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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

Cases No. 2021-CP-39-01127 and -01128
Appellate Case No. 2023-000033

Deonda Weldon, Individually and as
Personal Representative of the Estate of Earline Cooley, Appellant,

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at
Patrick Square; Dominion Senior Living, LLC; Dominion
Clemson, II, LLC; Dominion Management Group, LLC; and
Dominion Group, LLC, Respondents.

**REPLY IN SUPPORT OF RESPONDENTS' MOTION
(1) FOR LEAVE TO MAKE RULE 60, SCRPC, MOTION,
OR, ALTERNATIVELY, (2) FOR IMMEDIATE REVERSAL AND
REMAND PURSUANT TO *WIDENER V. FORT MILL FORD*, AND, IF
NECESSARY, (3) TO STAY/EXTEND BRIEFING DEADLINE**

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In further support of their Motion (1) For Leave To Make Rule 60, SCRCF, Motion, Or, Alternatively, (2) For Immediate Reversal And Remand Pursuant To *Widener v. Fort Mill Ford*, And, If Necessary, (3) To Stay/Extend Briefing Deadline (the “Subject Motion”), Defendants submit this reply to Plaintiff’s return to the Subject Motion.¹

ARGUMENT IN REPLY

At bottom, Plaintiff’s opposition to the Subject Motion is an attempt to make a mountain out of a molehill, or, to use Plaintiff’s own words, an attempt to make “dismissal” (in favor of arbitration, as opposed to a “stay”) out to be “an *integral* and *intentional* part of the circuit court’s decision” (Return p. 7 (emphasis added); *see also id.* at p. 3 (“[Defendants] seek a *wholesale change* to the remedy the circuit court granted by withdrawing the dismissal of [Plaintiff’s] suit and substituting a stay of her claims.”) (emphasis added); *id.* at p. 4 (“[Defendants] want *the most substantive change possible* (i.e. alteration of the scope of relief) in an order their own attorneys drafted.”) (emphasis added).)

¹ Shorthand references already defined in the Subject Motion are continued in this reply (e.g., “Defendants” refers to Defendants/Respondents, Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square; Dominion Senior Living, LLC; Dominion Clemson, II, LLC; Dominion Management Group, LLC; and Dominion Group, LLC, collectively; and “Plaintiff” refers to Plaintiff/Appellant, Deonda Weldon, Individually and as Personal Representative of the Estate of Earline Cooley).

According to Plaintiff, the fact that “dismissal was an integral and intentional part of the circuit court’s decision [is] evidenced by how often and in which contexts the order discussed dismissal.” (Return p. 7; *see also id.* at p. 5 (“First, the order language itself rebuts the notion that ‘dismissal’ was a mistake. The order references dismissal at least seven times. (Order at 1, 4, 6, 9, 22). It is not just the sheer number of references that is compelling but also their context. Dismissal is written right into the order’s caption. (Order at 1) (‘ORDER GRANTING DEFENDANTS’ MOTION TO COMPEL ARBITRATION AND *DISMISSING CASES*’) (italics added). Then, in the third sentence, the order summarizes its ruling by stating it will ‘ORDER[] that this matter be dismissed and compelled to binding arbitration . . .’ (Order at 1). In fact, the order is bookended with unambiguous statements that dismissal is the chosen and intended result. The conclusion starts by stating ‘Defendants’ Motion to Compel Arbitration is hereby **GRANTED** and this matter is **DISMISSED.**’ (Order at 22) (emphasis in original).”); *id.* at p. 5 (“The circuit court’s conscious choice to dismiss [Plaintiff’s] claims was even the specific reason why the parties’ competing discovery motions were deemed moot. (Order at 22) (‘Given the Court’s ruling granting the Motion to Compel Arbitration and Dismissing these Actions, Plaintiff’s Motion to Compel and Defendants’ Motion for a Protective Order are now denied as moot’).”).)

Respectfully, Plaintiff's argument is specious. True enough, as shown on Exhibit A attached hereto, the word "dismissed," or some variant thereof, appears seven times in the circuit court's order formal order granting Defendants' motion to compel arbitration. (Exhibit A pp. 1, 4, 6, 9, 22.) As also shown on Exhibit A, however, on each of those seven occasions, the word "dismissed," and the variants thereof, can be seamlessly removed from the order—without in any way undermining or otherwise upsetting the substance of the circuit court's analysis—simply by substituting the word "stayed," or some variant thereof. (Exhibit A pp. 1, 4, 6, 9, 22.) Were it actually the case that "dismissal was an integral and intentional part of the circuit court's decision,"² this would not be possible.³

In this same vein, consider Plaintiff's argument that "[a]t every step along the way, [Defendants] were asking the circuit court to dismiss [Plaintiff's] action.

² (Return p. 7.)

³ And, to be clear, Plaintiff's attempt to tie the circuit court's determination about the mootness of the parties' competing discovery motions to the court's so-called "conscious choice to dismiss [Plaintiff's] claims" is unsupported by the plain language of the court's order and illogical. As Plaintiff's return itself states, the circuit court's order reads, "'Given the Court's ruling *granting the Motion to Compel Arbitration* and Dismissing these Actions, Plaintiff's Motion to Compel and Defendants' Motion for a Protective Order are now denied as moot.'" (Return p. 5 (quoting Subject Motion at Exhibit 4 [Formal Order] p. 22) (emphasis added).) The plain language of the circuit court's order thus directly ties the mootness of the competing discovery motions to the court's decision to *compel arbitration*, which decision was, as Plaintiff of course knows, enough by itself (i.e., without any dismissal) to moot the issues raised by the discovery motions insofar as the circuit court was concerned, because, based on the

Defendants’ motion was asserted under the authority of Rules 12(b)(1), (3), and (6), SCRCF. All three of those rule provisions concern motions to dismiss. The rule language expressly states 12(b)(6) is a motion to ‘dismiss for failure of the pleading to state facts sufficient to constitute a cause of action.’” (Return p. 6 (internal citations omitted).) Here again, true enough, the references to these procedural rules do appear in Defendants’ motion to compel arbitration,⁴ but they (including the reference to Rule 12(b)(2) that Plaintiff does not mention) are just surplussage.

As explained in the Subject Motion itself, the bare references to Rules 12(b)(1), (2), (3), and (6) notwithstanding, the obvious aim of the motion that the circuit court granted (i.e., Defendants’ motion to compel arbitration, quoted below) was not dismissal of Plaintiff’s cases but rather to compel Plaintiff’s claims to arbitration:

YOU WILL PLEASE TAKE NOTICE that Defendants . . . through their undersigned attorneys, will move . . . for an Order compelling arbitration and for a protective order from discovery As part of Defendants’ Motion to Compel Arbitration, Defendants seek an Order requiring that arbitration be compelled subject to the limitations set forth in the Dominion Senior Living Resident Admission Agreement (“Admission Agreement”)

court’s decision to compel arbitration, those issues were no longer to be decided by the court but in arbitration instead.

⁴ Indeed, a reference to Rule 12(b)(2) does, too. (Subject Motion at Exhibit 3).

[T]his Motion is based on the terms and provisions of the arbitration clause found in the Admission Agreement The terms of the Admission Agreement expressly provide that all disputes for \$15,000.00 (Fifteen Thousand and 0/100) dollars or more between the parties will be resolved by binding arbitration in South Carolina.

Further, because this matter is required to be submitted to binding arbitration, Defendants respectfully request that this Court stay and protect Defendants from any requirement to file any further responsive pleadings, respond to any motions filed by Plaintiff, or respond to any discovery served by Plaintiff, in particular Plaintiff's March 22, 2022 pending Motion to Compel with this Court. Alternatively, Defendants request that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the Federal Arbitration Act.

(Subject Motion at Exhibit 3.) And, to be clear, nowhere in Defendants' 26-page memo in support did they make any actual, substantive argument for dismissal of Plaintiff's claim on the basis Rules 12(b)(1) (lack of jurisdiction over the subject matter), (2) (lack of jurisdiction over the person), (3) (improper venue), or (6) (failure to state facts sufficient to constitute a cause of action). (A copy of Defendants' memo in support, omitting exhibits, is attached hereto as **Exhibit B**. All references to "dismissed," or variants thereof, or to Rules 12(b)(1), (2), (3), or (6) are highlighted in yellow for ease of reference.)

Indeed, so obvious was it to Plaintiff (at the time) that the true aim of Defendants' motion was *not* a dismissal under Rules 12(b)(1), (2), (3), or (6) that nowhere in her 38-page memo in opposition to Defendants' motion did she ever make any actual, substantive argument against dismissal based on Rules 12(b)(1), (2), (3), or (6). (A copy of Plaintiff's memo in opposition, omitting exhibits, is attached hereto as **Exhibit C**. All references to "dismissed," or variants thereof, or to Rules 12(b)(1), (2), (3), or (6) are highlighted in yellow for ease of reference.) In fact, Plaintiff's memo provides the following helpful summary of her arguments, all of which have only to do with the enforceability of the subject arbitration agreement and nothing to do with a potential dismissal under Rules 12(b)(1), (2), (3), or (6), or, for that matter, any "dismissal" at all:

BRIEF SUMMARY OF ARGUMENTS

- I. *The Arbitration Agreement is unenforceable because Defendants abandoned and waived their right to seek to enforce arbitration.***
- II. *The Arbitration Agreement is unenforceable because Debra Galloway did not possess the appropriate authority to execute the Arbitration Agreement on behalf of Earline Cooley.***
- III. *The Arbitration Agreement is unenforceable because it is unconscionable.***
- IV. *The Arbitration is unenforceable as to the statutory beneficiaries' claims in the wrongful death action.***

- V. **The Corporate Defendants, Dominion Senior Living, Dominion Clemson, II, Dominion Management Group, and Dominion Group, are not parties to the alleged Arbitration Agreement, and therefore, *any alleged Arbitration Agreement is not enforceable as to those Defendants.***

(**Exhibit C** pp. 3–4 (emphasis added).) The conclusion of Plaintiff’s memo is more of the same:

CONCLUSION

The Arbitration Agreement is unenforceable because:

- 1) The Defendants waived their right to compel arbitration;
- 2) Earline Cooley’s signatory did not possess adequate authority to execute the agreement; and
- 3) The agreement is unconscionable.

Further, if for some reason the Court found the agreement enforceable, then it should not apply to either the statutory beneficiaries’ wrongful death claim nor include the Corporate Defendants. As a result, Defendants’ motions should be denied.

(**Exhibit C** p. 37 (emphasis added).)

And, naturally, of course, the circuit court’s formal order granting Defendants’ motion to compel arbitration says absolutely nothing about any dismissal pursuant to Rules 12(b)(1), (2), (3), or (6). (See **Exhibit A.**)

Our judicial system values substance over form. *See Fields v. Reg'l Med. Center Orangeburg*, 363 S.C. 19, 27–28, 609 S.E.2d 506, 510 (2005) (“It is proper to treat Plaintiff’s written motion as a Rule 59(e) motion even though it was erroneously captioned as a motion for new trial.”) (citing *Mickle v. Blackmon*, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its substance and effect as opposed to how it was captioned by party); *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (illustrating that when court is able to discern the relief requested, “[i]t is the substance of the requested relief that matters regardless of the form in which the request for relief was framed”); *Standard Fed. Sav. & Loan Assn. v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (explaining that civil procedure rules must be construed to secure the just, speedy, and inexpensive determination of every action, and defects which do not affect the substantial rights of the parties should be disregarded; thus, it is the substance of the relief sought that matters regardless of the form in which the request for relief was framed). Plaintiff’s opposition to the Subject Motion asks the Court to turn this value judgment on its head.

As explained in the Subject Motion itself, the substantive question posed to the circuit court via Defendants’ motion to compel arbitration was whether Plaintiff’s claims should be compelled to arbitration, not whether Plaintiff’s cases should be dismissed, and the use of the word “dismissed,” as opposed to the word

“stayed,” in the formal order granting Defendants’ motion was in no way material to the circuit court’s answer to this question. Clearly, the intended substance and effect of the circuit court’s decision, like that of the motion that precipitated it, was merely to compel Plaintiff’s claims to arbitration. The “dismissal” language in Defendants’ motion and, in turn, the circuit court’s order was indeed mere inartful or mischosen verbiage, as it related to a matter that was, with respect to the intended substance and effect of both the motion and the decision to grant it, merely incidental and logistical in nature.

Obviously, as a practical matter, when the claims in a pending lawsuit are compelled to arbitration, there must be some recognition on the court’s docket that the claims are no longer proceeding in litigation, but rather in arbitration. Clearly, the circuit court’s “dismissal” here was *not*, as Plaintiff urges, a matter of Defendants’ truly seeking or the circuit court truly granting “the most extensive remedy a defendant can ever receive” (Return p. 4.) Rather, it was a matter of procedural housekeeping, and whether by the circuit court via Rule 60(a) or (b), SCRCF, or by this Court pursuant to *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009)), any untidiness in this regard can and should be cleaned up immediately, so that this matter can proceed in the ordinary course, which, is, without question—but for the issue of verbiage upon which Plaintiff attempts to seize (“dismissed” versus “stayed”)—in arbitration and not on

immediate appeal. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584–85 (2003) (“[B]ecause South Carolina’s procedural rule on appealability of arbitration orders, rather than the FAA rule, is applicable, the court’s order compelling arbitration is not immediately appealable.”); *see also Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (“The right of appeal arises from and is controlled by statutory law.”); *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004) (“[South Carolina Code Ann. §] 15-48-200 does not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending arbitration. Therefore, the order compelling arbitration of the claims against Harms and Graves and staying the remaining claims is not immediately appealable.”); *White v. J.M. Brown Amusement Co., Inc.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) (explaining that South Carolina’s public policy is expressed in its constitution provisions, statutes, and judicial decisions). Indeed, South Carolina’s disallowance of immediate appeals from orders compelling arbitration bespeaks a public policy that is plainly at odds with Plaintiff’s effort to force a premature appeal here by, on the one hand, complaining about the circuit court’s use of the word “dismissed” (as opposed to “stayed”) while, on the other hand, opposing the use of procedural tools

readily available (Rule 60 or the procedure followed in *Widener*) to address the complaint.

Lastly, Plaintiff's contentions that the situation at hand is somehow misfit for relief under Rule 60 or materially different from that before the *Widener* Court are mistaken. As explained, the intended substance and effect of the circuit court's decision, like that of the motion that precipitated it, was merely to compel Plaintiff's claims to arbitration, and the "dismissal" of Plaintiff's cases (as opposed to "staying" them) was *not integral* thereto, but merely a logistical miscue *incidental* to bringing that intended substance and effect to fruition—and, of course, while Defendants have no reason whatsoever to expect it, to the extent that circuit court might disagree with Defendants in this regard, it would be free to say so in response to a Rule 60 motion. Whether it be under subsection (a) (regarding clerical mistakes) or (b)(1) (regarding mistake, inadvertence, surprise, or excusable neglect), Rule 60 surely embraces the type of motion for which Defendants now seek this Court's leave to make. *See Landry v. Landry*, 430 S.C. 153, 843 S.E.2d 491 (2020) ("[A] Rule 60(a) . . . 'mistake' must be one where 'there is an inconsistency between the text of an order or judgment and the . . . court's intent when it entered the order or judgment' . . .") (quoting *Sartin v. McNair Law Firm*, 756 F.3d 259, 265–66 (4th Cir. 2014)); *Goodson v. Am. Bankers Ins. Co. of Fla.*, 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988) ("Although most often

used when relief is sought from a judgment by default, Rule 60(b)(1) applies to any final judgment.”)).

Plaintiff’s argument that the Subject Motion runs afoul of the procedure for attempting to lift the automatic stay under Rule 241, SCACR,⁵ is also without merit. First off, even if this procedure were applicable here, Rule 60, the more specific law under the circumstances, takes precedence,⁶ and the Subject Motion complies with the directive in both Rule 60(a) and (b) to seek leave from the appellate court during the pendency of an appeal. Moreover, the procedure for attempting to lift the automatic stay under Rule 241 is simply irrelevant here. Indeed, as Rule 241(a) expressly states, “[t]he lower court . . . retains jurisdiction over matters not affected by the appeal” *See also* Rule 205, SCACR (“Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.”). The Rule 60 motion that the Subject Motion seeks leave to make is *not* something that is *affected by* the appeal; rather, *it would affect the appeal*. Presumably, this is why leave must be obtained from the appellate court to make it during the pendency of an appeal, but in any event, neither the automatic stay nor any need to lift it is implicated by the Subject Motion.

⁵ (See Return pp. 3–4.)

⁶ *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993) (“Generally, specific laws prevail over general laws”).

And as for Plaintiff’s argument that “this case is critically different than *Widener* and is actually governed by *Huskins [v. Mungo Homes, LLC, ___ S.E.2d ___, 2023 WL 2071173 (S.C. Ct. App. Feb. 15, 2023)]*,”⁷ Plaintiff is mistaken. Indeed, Plaintiff’s own argument shows that the circumstances of the instant case are exactly like *Widener*, and materially unlike *Huskins*.

Plaintiff’s attempt to distinguish the instant case from *Widener* and liken it to *Huskins* is founded on a demonstrably false premise, namely, that, like the appealed order in *Huskins*, “[t]he circuit court’s order [in the instant case] goes beyond compelling arbitration and enters a Rule 12(b)(6) dismissal of [Plaintiff’s] legal action.” (Return p. 10 (emphasis added).) Simply put, the circuit court’s order in the instant case does no such thing. As explained above, the circuit court’s order in the instant case neither relies on nor even so much as mentions Rule 12(b)(6). (See **Exhibit A.**)

Having thus erroneously compared the instant case to *Huskins*—wherein, as Plaintiff herself recognizes, the circuit court did more than just “dismiss” instead of “stay” the litigation in favor of arbitration and actually dismissed certain of the Huskinses’ claims pursuant to Rule 12(b)(6)⁸—Plaintiff has highlighted the reason why the instant case is not like *Huskins* but is like *Widener*. As in *Widener*, the

⁷ (Return p. 9.)

only basis for immediate appealability in the instant case is the fact that the appealed order “dismissed” instead of “stayed” the litigation in favor of arbitration, and contrary to Plaintiff’s flawed contention otherwise, the impetus for following the immediate-reverse-and-remand approach (i.e., immediate reversal only insofar as is necessary for the matter to be remanded to the circuit court to vacate its “dismissal” of the claims and to enter an order “staying” them pending the outcome of the arbitration proceedings) is every bit as compelling in the instant case as it was in *Widener*—and the countervailing circumstances underlying the different result in *Huskins* (namely, the fact that the appealed order included a Rule 12(b)(6) dismissal) do not exist.

⁸ To be sure, dismissal of an action pursuant Rule 12(b)(6) is immediately appealable. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

CONCLUSION

WHEREFORE, for the reasons set forth herein, along with those set forth in the Subject Motion itself, Defendants ask this Honorable Court to grant the Subject Motion.

Respectfully submitted,

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May 1, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

Deonda Weldon, Individually and as)
Personal Representative of the Estate)
of Earline Cooley,)

C.A. Number: 2021-CP-39-01127 &
2021-CP-39-01128

Plaintiff,

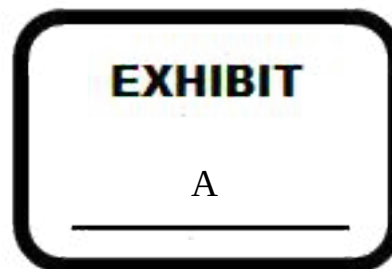
v.

Dominion Clemson, LLC d/b/a)
Dominion Senior Living at Patrick)
Square, Dominion Senior Living,)
LLC, Dominion Clemson, II, LLC,)
Dominion Management Group, LLC)
And Dominion Group, LLC,)

Defendants.

ORDER GRANTING DEFENDANTS'
MOTION TO COMPEL ARBITRATION
AND ~~DISMISSING~~ CASES

STAYING



This matter was before the Court on October 20, 2021, upon Defendants' Motion to Compel Arbitration and Protective Order from Discovery. Counsel of record for all parties were present, including Matthew W. Christian for Plaintiff and Joshua T. Thompson for Defendants. Having reviewed the submissions by counsel and hearing all arguments advanced, the Court hereby GRANTS Defendants' Motion to Compel Arbitration and ORDERS that this matter be ~~dismissed~~ *stayed* and compelled to binding arbitration in accordance with the below findings.

FINDINGS OF FACT

The Court has extensively reviewed the submissions of the parties, including exhibits. Of particular note, the Court has reviewed the Affidavit of Deonda Weldon, the Affidavit of Debra Galloway, Earline Cooley's Durable Power of Attorney attached to Defendants' Memorandum in Opposition as Exhibit 1, Ms. Cooley's Healthcare Power of Attorney (the "Healthcare POA") attached to Defendants Memorandum in Opposition as Exhibit 2, Ms. Cooley's Resident Admission Agreement attached to Defendants' Memorandum in Opposition as Exhibit 3, information on Ms. Cooley's

Emergency Contacts attached to Defendants' Memorandum in Opposition as Exhibit 4, and the various exhibits submitted by the parties which chronical the timeline for Defendants providing notice of investigating the arbitration issue through filing the present motion. Based upon said the arguments presented and said exhibits, the Court makes the following findings of fact:

On January 10, 2006, Earline Cooley ("Ms. Cooley") executed both a Durable Power of Attorney (the "POA") and Healthcare Power of Attorney (the "Healthcare POA"). The POA was filed in Greenville County, SC on August 1, 2014. The POA named Ms. Cooley's daughter, Deonda Weldon ("Ms. Weldon"), as Ms. Cooley's agent. Additionally, Ms. Cooley named her daughters, Phyllis Robin Cooley Elliott ("Ms. Elliott") and Debra Galloway ("Ms. Galloway"), in that order, as substitute or successor agents if Ms. Weldon was unable, unwilling, or unavailable. The POA granted the available agent all lawfully delegated powers not specifically limited in the POA. Ms. Cooley did not limit the available POA's power to admit her to a community residential care facility or limit the available POA's power to agree to any terms relevant to such admission. The powers expressly included the power to arbitrate; the power to abandon and/or compromise claims; the power to sign and execute contracts, agreements, releases, and waivers; and the power to pay medical expenses. The POA also stated that Ms. Cooley expressly provided that all actions taken by the available agent pursuant to the POA shall "bind me and my estate and my personal representative."

In the Healthcare POA, Ms. Cooley named Ms. Elliott as her agent. Ms. Cooley named Ms. Galloway and Ms. Weldon, in that order, as substitute or successor agents if Ms. Elliott was unable, unwilling, or unavailable. The Healthcare POA granted the power to provide a place of residence and to make arrangements at any nursing home or similar establishment. Like the POA, Ms. Cooley stated within the Healthcare POA that all actions taken by the available agent shall "bind me and my estate and my personal representative."

On February 14, 2019, Ms. Galloway, as the available durable power of attorney, executed the

Admission Agreement on behalf of Ms. Cooley as part of the process for admitting Ms. Cooley to Defendant Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square ("Dominion Clemson") for assisted living care. The Admission Agreement provided that Ms. Cooley was to be admitted to Dominion Clemson on March 8, 2019, for assisted living care that included accommodations, basic daily services such as meals, activities, and maintenance, and medication administration. The Admission Agreement also contained an arbitration clause within the same document, not as a separate document or exhibit. Based on the Admission Agreement, Ms. Cooley was admitted to Dominion Clemson for assisted living in March 2019. Ms. Cooley remained at Dominion Clemson until her discharge in March 2020.

In Paragraph 13 of the Admission Agreement, bolded and titled "**AGREEMENT TO ARBITRATE**," Ms. Galloway agreed that any claim or dispute "amongst the Parties, involving an amount in excess of \$15,000, arising out of or related to this Agreement, the Establishment or the services/care provided to the Resident, shall be determined by arbitration in South Carolina, before a sole arbitrator." Ms. Galloway likewise agreed that the Federal Arbitration Act "shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration provisions in this Agreement." Further, Ms. Galloway agreed that the parties would waive the right to be awarded punitive damages.

Likewise, Ms. Galloway agreed that the rights and obligations of the parties under the Admission Agreement "shall bind...the Parties hereto, their legal representatives, heirs, estates, successors and assigns. Ms. Galloway also agreed that should any provision of the Admission Agreement be found unenforceable, such unenforceable provisions would be severed and the remainder of the Admission Agreement would continue in full force and effect. Ms. Galloway agreed that "she was given the opportunity to read this Agreement before signing it." Ms. Galloway agreed in the Admission Agreement that all information provided to Dominion Clemson as part of the admission process, including Ms. Cooley's "application forms, health history and medical report, personal interview and emergency

information records, as applicable, is true and correct.”

On October 13, 2021, Plaintiff commenced actions 2021-CP-39-01127 and 2021-CP-39-01128, both alleging claims of negligence against all Defendants related to the care that Ms. Cooley received while she was a resident at Dominion Clemson. Defendants timely filed their Answer on December 21, 2021, expressly raising the arbitration provision within the Admission Agreement as an affirmative defense. Along with the filed Answer, Defendants simultaneously served Plaintiff on the same day with Defendants’ First Set of Interrogatories to Plaintiff and Defendants’ First Set of Requests for Production to Plaintiff. These discovery requests specifically sought all powers of attorney executed by Ms. Cooley.

Plaintiff responded to Defendants’ First Set of Interrogatories to Plaintiff and Defendants’ First Set of Requests for Production to Plaintiff on April 25, 2022, and included document production that contained the POA. On June 9, 2022, Defense counsel emailed Plaintiff’s counsel apologizing for a delayed response due to having Covid and informed Plaintiff’s counsel that Defendants searched Plaintiff’s county of residence, Pickens County, for a durable power of attorney and were unsuccessful in discovering such document. Defense counsel then stated that after reviewing Plaintiff’s Responses to Defendants’ First Set of Requests for Production Defendants, Defense counsel became aware of the Plaintiff’s POA and planned to move to compel arbitration pursuant to the admission agreement. Defendants filed their Motion to Compel Arbitration and Protective Order from Discovery on June 9, 2022, which is now present before the Court.

Since these claims expressly fall within the scope of the Admission Agreement that contain an arbitration provision, the Court finds this matter should be ~~dismissed~~ ^{stayed} and compelled to arbitration.

CONCLUSIONS OF LAW

As an initial matter, the Court recognizes that both Federal and South Carolina law favor arbitrating disputes. See O’Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997) (“The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption

in favor of the validity of arbitration agreements.”); Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (“Furthermore, it is the policy of this state to favor arbitration of disputes.”).

For this reason, both Federal and South Carolina courts have held that any doubts over arbitrability should be resolved in favor of compelling arbitration. See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 – 25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”); Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

Viewed through the lens of presumed enforceability outlined above, the Admission Agreement that contains an arbitration provision, by its terms and by law, are governed by the FAA, 9 U.S.C. §§ 1-16; Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA).

Pursuant to the FAA, any written provision in “a contract evidencing a transaction involving commerce” providing that disputes be settled by arbitration is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. The FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*

9 U.S.C. § 4 (emphasis added). “By its terms, the act leaves no place for the exercise of discretion by

a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). As discussed herein, the Admission Agreements satisfies these requirements, and the Court concludes that this matter should be ~~dismissed~~ ^{stayed} and compelled to arbitration.

I. The arbitration provision in the Admission Agreement is not unconscionable.

As set forth above, the following facts are undisputed. Ms. Galloway was a competent adult on February 14, 2019. She reviewed a legal document based upon authority vested by Ms. Cooley’s Power of Attorney. The legal document, an Admission Agreement, concerned Ms. Cooley’s admission to an assisted living facility twenty-two (22) days later on March 8, 2019. The arbitration provision at issue was its own provision of the agreement, conspicuously bolded, and set forth in all capital letters. Ms. Galloway agreed she had time to review the document. Plaintiff, Ms. Cooley, and Ms. Galloway all benefited from the document for the year that Ms. Cooley was admitted to Dominion Clemson. Plaintiff and Ms. Galloway both presented Affidavits to this Court. Neither have claimed that Ms. Galloway did not sign the Admission Agreement. Neither have claimed that Ms. Galloway was suffering from mental infirmity at the time she signed the Admission Agreement. As detailed below, Ms. Galloway as Ms. Cooley’s agent is held to her contract in such a circumstance.

Plaintiff argues that the arbitration provision contained in the Admission Agreement is unconscionable because there was an absence of meaningful choice on the part of Ms. Galloway and that the terms of the Admission Agreement are so oppressive that no fair or honest person would accept them. Plaintiff further argued that despite the Admission Agreement containing a severability provision that severability is not proper for an unconscionable provision and the arbitration “agreement” should be invalidated.

The South Carolina Supreme Court recently issued an opinion regarding the severability of unconscionable provisions. Similar to this matter, in Damico, the Purchase and Sale Agreement

("Agreement") between the parties contained an arbitration provision that was governed by the FAA. Damico v. Lennar Carolinas, LLC, No. 2020-001048, 2022 WL 4231032, at *3 (S.C. Sept. 14, 2022). The South Carolina Supreme Court clearly stated that "[t]he validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator" and that when "conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." Damico, 2022 WL 4231032, at *4 (internal citations omitted). Thus, this Court's analysis is limited to the arbitration provision contained within the Admission Agreement.

As to the arbitration provision, the party arguing unconscionability bears the burden of proving "(1) she lacked a meaningful choice as to whether to arbitrate because the Agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them." Doe v. TCSC, LLC, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "[C]ourts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Id.

Plaintiff attached the Affidavit of Ms. Galloway to her memorandum as an exhibit. In her Affidavit, Ms. Galloway testified that at the time of the execution of the Admission Agreement she was unaware that it contained an arbitration clause, that the admissions process was hurried, that this timeframe was extremely emotional for her family, and finally that had she been aware of the arbitration provision she would not have signed the Admission Agreement. Ms. Galloway fails to explain how she, as a competent adult, was unaware of the arbitration provision given that it was conspicuously set forth as a separate provision of the Admission Agreement under a bolded and capitalized heading that said, **"AGREEMENT TO ARBITRATE."**

South Carolina law is clear that anyone who enters into a written contract has a duty to read the contract which she signs. Maw, 252 S.C. at 284-285, 166 S.E.2d at 204. Likewise, anyone who is capable of reading and understanding, but fails to read a contract before signing is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms).

While Ms. Galloway claims that the admissions processed was hurried and an emotional time, Plaintiff fails to address the twenty-two (22) day time period between the execution of Ms. Cooley's Admission Agreement paperwork on February 14, 2019, and her admission on March 8, 2018. Plaintiff has not provided evidence showing that Ms. Galloway did not have the appropriate time to review the entire Admission Agreement that contained an arbitration provision during the twenty-two (22) day time period between the execution of the documentation and Ms. Cooley presenting to the facility for assisted living care.

The Court, therefore, finds and concludes the Plaintiff has failed to establish that the arbitration provision within the Admission Agreement is unconscionable. Pursuant to Damico, the Court declines to review the liability and damages limiting provisions of the Admission Agreement. Damico indicates that the arbitrator assigned to this matter will determine enforceability of those provisions.

II. The Defendants have not waived their right to compel arbitration.

The Plaintiff filed the Complaints against Defendants on October 13, 2021. After the Complaint was received, the parties corresponded via e-mail to discuss a 30-day extension for the responsive pleading. Defense counsel informed Plaintiff's counsel through e-mail that Defendants were aware of an

arbitration provision in the admission agreement but were only familiar with a healthcare power of attorney at that time and asked for an extension for filing a responsive pleading, including a motion to ~~dismiss~~ ^{stay} or compel arbitration. Defense counsel also stated that he was continuing to investigate the enforceability of the arbitration agreement. Plaintiff's counsel agreed to the request and said that he did not believe the arbitration agreement was "enforceable for several reasons." Plaintiff's counsel did not address whether a durable power of attorney existed.

Defendants timely filed their Answers to Plaintiff's Complaint on December 21, 2021, expressly raising the arbitration provision within the Admission Agreement as an affirmative defense. Along with the filed Answer, Defendants simultaneously served Plaintiff on the same day Defendants' First Set of Interrogatories to Plaintiff and Defendants' First Set of Requests for Production to Plaintiff. In Defendants' First Set of Requests for Production to Plaintiff, Defendants specifically requested "[a]ll powers of attorney, including but not limited to financial, durable, medical, and healthcare powers of attorney, executed by Earline Cooley at any time" in Request for Production No. 21. Over four (4) months later, Plaintiff responded to Defendants' First Set of Interrogatories to Plaintiff and Defendants' First Set of Requests for Production to Plaintiff on April 25, 2022. Plaintiff's response to Defendants' Request for Production No. 21 stated, "See Healthcare Power of Attorney and Durable Power of Attorney for Earline Cooley."

Defense counsel then emailed Plaintiff's counsel on June 9, 2022, apologizing for a delayed response due to being ill with coronavirus and informed Plaintiff's counsel that the Defendants searched Plaintiff's county of residence, Pickens County, for a durable power of attorney and were unsuccessful in discovering such document. Defense counsel then stated that after reviewing Plaintiff's Responses to Defendants' First Set of Requests for Production Defendants, he became aware of the Plaintiff's durable power of attorney and planned to move to compel arbitration pursuant to the admission agreement. Defendants filed the Motion to Compel Arbitration and Protective Order from Discovery at the earliest

possibility on June 9, 2022. Since filing the Motion to Compel Arbitration and Protective Order from Discovery all discovery in this matter ceased pending this Court's ruling on the above-mentioned motions.

Plaintiff argues that Defendants nonetheless waived the right to seek arbitration by serving discovery and subpoenas before learning of the POA. Plaintiff argues that this is true because Plaintiff's counsel attached a copy of the POA to a medical authorization sent to Dominion Clemson before the case was filed. Plaintiff argues that the attachment of the POA put the Defendants on notice of a the POA and that Defendants should not have had to wait for discovery production of the POA to know it existed.

As stated *supra*, both Federal and South Carolina law favor arbitrating disputes and there is no set rule as to what constitutes waiver of arbitration. See O'Neil; Liberty Builders. Even though there is no set rule regarding waiver, generally the factors South Carolina courts consider are:

whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others. Thus, a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. What is a substantial length of time varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (S.C. Ct. App. 2007).

Plaintiff cited to the recent U.S. Supreme Court decision, Morgan, in her memorandum and argued that the Supreme Court held that the prejudice requirement "was not appropriate in determining waiver..." and that "the prejudice requirement, no longer exists." See Plt's Mem. Opp. Page 6. However, this was not the Supreme Court's holding in Morgan. In Morgan, the Supreme Court granted

certiorari “to resolve the split over whether federal courts may adopt an arbitration-specific waiver rule demanding a showing of prejudice.” Morgan v. Sundance, Inc., 212 L. Ed. 2d 753, 142 S. Ct. 1708, 1709 (2022). The Supreme Court stated that “a court must hold a party to its arbitration contract just as the court would to any other kind.” Morgan, 142 S. Ct. 1708 at 1713. The Supreme Court held that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA. Id. at 1714 (stating that the Supreme Court’s “sole holding today is that it may not make up a new procedural rule based on the FAA’s policy favoring arbitration.”).

In addition to Morgan, Plaintiff cited four (4) South Carolina cases regarding waiver in her memorandum. Plaintiff is correct in her argument that nursing homes can waive arbitration rights. However, South Carolina courts have focused considerably on whether a substantial length of time has commenced in litigation, whether excessive discovery has taken place, and if the Plaintiff was prejudiced in the delay seeking arbitration. See Rhodes. Plaintiff also argued in her memorandum that the South Carolina Court of Appeals held in Liberty “that the party moving to compel arbitration waived their right after filing initial pleadings and responding to discovery.” See Plt’s Mem. Opp. Page 7. But, in Liberty, the parties filed initial pleadings, conducted discovery, and were on the brink of trial before a motion to stay in favor of arbitration was filed; a timeframe of over 2.5 years. See Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. Ct. App. 1999). The Court of Appeals stated, “Liberty’s decision to file suit, participate in pretrial discovery, and engage in procedural maneuvering for *two and one-half years* is sufficient to support the trial court’s finding of waiver.” Liberty, 521 S.E.2d 749 at 754 (emphasis added).

Plaintiff’s memorandum further cites Johnson, stating “the South Carolina Supreme Court held that the defendant nursing home waived its right to compel arbitration after, among other things, answering the Complaint, seeking limited discovery issues, serving discover, and waiting approximately ten (10) months to file the motion to compel arbitration...” See Plt’s Mem. Opp. Page 7. Prior to the

filing of the Complaint, the parties in Johnson spent over a year and a half in litigation regarding a temporary restraining order and appointing a guardian *ad litem* and during that time the nursing home failed to exercise its arbitration provision. See Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 788 S.E.2d 216 (S.C. 2016). The South Carolina Supreme Court specifically stated in its analysis in Johnson that the plaintiff indicted they “intended to pursue a defense of waiver” two months after the Complaint was filed and despite this information and acknowledgement from the defense, a motion to compel arbitration was not filed for another eight (8) months, “all while appearing in court and conducting discovery.” Johnson, 788 S.E.2d 216 at 219.

Lastly, Plaintiff relied on Flexon in her memorandum in opposition and stated that “the South Carolina Court of Appeals recognized and affirmed the order that the party moving for arbitration waived its right to arbitration by engaging in discovery without reservation or limitation. See Plt’s Mem. Opp. Page 7. The Flexon holding is complex since it involved several defendants, including a former and subsequent parent company. Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (S.C. Ct. App. 2015). In Flexon, a breach of contract action was filed in May 2009 against numerous defendants. Flexon, 776 S.E.2d 397 at 400. Two (2) months later, one of the defendants, a former subsidiary of one of the co-defendants, filed a motion to compel arbitration and a hearing was held on the matter where a non-moving co-defendant spoke supporting the motion and indicated that he would file his own motion to compel. Id.

In June 2010, the non-moving co-defendant filed his own motion to compel and subsequently the circuit court ruled on the initial motion to compel; denying it not based on time but because of a lack of interstate commerce language and that the parties agreed to litigate the matter in South Carolina. Id. at 401. The initial motion was appealed, upheld, and the second motion to compel was withdrawn without prejudice. Id. The parties then undertook depositions and after the depositions took place, a renewed motion to compel was filed. Id. The South Carolina Court of Appeals focused on the co-defendant

articulating to the court during the initial hearing that he would file a motion to compel, and that motion to compel was not filed for seven (7) months after it's co-defendant's initial motion to compel, and that the parties continued with discovery and depositions after the second motion to compel withdrawn. The Court of Appeals ultimately held that the co-defendant failed to take "the steps necessary to protect its own interests in a timely manner." Id. at 406.

In this matter, Defendants have moved swiftly to protect its interests in a timely manner. As detailed above, Defendants specifically requested from Plaintiff, during the initial discovery process, information regarding power of attorney documentation in December 2021. Defendants did not receive any documentation from Plaintiff, for over four (4) months, until April 2022 when Plaintiff produced her discovery responses. After receiving Plaintiff's discovery responses, the parties began corresponding regarding the scheduling of depositions. Unlike Flexon, no depositions were ever taken in this matter. Defendants specifically requested a stay in discovery pending the outcome of its Motion to Compel Arbitration.

The defendants in Liberty, waited over 2.5 years to file a motion to compel, all while conducting discovery and appearing before the court regarding other matters. The defendants in Johnson went through a lengthy temporary restraining order and guardian *ad litem* process before the Complaint was filed and then waited an *additional year* after the Complaint was filed to compel arbitration. In stark contrast to those cases, Defendants' counsel put Plaintiff's counsel on notice of the potential arbitration issue and what Defendants' counsel was doing to investigate it within their first communication on the case. Defendants also raised arbitration as an affirmative defense in their Answers filed on December 21, 2021. Further, Plaintiff knew from email correspondence and discovery that Defendants were seeking information on any applicable durable powers of attorney during the discovery process.

Defendants informed Plaintiff less than six (6) weeks after receiving Plaintiff's document production, that produced a tangible durable power of attorney for the first time in litigation, that it would

be moving to compel arbitration. Additionally, during those six (6) weeks from Plaintiff's document production to Defendant's filing a Motion to Compel, Defense counsel was ill with coronavirus and yet was still able to file Defendants' Motion to Compel Arbitration months faster than any of the defendants did in Liberty, Johnson, and Flexon.

In accordance with Rhodes, the Plaintiff has failed to show that a substantial length of time transpired between the commencement of this action and Defendants' Motion to Compel Arbitration. Six (6) weeks from the discovery of the durable power of attorney to filing the Motion to Compel Arbitration hardly stacks up to the years of delay in the cases discussed *supra* that Plaintiff relied on to show the Defendants waived its right to compel arbitration. Rhodes also requires this Court to consider whether the party requesting arbitration engaged in extensive discovery prior to moving to compel. Unlike Liberty, Johnson, or Flexon, no additional discovery has taken place in this matter since Defendants filed its Motion to Compel Arbitration on June 9, 2022. Only the initial discovery responses have been produced and no witnesses in this matter have been deposed. The Plaintiff has failed to prove that extensive discovery was conducted prior to Defendants filing its motion.

Finally, Plaintiff's rely on Morgan to claim that the prejudice requirement no longer exists. While this is not how the U.S. Supreme Court articulated it's holding, the Plaintiff has still failed to show any procedural preference to arbitration in this matter. Plaintiff has been unable to produce any evidence showing substantial delay, extensive discovery, or procedural prejudice by Defendants and therefore has failed to prove that the Defendants waived its right to compel arbitration.

The Court, therefore, finds and concludes that Plaintiff has failed to prove that the Defendants waived its right to compel arbitration.

III. All Defendants have the right to join in the request for arbitration pursuant to the Admission Agreement.

Plaintiff argues that the arbitration provision contained in the Admissions Agreement does not apply to the remaining Defendants in this matter. The court in Pearson v. Hilton Head Hosp., 400 S.C.

281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012), relying on International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000), held that “well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” These include principles such as incorporation by reference, assumption, agency, veil piercing/alter ego, and equitable estoppel. International Paper, Id. Further, “[i]t does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.” Id. at 416.

Pearson cited and relied upon the South Carolina District Court’s opinion in Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n.9 (D.S.C. 2005), which held that “equitable estoppel allows a non-signatory to compel arbitration . . . when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.” The court also held that “application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise, arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration is effectively thwarted.” Id. at 295; see also, J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-321 (4th Cir. 1988).

In S.C. Pub. Serv. Authority v. Great Western Coal, et al., the plaintiff contracted with Great Western Coal for the provision of coal. 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). The contract contained an arbitration clause. The plaintiff later brought suit against Great Western Coal, its president, and another employee, alleging that they had increased coal prices while lowering quality. Id. at 561, 437 S.E.2d at 23 – 24. Defendant president, a non-signatory to the contract, filed a motion to dismiss and compel arbitration. Id. at 561, 437 S.E.2d at 24. The trial judge denied defendant president’s motion because he did not sign the contract in his individual capacity, and defendant president appealed. Id. at

563, 437 S.E.2d at 24 – 25.

The South Carolina Court of Appeals reasoned that “a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration.” Id. at 563, 437 S.E.2d at 24 - 25, citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990). The Court of Appeals further reasoned that “when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated.” Id. The Court of Appeals therefore, concluded, that the defendant president was seeking arbitration and held that the trial judge erred in denying the same simply because the defendant president did not sign the contract. Id.

Looking to (1) the language of the Admission Agreement, (2) the claims Plaintiff has raised against Defendants, and (3) applying this law, it is clear that any claims against Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC are substantially intertwined with Plaintiff’s pending claims against Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square, the other signatory to the Admission Agreement.

In Plaintiff’s Complaint, she has alleged that Ms. Cooley was a resident at Dominion Clemson, and that the actions of the remaining Defendants “directly affected resident care such as that of Earline Cooley,” and that the parties were engaged in a “joint enterprise.” Plaintiff thereafter refers to all Defendants as simply “Defendants” within the remaining allegations. Plaintiff’s own allegations of the substantially interdependent and concerted alleged misconduct of Defendants, through which Plaintiff alleges joint liability for those alleged wrongs, compels the construction of the arbitration provision of the Admission Agreement to be equally enforceable by all Defendants. Further, based upon the Motion to Compel Arbitration, it is clear that all Defendants join in the Motion.

The Court, therefore, finds that all Defendants have the right to join in the request for arbitration pursuant to the Admission Agreement.

IV. The arbitration agreement is enforceable as to the statutory beneficiaries' claims in the wrongful death action.

Plaintiff alleged wrongful death claims in case action number 2021-CP-39-01128. Plaintiff argues in her memorandum, citing Bennett, that “South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims.” Plaintiff further argues that even if Ms. Galloway had agreed to arbitration, she did not have the legal authority to bind the statutory beneficiaries who are not parties to the Arbitration Agreement.”

As discussed in more detail *infra*, Ms. Galloway, as Ms. Cooley’s available agent, had the authority under the POA to obligate Ms. Cooley’s wrongful death beneficiaries to arbitration based upon the plain language of the POA and Admission Agreement and because South Carolina’s Wrongful Death Statute is a derivative action. See S.C. Code Ann. § 15-51-10 (The South Carolina Wrongful Death Act requires, as a condition of any suit, that the decedent herself, had she lived, could have “maintain[ed] an action and recover[ed] damages.”); Estate of Stokes v. Pee Dee Family Physicians, LLP, 389 S.C. 343, 347 (2010) (“[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued.” (cataloguing cases)); Rish v. Seaboard Air Line Ry., 90 S.E. 704, 704-05 (S.C. 1916) (“The [Wrongful Death Act] gives a right of action where none existed before, and limited the right of recovery to those cases in which the party injured would have been entitled to recover if death had not ensued.”)

Although the case law in South Carolina has not directly addressed the issue at hand, the court has not been hesitant to prohibit wrongful death actions in which the decedent had in some way barred herself from pursuing the underlying cause of action. In Price v. Richmond & D.R. Co., 33 S.C. 556, 12 S.E. 413 (1889), the court determined that a release executed by the decedent prior to his death prevented a wrongful death action brought by the decedent’s wife. The Court’s decision was premised upon the

limiting language of the wrongful death statute. The Price court held that if the defendant in some way deprived himself of the right to pursue a cause of action, “his administrator is, likewise, [also] barred of his right of action.” Id. at 560, 12 S.E. at 413.

Furthermore, the court in Reed v. Northeastern R. Co., 37 S.C. 42, 16 S.E. 289 (1892) affirmed the Price holding and found that “[a]nything that would have defeated [the decedent’s] recovery would defeat that in behalf of his family in case he failed to survive.” Reed at 53, 16 S.E. at 291. In Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988), the South Carolina District Court interpreted the Wrongful Death statute, and held that a survivor cannot bring an action under the wrongful death statute to recover for the same wrong sued upon earlier by the decedent, if the personal injury statute of limitations has expired, but the specific wrongful death limitations period has not expired. This clearly establishes that Wrongful Death cause of action is wholly derivative. The District Court, sitting in diversity, examined the issue as the highest court of South Carolina would if confronted with the same situation. It then traced the history of wrongful death claims starting with Lord Campbell’s Act. It further held that the same defenses that would have been available to use against the decedent, had he lived, were also available against those asserting the wrongful death claim.

Based on the legal nature of a wrongful death claim, the South Carolina Supreme Court has found that where a decedent or her agent executes an arbitration agreement in connection with the decedent’s admission to a nursing home, wrongful death actions brought by the personal representative can be subject to binding arbitration. Dean, 408 S.C. 371, 759 S.E.2d 727 at n. 3. District Courts in South Carolina interpreting Dean have found that statutory beneficiaries are subject to arbitration. See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015) (“Additionally, the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent’s estate for a claim in wrongful death.”)

Ms. Cooley authorized Ms. Galloway as her available agent under the POA to take acts which

“bind me and my estate and my personal representative.” Ms. Galloway as Ms. Cooley’s available agent then used that authority to sign an Admission Agreement containing an arbitration provision which bound “the Parties hereto, their legal representatives, heirs, estates, successors and assigns.”

Ms. Galloway’s execution of the Admission Agreement, as Ms. Cooley’s attorney-in-fact, defeated Plaintiff’s ability as the personal representative to later disavow her actions. Since the execution of the Admission Agreement, which contains an arbitration provision, lawfully bound Ms. Cooley to arbitrate any action arising from Dominion Clemson’s alleged negligence and expressly bound her estate, heirs, successors, and assigns, it also controls the availability of the wrongful death action to her heirs. Because Ms. Galloway signed the Admission Agreement in her legal capacity on behalf of Ms. Cooley with express authority to bind Ms. Cooley’s estate, heirs, and assigns—and not in her own capacity—she had every right to exercise her mother’s option and authority to bind her heirs to the decision to defer a wrongful death claim to arbitration. Courts across the country hold this premise true. See Diversicare Leasing Corp. v. Hubbard, 189 So.3d 24 (Ala. 2015) (holding that “an arbitration agreement that binds the nursing-home resident also binds the resident’s representative”), citing Entrekin v. Internal Medicine Associates of Dothan, P.A., 689 F.3d 1248, 1259 (11th Cir. 2012).

The court in Diversicare further held that personal representatives of estates of deceased nursing home residents who properly signed arbitration agreements on behalf of residents “were bound to arbitrate the wrongful-death claims” of the resident’s estates. Id. at 28, 30; see also Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004) (holding that personal representatives of nursing home residents were bound by arbitration provisions contained in admission contracts, arbitration provision was not unconscionable, and not a contract of adhesion); Owens v. Coosa Valley Heath Care, Inc., 890 So.2d 983 (Ala. 2004) (holding that arbitration agreement bound both resident and representative); Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc., 623 F. Supp. 2d 1235 (E.D. Wash. 2009) (holding that claims for neglect, corporate negligence, and wrongful death were

subject to arbitration based on arbitration agreement signed by resident's attorney-in-fact that was binding on the estate); Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013) (arbitration agreement covered wrongful death claims, and estate and statutory heirs were bound by the arbitration agreement).

Plaintiff's argument that an Estate and Personal Representative cannot be bound to an arbitration provision in an Admission Agreement ignores the clear language and the practicalities of arbitration provisions in the long term care context. "[T]o hold otherwise would eviscerate a long term care provider's contractual rights when presented with a wrongful death claim of a resident, the very claim anticipated by the Agreement." Estate of Eckstein, 623 F. Supp. at 1239. See also Sanford v. Castleton Health Care Center, LLC, 813 N.E.2d 411, 420 (Ind. Ct. App. 2004) (holding the estate's wrongful death claim was subject to arbitration because "regardless of whether [the personal representative], was privy to the contract containing the arbitration clause, the Estate's survival and wrongful death claims arose out of [Defendant's] alleged negligent treatment of [the resident]").

The wrongful death statute is clearly derivative. A claim under it only arises if there is a wrongful act that would have been actionable by the decedent if she had not died. Likewise, if a wrongdoer dies, a wrongful death action survives against the personal representative subject to actions taken by – or not taken by – the decedent during his lifetime. Execution of a nursing home arbitration agreement by a party with the capacity to contract on behalf of the decedent binds the decedent's estate and statutory heirs in a subsequent wrongful death action arising from an alleged tort within the scope of an otherwise valid arbitration agreement.

Plaintiff further relied on Boyle in her memorandum to argue that "wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants." However, Boyle does not mention the issue of whether a wrongful death claim can be subject to arbitration and the court's holding has no relevance to the issue of whether a decedent

can submit wrongful death claims to arbitration. Ultimately, a wrongful death claim is derivative and there would be no claim but for an injury to the decedent.

The Court, therefore, finds that the arbitration agreement is enforceable as to the statutory beneficiaries' claims in the wrongful death action.

V. Debra Galloway did possess the appropriate authority to execute the Arbitration Agreement on behalf of Earline Cooley.

Plaintiff argued that the arbitration provision, which is contained in Paragraph 13 of the Admission Agreement, was unenforceable because Ms. Galloway did not possess the appropriate authority to execute the Admission Agreement on behalf of Ms. Cooley.

On January 10, 2006, Ms. also executed a durable POA, which was filed in Greenville County, SC on August 1, 2014. The POA named Ms. Weldon as Ms. Cooley's agent. Additionally, Ms. Cooley named Ms. Elliott and Ms. Galloway, in that order, as substitute or successor agents if Ms. Weldon was unable, unwilling, or unavailable. The POA granted the available agent all lawfully delegated powers not specifically limited in the POA including the power to arbitrate, the power to abandon and/or compromise claims, the power to sign and execute contracts, agreements, releases, and waivers, and the power to pay medical expenses. Ms. Cooley did not limit the available POA's power to admit her to a community residential care facility or limit the available POA's power to agree to any terms relevant to such admission. Like the Healthcare POA, the POA clearly provided that all actions taken by the available agent pursuant to the POA shall "bind me and my estate and my personal representative."

On February 14, 2019, twenty-two (22) days before Ms. Cooley's admission to Dominion Clemson, Ms. Galloway, as a durable power of attorney, executed the Admission Agreement on behalf of Ms. Cooley as part of the process for admitting Ms. Cooley to Dominion Clemson for assisted living care. Based upon the information provided to Dominion Clemson during the admissions process, the Court finds and concludes that Ms. Galloway was an available agent under the POA and had the appropriate authority to execute the Admission Agreement, which contains an arbitration provision, on

behalf of Ms. Cooley.

VI. Plaintiff's Motion to Compel and Defendants' Request for a Protective Order from Discovery are denied as moot.

In addition to Defendants' Motion to Compel Arbitration, two (2) other related motions are pending before this Court in this matter, which are Plaintiff's March 22, 2022, Motion to Compel referencing Plaintiff's First Interrogatories and First Requests for Production to Defendants and the remainder of Defendant's June 9, 2022 Motion to Compel Arbitration requesting a Protective Order from Discovery.

At the Court's October 20, 2022, hearing, Defendants argued that they had to abstain from further discovery consultations and production once filing the Motion to Compel Arbitration at the risk of a waiver argument. Plaintiff indeed made this argument in her Memorandum in Opposition. As this Court instructed orally at the hearing on October 20, 2022, the Court only intends to rule on the Motion to Compel Arbitration and granted leave to re-file the Plaintiff's Motion to Compel and Defendants' Motion for a Protective Order pending the Court's ruling on the Motion to Compel Arbitration. Given the Court's ruling granting the Motion to Compel Arbitration and ~~Dismissing~~ ^{Staying} these Actions, Plaintiff's Motion to Compel and Defendants' Motion for a Protective Order are now denied as moot.

CONCLUSION

For the reasons set forth herein, Defendants' Motion to Compel Arbitration is hereby ~~GRANTED~~ ^{STAYED} and this matter is ~~DISMISSED~~. Should Plaintiff opt to pursue this claim in arbitration, she is **COMPELLED** to do so by initiating her claim pursuant to the procedures set forth in Paragraph 13 of the Admission Agreement entitled "AGREEMENT TO ARBITRATE".

IT IS SO ORDERED!



Pickens Common Pleas

Case Caption: Deonda Weldon , plaintiff, et al VS Dominion Clemson, Llc ,
defendant, et al
Case Number: 2021CP3901127
Type: Order/Compel

So Ordered

G.D. Morgan Jr.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

Deonda Weldon, Individually and as)
 Personal Representative of the Estate)
 of Earline Cooley,)

C.A. Number: 2021-CP-39-01127 &
 2021-CP-39-01128

Plaintiff,)

v.)

Dominion Clemson, LLC d/b/a)
 Dominion Senior Living at Patrick)
 Square, Dominion Senior Living,)
 LLC, Dominion Clemson, II, LLC,)
 Dominion Management Group, LLC)
 And Dominion Group, LLC,)

Defendants.)

DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION TO COMPEL
ARBITRATION AND PROTECTIVE ORDER
FROM DISCOVERY AND MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL

EXHIBIT

B

On February 14, 2019, Earline Cooley's daughter and available durable power of attorney Debra Galloway ("Ms. Galloway") executed documents as part of the process for admitting Cooley to Defendant Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square ("Dominion Clemson") for assisted living care twenty-two (22) days later on March 8, 2019. During the admission process, Galloway elected to sign the Admission Agreement which contains an arbitration clause as well as clauses limiting damages recoverable in any subsequent qualifying claim between the parties.

Plaintiff now brings claims against Defendants that are subject to this willing agreement to arbitrate as well as the damages limitation clauses. As such, Defendants respectfully request that the Court to compel arbitration pursuant to the Admission Agreement, **Rule 12(b)(1), (2), (3), and (6), SCRCF**, the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*), and all applicable statutory and

case law. Additionally, pursuant to Rule 26(c), SCRPC, Defendants respectfully request protection from being required to answer Plaintiff's written discovery served in this improperly filed action.

BACKGROUND

On January 10, 2006, Cooley executed a Durable Power of Attorney (the "POA") which was filed in Greenville County, SC on August 1, 2014. See Ex. 1 – POA. Cooley named daughter Deonda Weldon as her agent. Additionally, Cooley named daughter Phyllis Robin Cooley Elliott and Galloway, in that order, as substitute or successor agents if Weldon was unable, unwilling, or unavailable. Ex. 1, p. 1. The POA granted the available agent all lawfully delegated powers not specifically limited in the POA. Ex. 1, p. 1. **Cooley did not limit the available POA's power to admit her to a community residential care facility or limit the available POA's power to agree to any terms relevant to such admission.** The powers expressly included the power to arbitrate (Ex. 1, p. 3, ¶ 7; p. 5, ¶ 13); the power to abandon and/or compromise claims (Ex. 1, p. 5, ¶ 13); the power to sign and execute contracts, agreements, releases, and waivers (Ex. 1, p. 7, ¶ 3); and the power to pay medical expenses (Ex. 1, p. 7, ¶ 4). The POA also stated that Ms. Cooley expressly provided that all actions taken by the available agent pursuant to the POA shall "bind me and my estate and my personal representative." (Ex. 1, p. 8, ¶ 2).

In addition to the Durable Power of Attorney, Cooley executed a Healthcare Power of Attorney on January 10, 2006 (the "Healthcare POA"). Cooley named Elliott as her agent. See Ex. 2 – Healthcare POA. Cooley named Galloway and Weldon, in that order, as substitute or successor agents if Elliott was unable, unwilling, or unavailable. Ex. 2, p. 1. The Healthcare POA granted the power to provide a place of residence and to make arrangements at any nursing home or similar establishment. Ex. 2, p. 3, ¶ (1). Like the POA, Cooley stated within the Healthcare POA that all actions taken by the available agent shall "bind me and my estate and my personal representative." Ex. 2, p. 11, ¶ (15).

On February 14, 2019, twenty-two (22) days before Cooley's admission to Dominion Clemson, Galloway executed the Admission Agreement on behalf of Cooley as part of the process to admit Cooley to Dominion Clemson for assisted living care. The Admission Agreement provided that Cooley was to be admitted to Dominion Clemson on March 8, 2019, for assisted living care that included accommodations, basic daily services such as meals, activities, and maintenance, and medication administration. The Admission Agreement defined "Community" as Dominion Clemson and "Resident" as Ms. Cooley. See Ex. 3 – Admission Agreement.

In the second paragraph of the Admission Agreement, Galloway stated that Weldon agreed to act as the financially responsible party and/or agreed to act as the resident's representative, accepting their respective rights and obligations as set forth in the Admission Agreement. Ex. 3, Bates # Dominion – Cooley 28. Thus, it would have appeared to Dominion Clemson that Galloway and Weldon were communicating about the Admission Agreement.

In Paragraph 13 of the Admission Agreement, bolded and titled "**AGREEMENT TO ARBITRATE**," Galloway agreed that any claim or dispute "amongst the Parties, involving an amount in excess of \$15,000, arising out of or related to this Agreement, the Establishment or the services/care provided to the Resident, shall be determined by arbitration in South Carolina, before a sole arbitrator." Ex. 3, Bates # Dominion – Cooley 39, ¶ 13. Galloway likewise agreed that the Federal Arbitration Act "shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration provisions in this Agreement." Ex. 3, Bates # Dominion – Cooley 39, ¶ 13. Further, Galloway agreed that the parties would waive the right to be awarded punitive damages. Ex. 3, Bates # Dominion – Cooley 40, ¶ 13.

Additionally, in Paragraph 14 of the Admission Agreement, bolded and titled "**LIMITATIONS OF LIABILITY PROVISION**," Galloway agreed that for any claim arising

between the parties, the parties waived the right to jury trial, that net economic damages would be offset by collateral source payments, that non-economic damages would be capped at \$250,000, and that interest on unpaid fees would not be awarded. Ex. 3, Bates # Dominion – Cooley 40, ¶ 14, 15. Each of these points were numerated, spaced, and numbered in offset font from the other type in the Admission Agreement.

Likewise, Galloway agreed that the rights and obligations of the parties under the Admission Agreement “shall bind...the Parties hereto, their legal representatives, heirs, estates, successors and assigns. Ex. 3, Bates # Dominion – Cooley 42, ¶ 20(G). Galloway also agreed that should any provision of the Admission Agreement be found unenforceable, such unenforceable provisions would be severed and the remainder of the Admission Agreement would continue in full force and effect. Ex. 3, Bates # Dominion – Cooley 42, ¶ 20(F).

Importantly, Galloway agreed that “she was given the opportunity to read this Agreement before signing it.” Ex. 3, Bates # Dominion – Cooley 46, ¶ 22.

Also of great importance is that Galloway agreed in the Admission Agreement that all information provided to Dominion Clemson as part of the admission process, including Cooley’s “application forms, health history and medical report, personal interview and emergency information records, as applicable, is true and correct.” Ex. 3, Bates # Dominion – Cooley 46, ¶ 37

Building on Galloway’s representation that all information she provided to Dominion Clemson was true and correct, it appears that Galloway completed Cooley’s admission process and was the appropriate, available agent pursuant to the POA based on the geographic location of Weldon and Elliott. Galloway provided information to Dominion Clemson that Weldon was in Copenhagen, Denmark and that Elliott was in Trophy Club, Texas. Ex. 4 – Emergency Contacts.

Based on the Admission Agreement, Cooley was admitted to Dominion Clemson for assisted living in March 2019. Cooley remained at Dominion Clemson until her discharge in March 2020. In both actions, the Complaint was filed on October 13, 2021, and alleged negligence against all Defendants related to the care that Cooley received while she was a resident of Dominion Clemson. Since these claims expressly fall within the scope of the Admission Agreement that contain an arbitration provision, the Court should compel this matter to binding arbitration subject to the limitations on liability contained within the Admission Agreement.

ARGUMENT

I. Federal and State Law Favor Enforcing Arbitration.

As an initial matter, both Federal and South Carolina law favor arbitrating disputes. See O’Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997) (“The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption in favor of the validity of arbitration agreements.”); Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (“Furthermore, it is the policy of this state to favor arbitration of disputes.”).

For this reason, both Federal and South Carolina courts have held that any doubts over arbitrability should be resolved in favor of compelling arbitration. See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 – 25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”); Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay,

or a like defense to arbitrability.”).

II. The Federal Arbitration Act governs Admission Agreements and compels arbitration.

Viewed through the lens of presumed enforceability outlined above, the Admission Agreement that contains an arbitration provision, by its terms and by law, are governed by the FAA, 9 U.S.C. §§ 1-16. See Ex. 3, Dominion – Cooley 39, ¶ 13; Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA).

Pursuant to the FAA, any written provision in “a contract evidencing a transaction involving commerce” providing that disputes be settled by arbitration is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. The FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*

9 U.S.C. § 4 (emphasis added). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). As discussed herein, the Admission Agreements satisfies these requirements and requires that Plaintiff’s claims be compelled to arbitration.

(a) The Admission Agreement requires arbitration.

- i. Galloway, as Cooley’s available agent pursuant to the POA, executed a clear and valid contract that requires arbitration subject to the limitations on liability set forth therein.**

As set forth in the Background section, Cooley executed a January 10, 2006, Durable

Power of Attorney that was filed in Greenville County on August 1, 2014. See Ex. 1. Through the POA, Cooley gave her available agent—here, Galloway—the broadest lawful powers available to an agent and specifically authorized Plaintiff to agree to arbitration, sign and execute contracts, agreements, waivers, and releases, and pay for medical expenses. Ex. 1, p. 3, - 7. Cooley also specifically authorized the Durable POA Agent to bind her, her estate, and her personal representative. Ex. 1, p. 8.

Galloway, presumably due to the represented geographic unavailability of Weldon and Elliott, executed the Admission Agreement. As the available agent under the POA, Galloway had the authority to do so and to bind Cooley, her estate, and her personal representative to the same based on the agent powers set forth above.

In exchange for signing the Admission Agreement, Dominion Clemson offered Cooley assisted living care, including, accommodations, basic daily services such as meals, activities, and maintenance, and medication administration Ex. 3. Even for non-signatories, admission can serve as the direct benefit which supports arbitration where the admission and arbitration are governed by the same agreement as they are in these cases. See, e.g., Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 558, 813 S.E.2d 292, 299–300 (Ct. App. 2018) (“Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause.”). Cooley did receive the benefits of the Admission Agreement which Galloway bargained, residing at Dominion Clemson as a resident from March 2019 – March 2020.

Weldon now claims via Affidavit that she was the lawful agent under the POA and that Galloway did not have authority to act as Cooley’s agent. Interestingly, Weldon does not claim in her Affidavit that she was present and available to serve as Cooley’s agent at the time of

admission. Indeed, this would cause contact information for Weldon which Galloway agreed was truthful when provided to be false.

Galloway now claims that via Affidavit that she did not know what she was signing, did not know the Admission Agreement contained an arbitration provision, did not understand what she was signing, and was under stress. Interestingly, Galloway **does not** claim in her Affidavit that she was mentally incompetent at the time of execution or that she did not sign the Admission Agreement. All terms now at issue were contained in the Admission Agreement under capitalized and bolded titles, putting Galloway on notice. Likewise, Galloway agreed that she had been provided time to read the Admission Agreement. Ex. 3, Dominion – Clemson 46, ¶ 22. Finally, the admission agreement was signed twenty-two (22) days prior to admission on March 8, 2019. Ex. 3, p. 1. This was not a take-it-or-leave-it proposition. Galloway had time to study her decision and survey options for her mother’s placement twenty-two days later.

Just as any other competent adult entering a contract, Cooley, through the actions of her available agent Galloway, is bound by the terms of the Admission Agreement including the arbitration clause in paragraph 13. See J.B. Colt Co. v. Britt, 129 S.C. 226, 123 S.E. 845, 847 (1924) (a person who enters a valid contract is, “of course, bound by the terms and conditions thereof”); Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (“A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.”); Maw v. McAlister, 252 S.C. 280, 285, 166 S.E.2d 203, 205 (1969) (“The duty on the part of one who signs a written instrument to exercise reasonable care to protect himself requires that he read the contract which he signs....”).

ii. Plaintiff’s claims in both lawsuits are encompassed within the scope of the Admission Agreement.

Not only was a valid Admission Agreement executed, but the Estate's claims also are squarely governed by the arbitration provision in paragraph 13. Paragraph 13 of the Admission Agreement states that "any claim or dispute" as long as it is in "excess of \$15,000" that arises out of the Admission Agreement "shall be determined by arbitration in South Carolina" Ex. 4, p. 12, ¶ 13. "Any claim or dispute" includes the negligence allegations against all Defendants and wrongful death claims alleged in 2021-CP-39-01128 and Plaintiff's survival action in 2021-CP-39-01127.

Specifically as to the survival claims in 2021-CP-39-01127, Cooley's Estate is bound by the Admission Agreement because a survival action is a product of Cooley's alleged conscious pain and suffering. See Rutland v. S.C. Dep't of Trans., 390 S.C. 78, 83, 700 S.E.2d 451, 454 (Ct. App. 2010), aff'd as modified sub nom. Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 734 S.E.2d 142 (2012) ("The test of a survival action in South Carolina is whether the decedent suffered conscious pain and suffering.").

As to the wrongful death claims in 2021-CP-39-01128, Galloway as Cooley's available agent, had the authority under the POA to obligate Cooley's wrongful death beneficiaries to arbitration because South Carolina's Wrongful Death Statute is a derivative action. See S.C. Code Ann. § 15-51-10 (The South Carolina Wrongful Death Act requires, as a condition of any suit, that the decedent herself, had she lived, could have "maintain[ed] an action and recover[ed] damages."); Estate of Stokes v. Pee Dee Family Physicians, LLP, 389 S.C. 343, 347 (2010) ("[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued." (cataloguing cases)); Rish v. Seaboard Air Line Ry., 90 S.E. 704, 704-05 (S.C. 1916) ("The [Wrongful Death Act] gives a right of action where none existed before, and limited the right of recovery to those cases in which the party injured would have been entitled to recover

if death had not ensued.”)

Although the case law in South Carolina has not directly addressed the issue at hand, the court has not been hesitant to prohibit wrongful death actions in which the decedent had in some way barred herself from pursuing the underlying cause of action. In Price v. Richmond & D.R. Co., 33 S.C. 556, 12 S.E. 413 (1889), the court determined that a release executed by the decedent prior to his death prevented a wrongful death action brought by the decedent’s wife. The Court’s decision was premised upon the limiting language of the wrongful death statute. The Price Court held that if the defendant in some way deprived himself of the right to pursue a cause of action, “his administrator is, likewise, [also] barred of his right of action.” Id. at 560, 12 S.E. at 413. Furthermore, the court in Reed v. Northeastern R. Co., 37 S.C. 42, 16 S.E. 289 (1892) affirmed the Price holding and found that “[a]nything that would have defeated [the decedent’s] recovery would defeat that in behalf of his family in case he failed to survive.” Reed at 53, 16 S.E. at 291.

In Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988), the South Carolina District Court interpreted the Wrongful Death statute, and held that a survivor cannot bring an action under the wrongful death statute to recover for the same wrong sued upon earlier by the decedent, if the personal injury statute of limitations has expired, but the specific wrongful death limitations period has not expired. This clearly establishes that Wrongful Death cause of action is wholly derivative. The District Court, sitting in diversity, examined the issue as the highest court of South Carolina would if confronted with the same situation. It then traced the history of wrongful death claims starting with Lord Campbell’s Act. It further held that the same defenses that would have been available to use against the decedent, had he lived, were also available against those asserting the wrongful death claim.

Based on the legal nature of a wrongful death claim, the South Carolina Supreme Court has found that where a decedent or her agent executes an arbitration agreement in connection with

the decedent's admission to a nursing home, wrongful death actions brought by the personal representative can be subject to binding arbitration. Dean, 408 S.C. 371, 759 S.E.2d 727 at n. 3. District Courts in South Carolina interpreting Dean have found that statutory beneficiaries are subject to arbitration. See, e.g., THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015) ("Additionally, the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death.")

It follows logically that Galloway's execution of the Arbitration Agreement as Cooley's attorney-in-fact defeated Plaintiff's ability as the personal representative to later disavow her actions, as she is attempting. Because the execution of the Arbitration Agreement lawfully bound Cooley to arbitrate actions arising from Dominion Clemson's alleged negligence, it also controls the availability of the wrongful death action to her heirs.

Because Galloway signed the Arbitration Agreement in her legal capacity on behalf of Cooley - and not in her own capacity - she had every right to exercise her mother's option and authority to bind her heirs to the decision to defer a wrongful death claim to arbitration. Courts across the country hold this premise true. See Diversicare Leasing Corp. v. Hubbard, 189 So.3d 24 (Ala. 2015) (holding that "an arbitration agreement that binds the nursing-home resident also binds the resident's representative"), citing Entekin v. Internal Medicine Associates of Dothan, P.A., 689 F.3d 1248, 1259 (11th Cir. 2012). The court in Diversicare further held that personal representatives of estates of deceased nursing home residents who properly signed arbitration agreements on behalf of residents "were bound to arbitrate the wrongful-death claims" of the resident's estates. Id. at 28, 30; see also Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661 (Ala. 2004) (holding that personal representatives of nursing home residents were bound by arbitration provisions contained in admission contracts, arbitration provision was not

unconscionable, and not a contract of adhesion); Owens v. Coosa Valley Heath Care, Inc., 890 So.2d 983 (Ala. 2004) (holding that arbitration agreement bound both resident and representative); Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc., 623 F. Supp. 2d 1235 (E.D. Wash. 2009) (holding that claims for neglect, corporate negligence, and wrongful death were subject to arbitration based on arbitration agreement signed by resident's attorney-in-fact that was binding on the estate); Laizure v. Avante at Leesburg, Inc., 109 So.3d 752 (Fla. 2013) (arbitration agreement covered wrongful death claims, and estate and statutory heirs were bound by the arbitration agreement).

Plaintiff's argument that an Estate and Personal Representative cannot be bound to an arbitration agreement ignores the clear language of the Arbitration Agreement and the practicalities of arbitration agreements in the long term care context. "[T]o hold otherwise would eviscerate a long term care provider's contractual rights when presented with a wrongful death claim of a resident, the very claim anticipated by the Agreement." Estate of Eckstein, 623 F. Supp. at 1239. See also Sanford v. Castleton Health Care Center, LLC, 813 N.E.2d 411, 420 (Ind. Ct. App. 2004) (holding the estate's wrongful death claim was subject to arbitration because "regardless of whether [the personal representative], was privy to the contract containing the arbitration clause, the Estate's survival and wrongful death claims arose out of [Defendant's] alleged negligent treatment of [the resident]").

The wrongful death statute clearly derivative. A claim under it only arises if there is a wrongful act that would have been actionable by the decedent, if he had not died. Likewise, if a wrongdoer dies, a wrongful death action survives against the personal representative subject to actions taken by – or not taken by – the decedent during his lifetime.

Plaintiff's argument – taken to its logical end - would mean that the personal representative of an estate is personally liable for a decedent's wrongdoing, and that he - along with the other

heirs - must personally pay any resulting award. Such an outcome cannot be brooked, and such a ruling cannot stand and must be reversed.

Execution of a nursing home arbitration agreement by a party with the capacity to contract on behalf of the decedent binds the decedent's estate and statutory heirs in a subsequent wrongful death action arising from an alleged tort within the scope of an otherwise valid arbitration agreement.

Plaintiff's on Boyle v. United States, 948 F. Supp. 2d 570 (D.S.C. 2012) is wholly misplaced. This case is cited only by name, and not citation, in the trial court order. Boyle does not appear to mention the issue of whether a wrongful death claim can be subject to arbitration. The Boyle Court's holding has no relevance to the issue of whether a decedent can submit wrongful death claims to arbitration. And the fact remains that the wrongful death claim is patently derivative – there would be no claim but for an injury to the decedent.

(b) Defendants have not waived their right to compel arbitration.

Plaintiff filed the Complaints against Defendants on October 13, 2021. After the Complaint was received, the undersigned and Plaintiff's Counsel corresponded via e-mail to discuss a 30-day extension for the responsive pleading between November 19 - 23, 2021. The e-mail correspondence between the parties is attached hereto as Exhibit 5. In Exhibit 5, Plaintiff's Counsel agreed to a 30-day extension on November 23, 2021, for the Answer. That same day, the undersigned informed plaintiff's counsel through e-mail that Defendants were aware of an arbitration provision in the admission agreement but were only familiar with a healthcare power of attorney at that time and asked for an extension for filing a responsive pleading, including a motion to **dismiss** or compel arbitration. See Ex. 5. The undersigned stated that he was continuing to investigate the enforceability of the arbitration agreement. Plaintiff's counsel agreed to the request and stated that he did not believe the arbitration agreement was "enforceable for several

reasons.” Plaintiff’s counsel did not address the undersigned’s point about whether a durable power of attorney existed. Ex. 5.

Defendants timely filed their Answers to Plaintiff’s Complaint on December 21, 2021, expressly raising the arbitration provision within the Resident Admission Agreement as an affirmative defense. Along with the filed Answer, Defendants simultaneously served Plaintiff on the same day Defendants’ First Set of Interrogatories to Plaintiff and Defendants’ First Set of Requests for Production to Plaintiff. The Certificate of Service for Defendants’ Answer and discovery requests to Plaintiff is attached hereto as Exhibit 6. In Defendants’ First Set of Requests for Production to Plaintiff, Defendants specifically requested “[a]ll powers of attorney, including but not limited to financial, durable, medical, and healthcare powers of attorney, executed by Earline Cooley at any time” in Request for Production No. 21, which is attached hereto as Exhibit 7.

Over four (4) months later, Plaintiff responded to Defendants’ First Set of Interrogatories to Plaintiff and Defendants’ First Set of Requests for Production to Plaintiff on April 25, 2022. A copy of the Certificate of Service of attached hereto as Exhibit 8. Plaintiff’s response to Defendants’ Request for Production No. 21 states, “See Healthcare Power of Attorney and Durable Power of Attorney for Earline Cooley.” which is attached hereto as Exhibit 9.

The undersigned counsel emailed plaintiff’s counsel on June 9, 2022, apologizing for a delayed response due to being ill with coronavirus and informed Plaintiff’s Counsel that the Defendants searched Plaintiff’s county of residence, Pickens County, for a durable power of attorney and were unsuccessful in discovering such document. The undersigned then stated that after reviewing Plaintiff’s Responses to Defendants’ First Set of Requests for Production Defendants, the undersigned became aware of the Plaintiff’s durable power of attorney and planned to move to compel arbitration pursuant to the admission agreement. Ex. 10. Defendants

filed the Motion to Compel Arbitration and Protective Order from Discovery at the earliest possibility on June 9, 2022. Since filing the Motion to Compel Arbitration and Protective Order from Discovery all discovery in this matter has ceased pending the Court's ruling on the above-mentioned motions.

As stated *supra*, both Federal and South Carolina law favor arbitrating disputes and there is not set rule as to what constitutes waiver of arbitration. See O'Neil; Liberty Builders. Even though there is no set rule regarding waiver, generally the factors South Carolina courts consider are:

whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others. Thus, a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. What is a substantial length of time varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (S.C. Ct. App. 2007).

Plaintiff cites to the recent U.S. Supreme Court decision, Morgan, in her memorandum. See Plt's Mem. Opp. Page 6. Plaintiff states that the Court held that the prejudice requirement "was not appropriate in determining waiver..." and that "the prejudice requirement, no longer exists." Id. This is a misrepresentation of the Court's holding in Morgan. In Morgan, the Supreme Court granted *certiorari* "to resolve the split over whether federal courts may adopt an arbitration-specific waiver rule demanding a showing of prejudice." Morgan v. Sundance, Inc., 212 L. Ed.

2d 753, 142 S. Ct. 1708, 1709 (2022). The Supreme Court stated that “a court must hold a party to its arbitration contract just as the court would to any other kind.” Morgan, 142 S. Ct. 1708 at 1713. The Supreme Court held that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA. Id. at 1714 (stating that the Supreme Court’s “sole holding today is that it may not make up a new procedural rule based on the FAA’s policy favoring arbitration.”).

In addition to Morgan, Plaintiff cites four (4) South Carolina cases regarding waiver. As stated *supra*, Plaintiff is correct in stating that nursing homes can waive arbitration rights. However, South Carolina courts have focused considerably on whether a substantial length of time has commenced in litigation, whether excessive discovery has taken place, and if the Plaintiff was prejudiced in the delay seeking arbitration. See Rhodes.

Plaintiff states in her memorandum that the South Carolina Court of Appeals held in Liberty “that the party moving to compel arbitration waived their right after filing initial pleadings and responding to discovery. See Plt’s Mem. Opp. Page 7. Again, this is not a clear representation of the court’s holding. In Liberty, the parties filed initial pleadings, conducted discovery, and were on the brink of trial before a motion to stay in favor of arbitration was filed; a timeframe of over 2.5 years. See Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. Ct. App. 1999). The Court of Appeals stated “Liberty’s decision to file suit, participate in pretrial discovery, and engage in procedural maneuvering for **two and one-half years** is sufficient to support the trial court’s finding of waiver. Liberty, 521 S.E.2d 749 at 754 (emphasis added).

Plaintiff’s memorandum also cites Johnson, stating “the South Carolina Supreme Court held that the defendant nursing home waived its right to compel arbitration after, among other things, answering the Complaint, seeking limited discovery issues, serving discover, and waiting approximately ten (10) months to file the motion to compel arbitration...” See Plt’s Mem. Opp.

Page 7. Plaintiff does not mention that prior to the filing of the Complaint, the parties in Johnson spent over a year and a half in litigation regarding a temporary restraining order and appointing a guardian *ad litem* and during that time the nursing home failed to exercise its arbitration provision. See Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 788 S.E.2d 216 (S.C. 2016). The South Carolina Supreme Court specifically stated in its analysis in Johnson that the plaintiff indicted they “intended to pursue a defense of waiver” two months after the Complaint was filed and despite this information and acknowledgement from the defense a motion to compel arbitration was not filed for another eight (8) months, “all while appearing in court and conducting discovery.” Johnson, 788 S.E.2d 216 at 219.

Finally, Plaintiff relies on Flexon in her memorandum in opposition and states that “the South Carolina Court of Appeals recognized and affirmed the order that the party moving for arbitration waived its right to arbitration by engaging in discovery without reservation or limitation. See Plt’s Mem. Opp. Page 7. The Flexon holding is far more complex because it involved several defendants, including a former and subsequent parent company. Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (S.C. Ct. App. 2015). In Flexon, a breach of contract action was filed in May 2009 against numerous defendants. Flexon, 776 S.E.2d 397 at 400. Two (2) months later, one of the defendants, a former subsidiary of one of the co-defendants, filed a motion to compel arbitration and a hearing was held on the matter where a non-moving co-defendant spoke supporting the motion and indicated that he would file his own motion to compel. Id.

In June 2010, the non-moving co-defendant filed his own motion to compel and subsequently the circuit court ruled on the initial motion to compel; denying it not based on time but because of a lack of interstate commerce language and that the parties agreed to litigate the matter in South Carolina. Id. at 401. The initial motion was appealed, upheld, and the second

motion to compel was withdrawn without prejudice. Id. The parties then undertook depositions and after the depositions took place, a renewed motion to compel was filed. Id. The South Carolina Court of Appeals focused on the co-defendant articulating to the court during the initial hearing that he would file a motion to compel, and that motion to compel was not filed for seven (7) months after it's co-defendant's initial motion to compel, and that the parties continued with discovery and depositions after the second motion to compel withdrawn. The Court of Appeals ultimately held that the co-defendant failed to take "the steps necessary to protect its own interests in a timely manner." Id. at 406.

Defendants have moved swiftly to protect its interests in a timely manner. As detailed above, Defendants specifically requested from Plaintiff information regarding power of attorney documentation in December 2021. See Ex. 7. Defendants did not receive any documentation from Plaintiff, for over four (4) months, until April 2022 when Plaintiff produced her discovery responses. See Ex. 9. After receiving Plaintiff's discovery responses, the parties began corresponding regarding the scheduling of depositions. Unlike Flexon, no depositions were ever taken in this matter. Defendants specifically requested a stay in discovery pending the outcome of its Motion to Compel.

The defendants in Liberty, waited over 2.5 years to file a motion to compel, all while conducting discovery and appearing before the court regarding other matters. The defendants in Johnson went through a lengthy temporary restraining order and guardian *ad litem* process before the Complaint was filed and then waited an *additional year* after the Complaint was filed to compel arbitration. In stark contrast to those cases, Plaintiff's Counsel was aware of the arbitration provision in the admission agreement before Defendants' filed their Answer on December 21, 2021 and knew that the undersigned was seeking information on any applicable durable powers of attorney.

Defendants informed Plaintiff less than six (6) weeks after receiving Plaintiff's document production, that produced a tangible durable power of attorney for the first time in litigation, that it would be moving to compel arbitration. Additionally, during those six (6) weeks from Plaintiff's document production to Defendant's filing a Motion to Compel, the undersigned was ill with coronavirus and yet was still able to file Defendants' Motion to Compel Arbitration months faster than any of the defendants did in Liberty, Johnson, and Flexon.

In accordance with Rhodes, Plaintiff fails to show that a substantial length of time transpired between the commencement of the action and the motion to compel arbitration. Six (6) weeks from discovery of the durable power of attorney to filing the Motion to Compel Arbitration and Stay Pending Discovery hardly stacks up to the years of delay in the cases discussed *supra* that Plaintiff relies on to show the Defendants waived its right to compel arbitration. Rhodes also requires this Court to consider whether the party requesting arbitration engaged in extensive discovery prior to moving to compel. Unlike Liberty, Johnson, or Flexon, no additional discovery has taken place in this matter since Defendants filed their motion to compel. Only initial discovery responses have been produced and no witnesses in this matter has been deposed. Plaintiff has flatly failed to prove that extensive discovery was conducted prior to Defendants filing its motion. Finally, Plaintiff relies on Morgan to claim that the prejudice requirement no longer exists. While this is not how the U.S. Supreme Court articulated its holding, the Plaintiff has still failed to show any procedural preference to arbitration in this matter. Plaintiff has been unable to produce any evidence showing substantial delay, extensive discovery, or procedural prejudice by Defendants and therefore has failed to prove that the Defendants waived its right to compel arbitration.

III. All Defendants have the right to join in Dominion Clemson's request for arbitration pursuant to the Admission Agreement.

The court in Pearson v. Hilton Head Hosp., 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct.

App. 2012), relying on International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000), held that “well-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” These include principles such as incorporation by reference, assumption, agency, veil piercing/alter ego, and equitable estoppel. International Paper, Id. Further, “[i]t does not follow . . . that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.” Id. at 416.

Pearson cited and relied upon the South Carolina District Court’s opinion in Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n.9 (D.S.C. 2005), which held that “equitable estoppel allows a non-signatory to compel arbitration . . . when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.” The court also held that “application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise, arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration is effectively thwarted.” Id. at 295; see also, J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-321 (4th Cir. 1988).

In S.C. Pub. Serv. Authority v. Great Western Coal, et al., the plaintiff contracted with Great Western Coal for the provision of coal. 312 S.C. 559, 437 S.E.2d 22 (Ct. App. 1993). The contract contained an arbitration clause. The plaintiff later brought suit against Great Western Coal, its president, and another employee, alleging that they had increased coal prices while lowering quality. Id. at 561, 437 S.E.2d at 23 – 24. Defendant president, a non-signatory to the contract, filed a motion to **dismiss** and compel arbitration. Id. at 561, 437 S.E.2d at 24. The trial

judge denied defendant president's motion because he did not sign the contract in his individual capacity, and defendant president appealed. Id. at 563, 437 S.E.2d at 24 – 25.

The Court of Appeals reasoned that “a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity because this would nullify the rule requiring arbitration.” Id. at 563, 437 S.E.2d at 24 - 25, citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990). The Court of Appeals further reasoned that “when the nonsignatory parties are willing to submit to arbitration, the case should be arbitrated.” Id. The Court of Appeals therefore, concluded, that the defendant president was seeking arbitration and held that the trial judge erred in denying the same simply because the defendant president did not sign the contract. Id.

Looking to (1) the language of the Admission Agreement, (2) the claims Plaintiff has raised against Defendants, and (3) applying this law, it is abundantly clear that any claims against Dominion Senior Living, LLC, Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC are substantially intertwined with Plaintiff's pending claims against White Oak Estates, the other signatory to the Arbitration Agreement.

In fact, in Plaintiff's Complaint, she has alleged that Cooley was a resident at Dominion Clemson, and that the actions of remaining Defendants “directly affected resident care such as that of Earline Cooley,” and that the parties were engaged in a “joint enterprise.” Complaint, ¶ 36. Plaintiff thereafter refers to all Defendants as simply “Defendants” within the remaining allegations. See Complaint.

Plaintiff's own allegations of the substantially interdependent and concerted alleged misconduct of Defendants, through which Plaintiff alleges joint liability for those alleged wrongs, compels the construction of the Arbitration Agreement to be equally enforceable by all Defendants. To hold otherwise would gut the established federal policy in favor of arbitration and

result in inconsistent and unfair results of multiple proceedings in different forums, and a waste of judicial and party resources.

Plaintiff cannot avoid the Admission and Arbitration Agreements' provisions by naming non-signatories. Likewise, she cannot rely on the relationship created between Cooley and Dominion Clemson when the Agreements benefit her and repudiate those Agreements when they work to her alleged disadvantage. All Defendants thus are entitled to seek enforcement of the Agreements, and the trial court erred in holding otherwise.

IV. If not ordered to arbitrate, the FAA at a minimum requires that these actions be stayed while the parties submit to binding arbitration.

Should the Court elect not to compel arbitration with these two actions while the parties submit to binding arbitration, Defendants would alternatively request that these proceedings be stayed pending completion of arbitration. The FAA requires a stay under the following circumstances:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit 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 action until such arbitration has been had in accordance with the terms of the agreement[.]

9 U.S.C. § 3.

Accordingly, Defendants respectfully request that the Court stay all judicial proceedings pending arbitration in accordance with the arbitration clause. See Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (holding “the FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties” (internal citation omitted)); 9 U.S.C. § 3.

V. Defendants are Entitled to Protection from Responding to Plaintiff's Written Discovery.

On February 22, 2022, Defendant Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square ("Dominion Clemson") served its responses to Plaintiff's First Interrogatories and Requests for Production. See Plaintiff's Motion to Compel at Ex. A. As indicated in the responses, these responses included the production of over 400 pages of documents.

On March 1, 2022, Plaintiff mailed the undersigned counsel a discovery consult letter in response to Dominion Clemson's discovery responses. See Plaintiff's Motion to Compel at Ex. B.

Also on March 1, 2022, Defendant Dominion Senior Living, LLC ("Dominion Senior Living") served its responses to Plaintiff's First Interrogatories and Requests for Production. See Plaintiff's Motion to Compel at Ex. A. Dominion Senior Living's discovery responses have not been the subject of a discovery consult correspondence and, therefore, cannot be at issue in Plaintiff's Motion to Compel.

By email exchange dated June 9, 2022, the undersigned advised Plaintiff's counsel that the undersigned was:

...not aware of you serving discovery on any of the other three defendants [Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC]. I had assumed that was because you were aware they had no connection to this matter. (They do not, and discovery responses on behalf of Dominion Clemson (Rogg 29) and Dominion Senior Living (Rogg 20) confirm that.) Those three entities have common ownership but have nothing to do with operation of senior living facilities.

Ex. 10. Plaintiff's counsel did not respond on this point and has not attached discovery requests on behalf of Dominion Clemson, II, LLC, Dominion Management Group, LLC, and Dominion Group, LLC to Plaintiff's Motion to Compel. Without having access to the alleged discovery requests at dispute—a point which the undersigned raised over four (4) months ago, the undersigned cannot respond to a motion to compel responses to the same.

As to Dominion Clemson's discovery responses which are subject to Plaintiff's March 1, 2022 discovery consultation letter, Dominion Clemson's position on each discovery request is briefly stated as follows:

Interrogatory #7 and # 15: Plaintiff seeks the identification of all employees who provided care to Cooley at Dominion Clemson, including the employees' title, employment status, and last known contact information. Dominion Clemson has objected on the grounds that the interrogatories are overly broad, vague and unduly burdensome. Cooley was a resident at Dominion Clemson from March 2019 – March 2020. To identify each employee who provided care 24 hours a day for over a year would be an enormous task and is not tailored to relevant evidence concerning the claims in this case. Nonetheless, Dominion Clemson responses referred Plaintiff to the identification of twelve employees of Dominion Clemson known to have been involved with or otherwise have information pursuant to the claims. Dominion Clemson likewise referred Plaintiff to any other providers identified in the medical records.

Request # 19: Plaintiff requests proposed and actual budgets for the years of Plaintiff's residency (2019 and 2020) as well as the two years preceding her residency. Dominion Clemson objected on the grounds that the request was overly broad, vague and unduly burdensome, and not reasonably calculated to lead to the discovery of relevant or admissible evidence. Dominion Clemson likewise objected on the basis that the documents sought contained confidential and proprietary business information. Dominion Clemson maintains that budgeting information from preceding years makes this request overly broad and lack relevancy. Preceding budgets have no impact on the present litigation.

Request # 21, 22, 23: Plaintiff requests timecards, schedules, punch detail reports, work schedules, sign-in sheets, timesheets, and numbers of available hours for the entire term of Cooley's year-long residency. Due to the fact that these requests sought shift-by-shift information for nearly a year, Dominion Clemson objected on the grounds that the request was overly broad, vague and unduly burdensome, and not reasonably calculated to lead to the discovery of relevant or admissible evidence. While staffing information for particular dates of alleged events or injuries might be relevant, the burden imposed by gathering this information for each and every shift of a one-year residency is too great given the lack of relevancy.

Request # 25: Plaintiff requests all information related to staff training for the years of Plaintiff's residency (2019 and 2020) as well as the two years preceding her residency. Despite Plaintiff's allegations being limited, Plaintiff did not make any attempt to limit the training topics sought by this Request. As such, Dominion Clemson objected on the grounds that the request was overly broad, vague and unduly burdensome, and not reasonably calculated to lead to the discovery of relevant or admissible evidence. Again, the sheer burden imposed to gather any and all training information over a four-year course is not justified by the any purported relevancy.

Request # 36: Plaintiff initially requested all personnel files of former employees who

provided care to Cooley as well as former and current department heads. Again, Dominion Clemson objected on the grounds that the request was overly broad, vague and unduly burdensome, and not reasonably calculated to lead to the discovery of relevant or admissible evidence, given the volume of persons at issue as well the request for personnel files of persons not involved with Cooley's care.

Nonetheless, Plaintiff's counsel and the undersigned participated in a discovery consultation phone conference on April 22, 2022. As a result of that phone conference, Plaintiff and Dominion Clemson agreed to compromise the outstanding issues as outlined in counsel's April 29, 2022 – May 2, 2022 email exchange attached as Exhibit 11. Dominion Clemson stands on its original objections to each of the discovery requests at issue but believes that the compromise reached by the parties was a workable solution.

However, the undersigned received for the first time the Durable Power of Attorney in May 2022. At that point, Dominion Clemson had no choice but to cease participating in written discovery so as not to create an argument that it waived the right to enforce arbitration once the undersigned was aware of an applicable Durable Power of Attorney. The undersigned informed Plaintiff's counsel of the same on June 9, 2022. Indeed, the undersigned concern in continuing to participate in discovery was warranted as Plaintiff now asserts a waiver argument based on participation in litigation. See Plaintiff's Memorandum in Opposition to Motion to Compel Arbitration, p. 6 – 10.

For the reasons set forth in previous arguments, the appropriate next step is for the parties to submit to arbitration as clearly stated in the Admission Agreement. Defendants, therefore, are entitled to an order from this Court that Defendants are not required to respond further to Plaintiff's discovery requests pursuant to Rule 26(c), SCRCF.

CONCLUSION

Debra Galloway, as Earline Cooley's legally authorized and available agent, freely bound Cooley, her estate, her personal representative, her heirs, and her beneficiaries to arbitrate any

claims against Defendants. Defendants, therefore, respectfully request that this Court **dismiss** this case, compel arbitration pursuant to the Admission Agreement, **Rule 12(b)(1), (2), (3) and (6), SCRC**P, the Federal Arbitration Act (9 U.S.C. § 1, et seq.), and all applicable statutory and case law and that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the Federal Arbitration Act. Defendants further respectfully request that this Court protect Defendants from further participating in written discovery considering that arbitration is the next appropriate step for Plaintiff's claims.

s/Joshua T. Thompson
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Attorneys for Defendants

October 19, 2022

Spartanburg, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS)

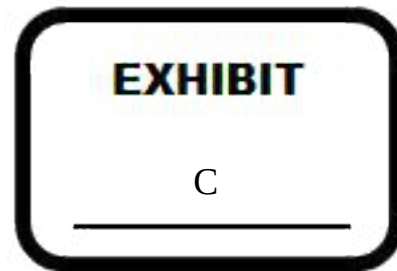
C.A. No.: 2021-CP-39-01127 &
2021-CP-39-01128Deonda Weldon, Individually and as
Personal Representative of the Estate
of Earline Cooley,

Plaintiff,

v.

Dominion Clemson, LLC d/b/a
Dominion Senior Living at Patrick
Square, Dominion Senior Living,
LLC, Dominion Clemson, II, LLC,
Dominion Management Group, LLC,
and Dominion Group, LLC,

Defendant(s).

**PLAINTIFF'S
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO
COMPEL ARBITRATION AND
PROTECTIVE ORDER FROM
DISCOVERY**

Defendants Dominion Clemson, LLC d/b/a Dominion Senior Living at Patrick Square (hereinafter "Facility"), Dominion Senior Living, LLC (hereinafter "Dominion Senior Living"), Dominion Clemson, II, LLC (hereinafter "Dominion Clemson, II"), Dominion Management Group, LLC (hereinafter "Dominion Management"), and Dominion Group, LLC (hereinafter "Dominion Group") filed these motions to dismiss the Complaint and to compel Plaintiff's claims against them to arbitration which was filed pursuant to multiple subsections of Rule 12(b) of the South Carolina Rules of Civil Procedure and the Federal Arbitration Act.

This case involves wrongful death and survival action claims alleging assisted living facility negligence and corporate negligence resulting in the serious injuries and death of Earline Cooley. Earline Cooley was admitted to the Facility on or about March 8, 2019 for assisted living facility services, but due to Earline Cooley's past medical

history, medical diagnoses, and medications, as well as other factors, Defendants knew or should have known that Earline Cooley was at high risk for falls at the time of her admission. In fact, the physician's evaluation form at the time of Earline Cooley's admission as well as the Fall Prevention Program Resident Risk Assessment form dated March 8, 2019 reflected that Earline Cooley had a history of falls and was a fall risk. The only individual care plan created by the Defendants was dated November 18, 2019, some eight months after her admission to the facility. The care plan from November reflected that Earline Cooley used a walker/cane but did not reflect any additional assistance that she may need in ambulation/transfers.

That further, during her admission, Earline Cooley suffered from at least ten (10) falls between August 2019 and March 9, 2020. Despite all of the falls as well as physical therapy notes reflecting that Earline Cooley required "moderate physical assistance" to transfer from sit to stand and notes reflecting that she had "unsteadiness on feet", "weakness", "history of falling", as well as other diagnoses, no changes were made to Earline Cooley's care plan and no interventions were implemented to prevent her from falling. As a result of the March 9, 2020 fall, Earline Cooley fractured her right hip and struck her head. She then underwent surgery and post-operatively suffered with hypoxia and thrombocytopenia as a result of the complications from surgery. As a result of her injuries, she continued to decline and never recovered until her death on May 27, 2021.

That in addition to the clinical negligence, Defendants were also negligent by having staff conduct out of scope assessments, understaffing the facility, and underfunding the facility. As a result of the underfunding, understaffing, failure to correct past deficiencies which were known to the Defendants and as a result of having

inadequate policies and procedures, Plaintiff has alleged corporate negligence as well as the facility's clinical negligence which Plaintiff alleges was directly caused by the parent, management, and affiliated companies of the facility, all of which owned, controlled, directed, and affected resident care at the facility.

As a result of Earline Cooley's injuries and statutory beneficiary claims, Plaintiff filed Summons and Complaints against Defendants on October 13, 2021 and subsequently served the Defendants. Defendants answered the Complaints on December 21, 2021. Defendants served their First Interrogatories and First Requests for Production upon the Plaintiff on December 21, 2021.

The parties engaged in significant discovery over the subsequent months. That further, the parties had actually set depositions of witnesses to be taken. Plaintiff responded to Defendants' First Interrogatories and First Requests for Production on April 25, 2022. On June 9, 2022, Defendants filed these Motions to **Dismiss** and Compel Arbitration. The Affidavits of Deonda Weldon and Debra Galloway are attached hereto at Exhibits 1 and 2. In response to Defendants' motions, Plaintiff submits this Memorandum in Opposition together with the attached exhibits.

BRIEF SUMMARY OF ARGUMENTS

- I. The Arbitration Agreement is unenforceable because Defendants abandoned and waived their right to seek to enforce arbitration.**
- II. The Arbitration Agreement is unenforceable because Debra Galloway did not possess the appropriate authority to execute the Arbitration Agreement on behalf of Earline Cooley.**
- III. The Arbitration Agreement is unenforceable because it is unconscionable.**
- IV. The Arbitration is unenforceable as to the statutory beneficiaries' claims in the wrongful death action.**

- V. The Corporate Defendants, Dominion Senior Living, Dominion Clemson, II, Dominion Management Group, and Dominion Group, are not parties to the alleged Arbitration Agreement, and therefore, any alleged Arbitration Agreement is not enforceable as to those Defendants.**

ARGUMENT

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that “where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). Arbitration agreements must satisfy the basic tenets and requirements of contract law. Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844, (Ct. App. 1999). Section 2 of the Federal Arbitration Act dictates that arbitration agreements are enforceable except “upon such grounds as exist at law or equity for the revocation of any contract”. 9 U.S.C. §2. The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the

parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008). Thus, unless there is a valid, irrevocable, and enforceable contract, the Federal Arbitration Act does not even apply.

Further, the party seeking enforcement of the agreement bears the burden to prove a valid arbitration agreement exists that is enforceable, knowing, voluntary, and intentional. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008); Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986). "A motion to compel arbitration pursuant to the FAA is 'akin to the burden on summary judgment.'" Thomas v. Progressive Leasing, Civ. No. 17-1249, 2017 WL 4805235, at *2 (D. Md. Oct. 25, 2017)(internal quotation marks omitted) (quoting Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 85 (4th Cir. 2016)). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), and that the movant is "entitled to judgment [compelling arbitration] as a matter of law." Burrell v. 911 Restoration Franchise Inc., 2017 WL 5517383, at *3 (D. Md. November 17, 2017) (citing Fed. R. Civ. P. 56(a)).

Further, "there is, however, no public policy – federal or state – favoring arbitration." Simmons v. Benson Hyundai, LLC, 2022 S.C. App. LEXIS 37, 22WL791174 quoting Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021). The arbitration agreement at issue in this

particular case with Facility is not valid to begin with and Defendants cannot meet their burden of proof. Therefore, the inquiry should go no further as to the motions.

I. The Arbitration Agreement is unenforceable because Defendants abandoned and waived their right to seek to enforce arbitration.

The right to enforce an arbitration clause may be waived. Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011). Courts generally consider the following factors when determining whether a party has waived his right to compel arbitration:

- 1) Whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration;
- 2) Whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and
- 3) Whether the non-moving party was prejudiced by the delay in seeking arbitration. Id.

However, the United States Supreme Court recently held that the third prong, the prejudice requirement, was not appropriate in determining waiver as it created a special rule for arbitration agreements that did not apply to other agreements and motions. Morgan v. Sundance, Inc., 142 S.Ct. 482, 211 L. Ed.2d 292 (2021). As a result, the third prong, the prejudice requirement, no longer exists. As the United States Supreme Court noted in Morgan, Defendants who do not seek the relief of an arbitration agreement right away and instead engage in months of litigation, answering complaints, discussing settlement, etc. before moving to compel arbitration, may waive their right to compel arbitration. Id. As the Morgan court noted, waiver “is the intentional relinquishment or

abandonment of a known right.” *Citing United States v. Olano*, 507 U.S. 725 733 (1993)(internal quotation marks omitted). The Morgan court also noted that in determining whether waiver has occurred, the court focuses on the person who held the right to compel arbitration and not on the actions of the opposing party. Id.

The Court of Appeals in Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. App 1999) held that the party moving to compel arbitration waived their right after filing initial pleading and responding to discovery. Furthermore, the South Carolina Supreme Court has also recognized that nursing homes can waive arbitration rights. Dean v. Heritage Healthcare of Ridgeway, LLC, 401 S.C. 371 (2014).

In Johnson v. Heritage Healthcare of Estell, LLC, 416 S.C. 508, 788 S.E.2d 216 (2016), the South Carolina Supreme Court held that the defendant nursing home waived its right to compel arbitration after, among other things, answering the Complaint, seeking limited discovery issues, serving discovery, and waiting approximately ten (10) months to file the motion to compel arbitration after the Plaintiffs filed the Complaint. Further, in Flexon v. PHC Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015), the South Carolina Court of Appeals recognized and affirmed the order that the party moving for arbitration waived its right to arbitration by engaging in discovery without reservation or limitation. Similar to the present case, the moving party had engaged in discovery and continued through litigation for a period of time before moving to compel arbitration. Further, multiple other South Carolina Circuit Courts have held that parties, including nursing homes, have waived their right to compel arbitration by participating in discovery and not moving for arbitration immediately after the filing of the Summons and Complaint.

In the present case, Defendants contend that any claim against them must be resolved through arbitration. The Defendants were on notice of the claim as early as June 2020 when Plaintiff served her requests for medical records from the Facility upon the Defendants, and that request explicitly stated that the purpose of it was to “aid in the investigation of a legal claim.” See Exhibit 3. Of note, with the request was included the General Durable Power of Attorney for Earline Cooley. See Affidavit of Amanda Venable at Exhibit 4. Subsequently, Plaintiff filed the Summons and Complaint against the Defendants on or about October 13, 2021. Defendants served their Answer on December 21, 2021. After the service of the Answer, Defendants attempted to engage in settlement discussions with Plaintiff which were unfruitful. On December 21, 2021, Defendants also served their First Interrogatories and First Requests for Production upon the Plaintiff. The Interrogatories, not including subparts, contained twenty-seven (27) questions/requests, all of which had no relationship to any arbitration issues whatsoever. Defendants’ Requests for Production contained at least twenty-nine (29) requests, not including subparts, all of which except for one had no relationship or bearing on arbitration issues. Additionally, Defendants sent out no less than four (4) subpoenas to third parties for the production of documents on December 31, 2021, a discovery tool not otherwise available to them in arbitration. See Exhibit 5.

On March 1, 2022, Defendants responded to Plaintiff’s First Interrogatories and First Requests for Production. Those responses were deficient and Plaintiff sent correspondence to defense counsel regarding same, a copy of which is attached hereto at Exhibit 6. As a result of not being able to resolve the deficiencies, Plaintiff filed a Motion to Compel with this Court on March 22, 2022. On April 25, 2022, Plaintiff provided

responses to Defendants' First Interrogatories and First Requests for Production. On May 2, 2022, the parties then began discussing dates for depositions of witnesses and depositions were in fact scheduled.

Defendants then delayed another six (6) weeks before filing a Motion to Compel Arbitration. As a result, Defendants waited nearly eight (8) months from the filing of the Summons and Complaint to file their Motion to Compel Arbitration after conducting extensive discovery and waited two (2) years from the date Plaintiff first requested records from the Defendants notifying them of a potential legal claim before filing their Motion to Compel Arbitration.

While Defendants may contend that they were unaware of the authority which Debra Galloway had to sign the Arbitration/Admissions Agreement until April 2022, this argument is without merit. First, Defendants were provided with the General Durable Power of Attorney on June 11, 2020 with Plaintiff's records request, and Defendants produced the records with the Health Care Power of Attorney on July 28, 2020. See Exhibit 7. Second, Defendants would be contending that they knowingly had Debra Galloway sign a form to admit her mother to a facility and to waive a right to a jury trial without knowing whether or not she had authority to do so. In fact, the form itself states that Debra Galloway signed as "Medical Power of Attorney." The Defendants cannot contend that they were asking Ms. Galloway to sign the form which the facility representative believed that Ms. Galloway had the requisite authority to sign, but then could only *really* believe it applies *if* a power of attorney is produced. Further, nearly all of these facilities obtain a copy of any power of attorney at the time of execution of these documents. Therefore, the Defendants should have been aware of these documents at

the time of admission. Finally, the General Durable Power of Attorney had been filed and recorded with the Register of Deeds which was publicly available to the Defendants to locate and obtain at any point in time.

As a result, under applicable case law as well as other circuit court orders in the State of South Carolina, the Defendants have waived their right to move for arbitration. See Briody, Smith, and Cook Orders at Exhibits 8, 9, and 10. The Defendants abandoned this right from the outset as they were aware of this potential claim since June 2020, had actual possession of both the Durable power of Attorney and Health Care Power of Attorney at that time, and never filed the motion until June 9, 2022. For this reason alone, the Defendants' motion should be denied.

II. The Arbitration Agreement is unenforceable because Debra Galloway did not possess the appropriate authority to execute the Arbitration Agreement on behalf of Earline Cooley.

While it is true that Debra Galloway was named as alternate Healthcare Power of Attorney, a Healthcare Power of Attorney is insufficient to provide the authority to enter into an arbitration agreement on behalf of her mother, Earline Cooley. In fact, South Carolina courts have repeatedly held that entering into an arbitration agreement is not a "healthcare" decision, and further explicitly state that a healthcare power of attorney is not sufficient to grant such authority. Hodge v. Uni-Health Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018); Thompson v. Pruitt Corp., 416 S.C. at 56-58, 784 S.E.2d; Coleman v. Mariner Health Care, Inc., 755 S.E.2d 450, 407 S.C. 346 (S.C. 2014); Arredondo v. SNH SE Ashley River Tenant, 433 S.C. 69 (2020), 856 S.E.2d 550. In fact, in Arredondo, the court specifically held that there must be specific language indicating that the power of attorney provides the authority to arbitrate. Arredondo v.

SNH SE Ashley River Tenant, 433 S.C. 69 (2020), 856 S.E.2d 550; also see Hodge v. Uni-Health Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018).

Because the Healthcare Power of Attorney did not provide Debra Galloway with any actual authority to sign the Arbitration Agreement on her mother's behalf, the Defendants would then have to attempt to rely upon the General Durable Power of Attorney. However, the General Durable Power of Attorney did not provide that authority to Debra Galloway at the time she signed the Arbitration Agreement.

As previously mentioned, Debra Galloway was the second alternate general durable power of attorney for her mother which empowered her only if the primary power of attorney, Deonda Weldon, and the first alternate power of attorney, Robin Elliott, were unavailable or unwilling to serve. See Durable Power of Attorney at Exhibit 11, p. 1. The Defendants knew that Debra Galloway did not have such authority because the first page of the Resident Admission Agreement, which contained the Arbitration Agreement states "Deonda Weldon" was the person designated to:

"act as the single 'Financially Responsible Party' and/or agrees to act as the 'Resident's Representative,' accepting their respective rights and obligations as set for the in this Agreement. Community, Manager, Resident, Financially Responsible Party and/or Resident's Representative are collectively referred to herein as the 'Parties'...."

Therefore, the Facility knew that Debra Galloway was not a party to the agreement as she was not identified in the Resident Admission Agreement as a party to the agreement. Furthermore, the Resident Admission Agreement which contains the Arbitration Agreement explicitly sets forth that Deonda Weldon should have been the party to the agreement and was the financially responsible party because the Facility

knew that she was, in fact, the primary general durable power of attorney. There is no evidence that Deonda Weldon was unwilling or unable to serve. In fact, her affidavit at Exhibit 1 explicitly states that, “Had the Defendants provided to me the Admission Agreement, I would have been designated and been responsible for reviewing and considering the execution of same.” That further, Debra Galloway’s affidavit attached hereto as Exhibit 2 specifically reflects that at no time had either of her sisters stated that they were unwilling or unable to serve as Earline Cooley’s power of attorney.

Therefore, Debra Galloway did not possess the necessary authority to be able to enter into an arbitration agreement, waiving her mother’s rights to a jury trial either in the Healthcare Power of Attorney or in the General Durable Power of Attorney. As a result, the Arbitration Agreement is unenforceable because Debra Galloway lacked the appropriate authority.

III. The Arbitration Agreement is unenforceable because it is unconscionable.

The Admission Agreement and incorporated attachments which contain the Arbitration Agreement is approximately thirty-five (35) pages long which required signatures and/or initials in multiple places by Debra Galloway.

The unconscionability is evidenced by multiple integral terms to the agreement including, but not limited to, the fact that the agreement purports to significantly limit damages with an onerous cap on compensatory and punitive damages, other liability waivers, and also due to the fact that the agreement implicitly carves out disputes that the Facility may have against residents and/or their families from the limitation on damages clauses but applies to all other claims which a resident may have against the Facility. See Admission Agreement, pp. 39-40.

Other sections of the agreement place upon the resident unreasonable waivers and assumptions of risk. In fact, on page 35 of the agreement, a release and assumption of risk waives liability that requires the resident to assume all risk related to or arising from living in the Facility. Further, there is a release and waiver of liability clause in that same paragraph requiring the resident to hold the Facility harmless from any claims arising out of the Facility's failure to obtain or furnish services beyond that which was contractually indicated even if the Facility performed an inadequate assessment of the resident's needs to identify what services should be performed.

That further, the agreement requires the resident to waive all liability against the Facility for injuries caused by another resident, presumably even if the other resident was known to the Facility to be a danger and was not appropriate for the assisted living facility. Admission Agreement, p. 35. Furthermore, the agreement purports to require the resident to agree that falls will occur and cannot be prevented. Admission Agreement, p. 45.

A waiver of liability exists with regards to any injuries resulting from a resident performing activities independently without requesting or waiting on staff despite the fact that the Facility is aware that many of these residents suffer with dementia and memory loss and are unable to remember or know to request help. Admission Agreement, p. 44. Additional waivers of liability purport to exist at page 44 where the agreement states that the resident agrees that if the resident chooses to not request assistance or supervision in attempting certain daily activities, then there is no liability despite the fact that many of these residents, including Earline Cooley, suffer from dementia and are unaware of the need to request such assistance. The Facility further requires the families to sign a waiver

releasing the Facility for medication errors and negligence unless they agree to use the Facility's pharmacy/medication system. Admission Agreement, p. 59.

Most importantly, in addition to the above-referenced unreasonable waivers and releases, the agreement prevents any non-economic damages above \$250,000.00, prevents punitive damages, and limits economic damages to actual economic loss offset by any collateral source payments. Admission Agreement, pp. 39-40. All of these damages are otherwise allowed under state law and are not capped. As a result, the agreement limits and restricts otherwise available statutory and common law damages.

Additionally, the limitations on damages provisions essentially do not apply to the Facility in claims against the resident. In no circumstance would the Facility have a claim against the resident for non-economic damages. Further, the Facility in no circumstance would have the issue of collateral source payments to be offset in a damages assessment. The agreement also allows the Facility to not arbitrate any claims less than \$15,000.00 which would include most claims the Facility would have for unpaid rent. As a result, the Facility implicitly carves out all of the limitations on damages clauses for any claims it may have against the resident and/or their family. Admission Agreement, pp. 39-40.

The arbitrator may award economic and non-economic damages, but shall have no authority to award punitive damages to any Party. Each side shall bear an equal share of the arbitrator's fees and the costs of the arbitration.

15. LIMITATIONS OF LIABILITY PROVISION.

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. Liability for any claim brought by a party of this Agreement against the other party, including but not limited to a claim by the Community for unpaid charges, or a claim by the Resident, Resident's Representative or by the Resident's estate, arising out of the care or treatment received by the Resident at the Establishment, including without limitation, claims for medical negligence or violation(s) of South Carolina Statutes, arising from simple or gross negligence, shall be limited as follows:

- (1) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses, offset by any collateral source payments.
- (2) Non-economic damages shall be limited to a maximum of \$250,000.
- (3) Interest on unpaid fees shall not be awarded.
- (4) Punitive damages shall not be awarded.

Under South Carolina law, unconscionability is “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (quoting Carolina Care Plan, Inc. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). The “absence of meaningful choice” element “speaks to the fundamental fairness of the bargaining process.” Simpson, 3873 S.C. at 25, 664 S.E.2d at 669. The key factors on this element include (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties’ bargaining power; (4) the parties’ relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the arbitration clause. Id. (citing Carlson v. Gen. Motors Corp., 883

F.2d 287, 293 (4th Cir. 1989)).

Identifying a document as an adhesion contract is a useful starting point for analyzing these substantive factors. Simpson, 373 S.C. at 27, 644 S.E.2d at 669. The evidence shows the Admission and Arbitration Agreement is an adhesion contract. An adhesion contract has two defining characteristics: (1) it is presented in a standardized form; and (2) it is presented by a party with greater bargaining power to a party with lesser power on a “take-it-or-leave-it” basis—i.e. without that party’s ability to negotiate terms. Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The Arbitration Agreement bears all the markers of a standard form contract. On its face, it is evident the Arbitration Agreement was not only for the Facility’s use but also for other facilities bearing the “Dominion Senior Living” brand. The Company’s name is printed on the first page of the Admission Agreement. Both the Admission Agreement and the Arbitration Agreement (which is purportedly incorporated into the Admission Agreement) are standard forms, unchangeable by Plaintiff. The evidence further shows this form contract was effectively non-negotiable. As Debra Galloway explained, the Arbitration Agreement was part of a stack of documents presented to her near the time of Earline Cooley’s admission. The employee who signed the Arbitration Agreement in the Facility’s name provided no indication to Debra Galloway that she was entitled to change the Arbitration Agreement’s terms.

The Simpson factors also show the fundamental unfairness of the bargaining process. The first factor favors the Plaintiff because Earline Cooley’s injuries were personal and substantial. Defendants’ negligence and neglect led to serious injuries with a

femur/hip fracture, urinary tract infection, hypoxia, head injury, and ultimately, her premature death. See Complaint. The other factors also favor Plaintiff. Debra Galloway was not a substantial business concern. She was acting only as Earline Cooley's daughter with the aim of obtaining the assisted living facility services care Earline Cooley urgently needed. In contrast, Defendants are sophisticated business entities evidenced in many ways including the complex organization structure they have built to manage the Facility's operations as well as the fact that they have multiple facilities generating extensive revenue from many residents. The disparity in bargaining power is considerable. Defendants operate long-term care facilities in multiple states with likely revenue totaling millions of dollars. See Exhibit 12. Dominion Senior Living Web Page Communities. Earline Cooley, on the other hand, was an elderly woman in poor health in need of daily care.

Finally, the key language of some of the unconscionable provisions were not conspicuous relative to any of the other admission paperwork the Facility presented to Debra Galloway. Further, many of these provisions were buried in attachments and significantly lengthy agreements and documents. See Exhibit 13. As a result, many of these onerous provisions and limitations would not have been immediately apparent to an unsophisticated person. i.e. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670 (finding arbitration provision "inconspicuous in light of its consequences" including the deprivation of statutory remedies). The fact that this agreement was presented on a take-it-or-leave-it basis at a stressful time while Debra Galloway was trying to locate a long-term care facility for Earline Cooley's safety and well-being, the fact that Debra Galloway had no option but to sign these documents in order to gain admission for her

mother and the fact that these documents are form documents provided by the Facility further demonstrates the fact that this is a contract of adhesion.

Additionally, as already addressed hereinabove, the Arbitration Agreement contains oppressive terms. The mandatory waiver of liability provisions which are purported to be included by virtue of the Admission Agreement attempting to incorporate the Arbitration Agreement serves to provide significant limitations and one-sided oppressive terms in and of that provision itself. However, when that provision is combined with the waivers in the Admission Agreement and the limitations on damages contained within the Admission and Arbitration Agreement, the unfairness and oppressive one-sided terms of this agreement are magnified to such a degree that no reasonable person would have agreed to same. In fact, there is no doubt that given these oppressive terms, that this is the very same reason which the Defendants implicitly chose to avail themselves to not be bound by the limitation on damages for any claim or action where they may sue the resident or resident's family.

Recent South Carolina Court of Appeals decisions further touch on and support the argument of unconscionability in this particular case. In Huskins v. Mungo Homes, LLC, 2022 S.C. App. LEXIS 61 (Ct. App. 2022), the South Carolina Court of Appeals determined that a provision within an arbitration agreement purporting to restrict the statute of limitations period for a homebuyer's recourse against the home builder was unconscionable. The Court noted that there was a lack of meaningful choice, lack of bargaining power, the purchasers were not represented by counsel nor were a substantial concern to the home builder. Furthermore, the Court noted that, "Even though this provision purports to apply equally to both parties, as a practical matter, it would

disproportionately affect the homebuyer's ability to bring a claim. Further, it is not geared towards achieving an unbiased decision by a neutral decision-maker." Id. at 17.

Moreover, the South Carolina Supreme Court in Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016), held that limitations on damages claims rendered the arbitration agreement unconscionable and unenforceable. The Court further noted that the home purchaser did not have a substantially stronger bargaining position than an average homebuyer nor were they represented by counsel. The Court further noted that the home purchaser was a single client to a corporation that constructs homes in twenty-seven (27) states, and as a result, they were not a substantial business concern of the home builder that comprised a large portion of the home builder's clientele. As a result, the Supreme Court found that the home purchaser lacked a meaningful choice in their ability to negotiate the arbitration clause. As in the present case, Debra Galloway was not represented by counsel, was not a substantial business concern to the Defendants who are a large long-term care company operating in multiple states across the country, and Debra Galloway was no more in a substantial bargaining position than the average family member admitting a loved one to a long-term care facility. That further, in the same respect, the limitations on damages and claims in the present case are one-sided, oppressive, unconscionable, and therefore, unenforceable. Multiple other South Carolina state courts have found arbitration agreement provisions in long-term care cases to be unenforceable due to one-sided, oppressive terms. See Putman, Whitfield, and Coleman Orders attached Exhibits 14, 15, and 16.

South Carolina law does not favor arbitration of disputes. Simmons v. Benson Hyundai, LLC, 2022 S.C. App. LEXIS 37, 22WL791174 quoting Palmetto Constr. Grp.,

LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021). Severability is frequently not proper for an unconscionable provision in an arbitration clause. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673 (2007). The parties' intent is the primary factor in determining whether the offending provision is severable. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). If the offending provision "pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts," then severance looks more like rewriting the contract than effectuating the parties' intent. Simpson, 373 S.C. at 34, 673 S.E.2d at 673 (quoting Booker v. Robert Half Int'l Inc., 413 F.3d 77, 84-85 (D.C. Cir. 2005)); see also Alexander v. Anthony Intern., LP, 341 F.3d 256, 271 (3rd Cir. 2003)(concluding court "cannot give effect to an agreement to arbitrate afflicted by so much fundamental and pervasive unfairness"). Recognizing South Carolina's policy about arbitration, the Simpson court refused to sever an arbitration agreement's offending provisions and instead invalidated the entire agreement because it contained multiple unconscionable provisions that denied statutory rights and violated established public policy. 373 S.C. at 35, 644 S.E.2d at 674 n. 9.

The previous sections of this Memorandum discuss several items within the Agreement's arbitration and limitation of liability provisions that are unconscionable and inconsistent with South Carolina public policy. The Agreement contains a severability provision but Simpson shows that severability clauses are ineffective if unconscionable provisions permeate the overall arbitration provision. This case is similar to Simpson and the Court should refuse to enforce the entire arbitration, limitation on damages, and waiver provisions rather than attempting to excise the multiple unconscionable items

within the provision. Like Simpson, the Arbitration Agreement contains multiple unconscionable items throughout the agreement including the damages cap. Like Simpson, the Agreement's unconscionable provisions are inconsistent with the state's clear public policy related to long-term care. Therefore, the Arbitration Agreement should be invalidated in full.

Additionally, the unconscionable sections are not severable under Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016). In Smith, the South Carolina Supreme Court, in addressing the lack of the option of severability of the unconscionable provisions, noted that the arbitration agreement and the contract as a whole contained "numerous cross references to one another, intertwining the sub-paragraphs so as to constitute a single provision." In the very same manner, the entirety of these contracts is so intertwined and cross-referenced that it would be impossible to sever the unconscionable provisions alone.

For example, the arbitration provision on page 39 contains unconscionable provisions discussed above. Further, multiple other unconscionable provisions discussed hereinabove exist throughout the Admission Agreement. Waivers of liability and assumption of risk provisions are on page 35 under the section "Assisted Living." More limitation on damages are in the "Limitations of Liability Provision" on page 40. Additional waivers or assumption of risk provisions are included under "Risk Management Process" on page 44, and also under an exhibit titled "Medication Administration Waiver" at page 59.

Additionally, the South Carolina Supreme Court recently affirmed the trial court's ruling that an arbitration agreement was unconscionable and inseverable despite a

severability clause in the contract. Damico v. Lennar Carolinas, Inc., 2022 S.C.LEXIS 107, 2022 WL 4231032. The Court noted the unconscionable provisions of the agreement and further declined to sever the unconscionable terms from the remainder of the agreement for two reasons. First, doing so would require the Court to “blue pencil the agreement regarding a material term of the contract, a result strongly disfavored in contract disputes. Second, as a matter of policy, we find severing terms from an unconscionable contract of adhesion (in this case an arbitration provision) discourages fair, arm’s length transactions.” Id. The Court also noted the importance of the fact that it was a contract of adhesion in refusing to sever the unconscionable provisions from the agreement. The Court also noted the public policy considerations in protecting the public from such agreements and that allowing such agreements to stand simply by allowing the Court to sever out those portions would promote sophisticated parties to intentionally insert unconscionable terms that often go unchallenged throughout their contracts, hoping that the courts would step in and rescue the party from their gross overreaches. Id. Similarly, in the present case, a contract of adhesion exists with multiple unconscionable terms intertwined throughout the contract which would apply to the arbitration agreement and would, in essence, both promote the Defendants to continue unconscionable provisions in their agreements and would require the Court to “blue pencil” the agreement.

As a result, there is no doubt that the multiple cross-references and intertwining of the unconscionable provisions and Arbitration Agreement into the contract as a whole make these provisions inseverable and unenforceable. The Court would have to essentially rewrite the entire agreements to sever out the unconscionable provisions.

IV. The Arbitration Agreement is unenforceable as to the statutory beneficiaries' claims in the wrongful death action.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement with Facility by its own terms is an agreement between “Dominion Clemson, LLC doing business as Dominion Senior Living of Clemson (‘Community’) located at 100 Pershing Ave., Clemson, SC 29631 (the ‘Establishment’), Lindsey Daugherty (‘Manager’) and Earline Cooley (‘Resident’).” (Admission Agreement at Exhibit 13, page 28). Therefore, any purported agreement to arbitrate any claims was clearly (by the terms of the contract which was drafted by the Defendants) only on behalf of the Facility and the Responsible Party for Earline Cooley.¹

However, even if Debra Galloway had agreed to arbitration, she did not have the legal authority to bind the statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Debra Galloway as Resident’s Representative and Executive Director on behalf of Facility. No other parties are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries’ claims. Other South Carolina courts have agreed that arbitration agreements do not reach the wrongful death beneficiaries’ claims in these circumstances. See Exhibits 14, 16, 17, 18, 19, 20, 21, 22, and 23, Putman, Coleman, Young, Royston, Boozer, Joyner, Testerman, Wilson, and Clinkscales Orders.

¹ It should be noted that the Responsible Party named and identified on the first page of the Agreement is not the signatory to the Agreement for Earline Cooley.

However, while Defendants would like to contend that the agreement covers the statutory beneficiaries' claims, which they do not, the problem with this contention is that Debra Galloway had no authority to waive the statutory beneficiaries' claims.

Defendants may erroneously contend that the South Carolina Supreme Court has held that arbitration agreements are binding as to the wrongful death claims. Defendants may rely on Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) for this proposition. To the contrary, in a footnote, the Dean Court indicated that a court may not refuse to compel arbitration "simply because a wrongful death claim is involved". However, the Supreme Court has been clear that a court may find a wrongful death claim not covered by an arbitration agreement - not because it is a wrongful death claim, but because of state law contract defenses such as a person(s) not being a party or signatory to the contract. In the present case, the statutory beneficiaries clearly are not parties/signatories to the contract. This is the exact type of basis courts have upheld invalidating an arbitration agreement.

While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge v. Uni-Health Post-Acute Care of Bamberg, Opinion No. 5541 (S.C. Ct. App. March 7, 2018), recognized the separateness of the statutory beneficiaries/estate's claims from those of the patient/resident. In discussing the Maryland court's case of Dickerson, the Court noted that the nursing home was attempting "to use equitable estoppel against [the patient's] estate based on actions that [Son] took *in her individual capacity*. The fact that [Son] is *now the Personal Representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's]

[e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [Son] in *her capacity as Personal Representative* of [the patient's] [e]state....” Hodge quoting Dickerson v. Longoria, 995 A.2d. 721, 743 (Md. 2010). As recognized in this discussion, actions taken by Debra Galloway in her *individual capacity* will not be held against the estate and as the Court noted, the estate may well have other beneficiaries or creditors.

Defendants may further incorrectly assert other cases hold that the statutory beneficiaries are bound as third-party beneficiaries. The Defendants may cite Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). In Pearson, the Plaintiff who sought to avoid the arbitration agreement had filed suit for a breach of the very contract that contained the arbitration clause. In the present case, no claim for breach of contract has been made whatsoever. Further, the Plaintiff in Pearson personally received direct benefits from the contract. Here, the statutory beneficiaries personally received zero benefit from any contract. Plaintiff's claim arises in tort, not based on a contract. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).

Defendants insist that Earline Cooley had the power to waive the right to a jury trial on a claim that did not exist when the Arbitration Agreement was presented but never belonged to her and covered injuries suffered exclusively by other people. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), provides the specific times when a contract may be enforced against a non-party and the Defendants would have the burden of proving each of the elements of one of those instances where such a contract may be

enforced against a non-party. Defendants cannot prove these elements existed with regards to this specific case.

The statutory beneficiaries' claim is much more akin to the claims of the non-signatory Plaintiffs in Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019), where the South Carolina Supreme Court held the non-signatories could not be bound by the arbitration agreement. Much like the non-signatories in Wilson, the statutory beneficiaries in the instant case are not attempting to exploit or receive a direct benefit from the agreement and were not even aware of the existence of the arbitration provision. Defendants confuse the benefit Earline Cooley received from admission and attempt to argue the statutory beneficiaries received a benefit personally from the admission. That argument is without merit.

As the Wilson Court notes, "Equitable estoppel is ultimately a theory designed to prevent injustice, and it should be used sparingly. See Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013)(observing equitable estoppel should be used sparingly to compel arbitration and noting 'it is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration'); 28 Am.Jr.2d Estoppel and Waiver §29 (2011)(stating equitable estoppel should be used with restraint and only in exceptional circumstances)."

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, United States District Court for the District of South Carolina, Beaufort Division (2009).

In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. See Exhibit 24, Boyle Order. Further, at least one other South Carolina court judge has come to the same conclusion. See Wilson v. Amisub Order at Exhibit 25. These analyses confirm that the wrongful death claimants have separate and distinct claims apart from that of the survival action. As such, Debra Galloway or Earline Cooley were incapable of waiving the statutory beneficiaries' right to a trial by jury.

Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) The only signatures to the agreement with Facility were Debra Galloway as "Resident's Representative" and Lindsey Daugherty, Executive Director, for "Dominion Clemson, LLC dba Dominion Senior Living at Patrick Square". Therefore, the only parties executing this Agreement were Debra Galloway purportedly on behalf of Earline Cooley and an employee as an agent for Facility.

As the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.:

[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the

general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's Son against contractor was subject to repair contract's arbitration clause because Son, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed.2d 491 (2002) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”, Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a “third party beneficiary” of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Defendants are left to argue the wrongful death claim actually belongs to Earline Cooley's estate rather than the statutorily designated beneficiaries. However, this argument incorrectly lumps together the wrongful death claims and the survival of tort claims Earline Cooley had against Defendants at the time of her death. The differences with these claims begin with the statutes themselves.

The wrongful death claims are separate claims apart from the Earline Cooley's claims. According to South Carolina's Wrongful Death Act:

"Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

The wrongful death beneficiaries are as follows:

"Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of Earline Cooley, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989). Damages are paid to these beneficiaries because a wrongful death claim is directed at their losses suffered as a result of Earline Cooley's absence. Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000)(citing F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 610 (2d ed 1997)). In contrast, the legislature positions the survival statute in a completely different code chapter. The wrongful death claim is a distinct claim

warranting its own designation (Chapter 51). The survival statute is classified within an existing chapter (Chapter 5) identifying the proper “parties” for pursuing legal claims.

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated “necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions.” Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court’s ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

In Grainger v. Greenville S&A Railway Co., the South Carolina Supreme Court traced the divergent tracks that wrongful death and survival claims have taken over their development. Grainger v. Greenville S&A Railway Co., 101 S.C. 399, 85 S.E. 968 (915). In that case, the trial court had dismissed the survival action because the decedent’s administrator (equivalent to the modern “Personal Representative”) had previously recovered on a wrongful death claim. Id. at 968. When the legislature recognized this abnormality, it responded by creating the predecessor to the modern survival statute. Id. citing 1912 Code §3693. Grainger held this legislative history conclusively established wrongful death and survival actions are distinct and independent. Id. The claims are distinct because “the beneficiaries, the cause of action, the measure of damages, are all different.” Grainger 85 S.E. at 969. Our courts have

further held that judgement in a wrongful death claim does not have preclusive effect on survival claims. 229 S.C. at 611-12 93 S.E.2d at 914. Further, the law is clear that in wrongful death claims, the personal representative “functions under two separate and distinct trusteeships”. Id. In other words, while it is the personal representative’s name in the caption for the wrongful death claim, “it is clear...the real parties to the action were the beneficiaries.” Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539, 541 (1928).

Further, as early as 1907, our Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime but is a “new cause of action”. Osteen v. Southern Ry., Carolina Division, 76 S.C. 368, 57 S.E. 196, 200 (1907). Claussen held a wrongful death claim is “not a continuation” of any claim the decedent had before her death. 145 S.E. at 540. A wrongful death claim is “independent” of claims the decedent had during her life and “wholly different” than any other claim available at her death. Wellman v. Bethea, 243 F. 222 (E.D.S.C. 1917). Our court continues to recognize the distinctiveness of the two actions and that the wrongful death statute created a new cause of action that did not exist at common law and only accrues at the decedent’s death as the wrongful death claim is subject to its own statute of limitations. Weaver v. Lentz, 348 S.C. 672, 678, 561 S.E.2d 360, 363 (Ct. App. 2002).

It is true that our Supreme Court reaffirmed that a claim under the Wrongful Death Act lies in the decedent’s estate only when the decedent possessed the right of recovery at his death. Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 699 S.E. 2d 143 (2010). This rule, however, does not dictate the conclusion that a wrongful death claim is wholly derivative of the decedent’s claim. Instead, the rule provides that if the defendant has a defense that would completely bar the decedent’s

claim had the decedent survived, then the wrongful death beneficiaries may not bring a claim under the statute. For instance, in Stokes, the statute of limitations had run on the decedent's claim, and the wrongful death beneficiaries were accordingly totally barred from pursuing their claims under the statute. The Supreme Court cited the following from United States District Court case of Quattlebaum v. Carey Canada, Inc., 685 F. Supp. 939 (D.S.C. 1988): "anything that would have *defeated the decedent's recovery* had he survived the accident, (such as contributory negligence, a valid release, or similar acts on his part." (Emphasis added). The Court held Quattlebaum was correctly decided and adheres to the principle that that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P., 389 S.C. 343, 143, 146, 699 S.E.2d (S.C. 2010) at 146.

Facility has never asserted that the claims here are completely barred or that Earline Cooley's recovery has been "defeated" by operation of law, such as by the running of the statute of limitations or the execution of a release. Instead, what Facility asserts is that Earline Cooley may not bring a claim in court but must pursue her remedies in arbitration. Thus, neither Stokes nor the wrongful death statute operate to cut off the statutory beneficiaries' rights, even if the claims had been subject to arbitration. See also Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶57, 976 N.E.2d 344, 359 (IL 2012) (noting the defendants overstated the significance of the derivative nature of a wrongful death action, and stating "Although a wrongful-death action is dependent upon the decedent's entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court's case law suggests that this

limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement”). Additionally, the legal provisions holding that an individual may prevent a wrongful death claim by ignoring or settling a personal injury suit during his life do not mean the individual may control the manner in which the wrongful death claim will be resolved should she *choose to leave it intact*.

The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries’ wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania’s wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. *Id.* at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement and in this case, would include the waiver of jury trial as well.

Likewise, in Bybee v. Abdulla, M.D., 189 P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah

Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on

behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their wrongful death claims because he held no right to those claims.'" Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Because the statutory beneficiaries have separate and independent claims and were not covered by the scope of this agreement nor were parties to this agreement, the Arbitration Agreement drafted by Facility cannot reach the claims of the wrongful death statutory beneficiaries. Many other South Carolina courts agree as well. See Putman, Coleman, Young, Boozer, Joyner, Testerman, Wilson, and Clinkscales Orders at Exhibits 14, 16, 17, 19, 20, 21, 22, and 23.

V. The Corporate Defendants, Dominion Senior Living, Dominion Clemson, II, Dominion Management Group, and Dominion Group, are not parties to the alleged Arbitration Agreement, and therefore, any alleged Arbitration Agreement is not enforceable as to those Defendants.

As previously noted hereinabove, the Arbitration Agreement is incorporated within the Resident Admission Agreement. See Admission Agreement at Exhibit 13. The Admission Agreement states that the agreement is "made by and between Dominion

Clemson, LLC doing business as Dominion Senior Living of Clemson ('Community'), Lindsey Daugherty ('Manager') and Earline Cooley ('Resident')." See Exhibit 13, page 28. The parties to the agreement do not include Facility Co-Defendants Dominion Senior Living, Dominion Clemson, II, Dominion Management Group, and Dominion Group (hereinafter collectively "Corporate Defendants"). That further, the only signatories to the Arbitration Agreement are Debra Galloway as Resident's Representative and the Executive Director of the Facility. See Exhibit 13, p. 47. As a result, Corporate Defendants are not parties to the Agreement or included therein.

South Carolina law is very clear in that Facility's Co-Defendants are not third-party beneficiaries to either of these contracts. South Carolina courts have held that third-party non-signatories should only be included in arbitration agreements in exceptionally limited circumstances. Wilson v. Willis, 926 S.C. 326, 827 S.E.2d 167 (2019). Further, "South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it". Trancik v. USAA Insurance Company, 354 S.C. 549, 553, 581 S.E.2d 858, 861 (Ct. App. 2003). "It is to be observed that the presumption is that the parties contract for their own benefit and not for that of others not parties to the contract." Ancrum v. Camden Water, Light and Ice Company, 82 S.C. 284, 295, 64 S.E. 151, 155 (1909). The rule of contract interpretation is to ascertain and give legal effect to the intentions of the parties as determined by the contract language. Schulmeyer v. State Farm Fire and Casualty Company, 353 S.C. 492, 495, 579 S.E.2d 132, 134 (2003). Generally, courts do not have the authority to alter a contract by construction or make new contracts for the parties and words cannot be read into a contract which give an intent not expressed within the contract. Gilstrap v.

Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). Only if a contract is made for the benefit of the third person and the contracting parties intended to create a direct, rather than incidental or consequential benefit to the third person, can the third person make a claim based on the contract. Windsor Green Owners Association v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). The Agreement in no way references the benefits or rights of such third parties and does not even contemplate their interests. As a result, these third parties should not be able to compel arbitration.

CONCLUSION

The Arbitration Agreement is unenforceable because:

- 1) The Defendants waived their right to compel arbitration;
- 2) Earline Cooley's signatory did not possess adequate authority to execute the agreement; and
- 3) The agreement is unconscionable.

Further, if for some reason the Court found the agreement enforceable, then it should not apply to either the statutory beneficiaries' wrongful death claim nor include the Corporate Defendants. As a result, Defendants' motions should be denied.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted,

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Greenville, South Carolina
Date: October 18, 2022

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Pickens County
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

Cases No. 2021-CP-39-01127 and -01128
Appellate Case No. 2023-000033

Deonda Weldon, Individually and as
Personal Representative of the Estate of Earline Cooley, Appellant,

v.

Dominion Clemson, LLC d/b/a Dominion Senior Living at
Patrick Square; Dominion Senior Living, LLC; Dominion
Clemson, II, LLC; Dominion Management Group, LLC; and
Dominion Group, LLC, Respondents.

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RECEIVED

May 01 2023

SC Court of Appeals

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Respondents, hereby certify that **REPLY IN SUPPORT OF RESPONDENTS' MOTION (1) FOR LEAVE TO MAKE RULE 60, SCRPC, MOTION, OR, ALTERNATIVELY, (2) FOR IMMEDIATE REVERSAL AND REMAND PURSUANT TO *WIDENER V. FORT MILL FORD*, AND, IF NECESSARY, (3) TO STAY/EXTEND BRIEFING DEADLINE** was served on all other parties to this matter on May 1, 2023, by emailing (see attached email) a copy of the same to their counsel of record:

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May 1, 2023

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Subject: Weldon v. Dominion Clemson (Appellate Case No. 2023-000033) -- Reply in Support of Motion for Leave etc.
Date: Monday, May 1, 2023 11:17:33 PM
Attachments: [image001.png](#)
[Weldon v. Dominion Clemson \(2023-000033\) -- Reply in Supp. of Motion to for Leave under Rule 60 etc.pdf](#)
[Exhibit A.pdf](#)
[Exhibit B.pdf](#)
[Exhibit C.pdf](#)

Attached for service regarding the above-referenced matter please find the **Reply in Support of Respondents' Motion (1) For Leave to Make Rule 60, SCRPC, Motion, or, alternatively, (2) For Immediate Reversal and Remand Pursuant to *Widener v. Fort Mill Ford*, and, if necessary, (3) To Stay/Extend Briefing Deadline** (and **Exhibits A, B, and C** thereto).

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