dewatering Sols. Inc.*, 49 F.4th 351, 356 (3d Cir. 2022).

Arbitration "is a matter of consent, not coercion." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). Where parties to an arbitration agreement dispute whether a contract later supersedes or revokes that agreement, a court must decide the existence of the arbitration agreement and the arbitrability of the dispute because otherwise "parties would never be able to execute a superseding agreement to rid themselves of a prior agreement to arbitrate arbitrability. They would forever be bound by that agreement even if their later dealings show an intent to avoid it." *Field Intel.*, 49 F.4th at 358 (internal quotations omitted). "That in turn would undermine our guiding principle in the arbitration context: that no arbitration may be compelled in the absence of an agreement to arbitrate." *Id.*

This is the same position Hamdorf is in. Having executed an arbitration policy with United, United insists that Hamdorf is now stuck in a perpetual cycle of being forced to have an arbitrator decide all threshold issues of arbitrability, without regard to provisions contained in later-executed contracts. That is plainly unfair and inconsistent with the law. The Arbitrator exceeded her powers under Section 10(a)(4) of the Federal Arbitration Act ("FAA") in issuing the Interim Award because there was no arbitration agreement concerning the dispute. For these reasons, Hamdorf moves the Court to vacate the Interim Award and permanently stay the arbitration proceeding such that the Parties may proceed in the proper forum. Second, and in the alternative, Hamdorf requests that the Court vacate the Interim Award under 9 U.S.C. § 10(a)(4) because the issuance of an Interim Award (or injunctive relief) is not within the scope of the arbitration policy, and thus the Arbitrator exceeded her authority to issue such relief.

JURISDICTIONAL STATEMENT

Hamdorf is a resident and citizen of the state of Kansas, residing in Johnson County, Kansas. (Hamdorf Dec. ¶ 4.) Defendant United Healthcare Services, Inc., is a Minnesota corporation with its principal place of business in Minnesota while Defendant UnitedHealth Group

Incorporated is a Delaware corporation with its principal places of business in Minnesota. (Olmstead Dec. ¶ 3; *Id*. Ex. A.) The amount in controversy exceeds $75,000.00, exclusive of interest and costs. (Olmstead Dec. ¶ 4; Hamdorf Dec. ¶ 5.) Diversity jurisdiction before this Court is therefore appropriate under 28 U.S.C. § 1332(a)(1). Venue is also proper because the arbitration proceeding was held and the Interim Award issued in Kansas (where the Arbitrator was sitting), which is within this District. 9 U.S.C. § 204 and 9 U.S.C. § 10(a). (Olmstead Dec. ¶ 5.)

BACKGROUND

On July 5, 2020, Hamdorf signed an Employment Arbitration Policy ("Arbitration Policy") with United. (Olmstead Dec. Ex. B.)[1] The Arbitration Policy provides that Hamdorf and United must resolve all "employment-related disputes" through "final and binding arbitration." (*Id*. at ¶ B.) The Arbitration Policy provides that "arbitration is the exclusive forum for the resolution of such disputes, and parties mutually waive their right to trial before a judge or jury in federal or state court in favor or arbitration…" (*Id*.) The Arbitration Policy states that the arbitration is to "be administered by the American Arbitration Association and, except as provided in this Policy, shall be in accordance with the then-current Employment Arbitration Rules of the AAA." (*Id*. at ¶ D). Nowhere in the Arbitration Policy is there any mention of restrictive covenants of any kind. (Olmstead Dec. Ex. B.)

Roughly seven months later, on February 22, 2021, and then a year later, on February 14, 2022, Hamdorf was granted four incentive awards (two NonQualified Stock Option Awards and two Restricted Stock Unit) (the "Stock Agreements"), which he accepted. (Olmstead Dec. Exs. D

[1] The Arbitration Policy was signed by Hamdorf purportedly as an "agreement," but was not signed by United.

and E.) The Stock Agreements contain the restrictive covenants that lay at the heart of United's statement of claims (the "Statement of Claims") against Hamdorf in the arbitration.[2]

Each of the Stock Agreements contains the same choice of law provision:

> 11. Miscellaneous.
>
> . . . (d) *Choice of Law, Injunctive Relief, Attorney's Fees and Jury Trial.* Participant consents to the law of Minnesota exclusively being applied to any matter arising out of or relating to this Award certificate, without regard to its conflict of law principles, and **exclusively to personal and subject matter jurisdiction in the state and federal courts of Minnesota for any dispute relating to this Award certificate or Participant's relationship with the Company**. In the event of a breach or a threatened breach of this Award by Participant, Participant acknowledges that the Company will face irreparable injury which may be difficult to calculate in dollar terms and that the Company shall be entitled, in addition to remedies otherwise available at law or in equity, to temporary restraining orders and preliminary injunctions and final injunctions without the posting of a bond enjoining such breach or threatened breach. Should the Company successfully enforce any portion of this Award certificate before a trier of fact or in an arbitration proceeding, the Company shall be entitled to all of its reasonable attorney's fees and costs incurred as a result of enforcing this Award certificate against Participant. Participant waives all rights or entitlement to a jury trial for any matter arising out of or relating to this Award certificate.

(Olmstead Dec. Exs. D and E at ¶ 11(d).) (emphasis supplied).

On May 1, 2023, United initiated an AAA arbitration proceeding against Hamdorf (Olmstead Dec. ¶ 7; *Id*. Ex. C.) and simultaneously filed a Motion for Preliminary Injunctive Relief against him. (Olmstead Dec. ¶ 10.) In the arbitration proceeding, United sought to prevent and restrict Hamdorf from working for a certain competitor for certain purposes. (*Id*. Ex. C.)

In the arbitration proceeding, Hamdorf moved to strike United's Statement of Claims and Motion, arguing that no agreement to arbitrate existed because the Stock Agreements do not contain an arbitration clause but rather mandate that any disputes regarding enforcement of

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[2] "This is an arbitration action to obtain declaratory relief regarding the parties' rights and obligations and to compel performance with, enjoin violations of, and obtain damages and other relief for violations of agreements that Hamdorf entered into as an employee of United." (Olmstead Dec. Ex. C at ¶ 1.)

restrictive covenants and Hamdorf's relationship with United must be brought "exclusively" in the state or federal courts of Minnesota. (Olmstead Dec. ¶ 11.) Following briefing, the Arbitrator issued an Order Regarding Arbitrability of Claims and Authority to Issue Preliminary Injunctive Relief where she found, in part, as follows:

> Contrary to Respondent's [Hamdorf's] assertion, this provision in the Stock Agreement… does not clearly reflect an unambiguous intent by the parties to override or supersede their agreement to arbitrate. [Hamdorf] points to language stating that the employee consents "exclusively to personal and subject matter jurisdiction in the state and federal courts of Minnesota." Language in the same paragraph, however, contemplates that [United] may "successfully enforce any portion of [the Stock Agreements] *in an arbitration proceeding*." *Id*. (emphasis added). In light of the language in the Stock Agreements referring to enforcing claims in an arbitration proceeding- combined with the absence of any language expressly opting out of the Arbitration Agreement- the undersigned finds the claims asserted in this arbitration are subject to the parties' Arbitration Agreement and are therefore arbitrable in these proceedings.

(Olmstead Dec. Ex. F.)

The Arbitrator relied on this finding and issued an Interim Award titled "Findings of fact, Conclusions of Law and Interim Award Granting Temporary Injunctive Relief" on August 30, 2023 (which Hamdorf challenges by this Motion.) (Olmstead Dec. Ex. G.) The Interim Award exceeded the Arbitrator's authority because no arbitration agreement exists respecting this dispute. Questions as to whether a subsequent agreement overrides or supersedes an agreement to arbitrate are questions as to whether an agreement to arbitrate exists *at all*. *Pro Tech Indus., Inc. v. URS Corp*., 377 F. 3d 868, 871 (8th Cir. 2004) (citations omitted). This issue must be decided by a Court, not an arbitrator.

In addition to exceeding her authority by finding that a valid arbitration provision controlled the dispute, the Arbitrator also exceeded her powers by finding that she had the authority to issue an interim award under the Arbitration Policy and the AAA Employment Rules, even though the AAA Employment Rules for interim awards are "Optional Rules for Emergency

Measures of Protection" which must be *specifically* incorporated into any arbitration agreement. (Olmstead Dec. Ex. H at AAA Employment Rule O-1.) The Arbitration Policy here—even if controlling—does not incorporate the Optional Rules.

A final hearing in the arbitration proceeding was scheduled for November 6-8, 2023, but was informally postponed. Hamdorf files this Motion to Vacate under Section 10(a)(4) of the FAA to vacate the August 30, 2023 Interim Award of the Arbitrator and requests that the Court stay and enjoin the AAA proceeding and direct that all litigation and disputes regarding the restrictive covenants be brought in the proper forum— the state or federal courts of Minnesota.

ARGUMENT

I. Legal Standard.

The Federal Arbitration Act ("FAA") provides certain instances in which a Court is permitted to vacate an arbitration award. 9 U.S.C. § 10(a). One such circumstances is "where the arbitrator exceeds [her] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject submitted was not made." *Id*. at (4). "Without such an underlying agreement or application of such a contract, the Court is under no obligation to provide any deference to the purported arbitrator." *See*, 9 U.S.C. §§ 2, 10; *see Crawford Grp., Inc. v. Holekamp*, 453 F.3d 971, 976 (8th Cir. 2008). Absent an agreement between the parties to be bound by arbitration, the arbiter necessarily "exceeds [her] powers" because she lacks any power to bind the parties by arbitration. Pursuant to 9 U.S.C. § 10(a)(4), this provides a more than sufficient basis to vacate the purported arbitration award. *Swanson v._Wilford, Geske, & Cook*, No. 19-CV-117 (DWF/LIB), 2019 WL 4575826, at *6–7 (D. Minn. Aug. 30, 2019), *report and recommendation adopted*, No. CV 19-117 (DWF/LIB), 2019 WL 4573252 (D. Minn. Sept. 20, 2019).

Under the FAA, a party to the arbitration may apply to a district court for an order affirming or vacating an arbitration award. 9 U.S.C. §§ 9–10. The application to affirm or vacate "shall be

made and heard in the manner provided by law for the making and hearing of motions...." *Id.* at § 6. This section makes clear that a request to vacate or affirm an arbitration award shall be made in the form of a motion—not in the form of a complaint or other pleading. *See Abbott v. Law Office of Patrick Mulligan,* 440 Fed.Appx. 612, 616 (10th Cir.2011) (explaining that an application to vacate an award will be treated as a motion). *Cessna Aircraft Co. v. Avcorp Indus., Inc*., 943 F. Supp. 2d 1191, 1195 (D. Kan. 2013). Thus, Hamdorf's Motion to Vacate, pursuant to Section 10(a)(4) of the FAA, is appropriate in this District without the filing of a Complaint, Petition or other case-initiating document normally filed in a newly initiated case.

II. There is No Arbitration Provision Governing this Dispute.

a. Whether or Not a Valid Arbitration Agreement Exists is an Issue for the Court

Before a party can be compelled to arbitrate, "the court determines whether a valid arbitration agreement exists." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019). "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *see also Carey v. 24 Hour Fitness, USA, Inc.,* 669 F.3d 202, 205 (5th Cir. 2012) ("The FAA reflects a liberal federal policy favoring arbitration. However, the federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.") If a reviewing court determines that an arbitrator exceeded her authority by issuing an arbitration award in the absence of an agreement to arbitrate, then the court must vacate the award. *See, e.g.*, *Comprehensive Accounting Corp. v. Rudell,* 760 F.2d 138, 140 (7th Cir. 1985) ("If there had been no arbitration clause, or if the Rudells had claimed that the clause was invalid and nevertheless the arbitrator had gone ahead and made an award against them, he might well (in the first case, clearly would) have exceeded his powers."); *Swanson v. Wilford, Geske, & Cook*, DC Civ. No. 19-cv-

00117, 2019 WL 4575826, at *7 (D. Minn. Aug. 30, 2019), *report and recommendation adopted*, 2019 WL 4573252 (Sept. 20, 2019) (vacating under FAA § 10(a)(4) an arbitration award on the basis that, "[a]bsent an agreement between the parties to be bound by arbitration, the arbiter necessarily 'exceeds [his] powers' because he lacks any power to bind the parties by arbitration").

Here, there is an Arbitration Policy that Hamdorf signed on July 5, 2020. However, the subsequent Stock Agreements he signed on February 2021 and February 2020 superseded or revoked the Arbitration Policy *at least* as to the subject matter of the Stock Agreements because they contain exclusive jurisdiction provisions. At a minimum, the existence of the exclusive jurisdiction provisions in the later agreements demonstrates that Hamdorf and United did not "clearly and unmistakably" intend to refer the issue of arbitrability to an arbitrator.

Appellate courts have held that whether a parties' second contract supersedes a first with respect to an arbitration provision is a dispute for a court, not an arbitrator. *Field Intel. Inc v. Xylem Dewatering Sols. Inc*, 49 F.4th 351, 356 (3d Cir. 2022). That is because "arbitration is strictly a matter of consent" and an arbitrator's authority is limited to those claims that the parties have agreement to submit to arbitration. *Id.* (citing *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)); *see also Sharpe v. AmeriPlan Corp.*, 769 F.3d 909, 914 (5th Cir. 2014) ("The question whether an arbitration provision conflicts with other dispute resolution provision is properly analyzed under the 'validity' step of the arbitration analysis.")

It is true that parties may delegate questions of arbitrability to an arbitrator by expressing a "clear and unmistakable intent" to do so. *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1245 (10th Cir. 2018). It is also true that this Circuit (like all others) has found that reference to AAA rules in an arbitration policy (as in the Arbitration Policy here) is sufficient evidence of such intent. *Id.* at 1245. However, where there is a dispute as to whether a second contract superseded an earlier

policy to arbitrate, it calls the existence of the arbitration agreement into question and the issue must be resolved by a court. *Field Intel.*, 48 F.4th at 356 ("if Field Intelligence is correct that the 2017 contract superseded the 2013 agreement, then there is no arbitration agreement for us to enforce."); *see also McRedmond v. HCR Healthcare, LLC*, No. CV 22-692-CFC, 2022 WL 17819679, at *4 (D. Del. Dec. 20, 2022) (arbitration could not be compelled where contract with arbitration agreement was superseded by later contract between the same parties that did not require arbitration); *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210, 215 (2d Cir. 2014) (issue of whether an agreement to arbitrate remained in effect given later agreement that contains a forum selection clause, was a dispute "concerning whether an agreement to arbitrate has been made," and thus there could be no presumption in favor of arbitration); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733 (9th Cir. 2014) (forum selection clause superseded obligation to arbitrate where parties agreed to bring claims that arose out of their contractual relationship in District of Nevada; presumption in favor of arbitrability did not apply).

Thus, the Arbitrator exceeded her powers, as demonstrated below, by finding that the forum selection clause in the Stock Agreements did not override or supersede the generic Arbitration Policy. That issue must be decided by a court.

b. The Stock Agreements Supersede the Arbitration Policy

To determine the validity and contours of an arbitration agreement, courts apply state law regarding contract formation issues. *Glacier Park Iron Ore Props. v. United States Steel Corp.*, 948 N.W.2d 686, 694 (Minn. Ct. App. 2020) (citations omitted); *see also First Options of Chi, Inc.*, 514 U.S. at 944 (same). Under Minnesota law, courts will find that a later-in-time contractual provision can supersede an earlier contractual provision if the contracts and provisions involve the same dealings. *See, e.g. W.R. Millar Co. v. UCM Corp*, 419 N.W.2d 852, 854 (Minn. Ct. App. 1988) (finding two contracts dealing with *different* dealings were not superseding.) Here, the

Stock Agreements supersede the Arbitration Policy. First, each of the four Stock Agreements were "later in time" contracts, which were executed after the generic Arbitration Policy. Second, these documents are completely at odds with each other, because the Stock Agreements state that Minnesota state and federal courts have "exclusive" jurisdiction over disputes related to the contracts themselves *and* disputes arising out of Hamdorf's relationship with United. Conversely, the Arbitration Policy requires that disputes relating to Hamdorf's employment be heard in an arbitration forum. That requirement cannot be harmonized with the Stock Agreements.

Moreover, the entire purpose of the Arbitration Policy is superseded by the broad forum selection clause in the Stock Agreements. This is not a case where the agreement to arbitrate is contained in a provision in a larger contract that governs the relationship between Hamdorf and United. The Arbitration Policy stands alone. And, because the later-executed Stock Agreements directly contradict and cannot be read in harmony with the Arbitration Policy, it indicates the parties agreed to a change in terms.

Other Circuits that have considered this issue agree. In the Second Circuit, "an agreement to arbitrate is superseded by a later-executed agreement containing a forum selection clause if the clause 'specifically precludes' arbitration . . . but there is no requirement that the forum selection clause mention arbitration." *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d at 215. "Contracting parties are free to revoke an earlier agreement to arbitrate by executing a subsequent agreement the terms of which plainly preclude arbitration." *Applied Energetics, Inc. v. NewOak Cap. Markets, LLC*, 645 F.3d 522, 525 (2d Cir. 2011).

United asked the Arbitrator (and will ask this Court) to essentially ignore the exclusivity provision of the later-executed Stock Agreements. Accepting that argument renders the provision meaningless. Worse, it perpetuates a cycle of arbitration that an individual like Hamdorf cannot escape, despite his efforts to supersede, revoke, or limit the Arbitration Policy, which undermines

the Court's guiding principle that arbitration is a matter of consent. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. at 681. United drafted the Stock Agreements, and if it wanted to maintain arbitration as the forum for all disputes, it should have drafted the agreements accordingly. It cannot now re-write the contract because it wants to preserve an invalid Interim Award. Thus, the Arbitrator exceeded her power by issuing an award, and it should be vacated under 9 U.S.C. § 10(a)(4), and the AAA Proceeding should be stayed.

c. The Exclusivity Provisions in the Stock Agreements Erode the Parties' "clear and unmistakable intent" of Referring All Issues of Arbitrability to the Arbitrator

Even if the Court is not convinced that the Arbitration Policy has been superseded or revoked (at least as to the subject matter contained within the Stock Agreements) the Court should *still* decide threshold issues of arbitrability because of the competing forum provisions. Whether "parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Dish Network*, 900 F.3d at 1244 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). It is true that incorporation of AAA Rules signals "clear and unmistakable evidence of an agreement to arbitrate arbitrability." *Id*. at 1246. But the Arbitration Policy cannot be read in a vacuum; it must be considered in the context of the Parties' dispute and the Stock Agreements. Each of the Stock Agreements were signed after the Arbitration Policy, and each provide that "any dispute relating to this Award certificate or Participant's relationship with the Company" are subject to exclusive jurisdiction of the Minnesota state and federal courts. That language signals a clear intent that the Parties did not agree to submit to arbitration for disputes concerning the Stock Agreements whatsoever, let alone that an arbitrator would decide issues of arbitrability. It certainly does not constitute a "clear and unmistakable intent" to have an arbitrator rule on arbitrability.

Other courts considering the issue agree. For example, in *Fairstead Cap. Mgmt. LLC v. Blodgett*, the Delaware Chancery Court considered a similar situation where the parties had first executed an employee arbitration agreement referencing AAA rules, and then executed a subsequent contract with a forum selection provision. 288 A.3d 729, 756–58 (Del. Ch. 2023). The Court noted that the employment agreement provided a clear and unmistakable intent to delegate issues of arbitrability to the arbitrator, but that the employment agreement did not stand alone." *Id*. at 758. The Court, citing *Field Intel*, found that the conflicting provisions prevented a finding of "clear and unmistakable evidence" of intent to arbitrate arbitrability. *Id*. ("The competing forum provisions prevent the court from finding clear and unmistakable evidence of an intent to arbitrate arbitrability, and the implications of the [later agreements] raises another question as to whether an agreement to arbitrate exists."). Ultimately, the court held that where the later agreements superseded the employment agreement, arbitration could not be compelled.

The same result should follow here. Hamdorf and United's use of an exclusive jurisdiction provision in the Stock Agreements flies in the face of any argument that the Parties' clearly and unmistakably intended to delegate issues of arbitrability to an arbitrator. That issue must be decided by this Court because if Hamdorf did not agree to arbitrate the issues in the Stock Agreements, the Arbitrator, as a matter of law, exceeded her powers under 9 U.S.C. § 10(a)(4). Moreover, because the dispute plainly arises out of the Stock Agreements containing the restrictive covenants at issue, the dispute must be brought in state or federal court in Minnesota.

d. <u>Ambiguities Surrounding the Parties' Intent Should be Construed Against United</u>

The Stock Agreements contain a clear directive that Hamdorf consented *exclusively* to the state and federal courts of Minnesota for any dispute arising therein. Despite this plain language, the provision states "[s]hould the Company successfully enforce any portion of this Award certificate before a trier of fact or in an arbitration proceeding, the Company shall be entitled to all

of its reasonable attorney's fees and costs. . ." from which United may argue that the provision provides for arbitration or is ambiguous. *Id*. That argument should be rejected. First, reference to "arbitration" in a fee provision is not "clear and unmistakable evidence" that Hamdorf agreed to arbitrate claims arising out of the Stock Agreements. Second, despite the exclusivity provisions, it is fathomable that the Parties could have later consented to have the dispute heard in arbitration, and thus United would not be precluded from then seeking fees.

Moreover, the Stock Agreements were drafted by United, and thus any ambiguity in the agreement must be resolved in favor of Hamdorf. *See Seagate Tech. v. Western Digital Corp*., 854 N.W.2d 750, 761 (contract construction rules must be applied where an agreement is subject to more than one interpretation); *see also Staffing Specifix v. TempWorks Mgmt. Servs.*, 896 N.W.2d 115, 130-31 (ambiguities in adhesion contracts must be construed against the drafter); *see also Mills v. Buter Snow LLP*, No. 3:18-cv-866-CWR-FKB, 2019 WL 4346587, at * 6 (S.D. Miss. Sept. 12, 2019) (holding that "it is not possible to reconcile the arbitration provision with the forum selection clause," and that "because the forum selection clause and the arbitration provision conflict, this part of the contract must be read favorably to the non-drafting party.")

III. The Arbitrator Exceeded Her Authority by Issuing an Interim Award.

If the Court agrees that no arbitration agreement exists respecting this dispute, and/or that the threshold question of arbitrability must be heard by the Court and not the arbitrator, then the Interim Award must be vacated, and the Court need not reach this issue. However, if the Court is not persuaded on the foregoing, the Interim Award should nevertheless be vacated because the Arbitrator exceeded her authority by issuing a type of award that was not contained within the parameters of the Arbitration Policy. Neither the Arbitration Policy signed by Hamdorf nor the AAA Employment Rules of Arbitration, which were incorporated by reference, provide for an Interim Award, and, therefore, the Arbitrator exceeded her powers by issuing the Interim Award

and it must be vacated under Section 10(a)(4) of the FAA. The AAA Employment Rules for interim awards are "Optional Rules for Emergency Measures of Protection" ("Optional Rules"), which must be *specifically* incorporated into any arbitration agreement. (Olmstead Dec. Ex. H. at AAA Employment Rule O-1). The Arbitration Policy here—even if controlling—does not incorporate the Optional Rules.

Even if United's claims are arbitrable, the Arbitration Policy did not vest the Arbitrator with authority to award *preliminary* injunctive relief. After an exhaustive listing of claims or disputes that must be arbitrated, Section B of the Arbitration Policy provides, in relevant part:

> [T]his Policy does not preclude any party from seeking a temporary restraining order or materially identical emergency relief ("temporary restraining order") in a court of law in accordance with applicable law, and any such application shall not be deemed incompatible with or a waiver of this agreement to arbitrate. ***The court to which such application is made*** is authorized to consider the merits of the arbitrable controversy to the extent it deems necessary to make its ruling related to the temporary restraining order, but only to the extent permitted by applicable law. The court shall have no jurisdiction over the matter after making its ruling related to the temporary restraining order and ***all determinations of final relief shall be decided in arbitration***.

Arbitration Agreement, ¶ B (emphasis added). This provision is subject to only one reasonable interpretation. Where, as here, this provision follows multiple paragraphs setting out a litany of claims and issues that *must* be raised only in arbitration, this provision mandates that claims for emergency, immediate, temporary injunctive relief *must* be brought in court. This interpretation is compelled by the language suggesting that "all determinations of final relief shall be decided in arbitration," which can only mean that determination of temporary or interim relief must be determined by the "court to which such application is made." *Id.*

Further, a party typically seeks temporary or preliminary injunctive relief to enforce a restrictive covenant when there is an immediate, emergency need "to prevent great and irreparable injury." *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979) (citations

omitted). Indeed, preliminary injunctions to enforce such agreements are most frequently sought to prohibit conduct which, if not enjoined, may render "a subsequent [permanent] injunction in … arbitration 'meaningless.'" *Johnson v. Dentsply Sirona, Inc.*, No. 16-CV-0520-CVE-PJC, 2017 WL 4295420, at *6 (N.D. Okla. Sept. 27, 2017) (citation omitted).

The Arbitrator thus exceeded her power under 9 U.S.C. § 10(a)(4) when the Arbitrator issued the Interim Award. There was no provision in the Arbitration Policy authorizing immediate, emergency, interim relief to be made in arbitration and the Arbitration Policy did not specifically incorporate the Optional Rules.

CONCLUSION

For the reasons stated herein, Plaintiff/Petitioner Jon Hamdorf respectfully asks that the Court grant his Motion to Vacate the "Findings of Fact, Conclusions of Law, And Interim Award Granting Temporary Injunctive Relief," dated August 30, 2023, in American Arbitration Association Case No. 01-23-0001-9735, styled *United Healthcare Services, Inc. and UnitedHealth Group Incorporated v. Jonathan Hamdorf* under Section 10(a)(4) of the FAA and to permanently stay and enjoin the AAA Proceeding against Hamdorf.

Respectfully submitted this 18th day of October 2023.

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