

2 5, 2008, Maldonado-Falcón was admitted to the Hospital “with a diagnosis of pancreatic head
3 mass and was discharged on June 15, 2008 with a diagnosis of pancreatic cancer” Docket
4 # 6, ¶ 3. Though he underwent surgery during that period, his condition “did not improve and
5 he continued experiencing pains in the abdominal area,” *id.* ¶¶ 9-10, so on July 29, 2009 he was
6 again admitted to the Hospital “in septic shock”; he was thereafter discharged in August 2009.
7 According to the amended complaint, Maldonado-Falcón was subsequently admitted to the
8 Hospital on September 10, 2009, and on October 29, 2009. *Id.* ¶¶ 11-12.

9 In January 2010, Maldonado-Falcón was transferred to another hospital in New York,
10 where doctors allegedly diagnosed him with “epigastric pain, a serious, infected abscess and
11 liver inflammation and a severe depression.” *Id.* ¶ 23. According to the amended complaint, the
12 New York doctors said that he was “unlikely to have had pancreatic cancer, with negative tumor
13 markers and a negative pancreatic biopsy report.” *Id.* This suit followed in late 2012. Docket
14 # 1. The plaintiffs claim medical malpractice and breach of the duty of care, asserting a right
15 to recover damages under Articles 1802 and 1803 of the Puerto Rico Civil Code, P.R. Laws
16 Ann. tit. 31, §§ 5141, 5142.

17 In September 2013, the Hospital filed a motion to dismiss based on a forum-selection
18 clause contained in a consent form that Maldonado-Falcón had signed on May 5, 2008, prior
19 to his first admission to the Hospital. Docket # 41. In pertinent part the consent form provided:

20 If I understand I have suffered damages as a direct or indirect result or in any way
21 related to diagnostic and/or therapeutic services offered by my physician and/or
22 [the Hospital] physicians or by the Hospital, and as a result, I decide to file suit
before the Court of First Instance of the Commonwealth of Puerto Rico, San Juan
Court.

23 Docket # 41-2, p. 2.

24 _____
25 Encyclopedia Britannica, Inc., 239 F.3d 385, 388 (1st Cir. 2001), or a Rule 12(b)(3), as maintained by
26 other circuits, see Atl Marine, 134 S.Ct. at 580. The Court, however, expressed no opinion on whether
a party bringing an action for breach of contract might obtain dismissal under Rule 12(b)(6). *Id.*

2 Noting that Maldonado Falcón’s signature did not appear on the separate signature line
3 below the forum-selection clause, the Court summarily denied the motion. Because a signature
4 is the “universal requisite of informed consent,” and because Maldonado-Falcón did not
5 “signal[] his assent to the forum selection clause,” Docket # 42 (quoting Rivera v. Centro
6 Médico de Turabo, Inc., 575 F.3d 10, 22 (1st Cir. 2009)), the Court refused to enforce the
7 forum-selection clause. Id.²

8 The Hospital promptly moved for reconsideration. It argues that Maldonado-Falcon did
9 sign the consent form, “only that his signature was placed on the wrong field.” Docket # 43, p.
10 2. His signature, the Hospital explains, appeared on the line for the “name of person giving
11 consent.” See Docket # 41-2.

12 The plaintiffs opposed. Conceding that “Maldonado-Falcón did sign the informed
13 consent form,” they nevertheless observe that “his signature was placed on the last page, page
14 3, away from the forum selection clause, which is buried in a single spaced paragraph in the
15 middle of page 2.” Docket # 46, p. 2. They also submit that Regulation No. 7504 (Regulation),
16 which in pertinent part prohibits health care providers from including in informed-consent
17 documents any forum-selection clauses, was in effect during Maldonado-Falcón’s last three
18 admissions to the Hospital.

19 **Standard of Review**

20 “The granting of a motion for reconsideration is ‘an extraordinary remedy which should
21 be used sparingly.’” Palmer v. Champion Mortg., 465 F.3d 24, 30 (1st Cir. 2006) (citation
22 omitted). It is common ground that the moving party “must ‘either clearly establish a manifest
23

24 ²In denying the Hospital’s motion, the Court assumed — without deciding — that the forum-
25 selection clause was mandatory, rather than permissive. See Rivera, 575 F.3d at 16-17 (describing the
26 difference between mandatory and permissive forum selection clause). The Court emulates that
assumption here.

2 error of law or must present newly discovered evidence.” Marie v. Allied Home Mortg. Corp.,
3 402 F.3d 1, 7 n. 2 (1st Cir. 2005) (quoting Pomerleau v. W. Springfield Pub. Sch., 362 F.3d 143,
4 146 n. 2 (1st Cir. 2004)). It is also well settled that “[a] motion for reconsideration is not a
5 vehicle for the introduction of arguments that could and should have been made to the district
6 court earlier.” Fábrica de Muebles J.J. Álvarez, Incorporado v. Inversiones Mendoza, Inc., 682
7 F.3d 26, 33 (1st Cir. 2012). Nor does Rule 59(e) “provide a vehicle for a party to undo its own
8 procedural failures.” Aybar v. Crispín-Reyes, 118 F.3d 10, 16 (1st Cir. 1997) (quoting Moro v.
9 Shell Oil Co., 91 F.3d 872, 876 (7th Cir.1996)).

10 **Applicable Law and Analysis**

11 As said, the Court summarily denied the Hospital’s request to enforce the
12 forum-selection clause. For the reasons laid out below, the Hospital’s motion for reconsideration
13 does not upend that determination.

14 *Judicial Enforcement of Forum-Selection Clauses*

15 The analysis begins with the mechanics of judicial enforcement of forum-selection
16 clauses. Because forum-selection clauses “are prima facie valid,” M/S Bremen v. Zapata Off-
17 Shore Co., 407 U.S. 1, 10 (1972), they “carr[y] a strong presumption of enforceability.”
18 Marrero v. Aragunde, 341 F. App’x 656, 658 (1st Cir. 2009) (citation and internal quotation
19 marks omitted).

20 In Bremen, the beacon by which courts must steer to determine a mandatory forum
21 selection clause’s enforceability, the Supreme Court listed four grounds for finding a forum-
22 selection clause unenforceable:

23 (1) the clause was the product of “fraud or overreaching,”

24 (2) “enforcement would be unreasonable and unjust,”;

25 (3) proceedings “in the contractual forum will be so gravely difficult and
26 inconvenient that [the party challenging the clause] will for all practical purposes
be deprived of his day in court,”; or

2 (4) “enforcement would contravene a strong public policy of the forum in which
3 suit is brought, whether declared by statute or by judicial decision,”

4 Huffington v. T.C. Group, Inc., 637 F.3d 18, 23 (1st Cir. 2011) (alterations in original and
5 citations omitted) (construing and discussing Bremen). The party resisting its enforcement bears
6 the “heavy burden” of persuading why a forum-selection clause should not be enforced.
7 Bremen, 407 U.S. at 17.

8 As to the last condition, the First Circuit’s 2009 decision in Rivera recognized that the
9 Regulation, which was passed on May 12, 2008 — a week after Maldonado-Falcón’s first
10 admission to the Hospital — reflected Puerto Rico’s strong public policy against forum-
11 selection clauses in informed consent forms. See 575 F.3d at 23 (remarking that “the Regulation
12 is persuasive evidence of Puerto Rico’s public policy ” against forum-selection clauses in
13 admissions documents). Two years later, the Puerto Rico Supreme Court ratified Rivera’s
14 observation, finding that “forum selection clauses in the informed consent documents presented
15 to patients . . . ha[ve] been validly banned in our legal system.” García-Mones v. Grupo HIMA
16 San Pablo, Inc., 875 F.Supp.2d 98, 105-06 (D.P.R. 2012) (citing Centro Médico del Turabo, Inc.
17 v. Departamento de Salud, 181 P.R. Dec. 72, 77 n. 1 (2011)). And a phalanx of cases in this
18 district have repeatedly enforced such a prohibition, expanding it to encompass “medical
19 admissions forms” as well. Rodríguez v. Ryder Mem’l Hosp., Inc., No. 11-1905, --- F.Supp.2d
20 ---- 2013 WL 2456215, at * 3 (D.P.R. June 6, 2013).³

21
22 ³See Segura-Sánchez v. Hosp. Gen. Menonita, Inc., 953 F. Supp. 2d 344, 346 (D.P.R. 2013)
23 (finding that forum-selection clause contained in documents to gain admission to hospital for emergency
24 treatment was unenforceable as contrary to Puerto Rico public policy); Rodríguez, 2013 WL 2456215,
25 at * 4 (“The [Puerto Rico] Supreme Court’s statement . . . is clear: forum selection clauses are against
26 public policy in informed-consent documents.”); Prince v. Hosp. HIMA San Pablo-Caguas, 943 F.
Supp. 2d 280, 284 (D.P.R. 2013) (“Certainly, the enactment of Regulation No. 7617 is a testament to
the public policy of prohibiting the enforcement of forum selection clauses included in admissions
documents for medical treatment.”); Vázquez v. Hosp. Episcopal Cristo, No. 10-2216, 2011 WL
6748951, at *1 (D.P.R. Dec. 22, 2011) (“As noted by the Puerto Rico Supreme Court, Puerto Rico has

2 Here, no one disputes that the consent form containing the forum-selection clause that
3 Maldonado-Falcón signed in May 2008 fell under the Regulation’s aegis. And for good reason:
4 The Regulation, as noted earlier, “prohibits a health care provider from including in informed
5 consent documents any ‘[a]spects about any decision regarding the possibility of any act of
6 malpractice by a provider’ or ‘legal clauses foreign to the sphere or field of medicine or health
7 . . . such as, but not limited to, forum selection clauses.’” Rivera, 575 F.3d at 23 (citing Article
8 13, Section 8C of Regulation 7504 of May 12, 2008 (alterations in original)). Puerto Rico’s
9 strong public policy against forum-selection clauses in admissions documents would therefore
10 apply here; and the clause would violate that public policy. The upshot is that the clause would
11 be unenforceable.

12 But there is a wrinkle. Maldonado-Falcón’s first visit to the Hospital took place on May
13 5, 2008, a week before the Regulation took effect. See Rivera, 575 F.3d at 23 (finding that “the
14 Office of the Patient’s Advocate of Puerto Rico passed the Regulation on “May 12, 2008”). And
15 in Rivera, the First Circuit explicitly declined to give the Regulation retroactive effect. See id.
16 (reasoning that “the default position under Article 3 of the Puerto Rico Code is that laws ‘shall
17 not have a retroactive effect unless they expressly so decree.’” (citing P.R. Laws Ann. tit. 31,
18 § 3)); accord Rodríguez, 2013 WL 2456215, at *2.

19 However, the plaintiffs say that according to the amended complaint, Maldonado-Falcón
20 was also admitted to the Hospital on July 29, September 10, and October 29, 2009. See Docket
21 # 6 ¶¶ 11-12. His last three visits to the Hospital, they correctly observe, took place well over
22 a year from his initial May 5, 2008 admission. And the Regulation was irrefragably in full force
23 during that time frame.

24 _____
25 statutorily prohibited forum selection clauses presented to patients as part of the informed consent
26 process in obtaining medical treatment.” (citations omitted)).

2 In its reply, the Hospital discloses, for the first time, two additional consent forms (with
3 embedded forum-selection clauses) for the July and October 2009 admissions. And the
4 Regulation, the Hospital acknowledges, was already in full force at that time.⁴ Downplaying this
5 problem, the Hospital demurs that the amended complaint makes clear “that any subsequent
6 admission, medical treatment or intervention of Maldonado-Falcón at [the Hospital] was the
7 direct result of the alleged negligent treatment received during the May 2008 surgical
8 intervention at [the Hospital].” Docket # 55, p. 7. And because the May 2008 “intervention
9 happened before the existence of [the Regulation],” goes the argument, “there is no need to
10 evaluate the applicability or not of the prohibition included in such regulation.” Id., p. 8. This
11 argument lacks force.

12 As an initial matter, the Hospital three-sentence proffer, which contains neither a
13 supporting authority nor a developed argument makes waiver a real possibility. See, e.g., CMM
14 Cable Rep, Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1525-26 (1st Cir.1996) (three
15 sentences with three undiscussed citations did not defeat waiver). But even putting that flaw
16 aside, the Hospital’s argument fails. If, as the Hospital says, the last three hospital visits were
17 covered by the May 2008 consent form’s forum-selection clause, then why did the Hospital find
18 it necessary to provide Maldonado-Falcón with additional consent forms for his subsequent
19 hospitalizations — which, again took place well over a year from his May 2008 visit?

20 It stands to reason that each hospital admission presented myriad risks and unforeseen
21 consequences. Such medical realities could explain why the Hospital (quite wisely) thought it
22 necessary to furnish its patients with new consent forms for each additional admission,
23 regardless of whether that admission “related back” to the initial visit. In all events,

24
25 ⁴Contrary to the May 5, 2008 consent form, none of the 2009 consent forms produced by the
26 Hospital was signed by Maldonado-Falcón, because he appeared to be “incapacitated” at that time. See
Docket # 60-1, 60-2. They were apparently signed by his sister-in-law. (While the plaintiffs dispute this,
such a dispute is of no moment.)

2 countenancing the Hospital's argument would produce absurd results. Suppose that
3 Maldonado-Falcón visited the Hospital today with symptoms similar to those exhibited in 2008.
4 Can the May 2008 forum-selection clause bind him today — five years later? Of course not.
5 Such a result would be nonsensical.

6 For these reasons, the Court rejects the Hospital's broad and implausible argument,
7 finding instead that, barring the May 2008 admission, Maldonado-Falcón's visits to the Hospital
8 took place during the Regulation's effectiveness. And because the forum-selection clauses
9 contained in the 2009 consent forms run contrary to Puerto Rico's public policy, they are
10 unenforceable. See note 3 above (collecting cases on this point).

11 That is not the end of the matter, however. The fact remains that the Regulation could
12 not bar enforcement of the May 2008 forum-selection clause, because — as noted earlier — the
13 Regulation lacks retroactive affect. But because the Court agrees with the plaintiffs that forum-
14 selection clause contained in the May 2008 consent form was a product of “overreaching” —
15 thus being unenforceable — the Court need not dwell on that point.⁵ After all, “[t]he simplest
16 way to decide a case is often the best.” Stor/Gard, Inc. v. Strathmore Ins. Co., 717 F.3d 242, 248
17 (1st Cir. 2013) (quoting Chambers v. Bowersox, 157 F.3d 560, 564 n.4 (8th Cir. 1998) (R.
18 Arnold, J.)).

19 While “overreaching” has been described as a “nebulous concept at best,” Haynsworth
20 v. The Corporation, 121 F.3d 956, 965 (5th Cir. 1997), the Rivera court defined it as one “party’s
21 unfair exploitation of its overwhelming bargaining power or influence over the other party.” 575
22 F.3d at 21 (construing concept).⁶ “But the mere fact of this inequality,” the First Circuit

23 ⁵By like token, the Court need not consider a recent non-binding, state-court decision submitted
24 by the Hospital that invalidates the Regulation on procedural grounds.

25 ⁶ Because Puerto Rico follows the federal standard enunciated in Bremen, see Rafael Rodríguez
26 Barril, Inc. v. Conbraco Indus., Inc., 619 F.3d 90, 92 (1st Cir. 2010) (citing Unisys P.R. v. Ramallo
Bros. Printing, Inc., 128 P.R. Dec. 842, 856-57 (1991)), the Court need not decide whether, for Erie

2 clarified, “is not enough to render an agreement unenforceable.” Id. (citations omitted). The
3 party bearing the burden of persuading — i.e., the one resisting a forum-selection clause’s
4 enforcement — must marshal “some evidence that the party has exploited this bargaining
5 power in a way that the courts will not tolerate.” Id. (quoting Outek Caribbean Distrib., Inc. v.
6 Echo, Inc., 206 F.Supp.2d 263, 267 (D.P.R. 2002)).

7 The plaintiffs have shouldered such a heavy burden here. To begin with, “there are
8 certainly suggestions of overreaching here.” Id. As the plaintiff in Rivera, Maldonado-Falcón’s
9 “relationship with the [H]ospital grew out of a grave medical condition,” which supports the
10 inference that “[h]e was likely more focused on that medical condition than the significance
11 of the documents that he was asked to sign. He was not thinking about possible lawsuits.” Id.

12 Yet under Rivera, the above circumstances, without more, fall short of overcoming the
13 “presumption in favor of enforcing a forum selection clause” Id. at 22. The court
14 explained:

15 The language of the clause was clear. The clause was in bold print and marked
16 off from the rest of the one-page form by a special box. It was not “buried in fine
17 print” or otherwise obscured. The clause required the patient to signal his assent
18 by placing his initials next to it.

19 Id. (citing Wilkerson ex rel. Estate of Wilkerson v. Nelson, 395 F.Supp.2d 281, 287
20 (M.D.N.C.2005)). The court further added that the Rivera plaintiff had “signaled his assent to
21 the forum selection clause on two separate occasions” Id.

22 Here, however, the clause was neither in bold nor marked off from the rest of the page
23 by “a special box.” See id. Nor did it require “the patient to signal his assent by placing his
24 initials next to it,” id. (citation omitted and emphasis added); rather, as properly argued by the
25 plaintiffs, Maldonado-Falcón’s signature was placed on the last page (page three), away from

26 _____
purposes, the forum-selection clause “is enforceable as ‘procedural’ and look to a federal test of validity
or instead treat it as ‘substantive’ and look to pertinent state law” Id.

2 the forum-selection clause, which was buried in a single-spaced paragraph in the middle of page
3 two. And while the language of the clause was arguably clear, it was nonetheless “‘buried in
4 fine print’ or otherwise obscured.” Id. Moreover, unlike Rivera, Maldonado-Falcón “signaled
5 his assent” to the forum-selection clause only once. Id. Even so, his signature did not even
6 appear on the signature line. Compare Wilkerson, 395 F.Supp.2d at 287 (finding “no claim of
7 ambiguity” where “[p]laintiff signed the form on the separate signature line before the
8 arbitration clause”); Wilcox v. Lexington Eye Inst., No. 53871-3-I, 2005 WL 1964481, at *2-3
9 (Wash .Ct. App. Aug.15, 2005) (rejecting argument that forum-selection clause was
10 unenforceable because of “undue influence,” and “overweening bargaining power,” where
11 plaintiff had the opportunity to read the consent form in advance of surgery and again on the day
12 of the procedure . . . , and plaintiff’s signature appeared directly underneath the forum selection
13 provision). What is more, Maldonado-Falcón — contrary to Rivera — had neither the chance
14 to “consult an attorney” regarding the forum-selection clause nor the opportunity to “consider
15 his assent to it outside the pressures of a hospital setting.” Rivera, 575 F.3d at 22. Indeed,
16 Maldonado-Falcón visited the Hospital in an emergency state after feeling “sharp stomach
17 pains.”

18 These crucial differences set this case apart from Rivera. The Court is, therefore,
19 convinced that the forum-selection clause contained in the May 2008 consent form was a
20 product of “overreaching.” Accordingly, the Court refuses to enforce it.

21 The Hospital resists this conclusion. But Silva v. Encyclopedia Britannica Inc., 239 F.3d
22 385, 387 (1st Cir. 2001), and Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991),
23 much touted by the Hospital, do not compel a contrary conclusion. It is true that those decisions
24 found no “overreaching.” Yet they arose in a wholly different context. While the
25 forum-selection clause in Silva appeared in small print on the back of the contract, the contract
26 at play there was an encyclopedia sales commission contract. Similarly, the clause in the

2 Carnival case — which also appeared in the fine print on the back of the contract — involved
3 a passenger ticket.

4 Those scenarios are a far cry from cases like Rivera, and the case at hand, where “there
5 are certainly suggestions of overreaching . . .” Rivera, 575 F.3d at 21. Contrary to the plaintiffs
6 in Silva and Carnival, Maldonado-Falcón’s “relationship with the [H]ospital grew out of a grave
7 medical condition,” which supports the inference that “[h]e was likely more focused on that
8 medical condition than the significance of the documents that he was asked to sign. He was not
9 thinking about possible lawsuits.” Id. “This reality in cases like this one undoubtedly” explain
10 why Puerto Rico enacted the Regulation. Id. at 21-22. The May 2008 forum-selection clause is
11 unenforceable.

12 **Conclusion**

13 For the reasons stated, the Hospital’s motion for reconsideration is **DENIED.**

14 **IT IS SO ORDERED.**

15 In San Juan, Puerto Rico, this 18th day of February, 2014.

16 *S/ Salvador E. Casellas*
17 SALVADOR E. CASELLAS
18 U.S. Senior District Judge
19
20
21
22
23
24
25
26