

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASES NO. 2021-CP-10-01437 & -02477

WILLIAM HAYNES, )  
as Personal Representative of the )  
Estate of Elizabeth Varner, )  
 )  
Plaintiff, )

vs. )

THI OF SOUTH CAROLINA AT )  
CHARLESTON, LLC d/b/a )  
Riverside Health and Rehab, )  
 )  
Defendant. )

**RECEIVED**  
**Jul 27 2023**  
**SC Court of Appeals**

**ORDER GRANTING  
MOTIONS TO COMPEL ARBITRATION  
AND RELATED MOTIONS TO STAY**

WILLIAM HAYNES, )  
as Personal Representative of the )  
Estate of Elizabeth Varner, )  
 )  
Plaintiff, )

vs. )

FUNDAMENTAL ADMINISTRATIVE )  
SERVICES, LLC; FUNDAMENTAL )  
CLINICAL AND OPERATIONAL )  
SERVICES, LLC; and JERROLYN )  
MONTGOMERY-SMALLS, )  
 )  
Defendants. )

This matter is before the Court on four motions (collectively, the “Subject Motions”): one motion in Case 1437<sup>1</sup>, namely, the Facility’s<sup>2</sup> motion to compel arbitration, and three motions in

<sup>1</sup> “Case 1437” is *Haynes v. THI of South Carolina at Charleston, LLC*, Case No. 2021-CP-10-01437.

<sup>2</sup> The “Facility” is THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, the defendant in Case 1437.

Case 2477<sup>3</sup>, namely, Ms. Montgomery-Small's<sup>4</sup> motion to compel arbitration and FAS<sup>5</sup> and FCOS's<sup>6</sup> motions to stay. All of the Subject Motions were filed on October 4, 2021, and they were all heard together on February 10, 2022, with all parties' respective counsel appearing before the Court via WebEx.

Chief among the Subject Motions are the Facility and Ms. Montgomery-Small's substantively identical motions to compel arbitration of the claims asserted against them in Case 1437 and Case 2477, respectively (collectively, the "Motions to Compel Arbitration"). Secondary to those motions are the substantively identical motions of FAS and FCOS to stay Case 2477 pending the final outcome of the Motions to Compel Arbitration and the arbitration proceedings they seek to compel (collectively, the "Motions to Stay"). After careful consideration, the Court GRANTS the Subject Motions. Its reasoning is set forth below.

## I.

### **BACKGROUND**

The Facility is a skilled nursing facility. With the help of her son and daughter-in-law, William Haynes ("William") and Kim Haynes ("Kim"), respectively, Elizabeth Varner ("Ms. Varner") was admitted as a resident of the Facility on May 20, 2019. Kim handled the paperwork in conjunction with Ms. Varner's admission, which included an Admission Agreement and an Arbitration Agreement that Kim signed on Ms. Varner's behalf.

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<sup>3</sup> "Case 2477" is *Haynes v. Fundamental Administrative Services, LLC*, Case No. 2021-CP-10-02477.

<sup>4</sup> "Ms. Montgomery-Small's" is Jerrolyn Montgomery-Small's, one of the defendants in Case 2477.

<sup>5</sup> "FAS" is Fundamental Administrative Services, LLC, one of the defendants in Case 2477.

<sup>6</sup> "FCOS" is Fundamental Clinical and Operational Services, LLC, one of the defendants in Case 2477.

By her signature on the Arbitration Agreement, Kim expressly “represent[ed] that . . . she ha[d] authority to sign on [Ms. Varner’s] behalf so as to bind [her] as well as [herself].” And, indeed, pursuant to a Durable Financial Power of Attorney executed March 25, 2018 (the “Power of Attorney”), Kim was Ms. Varner’s secondary agent. The Power of Attorney, which was effective “[i]mmediately upon [its] execution” and expressly included the power to “[s]ubmit to alternative dispute resolution,” authorized Kim to exercise the powers it conferred to Ms. Varner’s primary agent, William, in the event he was “unable or unwilling to serve.” According to the affidavits they filed on February 8, 2022, on the day Ms. Varner was admitted to the Facility, Kim and William were initially together with the Facility’s representative Chandra Bryant (“Ms. Bryant”) in the room that was being assigned to Ms. Varner until Kim went with Ms. Bryant to another location (within the Facility) to sign the paperwork while William stayed behind to await Ms. Varner’s arrival.

Plaintiff<sup>7</sup> filed Case 1437 and Case 2477 on March 25, 2021, and June 11, 2021, respectively, asserting claims arising out of alleged deficiencies in Ms. Varner’s care/treatment at the Facility. As for the relationship between the subject matter of the two cases, although Plaintiff ended up withdrawing the motion, his motion to consolidate (filed in Case 2477 on August 16, 2021) states that Case 1437 and Case 2477 “concern the same underlying facts and have factual and legal questions in common.”

Defendants<sup>8</sup> timely answered the respective lawsuits, subject to and without waiving any right to compel the matter to arbitration, denying the liability Plaintiff alleged and raising a number of affirmative defenses.

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<sup>7</sup> “Plaintiff” is William in his capacity as personal representative of Ms. Varner’s estate, who is the plaintiff in both Case 1437 and Case 2477.

<sup>8</sup> “Defendants” are the Facility, FAS, FCOS, and Ms. Montgomery-Small, collectively.

Citing the Arbitration Agreement, the Motions to Compel Arbitration ask the Court to compel Plaintiff's claims against the Facility and Ms. Montgomery-Small to arbitration. Citing the Motions to Compel Arbitration, the Motions to Stay ask the Court to stay Case 2477 pending the ultimate outcome of the Motions to Compel Arbitration, i.e., until arbitrability is finally determined and any arbitration proceedings resulting from that determination are themselves finally concluded.

## II.

### ANALYSIS

#### A. **Re: the Motions to Compel Arbitration**

The core question here is this: Is the Arbitration Agreement (which Kim signed for Ms. Varner) enforceable against Ms. Varner's estate (i.e., Plaintiff) even though it was not signed by Ms. Varner herself? For two reasons, the Court answers this question in the affirmative: (1) the Arbitration Agreement was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney, and (2) the Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement is enforceable—by virtue of merger and equitable estoppel. Thus, since Plaintiff's claims against the Facility and Ms. Montgomery-Small are clearly within the scope of the Arbitration Agreement, they should proceed in arbitration, not litigation. The Court's findings/analytical steps in reaching this conclusion follow.

#### 1. **Both state and federal policy favor arbitration.**

There is a "strong South Carolina and federal policy favoring arbitration . . . ." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) ("The policy of the United States and of South Carolina is to favor arbitration of disputes."). Indeed,

“arbitration agreements are *presumed valid*.” *Doe*, 430 S.C. at 607, 846 S.E.2d at 877 (emphasis added).

**2. The Arbitration Agreement is governed by the FAA<sup>9</sup>.**

The Arbitration Agreement is governed by the FAA, not South Carolina’s Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (the “SCAA”). For one reason, the Arbitration Agreement expressly states that the FAA applies:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.

This must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties ‘specifically agree that this transaction involves interstate commerce.’ We must enforce this agreement like any other contract term.”) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed the subject contract involved interstate commerce)).

Moreover, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause). Our

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<sup>9</sup> The “FAA” is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

**3. The FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law.**

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”<sup>10</sup> and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “By its terms, the [FAA] 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) (emphasis added); *see also* 9 U.S.C. § 4 (“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.*”) (emphasis added).

While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v.*

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<sup>10</sup> *Allied–Bruce*, 513 U.S. at 270.

*Concepcion*, 563 U.S. 333, 339 (2011)). Under the FAA, “courts *must* place arbitration agreements on *equal footing with other contracts* . . . .” *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted).<sup>11</sup>

#### 4. The Arbitration Agreement is valid on its face.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Kim’s signature on behalf of Ms. Varner, along with her express representation that she is authorized to sign for her.<sup>12</sup> It is countersigned by Ms. Bryant for the Facility. It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties’ mutual promises to submit a certain

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<sup>11</sup> To be clear, what the FAA requires is for arbitration agreements to be placed on *at least* equal footing with all other contracts under state law. As explained above, both state and federal policy *favor* arbitration. The FAA prohibits arbitration agreements from being singled out for *disfavored* treatment relative to other contracts, but it does not prohibit the *favored* treatment of arbitration agreements relative to other contracts.

<sup>12</sup> By virtue of her signature, Kim is “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”), including, of course, the express representation therein of her authority to act on Ms. Varner’s behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (“There exists in every contract an implied covenant of good faith and fair dealing.”), and Kim is no less bound by this covenant than the Facility.

defined scope of disputes to binding arbitration<sup>13</sup> before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.<sup>14</sup> To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

Moreover, the Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive 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, 25, 644 S.E.2d 663, 668 (2007). Neither is the case here.

The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident." It is further undermined by the fact that the Arbitration Agreement itself was not required for admission to the Facility.

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<sup>13</sup> The parties' mutual promises to arbitrate constitute sufficient consideration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) ("[T]he exchange of promises qualified as consideration."); see also *Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises also constitute a good consideration.")).

<sup>14</sup> In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the SCAA, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

But even assuming, *arguendo*, the first part of the test were somehow met, the second part (unreasonably oppressive terms) certainly is not. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, which is something that is expressly favored as a matter of both state and federal policy. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131; *Doe*, 430 S.C. at 607, 846 S.E.2d at 877. And there is nothing about the Arbitration Agreement—which, again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 (“In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.”). Indeed, Rule 1 of the South Carolina ADR Rules expressly states, “These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply.”

**5. Plaintiff’s claims are within the scope of the Arbitration Agreement.**

Without question, Plaintiff’s claims against the Facility and Ms. Montgomery-Small are within the scope of the Arbitration Agreement. In pertinent part, the Arbitration Agreement reads as follows:

It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively “Disputes”), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

This plain language clearly embraces the subject matter of Plaintiff's claims. And even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

**6. The Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Small.**

The Arbitration Agreement expressly states that it not only covers the Facility itself but also the Facility's "agents, employees, and servants." Plaintiff's complaint in Case 2477 alleges that, "at all times relevant herein [Ms. Montgomery-Small] was the Administrator of [the Facility]." Accordingly, the Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Small.

**7. The Arbitration Agreement is valid and enforceable because it was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney.**

A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344–45, 597 S.E.2d 12, 20 (Ct. App. 2004); *see also Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.") (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of

[the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor.” *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

The Power of Attorney was duly executed on March 25, 2018, and became effective immediately upon its execution. The Power of Attorney expressly included the power to “[s]ubmit to alternative dispute resolution.” And while, as secondary agent, Kim’s authority under the Power of Attorney was contingent upon William being “unable or unwilling to serve,” this contingency came to pass due to William’s desire to wait in Ms. Varner’s room for her arrival. Accordingly, when she signed the Arbitration Agreement for Ms. Varner in May of 2019, Kim was properly acting within the scope of her authority under the Power of Attorney.

**8. Plaintiff is precluded from denying the enforceability of the Arbitration Agreement because of merger and equitable estoppel.**

Even though Ms. Varner is a nonsignatory to the Arbitration Agreement, i.e., even though she did not actually sign the Arbitration Agreement herself, it is nonetheless enforceable against her/her estate (i.e., Plaintiff).

“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: “Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the

course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”).

Conceptually, the Facility and Ms. Montgomery-Small’s merger/equitable estoppel argument is not about showing that the Arbitration Agreement is enforceable but about showing that Plaintiff is estopped to deny that the Arbitration Agreement is enforceable. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and, Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Ms. Varner in bringing these actions as the personal representative of her estate) is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments aimed at denying the Arbitration Agreement’s enforceability (e.g., arguments based on a supposed lack of authority to sign the Arbitration Agreement on behalf of Ms. Varner) are beside the point and unavailing.

As explained below, the Court finds that the Arbitration Agreement is also enforceable against Plaintiff based on merger and equitable estoppel.

### **Merger**

In *Coleman*, even though our Supreme Court found against merger on the *particular facts* then before it, the Court nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA’s enforceability. The circuit court held there was no estoppel here, and we agree.

Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

*Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

*Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”<sup>15</sup> as undoubtedly the Admission Agreement and the Arbitration Agreement were here,<sup>16</sup> evidence exists to upset the presumption in favor of merger, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). And “in attempting to ascertain th[e] [parties’] intention,” courts “endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

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<sup>15</sup> *Id.* at 355, 755 S.E.2d at 455.

<sup>16</sup> As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

It must be remembered that, where, as here, the instruments in question (i.e., the Admission Agreement and the Arbitration Agreement) were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances that gave rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here.

Although the Admission Agreement does contain an “Entire Agreement” clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, “other Admissions materials . . . are made a part of this Agreement by reference herein.” Clearly, the Arbitration Agreement is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (recognizing “admission documentation” to include an arbitration agreement: “The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s *admission documentation—including the Arbitration Agreement.*”) (emphasis added) (internal footnote omitted). This directly contradicts the notion of any intended “separatedness” (in the parlance of the *Coleman* Court<sup>17</sup>) between the Admission Agreement and the Arbitration Agreement.

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<sup>17</sup> 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration agreement and, thus, “recognize[d] the ‘*separatedness*’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

While the Arbitration Agreement was not required for Ms. Varner's admission to the Facility, all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed, which, without question, it was—and under the very circumstances (same time, parties, purpose, and transaction) that give rise to the presumption of merger. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was certainly agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Ms. Varner's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission.

Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. Unlike the Admission Agreement, which theoretically could have stood on its own in the absence of the Arbitration Agreement—and, of course, had the Arbitration Agreement not been executed, it simply would not exist and no question of merger would have arisen to begin with—the Arbitration Agreement could not have stood on its own: It only makes sense together with, i.e., connected to, the Admission Agreement, which is its sole reason for being.

That the Admission Agreement and the Arbitration Agreement have their own titles and are separately paginated and signed admits of no reasonable inference of an intent contrary to

merger. To point to such things is to do no more than to observe that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And even assuming, *arguendo*, there is some ambiguity in this regard, to fall back on the idea that it should be construed against the Facility as the drafter is uncalled for in this context. *Merger is the default position*, i.e., it is presumed, and this is so because of the confluence of a particular set of circumstances—the instruments at issue were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these stars align—same time, same parties, same purpose, same transaction—our law instructs the Court to consider and construe the instruments together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

### **Equitable Estoppel**

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of

the direct benefits test our Supreme Court endorsed in *Wilson*. See 426 S.C. at 340, 827 S.E.2d at 175 (“Under direct benefits estoppel, ‘[a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when [the nonsignatory] receives a direct benefit from a contract containing an arbitration clause.’”) (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)); *id.* (““In the arbitration context, the doctrine [of direct benefits estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*”) (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int’l Paper*, 206 F.3d at 418).

The *Wilson* Court favorably discussed the application of the direct benefits test in the arbitration agreement context—the Court of Appeals having applied the test in the decision then before the *Wilson* Court on writ of certiorari, which test the Court of Appeals had earlier applied to find a nonsignatory estopped to deny the validity of an arbitration agreement in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which test the Facility and Ms. Montgomery-Small contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. See *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; see also *id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added).

Without question, Ms. Varner received direct benefits from the Admission Agreement throughout her residency at the Facility, including, without limitation, the room, board, care/treatment she received therein. To deny her receipt of such benefits is illogical and objectively unreasonable and would require wholly discrediting the entirety of her residency: every meal, every instance of care/treatment she received, essentially every moment at the Facility—even Plaintiff’s complaints do not go nearly so far as that. Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff cannot now deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged.

**9. Neither the Facility nor Ms. Montgomery-Small's waived any arbitration rights.**

Waiver is the voluntary relinquishment of a known right. When timely answering Plaintiff’s complaints, the Facility and Ms. Montgomery-Small's expressly reserved their arbitration rights. Moreover, Case 2477 was filed some three months after Case 1437, and by virtue of his now-withdrawn motion to consolidate, Plaintiff acknowledges that the cases “concern the same underlying facts and have factual and legal questions in common.” There was no undue delay in moving to compel arbitration; nor was there any prejudice from any supposed delay; nor did either the Facility or Ms. Montgomery-Small's make any use of the tools of litigation inconsistent with their arbitration rights.

**B. Re: the Motions to Stay**

The relationship between the Motions to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. *See* 9 U.S.C. § 3 (“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 the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.”) (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (“[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.”). But even assuming, *arguendo*, staying Case 2477 is not mandatory here, for the sake of judicial economy, of avoiding piecemeal litigation and the potential for inconsistent obligations, and of the orderly administration of its own docket, the Court exercises its discretion to impose such a stay. *See State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) (“[A] court’s power to hear and decide cases ‘carries with it the inherent power to control the order of its business.’”) (quoting *Williams v. Bordon’s, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) (“The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.”). Indeed, as stated in Plaintiff’s now-withdrawn motion to consolidate Case 1437 with Case 2477, “[i]t is in the interest of efficiency and judicial economy to consolidate these actions as aforesaid and avoid duplicative discovery and trials.” These interests likewise support staying Case 2477.

**III.**

**CONCLUSION**

The Subject Motions are hereby GRANTED. Case 1437 is stayed in favor of arbitration between Plaintiff and the Facility. Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Small, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Small.

IT IS SO ORDERED.

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ROGER M. YOUNG, SR., Presiding Judge  
Court of Common Pleas  
Charleston County

Charleston, South Carolina

Dated: \_\_\_\_\_



Charleston Common Pleas

**Case Caption:** William Haynes , plaintiff, et al VS Thi Of South Carolina At  
Charleston , defendant, et al

**Case Number:** 2021CP1001437

**Type:** Order/Compel

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134