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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **WRONGFUL DEATH ESTATE OF**
3 **CLIFFORD COOPER, deceased, by**
4 **the personal representative for the**
5 **wrongful death estate, MIKE HART,**

6 Plaintiff-Appellee,

7 v.

NO. 31,100

8 **EVANGELICAL LUTHERAN GOOD**
9 **SAMARITAN SOCIETY, a North**
10 **Dakota corporation, d/b/a GRANTS**
11 **GOOD SAMARITAN CENTER, and**
12 **MONIQUE DILLON, a New Mexico**
13 **resident, Director of Nursing,**

14 Defendants-Appellants.

15 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

16 **Carl J. Butkus, District Judge**

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20 Albuquerque, NM

21 Jaramillo Touchet

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4 Washington, D.C.

5 for Appellee

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7 Martha G. Brown

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10 Albuquerque, NM

11 for Appellants

12 **MEMORANDUM OPINION**

13 **KENNEDY, Chief Judge.**

14 {1} The personal representative of the wrongful death estate of a deceased man sued
15 a nursing home for wrongful death and negligence. The nursing home moved to
16 compel arbitration based on the Arbitration Agreement (the Agreement) the man's
17 wife had signed when admitting him to the nursing home. The district court denied
18 the motion to compel arbitration. We must consider whether the unavailability of the
19 designated arbitrator renders the Agreement unenforceable. As we conclude that the
20 designation of the arbitrator was integral to the Agreement, its unavailability renders
21 the Agreement unenforceable, and we affirm the denial of the motion.

22 **I. BACKGROUND**

1 {2} Clifford Cooper fell and broke his hip in 2008, when he was eighty-one years
2 old. After hospitalization, he was released for therapy to Grants Good Samaritan
3 Center (the nursing home), which is owned and operated by Evangelical Lutheran
4 Good Samaritan Society (Evangelical). On June 24, 2008, Cooper's wife, Pacita, took
5 him to the nursing home and signed his admission paperwork. She held a general
6 durable power of attorney for her husband. Included in the admission paperwork was
7 a page labeled "Resolution of Legal Disputes." It stated that any legal disputes would
8 be settled by arbitration and would be governed by the Rules of the National
9 Arbitration Forum (NAF). Pacita signed the bottom of the page in acknowledgment
10 that she received the Resolution and did not check a box to opt out of arbitration.

11 {3} Cooper left the nursing home after slightly more than a month. When he left
12 the nursing home, his other hip was broken, and he had several health issues. He
13 required further medical attention until he died the following April. Following
14 Cooper's death, Mike Hart, the personal representative of Cooper's wrongful death
15 estate, brought a claim in February 2010 against Evangelical and its Director of
16 Nursing, Monique Dillon, for wrongful death, negligence, negligence per se,
17 misrepresentation, violation of the unfair trade practices act, and punitive damages.
18 Evangelical moved to compel arbitration pursuant to the Agreement Pacita signed.
19 After briefing from both sides, the district court denied the motion to compel

1 arbitration on the grounds that the arbitration clause does not bind the Wrongful Death
2 Act (the Act) beneficiaries acting through a personal representative. Evangelical
3 appealed.

4 {4} Both parties agree that NAF is not available to arbitrate. After the Minnesota
5 Attorney General filed a lawsuit against NAF based on its ties to consumer loan and
6 debt collection industries, it agreed to cease participating in consumer disputes
7 initiated after July 24, 2009. *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033,
8 ¶ 9, 150 N.M. 398, 259 P.3d 803. We requested supplemental briefing from the
9 parties on the issue of whether applying *Rivera* to the NAF issue disposes of the case
10 entirely, therefore, no longer requiring us to address the issues under the Act and
11 whether remand is necessary in order to conduct further discovery.

12 **II. DISCUSSION**

13 {5} “We apply a de novo standard of review to a district court’s denial of a motion
14 to compel arbitration.” *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 11,
15 146 N.M. 256, 208 P.3d 901. “As contracts, ‘[w]e consider [arbitration agreements]
16 as a whole to determine how they should be interpreted.’” *Medina v. Holguin*, 2008-
17 NMCA-161, ¶ 8, 145 N.M. 303, 197 P.3d 1085 (alterations in original) (internal
18 quotation marks and citation omitted). “[W]hether the parties have agreed to arbitrate
19 presents a question of law, and we review the applicability and construction of a

1 contractual provision requiring arbitration de novo.” *Cordova*, 2009-NMSC-021, ¶ 11
2 (internal quotation marks and citation omitted).

3 {6} Hart argues that the Agreement is unenforceable because the designated
4 arbitrator, NAF, is unavailable. Evangelical argues that the designation of NAF and
5 its rules is ancillary at best and allows for the appointment of a substitute arbitrator.
6 The parties argued the implications of NAF’s unavailability both below and on appeal.
7 Although the district court did not address NAF’s unavailability in its order, “[t]his
8 Court may affirm a district court ruling on a ground not relied upon by the district
9 court, [but] will not do so if reliance on the new ground would be unfair to [the]
10 appellant.” *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d
11 1154 (alteration in original) (internal quotation marks and citation omitted). In their
12 supplemental briefing, both parties apply *Rivera* analysis despite coming to different
13 conclusions. We conclude that the issue of NAF’s unavailability is dispositive, and
14 we do not need to address the remaining issues.

15 {7} The New Mexico Supreme Court’s recent decision in *Rivera* provides us with
16 sufficient guidance to resolve the issue before us. *Rivera* also involved an arbitration
17 agreement that designated the now-unavailable NAF as the arbitrator. 2011-NMSC-
18 033, ¶ 1. The Supreme Court established that when the designation of NAF is integral
19 to an arbitration agreement, then NAF’s unavailability renders the entire arbitration

1 agreement unenforceable. *Id.* ¶¶ 26-27. The Supreme Court held that “[d]espite the
2 policy favoring enforcement of arbitration agreements, under the [Federal Arbitration
3 Act (FAA),] an arbitration agreement is not enforceable where grounds . . . exist at
4 law or in equity for the revocation of any contract.” *Id.* ¶ 17 (third alteration in
5 original) (internal quotation marks and citation omitted). General state law contract
6 defenses may invalidate arbitration agreements. *Id.* Although Section 5 of the FAA
7 allows a court to fill a vacancy if there is a lapse in naming an arbitrator, in *Rivera*,
8 our Supreme Court stated that Section 5 “cannot be used to circumvent the parties’
9 intent to arbitrate before that specific forum” when designation of a particular
10 arbitrator was integral to the agreement. *Id.* ¶ 24.

11 {8} The Supreme Court concluded that “whether . . . NAF is integral to the parties’
12 agreement to arbitrate is a matter of contract interpretation,” *id.* ¶ 27, and adopted a
13 test to determine whether the designation of NAF was integral to the agreement or
14 merely an “ancillary logistical concern[.]” *Id.* ¶ 24 (internal quotation marks and
15 citation omitted). The Supreme Court held that the designation of NAF was integral
16 to the agreement because the agreement expressly designated a single arbitration
17 provider, designated a single set of rules, used mandatory language, and referenced
18 NAF pervasively throughout the agreement. *Id.* ¶¶ 30, 33, 38. Because the
19 designation of NAF was integral and NAF was unavailable, the Supreme Court

1 determined that a court may not “select and impose on the contracting parties a
2 substitute arbitrator inconsistent with the plain terms of their contract.” *Id.* ¶ 38. The
3 Supreme Court declined to enforce the arbitration agreement.

4 {9} Here, the Agreement is similar, but not identical to the one in *Rivera*. In *Rivera*,
5 the parties explicitly designated that any arbitration shall be conducted pursuant to
6 NAF rules and procedures. *Id.* ¶ 38. The first rule of the NAF Code states: “This
7 Code shall be administered only by the [NAF] or by any entity or individual providing
8 administrative services by agreement with the [NAF].” National Arbitration Forum,
9 *Code of Procedure*, Rule 1(A) (Aug. 1, 2008). In *Rivera*, our Supreme Court
10 questioned whether a substitute arbitrator could even use the NAF rules, and if the
11 NAF rules exist in the absence of NAF. 2011-NMSC-033, ¶ 35. In *Rivera*, we have
12 been provided with no information about whether a substitute arbitrator is available
13 under the first rule of NAF. The express designation of the rules of NAF weighs in
14 favor of NAF being integral to the agreement.

15 {10} Here, the Agreement uses mandatory language to refer to NAF as in the *Rivera*
16 agreement. In the present case, the Agreement states that the arbitration “shall” be
17 conducted in accordance with the NAF rules. It further states that “any person
18 requesting arbitration *will* be required to pay a filing fee to NAF and other
19 expenses[.]” (Emphasis added.) The use of mandatory language strengthens the

1 comparison with the agreement in *Rivera* in favor of the arbitration clause being
2 integral. The instruction that anyone who wishes to arbitrate “will” pay a filing fee
3 to NAF also supports a reading that the agreement exclusively designates NAF as
4 arbitrator.

5 {11} In stating that the NAF rules shall be used and that a filing fee will be paid to
6 NAF, the Agreement includes NAF’s contact information via phone, postal mail, or
7 website. This information is provided if the consumer signing the agreement “would
8 like information regarding NAF’s arbitration service and its rules and procedures for
9 arbitration[.]” While NAF appears to be referenced fewer times than in *Rivera*, we
10 determine that NAF is still referenced pervasively throughout the Agreement.

11 {12} Although the arbitration clause did not expressly designate NAF as the
12 arbitrator, the designation of NAF rules, which include NAF’s control over the
13 appointment of an arbitrator, the use of mandatory language, and several references
14 to NAF indicate that designation of NAF is integral to the arbitration clause. We also
15 note the absence of reference to any other arbitrator or alternative methods of
16 appointing one.

17 {13} Evangelical argues that the question of NAF’s importance to the contract should
18 be remanded for limited discovery in a lower court because *Rivera* was not decided
19 until after briefing was complete in the district court. Interpretation of a contract for

1 arbitration, including the issue of whether the parties agreed to arbitrate, is a matter
2 of law that we review de novo. *Cordova*, 2009-NMSC-021, ¶ 11. Evangelical did not
3 point us to factual issues that require discovery. In response to our request for
4 clarification on what issues needed discovery, Evangelical merely stated that it needed
5 discovery about the “permissive nature of the NAF Code” and whether the delegation
6 provision is valid. We do not agree that those are issues requiring remand rather than
7 legal issues of whether the parties agreed to arbitrate. No discovery is necessary in
8 order to determine whether designation of NAF is integral.

9 **III. CONCLUSION**

10 {14} We conclude that the designation of NAF is integral to the parties’ agreement
11 to arbitrate and that its unavailability therefore renders the entire Agreement
12 unenforceable. We affirm the district court’s denial of Evangelical’s motion to
13 compel arbitration.

1 {15} **IT IS SO ORDERED.**

2

3

RODERICK T. KENNEDY, Chief Judge

4 **WE CONCUR:**

5

6 **JAMES J. WECHSLER, Judge**

7

8 **MICHAEL E. VIGIL, Judge**