



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ANDRAS SZANTHO, as Personal Representative
for the Wrongful Death Estate of BILL FOSTER,

Plaintiff-Respondent,

vs.

NO. S-1-SC-40809

THI OF NEW MEXICO AT SUNSET VILLA, LLC d/b/a
SUNSET VILLA CARE CENTER and THI OF NEW
MEXICO, LLC,

Defendants-Petitioners.

REPLY BRIEF OF DEFENDANTS-PETITIONERS

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

The body of this reply brief exceeds the 15-page limitation set forth in Rule 12-318(F)(2) NMRA but complies with the limitations of Rule 12-318(F)(3). The body of this brief uses a proportionally spaced typeface (14-point Times New Roman) and the body of the brief contains 4,351 words, which is less than the 4,400 word maximum permitted by Rule 12-318(F)(3). The brief was prepared using Microsoft Word for Microsoft 365 MSO (Version 2503) and the word count was obtained using that program.

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ARGUMENT

I. PLAINTIFF WRONGLY CONFLATES CONTRACT FORMATION WITH CONTRACT ENFORCEMENT (Question 1)

Plaintiff's assertion that whether a third-party beneficiary is bound by an arbitration agreement containing a delegation clause is an issue of contract formation (not contract enforcement) that a court (rather than an arbitrator) must decide misapprehends and obscures controlling FAA principles and U.S. Supreme Court precedents interpreting them. We begin by clarifying those principles.

A motion to compel arbitration involves two analytical steps. *See Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). The first step is contract formation, which the court decides. *Id.*; *see also Granite Rock v. Int'l Broth. of Teamsters*, 561 U.S. 287, 296 (2010) ("where the dispute at issue concerns contract formation, the dispute is generally for courts to decide"). At this stage, the court determines only whether "whether there is any agreement to arbitrate any set of claims." *Kubala*, 830 F.3d at 202. At step two, the court addresses whether the arbitration agreement covers the *specific claims* before the court. *Id.* at 201-02.

However, where the arbitration agreement includes a delegation clause ceding the court's power to decide arbitrability questions to the arbitrator, the analysis changes: "the only question, after finding that there is in fact a valid agreement, is whether the purported delegation clause is in fact a delegation clause—that is, if it

evinces an intent to have the arbitrator decide whether a given claim must be arbitrated.” *Id.* at 202 (applying *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) and *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010).) If there is a delegation clause, the case must go to arbitration because, under the FAA, the court lacks the power to decide even “wholly groundless” questions of arbitrability. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69-70 (2019).

Under the plain language of FAA § 2, this analysis applies the same way to third-party beneficiary agreements, like the Arbitration Agreement here: “A written provision in *any*...contract”—thus *including third-party beneficiary contracts*—“to settle by arbitration a controversy thereafter arising out of such contract...*shall* be valid, irrevocable, and enforceable” absent a generally-applicable contract defense. 9 U.S.C. § 2 (emphasis added). In a third-party beneficiary contract, the contracting parties create an agreement to benefit a third party. *See Fleet Mortg. Corp. v. Schuster*, 1991-NMSC-046, ¶ 4, 112 N.M. 48, 811 P.2d 81. Critically, the third-party beneficiary is *not* itself a party to the contract and has *no* right to negotiate or dictate the terms of the agreement reached between the contracting parties. *See City of Santa Fe v. Travelers Cas. & Sur. Co.*, 2010-NMSC-010, ¶ 10, 147 N.M. 699, 228 P.3d 483 (“third-party beneficiaries...are not in a position to actively negotiate the contract’s terms”).

For these reasons, at step one of the arbitration analysis, the only formation question applicable to a third-party beneficiary agreement is whether the contracting parties—*not* the beneficiary—formed a contract containing an arbitral agreement with a delegation clause that “clearly and unmistakably” commits arbitrability issues to the arbitrator. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). If the answer to that question is “yes,” the court must order arbitration because under FAA § 2, a delegation clause in a third-party beneficiary contract—agreed to by the *contracting parties*—is “valid, irrevocable, and enforceable” no less than a delegation clause in any other type of contract. *See Henry Schein*, 586 U.S. at 68 (“We must interpret the [FAA] as written, and the [FAA], in turn requires that we interpret the contract as written.”).

Next, distinct from issues of contract formation are issues of arbitrability. The U.S. Supreme Court repeatedly has said that arbitrability includes “gateway dispute[s] about whether the parties are bound by a given arbitration clause.” *Howsam* at 84; *see also Henry Schein* at 67-68 (“Applying the [FAA], we have held that parties may agree to have an arbitrator decide...‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate” (citing *Rent-A-Ctr.*, 561 U.S. at 67 (same))); *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014) (citing *Howsam* for the same principle); *see also* 3D Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.*

§ 3569 n.53 (3d ed. May 21, 2025 update) (“Examples of questions of arbitrability” include “whether an arbitration clause binds persons who did not sign it”).

These principles resolve the formation/enforcement issue in this case. Here, Plaintiff did not dispute that the Arbitration Agreement was formed between the Facility and Son, or that Father was the intended third-party beneficiary of the Agreement.¹ And, while Plaintiff contended below that the Arbitration Agreement’s delegation clauses were not “clear and unmistakable” evidence of intent to arbitrate arbitrability (an issue the trial court ignored **[RP 155]**), the COA already ruled in two earlier cases that they are. *See Juarez v. THI of N.M at Sunset Villa, LLC*, 2022-NMCA-056, ¶¶ 23-28, 517 P.3d 918; *Szantho for Est. of Kuykendall v. Casa Maria of N.M., LLC*, No. A-1-CA-38272, ¶ 2 & n.2, 2022 WL 539230, at *1 (N.M. Ct. App. Feb. 23, 2022) (unpub.) **[RP 97-101.]** Thus, the only operative question is whether there is a legal principle by which the validly-formed Arbitration Agreement may be *enforced* against Father. Where, as here, the arbitration contract

¹ Contrary to Plaintiff’s protestations [Opp. 11], Plaintiff never claimed that Son did not enter into the Arbitration Agreement with the Facility in his personal capacity for Father’s benefit; Plaintiff argued the irrelevant point that Son had no authority to sign the Agreement as Father’s *agent*. **[RP 124-25.]** Nor did Plaintiff dispute that Father was the intended third-party beneficiary of the Arbitration Agreement; he argued only that Father could not be compelled to arbitrate even if he was a third-party beneficiary. **[RP 124-26.]** Moreover, as explained *infra* at 8-9, Plaintiff is suing under the Unfair Practices Act to enforce Father’s rights under the Admission Contract, of which the Arbitration Agreement is a part. [BIC 4 (citing **[RP 84, 62].**)] Plaintiff cannot now deny the Arbitration Agreement’s existence.

delegates arbitrability questions to the arbitrator, the “court possesses no power to decide the arbitrability issue.” *Henry Schein*, 586 U.S. at 68. As explained in the BIC at 20-21, *Casa Arena Blanca, LLC v. Rainwater*, No. 21-2037, 2022 WL 839800, at *4-5 (10th Cir. Mar. 22, 2022), correctly applied these principles in construing the same Arbitration Agreement in this case based on similar facts. Contrary to Plaintiff’s contentions [Opp. 19], *Rainwater* thus provides sound guidance that this Court should follow.²

By contrast, the COA’s new contract-formation rule—*i.e.*, a contract with an arbitration clause is enforceable against a third-party beneficiary of the contract only if there is a *separate* agreement to arbitrate between a *signatory* and the *beneficiary* (COA Op. ¶¶ 19, 21)—turns the FAA on its head by conflating the issue of whether a contract was formed with the issue of that agreement’s enforceability between the parties. The COA’s contract-formation rule is fatally defective for several reasons.

² Plaintiff’s cases are inapposite. [Opp. 14-20.] In *Microchip*, *Sherer*, *Mastrobuono*, *Jody James*, and *Lovato*, there was no delegation of arbitrability to the arbitrator; in *O’Shaughnessy* and *Druco*, no arbitration agreement (much less a delegation clause) was formed; *Elahi* did not involve non-signatories; *Contec* and *Berg* ruled that a non-signatory could compel a signatory to arbitrate arbitrability under a delegation clause without deciding whether a non-signatory could be compelled to do the same; and, *Noble Capital* supports the Facility’s position because the court compelled a non-signatory to arbitrate arbitrability per a delegation clause. To the extent any of Plaintiff’s other cases are contrary to *Rainwater*, they are inconsistent with the FAA and controlling U.S. Supreme Court precedents.

First, this result rests on the COA’s faulty premise that “[i]n every arbitration case, the first question a court must answer is whether *the parties to the litigation* agreed to arbitrate.” (COA Op. ¶ 19 (emphasis in original).] Plaintiff likewise relies on a literal reading of this statement. [Opp. 7-12, 14-19.]

But the COA’s premise is *not* a correct statement of law—as the COA tacitly recognized in identifying various contract theories that bind litigants to agreements they did not sign. (COA Op. ¶ 20.) In addition, the COA cited *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116, ¶ 9, 338 P.3d 123, which explicitly says “[t]here are well recognized exceptions to the general rule” that a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. (COA Op. ¶ 20.) Moreover, if the law strictly required that “the *parties to the litigation* agreed to arbitrate,” a third-party beneficiary never could compel arbitration. But the opposite is true. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2010-NMCA-046, ¶ 20, 148 N.M. 784, 242 P.3d 351 (allowing a third-party beneficiary “who was *not* a party to the agreement” to compel arbitration against a signatory (emphasis added)), *rev’d on other grounds*, 150 N.M. 398 (2010). For these reasons, the COA’s contract-formation rule cannot be accepted.

Second, even if the COA Opinion could be read to mean that the COA’s new contract-formation rule does not require an actual agreement between the promisor and non-signatory third-party beneficiary, but instead requires either a showing that

the third-party beneficiary assented to the contract by receiving its benefits, or that the “non-signatory could be said to have agreed to arbitrate by means other than signing a contract based on one of the five theories [identified in the COA Opinion] arising out of contract and agency law” (COA Op. ¶ 20), the COA still was wrong. “Third-party beneficiaries are created when the language of the contract itself evidences the intent of both signatories to that contract to benefit a third party.” *Rivera*, 2010-NMCA-046, ¶ 21 (citing *Fleet Mortg.*, 1991-NMSC-046, ¶ 4). Thus, once the contracting parties sign an agreement to benefit a third party, it is fully formed; nothing that happens thereafter can affect the contract’s initial existence. Therefore, under any scenario, a determination of whether a third-party beneficiary is bound by the contract can only be a matter of contract enforcement that a delegation clause sends to arbitration.

The same is true of the other legal theories cited by the COA Opinion ¶ 20 that bind non-parties to contracts. For example, in *Damon*, the COA ruled that a signatory to a home warranty contract that included an arbitration clause could compel non-signatories to arbitrate under the equitable estoppel doctrine. 2014-NMCA-116, ¶ 19. Instead of requiring a separate agreement to arbitrate between the signatory and non-signatories, *Damon* ordered arbitration even though the non-signatories asserted that they did not “know about the arbitration agreement in the warranty until after they purchased the home.” *Id.* ¶ 3.

Finally, if allowed to stand, the unintended consequences of the COA’s new contract-formation rule are sobering. Because an arbitration clause cannot be treated differently than any other contract terms, if a patient admitted to a healthcare facility as a third-party beneficiary of an admission contract (which often happens) can later repudiate the contract’s arbitration clause based on the absence of an independent agreement to arbitrate between patient and provider, nothing prevents the patient from also disavowing the admission contract’s other terms, such as contract provisions requiring payment for services [RP 56], assignment of Medicaid/Medicare or insurance benefits [RP 57-59], and consent to render treatment [RP 52-53]. In such situations, healthcare providers may decline to provide care when a third-party beneficiary arrangement is the only means of timely securing the patient’s admission. The COA Opinion therefore must be reversed.

II. PLAINTIFF’S THIRD-PARTY BENEFICIARY ARGUMENTS ARE WRONG (Question 2)

Plaintiff presses several invalid arguments in defense of the COA’s new rule that an arbitration clause can be enforced against a third-party beneficiary only when the third-party beneficiary sues to enforce the contract. [Opp. 21-30.]

First, even if the COA Opinion was correct (which it is not), Plaintiff *is* suing to enforce Father’s rights under the Admission Contract (of which the Arbitration Agreement is a part). In the Complaint ¶ 108(a)(iii), Plaintiff asserts a claim against the Facility under the Unfair Practices Act (“UPA”) for “[f]ailing to provide the

quality of services **contracted for by [Father].**” [RP 29 (emphasis added).] The “services” that the Facility “contracted” to provide Father are set forth in the Admission Contract [RP 53], which includes the Arbitration Agreement [RP 84]. Because Plaintiff seeks to vindicate Father’s rights under the Admission Contract, Plaintiff may not disavow Father’s contractual duty to arbitrate.

Second, many cases that Plaintiff cites in arguing that a third-party beneficiary is not bound by the contract unless the beneficiary sues to enforce it are either factually inapposite or run in the opposite direction. [Opp. 21-24.] For instance, *Central Trust Bank v. Graves*, 495 S.W.3d 797, 803-04 (Mo. Ct. App. 2016), recognized that under Missouri law a contract is enforceable against a non-signatory when the beneficiary accepts the non-incidental benefits of the contract. Likewise, *MTA, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 114 So. 3d 27, 31 (Ala. 2012) (cleaned up), noted that under Alabama law, a third-party beneficiary is “bound to an arbitration agreement if the contracting parties intended...to bestow a direct, as opposed to incidental, benefit upon the third party” regardless of whether the beneficiary sues to enforce it.

Further, the *Atlanta Concorde Fire Soccer Ass’n, Inc. v. Graham*, 843 S.E.2d 889, 893 (Ga. Ct. App. 2020), court ruled that the defendants could not compel arbitration under California third-party beneficiary law because they were not third-party beneficiaries (and, in California, a third-party beneficiary need not sue to be

bound by the contract; the beneficiary can manifest assent by accepting the contract's benefits. *See Suh v. Superior Court*, 181 Cal. App. 4th 1504, 1513-14 (Cal. Ct. App. 2010) (recognizing this principle but concluding that plaintiffs were not bound by arbitration clause as third-party beneficiaries because they never benefited from the contract)).³

Other jurisdictions likewise recognize that receipt of contractual benefits manifests a third-party beneficiary's assent to the contract. *See, e.g., NAMA Holdings, LLC v. Related World Market Ctr., LLC*, 922 A.2d 417, 431 (Del. Ch. 2007) ("When the [third-party] beneficiary accepts the benefits of the contract, it also must accept the burdens expressed in that document."); *Olshan Found. Repair & Waterproofing v. Otto*, 276 S.W.3d 827, 831 (Ky. 2009) (a third-party beneficiary is bound to a contractual arbitration clause "if the [third-party beneficiary] receives a direct benefit from the contract"); *Cleveland-Akron-Canton Adver. Coop. v. Physician's Weight Loss Ctrs. of Am., Inc.*, 922 N.E.2d 1012, 1017 (Ohio Ct. App. 2009) ("by accepting the benefits of the contract, the third party beneficiary also assumes the attendant burdens").

The foregoing authorities align with federal cases recognizing that under New Mexico law, a third-party beneficiary is bound by the contract when the beneficiary

³ Plaintiff's reliance on *Miller v. Life Care Cntrs. of Am., Inc.*, 478 P.3d 164 (Wyo. 2020), is misplaced because it addressed agency, not the third-party beneficiary doctrine.

obtains its benefits. *See, e.g., Life Care Ctrs. of Am., Inc. v. Deal*, No. 18-CV-187-MV, 2019 WL 1283006, at *6 (D.N.M. Mar. 20, 2019) (resident was a third-party beneficiary who “obtained the benefits of residency and care at the [facility] for eight months”); *THI of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309, 1327 (D.N.M. 2012) (same); *THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, 893 F. Supp. 2d 1172, 1189 (D.N.M. 2012) (same); *aff’d*, 532 F. App’x 813 (10th Cir. 2013).

Plaintiff relies on the trio of out-of-state cases cited by the COA—*Mendez*, *Thompson*, and *Hattiesburg*—in support of its new rule that a contract does not bind a third-party beneficiary unless the beneficiary sues to enforce it because “merely conferring a benefit on the third party” is insufficient.⁴ [COA Op. ¶ 36; Opp. 22-23.] As demonstrated above, these cases and the COA Opinion itself are out-of-step with the prevailing view that a third-party beneficiary need not sue to enforce the contract to be bound by it because obtaining the contract’s benefits manifests the beneficiary’s assent to the agreement.

⁴ *Hattiesburg* does not support the COA Opinion. *Hattiesburg* recognized that under Mississippi estoppel law, “non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status” cannot “attempt to repudiate the arbitration clause in the contract.” 176 So. 3d 17, 24 (Miss. 2015) (citation omitted). A non-signatory “embraces” the contract by “knowingly seeking and obtaining ‘direct benefits’ from that contract” irrespective of whether the non-signatory seeks to enforce the contract’s terms. *Id.* (cleaned up).

Moreover, as explained in the BIC at 34-35 but ignored by Plaintiff, the law could not be otherwise because if that were so, a promisor who confers the contracted benefits on a third-party beneficiary, thus obviating any need for the beneficiary to enforce the contract, would lose its arbitration rights vis-à-vis the beneficiary. In that scenario, a non-suing beneficiary could repudiate the arbitration clause in an action by the promisor against the beneficiary, thereby securing greater rights under the contract than the contracting parties themselves. *See NAMA Holdings*, 922 A.2d at 431 (“The law is clear that...a third-party beneficiary of the agreement has no greater rights to compel or avoid arbitration than does one of the signatories to the contract.”); *Physician’s Weight Loss Ctrs. of Am.*, 922 N.E.2d at 1017 (a third-party beneficiary “can receive no greater rights from the contract than those possessed by the signatories”); *Floeck v. United Benefit Life. Ins. Co.*, 1948-NMSC-049, ¶ 17, 52 N.M. 324, 197 P.2d 897 (same).⁵

Third, Plaintiff argues that Father was not a third-party beneficiary of the Arbitration Agreement because Son lacked agency authority to sign it on Father’s behalf. [Opp. 28.] But the Facility did not seek to compel arbitration based on *agency* theory. [RP 136-37.] Rather, the Facility sought to compel arbitration under

⁵ Plaintiff claims that *Floeck* is inapplicable because it “originates from an insurance contract, a vastly different contract than a nursing home residency contract.” [Opp. 26.] The FAA requires that nursing-home arbitration contracts be treated no differently than any other type of contract. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam).

third-party beneficiary law. Because agency law and the third-party beneficiary doctrine are distinct theories of contract enforcement, agency law is irrelevant to this case. *See Spradlin*, 893 F. Supp. 2d at 1188 (“an agency relationship was not required to create an enforceable Admission Contract [containing an arbitration clause] binding [the resident] to its terms” because the resident was as a third-party beneficiary of the contract).

Fourth, Plaintiff argues that Father never assented to the Arbitration Agreement.⁶ [Opp. 28.] In so arguing, Plaintiff references the test for equitable estoppel in *Damon*, 2014-NMCA-116, ¶ 11, that “a non-party is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.”⁷ According to Plaintiff, the Facility “argues that [Father] should be compelled to arbitrate because he ‘accepted the benefits’ of the [A]rbitration [A]greement by *remaining in the Facility*.” [Opp. 29 (emphasis added).]

⁶ The district court found (incorrectly) that “[t]here is no evidence that [Father] accepted the arbitration agreement after it was made” [**RP 155**], a ground that was not argued by either party. [COA BIC at 11.]

⁷ Alternatively, Plaintiff argues that the Facility must meet the test for implied acceptance under *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 17, 134 N.M. 630, 81 P.3d 536, which requires knowledge by the parties to the contract of a written offer and awareness that conduct constitutes acceptance. [Opp. 29.] Implied acceptance is inapplicable, however, because the Facility does not claim that Father was a contracting party, but rather, that he was a third-party beneficiary of the contract between Son and the Facility.

Not so. Father was a resident of the Facility on *three* separate occasions. Each time, one of Father's children executed an identical Admission Contract and Arbitration Agreement [RP 45-89] to secure his admission and treatment at the Facility because the Arbitration Agreement was a *condition* of each admission. [RP 65, 74, 83.] Thus, Father claimed the benefits of the Arbitration Agreement, thereby manifesting his assent, by becoming a resident of the Facility and accepting its medical treatment and services. The Complaint ¶ 12 acknowledges as much, claiming that "[Father] was dependent on the Facility for assistance with activities of daily living...." [RP 9, ¶ 12.] These facts alone satisfy the "direct benefit" test for equitable estoppel. *See Hawthorne v. Fundamental Long Term Care Holdings, LLC*, No. 2:12cv1826, 2013 WL 5273218, at *4 n.2 (W.D. Pa. Sept. 19, 2013) (applying the equitable estoppel doctrine to similar facts).

In addition, as a third-party beneficiary, Father obtained the right to force the Facility to arbitrate any claims he chose to assert. Plaintiff himself cited [Opp. 18] a New Mexico federal court decision *rejecting* the assertion that a nursing home resident "claimed no benefit" as a third-party beneficiary of an arbitration agreement because the "New Mexico Court of Appeals has specifically found that 'there are advantages to arbitration which, among other benefits, are that it generally costs less than litigation and leads to a quicker resolution.'" *Lovato*, 848 F. Supp. 2d at 1328 (quoting *Barron v. Evangelical Lutheran Good Samaritan Soc.*, 2011-NMCA-094,

¶ 41, 150 N.M. 669, 265 P.3d 720)). Further, under the Arbitration Agreement, Father obtained the right to make the Facility “pay for 100%” of the arbitrators’ fees and “up to \$5,000 in attorneys’ fees” that he incurred regardless of whether he won or lost. [RP 85.] There should be no question that under New Mexico law, Father obtained the benefits of the Arbitration Agreement and thus manifested his assent to it.

Moreover, Plaintiff is estopped from refusing to arbitrate because, as noted above, Plaintiff’s claim under the UPA seeks enforcement of Father’s contract rights. [RP 29.] Plaintiff thus may not avoid the duty to arbitrate under the Arbitration Agreement that is part of the larger Admission Contract. *See Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (cited with approval in *Damon*, 2014-NMCA-116, ¶¶ 11, 14).

Finally, Plaintiff portends that if the Facility prevails, “any unauthorized, random person off the street” could bind nursing-home residents to arbitral contracts. [Opp. 30.] Plaintiff’s speculative hyperbole ignores reality. No such “stranger” signed Father’s admission paperwork; for each of his three admissions, one of Father’s *children* signed the documents to ensure he obtained much-needed medical care. The caselaw illustrates that the same fact pattern plays out every day across the State where family members seek healthcare for their loved ones. Proper application of the third-party beneficiary doctrine poses no danger of opening the

floodgates to the abuses that Plaintiff's envisions; rather, as explained *supra* at 7-8, it would ensure that medical care and treatment will continue to be readily accessible to patients and their families.

III. PLAINTIFF'S FAA PREEMPTION ARGUMENTS ARE WRONG (Question 3)

Plaintiff errs in arguing that the COA's new contract-formation rule is not arbitration-specific in contravention of FAA § 2. [Opp. 31.] As explained above, the COA's contract-formation rule rests on the COA's premise that "[i]n *every arbitration case*, the first question a court must answer is whether *the parties to the litigation* agreed to *arbitrate*." [COA Op. ¶ 19 (bold emphasis added).] These very words demonstrate that the COA's contract-formation rule applies only to arbitration contracts and therefore is preempted. [BIC 14-15 (citing authorities).]

Second, Plaintiff avers that the COA's new third-party beneficiary rule—that a third-party beneficiary may be compelled to arbitrate only if the beneficiary sues to enforce the contract—does not run afoul of the FAA because the rule applies “neutrally to all cases involving enforcement of contractual rights against a non-signatory.” [Opp. 32.] The COA Opinion, however, says no such thing. Rather, the COA Opinion speaks only to third-party beneficiary agreements. [COA Op. ¶¶ 26-37.] The COA's ruling thus derives from the fact that a third-party beneficiary arbitration agreement is at issue and therefore is displaced by the FAA. [BIC 16-17 (citing authorities).]

Finally, Plaintiff’s response to the Facility’s point—that by exempting third-party beneficiaries from arbitration unless they are suing to enforce the contract, the COA Opinion violates the FAA by granting non-suing beneficiaries greater rights than the contracting parties—is no response at all. Plaintiff merely repeats his erroneous incantation that the “[COA] [O]pinion is applied neutrally to all cases” involving enforcement of contract duties against non-signatories. [Opp. 32.] Under generally-applicable contract law, “a third-party beneficiary of the agreement has no greater rights to compel or avoid arbitration than does one of the signatories to the contract.” *NAMA Holdings*, 922 A.2d at 431. The COA Opinion departs from this principle by exculpating non-suing third-party beneficiaries from the obligation to arbitrate, a right unavailable to the contracting parties. The COA’s new third-party beneficiary rule thus is preempted by FAA § 2.

IV. THE COA’S RULING THAT THE THIRD-PARTY BENEFICIARY DOCTRINE CANNOT BE USED AGAINST A THIRD-PARTY WHO IS NOT SUING IN CONTRACT IS AN ISSUE OF FIRST IMPRESSION (Question 4)

Plaintiff wrongly claims that the issue of first impression decided by the COA is merely “whether a signatory to a contract can enforce contractual obligations against a non-signatory third party.” [Opp. 33-34.] In fact, the COA decided a *wholly different issue*, namely, whether a signatory can compel arbitration against a third-party beneficiary of a contract containing an arbitration clause where the beneficiary is not suing on that contract. [COA Op. ¶¶ 4, 37.] Without question, *that*

issue never was raised by Plaintiff or briefed by the parties, yet the COA decided it anyway contrary to the authorities cited in the BIC at 35-37. As a result, if the Court reaches this question, it should remand the case to the district court for briefing on the issue, from which appellate review would be appropriate.

CONCLUSION

For the foregoing reasons and those set forth in the BIC, this Court should reverse and vacate the COA Opinion and remand this case to the district court to compel arbitration.

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2025 a true and correct copy of the foregoing was served via Odyssey File and Serve on all counsel of record.

/s/ Faith Kalman Reyes