

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County Court of Common Pleas
Carmen Tevis Mullen, Circuit Court Judge

Consolidated Appellate Case No. 2011-199666

Elizabeth O'Meara,.....Respondent,

v.

Brookdale Senior Living, Inc., and Southern Assisted Living, LLC,.....Appellants,

and

Sonia S. King,.....Defendant.

Yvonne Carrie Pruett,.....Respondent,

v.

Brookdale Senior Living, Inc., and Southern Assisted Living, LLC,.....Appellants,

and

Sonia S. King,.....Defendant.

Janet Sue Scheerle,.....Respondent,

v.

Brookdale Senior Living, Inc., and Southern Assisted Living, LLC,.....Appellants,

and

Sonia S. King,.....Defendant.

**RESPONDENTS' RETURN TO APPELLANTS' MOTION TO ENFORCE THE
AUTOMATIC STAY**

Elizabeth O'Meara, Yvonne Carrie Pruett, and Janet Sue Scheerle (collectively "Respondents") hereby respond to and oppose Appellants Brookdale Senior Living, Inc., and Southern Assisted Living, LLC's motion to enforce an alleged automatic stay.

This consolidated appeal involves three elder abuse cases pending against Appellants. The cases arise from severe physical and verbal abuse suffered by Respondents, three Alzheimer's patients, while they were residents at Appellants' assisted living facility from 2008 to 2011. Respondents initiated separate actions in circuit court against Appellants for damages resulting from the abuse. Appellants filed Motions to Dismiss and Compel Arbitration as to Mrs. O'Meara and Mrs. Pruett on June 6, 2011, and as to Mrs. Scheerle on November 15, 2011, based on an arbitration provision in their Residency Agreements. The circuit court denied all of Appellants' motions. Appellants appealed those orders, and this court granted Respondents' motion to consolidate the appeals on October 9, 2012. The appeal is fully briefed and awaiting a date for oral argument.

Appellants now seek an order from this Court to enforce an alleged automatic stay of discovery during the pendency of the appeal. There are numerous, independent bases upon which this Court should deny Appellants' motion.

As an initial matter, and without regard to the merits of the motion, this court should deny Appellants' motion because Appellants filed the same motion as to Mrs. O'Meara and Mrs. Scheerle in the circuit court **before** filing the motion to enforce an alleged automatic stay in this court. Those motions are still pending in circuit court and are discussed below. Additionally, should this Court proceed to resolve Appellants' motion on the merits, it should be denied because (1) there is no automatic stay in these cases regarding discovery because discovery is not a matter decided in the appealed order; (2) discovery is not a matter affected by the appeal; (3) as

to Mrs. Scheerle, the circuit court ordered certain written and deposition discovery before any appeal was taken and, thereafter, ruled discovery was not stayed pending the appeal, and Appellants did not appeal the orders of the circuit court and, in fact, have since participated in some discovery; therefore, Appellants have waived any argument of a stay in Mrs. Scheerle's case; and (4) justice requires that the parties be allowed to proceed with discovery to avoid the injustice of lost evidence.

Appellants' motion to enforce the alleged automatic stay omits numerous facts that are essential to this Court's ruling on the motion, most importantly the orders appealed and the issues on raised on appeal. See Rule 241(a), SCACR ("[T]he service of a notice of appeal in a civil matter acts to automatically stay *matters decided in the order* . . . and to automatically stay *the relief ordered*. . . . The lower court . . . retains jurisdiction over *matters not affected by the appeal*" (emphases added)). A review of the orders appealed and the discovery terms in the arbitration provisions of Respondents' Residency Agreements shows that discovery is neither decided in the appealed orders nor affected by the appeals. Second, the factual and procedural background of the discovery conducted thus far proves that, as to Mrs. Scheerle, the circuit court already ruled in Respondents' favor on this issue in an unappealed order and Appellants have waived any argument regarding an alleged automatic stay by participating in discovery after the filing of the notice of appeal and after the filing of this motion.

I. Factual and Procedural Background

Appellants required Mrs. O'Meara, Mrs. Pruett, and Mrs. Scheerle to enter into a Residency Agreement as a condition of entering the Carolina House assisted living facility. Mrs. O'Meara and Mrs. Pruett's Residency Agreements are identical, and are attached as **Exhibits 1 and 2**. They specify that the Federal Rules of Civil Procedure govern discovery. (Exhibits 1 and

2, O'Meara and Pruett Residency Agreements, p. 12). Mrs. Scheerle's Residency Agreement specifies that the South Carolina Rules of Civil Procedure govern discovery. (attached as **Exhibit 3**, p. 8). The Residency Agreements modify the Federal and South Carolina Rules of Civil Procedure in that they provide for depositions of only expert witnesses and *shorten* the time for responding to or providing discovery to the opposing party to twenty days. (Exhibits 1 and 2, O'Meara and Pruett Residency Agreements, p. 12; Exhibit 3, Scheerle Residency Agreement, p. 8). Therefore, standard, written discovery is allowed in these cases regardless of whether they are arbitrated or proceed to a jury trial.

The orders on appeal which denied Appellants' motions to compel arbitration are attached as **Exhibit 4**. In all of Respondents' cases, the circuit court refused to compel arbitration because it found the arbitration provisions (1) were not subject to the Federal Arbitration Act because the transaction between each Respondent and Appellants did not involve interstate commerce, and (2) contained unconscionable provisions that restricted discovery, specifically the taking of only expert depositions, and limited compensatory and punitive damages. (Exhibit 4, O'Meara, Pruett, and Scheerle Orders Denying Defendants' Motions to Compel Arbitration). Accordingly, the relief granted in the appealed orders is that the parties proceed to a civil jury trial pursuant to the South Carolina Rules of Civil Procedure.

Appellants raise four issues on appeal, only one of which addresses discovery. (See Appellants' Initial Brief attached as **Exhibit 5**). The fourth issue in Appellants' statement of the issues on appeal is: "Whether the Residency Agreements are not unconscionable; and, in the alternative, whether the Court should enforce arbitration and sever any provision it finds unconscionable?" (Exhibit 5, Appellants' Initial Brief, p. 1). Within the substance of Appellants' argument as to that issue, they state: "The arbitration agreement provides for

‘permissible discovery per the Federal Rules of Civil Procedure’ or the South Carolina Rules of Civil Procedure. Thus, the parties are allowed to serve interrogatories and requests to produce and admit.” (Exhibit 5, Appellants’ Initial Brief, p. 26 (internal citation to Residency Agreements omitted)).

Appellants participated in discovery in Mrs. Scheerle’s case both prior and subsequent to the filing of the notice of appeal. Prior to the filing of the notice of appeal, Appellants responded to interrogatories and requests for production. On September 4, 2012, the circuit court held a hearing on Mrs. Scheerle’s Motion to Compel Responses to Plaintiff’s First Set of Interrogatories and Requests for Production to Defendants and Plaintiff’s Subpoena Duces Tecum and 30(b)(6) Deposition of Southern Assisted Living, LLC. (Order Granting Plaintiff, Mrs. Scheerle’s Motion to Compel attached as **Exhibit 6**). The Honorable Carmen T. Mullen ruled from the bench and ordered Appellants to produce certain documents and participate in the noticed 30(b)(6) deposition after producing the documents.

On September 7, 2012, Appellants filed the notice of appeal from the circuit court’s order denying Appellants’ motion to compel arbitration. On September 19, 2012, the circuit court filed its written order granting Mrs. Scheerle’s motion to compel and ordering Appellants to produce certain documents to Mrs. Scheerle, to produce internal investigation documents to the court for an in camera review, and to participate in a Rule 30(b)(6) deposition of Southern Assisted Living on either November 13 or 14, 2012, based on the court’s deadlines for Appellants’ compliance with the order. (Exhibit 6, Order Granting Plaintiff, Mrs. Scheerle’s Motion to Compel). Appellants did not object to complying with the court’s order after filing the notice of appeal. Rather, Appellants produced documents to Mrs. Scheerle and submitted the internal investigation documents to the court. However, the deposition never took place because

Appellants did not produce the internal investigation documents until after the court-ordered deposition dates. Appellants have since refused to allow the 30(b)(6) deposition to go forward.

On November 14, 2012, Mrs. Scheerle filed a Motion for Sanctions Under Rule 37, SCRCF, for Appellants failure to comply with the circuit court's order to produce certain documents and to produce the internal investigation documents. (Motion for Sanctions, attached as **Exhibit 7**). On January 23, 2013, at the hearing on Mrs. Scheerle's motion, Appellants provided the court and Mrs. Scheerle's counsel with a Memorandum in Opposition to Plaintiff's Motion for Sanctions Under Rule 37, SCRCF, attached as **Exhibit 8**. In the memorandum, and at the hearing, Appellants argued that discovery should be stayed under Rule 205, SCACR, during the pendency of the appeal. (Exhibit 8, pp. 1, 3-6). The circuit court rejected Appellants' argument and specifically ruled as follows:

[T]his Court . . . finds the appeal as to the arbitration issue does not stay this Court's ability to grant sanctions for Defendants' failure to comply with a discovery order. Under Rule 241, SCACR, the lower court "retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." Under Rules 205 and 241(a), SCACR, "the lower court's power to proceed" with the action and address matters not affected by the appeal "is determined by whether the issue sought to be litigated in the lower court during the appeal is a matter affected by the appeal." *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012). This Court's order on Defendants' failure to follow a discovery order is not a matter affected by an appeal of an order denying a motion to compel arbitration. Additionally, the determination of whether certain documents are privileged or subject to work product doctrine is not a matter affected by the appeal because even the arbitration provision provides that written discovery "shall be governed by the South Carolina Rules of Civil Procedure."

(Order granting Mrs. Scheerle's Motion for Sanctions, attached as **Exhibit 9**, pp. 3-4). Appellants appealed the Order but later filed a motion to withdraw the appeal on February 19, 2013, which this court granted. (See **Exhibit 10**).

On April 18, 2013, Mrs. Scheerle served Plaintiff's First Set of Requests for Admission to Appellants. Appellants responded to the requests for admission on May 23, 2013. (See **Exhibit 11**). On May 6, 2013, Mrs. Scheerle served a subpoena on attorney Carter Elliott requesting copies of deposition transcripts in another elder abuse case in which Appellants were named as Defendants. The subpoena specified that the documents requested were due to Mrs. Scheerle's counsel by May 31, 2013. On May 9, 2013, Mrs. Scheerle served an Amended Notice of 30(b)(6) Videotaped Deposition of Southern Assisted Living, LLC. In response to these discovery requests, Appellants first filed a motion in circuit court on **May 30, 2013**, sent via U.S. mail, for a protective order regarding the 30(b)(6) deposition notice, to quash the subpoena, and to stay discovery pending appeal, attached as **Exhibit 12**. The following day, **May 31, 2013**, Appellants filed the motion at issue before the Court of Appeals to enforce an alleged automatic stay. The motion was hand delivered to the court and sent via U.S. mail to Mrs. Scheerle's counsel. By the time counsel received Appellants' motions, it had already received the documents requested via subpoena, as neither counsel nor the person responding to the subpoena received Appellants' objection prior to the date for compliance.

As to Mrs. O'Meara, the first discovery requests in her case were served on Appellants on April 18, 2013. The requests included interrogatories, requests for production, a notice of a 30(b)(6) deposition of Southern Assisted Living, LLC, and a subpoena duces tecum to Southern Assisted Living. Appellants did not respond to any of the requests. They filed a motion in circuit court on **April 30, 2013**, for a protective order, to quash the subpoena duces tecum and 30(b)(6) deposition notice, and to stay discovery pending appeal, attached as **Exhibit 13**. A month later, on **May 31, 2013**, Appellants filed the motion at issue before the Court of Appeals to enforce an alleged automatic stay.

The motions pending in circuit court in Mrs. Scheerle and Mrs. O'Meara's cases are scheduled to be heard before the Honorable Carmen T. Mullen on June 19, 2013. There are no pending discovery requests in Mrs. Pruett's case. However, Respondents assert discovery is permissible in all three cases and is not stayed by the consolidated appeal.

II. Appellants Cannot Seek the Same Relief in Two Courts of Different Jurisdiction

This motion should be dismissed without regard to the merits because Appellants filed the same motion in circuit court **before** it filed this motion in the Court of Appeals. Therefore, the same motion is pending before the circuit court and this Court, and Respondents are being forced to defend the same motion in two different courts. Appellants seek the enforcement of an alleged automatic stay to avoid responding to discovery requests served in Mrs. O'Meara and Mrs. Scheerle's cases.

As explained above, after Appellants filed motions in circuit court to stay discovery pending the appeal in Mrs. O'Meara and Mrs. Scheerle's cases, they then filed the motion to enforce an alleged automatic stay pending before this court. The substance of all three motions is the same.

Appellants cannot file the same motion seeking the same remedy in two courts of different jurisdiction. *See, e.g.*, Rule 12(b)(8) (stating as a ground for a motion to dismiss that "another action is pending between the same parties for the same claim"). Appellants filed their motion first in the circuit court and have not dismissed that action to account for the filing of the same motion in this Court. As a practical matter, two courts cannot rule on the same motion and Appellants cannot have two bites at the same apple, especially when the circuit court has already denied their motion for a stay of discovery pending appeal in Mrs. Scheerle's case.

Accordingly, Respondents request this court dismiss Appellants' motion.

III. There is no Automatic Stay under Rule 241(a) and Discovery is Not a Matter Effected by the Appeal

The issue before the Court is whether the parties may proceed with discovery while the Order denying Defendants' motion to compel arbitration is on appeal. The answer is "yes" for two reasons. First, discovery is not a matter decided in the order on appeal and, therefore, discovery is not automatically stayed. Second, the circuit court retains power to address and enforce discovery matters in this case because they are not matters affected by the appeal.

Rule 241(a), SCACR, governs stay and supersedeas in civil actions on appeal.

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay *matters decided in the order*, judgment, decree or decision on appeal, and to automatically stay the *relief ordered* in the appealed order, judgment, or decree or decision. . . . The lower court or administrative tribunal retains jurisdiction over matters *not affected by the appeal* including the authority to enforce any matters not stayed by the appeal.

Rule 241(a) (emphases added). The "jurisdiction" reference in Rule 241(a) "does not refer to subject matter jurisdiction. Rather, the rules govern the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the lower court of the power to address a particular issue, or 'matter' during the pendency of the appeal." *Tillman v. Oakes*, 398 S.C. 245, 255 n.3, 728 S.E.2d 45, 51 n.3 (Ct. App. 2012). Rule 241(b) contains exceptions to the general rule pronounced in subsection (a). None of the exceptions are applicable to this case.

"[T]he purpose of a stay under Rule 241 . . . [is] to determine whether the appealed *order* may be carried out or enforced—not to determine whether the *action* may proceed in the lower court while the appeal is pending." *Tillman*, 398 S.C. at 255, 728 S.E.2d at 51. Therefore, aside from carrying out or enforcing the appealed order, an action may proceed in the lower court

during the pendency of the appeal. Conducting discovery during the pendency of an appeal to determine the mode of trial is neither carrying out nor enforcing the appealed order.

In *Tillman*, the Court set out a two-part analysis for determining whether a particular matter is stayed in circuit court during the pendency of an appeal.

When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending.

398 S.C. at 254-55, 728 S.E.2d at 50.

As to the first part of the *Tillman* analysis, the relief ordered has no effect on discovery and therefore there is no automatic stay of discovery during the appeal. The Orders on appeal in these cases deny Defendants' motions to compel arbitration. The relief ordered is that the parties proceed to a civil jury trial according to the South Carolina Rules of Civil Procedure. The effect of the appeal on matters decided in the orders is that the parties may not proceed to jury trial. The issue to be decided by the Court of Appeals is whether the parties will proceed with a jury trial or be forced to arbitrate pursuant to the Residency Agreement. The appeal does not affect whether the parties may conduct discovery. Appellants represented this to the Court in their brief on appeal. In either outcome—arbitration or a jury trial—the parties may conduct discovery.

As to the second *Tillman* question, discovery is not a matter affected by the appeal because the process will be the same whether or not the parties arbitrate the case or try it before a jury. The Residency Agreements, drafted by Appellants, provide for discovery pursuant to the South Carolina and Federal Rules of Civil Procedure. The arbitration provisions in the Residency Agreements do not limit the type of information the parties may request and exchange

or the scope of discoverable information. Further, aside from the limitation of deposing only experts, the discovery procedure written by Defendants does not provide for a lesser burden, expense, or responsibility in the discovery process than standard discovery. Therefore, discovery is not a matter affected by the appeal.

IV. The Law of the Case as to Mrs. Scheerle is that Discovery is not Stayed and Appellants Waived the Right to Enforce any Alleged Stay by Failing to Appeal the Circuit Court's Order and by Participating in Discovery

The circuit court previously ruled that discovery is not stayed in Mrs. Scheerle's case. (Order granting Mrs. Scheerle's Motion for Sanctions, Exhibit 9, pp. 3-4). As explained above, Mrs. Scheerle filed a motion for sanctions on November 14, 2012, for Appellants failure to comply with the circuit court's September 19, 2012 order requiring them to produce certain documents and the internal investigation documents. (Motion for Sanctions, Exhibit 7). At the January 23, 2013 hearing on Mrs. Scheerle's motion, Appellants argued that discovery should be stayed under Rule 205, SCACR, while the case is pending on appeal. (Appellants' Memorandum in Opposition to Mrs. Scheerle's Motion for Sanctions, Exhibit 8, pp. 3-6). The circuit court rejected Appellants' argument and specifically ruled that discovery was not a matter affected by the appeal and was not stayed pending the appeal. (Order granting Mrs. Scheerle's Motion for Sanctions, Exhibit 9, pp. 3-4). Appellants appealed the Order but later withdrew the notice of appeal. (Orders of the Court of Appeals Granting Appellants' Motion to Withdraw the Notice of Appeal and Remitting the Case to the Lower Court, Exhibit 10).

The circuit court's ruling that discovery is not stayed in Mrs. Scheerle's case is the unappealed, law of the case. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance."). Accordingly, this Court should dismiss Appellants' motion and order

that the parties proceed with written discovery as well as with the Rule 30(b)(6) deposition of Southern Assisted Living, which was noticed and ordered to occur **prior to** the filing of the notice of appeal.

As an additional reason for denying and dismissing Appellants' motion, they have waived the right to argue that discovery is stayed by participating in discovery without objection after the filing of the notice of appeal. "Waiver is the voluntary and intentional relinquishment or abandonment of a known right." *Jervy v. Martint Envtl., Inc.*, 396 S.C. 442, 451, 721 S.E.2d 469, 473 (Ct. App. 2012) (internal quotation marks omitted). "The party claiming waiver must show the other party possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they were dependent." 396 S.C. at 451, 721 S.E.2d at 473.

Appellants' filed the notice of appeal in Mrs. Scheerle's case on September 7, 2012. Since September 7, 2012, Appellants' have participated in discovery without objection, and without appealing the circuit court's ruling that discovery was not stayed, in the following instances:

- November 5, 2012: Appellants served *Brookdale Defendants' Supplemental Response to Plaintiff's First Set of Requests for Production of Documents*.
- November 19, 2012: Appellants filed a *Motion to Reconsider* the circuit court's ruling that it produce the internal investigation files.
- April 23, 2013: Appellants served *Brookdale Defendants' Second Supplemental Responses to Plaintiff's First Set of Requests for Production of Documents and Brookdale Defendants' Supplemental Answers to Plaintiff's First Set of Interrogatories*.

- May 23, 2013: Appellants served *Defendants' Response to Plaintiff's First Set of Requests for Admission*. The Responses state Appellants object to the requests on the grounds that discovery is allegedly stayed on pending the appeal. (Exhibit 11).

Appellants cannot pick and choose when to participate in discovery. They previously participated in discovery without objection both before and after the circuit court ruled discovery was not stayed by the appeal in Mrs. Scheerle's case, as well as before and after the filing of the notice of appeal. Appellants now seek to avoid responding to requests to admit and participating in the Rule 30(b)(6) deposition ordered by the circuit court to take place in November 2012. Appellants are well aware of the Appellate Court Rules and the arguments they now belatedly present to this Court and the circuit court. With that knowledge, Appellants participated in discovery after the filing of a notice of appeal and, as a result, waived their right to enforce any alleged automatic stay as to discovery.

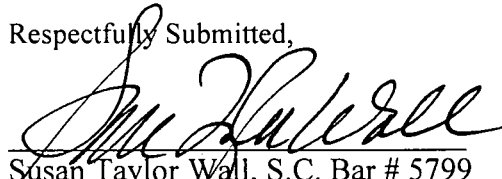
V. In the Alternative, the Court Should Allow Discovery to Proceed in the Interests of Justice

The most recent event giving rise to the causes of action in these cases occurred on December 31, 2010—over two years ago. Since that time, two of the plaintiffs have died, relevant documents have been lost, Appellants sold the facility where the abuse occurred, and employees were fired or left the facility. The discoverable information in this case is disappearing while Appellants hinder, frustrate, and delay Respondents' exercise of their rights to such information. Should this Court determine an automatic stay does exist as to discovery in these cases, Respondents request the Court order that, in the interests of justice, discovery proceed regardless of the stay.

“The equity powers of the Court may allow discovery when the Rules do not provide a mechanism.” *Wofford v. Ethyl Corp.*, 316 S.C. 75, 77, 447 S.E.2d 187, 189 (1994) (invoking the Court’s equitable powers to affirm an order allowing an inspection of a plant although no action was pending). The courts retain “traditional equitable jurisdiction . . . to issue appropriate orders for independent discovery when effective discovery cannot otherwise be obtained and the ends of justice are served.” 316 S.C. at 77, 447 S.E.2d at 189.

Finally, should this Court find that an automatic stay exists but choose not to order discovery in the interests of justice at this time, Respondents intend to file a motion for relief from an automatic stay in the circuit court pursuant to Rule 241(d).

Respectfully Submitted,



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June 12, 2013

Exhibits:

1. Mrs. O'Meara Residency Agreement
2. Mrs. Pruett Residency Agreement
3. Mrs. Scheerle Residency Agreement
4. Orders on appeal (denying Appellants' motions to compel arbitration), Pruett filed August 3, 2012; O'Meara filed August 19, 2012; and Scheerle filed September 19, 2012
5. Appellants' Initial Brief
6. Scheerle Order Granting Plaintiff's Motion to Compel, filed September 19, 2012
7. Scheerle Motion for Sanctions filed November 14, 2012
8. Appellants' Memorandum in Opposition to Scheerle's Motion for Sanctions, dated January 23, 2013
9. Scheerle Order Granting Plaintiff's Motion for Sanctions, dated February 21, 2013
10. Order of the Court of Appeals Granting Appellants' Motion to Withdraw the Notice of Appeal, dated May 2, 2013
11. Appellants' Responses to Plaintiff Scheerle's First Set of Requests to Admit, dated May 23, 2013
12. Appellants' Motion in Mrs. Scheerle's case for a Protective Order regarding the 30(b)(6) Deposition Notice, to Quash the Subpoena, and to Stay Discovery Pending Appeal, filed May 30, 2013
13. Appellants' Motion in Mrs. O'Meara's case for a Protective Order, to Quash the Subpoena Duces Tecum and 30(b)(6) Deposition Notice, and to Stay Discovery Pending Appeal, filed April 30, 2013

THE STATE OF SOUTH CAROLINA
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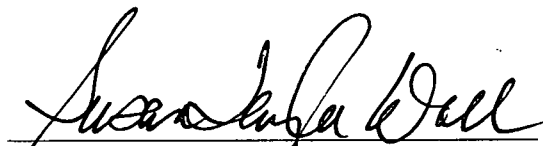
Sonia S. King,.....Defendant.

PROOF OF SERVICE

The undersigned hereby certifies that on June 12, 2013, the foregoing
**RESPONDENTS' RETURN TO APPELLANTS' MOTION TO ENFORCE THE
AUTOMATIC STAY** was served on all counsel of record via U.S. Mail, postage
prepaid and addressed as follows:

Marc Manos, Esq.
Manton M. Grier, Jr., Esq.
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*Attorneys for Appellants Brookdale Senior
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Charleston, South Carolina 29401
Phone: (843) 723-7831

Exhibit 1

Mrs. O'Meara Residency Agreement

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RESIDENCY AGREEMENT

The Company strongly believes in the importance of fully disclosing all services and fees to the best of our ability and in accordance with state law. As with any legally binding contract, it is our recommendation that you consult your legal counsel to ensure proper understanding of this Agreement before signing.

THIS AGREEMENT IS SUBJECT TO ARBITRATION

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RESIDENCY AGREEMENT

This Agreement is entered into as of 9/30/08, by and between Southern Assisted Living, Inc., d/b/a Carolina House of Hilton Head ("Company"),
____ ("You" or "Resident"); and _____
("Responsible Party"). The terms and conditions of this Agreement are as follows:

I. SERVICES AND ACCOMMODATIONS

A. BASIC SERVICES

You will be entitled to the following Basic Services, which are included in the Basic Service Rate, subject to the terms and conditions of this Agreement:

- ♦ Accommodations - You are entitled to the use of the suite described in Exhibit A and to the use of the Company's personal property located in the suite. You are also entitled to use and enjoy with all other residents the common areas of the building (the "Community"). You may provide your own furnishings and personal property; however, the Company reserves the right to limit the number and type of furnishings if the Company determines that they present a safety hazard or potential safety hazard.
- ♦ Daily Meals - The Company will provide three meals daily. Snacks are available 24 hours a day.
- ♦ Utility Service - The Company will provide gas, electric and water service. Telephone charges are not included in the Basic Service Rate. Costs for basic cable television are described in Exhibit A.
- ♦ Weekly Housekeeping Service - The Company will clean your suite once a week.
- ♦ ~~Weekly Laundry and Linen Service~~ - ~~The Company will launder your personal items and your bed linens once a week.~~
- ♦ Life Enrichment Program - The Company will provide planned social, educational and recreational programs.
- ♦ ~~Staffing 24 hours a day~~ - ~~The Company will have staff available 24-hours a day, seven days a week.~~
- ♦ Transportation - The Company will secure or provide transportation for resident when a physician's services are needed. Local transportation (within a ten (10) mile radius of the Community) for medical reasons shall be provided by the Company at no additional charge. Basic transportation

services will include the use of a car or conventional, non-adapted mini van. Residents requiring more services including private duty aide or specially adapted equipment or vehicle will be responsible for the costs incurred by that service. You understand that transportation for purposes other than those described in the preceding sentence will be at your expense.

The Company will provide thirty (30) days written notice of any change in Basic Services.

B. PERSONAL SERVICE PLAN

The Company will make available, at an additional cost, a Personal Service Plan. The Personal Service Plan is designed to provide you greater personal services than those provided under the Basic Services. The Company will use a personal service assessment to determine the personal services you require prior to moving in and periodically throughout your residency. The results of the assessments and the cost of providing the additional personal services will be shared with you and your Responsible Party. In some circumstances, the provision of outside services may be required for your continued ability to safely remain at the residence. An outside agency or individual will be permitted to provide these services or any related personal services only if the Company has given prior approval.

C. AVAILABLE SELECT SERVICES

From time to time, the Company may make select services available to you at your or your Responsible Party's request. If available, such additional services may include guest meals, transportation, transportation escort services, enhanced cable television, or special events. (See additional information on Transportation in Section I. A of this Agreement.) These additional choices are not included in the Basic Service Rate or the Personal Service Plan. Your Executive Director will provide, upon your request, a listing of the available select services as well as a current fee schedule.

D. SERVICES NOT COVERED BY RESIDENCY AGREEMENT

You and your Responsible Party are responsible for obtaining and paying for all services which are not included in the Basic Services or Personal Services Plan (including, but not limited to, the services of third party health care and medical providers), whether provided by the Company, its subcontractors, third party health care and medical providers, or others. These services may include, but are not limited to, pharmacy services, newspaper subscriptions, or beauty/barber services. Any fees for services provided by other service providers will be billed directly by the service provider. All third party service providers (including, but not limited to, third party health care and medical providers) must receive the Company's prior authorization to provide services to you at the residence. All third party providers who enter the residence must sign in with the Executive Director or supervisor on duty and agree to comply with the Company's policies.

You may not contract with any of the Company's current employees to perform any services at the residence. You may contract with former employees to perform any

services at the residence only with the Company's consent. The Company reserves the right to refuse entry to 1) former employees, 2) persons whose actions may be disruptive to the residence; 3) persons whose actions may threaten the safety of any resident or employee; or 4) persons whose presence may foreseeably result in liability to the Company.

II. RESIDENT RESPONSIBILITIES AND REPRESENTATIONS

A. CARE OF SUITE

You agree that residence and the suite are in satisfactory, habitable condition. You also agree the Company has made no promise to decorate, alter or improve the residence or suite, unless otherwise provided in writing by the Company and attached as part of this Agreement. You agree to maintain the suite and to surrender the suite upon termination of this Agreement in good condition, exclusive of normal wear and tear. You agree to pay all damages, beyond normal wear and tear, including any improvements made without the Company's consent, which you, your Family, and/or other Guests (including any agent, employee, contractor, or other invitee) cause to residence property.

*I say said
I will be
admitted new
guest etc
installed*

B. SUITE ACCESS

You agree to give the Company access to the suite in order to carry out the intent of this Agreement. Such entry includes, but is not limited to, performance of services provided as part of the Basic Services or in your Personal Service Plan; response to emergency situations; and entry by authorized personnel with the reasonable belief that your safety or safety of others is in question or that the Company's policies and procedures are being violated.

Upon written notice, the Company reserves the right to relocate you to a more appropriate suite within residence as required for your health or safety, or because the residents of a companion suite are incompatible.

C. HEALTH ASSESSMENT

You agree that the Company may from time to time assess your health to determine the appropriate Personal Service Plan and/or whether you are appropriate to stay in the residence. Not more than thirty (30) days prior to the date this Agreement is entered into, and at least annually thereafter or upon the request of the Company, you agree to undergo an examination by your physician (or other licensed provider as allowed by law). You agree that the Company may require you to undergo examination by a particular specialist, at your cost, as the Company determines is warranted by your current physical or mental status. You will request the examiner to provide the Company with recommendations, including a statement attesting to the appropriateness of the placement. Based upon the assessment(s) and the Company's judgement, the Company may determine your appropriateness to remain in the residence. You will request the examiner to perform any tests and complete any forms required by the Company or applicable law.

D. HEALTH CARE PROVIDER NOTIFICATION

You authorize the Company to contact responsible parties, health care providers, and/or other persons listed in your records:

- (1) If the Company determines it is necessary to advise them of your situation;
- (2) To arrange for health care services and other assistance required by you; or
- (3) In case of an emergency. If you have a life-threatening emergency, the Company will contact an emergency rescue service.

If your designated health care providers are unavailable, you authorize the Company to arrange for the services of other health care providers.

During the term of this Agreement, you agree the Company may provide such persons with copies of your records, including, but not limited to, resident records to the extent they are needed to assist with treatment, advance directives, living will, and the names of persons empowered to make health care decisions, for the purpose of arranging for health care services.

E. OBLIGATORY INFORMATION

You will provide the Company with accurate, complete and current information about yourself, substitute decision-makers and health care providers, including but not limited to addresses and phone numbers, and your health care status and needs. You or your Responsible Party will provide the Company with copies of any health care power of attorney, power of attorney executed by you or of any court order, guardianship, or other legal action which may (1) affect your status or (2) designate or appoint another person to make health care or financial decisions or to bear financial responsibility on your behalf. You authorize the Company to rely on the instructions of such designees or appointees. You understand that you must immediately notify the Company of changes relating to any of the information stated above.

F. ADVANCE DIRECTIVES

Upon admission to the Company, it is strongly suggested that you have your advance directives in place in the event you become incapacitated. Advance directives include, but are not limited to, Living Wills, Powers of Attorney for Health Care, Guardianships and Do Not Resuscitate Orders. You will notify the Company and provide copies to the Company of such advance directives. If you do not have such advance directives in place, you understand that a court may name a guardian upon application of any interested party (including the Company), subject to all bond, accounting and other legal requirements. Neither the Company nor any of its employees or agents may be your guardian. If it is necessary for the Company to petition the court for appointment of a guardian, any costs associated therein shall be paid by you. If you are a Resident in a Memory Care Unit (e.g. Clare Bridge or a Clare Bridge Cottage), these designations should be made prior to move-in.

G. MOTORIZED VEHICLES

Motorized vehicles may be used by a resident, subject to the following:

- (1) You have a physician's order stating that such a vehicle is a medical necessity for you;
- (2) You have been assessed as being able to safely operate the vehicle and you continue to demonstrate that your operation of the vehicle does not pose a threat to the health and safety of yourself or others.
- (3) The vehicle is operated at a low setting; and
- (4) You agree to abide by the Company's safety guidelines for the use of motorized vehicles on the premises, which may be modified from time to time.

Reasonable accommodations will be made to the motorized vehicle rules, policies and practices (upon a showing of necessity) so long as the requested accommodation does not constitute a threat to the health or safety of yourself, the other residents, the residence staff or visitors.

- (1) You further understand and agree that the Company may, at its sole discretion, prohibit your further use of a motorized vehicle at any time.

H. RESPONSIBILITIES UPON TERMINATION

You will vacate premises, removing all belongings on or before the effective date of termination. If you fail to remove your belongings by the effective date of termination, you understand and agree that the Company may charge you a storage fee for your belongings equal to your Basic Service Rate. You further agree that the Company may donate any unclaimed property after forty-five (45) days. You will provide written notice of a forwarding address where you can be reached and receive mail.

~~Termination will not release you or the Company from any liability or obligation to the other party under the terms of this Agreement.~~

I. RULE AND REGULATION COMPLIANCE

You acknowledge that the Company is licensed by the State of South Carolina as a Community Residential Care Facility. You understand that the Company has shared common areas, and you agree to honor all rules of courtesy and respect for others.

You agree to abide by and conform to the rules, regulations, policies and procedures as they now exist and as amended from time-to-time for the operation and management of the Community.

J. GUESTS

You understand that as a resident, you have the right to associate with your friends and family ("guests") during reasonable hours. Because the Company is a licensed building, overnight guests are generally not permitted in a resident's room. Limited exceptions may be granted by the Executive Director based upon the resident's health status or other pertinent factors.

You acknowledge and understand that your guests are subject to the Company's Rules and Regulations, and if your guests become disruptive to the operations of the Community and/or are verbally or physically abusive to staff, residents or others, the Company may request that they leave the Community until their behavior is under control or may place limitations upon the location and time of their visitation. You understand that, where circumstances warrant, the Company may exclude such individuals from the residence.

III. RATES

A. MOVE-IN FEE

1. Fee - You will pay the Company a one-time Move-In Fee in an amount indicated in Exhibit A at the time this Agreement is signed.
2. Refund - The Company will refund a prorated share of one-half of the Move-In Fee if this Agreement is terminated within ninety (90) days of the date this Agreement is signed and any one of the following circumstances occur:
 - (a) The Company terminates this Agreement;
 - (b) The Company or your physician determines you require care not offered by the Company; or
 - (c) by reason of death.

↓
X
(Please initial as having read and understood the above provision.)

B. MONTHLY SERVICE RATE

1. Rate - You agree to pay the Basic Service Rate and, if applicable, the charge for the Personal Service Plan as indicated in Exhibit A (together the "Monthly Service Rate").
2. Refund - The Company will refund a prorated share of the Monthly Service Rate if this Agreement is terminated before the end of a month:
 - (a) following termination in accordance with Section IV;
 - (b) because you require care that is not offered by the Company; or
 - (c) by reason of death.

Refunds will be based upon the actual number of days the resident is in the facility and a reasonable number of bed hold days. A storage fee equal to the prorated share of the Monthly Service Rate will be charged until such time as all of your property is removed

from the Suite. The Company will issue the refund to Resident or Responsible Party within 45 days of the effective date of termination based on Section IV of this Agreement. Unless prohibited by law, you agree the Company may offset such refunds by any amount due under the terms of this Agreement.

✓ X _____
(Please initial as having read and understood
the above provision.)

C. RESIDENT ABSENCE

If the Resident is absent from the Community for any reason, including, but not limited to, hospitalization, vacation, temporary nursing home care or rehabilitation, the Residency Agreement will remain effective and you will be charged the full Monthly Service Rate until such time that the Resident or Representative provides the Company with written notice of their intent to terminate the Agreement, pursuant to Section IV of the Agreement. Termination will be effective and charges will cease the later of the end of any applicable notice period or the removal of all of your personal belongings.

D. SELECT SERVICES

In addition to the Monthly Service Rate, you agree to pay the Company the established charges for any select services provided to you by the Company.

E. PAYMENT

The Company will issue a monthly statement before the first day of the month itemizing the Monthly Service Rate for the upcoming month and, if any, charges incurred for select services provided during the prior month. Payment for all charges shown on the statement is due on the first (1st) calendar day of each month. The first payment of the Monthly Service Rate is due prior to taking occupancy. If you move in after the first of the month, your first Monthly Service Rate will be one thirtieth (1/30) of the usual rate times the number of days remaining in the month.

The Company will charge a \$250.00 late fee if the Company has not received all fees when due. ~~The Company will also charge a \$25.00 returned payment fee for each check or automatic withdrawal that is returned by a financial institution for any reason, including but not limited to, insufficient funds or incompleteness. After two payments are returned by a financial institution to the Company, you will thereafter pay the Monthly Service Rate and any other amounts due by cashiers check. You also agree to pay interest on all amounts not paid by the due date. The interest rate will be the lesser of 1.5% per month or the highest rate permitted by law.~~

F. RATE CHANGES

The Company will provide thirty (30) days written notice of any change in the Basic Services Rate. The Company may offer or require a change in the Personal Service Plan when the Company determines additional services are requested or required. The new charge for the Personal Service Plan will be effective immediately upon the provision of written notice.

X QJ
(Please initial as having read and understood the above provision.)

IV. TERM AND TERMINATION

A. TERM

This Agreement will commence on the date set forth above and will continue until terminated as provided below.

B. TERMINATION BY RESIDENT

The Company requests you or your Responsible Party to provide thirty (30) days written notice of your intent to terminate this Agreement. Termination shall be effective the day after your last date of residence.

X QJ
(Please initial as having read and understood the above provision.)

C. TERMINATION BY COMPANY

The Company may terminate this Agreement, upon providing you or your Responsible Party thirty (30) days written notice, for any of the following events, as determined by the Company:

- (1) You require care or services that the Company is unable to provide or which requires staff that are not available at the Company;
- (2) You are disruptive, create unsafe conditions, are physically or verbally abusive to other residents or otherwise impair the welfare of yourself or others in the residence;
- (3) You fail to pay fees and charges when due.

X QJ
(Please initial as having read and understood the above provision.)

For emergency medical or welfare reasons of you or other residents, the Company may, upon written notice to you or your Responsible Party, immediately terminate the Agreement, and transfer or discharge you. If the emergency requires your immediate transfer, the Company will notify the Responsible Party at the earliest practicable hour, but not later than twenty-four (24) hours following the transfer.

The Company will provide a written explanation if the Company terminates this Agreement with less than thirty (30) days notice.

D. TERMINATION BY EITHER PARTY

You, your Responsible Party or the Company may terminate this agreement immediately in the event of death or if a physician certifies, based upon an examination prior to moving out, that you must be relocated because of your health. The Company requests you provide written notice of your intent to terminate. Termination shall be effective the day after your last date of residence.

V. ARBITRATION AND LIMITATION OF LIABILITY PROVISION

Should any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.

A. ARBITRATION PROVISION

1. Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at the Company, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a jury will not decide their case. The Federal Arbitration Act shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.
2. Demand for Arbitration by Resident, his or her guardian, a person or organization acting on behalf of a Resident with the consent of the Resident or his or her guardian, or the personal representative of the estate of a deceased Resident (collectively "Resident Party") shall be made in writing and submitted to CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza, Greenville, SC 29601, via certified mail, return receipt requested. Demand for Arbitration by the Company shall be made in writing and submitted to the Resident or his or her agent, representative, successor or assign and/or Resident's Attorney-in-Fact, and/or Responsible Party via certified mail, return receipt requested.

3. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.
4. The arbitration panel shall be composed of one (1) arbitrator. Subject to the requirements of section A.5. herein, the parties shall agree upon an arbitrator that must either be a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience as an attorney. If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then the arbitration shall be submitted to the National Arbitration Forum, or other similar organization, but must still be conducted by one (1) arbitrator who is a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience practicing as an attorney. If the arbitrator is selected from the National Arbitration Forum, or other similar organization, each party shall have the right to request one (1) substitution within ten (10) days of receiving notice of the identity of the arbitrator. The person requesting of the substitution shall submit a request for substitution in writing to the National Arbitration Forum, or other similar organization, and to the other party via U.S. mail.
5. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.
6. Discovery in the arbitration proceeding shall be governed by the Federal Rules of Civil Procedure. However, discovery shall be modified by the following, unless agreed to otherwise by the party to whom the request is made:
 - a. The Resident Party shall provide the Company with permissible discovery per the Federal Rules of Civil Procedure within twenty (20) days after Demand for Arbitration is received (and the Company shall reimburse Resident Party \$0.25 per page).
 - b. The Company shall provide the Resident Party with permissible discovery per the Federal Rules of Civil Procedure within twenty (20) days after the Demand for Arbitration is received (and Resident Party, unless proven indigent, shall reimburse the Company \$0.25 per page).
 - c. The only depositions allowed shall be of experts. No other individuals may be deposed.
 - d. Resident Party shall designate any and all expert witnesses within sixty-five (65) days after Demand for Arbitration is submitted.
 - e. The Company shall have thirty (30) days after Resident Party's expert designation is received in which to depose such experts.

- f. The Company shall designate any and all experts one hundred and fifteen (115) days after Demand for Arbitration is submitted.
- g. Resident Party shall have thirty (30) days after the Company's expert designation is received in which to depose such experts.
- h. Any report or affidavit of an expert, and a list of all records contained in the expert's file, must be exchanged by the parties no later than ten (10) working days before the date of the expert's deposition.
- i. The following shall be exchanged no later than fourteen (14) working days before the arbitration hearing:
 - 1. List of witnesses to be called at the arbitration hearing (full name, title, address and phone number if known) and an outline of each witnesses' intended testimony;
 - 2. List of documents to be relied upon at the arbitration hearing;
 - 3. Any sworn recorded statements to be relied upon at the arbitration hearing and included therewith the full name, title, address and phone number of the person making the sworn statement.
- j. The arbitration hearing shall be held no later than one hundred and eighty (180) days after Demand for Arbitration is submitted, or within a reasonable time thereafter if a conflict arises with the arbitrator's calendar.
- 7. The arbitrator shall designate a time and place within the county in which the Community is located, for the arbitration hearing and shall provide thirty (30) days' notice to the parties of the arbitration hearing.
- 8. The arbitrator shall apply the Federal Rules of Evidence and Federal Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, Federal law except as otherwise stated in this Arbitration Provision.
- 9. The arbitration decision should be signed by the arbitrator and delivered to the parties and their counsel within thirty (30) days following the conclusion of the arbitration. The decision shall set forth in detail the arbitrator's findings of fact and conclusions of law.
- 10. The arbitrator's decision shall be final and binding without the right to appeal.
- 11. The arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent. The parties shall bear their own attorneys' fees and costs and hereby expressly waive any right to recover attorney fees or costs, actual or statutory.

12. The arbitration proceeding shall remain confidential in all respects, including the Demand for Arbitration, all arbitration filings, deposition transcripts, documents produced or obtained in discovery, or other material provided by and exchanged between the parties and the arbitrator's findings of fact and conclusions of law. Following receipt of the arbitrator's decision, each party agrees to return to the producing party within thirty (30) days the original and all copies of documents exchanged in discovery and at the arbitration hearing, except those documents required to be retained by counsel pursuant to law. Further the parties to the arbitration also agree not to discuss the amount of the arbitration award or any settlement, the names of the parties, or the name/location of the Community except as required by law.
13. The Limitation of Liability Provision below is incorporated by reference into this Arbitration Provision
14. This Arbitration Provision and the Limitation of Liability Provision below shall survive the death of the Resident.

X 
(Please initial as having read and understood
the provisions of section V., subsection A)

B. LIMITATION OF LIABILITY PROVISION: *Read Carefully Before Signing*

1. The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement.
2. Liability for any claim brought by a party to this Agreement against the other party, including but not limited to a claim by the Company for unpaid Basic Service or Personal Service charges, or a claim by, or on behalf of, a Resident, Resident Party, or by a Resident's Estate, Agent or Legal Representative, arising out of the care or treatment received by the Resident or the Resident's occupancy or presence at the Company, including, without limitation, claims for medical negligence, shall be limited as follows:
 - a. Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance.
 - b. Noneconomic damages, such as pain and suffering, shall be limited to a maximum of \$250,000.00.
 - c. Interest and/or late fees on unpaid assisted living charges shall not be awarded.
 - d. Punitive damages shall not be awarded.

3. Should sub-sections a, b, c and/or d, provided above, be deemed invalid, the validity of the remaining sub-sections will not be affected.

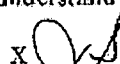
X 
(Please initial as having read and understood
the provisions of section V., subsection B.)

C. BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISIONS

The parties' decision to select arbitration is supported by the potential cost-effectiveness and time-savings offered by selecting arbitration, which may avoid the expense and delay of judicial resolution in the court system. The parties' decision to select arbitration and to agree to a limitation of liability also are supported by the potential benefit of preserving the availability, viability, and insurability of an assisted living company for the elderly and disabled in South Carolina, by limiting such assisted living company's exposure to liability. With this Agreement, the Company is better able to offer its services and accommodations at a rate that is more affordable to the Resident. In terms of the time-savings offered by selecting arbitration, the parties recognize that often the Resident is elderly and may have a limited life-expectancy, and therefore selecting a quick method of resolution is potentially to a Resident's advantage.

The Resident, Responsible Party, or his or her legal guardian, or authorized Power of Attorney understands that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability provision. The parties agree that the reasons stated above are proper consideration for the acceptance of the Arbitration and Limitation of Liability Provisions. The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.

The parties to this Agreement further understand that a jury will not decide their case.

X 
(Please initial as having read and understood
the provisions of section V., subsection C.)

VI. MISCELLANEOUS

A. DEFAULT TO ARBITRATION

If it is determined by a court of law that the Arbitration Provision provided in this Agreement is invalid, the parties hereto make clear their express desire to waive a jury trial and resolve their claims against each other in the appropriate court solely before a judge.

B. NON-DISCRIMINATION

The Company does not discriminate on the basis of race, religion, color, national origin, sex, age, disability, marital status, sexual preference, or source of payment. The Company respects all religious faiths and does not have any specific religious affiliation.

C. RISK AGREEMENT

You and your Responsible Party are responsible for your personal, financial and health care decisions. In addition, you are responsible for maintaining at all times your own health, personal property, liability, automobile (if applicable), and other insurance coverages in adequate amounts. You agree to obtain insurance with coverage for your personal property and your general liability in the amount of \$100,000. You agree to provide proof of such coverage to the Company. You acknowledge that the Company is not an insurer of your person or property.

You understand and agree that:

1. The Company may encourage you to participate in community, leisure, and social activities and to maintain an appropriate level of independence in activities of daily living, as well as your personal and financial affairs;
2. Independent activities, responsibility for personal, financial, and health care decisions, and lifestyle and care preferences may involve risks of personal injury and/or property damage or loss;
3. The standard of services in an assisted living residence does not include one-on-one care, assistance or supervision e.g. one resident assistant for each Resident, or immediate response to non-emergent needs. Consistent with your daily life activities, including but not limited to resting in your apartment or common areas, watching television, listening to music, reading, and sleeping at night, there may be short and long periods of time in which you will be left alone, unsupervised;
4. The Company makes no representations or guarantees that the Company staff can prevent Residents from falling. Further, the Company does not represent or guarantee your health condition will not change or deteriorate throughout your Residency;
5. The services provided by the Company may not meet all of your personal, social, or health care needs and the Company will use its best efforts to assist you in arranging for services which you require and which are not included in this Agreement;
6. Many Residents of the Company suffer from memory impairment, including Alzheimer's disease and dementia. This condition can cause unexpected behavior

including, but not limited to, wandering, forgetfulness, agitation towards others and confusion. The Company makes no representations or guarantees that it can predict the behavior of its Residents. Therefore, the Company also makes no representations or guarantees that it can always prevent a Resident from wandering or attempting to wander from the Community, entering into a private area, misplacing or losing items or engaging in physical contact with another Resident;

7. The Company makes no representations or guarantees that the Company is secure from theft or any other criminal act perpetrated by any other Resident or person; therefore, the Company recommends that valuables, including but not limited to, jewelry and large amounts of money, not be brought into the Community. If you choose to bring in such valuables, you are doing so at your own risk and the Company will not be responsible for any theft or loss of these items;
8. Due to state regulations and fire code, the Company is not permitted to lock its exterior doors and, therefore, does not guarantee that its Residents will not wander out of the Community. In our memory care buildings, the exterior doors are alarmed with a delayed egress feature and our systems are designed to alert our staff to respond and assist a Resident to safety, should they wander from the building.

You understand and agree to assume the risks inherent in this Agreement. You agree to hold the Company and its employees and agents harmless for any damages or injury or other loss resulting from: (1) reasonable acts or omissions made in good faith; (2) action of any third party, fire, water, theft or the elements; or (3) loss of personal property. The Company will only be liable for damages, injuries or other losses to you or any third party entering a Suite, or any other part of the residence, if due to willful misconduct or negligence of the Company.

The Company reserves the right to recover from you any loss caused by fire, vandalism or any other acts by you or your invitees or guests. The Company may assign such right to its insurance carrier.

D. RELIANCE

By entering into this Agreement, the Company is relying upon the truthfulness of the promises and representations made by you and your Responsible Party.

E. NO LIABILITY IF AWAY FROM RESIDENCE

In the event that you knowingly leave the Community or are temporarily away from the Community, any and all responsibility of the Company for your welfare shall terminate during your absence.

F. ASSIGNMENT

This Agreement is not assignable by you or your Responsible Party without prior written consent of the Company. The rights and obligations of the Company may be assigned to any person or entity, and such person or entity will be responsible to ensure the obligations of the Company under this Agreement are satisfied in full from and after the date that you are notified of such assignment. The Company may engage another person or entity to perform any or all of the services under this Agreement.

G. HEIRS AND SUCCESSORS

This Agreement is for the benefit of and binds the parties and their respective heirs, representatives, successors and assigns.

H. AMENDMENTS

This Agreement and any written amendments constitute the entire agreement between the parties and supercede all prior and contemporaneous discussions, representations, correspondence, and agreements whether oral or written, pertaining to this Agreement. Except for the right of the Company to modify fees, rates and charges, amend services provided and establish reasonable operating procedures and rules for the general welfare and safety of the residents, this Agreement may be amended only in writing signed by both parties.

I. SEVERANCE

Should any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected.

J. RESPONSIBLE PARTY

You have designated a Responsible Party, who has agreed to the terms of the attached Responsible Party Agreement and whose signature appears below.

K. SUBORDINATION

This Agreement and the parties' rights hereunder will be subordinate to any ground lease, mortgage or deed of trust now or hereafter placed upon the residence, but your right to remain in possession of your suite will not be disturbed so long as you comply with all of the provision of this Agreement.

L. NOTICES

Notices will be written and given by personal delivery or mailing by regular mail, postage pre-paid to the following or such other persons or places as the parties may notify each other. Notices shall be deemed given based upon the date personally delivered or upon the date postmarked.

The Company:
Executive Director at Community
Address (as noted on Exhibit A)

Resident:
(as noted at end of this Agreement)

Responsible Party:
(as noted in Exhibit B)

BY THEIR SIGNATURES, the parties or their representatives have executed this Agreement.

Chunede Maur, Esq. 9-30-08
For the Company Title Date

Elizabeth O'Meara 9/30/08
Resident Date

Julia A. Stanton 9/30/08
Responsible Party Date

SEND NOTICES AND MONTHLY STATEMENTS TO RESIDENT IN CARE OF:

Name: Julia A. Stanton
Address: 2 NIBLICK CT., Hilton Head Is., SC 29928
Phone No.: 843-686-2008

OTHER RELATED MATERIALS

1. Resident Bill of Rights
2. Community Handbook
3. Emergency Evacuation Plan
4. Admissions Package and Special Services Form
5. Medical Records Release
6. Resident Assessment
7. Personalized Service Plan

EXHIBITS INCLUDED:

- A. Schedule of Services and Rates
- B. Responsible Party Agreement
- C. Pet Addendum
- D. Additional Resident Fee
- E. Pharmacy Services Agreement
- F. Acknowledgement of Grievance Procedure and Resident Bill of Rights

ADDITIONAL EXHIBITS:

- X. Select Services List
- Y. Therapeutic Services List
- Z. Assessment Price Schedule

EXHIBIT A
SCHEDULE OF SERVICES AND RATES

Resident

Elizabeth O' Mara MEARA

Community

C111111

Address

35 Beach City Rd.
H11, SC 29920

Suite #

404

Move-In Fee (Prior to Move-in)

\$ 1000

Basic Services

Basic Service Rate

\$ 4368

♦ Accommodations - You are entitled to the use of the suite described above and to the use of the Company's personal property located in the suite. You are also entitled to use and enjoy with all other residents the common areas of the residence. You may provide your own furnishings and personal property, however, the Company reserves the right to limit the number and type of furnishings if the Company determines that they present a safety hazard or potential safety hazard.

♦ Daily Meals - The Company will provide three meals daily. Snacks are available 24-hours a day.

♦ Utility Service - The Company will provide gas, electric and water service. Telephone charges are not included in the Basic Service Rate. Basic cable television is not included in the Basic Service Rate.

♦ Weekly Housekeeping Service - The Company will clean your suite once a week.

♦ Weekly Laundry and Linen Service - The Company will launder your personal items and your bed linens once a week.

♦ Life Enrichment Program - The Company will provide planned social, educational and recreational programs.

♦ Staffing 24 hours a day - The Company will have staff on duty 24-hours per day, seven days a week.

♦ **Transportation** – The Company will secure or provide transportation for resident when a physician's services are needed. Local transportation (within a ten (10) mile radius of the Community) for medical reasons shall be provided by the Company at no additional charge. Basic transportation services will include the use of a car or conventional, non-adapted mini van. Residents requiring more services including private duty aide or specially adapted equipment or vehicle will be responsible for the costs incurred by that service. You understand that transportation for purposes other than those described in the preceding sentence will be at your expense.

The Company will provide thirty (30) days written notice of any change in Basic Services.

Personal Service Plan

Personal Service Plan Rate

\$ 855.00

The Company will make available, at an additional cost, a Personal Service Plan. The Personal Service Plan is designed to provide you greater personal services than those provided under the Basic Services. The Company will use a personal service assessment to determine the personal services you require prior to moving in and periodically throughout your residency. The results of the assessments and the cost of providing the additional personal services will be shared with you and your Responsible Party. All third party providers (including, but not limited to, third party health care and medical providers) who enter residence must sign in with the Executive Director or supervisor on duty and agree to comply with the Company's policies.

MONTHLY SERVICE RATE

(Add Basic Service Rate and Personal Service Plan)

\$ 4368 + 855 = 5223

Available Select Services

From time to time, the Company may make select services available to you at your request. When available, such additional services may include guest meals, transportation, transportation escort services, enhanced cable television, special events, or special programs. These additional choices are not included in the Basic Service Rate. Please contact your Executive Director for a current fee schedule.

I agree to the above Schedule of Services and Rates effective 8/29/08 and I understand and agree that the Company has a right to change these rates and/or change the services provided in accordance with the provisions of the Residency Agreement.

For the Company

Title

Date

Resident

Date

Responsible Party

Date

EXHIBIT B
RESPONSIBLE PARTY AGREEMENT

Cynthia O'Meara ("Resident"); Julia A. Stanton
("Responsible Party") and Southern Assisted Living, Inc., d/b/a Carolina House of Hilton
Head ton (herein after the "Company"), hereby agree as follows:

WHEREAS, the Resident desires to live in the suite identified in the attached
Residency Agreement; and

WHEREAS, the Company is willing to enter into the Residency Agreement if
Resident identifies an individual who is willing to provide certain assistance to or on behalf of
Resident in the event that such assistance is necessary, and who is willing to pay Resident's
financial obligations to the Company under the Residency Agreement in the event that
Resident does not make payments when due; and

WHEREAS, Responsible Party agrees to provide such assistance and to pay such
obligations, if and as necessary.

IN CONSIDERATION of the foregoing, the Parties agree as follows:

I. **PERSONAL ASSISTANCE.** In the event the condition of the Resident requires such
assistance, and upon the request of the Company, Responsible Party will assist Resident or
legally responsible person, as necessary by:

- (a) Participating with the Company staff in evaluating Resident's needs and in
planning and implementing an appropriate plan for Resident's care;
- (b) Maintaining Resident's welfare and fulfilling Resident's obligations under the
Residency Agreement;
- (c) Relocating Resident following termination;
- (d) Transferring Resident to a hospital, nursing home, or other facility in the
event that Resident requires care the Company does not offer;
- (e) Removing Resident's personal property from suite when Resident leaves;
- (f) Making necessary arrangements for funeral services and burial in the event of
death.

II. **FINANCIAL RESPONSIBILITY.** If Resident fails to make payments due to the
Company under the Residency Agreement, Responsible Party agrees to pay the Company
such amounts within thirty (30) days of receiving written notice of nonpayment.

III. REVIEW OF RESIDENCY AGREEMENT. Responsible Party acknowledges that he or she has received and has reviewed a copy of the Residency Agreement, and has had an opportunity to ask any questions Responsible Party may have.

BY THEIR SIGNATURES, the parties or their representatives have executed this

Agreement to be effective as of 9-30-2008

<u>Theresa M. May, Sr.</u>	<u>9-30-08</u>
For the Company	Date
<u>Charlotte O. Meade</u>	<u>9-30-08</u>
Resident	Date
<u>Julia A. Stanton</u>	<u>9-30-08</u>
Responsible Party	Date
<u>292-36-5834 #100018536</u>	
Social Security No.	DL No.

SEND NOTICES TO RESPONSIBLE PARTY AT:

Address: 2 NIBLICK CT, NLT, SC 29928

Phone No.: 843-686-2008

**EXHIBIT C
PET ADDENDUM**

The Company consents to the Resident keeping in the suite the household Pet described as follows:

_____	Kind and breed
_____	Name
_____	Color
_____	Weight
_____	Age

I. RESIDENT RESPONSIBILITIES. The Resident will keep the Pet in the suite except when walking the Pet, if applicable, or transporting it to and from the suite. The Resident will not allow the Pet in lobbies or in common residential areas, and will transport the Pet to and from the suite only by side entrances of the building, when available and/or feasible. The Resident will walk and curb the Pet only in areas designated by the Company and will be responsible for cleaning up after the Pet. When the Pet is not in the suite, the Resident will keep it on a leash no longer than five (5) feet or in a cage or other appropriate closed and ventilated container, and in the control of the Resident. If the Pet is a bird, the Resident will keep it caged both in and out of the suite. If the Pet is a dog or cat, the Resident will ensure that it wears a collar with appropriate identification (including the Resident's telephone number) at all times that it is out of the suite.

The Resident will comply with all vaccination and licensing requirements applicable to the Pet, showing proof of this upon request, and will comply with appropriate standards of care, treatment, and grooming. In all circumstances, the Resident is responsible for the health, welfare, and proper care of the Pet. The Resident will ensure that the Pet does not disturb the right of other residents to the peaceful enjoyment of their suites and of the common areas. The Resident will not leave the Pet unattended when the Pet is not in the suite.

The Company, in its discretion, may assist the Resident in caring for the Pet as part of the Resident's Personal Service Plan. Charges and payment for such services will be governed by the terms of the Residency Agreement.

The Resident will be liable for any personal injury or property damage caused by the Pet that is suffered by the Company, its employees or agents, other residents, guests, or invitees. The Resident and/or Responsible Party agree to purchase renter's insurance in the amount of \$100,000, which specifically covers any personal injury or property damage caused by the Pet. The Resident shall provide Community with proof of insurance coverage.

II. TERM & TERMINATION. This Addendum will continue until the Residency Agreement between the Resident and the Company is terminated, unless either party terminates this Addendum for any reason by giving fourteen (14) days prior written notice to

the other party. The Company may terminate this Addendum upon twenty-four (24) hours notice in the event the Resident breaches any of the Resident's obligations under this Addendum. In the event that the Pet is left unattended for more than twenty-four (24) hours, or if the Company determines that the Resident, for any reason, is unable to care for the Pet, the Company reserves the right to arrange for the Pet to be delivered to:

Sponsor: _____
Address: _____
Phone: _____

Or to such other individual or agency as the Company determines to be appropriate. The Resident will pay all costs of delivery, feeding, care, treatment, and housing of the Pet. The Resident acknowledges that the Resident has no right to keep a pet, except to the extent expressly permitted by this Addendum. The Company reserves the right to withdraw its consent to the Resident keeping the Pet at any time by terminating this Addendum, as permitted above.

BY THEIR SIGNATURES, the parties executed the Addendum to be effective _____

_____	_____	_____
For the Company	Title	Date
_____	_____	_____
Resident		Date
_____		_____
Responsible Party		Date

EXHIBIT D
ADDITIONAL RESIDENT FEE

When two residents occupy a single occupancy suite, the Company charges a single occupancy Basic Service Rate plus an additional resident fee. Each resident in the suite is responsible for paying one-half of the total of the single occupancy Basic Service Rate plus the additional resident fee, entitling each resident to receive the Basic Services described in Section I of the Residency Agreement. Each resident will also be responsible for the cost of his or her Personal Service Plan.

In the event that the Agreement of one resident is terminated for any reason, effective upon such termination, the remaining resident's Basic Service Rate will automatically be adjusted to reflect the Basic Service Rate for a single occupancy suite for the remainder of the month in which the adjustment is made and for each month thereafter.

Single Occupancy Basic Service Rate \$ _____

Additional Resident Fee \$ _____

Total Charge for Suite \$ _____

BASIC SERVICE RATE FOR EACH RESIDENT \$ _____
(1/2 of the total charge for suite)

Resident

Date

Responsible Party

Date

EXHIBIT E
PHARMACY SERVICES AGREEMENT

The Company works closely with pharmacy providers to make certain that the needs of our residents are met. Preferred pharmacy providers are chosen based upon their ability to provide services to our residents to enhance their health and wellness. Important services include:

- Screening for possible negative drug interactions
- Assessments for potential allergic reactions of medications
- Recommending therapeutic substitutions when appropriate
- Providing competitive pricing for comparable packaging and offering generic substitutions when appropriate
- Alerting staff and physicians when there is a duplication of prescriptions
- Individual wellness recommendations
- Regular scheduled review and monitoring of medications
- Routine or emergency delivery 24-hours a day, 365 days a year
- Medication packaging that meets the Community's standards for safety

Our "preferred provider" for pharmacy services at the Community CHH14 is Palmetto PC. Our staff works closely with this pharmacy to meet the needs of our residents. They will review all current medications before your move-in and the consultant pharmacist will be in the Community on a regular schedule to meet with you individually, if needed.

If you decide to use another pharmacy provider other than the Company's "preferred provider", they will be required to meet the Company's standards regarding medication management.

Please review and sign the following statement acknowledging you understand the Company's expectations and requirements regarding the provision of medications.

I understand that if I choose not to use the Company's preferred provider, I will be charged a fee, which is set forth on Exhibit X, the Select Services List.

I understand that I will be required to provide medications that are packaged in a unit of use packaging system, unless I have been granted an exemption to the packaging requirement by the Regional Director of Operations.

I understand there is a service fee of \$ 50.00 a month associated with a packaging exemption due to the additional administrative oversight required.

If at any time I am not able or no longer willing to provide this type of packaging system and I do not have an exemption, I understand that I need to find alternative housing.

X JA

(Please initial as having read and understood the above provision.)

If I do not use the Company's preferred provider, I also understand that I will have the responsibility for reordering medications but in the event the medications are not delivered within two days prior to the depletion of my medication stock, the Company will reorder my medications with the 'Preferred Pharmacy' to insure no disruption takes place. I agree to pay for the medications and any associated service charges.

The fees associated with reordering medications from the "Preferred Pharmacy" are determined by the "Preferred Pharmacy", and are in addition to the service fee described above.

MY SIGNATURE BELOW INDICATES THAT I HAVE READ, UNDERSTAND AND AGREE TO ABIDE BY THE TERMS OF THIS PHARMACY SERVICES AGREEMENT.

Elizabeth O'Meara
Resident Signature (leg. J. Stanton)

7-30-08
Date

Legal Representative Signature

Date

Exhibit 2

Mrs. Pruett Residency Agreement

RESIDENCY AGREEMENT

The Company strongly believes in the importance of fully disclosing all services and fees to the best of our ability and in accordance with state law. As with any legally binding contract, it is our recommendation that you consult your legal counsel to ensure proper understanding of this Agreement before signing.

THIS AGREEMENT IS SUBJECT TO ARBITRATION

SC- Carolina House of Hilton Head

6/16/06

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Jun. 3. 2011 1:48PM Carolina House of Hilton Head

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RESIDENCY AGREEMENT

This Agreement is entered into as of March 31, 2009 by and between Southern Assisted Living, Inc., d/b/a Carolina House of Hilton Head ("Company"), Yvonne C. Pruett ("You" or "Resident"); and Samuel H. Pruett ("Responsible Party"). The terms and conditions of this Agreement are as follows:

I. SERVICES AND ACCOMMODATIONS

A. BASIC SERVICES

You will be entitled to the following Basic Services, which are included in the Basic Service Rate, subject to the terms and conditions of this Agreement:

- ♦ Accommodations - You are entitled to the use of the suite described in Exhibit A and to the use of the Company's personal property located in the suite. You are also entitled to use and enjoy with all other residents the common areas of the building (the "Community"). You may provide your own furnishings and personal property; however, the Company reserves the right to limit the number and type of furnishings if the Company determines that they present a safety hazard or potential safety hazard.
- ♦ Daily Meals - The Company will provide three meals daily. Snacks are available 24 hours a day.
- ♦ Utility Service - The Company will provide gas, electric and water service. Telephone charges are not included in the Basic Service Rate. Costs for basic cable television are described in Exhibit A.
- ♦ Weekly Housekeeping Service - The Company will clean your suite once a week.
- ♦ Weekly Laundry and Linen Service - The Company will launder your personal items and your bed linens once a week.
- ♦ Life Enrichment Program - The Company will provide planned social, educational and recreational programs.
- ♦ Staffing 24 hours a day - The Company will have staff available 24-hours a day, seven days a week.
- ♦ Transportation - The Company will secure or provide transportation for resident when a physician's services are needed. Local transportation (within a ten (10) mile radius of the Community) for medical reasons shall be provided by the Company at no additional charge. Basic transportation

SC- Carolina House of Hilton Head

6/16/06

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Carolina House of Hilton Head

Jan. 5, 2011 1:48PM

services will include the use of a car or conventional, non-adapted mini van. Residents requiring more services including private duty aide or specially adapted equipment or vehicle will be responsible for the costs incurred by that service. You understand that transportation for purposes other than those described in the preceding sentence will be at your expense.

The Company will provide thirty (30) days written notice of any change in Basic Services.

B. PERSONAL SERVICE PLAN

The Company will make available, at an additional cost, a Personal Service Plan. The Personal Service Plan is designed to provide you greater personal services than those provided under the Basic Services. The Company will use a personal service assessment to determine the personal services you require prior to moving in and periodically throughout your residency. The results of the assessments and the cost of providing the additional personal services will be shared with you and your Responsible Party. In some circumstances, the provision of outside services may be required for your continued ability to safely remain at the residence. An outside agency or individual will be permitted to provide these services or any related personal services only if the Company has given prior approval.

C. AVAILABLE SELECT SERVICES

From time to time, the Company may make select services available to you at your or your Responsible Party's request. If available, such additional services may include guest meals, transportation, transportation escort services, enhanced cable television, or special events. (See additional information on Transportation in Section I. A. of this Agreement.) These additional choices are not included in the Basic Service Rate or the Personal Service Plan. Your Executive Director will provide, upon your request, a listing of the available select services as well as a current fee schedule.

D. SERVICES NOT COVERED BY RESIDENCY AGREEMENT

You and your Responsible Party are responsible for obtaining and paying for all services which are not included in the Basic Services or Personal Services Plan (including, but not limited to, the services of third party health care and medical providers), whether provided by the Company, its subcontractors, third party health care and medical providers, or others. These services may include, but are not limited to, pharmacy services, newspaper subscriptions, or beauty/barber services. Any fees for services provided by other service providers will be billed directly by the service provider. All third party service providers (including, but not limited to, third party health care and medical providers) must receive the Company's prior authorization to provide services to you at the residence. All third party providers who enter the residence must sign in with the Executive Director or supervisor on duty and agree to comply with the Company's policies.

You may not contract with any of the Company's current employees to perform any services at the residence. You may contract with former employees to perform any

services at the residence only with the Company's consent. The Company reserves the right to refuse entry to 1) former employees; 2) persons whose actions may be disruptive to the residence; 3) persons whose actions may threaten the safety of any resident or employee; or 4) persons whose presence may foreseeably result in liability to the Company.

II. RESIDENT RESPONSIBILITIES AND REPRESENTATIONS

A. CARE OF SUITE

You agree that residence and the suite are in satisfactory, habitable condition. You also agree the Company has made no promise to decorate, alter or improve the residence or suite, unless otherwise provided in writing by the Company and attached as part of this Agreement. You agree to maintain the suite and to surrender the suite upon termination of this Agreement in good condition, exclusive of normal wear and tear. You agree to pay all damages, beyond normal wear and tear, including any improvements made without the Company's consent, which you, your Family, and/or other Guests (including any agent, employee, contractor, or other invitee) cause to residence property.

B. SUITE ACCESS

You agree to give the Company access to the suite in order to carry out the intent of this Agreement. Such entry includes, but is not limited to, performance of services provided as part of the Basic Services or in your Personal Service Plan; response to emergency situations; and entry by authorized personnel with the reasonable belief that your safety or safety of others is in question or that the Company's policies and procedures are being violated.

Upon written notice, the Company reserves the right to relocate you to a more appropriate suite within residence as required for your health or safety, or because the residents of a companion suite are incompatible.

C. HEALTH ASSESSMENT

You agree that the Company may from time to time assess your health to determine the appropriate Personal Service Plan and/or whether you are appropriate to stay in the residence. Not more than thirty (30) days prior to the date this Agreement is entered into, and at least annually thereafter or upon the request of the Company, you agree to undergo an examination by your physician (or other licensed provider as allowed by law). You agree that the Company may require you to undergo examination by a particular specialist, at your cost, as the Company determines is warranted by your current physical or mental status. You will request the examiner to provide the Company with recommendations, including a statement attesting to the appropriateness of the placement. Based upon the assessment(s) and the Company's judgement, the Company may determine your appropriateness to remain in the residence. You will request the examiner to perform any tests and complete any forms required by the Company or applicable law.

D. HEALTH CARE PROVIDER NOTIFICATION

You authorize the Company to contact responsible parties, health care providers, and/or other persons listed in your records:

- (1) If the Company determines it is necessary to advise them of your situation;
- (2) To arrange for health care services and other assistance required by you; or
- (3) In case of an emergency. If you have a life-threatening emergency, the Company will contact an emergency rescue service.

If your designated health care providers are unavailable, you authorize the Company to arrange for the services of other health care providers.

During the term of this Agreement, you agree the Company may provide such persons with copies of your records, including, but not limited to, resident records to the extent they are needed to assist with treatment, advance directives, living will, and the names of persons empowered to make health care decisions, for the purpose of arranging for health care services.

E. OBLIGATORY INFORMATION

You will provide the Company with accurate, complete and current information about yourself, substitute decision-makers and health care providers, including but not limited to addresses and phone numbers, and your health care status and needs. You or your Responsible Party will provide the Company with copies of any health care power of attorney, power of attorney executed by you or of any court order, guardianship, or other legal action which may (1) affect your status or (2) designate or appoint another person to make health care or financial decisions or to bear financial responsibility on your behalf. You authorize the Company to rely on the instructions of such designees or appointees. You understand that you must immediately notify the Company of changes relating to any of the information stated above.

F. ADVANCE DIRECTIVES

Upon admission to the Company, it is strongly suggested that you have your advance directives in place in the event you become incapacitated. Advance directives include, but are not limited to, Living Wills, Powers of Attorney for Health Care, Guardianships and Do Not Resuscitate Orders. You will notify the Company and provide copies to the Company of such advance directives. If you do not have such advance directives in place, you understand that a court may name a guardian upon application of any interested party (including the Company), subject to all bond, accounting and other legal requirements. Neither the Company nor any of its employees or agents may be your guardian. If it is necessary for the Company to petition the court for appointment of a guardian, any costs associated therein shall be paid by you. If you are a Resident in a Memory Care Unit (e.g. Clare Bridge or a Clare Bridge Cottage), these designations should be made prior to move-in.

G. MOTORIZED VEHICLES

Motorized vehicles may be used by a resident, subject to the following:

- (1) You have a physician's order stating that such a vehicle is a medical necessity for you;
- (2) You have been assessed as being able to safely operate the vehicle and you continue to demonstrate that your operation of the vehicle does not pose a threat to the health and safety of yourself or others.
- (3) The vehicle is operated at a low setting; and
- (4) You agree to abide by the Company's safety guidelines for the use of motorized vehicles on the premises, which may be modified from time to time.

Reasonable accommodations will be made to the motorized vehicle rules, policies and practices (upon a showing of necessity) so long as the requested accommodation does not constitute a threat to the health or safety of yourself, the other residents, the residence staff or visitors.

- (1) You further understand and agree that the Company may, at its sole discretion, prohibit your further use of a motorized vehicle at any time.

H. RESPONSIBILITIES UPON TERMINATION

You will vacate premises, removing all belongings on or before the effective date of termination. If you fail to remove your belongings by the effective date of termination, you understand and agree that the Company may charge you a storage fee for your belongings equal to your Basic Service Rate. You further agree that the Company may donate any unclaimed property after forty-five (45) days. You will provide written notice of a forwarding address where you can be reached and receive mail.

Termination will not release you or the Company from any liability or obligation to the other party under the terms of this Agreement.

I. RULE AND REGULATION COMPLIANCE

You acknowledge that the Company is licensed by the State of South Carolina as a Community Residential Care Facility. You understand that the Company has shared common areas, and you agree to honor all rules of courtesy and respect for others.

You agree to abide by and conform to the rules, regulations, policies and procedures as they now exist and as amended from time-to-time for the operation and management of the Community.

J. GUESTS

You understand that as a resident, you have the right to associate with your friends and family ("guests") during reasonable hours. Because the Company is a licensed building, overnight guests are generally not permitted in a resident's room. Limited exceptions may be granted by the Executive Director based upon the resident's health status or other pertinent factors.

You acknowledge and understand that your guests are subject to the Company's Rules and Regulations, and if your guests become disruptive to the operations of the Community and/or are verbally or physically abusive to staff, residents or others, the Company may request that they leave the Community until their behavior is under control or may place limitations upon the location and time of their visitation. You understand that, where circumstances warrant, the Company may exclude such individuals from the residence.

III. RATES

A. MOVE-IN FEE

— waived per 00 SAP
(KAP)

1. Fee - You will pay the Company a one-time Move-In Fee in an amount indicated in Exhibit A at the time this Agreement is signed.
2. Refund - The Company will refund a prorated share of one-half of the Move-In Fee if this Agreement is terminated within ninety (90) days of the date this Agreement is signed and any one of the following circumstances occur:
 - (a) The Company terminates this Agreement;
 - (b) The Company or your physician determines you require care not offered by the Company; or
 - (c) by reason of death.

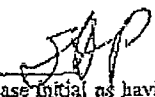
X X SAP
(Please initial as having read and understood the above provision.)

B. MONTHLY SERVICE RATE

1. Rate - You agree to pay the Basic Service Rate and, if applicable, the charge for the Personal Service Plan as indicated in Exhibit A (together the "Monthly Service Rate").
2. Refund - The Company will refund a prorated share of the Monthly Service Rate if this Agreement is terminated before the end of a month:
 - (a) following termination in accordance with Section IV;
 - (b) because you require care that is not offered by the Company; or
 - (c) by reason of death.

Refunds will be based upon the actual number of days the resident is in the facility and a reasonable number of bed hold days. A storage fee equal to the prorated share of the Monthly Service Rate will be charged until such time as all of your property is removed

from the Suite. The Company will issue the refund to Resident or Responsible Party within 45 days of the effective date of termination based on Section IV of this Agreement. Unless prohibited by law, you agree the Company may offset such refunds by any amount due under the terms of this Agreement.

X 
(Please Initial as having read and understood
the above provision.)

C. RESIDENT ABSENCE

If the Resident is absent from the Community for any reason, including, but not limited to, hospitalization, vacation, temporary nursing home care or rehabilitation, the Residency Agreement will remain effective and you will be charged the full Monthly Service Rate until such time that the Resident or Representative provides the Company with written notice of their intent to terminate the Agreement, pursuant to Section IV of the Agreement. Termination will be effective and charges will cease the later of the end of any applicable notice period or the removal of all of your personal belongings.

D. SELECT SERVICES

In addition to the Monthly Service Rate, you agree to pay the Company the established charges for any select services provided to you by the Company.

E. PAYMENT

The Company will issue a monthly statement before the first day of the month itemizing the Monthly Service Rate for the upcoming month and, if any, charges incurred for select services provided during the prior month. Payment for all charges shown on the statement is due on the first (1st) calendar day of each month. The first payment of the Monthly Service Rate is due prior to taking occupancy. If you move in after the first of the month, your first Monthly Service Rate will be one thirtieth (1/30) of the usual rate times the number of days remaining in the month.

The Company will charge a \$250.00 late fee if the Company has not received all fees when due. The Company will also charge a \$25.00 returned payment fee for each check or automatic withdrawal that is returned by a financial institution for any reason, including but not limited to, insufficient funds or incompleteness. After two payments are returned by a financial institution to the Company, you will thereafter pay the Monthly Service Rate and any other amounts due by cashiers check. You also agree to pay interest on all amounts not paid by the due date. The interest rate will be the lesser of 1.5% per month or the highest rate permitted by law.

F. RATE CHANGES

The Company will provide thirty (30) days written notice of any change in the Basic Services Rate. The Company may offer or require a change in the Personal Service Plan when the Company determines additional services are requested or required. The new charge for the Personal Service Plan will be effective immediately upon the provision of written notice.

X [Signature]
(Please initial as having read and understood the above provision.)

IV. TERM AND TERMINATION

A. TERM

This Agreement will commence on the date set forth above and will continue until terminated as provided below.

B. TERMINATION BY RESIDENT

The Company requests you or your Responsible Party to provide thirty (30) days written notice of your intent to terminate this Agreement. Termination shall be effective the day after your last date of residence.

X [Signature]
(Please initial as having read and understood the above provision.)

C. TERMINATION BY COMPANY

The Company may terminate this Agreement, upon providing you or your Responsible Party thirty (30) days written notice, for any of the following events, as determined by the Company:

- (1) You require care or services that the Company is unable to provide or which requires staff that are not available at the Company;
- (2) You are disruptive, create unsafe conditions, are physically or verbally abusive to other residents or otherwise impair the welfare of yourself or others in the residence;
- (3) You fail to pay fees and charges when due.

X [Signature]
(Please initial as having read and understood the above provision.)

For emergency medical or welfare reasons of you or other residents, the Company may, upon written notice to you or your Responsible Party, immediately terminate the Agreement, and transfer or discharge you. If the emergency requires your immediate transfer, the Company will notify the Responsible Party at the earliest practicable hour, but not later than twenty-four (24) hours following the transfer.

The Company will provide a written explanation if the Company terminates this Agreement with less than thirty (30) days notice.

D. TERMINATION BY EITHER PARTY

You, your Responsible Party or the Company may terminate this agreement immediately in the event of death or if a physician certifies, based upon an examination prior to moving out, that you must be relocated because of your health. The Company requests you provide written notice of your intent to terminate. Termination shall be effective the day after your last date of residence.

V. ARBITRATION AND LIMITATION OF LIABILITY PROVISION

Should any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.

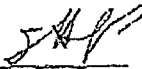
A. ARBITRATION PROVISION

1. Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at the Company, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a jury will not decide their case. The Federal Arbitration Act shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.
2. Demand for Arbitration by Resident, his or her guardian, a person or organization acting on behalf of a Resident with the consent of the Resident or his or her guardian, or the personal representative of the estate of a deceased Resident (collectively "Resident Party") shall be made in writing and submitted to CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza, Greenville, SC 29601, via certified mail, return receipt requested. Demand for Arbitration by the Company shall be made in writing and submitted to the Resident or his or her agent, representative, successor or assign and/or Resident's Attorney-in-Fact, and/or Responsible Party via certified mail, return receipt requested.

3. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.
4. The arbitration panel shall be composed of one (1) arbitrator. Subject to the requirements of section A.5. herein, the parties shall agree upon an arbitrator that must either be a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience as an attorney. If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then the arbitration shall be submitted to the National Arbitration Forum, or other similar organization, but must still be conducted by one (1) arbitrator who is a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience practicing as an attorney. If the arbitrator is selected from the National Arbitration Forum, or other similar organization, each party shall have the right to request one (1) substitution within ten (10) days of receiving notice of the identity of the arbitrator. The person requesting of the substitution shall submit a request for substitution in writing to the National Arbitration Forum, or other similar organization, and to the other party via U.S. mail.
5. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.
6. Discovery in the arbitration proceeding shall be governed by the Federal Rules of Civil Procedure. However, discovery shall be modified by the following, unless agreed to otherwise by the party to whom the request is made:
 - a. The Resident Party shall provide the Company with permissible discovery per the Federal Rules of Civil Procedure within twenty (20) days after Demand for Arbitration is received (and the Company shall reimburse Resident Party \$0.25 per page).
 - b. The Company shall provide the Resident Party with permissible discovery per the Federal Rules of Civil Procedure within twenty (20) days after the Demand for Arbitration is received (and Resident Party, unless proven indigent, shall reimburse the Company \$0.25 per page).
 - c. The only depositions allowed shall be of experts. No other individuals may be deposed.
 - d. Resident Party shall designate any and all expert witnesses within sixty-five (65) days after Demand for Arbitration is submitted.
 - e. The Company shall have thirty (30) days after Resident Party's expert designation is received in which to depose such experts.

- f. The Company shall designate any and all experts one hundred and fifteen (115) days after Demand for Arbitration is submitted.
- g. Resident Party shall have thirty (30) days after the Company's expert designation is received in which to depose such experts.
- h. Any report or affidavit of an expert, and a list of all records contained in the expert's file, must be exchanged by the parties no later than ten (10) working days before the date of the expert's deposition.
- i. The following shall be exchanged no later than fourteen (14) working days before the arbitration hearing:
 1. List of witnesses to be called at the arbitration hearing (full name, title, address and phone number if known) and an outline of each witnesses' intended testimony;
 2. List of documents to be relied upon at the arbitration hearing;
 3. Any sworn recorded statements to be relied upon at the arbitration hearing and included therewith the full name, title, address and phone number of the person making the sworn statement.
- j. The arbitration hearing shall be held no later than one hundred and eighty (180) days after Demand for Arbitration is submitted, or within a reasonable time thereafter if a conflict arises with the arbitrator's calendar.
7. The arbitrator shall designate a time and place within the county in which the Community is located, for the arbitration hearing and shall provide thirty (30) days' notice to the parties of the arbitration hearing.
8. The arbitrator shall apply the Federal Rules of Evidence and Federal Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, Federal law except as otherwise stated in this Arbitration Provision.
9. The arbitration decision should be signed by the arbitrator and delivered to the parties and their counsel within thirty (30) days following the conclusion of the arbitration. The decision shall set forth in detail the arbitrator's findings of fact and conclusions of law.
10. The arbitrator's decision shall be final and binding without the right to appeal.
11. The arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent. The parties shall bear their own attorneys' fees and costs and hereby expressly waive any right to recover attorney fees or costs, actual or statutory.

12. The arbitration proceeding shall remain confidential in all respects, including the Demand for Arbitration, all arbitration filings, deposition transcripts, documents produced or obtained in discovery, or other material provided by and exchanged between the parties and the arbitrator's findings of fact and conclusions of law. Following receipt of the arbitrator's decision, each party agrees to return to the producing party within thirty (30) days the original and all copies of documents exchanged in discovery and at the arbitration hearing, except those documents required to be retained by counsel pursuant to law. Further the parties to the arbitration also agree not to discuss the amount of the arbitration award or any settlement, the names of the parties, or the name/location of the Community except as required by law.
13. The Limitation of Liability Provision below is incorporated by reference into this Arbitration Provision
14. This Arbitration Provision and the Limitation of Liability Provision below shall survive the death of the Resident.

X. 

(Please initial as having read and understood the provisions of section V., subsection A)

B. LIMITATION OF LIABILITY PROVISION: *Read Carefully Before Signing*

1. The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement.
2. Liability for any claim brought by a party to this Agreement against the other party, including but not limited to a claim by the Company for unpaid Basic Service or Personal Service charges, or a claim by, or on behalf of, a Resident, Resident Party, or by a Resident's Estate, Agent or Legal Representative, arising out of the care or treatment received by the Resident or the Resident's occupancy or presence at the Company, including, without limitation, claims for medical negligence, shall be limited as follows:
 - a. Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance.
 - b. Noneconomic damages, such as pain and suffering, shall be limited to a maximum of \$250,000.00.
 - c. Interest and/or late fees on unpaid assisted living charges shall not be awarded.
 - d. Punitive damages shall not be awarded.

3. Should sub-sections a, b, c and/or d, provided above, be deemed invalid, the validity of the remaining sub-sections will not be affected.

x

JHP
(Please initial as having read and understood the provisions of section V., subsection B.)

C. BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISIONS

The parties' decision to select arbitration is supported by the potential cost-effectiveness and time-savings offered by selecting arbitration, which may avoid the expense and delay of judicial resolution in the court system. The parties' decision to select arbitration and to agree to a limitation of liability also are supported by the potential benefit of preserving the availability, viability, and insurability of an assisted living company for the elderly and disabled in South Carolina, by limiting such assisted living company's exposure to liability. With this Agreement, the Company is better able to offer its services and accommodations at a rate that is more affordable to the Resident. In terms of the time-savings offered by selecting arbitration, the parties recognize that often the Resident is elderly and may have a limited life-expectancy, and therefore selecting a quick method of resolution is potentially to a Resident's advantage.

The Resident, Responsible Party, or his or her legal guardian, or authorized Power of Attorney understands that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability provision. The parties agree that the reasons stated above are proper consideration for the acceptance of the Arbitration and Limitation of Liability Provisions. The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.

The parties to this Agreement further understand that a jury will not decide their case.

x

JHP
(Please initial as having read and understood the provisions of section V., subsection C.)

VI. MISCELLANEOUS

A. DEFAULT TO ARBITRATION

If it is determined by a court of law that the Arbitration Provision provided in this Agreement is invalid, the parties hereto make clear their express desire to waive a jury trial and resolve their claims against each other in the appropriate court solely before a judge.

B. NON-DISCRIMINATION

The Company does not discriminate on the basis of race, religion, color, national origin, sex, age, disability, marital status, sexual preference, or source of payment. The Company respects all religious faiths and does not have any specific religious affiliation.

C. RISK AGREEMENT

You and your Responsible Party are responsible for your personal, financial and health care decisions. In addition, you are responsible for maintaining at all times your own health, personal property, liability, automobile (if applicable), and other insurance coverages in adequate amounts. You agree to obtain insurance with coverage for your personal property and your general liability in the amount of \$100,000. You agree to provide proof of such coverage to the Company. You acknowledge that the Company is not an insurer of your person or property.

You understand and agree that:

1. The Company may encourage you to participate in community, leisure, and social activities and to maintain an appropriate level of independence in activities of daily living, as well as your personal and financial affairs;
2. Independent activities, responsibility for personal, financial, and health care decisions, and lifestyle and care preferences may involve risks of personal injury and/or property damage or loss;
3. The standard of services in an assisted living residence does not include one-on-one care, assistance or supervision e.g. one resident assistant for each Resident, or immediate response to non-emergent needs. Consistent with your daily life activities, including but not limited to resting in your apartment or common areas, watching television, listening to music, reading, and sleeping at night, there may be short and long periods of time in which you will be left alone, unsupervised;
4. The Company makes no representations or guarantees that the Company staff can prevent Residents from falling. Further, the Company does not represent or guarantee your health condition will not change or deteriorate throughout your Residency;
5. The services provided by the Company may not meet all of your personal, social, or health care needs and the Company will use its best efforts to assist you in arranging for services which you require and which are not included in this Agreement;
6. Many Residents of the Company suffer from memory impairment, including Alzheimer's disease and dementia. This condition can cause unexpected behavior

including, but not limited to, wandering, forgetfulness, agitation towards others and confusion. The Company makes no representations or guarantees that it can predict the behavior of its Residents. Therefore, the Company also makes no representations or guarantees that it can always prevent a Resident from wandering or attempting to wander from the Community, entering into a private area, misplacing or losing items or engaging in physical contact with another Resident;

7. The Company makes no representations or guarantees that the Company is secure from theft or any other criminal act perpetrated by any other Resident or person; therefore, the Company recommends that valuables, including but not limited to, jewelry and large amounts of money, not be brought into the Community. If you choose to bring in such valuables, you are doing so at your own risk and the Company will not be responsible for any theft or loss of these items;
8. Due to state regulations and fire code, the Company is not permitted to lock its exterior doors and, therefore, does not guarantee that its Residents will not wander out of the Community. In our memory care buildings, the exterior doors are alarmed with a delayed egress feature and our systems are designed to alert our staff to respond and assist a Resident to safety, should they wander from the building.

You understand and agree to assume the risks inherent in this Agreement. You agree to hold the Company and its employees and agents harmless for any damages or injury or other loss resulting from: (1) reasonable acts or omissions made in good faith; (2) action of any third party, fire, water, theft or the elements; or (3) loss of personal property. The Company will only be liable for damages, injuries or other losses to you or any third party entering a Suite, or any other part of the residence, if due to willful misconduct or negligence of the Company.

The Company reserves the right to recover from you any loss caused by fire, vandalism or any other acts by you or your invitees or guests. The Company may assign such right to its insurance carrier.

D. RELIANCE

By entering into this Agreement, the Company is relying upon the truthfulness of the promises and representations made by you and your Responsible Party.

E. NO LIABILITY IF AWAY FROM RESIDENCE

In the event that you knowingly leave the Community or are temporarily away from the Community, any and all responsibility of the Company for your welfare shall terminate during your absence.

F. ASSIGNMENT

This Agreement is not assignable by you or your Responsible Party without prior written consent of the Company. The rights and obligations of the Company may be assigned to any person or entity, and such person or entity will be responsible to ensure the obligations of the Company under this Agreement are satisfied in full from and after the date that you are notified of such assignment. The Company may engage another person or entity to perform any or all of the services under this Agreement.

G. HEIRS AND SUCCESSORS

This Agreement is for the benefit of and binds the parties and their respective heirs, representatives, successors and assigns.

H. AMENDMENTS

This Agreement and any written amendments constitute the entire agreement between the parties and supercede all prior and contemporaneous discussions, representations, correspondence, and agreements whether oral or written, pertaining to this Agreement. Except for the right of the Company to modify fees, rates and charges, amend services provided and establish reasonable operating procedures and rules for the general welfare and safety of the residents, this Agreement may be amended only in writing signed by both parties.

I. SEVERANCE

Should any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected.

J. RESPONSIBLE PARTY

You have designated a Responsible Party, who has agreed to the terms of the attached Responsible Party Agreement and whose signature appears below.

K. SUBORDINATION

This Agreement and the parties' rights hereunder will be subordinate to any ground lease, mortgage or deed of trust now or hereafter placed upon the residence, but your right to remain in possession of your suite will not be disturbed so long as you comply with all of the provision of this Agreement.

L. NOTICES

Notices will be written and given by personal delivery or mailing by regular mail, postage pre-paid to the following or such other persons or places as the parties may notify each other. Notices shall be deemed given based upon the date personally delivered or upon the date postmarked.

The Company:
Executive Director at Community
Address (as noted on Exhibit A)

Resident:
(as noted at end of this Agreement)

Responsible Party:
(as noted in Exhibit B)

BY THEIR SIGNATURES, the parties or their representatives have executed this Agreement.

[Signature] 3/31/09
For the Company Title Date

Resident Date
[Signature] 3/31/09
Responsible Party Date

SEND NOTICES AND MONTHLY STATEMENTS TO RESIDENT IN CARE OF:

Name: [Signature]
Address: 9 N. Calabogue Cay Rd., Hilton Head SC
Phone No.: 843 363 6604 - Home 843-422-1166 - cell 24928

OTHER RELATED MATERIALS

1. Resident Bill of Rights
2. Community Handbook
3. Emergency Evacuation Plan
4. Admissions Package and Special Services Form
5. Medical Records Release
6. Resident Assessment
7. Personalized Service Plan

EXHIBITS INCLUDED:

- A. Schedule of Services and Rates
- B. Responsible Party Agreement
- C. Pet Addendum
- D. Additional Resident Fee
- E. Pharmacy Services Agreement
- F. Acknowledgement of Grievance Procedure and Resident Bill of Rights

ADDITIONAL EXHIBITS:

- X. Select Services List
- Y. Therapeutic Services List
- Z. Assessment Price Schedule

EXHIBIT A
SCHEDULE OF SERVICES AND RATES

Resident Yvonne (Bonnie) C. Pruett.

Community Carolina House - Hilton Head
Address 35 Beach City Rd.
Hilton Head, SC 29926

Suite # 312 # 415

Move-In Fee (Prior to Move-in) \$ waived

6-1-2009
C.B. x 5/11/09

Basic Services

Basic Service Rate \$2500 (per RS) \$3100 - Private

* Accommodations - You are entitled to the use of the suite described above and to the use of the Company's personal property located in the suite. You are also entitled to use and enjoy with a own furnish the number hazard or p

Base rent

* Daily Meal a day.

* Utility Ser charges are included in

* Weekly Hi

* Weekly Li your bed li

* Life Time recreation

* Staffing 2 days a week

3 year fixed
Rate at 8/15/2009
\$3100 (per RS)
Sum must sign

COZAAR (LOSARTAN POTASSIUM TABLETS) HYZAAR (LOSARTAN POTASSIUM HYDROCHLOROTHAZIDE TABLETS)

Please read accompanying Prescribing Information, including Exact Warning on use in pregnancy, at back of box. COZAAR and HYZAAR are registered trademarks of P. du Pont de Nemours and Company, Wilmington, Delaware, USA. www.COZAAR.com

COZAAR 40 mg

SC- Carolina House of Hilton Head

* Transportation - The Company will secure or provide transportation for resident when a physician's services are needed. Local transportation (within a ten (10) mile radius of the Community) for medical reasons shall be provided by the Company at no additional charge. Basic transportation services will include the use of a car or conventional, non-adapted mini van. Residents requiring more services including private duty aide or specially adapted equipment or vehicle will be responsible for the costs incurred by that service. You understand that transportation for purposes other than those described in the preceding sentence will be at your expense.

The Company will provide thirty (30) days written notice of any change in Basic Services.

Personal Service Plan

Personal Service Plan Rate

\$ 372⁰⁰

The Company will make available, at an additional cost, a Personal Service Plan. The Personal Service Plan is designed to provide you greater personal services than those provided under the Basic Services. The Company will use a personal service assessment to determine the personal services you require prior to moving in and periodically throughout your residency. The results of the assessments and the cost of providing the additional personal services will be shared with you and your Responsible Party. All third party providers (including, but not limited to, third party health care and medical providers) who enter residence must sign in with the Executive Director or supervisor on duty and agree to comply with the Company's policies.

MONTHLY SERVICE RATE

(Add Basic Service Rate and Personal Service Plan)

Available Select Services

6-1-2009

\$ 372⁰⁰

From time to time, the Company may make select services available to you at your request. When available, such additional services may include guest meals, transportation, transportation escort services, enhanced cable television, special events, or special programs. These additional choices are not included in the Basic Service Rate. Please contact your Executive Director for a current fee schedule.

I agree to the above Schedule of Services and Rates effective Mar 31, 2009, and I understand and agree that the Company has a right to change these rates and/or change the services provided in accordance with the provisions of the Residency Agreement.

For the Company

Title

Date

Resident

Date

Responsible Party

Date

SC- Carolina House of Hilton Head

6/16/06

21

EXHIBIT B
RESPONSIBLE PARTY AGREEMENT

Kronne C. Pruett ("Resident"); Samuel H. Pruett
("Responsible Party") and Southern Assisted Living, Inc., d/b/a Carolina House of Hilton
Head ton (herein after the "Company"), hereby agree as follows:

WHEREAS, the Resident desires to live in the suite identified in the attached
Residency Agreement; and

WHEREAS, the Company is willing to enter into the Residency Agreement if
Resident identifies an individual who is willing to provide certain assistance to or on behalf of
Resident in the event that such assistance is necessary, and who is willing to pay Resident's
financial obligations to the Company under the Residency Agreement in the event that
Resident does not make payments when due; and

WHEREAS, Responsible Party agrees to provide such assistance and to pay such
obligations, if and as necessary.

IN CONSIDERATION of the foregoing, the Parties agree as follows:

I. PERSONAL ASSISTANCE. In the event the condition of the Resident requires such
assistance, and upon the request of the Company, Responsible Party will assist Resident or
legally responsible person, as necessary by:

- (a) Participating with the Company staff in evaluating Resident's needs and in
planning and implementing an appropriate plan for Resident's care;
- (b) Maintaining Resident's welfare and fulfilling Resident's obligations under the
Residency Agreement;
- (c) Relocating Resident following termination;
- (d) Transferring Resident to a hospital, nursing home, or other facility in the
event that Resident requires care the Company does not offer;
- (e) Removing Resident's personal property from suite when Resident leaves;
- (f) Making necessary arrangements for funeral services and burial in the event of
death.

II. FINANCIAL RESPONSIBILITY. If Resident fails to make payments due to the
Company under the Residency Agreement, Responsible Party agrees to pay the Company
such amounts within thirty (30) days of receiving written notice of nonpayment.

III. REVIEW OF RESIDENCY AGREEMENT. Responsible Party acknowledges that he or she has received and has reviewed a copy of the Residency Agreement, and has had an opportunity to ask any questions Responsible Party may have.

BY THEIR SIGNATURES, the parties or their representatives have executed this

Agreement to be effective as of Mar 31, 2009.

<u>I. Chinedu I. Nwagwu</u>	<u>8/31/09</u>
For the Company	Title Date
<u>John Pruitt</u>	<u>3/31/09</u>
Resident	Date
<u>314 80 8496</u>	<u>3/31/09</u>
Responsible Party	Social Security No. DL No. Date

SEND NOTICES TO RESPONSIBLE PARTY AT:

Address: 9 N. Calabogue Cay Rd, Hilton Head, SC 29928
Phone No.: 843 363-6664

**EXHIBIT C
PET ADDENDUM**

The Company consents to the Resident keeping in the suite the household Pet described as follows:

<u>Half Shitzu / Half Bull Terrier</u>	Kind and breed
<u>Maggie</u>	Name
<u>Gray</u>	Color
<u>12 lbs.</u>	Weight
<u>13 yrs.</u>	Age

I. RESIDENT RESPONSIBILITIES. The Resident will keep the Pet in the suite except when walking the Pet, if applicable, or transporting it to and from the suite. The Resident will not allow the Pet in lobbies or in common residential areas, and will transport the Pet to and from the suite only by side entrances of the building, when available and/or feasible. The Resident will walk and curb the Pet only in areas designated by the Company and will be responsible for cleaning up after the Pet. When the Pet is not in the suite, the Resident will keep it on a leash no longer than five (5) feet or in a cage or other appropriate closed and ventilated container, and in the control of the Resident. If the Pet is a bird, the Resident will keep it caged both in and out of the suite. If the Pet is a dog or cat, the Resident will ensure that it wears a collar with appropriate identification (including the Resident's telephone number) at all times that it is out of the suite.

The Resident will comply with all vaccination and licensing requirements applicable to the Pet, showing proof of this upon request, and will comply with appropriate standards of care, treatment, and grooming. In all circumstances, the Resident is responsible for the health, welfare, and proper care of the Pet. The Resident will ensure that the Pet does not disturb the right of other residents to the peaceful enjoyment of their suites and of the common areas. The Resident will not leave the Pet unattended when the Pet is not in the suite.

The Company, in its discretion, may assist the Resident in caring for the Pet as part of the Resident's Personal Service Plan. Charges and payment for such services will be governed by the terms of the Residency Agreement.

The Resident will be liable for any personal injury or property damage caused by the Pet that is suffered by the Company, its employees or agents, other residents, guests, or invitees. The Resident and/or Responsible Party agree to purchase renter's insurance in the amount of \$100,000, which specifically covers any personal injury or property damage caused by the Pet. The Resident shall provide Community with proof of insurance coverage.

II. TERM & TERMINATION. This Addendum will continue until the Residency Agreement between the Resident and the Company is terminated, unless either party terminates this Addendum for any reason by giving fourteen (14) days prior written notice to

the other party. The Company may terminate this Addendum upon twenty-four (24) hours notice in the event the Resident breaches any of the Resident's obligations under this Addendum. In the event that the Pet is left unattended for more than twenty-four (24) hours, or if the Company determines that the Resident, for any reason, is unable to care for the Pet, the Company reserves the right to arrange for the Pet to be delivered to:

Sponsor: Sam H Pruett
Address: 9 North Calibogue, Ray Rd, Ht. 29928.
Phone: 843-363-1664

Or to such other individual or agency as the Company determines to be appropriate. The Resident will pay all costs of delivery, feeding, care, treatment, and housing of the Pet. The Resident acknowledges that the Resident has no right to keep a pet, except to the extent expressly permitted by this Addendum. The Company reserves the right to withdraw its consent to the Resident keeping the Pet at any time by terminating this Addendum, as permitted above.

BY THEIR SIGNATURES, the parties executed the Addendum to be effective Mar 31 2009

Khinead Mary En 3/31/09
For the Company Title Date

Resident Date
Sam Pruett 3/31/09
Responsible Party Date

4/8/2009 On hold (RM)

EXHIBIT D
ADDITIONAL RESIDENT FEE

When two residents occupy a single occupancy suite, the Company charges a single occupancy Basic Service Rate plus an additional resident fee. Each resident in the suite is responsible for paying one-half of the total of the single occupancy Basic Service Rate plus the additional resident fee, entitling each resident to receive the Basic Services described in Section I of the Residency Agreement. Each resident will also be responsible for the cost of his or her Personal Service Plan.

In the event that the Agreement of one resident is terminated for any reason, effective upon such termination, the remaining resident's Basic Service Rate will automatically be adjusted to reflect the Basic Service Rate for a single occupancy suite for the remainder of the month in which the adjustment is made and for each month thereafter.

Single Occupancy Basic Service Rate \$ _____

Additional Resident Fee \$ _____

Total Charge for Suite \$ _____

BASIC SERVICE RATE FOR EACH RESIDENT \$ _____
(1/2 of the total charge for suite)

Resident _____

Date _____

Responsible Party _____

Date _____

EXHIBIT E
PHARMACY SERVICES AGREEMENT

The Company works closely with pharmacy providers to make certain that the needs of our residents are met. Preferred pharmacy providers are chosen based upon their ability to provide services to our residents to enhance their health and wellness. Important services include:

- Screening for possible negative drug interactions
- Assessments for potential allergic reactions of medications
- Recommending therapeutic substitutions when appropriate
- Providing competitive pricing for comparable packaging and offering generic substitutions when appropriate
- Alerting staff and physicians when there is a duplication of prescriptions
- Individual wellness recommendations
- Regular scheduled review and monitoring of medications
- Routine or emergency delivery 24-hours a day, 365 days a year
- Medication packaging that meets the Community's standards for safety

Our "preferred provider" for pharmacy services at the Community Carolina House Hills
Long Term Care Pharmacy Our staff works closely with this pharmacy to meet the needs of our residents. They will review all current medications before your move-in and the consultant pharmacist will be in the Community on a regular schedule to meet with you individually, if needed.

If you decide to use another pharmacy provider other than the Company's "preferred provider", they will be required to meet the Company's standards regarding medication management.

Please review and sign the following statement acknowledging you understand the Company's expectations and requirements regarding the provision of medications.

I understand that if I choose not to use the Company's preferred provider, I will be charged a fee, which is set forth on Exhibit X, the Select Services List.

I understand that I will be required to provide medications that are packaged in a unit of use packaging system, unless I have been granted an exemption to the packaging requirement by the Regional Director of Operations.

I understand there is a service fee of \$ 50.00 a month associated with a packaging exemption due to the additional administrative oversight required.

If at any time I am not able or no longer willing to provide this type of packaging system and I do not have an exemption, I understand that I need to find alternative housing.

X SH
(Please initial as having read and understood the above provision.)

If I do not use the Company's preferred provider, I also understand that I will have the responsibility for reordering medications but in the event the medications are not delivered within two days prior to the depletion of my medication stock, the Company will reorder my medications with the 'Preferred Pharmacy' to insure no disruption takes place. I agree to pay for the medications and any associated service charges.

The fees associated with reordering medications from the "Preferred Pharmacy" are determined by the "Preferred Pharmacy", and are in addition to the service fee described above.

MY SIGNATURE BELOW INDICATES THAT I HAVE READ, UNDERSTAND AND AGREE TO ABIDE BY THE TERMS OF THIS PHARMACY SERVICES AGREEMENT.

Jane Pruett
Resident Signature

3/30/09
Date

[Signature]
Legal Representative Signature

Date

ADDENDUM TO THE RESIDENCY AGREEMENT

BASE RATE FREEZE

I understand and acknowledge that Carolina House of Hilton Head (the "Community") agrees to issue me a Base Rate Freeze in the amount of \$3100 per month, effective August 13, 2009. This rate freeze will be in effect for three years, ending August 13, 2012.

I understand and acknowledge that this Base Rate Freeze is not automatically transferable to another Brookdale Senior Living Community, meaning if I move to another Brookdale Community, this Base Rate Freeze will not transfer unless the Regional Director responsible for such Brookdale Community approves the transfer. In addition, this Base Rate Freeze is not transferable to another individual.

If I choose to relocate to a different apartment style within the community or choose to have a roommate at any point during my residency with the Community, my Basic Service Rate will be adjusted to be equitable with the current market rate for that apartment style or living option at the time of relocation. I further understand and acknowledge that my Personal Service Rate and other charges may increase over time, consistent with the terms of the Residency Agreement.

It is further explicitly understood that the terms of Section IV of the Residency Agreement regarding termination of the contract are not affected by the Basic Rate Freeze and remain in full force and effect.

Shirley I. Mann
For the Community

Title

Date

8/19/2009

Yvonne Pruitt
Resident

John Pruitt
Responsible Party

Date

08/19/09

Exhibit 3

Mrs. Scheerle Residency Agreement

CAROLINA HOUSE
BROOKDALE SENIOR LIVING
RESIDENCY AGREEMENT

THIS AGREEMENT IS SUBJECT TO ARBITRATION

This Agreement ("Agreement") dated July 10, 2010 is made by and between Southern Assisted Living, Inc. d/b/a Carolina House of Hilton Head (the "Company," "us," "we" or "our") a corporate affiliate of Brookdale Senior Living Inc., and Janet Scheerle ("Resident," "you" or "your").

We operate the community located at 35 Beach City Road, Hilton Head, South Carolina 29926 (the "Community") which is licensed by the State of South Carolina as a Community Residential Care Facility and residency in the Community has been requested by you or on your behalf. The terms and conditions of this Agreement are as follows:

I. SERVICES AND ACCOMMODATIONS.

A. BASIC SERVICES. We will provide you with the following Basic Services, which are included in the Basic Service Rate, subject to the terms of this Agreement:

- ♦ **Accommodations** – You have elected to live in the Suite described in Exhibit A and are entitled to the use of our property located in the Suite. You are also entitled to use and enjoy with all other residents the common areas of the Community. You may provide your own furnishings and personal property; however, we reserve the right to limit the number and type of furnishings/small appliances. You agree that you are responsible for the maintenance and repair of any personal belongings you bring to the Community.
- ♦ **Dining Services** – We will furnish three meals daily. Snacks are available 24 hours a day.
- ♦ **Utility Service** – The cost of gas, electric, heat, air conditioning and water service are included. The cost of basic cable, satellite or comparable television service is not included. You are responsible for paying any other utility charges including, but not limited to, telephone, internet or premium cable charges.
- ♦ **Housekeeping Service** – We will provide light housekeeping once a week.
- ♦ **Laundry and Linen Service** – We will launder your personal belongings and bed linens once a week.
- ♦ **Activities Program** – We will provide planned social and recreational programs.
- ♦ **Transportation** – We will secure or provide transportation for resident when a physician's services are needed. Local transportation (within a ten (10) mile radius of the Community) for medical reasons shall be provided by us at no additional charge. Basic transportation services will include the use of a car or conventional, non-adapted mini van. Residents requiring more services including private duty aide or specially adapted equipment or vehicle will be responsible for the costs incurred by that service. You

understand that transportation for purposes other than those described in the preceding sentence will be at your expense.

- ♦ Staffing 24 hours a day – Associates are available 24 hours a day, seven days a week.

We will provide thirty (30) days written notice of any change in Basic Services.

- B. PERSONAL SERVICE PLAN. Prior to moving in and periodically throughout your residency, we will use a personal service assessment to determine the personal services you require. The personal service assessment will be used to develop your Personal Service Plan. The results of the assessment and the cost of providing the additional personal services (the "Personal Service Rate") will be shared with you. Your initial Personal Service Rate is set forth in Exhibit A.

- C. AVAILABLE SELECT AND THERAPEUTIC SERVICES. Select Services and Therapeutic Services are available to you at your request. Such additional services are not included in the Basic Service Rate or the Personal Service Rate. Where available, such services may include, but are not limited to guest meals, transportation beyond that which is included in the Basic Service Rate, transportation escort services, enhanced cable television, special events or certain clinical services. The available Select Services and Therapeutic Services as well as the associated prices are found on Exhibit X and Exhibit Y to this Agreement.

- D. SERVICES NOT COVERED BY RESIDENCY AGREEMENT. In some circumstances, the provision of outside services may be required for your continued ability to safely remain at the Community. An outside agency or individual will be permitted to provide these services or any related personal services only if we have given prior approval.

You are responsible for obtaining and paying for all services that are not included in the Basic Services or Personal Service Plan (including, but not limited to, the services of third party health care and medical providers), whether provided by us, our subcontractors, third party health care and medical providers, or others. These services may include, but are not limited to, pharmacy, therapy, private companion, beauty/barber or other health care services. Fees for such services will be billed to you directly by the service provider, unless otherwise agreed to by the parties. All third party service providers (including, but not limited to, health care service providers) must agree to adhere to our standards for outside providers prior to being permitted to provide services in the Community.

You may not hire our current associates to provide services in the Community. You may contract with former associates to perform any services at the Community only with our consent. We reserve the right to refuse entry to (1) former associates; (2) persons whose actions may be disruptive to the Community; or (3) persons whose actions may threaten the safety of any resident or associate.

II. YOUR RESPONSIBILITIES AND REPRESENTATIONS.

- A. CARE OF SUITE. You agree that the Community and the Suite are in satisfactory, habitable condition and we have made no promise to decorate, alter or improve the Community or Suite unless otherwise provided in writing and attached as part of this Agreement. You agree to maintain the Suite and to leave the Suite upon termination of this Agreement in good condition, except for normal wear and tear. You agree to pay all damages, beyond normal wear and tear, which you (including your agent, employee,

contractor, or other invitee) cause to our property. The Community may invoice you for the cost of such repairs.

B. ALTERATIONS. We, in our sole discretion, will permit reasonable alterations to the Suite if you have a disability and the proposed modification is necessary to afford you full enjoyment of the Suite. Structural or physical alterations, whether based on a handicap or not, may be made only upon our prior written approval. All structural or physical changes to the Suite shall remain at the Suite and be considered part of the Suite and the Community. Any changes or modifications to the Suite that require assistance of appropriately licensed and insured electricians, contractors or similar professionals must be approved in advance by us in our sole discretion. The cost of any alterations made by you shall be paid by you unless we otherwise agree in writing. You agree that you will bear the cost of restoring the Suite to its original condition, reasonable wear and tear excepted, upon the termination of this Agreement, unless we specifically exempt you from this requirement in writing. We may enter and make any modifications or alterations to the Suite to meet the requirements of any applicable law.

C. RIGHT OF ENTRY. For your safety and comfort, our associates must be permitted to enter your Suite to provide services under the terms of this Agreement, to respond to emergencies, to make repairs and improvements, or if there is reasonable belief that your safety or the safety of others is in question or that our policies and procedures are being violated, as we deem necessary or advisable. Therefore, it is not permissible to change the locks or add locks to the entrance door to your Suite. When feasible, our associates will attempt to give you reasonable notice before entering your Suite.

We reserve the right to relocate you to a more appropriate Suite within the Community as required for your health or safety, or because the residents of a companion Suite are incompatible.

D. HEALTH ASSESSMENT. You agree that we may assess your health to create and update a Personal Service Plan and/or to determine whether you are appropriate to remain at the Community. Not more than thirty (30) days prior to the date of this Agreement or upon our request, you agree to undergo an examination by your physician (or other licensed provider as allowed by law). You agree to undergo examination by a particular specialist, at your cost, as we determine is warranted by your current physical or mental status. You will request the examiner to provide us with recommendations, including a statement attesting to the appropriateness of your continued placement. Based upon the assessment(s) and our judgment, we may determine your appropriateness to remain in the Community. You will request the examiner to perform any tests and complete any forms required by us or applicable law.

E. HEALTH CARE PROVIDER NOTIFICATION. You authorize us to contact your legal representative/family, health care providers, and/or other persons listed in your records (1) if it is necessary to advise them of your situation; (2) to arrange for required health care services and other assistance; or (3) in case of an emergency.

If your designated health care providers are unavailable, you authorize us to arrange for the services of other health care providers. You agree we may provide such persons with copies of your records, including, but not limited to, resident records, advance directives, living will, and the names of persons empowered to make health care decisions.

F. SUBSTITUTE DECISION MAKERS/ADVANCE DIRECTIVES. You will provide us with accurate, complete and current information about yourself, substitute decision-makers and health care providers, including but not limited to addresses and phone numbers, and your health care status and needs. You will provide us with copies of any power of attorney, guardianship, living will, or conservator documents, or other legal documents relating to the making of health or financial decisions or decision-makers. You authorize us to rely on the instructions of such designees or appointees. You further agree to immediately notify us of changes relating to the information stated above.

It is strongly suggested that you have advance directives in place in the event you become incapacitated. If you do not have such advance directives in place, you understand that a court may name a guardian upon application of any interested party (including the Company). Neither we nor any of our associates or agents may be your guardian. If it is necessary for us to petition the court for appointment of a guardian, any costs associated therein shall be paid by you and we may invoice you for such costs.

G. ELECTRIC SCOOTERS. Electric scooters and similar vehicles may be used, subject to the following:

1. Your ability to walk is substantially limited due to a disability;
2. Your operation of the vehicle does not pose a threat to the health and safety of yourself or others.
3. The vehicle is operated at a low speed setting; and
4. You agree to abide by our safety guidelines for the use of motorized vehicles on the premises, which may be modified from time to time.

Reasonable accommodations will be made to the rules, policies and practices (upon a showing of necessity) so long as the requested accommodation does not constitute a threat to the health or safety of you, the other residents, our associates or visitors.

You agree to pay for all damages to others or to the Community, which are caused by you or your scooter and that we may invoice you for such costs. You further understand and agree that we may, at our sole discretion, prohibit your further use of an electric scooter or similar vehicle at any time.

H. RESPONSIBILITIES UPON TERMINATION. You will vacate premises, removing all belongings on or before the effective date of termination. If you fail to remove your belongings by the effective date of termination, you understand and agree that we may continue to charge you for the Basic Service Rate of your Suite, or have your belongings placed in storage at your cost. You further agree that we may donate any unclaimed property after forty-five (45) days. You will provide written notice of a forwarding address where you can be reached and receive mail. Termination will not release you or us from any liability or obligation to the other party under the terms of this Agreement.

I. EXAMINATION OF RECORDS. You acknowledge that we are licensed by the State of South Carolina as an Community Residential Care Facility. You understand that regulatory officials having jurisdiction over the Community may inspect your records as part of an evaluation of the Community. You have the right to review and access your health care records in accordance with the requirements of applicable law.

J. RULE AND REGULATION COMPLIANCE. You understand that the Community has shared common areas, and you agree to honor all rules of courtesy and respect for others.

You agree to abide by and conform to our rules, regulations, handbook, policies and procedures as they now exist and as amended from time-to-time. You understand that failure to abide by such policies may result in your discharge from the Community.

- K. GUESTS.** You have the right to associate with your friends and family during reasonable hours. Because the Community is a licensed building, overnight guests are generally not permitted in a resident's room. Limited exceptions may be granted by the Executive Director based upon the circumstances.

You acknowledge and understand that your guests are subject to our rules and regulations, and if your guests become disruptive to the operations of the Community and/or are verbally or physically abusive to residents, our associates or others, we may request that they leave the Community until their behavior is under control or may restrict their visitation. Where circumstances warrant, we may exclude such individuals from the Community.

III. RATES.

- A. COMMUNITY FEE.** We require a one-time non-refundable Community Fee in an amount indicated in Exhibit A to be paid at the time this Agreement is signed. The Community Fee does not excuse you from financial responsibility for any damage caused to your Suite beyond normal wear and tear upon move-out.

B. MONTHLY SERVICE RATE.

1. **Rate.** You agree to pay the Basic Service Rate and, if applicable, the Personal Service Rate as indicated in Exhibit A (together the "Monthly Service Rate").
2. **Refund.** We will refund a prorated share of the Monthly Service Rate if this Agreement is terminated before the end of a month:
 - a. following written notice in accordance with Section IV;
 - b. because you require care that is not offered by us; or
 - c. by reason of death.

Refunds will be based on the actual number of days you were in the Community or a bed was held for you in the Community. A storage fee equal to the prorated (using 30.5 days to calculate the Daily Rate) share of the Monthly Service Rate will be charged until all of your property is removed from the Suite. Unless prohibited by law, you agree we may offset such refunds by any amount due under the terms of this Agreement.

C. ABSENCES.

1. **Notice of Absence.** Except for an emergency medical absence, if you will be absent from the Community for any period of time, you must inform us of your plans prior to leaving and sign the Sign In/Sign Out Book upon exiting and re-entering the Community. We assume no responsibility or liability for your welfare during times that you are away from the Community.
2. **Fees During Absence.** If you are absent from the Community for any reason, such as, for a hospitalization, vacation, temporary nursing home care or rehabilitation, the Residency Agreement will remain effective and you will be charged the full Monthly Service Rate. If you provide written notice of your intent to terminate the Agreement pursuant to Section IV, termination will be effective and charges will cease the later of the end of any applicable notice period or the removal of all of your personal belongings.

D. **SELECT & THERAPEUTIC SERVICES.** In addition to the Monthly Service Rate, you agree to pay the established charges for any Select Services or Therapeutic Services provided to you by us.

E. **PAYMENT.** We will issue a monthly statement before the first day of the month itemizing the Monthly Service Rate for the upcoming month and, if any, charges incurred for Select Services and Therapeutic Services provided during the prior month. Payment for all charges shown on the statement is due on the first (1st) calendar day of each month. The first payment of the Monthly Service Rate is due prior to taking occupancy. If you move in after the first of the month, your first Monthly Service Rate will be prorated (using 30.5 days to calculate the Daily Rate).

We will charge a \$250.00 late fee if we have not received all fees when due. We will also charge a \$30.00 returned payment fee for each check or automatic withdrawal that is returned or denied for any reason. After two such occurrences, you agree to pay all amounts due by cashiers check or such other method specified by us. You also agree to pay interest on all outstanding amounts based upon the lesser of 1.5% per month or the highest rate permitted by law.

F. **RATE CHANGES.** We will provide thirty (30) days written notice of any change in the rates for Basic Services, Personal Services, Select Services or Therapeutic Services. We may offer or require a change in the Personal Service Plan when we determine additional services are requested or required. The new Personal Service Rate resulting from a change in your Personal Service Plan is effective immediately after written notice is given.

IV. **TERM AND TERMINATION.**

A. **TERM.** This Agreement begins on the date set forth above and continues until terminated as provided below.

B. **TERMINATION BY RESIDENT.** You may terminate this Agreement upon thirty (30) days written notice to us. Termination occurs shall be effective the day after your last day of residence. You will be charged a storage fee equal to the Monthly Service Rate until all of your belongings are removed from the Community.

C. **TERMINATION BY THE COMPANY.** We may terminate this Agreement, upon providing you or your legal representative thirty (30) days written notice, for any of the following events, as determined by us:

1. You require care or services that we are unable to provide or which requires staff that are not available at the Community;
2. Your or your visitors' behavior impairs the well-being, care or safety of yourself or others, creates unsafe conditions, is physically or verbally abusive to others, or otherwise interferes with the orderly operation of the Community.
3. For your welfare or the welfare of others in the Community;
4. You or your third party payor fail to pay fees and charges when due.

We may, upon written notice to you, immediately terminate this Agreement, and transfer or discharge you for emergency medical or welfare reasons that would endanger the health and safety of yourself or others. If the emergency requires your immediate transfer, we will notify your legal representative as soon as practical, but not later than twenty-four (24) hours

following the transfer. We will provide a written explanation for termination with less than thirty (30) days notice.

D. TERMINATION BY EITHER PARTY. Either party may terminate this Agreement immediately upon written notice in the event of your death or if a physician certifies to us in writing, based upon an examination prior to moving out, that you must be relocated due to your health. You will be charged a storage fee equal to the Monthly Service Rate until all of your belongings are removed from Community.

V. ARBITRATION AND LIMITATION OF LIABILITY PROVISION. Should any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.

A. ARBITRATION PROVISION.

1. Any and all claims or controversies arising out of, or in any way relating to, this Agreement or your stay at the Community, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a jury will not decide their case. The South Carolina Revised Code concerning arbitration shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.
2. A demand for Arbitration by you, your legal representative, a person or organization acting on your behalf with your consent, or the personal representative of the estate of your estate (collectively "Resident Party") shall be made in writing and submitted to CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza, Greenville, SC 29601, via certified mail, return receipt requested. Demand for Arbitration by us shall be made in writing and submitted to you or your agent, representative, successor or assign and/or your legal representative via certified mail, return receipt requested.
3. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.
4. The arbitration panel shall be composed of one (1) arbitrator. Subject to the requirements of section A.5. herein, the parties shall agree upon an arbitrator that must either be a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience as an attorney. If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then each party will select an arbitrator. These arbitrators will act only for the purpose of appointing a sole arbitrator to hear the case, subject to the criteria above. If

either party fails to select their arbitrator within the (20) days mentioned above, they effectively forfeit their right to choose an arbitrator. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.

5. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.
6. Discovery in the arbitration proceeding shall be governed by the South Carolina Rules of Civil Procedure. However, discovery shall be modified by the following, unless agreed to otherwise by the party to whom the request is made:
 - a. The Resident Party shall provide us with permissible discovery per the South Carolina Rules of Civil Procedure within twenty (20) days after Demand for Arbitration is received (and we shall reimburse Resident Party \$0.25 per page).
 - b. We shall provide the Resident Party with permissible discovery per the South Carolina Rules of Civil Procedure within twenty (20) days after the Demand for Arbitration is received (and Resident Party, unless proven indigent, shall reimburse us \$0.25 per page).
 - c. The only depositions allowed shall be of experts. No other individuals may be deposed.
 - d. Resident Party shall designate any and all expert witnesses within sixty-five (65) days after Demand for Arbitration is submitted.
 - e. We shall have thirty (30) days after Resident Party's expert designation is received in which to depose such experts.
 - f. We shall designate any and all experts one hundred and fifteen (115) days after Demand for Arbitration is submitted.
 - g. Resident Party shall have thirty (30) days after our expert designation is received in which to depose such experts.
 - h. Any report or affidavit of an expert, and a list of all records contained in the expert's file, must be exchanged by the parties no later than ten (10) working days before the date of the expert's deposition.
 - i. The following shall be exchanged no later than fourteen (14) working days before the arbitration hearing:
 - (1) List of witnesses to be called at the arbitration hearing (full name, title, address and phone number if known) and an outline of each witness' intended testimony;
 - (2) List of documents to be relied upon at the arbitration hearing;
 - (3) Any sworn recorded statements to be relied upon at the arbitration hearing and included therewith the full name, title, address and phone number of the person making the sworn statement.
 - j. The arbitration hearing shall be held no later than one hundred and eighty (180) days after Demand for Arbitration is submitted, or within a reasonable time thereafter if a conflict arises with the arbitrator's calendar.

7. The arbitrator shall designate a time and place within the county in which the Community is located, for the arbitration hearing and shall provide thirty (30) days' notice to the parties of the arbitration hearing.
8. The arbitrator shall apply the South Carolina Rules of Evidence and South Carolina Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, South Carolina law except as otherwise stated in this Arbitration Provision.
9. The arbitration decision should be signed by the arbitrator and delivered to the parties and their counsel within thirty (30) days following the conclusion of the arbitration. The decision shall set forth in detail the arbitrator's findings of fact and conclusions of law.
10. The arbitrator's decision shall be final and binding without the right to appeal.
11. The arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent. The parties shall bear their own attorneys' fees and costs and hereby expressly waive any right to recover attorney fees or costs, actual or statutory.
12. The arbitration proceeding shall remain confidential in all respects, including the Demand for Arbitration, all arbitration filings, deposition transcripts, documents produced or obtained in discovery, or other material provided by and exchanged between the parties and the arbitrator's findings of fact and conclusions of law. Following receipt of the arbitrator's decision, each party agrees to return to the producing party within thirty (30) days the original and all copies of documents exchanged in discovery and at the arbitration hearing, except those documents required to be retained by counsel pursuant to law. Further, the parties to the arbitration also agree not to discuss the amount of the arbitration award or any settlement, the names of the parties, or name/location of the Community except as required by law.
13. The Limitation of Liability Provision below is incorporated by reference into this Arbitration Provision.
14. The Arbitration Provision and the Limitation of Liability Provision below shall survive your death.

B. LIMITATION OF LIABILITY PROVISION. *Read Carefully Before Signing*

1. The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement.
2. Liability for any claim brought by a party to this Agreement against the other party, including but not limited to a claim by us for unpaid Basic Service Rate or Personal Service Rate or other charges, or a claim by, or on behalf of you, Resident Party or your estate, agent or legal representative, arising out of the care or treatment received by you or your occupancy or presence at the Community, including, without limitation, claims for medical negligence, shall be limited as follows:
 - a. Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance.
 - b. Non-economic damages, such as pain and suffering, shall be limited to a maximum of \$250,000.00.

- c. Interest and/or late fees on unpaid assisted living charges shall not be awarded.
 - d. Punitive damages shall not be awarded.
3. Should sub-sections a, b, c and/or d, provided above, be deemed invalid, the validity of the remaining sub-sections will not be affected.

C. BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISIONS.

The parties' decision to select arbitration is supported by the potential cost-effectiveness and time-savings offered by selecting arbitration, which may avoid the expense and delay of judicial resolution in the court system. The parties' decision to select arbitration and to agree to a limitation of liability also are supported by the potential benefit of preserving the availability, viability, and insurability of an assisted living company for the elderly and disabled in South Carolina, by limiting such assisted living company's exposure to liability. With this Agreement, we are better able to offer our services and accommodations at a rate that is more affordable to you. In terms of the time-savings offered by selecting arbitration, the parties recognize that selecting a quick method of resolution is potentially to a Resident's advantage.

You or your legal representative understands that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability provision. The parties agree that the reasons stated above are proper consideration for the acceptance of the Arbitration and Limitation of Liability Provisions. The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.

The parties to this Agreement further understand that a jury will not decide their case.

VI. MISCELLANEOUS.

- A. **WAIVER OF TRIAL BY JURY.** If a court determines that the Arbitration Provision provided above is invalid, the parties express their desire to waive a jury trial and resolve any claims in the appropriate court solely before a judge.
- B. **NON-DISCRIMINATION.** We operate on a non-discriminatory basis and afford equal treatment and access to services to eligible persons regardless of race, religion, color, national origin, sex, disability or any other category protected by applicable law.
- C. **RISK AGREEMENT.** You are responsible for your personal, financial and health care decisions. You are also responsible for maintaining health, personal property, liability, automobile (if applicable), and other insurance coverages in adequate amounts. You agree to obtain insurance in an amount adequate to cover your personal property and your general liability. You acknowledge that we do not insure your person or property. You understand and agree that:
 - 1. We may encourage you to participate in community, leisure, and social activities and to maintain an appropriate level of independence in activities of daily living, as well as your personal and financial affairs;
 - 2. Independent activities, responsibility for personal, financial, and health care decisions, and lifestyle and care preferences may involve risks of personal injury and/or property damage or loss;
 - 3. The standard of service for an assisted living community does not include one-on-one care, assistance or supervision, e.g., one resident assistant for each Resident, or immediate response to non-emergent needs. There may be short and long periods of time

in which you will be left alone, unsupervised such as while watching television, listening to music, reading, and sleeping at night;

4. We make no representations or guarantees that our associates can prevent falls. We do not represent or guarantee that your health condition will not change or deteriorate;
5. We make no representations or guarantees that our associates can prevent the onset of skin break down or the worsening of existing skin break down.
6. Our services may not meet all of your personal, social, or health care needs and we will attempt to assist you in arranging for such services which are not included in this Agreement;
7. Many residents suffer from cognitive impairment, including Alzheimer's disease and dementia. This condition can cause unexpected behavior such as wandering, forgetfulness, agitation towards others and confusion. We make no representations or guarantees that we can predict the behavior of our residents. Therefore, we also make no representations or guarantees that we can always prevent a resident from wandering or attempting to wander from the Community, entering into a private area, misplacing or losing items or engaging in physical contact with another resident;
8. We make no representations or guarantees that we can prevent the loss of personal items, including but not limited to clothing, dentures, hearing aides or other medical equipment. We will not be responsible for the loss of such items. We make no representations or guarantees that we can prevent theft or other criminal acts perpetrated by another resident or person; therefore, we recommend that valuables such as jewelry and large sums of money, not be kept at the Community. If you choose to bring in valuables, you do so at your own risk and we will not be held responsible for any theft or loss of such items;
9. Due to state regulations and fire code, we may not lock our exterior doors against exiting. Therefore, we cannot guarantee that a resident will not wander from the Community. Some buildings have exterior doors that are alarmed with a delayed egress feature and our systems are designed to alert our associates to respond and assist a resident if they wander from the building.

You understand and agree to assume the risks inherent in this Agreement. You agree to hold us, our associates and agents harmless for any damages, injury or other loss resulting from: (1) reasonable acts or omissions made in good faith; (2) action by a third party, fire, water, theft or the elements; or (3) loss of personal property.

D. **PETS.** You may have a household pet in your Suite, subject to (1) our prior written approval, (2) execution of a Pet Agreement, which is available upon request and (3) payment of any applicable pet fee or deposit. You agree to pay for any damage to our property or the property of others caused by your pet. We reserve the right to require the permanent removal of your pet for failure to adhere to the Pet Agreement or our applicable policies and rules, or if we have reason to believe that your pet poses a threat to others or the Community.

E. **SMOKING.** Except for grandfathered residents, smoking is not permitted in any part of the Community.

- F. **WEAPONS.** Weapons, as defined by us, are not allowed in the Community or on Community property. This includes but is not limited to firearms, explosive materials, and collectible or antique weapons.
- G. **NO TENANCY INTEREST.** You have none of the rights of a tenant under this Agreement, subject to applicable state law.
- H. **ASSIGNMENT.** This Agreement is not assignable without our prior written consent. Our rights and obligations may be assigned to any person or entity which will be responsible to ensure our obligations under this Agreement are satisfied in full from the date of notification. We may engage another person or entity to perform any or all of the services under this Agreement.
- I. **AMENDMENTS.** This Agreement and any written amendments constitute the entire agreement between the parties and supersede all prior and contemporaneous discussions, representations, correspondence, and agreements whether oral or written. Except for our right to modify fees, rates and charges, amend services provided and establish and modify reasonable operating procedures and rules for the general welfare and safety of the residents, this Agreement may be amended only in writing signed by both parties.
- J. **SEVERANCE.** Should any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected.
- K. **FINANCIAL RESPONSIBILITY.** You have designated a Guarantor, who has agreed to the terms of the attached Statement of Financial Responsibility.
- L. **SUBORDINATION.** This Agreement and the parties' rights hereunder are subordinate to any lease, mortgage or deed of trust placed upon the Community, but you may remain in your Suite so long as you comply with the provision of this Agreement.
- M. **REPRESENTATION AND WARRANTY.** By executing this Agreement you represent and warrant that all representations made by you or on your behalf, whether written or verbal, with respect to your application for admission to the Community were true when made. You understand that we rely upon the truthfulness of this information in making our decision to enter into this Agreement. Your application forms, including personal data forms, statement of financial condition (if applicable), health history and medical reports submitted by you or on your behalf to us, are incorporated by reference into this Agreement and made an express part of it. You understand and agree that any material misrepresentation or omission made by you or on your behalf in connection with these documents shall make this Agreement voidable at our option, the extent permitted by law.
- N. **CHOICE.** You have a choice of providers for private sitters, therapy, rehabilitation, home health and other health care services. As part of the complement of services offered by the Company and its affiliates, therapy, rehabilitation, home health or other services may be available at the Community through Innovative Senior Care or other corporate affiliates. If you require such services, Community associates will assist you in obtaining such services from Innovative Senior Care or another service provider of your choice.
- O. **ASSIGNMENT OF BENEFITS.** To the extent that the Community participates in a government payor program, long term care insurance program or other insurance program ("Third Party Payor") of which you are a beneficiary, you authorize us to disclose any medical or administrative information and request payment. You certify that the information given in applying for payment from such Third Party Payor is correct. You authorize release

of all medical and administrative records required to act on this request and request that payment of authorized benefits be made on your behalf. You authorize us to disclose any medical or administrative information required in the processing of applications for financial coverage for services rendered. To the extent permitted by your Third Party Payor, you authorize direct payment of all benefits to us.

- P. **NOTICES.** Notices will be written and given by personal delivery or mailing by regular mail, postage pre-paid to the following or such other persons or places as the parties may notify each other. Notices shall be deemed given based upon the date personally delivered or upon the date postmarked.

Company:
Executive Director at Community
(At the Community)

Resident:
(At the Community)

Legal Representative/Responsible Party:
(as noted below)

We believe it is important to disclose all services and fees to the best of our ability and in accordance with the law. We recommend that you consult with legal counsel to ensure understanding of this Agreement before signing.

BY THEIR SIGNATURES, the parties or their representatives have executed this Agreement.

Resident/Legal Representative

Date

For Company

Title

Date

LEGAL REPRESENTATIVE/RESPONSIBLE PARTY ADDRESS:

Name:

Address:

Phone Nos:

Email:

OTHER RELATED MATERIALS:

1. Resident Bill of Rights
2. Community Handbook
3. Emergency Evacuation Plan
4. Admissions Package
5. Medical Records Release
6. Personal Service Assessment
7. Personalized Service Plan

EXHIBITS INCLUDED:

- A. Schedule of Services and Rates
- B. Statement of Financial Responsibility

C. Pharmacy Services Agreement

ADDITIONAL EXHIBITS TO ATTACH AS PART OF THE AGREEMENT:

X. Select Services List

Y. Therapeutic Services List

Z. Assessment Price Schedule

EXHIBIT A
SCHEDULE OF SERVICES AND RATES

Resident

Suite Type and Number

Services Included in the Basic Service Rate

- ♦ **Parking.** - Each Suite (whether occupied by one or two Residents) will have access to shared and uncovered parking spaces, provided you own and drive an automobile.

COMMUNITY FEE (Prior to Move-in)

\$ 1000.00

BASIC SERVICE RATE

\$ _____

(Check below if applicable)

- ☐ The Basic Service Rate above is the Basic Service Rate for a Companion Suite. If the Companion Suite converts to single occupancy, the Basic Service Rate will adjust to the then current single occupancy Basic Service Rate for such Suite.

PERSONAL SERVICE RATE

\$ 2550

(The current Personal Service Price Schedule is attached as Exhibit Z)
(See attached Personal Service Rate Report)

MONTHLY SERVICE RATE

\$ 3131

(Add Basic Service Rate and Personal Service Rate)

PSR - \$ 581

SELECT SERVICES AND THERAPEUTIC SERVICES

\$ _____

(The Select Service List and Therapeutic Services List are attached as Exhibits X and Y)

* Amount varies based upon monthly usage.

I acknowledge receipt of Exhibits X, Y and Z and agree to the above Schedule of Services and Rates to commence as of July 10, 2010. I understand and agree that the Company has the right to change these rates and/or change the services provided in accordance with the provisions of the Residency Agreement.

Resident/Legal Representative

Date

For Company

Title

Date

EXHIBIT B
STATEMENT OF FINANCIAL RESPONSIBILITY

Julie Jones ("Guarantor" or "you") and Southern Assisted Living, Inc. d/b/a Carolina House of Hilton Head (the "Company," "us," "we" or "our"), agree as follows:

The Resident named in the attached Residency Agreement desires to live at the Community and we are willing to enter into the Residency Agreement if the Resident has an individual who is willing to fulfill the conditions of this Statement of Financial Responsibility; and

In consideration for our accepting the Resident into the Community, you agree to fulfill the provisions of this Statement of Financial Responsibility, if and as necessary.

Therefore, in consideration of the mutual covenants contained in this Statement of Financial Responsibility, the parties agree as follows:

I. PERSONAL ASSISTANCE. In the event the condition of the Resident requires such assistance, and upon our request, you will assist Resident or legally responsible person, as necessary by:

- A. Participating with our associates in evaluating Resident's needs and in planning and implementing an appropriate plan for Resident's care;
- B. Maintaining Resident's welfare and fulfilling Resident's obligations under the Residency Agreement;
- C. Relocating Resident following termination and removing the Resident's property;
- D. Transferring Resident to a hospital, nursing home, or other facility in the event that Resident requires care we do not offer;
- E. Making necessary arrangements for funeral services and burial in the event of death.

II. FINANCIAL RESPONSIBILITY. If Resident fails to make payments due to us under the Residency Agreement, you agree to pay us such amounts within thirty (30) days of receiving written notice of nonpayment.

III. REVIEW OF RESIDENCY AGREEMENT. You acknowledge that you have received and reviewed a copy of the Residency Agreement, and have had an opportunity to ask questions.

BY THEIR SIGNATURES, the parties have executed this Agreement to be effective as of

<u>Julie Jones</u>	<u>2010</u>		
<u>Julie Jones</u>	<u>275-74-8542</u>	<u>7/9/10</u>	
Guarantor	Social Security No.	DL No.	Date
<u>Rhonda Mann</u>	<u>Er</u>	<u>July 9, 2010</u>	
For the Company	Title		Date

SEND NOTICES TO GUARANTOR AT:

Address: 80 Wedge Field Dr, Hilton Head, SC 29926
Home and Work Phone Nos.: 843-342-9216
Cell Phone No.: 843-247-2808
Email Address: Julie Jones 8968@aol.com

EXHIBIT C
PHARMACY SERVICES AGREEMENT

We work closely with pharmacy providers to meet the needs of our residents. Preferred pharmacy providers are chosen based upon their ability to provide services to our residents to enhance their health and wellness. Important services include:

- Screening for possible negative drug interactions
- Assessments for potential allergic reactions of medications
- Recommending therapeutic substitutions and offering generic substitutions when appropriate
- Providing competitive pricing for comparable packaging
- Alerting our associates and physicians when there is a duplication of prescriptions
- Regular scheduled review and monitoring of medications
- Routine or emergency delivery 24-hours a day, 365 days a year
- Medication packaging that meets our safety standards

Palmetto Long Term Care Pharmacy is our preferred provider for pharmacy services ("Preferred Provider"). The Preferred Provider will review your current medications upon your move-in and the consultant pharmacist will be in the Community on a regular schedule to meet with you individually, if needed.

If you decide to use another pharmacy provider other than the Preferred Provider, it will be required to meet our medication management standards.

Please review and sign the following statement acknowledging you understand our expectations and requirements regarding the provision of medications.

I understand that if I choose not to use the Preferred Provider, I will be charged a service fee, which is set forth on Exhibit X.

I understand that I will be required to provide medications that are packaged in a unit of use packaging system, unless I have been granted an exemption to the packaging requirement by the Company's Regional Director of Operations. I understand there is a packaging exemption fee as set forth in Exhibit X associated with a packaging exemption due to the additional administrative oversight required. If at any time I am not able or no longer willing to provide this type of packaging system and I do not have an exemption, I understand that I need to find alternative housing.

If I do not use the Community's Preferred Provider, I also understand that I will have the responsibility for reordering medications. If medications are not delivered within two days prior to their depletion, the Community will reorder my medications with the Preferred Provider. I agree to pay for the medications and any associated service charges. The fees associated with reordering medications from the Preferred Provider are determined by the Preferred Provider, and are in addition to the service fee described above.

MY SIGNATURE BELOW INDICATES THAT I HAVE READ, UNDERSTAND AND AGREE TO ABIDE BY THE TERMS OF THIS PHARMACY SERVICES AGREEMENT.

Resident/Legal Representative Signature

Date

Exhibit 4

Orders on Appeal

(denying Appellants' motions to compel arbitration)

Pruett filed August 3, 2012

O'Meara filed August 19, 2012

Scheerle filed September 19, 2012

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-07-1700

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(3) the arbitration and limitation of liability clauses in the Residency agreement are unconscionable. The Court is persuaded by Plaintiff's arguments opposing the Motion to Compel Arbitration and accordingly denies Defendants' Motion to Dismiss and Compel Arbitration.

During the hearing on this Motion, the parties conceded that arbitration cannot be compelled under the South Carolina Arbitration Act in this matter because Mrs. Pruett's claims all arise out of her alleged personal injury. S.C. Code Ann. Section 15-48-10. Defendants contend that the FAA preempts the South Carolina state statute. However, I find that the Residency Agreement between Mrs. Pruett and Carolina House does not involve interstate commerce. Therefore, this case subject is not subject to the FAA. The South Carolina Supreme Court in *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) held that the FAA was inapplicable to a similar contract for patient and residency services. The Court explained that the analysis must focus on the contract between the parties, and whether that contract involves interstate commerce. The Residency Agreement here is a contract for basic services -- accommodations, meals, utilities, housekeeping, laundry and recreation. The provision of these contractual services to Mrs. Pruett at the Carolina House facility in Hilton Head does not involve interstate commerce. Moreover, the Affidavit of Timothy J. Caesar attached to Defendants' Motion does not contain any facts from which one could conclude that any of the basic services included in the contract between Mrs. Pruett and Carolina House involve interstate commerce.

Defendants argued that *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531 (2001) and *Allied Bruce Terminal Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) changed the analysis previously supported in *Timms*. However, these cases clarify that a transaction occurring via a contract must in fact involve interstate commerce to enforce an arbitration provision in the

contract. Neither case alters our Supreme Court's holding in *Timms* that arbitration cannot be compelled pursuant to the FAA when the underlying transaction does not involve interstate commerce. The Residency Agreement does not involve interstate commerce and Defendants' Motion to Dismiss and Compel Arbitration must be denied.

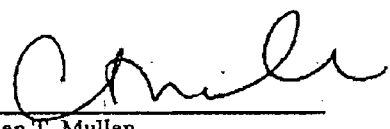
Even if the Residency Agreement did involve interstate commerce so as to bring it under the purview of the FAA, I find that the arbitration and limitation of liability clauses in the Residency Agreement are unconscionable and should be struck in their entirety from the contract. Among other provisions, the arbitration and limitation of liability clauses in the Residency Agreement significantly restrict discovery, limit compensatory damages, and prohibit punitive damages. Both the "Arbitration Provision" (V.A.) and the "Limitation of Liability Provision" (V.B.) are included in Section V. of the Residency Agreement. Subsection V.A(13) incorporates by reference the Limitation of Liability Provision into the Arbitration Provision. Taken together, these provisions restrict discovery, including a limitation on depositions to only those of experts, and limits liability for any "claims by, or on behalf of, a Resident ... arising out of the care or treatment received by the Resident...." For example, all "[n]et economic damages" awarded must be "offset by any collateral source payments such as payments made by medical insurance." Additionally, the provisions limit noneconomic damages, including pain and suffering, to "a maximum of \$350,000.00", prohibit payment of "[i]nterest and/or late fees on unpaid assisted living charges", and preclude any award for punitive damages.

Generally, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007). I find that the limitations on damages and discovery unilaterally imposed upon Mrs. Pruett in the Residency Agreement are substantively

unconscionable and violate public policy. Accordingly, even if the FAA were applied to the Residency Agreement, Section V of the Residency Agreement ("Arbitration and Limitation of Liability Provision") is unconscionable and unenforceable in its entirety. *See, e.g. Simpson*, 373 S.C. at 33-37, 644 S.E.2d at 673-674.

IT IS NOW THEREFORE ORDERED, this action shall proceed on the jury docket for the Fourteenth Judicial Circuit, Beaufort County, South Carolina. The Defendants shall have fifteen (15) days from the date of this Order to file responsive pleadings.

AND IT IS SO ORDERED.

By: 
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

July 30, 2011
Beaufort, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-1610

ELIZABETH O'MEARA,

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC, and
SONIA S. KING,

Defendants.

(Jury Trial Requested)

ORDER DENYING DEFENDANTS,
BROOKDALE SENIOR LIVING, INC.
AND SOUTHERN ASSISTED LIVING,
LLC'S MOTION TO DISMISS AND
COMPEL ARBITRATION

AUG 19 PM 4:06
CLERK OF COURT

This matter is before me on Defendants Brookdale Senior Living, Inc. and Southern Assisted Living, LLC's (collectively the "Defendants") Motion to Dismiss and Compel Arbitration on the claims asserted by Plaintiff Elizabeth O'Meara ("Plaintiff" or "Mrs. O'Meara"). A hearing was held on June 14, 2009 at 11 a.m. in which I heard oral arguments from Defendants' counsel, Manton R. Grier, Jr., and Plaintiffs' counsel, Kelly M. Jolley.

The basis for Defendants' Motion is arbitration language found in the arbitration provision contained in the Residency Agreement between Elizabeth O'Meara and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head ("Carolina House"), signed by Mrs. O'Meara's daughter Julie Stanton on September 30, 2008. Mrs. O'Meara opposed this motion and filed an opposing memorandum with exhibits, and Defendants filed a memorandum in support of the motion. Plaintiff opposed enforcement of the arbitration clause found in the Residency Agreement on four grounds: (1) it is not binding pursuant to the South Carolina Arbitration Act, S.C. Code Section 15-48-10(b), (2) the Federal Arbitration Act (hereinafter "FAA") does not apply to this action because the Residency Agreement does not involve

interstate commerce, (3) the arbitration and limitation of liability clauses contained in the Residency Agreement are unconscionable, and (4) no one with the authority to bind Elizabeth O'Meara to arbitration executed the Residency Agreement on her behalf and discovery would be required to demonstrate any such authority. The Court is persuaded by Plaintiff's arguments opposing the Motion to Compel Arbitration and accordingly denies Defendants' Motion to Dismiss and Compel Arbitration.

During the hearing on this Motion, the parties conceded that arbitration cannot be compelled under the South Carolina Arbitration Act in this matter because Mrs. O'Meara's claims all arise out of her alleged personal injury. S.C. Code Ann. Section 15-48-10. Defendants contend that the FAA preempts the South Carolina state statute. However, I find that the Residency Agreement between Elizabeth O'Meara and Carolina House does not involve interstate commerce. Therefore, this case is not subject to the FAA. The South Carolina Supreme Court in *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) held that the FAA was inapplicable to a similar contract for patient and residency services. The Court explained that the analysis must focus on the contract between the parties, and whether that contract involves interstate commerce. The Residency Agreement here is a contract for basic services – accommodations, meals, utilities, housekeeping, laundry and recreation. The provision of these contractual services to Mrs. O'Meara at the Carolina House facility in Hilton Head does not involve interstate commerce. Moreover, the Affidavit of Timothy J. Caesar attached to Defendants' Motion does not contain any facts from which one could conclude that any of the basic services included in the contract between Mrs. O'Meara and Carolina House involve interstate commerce.

Defendants argued that *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531 (2001) and *Allied Bruce Terminal Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) changed the analysis previously supported in *Timms*. However, these cases clarify that a transaction occurring via a

contract must in fact involve interstate commerce to enforce an arbitration provision in the contract. Neither case alters our Supreme Court's holding in *Timms* that arbitration cannot be compelled pursuant to the FAA when the underlying transaction does not involve interstate commerce. The Residency Agreement does not involve interstate commerce and Defendants' Motion to Dismiss and Compel Arbitration must be denied.

Even if the Residency Agreement did involve interstate commerce so as to bring it under the purview of the FAA, I find that the arbitration and limitation of liability clauses in the Residency Agreement are unconscionable and should be struck in their entirety from the contract. Among other provisions, the arbitration and limitation of liability clauses in the Residency Agreement significantly restrict discovery, limit compensatory damages, and prohibit punitive damages. Both the "Arbitration Provision" (V.A.) and the "Limitation of Liability Provision" (V.B.) are included in Section V. of the Residency Agreement. Subsection V.A(13) incorporates by reference the Limitation of Liability Provision into the Arbitration Provision. Taken together, these provisions restrict discovery, including a limitation on depositions to only those of experts, and limits liability for any "claims by, or on behalf of, a Resident ... arising out of the care or treatment received by the Resident...." For example, all "[n]et economic damages" awarded must be "offset by any collateral source payments such as payments made by medical insurance." Additionally, the provisions limit noneconomic damages, including pain and suffering, to "a maximum of \$350,000.00", prohibit payment of "[i]nterest and/or late fees on unpaid assisted living charges", and preclude any award for punitive damages. Generally, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007). I find that the limitations on damages and discovery unilaterally

imposed upon Mrs. O'Meara in the Residency Agreement are substantively unconscionable and violate public policy. Accordingly, even if the FAA were applied to the Residency Agreement, Section V of the Residency Agreement ("Arbitration and Limitation of Liability Provision") is unconscionable and unenforceable in its entirety. *See, e.g. Simpson*, 373 S.C. at 33-37, 644 S.E.2d at 673-674.

Finally, there is a question whether Mrs. O'Meara's acquiescence to the arbitration agreement in the Residency Agreement is valid. Mrs. O'Meara argued that she did not execute the Residency Agreement, that Julia Stanton, Mrs. O'Meara daughter, executed the Residency Agreement as Mrs. O'Meara's Attorney-in-Fact for health care matters, and that Julia Stanton is not Mrs. O'Meara's attorney-in-fact under Mrs. O'Meara's durable power of attorney and does not have the authority to bind Mrs. O'Meara to arbitration. Mrs. O'Meara presented a instrument designating Thomas Stanton as Mrs. O'Meara's attorney-in-fact. The proper forum for determining whether an arbitration clause is enforceable in South Carolina is the trial court rather than arbitration. *See, Simpson*, 373 S.C. at 23, 644 S.E.2d at 667-668 ("[T]he trial court should determine the threshold validity of the arbitration agreement."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties.") To the extent that the parties contest whether Julia Stanton had the authority to bind Mrs. O'Meara to arbitration, the parties must engage in discovery regarding the matter, precluding dismissal of this case at this time.

IT IS NOW THEREFORE ORDERED, this action shall proceed on the jury docket for the Fourteenth Judicial Circuit, Beaufort County, South Carolina. The Defendants shall have fifteen (15) days from the date of this Order to file responsive pleadings.

AND IT IS SO ORDERED.

By: *C. Mullen*
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

July 8, 2011

Beaufort, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

JANET SUE SCHEERLE

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC d/b/a
CAROLINA HOUSE OF HILTON HEAD and
SONIA S. KING,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-5654

SEP 19 PM 2:10
CLERK OF COURT
ORDER DENYING DEFENDANTS,
BROOKDALE SENIOR LIVING, INC.
AND SOUTHERN ASSISTED LIVING,
LLC d/b/a CAROLINA HOUSE OF
HILTON HEAD'S
MOTION TO DISMISS AND COMPEL
ARBITRATION ON
AMENDED COMPLAINT

This matter is before me on Defendants Brookdale Senior Living, Inc's. and Southern Assisted Living, LLC d/b/a Carolina House of Hilton Head's (collectively the Defendants) Renewed Motion to Dismiss and Compel Arbitration on the claims asserted by Plaintiff Janet Sue Scheerle (Plaintiff or Mrs. Scheerle) in her Amended Complaint.

Plaintiff filed her summons and complaint on June 4, 2011. On or about August 10, 2011, Defendants filed a motion to dismiss and compel arbitration. A hearing on that motion was held on October 19, 2011 and this court denied the motion by order dated October 28, 2011. Defendants filed a motion for reconsideration on November 11, 2011. However, Plaintiff filed an amended summons and complaint on June 26, 2012 prior to the motion being heard. Defendants filed a Renewed Motion to Dismiss on or about June 28, 2012. A hearing was held on September 4, 2012 at 1:00 p.m. in which I heard oral arguments from Defendants' counsel, Manton R. Grier, Jr., and Plaintiff's counsel, Kelly M. Jolley.

The basis for Defendants' Motion is arbitration language found in the arbitration provision contained in the Residency Agreement between Janet Sue Scheerle and Southern

Assisted Living, LLC, d/b/a Carolina House of Hilton Head (Carolina House), signed by Mrs. Scheerle's daughter Julie Jones on July 9, 2010. Plaintiff opposed enforcement of the arbitration clause found in the Residency Agreement on three grounds: (1) the Federal Arbitration Act (FAA) does not apply to this action because the Residency Agreement does not involve interstate commerce, (2) the arbitration and limitation of liability clauses contained in the Residency Agreement are unconscionable, and (3) no one with the authority to bind Janet Sue Scheerle to arbitration executed the Residency Agreement on her behalf. The Court is persuaded by Plaintiff's arguments opposing the Motion to Compel Arbitration and accordingly denies Defendants' Motion to Dismiss and Compel Arbitration.

Defendants have not attempted to compel arbitration under the South Carolina Arbitration Act. Instead, Defendants contend that the FAA preempts the South Carolina state statute and compels arbitration in this case. However, I find that the Residency Agreement between Janet Sue Scheerle and Carolina House does not involve interstate commerce. Therefore, this case is not subject to the FAA. The South Carolina Supreme Court in *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) held that the FAA was inapplicable to a similar contract for patient and residency services. The Court explained that the analysis must focus on the contract between the parties, and whether that contract involves interstate commerce. The Residency Agreement here is a contract for services—accommodations, meals, utilities, housekeeping, laundry and recreation—all of which were to be provided to Plaintiff in South Carolina. The provision of these contractual services to Mrs. Scheerle at the Carolina House facility in Hilton Head does not involve interstate commerce. Defendants argue that many of their suppliers are located out of state, as is their bank and their corporate office. However, the fact that Defendants chose to engage out of state suppliers does not change the location or

purpose of the Residency Agreement. Moreover, the Affidavit of Timothy J. Caesar attached to Defendants' Motion does not contain any facts from which one could conclude that any of the basic services Carolina House contracted to provide to Mrs. Scheerle involve interstate commerce.

Defendants argued that *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531 (2001) and *Allied Bruce Terminal Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) changed the analysis previously supported in *Timms*. However, these cases clarify that a transaction occurring via a contract must in fact involve interstate commerce to enforce an arbitration provision in the contract. Neither case alters our Supreme Court's holding in *Timms* that arbitration cannot be compelled pursuant to the FAA when the underlying transaction does not involve interstate commerce. The Residency Agreement does not involve interstate commerce and Defendants' Motion to Dismiss and Compel Arbitration is denied.

Even if the Residency Agreement did involve interstate commerce so as to bring it under the purview of the FAA, I find that the arbitration and limitation of liability clauses in the Residency Agreement are unconscionable and should be struck in their entirety from the contract. Among other provisions, the arbitration and limitation of liability clauses in the Residency Agreement significantly restrict discovery, limit compensatory damages, and prohibit punitive damages. Both the "Arbitration Provision" (V.A.) and the "Limitation of Liability Provision" (V.B.) are included in Section V of the Residency Agreement. Subsection V.A(13) expressly incorporates by reference the Limitation of Liability Provision into the Arbitration Provision. Accordingly, if the Limitation of Liability Provision is unconscionable, the arbitration Provision that expressly incorporates the Limitation of Liability Provision in its entirety must be unconscionable as well.

Taken together, these provisions restrict discovery, including a limitation on depositions to only those of experts, and limits liability for any "claims by, or on behalf of, a Resident ... arising out of the care or treatment received by the Resident...." For example, all "[n]et economic damages" awarded must be "offset by any collateral source payments such as payments made by medical insurance." Additionally, the provisions limit noneconomic damages, including pain and suffering, to "a maximum of \$250,000.00," prohibit payment of "[i]nterest and/or late fees on unpaid assisted living charges," and preclude any award for punitive damages. Generally, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007). I find that the limitations on damages and discovery unilaterally imposed upon Mrs. Scheerle in the Residency Agreement are substantively unconscionable and violate public policy. Accordingly, even if the FAA were applied to the Residency Agreement, Sections V.A. and V.B. of the Residency Agreement ("Arbitration and Limitation of Liability Provision") are unconscionable and unenforceable in their entirety. *See, e.g. Simpson*, 373 S.C. at 33-37, 644 S.E.2d at 673-74.

Finally, Plaintiff argues that Mrs. Scheerle's acquiescence to the arbitration agreement in the Residency Agreement is invalid. Mrs. Scheerle argued that she did not execute the Residency Agreement, that Julie Jones, Mrs. Scheerle's daughter executed the Residency Agreement as Mrs. Scheerle "Legal Representative." However, Plaintiff produced evidence at the hearing showing that Julie Jones was not Mrs. Scheerle's attorney-in-fact under Mrs. Scheerle's durable power of attorney at the time the Residency Agreement was signed. Mrs. Scheerle presented an instrument designating Jacqueline E. Lynn, not Julie Jones, as Mrs.

Scheerle's attorney-in-fact when the Residency Agreement was signed. Accordingly, Ms. Jones did not have legal authority to bind Mrs. Scheerle to arbitration.

The proper forum for determining whether an arbitration clause is enforceable in South Carolina is the trial court rather than arbitration. See, *Simpson*, 373 S.C. at 23, 644 S.E.2d at 667-68 ("[T]he trial court should determine the threshold validity of the arbitration agreement."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties.") To the extent that the parties contest whether Julie Jones had the authority to bind Mrs. Scheerle to arbitration, the parties must engage in discovery regarding the matter, precluding dismissal of this case at this time.

IT IS NOW THEREFORE ORDERED, this action shall proceed on the jury docket for the Fourteenth Judicial Circuit, Beaufort County, South Carolina. The Defendants shall have fifteen (15) days from the date of this Order to file responsive pleadings.

AND IT IS SO ORDERED.

By: 
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

September 13, 2012
Beaufort, South Carolina

Exhibit 5

Appellants' Initial Brief

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Court of Common Pleas of Beaufort County, South Carolina
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2011-199666

Elizabeth O'Meara,..... Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC, and Sonia S. King,
.....Defendants,

Of whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC
.....are the Appellants.

Yvonne Carrie Pruett,..... Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC, and Sonia S. King,
.....Defendants,

Of whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC,
.....are the Appellants.

Janet Sue Scheerle,..... Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC, and Sonia S. King,
.....Defendants,

Of whom Brookdale Senior Living, Inc. and Southern Assisted Living, LLC,
.....are the Appellants.

APPELLANTS' INITIAL BRIEF

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BACKGROUND OF THE CONSOLIDATED APPEALS

This consolidated appeal seeks to enforce three similar arbitration agreements that were voluntarily entered on behalf of the three Respondents, who were residents of the Carolina House of Hilton Head ("Carolina House"), an assisted-living community. The Respondents are not related, and each entered the Carolina House on different dates. They allege that they were abused by Sonia King, a former employee at the Carolina House, during the early morning hours of December 31, 2010. After each Respondent filed a complaint, the Appellants moved to dismiss the cases and compel arbitration pursuant to the arbitration clauses found in each Residency Agreement. The lower court, Judge Carmen T. Mullen, denied the motions, which led to this appeal.

ISSUES ON APPEAL

- I. Whether the Residency Agreements signed on behalf of each Respondent involve interstate commerce and are governed by the Federal Arbitration Act?
- II. Whether Respondents Elizabeth O'Meara and Janet Sue Scheerle, who are beneficiaries under the Residency Agreements, should be equitably estopped from refusing to comply with the terms of their agreements?
- III. Whether the Respondents' claim of unconscionability are not yet ripe and should first be decided by an arbiter, and not a Court?
- IV. Whether the Residency Agreements are not unconscionable; and, in the alternative, whether the Court should enforce arbitration and sever any provisions it finds unconscionable?

STATEMENT OF THE CASE

These consolidated appeals seek to enforce three similar arbitration clauses found in the admission agreements to an assisted-living community. The Respondents—Elizabeth O'Meara, Yvonne Carrie Pruett, and Janet Sue Scheerle—

are former residents of the Carolina House. They each filed separate suits against the Appellants Southern Assisted Living d/b/a Carolina House of Hilton Head and Brookdale Senior Living, Inc. (collectively "Appellants"). They also sued Sonia King, a former employee of the Carolina House, but it does not appear that she has appeared in any of the actions.¹ Respondent O'Meara served her Amended Complaint on the Appellants on May 4, 2011; Respondent Pruett served a Complaint on May 6, 2011 and an Amended Complaint on September 24, 2012; and Respondent Scheerle served a Complaint on July 10, 2011 and an Amended Complaint on June 26, 2012. [Respondents' Complaint and Amended Complaints]. The Respondents alleged that Ms. King verbally and physically assaulted them. They alleged causes of action for negligence, intentional infliction of emotional distress, violation of the South Carolina Unfair Trade Practices Act, and assault and battery. Id. Respondent Pruett also brought a wrongful death and survival action, alleging Ms. King's actions led to her death on May 30, 2012.

In each case, Appellants filed a Motion to Dismiss and Compel Arbitration, arguing that an arbitration clause in the Respondent's Residency Agreement governed this dispute. [Motions to Dismiss]. The Motions were filed on the following dates: June 3, 2011 in the O'Meara action; June 6, 2011 in the Pruett action; and August 10, 2011 in the Scheerle action. Id. Respondents O'Meara and Pruett served Memoranda in Opposition on June 21, 2011, and the Appellants

¹ Ms. King was not acting for the benefit of the Appellants; therefore, she is not being defended or indemnified by the Appellants.

served a Memorandum in Support on June 22, 2011. [O'Meara and Pruett Memoranda In Support; Def. Memoranda In Support].

In the O'Meara and Pruett actions, a hearing was held on June 14, 2011 before the Honorable Carmen Tevis Mullen. The Appellants received a written copy of the Orders Denying the Motion to Dismiss and Compel Arbitration on August 23, 2011. [O'Meara and Pruett Orders]. Appellants served a Motion to Reconsider on September 2, 2011 in the O'Meara action and September 6, 2011 in the Pruett action. The lower court denied the Motions to Reconsider, and Appellants received written notice of the lower court's decisions on September 22, 2011 [Order Denying Motion to Reconsider]. On that same day, September 22, 2011, Appellants filed their Notice of Appeal in the O'Meara and Pruett actions.

As to the Scheerle action, a hearing on the Motion to Compel Arbitration was held on October 19, 2011. The lower court denied the Motion, and the Appellants received written notice of the decision on November 3, 2011. [Scheerle Order]. On November 11, 2011, Appellants filed a Motion to Reconsider. [Scheerle Motion to Reconsider].

The Motion to Reconsider was not immediately placed on the lower court's motion roster, and the case languished for almost ten months. In the meantime, Respondent Scheerle filed an Amended Summons and Complaint on June 26, 2012, to which the Appellants responded on June 28, 2012 with a renewed Motion to Dismiss. [Scheerle Amended Complaint; Renewed Motion to Dismiss]. On September 4, 2012, a hearing was held on the motions. The Appellants filed a Notice

of Appeal on September 7, 2012, before receiving an Order from the lower court that was filed on September 18, 2012.² [Notice of Appeal; Order denying Motion].

Because of issues concerning difficulty securing a transcript for these hearings, the parties agreed to move forward with these appeals without the transcripts below. On October 3, 2012, the Respondents filed a Motion to Consolidate all three appeals, which this Court granted on January 16, 2013.

FACTS

The three cases involve three separate but virtually identical arbitration agreements. Each is discussed below.

A. *The Yvonne Carrie Pruett Arbitration Agreement*

On March 31, 2009, Respondent Pruett entered into a Residency Agreement with Appellant Southern Assisted Living d/b/a Carolina House of Hilton Head, an assisted-living facility owned and controlled by Appellant Brookdale Senior Living, Inc. Respondent's husband, Sam Pruett, signed the Agreement as "Responsible Party." [Pruett Agreement, p. 19]. Mr. Pruett also signed a "Responsible Party Agreement" whereby he agreed to provide necessary assistance and payments on behalf of Respondent. *Id.*, p. 22.

The arbitration clause states as follows:

A. ARBITRATION PROVISION

1. Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at the Company, excluding any action for eviction, and including disputes regarding the interpretation of this Agreement, whether arising out of State or

² The Order was styled "Order Denying Defendants, Brookdale Senior Living, Inc. and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head's Motion to Dismiss and Compel Arbitration on Amended Complaint."

Federal Law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. **The parties to this Agreement further understand that a jury will not decide their case.** The Federal Arbitration Act shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceedings shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.

Id. at p. 11. (emphasis in original). Underneath this clause are subsections regarding arbitration procedures. Id. pp. 11-14. As responsible party, Mr. Pruett initialed underneath each arbitration section acknowledging "as having read and understood the provisions [relating to arbitration]." Id. p. 14.

A separate part of the Agreement contained a section titled, "**BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISION**," which outlines the benefits of arbitration that flow to both resident and facility. The section informs the resident that the arbitration provision allows the facility to provide services at an affordable rate, while at the same time providing a quick resolution for elderly residents who may have a limited life expectancy. The section is also designed to give a resident a meaningful choice about whether to accept arbitration, as it informs the resident or her responsible party "that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability

provision." *Id.* p. 15 (emphasis in original). Further, the section contains an acknowledgment in bold font that "[t]he undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an Attorney." *Id.* p. 15 (bold in original).

The arbitration provision is not buried inconspicuously in the Agreement, as it takes up five pages (more than 25%) of the 19-page Agreement. The front page of the Agreement states that "**THIS AGREEMENT IS SUBJECT TO ARBITRATION**," and further recommends that "you consult your legal counsel to ensure proper understanding of this Agreement before signing." *Id.* p. 1 (bold in original).

B. The Elizabeth O'Meara Arbitration Agreement.

On September 30, 2008, Respondent O'Meara entered into the same Residency Agreement that Respondent Pruett entered. Ms. O'Meara's signature appears on the O'Meara Agreement, and her daughter, Julie Stanton, signed as "Responsible Party." [O'Meara Agreement, p. 19]. Like Sam Pruett, Ms. Stanton also signed a "Responsible Party Agreement" whereby she agreed to provide necessary assistance and payments on behalf of Ms. O'Meara.

The O'Meara Agreement appears identical to the Pruett Agreement. The arbitration clause is the same, and the same encouragement to seek legal counsel is found in the O'Meara Agreement. Ms. Stanton likewise initialed under the provisions, acknowledging "as having read and understood the provisions [relating to arbitration]." *Id.* p. 14.

C. *The Janet Sue Scheerle Arbitration Agreement*

Respondent Scheerle entered her agreement with Appellant Southern Assisted Living, Inc. on July 10, 2010. Julie Jones, Ms. Scheerle's daughter, signed the agreement as "Resident/Legal Representative." [Scheerle Agreement, p. 15]. Ms. Jones also signed a "Statement of Financial Responsibility," wherein she agreed to assist in Ms. Scheerle's care as a "legally responsible person." *Id.*, p. 16. In that statement, she "acknowledge[d] that [she has] received and reviewed a copy of the Residency Agreement, and [has] had an opportunity to ask questions."

Although similar, the Scheerle Agreement is not identical to the O'Meara and Pruett Agreements. The arbitration clause itself is virtually identical, with a few cosmetic differences in phrasing and comma placement, but it has one substantive distinction. Rather than providing that the "Federal Arbitration Act shall govern the procedure," the clause states that the "South Carolina Revised Code concerning arbitration shall govern the procedure[.]" *Id.*, p. 7. Further, written discovery is governed by the South Carolina Rules of Civil Procedure rather than the federal rules. *Id.*, p. 8.

As to the rest of the Scheerle Agreement, it contains no cover page, but the header on the first page states, "THIS AGREEMENT IS SUBJECT TO ARBITRATION." *Id.*, p. 1. The Agreement also contains "Benefits of Arbitration and Limitation of Liability Provisions" that has a sentence encouraging the signing parties "to discuss **this Agreement with an attorney.**" *Id.*, p. 10 (emphasis in original). Above the signature block is another recommendation that "you consult with legal counsel

to ensure understanding of this Agreement before signing." *Id.* p. 13 (emphasis in original).

D. *The Interstate Character of the Residency Agreements.*

The Residency Agreements are interstate in character because many of the goods and services delivered under the agreements come from out of state. They specify the basic services each resident will receive from the facility, including daily meals, amenities, furnishing, housing, and the ability to further agree to receive medical services from third parties. Specifically, the Agreements provide that residents will receive three meals daily. That food is supplied by Sysco Corporation of Texas. [Cesar Affidavits: O'Meara (09.01.2011) ¶4; Pruet (09.01.2011) ¶4; Scheerle (08.09.2011) ¶4]. Direct Supply of Wisconsin provides the medical supplies that the residents receive pursuant to the Agreement. *Id.*

The Agreements also affect interstate commerce because they are between parties residing in two different states. The Respondents are South Carolina residents, while Southern Assisted Living is a North Carolina corporation. The parent company, Brookdale Senior Living, is a Delaware corporation with its headquarters in Tennessee and relevant corporate offices in Wisconsin, Illinois, and Florida. It advertises nationally.

The facility and the Agreements are also involved in interstate commerce in other ways. When a resident pays for the goods, services, and housing provided under the Agreements, a check is written and sent to a Wells Fargo bank in Texas, and the funds are deposited into accounts owned by Brookdale Senior Living, an out-of-state corporation. [Cesar Affidavits: O'Meara (09.01.2011) ¶5; Pruet

(09.01.2011) ¶5; Scheerle (08.09.2011) ¶7]. The facility also receives and admits out-of-state residents, including residents from Connecticut, Florida, and New York. Id.

STANDARD OF REVIEW

"Appeal from the denial of a motion to compel arbitration is subject to de novo review." New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

ARGUMENT

L THE ARBITRATION AGREEMENTS IN THE RESIDENCY AGREEMENTS ARE VALID AND ENFORCEABLE AGREEMENTS UNDER THE FEDERAL ARBITRATION ACT BECAUSE THE RESIDENCY AGREEMENTS INVOLVE INTERSTATE COMMERCE.

"South Carolina law generally favors arbitration." Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2005). "Any doubts regarding the scope of arbitrable issues should be resolved in favor of arbitration." Zabrinsky v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "Unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." Id. "A motion to compel arbitration . . . should only be denied where the [arbitration] clause is not susceptible to any interpretation which would cover the asserted dispute." Id.

A. The Scope of the Federal Arbitration Act

Under the Federal Arbitration Act ("FAA"), parties may enter pre-injury agreements and arbitrate personal-injury claims. When the FAA governs a dispute, it preempts conflicting state law. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 269 (1995); Soil Remediation Co. v. Nu-Way Environmental, Inc., 323 S.C. 454, 459, 476 S.E.2d 149, 152 (1996).³

Section 2 of the FAA states that a "contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "To ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabrinsky v. Bright Acres Associates, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

The basic purpose of the FAA "is to overcome courts' refusal to enforce agreements to arbitrate." Allied-Bruce, 513 U.S. at 270. Because the FAA was intended to enforce arbitration agreements and put them on "the same footing as other contracts," Congress intended the FAA to have a broad scope and for courts to interpret it liberally. Id. at 270, 275. The language of the FAA evidences a strong

³ Although the Scheerle Agreement states that the "South Carolina Revised code concerning arbitration shall govern the procedure," the FAA still preempts the South Carolina Uniform Arbitration Act, S.C. Code §§ 15-48-10 *et seq.*, "to the extent [state law] would have invalidated the arbitration agreement." Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n.2, 542 S.E.2d 360, 363 n.2 (2001). In Soil Remediation, the Court held that the FAA preempted the South Carolina Act despite the agreement stating, "THIS SUBCONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO SECTION 15-48-10, CODE OF LAWS OF SOUTH CAROLINA (1976)." 323 S.C. at 457, 476 S.E.2d at 150.

federal policy favoring arbitration. Mastrobouno v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

Prior to the Supreme Court's decision in Allied-Bruce, many courts refused to apply the FAA to contracts where the parties did not contemplate an interstate transaction, or where the interstate transaction was "too slight." 513 U.S. at 269. In Allied-Bruce, a homeowner had signed a termite-prevention contract containing an arbitration clause. The defendant was a multistate company that used termite-treating and house-repairing materials that came from out of state. The Supreme Court of Alabama upheld a denial of a motion to compel arbitration, finding that, although there was an interstate connection, the connection between the termite contract and interstate commerce was too slight. The Alabama court had held that the FAA applies only if the parties "contemplated substantial interstate activity." Id. at 269.

The United States Supreme Court rejected this narrow interpretation. It held that the FAA applies to transactions that "in fact" involve interstate commerce, "even if the parties did not contemplate an interstate commerce connection." Id. at 281. The FAA's phrase "involving commerce" evidenced "an intent to exercise Congress' commerce power to the full." Id. at 277. There is no requirement that the transaction "substantially" involve interstate commerce, as argued by the Respondent in her Memorandum in Opposition filed in the lower court. [Memo In Opp., p. 3].

Allied-Bruce is significant because since that opinion a decided majority of published opinions in South Carolina have upheld the application of the FAA.

Significantly, in Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 n.3 (2001), the Court overruled its prior precedent to the extent it considered whether the parties contemplated interstate commerce as a factor in applying the FAA. In that case, the Munoz family signed an installment contract and security agreement with the builder to finance \$15,000 in home improvements. Both the Munoz family and the builder were from South Carolina. However, the builder assigned the agreement to a creditor on the same day. The creditor, a Delaware corporation with a principal place of business in Minnesota, had prepared the agreement in Minnesota and forwarded it to the builder in South Carolina. The loan proceeds were disbursed from a bank in Minnesota. "Although the Munozes may not have contemplated an interstate transaction, *their contractual relationship with Creditor* in fact involves interstate commerce and therefore the FAA applies." Id. at 539, 542 S.E.2d at 364 (emphasis added).

In Zabrinsky v. Bright Acres Associates, the Court cited Allied-Bruce and held that the FAA applied to a partnership dispute involving a South Carolina partnership selling and developing land located entirely in South Carolina. 346 S.C. at 595, 553 S.E.2d at 117-18. Although developing South Carolina land is typically an intrastate activity, "the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors." Id.; see also Soil Remediation, 323 S.C. at 461, 476 S.E.2d at 153 (holding contract to remove water and sludge materials from a South Carolina property involved interstate commerce because one party subcontracted with a third-party who would remove the materials to a North Carolina facility).

B. Assisted Living and Nursing Home Admission Agreements Typically Involve Interstate Commerce.

Much like the agreements at issue in Allied-Bruce, Zabransky, and Soil Remediation, admission agreements to assisted-living facilities or nursing homes typically involve interstate commerce because the facilities usually fulfill their contractual duties by providing supplies and goods from out-of state. See Pickering v. Urbantus, LLC, 827 F. Supp2d 1010 (S.D. Iowa 2011); Miller v. Cotter, 863 N.E.2d 537 (Mass. 2007); Briarcliff Nursing Home v. Turcotte, 894 So.2d 661, 667 (Ala. 2004).

In McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 at *5 (D.S.C., Dec. 15, 2011), the District Court of South Carolina (Judge Norton) granted a motion to compel arbitration under the FAA and found "the type of nursing home care involved here affects interstate commerce." The court stressed that the home received food from Sysco Corporation of Texas—the same company supplying food to Appellants in this case—and bought supplies from manufacturers in several other states. Id. "The supplies must be shipped across state lines to reach [the] facility." Id. Because of this, the FAA applied to the admission agreement.

Similarly, in Triad Health Mgmt. of Georgia, III, LLC v. Johnson, 679 S.E.2d 785 (Ct. App. Ga. 2009), the court held that the FAA applied to a nursing home admission contract, where the home bought supplies from out-of-state vendors, treated out-of-state patients, and had patients insured through Medicaid and Medicare. "Given the evidence establishing a nexus between Triad's nursing home operations and interstate commerce, and in light of the United States Supreme Courts' *expansive interpretation of commerce for purposes of the FAA* [in Allied-

Bruce], we conclude that the Admission Contract was a contract evidencing a transaction involving commerce, and the FAA therefore applies." Id. at 788 (emphasis added).

In denying arbitration in these cases, the lower court improperly relied on Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993). In that case, the Court examined the face of the nursing home agreement and held that it did not involve interstate commerce. The Court noted that, although the facility was involved in interstate commerce, there was nothing tying the *agreement* itself to interstate commerce. Id. at 473, 427 S.E.2d at 644.

The lower court's reliance on Timms was misplaced for several reasons. First, Timms was decided almost 20 years ago and before FAA's reach was expanded by Allied-Bruce. Second, Timms is limited in scope because the transaction was confined to South Carolina in that it was a South Carolina home, with no evidence that the agreement involved interstate commerce. In Soil Remediation, the Court recognized that "[t]he present case differs from . . . Timms in that the transaction is not confined to this state[.]" 323 S.C. at 461, 476 S.E.2d at 153. Third, the facts differ from Timms in that the Agreement in this case specifies that residents will receive goods and services. As discussed below, the goods and services specified in the agreement come from out-of-state. Nothing in Timms indicates that the admission agreement referenced any supplies or goods that would ultimately be procured from out-of-state vendors. Timms is factually distinguishable in other ways, including the fact the Agreement in this case was signed on behalf of a North Carolina corporation that owns the facility, and that residents must pay for their

housing and services through payments to a Wells Fargo bank in Texas. In short, Timms concerned a factual record that failed to show *the agreement itself* involved interstate commerce.

Finally, Timms may have applied a standard that is no longer applicable. In Timms, the Court stated that, "[i]n determining whether the contract on its face evidences commerce, we are required to look to the entire contract." 310 S.C. at 472, 427 S.E.2d at 644. By examining merely the face of the contract, Timms seemed to articulate the pre-Allied-Bruce standard, where the contemplation of the parties is a factor. However, as other cases have made clear, "[t]o ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabrinsky, 346 S.C. at 594, 553 S.E.2d at 117 (emphasis added). In fact, Munoz held the FAA applied to a contract between a South Carolina resident and a South Carolina vendor, because it was later assigned to an out-of-state creditor. 343 S.C. at 539, 542 S.E.2d at 364. To the extent Timms applied a standard that considered only the face of the contract or the parties' contemplation, it has been implicitly overruled by Allied-Bruce.⁴

⁴ Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994) cited Timms for the proposition that "the express terms of the contract [must involve] interstate commerce." Munoz, however, expressly overruled Mathews "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied." 343 S.C. at 363 n.3, 542 S.E.2d at 539 n.3. Presumably, Munoz (and Allied-Bruce) also overruled Timms to the same extent.

C. The Residency Agreements Involve Interstate Commerce and Are Governed by the FAA.

In this case, much like the facts in Allied-Bruce and Zabrinsky, the facility uses goods and materials obtained from out-of-state vendors in order to serve its residents. The Agreements state that residents will receive three meals daily and snacks are available 24 hours a day. [O'Meara and Pruett Agreement, p. 3; Scheerle Agreement, p. 1]. The facility fulfills their contractual obligation by providing food it receives from Sysco Company, the same Texas Corporation used by the nursing home in McCutcheon. [Cesar Affidavits: O'Meara (09.01.2011) ¶4; Pruett (09.01.2011) ¶4; Scheerle (08.09.2011) ¶4]. The facility also receives its medical supplies from One Source, a Wisconsin Corporation, and carpeting from a North Carolina vendor. Id.

Further the residents are required to pay monthly fees, and those fees are specified in the Agreement. [O'Meara and Pruett Agreements, p. 21; Scheerle Agreement, p. 15]. To pay those fees, residents draft checks written out to Brookdale Senior Living, Inc. [Cesar Affidavits: O'Meara (09.01.2011) ¶5; Pruett (09.01.2011) ¶5; Scheerle (08.09.2011) ¶7]. The checks are then sent to a Wells Fargo bank in Texas and deposited into accounts owned by Brookdale Senior Living, Inc., which ultimately receives that money at one of its corporate offices in Milwaukee, Wisconsin. Id. Finally, the Agreements are between Southern Assisted Living, a North Carolina corporation, and the Respondents, who are South Carolina resident. [O'Meara and Pruett Agreement, p. 3; Scheerle Agreement, p. 1].

Thus, the Agreements involve interstate commerce in many ways. Unlike the situation in Timms—where there was no evidence that the agreement involved

interstate commerce—there is ample evidence that the Agreements involve interstate commerce. These Agreements are much closer to the agreements in Allied-Bruce and Zabrinsky, where out-of-state vendors supplied the materials in those agreements. Because the Agreements involve interstate commerce, the lower court erred by failing to compel arbitration under the FAA.

II. RESPONDENTS ELIZABETH O'MEARA AND JANET SUE SCHEERLE, BENEFICIARIES UNDER THE AGREEMENTS, SHOULD BE EQUITABLY ESTOPPED FROM REFUSING TO COMPLY WITH THE ARBITRATION AGREEMENTS; FURTHER, ISSUES REGARDING ENFORCEABILITY OF THE ENTIRE CONTRACT ARE DECIDED BY AN ARBITER.

This section applies only to Respondents O'Meara and Scheerle. Respondent Pruett never raised this issue in the lower court.

A. Respondents O'Meara and Scheerle Are Beneficiaries of Their Residency Agreements.

The lower court improperly found that Respondents O'Meara's and Pruett's acquiescence to the Agreements was invalid [O'Meara and Scheerle Orders, p.4]. The Agreements were signed by their daughters, Julia Stanton for Mrs. O'Meara and Julie Jones for Mrs. Scheerle. The lower court reasoned that, because they lacked a durable power of attorney, the daughters lacked the authority to bind them to the Agreements. The lower court's reasoning, however, was flawed. It failed to consider that Mrs. O'Meara and Mrs. Pruett were beneficiaries of the Agreement, and they should be estopped from attempting to repudiate an Agreement from which they have already benefitted.

"A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct.

App. 2012) (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)). In Pearson, which was recently decided, this Court compelled a doctor to arbitrate his claims against the hospital even though he did not sign the arbitration agreement. The doctor had been placed at the hospital through an employment agency. Although the doctor had signed an arbitration agreement with the agency, and although the agency had signed an arbitration agreement with the hospital, the doctor did not sign an arbitration agreement with the hospital.

Nevertheless, this Court held that the doctor could not claim the benefits of the employment contract and then disown the contract when it suited him. 733 S.E.2d at 605. "[A] party may not 'rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.'" Id. at 604. Because of the contract, the doctor received the benefit of working at the hospital and receiving compensation. After receiving the benefits of the contract, he could not disown those parts that did not suit him.

A case on point from the District Court of South Carolina is THI of South Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) (unpublished). In that case, a daughter admitted her father to a nursing home and signed the admission agreement as "Fiduciary Party" and "Immediate Family Member." However, her father did not sign the agreement, and the daughter attempted to avoid arbitration, arguing that she lacked authority to bind her father to the admission agreement.

The Court (J. Currie) disagreed. Although the father did not sign the admission agreement, "he is the named resident to be admitted to the facility." Id. at *6. His "care was the essential purpose of the Contract." Id. "Thus, [the father] was an intended third-party beneficiary of the Contract which was signed by [the daughter] in her capacity as immediate family member." Id. Further, the father's estate was equitably estopped from denying contract formation. The father had received benefits under the admission agreement. "Under these circumstances, it would be inequitable for [the father's estate] . . . to avoid the Contract's Arbitration Provision." Id.; see also McCutcheon, 2011 WL 6318575 at *3 (finding arbitration agreement binding on resident and her estate despite the fact that she did not sign the agreement; she was an intended beneficiary of admission agreement).

In this case, both Julia Stanton (O'Meara) and Julie Jones (Scheerle) signed for their mothers. [O'Meara Agreement, p. 19; Scheerle Agreement, p. 13]. They both signed as "Responsible Party" or "Legal Representative." Id. Further, Ms. Stanton signed a Responsible Party Agreement, and Ms. Jones signed as "Guarantor" on a Statement of Financial Responsibility. [O'Meara Agreement, p. 22; Scheerle Agreement, p. 16].

Mrs. O'Meara and Mrs. Scheerle were the beneficiaries of the Agreements. Under the Agreements, they were the named residents, and received room and board and medical care for dementia and/or Alzheimer's. Because they received the benefit of the Agreement when it came to room, board, meals, and medical attention, they cannot now disown the Agreement when it works to their disadvantage.

Therefore, this Court should find that both are beneficiaries under the Agreements and should be equitably estopped from refusing to arbitrate.

B. Challenges to the Validity of the Residency Agreement Should be Decided by an Arbiter.

In the alternative, an arbiter should decide whether the Respondents O'Meara and Pruett are bound by the Residency Agreement. When a party challenges the existence of the entire agreement and not just the arbitration provision, the arbiter acts as a gateway and determines the contract's validity in the first instance. Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 125-26, 713 S.E.2d 799, 804 (Ct. App. 2011) (citing Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006)).

Here, the arbitration provision states that "disputes regarding the interpretation of this Agreement . . . shall be submitted to binding arbitration[.]" [O'Meara Agreement, p. 11; Scheerle Agreement, p. 7]. Thus, the parties agreed that an arbiter would act as a gateway regarding the interpretation of the Agreement. And the Respondents challenged whether their daughters had the authority to bind them to the Residency Agreements. Such a challenge is to the validity of the Agreement as a whole, and not just a challenge to the arbitration agreement. Therefore, this issue should be raised before an arbiter and not a court.

III. THE ISSUE OF WHETHER THE ARBITRATION CLAUSES IN THE RESIDENCY AGREEMENTS ARE UNCONSCIONABLE IS NOT RIPE BECAUSE THE RESPONDENTS FAILED TO ALLEGE THAT THE SPECIFIC ARBITRATION CLAUSES WERE UNCONSCIONABLE.

When a plaintiff fails to adequately plead that an arbitration clause is unconscionable, the issue of unconscionability "is not yet ripe because an arbitrator has not ruled on the issue." Carolina Care Plan, 361 S.C. at 556-57, 606 S.E.2d at 758-59.

In Carolina Care Plan, the plaintiff, an HMO, entered into an agreement that included an arbitration clause excluding punitive damages. A defendant moved to dismiss or stay the proceedings and compel arbitration. In response, the HMO filed an amended complaint, which included allegations that the arbitration provision was unconscionable and violated public policy because it limited discovery and certain rights and remedies, including punitive damages. The trial court dismissed the causes of action in the amended complaint related to the making of the arbitration clause and ordered arbitration.

On appeal, the HMO argued, among other things, that the arbitration clause was unenforceable as a matter of law because it sought to limit the HMO's remedies, including punitive damages. The Court, however, affirmed the trial court and held that the unconscionability issue was not ripe, because an arbiter, not a court, must decide whether the clause was unconscionable. Id. The court reasoned that, first, the HMO failed to adequately plead that the arbitration provision was unconscionable. Id. at 554, 606 S.E.2d at 757. Second, it was unclear whether the HMO would prevail on the merits at arbitration and "whether an arbitrator would find that punitive damages are warranted." Id. at 557, 606 S.E.2d at 759; see also

Hawkins v. Aid Assn. for Lutherans, 338 F.3d 801 (7th Cir. 2003) (holding that complaints about the unavailability of punitive damages must first be presented to an arbiter) (cited by Carolina Care Plan, 361 S.C. at 557, 606 S.E.2d at 759).

In these cases, the Respondents failed to allege that the arbitration clause itself was unconscionable. In their pleadings, the Respondents fail to mention the arbitration clause. [O'Meara, Pruett, and Scheerle Complaints and Amended Complaints]. After Appellants filed Motions to Compel Arbitration, the Respondents served copies of Memoranda in Opposition in the O'Meara and Pruett cases⁵, but again the Respondents failed to contest the arbitration clause on the grounds of unconscionability.⁶ [O'Meara and Pruett Memoranda in Opp.]. The Memoranda argued against the enforceability of arbitration on two grounds unrelated to unconscionability. *Id.*

Thus, because the Respondents failed to allege that the specific arbitration provision was unconscionable, the issues were not yet ripe.⁷ The trial court erred by refusing to compel arbitration on the basis of unconscionability.

⁵ Respondent Scheerle did not serve a Memorandum in Opposition.

⁶ Unfortunately, the parties lack a transcript of that hearing, as the court reporter apparently lost her job and abandoned the transcript, requiring the parties to agree to move forward without the transcript.

⁷ The Respondents' claim that the provision limiting depositions to experts only is unconscionable is also not ripe, as the Agreement allows the parties to modify the arbitration discovery. The Respondents never asked whether Appellants would have agreed to modify discovery, which they have done at times.

IV. IN THE ALTERNATIVE, THE RESIDENCY AGREEMENTS WERE NOT UNCONSCIONABLE, AS THEY GAVE THE RESPONDENTS A MEANINGFUL CHOICE WITH REASONABLE TERMS.

Even assuming for the sake of argument that the issue of unconscionability was ripe, the lower court improperly found that the arbitration and limitations of liability clauses in the Agreements were unconscionable. An agreement is unconscionable only if (a) there was an absence of meaningful choice due to one-sided provisions and (b) the terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Munoz, 343 S.C. at 541, 542 S.E.2d at 365.

A. The Respondents Had a Meaningful Choice.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In Munoz, the debtors argued that an arbitration clause in an installment contract and security agreement was unconscionable because it was "part of an adhesion contract and they were not advised it was included in the contract." 343 S.C. at 541, 542 S.E.2d at 365. In finding that the arbitration agreement was not unconscionable, the Court stressed that an adhesion contract was not per se unconscionable, and "a person who can read is bound to read an agreement before signing it." Id.

In this case, the Respondents had a meaningful choice. The Agreements contain a clause titled "Benefits of Arbitration and Limitation of Liability Provisions." That clause states that the resident, responsible party, or legal

guardian "understands that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability provision." [O'Meara and Pruett Agreements, p. 15; Scheerle Agreement, p. 10]. Underneath that provision it states in bold font, "[t]he undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney." *Id.* (emphasis in original). Julie Stanton and Sam Pruett, as Responsible Parties for Respondents O'Meara and Pruett, initialed this provision indicating that they "read and understood the provisions of section V., subsection C." *Id.*

Further, the arbitration clauses are not buried inconspicuously in the Agreements. Each Agreement states on the front page in all-caps and underlined font that, "THIS AGREEMENT IS SUBJECT TO ARBITRATION." [Agreements, p. 1]. The O'Meara and Pruett Agreements also contain a recommendation on the front page, in bold font, to "consult your legal counsel to ensure proper understanding of this Agreement before signing." [O'Meara and Pruett Agreements, p. 1]. The Scheerle Agreement places a similar warning in bold font just above where Julie Jones signed as legal representative for Ms. Scheerle. [Scheerle Agreement, p. 15].

The limitations on liability provisions also contain italicized warnings to "*Read Carefully Before Signing.*" [O'Meara and Pruett Agreements, p. 14; Scheerle Agreement, p. 9]. The representatives for Respondents O'Meara and Pruett also initialed as "having read and understood the provisions" of (a) the arbitration provision, (b) the limitations on liability provision, and (c) the benefits of arbitration and limitation of liability provision. [O'Meara and Pruett Agreements, pp. 14-15].

In this case, there is no evidence that the Agreements were presented on a take-it-or-leave-it basis. In fact, Respondent Pruett was able to negotiate the move-in fee, which was waived by the executive director, with the changes being initialed by her and Mr. Pruett. [Pruett Agreement, p. 8].

The Respondents also failed to present any evidence, via affidavit or otherwise, that they lacked a meaningful choice to either negotiate the arbitration agreement or reside at one of the many other facilities in the Hilton Head area. See Hayes v. Oakridge Home, 908 N.E.2d 408 (Ohio 2009) (finding that nursing home resident failed to satisfy her burden of producing evidence supporting her challenge that the admission agreement was unconscionable). The *only* evidence that the Respondents presented regarding unconscionability were the arbitration provisions.

Thus, because the Agreements had a conspicuous arbitration provision that advised the Respondents to consult an attorney, and because the Agreements informed them that other facilities may not request arbitration in the admission agreement, the Respondents had a meaningful choice. The Respondents never voiced a concern over the provision at the time of signing.

B. The Terms of the Arbitration Agreement Were Not Oppressive and One-Sided.

In finding the arbitration agreement unconscionable, the lower court focused on the provisions that (1) limit discovery and (1) limit damages. [O'Meara and Pruett Orders, p. 3; Scheerle Order, p. 4]. Each is discussed below.

1. The Limitations on Discovery are Relatively Few and Consistent With Keeping Arbitration a Low-Cost, Quick Proceeding and Would Not Prevent a Complainant From Vindicating Her Rights.

The lower court improperly ruled that the limitation on depositions to only expert witnesses, taken with other provisions, rendered the arbitration provision unconscionable. Discovery limitations in arbitration, however, are part of the trade-off for the "simplicity, informality, and expedition of arbitration." In re: Cotton Yarn Antitrust Litigation, 505 F.3d 274, 286 (4th Cir. 2007) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). "Because limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement." Id.

In this case, the Respondents bore the burden of establishing that the limits on discovery would prevent them from vindicating their rights. See Id. at 283. The Respondents, however, presented no evidence in this regard.

The arbitration agreements provides for "permissible discovery per the Federal Rules of Civil Procedure" or the South Carolina Rules of Civil Procedure. [O'Meara and Pruet Agreements, p. 12; Scheerle Agreement, p. 8]. Thus, the parties are allowed to serve interrogatories and requests to produce and admit. The Agreements also allow for expert witnesses, an exchange of witness lists, and provide a timeline in order to resolve the arbitration within 180 days. [O'Meara and Pruet Agreements, pp. 12-13; Scheerle Agreement, pp. 8-9]. Further, the Agreements allow the parties to stipulate to expanded or modified discovery. Id. The only discovery "limitation" addressed by the lower court was the limitation of depositions to experts only.

The Respondents failed to carry their burden of showing that this single discovery limitation prevented them from vindicating their rights. Most arbitration agreements provide for less discovery than the provided in the Agreements, as arbitrations are meant to be informal, simple, and quick. A simple limit on deposition discovery alone—when other types of discovery are available—is not enough to render an agreement unconscionable.

2. The Limitations on Damages and Liability are Reasonable and Not a Basis for a Finding of Unconscionability.

First, whether arbitration remedies are inadequate is an analysis separate from the arbitrability of the Respondents' claims. "Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of the agreement, these challenges must first be considered by the arbitrator." Hawkins, 338 F.3d at 807 (cited by Carolina Care Plan, 361 S.C. at 557, 606 S.E.2d at 759). Here, the limitations on damages and liability are found in a provision in the Residency Agreements separate from the arbitration provision. The "Arbitration Provision" is found at Section V(A) of the Agreement and consists of roughly three pages. Although incorporated by reference, the "Limitation of Liability Provision" is a separate provision found at Section V(B) of the Agreement. Thus, an arbiter should decide whether the arbitration remedies are inadequate.

Second, even if this issue were ripe, it should not render the Agreements unenforceable. The Agreements do not exculpate the Appellants from liability. See, e.g., Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281-223 (1981) (upholding exculpatory contract). The Agreements provide that "[n]et economic

damages shall be awardable, including but not limited to, past and future medical expenses[.]” [O’Meara and Pruet Agreements, p. 14; Scheerle Agreement, p. 8]. Although the Agreements limit noneconomic damages to \$250,000, offset collateral source payments, and prohibit the award of punitive damages, Sam Pruet and Julie Stanton initialed these sections as “having read and understood” them. [O’Meara and Pruet Agreements, p. 15].

Regardless, the limitations should not render the Agreements unconscionable, especially where the Respondents will still have the opportunity to raise these issue before an arbiter. See Hayes v. Oakridge Home, 908 N.E.2d 408, 415 (Ohio 2009) (holding arbitration agreement in nursing home excluding punitive damages and attorney fees not unconscionable).

C. In the Alternative, This Court Should Sever Any Portions of the Agreements It Finds Unconscionable and Enforce Arbitration.

If a court determines that a contractual provision is unconscionable, it may sever that provision and enforce the remainder of the contract. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-67 (Ct. App. 2002) (enforcing contract to extent it required plaintiff to waive jury trial, but severing portion that waived his compulsory counterclaims). Here, the Agreements contain a severability clause, stating that “[s]hould any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected.” [O’Meara and Pruet Agreements, p. 18; Scheerle Agreement, p. 12]. The Agreements also provide that if any portions of the arbitration provisions or limitation on liability provisions are deemed invalid, the validity of the remaining subsections is not affected. Id., p. 11.

Thus, to the extent this Court finds a provision invalid, it should sever that provision and compel the parties to arbitrate on the remaining terms.

Finally, the lower court erroneously relied on Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 35, 644 S.E.2d at 674, in refusing to sever the portions of the Agreement it found offensive. In that case, the arbitration clause was an adhesion contract, filled with "oppressive and one-sided provisions contained within the entire clause." The clause waived mandatory statutory remedies under the South Carolina Dealers Act. Such a waiver would have defeated the statutes' "very purposes of punishing acts that adversely affect the public interest." Id. at 30, 644 S.E.2d at 671.

Further, the clause was entirely one-sided in that the dealer's claims for claim and delivery, repossession, injunctive relief, or monies owed for the purchase of the vehicle were not stayed by arbitration. Id. at 31, 644 S.E.2d at 672. Thus, the dealer "may bring a judicial proceeding that completely disregards any pending consumer claims that require arbitration." Id. A dealer could initiate a claim and delivery action, repossess the vehicle, and sell it—all while the consumer's claims over the same vehicle were still pending in arbitration. The terms in the Simpson agreement were grossly one-sided and oppressive, unlike the terms in this case.

Most importantly, however, is that all of the oppressive terms in Simpson were contained within the lengthy arbitration provision itself. The arbitration provision was one very long paragraph, without breaks, that included the offending provisions "within the entire clause." Id. at 34, 644 S.E.2d at 674. The Court would have been required to re-write the arbitration provision, which it declined to do.

In this case, the basic arbitration clause in the Agreements is the same, separate clause appearing on pages 4 and 5 of this Brief. [Agreement, Section (V)(A)(1), p. 11]. Unlike the clause in Simpson, the arbitration clause at Section (V)(A)(1) is clear of any offending terms. Neither the Respondents nor the lower court has indicated that any of the provisions in Section (V)(A)(1) are unconscionable. Although the court referenced Subsection (V)(A)(6)(b) (limiting depositions to experts), the bulk of the lower court's finding of unconscionability rests on the provisions found in the "Limitation of Liability Provision" found in Section (V)(B).

Therefore, in the alternative, this Court may easily sever any portion it finds offending. The allegedly offending portions are found within separate, and easily severable, subsections. Unlike in Simpson, it would not be required to rewrite the contract.

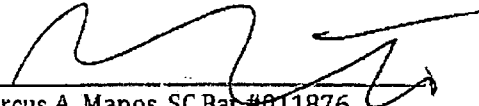
CONCLUSION

The Agreements are governed by the FAA because they involve the provision of goods and supplies that are procured through interstate commerce. As to the O'Meara and Scheerle Agreements, they are binding on Respondents O'Meara and Scheerle as beneficiaries, and they should be equitably estopped from disowning an agreement when inconvenient to them. Further, the Respondents failed to allege that the arbitration clauses were unconscionable and, therefore, the issue of unconscionability is not ripe until first addressed by an arbiter. Finally, the arbitration and limitation on liability clauses are not unconscionable but, to the

extent this Court believes otherwise, the offending provisions should be severed and arbitration ordered on modified terms.

Therefore, this Court should order the parties to proceed to arbitration.

Respectfully submitted,



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Living, LLC

March 7, 2013

Columbia, South Carolina

Exhibit 6

Scheerle Order Granting Plaintiff's Motion to
Compel

Filed September 19, 2012

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-2654

JANET SUE SCHEERLE

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC d/b/a
CAROLINA HOUSE OF HILTON HEAD and
SONIA S. KING,

Defendants.

)
)
)
) ORDER GRANTING PLAINTIFF'S,
) MOTION TO COMPEL RESPONSES TO
) PLAINTIFF'S FIRST SET OF
) INTERROGATORIES, REQUESTS FOR
) PRODUCTION TO DEFENDANTS, AND
) PLAINTIFF'S SUBPOENA DUCES
) TECUM AND 30(B)(6) DEPOSITION OF
) SOUTHERN ASSISTED LIVING, LLC
)
)

This matter is before me on Plaintiff, Janet Sue Scheerle's (Plaintiff or Mrs. Scheerle) Motion to Compel responses to Plaintiff's First Set of Interrogatories and Requests for Production to Defendants and Plaintiff's Subpoena Duces Tecum and 30(b)(6) Deposition of Southern Assisted Living, LLC d/b/a Carolina House of Hilton Head's ("Southern Assisted Living") (collectively the Defendants). A hearing was held on September 4, 2012, at 1:00 p.m. in which I heard oral arguments from Defendants' counsel, Manton R. Grier, Jr., and Plaintiff's counsel, Kelly M. Jolley.

Plaintiff requested that the Court compel Defendants produce documents in response to Plaintiff's First Interrogatories to Defendants ("Interrogatory"), First Requests for Production to Defendants ("Request(s)"), and Subpoena Duces Tecum to Defendant Southern Assisted Living (the "Subpoena") which was served along with a Notice of a Rule 30(b)(6) Deposition. Subsequent to the filing of Plaintiff's motion to compel production, Defendants provided additional documents to Plaintiff and certain requests were resolved through consent of the

parties. At the hearing, Counsel for Plaintiff represented to the Court that Plaintiff seeks to compel production of only the following information and documents:

1. All documentation relating to any in-house investigation conducted by or on behalf of Defendants regarding any of Janet Scheerle's injuries while a resident at Carolina House and/or any other allegations of abuse and neglect by Sonia King, including but not limited to:

- a) All documents, drawings, films, models or other items generated or obtained by or on behalf of Defendants, which are relevant or contain information relevant to the cause of the occurrence in question, the injuries allegedly sustained by the Plaintiff, and/or Defendants' affirmative defenses to Plaintiff's causes of action;
- b) All statements obtained by or on behalf of the Defendants;
- c) All physical and/or tangible items and/or potentially usable evidence obtained by or on behalf of the Defendants from the scene of the occurrence in question;
- d) Any quality assurance report, study, complaint or incident investigation, or investigation of the alleged substandard care or abuse which in any way refers to or concerns Janet Scheerle.

(Request No. 24 and Subpoena No. 15).

2. All resident care policies, procedures and manuals of Carolina House that are or were in effect during Janet Scheerle's residency, including but not limited to, documentation that sets forth policies and procedures in the following areas:

- a) Admission, assessment and initial treatment/care plans and corresponding documentation for newly admitted or readmitted residents;
- b) Obtaining, documenting, and carrying out physicians' orders for treatment including, but not limited to orders upon readmission from another healthcare facility;
- c) The facility's infection control program;
- d) The facility's restorative/rehabilitative nursing program;

- e) Nurses aides services;
- f) Activities for residents;
- g) Safety;
- h) Supervision;
- i) Medical Record charting;
- j) Procedures regarding transfers, baths, and general nursing care and fall risk assessment;
- k) Change of Shift Reports and/or report sheets charting;
- l) Contacting physicians with regard to health or changes in residents;
- m) Prevention of urinary tract infections; and
- n) Complaints by residents and resident family members
- o) Medical tech services

(Request No. 17 and Subpoena Nos. 3 and 7).

3. The written description of the services provided by the facility and the rates charged for those services and items for which a resident may be separately charged in effect January 1, 2008, through March 1, 2011. (Request No. 18).
4. Staff training schedules, sign in sheets, tests or evaluations for training. (Request No. 24).
5. A list of all legal claims and lawsuits brought against either Defendant Brookdale or any subsidiary of Brookdale arising out of an occurrence at or involving any assisted living facility owned by Brookdale or a subsidiary of Brookdale in South Carolina on or after January 1, 2007, including documents produced in prior litigation by either Defendant relating to allegations of abuse, neglect, understaffing, or inadequate care during the last three years. (Request No. 28 and Subpoena No. 27).

6. Any and all documents concerning, about or relating to any deficiency or sanction imposed against Carolina House in Hilton Head Island, South Carolina, by any governmental or other regulatory entity or agency on or after January 1, 2007. (Request No. 29).
7. Copies of resident daily census forms or reports while Plaintiff resided in the facility. (Request No. 36).
8. An organization directory or chart for Carolina House containing the various organizational divisions, as well as the names of the Board of Directors and/or Trustees, corporate consultants and any regional supervisors, division leaders and department heads. (Subpoena No. 6).
9. A Profit and Loss statement and balance sheets for Defendants. (Subpoena Nos. 17, 18).
10. All Resident Grievance/Concern Forms for Carolina House from January 1, 2007, through March 30, 2011, which may be redacted as to patient names only, unless it involves Janet Scheerle. (Subpoena No. 33).
11. Minutes for Resident's Council Meetings from January 2008 – January 2011. (Subpoena No. 35).
12. Corporate documents for Defendants articles of incorporation, names of executives or Board members and head of management personnel. (Subpoena No. 39).

Plaintiff's motion to compel included a request for an award of attorneys' fees and costs incurred in connection with the motion to compel; however, Plaintiff withdrew the request for fees and costs at the hearing.

As to the documents requested in number one of the above list, Defendants claim that all documents prepared during any internal investigation of Plaintiff's abuse or other alleged or suspected abuse and neglect by Defendant King were prepared in anticipation of litigation and are, therefore, privileged. At the hearing, Defendants stated the investigation was prepared in anticipation of litigation because the investigation it conducted following the incident at issue in the case was a broader and more thorough investigation than its policies or the law requires.

South Carolina law requires health care facilities to report any known or suspected abuse, neglect or exploitation of a vulnerable adult to the Long Term Care Ombudsman Program and law enforcement, the Omnibus Adult Protection Act, S.C. Code Section 43-35-25. Additionally, licensed community residential care facilities, also known as assisted living facilities, like Carolina House, are required to report incidents including neglect and abuse to the South Carolina Department of Health and Environmental Control. S.C. Code of Reg. 61-84, Section 601. As stated in S.C. Code Section 43-35-25(F) ("[n]o facility may develop policies or procedures that interfere with the reporting requirements of this section"). Defendants' own policies require that staff investigate suspected abuse and neglect, prepare a written report, and report the abuse to DHEC. Any investigation and reporting required by law as well as institutional policy are not privileged on the grounds that they were prepared in anticipation of litigation. Defendants are required to produce to Plaintiff the investigation reports it filed with the Department of Health and Environmental Control and with the Long Term Care Ombudsman program. Defendants shall file all documents it prepared in its full internal investigation, including specifically those listed on Defendants' privilege log, with this court for an in camera review within thirty (30) days. The court will then determine whether any of the documents

prepared during Defendants' investigation are privileged attorney work product prepared in anticipation of litigation.

Regarding Plaintiff's other outstanding requests, Defendants argued that the document requests are overbroad, request irrelevant information, and will not lead to the discovery of admissible evidence. Nonetheless, upon hearing the arguments of the parties, and in light of the subsequent resolution of matters by the parties as represented to the Court, this Court finds Plaintiff's arguments in favor of production of the requested discovery persuasive. Therefore, to the extent such documents exist and are in the possession, custody, or control of the Defendants, Defendants are ordered to produce the documents requested in numbers 1, 2, 3, 4, 6, 7, 8, 10, 11, and 12 in the above list. As to the documents requested in number five of the above list, Defendants are ordered to produce a list of all counties in South Carolina in which Defendants owned or operated a facility on or after January 1, 2007. As to the documents requested in number nine of the above list, Defendants are ordered to produce statements of Defendants' net worth from July 10, 2010 until the present.

IT IS NOW THEREFORE ORDERED, that Defendants shall have sixty (60) days from the date of the hearing to serve Plaintiff with copies of all requested documents and information listed in this Order. Based on this discovery deadline for Defendants' responses to Plaintiff's subpoena duces tecum, the Rule 30(b)(6) deposition will now take place on either November 13 or 14, 2012. Defendants shall have thirty (30) days from the date of the hearing to submit its internal investigation documents to the court for an in camera review. All resident information ordered to be produced must remain confidential pursuant to the confidentiality order entered in this matter and applicable state and federal law including 45 C.F.R. § 106.103.

AND IT IS SO ORDERED.

By: 
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

September 18, 2012
Beaufort, South Carolina

Exhibit 7

Scheerle Motion for Sanctions

Filed November 14, 2012

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

JANET SUE SCHEERLE,

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC, d/b/a
CAROLINA HOUSE OF HILTON HEAD, and
SONIA S. KING,

Defendants.

2012 NOV 16 11:41 AM
IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-07-2654
BEAUFORT COUNTY, S.C.
CLERK OF COURT

PLAINTIFF'S MOTION FOR
SANCTIONS UNDER RULE 37, SCRCP

TO: MANTON M. GRIER, JR., ESQUIRE, AND MARCUS A. MANOS, ESQUIRE,
ATTORNEYS FOR DEFENDANTS BROOKDALE SENIOR LIVING, INC., AND
SOUTHERN ASSISTED LIVING, LLC, d/b/a CAROLINA HOUSE OF HILTON HEAD:

PLEASE TAKE NOTICE that Plaintiff Janet Sue Scheerle, by and through her undersigned counsel, pursuant to Rule 37(b), SCRCP, hereby moves the Court for an order awarding sanctions against Defendants Brookdale Senior Living, Inc., and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head, for failing to obey this Court's order requiring Defendants to produce discovery to Plaintiff.

This case arises out of three incidents of elder abuse that occurred at Defendants' community residential care facility on Hilton Head Island, Beaufort County, South Carolina on December 31, 2010. Plaintiff filed an initial Complaint on June 24, 2011. Defendants filed a Motion to Dismiss or Compel Arbitration on or about August 10, 2011. On October 28, 2011, this Court issued an order denying Defendants' Motion to Dismiss or Compel Arbitration. On or about November 11, 2011, Defendants filed a Motion to Reconsider.

On June 26, 2012, Plaintiff filed an Amended Summons and Complaint. Defendants filed a Renewed Motion to Dismiss or Compel Arbitration on or about June 28, 2012.

On August 2, 2012, Plaintiff filed a Motion to Compel Responses to Plaintiff's First Set of Interrogatories and Requests for Production to Defendants and Plaintiff's Subpoena Duces Tecum and 30(b)(6) Deposition of Southern Assisted Living, LLC, pursuant to Rule 37(a), SCRPC. On September 4, 2012, there were three motions before this Court in Plaintiff's case: (1) Defendants' Motion to Reconsider the Court's order denying its initial Motion to Dismiss or Compel Arbitration, (2) Defendants' Renewed Motion to Dismiss or Compel Arbitration, and (3) Plaintiff's Motion to Compel discovery responses. At the hearing, the Court denied Defendants' Renewed Motion to Dismiss or Compel Arbitration and granted Plaintiff's Motion to Compel discovery responses.

This Court issued an *Order Granting Plaintiff's Motion to Compel Responses to Plaintiff's First Set of Interrogatories, Requests for Production to Defendants, and Plaintiff's Subpoena Duces Tecum and 30(b)(6) Deposition of Southern Assisted Living, LLC*, on September 18, 2012. (Attached as Exhibit A). This Court ordered Defendants to produce to Plaintiff any documents relating to the "investigation and reporting required by law," specifically "to produce to Plaintiff the investigation reports [Defendants] filed with the Department of Health and Environmental Control and with the Long Term Care Ombudsman program" within sixty days of the hearing. (Exhibit A pg. 5). Additionally, the Court ordered the Defendants to "file all documents it prepared in its full internal investigation, including specifically those listed on Defendants' privilege log, with this court for an in camera review within thirty (30) days. The court will then determine whether any of the documents prepared during Defendants'

investigation are privileged attorney work product prepared in anticipation of litigation." (Exhibit A pgs. 5-6).

On November 5, 2012, Defendants produced supplemental responses and documents to Plaintiff, allegedly in compliance with this Court's order. However, Defendants failed to produce the investigation reports it filed with the Department of Health and Environmental Control and the Long Term Care Ombudsman program. Defendants claim "[t]hey have searched numerous times and cannot find copies of what was given to DHEC and the ombudsman. We will consent to allowing DHEC and the Ombudsman to turn over those specific records relating to Sonia King, and we can tell them they will be protected under a confidentiality order." (Attached as Exhibit B).

On November 7, 2012, the law clerk of the Honorable Carmen T. Mullen sent the parties an email ordering the Defendants to produce the internal investigation documents reviewed by the Court in camera. (Attached as Exhibit C). The email states: "Judge Mullen has completed the in camera review in the above reference matter. All documents submitted for this review need to be turned over." (Exhibit C).

On November 8, 2012, Plaintiff's counsel, Kelly M. Jolley, communicated with Defendants' counsel, Manton M. Grier, Jr., via email to confirm that Plaintiff would receive the internal investigation documents prior to the Rule 30(b)(6) deposition scheduled in accordance with Judge Mullen's order granting Plaintiff's Motion to Compel for November 14, 2012. (Attached as Exhibit D). Mr. Grier replied that "This is a much bigger issue for the client than [he] realized," and the client would need to decide whether to fight this Court's order. (Exhibit D). Later, Mr. Grier informed Mrs. Jolley that Defendants intend to file a motion to enforce a stay in an attempt to keep from handing over the internal investigation documents as ordered by

the Court. (Exhibit E). Based on Mr. Grier's reply and Defendants' insistence on not disclosing the internal investigation documents, these documents are obviously essential to Plaintiff's case and damaging to Defendants' case. Mrs. Jolley informed Mr. Grier that Plaintiff would petition for a rule to show cause and sanctions if the Defendants did not comply with this Court's order by 5:00 p.m. on Monday, November 12, 2012. (Exhibit D). At the time of filing this motion, Defendants had not produced the internal investigation documents per the Court's order. The Rule 30(b)(6), SCRCR, deposition was cancelled because Plaintiff did not have the documents required for a sufficient and meaningful deposition. Defendants have failed to obey this Court's order to provide discovery and made clear their intention to prevent Plaintiff from getting the internal investigation documents.

As to the DHEC and Ombudsman investigation reports, Defendants made no representation to this Court at the motion to compel hearing in September that they could not find the investigation reports. Even assuming Defendants cannot find the investigation reports, there is no reason that Defendants cannot obtain the materials they claim to have produced to the Ombudsman and DHEC and then produce the documents to Plaintiff. Defendants have had more than sixty days to find and obtain copies of those documents and it is indefensible to, after sixty days, inform Plaintiff that Defendants do not have copies but will assist Plaintiff in obtaining some of the documents. Defendants are intentionally delaying discovery and preventing Plaintiff from receiving documents this Court has already ordered Defendants to produce. For Defendants to claim to not have investigation reports they were required to create and produce by law, their own internal policies, and this Court at the same time they willfully and intentionally refuse to comply with this Court's order to produce their internal investigation documents is a blatant act to conceal information essential to Plaintiff's case.

"[S]anctions for discovery abuse are left to the sound discretion of the trial court." *McNair v. Fairfield County*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008). "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Id.* at 467, 665 S.E.2d at 832 (internal quotation marks omitted). Here, the documents at issue are likely the quintessential "smoking gun" documents to Plaintiff's case and one of the critical pieces to discovery setting forth facts and witnesses Plaintiff must locate before the evidence disappears. Defendants already refused to hand over these documents alleging they were privileged. Even though the Court has found that the documents are not protected by privilege, Defendants are willfully refusing to produce documents which this Court ordered them to produce and without those documents, Plaintiff's case is severely prejudiced.

Based on Defendants' willful, intentional, and prejudicial conduct, Plaintiff seeks an order from this Court awarding one of the following sanctions against Defendants:

- (1) an order rendering a default judgment against Defendants, leaving only the issue of damages to be determined by the finder of fact;
- (2) an order deeming all of Plaintiff's allegations in the Amended Complaint admitted; or
- (3) an order refusing to allow Defendants to oppose Plaintiff's negligence claims.

See Rule 37(b)(2)(A)-(C), SCRCP; *McNair*, 379 S.C. at 465, 665 S.E.2d at 832 ("Under Rule 37(b)(2)(C), SCRCP, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action."); *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 594-95, 586 S.E.2d 572, 575-76 (2003) (affirming the trial court's sanction dismissing plaintiff's case after plaintiff persistently refused

to comply with the court's order that she sign a medical authorization form); *QZO, Inc. v. Moyer*, 358 S.C. 246, 256-58, 594 S.E.2d 541, 547-48 (Ct. App. 2004) (affirming the trial court's order striking the defendant's pleadings and entering a judgment of liability in the plaintiff's favor where the defendant disobeyed a court order to turn over a computer and instead erased all information on the computer);

WHEREFORE, Plaintiff requests this Court enter an Order awarding sanctions against Defendants. Further, Plaintiff requests attorney's fees and costs related to this motion and any other and further relief as the Court may deem appropriate.

Dated: November 13, 2012

MCNAIR LAW FIRM, P.A.

By


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Charleston, SC 29402

(843) 723-7831

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-2654

JANET SUE SCHEERLE

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC d/b/a
CAROLINA HOUSE OF HILTON HEAD and
SONIA S. KING,

Defendants.

)
) ORDER GRANTING PLAINTIFF'S
) MOTION TO COMPEL RESPONSES TO
) PLAINTIFF'S FIRST SET OF
) INTERROGATORIES, REQUESTS FOR
) PRODUCTION TO DEFENDANTS, AND
) PLAINTIFF'S SUBPOENA DUCES
) TECUM AND 30(b)(6) DEPOSITION OF
) SOUTHERN ASSISTED LIVING, LLC
)

This matter is before me on Plaintiff, Janet Sue Scheerle's (Plaintiff or Mrs. Scheerle) Motion to Compel responses to Plaintiff's First Set of Interrogatories and Requests for Production to Defendants and Plaintiff's Subpoena Duces Tecum and 30(b)(6) Deposition of Southern Assisted Living, LLC d/b/a Carolina House of Hilton Head's ("Southern Assisted Living") (collectively the Defendants). A hearing was held on September 4, 2012, at 1:00 p.m. in which I heard oral arguments from Defendants' counsel, Manton R. Grier, Jr., and Plaintiff's counsel, Kelly M. Jolley.

Plaintiff requested that the Court compel Defendants produce documents in response to Plaintiff's First Interrogatories to Defendants ("Interrogatory"), First Requests for Production to Defendants ("Request(s)"), and Subpoena Duces Tecum to Defendant Southern Assisted Living (the "Subpoena") which was served along with a Notice of a Rule 30(b)(6) Deposition. Subsequent to the filing of Plaintiff's motion to compel production, Defendants provided additional documents to Plaintiff and certain requests were resolved through consent of the



parties. At the hearing, Counsel for Plaintiff represented to the Court that Plaintiff seeks to compel production of only the following information and documents:

1. All documentation relating to any in-house investigation conducted by or on behalf of Defendants regarding any of Janet Scheerle's injuries while a resident at Carolina House and/or any other allegations of abuse and neglect by Sonia King, including but not limited to:

- a) All documents, drawings, films, models or other items generated or obtained by or on behalf of Defendants, which are relevant or contain information relevant to the cause of the occurrence in question, the injuries allegedly sustained by the Plaintiff, and/or Defendants' affirmative defenses to Plaintiff's causes of action;
- b) All statements obtained by or on behalf of the Defendants;
- c) All physical and/or tangible items and/or potentially usable evidence obtained by or on behalf of the Defendants from the scene of the occurrence in question;
- d) Any quality assurance report, study, complaint or incident investigation, or investigation of the alleged substandard care or abuse which in any way refers to or concerns Janet Scheerle.

(Request No. 24 and Subpoena No. 15).

2. All resident care policies, procedures and manuals of Carolina House that are or were in effect during Janet Scheerle's residency, including but not limited to, documentation that sets forth policies and procedures in the following areas:

- a) Admission, assessment and initial treatment/care plans and corresponding documentation for newly admitted or readmitted residents;
- b) Obtaining, documenting, and carrying out physicians' orders for treatment including, but not limited to orders upon readmission from another healthcare facility;
- c) The facility's infection control program;
- d) The facility's restorative/rehabilitative nursing program;

- e) Nurses aides services;
- f) Activities for residents;
- g) Safety;
- h) Supervision;
- i) Medical Record charting;
- j) Procedures regarding transfers, baths, and general nursing care and fall risk assessment;
- k) Change of Shift Reports and/or report sheets charting;
- l) Contacting physicians with regard to health or changes in residents;
- m) Prevention of urinary tract infections; and
- n) Complaints by residents and resident family members
- o) Medical tech services

(Request No. 17 and Subpoena Nos. 3 and 7).

3. The written description of the services provided by the facility and the rates charged for those services and items for which a resident may be separately charged in effect January 1, 2008, through March 1, 2011. (Request No. 18).
4. Staff training schedules, sign in sheets, tests or evaluations for training. (Request No. 24).
5. A list of all legal claims and lawsuits brought against either Defendant Brookdale or any subsidiary of Brookdale arising out of an occurrence at or involving any assisted living facility owned by Brookdale or a subsidiary of Brookdale in South Carolina on or after January 1, 2007, including documents produced in prior litigation by either Defendant relating to allegations of abuse, neglect, understaffing, or inadequate care during the last three years. (Request No. 28 and Subpoena No. 27).

6. Any and all documents concerning, about or relating to any deficiency or sanction imposed against Carolina House in Hilton Head Island, South Carolina, by any governmental or other regulatory entity or agency on or after January 1, 2007. (Request No. 29).
7. Copies of resident daily census forms or reports while Plaintiff resided in the facility. (Request No. 36).
8. An organization directory or chart for Carolina House containing the various organizational divisions, as well as the names of the Board of Directors and/or Trustees, corporate consultants and any regional supervisors, division leaders and department heads. (Subpoena No. 6).
9. A Profit and Loss statement and balance sheets for Defendants. (Subpoena Nos. 17, 18).
10. All Resident Grievance/Concern Forms for Carolina House from January 1, 2007, through March 30, 2011, which may be redacted as to patient names only, unless it involves Janet Scheerle. (Subpoena No. 33).
11. Minutes for Resident's Council Meetings from January 2008 – January 2011. (Subpoena No. 35).
12. Corporate documents for Defendants articles of incorporation, names of executives or Board members and head of management personnel. (Subpoena No. 39).

Plaintiff's motion to compel included a request for an award of attorneys' fees and costs incurred in connection with the motion to compel; however, Plaintiff withdrew the request for fees and costs at the hearing.

As to the documents requested in number one of the above list, Defendants claim that all documents prepared during any internal investigation of Plaintiff's abuse or other alleged or suspected abuse and neglect by Defendant King were prepared in anticipation of litigation and are, therefore, privileged. At the hearing, Defendants stated the investigation was prepared in anticipation of litigation because the investigation it conducted following the incident at issue in the case was a broader and more thorough investigation than its policies or the law requires.

South Carolina law requires health care facilities to report any known or suspected abuse, neglect or exploitation of a vulnerable adult to the Long Term Care Ombudsman Program and law enforcement, the Omnibus Adult Protection Act, S.C. Code Section 43-35-25. Additionally, licensed community residential care facilities, also known as assisted living facilities, like Carolina House, are required to report incidents including neglect and abuse to the South Carolina Department of Health and Environmental Control. S.C. Code of Reg. 61-84, Section 601. As stated in S.C. Code Section 43-35-25(F) ("[n]o facility may develop policies or procedures that interfere with the reporting requirements of this section"). Defendants' own policies require that staff investigate suspected abuse and neglect, prepare a written report, and report the abuse to DHEC. Any investigation and reporting required by law as well as institutional policy are not privileged on the grounds that they were prepared in anticipation of litigation. Defendants are required to produce to Plaintiff the investigation reports it filed with the Department of Health and Environmental Control and with the Long Term Care Ombudsman program. Defendants shall file all documents it prepared in its full internal investigation, including specifically those listed on Defendants' privilege log, with this court for an in camera review within thirty (30) days. The court will then determine whether any of the documents

prepared during Defendants' investigation are privileged attorney work product prepared in anticipation of litigation.

Regarding Plaintiff's other outstanding requests, Defendants argued that the document requests are overbroad, request irrelevant information, and will not lead to the discovery of admissible evidence. Nonetheless, upon hearing the arguments of the parties, and in light of the subsequent resolution of matters by the parties as represented to the Court, this Court finds Plaintiff's arguments in favor of production of the requested discovery persuasive. Therefore, to the extent such documents exist and are in the possession, custody, or control of the Defendants, Defendants are ordered to produce the documents requested in numbers 1, 2, 3, 4, 6, 7, 8, 10, 11, and 12 in the above list. As to the documents requested in number five of the above list, Defendants are ordered to produce a list of all counties in South Carolina in which Defendants owned or operated a facility on or after January 1, 2007. As to the documents requested in number nine of the above list, Defendants are ordered to produce statements of Defendants' net worth from July 10, 2010 until the present.

IT IS NOW THEREFORE ORDERED, that Defendants shall have sixty (60) days from the date of the hearing to serve Plaintiff with copies of all requested documents and information listed in this Order. Based on this discovery deadline for Defendants' responses to Plaintiff's subpoena duces tecum, the Rule 30(b)(6) deposition will now take place on either November 13 or 14, 2012. Defendants shall have thirty (30) days from the date of the hearing to submit its internal investigation documents to the court for an in camera review. All resident information ordered to be produced must remain confidential pursuant to the confidentiality order entered in this matter and applicable state and federal law including 45 C.F.R. § 106.103.

AND IT IS SO ORDERED.

By: 
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

September 18, 2012
Beaufort, South Carolina

Jolley, Kelly

From: Grier, Manton M. [MGrier@nexsenpruet.com]
Sent: Monday, November 12, 2012 10:45 AM
To: Jolley, Kelly; Mitchell, VickiLynn
Subject: Scheerle [IWOV-NPCOL1.FID1229708]

Kelly:

My responses are in red. You do what you have to do regarding the threat for sanctions, but keep in mind that we are complying with this discovery by consent even though it should be stayed on appeal. We plan on filing a motion to enforce the stay regarding the discovery of the internal investigation files, even though we are willing to consent to getting you virtually all of the documents you have requested despite the appeal.

We should be giving you the additional documents today.

Manton

- Investigation reports Defendants filed with the Department of Health and Environmental Control and with the Long Term Care Ombudsman program. (No. 1 in the Order Granting Plaintiff's Motion to Compel).
 - We received no internal investigation reports related to this incident.

They have searched numerous times and cannot find copies of what was given to DHEC and the ombudsman. I do not recall ever seeing what was turned over to DHEC and the Ombudsman. We will consent to allowing DHEC and the Ombudsman to turn over those specific records relating to Sonia King, and we can tell them they will be protected under a confidentiality order. I will ask the ED and corporate to search again (for the third or fourth time), but we may have to get those copies from DHEC or the Ombudsman.

- Price Schedules for services in effect from January 1, 2008, to March 1, 2011. (No. 3 in the Order Granting Plaintiff's Motion to Compel).
 - We received only the effective prices as of January 1, 2011.

We received additional information shortly after we sent you the discovery. We will send this to you today.

- Staff training schedules, sign in sheets, tests or evaluations for training. (No. 4 in the Order Granting Plaintiff's Motion to Compel).
 - We only received the ones contained in the employee files for Sonia King, Lynn O'Donnell, Shanada Young, and Rhoneda Maury.
 - The Defendants' original response to Plaintiff's Request to Produce No. 24 states they would also produce the file for Ashley Conen. We have not received that file.

Regarding Conen, that was an oversight on my part. We will produce her file ASAP. As to the staff training schedules, they are kept in the employee files. They are typically not found outside employee files.



- Documents concerning, about or relating to any deficiency or sanction imposed against Carolina House of Hilton Head Island, South Carolina, by any governmental or other regulatory entity or agency from January 2007 to April 2010. (No. 6 in the Order Granting Plaintiff's Motion to Compel).

- We received only SC Surveys of Resident Care for May 2010, July 2010, and February 2010.

We provided what we have. The one thing that may be missing is from the Peterson matter and I will check those files to see if the facility's lone copy happened to end up in our Peterson litigation file.

- An organization directory or chart for Carolina House containing the various organizational divisions, as well as the names of the Board of Directors and/or Trustees, corporate consultants and any regional supervisors, division leaders and department heads. (No. 8 in the Order Granting Plaintiff's Motion to Compel).

- We received only manager names, corporate officer names and titles, one division VP name, and two regional names.

We provided the below information at bates no. 00963.

Carolina House of Hilton Head

Management hierarchy

Manager:

W.E. Sheriff

Mark W. Ohlendorf

John P. Rijos

Officers/management:

Chief Executive Officer – W.E. Sheriff

Co-President/CFO – Mark W. Ohlendorf

Co-President/COO – John P. Rijos

Executive Vice President/General Counsel/Secretary - T. Andrew Smith

Executive Vice President/Chief Administrative Officer – Bryan D. Richardson

Executive Vice President/Treasurer – Kristin A. Ferge

Divisional Vice President – Cindy Chastulik

Regional Vice President – Kellee Armsworthy-Agee

Regional Clinical – Cristol Cannon

Executive Director – Steven Frisch

The board members are the managers. The board members are W.E. Sheriff, Mark Ohlendorf and John Rijos.

- Resident Grievance/Concern Forms for Carolina House from January 1, 2007 to December 31, 2012. (No. 10 in the Order Granting Plaintiff's Motion to Compel).

- We received only an "Issue Register: CH Hilton Head 2008-2011" with a table of some complaints from January 26, 2010, to March 24, 2011. The "Issue Register" does not even appear to be solely for grievances or concerns because it contains some phone calls to compliment Carolina House.

We provided what we have.

- Minutes for Resident's Council Meetings from June to December 2008, January to April 2009, July to November 2009, and September 2010 to January 2011. (No. 11 in the Order Granting Plaintiff's Motion to Compel).

- We received meeting minutes only from June 2007 to April 2008; and May, June, and December 2009.

We provided what we have. We will ask again to see if there are any additional minutes.

- Names of Executives or Boards members and head of management personnel. (No. 12 of the Order Granting Plaintiff's Motion to Compel).
- We only received the articles of Incorporation.

The board members are W.E. Sheriff, Mark Ohlendorf and John Rijos.

Please send us all of the responsive documents Defendants were ordered by the Court to produce to Plaintiff by 5 pm on Monday, November 12, 2012. If we do not receive the complete documents by that time, we will file a motion for contempt and a request for sanctions on Tuesday. Since we do not have complete documents in accordance with the court order, we will not be going forward with the Rule 30(b)(6) deposition on Wednesday, November 14, 2012. We will reschedule the deposition once we have the documents or have resolved the contempt proceedings with the court.

Kelly

Manton M. Grier, Jr.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
T: 803.540.2116, F: 803.253.8277
mgrier@nexsenpruet.com
www.nexsenpruet.com

NEXSEN PRUET

Tab	Card	Home	Practice Areas	Attorneys	Offices

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intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication.

Jolley, Kelly

From: Mullen, Carmen T. Law Clerk (Allison C. Coppage) [CMullenLC@sccourts.org]
Sent: Wednesday, November 07, 2012 6:27 PM
To: Grier, Manton M.
Cc: Jolley, Kelly; Wall, Susan; Huey, Linda; Chewing, Kathleen; Richardson, Joyce; Mitchell, VickiLynn; Ellington, S. Bronwyn
Subject: RE: Scheerle v. Brookdale Senior Living et al. [JWOV-NPCOL1.FID1229708]

Dear all -

Judge Mullen has completed the in camera review in the above reference matter. All documents submitted for this review need to be turned over.

Please feel free to contact me if I can be of any further assistance.

Allison C. Coppage
Law Clerk to The Honorable Carmen T. Mullen Fourteenth Judicial Circuit
102 Ribaut Road
P.O. Drawer 1128
Beaufort, SC 29901
Telephone (843) 255-5070
Facsimile (843) 522-8362
P Please consider the environment before printing this e-mail



Jolley, Kelly

From: Jolley, Kelly
Sent: Friday, November 09, 2012 11:08 AM
To: 'Grier, Manton M.'
Cc: Wall, Susan; Chewning, Kathleen
Subject: RE: Scheerle v. Brookdale Senior Living et al. [IWOV-NPCOL1.FID1229708]

Manton:

Please make your clients aware that if we do not have the documents Judge Mullen reviewed in camera and ordered your clients produce by 5:00 pm on Monday, we will file a motion for contempt and a request for sanctions Tuesday morning.

Kelly

Kelly Jolley-
Special Counsel-
kjolley@mcnair.net -

-
McNair Law Firm, P.A.-
Hilton Head Island Office | Shelter Cove Executive Park, 23-B Shelter Cove Lane | Suite 400 |
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-
-
-

-----Original Message-----

From: Grier, Manton M. [mailto:MGrier@nexsenpruet.com]
Sent: Friday, November 09, 2012 9:42 AM
To: Jolley, Kelly
Subject: Re: Scheerle v. Brookdale Senior Living et al. [IWOV-NPCOL1.FID1229708]

Kelly. This is actually a much bigger issue for the client than I realized. Marc is out of town but they want to talk with both of us on Monday to determine whether its worth fighting or not. If you need to push back the 30b6 I understand and will consent.

----- Original Message -----

From: Jolley, Kelly [mailto:KJolley@MCNAIR.NET]
Sent: Thursday, November 08, 2012 06:11 PM
To: Grier, Manton M.
Cc: Wall, Susan <SWall@mcnair.net>; Richardson, Joyce
Subject: FW: Scheerle v. Brookdale Senior Living et al. [IWOV-NPCOL1.FID1229708]

Manton:



When will you provide these documents to us? Unless we have them before the weekend, we will not be able to complete the 30(b)(6) deposition on Wednesday.

Thanks,
Kelly

Kelly Jolley-
Special Counsel-
kjolley@mcnair.net -

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-----Original Message-----

From: Mullen, Carmen T. Law Clerk (Allison C. Coppage) [mailto:CMullenLC@sccourts.org]
Sent: Wednesday, November 07, 2012 6:27 PM
To: Grier, Manton M.
Cc: Jolley, Kelly; Wall, Susan; Huey, Linda; Chewning, Kathleen; Richardson, Joyce; Mitchell, Vickilyn; Ellington, S. Bronwyn
Subject: RE: Scheerle v. Brookdale Senior Living et al. [IWOV-NPCOL1.FID1229708]

Dear all -

Judge Mullen has completed the in camera review in the above reference matter. All documents submitted for this review need to be turned over.

Please feel free to contact me if I can be of any further assistance.

Allison C. Coppage
Law Clerk to The Honorable Carmen T. Mullen Fourteenth Judicial Circuit
102 Ribaut Road
P.O. Drawer 1128
Beaufort, SC 29901
Telephone (843) 255-5070
Facsimile (843) 522-8362
P Please consider the environment before printing this e-mail

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Jolley, Kelly

From: Jolley, Kelly
Sent: Monday, November 12, 2012 11:04 AM
To: 'Grier, Manton M.'; Mitchell, VickiLynn
Subject: RE: Scheerle [IWOV-NPCOL1.FID1229708]

Manton:

We look forward to receiving the additional documents. Please know, however, that we disagree with your characterization of this as discovery by consent. You did not appeal Judge Mullen's order on our motion to compel and she had jurisdiction over this case when she ordered these documents be produced. Your appeal only stays the issues on appeal.

Since, per your email this morning, you and your clients are not going to produce the internal investigation documents according to Judge Mullen's order, we will move ahead with our motion. We both know that we will get these documents eventually – the fact that your client can't find the documents it was required by law to create and submit even though it sent staff to the facility to conduct an investigation has me feeling even better about our cases at trial.

Kelly

MCNAIR
ATTORNEYS

Kelly Jolley
Special Counsel
kjolley@mcnair.net

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VCard | Bio URL | Web site

From: Grier, Manton M. [mailto:MGrier@nexsenpruet.com]
Sent: Monday, November 12, 2012 10:45 AM
To: Jolley, Kelly; Mitchell, VickiLynn
Subject: Scheerle [IWOV-NPCOL1.FID1229708]

Kelly:

My responses are in red. You do what you have to do regarding the threat for sanctions, but keep in mind that we are complying with this discovery by consent even though it should be stayed on appeal. We plan on filing a motion to enforce the stay regarding the discovery of the internal investigation files, even though we are willing to consent to getting you virtually all of the documents you have requested despite the appeal.

We should be giving you the additional documents today.

Manton



Exhibit 8

Appellants' Memorandum in Opposition to Scheerle's Motion for Sanctions

Dated January 23, 2013

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Janet Sue Scheerle,

Plaintiff,

vs.

Brookdale Senior Living, Inc., Southern
Assisted Living, LLC, and Sonia S. King,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-07-2654

**MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SANCTIONS
UNDER RULE 37, SCRPC**

Defendants Brookdale Senior Living Inc. ("Brookdale") and Southern Assisted Living, LLC ("Defendants") submit this Memorandum in Opposition to Plaintiff's Motion for Sanctions under Rule 37, SCRPC.

The Plaintiff's motion is inappropriate for two reasons:

1. This matter should be stayed, as the case is currently on appeal regarding the enforceability of an arbitration provision in the Plaintiff's Residency Agreement. Under Rule 205, SCACR, the Appellate Courts have exclusive jurisdiction over matters affected by the appeal. Because the arbitration provision that is the subject of the appeal provides for discovery, this matter is affected by the appeal and, therefore, should be stayed.
2. The Plaintiff's motion was premature and was filed before the Defendants had the opportunity to serve and file a timely Motion to Reconsider, which the Defendants served on November 19, 2012. There is no basis to sanction a party for taking procedural steps that are permitted under the South Carolina Rules of Civil Procedure.

3. Defendants' failure to produce documents only six days after the entry of an Order on a Motion to Compel is not sanctionable conduct under Rule 37. The Order granting the Motion to Compel did not set a time for compliance. The production of documents which may waive the claimed attorney-client privilege is an important issue for any party. The party must evaluate and weigh, prior to actually producing the documents, the risk and cost of permanently waiving a claim to privilege. Six days, which is less time than is allowed for a motion to reconsider under Rule 52, is simply is not an unreasonable amount of delay from the time of the entry of such an Order and cannot support sanctions.

BACKGROUND

This case is currently on appeal regarding the enforcement of an arbitration provision located in the Residency Agreement signed on the Plaintiff's behalf.

After the Plaintiff served her Complaint, the Defendants filed a Motion to Dismiss or Compel Arbitration on August 10, 2011. This Court denied that motion on October 28, 2011. The Defendants then filed a timely Motion to Reconsider the Order denying arbitration. The hearing on the Motion to Reconsider was delayed, and it took roughly ten months to set a hearing.

During the intervening time, the parties mediated the case on June 12, 2012. The mediation failed, and the Plaintiff then served discovery three days later on June 15. The Plaintiff denied the Defendants a 30-day extension but granted an extension until August 1, 2012 to answer discovery, which the Defendants produced on that day. The Defendants asserted attorney-client and work-product privileges as to the internal-investigation files. On August 2, Plaintiff filed a Motion to Compel Discovery.

On September 4, 2012, the Court held a hearing on the Defendants' Motion to Reconsider and the Plaintiff's Motion to Compel. The Court denied the Motion to Reconsider but partially granted the Motion to Compel. As to the internal-investigation files, the Court ordered the Defendants to produce them to the Court for an *in camera* inspection.

On September 7, 2012, Defendants filed a Notice of Appeal as to the enforceability of the arbitration provision. (Exhibit A).

On November 7, 2012, the Court ordered the Defendants' to produce the internal-investigation files through an email sent by the law clerk of the Honorable Carmen T. Mullen. (See Exhibit C to Plaintiff's Motion). Six days later, on November 13, the Plaintiff filed her Motion for Sanctions under Rule 37. This was filed before the Defendants had exhausted their procedural remedies and before they had the opportunity to file a Motion to Reconsider regarding the internal-investigation files. On November 19, 2012, Defendants served a timely Motion to Reconsider regarding the internal-investigation files. (Exhibit B).

ARGUMENT

- I. **THE PLAINTIFF'S MOTION SHOULD BE DENIED BECAUSE AN ORDER THAT MODIFIES THE PARTIES' ARBITRATION AGREEMENT, WHICH IS PENDING ON APPEAL, IS AN ORDER "AFFECTED BY THE APPEAL" AND, THEREFORE, SHOULD BE STAYED.**

Under Rule 205, SCACR, once a Notice of Appeal is filed, "the appellate court shall have exclusive over the appeal[.]" The lower court retains jurisdiction only on matters "not affected by the appeal." Rule 205, SCACR. "[T]he lower court may act only to enforce matters not stayed by the appeal." Arnal v. Fraser, 371 S.C. 512, 519, 641 S.E.2d 419, 422 (2007). A stay is automatic, meaning that a party need not file a motion to enforce the stay.

See Rule 241 (a), SCACR.

In Arnal, a father appealed several aspects of a divorce decree. The Court held that, although payment of child support and medical expenses were exceptions to the automatic stay, the family court lacked the jurisdiction to *modify* the final divorce order that was on appeal. Id. Because of the "jurisdictional bar of Rule 205" the family court could not modify a decree that was subject to an appeal. Id. at 520, 641 S.E.2d at 423; see also Wilson v. Walker, 340 S.C. 531, 532 S.E.2d 19 (Ct. App. 2000) (vacating contempt order for lack of jurisdiction where father was held in contempt for an order that was "affected" by the appeal); Wingate v. Wingate, 289 S.C. 574, 347 S.E.2d 878 (1985) (holding that family court lacked jurisdiction to change the amount of alimony during pendency of appeal).

Defendants' counsel found no cases addressing whether discovery orders are stayed while a motion to compel arbitration is pending on appeal, but cases from other jurisdictions are instructive. A case on point is Klepper v. SLL, Inc., 45 Fed.Appx. 136, 2002 WL 2005431 (3rd Cir. May 28, 2002) (unpublished and attached). In that case, the defendant sought a ruling that the dispute was governed by the Federal Arbitration Act ("FAA"). While that was pending, the district court ordered the parties to complete discovery. The Third Circuit, however, reversed and vacated the discovery order. Id. at *2. The court reasoned that "requiring the parties to submit to full discovery under the Federal Rules of Civil Procedure may unnecessarily subject them 'to the very complexities, inconveniences and expenses of litigation that they determined to avoid.'" Id. at *1.

In Roadbuilders Machinery Supply Co., Inc. v. Sennebogen, Inc., 2012 WL 1253265 (D. Kan. April 13, 2012) (unpublished and attached), the District Court of Kansas ordered discovery stayed while the court considered the arbitrability of the claims. The court noted that if the case proceeds to arbitration, the responsibility of determining the scope of discovery shifts to the arbiter. Thus, "[t]here is potential for wasted resources if the previously conducted discovery is not allowed by the arbitrator." Id. at *2; see also Merrill Lynch v. Coors, 357 F. Supp.2d 1277 (D. Colo. 2004) (holding that discovery should be stayed while the merits of arbitration are decided).

In this case, the arbitration clause in the Residency Agreement gives the arbiter the power to decide all disputes relating to the Plaintiff's stay at the Defendants' facility. (Exhibit C, Arbitration Provision). The issue of whether the arbitration agreement is valid is currently on appeal. Thus, the issue of whether the parties will arbitrate, rather than litigate, this case is on appeal and any discovery order would necessarily be "affected by the appeal." Rule 205, SCACR. The issue in the Court of Appeals is the method and manner to resolve this dispute, and any orders regarding the scope of discovery are premature until the Court of Appeals decides the appeal. Further, staying the enforcement of the discovery order prevents the waste of judicial resources if, for example, the arbiter is forced to address this issue after this Court has likewise decided it. Finally, and most importantly, if the Defendants are forced to produce the internal-investigation files it may act as a waiver in the related cases of O'Meara v. Brookdale Senior Living, et al. and Pruett v. Brookdale Senior Living, et al., both of which are likewise on appeal regarding the same arbitration issue.

Therefore, any discovery order in this case should be stayed pending a resolution in the Court of Appeals.

II. PLAINTIFF'S MOTION FOR SANCTIONS WAS PREMATURE, AS SHE SOUGHT TO SANCTION THE DEFENDANTS FOR AN ACT THEY WERE ALLOWED TO TAKE UNDER THE RULES OF CIVIL PROCEDURE.

The Plaintiff filed her Motion for Sanctions a mere six days after the Court concluded its *in camera* inspection. The Plaintiff's Motion sought to sanction the Defendants before allowing the Defendants to file a Motion to Reconsider, which the Defendants timely filed. There is simply no basis for sanctioning a party for taking action permitted by the Rules of Civil Procedure.

III. PLAINTIFF'S MOTION FOR SANCTIONS FOR FAILURE TO PRODUCE DOCUMENTS WITHIN SIX DAYS OF AN ORDER NOT SPECIFYING A TIME FOR PRODUCTION DOES ALLEGE CONDUCT SANCTIONABLE UNDER RULE 37.

The portions of Rule 37 which allows sanctions contains an important caveat. S.C.R. Civ. P. Rule 37(b)(2) and 37(c). The Court may impose various sanctions for the failure to produce documents in response to an Order on a Motion to Compel provided the Court does not find "that the failure was substantially justified or that other circumstances make an award of expenses unjust." *Id.*

South Carolina Rule of Civil Procedure 37 is substantially similar to the same federal rule and the restrictions forbidding an award of sanctions where the non-producing party's position was justified and reasonable is the same as the federal rule. When the South Carolina Rule of Civil Procedure is identical or substantially similar to the federal rule, it is appropriate to look to federal cases decided under the same rule for guidance. Dawkins v. Fields, 354 S.C. 58, 67, 580 S.E.2d 433, 437-38 (2003). A party defending against a motion to compel or for sanctions meets the "substantially justified" standard when there is a

genuine dispute or if reasonable people can disagree as to the appropriateness of the motion. Kemp v. Harris, 263 F.R.D. 293, 296-97 (D. Md. 2009), citing, Pierce v. Underwood, 487 U.S. 552, 565 (1988).

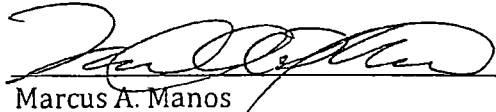
Here, there is a reasonable assertion of the attorney-client privilege as the investigation was directed by in-house counsel in anticipation of litigation and went far beyond the scope of an investigation required by DHEC regulations. The Order compelling production of the documents was only six days old when the Motion for Sanctions was filed. After that point, Defendants filed a Motion to Reconsider supported by an additional affidavit.

It makes no sense to sanction a party asserting reasonable rights within a reasonable time of a Court ruling. Now that the Court has disposed of the Motion to Reconsider, Defendants must weigh potential sanctions for non-compliance with preserving this issue for appellate review as the assertion of the privilege is important to Defendants in these actions.

CONCLUSION

Under Rule 205, SCACR, any discovery order should be stayed while this case is pending on appeal. A discovery order would be "affected by the appeal" as it affects the mode and method of resolving this dispute, and may impermissibly take the power away from the arbiter to rule on discover issues. Further, the Plaintiff's motion was premature, and sought sanctions for acts permissible under the South Carolina Rules of Civil

Procedure. Therefore, the Plaintiff's Motion for Sanctions should either be denied or stayed while this appeal is pending.



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Attorneys for Defendants Brookdale Senior
Living, Inc. and Southern Assisted Living, LLC

January 22 2013

Columbia, South Carolina

EXHIBIT A

Notice of Appeal

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-CP-07-2654

RECEIVED

SEP 07 2012

SC Court of Appeals

Janet Sue Scheerle....., Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC....., Appellants,

and

Sonia S. King....., Defendant.

NOTICE OF APPEAL

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC ("Appellants") appeals the Order of the Honorable Carmen Tevis Mullen, dated October 28, 2011, denying the Motion to Dismiss and Compel Arbitration filed by Brookdale Senior Living, Inc. and Southern Assisted Living, LLC. A copy of the Order is attached to this Notice of Appeal. Appellants received written notice of entry of this Order on November 3, 2011.

Appellants filed a Motion to Reconsider on November 11, 2011. A copy of that Motion is also attached to this Notice of Appeal. The lower Court denied this Motion from the bench at a hearing held on September 4, 2012. Although Appellants have not yet received the written order denying the Motion to Reconsider, this case is scheduled on

the trial roster for September 10, 2012, and the Appellants are appealing in advance of receiving the written order, which will be sent to the Court when received.



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Attorneys for Appellants
Brookdale Senior Living, Inc. and Southern Assisted
Living, LLC

September 7, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Janet Sue Scheerle,

Plaintiff,

vs.

Brookdale Senior Living, Inc., Southern
Assisted Living, LLC, and Sonia S. King,

Defendants.

RECEIVED
SEP 07 2012
IN THE COURT OF COMMON PLEAS
SC Court of Appeals

Case No. 2011-CP-077654

**MOTION TO RECONSIDER OR TO
ALTER OR AMEND THE JUDGMENT**

Pursuant to South Carolina Rules of Civil Procedure, including Rule 59, Defendants Brookdale Senior Living Inc. and Southern Assisted Living, LLC ("Defendants") move this Court to reconsider or alter or amend its Order Denying Defendants Motion to Dismiss and Compel Arbitration, received by Defendants' counsel on November 3, 2011.

The grounds for this motion are as follows:

The FAA governs the Residency Agreement

1. The Court failed to apply the Federal Arbitration Act ("FAA") to a Residency Agreement that involves interstate commerce. (The Residency Agreement is attached as Exhibit A to Defendants' Original Motion). The United States Supreme Court expanded the scope of the FAA in Allied-Bruce Terminix Cos. Inc. v. Dobson, 513 U.S. 265, 269 (1995). There is no requirement that interstate commerce be "substantially involved," or that the parties contemplate an interstate transaction at the time they entered the agreement. To satisfy the FAA, an agreement must simply "involve commerce." The courts have held that this is a relatively easy threshold to meet.

2. In this case, the Residency Agreement involves interstate commerce because it specifies that residents are to receive meals from the facility, and the food to prepare those meals comes from a Texas corporation. Further, medical supplies administered to the residents come from a Wisconsin Corporation. Finally, the payments made on Ms. Scheerle's behalf are addressed to Brookdale Senior Living Inc. ("Brookdale"), a Delaware corporation, and sent to a Wells Fargo bank in Texas, where they ultimately end up in Brookdale's corporate offices in Milwaukee, Wisconsin.

The Arbitration Agreement is Not Unconscionable and, In the Alternative, is Severable

3. The arbitration agreement found in the Residency Agreement is not unconscionable. The contract was entered into knowingly by Ms. Scheerle, with full knowledge that she and her responsible party should consult with an attorney before signing. Considering the time and expenses saved through arbitration, the terms are not unconscionable. In the alternative, the arbitration stands alone and is severable. The portions of the Residency Agreement that this Court found unconscionable were not part of the actual, specific arbitration clause. Because the Court would not need to re-write the arbitration clause, there was no basis for failing to sever the parts of the Residency Agreement that the Court found unconscionable.

Ms. Scheerle is Bound by the Residency Agreement

4. Finally, Ms. Scheerle is bound by the Residency Agreement because either she signed it, or a responsible party signed on her behalf and with her authority. To the extent an issue exists over whether Ms. Scheerle is bound by the Residency Agreement, such issues must be decided by an arbiter not a court.

5. Defendants, therefore, respectfully ask the Court to reconsider its Order Denying Defendants' Motion to Dismiss and Compel Arbitration.



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Attorneys for Defendants Brookdale Senior
Living, Inc. and Southern Assisted Living, LLC

November 11, 2011

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Janet Sue Scheerle

☐ Plaintiff

v.

Brookdale Senior Living, Inc., Et Al.

☒ Defendant.

11 NOV 15 PM 1:57

CASE NO.
2011-CP-07-2654

BEAUFORT COUNTY, S.C. MOTION AND ORDER INFORMATION
CLERK OF COURT FORM AND COVER SHEET

Plaintiff's Attorney: Kelly M. Jolley, Bar No. 72573 Address: Post Office Drawer 3, Hilton Head, SC 29938 phone: 843-785-2171 fax: e-mail: other:		Defendant's Attorney: Manton M. Grier, Jr., Bar No. 70525 Address: Post Office Drawer 2426, Columbia, SC 29202 phone: 803-540-2116 fax: 803-727-1439 e-mail: MGrier@nexsenpruet.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion to Reconsider Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. November 11, 2011 Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

RECEIVED

NOV 13 2011

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Janet Sue Scheerle,

Plaintiff,

vs.

Brookdale Senior Living, Inc., Southern
Assisted Living, LLC, and Sonia S. King,

Defendants.

IN THE COURT OF COMMON PLEAS

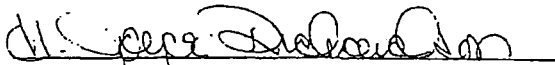
Case No. 2011-CP-07654

CERTIFICATE OF SERVICE

NOV 15 PM 1:57
BEAUFORT COUNTY, S.C.
CLERK OF COURT

The undersigned certifies that a copy of the foregoing **MOTION TO RECONSIDER OR, TO ALTER OR AMEND THE JUDGMENT** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail on the 11th day of November, 2011, to the address shown below.

Kelly M. Jolley, Esquire
McNAIR LAW FIRM
Post Office Drawer 3
Hilton Head Island, South Carolina 29938


NEXSEN PRUET, LLC

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-2654

JANET SUE SCHEERLE

(Jury Trial Requested)

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC, and
SONIA S. KING,

ORDER DENYING DEFENDANTS,
BROOKDALE SENIOR LIVING, INC.
AND SOUTHERN ASSISTED LIVING,
LLC'S MOTION TO DISMISS AND
COMPEL ARBITRATION

Defendants.

2011 OCT 28 PM 2:20
JANET SUE SCHEERLE
BEAUFORT COUNTY S.C.
CLERK OF COURT

This matter is before me on Defendants Brookdale Senior Living, Inc.'s Southern Assisted Living, LLC's (collectively the Defendants) Motion to Dismiss and Compel Arbitration on the claims asserted by Plaintiff Janet Sue Scheerle (Plaintiff or Mrs. Scheerle). A hearing was held on October 19, 2011 at 2:00 p.m. in which I heard oral arguments from Defendants' counsel, Manton R. Grier, Jr., and Plaintiff's counsel, Kelly M. Jolley.

The basis for Defendants' Motion is arbitration language found in the arbitration provision contained in the Residency Agreement between Janet Sue Scheerle and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head (Carolina House), signed by Mrs. Scheerle's daughter Julie Jones on July 9, 2010. Plaintiff opposed enforcement of the arbitration clause found in the Residency Agreement on three grounds: (1) the Federal Arbitration Act (FAA) does not apply to this action because the Residency Agreement does not involve interstate commerce, (2) the arbitration and limitation of liability clauses contained in the Residency Agreement are unconscionable, and (3) no one with the authority to bind Janet Sue Scheerle to arbitration executed the Residency Agreement on her behalf. The Court is persuaded by Plaintiff's arguments

opposing the Motion to Compel Arbitration and accordingly denies Defendants' Motion to Dismiss and Compel Arbitration.

Defendants have not attempted to compel arbitration under the South Carolina Arbitration Act. Instead, Defendants contend that the FAA preempts the South Carolina state statute and compels arbitration in this case. However, I find that the Residency Agreement between Janet Sue Scheerle and Carolina House does not involve interstate commerce. Therefore, this case is not subject to the FAA. The South Carolina Supreme Court in *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) held that the FAA was inapplicable to a similar contract for patient and residency services. The Court explained that the analysis must focus on the contract between the parties, and whether that contract involves interstate commerce. The Residency Agreement here is a contract for services—accommodations, meals, utilities, housekeeping, laundry and recreation—all of which were to be provided to Plaintiff in South Carolina. The provision of these contractual services to Mrs. Scheerle at the Carolina House facility in Hilton Head does not involve interstate commerce. Defendants argue that many of their suppliers are located out of state, as is their bank and their corporate office. However, the fact that Defendants choose to engage out of state suppliers does not change the location or purpose of the Residency Agreement. Moreover, the Affidavit of Timothy J. Caesar attached to Defendants' Motion does not contain any facts from which one could conclude that any of the basic services Carolina House contracted to provide to Mrs. Scheerle involve interstate commerce.

Defendants argued that *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531 (2001) and *Allied Bruce-Terminal Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) changed the analysis previously supported in *Timms*. However, these cases clarify that a transaction occurring via a contract must in fact involve interstate commerce to enforce an arbitration provision in the

contract. Neither case alters our Supreme Court's holding in *Timms* that arbitration cannot be compelled pursuant to the FAA when the underlying transaction does not involve interstate commerce. The Residency Agreement does not involve interstate commerce and Defendants' Motion to Dismiss and Compel Arbitration is denied.

Even if the Residency Agreement did involve interstate commerce so as to bring it under the purview of the FAA, I find that the arbitration and limitation of liability clauses in the Residency Agreement are unconscionable and should be struck in their entirety from the contract. Among other provisions, the arbitration and limitation of liability clauses in the Residency Agreement significantly restrict discovery, limit compensatory damages, and prohibit punitive damages. Both the "Arbitration Provision" (V.A.) and the "Limitation of Liability Provision" (V.B.) are included in Section V of the Residency Agreement. Subsection V.A(13) expressly incorporates by reference the Limitation of Liability Provision into the Arbitration Provision. Accordingly, if the Limitation of Liability Provision is unconscionable, the arbitration Provision that expressly incorporates the Limitation of Liability Provision in its entirety must be unconscionable as well.

Taken together, these provisions restrict discovery, including a limitation on depositions to only those of experts, and limits liability for any "claims by, or on behalf of, a Resident ... arising out of the care or treatment received by the Resident...." For example, all "[n]et economic damages" awarded must be "offset by any collateral source payments such as payments made by medical insurance." Additionally, the provisions limit noneconomic damages, including pain and suffering, to "a maximum of \$250,000.00;" prohibit payment of "[i]nterest and/or late fees on unpaid assisted living charges," and preclude any award for punitive damages. Generally, "courts will not enforce a contract which is violative of public

policy, statutory law, or provisions of the Constitution." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007). I find that the limitations on damages and discovery unilaterally imposed upon Mrs. Scheerle in the Residency Agreement are substantively unconscionable and violate public policy. Accordingly, even if the FAA were applied to the Residency Agreement, Sections V.A. and V.B. of the Residency Agreement ("Arbitration and Limitation of Liability Provision") are unconscionable and unenforceable in their entirety. See, e.g. *Simpson*, 373 S.C. at 33-37, 644 S.E.2d at 673-74.

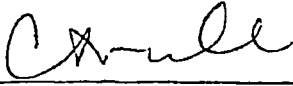
Finally, Plaintiff argues that Mrs. Scheerle's acquiescence to the arbitration agreement in the Residency Agreement is invalid. Mrs. Scheerle argued that she did not execute the Residency Agreement, that Julie Jones, Mrs. Scheerle's daughter executed the Residency Agreement as Mrs. Scheerle "Legal Representative." However, Plaintiff produced evidence at the hearing showing that Julie Jones was not Mrs. Scheerle's attorney-in-fact under Mrs. Scheerle's durable power of attorney at the time the Residency Agreement was signed. Mrs. Scheerle presented an instrument designating Jacqueline E. Lynn, not Julie Jones, as Mrs. Scheerle's attorney-in-fact when the Residency Agreement was signed. Accordingly, Ms. Jones did not have legal authority to bind Mrs. Scheerle to arbitration.

The proper forum for determining whether an arbitration clause is enforceable in South Carolina is the trial court rather than arbitration. See, *Simpson*, 373 S.C. at 23, 644 S.E.2d at 667-68 ("[T]he trial court should determine the threshold validity of the arbitration agreement."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the

trial court is whether an arbitration agreement exists between the parties.") To the extent that the parties contest whether Julie Jones had the authority to bind Mrs. Scheerle to arbitration, the parties must engage in discovery regarding the matter, precluding dismissal of this case at this time.

IT IS NOW THEREFORE ORDERED, this action shall proceed on the jury docket for the Fourteenth Judicial Circuit, Beaufort County, South Carolina. The Defendants shall have fifteen (15) days from the date of this Order to file responsive pleadings.

AND IT IS SO ORDERED.

By: 
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

October 28, 2011
Beaufort, South Carolina

MCNAIR
ATTORNEYS

November 1, 2011

Kelly M. Jolley

kjolley@mcnair.net
T (843) 785-2171
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Manton M. Grier, Jr.
Nexsen Pruet, LLC
P.O. Drawer 2426
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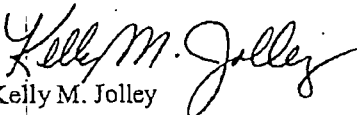
Re: Janet Sue Scheerle vs. Brookdale Senior Living, Inc.,
Southern Assisted Living, LLC, and Sonia S. King
Case No.: 2011-CP-07-2654

Dear Manton:

Please find enclosed the Order Denying Defendants, Brookdale Senior Living, Inc. and Southern Assisted Living, LLC's Motion to Dismiss and Compel Arbitration which was filed with the Court on October 28, 2011. Also enclosed is a Certificate of Service for the Order.

Very truly yours,

McNAIR LAW FIRM, P.A.


Kelly M. Jolley

KMJ:ich
Enclosure

McNair Law Firm, P.A.
Shelter Cove Executive Park
23-B Shelter Cove Lane, Suite 400
Hilton Head Island, SC 29928

Mailing Address
Post Office Drawer 3
Hilton Head Island, SC 29928

mcnair.net

RECEIVED

NOV - 3 2011

NEEDEN FIRM

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-CP-07-2654

RECEIVED

SEP 07 2012

SC Court of Appeals

Janet Sue Scheerle....., Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC....., Appellants,

and

Sonia S. King....., Defendant.

PROOF OF SERVICE

The undersigned certifies that a copy of the Notice of Appeal has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid in the United States Mail, on the 7th day of September, 2012, to the address shown below.

Kelly M. Jolley, Esquire
McNAIR LAW FIRM, P.A.
Shelter Cove Executive Park
23-B Shelter Cove Lane, Suite 400
Hilton Head Island, South Carolina 29938

The Honorable Jerri Ann Roseneau
Clerk of Court, Beaufort County
102 Ribaut Road, Room 208
Post Office Box 1128
Beaufort, South Carolina 29901


NEXSEN PRUIT, LLC

EXHIBIT B

Motion to Reconsider
Or, to Alter or Amend
the Judgment

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Janet Sue Scheerle

☐ Plaintiff

v.

Brookdale Senior Living, Inc., Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-07-2654

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Kelly M. Jolley, Bar No. 72573 Address: Post Office Drawer 3, Hilton Head, SC 29938 phone: 843-785-2171 fax: e-mail: other:	Defendant's Attorney: Manton M. Grier, Jr., Bar No. 70525 Address: Post Office Drawer 2426, Columbia, SC 29202 phone: 803-540-2116 fax: 803-727-1439 e-mail: MGrier@nexsenpruet.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Reconsider November 7, 2012 Ruling Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. November 19, 2012 Signature of Attorney for ☐ Plaintiff / ☒ Defendant	
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: Date:
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Janet Sue Scheerle,
Plaintiff,

Case No. 2011-CP-07-2654

vs.

Brookdale Senior Living, Inc., Southern
Assisted Living, LLC, and Sonia S. King,
Defendants.

~~MEMORANDUM IN SUPPORT OF~~
**MOTION TO RECONSIDER OR, TO
ALTER OR AMEND THE JUDGMENT**

Pursuant to South Carolina Rules of Civil Procedure, including Rule 59, Defendants Brookdale Senior Living Inc. ("Brookdale") and Southern Assisted Living, LLC (collectively "Defendants") move this Court to reconsider or alter or amend its Order compelling Defendants to produce the internal investigation files that were generated at the direction of Brookdale's in-house counsel.

The grounds for this motion are as follows:

1. This Motion to Reconsider is timely served within ten day of Defendants' written receipt of the Court's order granting Plaintiff's Motion to Compel the internal investigation files created by Brookdale. The Court did not provide a specific basis as to why it was ordering the Defendants to produce the files. The Defendants received written notice of the Court's ruling on November 7, 2012, and this Motion is being served within ten days of that Order. (November 17 is a Saturday, and the next business day is today, November 19).

2. The investigation involving Sonia King was not a garden-variety investigation

done in the ordinary course of Brookdale's business. Although South Carolina law requires facilities to report certain incidents, the law does not require an organization to perform a detailed and thorough investigation of employees who were not even witnesses to the alleged abuse. In this case, the investigation in this case went far beyond what is required under the statute and regulations, and was done in anticipation of litigation, and not for purposes of regulatory reporting.

3. Typically, regulatory reporting of incidents is done at a local level, handled by a facility's executive director and his or her employees. In this case, however, the investigation was directed by Brookdale's in-house counsel on a national level, with the investigation performed by regional employees. In fact, the facility's executive director was not directly involved in the internal investigation files that the Defendants contend are privileged.

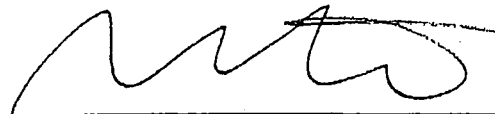
4. The primary purpose of this Motion to Reconsider is to ask the Court to reconsider its ruling and to present the Court with the distinction between investigations that are required to be reported under South Carolina law, and those investigations that go far beyond what is required to be reported and instead are done in anticipation of litigation.

5. Because the primary purpose of conducting the internal investigation was for the purpose of preparing a defense in litigation, the internal investigation files should be protected by the attorney-client privilege, the attorney work-product doctrine, or both.

The Defendants, therefore, respectfully request that the Court reconsider its ruling.

6. This Motion is supported by the affidavit of Timothy J. Cesar, which is attached, the pleadings, the applicable law, and the documentary evidence produced in this

case. The Motion is further supported by a Memorandum in Support of the Motion to Reconsider, which Defendants intend to file and serve on November 20, 2012.



Marcus A. Manos
Manton M. Grier, Jr.
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MManos@nexsenpruet.com
MGrier@nexsenpruet.com
Attorneys for Defendants Brookdale Senior
Living, Inc. and Southern Assisted Living, LLC

November 19, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Janet Sue Scheerle,

Plaintiff,

Case No. 2011-CP-07-2654

vs.

CERTIFICATE OF SERVICE

Brookdale Senior Living, Inc., Southern
Assisted Living, LLC, and Sonia S. King,

Defendants.

The undersigned certifies that a copy of the foregoing **MOTION TO RECONSIDER OR, TO ALTER OR AMEND THE JUDGMENT** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid, in the United States Mail on the 19th day of November, 2012, to the address shown below.

Susan Taylor Wall
Kelly M. Jolley, Esquire
McNAIR LAW FIRM
Post Office Drawer 3
Hilton Head Island, South Carolina 29938



NEXSEN PRUET, LLC

Columbia, South Carolina

EXHIBIT C

Arbitration Agreement (excerpted from Residency Agreement)

following the transfer. We will provide a written explanation for termination with less than thirty (30) days notice.

D. TERMINATION BY EITHER PARTY. Either party may terminate this Agreement immediately upon written notice in the event of your death or if a physician certifies to us in writing, based upon an examination prior to moving out, that you must be relocated due to your health. You will be charged a storage fee equal to the Monthly Service Rate until all of your belongings are removed from Community.

V. ARBITRATION AND LIMITATION OF LIABILITY PROVISION. Should any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.

A. ARBITRATION PROVISION.

1. Any and all claims or controversies arising out of, or in any way relating to, this Agreement or your stay at the Community, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a jury will not decide their case. The South Carolina Revised Code concerning arbitration shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.
2. A demand for Arbitration by you, your legal representative, a person or organization acting on your behalf with your consent, or the personal representative of the estate of your estate (collectively "Resident Party") shall be made in writing and submitted to CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza, Greenville, SC 29601, via certified mail, return receipt requested. Demand for Arbitration by us shall be made in writing and submitted to you or your agent, representative, successor or assign and/or your legal representative via certified mail, return receipt requested.
3. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.
4. The arbitration panel shall be composed of one (1) arbitrator. Subject to the requirements of section A.5. herein, the parties shall agree upon an arbitrator that must either be a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience as an attorney. If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then each party will select an arbitrator. These arbitrators will act only for the purpose of appointing a sole arbitrator to hear the case, subject to the criteria above. If

either party fails to select their arbitrator within the (20) days mentioned above, they effectively forfeit their right to choose an arbitrator. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.

5. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.
6. Discovery in the arbitration proceeding shall be governed by the South Carolina Rules of Civil Procedure. However, discovery shall be modified by the following, unless agreed to otherwise by the party to whom the request is made:
 - a. The Resident Party shall provide us with permissible discovery per the South Carolina Rules of Civil Procedure within twenty (20) days after Demand for Arbitration is received (and we shall reimburse Resident Party \$0.25 per page).
 - b. We shall provide the Resident Party with permissible discovery per the South Carolina Rules of Civil Procedure within twenty (20) days after the Demand for Arbitration is received (and Resident Party, unless proven indigent, shall reimburse us \$0.25 per page).
 - c. The only depositions allowed shall be of experts. No other individuals may be deposed.
 - d. Resident Party shall designate any and all expert witnesses within sixty-five (65) days after Demand for Arbitration is submitted.
 - e. We shall have thirty (30) days after Resident Party's expert designation is received in which to depose such experts.
 - f. We shall designate any and all experts one hundred and fifteen (115) days after Demand for Arbitration is submitted.
 - g. Resident Party shall have thirty (30) days after our expert designation is received in which to depose such experts.
 - h. Any report or affidavit of an expert, and a list of all records contained in the expert's file, must be exchanged by the parties no later than ten (10) working days before the date of the expert's deposition.
 - i. The following shall be exchanged no later than fourteen (14) working days before the arbitration hearing:
 - (1) List of witnesses to be called at the arbitration hearing (full name, title, address and phone number if known) and an outline of each witness' intended testimony;
 - (2) List of documents to be relied upon at the arbitration hearing;
 - (3) Any sworn recorded statements to be relied upon at the arbitration hearing and included therewith the full name, title, address and phone number of the person making the sworn statement.
 - j. The arbitration hearing shall be held no later than one hundred and eighty (180) days after Demand for Arbitration is submitted, or within a reasonable time thereafter if a conflict arises with the arbitrator's calendar.

7. The arbitrator shall designate a time and place within the county in which the Community is located, for the arbitration hearing and shall provide thirty (30) days' notice to the parties of the arbitration hearing.
8. The arbitrator shall apply the South Carolina Rules of Evidence and South Carolina Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, South Carolina law except as otherwise stated in this Arbitration Provision.
9. The arbitration decision should be signed by the arbitrator and delivered to the parties and their counsel within thirty (30) days following the conclusion of the arbitration. The decision shall set forth in detail the arbitrator's findings of fact and conclusions of law.
10. The arbitrator's decision shall be final and binding without the right to appeal.
11. The arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent. The parties shall bear their own attorneys' fees and costs and hereby expressly waive any right to recover attorney fees or costs, actual or statutory.
12. The arbitration proceeding shall remain confidential in all respects, including the Demand for Arbitration, all arbitration filings, deposition transcripts, documents produced or obtained in discovery, or other material provided by and exchanged between the parties and the arbitrator's findings of fact and conclusions of law. Following receipt of the arbitrator's decision, each party agrees to return to the producing party within thirty (30) days the original and all copies of documents exchanged in discovery and at the arbitration hearing, except those documents required to be retained by counsel pursuant to law. Further, the parties to the arbitration also agree not to discuss the amount of the arbitration award or any settlement, the names of the parties, or name/location of the Community except as required by law.
13. The Limitation of Liability Provision below is incorporated by reference into this Arbitration Provision.
14. The Arbitration Provision and the Limitation of Liability Provision below shall survive your death.

B. LIMITATION OF LIABILITY PROVISION. *Read Carefully Before Signing*

1. The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement.
2. Liability for any claim brought by a party to this Agreement against the other party, including but not limited to a claim by us for unpaid Basic Service Rate or Personal Service Rate or other charges, or a claim by, or on behalf of you, Resident Party or your estate, agent or legal representative, arising out of the care or treatment received by you or your occupancy or presence at the Community, including, without limitation, claims for medical negligence, shall be limited as follows:
 - a. Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance.
 - b. Non-economic damages, such as pain and suffering, shall be limited to a maximum of \$250,000.00.

- c. Interest and/or late fees on unpaid assisted living charges shall not be awarded.
 - d. Punitive damages shall not be awarded.
3. Should sub-sections a, b, c and/or d, provided above, be deemed invalid, the validity of the remaining sub-sections will not be affected.

C. BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISIONS.

The parties' decision to select arbitration is supported by the potential cost-effectiveness and time-savings offered by selecting arbitration, which may avoid the expense and delay of judicial resolution in the court system. The parties' decision to select arbitration and to agree to a limitation of liability also are supported by the potential benefit of preserving the availability, viability, and insurability of an assisted living company for the elderly and disabled in South Carolina, by limiting such assisted living company's exposure to liability. With this Agreement, we are better able to offer our services and accommodations at a rate that is more affordable to you. In terms of the time-savings offered by selecting arbitration, the parties recognize that selecting a quick method of resolution is potentially to a Resident's advantage.

You or your legal representative understands that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability provision. The parties agree that the reasons stated above are proper consideration for the acceptance of the Arbitration and Limitation of Liability Provisions. The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.

The parties to this Agreement further understand that a jury will not decide their case.

VI. MISCELLANEOUS.

- A. **WAIVER OF TRIAL BY JURY.** If a court determines that the Arbitration Provision provided above is invalid, the parties express their desire to waive a jury trial and resolve any claims in the appropriate court solely before a judge.
- B. **NON-DISCRIMINATION.** We operate on a non-discriminatory basis and afford equal treatment and access to services to eligible persons regardless of race, religion, color, national origin, sex, disability or any other category protected by applicable law.
- C. **RISK AGREEMENT.** You are responsible for your personal, financial and health care decisions. You are also responsible for maintaining health, personal property, liability, automobile (if applicable), and other insurance coverages in adequate amounts. You agree to obtain insurance in an amount adequate to cover your personal property and your general liability. You acknowledge that we do not insure your person or property. You understand and agree that:
 - 1. We may encourage you to participate in community, leisure, and social activities and to maintain an appropriate level of independence in activities of daily living, as well as your personal and financial affairs;
 - 2. Independent activities, responsibility for personal, financial, and health care decisions, and lifestyle and care preferences may involve risks of personal injury and/or property damage or loss;
 - 3. The standard of service for an assisted living community does not include one-on-one care, assistance or supervision, e.g., one resident assistant for each Resident, or immediate response to non-emergent needs. There may be short and long periods of time

ATTACHMENT 1

UNPUBLISHED DECISION

Klepper v. SLI, Inc., 45 Fed.Appx. 136, 2002
WL 2005431 (3rd Cir. May 28, 2002)

Westlaw

Page 1

45 Fed.Appx. 136, 2002 WL 2005431 (C.A.3 (Pa.)), 28 Employee Benefits Cas. 2395
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 45 Fed.Appx. 136, 2002 WL 2005431 (C.A.3 (Pa.)))

H

This case was not selected for publication in the
 Federal Reporter.

Not for Publication in West's Federal Reporter See
 Fed. Rule of Appellate Procedure 32.1 generally
 governing citation of judicial decisions issued on or
 after Jan. 1, 2007. See also Third Circuit LAR,
 App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)

United States Court of Appeals,
 Third Circuit.

Edward M. KLEPPER; Mediator,
 v.

SLI, INC. f/k/a Chicago Miniature Lamp, Inc.;
 Chicago Miniature Lamp, Inc.; Chicago Miniature
 Lamp, Inc. 1995 Incentive and Non-Statutory Stock
 Option Plan; Chicago Miniature Lamp, Inc. Incentive
 and Non-Statutory Stock Option Grant; Frank
 M. Ward, President of SLI, Inc. f/k/a Chicago
 Miniature Lamp Co., Inc. SLI, Inc.; Chicago Mini-
 ature Lamp, Inc.; Chicago Miniature Lamp,
 Inc. 1995 Incentive and Non-Statutory Stock Option
 Plan; Chicago Miniature Lamp, Inc. Incentive and
 Non-Statutory Stock Option Grant; Frank M. Ward,
 Appellants.

No. 01-2848.

Argued April 23, 2002.

Decided May 28, 2002.

Former employee sued employer for breach of
 contract and violation of state wage laws in connection
 with employee's desire to exercise stock options.
 Employer sought ruling on arbitrability under
 option agreement's arbitration clause. The United
 States District Court for the Middle District of
 Pennsylvania, Yvette Kane, J., issued full discovery
 order. Employer sought interlocutory appeal. The
 Court of Appeals, Scirica, Circuit Judge, held that:
 (1) discovery order was appealable under Federal
 Arbitration Act, and (2) discovery order should
 have been preceded by finding of non-arbitrability.

Vacated and remanded.

West Headnotes

[1] Alternative Dispute Resolution 25T 196

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement,
 and Contest

25Tk190 Stay of Proceedings Pending Arbitration

25Tk196 k. Particular Cases. Most
 Cited Cases

(Formerly 33k23.9 Arbitration)

Court of Appeals had jurisdiction to hear appeal
 from district court's full discovery order in
 breach of contract action arising from dispute over
 stock option agreement containing arbitration
 clause; discovery order in essence constituted declination
 to stay litigation pending arbitration and was
 immediately appealable. 9 U.S.C.A. §§ 3, 16(b).

[2] Alternative Dispute Resolution 25T 154

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk150 Operation and Effect

25Tk154 k. Effect on Pending Action.

Most Cited Cases

(Formerly 33k8 Arbitration)

Federal district court should not have required
 parties in breach of contract action involving stock
 option agreement containing arbitration clause to
 submit to full discovery without first determining
 non-arbitrability, i.e. without examining scope and
 applicability of arbitration clause. 9 U.S.C.A. § 3.

*137 On Appeal from the United States District
 Court for the Middle District of Pennsylvania. D.C.
 Civil Action No. 99-cv-02256. (Honorable Yvette
 Kane). Michael A. Pavlick (Argued), Kirkpatrick &
 Lockhart, Pittsburgh, Pennsylvania, for Appellants.

45 Fed.Appx. 136, 2002 WL 2005431 (C.A.3 (Pa.)), 28 Employee Benefits Cas. 2395
(Not Selected for publication in the Federal Reporter)
(Cite as: 45 Fed.Appx. 136, 2002 WL 2005431 (C.A.3 (Pa.)))

Frank P. Clark (Argued), Camp Hill, Pennsylvania,
for Appellee.

Before SCIRICA, RENDELL, and NOONAN,^{FN*}
Circuit Judges.

FN* The Honorable John T. Noonan, Jr.,
United States Circuit Judge for the Ninth
Judicial Circuit, sitting by designation.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

**1 Defendant appeals a discovery order on the ground that it was the equivalent of a refusal to enforce an arbitration clause in violation of the Federal Arbitration Act.

I.

Our review over legal issues is plenary. *Sandvik v. Advent Int'l Corp.*, 220 F.3d 99, 102 (3d Cir.2000).

*138 II.

[1] Before considering the merits of defendant's appeal, we must determine whether we have appellate jurisdiction. Section 16 of the Federal Arbitration Act provides that an appeal may be taken from an order refusing to stay an action pending arbitration pursuant to FAA 9 U.S.C. § 3.^{FN1} See 9 U.S.C. § 16(a)(1)(A); *Smith v. Equitable*, 209 F.3d 268, 272 (3d Cir.2000) ("Section 16(b) makes [it] clear that with respect to an interlocutory order issued in an ongoing proceeding, any order favoring litigation over arbitration is immediately appealable...."); *Corpman v. Prudential-Bache Securities, Inc.*, 907 F.2d 29, 30 (3d Cir.1990) (per curiam) (stating that when a district court's order "is in essence an order refusing to stay [litigation] under section 3 of the Federal Arbitration Act," we have jurisdiction to hear an appeal under FAA 9 U.S.C. § 16).

FN1 F.A.A. 9 U.S.C. § 3 provides, "If any suit or proceeding be brought ... upon an

issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Here, plaintiff Edward Klepper seeks to exercise stock options under a stock option incentive plan administered by his former employer SLI, Inc. The SLI stock option incentive plan contains an arbitration clause providing that "[a]ny dispute or disagreement which shall arise under or as the result of this Option Grant shall be settled by an arbitrator." Rather than submit his stock option claim to arbitration, plaintiff brought this suit for breach of contract and violation of the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1.^{FN2}

FN2. Klepper's Complaint alleged four counts: a breach of contract claim (Count I), the state law WPCL claim (Count II), and two ERISA claims (Count III and IV). The two ERISA claims were dismissed and are not on appeal here.

Defendant has requested a ruling on the arbitrability of the stock option claim. On June 22, 2001, the District Court issued an order requiring the parties to complete discovery "on all pending issues, including the stock option issue." In so doing, it appears the district judge may have permitted the litigation to proceed without a prior ruling on the arbitrability issue. Or she may have simply wanted the parties to develop a record on the arbitrability of the stock option claims. Cf. *Suarez-Valdez v. Shearson Lehman/American Exp., Inc.*, 858 F.2d 648, 649 (11th Cir.1988) (Tjoflat, J., concurring) ("The district court erred in refusing to

45 Fed.Appx. 136, 2002 WL 2005431 (C.A.3 (Pa.)), 28 Employee Benefits Cas. 2395
(Not Selected for publication in the Federal Reporter)
(Cite as: 45 Fed.Appx. 136, 2002 WL 2005431 (C.A.3 (Pa.)))

stay discovery. An agreement to arbitrate is an agreement to proceed under arbitration and not under court rules [like the Fed. R. Civ. P.]", quoted in *Corpman*, 907 F.2d at 31. We are not certain, but to move this matter along, we hold the District Court's Order "in essence" constituted a declination to stay litigation pending arbitration under FAA 9 U.S.C. § 3. Therefore we have jurisdiction to hear defendant's appeal from the Order of June 22, 2001.

III.

[2] The Federal Arbitration Act "federalizes arbitration law" and "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate...." *John Hancock Mutual Life Ins. v. Olick*, 151 F.3d 132, 136 (3d Cir.1998). See also *139 *Seus v. Nuveen & Co.*, 146 F.3d 175, 178 (3d Cir.1998) (asserting the FAA was enacted to make agreements to arbitrate enforceable to the same extent as other contracts); *Sharon Steel Corp. v. Jewell Coal*, 735 F.2d 775, 778 (3d Cir.1984) (stating the FAA reflects "a legislative determination of the desirability of arbitration as an alternative to litigation...."). Accordingly, FAA § 3 provides that "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration," the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. Thus requiring the parties to submit to full discovery under the Federal Rules of Civil Procedure may unnecessarily subject them "to the very complexities, inconveniences and expenses of litigation that they determined to avoid." *Suarez*, 858 F.2d at 649 (Tjoflat, J., concurring).

IV.

**2 For these reasons, we will vacate the District Court's discovery order of June 22, 2001 and remand for examination of the scope and applicability of the stock option plan's arbitration clause in accordance with *Blair v. Scott*, 283 F.3d 595, 604 (3d Cir.2002) (examining the enforceability of an

arbitration agreement under basic contract principles) and *Hancock*, 151 F.3d at 137 (describing "the threshold questions a district court must answer before compelling or enjoining arbitration...."). Of course, to the extent discovery is appropriate on the arbitrability issue, we leave that to the sound discretion of the able District Judge.

C.A.3 (Pa.),2002.

Klepper v. SLI, Inc.

45 Fed.Appx. 136, 2002 WL 2005431 (C.A.3 (Pa.)), 28 Employee Benefits Cas. 2395

END OF DOCUMENT

ATTACHMENT 2

UNPUBLISHED DECISION

Roadbuilders Machinery Supply Co., Inc. v.
Sennebogen, Inc., 2012 WL 1253265 (D. Kan.
April 13, 2012)

Westlaw.

Page 1

Slip Copy, 2012 WL 1253265 (D.Kan.)
(Cite as: 2012 WL 1253265 (D.Kan.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.
ROADBUILDERS MACHINERY SUPPLY CO.,
INC., a Kansas Corporation, et al., Plaintiffs,
v.
SENNEBOGEN, INC., Defendant.

Civil Action No. 11-2681-KHV-DJW.
April 13, 2012.

Michael P. Healy, The Healy Law Firm, LLC, Kansas City, MO, for Plaintiffs.

Todd E. Shadid, Klenda Austerman-Wichita, Wichita, KS, for Defendant.

MEMORANDUM AND ORDER

DAVID J. WAXSE, United States Magistrate Judge.

*1 Pending before the Court are Plaintiffs' Motion to Serve Discovery (ECF No. 15) and Defendant's Motion to Stay Planning Conference and Scheduling Order (ECF No. 18). Plaintiffs move the Court for leave to serve discovery on Defendant, including interrogatories and requests for production of documents. Defendant moves the Court for an order staying the planning conference and issuance of the scheduling order until the Court rules on Defendant's Motion to Dismiss or Stay Proceedings and Compel Arbitration (ECF No. 6). For the reasons set forth below, the Court grants Defendant's motion to stay and denies Plaintiffs' motion to serve discovery.

I. Background Facts

Plaintiffs filed this action on December 16, 2011, alleging that Defendant unlawfully terminated Plaintiffs' Sennebogen equipment dealership. Defendant filed its Motion to Dismiss or Stay Proceedings and Compel Arbitration on January 26, 2012. Plaintiffs oppose Defendant's motion on the

grounds that because the arbitration clause in the dealership agreement conflicts with K. S.A. 16-308, the clause must be struck from the agreement. According to Plaintiffs, the dealership agreement provides that in the event of such a conflict between a clause contained in the agreement and state law, the clause shall be stricken from the agreement. Defendant's Motion to Dismiss or Stay Proceedings and Compel Arbitration is still pending.

II. Parties' Arguments

After a failed attempt to confer with Defendant regarding a discovery plan, Plaintiffs filed this instant motion for leave to serve discovery on March 8, 2012. Plaintiffs assert that Defendant's Motion to Dismiss or Stay Proceedings and Compel Arbitration provides an insufficient basis to stay discovery. Plaintiffs note that, even when a dispositive motion is pending, it is the general policy in the District of Kansas not to stay discovery proceedings. Defendant opposes Plaintiffs' motion on three grounds. First, Defendant asserts that the Federal Arbitration Act only allows discovery related to the issue of arbitration once the motion to compel arbitration has been filed. Second, Defendant claims that the Commercial Arbitration Rules, which govern the arbitration process, do not permit the type of discovery sought by the Plaintiff. Third, Defendant states that allowing discovery at this stage could result in a waste of time and resources for all involved.

Relying on these same reasons, Defendant filed a Motion to Stay Planning Conference and Scheduling Order on March 9, 2012. In their Response to Defendant's motion, Plaintiffs reassert that discovery should proceed because it is the policy of the District of Kansas not to stay discovery when a dispositive motion is pending. Plaintiffs also oppose Defendant's interpretation that the Federal Arbitration Act stays proceedings until after the district court rules on the Defendant's motion to compel arbitration. In response to Defendant's waste argument, Plaintiffs contend that no waste will occur

Slip Copy, 2012 WL 1253265 (D.Kan.)
(Cite as: 2012 WL 1253265 (D.Kan.))

because the discovery will take place regardless of the forum.

III. Analysis

*2 Plaintiffs correctly point out that in *Wolf v. United States*^{FN1} the court noted the District of Kansas has a general policy not to stay discovery even when a dispositive motion is pending. The next sentence in the *Wolf* opinion, however, identifies several situations when it would be appropriate to stay discovery until the pending dispositive motion has been decided.^{FN2} The court in *Wolf* noted that a stay might be appropriate when the resolution of the dispositive motion might end the case, the discovery sought is not necessary for resolving the pending dispositive motion, or the discovery would be "wasteful and burdensome."^{FN3}

FN1. 157 F.R.D. 494, 495 (D.Kan.1994).

FN2. *Id.*

FN3. *Id.*

Other courts have stayed discovery and further proceedings pending the outcome of a motion to compel arbitration on the grounds that such discovery would be costly, both in terms of time and money, to the parties and the court. In *Klepper v. SLI, Inc.*,^{FN4} the U.S. Court of Appeals for the Third Circuit reversed a lower court's order allowing discovery while a motion to compel arbitration was pending. In support of its reversal, the Third Circuit reasoned that allowing discovery to continue would force upon the party the very processes and expenses of litigation that the party sought to avoid through arbitration.^{FN5} In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Coors*,^{FN6} the United States District Court for the District of Colorado cited the "interests of judicial economy" as the basis for an order to stay discovery pending the outcome of the defendants' motion to dismiss, or in the alternative, compel arbitration.

FN4. 45 Fed. Appx. 136, 139 (3d Cir.2002).

FN5. *Id.*

FN6. 357 F.Supp.2d 1277, 1280 (D.Colo.2004) (noting that the defendant's motion to dismiss could end the case).

Plaintiffs assert discovery would not be wasteful because discovery will occur regardless of whether the forum is in federal court or arbitration. The removal of the case to arbitration, however, shifts the responsibility to the arbitrator to oversee the process and determine the scope of discovery allowed. There is potential for wasted resources if the previously conducted discovery is not allowed by the arbitrator.^{FN7}

FN7. See *Stiener v. Apple Computer, Inc.*, No. C07-4486 SBA, 2007 WL 4219388, at *1 (N.D.Cal. Nov. 29, 2007).

Despite this District's general policy of not staying discovery while a dispositive motion is pending, this Court finds that protecting the resources of the parties and the judiciary outweighs Plaintiffs' interest in beginning discovery before the resolution of Defendant's Motion to Dismiss or Stay and Compel Arbitration. The Court, after reviewing the Plaintiffs' discovery requests, does not find that the information sought through discovery is necessary to resolve Defendant's Motion to Dismiss or Stay Proceedings and Compel Arbitration. Moreover, this Court does not find that Plaintiffs will be unduly prejudiced by this delay in beginning the discovery process. In fact, if the case is transferred to arbitration, Plaintiffs may benefit from not having to change course in their discovery plan. Allowing discovery at this point would, however, require Defendant to expend resources on litigation activities that it sought to avoid when it included an arbitration clause in the dealership agreement.

***3 IT IS THEREFORE ORDERED** that Defendant's Motion to Stay Planning Conference and Scheduling Order (ECE No. 18) is granted. All pre-trial proceedings are hereby stayed until such time

Slip Copy, 2012 WL 1253265 (D.Kan.)
(Cite as: 2012 WL 1253265 (D.Kan.))

as the Court rules on Defendant's Motion to Dismiss or Stay Proceeding and Compel Arbitration (ECF No. 6). In the event the motion is denied, counsel for Plaintiffs should send an email to KSD_Waxse_chambers@ksd.uscourts.gov to set up a scheduling conference.

IT IS FURTHER ORDERED that Plaintiff's Motion to Serve Discovery (ECF No. 15) is denied.

D.Kan., 2012.
Roadbuilders Machinery Supply Co., Inc. v. Sennebogen, Inc.
Slip Copy, 2012 WL 1253265 (D.Kan.)

END OF DOCUMENT

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Janet Sue Scheerle,
Plaintiff,

Case No. 2011-CP-07-2654

vs.

CERTIFICATE OF SERVICE

Brookdale Senior Living, Inc., Southern
Assisted Living, LLC, and Sonia S. King,
Defendants.

The undersigned certifies that a copy of the foregoing MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS UNDER RULE 37, SCRPC has
been served upon counsel of record by hand-delivering a copy of the same on the 23^d
day of January, 2013.

Kelly M. Jolley, Esquire
McNAIR LAW FIRM
Post Office Drawer 3
Hilton Head Island, South Carolina 29938

Susan Taylor Wall, Esquire
McNAIR LAW FIRM, P.A.
Post Office Box 1431
Charleston, South Carolina 29402


NEXSEN PRUET, LLC

Columbia, South Carolina

Exhibit 9

Scheerle Order Granting Plaintiff's Motion for Sanctions

Dated February 21, 2013

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

JANET SUE SCHEERLE,

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC, d/b/a
CAROLINA HOUSE OF HILTON HEAD, and
SONIA S. KING,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-07-2654

ORDER

This matter comes before the Court upon Plaintiff's motion for sanctions against Defendants Brookdale Senior Living, Inc., and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head (collectively "Defendants") for failing to obey this Court's order requiring Defendants to produce discovery to Plaintiff. Following adequate notice, a hearing was held on this motion on January 23, 2013.¹ Plaintiff was represented by her counsel Kelly Jolley and Kathleen Chewning. Defendants were represented by their counsel Mark Manos and Manton Grier. After listening to oral arguments by counsel, and reviewing the pleadings, I find as follows:

 alleged

1. This case arises out of three incidents of elder abuse that occurred at Defendants' community residential care facility on Hilton Head Island, Beaufort County, South Carolina on December 31, 2010.

¹ Plaintiff had also filed a Petition for a Rule to Show Cause directing Defendants to appear before this Court and show cause as to why Defendants refuse to comply with this Court's order requiring Defendants to produce discovery documents to Plaintiff and why Defendants should not be found in contempt of court for refusing to comply with this Court's order. However, at the hearing on both motions, Plaintiff's counsel explained that Plaintiff did not wish to hold either of the lawyers in contempt based on a decision by their corporate client. Instead, Plaintiff requested only that the Court grant her motion for sanctions. Therefore, this Court need not rule on the Motion for Contempt and does not do so.



2. On August 2, 2012, Plaintiff filed a Motion to Compel Responses to Plaintiff's ~~First Set of Interrogatories and Requests for Production to Defendants and Plaintiff's~~

Subpoena Duces Tecum and 30(b)(6) Deposition of Southern Assisted Living, LLC, pursuant to Rule 37(a), SCRCF. On September 4, 2012, this Court considered three motions in Plaintiff's case: (1) Defendants' Motion to Reconsider the Court's order denying its initial Motion to Dismiss or Compel Arbitration, (2) Defendants' Renewed Motion to Dismiss or Compel Arbitration, and (3) Plaintiff's Motion to Compel discovery responses. At the hearing, the Court denied Defendants' Renewed Motion to Dismiss or Compel Arbitration and granted Plaintiff's Motion to Compel discovery responses.

3. On September 18, 2012, this Court issued an *Order Granting Plaintiff's Motion to Compel Responses to Plaintiff's First Set of Interrogatories, Requests for Production to Defendants, and Plaintiff's Subpoena Duces Tecum and 30(b)(6) Deposition of Southern Assisted Living, LLC*. Among other items, the Court ordered the Defendants to "file all documents it prepared in its full internal investigation, including specifically those listed on Defendants' privilege log, with this court for an in camera review within thirty (30) days. The court will then determine whether any of the documents prepared during Defendants' investigation are privileged attorney work product prepared in anticipation of litigation."

4. On November 7, 2012, after reviewing the documents submitted for in camera review, I ordered that all documents submitted for review be turned over to Plaintiff.

5. Defendants have failed to obey this Court's order to provide discovery and have made clear their intention to not give the internal investigation documents to the Plaintiff.

2

6. Based on the nature of this case and Plaintiff's allegations of abuse, documents ~~regarding Defendants' non-privileged internal investigation of the abuse is integral to~~ Plaintiff's case and Defendants' willful refusal to produce these documents after this Court has ruled that they are not protected by any privilege is, at least, in gross indifference to the rights of the Plaintiff.

7. "[S]anctions for discovery abuse are left to the sound discretion of the trial court." *McNair v. Fairfield County*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008). "Under Rule 37(b)(2)(C), SCRCP, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just...." *Id.* at 465, 665 S.E.2d at 832. "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Id.* (internal quotation marks omitted).

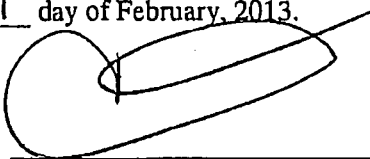
8. As to Defendants' assertion at the hearing that this Court lacks jurisdiction to issue an order for sanctions, this Court disagrees and finds the appeal as to the arbitration issue does not stay this Court's ability to grant sanctions for Defendants' failure to comply with a discovery order. Under Rule 241, SCACR, the lower court "retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." Under Rules 205 and 241(a), SCACR, "the lower court's power to proceed" with the action and address matters not affected by the appeal "is determined by whether the issue sought to be litigated in the lower court during the appeal is a matter affected by the appeal." *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012). This Court's order on Defendants' failure to follow a discovery order is not a matter affected by an appeal of an order denying a motion to

compel arbitration. Additionally, the determination of whether certain documents are ~~privileged or subject to work product doctrine is not a matter affected by the appeal~~ because even the arbitration provision provides that written discovery "shall be governed by the South Carolina Rules of Civil Procedure."

9. Based on Defendants' willful, intentional, and prejudicial conduct, I grant Plaintiff's request for sanctions. Defendants have ten (10) days from the date of this order to produce all of the documents I reviewed in camera to Plaintiff's counsel. Should Defendants fail to produce the documents to Plaintiff's counsel within ten (10) days of this order, Defendants will be required to pay a fine of One Thousand Dollars and no cents (\$1,000) per day, for each day that Defendants remain in violation of my order to produce the discovery.

10. I find that this sanction is just and reasonable and does not go beyond the necessities of the matter to foreclose on any decision on the merits of this case. *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990).

AND IT IS SO ORDERED, this 21 day of February, 2013.



Carmen T. Mullen
Circuit Court Judge, Fourteenth Judicial Circuit

Beaufort, South Carolina



Exhibit 10

Order of the Court of Appeals Granting
Appellants' Motion to Withdraw the Notice of
Appeal

Dated May 2, 2013



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 02, 2013

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: Janet Sue Sheerle v. Brookdale Senior (2)
Lower Court Case No. 2011CP0702654
Appellate Case No. 2013-000378

Dear Clerk of Court:

This appeal involves a notice of appeal filed on February 19, 2013. The above referenced matter is hereby remitted to the lower court or tribunal only as to the notice of appeal filed February 19, 2013. A copy of the judgment of the Court is enclosed.

The notice of appeal filed September 7, 2012, has been assigned appellate case number 2012-212948. That appeal is not affected by this remittitur.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Kelly McPherson Jolley
Marcus Angelo Manos
Manton M. Grier, Jr.
Susan Taylor Wall
Kathleen Gillespie Chewning

The South Carolina Court of Appeals

Janet Sue Scheerle, Respondent,

v.

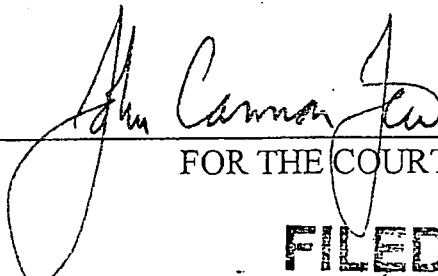
Brookdale Senior Living, Inc., Southern Assisted Living,
LLC d/b/a Carolina House of Hilton Head and Sonia S.
King, Defendants,

Of whom Brookdale Senior Living, Inc. and Southern
Assisted Living, LLC d/b/a Carolina House of Hilton
Head are the Appellants.

Appellate Case No. 2013-000378

ORDER

After careful consideration, Appellants' motion to withdraw its notice of appeal filed February 19, 2013 is granted. Because the motion to withdraw is granted, this court need not act on Respondent's motion to dismiss; however, Respondent's request for sanctions is denied.



FOR THE COURT

FILED

4/12/13 AS

Columbia, South Carolina

cc:

Kelly McPherson Jolley
Marcus Angelo Manos
Manton M. Grier, Jr.

Susan Taylor Wall
Kathleen Gillespie Chewning

Exhibit 11

Appellants' Responses to Plaintiff Scheerle's First Set of Requests to Admit

Dated May 23, 2013

NEXSEN | PRUET

Manton M. Grier, Jr.
Special Counsel
Admitted in SC

May 23, 2013

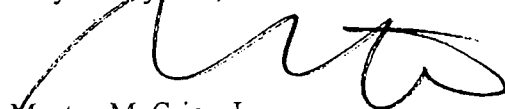
Kelly M. Jolley, Esquire
McNAIR LAW FIRM, P.A.
Shelter Cove Executive Park
23-B Shelter Cove Lane, Suite 400 (29928)
Post Office Drawer 3
Hilton Head Island, South Carolina 29938

**Re: Janet Scheerle vs. Brookdale Senior Living, Inc., Southern Assisted
Living, LLC and Sonia S. King / Case No. 2011-CP-07-2654**

Dear Kelly:

Enclosed for service upon you by mail is a copy of *Defendants' Response To
Plaintiff's First Set Of Requests For Admission* in the above-referenced matter.

Very truly yours,



Manton M. Grier, Jr.

MMG/hjr
Enclosure
cc w/encl.: Susan Taylor Wall, Esquire

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Raleigh

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Janet Sue Scheerle,
Plaintiff,

Case No. 2011-CP-07-2654

vs.

Brookdale Senior Living, Inc., Southern
Assisted Living, Inc. d/b/a Carolina House of
Hilton Head, and Sonia S. King,
Defendants.

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S FIRST SET OF REQUESTS
FOR ADMISSION**

Defendants, Brookdale Senior Living, Inc. and Southern Assisted Living, Inc. d/b/a Carolina House of Hilton Head (hereinafter "Defendants") object to these requests on the grounds that discovery is stayed pending the appeal regarding the interpretation of the arbitration provision signed by the parties. By agreeing to provide answers, the Defendants are not waiving their right to enforce the arbitration agreement. Further, these responses are marked as confidential. Because these answers involve certain residents and employees, they are treated as confidential under the parties' confidentiality order.

Subject to these objections, the Defendants respond as follows:

- 1. Admit that prior to December 30, 2010, Defendants were told, by and through their employees and agents, of abuse perpetrated by Defendants' employees on vulnerable adult residents of Carolina House.**

RESPONSE: The Defendants object to the Plaintiff's subjective definition of "abuse," as it is a definition not found in the South Carolina Adult Protection Act, S.C. Code Ann. §§ 43-35-5 to -595. The Defendants also object as this request is vague, because it

equates allegations of abuse with actual abuse. The Defendants further object to the time frame of this request, as it fails to provide a reasonable time period and instead goes back indefinitely in time. The Defendants, therefore, deny as characterized.

2. Admit that prior to December 30, 2010, Defendants' employee, Barbara Newton, slapped a vulnerable adult resident of Carolina House and Defendants continued to employ Barbara Newton as a caregiver to vulnerable adult residents at Carolina House until January 1, 2011.

RESPONSE: Denied.

3. Admit Defendants' employees who abused vulnerable adult residents at Carolina House prior to December 30, 2010, included Sonia King and Defendants continued to employ Sonia King as a caregiver to vulnerable adult residents at Carolina House until after January 1, 2011.

RESPONSE: Denied.

4. Admit that prior to December 30, 2010, abuse of vulnerable adult residents at Carolina House was reported to Jackie Cochran a/k/a Jackie Marshall, who was Defendants' employee in a management position at Carolina House.

RESPONSE: The Defendants object to the Plaintiff's subjective definition of "abuse," as it is a definition not found in the South Carolina Adult Protection Act, S.C. Code Ann. §§ 43-35-5 to -595. The Defendants also object as this request is vague, because it equates allegations of abuse with actual abuse. The Defendants, therefore, deny as characterized.

5. Admit that prior to December 30, 2010, Shanada R. Young, a resident care associate at Carolina House and Defendants' employee since 2007, witnessed Defendants' employee Sonia King do some "really bad things to residents."

RESPONSE: The Defendants can neither admit nor deny what Ms. Young alleges to have seen. The Defendants further object as this request is vague and "really bad things" is not defined and is open to speculation.

6. Admit that one or more employees at Carolina House told Defendants' management personnel of abuse on vulnerable adult residents at Carolina House perpetrated by Defendants' employees Barbara Newton, Olivia King, Sonia King, Janette Ferguson, Angel Rivers, and Willemae Perry.

RESPONSE: The Defendants object to the Plaintiff's subjective definition of "abuse," as it is a definition not found in the South Carolina Adult Protection Act, S.C. Code Ann. §§ 43-35-5 to -595. The Defendants also object as this request is vague, because it equates allegations of abuse with actual abuse. The Defendants further object to the time frame of this request, as it fails to provide a reasonable time period and instead goes back indefinitely in time. The Defendants, therefore, deny as characterized.

7. Admit that prior to December 30, 2010, Defendants' employees Janette Ferguson, Ashley Cohen, Paula Hohman, Shanada Young, Brian Houlihan, and Dorothy Bryant had knowledge of abuse of vulnerable adult residents at Carolina House and spoke to Defendants' employees concerning abuse of vulnerable adult residents at Carolina House after December 30, 2010.

RESPONSE: The Defendants can neither admit nor deny this request to admit as it calls for the state of mind of another.

8. Admit that abuse of vulnerable adult residents at Carolina House was known to Defendants' employees, including those serving in supervisory positions, before December 30, 2010.

RESPONSE: Denied.

9. Admit that abuse of vulnerable adult residents at Carolina House that occurred before December 30, 2010, included one or more of the following acts:

- 1) threatening residents
- 2) using verbal obscenities with residents
- 3) yelling at residents
- 4) roughly handling residents
- 5) yanking residents
- 6) punching residents
- 7) slapping residents
- 8) choking residents
- 9) leaving a resident in a wheelchair overnight
- 10) leaving a resident on the floor
- 11) forcing residents to ingest medication not a part of that resident's medication protocol
- 12) forcing residents to strip their own clothes if wet
- 13) forcing residents to strip their own beds if soiled
- 14) using toothpaste or abrasives on resident's genitalia.

RESPONSE: The Defendants object to the Plaintiff's subjective definition of "abuse," as it is a definition not found in the South Carolina Adult Protection Act, S.C. Code Ann. §§ 43-35-5 to -595. The Defendants also object as this request is vague, because it equates allegations of abuse with actual abuse. The Defendants further object to the time frame of this request, as it fails to provide a reasonable time period and instead goes back indefinitely in time. The Defendants, therefore, deny as characterized.

10. Admit Defendants' employees did not always report incidents of abuse upon vulnerable adult residents at Carolina House because, at Carolina House, Defendants' employees in a management position took no meaningful action to

protect the vulnerable adult resident in response to previous reports of abuse.

RESPONSE: Denied.

11. Admit Defendants' employees did not always report incidents of abuse on residents at Carolina House because some reports of abuse were not kept confidential and employees reporting abuse feared reprisals.

RESPONSE: Denied.

12. Admit that some of Defendants' employees who reported suspected abuse, neglect or mismanagement at Carolina House were targeted or threatened with discharge by Defendants' employees, including Defendants employees who held regional supervisory positions and executives in Brookdale Senior Living, Inc.'s corporate offices.

RESPONSE: Denied.

13. Admit that Carolina House employees, including Ashley Cohen, Janet Ferguson, Olivia King, Sonia King, and Barbara Newton, abused vulnerable adult residents at Carolina House prior to December 30, 2010.

RESPONSE: The Defendants object to the Plaintiff's subjective definition of "abuse," as it is a definition not found in the South Carolina Adult Protection Act, S.C. Code Ann. §§ 43-35-5 to -595. The Defendants also object as this request is vague, because it equates allegations of abuse with actual abuse. The Defendants further object to the time frame of this request, as it fails to provide a reasonable time period and instead goes back indefinitely in time. Defendants, therefore, deny as characterized.

14. Admit that Carolina House employees Ashley Cohen, Janet Ferguson, Olivia King, Sonia King, and Barbara Newton remained employees of Carolina House and were not discharged until after January 1, 2011.

RESPONSE: The Defendants object to this request to admit on the grounds that it is vague. The Defendants are unsure what is meant by "remained employees of Carolina House." Subject to and without waiving this objection, the Defendants admit that Ms. Cohen, Ms. Ferguson, Olivia King, Sonia King, and Barbara Newton were employees of the Carolina House as of January 1, 2011, and that their employment ceased at some point after this date.

15. Admit Carolina House residents Elizabeth O'Meara, Janet Scheerle and Bonnie Pruett, vulnerable adults who suffered from dementia and/or Alzheimer's disease, were abused by one or more of Defendants' employees and lacked the capacity or ability to lodge a complaint about the suffered abuse.

RESPONSE: The Defendants can neither admit nor deny the state of mind and ability of Ms. O'Meara, Scheerle, and Pruett. Subject to and without waiving this objection, the Defendants admit that former employee Sonia King pleaded guilty to abusing certain residents. The Defendants deny that Ms. King was acting on their behalf or for their benefit when she committed her crimes.

16. Admit Carolina House vulnerable adult residents Doris Hadden, Fran Cody, Helen Jordan, and Peggy Ross, all of whom suffered from Alzheimer's disease and/or dementia, were abused by one or more of Defendants' employees at Carolina House.

RESPONSE: Denied.

17. Admit that Rhoneda Maury, executive director at Carolina House, on or about December 5, 2009, neglected to provide service to a resident, failed to promptly report suspected abuse of a resident, disregarded the safety and security regulations and violated Defendants' policies and procedures, particularly with regard to reportable incidents and that Rhoneda Maury remained at Carolina House as executive director until after January 1, 2011.

RESPONSE: Denied.

18. Admit that at Carolina House, Clare Bridge Unit for residents with Alzheimer's disease and/or dementia, from 2008 through 2010, the resident's profile books were kept locked up and resident care associates on the night shift did not possess keys to unlock the residents' profile books.

RESPONSE: The Defendants object to this request to admit on the grounds that it is vague and deny as characterized.

19. Admit that at Carolina House, Clare Bridge Unit for residents with Alzheimer's disease and/or dementia, from 2008 through 2010, charts and/or records on patients were not available to the resident care associates on the night shift.

RESPONSE: The Defendants object to this request to admit on the grounds that it is vague and deny as characterized.

20. Admit that DHEC found violations of written standards at Carolina House in December 2009 and May 2010.

RESPONSE: The Defendants admit only that DHEC found small violations unrelated to the care received by Ms. Scheerle, and that the DHEC documents speak for themselves.



Marcus A. Manos
Manton M. Grier, Jr.
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
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803.771.8900

Attorneys for Defendants
Brookdale Senior Living, Inc. and Southern
Assisted Living, Inc.

May 23, 2013

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Janet Sue Scheerle,

Plaintiff,

Case No. 2011-CP-07-2654

vs.

CERTIFICATE OF SERVICE

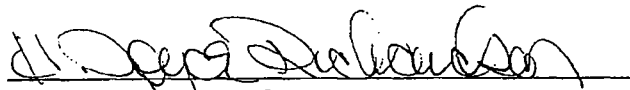
Brookdale Senior Living, Inc., Southern
Assisted Living, Inc. d/b/a Carolina House of
Hilton Head, and Sonia S. King,

Defendants.

The undersigned certifies that a copy of the foregoing **Brookdale Defendants' Response To Plaintiff's First Set of Requests For Admission** has been served upon counsel of record by electronic mail on the 30th day of May, 2013, by depositing a copy of the same, first-class postage prepaid, in the United States Mail, to the addresses shown below.

Susan Taylor Wall, Esquire
McNAIR LAW FIRM, P.A.
Post Office Box 1431
Charleston, South Carolina 29402

Kelly M. Jolley, Esquire
McNAIR LAW FIRM, P.A.
Post Office Drawer 3
Hilton Head Island, South Carolina 29938


NEXSEN PRUET, LLC

Columbia, South Carolina

Exhibit 12

Appellants' Motion in Mrs. Scheerle's Case for
a Protective Order regarding the 30(b)(6)
Deposition Notice, to Quash the Subpoena, and
to Stay Discovery Pending the Appeal

Filed May 30, 2013

NEXSEN|PRUET

Manton M. Grier, Jr.
Special Counsel
Admitted in SC

May 30, 2013

The Honorable Jerri Ann Roseneau
Clerk of Court
Beaufort County
Post Office Box 1128
Beaufort, South Carolina 29901-1128

**Re: Janet Sue Scheerle v. Brookdale Senior Living, Inc., Southern
Assisted Living, LLC and Sonia S. King
Case No. 2011-CP-07-2654**

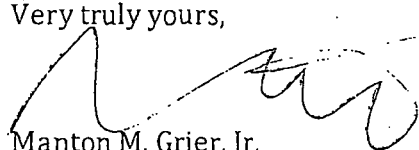
Dear Ms. Roseneau:

Enclosed for filing with the Court is an original and one copy of Defendants' **Motion For A Protective Order Regarding 30(b)(6) Deposition Notice, To Quash Subpoena, And To Stay Discovery Pending Appeal** in the above-referenced matter along with the Motion And Order Information Form And Cover Sheet and check for \$25.00 filing fee. Please return the copy to me, clocked-in, in the envelope provided.

By copy of this letter and as evidenced in the attached Certificate Of Service, we are serving counsel of record with the above Motion.

Thank you for your assistance in this matter.

Very truly yours,


Manton M. Grier, Jr.

MMG/hjr

Enclosure

cc w/encl.: Kelly M. Jolley, Esquire
Susan T. Wall, Esquire
Carter Elliott, Esquire

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2118
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E MGrier@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Janet Sue Scheerle

☐ Plaintiff

v.

Brookdale Senior Living, Inc., Et Al.

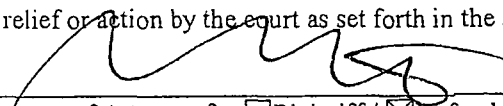
☒ Defendant

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-07-2654

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Kelly M. Jolley, Bar No. 72573 Address: Post Office Drawer 3, Hilton Head, SC 29938 phone: 843-785-2171 fax: e-mail: other:		Defendant's Attorney: Manton M. Grier, Jr., Bar No. 70525 Address: Post Office Drawer 2426, Columbia, SC 29202 phone: 803-540-2116 fax: 803-727-1439 e-mail: MGrier@nexsenpruet.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Protective Order, Quash Subpoena, Stay Discovery Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant May 30, 2013 Date submitted			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: Date:	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Janet Sue Scheerle,

Plaintiff,

vs.

Brookdale Senior Living, Inc.,
Southern Assisted Living, LLC d/b/a
Carolina House of Hilton Head, and
Sonia S. King,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-07-2654

**MOTION FOR A PROTECTIVE
ORDER REGARDING 30(B)(6)
DEPOSITION NOTICE, TO QUASH
SUBPOENA, AND TO STAY
DISCOVERY PENDING APPEAL**

Defendants Brookdale Senior Living, Inc. and Southern Assisted Living, LLC d/b/a Carolina House of Hilton Head ("Brookdale Defendants") moves this Court for a Protective Order regarding a 30(b)(6) Notice dated May 9, 2013, and an Order staying discovery pending appeal. The grounds for this Motion are as follows:

1. This case is currently pending on appeal regarding the enforceability of an arbitration clause under the Federal Arbitration Act ("FAA"). (**Exhibits A and B**, Notice of Appeal and Statement of Issues on Appeal). The arbitration clause states that the parties may not take fact depositions, as only expert depositions are allowed. (**Exhibit C**, Arbitration Provision, p. 12, ¶ 6(c)).

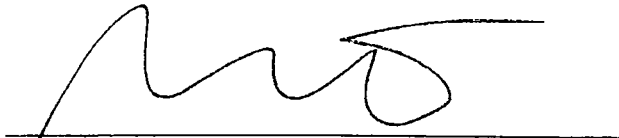
2. Under SCACR 205 and 241, the filing of an appeal is an automatic stay of matters affecting the appeal. Further, under the FAA, "a party may demand a stay of . . . judicial proceedings pending exercise of a contractual right" to resolve the case through arbitration. Rich v. Walsh, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2004) (quoting MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001)).

3. Despite the pendency of an appeal that will determine the mode of litigation and trial, the Plaintiff served on May 9, 2013, a Rule 30(b)(6) Deposition Notice. The Plaintiff also served a document subpoena to Elliott & Phelan on May 6, 2013. (**Exhibits D and E**). All discovery is improper while the case is pending on appeal, as the deposition is forbidden under the arbitration agreement, and the discovery should be stayed while the Court of Appeals determines the enforceability of the arbitration agreement.

4. Further, for example, and without waiving objections to the 30(b)(6) topics, Topics #1, #2, #4, #5, #6, #8, #10, #11, #12, #13, and #14 are either not reasonably calculated to lead to the discovery of admissible evidence, overbroad or burdensome, calls for the production of privileged or confidential information, or a combination of all three.

5. Finally, in the alternative, if a Rule 30(b)(6) deposition is ordered, it should take place in Nashville, Tennessee, as that is the principal place of business for Southern Assisted Living, LLC. "The deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business." 8A Wright & Miller, § 2112 (3d. ed); Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979); Magnus Electronics, Inc. v. Masco Corp. of Indiana, 871 F.2d 626, 630 (7th Cir. 1989).

Therefore, this Court should enter a protective order and ordering that no discovery should be had during the pendency of this appeal.



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MGrier@nexsenpruet.com

Attorneys for Defendants
Brookdale Senior Living, Inc. and
Southern Assisted Living, LLC d/b/a
Carolina House of Hilton Head

May 30, 2013

Columbia, South Carolina

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

RECEIVED

SEP 22 2011

SC Court of Appeals

Case No. 2011-CP-07-1610

Elizabeth O'Meara....., Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC....., Appellants,

and

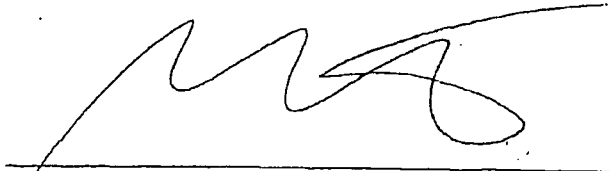
Sonia S. King....., Defendant.

NOTICE OF APPEAL

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC appeals the Order of the Honorable Carmen Tevis Mullen, dated August 8, 2011, denying the Motion to Dismiss and Compel Arbitration filed by Brookdale Senior Living, Inc. and Southern Assisted Living, LLC. A copy of the Order is attached to this Notice of Appeal. Appellants received written notice of entry of this Order on August 23, 2011.

Appellants also filed a Motion to Reconsider on September 2, 2011, which the lower court denied on September 20, 2011. A copy of the Order denying the Motion to

Reconsider is also attached to this Notice of Appeal. Appellants received written notice of that Order on September 22, 2011.



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FACSIMILE: 803.253.8277
MManos@nexsenpruet.com

Attorneys for Appellants
Brookdale Senior Living, Inc. and Southern Assisted
Living, LLC

September 22, 2011

Columbia, South Carolina

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-1610

(Jury Trial Requested)

**ORDER DENYING DEFENDANTS,
BROOKDALE SENIOR LIVING, INC.
AND SOUTHERN ASSISTED LIVING,
LLC'S MOTION TO DISMISS AND
COMPEL ARBITRATION**

COMPULSORY ARBITRATION

AUG 19 PM 4:06
CLERK OF COURT
JUDICIAL DEPARTMENT
COUNTY S.C.

Senior Living, Inc.

The basis for Defendants' Motion is arbitration language found in the arbitration provision contained in the Residency Agreement between Elizabeth O'Meara and Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head ("Carolina House"), signed by Mrs. O'Meara's daughter Julie Stanton on September 30, 2008. Mrs. O'Meara opposed this motion and filed an opposing memorandum with exhibits, and Defendants filed a memorandum in support of the motion. Plaintiff opposed enforcement of the arbitration clause found in the Residency Agreement on four grounds: (1) it is not binding pursuant to the South Carolina Arbitration Act, S.C. Code Section 15-48-10(b), (2) the Federal Arbitration Act (hereinafter "FAA") does not apply to this action because the Residency Agreement does not involve

interstate commerce, (3) the arbitration and limitation of liability clauses contained in the Residency Agreement are unconscionable, and (4) no one with the authority to bind Elizabeth O'Meara to arbitration executed the Residency Agreement on her behalf and discovery would be required to demonstrate any such authority. The Court is persuaded by Plaintiff's arguments opposing the Motion to Compel Arbitration and accordingly denies Defendants' Motion to Dismiss and Compel Arbitration.

During the hearing on this Motion, the parties conceded that arbitration cannot be compelled under the South Carolina Arbitration Act in this matter because Mrs. O'Meara's claims all arise out of her alleged personal injury. S.C. Code Ann. Section 15-48-10. Defendants contend that the FAA preempts the South Carolina state statute. However, I find that the Residency Agreement between Elizabeth O'Meara and Carolina House does not involve interstate commerce. Therefore, this case is not subject to the FAA. The South Carolina Supreme Court in *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) held that the FAA was inapplicable to a similar contract for patient and residency services. The Court explained that the analysis must focus on the contract between the parties, and whether that contract involves interstate commerce. The Residency Agreement here is a contract for basic services – accommodations, meals, utilities, housekeeping, laundry and recreation. The provision of these contractual services to Mrs. O'Meara at the Carolina House facility in Hilton Head does not involve interstate commerce. Moreover, the Affidavit of Timothy J. Caesar attached to Defendants' Motion does not contain any facts from which one could conclude that any of the basic services included in the contract between Mrs. O'Meara and Carolina House involve interstate commerce.

Defendants argued that *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531 (2001) and *Allied Bruce Terminal Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) changed the analysis previously supported in *Timms*. However, these cases clarify that a transaction occurring via a

contract must in fact involve interstate commerce to enforce an arbitration provision in the contract. Neither case alters our Supreme Court's holding in *Timms* that arbitration cannot be compelled pursuant to the FAA when the underlying transaction does not involve interstate commerce. The Residency Agreement does not involve interstate commerce and Defendants' Motion to Dismiss and Compel Arbitration must be denied.

Even if the Residency Agreement did involve interstate commerce so as to bring it under the purview of the FAA, I find that the arbitration and limitation of liability clauses in the Residency Agreement are unconscionable and should be struck in their entirety from the contract. Among other provisions, the arbitration and limitation of liability clauses in the Residency Agreement significantly restrict discovery, limit compensatory damages, and prohibit punitive damages. Both the "Arbitration Provision" (V.A.) and the "Limitation of Liability Provision" (V.B.) are included in Section V. of the Residency Agreement. Subsection V.A(13) incorporates by reference the Limitation of Liability Provision into the Arbitration Provision. Taken together, these provisions restrict discovery, including a limitation on depositions to only those of experts, and limits liability for any "claims by, or on behalf of, a Resident ... arising out of the care or treatment received by the Resident..." For example, all "[n]et economic damages" awarded must be "offset by any collateral source payments such as payments made by medical insurance." Additionally, the provisions limit noneconomic damages, including pain and suffering, to "a maximum of \$350,000.00", prohibit payment of "[i]nterest and/or late fees on unpaid assisted living charges", and preclude any award for punitive damages. Generally, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007). I find that the limitations on damages and discovery unilaterally

imposed upon Mrs. O'Meara in the Residency Agreement are substantively unconscionable and violate public policy. Accordingly, even if the FAA were applied to the Residency Agreement, Section V of the Residency Agreement ("Arbitration and Limitation of Liability Provision") is unconscionable and unenforceable in its entirety. *See, e.g. Simpson*, 373 S.C. at 33-37, 644 S.E.2d at 673-674.

Finally, there is a question whether Mrs. O'Meara's acquiescence to the arbitration agreement in the Residency Agreement is valid. Mrs. O'Meara argued that she did not execute the Residency Agreement, that Julia Stanton, Mrs. O'Meara daughter, executed the Residency Agreement as Mrs. O'Meara's Attorney-in-Fact for health care matters, and that Julia Stanton is not Mrs. O'Meara's attorney-in-fact under Mrs. O'Meara's durable power of attorney and does not have the authority to bind Mrs. O'Meara to arbitration. Mrs. O'Meara presented a instrument designating Thomas Stanton as Mrs. O'Meara's attorney-in-fact. The proper forum for determining whether an arbitration clause is enforceable in South Carolina is the trial court rather than arbitration. *See, Simpson*, 373 S.C. at 23, 644 S.E.2d at 667-668 ("[T]he trial court should determine the threshold validity of the arbitration agreement."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties.") To the extent that the parties contest whether Julia Stanton had the authority to bind Mrs. O'Meara to arbitration, the parties must engage in discovery regarding the matter, precluding dismissal of this case at this time.

IT IS NOW THEREFORE ORDERED, this action shall proceed on the jury docket for the Fourteenth Judicial Circuit, Beaufort County, South Carolina. The Defendants shall have fifteen (15) days from the date of this Order to file responsive pleadings.

AND IT IS SO ORDERED.

By: 
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

July 20, 2011

Beaufort, South Carolina

FORM 4

9.22.11

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-070-11610

Elizabeth O'Meara vs. Brookdale Senior Living Inc, et al

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 12(e), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

2011 SEP 20 AM 10:04
JAMIE THOMPSON
CLERK OF COURT
BEAUFORT COUNTY, SC

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Defendant Brookdale Senior Living's Motion to Reconsider Order, is respectfully denied without a hearing.

Dated at Beaufort, South Carolina, this 20 day of September, 2011



PRESIDING JUDGE - Carmen T. Mullen

This judgment was entered on the 20 day of September 2011, and a copy mailed first class this 20 day of September, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Kelly McPherson Jolley McNair Law Firm, PA
PO Drawer 3 Hilton Head Island, SC 29938

Manton M Grier, Jr. Nexsen Pruet, LLC
PO Drawer 2426 Columbia, SC 29202

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

Jamie Thompson

Jerri Ann Roscneau - Clerk of Court

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-CP-07-1610

Elizabeth O'Meara,.....Respondent,
v.
Brookdale Senior Living, Inc. and Southern Assisted Living, LLC,.....Appellants
and
Sonia S. King,.....Defendant.

RECEIVED
SEP 22 2011
SC Court of Appeals

PROOF OF SERVICE

The undersigned certifies that a copy of the **Notice Of Appeal** has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid in the United States Mail, on the 22nd day of September, 2011, to the address shown below.

Kelly M. Jolley, Esquire
McNAIR LAW FIRM, P.A.
Shelter Cove Executive Park
23-B Shelter Cove Lane, Suite 400 (29928)
Post Office Drawer 3
Hilton Head Island, South Carolina 29938

H. Jolley
NEXSEN PRUET, LLC

EXHIBIT B

BACKGROUND OF THE CONSOLIDATED APPEALS

This consolidated appeal seeks to enforce three similar arbitration agreements that were voluntarily entered on behalf of the three Respondents, who were residents of the Carolina House of Hilton Head ("Carolina House"), an assisted-living community. The Respondents are not related, and each entered the Carolina House on different dates. They allege that they were abused by Sonia King, a former employee at the Carolina House, during the early morning hours of December 31, 2010. After each Respondent filed a complaint, the Appellants moved to dismiss the cases and compel arbitration pursuant to the arbitration clauses found in each Residency Agreement. The lower court, Judge Carmen T. Mullen, denied the motions, which led to this appeal.

ISSUES ON APPEAL

- I. Whether the Residency Agreements signed on behalf of each Respondent involve interstate commerce and are governed by the Federal Arbitration Act?
- II. Whether Respondents Elizabeth O'Meara and Janet Sue Scheerle, who are beneficiaries under the Residency Agreements, should be equitably estopped from refusing to comply with the terms of their agreements?
- III. Whether the Respondents' claim of unconscionability are not yet ripe and should first be decided by an arbiter, and not a Court?
- IV. Whether the Residency Agreements are not unconscionable; and, in the alternative, whether the Court should enforce arbitration and sever any provisions it finds unconscionable?

STATEMENT OF THE CASE

These consolidated appeals seek to enforce three similar arbitration clauses found in the admission agreements to an assisted-living community. The Respondents—Elizabeth O'Meara, Yvonne Carrie Pruett, and Janet Sue Scheerle—

EXHIBIT C

following the transfer. We will provide a written explanation for termination with less than thirty (30) days notice.

D. TERMINATION BY EITHER PARTY. Either party may terminate this Agreement immediately upon written notice in the event of your death or if a physician certifies to us in writing, based upon an examination prior to moving out, that you must be relocated due to your health. You will be charged a storage fee equal to the Monthly Service Rate until all of your belongings are removed from Community.

V. ARBITRATION AND LIMITATION OF LIABILITY PROVISION. Should any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.

A. ARBITRATION PROVISION.

1. Any and all claims or controversies arising out of, or in any way relating to, this Agreement or your stay at the Community, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a jury will not decide their case. The South Carolina Revised Code concerning arbitration shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.
2. A demand for Arbitration by you, your legal representative, a person or organization acting on your behalf with your consent, or the personal representative of the estate of your estate (collectively "Resident Party") shall be made in writing and submitted to CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza, Greenville, SC 29601, via certified mail, return receipt requested. Demand for Arbitration by us shall be made in writing and submitted to you or your agent, representative, successor or assign and/or your legal representative via certified mail, return receipt requested.
3. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.
4. The arbitration panel shall be composed of one (1) arbitrator. Subject to the requirements of section A.5. herein, the parties shall agree upon an arbitrator that must either be a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience as an attorney. If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then each party will select an arbitrator. These arbitrators will act only for the purpose of appointing a sole arbitrator to hear the case, subject to the criteria above. If

either party fails to select their arbitrator within the (20) days mentioned above, they effectively forfeit their right to choose an arbitrator. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.

5. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.
6. Discovery in the arbitration proceeding shall be governed by the South Carolina Rules of Civil Procedure. However, discovery shall be modified by the following, unless agreed to otherwise by the party to whom the request is made:
 - a. The Resident Party shall provide us with permissible discovery per the South Carolina Rules of Civil Procedure within twenty (20) days after Demand for Arbitration is received (and we shall reimburse Resident Party \$0.25 per page).
 - b. We shall provide the Resident Party with permissible discovery per the South Carolina Rules of Civil Procedure within twenty (20) days after the Demand for Arbitration is received (and Resident Party, unless proven indigent, shall reimburse us \$0.25 per page).
 - c. The only depositions allowed shall be of experts. No other individuals may be deposed.
 - d. Resident Party shall designate any and all expert witnesses within sixty-five (65) days after Demand for Arbitration is submitted.
 - e. We shall have thirty (30) days after Resident Party's expert designation is received in which to depose such experts.
 - f. We shall designate any and all experts one hundred and fifteen (115) days after Demand for Arbitration is submitted.
 - g. Resident Party shall have thirty (30) days after our expert designation is received in which to depose such experts.
 - h. Any report or affidavit of an expert, and a list of all records contained in the expert's file, must be exchanged by the parties no later than ten (10) working days before the date of the expert's deposition.
 - i. The following shall be exchanged no later than fourteen (14) working days before the arbitration hearing:
 - (1) List of witnesses to be called at the arbitration hearing (full name, title, address and phone number if known) and an outline of each witness' intended testimony;
 - (2) List of documents to be relied upon at the arbitration hearing;
 - (3) Any sworn recorded statements to be relied upon at the arbitration hearing and included therewith the full name, title, address and phone number of the person making the sworn statement.
 - j. The arbitration hearing shall be held no later than one hundred and eighty (180) days after Demand for Arbitration is submitted, or within a reasonable time thereafter if a conflict arises with the arbitrator's calendar.

7. The arbitrator shall designate a time and place within the county in which the Community is located, for the arbitration hearing and shall provide thirty (30) days' notice to the parties of the arbitration hearing.
8. The arbitrator shall apply the South Carolina Rules of Evidence and South Carolina Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, South Carolina law except as otherwise stated in this Arbitration Provision.
9. The arbitration decision should be signed by the arbitrator and delivered to the parties and their counsel within thirty (30) days following the conclusion of the arbitration. The decision shall set forth in detail the arbitrator's findings of fact and conclusions of law.
10. The arbitrator's decision shall be final and binding without the right to appeal.
11. The arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent. The parties shall bear their own attorneys' fees and costs and hereby expressly waive any right to recover attorney fees or costs, actual or statutory.
12. The arbitration proceeding shall remain confidential in all respects, including the Demand for Arbitration, all arbitration filings, deposition transcripts, documents produced or obtained in discovery, or other material provided by and exchanged between the parties and the arbitrator's findings of fact and conclusions of law. Following receipt of the arbitrator's decision, each party agrees to return to the producing party within thirty (30) days the original and all copies of documents exchanged in discovery and at the arbitration hearing, except those documents required to be retained by counsel pursuant to law. Further, the parties to the arbitration also agree not to discuss the amount of the arbitration award or any settlement, the names of the parties, or name/location of the Community except as required by law.
13. The Limitation of Liability Provision below is incorporated by reference into this Arbitration Provision.
14. The Arbitration Provision and the Limitation of Liability Provision below shall survive your death.

B. LIMITATION OF LIABILITY PROVISION. *Read Carefully Before Signing*

1. The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement.
2. Liability for any claim brought by a party to this Agreement against the other party, including but not limited to a claim by us for unpaid Basic Service Rate or Personal Service Rate or other charges, or a claim by, or on behalf of you, Resident Party or your estate, agent or legal representative, arising out of the care or treatment received by you or your occupancy or presence at the Community, including, without limitation, claims for medical negligence, shall be limited as follows:
 - a. Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance.
 - b. Non-economic damages, such as pain and suffering, shall be limited to a maximum of \$250,000.00.

EXHIBIT D

MCNAIR
ATTORNEYS

May 9, 2013

Kelly M. Jolley

kjolley@mcnair.net
T 843.785.2171
F 843.686.5991

Via U.S. Mail

Manton M. Grier, Jr.
Special Counsel
Nexsen Pruet, LLC
1230 Main Street
Suite 700
Columbia, SC 29201

Re: *Janet Sue Scheerle v. Brookdale Senior Living, Inc., Southern Assisted
Living, LLC, d/b/a Carolina House of Hilton Head, and Sonia S. King*
Case No. 2011-CP-07-2654
MFN: 055181-00001

Dear Manton:

Enclosed please find Plaintiff's Amended Notice of 30(b)(6) Videotaped Deposition of Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head for June 11, 2013 at 10:00 a.m. in our Hilton Head Island office.

As you know, Judge Mullen ordered that this deposition take place on November 13 or 14, 2012, after your clients produced certain documents Judge Mullen ordered them to produce to the Plaintiff. Judge Mullen ordered your clients to produce the internal investigation documents to Plaintiff on November 7, 2012. However, when your clients failed to produce the documents prior to the deposition date, it was cancelled. Now that Plaintiff has received the internal investigation documents, the deposition should take place as ordered.

We have scheduled the deposition of the 30(b)(6) representative of Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head for June 11, 2013 at 10:00 a.m. in our Hilton Head office. If your client is not available for the chosen date, please let me know and provide additional dates so the deposition can be rescheduled.

McNair Law Firm, P. A.
Shelter Cove Executive Park
23-B Shelter Cove Lane, Suite 400
Hilton Head Island, SC 29928

Mailing Address
Post Office Drawer 3
Hilton Head Island, SC 29938

mcnair.net

RECEIVED

MAY 13 2013

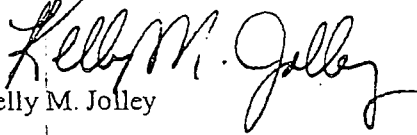
NEXSEN PRUET, LLC

HILTONHEAD 812369v1

Manton M. Grier, Jr.
May 9, 2013
Page 2

M C N A I R
ATTORNEYS

Very truly yours,


Kelly M. Jolley

KMJ:ehb
Enclosures: as stated

cc: Susan Taylor Wall, Esquire
Marc Manos, Esquire

RECEIVED

MAY 13 2013

NEXSEN PRUET, LLC

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-2654

JANET SUE SCHEERLE,

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC d/b/a
CAROLINA HOUSE OF HILTON HEAD and
SONIA S. KING,

Defendants.

)
)
)
) NOTICE OF 30(B)(6)
) VIDEOTAPED DEPOSITION OF
) SOUTHERN ASSISTED LIVING, LLC,
) D/B/A CAROLINA HOUSE OF HILTON
) HEAD
)
)
)
)

TO: MANTON GRIER, JR., ESQ. AND MARC MANOS, ESQ., ATTORNEYS FOR
DEFENDANTS BROOKDALE SENIOR LIVING, INC. AND SOUTHERN
ASSISTED LIVING, LLC, d/b/a CAROLINA HOUSE OF HILTON HEAD:

PLEASE TAKE NOTICE that pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, the undersigned counsel for Plaintiff Janet Sue Scheerle will take the testimony on oral examination by both stenographic and videotaped means of the 30(b)(6) representative of Southern Assisted Living, LLC, d/b/a Carolina House of Hilton Head ("Carolina House"), for the purposes of discovery and all other purposes pursuant to the South Carolina Rules of Civil Procedure, before a Notary Public, or some other officer authorized by law to administer oaths and take depositions, at 10:00 a.m. on June 11, 2013, at the McNair Law Firm, P.A., 23-B Shelter Cove Lane, Suite 400 Hilton Head Island, South Carolina 29928. The deponent will be examined regarding all matters relevant to the subject matter involved in the pending case, as more specifically outlined in Schedule A attached hereto. Said deposition shall continue from time to time until completed, including any adjournments thereof.

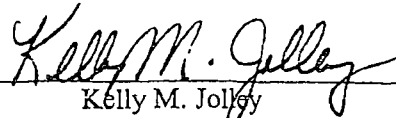
PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 30(j)(8), SCRPC, counsel for Plaintiff hereby identifies and reserves the right to use any and all documents produced or made available in discovery during this deposition and hereby gives notice of Plaintiff's intent to question the witness regarding any and all documents produced or made available by either party during the course of discovery, as well as those obtained pursuant to subpoena or records request.

You are hereby invited to be present as you may be advised in the premises.

Dated: May 9, 2013

McNAIR LAW FIRM, P.A.

By



Kelly M. Jolley
E-Mail: kjolley@mcnair.net
Kathleen Chewning
E-Mail: kchewning@mcnair.net
Post Office Drawer 3
Hilton Head Island, SC 29938
(843) 785-2171

Susan Taylor Wall
E-Mail: swall@mcnair.net
Post Office Box 1431
Charleston, SC 29402
(843) 723-7831

Attorneys for Plaintiff
Janet Sue Scheerle

SCHEDULE A

1. All corporations, associations, entities, or persons who were a part of or had ownership or a financial interest in Carolina House and any company that was responsible for managing Carolina House from January 1, 2007, through present.
2. The sale of the Carolina House of Hilton Head community residential care facility to Kandu Capital, LLC, including the purchase price and terms as well as all operational changes including changes made to personnel, staffing, training, and supervision.
3. Names and addresses of employees of Carolina House who rendered care to Janet Sue Scheerle during her residency at Carolina House and the patient log for Mrs. Scheerle.
4. Complaint(s) or claims of alleged or suspected abuse, neglect, or mistreatment of any resident at Carolina House from January 1, 2007 to January 1, 2012.
5. Internal investigations of alleged or suspected abuse, neglect, or mistreatment of any resident at Carolina House from January 1, 2007 to January 1, 2012.
6. Any claims or litigation related to any complaint(s) of alleged or suspected abuse, neglect, or mistreatment of any resident at Carolina House from January 1, 2007 to January 1, 2012.
7. Staffing of the Clare Bridge Memory Care Unit at Carolina House from January 1, 2007, through March 1, 2011.
8. Resident daily census at Carolina House and in the Clare Bridge Memory Care Unit at Carolina House from January 1, 2007 through March 1, 2011.
9. Policies and procedures in place at Carolina House from January 1, 2007 through March 1, 2011, including but not limited to the following:
 - a. Dispensing medications;
 - b. Safety;
 - c. Supervision;
 - d. Medical Record charting;
 - e. Procedures regarding transfers, baths, and general nursing care and fall risk assessment;
 - f. Reporting Incidents/Accidents;
 - g. Change of Shift Reports and/or report sheets charting;
 - h. Contacting physicians with regard to health or changes in residents;
 - i. Reporting suspected abuse and neglect;
 - j. Complaints by residents and resident family members;
 - k. Internal investigations of abuse and neglect.
10. Employee training at Carolina House from January 1, 2007 through March 1, 2011, including but not limited to the following:

- a. Care and treatment of residents with Alzheimer's disease and/or dementia;
 - b. Observing and documenting a resident's condition;
 - c. Reporting and documenting changes in a resident's condition, including but not limited to behavioral changes, deterioration, incidents, injuries and accidents, and medication errors or concerns;
 - d. Observing, assessing, documenting, and reporting symptoms or other evidence of suspected abuse; and reporting suspected abuse or neglect to Carolina House administration and legal authorities as required by law;
 - e. Dispensing medications;
 - f. Resident safety;
 - g. Supervision of residents and staff;
 - h. Medical record charting;
 - i. Procedures regarding transfers, baths, and general nursing care and fall risk assessment;
 - j. Reporting Incidents/Accidents;
 - k. Change of Shift Reports and/or report sheets charting;
 - l. Contacting physicians with regard to health or changes in residents;
 - m. Rehabilitation of residents;
 - n. Responding to complaints by residents and resident family members;
 - o. Medical tech services;
 - p. Internal investigations of abuse and neglect;
 - q. Treatment and retaliation against employees reporting suspected abuse or neglect of a resident.
11. Employment history for Sonia King, Barbara Newton, Olivia King, Rhoneda Maury, Silas Golden, Jennifer Benson, Ashley Cohen, Janette Ferguson, Angel Rivers and Williamae Perry.
 12. Deficiencies or sanctions imposed against Carolina House by any governmental or other regulatory entity or agency from January 1, 2007, through the present.
 13. Drug inventories and reports at Carolina House from January 1, 2007, through March 1, 2011.
 14. Surveys, survey reports, and communications regarding surveys scheduled or performed by the South Carolina Department of Health and Environmental Control regarding Carolina House from January 1, 2007, through March 1, 2011.
 15. Care and services provided to Janet Sue Scheerle while she was a resident of Carolina House.
 16. The medication schedule and administration for Janet Sue Scheerle while she was a resident of Carolina House.
 17. All injuries sustained by Janet Sue Scheerle while a resident at Carolina House, including visits to any physician or hospital facility for any matter.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-2654

JANET SUE SCHEERLE,

Plaintiff,

v.

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC d/b/a
CAROLINA HOUSE OF HILTON HEAD and
SONIA S. KING,

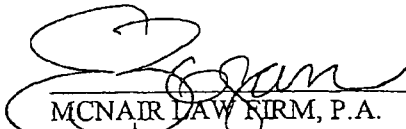
Defendants.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing NOTICE OF 30(B)(6) VIDEOTAPED DEPOSITION
OF SOUTHERN ASSISTED LIVING, LLC, D/B/A CAROLINA HOUSE OF HILTON
HEAD has been served upon the following counsel of record by mailing a copy of the same to
them, postage prepaid, in the United States Mail, addressed as shown below this 9th day of
May, 2013:

Marc Manos, Esq.
Manton Grier, Jr., Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29202

*Attorneys for Defendants Brookdale Senior Living,
Inc. and Southern Assisted Living, LLC, d/b/a
Carolina House of Hilton Head*


MCNAIR LAW FIRM, P.A.
23-B Shelter Cove Lane, Suite 400
Hilton Head Island, South Carolina 29401
(843) 785-2171

RECEIVED

MAY 13 2013

NEXSEN PRUET, LLC

EXHIBIT E

MCNAIR
ATTORNEYS

May 6, 2013

Kelly M. Jolley

kjolley@mcnair.net
T 843.785.2171
F 843.686.5991

Via Certified Mail, Return Receipt Requested

Carter C. Elliott, Jr., Esquire
Elliott & Phelan
P.O. Box 1405
Georgetown, SC 29442

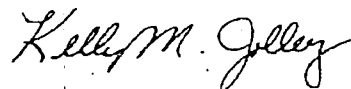
Re: *Janet Sue Scheerle v. Brookdale Senior Living, Inc., Southern Assisted
Living, LLC, and Sonia S. King*
Case No. 2011-CP-07-2654
MFN: 055181-00001

Dear Carter:

Enclosed please find our subpoena for the production of transcripts of the
deposition testimony for the individuals listed therein on or before May 31,
2013, at 5:00 p.m.

Very truly yours,

McNAIR LAW FIRM, P.A.



Kelly M. Jolley

KMJ:ehb

Enclosure: as stated

cc: Manton M. Grier, Jr.

McNair Law Firm, P.A.
Shelter Cove Executive Park
23-B Shelter Cove Lane, Suite 400
Hilton Head Island, SC 29928

Mailing Address
Post Office Drawer 3
Hilton Head Island, SC 29938

mcnair.net

RECEIVED

MAY - 8 2013

NEXSEN PRUET, LLC

HILTONHEAD 811837v1

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF GEORGETOWN

JANET SUE SCHEERLE, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC d/b/a
CAROLINA HOUSE OF HILTON HEAD, AND
SONIA S. KING, Defendant

Case Number: 2011-CP-07-2654

Pending in BEAUFORT County

TO: Carter C. Elliott, Jr., Esquire, Elliott & Phelan, 117 Screven Street, Georgetown, SC 29442

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects:

Transcripts of the deposition testimony of the following persons, including any deposition conducted pursuant to Rule 30(b)(6):

1. Shanada Young
2. Kristi McCuin
3. Rhoneda Maury
4. Thomas Golden
5. Kenya Barkley
6. Shirley Harley
7. Monica Jenkins
8. Diane Bornstein
9. Olivia King
10. Janie Moore
11. Tywana Freeman
12. Julie Ling

PLACE

McNair Law Firm, P.A., Post Office Drawer 3, Hilton Head Island, SC 29938 - Attention: Kelly M. Jolley, Esq. (Street address: 23-B Shelter Cove Lane, Suite 400, Hilton Head Island, SC 29938)

DATE AND TIME May 31, 2013, by 5:00 PM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(e)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES

Attorney/Issuing Officer's Signature

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

Kelly M. Jolley, Esquire, SC Bar No. 72573, McNair Law Firm, P.A., Post Office Drawer 3, Hilton Head Island, SC 29938; (843) 785-2171

Date

Kelly M. Jolley

Print Name

Clerk of Court/Issuing Officer's Signature

Pro Se Litigant's Name, Address and Telephone Number :

Date

Print Name

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE 117 Screven Street, Georgetown, SC 29442	☐ YES ☐ NO AMOUNT \$ NA
SERVED ON Carter C. Elliott, Jr., Esquire		MANNER OF SERVICE <u>CERTIFIED MAIL</u>
SERVED BY <u>E. BOGAN</u>		TITLE <u>LEGAL ASSISTANT</u>

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.
 Executed on 16 May, 2013

E. Bogan
 SIGNATURE OF SERVER
MCNAR LAW FIRM ROOM 301
 ADDRESS OF SERVER
HALL, SC 29438

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- i. fails to allow reasonable time for compliance; or
- ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or
- iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or
- iv. subjects a person to undue burden.

(B) If a subpoena:

- i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

RECEIVED

MAY - 8 2013

NEXSEN PRUET, LLC

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Janet Sue Scheerle,

Plaintiff,

vs.

Brookdale Senior Living, Inc.,
Southern Assisted Living, Inc. d/b/a
Carolina House of Hilton Head, and
Sonia S. King,

Defendants.

IN THE COURT OF COMMON PLEAS

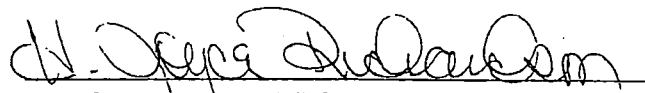
Case No. 2011-CP-07-2654

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Motion For A Protective Order Regarding 30(b)(6) Deposition Notice, To Quash Subpoena, And To Stay Discovery Pending Appeal** has been served upon counsel of record on the 30th day of May, 2013, by depositing a copy of the same, first-class postage prepaid, in the United States Mail, to the addresses shown below.

Susan Taylor Wall, Esquire
McNAIR LAW FIRM, P.A.
Post Office Box 1431
Charleston, South Carolina 29402

Kelly M. Jolley, Esquire
McNAIR LAW FIRM, P.A.
Post Office Drawer 3
Hilton Head Island, South Carolina 29938


NEXSEN PRUETT, LLC

Columbia, South Carolina

Exhibit 13

Appellants' Motion in Mrs. O'Meara's Case for
a Protective Order, to Quash the Subpoena
Duces Tecum and 30(b)(6) Deposition Notice,
and to Stay Discovery Pending the Appeal

Filed April 30, 2013

NEXSEN|PRUET

RECEIVED
MAY 02 2013
BY: _____

Manton M. Grier, Jr.
Special Counsel
Admitted in SC

April 30, 2013

The Honorable Jerri Ann Roseneau
Clerk of Court, Beaufort County
102 Ribaut Road, Room 208
Post Office Box 1128
Beaufort, South Carolina 29901-1128

**Re: Elizabeth O'Meara vs. Brookdale Senior Living, Inc., Southern
Assisted Living, LLC and Sonia S. King
Case No. 2011-CP-07-1610**

Dear Ms. Roseneau:

Enclosed for filing with the Court is the original and one copy of Defendants' **Motion For A Protective Order, To Quash Subpoena And 30(b)(6) Deposition Notice, And To Stay Discovery Pending Appeal** along with the Motion And Order Information Form And Cover Sheet and check for the \$25.00 filing fee. Please return the copy, clocked-in, to us in the envelope provided.

By copy of this letter and as evidenced by the attached Certificate of Service, we are serving counsel of record with a copy of the above Motion.

Thank you for your assistance in this matter.

Very truly yours,



Manton M. Grier, Jr.

MMG/hjr
Enclosure

cc w/encl.: Kelly M. Jolley, Esquire
Susan T. Wall, Esquire

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2118
F 803.727.1439
E MGrier@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Elizabeth O'Meara.

☐ Plaintiff

v.

Brookdale Senior Living, Inc., Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-07-1610

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Kelly M. Jolley, Bar No. 72573 Address: PO Drawer 3, Hilton Head Island, SC 29938 phone: 843-785-2171 fax: e-mail: kjolley@mcnair.net other:	Defendant's Attorney: Marc Manos/Manton Grier, Jr, Bar No. 011876/70525 Address: Post Office Drawer 2426, Columbia, SC 29202 phone: 803-540-2116 fax: 803-727-1439 e-mail: MGrier@nexsenpruet.com other: MManos@
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion for a Protective Order, Quash Subpoena and 30(b)(6) Notice, Stay Discovery Estimated Time Needed: 30 min Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. April 30, 2013 Signature of Attorney for ☐ Plaintiff / ☒ Defendant	
SECTION III: Motion Fee ☒ PAID – AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Elizabeth O'Meara,
Plaintiff,

Case No. 2011-CP-07-1610

vs.

Brookdale Senior Living, Inc., Southern
Assisted Living, LLC d/b/a Carolina House
of Hilton Head, and Sonia S. King,

Defendants.

**MOTION FOR A PROTECTIVE ORDER, TO
QUASH SUBPOENA AND 30(B)(6)
DEPOSITION NOTICE, AND TO STAY
DISCOVERY PENDING APPEAL**

Defendants Brookdale Senior Living, Inc. and Southern Assisted Living, LLC d/b/a Carolina House of Hilton Head ("Brookdale Defendants") moves this Court for a Protective Order and an Order quashing a Subpoena dated April 18, 2013, and staying discovery pending appeal. The grounds for this Motion are as follows:

1. This case is currently pending on appeal regarding the enforceability of an arbitration clause under the Federal Arbitration Act ("FAA"). (Exs. A and B, Notice of Appeal and Statement of Issues on Appeal). The arbitration clause states that the parties may not take fact depositions, as only expert depositions are allowed. (Ex. C, Arbitration Provision, p. 12, ¶ 6(c)).

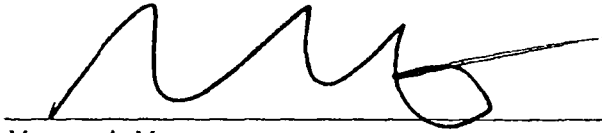
2. Under SCACR 241, the filing of an appeal is an automatic stay of matters affecting the appeal. Further, under the FAA, "a party may demand a stay of . . . judicial proceedings pending exercise of a contractual right" to resolve the case through arbitration. Rich v. Walsh, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2004) (quoting MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001)).

3. Despite the pendency of an appeal that will determine the mode of litigation and trial, the Plaintiff served on April 18, 2013 a Rule 30(b)(6) Deposition Notice and a Rule 30(b)(6) Deposition Subpoena Duces Tecum. The Plaintiff also served Interrogatories and Requests to Produce. All discovery is improper while the case is pending on appeal, as the deposition is forbidden under the arbitration agreement, and the discovery should be stayed while the Court of Appeals determines the enforceability of the arbitration agreement.

4. Further, a number of specific requests in the subpoena and specific topics in the 30(b)(6) deposition notice are objectionable. For example, without waiving objections to other Subpoena requests, Requests #4, #5, #6, #7, #8, #9, #11, #12, #14, #15, #16, #17, #18, #20, #21, #22, #23, #24, #25, #27, #29, #30, #31, #38, and #39 are either not reasonably calculated to lead to the discovery of admissible evidence, overbroad or burdensome, calls for the production of privileged or confidential information, or a combination of all three. Also, for example, and without waiving objections to the 30(b)(6) topics, Topics #1, #2, #4, #5, #6, #8, #10, #11, #12, #13, and #14 are either not reasonably calculated to lead to the discovery of admissible evidence, overbroad or burdensome, calls for the production of privileged or confidential information, or a combination of all three.

5. Finally, in the alternative, if a Rule 30(b)(6) deposition is ordered, it should take place in Nashville, Tennessee, as that is the principal place of business for Southern Assisted Living, LLC. "The deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business." 8A Wright & Miller, § 2112 (3d. ed); Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979); Magnus Electronics, Inc. v. Masco Corp. of Indiana, 871 F.2d 626, 630 (7th Cir. 1989).

Therefore, this Court should enter a protective order quashing the subpoenas and ordering that no discovery should be had during the pendency of this appeal.



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Manton M. Grier, Jr.
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MManos@nexsenpruet.com
MGrier@nexsenpruet.com

Attorneys for Defendants
Brookdale Senior Living, Inc. and Southern
Assisted Living, LLC d/b/a Carolina House of
Hilton Head

April 30 2013

Columbia, South Carolina

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

SEP 22 2011

Carmen Tevis Mullen, Circuit Court Judge

SC Court of Appeals

Case No. 2011-CP-07-1610

Elizabeth O'Meara....., Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC....., Appellants,

and

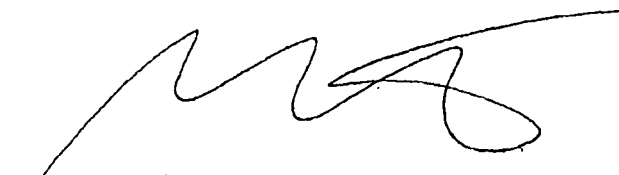
Sonia S. King....., Defendant.

NOTICE OF APPEAL

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC appeals the Order of the Honorable Carmen Tevis Mullen, dated August 8, 2011, denying the Motion to Dismiss and Compel Arbitration filed by Brookdale Senior Living, Inc. and Southern Assisted Living, LLC. A copy of the Order is attached to this Notice of Appeal. Appellants received written notice of entry of this Order on August 23, 2011.

Appellants also filed a Motion to Reconsider on September 2, 2011, which the lower court denied on September 20, 2011. A copy of the Order denying the Motion to

Reconsider is also attached to this Notice of Appeal. Appellants received written notice of that Order on September 22, 2011.



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Attorneys for Appellants
Brookdale Senior Living, Inc. and Southern Assisted
Living, LLC

September 22, 2011

Columbia, South Carolina

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-07-1610

(Jury Trial Requested)

**ORDER DENYING DEFENDANTS,
BROOKDALE SENIOR LIVING, INC.
AND SOUTHERN ASSISTED LIVING,
LLC'S MOTION TO DISMISS AND
COMPEL ARBITRATION**

**BROOKDALE SENIOR LIVING, INC.,
SOUTHERN ASSISTED LIVING, LLC, and
SONIA S. KING,**

Defendants.

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 08-19 PM 4:06
BY 60322 UCBAU/FT COUNTY, S.C.
CLERK OF COURT

1

interstate commerce, (3) the arbitration and limitation of liability clauses contained in the Residency Agreement are unconscionable, and (4) no one with the authority to bind Elizabeth O'Meara to arbitration executed the Residency Agreement on her behalf and discovery would be required to demonstrate any such authority. The Court is persuaded by Plaintiff's arguments opposing the Motion to Compel Arbitration and accordingly denies Defendants' Motion to Dismiss and Compel Arbitration.

During the hearing on this Motion, the parties conceded that arbitration cannot be compelled under the South Carolina Arbitration Act in this matter because Mrs. O'Meara's claims all arise out of her alleged personal injury. S.C. Code Ann. Section 15-48-10. Defendants contend that the FAA preempts the South Carolina state statute. However, I find that the Residency Agreement between Elizabeth O'Meara and Carolina House does not involve interstate commerce. Therefore, this case is not subject to the FAA. The South Carolina Supreme Court in *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) held that the FAA was inapplicable to a similar contract for patient and residency services. The Court explained that the analysis must focus on the contract between the parties, and whether that contract involves interstate commerce. The Residency Agreement here is a contract for basic services – accommodations, meals, utilities, housekeeping, laundry and recreation. The provision of these contractual services to Mrs. O'Meara at the Carolina House facility in Hilton Head does not involve interstate commerce. Moreover, the Affidavit of Timothy J. Caesar attached to Defendants' Motion does not contain any facts from which one could conclude that any of the basic services included in the contract between Mrs. O'Meara and Carolina House involve interstate commerce.

Defendants argued that *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531 (2001) and *Allied Bruce Terminal Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) changed the analysis previously supported in *Timms*. However, these cases clarify that a transaction occurring via a

contract must in fact involve interstate commerce to enforce an arbitration provision in the contract. Neither case alters our Supreme Court's holding in *Timms* that arbitration cannot be compelled pursuant to the FAA when the underlying transaction does not involve interstate commerce. The Residency Agreement does not involve interstate commerce and Defendants' Motion to Dismiss and Compel Arbitration must be denied.

Even if the Residency Agreement did involve interstate commerce so as to bring it under the purview of the FAA, I find that the arbitration and limitation of liability clauses in the Residency Agreement are unconscionable and should be struck in their entirety from the contract. Among other provisions, the arbitration and limitation of liability clauses in the Residency Agreement significantly restrict discovery, limit compensatory damages, and prohibit punitive damages. Both the "Arbitration Provision" (V.A.) and the "Limitation of Liability Provision" (V.B.) are included in Section V. of the Residency Agreement. Subsection V.A(13) incorporates by reference the Limitation of Liability Provision into the Arbitration Provision. Taken together, these provisions restrict discovery, including a limitation on depositions to only those of experts, and limits liability for any "claims by, or on behalf of, a Resident ... arising out of the care or treatment received by the Resident...." For example, all "[n]et economic damages" awarded must be "offset by any collateral source payments such as payments made by medical insurance." Additionally, the provisions limit noneconomic damages, including pain and suffering, to "a maximum of \$350,000.00", prohibit payment of "[i]nterest and/or late fees on unpaid assisted living charges", and preclude any award for punitive damages. Generally, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007). I find that the limitations on damages and discovery unilaterally

imposed upon Mrs. O'Meara in the Residency Agreement are substantively unconscionable and violate public policy. Accordingly, even if the FAA were applied to the Residency Agreement, Section V of the Residency Agreement ("Arbitration and Limitation of Liability Provision") is unconscionable and unenforceable in its entirety. *See, e.g. Simpson*, 373 S.C. at 33-37, 644 S.E.2d at 673-674.

Finally, there is a question whether Mrs. O'Meara's acquiescence to the arbitration agreement in the Residency Agreement is valid. Mrs. O'Meara argued that she did not execute the Residency Agreement, that Julia Stanton, Mrs. O'Meara daughter, executed the Residency Agreement as Mrs. O'Meara's Attorney-in-Fact for health care matters, and that Julia Stanton is not Mrs. O'Meara's attorney-in-fact under Mrs. O'Meara's durable power of attorney and does not have the authority to bind Mrs. O'Meara to arbitration. Mrs. O'Meara presented a instrument designating Thomas Stanton as Mrs. O'Meara's attorney-in-fact. The proper forum for determining whether an arbitration clause is enforceable in South Carolina is the trial court rather than arbitration. *See, Simpson*, 373 S.C. at 23, 644 S.E.2d at 667-668 ("[T]he trial court should determine the threshold validity of the arbitration agreement."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties.") To the extent that the parties contest whether Julia Stanton had the authority to bind Mrs. O'Meara to arbitration, the parties must engage in discovery regarding the matter, precluding dismissal of this case at this time.

IT IS NOW THEREFORE ORDERED, this action shall proceed on the jury docket for the Fourteenth Judicial Circuit, Beaufort County, South Carolina. The Defendants shall have fifteen (15) days from the date of this Order to file responsive pleadings.

AND IT IS SO ORDERED.

By: 
Carmen T. Mullen
Circuit Court Judge
Fourteenth Judicial Circuit

July 20, 2011
Beaufort, South Carolina

FORM 4

9-22-11

STATE OF SOUTH CAROLINA
COUNTY OF Beaufort
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-070-1610

Elizabeth O'Meara vs. Brookdale Senior Living Inc, et al

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 12(e), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

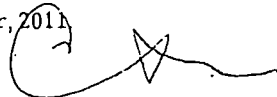
2011 SEP 20 AM 10:04
CLERK OF COURT
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Defendant Brookdale Senior Living's Motion to Reconsider Order, is respectfully denied without a hearing.

Dated at Beaufort, South Carolina, this 20 day of September, 2011.



PRESIDING JUDGE - Carmen T. Mullen

This judgment was entered on the 20 day of September 2011, and a copy mailed first class this 20 day of September, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Kelly McPherson Jolley McNair Law Firm, PA
PO Drawer 3 Hilton Head Island, SC 29938

Manton M Grier, Jr. Nexsen Pruet, LLC
PO Drawer 2426 Columbia, SC 29202

ATTORNEY(S) FOR PLAINTIFF

ATTORNEY(S) FOR DEFENDANT

Jamie Thompson

Jerri Ann Roseneau - Clerk of Court

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-CP-07-1610

Elizabeth O'Meara,.....Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC,.....Appellants

and

Sonia S. King,.....Defendant.

PROOF OF SERVICE

The undersigned certifies that a copy of the Notice Of Appeal has been served upon counsel of record by depositing a copy of the same, first-class postage prepaid in the United States Mail, on the 22nd day of September, 2011, to the address shown below.

Kelly M. Jolley, Esquire
McNAIR LAW FIRM, P.A.
Shelter Cove Executive Park
23-B Shelter Cove Lane, Suite 400 (29928)
Post Office Drawer 3
Hilton Head Island, South Carolina 29938

H. Jolley Jolley
NEXSEN PRUET, LLC

EXHIBIT B

BACKGROUND OF THE CONSOLIDATED APPEALS

This consolidated appeal seeks to enforce three similar arbitration agreements that were voluntarily entered on behalf of the three Respondents, who were residents of the Carolina House of Hilton Head ("Carolina House"), an assisted-living community. The Respondents are not related, and each entered the Carolina House on different dates. They allege that they were abused by Sonia King, a former employee at the Carolina House, during the early morning hours of December 31, 2010. After each Respondent filed a complaint, the Appellants moved to dismiss the cases and compel arbitration pursuant to the arbitration clauses found in each Residency Agreement. The lower court, Judge Carmen T. Mullen, denied the motions, which led to this appeal.

ISSUES ON APPEAL

- I. Whether the Residency Agreements signed on behalf of each Respondent involve interstate commerce and are governed by the Federal Arbitration Act?
- II. Whether Respondents Elizabeth O'Meara and Janet Sue Scheerle, who are beneficiaries under the Residency Agreements, should be equitably estopped from refusing to comply with the terms of their agreements?
- III. Whether the Respondents' claim of unconscionability are not yet ripe and should first be decided by an arbiter, and not a Court?
- IV. Whether the Residency Agreements are not unconscionable; and, in the alternative, whether the Court should enforce arbitration and sever any provisions it finds unconscionable?

STATEMENT OF THE CASE

These consolidated appeals seek to enforce three similar arbitration clauses found in the admission agreements to an assisted-living community. The Respondents—Elizabeth O'Meara, Yvonne Carrie Pruett, and Janet Sue Scheerle—

EXHIBIT C

The Company will provide a written explanation if the Company terminates this Agreement with less than thirty (30) days notice.

D. TERMINATION BY EITHER PARTY

You, your Responsible Party or the Company may terminate this agreement immediately in the event of death or if a physician certifies, based upon an examination prior to moving out, that you must be relocated because of your health. The Company requests you provide written notice of your intent to terminate. Termination shall be effective the day after your last date of residence.

V. ARBITRATION AND LIMITATION OF LIABILITY PROVISION

Should any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.

A. ARBITRATION PROVISION

1. Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at the Company, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. The parties to this Agreement further understand that a jury will not decide their case. The Federal Arbitration Act shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.
2. Demand for Arbitration by Resident, his or her guardian, a person or organization acting on behalf of a Resident with the consent of the Resident or his or her guardian, or the personal representative of the estate of a deceased Resident (collectively "Resident Party") shall be made in writing and submitted to CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza, Greenville, SC 29601, via certified mail, return receipt requested. Demand for Arbitration by the Company shall be made in writing and submitted to the Resident or his or her agent, representative, successor or assign and/or Resident's Attorney-in-Fact, and/or Responsible Party via certified mail, return receipt requested.

3. The arbitration proceedings shall take place in the county in which the Community is located, unless agreed to otherwise by mutual consent of the parties.
4. The arbitration panel shall be composed of one (1) arbitrator. Subject to the requirements of section A.5. herein, the parties shall agree upon an arbitrator that must either be a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience as an attorney. If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then the arbitration shall be submitted to the National Arbitration Forum, or other similar organization, but must still be conducted by one (1) arbitrator who is a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience practicing as an attorney. If the arbitrator is selected from the National Arbitration Forum, or other similar organization, each party shall have the right to request one (1) substitution within ten (10) days of receiving notice of the identity of the arbitrator. The person requesting of the substitution shall submit a request for substitution in writing to the National Arbitration Forum, or other similar organization, and to the other party via U.S. mail.
5. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.
6. Discovery in the arbitration proceeding shall be governed by the Federal Rules of Civil Procedure. However, discovery shall be modified by the following, unless agreed to otherwise by the party to whom the request is made:
 - a. The Resident Party shall provide the Company with permissible discovery per the Federal Rules of Civil Procedure within twenty (20) days after Demand for Arbitration is received (and the Company shall reimburse Resident Party \$0.25 per page).
 - b. The Company shall provide the Resident Party with permissible discovery per the Federal Rules of Civil Procedure within twenty (20) days after the Demand for Arbitration is received (and Resident Party, unless proven indigent, shall reimburse the Company \$0.25 per page).
 - c. The only depositions allowed shall be of experts. No other individuals may be deposed.
 - d. Resident Party shall designate any and all expert witnesses within sixty-five (65) days after Demand for Arbitration is submitted.
 - e. The Company shall have thirty (30) days after Resident Party's expert designation is received in which to depose such experts.

- f. The Company shall designate any and all experts one hundred and fifteen (115) days after Demand for Arbitration is submitted.
- g. Resident Party shall have thirty (30) days after the Company's expert designation is received in which to depose such experts.
- h. Any report or affidavit of an expert, and a list of all records contained in the expert's file, must be exchanged by the parties no later than ten (10) working days before the date of the expert's deposition.
- i. The following shall be exchanged no later than fourteen (14) working days before the arbitration hearing:
 - 1. List of witnesses to be called at the arbitration hearing (full name, title, address and phone number if known) and an outline of each witnesses' intended testimony;
 - 2. List of documents to be relied upon at the arbitration hearing;
 - 3. Any sworn recorded statements to be relied upon at the arbitration hearing and included therewith the full name, title, address and phone number of the person making the sworn statement.
- j. The arbitration hearing shall be held no later than one hundred and eighty (180) days after Demand for Arbitration is submitted, or within a reasonable time thereafter if a conflict arises with the arbitrator's calendar.
- 7. The arbitrator shall designate a time and place within the county in which the Community is located, for the arbitration hearing and shall provide thirty (30) days' notice to the parties of the arbitration hearing.
- 8. The arbitrator shall apply the Federal Rules of Evidence and Federal Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, Federal law except as otherwise stated in this Arbitration Provision.
- 9. The arbitration decision should be signed by the arbitrator and delivered to the parties and their counsel within thirty (30) days following the conclusion of the arbitration. The decision shall set forth in detail the arbitrator's findings of fact and conclusions of law.
- 10. The arbitrator's decision shall be final and binding without the right to appeal.
- 11. The arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent. The parties shall bear their own attorneys' fees and costs and hereby expressly waive any right to recover attorney fees or costs, actual or statutory.

12. The arbitration proceeding shall remain confidential in all respects, including the Demand for Arbitration, all arbitration filings, deposition transcripts, documents produced or obtained in discovery, or other material provided by and exchanged between the parties and the arbitrator's findings of fact and conclusions of law. Following receipt of the arbitrator's decision, each party agrees to return to the producing party within thirty (30) days the original and all copies of documents exchanged in discovery and at the arbitration hearing, except those documents required to be retained by counsel pursuant to law. Further the parties to the arbitration also agree not to discuss the amount of the arbitration award or any settlement, the names of the parties, or the name/location of the Community except as required by law.
13. The Limitation of Liability Provision below is incorporated by reference into this Arbitration Provision
14. This Arbitration Provision and the Limitation of Liability Provision below shall survive the death of the Resident.

X 
(Please initial as having read and understood
the provisions of section V., subsection A)

B. LIMITATION OF LIABILITY PROVISION: *Read Carefully Before Signing*

1. The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement.
2. Liability for any claim brought by a party to this Agreement against the other party, including but not limited to a claim by the Company for unpaid Basic Service or Personal Service charges, or a claim by, or on behalf of, a Resident, Resident Party, or by a Resident's Estate, Agent or Legal Representative, arising out of the care or treatment received by the Resident or the Resident's occupancy or presence at the Company, including, without limitation, claims for medical negligence, shall be limited as follows:
 - a. Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance.
 - b. Noneconomic damages, such as pain and suffering, shall be limited to a maximum of \$250,000.00.
 - c. Interest and/or late fees on unpaid assisted living charges shall not be awarded.
 - d. Punitive damages shall not be awarded.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Elizabeth O'Meara,
Plaintiff,

Case No. 2011-CP-07-1610

vs.

CERTIFICATE OF SERVICE

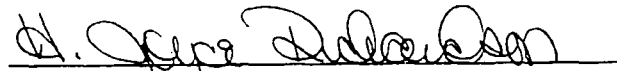
Brookdale Senior Living, Inc., Southern
Assisted Living, Inc. d/b/a Carolina House of
Hilton Head, and Sonia S. King,

Defendants.

The undersigned certifies that a copy of the foregoing **Motion For A Protective Order, To Quash Subpoena And 30(b)(6) Deposition Notice, And To Stay Discovery Pending Appeal** has been served upon counsel of record on the 30th day of April, 2013, by depositing a copy of the same, first-class postage prepaid, in the United States Mail, to the addresses shown below.

Susan Taylor Wall, Esquire
McNAIR LAW FIRM, P.A.
Post Office Box 1431
Charleston, South Carolina 29402

Kelly M. Jolley, Esquire
McNAIR LAW FIRM, P.A.
Post Office Drawer 3
Hilton Head Island, South Carolina 29938


NEXSEN PRUETT, LLC

Columbia, South Carolina

MCNAIR
ATTORNEYS

June 12, 2013

Susan Taylor Wall

swall@mcnair.net
T (843) 723-7831
F (843) 722-3227

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Elizabeth O'Meara vs. Brookdale Senior Living, Inc., et al./Yvonne
Carrie Pruett vs. Brookdale Senior Living, Inc., et al./Janet Sue Scheerle
vs. Brookdale Senior Living, Inc., et al.*
Consolidated Appellate Case No.: 2011-199666

Dear Ms. Kitchings:

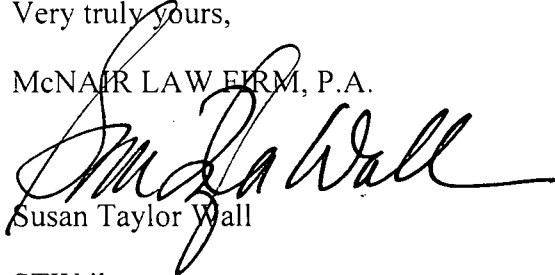
Enclosed for filing, please find the original and seven copies of Respondents' Return to Appellants' Motion to Enforce the Automatic Stay in the above-referenced case. Please file these documents and return a stamp-filed copy to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving a copy of the same upon all counsel of record.

If you have any questions, please do not hesitate to call me. With kind regards,
I am

Very truly yours,

McNAIR LAW FIRM, P.A.



Susan Taylor Wall

STW:jh
Enclosures

cc: Marc Manos, Esq. (w/ Enclosures, via U.S. Mail)
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