IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

DEBRA J. BRENT,	*	
Plaintiff,	*	
v.	*	**Case No.: PWG-14-1705**
PRIORITY 1 AUTOMOTIVE GROUP, BMW OF ROCKVILLE,	*	
Defendant.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

After Plaintiff Debra J. Brent filed this employment discrimination suit against Priority 1 Automotive Group, BMW of Rockville ("Priority 1"), her former employer, Priority 1 sought to dismiss the complaint and proceed with arbitration instead, insisting that Brent had signed an arbitration agreement. Def.'s Mot. to Dismiss Compl. & Compel Arbitration, ECF No. 6. Because a genuine dispute existed at that time as to the validity of the purported arbitration agreement, I denied Priority 1's motion. ECF No. 39. Now Brent has moved for summary judgment on "whether the arbitration policies at issue constitute an enforceable agreement to arbitrate." Pl.'s Mem. 1, ECF No. 64-1; *see* Pl.'s Mot., ECF No. 64.[1] She has demonstrated that there is no evidence of consideration to give rise to an agreement to arbitrate, and Priority 1 has not shown otherwise. Accordingly, the purported arbitration agreement is unenforceable, and Brent's motion is granted.

[1] The parties fully and skillfully briefed the issue. ECF Nos. 64-1, 65, 68. A hearing is not necessary. *See* Loc. R. 105.6.

Factual Background

VOB BMW of Rockville hired Brent in October 2011. Pl.'s Mem. 4. Rockville Cars, LLC purchased VOB BMW of Rockville on March 1, 2012. *Id.* Thus, "Brent was an employee of Rockville Cars, LLC, as of March 1, 2012." *Id.* "Priority 1 is the sole member of Rockville Cars, LLC." *Id.*

Priority 1 President Louis Cohen sent all Priority 1 employees a memorandum on November 4, 2011, with regard to the "New Company Policy and Employee Handbook" ("Employee Handbook"). Jt. Ex. 1, ECF No. 68-1. It stated that "Handbooks [would] be distributed" and directed employees:

> THERE ARE (2) COPIES EACH OF THREE (3) ACKNOWLEDGMENT FORMS IN THE BACK OF EACH BOOK. ONE COPY OF EACH IS TO BE *SIGNED BY YOU* AND TURNED INTO [sic] YOUR MANAGER FOR FORWARDING TO THE OFFICE NO LATER THAN FRIDAY NOVEMBER 11, 2011. The other is yours to keep. **The acknowledgements include**:
>
> - Acknowledgement of receipt of Employee Handbook on reverse side **Arbitration** and Consumer Report Consent
> - Acknowledgement & Agreement to comply with Information Security Program and on reverse side Operating Motor Vehicles
> - Internet Usage Policy

Id. (emphasis in bold added).

The "acknowledgement" labeled "ARBITRATION" ("Arbitration Acknowledgment") stated:

> The Employee agrees that as a condition of Priority 1 A.G. employment and continued employment, that any and all differences or disputes between the employee and the company shall be settled by the parties or through binding arbitration. Either side may request that the dispute be submitted for arbitration to the Maryland state board of mediation with the request that a staff member be appointed to act as arbitrator. The arbitrator's finding, decision and award shall be final, binding and conclusive on both parties. Judgment may be entered in any court or forum having jurisdiction. The losing party agrees to pay any attorney's fees or costs incurred by the prevailing party, as part of the judgment rendered.

> Any and all hearings or proceedings involving arbitration shall be held in Baltimore County, Maryland.

Jt. Ex. 101. It included "employee signature" and "date" lines. *Id.* It did not include a line for the employer's signature. *See id.*

The Employee Handbook had a provision titled "Binding Arbitration Program" ("Arbitration Policy"), which provided:

> In an attempt to provide employees with another open and unbiased means of resolving a disagreement or controversy not settled within the normal open door policy process, a binding arbitration is also available to employees. Any controversy or claim arising out of, or related to your employment with this Company, shall be settled by arbitration in accordance with the current rules of the American Arbitration Association. The decision and/or award of the arbitration process, except for mistakes by law, shall be final and binding upon the parties. No arbitration shall involve parties other than those in this agreement, its successors, employees, agents and representatives. The employee consents to having personal jurisdiction in the State of Maryland and agrees to service of process within this jurisdiction by way of certified mail, return receipt requested, signed by the employee. The losing party agrees to pay any attorney's fees or costs incurred by the prevailing party, as part of the judgment rendered. Any and all hearings or proceedings involving arbitration shall be held in Baltimore County, Maryland.

Jt. Ex. 33. The Employee Handbook stated that Priority 1 "reserve[d] the right . . . to enforce, change, abolish or modify existing policies . . . as [Priority 1] may consider necessary with or without notice." *Id.* at 7; *see id.* at 94 (Priority 1 "ha[d] the right . . . to enforce, change, abolish or modify existing policies . . . as [Priority 1] may deem necessary or advisable."). Likewise, the Acknowledgment of Receipt of the Employee Handbook, which included signature lines for "employee signature" and "manager signature," provided that "Priority 1 A.G. reserve[d] the right to modify, supplement, amend or delete any of the policies . . . contained in this Handbook . . . without prior notice at any time." *Id.* at 100.

Beginning in March 2012, Priority 1's "employees, including Brent, were required to . . . electronically sign an acknowledgement of each employee's receipt of and agreement to" these

documents via a web portal. Delach Aff. ¶ 5, Jt. Ex. 104–05. With one click, an employee could view "the Company Policy and Employee Handbook (including accompanying Dispute Resolution via Arbitration Policy)," and with a second click, the employee could sign the same electronically. *Id.* The portal did not include a separate link to view and sign the Arbitration Acknowledgment. *See id.* The parties dispute whether Brent electronically signed the forms at that time, but whether she did is not material to the pending motion. *See* Pl.'s Mem. 13 n.1. Rather, what is at issue is whether, assuming arguendo that Brent electronically signed the Arbitration Acknowledgment and other forms, the parties entered into an enforceable agreement to arbitrate.

Standard of Review

In reviewing a motion for summary judgment, the Court considers the facts in the light most favorable to the nonmovant, drawing all justifiable inferences in that party's favor. *Ricci v. DeStefano*, 557 U.S. 557, 585–86 (2009); *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 391–92 (4th Cir. 2009). Summary judgment is proper when the moving party demonstrates, through "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials," that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c)(1)(A); *see Baldwin v. City of Greensboro*, 714 F.3d 828, 833 (4th Cir. 2013).

If the party seeking summary judgment demonstrates that there is no evidence to support the nonmoving party's case, the burden shifts to the nonmoving party to identify evidence that shows that a genuine dispute exists as to material facts. *See Celotex v. Catrett*, 477 U.S. 317, 324 (1986). The existence of only a "scintilla of evidence" is not enough to defeat a motion for

summary judgment. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251–52 (1986). Instead, the evidentiary materials submitted must show facts from which the finder of fact reasonably could find for the party opposing summary judgment. *Id.* This means that the nonmovant "'must do more than simply show that there is some metaphysical doubt as to the material facts,'" because "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."'" *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (footnote omitted)).

> "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

Id. (quoting *Anderson*, 477 U.S. at 247–48).

Discussion

Federal policy favors arbitration agreements. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500–01 (4th Cir. 2002); *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997). But, an arbitration agreement only "is enforceable if it is a valid contract." *Caire v. Conifer Value Based Care, LLC*, 982 F. Supp. 2d 582, 591 (D. Md. 2013) (citing *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540 (4th Cir. 2005)). Further, "'the presumption in favor of arbitration does not apply to questions of an arbitration provision's validity, rather than its scope.'" *Id.* at 593 (quoting *Noohi v. Toll Brothers, Inc.*, 708 F.3d 599, 611 n.6 (4th Cir. 2013)). "Courts apply 'ordinary state-law principles that govern the formation of contracts when assessing whether the parties agreed to arbitrate a matter.'" *Galloway v. Santander Consumer USA, Inc.*, No. CCB-13-3240, 2014 WL

4384641, at *2 (D. Md. Sept. 3, 2014) (quoting *Noohi*, 708 F.3d at 607 (internal quotation marks and citations omitted)). Under Maryland law,[2] "[a]s with any contract, the arbitration provision must be supported by adequate consideration in order to be valid and enforceable." *Caire*, 982 F. Supp. 2d at 591; *see Raglani v. Ripkin Prof'l Baseball*, 939 F. Supp. 2d 517, 522 (D. Md. 2013) ("Arbitration agreements, like all contracts, 'ordinarily require consideration.'" (quoting *Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, 835 A.2d 656, 661 (Md. 2003))). Significantly, the "arbitration agreement must, within its four corners, contain adequate consideration," as "courts are not permitted, when assessing the enforceability of an arbitration agreement, 'to go beyond the confines of the arbitration agreement itself and into an analysis of the validity of the larger contract.'" *Id.* (quoting *Cheek*, 835 A.2d at 664).

Brent contends that, regardless whether she electronically signed the Arbitration Acknowledgment, Priority 1 offered no consideration to support any arbitration agreement between the parties. Pl.'s Mem. 10–15.[3] As Brent sees it, "neither employment nor continued employment can serve as consideration for an agreement to arbitrate under Maryland law and Defendants' promise to arbitrate is illusory and unenforceable" because Priority 1 "had the authority to unilaterally modify its arbitration policies at any time, without notice." *Id.* at 10. Central to Brent's argument is her contention that any arbitration agreement includes the Arbitration Policy, which is part of the Employee Handbook. *Id.* at 10, 14. Priority 1 counters that this is a "false premise," as "the Arbitration Agreement [i.e., the document I refer to as the Arbitration Acknowledgment] and Company Policy and Employee Handbook are separate and

[2] The parties agree that Maryland law applies. *See* Pl.'s Mem. 10; Def.'s Opp'n 6.

[3] Because I find that there is no enforceable arbitration agreement, I need not address Brent's alternative arguments that she did not agree to enter into the purported agreement by electronic means, that it was not a contract because Priority 1 stated that it was not, and that there was no meeting of the minds on the terms of the purported contract.

distinct documents." Pl.'s Opp'n 7, 13. Thus, Priority 1 argues, the mutual agreement to arbitrate contained within the Arbitration Acknowledgment provides sufficient consideration, and it is not illusory because Priority 1's authority to modify the Employee Handbook did not extend to the Arbitration Acknowledgment.

In this regard, *Caire v. Conifer Value Based Care, LLC*, 982 F. Supp. 2d 582 (D. Md. 2013), presents remarkably similar facts and provides guidance. Like Brent, Caire sued his former employer for employment discrimination; he also named its human resources manager as a defendant. *Id.* at 584. As in this case, the defendants moved to compel arbitration or to dismiss, and the validity of the employer–employee arbitration agreement was at issue. *Id.*

Like Brent, Caire had received an employee handbook when he began his employment. Both handbooks included an arbitration provision. The provision in Caire's handbook ("Caire's Arbitration Policy") provided:

> "If an employment dispute arises while you are employed at InforMed [his employer's former name], the company requests that you agree to submit any such dispute arising out of your employment or the termination of your employment . . . exclusively under the Federal Arbitration Act, 9 U.S.C., Section 1. Similarly, any disputes arising during your employment involving claims of unlawful discrimination or harassment under federal or state statutes shall be submitted exclusively to binding arbitration under the above provisions. This arbitration shall be the exclusive means of resolving any dispute arising out of your employment or termination from employment by InforMed or you, and no other action can be brought by employees in any court or any forum."
>
> "By simply accepting or continuing employment with InforMed, you automatically agree that arbitration is the exclusive remedy for all disputes arising out of or related to your employment with InforMed and you agree to waive all rights to a civil court action regarding your employment and the termination of your employment with InforMed; only the arbitrator, and not a judge or jury, will decide the dispute."

Id. at 585–86 (quoting Caire's Arbitration Policy).

Similar to Brent, Caire had to acknowledge receipt of and agreement to his employer's arbitration policy ("Caire's Arbitration Policy Acknowledgment"). Caire's Arbitration Policy Acknowledgment stated:

> "My signature on this document acknowledges I understand the above Arbitration Policy and agree to abide by its conditions. I also acknowledge that I understand my employment is at-will and may be terminated at any time, with or without reason, by either InforMed or myself. I further agree that, in accordance with InforMed's Arbitration Policy I will submit any dispute . . . arising under or involving my employment with InforMed to binding arbitration . . . . I agree that arbitration shall be the exclusive forum for resolving all disputes arising out of or involving my employment with InforMed or the termination of that employment." . . .

Id. at 586 (quoting Caire's Arbitration Policy Acknowledgment). Unlike the Arbitration Acknowledgment in this case, which only included a signature line for the employee, Caire's Arbitration Policy Acknowledgment "included signature lines for the employee and a 'Designated Manager.'" *Id.* Caire also had to acknowledge receipt of and agreement to the employee manual ("Caire's Manual Acknowledgment"). Caire's Manual Acknowledgment contained the following language:

> **Understanding and Acknowledging Receipt of Informed Employee Manual**
>
> I have received and read a copy of the InforMed Employee Manual. I understand that the policies and benefits described in it are subject to change at the sole discretion of InforMed at any time.
>
> * * *
>
> **Arbitration**
>
> I also acknowledge that I have read and understand the Arbitration Policy contained in this Employee Manual and I agree to abide by the policy.

Id. In *Caire*, the Court stated that the arbitration agreement at issue before it included Caire's Arbitration Policy, Caire's Arbitration Policy Acknowledgment, and Caire's Manual Acknowledgment. *Id.* at 586–87.

Caire, like Brent, argued that his "arbitration agreement [was] unenforceable for lack of mutual consideration." *Id.* at 591. Judge Bennett of this Court observed that, while "[e]mployment or continued employment cannot act as consideration for an employee's promise to arbitrate," even if an arbitration agreement expressly provides for employment to serve as consideration, "the mutual exchange of promises to arbitrate disputes represent[s] the necessary consideration in support of an arbitration agreement." *Id.* at 591–92 (citing *Cheek*, 835 A.2d at 665, 669). Accordingly, he considered whether both parties had made promises; Caire contended that the defendants had not. *Id.* at 593. In this regard, Judge Bennett noted that "[t]he language of the Arbitration Policy [was] one-sided," with phrases such as "'the company requests that *you* agree,'" and "[n]owhere d[id] the employer agree to be bound by arbitration." *Id.* He concluded that, consequently, "[t]here [was] no mutual promise to arbitrate" and no enforceable agreement. *Id.* In reaching this conclusion, he relied on *Noohi v. Toll Brothers, Inc.*, 708 F.3d 599, 611 (4th Cir. 2013), in which the language "relate[d] to the buyer's obligations" only, without stating what the seller agreed to, and the Fourth Circuit held that "the arbitration provision bound only the plaintiffs, and was thus unenforceable for lack of mutual consideration." *Caire*, 982 F. Supp. 2d at 592.

Judge Bennett also considered Caire's argument that "the Arbitration Policy [was] not supported by mutual consideration because the Defendants, by retaining the right to alter the terms of the arbitration agreement at any time, did not bind themselves to arbitration," *id.* at 593, another argument that Brent makes. He stated: "Where a party reserves the right to 'alter, amend, modify or revoke' an arbitration agreement, the promise to arbitrate is illusory and the arbitration agreement is unenforceable for lack of consideration." *Id.* at 593–94 (quoting *Cheek*, 835 A.2d at 662, 669). He observed that Caire's Arbitration Policy was "contained within the

employee handbook," which also included Caire's Manual Acknowledgment, and Caire's Manual Acknowledgment "state[d] that 'the policies and benefits described in it are subject to change at the sole discretion of InforMed at any time.'" *Id.* at 594 (quoting Caire's Manual Acknowledgment). Judge Bennett concluded that the employer's promise to arbitrate "or not," in its discretion, was "a 'nonexistent' promise," and "[t]he arbitration agreement [was] void because InforMed made no promise to arbitrate at all." *Id.* (quoting *Howard v. King's Crossing, Inc.*, 264 F. App'x 345, 347 (4th Cir. 2008)). In reaching this conclusion, Judge Bennett rejected the defendants' argument that the language granting the defendants the authority to alter the arbitration provision appeared outside the provision itself, reasoning that the case before him was not a "case[] where an employee handbook and the arbitration provision were separate documents," but rather "[t]he arbitration provision [was] a policy described in the employee manual, [and] therefore, the clause stating that such a policy [was] subject to change at the sole discretion of InforMed directly applie[d] to the Arbitration Policy." *Id.*

Here, the Arbitration Acknowledgment stated that "[t]he Employee agrees [to arbitration] as a condition of Priority 1 A.D. employment and continued employment." Jt. Ex. 101. Yet it is well-settled that "[e]mployment or continued employment cannot act as consideration for an employee's promise to arbitrate," even if an arbitration agreement expressly provides for employment to serve as consideration. *Caire*, 982 F. Supp. 2d at 591–92; *see Raglani v. Ripkin Prof'l Baseball*, 939 F. Supp. 2d 517, 522 (D. Md. 2013); *see also Cheek*, 835 A.2d at 665, 669; *Shaffer v. ACS Gov't Servs.*, 321 F. Supp. 2d 682, 687–88 (D. Md. 2004). Thus, the question is whether both parties promised to arbitrate disputes, such that there was "the necessary consideration." *Caire*, 982 F. Supp. 2d at 591–92; *see Raglani*, 939 F. Supp. 2d at 522. The answer is "no."

Certainly, "when it is clear that both parties are bound there is no need to expressly state that the employer agrees to arbitrate." *See Caire*, 982 F. Supp. 2d at 593 (citing *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997)). But here, it is not obvious that Priority 1 intended to be bound. As in *Caire*, the language in the Arbitration Acknowledgment is unilateral, providing only that "[t]he *Employee* agrees" to arbitration. *See* Jt. Ex. 101; *Caire*, 982 F. Supp. 2d at 591–93; *see also Raglani*, 939 F. Supp. 2d at 523 ("The [Problem Support Policy] PSP's 'binding arbitration' provision itself . . . requires only *the employee* to submit 'problems' to arbitration. It only refers to affirmative steps *employees* must take to invoke arbitration. The PSP lacks any suggestion that [the employer] is required to submit any dispute it may have with an employee to arbitration, and contains no other potential 'mutuality of obligation' between [the employer] and the signing '[employee].'" (emphasis added)). Priority 1, in contrast, is not obligated; the Arbitration Acknowledgment states that "[e]ither side *may* request that the dispute be submitted for arbitration," permitting Priority 1 to proceed with arbitration while not requiring it to do so. *See* Jt. Ex. 101 (emphasis added). And here, unlike in *Caire*, the Arbitration Acknowledgment only includes a signature line for the employee, not for the employer. *See* Jt. Ex. 101.

Moreover, despite Priority 1's arguments to the contrary, what is clear from the exhibits and Priority 1's previous contentions before this Court is that any agreement to arbitrate included the Arbitration Policy in the Employee Handbook, and Priority 1 could alter the terms of that policy unilaterally at any time, such that any promise to arbitrate was ephemeral at best. Notably, Priority 1's November 4, 2011 memorandum from its president to its employees referred to the Arbitration Acknowledgment not as an agreement but rather as an "acknowledgment form[]" included "in the back of" the Employee Handbook. Jt. Ex. 1.

Additionally, Priority 1's Human Resources Manager, Nancy Delach, described[4] the purported arbitration agreement to include both the Arbitration Acknowledgment and the Arbitration Policy that was a part of the Employee Handbook. *See* Delach Aff. ¶¶ 5, 7. Specifically, she said:

> The Company Policy and Employee Handbook contained provisions for binding arbitration (collectively, "Arbitration Agreement"), true and correct copies of which are collectively attached hereto and incorporated herein as Exhibit B. The first page of Exhibit B constitutes a page from the body of the Company Policy and Employee Handbook containing a paragraph entitled "Binding Arbitration Program." The second page of Exhibit B contains the corresponding Dispute Resolution via Arbitration Policy acknowledgement [i.e., the Arbitration Acknowledgment] which accompanied and was included at the end of the Company Policy and Employee Handbook.

Id. ¶ 7. Delach stated that "employees, including Brent, were required to . . . electronically sign an acknowledgement of each employee's receipt of and agreement to Priority 1's standard employee information handbook ('Company Policy and Employee Handbook'), *including accompanying dispute resolution via arbitration policy acknowledgement* ('Dispute Resolution via Arbitration Policy')," and that "each employee, including Brent, was . . . required to log into a secure web portal . . . for the purposes, *inter alia*, of: (1) viewing the Company Policy and Employee Handbook (*including accompanying Dispute Resolution via Arbitration Policy*); and (2) electronically signing *an* acknowledgment of that employee's receipt of same and agreement thereto."). *Id.* (emphases added). Where the web portal directed employees to "click on the document link(s) below to open the document(s) you are required to electronically sign," it included

> (1) a web link to a copy of the Company Policy and Employee Handbook (including accompanying Dispute Resolution via Arbitration Policy), above which was displayed the verbiage, "1. Open the document"; and (2) an "E-Sign" button to the right of the aforementioned web link, above which was displayed the verbiage, "2. Click to electronically sign."

[4] Her affidavit constitutes an admission by Priority 1. Fed. R. Evid. 801(d)(2)(D).

Id. Thus, with one click, employees viewed the Employee Handbook, which included the Arbitration Policy, and with another click, employees agreed to both; there was no separate viewing and acceptance of the Arbitration Acknowledgment. *See id.* Priority 1's president and human resources manager's statements, along with the inclusion of the Arbitration Acknowledgment in the back of the Employee Handbook and as the same document on the web portal, show that the Arbitration Acknowledgment was not a stand-alone agreement.

Indeed, in Defendant's Motion to Dismiss Complaint and Compel Arbitration, Priority 1 stated that "[the] Company Policy and Employee Handbook contained arbitration provisions whereby Plaintiff and Defendant agreed that all differences or disputes between the parties . . . shall be submitted to by binding arbitration, as opposed to litigation ('Arbitration Agreement')." Def.'s Mot. to Dismiss Compl. & Compel Arbitration ¶ 3. In its Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss and Compel Arbitration, Priority 1 asserted:

> [T]hat *Arbitration Agreement provides*:
>
> **BINDING ARBITRATION PROGRAM**
>
> In an attempt to provide employees with another open and unbiased means of resolving a disagreement or controversy not settled within the normal open door policy process, a binding arbitration program is also available to employees. Any controversy or claim arising out of, or related to[,] your employment with this Company, shall be settled by arbitration in accordance with the current rules of the American Arbitration Association. The decision and/or award of the arbitration process, except for mistakes by [*sic*] law, shall be final and binding upon the parties. No arbitration shall involve parties other than those in this agreement, its successors, employees, agents and representatives. The employee consents to having personal jurisdiction in the State of Maryland and agrees to service of process within this jurisdiction by way of certified mail, return receipt requested, signed by the employee. The losing party agrees to pay any attorney's fees or costs incurred by the prevailing party, as part of the judgment rendered. Any and all hearings or

> proceedings involving arbitration shall be held in Baltimore County, Maryland.
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> * * *
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> **ARBITRATION**
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> The Employee agrees that as a condition of **Priority 1 A.G.** employment and continued employment, that any and all differences or disputes between the employee and the company shall be settled by the parties or [*sic*] through binding arbitration. Either side may request that the dispute be submitted for arbitration to the Maryland state board of mediation with the request that a staff member be appointed to act as arbitrator. The arbitrator's finding, decision and award shall be final, binding and conclusive on both parties. Judgment may be entered in any court or forum having jurisdiction. The losing party agrees to pay any attorney's fees or costs incurred by the prevailing party, as part of the judgment rendered. Any and all hearings or proceedings involved in arbitration shall be held in Baltimore County, Maryland.
>
> Plaintiff's agreement to the Arbitration Agreement is evidenced by her signature on the Offer of Employment Confirmation, wherein Plaintiff acknowledged and agreed that the terms of her employment with Defendant were subject to the policies and provisions contained in Defendant's Company Policy and Employee Handbook, and her corresponding electronic signature acknowledging her receipt of *the Company Policy and Employee Handbook containing the Arbitration Agreement*.

Def.'s Mem. 3–4 (footnotes omitted) (emphases added), ECF No. 6-1. It is simply disingenuous for Priority 1 to argue now that the purported arbitration agreement only includes the Arbitration Acknowledgment and not the Arbitration Policy.

Thus, any agreement to arbitrate necessarily encompassed the Arbitration Policy. Therefore, while the court may not "'go beyond the confines of the arbitration agreement itself and into an analysis of the validity of the larger contract,'" the Arbitration Policy is within the purported arbitration agreement's four corners and must be considered. *See Raglani*, 939 F. Supp. 2d at 522 (quoting *Cheek*, 835 A.2d at 664). Significantly, Priority 1 "reserve[d] the right . . . to enforce, change, abolish or modify existing policies," such as the Arbitration Policy, "as [Priority 1] may consider necessary with or without notice." Jt. Ex. 7; *see id.* at 94; 100. As

noted, "[w]here a party reserves the right to 'alter, amend, modify or revoke' an arbitration agreement, the promise to arbitrate is illusory and the arbitration agreement is unenforceable for lack of consideration." *Caire*, 982 F. Supp. 2d at 593–94 (quoting *Cheek*, 835 A.2d at 662, 669). As in *Caire*, "[t]he arbitration provision [was] a policy described in the employee manual, [and] therefore, the clause stating that such a policy [was] subject to change at the sole discretion of [the employer] directly applie[d] to the Arbitration Policy." *Id.* at 594. Therefore, as in *Caire*, the authority the employer retained to change its policies resulted in an illusory promise that does not suffice as consideration. *See id.* at 593–94. Consequently, there is no enforceable agreement to arbitrate. *See id.*; *Cheek*, 835 A.2d at 662; *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) ("A 'promise becomes consideration for another promise only when it constitutes a binding obligation.' Unlike a binding obligation, an '"illusory promise" appears to be a promise, but it does not actually bind or obligate the promisor to anything.' Because an illusory promise is not binding on the promisor, an illusory promise cannot constitute consideration." (quoting *Cheek*, 835 A.2d at 661–62)).

ORDER

Accordingly, it is, this 4th day of August, 2016, hereby ORDERED that

1. Plaintiff's Motion for Summary Judgment, ECF No. 64, IS GRANTED;
2. There is no enforceable agreement to arbitrate;
3. The Court WILL SET a conference call with regard to whether Plaintiff will renew her Motion to File an Amended Complaint and the deadline for Defendant's Answer.

/S/
Paul W. Grimm
United States District Judge

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