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**Sep 13 2023**

**SC Court of Appeals**

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

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Appeal from Dorchester County  
Court of Common Pleas

Robert Bonds, Circuit Court Judge  
R. Markley Dennis, Jr., Circuit Court Judge

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Case No. 2021-CP-18-01030  
Appellate Case No. 2022-001807

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Tammy China,  
as Personal Representative of the  
Estate of Emma Lee James,

Respondent,

v.

Palmetto Hallmark Operating, LLC  
d/b/a Hallmark Healthcare Center, and  
Elite Patient Care of South Carolina, PC,

Defendants,

Of which Palmetto Hallmark Operating, LLC  
d/b/a Hallmark Healthcare Center is

Appellant.

---

**RECORD ON APPEAL**

---

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF DORCHESTER ) FIRST JUDICIAL CIRCUIT

TAMMY CHINA, AS PERSONAL ) CASE NO. 2021-CP-18-01030  
REPRESENTATIVE FOR THE ESTATE )  
OF EMMA LEE JAMES, )

PLAINTIFF, )

vs. )

PALMETTO HALLMARK )  
OPERATING, LLC D/B/A HALLMARK )  
HEALTHCARE CENTER, )  
FUNDAMENTAL LONG TERM CARE, )  
THI OF SOUTH CAROLINA, LLC, THI )  
OF BALTIMORE, INC., AND ELITE )  
PATIENT CARE OF SOUTH )  
CAROLINA, PC, )

**CONSENT ORDER OF CONTINUANCE**

DEFENDANTS. )  
 )  
 )

This matter comes before the court pursuant to Defendant Fundamental Long Term Care Holdings, LLC’s Motion to Dismiss. Prior to the scheduled hearing on this matter, the parties requested a continuance to allow for ongoing negotiations toward resolving the issues raised in the Motion.

Therefore, for good cause shown, and with consent of all parties, it is hereby ORDERED that this matter shall be continued until the next available term of court.

IT IS SO ORDERED.

\_\_\_\_\_  
The Honorable Edgar W. Dickson  
Chief Administrative Judge  
First Judicial Circuit

WE CONSENT:

STROM LAW FIRM, LLC

By: /s/ Amy E. Willbanks

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Dorchester Common Pleas

**Case Caption:** Tammy China , plaintiff, et al VS Palmetto Hallmark Operating Llc ,  
defendant, et al  
**Case Number:** 2021CP1801030  
**Type:** Order/Continuance

So Ordered

s/ Edgar W. Dickson #2153

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 1st JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
	)	C/A No. 2021-CP-18-01030
Tammy China, as Personal Representative	)	
of the Estate of Emma Lee James,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>ORDER</b>
	)	
Palmetto Hallmark Operating, LLC	)	
d/b/a Hallmark Healthcare Center,	)	
and Elite Patient Care of	)	
South Carolina, PC,	)	
	)	
Defendants.	)	
	)	

---

This matter came before the Court on April 13, 2022, on a Motion to Compel Arbitration filed by Defendant Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (Palmetto Hallmark), pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Present at the video conference hearing and arguing on behalf of Defendants was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Mario A. Pacella. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Defendant’s Motion to Compel Arbitration for the reasons set forth herein.

Plaintiff Tammy China brought this wrongful death and survival action against Palmetto Hallmark on behalf of the Estate of Emma Lee James. Decedent James died on November 4, 2018. This action was filed on June 9, 2021.

The basis of Palmetto Hallmark’s Motion is that a valid and enforceable arbitration agreement exists between the parties. The Arbitration Agreement relied upon by Palmetto

Hallmark was signed by Emma Dunham, decedent's daughter and one of her three children. Palmetto Hallmark attached to its motion a health care power of attorney document that purported to nominate Emma Dunham as power of attorney, but that healthcare power of attorney form was not executed by decedent. Further, Palmetto Hallmark provided an Arbitration Agreement and an Admission Agreement that was signed by Emma Dunham. There is no evidence that at the time these documents were executed by Emma Dunham that she had valid healthcare power of attorney. Further, Emma Dunham did not have legal authority to enter the Admission Agreement on her behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq.*, as she was a minority of the children of decedent. Because Emma Dunham lacked legal authority to enter into legal agreements on behalf of her mother, neither the Arbitration Agreement nor the Admission Agreement can be considered to be valid.

In *Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69 (2021), the South Carolina Supreme Court held that a general durable power of attorney for decisions regarding all types of personal and real property, including “choses in action,” does not provide the agent the authority to sign pre-dispute arbitration agreements requiring arbitration of certain claims by a resident against a facility. *Arredondo*, 433 S.C. at 78-79. The Supreme Court further held that the provision of a general durable power of attorney permitting the agent to enter agreements concerning transfers of property also did not authorize the signing of an arbitration agreement. In this regard, the Supreme Court noted the difference between a property right and a constitutional right. *Arredondo*, 433 S.C. at 79. Thus, unless the general durable power of attorney permitted decisions related to constitutional rights, it would appear that a durable power of attorney does not convey the right to the holder or agent to waive constitutional rights, including the right to a jury trial

under the Seventh Amendment. However, it is clear in this case, Ms. Dunham did not have durable power of attorney.

Moreover, Ms. Dunham did not have healthcare power of attorney, as it was not signed by Decedent. In fact, the signature for principal reflects Ms. Dunham's signature, witnessed by Veronica Gee. Nonetheless, even if this healthcare power of attorney was valid, which it is not, it still would not convey authority to Ms. Dunham to waive Decedent's constitutional rights. *Arredondo* sets forth the standard regarding whether a healthcare power of attorney can convey the authority to waive a principal's constitutional rights. In *Arredondo*, the Supreme Court held that language in a healthcare power of attorney giving the holder the right to make necessary healthcare decisions could not give the right to sign an arbitration agreement unless the arbitration agreement was necessary to the implantation of a health care decision. *Arredondo*, 433 S.C. at 81-84. Further, a healthcare power of attorney authorizing the holder or agent to pursue legal action does not grant the agent the authority to execute an arbitration clause. *Arredondo*, 433 S.C. at 85. Thus, *Arredondo* implies that courts can consider whether the arbitration agreement is necessary for the facility to provide care in making the determination as to the effect of an arbitration agreement.

However, here, Palmetto Hallmark cannot make this argument, as its Memorandum in Support of its Motion to Compel Arbitration states that “[t]he Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or “take it or leave it” contract. Ms. Dunham had the option not to enter into the Arbitration Agreement on behalf of her mother”. Because Ms. Dunham did not have healthcare power of attorney or general power of attorney conveying the authority to waive constitutional rights, the Arbitration Agreement has no effect as to Decedent, her estate, or her heirs.

Even if Ms. Dunham had authority under the Act to enter the Admission Agreement as an act in furtherance of Decedent James' health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Decedent James' estate would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Dunham had actual or apparent authority to enter the Arbitration Agreement on behalf of Decedent James. The answer to both inquiries is "no".

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Decedent's daughter, Emma Dunham, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. Only a majority of children are authorized to make decisions concerning health care under the Adult Health Care Consent Act. S.C. Code Ann. § 44-66-30(A)(4). Ms. Dunham was only a minority and could not bind Decedent James under the Act. Further, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See Black's Law Dictionary*, 125 (10th ed. 2014).

Palmetto Hallmark's Arbitration Agreement is optional and separate from its Admission Agreement and contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", and is a one-page document and contains its own signature lines. The agreement is signed by Ms. Dunham as "Resident/Representative." Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement

purports to incorporate admissions materials into itself “by reference herein”, when viewed alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances, and “the law is clear that any ambiguity in such a clause is construed against the drafter”, i.e., Palmetto Hallmark. *Coleman v. Mariner Health Care Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). Since Ms. Dunham lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, the Estate of Emma James cannot be equitably estopped from denying enforcement of the Arbitration Agreement. “Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Palmetto Hallmark cannot meet its burden to establish this element. There is no evidence Decedent James herself acted in a way amounting to a false representation to Palmetto Hallmark regarding Ms. Dunham's status or that Decedent James intended for Palmetto Hallmark to act in reliance on her conduct. If anything, the evidence shows that, more likely than not, Decedent James was not consciously aware of anything that was occurring at the time of his admission. Further, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450.

Palmetto Hallmark’s assertion that the Estate of Emma James is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of

estoppel, i.e., that since Decedent James benefited from the terms of the Admission Agreement, she should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Virtually all of the Circuit Court orders filed by Palmetto Hallmark in support of its Motion rely in some form or another on this theory. However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought his lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Plaintiff's claims are indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a nonsignatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Ms. Dunham did not have any legal authority to enter the Arbitration Agreement. The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). For the reasons mentioned above, the healthcare power of attorney document that Decedent never signed did not provide Ms. Dunham with the authority to enter the Agreement.

The simple fact that Ms. Dunham erroneously and without authority signed the agreements so that her mother could be admitted to Palmetto Hallmark and receive health care in no way indicates a manifestation of authority by Ms. Dunham waive her mother's right to a jury trial or agree to arbitration. There is no evidence that Decedent James ever manifested any form of assent establishing Ms. Dunham as her agent.

Palmetto Hallmark's assertion that Ms. Dunham held "inherent agency powers" to act on behalf of Decedent James is unsupported by South Carolina law or Palmetto Hallmark's brief. Palmetto Hallmark concedes that its inherent agency argument requires some authorized conduct on the part of the agent. Here, as explained above, Decedent James did not convey to Ms. Dunham any authority to transact business, healthcare or otherwise, for Decedent James. A simple review of the healthcare power of attorney attached to Palmetto Hallmark's motion easily shows that Decedent James never signed it.

In the alternative, Palmetto Hallmark has requested that the Court grant additional discovery on the nature of Ms. Dunham's agency relationship with her mother. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.

Based on the foregoing authorities and findings, the Court denies Defendant's Motion to Compel Arbitration.

THEREFORE, it is ORDERED that the Defendant's Motion to Compel Arbitration is DENIED.

**IT IS SO ORDERED.**

---

The Honorable R. Markley Dennis, Jr.

\_\_\_\_\_, 2022.  
Moncks Corner, South Carolina



Dorchester Common Pleas

**Case Caption:** Tammy China , plaintiff, et al VS Palmetto Hallmark Operating Llc ,  
defendant, et al  
**Case Number:** 2021CP1801030  
**Type:** Order/Compel

R. Markley Dennis Jr., 2060

R. Markley Dennis Jr., 2060

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## Certificate of Electronic Notification

### Recipients

**Kara Grevey** - Notification transmitted on 05-04-2022 07:41:56 AM.

**Donald Davis** - Notification transmitted on 05-04-2022 07:41:57 AM.

**Hunter Morgan** - Notification transmitted on 05-04-2022 07:41:56 AM.

**Amy Willbanks** - Notification transmitted on 05-04-2022 07:41:57 AM.

**Mario Pacella** - Notification transmitted on 05-04-2022 07:41:56 AM.

**Joseph Tierney** - Notification transmitted on 05-04-2022 07:41:56 AM.

**Matthew Riddle** - Notification transmitted on 05-04-2022 07:41:56 AM.

**Jessica Fickling** - Notification transmitted on 05-04-2022 07:41:56 AM.

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

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**A filing has been submitted to the court RE:** 2021CP1801030

**Official File Stamp:** 05-04-2022 07:41:43 AM

**Court:** CIRCUIT COURT

Common Pleas

Dorchester

**Case Caption:** Tammy China , plaintiff, et al VS Palmetto  
Hallmark Operating Llc , defendant, et al

**Document(s) Submitted:** Order/Denying Motion to Compel Arbitration  
Order/Denying Motion to Compel Arbitration

**Filed by or on behalf of:** R. Markley Dennis, Jr.

This notice was automatically generated by the Court's auto-notification system.

-

**The following people were served electronically:**

Amy E. Willbanks for Tammy China et al

Donald Jay Davis, Jr. for Hallmark Healthcare  
Center, Palmetto Hallmark Operating Llc

Matthew Oliver Riddle for Hallmark Healthcare  
Center, Palmetto Hallmark Operating Llc

Kara Shea Grevey for Hallmark Healthcare  
Center, Palmetto Hallmark Operating Llc

Joseph John Tierney, Jr. for Elite Patient Care Of  
South Carolina Pc

Jessica Lerer Fickling for Tammy China

Hunter Adam Morgan for Elite Patient Care Of  
South Carolina Pc

Mario Anthony Pacella for Tammy China

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

Tammy China et al  
PLAINTIFF(S)

Palmetto Hallmark Operating Llc et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (*CHECK REASON*):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

Defendant's Motion to Reconsider was heard Nov 17, 2022. After hearing arguments of council and reviewing the order of Judge Dennis, this court agrees with Judge Dennis' findings, conclusions of law and Order and therefore, affirms his ruling. The Defendant's motion to Reconsider is respectfully, denied.

**ORDER INFORMATION**

This order  ends  does not end the case.

See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/28/2022 .

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Dorchester Common Pleas

**Case Caption:** Tammy China , plaintiff, et al VS Palmetto Hallmark Operating Llc ,  
defendant, et al  
**Case Number:** 2021CP1801030  
**Type:** Order/Electronic Form 4

So Ordered

s/ Robert Bonds, 2770

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Tammy China et al  
PLAINTIFF(S)

Palmetto Hallmark Operating Llc et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (*CHECK REASON*):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

This Form 4 shall serve as a supplement to this Court's Order of November 28th, 2022. After hearing arguments of Counsel and reviewing briefs provided to me, the Court respectfully denies Defendant's Motion to Compel Arbitration. Furthermore, Defendant's Motion to Alter/Amend/Reconsider is respectfully denied. The Court's findings and rationales can be found in Judge Dennis' May 4th, 2022 Order.

**ORDER INFORMATION**

This order  ends  does not end the case.  See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/28/2022 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

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---



Dorchester Common Pleas

**Case Caption:** Tammy China , plaintiff, et al VS Palmetto Hallmark Operating Llc ,  
defendant, et al  
**Case Number:** 2021CP1801030  
**Type:** Order/Electronic Form 4

So Ordered

s/ Robert Bonds, 2770

Electronically signed on 2022-12-28 09:55:07 page 3 of 3

STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )  
Tammy China, as Personal Representative )  
for the Estate of Emma Lee James, )  
PLAINTIFF, )  
VS. )  
Palmetto Hallmark Operating, LLC d/b/a )  
Hallmark Healthcare Center, Fundamental )  
Long Term Care, THI of South Carolina, )  
LLC, THI of Baltimore, Inc., and Elite )  
Patient Care of South Carolina, PC, )  
DEFENDANTS. )

IN THE COURT OF COMMON PLEAS  
FOR THE 1<sup>st</sup> JUDICIAL CIRCUIT

**SUMMONS**

**TO THE DEFENDANTS ABOVE-NAMED:**

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

\_\_\_\_\_  
s/ Mario A. Pacella  
Attorney for Plaintiff

Dated: June 9, 2021

Address: Strom Law Firm, LLC  
6923 N. Trenholm Road  
Columbia, South Carolina 29206  
803-252-4800

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
FOR THE 1st JUDICIAL CIRCUIT

C/A No. 2021-CP-18-\_\_\_\_\_

Tammy China, as Personal Representative )  
for the Estate of Emma Lee James, )  
 )  
Plaintiff, )

**COMPLAINT  
(JURY TRIAL REQUESTED)**

v. )

Palmetto Hallmark Operating, LLC )  
d/b/a Hallmark Healthcare Center, )  
Fundamental Long Term Care, THI of )  
South Carolina, LLC, THI of )  
Baltimore, Inc., and Elite Patient Care of )  
South Carolina, PC, )  
 )  
Defendants. )

Plaintiff Tammy China, individually and as the personal representative for the Estate of Emma Lee James, hereby brings this action against the above Defendant and alleges unto this Court as follows:

**INTRODUCTION**

1. This is an action for damages associated with the treatment and death of Emma Lee James, which occurred on November 4, 2018. Prior to her death, Plaintiff was a patient and resident of Defendant Palmetto Hallmark Operating LLC d/b/a Hallmark Healthcare Center (“Defendant” or “Defendant Hallmark”) from August 1, 2018, when she was admitted for skilled care after treatment at Summerville Medical Center. At all times relevant to this complaint, and upon information and belief, Defendant Hallmark is owned, operated and controlled, in whole or in part, by Defendants Fundamental Long Term Care, THI of South Carolina, LLC, and THI of Baltimore, LLC ( collectively the “Fundamental Defendants”). In addition, Defendant Elite Patient Care

provided clinical and nursing services in conjunction with the services offered by Defendant Hallmark and the Fundamental Defendants.

2. As set forth below, and upon information and belief, at all times relevant to this complaint, these Defendants coordinated their decision making and control over the care provided to residents of Defendant Hallmark, such as Emma Lee James, and were ultimately responsible for the budgeting, training, and operations, which encompassed Ms. James' care.

3. As set forth more fully herein, Plaintiff seeks monetary damages against Defendants individually and collectively due to Defendant's negligent, grossly negligent, and/or reckless care of Ms. James, including Defendant's failures to adhere to applicable standards of care for a patient receiving skilled nursing care for existing wounds and for identifying new wounds where the patient was known to be a high wound risk.

4. The acts, omissions, and decision making of Defendants individually and collectively, all directly and proximately caused significant harm to Ms. James, and, as set forth more fully below, ultimately resulted in her death.

### **PARTIES**

5. At all times relevant to this Complaint, Plaintiff Tammy China was the granddaughter of Plaintiff Emma Lee James (hereinafter "Plaintiff" or "the Decedent" or "Ms. James") and is the duly appointed personal representative of the Estate of Emma Lee James.

6. Plaintiff Tammy China was appointed personal representative of the Decedent by Order of the Dorchester County Probate Court, dated May 14, 2019 in estate number 2019-ES-18-00277.

7. At all times relevant to this Complaint, the Decedent was a 92-year-old resident of the County of Dorchester and with a primary address located at 255 Midland Pkwy, Summerville,

SC 29485.

8. Upon information and belief, at all times relevant to this Complaint, Defendant Hallmark has been a for-profit LLC incorporated in Delaware and licensed and operating pursuant to South Carolina law, with a principle place of business located at 255 Midland Pkwy, Summerville, SC 29485.

9. Upon information and belief, at all times relevant to this Complaint, Defendant Fundamental Long Term Care has been a for-profit holding company, and has provided administration, payroll, human resources, and staffing services, in addition to having an ownership interest in, of over 400 long-term and skilled nursing companies nationwide, including facilities in South Carolina, such as Defendant Hallmark.

10. Upon information and belief, at all times relevant to this Complaint, Defendant THI of South Carolina, LLC has been a for-profit entity organized and existing pursuant to the laws of South Carolina, and the owner of record for Defendant Hallmark.

11. Upon information and belief, at all times relevant to this Complaint, Defendant THI of Baltimore, LLC has been a for-profit entity organized and existing pursuant to Maryland law, and has been a partial of exclusive owner of health care and skilled nursing facilities across the United States, including Defendant Hallmark.

12. Upon information and belief, at all times relevant to this Complaint, Defendant Elite Patient Care has been a for-profit entity offering “population management,” post-acute, and transitional nursing and clinical care for a variety of facilities in Texas, North Carolina, South Carolina, and Nevada, and, upon information and belief, was responsible for providing these services at Defendant Hallmark’s facility located in Summerville, South Carolina, where Ms. James was a resident.

### **JURISDICTION AND VENUE**

13. At all times relevant to this Complaint, Defendant Hallmark, the Fundamental Defendants, and Defendant Elite Patient Care were responsible for the ownership, operation, management, budget, training, and decision-making of a for-profit skilled nursing facility licensed, organized and existing pursuant to South Carolina law, with a principle place of business in Summerville, South Carolina.

14. At all times relevant to this Complaint, Defendant Hallmark, the Fundamental Defendants, and Defendant Elite Patient Care employed, privileged, and/or otherwise empowered by agency various physicians, clinicians, nurses, CNAs, interns, technicians, and administrative staff at its skilled nursing center in Summerville, South Carolina.

15. At all times relevant to this Complaint, Defendants individually and collectively had exclusive control over the medical care provided to Emma Lee James.

16. Prior to her death on November 4, 2018, Emma Lee James was completely reliant upon Defendants to provide her required and minimally adequate healthcare.

17. According to the level of control exercised by Defendants over Ms. James's medical care, upon information and belief, the actions and inactions leading to the death of Ms. James were known, authorized, condoned and effectuated by Defendants.

18. Upon information and belief, at all times relevant to this Complaint, and with regard to care provided to Emma Lee James, the physicians, clinicians, employees, staff, agents, contract entities or individuals, volunteers, and other support available through Defendant Hallmark, the Fundamental Defendants, and Defendant Elite Patient Care were acting within the course and scope of their employment and/or agency.

19. The negligent, grossly negligent, negligent *per se*, reckless, willful and/or wanton

acts, omissions, and liabilities of Defendant Hallmark, the Fundamental Defendants, and Defendant Elite Patient Care included agents, contract entities or individuals, principles, employees, servants and/or volunteers, both directly and vicariously under principles of *respondeat superior*, non-delegable duties, corporate liability, apparent and actual authority and agency, and ostensible agency.

20. Upon information and belief, at all times relevant to this Complaint, additional licensees, licensed entities and/or corporations organized, existing, or availing themselves of the laws of the State of South Carolina, may have been responsible for the care provided to Emma Lee James. Accordingly, Plaintiff expressly intends and reserves the right to name such person(s) or entities who individually or collectively breached the applicable standard(s) of care owed to Ms. James directly and proximately resulting in her death.

21. The acts and omissions set forth in this Complaint all occurred upon the premises of Defendant Hallmark at 255 Midland Pkwy, Summerville, South Carolina 29485, which, at all times relevant to this complaint was owned operated and controlled by Defendant Hallmark in conjunction with and/or in addition to the Fundamental Defendants.

22. At all times relevant to this Complaint, Defendant Elite Patient Care provided clinical and nursing services on behalf of and for patients at Defendant Hallmark's facility, located in Summerville, South Carolina.

23. This case was previously filed as a Notice of Intent Action bearing Civil Action Number 2020-NI-18-00007, with the requisite expert affidavit(s) and discovery responses, as provided under S.C. Code Ann. § 15-79-125.

24. Jurisdiction and venue are therefore proper before this Court.

**JOINT AND SEVERAL LIABILITY**

25. Defendants collectively and individually, by and through their various corporate entities and forms, where applicable, are jointly and severally liable for all damages set forth in this Complaint as a result of the singular or conjunctive conduct of Defendants, which directly and proximately caused physical harm to Emma Lee James, leading to her death on November 4, 2018.

**FACTUAL BACKGROUND**

26. Plaintiff reiterates the preceding paragraphs as though repeated verbatim herein.

27. On August 1, 2018, Emma Lee James was transferred from Summerville Medical Center to Defendant Hallmark with a diagnosis of left lower extremity cellulitis and a pressure wound, for which she was being treated with doxycycline.

28. The day Ms. James was admitted, she had an initial body audit revealing a healed right leg wound and an active left leg wound. Additional audits for skin integrity were ordered to be performed weekly on Thursdays.

29. During August of 2018, Plaintiff was repeatedly noted to be at risk for pressure wounds; however records specifically indicated that no pressure ulcers existed.

30. On September 5, 2018, a care plan conference summary indicates only that Plaintiff had a right calf wound.

31. Records from Plaintiff's chart mention the need to intervene with pressure injury preventative measures and the need for pressure devices on the bed, but no such care was ordered nor documented during that time.

32. Records also indicate Plaintiff was a complete assist patient, yet no documentation exists of any frequency of repositioning Plaintiff.

33. There was no mention in the records of the existence of any skin breakdown on

Plaintiff's body from her admission date until she was discharged to the hospital. In fact, there is a record from her date of discharge indicating no pressure wounds.

34. Dr. Popp, Plaintiff's physician, and the medical director of Defendants' facility, indicated in her records a serious left leg wound for which Plaintiff was being treated, but made no mention of a sacral wound.

35. Dr. Popp's nurse noted various times that Plaintiff's wound vac on her left leg was turned off, had not been replaced, or was full of drainage.

36. On September 4, 2018, there is mention in Dr. Popp's records of sending Plaintiff to the emergency room, but it was noted they would wait because Plaintiff was seeing her vascular surgeon, Dr. Ashwander, the next day.

37. Dr. Ashwander determined Plaintiff would undergo an elective above-the-knee amputation at Roper Hospital on September 12, 2018.

38. On September 11, 2018, Defendants sent Plaintiff to the emergency department of Roper Hospital stating Plaintiff's leg wound was very bad and that she was not stable enough to be evacuated due to a hurricane and thus needed to be hospitalized one day prior to her scheduled surgery.

39. Plaintiff was admitted with gangrene of the left leg, severe malnutrition, and an electrolyte imbalance.

40. The day after admission, on September 12, 2018, Plaintiff's dietician at Roper Hospital noted that Plaintiff had breakdown to her buttock area.

41. Later the same day, the wound, ostomy and continence (WOC) nurse at Roper Hospital evaluated Plaintiff and noted her to have a large, unstageable sacral wound.

42. Plaintiff underwent her left leg amputation that day, was stabilized over the course

of the next several days, and then was discharged back to Defendant Hallmark on September 18, 2018.

43. Dr. Popp's records show Plaintiff's sacral wound was large and painful, and that the certified nursing assistants (CNAs) showed the wound on September 18, as they were putting Plaintiff into bed.

44. Upon Plaintiff's return to Defendant Hallmark, records from Dr. Popp and her practice, Elite Patient Care, deny that Plaintiff had any sacral wound when she left Defendant Hallmark for admission at Roper Hospital.

45. On September 21, 2018, Dr. Popp ordered Plaintiff to be turned every two hours to offload the sacral wound area and noted she would follow-up with Dr. Ashwander in the second week of October.

46. Dr. Popp made changes to Plaintiff's sacral wound treatment on September 24, 2018.

47. On September 25, 2018, S. Burding, LPN at Defendants' facility made a late entry nurse's note stating that on September 10, 2018, she observed an excoriated wound site on Plaintiff's buttock area while assisting a CNA with the changing of her brief.

48. On October 1, 2018, there are notes from a phone order from Dr. Popp discussing "sacral wound clarification" which ordered a change in cleanser and packing. Though these treatment changes are reflected in the physician's orders, existence of the sacral wound was still omitted from the diagnosis.

49. Progress notes by Mary Sherman from Elite Patient Care on October 1, 2018 stated, "Joanna does not feel patient needs to see a surgeon for her sacral wound."

50. On October 5, 2018, a form in the Plaintiff's chart attempted to document the

unavoidability of Plaintiff's wounds based on the presence of interventions which were mentioned in Defendant Hallmark's minimum data set (MDS) but appear nowhere in Plaintiff's orders or treatment records.

51. On October 8, 2018, treatment of the sacral wound was again changed by Dr. Popp and the cleansing and packing methods for the sacral wound were altered.

52. On October 15, 2018, it was noted Plaintiff was inconsolable and in excruciating pain and that her family, at her bedside, was asking for discharge to the hospital.

53. Plaintiff was admitted to Roper Hospital that day and was found to have sepsis, a urinary tract infection (UTI) and severe malnutrition.

54. Plaintiff was placed on antibiotic therapy and her sacral wound was surgically debrided, including removal of both tissue and bone, and a wound vac was placed.

55. Plaintiff was placed on high-dose IV fentanyl for her severe pain.

56. On October 22, 2018, Plaintiff was admitted to Roper Hospice.

57. Plaintiff died on November 4, 2018 at 1:16 AM.

58. On autopsy examination, the cause of Ms. James's death was determined to be sepsis secondary to a sacral pressure ulcer.

**FOR A FIRST CAUSE OF ACTION**  
**(Negligence and/or Gross Negligence)**

59. Plaintiff reiterates the preceding paragraphs as though repeated verbatim herein.

60. At all times relevant to this Complaint, Defendants were providers of skilled nursing services, and, as such, were required to provide reasonable care in accord with regulations, statutes, standards, codes, policies and procedures.

61. By accepting and providing care to Ms. James, Defendants expressly undertook to provide care to Ms. James in accordance with her needs, and as indicated by governing laws, and

the standard of care.

62. With regard to Emma Lee James, Defendants deviated from the acceptable standards of care in one or more of the following particulars, to wit:

- a. Failure to accurately assess risk status and appropriately intervene with pressure injury preventive measures;
  - b. Failure to order use of pressure devices until after Plaintiff returned from Roper Hospital on September 18, 2018;
  - c. Failure to document any frequency of repositioning the Plaintiff;
  - d. Failure to properly document the existence of any skin breakdown until Plaintiff was transferred to Roper Hospital on September 11, 2018.
  - e. Failure to document Plaintiff's unstageable sacral wound even on the day she was transferred to Roper Hospital for treatment by the Wound Ostomy and Continence (WOC) team.
  - f. In creating late entry documentation on September 25, 2018, a week after Ms. James had returned from the hospital, that an excoriated buttock wound had in fact been observed during a brief changing the day prior to Ms. James' hospitalization.
  - g. In creating another late entry documentation on October 5, 2018 discussing an alleged unavailability of Ms. James' wounds based solely on the mention of a pressure relief mattress, specialty bed, pressure relief cushion, and turn and reposition as interventions in the MDS, but for which no orders were ever documented.
  - h. In such other particulars as may be revealed during discovery or trial of this matter.
63. Defendants' failures, including but not limited to those failures set forth more fully

herein, constitute the complete absence of care.

64. As a direct and proximate result of Defendants' negligent, grossly negligent and/or reckless, willful and wanton conduct, Emma Lee James suffered grievous bodily injury, experienced pain and suffering, and mental anguish, including fear for her life.

65. Ultimately, Ms. James died as a result of her condition.

66. Plaintiff is therefore entitled to judgment against Defendant and for compensation in the amount of actual, consequential, and punitive damages, to be determined through a trial of this matter.

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence Per Se)**

67. Plaintiff reiterates the preceding paragraphs as though repeated verbatim herein.

68. At all times relevant to this Complaint, Defendants have been entities or individuals duly licensed and authorized to provide healthcare services in South Carolina, and were, accordingly, responsible for abiding by the statutes, regulations, codes, and ordinances governing long-term care services.

69. These regulations, statutes, codes, and ordinances, including but not limited to S.C. Code of Regs. Ann. §61-17, S.C. Code Ann. § 43-35-5, *et seq.*, and S.C. Code Ann. § 49-81-10, *et seq.*, form the minimally acceptable standards for the provision of long-term skilled nursing in South Carolina.

70. At all times relevant to this Complaint, Defendants had a responsibility to adhere to and provide care consistent with the aforementioned standards to each and every patient including Emma Lee James.

71. Defendants failed to adhere to the standards of care applicable for Emma Lee James in one or more of the following particulars:

- a. Failing to implement policies and procedures to assure residents were provided care consistent with dignity and quality of life;
- b. Failing to ensure the medical director implements policies and procedures for the adequate care of patients;
- c. Failing to ensure implementation of orders and plans of care;
- d. Failing to adequately hire, train and manage staffing for qualitative and continuous care;
- e. Failing to appropriately monitor, manage, and update changes to patient condition;
- f. Failing to ensure clinical, nursing, professional and administrative staff provided care as needed by patients;
- g. Failing to provide minimally adequate care;
- h. Failing to provide minimally adequate follow up care for specific conditions of Emma Lee James;
- i. Failing to order and implement standard pressure wound avoidance measures;
- j. Failing to closely monitor and treat a patient with known wounds;
- k. Failing to provide emergency care;
- l. Failing to provide adequate access to emergency care;
- m. Failing to ensure administrative oversight in implementing policies and procedures for adequate care of patients;
- n. Failing to ensure proper medical management by the medical director and proper interdisciplinary communication designed to maximize a patient's quality of life; and
- o. Such other particulars as may be revealed during the discovery or trial.

72. The statutes, regulations, and standards to which Defendants were required to adhere were specifically put in place to protect vulnerable adults like Emma Lee James.

73. In general, the violation of a statute expressly created to protect a certain classification of person establishes the negligence per se of the offender.

74. Defendants' conduct in violating statutes, regulations, codes and ordinances enacted for the protection of vulnerable adults including decedent Emma Lee James constitutes negligence per se.

75. In addition, Defendants' violations of statutes, regulations, codes, and ordinances constitute recklessness.

76. Defendants' negligence per se directly and proximately caused Emma Lee James to sustain grievous bodily harm, pain and suffering, and mental anguish, and resulted in her death.

77. Plaintiff is therefore entitled to judgment against Defendants and for such actual, consequential, punitive and equitable damages to be determined through a trial of this matter.

**FOR A THIRD CAUSE OF ACTION**  
**(Vicarious Liability, Ostensible Agency and/or *Respondeat Superior*)**

78. Plaintiff reiterates the preceding paragraphs as though repeated verbatim herein.

79. Emma Lee James, as a patient of Defendant Hallmark, experienced harm from the negligent, grossly negligent, reckless and negligent per se acts and omissions of the employees, agents, and assigns of Defendant Hallmark, the Fundamental Defendants, and/or Defendant Elite Care, including the acts and omissions of Defendants' clinicians, nurses, technicians, volunteers, medical director(s), administrators, and other responsible personnel.

80. The wrongful conduct of Defendants' employees, agents, and/or assigns were directly related to duties undertaken for the care of Emma Lee James in the course and scope of their employment, on-site at Defendants' facilities, and using equipment, tools, and goods provided by Defendants.

81. The negligence, gross negligence, and/or failure to adequately provide care to

Emma Lee James by the employees, agents, and assigns of Defendant Hallmark, the Fundamental Defendants, and/or Defendant Elite Care occurred during a time and at a place created and facilitated by employment and/or contractual relationship with Defendants.

82. The negligence, neglect, and/or failure to adequately provide care to Emma Lee James, by and through employees and staff, including medical and administrative personnel, is a well-known, foreseeable hazard and risk for medical providers in South Carolina.

83. As a direct and proximate result of the negligent, grossly negligent, negligent per se, reckless acts of Defendants' employees, agents, and assigns for whom Defendants are vicariously liable, Emma Lee James sustained grievous bodily injury, and ultimately died as a result.

84. Plaintiff is therefore entitled to judgment against Defendants and for such actual, punitive, and equitable damages to be determined through a trial of this matter.

**FOR A FOURTH CAUSE OF ACTION**  
**(Wrongful Death Pursuant to S.C. Code Ann. § 15-51-10)**

85. Plaintiff reiterates the preceding paragraphs as though repeated verbatim herein.

86. Plaintiff brings this action pursuant to S.C. Code Ann. § 15-51-10, *et seq.* on behalf of the statutory heirs of Emma Lee James, for the wrongful death of Ms. James, who died on November 4, 2018.

87. The death of Emma Lee James was caused directly and proximately by the Defendants' negligent, grossly negligent, reckless, willful and wanton conduct, set forth more fully herein.

88. As a direct and proximate result of Defendants' conduct, the beneficiaries of Emma Lee James have been damaged, and suffered the loss of Ms. James's support, society, companionship, love, and/or affection.

89. Plaintiff is therefore entitled to a judgment against Defendants, and for such actual, consequential, and punitive damages in an amount to be determined by a jury at trial.

**FOR A FIFTH CAUSE OF ACTION**  
**(Survival Pursuant to S.C. Code Ann. §15-5-90)**

90. Plaintiff reiterates the preceding paragraphs as though repeated verbatim herein.

91. Emma Lee James's estate has incurred funeral and related expenses as a direct and proximate result of the negligence, gross negligence, recklessness, willful and wantonness of Defendants described herein.

92. As a direct and proximate result of Defendants' conduct, set forth more expressly above, Emma Lee James suffered grievous bodily injuries, physical pain and suffering, and incurred medical expenses prior to her death, and her estate is entitled to an award of actual and punitive damages in an amount to be determined through a trial of this matter.

WHEREFORE, Plaintiff, individually, and on behalf of the Estate of Emma Lee James, prays for judgment against Defendants, and for actual, consequential, and punitive damages, and, if applicable, for the costs and fees associated with this action, and for such other relief in law or equity as this court deems just and proper.

STROM LAW FIRM, LLC

s/ Mario A. Pacella  
Mario A. Pacella (S.C. Bar #68488)  
Jessica L. Fickling (S.C. Bar #100161)  
6923 N. Trenholm Rd.  
Columbia, SC 29206  
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[mpacella@stromlaw.com](mailto:mpacella@stromlaw.com)

This 9<sup>th</sup> day of June, 2021.

STATE OF NEW YORK            )  
  )  
COUNTY OF SARATOGA        )

**AFFIDAVIT OF DOROTHY WEIR**

**Estate of Emma James**

AFFIANT, DOROTHY WEIR, RN, CWON, CWS, being of sound mind and body, and over the age of eighteen (18), and having the requisite training, knowledge and experience to provide the opinions enunciated more fully below, hereby avers as follows:

1.     **CLINICAL BACKGROUND:** I, Dorothy (“Dot”) Weir, am a licensed registered nurse with an Associates of Science in Nursing. I have been practicing in the specialty of wound care since 1980 and have held the certification of Certified Wound Nurse by the Wound, Ostomy and Continence Certification Board since 1985, and that of Certified Wound Specialists by the American Board of Wound Management since 2004. I lecture extensively in all areas of wound management both nationally and internationally and I have multiple publications. I currently practice as a wound clinician and trainer for the Saratoga Hospital Center for Wound Healing and Hyperbaric Medicine in Malta, New York. A copy of my Curriculum Vitae has been included as **Attachment A** to this Affidavit, which fully sets forth my credentials and background, and is fully incorporated herein.

2.     **FAMILIARITY WITH TREATMENT SETTING:** As a direct result of my education, training, background and clinical experience, I have substantial background in the treatment of pressure related injuries in hospitals, post-acute facilities, and long-term care facilities.

3.     **FAMILIARITY WITH STANDARD OF CARE:** I am familiar with the standard of care applicable to the management of patients such as Emma James. As a registered nurse, I have cared for patients with the same or similar diagnoses as those with which Ms. James

suffered when she died on November 4, 2018, including the pressure injury on her sacrum, first diagnosed on September 12, 2018.

4. RECORDS RELIED UPON: In forming my conclusions, I reviewed the following records:

- a. Death Certificate of Emma James;
- b. Patient Chart – Hallmark Healthcare Center, including but not limited to the following:
  - i. Nursing Progress Notes;
  - ii. Physician Notes;
  - iii. Interdisciplinary progress notes;
  - iv. Discharge Documentation;
  - v. Plans of Care;
  - vi. History and Physical;
  - vii. Change of Condition Records;
  - viii. Consultation Notes;
- c. Roper Medical Records, date of admission September 10, 2018; and
- d. Photographs provided by counsel.

I expressly reserve the right to amend and/or supplement this opinion in light of additional medical information and/or records.

5. BASIS FOR OPINION: I am qualified to express opinions in this matter on the basis of my training, education and experience, including evaluation and management of patients similar to Emma James.

I have reviewed materials provided or furnished by other individuals and sources. My opinions are based upon my review of the medical records. All opinions set forth herein are therefore to a reasonable degree of medical certainty, being more probable than not. If additional information becomes available, I expressly reserve the right to supplement or modify my opinions.

I have been qualified to render expert opinions on numerous occasions. I have never been disqualified as an expert witness. With respect to this matter, I have been asked to provide my opinions regarding Emma James. What is included herein is a fair summary of my opinions as of the date of this affidavit regarding the applicable Standard of Care, the deficiencies in the care Defendants provided to Ms. James, and Defendants' failure, violations and/or breaches in the applicable standard of care for Ms. James.

6. PROFESSIONAL OPINIONS: Based upon my review of the medical records identified herein, my background, training, education and experience, it is my opinion to a reasonable degree of medical certainty that the care provided to Emma James fell below and deviated from the acceptable Standard of Care in one or more of the followings particulars:

- a. Failure to accurately assess risk status and appropriately intervene with pressure injury preventive measures. There is mention of pressure devices on bed and chair in Minimum Data Set (MDS), however no orders of such and no entries of presence of such devices in the remainder of the record until after she returned from Roper on 9/18/18.
- b. The CNA ADL tracking form documents resident as complete assist each shift, however no documentation of any frequency of repositioning is noted.
- c. Failure to properly document, until 9/11/18 when she was transferred to Roper Hospital, the existence of any skin breakdown. Specifically, a progress note by Ginger Arntz, ARNP on 9/11/18 states only "wound to left lower extremity".

- d. Resident was transferred to Roper Hospital on 9/11/18; on 9/12/18 the Wound Ostemy and Continance (WOC) team at Roper hospital documented a large sacral deep tissue injury with periwound skin peeling away.
- e. Resident returned to Hallmark Center on 9/18/18. On 9/25/18, S. Burding LPN made a late entry nurse's note stating that on 9/10/18, she observed excoriated buttock site while assisting CNA with changing brief.
- f. On 10/5/18, there is a form in the resident chart documenting unavailability of the patient's wounds stating that she had a pressure relief mattress, specialty bed, pressure relief cushion, and turn and reposition as interventions for which there are no orders and no entries of their presences other than in the MDS.

7. RESERVATION TO SUPPLEMENT: This document does not necessarily address all violations of the standard of care identified in this case. I specifically reserve the right to add, amend, clarify, or supplement this opinion as new evidence and information become available.

Under penalty of perjury, I declare the foregoing Affidavit and facts stated herein are true and accurate to the best of my knowledge.

Dorothy M Weir  
DOROTHY WEIR

SWORN AND SUBSCRIBED to me  
On this the 26 day of August, 2020.

Joan B. Shevlin  
Notary Public for New York State  
Saratoga County  
My Commission Expires: 4/9/2023

JOAN B. SHEVLIN  
NOTARY PUBLIC STATE OF NEW YORK  
RENSELAER COUNTY  
LIC. #01SH6057070  
COMM. EXP. 4/9/2023

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DORCHESTER )  
 )  
Tammy China, as Personal Representative )  
for the Estate of Emma Lee James, )  
 )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Palmetto Hallmark Operating, LLC d/b/a )  
Hallmark Healthcare Center, Fundamental )  
Long Term Care, THI of South Carolina, )  
LLC, THI of Baltimore, Inc., and Elite )  
Patient Care of South Carolina, PC )  
 )  
Defendants. )  
 )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT  
CASE NO. 2021-CP-18-01030  
  
**ANSWER ON BEHALF OF ELITE  
PATIENT CARE OF SOUTH CAROLINA,  
PC**

**TO: MARIO A. PACELLA, ESQ., AND JESSICA L. FICKLING, ESQ., ATTORNEYS  
FOR PLAINTIFF:**

The Defendant Elite Patient Care of South Carolina, PC (hereinafter referred to as “Defendant”), by and through its undersigned counsel, responds to the allegations in Plaintiff’s Complaint as follows:

**INTRODUCTION**

1. Any and all allegations in Plaintiff’s Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. Responding to the allegations in Paragraph 1, Defendant admits only that it provides medical services. The remaining allegations in Paragraph 1 are not directed toward this Defendant and/or call for conclusions of law, and therefore require no response from these Defendants. To the extent a response is required, these allegations are denied.

3. The allegations in Paragraph 2 call for conclusions of law and therefore require no response from this Defendant. To the extent a response is required, these allegations are denied.

4. Defendant denies the allegations in Paragraphs 3 and 4 and demands strict proof thereof.

### **PARTIES**

5. The allegations in Paragraphs 5, 6, and 7 do not contain any allegations directed to this Defendant and/or call for conclusions of law, and therefore no response is required from this Defendant.

6. The allegations in Paragraphs 8, 9, 10, and 11 are directed to parties other than this Defendant and therefore require no response from this Defendant. To the extent a response is required, these allegations are denied.

7. Responding to the allegations in Paragraph 12, Defendant admits only that it provides medical services in Summerville, South Carolina. Defendant denies any remaining and inconsistent allegations in Paragraph 12.

### **JURISDICTION AND VENUE**

8. Defendant denies the allegations in Paragraph 13 and demands strict proof thereof.

9. Defendant admits the allegations in Paragraph 14.

10. Defendant is without information or knowledge sufficient to form a belief as to the allegations in Paragraphs 15 and 16 and therefore denies the same.

11. Defendant denies the allegations in Paragraph 17 as stated.

12. The allegations in Paragraphs 18 and 19 call for conclusions of law to which no response is required. To the extent a response is required, Defendant denies these allegations and demands strict proof thereof.

13. Defendant is without information or knowledge sufficient to form a belief as to the allegations in Paragraph 20. Defendant reserves the right to assert that any injury or damage suffered by Plaintiff was the result of intervening negligence, recklessness, willfulness and wantonness of parties other than this Defendant, including any currently unnamed entities or persons that Plaintiff alleges may have been responsible for the care provided to Emma Lee James.

14. Responding to the allegations in Paragraphs 21 and 22, Defendant admits only that Hallmark Healthcare Center is located at 255 Midland Pkwy, Summerville, SC 29485, and that Defendant provides medical services at that location. Defendant denies any allegations in these paragraphs that allege or intend to allege any deviation from the standard of care, acts, errors, omissions, liability, or damages as to this Defendant and demands strict proof thereof.

15. The allegations in Paragraph 23 do not contain any allegations directed to this Defendant, and therefore require no response. Further responding, the allegations in Paragraph 23 reference an affidavit and Defendant denies that the contents of the affidavit properly identify any acts of negligence and further deny any and all assertions of liability against Defendant contained within the affidavit.

16. The allegations in Paragraph 24 call for conclusions of law and therefore require no response from this Defendant. To the extent a response is required, Defendant denies venue is proper and reserves the right to argue same.

#### **JOINT AND SEVERAL LIABILITY**

17. Defendant denies the allegations in Paragraph 25 and demands strict proof thereof.

#### **FACTUAL BACKGROUND**

18. Responding to the allegations in Paragraph 26, Defendant restates all previous paragraphs and responses as if fully set forth herein verbatim.

19. Responding to the allegations in Paragraphs 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56, Defendant refers to the complete medical records of Plaintiff and testimony of treating healthcare providers for a full, complete, and accurate recitation of all care, treatment, diagnoses, and scope of statements expressed therein. Defendant denies any allegations in these Paragraphs inconsistent with those records or this response. Defendant further denies any allegations in these Paragraphs which allege or intend to allege any deviation from the standard of care, causes of actions, claims, acts, errors, omissions, liability, or damages as to this Defendant and demands strict proof thereof. To the extent the allegations are directed to parties other than this Defendant, no response is required. Defendant denies all remaining and inconsistent allegations in these Paragraphs.

20. Defendant admits the Death Certification produced by Plaintiff indicates Ms. James died on November 4, 2018, at 1:16 AM as alleged in Paragraph 57 of Plaintiff's Complaint.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 58 and therefore denies the same and demands strict proof thereof. Further responding, Defendant denies any allegations in this Paragraph that allege or intend to allege any deviation from the standard of care, causes of actions, claims, acts, errors, omissions, liability, or damages as to this Defendant and demands strict proof thereof. Defendant further denies that any of its act or omission was the proximate cause of Ms. James' death.

**FOR A FIRST CAUSE OF ACTION**  
**(Negligence and/or Gross Negligence)**

22. Responding to the allegations in Paragraph 59, Defendant restates all previous paragraphs and responses as if fully set forth herein verbatim.

23. Defendant admits the allegations in Paragraph 60.

24. The allegations in Paragraph 61 call for conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

25. Defendant denies the allegations in Paragraphs 62, 63, 64, 65, and 66, including all subparts, and demands strict proof thereof.

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence Per Se)**

26. Responding to the allegations in Paragraph 67, Defendant restates all previous paragraphs and responses as if fully set forth herein verbatim.

27. Defendant admits the allegations in Paragraph 68.

28. The allegations in Paragraph 69 do not contain any allegations directed to this Defendant and therefore require no response from this Defendant. To the extent a response is required, these allegations are denied.

29. The allegations in Paragraph 70 call for conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

30. Defendant denies the allegations in Paragraph 71, including all subparts, and demands strict proof thereof.

31. The allegations in Paragraphs 72 and 73 call for conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

32. Defendant denies the allegations in Paragraphs 74, 75, 76, and 77 and demands strict proof thereof.

**FOR A THIRD CAUSE OF ACTION**  
**(Vicarious Liability, Ostensible Agency and/or *Respondeat Superior*)**

33. Responding to the allegations in Paragraph 78, Defendant restates all previous paragraphs and responses as if fully stated herein verbatim.

34. Defendant denies the allegations in Paragraph 79 and demands strict proof thereof.

35. Defendant denies the allegations in Paragraphs 80, 81, and 82 as stated and demands strict proof thereof. Further responding, the allegations in Paragraphs 80, 81, and 82 call for conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

36. Defendant denies the allegations in Paragraphs 83 and 84 and demands strict proof thereof.

**FOR A FOURTH CAUSE OF ACTION**  
**(Wrongful Death Pursuant to S.C. Code Ann. § 15-51-10)**

37. Responding to the allegations in Paragraph 85, Defendant restates all previous paragraphs and responses as if fully set forth herein verbatim.

38. The allegations in Paragraph 86 do not contain any allegations directed to this Defendant and therefore require no response. Further responding, Defendant affirmatively denies Plaintiff is entitled to relief pursuant to the wrongful death statute.

39. Defendant denies the allegations in Paragraphs 87, 88, and 89 and demands strict proof thereof.

**FOR A FIFTH CAUSE OF ACTION**  
**(Survival Pursuant to S.C. Code Ann. § 15-5-90)**

40. Responding to the allegations in Paragraph 90, Defendant restates all previous paragraphs and responses as if fully set forth herein verbatim.

41. Defendant denies the allegations in Paragraphs 91 and 92 and demands strict proof thereof.

42. Defendant denies the allegations in the WHEREFORE clause of Plaintiff's Complaint, including the claim for judgment and damages, and demands strict proof thereof.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant would affirmatively state that at all times it complied with the applicable standard of care in her care and treatment of Plaintiff.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

There was no negligence, recklessness, gross negligence, or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff, and therefore, Defendant is not liable for any damages allegedly sustained.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

The allegations contained in the Complaint fail in their entirety to state a claim upon which relief may be granted against this Defendant. As a result, this matter should be dismissed against this Defendant pursuant to Rule 12(b)(6), SCRPC.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant would affirmatively assert that it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Economic Development, Citizen and Small Business Protection Act and the South Carolina Medical Malpractice Reform Bill including,

but not limited to §15-38-15; §15-32-200; §15-32-210; §15-32-220; §15-32-230; §15-32-240; §15-36-100; and §15-79-125 and any other applicable provisions under these acts.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant would affirmatively state that no award of non-economic damages should exceed the statutory limits contained in the Non-Economic Damages Awards Act of 2005, S.C. Code Ann. §15-32-200, et seq.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant hereby reserves the right to seek all remedies, rights and privileges available to it pursuant to S.C. Code Ann. § 15-38-10, et. Seq.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

That any award or assessment of punitive damages as prayed for by the Plaintiff, which Defendant expressly denies, would violate this Defendant's Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

That any award or assessment of punitive damages as prayed for by the Plaintiff, which this Defendant explicitly denies, should be limited pursuant to South Carolina Code §15-32-530.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant asserts entitlement to all benefits, privileges, protections, and limitations on any punitive damages award under the South Carolina Fairness in Civil Justice Act of 2011, as codified in S.C. Code Ann. §15-32-510; §15-32-520; §15-32-530; and §15-32-540, et. Seq.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant does not waive any defense that whatever injury or damage that was suffered by the Plaintiff was the proximate result of the intervening negligence, recklessness, willfulness and wantonness of parties other than this Defendant (should the discovery process reveal this), barring Plaintiff from recovery from this Defendant, or in the alternative, that Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant pleads any and all applicable statutes of limitations and repose as affirmative defenses.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant does not waive any defense that whatever injuries the Plaintiff sustained were the result of pre-existing medical conditions, whether disclosed or undisclosed (should the discovery process reveal this), and were not related to the incidents complained of in the Plaintiff's Complaint.

**FURTHER ANSWERING AND AS A FURTHER  
AND AFFIRMATIVE DEFENSE**

Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE having answered all of the allegations of the Plaintiff's Complaint and asserting these affirmative defenses herein, Defendant hereby moves the Court for a dismissal of

all claims, for costs and fees associated with the defense of this action, and for such other relief as the Court deems appropriate.

*s/ Joseph J. Tierney, Jr.*

**Joseph J. Tierney, Jr., Esquire** (SC Bar# 13917)

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E-mail: hunter.morgan@rogerstowndsend.com

**ROGERS TOWNSEND, LLC**

177 Meeting Street, Suite 320

Charleston, South Carolina 29401

*Attorneys for Defendant Elite Patient Care of South Carolina, PC*

August 12, 2021

Charleston, South Carolina



3. To the extent this Defendant responds to allegations made against “Defendants,” the “Fundamental Defendants,” or any other collective references to the defendants, any such responses are being made by this Defendant as to itself.

4. As to any and all allegations in Plaintiff’s Complaint directed at parties other than this Defendant, no response is required. Any and all such allegations not hereinafter specifically addressed in this manner are hereby answered as no response is required by this Defendant.

5. The allegations in Paragraph 1 of Plaintiff’s Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant craves reference to the facility chart and Ms. James’s medical records for their contents and denies any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages against this Defendant. Further responding, this Defendant affirmatively asserts that it was the sole entity licensed to operate, and was the sole operator of, the Facility during the time period at issue. Further, this Defendant affirmatively asserts that it was not owned, operated or controlled by defendants “Fundamental Long Term Care, THI of South Carolina, LLC and THI of Baltimore, LLC.” This Defendant denies any remaining allegations in Paragraph 1 inconsistent with this response.

6. Answering the allegations in Paragraph 2 of Plaintiff’s Complaint, this Defendant admits only that it was the sole entity licensed to operate, and was the sole operator of, the Facility during the time period at issue. This Defendant denies any remaining allegations in Paragraph 2 inconsistent with this response.

7. The allegations in Paragraph 3 of Plaintiff's Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations in Paragraph 3.

8. This Defendant denies the allegations in Paragraph 4 of Plaintiff's Complaint.

9. Answering the allegations in Paragraphs 5, 6, and 7 of Plaintiff's Complaint, this Defendant is without sufficient information and knowledge to respond to these allegations and, therefore, denies the same and demands strict proof thereof. To the extent those allegations state or call for legal conclusions, no response is required.

10. Answering the allegations in Paragraph 8 of Plaintiff's Complaint, this Defendant admits only that it is a Delaware limited liability company duly licensed to operate the Facility located at 255 Midland Pkwy, Summerville, SC 29485 during the timeframe at issue. Any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

11. The allegations in Paragraphs 9, 10, 11, and 12 of Plaintiff's Complaint are directed at parties other than this Defendant and, therefore, do not require a response. To the extent a response is required, this Defendant admits only that it was the sole entity licensed to operate, and was the sole operator of, the Facility during the time period at issue. This Defendant denies the remaining allegations in Paragraphs 9 through 12.

12. The allegations in Paragraph 13 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant to that extent. To the extent the allegations are directed at this Defendant, this Defendant admits only that it was the sole entity licensed to operate, and was the sole operator of,

the Facility, which has its place of business in Summerville, South Carolina. This Defendant denies any remaining allegations in Paragraph 13.

13. The allegations in Paragraph 14 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant, and therefore, do not required a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant admits that it employed healthcare providers and administrative staff at the Facility in Summerville, South Carolina. This Defendant denies any remaining allegations in Paragraph 14 inconsistent with this response, to the extent they are directed at this Defendant.

14. The allegations in Paragraph 15 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations as written.

15. Answering the allegations in Paragraph 16 of Plaintiff's Complaint, this Defendant craves reference to the facility chart and Ms. James's medical records for their contents and denies any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages against this Defendant. This Defendant further affirmatively asserts that it complied with the applicable standard of care at all times in its care of Ms. James.

16. This Defendant denies the allegations in Paragraph 17 of Plaintiff's Complaint.

17. The allegations in Paragraphs 18 and 19 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. Further, the allegations in Paragraphs 18 and 19 of Plaintiff's Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations in Paragraphs 18 and 19.

18. The allegations in Paragraph 20 of Plaintiff's Complaint are not directed at or against this Defendant and, therefore, do not require any response.

19. Answering the allegations in Paragraph 21 of Plaintiff's Complaint, this Defendant admits only that it was the sole entity licensed to operate, and was the sole operator of, the Facility, which has its place of business in Summerville, South Carolina. This Defendant denies any remaining allegations in Paragraph 21 inconsistent with this response.

20. The allegations in Paragraph 22 of Plaintiff's Complaint are directed toward a party other than this Defendant and, therefore, do not require a response.

21. Answering the allegations in Paragraph 23 of Plaintiff's Complaint, this Defendant admits only that Plaintiff filed a Notice of Intent, along with an affidavit and discovery responses. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant.

22. The allegations in Paragraph 24 of Plaintiff's Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant respectfully denies the allegations set forth in Paragraph 24. Further answering the allegations in Paragraph 24, this Defendant affirmatively asserts there is a valid and binding arbitration agreement between Plaintiff's decedent and this Defendant.

23. Answering the allegations in Paragraph 25 of Plaintiff's Complaint, to the extent they are directed to this Defendant, this Defendant denies the allegations in Paragraph 25.

24. Answering the allegations in Paragraph 26 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

25. The allegations in Paragraphs 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 , and 57 of Plaintiff's Complaint are,

in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant craves reference to Ms. James's medical records, including the Facility chart, autopsy report, "Death Certification" and other medical records for their contents. This Defendant denies any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages against this Defendant.

26. Answering the allegations in Paragraph 58 of Plaintiff's Complaint, this Defendant craves reference to Ms. James's "Death Certification" for its contents and denies any allegations inconsistent therewith. This Defendant further denies all allegations intended to assert or imply liability or damages against this Defendant.

27. Answering the allegations in Paragraph 59 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

28. Answering the allegations in Paragraphs 60 and 61 of Plaintiff's Complaint, this Defendant admits only that it provided skilled healthcare services and care to Ms. James and owed a duty to comply with the applicable standard of care, but denies the nature and scope of the duty as written. Answering further, this Defendant states that it complied with the applicable standard of care at all times in regard to Ms. James. This Defendant denies any and all further allegations in Paragraphs 60 and 61 of Plaintiff's Complaint inconsistent with the foregoing response and all allegations intended to assert or imply liability or damages.

29. This Defendant denies the allegations in Paragraphs 62, 63, 64, 65, and 66 of Plaintiff's Complaint to the extent they are directed at this Defendant, including all subparts, and demands strict proof thereof.

30. Answering the allegations in Paragraph 67 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

31. Answering the allegations in Paragraph 68 of Plaintiff's Complaint, to the extent they are directed at this Defendant, this Defendant admits only that it is an entity duly licensed and authorized to provide healthcare services in South Carolina and that it is required to comply with the law in its provision of services. This Defendant affirmatively asserts that such statutes, regulations, codes, and ordinances do not establish a standard of care. This Defendant affirmatively asserts that the care provided to Ms. James was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

32. Responding to the allegations set forth in Paragraph 69 and 70 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. James was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

33. This Defendant denies the allegations in Paragraph 71 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

34. In responding to the allegations set forth in Paragraphs 72, 73, 74, and 75 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing

facility at issue, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms.. James was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

35. This Defendant denies the allegations in Paragraphs 76 and 77 of Plaintiff's Complaint.

36. Answering the allegations in Paragraph 78 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

37. The allegations in Paragraphs 79, 80, 81, 82, 83 and 84 of Plaintiff's Complaint are, in part, directed toward a party other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in the above Paragraphs of Plaintiff's Complaint and demands strict proof thereof. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required.

38. Answering the allegations in Paragraph 85 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

39. The allegations in Paragraph 86 of Plaintiff's Complaint are not directed at or against this Defendant and, therefore, do not require any response. To the extent a response is required and/or these allegations are intended to allege liability against this Defendant, this

Defendant denies the allegations in Paragraph 86. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required.

40. This Defendant denies the allegations in Paragraphs 87, 88, and 89 of Plaintiff's Complaint, to the extent they are directed at this Defendant. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

41. Answering the allegations in Paragraph 90 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

42. This Defendant denies the allegations in Paragraphs 91 and 92 of Plaintiff's Complaint, to the extent they are directed at this Defendant. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

43. The Defendant denies the allegations set forth in Plaintiff's prayer for relief and judgment.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

44. This Court lacks jurisdiction with respect to this Defendant and Plaintiff as to Plaintiff's claims because this matter should be compelled to arbitration pursuant to a valid arbitration agreement entered into between this Defendant and Plaintiff's decedent. Pursuant to § 4 of the Federal Arbitration Act (the "FAA"), this action must be stayed until the validity of the arbitration agreement entered into by the Plaintiff's decedent and the Facility is determined by this Court. Further, pursuant to the South Carolina Rules of Civil Procedure and the FAA, this matter should be dismissed or stayed pending final resolution of all claims pursuant to the valid arbitration agreement. This Defendant hereby provides notice that a Motion to Compel Arbitration and associated Motion to Dismiss or Stay is forthcoming.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

45. The Complaint fails to state facts sufficient to constitute a cause of action in several regards and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

46. This Defendant asserts that some or all of the standards, regulations, and statutes which Plaintiff alleges apply do not create any standard of care applicable to Plaintiff's claims or any private right of action in this matter.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

47. This Defendant would assert that it complied with the applicable standard of care at all times during the timeframe alleged in Plaintiff's Complaint and did not proximately cause any damage to the Plaintiff or her decedent.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

48. Plaintiff's recovery in the matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at S.C. Code Ann. §15-32-200, *et seq.* and which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

49. This Defendant would affirmatively assert that, to the extent it is liable to Plaintiff, which it vehemently denies, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps

of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200, *et seq.*; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

50. This Defendant would affirmatively assert the defense of intervening and superseding negligence of one or more third parties not a party to this action. This Defendant reserves the right to withdraw this defense at a later time as discovery progresses.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

51. A claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection, and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, 15-32-520, 15-32-530, 15-32-540, *et seq.*

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

52. This Defendant hereby asserts that the Plaintiff lacks legal standing to pursue the instant claims.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

53. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

Kara S. Grevey

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*Attorneys for the Defendant Palmetto Hallmark  
Operating, LLC d/b/a Hallmark Healthcare Center*

Charleston, South Carolina

Dated: August 16, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
TAMMY CHINA, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF EMMA LEE JAMES,	)	CASE NO. 2021-CP-18-01030
	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
PALMETTO HALLMARK OPERATING, LLC D/B/A HALLMARK HEALTHCARE CENTER, FUNDAMENTAL LONG TERM CARE, THI OF SOUTH CAROLINA, LLC, THI OF BALTIMORE, INC., AND ELITE PATIENT CARE OF SOUTH CAROLINA, PC,	)	<b>DEFENDANT THI OF SOUTH CAROLINA, LLC'S ANSWER TO PLAINTIFF'S COMPLAINT</b>
	)	
	)	
DEFENDANTS.	)	
	)	

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**TO: MARIO A. PACELLA AND JESSICA L. FICKLING, ATTORNEYS FOR THE PLAINTIFF:**

The Defendant THI of South Carolina, LLC (“this Defendant”), *subject to and without waiving objections to the jurisdiction of this Court, this Defendant’s right to move to stay this matter pending arbitration, and its right to move to dismiss this action*, hereby responds to Plaintiff’s Complaint as follows:

1. Any and all allegations set forth in Plaintiff’s Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. As to any and all allegations set forth in Plaintiff’s Complaint wherein Plaintiff uses the conflated term “Defendants” and/or the term “Fundamental Defendants” as an erroneous reference to multiple defendants or any other collective references to the defendants, or which

reference the skilled nursing facility or “the Facility,” this Defendant affirmatively asserts that it was not (and is not) a licensee or operator of Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (“the Facility”) and did not (and does not) operate, control or direct the Facility at all times pertinent to the Plaintiff’s claims. Any and all such allegations and references in Plaintiff’s Complaint not hereinafter specifically responded to in this manner are hereby denied and strict proof is demanded thereof.

3. To the extent this Defendant responds to allegations made against “Defendants,” the “Fundamental Defendants,” or any other collective references to the defendants, any such responses are being made by this Defendant as to itself.

4. As to any and all allegations in Plaintiff’s Complaint directed at parties other than this Defendant, no response is required. Any and all such allegations not hereinafter specifically addressed in this manner are hereby answered as no response is required by this Defendant.

5. The allegations in Paragraph 1 of Plaintiff’s Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant is without sufficient knowledge and information to respond to the allegations in Paragraph 1 and, therefore, denies the same. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Ms. James. Any remaining allegations in Paragraph 1 are denied.

6. To the extent the allegations in Paragraph 2 of Plaintiff’s Complaint are directed at this Defendant, this Defendant denies the same and demands strict proof thereof. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Ms. James.

7. The allegations in Paragraph 3 of Plaintiff's Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations in Paragraph 3.

8. This Defendant denies the allegations in Paragraph 4 of Plaintiff's Complaint.

9. Answering the allegations in Paragraphs 5, 6, and 7 of Plaintiff's Complaint, this Defendant is without sufficient information and knowledge to respond to these allegations and, therefore, denies the same and demands strict proof thereof. To the extent those allegations state or call for legal conclusions, no response is required.

10. The allegations in Paragraphs 8 and 9 of Plaintiff's Complaint are directed toward a party other than this Defendant and, therefore, do not require a response.

11. This Defendant denies the allegations in Paragraph 10 of Plaintiff's Complaint.

12. The allegations in Paragraphs 11 and 12 of Plaintiff's Complaint are directed toward a party other than this Defendant and, therefore, do not require a response.

13. The allegations in Paragraphs 13, 14, 15, and 16 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in Paragraphs 13, 14, 15, and 16. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Ms. James.

14. This Defendant denies the allegations in Paragraph 17 of Plaintiff's Complaint.

15. The allegations in Paragraphs 18 and 19 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. Further, the allegations in Paragraphs 18 and 19 of Plaintiff's Complaint state or

call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations in Paragraphs 18 and 19.

16. The allegations in Paragraph 20 of Plaintiff's Complaint are not directed at or against this Defendant and, therefore, do not require any response.

17. The allegations in Paragraph 21 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent a response is required, this Defendant denies the allegations in Paragraph 21. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility.

18. The allegations in Paragraph 22 of Plaintiff's Complaint are directed toward a party other than this Defendant and, therefore, do not require a response.

19. Answering the allegations in Paragraph 23 of Plaintiff's Complaint, this Defendant admits only that upon information and belief, Plaintiff filed a Notice of Intent, along with an affidavit and discovery responses. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant.

20. The allegations in Paragraph 24 of Plaintiff's Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant respectfully denies the allegations set forth in Paragraph 24.

21. To the extent the allegations in Paragraph 25 of Plaintiff's Complaint are directed to this Defendant, this Defendant denies the allegations in Paragraph 25.

22. Answering the allegations in Paragraph 26 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

23. The allegations in Paragraphs 27 through 57 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant is without sufficient knowledge and information to respond to the allegations in Paragraphs 27 through 57 and, therefore, denies the same. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Ms. James. This Defendant further denies any interaction or relationship with Ms. James of any kind.

24. Answering the allegations in Paragraph 58 of Plaintiff's Complaint, this Defendant craves reference to Ms. James's "Death Certification" for its contents and denies any allegations inconsistent therewith. This Defendant further denies all allegations intended to assert or imply liability or damages against this Defendant.

25. Answering the allegations in Paragraph 59 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

26. The allegations in Paragraphs 60, 61, 62, 63, 64, 65, and 66 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in Paragraphs 60 through 66 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

27. Answering the allegations in Paragraph 67 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

28. The allegations in Paragraph 68 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this

Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in Paragraphs 68.

29. In responding to the allegations set forth in Paragraphs 69 and 70 of Plaintiff's Complaint, this Defendant admits that skilled nursing facilities are subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further affirmatively asserts it has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required. To the extent that the allegations set forth in the above Paragraph call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

30. The allegations in Paragraphs 71 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in Paragraph 71 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind.

31. In responding to the allegations set forth in Paragraphs 72, 73, 74, and 75 of Plaintiff's Complaint, this Defendant admits that skilled nursing facilities are subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and

regulations do not establish a standard of care. This Defendant further affirmatively asserts it has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required. To the extent that the allegations set forth in the above Paragraph call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

32. This Defendant denies the allegations in Paragraphs 76 and 77 of Plaintiff's Complaint and demands strict proof thereof.

33. Answering the allegations in Paragraph 78 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

34. This Defendant denies the allegations set forth in Paragraphs 79, 80, 81, 82, 83, and 84 of Plaintiff's Complaint, to the extent they are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required.

35. Answering the allegations in Paragraph 85 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

36. The allegations in Paragraph 86 of Plaintiff's Complaint are not directed at or against this Defendant and, therefore, do not require any response. To the extent a response is

required and/or these allegations are intended to allege liability against this Defendant, this Defendant denies the allegations in Paragraph 86. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required.

37. This Defendant denies the allegations set forth in Paragraphs 87, 88, and 89 of Plaintiff's Complaint, to the extent they are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

38. Answering the allegations in Paragraph 90 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

39. This Defendant denies the allegations set forth in Paragraphs 91 and 92 of Plaintiff's Complaint, to the extent they are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

40. This Defendant denies the allegations in Plaintiff's prayer for relief and judgment.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

41. This Defendant would assert that this matter should be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure for lack of personal jurisdiction over this Defendant.

**FURTHER ANSWERING AND**

**FOR A FURTHER AFFIRMATIVE DEFENSE**

42. This matter must be stayed as against this Defendant pending the result of arbitration pursuant to a valid arbitration agreement entered into between Plaintiff's decedent and the Facility, pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3. This Defendant hereby gives notice of its intent to file a Motion to Stay.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

43. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process, and equal protection, and this Defendant would further assert the protections and defenses set forth in S.C. Code Ann. §§ 15-32-510, 15-32-520, 15-32-530, and 15-32-540.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

44. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(6).

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

45. Plaintiff's right to recovery in the matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified in S.C. Code Ann. § 15-32-200, et seq., which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

46. This Defendant affirmatively asserts that, to the extent it is liable to Plaintiff or Plaintiff's decedent, as alleged, which it vehemently denies, it would be entitled to any and all benefits, joint and several liability protections, emergency situations on liability, any and all monetary limitations or caps or liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200, et seq.; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

47. This Defendant affirmatively asserts the defenses of intervening and superseding negligence of third parties not a party to this action.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

48. This Defendant would assert that some or all of the state or federal laws cited by or impliedly referenced by the Plaintiff do not create a standard of care applicable to Plaintiff's claims in this matter.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

49. This Defendant would assert that it owes no duty of care to the Plaintiff or her decedent in either tort or contract. To the extent this Defendant did owe Plaintiff or Plaintiff's decedent a duty of care, which it denies, this Defendant was at all times compliant with the governing standard of care.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

50. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

Kara S. Grevey

SC State Bar ID No.: 101742

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

*Attorneys for Defendant THI of South Carolina,  
LLC*

Charleston, South Carolina

Dated: August 16, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
TAMMY CHINA, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF EMMA LEE JAMES,	)	CASE NO. 2021-CP-18-01030
	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
PALMETTO HALLMARK OPERATING, LLC D/B/A HALLMARK HEALTHCARE CENTER, FUNDAMENTAL LONG TERM CARE, THI OF SOUTH CAROLINA, LLC, THI OF BALTIMORE, INC., AND ELITE PATIENT CARE OF SOUTH CAROLINA, PC,	)	<b>DEFENDANT THI OF BALTIMORE, INC.’S ANSWER TO PLAINTIFF’S COMPLAINT</b>
	)	
	)	
DEFENDANTS.	)	
	)	

**TO: MARIO A. PACELLA, ATTORNEY FOR TAMMY CHINA, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF EMMA LEE JAMES:**

The Defendant THI of Baltimore, Inc. (“this Defendant”), by and through its undersigned counsel, *subject to and without waiving objections to the jurisdiction of this Court, its rights to stay this matter pending arbitration and any rights to have any and all claims dismissed,* hereby responds to Plaintiff’s Complaint as follows:

1. Any and all allegations set forth in Plaintiff’s Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.
2. As to any and all allegations set forth in Plaintiff’s Complaint wherein Plaintiff uses the conflated term “Defendants” and/or the term “Fundamental Defendants” as an erroneous reference to multiple defendants or any other collective references to the defendants, or which

reference the skilled nursing facility or “the Facility,” this Defendant affirmatively asserts that it was not (and is not) a licensee or operator of Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (“the Facility”) and did not operate, control or direct the Facility at all times pertinent to the Plaintiff’s claims. Any and all such allegations and references in Plaintiff’s Complaint not hereinafter specifically responded to in this manner are hereby denied and strict proof is demanded thereof.

3. To the extent this Defendant responds to allegations made against “Defendants,” the “Fundamental Defendants,” or any other collective references to the defendants, any such responses are being made by this Defendant as to itself.

4. As to any and all allegations in Plaintiff’s Complaint directed at parties other than this Defendant, no response is required. Any and all such allegations not hereinafter specifically addressed in this manner are hereby answered as no response is required by this Defendant.

5. The allegations in Paragraph 1 of Plaintiff’s Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant to that extent. To the extent the allegations are directed at this Defendant, this Defendant the allegations in Paragraph 1 are denied.

6. To the extent the allegations in Paragraph 2 of Plaintiff’s Complaint are directed at this Defendant, this Defendant denies the same and demands strict proof thereof. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Ms. James.

7. The allegations in Paragraph 3 of Plaintiff’s Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations in Paragraph 3.

8. This Defendant denies the allegations in Paragraph 4 of Plaintiff's Complaint.

9. Answering the allegations in Paragraphs 5, 6, and 7 of Plaintiff's Complaint, this Defendant is without sufficient information and knowledge to respond to these allegations and, therefore, denies the same and demands strict proof thereof. To the extent those allegations state or call for legal conclusions, no response is required.

10. The allegations in Paragraphs 8, 9, and 10 of Plaintiff's Complaint are directed toward a party other than this Defendant and, therefore, do not require a response.

11. This Defendant denies the allegations in Paragraph 11 of Plaintiff's Complaint..

12. The allegations in Paragraph 12 of Plaintiff's Complaint are directed toward a party other than this Defendant and, therefore, do not require a response.

13. The allegations in Paragraphs 13, 14, 15, and 16 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in Paragraphs 13, 14, 15, and 16. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Ms. James.

14. This Defendant denies the allegations in Paragraph 17 of Plaintiff's Complaint.

15. The allegations in Paragraphs 18 and 19 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant to that extent. Further, the allegations in Paragraphs 18 and 19 of Plaintiff's Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant denies the allegations in Paragraphs 18 and 19.

16. The allegations in Paragraph 20 of Plaintiff's Complaint are not directed at or against this Defendant and, therefore, do not require any response.

17. The allegations in Paragraph 21 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant. To the extent a response is required, this Defendant denies the allegations in Paragraph 21. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility.

18. The allegations in Paragraph 22 of Plaintiff's Complaint are directed toward a party other than this Defendant and, therefore, do not require a response.

19. Answering the allegations in Paragraph 23 of Plaintiff's Complaint, this Defendant admits only that Plaintiff filed a Notice of Intent, along with an affidavit and discovery responses. This Defendant denies the sufficiency of the affidavit and denies any and all allegations and assertions contained therein to the extent they allege liability or damages against this Defendant.

20. The allegations in Paragraph 24 of Plaintiff's Complaint state or call for legal conclusions and, therefore, do not require any response. To the extent a response is required, this Defendant respectfully denies the allegations set forth in Paragraph 24.

21. To the extent the allegations in Paragraph 25 of Plaintiff's Complaint are directed to this Defendant, this Defendant denies the allegations in Paragraph 25.

22. Answering the allegations in Paragraph 26 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

23. The allegations in Paragraphs 27 through 58 of Plaintiff's Complaint are, in part, directed toward parties other than this Defendant and, therefore, do not require a response from this Defendant to that extent. To the extent the allegations are directed at this Defendant, this

Defendant is without sufficient knowledge and information to respond to the allegations in Paragraphs 27 through 58 and, therefore, denies the same. This Defendant has never operated, managed, or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Ms. James. This Defendant further denies any interaction or relationship with Ms. James of any kind.

24. Answering the allegations in Paragraph 59 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

25. The allegations in Paragraphs 60, 61, 62, 63, 64, 65, and 66 of Plaintiff's Complaint are, in part, directed toward a party other than this Defendant and, therefore, do not require a response from this Defendant to that extent. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in Paragraphs 60 through 66 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

26. Answering the allegations in Paragraph 67 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

27. The allegations in Paragraph 68 of Plaintiff's Complaint are, in part, directed toward a party other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in Paragraphs 68.

28. In responding to the allegations set forth in Paragraphs 69 and 70 of Plaintiff's Complaint, this Defendant admits that skilled nursing facilities are subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further affirmatively asserts it has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James

or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required. To the extent that the allegations set forth in the above Paragraph call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

29. The allegations in Paragraph 71 of Plaintiff's Complaint are, in part, directed toward a party other than this Defendant and, therefore, do not require a response from this Defendant. To the extent the allegations are directed at this Defendant, this Defendant denies the allegations in Paragraph 71 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind.

30. In responding to the allegations set forth in Paragraphs 72, 73, 74, and 75 of Plaintiff's Complaint, this Defendant denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required. To the extent that the allegations set forth in the above Paragraph call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

31. This Defendant denies the allegations in Paragraphs 76 and 77 of Plaintiff's Complaint and demands strict proof thereof.

32. Answering the allegations in Paragraph 78 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

33. This Defendant denies the allegations set forth in Paragraphs 79, 80, 81, 82, 83, and 84 of Plaintiff's Complaint, to the extent they are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required.

34. Answering the allegations in Paragraph 85 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

35. The allegations in Paragraph 86 of Plaintiff's Complaint are not directed at or against this Defendant and, therefore, do not require any response. To the extent a response is required and/or these allegations are intended to allege liability against this Defendant, this Defendant denies the allegations in Paragraph 86. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required.

36. This Defendant denies the allegations set forth in Paragraphs 87, 88, and 89 of Plaintiff's Complaint, to the extent they are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

37. Answering the allegations in Paragraph 90 of Plaintiff's Complaint, this Defendant reincorporates and restates its previous responses as if fully set forth verbatim herein.

38. This Defendant denies the allegations set forth in Paragraphs 91 and 92 of Plaintiff's Complaint, to the extent they are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Ms. James or any person. This Defendant further denies any interaction or relationship with Ms. James of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

39. This Defendant denies the allegations in Plaintiff's prayer for relief and judgment.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

40. This Defendant would assert that this matter should be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure for lack of personal jurisdiction over this Defendant.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

41. This matter must be stayed as against this Defendant pending the result of arbitration pursuant to a valid arbitration agreement entered into between Plaintiff's decedent and the Facility, pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3. This Defendant hereby gives notice of its intent to file a Motion to Stay.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

42. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process, and equal protection, and this Defendant would further

assert the protections and defenses set forth in S.C. Code Ann. §§ 15-32-510, 15-32-520, 15-32-530, and 15-32-540.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

43. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(6).

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

44. Plaintiff's right to recovery in the matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified in S.C. Code Ann. § 15-32-200, *et seq.*, which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

45. This Defendant affirmatively asserts that, to the extent it is liable to Plaintiff or Plaintiff's decedent, as alleged, which it vehemently denies, it would be entitled to any and all benefits, joint and several liability protections, emergency situations on liability, any and all monetary limitations or caps or liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200, *et seq.*; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

46. This Defendant affirmatively asserts the defenses of intervening and superseding negligence of third parties not a party to this action.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

47. This Defendant would assert that some or all of the state or federal laws cited by or impliedly referenced by the Plaintiff do not create a standard of care applicable to Plaintiff's claims in this matter.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

48. This Defendant would assert that it owes no duty of care to the Plaintiff or her decedent in either tort or contract. To the extent this Defendant did owe Plaintiff or Plaintiff's decedent a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

**FURTHER ANSWERING AND  
FOR A FURTHER AFFIRMATIVE DEFENSE**

49. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

Kara S. Grevey

SC State Bar ID No.: 101742

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

*Attorneys for Defendant THI of Baltimore, Inc.*

Charleston, South Carolina

Dated: August 18, 2021

State of South Carolina )  
 ) Court of General Sessions  
County of Dorchester ) 2021-CP-18-01030

Tammy China )  
 )  
 vs. ) Transcript of Record  
 )  
 Palmetto Hallmark Operating, )  
 LLC )  
 )

April 13, 2022  
Dorchester, South Carolina

B E F O R E:

The Honorable R. Markley Dennis Jr., Judge.

A P P E A R A N C E S (All present by video or telephone):

Mario A. Pacella  
Attorney for the Plaintiff

Russell G. Hines  
Attorney for the Defendant

Brooke Buford  
Transcriber



1 THE DEPUTY CLERK: Judge, the next one was withdrawn.

2 THE COURT: Yup.

3 THE DEPUTY CLERK: So that makes us number 4 which is  
4 Tammy China v. Palmetto Hallmark Operating, and it's a motion  
5 to compel arbitration.

6 THE COURT: Yeah. And I have that, and I have reviewed  
7 the situation. And it appears to me, looking at everything --  
8 interesting case, too, by the way. I don't -- let me just  
9 say, Russ, you're arguing that obviously, on behalf -- before  
10 we start -- and let me summarize, and then if we need to  
11 record it, I'll be happy to. There's no question there's a  
12 contract that provides that, and there's no question that I'm  
13 sure those contracts are signed all the time.

14 And I have one that I ruled on that I think is a adhesion  
15 contract; this is not. I mean, it just doesn't fall into that  
16 category, in my opinion. I understand about it, but my son  
17 now is a lawyer for a company. He doesn't practice general  
18 law anymore, and we've talked about -- I talked to him about  
19 that case after I ruled on it. And he said every contract I  
20 draw now has that in there. I don't draw one that doesn't  
21 have that in there. And I understand that.

22 My concern is this. And it really has raised, I think,  
23 Mario, from your position, where's the authority of this  
24 person that's executing the contract. And that's my problem.  
25 I don't have -- I don't have that. And I have copied what's

1 in the file. It's clear that there was somebody said, this  
2 person said okay. But I don't have any authority for her to  
3 say okay because it hadn't been signed.

4 MR. HINES: Your Honor, and that's, well --

5 THE COURT: And I'll be happy to hear from you. Tell me  
6 why I should -- why that doesn't control the day. Do you need  
7 this recorded?

8 MR. HINES: Your Honor, I think I do, at least an audio  
9 (indiscernible). And I appreciate it.

10 THE COURT: No problem. Just one second. Let me go  
11 ahead and announce it.

12 This is the case of Tammy China as personal  
13 representative for the Estate of Emma Lee James, plaintiff, v.  
14 Palmetto Hallmark Operating, LLC, DBA Hallmark Healthcare  
15 Center and others. And this is motion -- this is case number  
16 2021-CP-18-1030. And we're now arguing the motion to compel  
17 arbitration, which has been filed by the defendant, Hallmark.

18 And I'll be happy to hear from you now.

19 MR. HINES: Thank you very much, Your Honor, and may it  
20 please the Court. Again, this is Russ Hines, here on behalf  
21 of the defendant. I apologize for a little bit of confusion,  
22 perhaps, earlier. I'm not, I guess, of record in the case. I  
23 work with Jay Davis, and I'm arguing this on his behalf.

24 THE COURT: Well, just tell Jay that he needs to  
25 probably -- because I know Jay. He probably needs to put you

1 down and take his name off. But other than that --

2 MR. HINES: You're too kind, Your Honor.

3 THE COURT: Tell him I said hi.

4 MR. HINES: I will do. Your Honor, thank you very much  
5 for, I think it was just a moment ago, when you went through  
6 and gave your view of the situation, at least here,  
7 preliminarily. That's very helpful, and I appreciate your  
8 advanced work in that regard. And let me try to explain  
9 how -- I don't intend to argue to you, Your Honor, that there  
10 is authority.

11 The way that I intend to argue to you, Your Honor, is on  
12 the basis of the concept of merger and equitable estoppel.  
13 And so Your Honor, in the -- our case law recognizes these two  
14 doctrines, and it's kind of a one-two punch. And I will try  
15 to cover this ground as quickly as I can, Your Honor. And  
16 I'll refer to the defendant here, which is a skilled nursing  
17 facility, just as the facility.

18 When the resident who's not a decedent, Ms. James -- Emma  
19 Lee James -- she was a resident of our facility for about two  
20 months in 2018, from August through October of that year.  
21 When she was admitted to the facility, her daughter, Ms. Emma  
22 Dunham, signed an arbitration agreement and also -- excuse  
23 me -- an arbitration agreement and an admission agreement. It  
24 was two different documents that were signed on behalf of her  
25 mother, the resident, Ms. James.

1 Now, the argument that I'm making to Your Honor here is  
2 is that what I first want to do -- and I'm giving you just a  
3 quick roadmap -- is to argue that the admission agreement and  
4 the arbitration agreement merge, and they should be treated as  
5 one document. And then, Your Honor, if I can get you to go  
6 with me that far, the next part of this is the argument for  
7 estoppel, which is that you can't have your cake and eat --

8 THE COURT: Russ -- Mr. Hines, excuse me for interrupting  
9 you, because if I don't agree with you on that, there is no  
10 equitable estoppel.

11 MR. HINES: Yes, sir. That's --

12 THE COURT: Would you agree with that?

13 MR. HINES: My argument for estoppel hinges on that first  
14 point of merger.

15 THE COURT: Yeah. I disagree with you.

16 MR. HINES: And just to make that point --

17 THE COURT: I disagree with you, so that kicks out that  
18 one. I'm sorry. This case has got to go up -- I'm all for --  
19 I understand it's a business practice, but I don't think we  
20 get -- there's something in -- I appreciate plaintiff's  
21 raising the issue about the constitutional right to have a  
22 jury trial. And I just don't think we can be real flippant  
23 with that. I think you've got to dot all the I's and cross  
24 all the T's to be able to -- to get through that hurdle.

25 That's my problem, Russ. And so I understand your

1 position. I understand why they probably did what they did.  
2 They wanted to help this lady, and that's what their intention  
3 was. And that's fine, and I don't know anything otherwise.  
4 Mario may disagree with me on that, and that'll be for another  
5 day. But I just can't get over the first hurdle because  
6 there's no authority to do it. So --

7 MR. HINES: Your Honor, and I understand. And that  
8 really does short circuit things. I think our position for  
9 purposes of our record is certainly outlined in the briefing  
10 that we filed.

11 THE COURT: Yeah. And Russ, thank you for doing that  
12 because I failed to mention that. I'm incorporating all the  
13 pleadings that have been filed for purposes of review, should  
14 that become necessary, and each of you entitled to rely on the  
15 positions stated.

16 And so Mario, you filed an extensive brief regarding your  
17 position on it, and you're entitled to rely on all of that as  
18 well. Thank you for bringing that, because that's one of the  
19 ways that -- I never want to -- one thing I've tried to do is  
20 correct something I did early on in my career as a judge,  
21 being a little bit, as you can tell. And so Bert (phonetic)  
22 would probably agree I hadn't mastered my impatience.

23 But I don't want to ever jeopardize -- having had a  
24 conversation with the clerk here this morning about the  
25 significant of having practiced law and how important it is

1 for me and having had that privilege -- because the last thing  
2 I want to do is jeopardize a lawyer's right to protect their  
3 client and argue their interests. So you don't have to worry  
4 about taking time, Russ. I'm delighted to do that. But I  
5 will incorporate it. Now, if you need to supplement anything  
6 further, please feel free to state it. But it is incorporated  
7 fully for purposes of review.

8 MR. HINES: Thank you very much, Your Honor. I think  
9 we've got it covered in the papers, and I will leave it at  
10 that.

11 THE COURT: Thank you.

12 Mario, do you care to supplement yours at all?

13 MR. PACELLA: No, sir. I rely on my brief.

14 THE COURT: If you would prepare a brief order that I  
15 denied just for the reasons said. I think we need to state  
16 that for the purpose of the ruling because equitable estoppel  
17 could kick in if that's in error. I'm not saying it does; I'm  
18 just saying it could. So I've short-circuited that aspect.  
19 But you've briefed that part, Russ.

20 MR. HINES: Your Honor, we did. It's briefed. Yes, sir.

21 THE COURT: If you would just prepare a brief order to  
22 that effect for the basis I stated and e-file it for me, I'll  
23 be happy to sign it.

24 MR. PACELLA: Your Honor, just for scheduling purposes,  
25 is it okay if I get something to you early next week?

1 THE COURT: My friend, I don't have any problem with it.  
2 There's another thing, just what I said. You don't have to  
3 ever apologize to me about an order. It'll get filed when it  
4 gets filed and done. The only time I do is if somebody says,  
5 there's an urgency, Judge. I need to have that. And then  
6 I'll try to make an effort. But no sir, it doesn't offend me  
7 in the slightest, okay?

8 MR. PACELLA: Thank you, sir.

9 THE COURT: You bet.

10 Thank you all. Have a great day.

11 Russ, tell Jay I said hello to him.

12 MR. HINES: Will do, Your Honor. Thank you.

13 THE COURT: And you did a magnificent job for Jay.

14 MR. HINES: Thank you. Thank you.

15 THE COURT: Okay. You all take care.

16 MR. HINES: Yes, sir.

17 (End of Transcript of Record)

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CERTIFICATE OF TRANSCRIBER

State of South Carolina            )  
  )  
County of Dorchester                )

I, BROOKE BUFORD, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Dorchester County, South Carolina, on the 13th day of April, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 24, 2023

*Brooke Buford*

\_\_\_\_\_  
Brooke Buford, CDLT-183  
Transcriber

State of South Carolina )  
 ) Court of General Sessions  
County of Colleton ) 2021-CP-18-01030

Tammy China )  
 )  
 vs. ) Transcript of Record  
 )  
 Palmetto Hallmark Operating, )  
 LLC )

November 17, 2022  
Walterboro, South Carolina

B E F O R E:

The Honorable Robert J. Bonds, Judge.

A P P E A R A N C E S (All present by video or telephone):

Russell G. Hines  
Attorney for the Plaintiff

Mario A. Pacella  
Attorney for the Defendant

Jaimi Van Bochove  
Transcriber



1 THE DEPUTY CLERK: The next case up is 2021-CP-18-01030,  
2 Tammy China v. Palmetto Hallmark Operating, LLC. This is for  
3 a motion to compel arbitration and (indiscernible) Judge  
4 Goodstein, and it's filed by the plaintiff.

5 THE COURT: Okay. And so who's here on behalf of the  
6 plaintiff?

7 MR. PACELLA: Mario Pacella, Your Honor.

8 THE COURT: Did you say Mr. Pacella?

9 MR. PACELLA: Yes, sir.

10 THE COURT: Yes, sir. Okay. You broke just for a second  
11 there when you came on.

12 And who's here on behalf of the defendant?

13 MR. HINES: Your Honor, Russ Hines, that's H-I-N-E-S, for  
14 the defendant, Palmetto Hallmark Operating, LLC, dba Hallmark  
15 Healthcare Center. We are the moving party. I was just  
16 looking to see, I'm not sure if I've actually appeared in this  
17 case formally. I work at Clement Rivers with Jay Davis and  
18 the other lawyers who have appeared on behalf of that client.

19 THE COURT: Okay. Great. So this is your motion, sir?

20 MR. HINES: Yes, sir.

21 THE COURT: All right. Well, can you give me a little  
22 background before you get into your motion? Because I'm a  
23 little confused in that it looks like Judge Dennis -- is this  
24 the one? Judge Dennis already signed an order denying the  
25 relief.

1 MR. HINES: Your Honor, you're exactly right. And the  
2 background, if it may please the Court, is that this motion  
3 was made a while back. It was argued to Judge Dennis, who  
4 denied it and entered an order denying it. We made a timely  
5 motion for reconsideration. And while that motion was  
6 pending, Judge Dennis retired, and so the sort of unusual  
7 circumstance just based upon the timing of it all.

8 And my understanding is that this was from -- according  
9 to Judge Goodstein's determination, as the chief administrator  
10 judge, as to how to proceed in this event, where we had a  
11 timely and proper motion to reconsider, the motion could only  
12 be reconsidered by the judge who issued the order for which  
13 reconsideration was sought. That being Judge Dennis, who as a  
14 result of his retirement was no longer in a position to rule  
15 on that motion. And my understanding is Judge Goodstein  
16 determined that the appropriate way to handle that was to  
17 start back from scratch and simply argue our motion to compel  
18 arbitration anew to a new judge. And I think that's what gets  
19 it in front of Your Honor. So it is --

20 THE COURT: All right.

21 So let me just ask, Mr. Pacella, is that your  
22 understanding as where we are procedurally, sir?

23 MR. PACELLA: It is.

24 THE COURT: Okay. So I'm hearing this motion anew, for  
25 lack of better words. Is that correct, gentlemen?

1 MR. PACELLA: That's our understanding from Judge  
2 Goodstein, correct.

3 MR. HINES: Yes, Your Honor. And I can understand your  
4 concerns, in that I'm imaging that you might have some concern  
5 about doing something that's inconsistent with what Judge  
6 Dennis did before. But I think under this circumstance,  
7 what's happened is that, essentially, it has been vacated.  
8 What Judge Dennis did before has been nullified just by virtue  
9 of the retirement. And so anyways, I'm not trying to  
10 overstate that point. But I think it's --

11 THE COURT: No. I'm just trying to make sure so that if  
12 and when an order gets made that we indicate and at least  
13 procedurally there's agreement or understanding as to where we  
14 are. And it seems like that is the case. Okay?

15 MR. HINES: Yes, Your Honor.

16 THE COURT: I'm happy to hear from you, sir.

17 MR. HINES: Your Honor, this is, again, our motion to  
18 compel arbitration. The context for this motion is, this is a  
19 case of alleged nursing home malpractice. Again, our client  
20 is Palmetto Hallmark Operating, LLC, doing business as  
21 Hallmark Healthcare Center. It's a skilled nursing facility.  
22 I'm just going to call it, if it's all right, the facility  
23 just for shorthand.

24 And we are moving to compel the alleged malpractice  
25 against us to arbitration. And Your Honor, we filed, oh, a

1 while back, we filed a memo in support, and it's rather  
2 lengthy. And we certainly would rely on that. But to try and  
3 hit the high points in the context of this hearing, my  
4 argument to you is one that's based on a concept of merger and  
5 equitable estoppel. And just to lay out a little bit of a  
6 roadmap before I get into it, I want to explain it as kind of  
7 a one-two punch.

8         And the merger component of that has to do with the  
9 merger of two documents, an admission agreement and an  
10 arbitration agreement. And in this case -- again, the case is  
11 about alleged nursing home malpractice. The resident at  
12 issue, her name is -- she's the decedent in this case, this  
13 case brought by Tammy China, as personal representative for  
14 the estate of Emily James. Ms. James, Emily James, was the  
15 resident of our facility. She was there from August of 2018  
16 until the middle of October of 2018, and then she passed away  
17 in early November of 2018.

18         In conjunction with Ms. James' admission to our facility,  
19 her daughter, Emma Dunham -- my understanding is that Ms.  
20 China is the granddaughter of the decedent. I want to say  
21 that just -- I know there's a few names I'm throwing at you  
22 and just to try to keep them straight. But the plaintiff,  
23 Tammy China, personal representative, I believe, is the  
24 granddaughter of Emily James. Emma Dunham would be Tammy  
25 China's mother and Emily James' daughter.

1 Ms. Dunham is the one who signed the arbitration  
2 agreement and admission agreement on behalf of her mother, Ms.  
3 James, the resident, when she was admitted to our facility.

4 The first part of my argument, Your Honor, is to argue  
5 for the merger of the arbitration agreement and the admission  
6 agreement. The idea being that under our law that we've cited  
7 cases to this effect in our memo, the main case is a case  
8 called Coleman --

9 THE COURT: Let me ask you something.

10 MR. HINES: Yes, Your Honor.

11 THE COURT: Is your memo the memo that looks like it was  
12 filed April 8 of '22, sir?

13 MR. HINES: Yes, Your Honor, it is.

14 THE COURT: That's fine. You said it was a while back,  
15 and actually, I don't think that's too long ago. But I just  
16 wanted to make sure there wasn't anything else. I've got it  
17 in front of me. Go ahead.

18 MR. HINES: Thank you for confirming that, Your Honor.  
19 And I do appreciate that bit of housekeeping. Exactly, you're  
20 looking at the very same thing I'm referring to, the April 8th  
21 memo.

22 And the case Coleman v. Mariner Health Care, that was  
23 another case that had to with an appeal, and that was an  
24 appeal from the denial of a motion to compel arbitration. And  
25 really the main point of that case, in terms of maybe why it's

1 most famous, so to speak, is that that case -- it was argued  
2 in that case the sister signed it for her sister, who was the  
3 resident. And the question was whether or not the South  
4 Carolina Adult Health Care Consent Act provided the sister  
5 authority to sign on her sister's behalf. That was sort of  
6 the main point that was addressed in Coleman. And the Supreme  
7 Court said, no, it doesn't.

8         And I say that to make a couple different points. The  
9 first one is we're not arguing anything to do with the Adult  
10 Health Care Consent Act. We're not even arguing authority,  
11 per se, to sign this. Because what we have here is a case,  
12 what they call a case, where we're trying to force an  
13 arbitration agreement against a nonsignatory. In this case,  
14 the nonsignatory would be Ms. James, the resident, and now by  
15 virtue of her passing, her estate in her stead. But she did  
16 not sign it. We acknowledge that. It was signed by her  
17 daughter, both documents. The admission agreement and the  
18 arbitration agreement signed by Ms. Dunham.

19         Now, Ms. Dunham, in signing the arbitration agreement --  
20 I should note that the arbitration agreement contains language  
21 that says, "By his/her signature below, the executing party  
22 represents that he/she has the authority to sign on a  
23 resident's behalf so as to bind the resident as well as the  
24 representative." So I point that language out. That's in  
25 Exhibit 2 to our memo. And I would point that language out in

1 conjunction with the case law that says that when someone  
2 signs a document, they are presumed to have read, understood,  
3 and assented to it. I would note, that is Ms. James -- excuse  
4 me, Ms. Dunham there representing to us her authority to sign  
5 on Ms. James' behalf.

6         Nonetheless, my argument here is ultimately based on  
7 equity, Your Honor. But it's a one-two punch, again. I'm  
8 trying to merge -- explain to Your Honor why I believe this  
9 should be the merger of the arbitration agreement and  
10 admission agreement, such that they're considered as one  
11 document.

12         And that gets me back to the Coleman case, where one of  
13 the arguments that was made in Coleman, in addition to this  
14 Adult Health Care Consent Act argument, was that there could  
15 be enforcement of the arbitration agreement through this  
16 merger and estoppel. And what the Coleman court said in that  
17 case, because Coleman ultimately affirmed the denial of the  
18 motion to compel arbitration, but importantly, it recognized  
19 the analytical or the legal framework for my argument today.  
20 Because Coleman was decided on one set of facts. This case,  
21 we submit, is a different set of facts.

22         But on the law that the Coleman court recognized, they  
23 recognized something that allows me to prevail today. And  
24 that is that the general rule in the absence of anything  
25 indicating a contrary intention, where instruments are

1 executed at the same time, by the same parties, for the same  
2 purpose, and in the course of the same transaction, the courts  
3 will consider and construe the documents together. The theory  
4 is that the instruments are effectively one instrument or  
5 contract. The Coleman court went on to say -- it was quoting  
6 that rule, and then itself it said, "Here, the documents were  
7 executed at the same time, by the same parties, for the same  
8 purposes, and in the course of the same transaction. Unless  
9 there is a contrary intention, appellants," those were the  
10 parties that wanted to arbitrate, "are correct and there was a  
11 merger."

12 Your Honor, what Coleman says is that there is a doctrine  
13 that South Carolina law recognizes that we have instruments,  
14 two different instruments signed at the same time, by the same  
15 parties, for the same purpose, and in the course of the same  
16 transaction. They are presumed to merge unless there is an  
17 evidence of a contrary intention. What the Coleman court  
18 ended up doing on those facts there is it said, well, we find  
19 there is evidence of a contrary intention, there's no merger.  
20 But importantly -- this is the point I'm trying to make now --  
21 is that that law is good law. And the Coleman court  
22 recognized not only that that law is good law, but in the very  
23 case of an admission agreement and an arbitration agreement,  
24 because in this respect this case is identical to Coleman --  
25 there's an important distinction I'll make in a moment -- but

1 in the case of an admission agreement and an arbitration  
2 agreement, you have documents that are executed at the same  
3 time, by the same parties, for the same purposes, and in the  
4 course of the same transaction.

5       The court in Coleman found, yep, you checked every one of  
6 those boxes. Now, it went on to say the presumption of merger  
7 is overcome because there are some evidence -- there's  
8 indication of a contrary intention to merger. And in that  
9 case, what the Coleman court said were a couple things. In  
10 Coleman, the arbitration agreement had a provision in it that  
11 allowed it to be revoked within 30 days, and the admission  
12 agreement didn't. And the Coleman court looked at that and  
13 said, well, that seems to us to indicate an intention contrary  
14 to merger because one of the documents might just fall away in  
15 30 days. And if they were intended to be together, they  
16 wouldn't have -- that's an inconsistency. That's an intention  
17 contrary to merger. It was evidenced by the revocation  
18 provision that's in one but not the other.

19       The Coleman court also said there is an entire agreement  
20 clause in the arbitration agreement, and that clause refers to  
21 specifically the arbitration agreement. Which is to say, you  
22 have the admission agreement containing a clause that says,  
23 this includes the entire agreement. And in so doing, it  
24 references the arbitration agreement, which leads us to  
25 conclude that the arbitration agreement is something else. If

1 your admission agreement has this entire agreement language  
2 and then refers to something else, some other agreement by  
3 name, then it draws the inference that the arbitration  
4 agreement was not intended to be merged into that document but  
5 is to stand alone. Here in this case, we don't have that. We  
6 don't have any revocation provision that applies to either one  
7 of these documents.

8 Two, not only we do have an entire agreement provision in  
9 our arbitration -- excuse me, in our admission agreement;  
10 however, that agreement, rather than reflecting any  
11 separatedness -- and that's the wording of the Coleman court.  
12 It talked about an intention to maintain the separatedness of  
13 these two documents. We don't have that. Our entire  
14 agreement provision includes language that says, "The  
15 undersigned further acknowledges that he/she has received and  
16 read the admission handbook and other admissions materials and  
17 understands that these documents are made a part of this  
18 agreement by reference herein."

19 So we have an entire agreement provision in our admission  
20 agreement. Not only does it not reference the arbitration  
21 agreement in any way that could be said to be treating it  
22 separate, it expressly says, other admissions materials are  
23 incorporated herein. And we submit to Your Honor that the  
24 arbitration agreement is exactly that. It's another  
25 admissions material. It was signed in conjunction with the

1 admission.

2           And even in just sort of common parlance with which our  
3 courts discuss things like -- have discussed this in other  
4 cases, and we've cited this in our brief, it's a case called  
5 Stock v. White Oak. I'm trying to flip to it now. I should  
6 have tabbed it. But the bottom line is we've cited in our  
7 brief, and what you would see in that regard is that the court  
8 seemed to recognize the idea that an arbitration agreement  
9 signed in conjunction with an admission to a nursing facility  
10 is an admissions material. And all my point is to say if you  
11 would go along with that, Your Honor, if you're persuaded of  
12 that, then we have a merger. We have a merger between  
13 arbitration agreement and admission agreement.

14           And the whole reason why merger is important is because  
15 the next part of my one-two punch argument is estoppel,  
16 equitable estoppel on the basis of something called direct  
17 benefits estoppel. And that's a very simple concept. The  
18 concept is you can't enjoy the benefits under part of a  
19 contract and at the same time disavow the enforceability of  
20 another part of the very same contract. The idea being here  
21 that there's no question that the resident, Ms. James,  
22 received all sorts of benefits by virtue of the admission  
23 agreement. She received room and board and various  
24 treatments.

25           Understanding that her estate is alleging in this case

1 malpractice, there's two things on that, I would say. Number  
2 one, those allegations are not to be pre-judged in the context  
3 of this motion. It's all in dispute as to whether there was  
4 any malpractice to begin with. But the scope of her complaint  
5 certainly does not include the entirety of every benefit she  
6 received, every meal, every night's lodging, every treatment.  
7 I mean, it's a much more discreet complaint than that. So it  
8 cannot reasonably be denied, we maintain, that she received  
9 benefits by virtue of her admission.

10           And if Your Honor is persuaded that there is a merger of  
11 the two documents, then you have the problem for the plaintiff  
12 in this case, in terms of trying to oppose arbitration, you  
13 have the problem that they have received direct benefits. Ms.  
14 James received direct benefits by virtue of the admission  
15 agreement. And because of merger, arbitration agreement is  
16 merged with it, and therefore, direct benefits estoppel  
17 prohibits the plaintiff from denying the enforceability of the  
18 admission agreement.

19           And Your Honor, I know that's quite a monologue I've  
20 given. But to try to just recap and make it very quick, I'm  
21 asking the Court to recognize a merger of admission agreement  
22 and arbitration agreement and to do that on the basis of our  
23 law that says, when you have two instruments that are executed  
24 at the same time, for the same purpose, by the same parties,  
25 in the course of the same transaction, they're deemed merged

1 unless there's a contrary intention. The Coleman case says  
2 two very important things in that regard. Number one, that is  
3 the law. We recognize the merger doctrine.

4 Number two, we recognize that, as was the case in  
5 Coleman, admission agreements and arbitration agreements  
6 signed in conjunction with a nursing home admission check  
7 every one of those boxes; same time, parties, purpose, and  
8 transaction. So the only way around merger would be to argue  
9 there's evidence of a contrary intention.

10 And as I've mentioned and we've got it in our brief,  
11 there is no evidence here of a contrary intention. Because  
12 unlike Coleman, we don't have any revocation provision. And  
13 the entire agreement provision in our admission agreement, not  
14 only does it not give any suggestion that the arbitration  
15 agreement is separate, it specifically incorporates by  
16 reference the other admissions materials. And once it is  
17 signed, we certainly maintain and believe it is correct, that  
18 the arbitration agreement is one of those other admissions  
19 materials. And one of the cases, Your Honor, that I was --

20 THE COURT: So let me ask you this. So what you're  
21 saying is that because the daughter signed both of these  
22 documents, I guess, at or near the same time, I think you're  
23 arguing that they're sort of admission materials. Is that  
24 right?

25 MR. HINES: That's exactly right, Your Honor.

1 THE COURT: So then let me just ask you this. Any  
2 document they signed at that point is an admission material?

3 MR. HINES: Any document signed in conjunction with that  
4 admissions process, yes. Theoretically, I can't --

5 THE COURT: And because they don't basically say, hey, by  
6 the way, arbitration doesn't apply, and they're signed at the  
7 same time by this daughter who supposedly says that she has  
8 the authority to do this, you're saying that the documents are  
9 merged; is that right?

10 MR. HINES: Yes, Your Honor. I think that is right.

11 THE COURT: All right. I just want to make sure I'm  
12 following your argument. Okay? All right. And then what  
13 you're saying is because she reaped some of the benefits, you  
14 can't then go and basically say, I don't want the detriments  
15 or I don't want part -- I can't take one part, enjoy that, and  
16 not the other part. And that's your direct benefit estoppel  
17 argument; is that correct?

18 MR. HINES: Your Honor, you're right. You're correct.

19 THE COURT: All right. So what else you want to tell me?

20 MR. HINES: Thank you for listening to all that. That's  
21 all I'll tell you. I believe I've got it all. Other than  
22 saying, Your Honor, we'll rely on our brief. We'll allow it  
23 to suffice or allow it to -- I mean, I realize this is a bit  
24 of a complicated and nuanced issue. And other than thanking  
25 you for your indulgence in hearing that argument, I would just

1 ask for a moment to reply to whatever Mr. Pacella has to say  
2 in opposition. But that's our argument; merger, equitable  
3 estoppel --

4 THE COURT: All right.

5 MR. HINES: -- and that's what we got.

6 THE COURT: All right.

7 Sir, I'm happy to hear from, you.

8 MR. PACELLA: Thank you, Your Honor. Mr. Hines and I  
9 argued this before. And I think (indiscernible) over the real  
10 issues. He submitted three exhibits. There's a number of  
11 exhibits to his motion, but the important ones are Exhibits 1,  
12 2, and 3. 1 is the admission agreement signed by Ms. Dunham.  
13 Exhibit 2 is the arbitration agreement (indiscernible) by Ms.  
14 Dunham, and Exhibit (indiscernible).

15 THE COURT: Hold on.

16 MR. PACELLA: Ms. James never gave --

17 THE COURT: You've got to start over. You're breaking  
18 up.

19 MR. PACELLA: (Indiscernible) any better?

20 THE COURT: You're just coming and going. Let's try  
21 again. Start over. You were talking about the admission  
22 agreement and then the other -- go ahead.

23 MR. PACELLA: Yes, Your Honor. There are three exhibits  
24 that are attached to the defendant's motion. Exhibit 1 is the  
25 admission agreement signed by Ms. Dunham. Exhibit 2 is the

1 arbitration agreement signed by Ms. Dunham. And Exhibit 3 is  
2 a health care power of attorney that is not signed. It is  
3 signed by Ms. Dunham, but not signed by Ms. James, the  
4 decedent. And --

5 THE COURT: Well, hold on. It's a health care power of  
6 attorney that's signed by Ms. Dunham?

7 MR. PACELLA: It is. Ms. Dunham signs as principal on  
8 the document, but Ms. James signs nowhere on the document.  
9 And of course, Ms. James would have been the principal, not  
10 the agent. It is Exhibit --

11 THE COURT: Well, I thought the person who's given the  
12 health care power of attorney is the person that's got to sign  
13 it?

14 MR. PACELLA: She didn't.

15 THE COURT: Okay.

16 MR. PACELLA: And at the time that the defendant is doing  
17 the admission, they are using this health care power of  
18 attorney -- unsigned health care power of attorney to complete  
19 the admission process. They know that Ms. Dunham does not  
20 have authority to admit her mom into the facility. So what  
21 Mr. Hines has glossed over, and I believe intentionally  
22 glossed over, is the lack of authority that Ms. Dunham has  
23 had, arguing her apparent authority because she signed an  
24 agreement that says she had the authority, when it's clear to  
25 them at the time of admission, she did not have the authority.

1           And this brings us to the real legal argument in the  
2 case, which is not the merger and estoppel argument, but which  
3 is Arredondo. The Arrendondo case, Arrendondo v. SNH SE  
4 Ashley River Tenant, LLC, this is in our brief. It's really  
5 the main case in this case. It talks about both a durable  
6 power of attorney and a healthcare power of attorney.

7           The durable power of attorney does not give someone  
8 authority to waive Constitutional rights with respect to  
9 arbitration and the 7th Amendment right to a jury trial.  
10 That's Arrendondo. That's part one.

11           Part two is that a health care power of attorney would  
12 only allow for the waiver of the 7th Amendment Constitutional  
13 rights if the arbitration agreement was essential to the care  
14 of the patient. And that would mean is it mandatory for --

15           THE COURT: You've got to back up for one second. I  
16 apologize. Back up about 15 or 20 seconds because I lost my  
17 focus and --

18           MR. PACELLA: Sure.

19           THE COURT: Go ahead.

20           MR. PACELLA: So Arrendondo starts with two propositions.  
21 One for durable power of attorney, and it says that a durable  
22 power of attorney does not give the agent the authority to  
23 waive someone's Constitutional rights. And it goes through  
24 whether it's a property interest and that sort of thing. But  
25 it stands for that proposition.

1           And then it addresses the issue of a health care power of  
2 attorney. And Arrendondo also says that a health care power  
3 of attorney could only effectuate a waiver of Constitutional  
4 rights, a waiver to a jury trial, if the arbitration clause  
5 was necessary to the delivery of health care. And Mr. Hines,  
6 in his brief, has made it clear that it was not mandatory,  
7 that it was an optional agreement.

8           And so the Arrendondo case, because we have no authority  
9 granted by Ms. James or her estate to the waiver of the 7th  
10 Amendment rights, then there is no authority to this. Because  
11 there's no authority, there is no way for them to compel  
12 arbitration. We'd get to the merger argument if there was a  
13 valid health care power of attorney, but there is not in this  
14 case, Your Honor.

15           THE COURT: Well, let me ask you this, Mr. Pacella. Was  
16 there anything that was prohibiting or impeding your, I guess,  
17 decedent, your client -- you represent the estate now, but the  
18 estate. Anything that was impeding or prohibiting her from  
19 being able to be shown, explain, read, anything prohibiting  
20 her from understanding the document and then being able to  
21 sign the document, if that's what she wanted to do? Is there  
22 any evidence of that?

23           MR. PACELLA: There's not evidence to the extent that we  
24 have -- we haven't developed that evidence in the record. But  
25 this health care power of attorney, Your Honor, was signed in

1 October of -- I'm sorry, was initially drafted in October of  
2 2017. Again, not signed by Ms. James. And the admission is  
3 in August of '18, some ten months later. So there's certainly  
4 some development of time that had elapsed.

5 THE COURT: Okay.

6 MR. PACELLA: I don't know if there's been any --

7 THE COURT: If she had signed it, would your argument be  
8 different?

9 MR. PACELLA: If Ms. James, the decedent, had signed it?

10 THE COURT: Yeah.

11 MR. PACELLA: There is one particular argument that I  
12 would make related to whether it combined all the heirs.  
13 There's a case before the South Carolina Court of Appeals  
14 right now. It is a Judge Stilwell order. I believe it was  
15 Judge Stilwell that had said that the decedent can't bind all  
16 the heirs to a wrongful death because the cause of action  
17 hadn't accrued yet. That's an issue before the Court of  
18 Appeals. I'd be making that argument if Ms. James had signed  
19 it, but Ms. James didn't sign it. I'm not making --

20 THE COURT: I understand.

21 MR. PACELLA: That's not --

22 THE COURT: All right. Thank you. Go ahead.

23 MR. HINES: Is it my turn again?

24 THE COURT: No, no, no. I'm sorry.

25 I didn't mean to cut you off, Mr. Pacella. Is there

1 anything else you want to tell me, sir? I was just asking the  
2 question, because if I don't ask it, I will forget it.

3 MR. PACELLA: Right. No, Your Honor. I believe  
4 Arrendondo is the case to follow in this particular situation  
5 because there is no evidence in the record that Ms. James had  
6 consented either to give her daughter any power of attorney or  
7 consented to the waiver of 7th Amendment rights to a jury  
8 trial. And so I think that's the twofold proposition.  
9 There's no power of attorney that had given her the rights.

10 And what Mr. Hines is asking this Court to do is to bind  
11 three statutory heirs, not just Ms. Dunham, but Ms. Dunham's  
12 siblings as well as statutory heirs and the estate. I believe  
13 that the estate is going to pass to the statutory heirs in the  
14 same manner, so I don't think that's particularly an issue.  
15 But from an intellectual standpoint, the estate and the  
16 statutory heirs is what -- he's asking one of the heirs to  
17 bind the remaining heirs. And equity wouldn't allow for that  
18 kind of proposition.

19 THE COURT: Counsel, I'm happy to hear from you in reply  
20 briefly, please.

21 MR. HINES: Yes, Your Honor. I think this can be  
22 simplified in terms of a lot of what Mr. Pacella just said.  
23 And we're not arguing that there was any form of actual  
24 authority here. And I don't want the Court to get the  
25 impression that that matters. Because there's a case called

1 Wilson v. Willis, which we cite. South Carolina has  
2 recognized several theories that combine nonsignatories to  
3 arbitration agreements under the general principles of  
4 contract and agency law, including estoppel.

5 If we had authority, we would need to -- if authority was  
6 something I could argue to Your Honor, in terms of actual  
7 authority or even apparent, I do think we've argued -- our  
8 brief contains an argument about actual and apparent  
9 authority. But I can go ahead and simplify and say, we can  
10 abandon any notion of actual or apparent authority. My  
11 argument to you is based upon the merger and equitable  
12 estoppel.

13 And it has nothing to do with the health care power of  
14 attorney. I think that was -- included it because I think it  
15 wasn't -- candidly, that it hadn't been signed. And if it had  
16 been signed, there would be an argument to be made about that.  
17 But as far as that actually providing actual authority, Mr.  
18 Pacella had mentioned the Arrendondo case. That would cut  
19 against us on that. I'd like to see that issue go up again,  
20 because I do think there's an argument to be made. But  
21 nonetheless, that's really not here -- it is neither here nor  
22 there.

23 It's merger and equitable estoppel. And the estoppel  
24 argument, obviously, it is not an argument that is trying to  
25 show that there was authority. Equitable estoppel, what it

1 does conceptually is because of the received direct benefits,  
2 you cannot now -- you are estopped to deny the enforceability  
3 of this arbitration agreement that's merged with the admission  
4 agreement. The whole idea is it's not about authority per se.  
5 It's about the inability of the party opposing arbitration to  
6 step in and say, no, I'm going to have my cake and eat it too.  
7 I'm going to get the benefits but not the burdens or what they  
8 would consider to be the burdens. So anyways, authority isn't  
9 the point, nor --

10 THE COURT: I'm with --

11 MR. HINES: -- is the health care --

12 THE COURT: I'm with you on that. I mean, I understand  
13 where you're going. If it's signed, then you move on to, at  
14 the same time, the admission package, and you move on to this  
15 whole direct estoppel type of argument you're making. But  
16 you're saying it doesn't matter -- if the person who signed  
17 the first two documents that create the merger, it doesn't  
18 matter if they have authority?

19 MR. HINES: Yes, Your Honor. Because we're relying --  
20 the reason why it doesn't matter, and this is why it would be  
21 fair and it would be equitable, is because when they've done  
22 that -- and again, by virtue of merger, it's all part of now  
23 one contract. Then you have the party that we're suggesting  
24 should be estopped, which is the resident, and then now the  
25 resident's personal representative, because she's now the

1 decedent. The estoppel -- and the reason why that's fair is  
2 because of the receipt of direct benefits. That resident  
3 having received those direct benefits under the contract is  
4 estopped.

5 It sort of operates like a form of ratification in  
6 that -- it's not ratification per se. It's direct benefits  
7 estoppel, but you can imagine the concept of ratification,  
8 where someone can sign something, who doesn't have authority,  
9 but it can be ratified by the principal after the fact,  
10 express or implied. I mean, to me, it is similar or analogous  
11 to that concept, although I don't want to conflate the two.

12 But yes, Your Honor, to be clear, we are arguing that  
13 that all applies, even in the absence of any actual or  
14 apparent authority on the front end. Although, I would make  
15 clear, any suggestion that we knew that Ms. Dunham didn't have  
16 authority is false. There's no evidence to that effect. And  
17 in fact, she's expressly said that she had authority to sign  
18 the arbitration agreement and did so by signing and saying --  
19 and I mentioned to Your Honor earlier the case called Gibson  
20 v. Epting. There's other cases that would echo this. But  
21 that a party who signs is deemed to have read, understood, and  
22 assented to it. And of course, there's an obligation of good  
23 faith and fair dealing.

24 THE COURT: Mr. Hines, let me ask you this. If we  
25 carried your argument to its logical end, could literally a

1 CNA who works there or somebody off the street go in there and  
2 sign those two things, and then because the decedent received  
3 some benefit, it's merger? I mean, I'm not --

4 MR. HINES: Your Honor, that's a --

5 THE COURT: I mean, I don't see it. I mean, I'm  
6 having --

7 MR. HINES: That's a fair question. And Your Honor, to  
8 take your example, the CNA. If a CNA did that, if someone did  
9 that -- and the reason I wanted to make the point I was just  
10 making about us not knowing that she didn't have authority,  
11 which we did not, and it was expressly -- her daughter  
12 expressed to us that she had authority. Her daughter provided  
13 us, even, with a health care power attorney, albeit an  
14 unsigned one. But the whole idea in her providing it was,  
15 obviously, in furtherance of the fact that she had authority.  
16 And that wouldn't necessarily be the only basis for that  
17 authority anyway. She could have authority outside the  
18 context of a health care power of attorney.

19 But if, Your Honor, to use your example, a CNA who worked  
20 there and we knew that person didn't have authority, then I  
21 think your whole claim for estoppel crumbles. Because  
22 obviously, you can't have unclean hands. So if you're doing  
23 something where it's just out and out funny business, then  
24 you're never going to win an on an estoppel claim. So that  
25 would be a safeguard.

1 THE COURT: All right. I'm with you. I'm with you. All  
2 right.

3 So I only have -- do we have the other brief? Do we have  
4 that?

5 THE DEPUTY CLERK: Um-hum.

6 THE COURT: Okay. So you can print the out for me.

7 All right. Because I want to review both briefs. I have  
8 one of them that's been printed out. I kind of like it old --  
9 I like to read it and hold it in my hand. He's going to print  
10 me out the other one.

11 Anything else you all want to tell me briefly? Because  
12 if not, I'll get you all a decision by Tuesday or Wednesday,  
13 and then I'll have somebody prepare an order. Okay?

14 MR. PACELLA: Your Honor --

15 MR. HINES: (Indiscernible) --

16 MR. PACELLA: -- the issue of whether the facility knew  
17 or didn't know, I think an unsigned power of attorney gives  
18 them pretty good indication that there is no authority. And  
19 reading that power of attorney and in looking at the  
20 signatures would identify that there was not authority. And  
21 so I just wanted to make sure that factual argument is set  
22 forth. And I don't know that I made that in my brief --

23 THE COURT: Well, I --

24 MR. PACELLA: -- but I (indiscernible) argument in the  
25 brief.

1 THE COURT: You made it. I mean, I understand where  
2 you're coming from.

3 MR. HINES: The counterpoint on that, Your Honor --

4 THE COURT: All right.

5 MR. HINES: -- would be we got her expressed  
6 representation. She's giving us that power of attorney in  
7 furtherance of --

8 THE COURT: I understand.

9 MR. HINES: -- a representation of authority. And the  
10 Arrendondo case had not come out by that time back in 2018.  
11 But with that, Your Honor, I'll hush and stand down.

12 THE COURT: All right. Gentlemen, I'll be in touch, or  
13 my clerk, and have something to you all no later than  
14 Wednesday. Okay?

15 MR. HINES: Thank you, Your Honor.

16 MR. PACELLA: Thanks.

17 THE COURT: Thank you.

18 MR. PACELLA: Thanks, Russ.

19 THE COURT: Have a good Thanksgiving.

20 MR. HINES: Thanks, Mario.

21 (End of Transcript of Record)

22

23

24

25



State of South Carolina )  
 ) Court of General Sessions  
County of Colleton ) 2021-CP-18-01030

Tammy China )  
 )  
 vs. ) Transcript of Record  
 )  
 Palmetto Hallmark Operating, )  
 LLC )

December 19, 2022  
Walterboro, South Carolina

B E F O R E:

The Honorable Robert J. Bonds, Judge.

A P P E A R A N C E S (All present by video or telephone):

Russell G. Hines  
Attorney for the Defendant

Mario A. Pacella  
Attorney for the Plaintiff

Jaimi Van Bochove  
Transcriber



1 THE COURT: All right. We got everybody?

2 We've got, let's see, a motion to alter or amend in Tammy  
3 China V. Palmetto Hallmark Operating. And I think this is a  
4 defense motion.

5 Are you guys there?

6 MR. HINES: Oh, Your Honor. This is Russ Hines. I'm  
7 just now realizing -- yes, I'm here. I hope you can hear me  
8 all right.

9 THE COURT: Yeah, I can hear you fine, Mr. Hines.

10 And so who do we have here on behalf of the plaintiff?

11 MR. PACELLA: Hi, Your Honor. Mario Pacella on behalf of  
12 the plaintiff.

13 THE COURT: Yes, sir. All right.

14 So Mr. Hines, I think this is your motion, sir, to  
15 reconsider?

16 MR. HINES: Yes, Your Honor.

17 THE COURT: Yes, sir, Mr. Hines. I'm happy to hear from  
18 you, sir.

19 MR. HINES: Thank you. And may it please the Court, I  
20 hope to make fairly quick work of this. I know that the  
21 motion itself is -- well, is fairly long because it goes into  
22 a number of issues. Well, I think for my purposes, it  
23 suffices it to rest on what the motion says there in writing.  
24 But really, my main concern, Your Honor -- and I don't mean to  
25 be a pain in the neck about this. Because this was one -- and

1 I don't -- well, I think all of us, it's a bit of an unusual  
2 circumstance. This is the one where we made a motion to  
3 compel arbitration. It was heard and denied by Judge Dennis  
4 back in May.

5 THE COURT: Right.

6 MR. HINES: We made a timely motion to reconsider. And  
7 while that motion was pending, Judge Dennis retired without  
8 having ruled on the motion and went in to private practice.  
9 My understanding then was that, from Judge Goodstein as chief  
10 administrative judge, she made a determination that we had  
11 sort of an odd situation where because of the nature of the  
12 motion, it being a motion directed specifically to Judge  
13 Dennis asking him to reconsider an order and his inability to  
14 do that considering his retirement, the motion to compel  
15 arbitration needed to be reheard. And that's what was in  
16 front of Your Honor on November the 17th.

17 And in the wake of that November 17th hearing, you issued  
18 an order that was filed on the 28th of November that expressed  
19 that it was denying Judge Dennis' motion to reconsider. And  
20 this is me perhaps being paranoid. I'm not trying to be,  
21 again, a pain in the neck.

22 THE COURT: You're not, sir.

23 MR. HINES: But I was thinking that what I understood  
24 Your Honor to be ruling on on that November 17th hearing was a  
25 motion -- was ruling on it as if Judge Dennis hadn't ruled

1 sort of. It was --

2 THE COURT: Okay.

3 MR. HINES: While preserving, of course, my arguments on  
4 the merits, I just want to make sure my record is protected to  
5 protect my client's interest. And again, while I'd be  
6 delighted if Your Honor was inclined to go so far as to grant  
7 this motion and totally reverse course and compel arbitration,  
8 that's obviously our number one thing, and we've written that  
9 in motion. But really, to the extent Your Honor is not  
10 inclined to do that, and I realize that it's a long shot that  
11 you might be, but more likely than not you're not inclined to  
12 do it.

13 But to the extent you're not inclined to reverse course  
14 and grant us the motion to compel arbitration, I think a  
15 convenient way, perhaps, to clear this up would simply be a  
16 Form 4 from Your Honor that clarifies that your ruling on the  
17 28th constitutes a denial of the motion to compel arbitration  
18 on the same reasoning is that set forth in Judge Dennis'  
19 order. Because it looked like you concurred with his  
20 reasoning in the Form 4 and also denying this motion to  
21 reconsider. Again, I'm not asking, per se, for a denial  
22 because we would like to -- again, I'm just trying to make the  
23 point that --

24 THE COURT: I understand that.

25 MR. HINES: -- we don't waive our -- but as far as --

1 unless we're going to have the extraordinary event of you  
2 granting our motion to reconsider, which is not often the case  
3 in these type of motions, all I'm trying to do really is to  
4 clean up that little bit of housekeeping as to the nature of  
5 what Your Honor heard and ruled on the 28th.

6 THE COURT: All right. All right.

7 Counsel, is that your understanding? We were basically  
8 going to let me just stand in and hear this? I wasn't  
9 reviewing, per se, Judge Dennis, but this was a finding that I  
10 was going to make?

11 MR. PACELLA: Yes, Your Honor. That was our  
12 understanding from Judge Goodstein, in that because you  
13 couldn't overrule another superior -- I mean, sorry, I'm in  
14 Georgia today -- another circuit court judge, that you'd have  
15 to start over. And I understand Mr. Hines is not asking you  
16 to do this, but I think his proposed solution makes some  
17 sense, as to want to keep the record clean for his  
18 appellate -- to preserve the record (indiscernible).

19 THE COURT: All right.

20 And as it relates to that again Mr. Hines -- and then I  
21 still want to hear from you a little bit. But as it relates  
22 to the record to be cleaned up in what fashion, sir, by a  
23 supplemental Form 4?

24 MR. HINES: Yes, Your Honor. I think that a supplemental  
25 Form 4 that just makes clear that your ruling of November 28th

1 denied our motion to compel arbitration.

2 THE COURT: Right.

3 MR. HINES: As opposed to the -- and this is, I know,  
4 hair splitting. But what it said was that it denied our  
5 motion to reconsider the denial of motion to compel. And  
6 because of the sort of unusual circumstances with Judge Dennis  
7 having retired, as I understood it, it's as if he never  
8 actually denied our motion in the first place.

9 THE COURT: All right. So I'm going to be the one -- and  
10 I understand, and I'm still going to listen to you. And I've  
11 reviewed some of a 21-page brief. I'm going to be honest, I  
12 haven't read every page of it, Mr. Hines. I'm going to be  
13 honest with you, sir.

14 MR. HINES: Well, and that's --

15 THE COURT: So basically, I'm denying the motion to  
16 compel. Amongst other things, some of the reasons that I was  
17 doing that was adopting some of the findings I think that  
18 Judge Dennis had indicated in his prior order. Now, you'd  
19 like to see me reverse course. I understand. But as far as  
20 housekeeping and cleaning that up, would that be satisfactory,  
21 sir?

22 MR. HINES: Yes, Your Honor. I believe it would, just to  
23 make --

24 THE COURT: All right.

25 MR. HINES: -- to make clear that the original motion to

1 compel, let's call it --

2 THE COURT: I understand.

3 MR. HINES: -- you're denying it. And then with that,  
4 Your Honor, with the understanding that we're not waiving the  
5 arguments on the merits. I realize this is a motion to  
6 reconsider. You certainly spent a nice amount of time with us  
7 when you heard this in the first instance.

8 THE COURT: This is the case, Mr. Hines, where the lady  
9 was in the nursing home and the paperwork and the welcoming  
10 package, but then also there was a place for her to sign on  
11 the power of attorney, but it didn't get signed; is that what  
12 this is, Mr. Hines? Is this the case?

13 MR. HINES: Your Honor, this is one where what we're  
14 trying to do is we're trying to compel to arbitration. This  
15 is a wrongful death and survival action brought against our  
16 client, is the nursing facility -- skilled nursing facility.  
17 And we're trying to compel the claims against us to  
18 arbitration. We have to concede that we don't have a signed  
19 arbitration agreement by the decedent, Ms. James.

20 THE COURT: Right.

21 MR. HINES: What we have is an agreement that was signed  
22 on her behalf by Emma Dunham. And we go through in -- the  
23 primary argument we make for enforcement, Your Honor, is based  
24 upon merger and equitable estoppel. And the basic argument  
25 there is that even though Ms. James was not herself a -- even

1 though she did not herself sign the arbitration agreement,  
2 that it was signed on her behalf, and it was signed in  
3 conjunction with the admission agreement that admitted her to  
4 our facility.

5 And so therefore, we trigger a doctrine called merger,  
6 which is if you have two documents that are signed at the same  
7 time, by the same parties, for the same purpose, and in the  
8 course of the same transaction, they should be construed and  
9 considered together as one. And so the basic point there is  
10 to say the arbitration agreement and admission agreement would  
11 be construed as a single document. And it's a one-two punch,  
12 this argument because that's the first punch.

13 The second one is equitable estoppel, and this is on the  
14 basis of something called direct benefits estoppel, which says  
15 that if you receive benefits under certain provisions of a  
16 contract, you cannot deny the enforceability of other parts of  
17 the contract that you don't like. And the way that would  
18 operate here is to say that Ms. James, having been admitted to  
19 the facility, received benefits in terms of room and board,  
20 various services that she received at the facility and under  
21 the admission agreement, with which, by virtue of my merger  
22 argument, is merged with the arbitration agreement, and  
23 therefore, you have this direct benefits estoppel. I realize  
24 I'm covering a lot of ground there, Your Honor, but that's --

25 THE COURT: No. No.

1 MR. HINES: -- the basic --

2 THE COURT: You're refreshing my memory.

3 MR. HINES: That is the basic setup of the argument.

4 THE COURT: All right.

5 MR. HINES: And I would say that our Supreme Court, in a  
6 case called Wilson v. Willis, the first one that comes to  
7 mind -- I think I can cite to you another authority -- but I  
8 know it's a bit odd to think of enforcement of an arbitration  
9 agreement against someone who didn't sign it. And the  
10 terminology that you use is a nonsignatory, and we have to  
11 acknowledge that Ms. James is a nonsignatory. Even though  
12 she's no longer living, her personal representative steps into  
13 her shoes. And so therefore, we would have to show that Ms.  
14 James would be bound. And if Ms. James is bound, then her PR  
15 would be bound through Ms. James.

16 But Wilson v. Willis I mentioned because our Supreme  
17 Court in that case did recognize that you can bind a  
18 nonsignatory to an arbitration agreement in a number of  
19 different ways. One of which was through estoppel. And so  
20 the point I make there is to say, I realize that the Court  
21 could have some discomfort in just the basic setup of  
22 compelling arbitration against a nonsignatory, but it's not  
23 foreign to our law.

24 And the other point that I would make is -- oh, forgive  
25 me. Oh, in the doctrine of merger, the case that we cite I

1 think primarily is a case called Coleman v. Mariner Health  
2 Care. And in that case, you had a nursing home resident and  
3 her sister were involved. The sister signed the paperwork for  
4 the resident. And the main issue in Coleman was a question of  
5 whether or not the South Carolina Adult Health Care Consent  
6 Act provided authority for the sister to sign on her other  
7 sister's behalf. And the Coleman court explained how it did  
8 not. We don't get into that here.

9 But the second part of Coleman, it was a smaller part of  
10 the opinion, talked about an alternate argument that the  
11 proponent of arbitration made in that case, which was on the  
12 basis of equitable estoppel. And it started as I'm doing here  
13 with the idea of merger. Because the first thing I want to  
14 try to convince Your Honor is that we should merge arbitration  
15 agreement and admission agreement. Because once they become  
16 one, then I'm looking to find the benefits that were received  
17 under that document in the form of the admission, and  
18 therefore, I can argue for direct benefits estoppel.

19 But it's a long way of saying that in Coleman, it was an  
20 arbitration case in a nursing home context. And the Coleman  
21 course specifically said that the arbitration agreement and  
22 the admission agreement that the sister signed for the other  
23 sister, her resident, that they acknowledge that was in the  
24 documents signed at the same time, for the same purpose, by  
25 the same parties, in the course the same transaction.

1           Now, what happened in Coleman is the court said, if you  
2 have all those four things, you checked all those boxes, you  
3 have merger unless there is evidence of an intent contrary to  
4 merger. And the court went on and explained how in that case,  
5 there was, in fact, evidence of an intent contrary to merger.  
6 Primarily, the court found that there was evidence of intent  
7 contrary to merger because in that case there was an entire  
8 agreement clause in the admission agreement that seemed to  
9 refer to the arbitration agreement in terms that the court  
10 considered evidence, what it called separatedness. Meaning to  
11 say that there was an intention there expressed from the  
12 documents to maintain the separate status of these two  
13 documents that would thwart merger through the doctrine of  
14 merger.

15           I argue here that we don't have the facts that would show  
16 separatedness. In fact, we have an entire agreement provision  
17 in the arbitration agreement, but it expressly indicates that  
18 other admissions materials would be considered to be part of  
19 it. And we make the argument that other admissions materials  
20 include the arbitration agreement. They include the  
21 arbitration agreement, which -- well, one of the arguments  
22 that we hear sometimes in opposition to this is that, well,  
23 the arbitration agreement wasn't necessary to the admission.

24           And that's true, it wasn't. It wasn't required. It was  
25 optional. But once it is signed, then it is a part of the

1 admissions materials because it is signed in conjunction with  
2 the admissions process. This is all part of the documentation  
3 that, whether it's the resident or this case the resident's  
4 representative, is going through in the process of being  
5 admitted. So Coleman is often cited, well, against me in this  
6 argument. I look at Coleman and see it as much more positive  
7 for me than it is negative.

8       Because Coleman, for one thing, absolutely makes clear  
9 that when you have an admission agreement and an arbitration  
10 agreement signed in conjunction with a nursing home admission,  
11 you check all four boxes; the same party, same time, purpose,  
12 and transaction. Then the battleground becomes is there this  
13 evidence of an intention contrary to merger. And that's where  
14 you get on the specific facts of the cases. And I think our  
15 case is different from Coleman.

16       Coleman, again, we have better entire agreement clause.  
17 Ours does not have the language that would reflect a  
18 separatedness between arbitration agreement and admission  
19 agreement. Ours is more encompassing. It actually talks  
20 about other admissions materials being included.

21       We also don't have what they had in Coleman, which was  
22 this revocation provision. In Coleman, the admission  
23 agreement -- or the arbitration agreement, rather, had a  
24 provision in it that allowed it to be revoked within 30 days  
25 for any reason. So you had a situation where you could say,

1 in the Coleman case, well, how can you say they're merged when  
2 one of the two documents might just fall away and might be a  
3 part of it and could be revoked. Well, we don't have that  
4 here. Once you sign it, there is no revocation as far as the  
5 30 day revocation.

6 And then as far as the -- if Your Honor would go with me  
7 that far, then you look at direct benefits estoppel. And the  
8 question there is, is there the direct benefit that's realized  
9 under the contract? And if so, then the direct benefit  
10 estoppel would say, you can't have your cake and eat it too or  
11 you got to take the good with the bad. You can't get the  
12 benefits of the contract and deny provisions that you find to  
13 be not to your liking.

14 And that's really the -- well, we get into some other --  
15 the way this motion to reconsider was drafted is it really  
16 took -- as for the substance of the Court's ruling, it tried  
17 to track what Judge Dennis did in his prior ruling. Because  
18 it seemed that Your Honor was in line -- your thinking was in  
19 line with Judge Dennis' thinking, that you --

20 THE COURT: Yes, sir.

21 MR. HINES: And so that's where we took that as far as  
22 trying to get into that. But the main point here is we're  
23 arguing as merger and equitable estoppel.

24 THE COURT: Okay.

25 MR. HINES: Otherwise we can -- there's some nuance in

1 there, but we could rely on this brief, and we're happy to do  
2 that. And again, we understand -- I thank you very much for  
3 your indulgence. I understand we're here on a motion to  
4 reconsider, and you've already given this quite a bit of  
5 consideration in the first instance. So I appreciate very  
6 much you hearing it --

7 THE COURT: Not at all.

8 MR. HINES: -- (indiscernible).

9 THE COURT: Not at all, sir. That's what I'm here to do.  
10 And I appreciate your summary, and I will go back and  
11 examine -- I probably got about a third of the way through the  
12 brief, but I will examine the rest of it.

13 Mr. Pacella, anything you want to tell me, sir?

14 MR. PACELLA: Your Honor, I'm not going to get involved  
15 too far afield in this. I think we've got a power of attorney  
16 that was not executed. Ms. Dunham didn't have the authority.  
17 And following the Arrendondo ruling, it's going to be a very  
18 tough stretch for anyone to say that there was a knowing and  
19 intelligent voluntary waiver of a Constitutional right to a  
20 jury trial, given that the documents, the arbitration  
21 agreement and the admission agreement, are signed not by Ms.  
22 James and not signed by all three of the statutory heirs for  
23 the wrongful death, or even the person who's ultimately  
24 personal representative.

25 I think we're just going very far afield to try to get

1 into a merger and estoppel argument based on some apparent  
2 authority that the nursing home certainly knew Ms. Dunham  
3 didn't have, given the fact that they had the health care  
4 power of attorney document with their admission materials and  
5 easily could have read it and known that she didn't have any  
6 authority.

7 THE COURT: All right. Well, gentleman, I'm going to  
8 look back through it. I'll have a decision this week.

9 MR. HINES: Thank you, Your Honor.

10 THE COURT: I'll have a decision this week. I'm trying  
11 to finish a bunch of stuff up, and I'll have it done this  
12 week. So you guys have a good holiday, and you'll hear from  
13 me before the end of the week.

14 Madam Clerk, thank you, again, for helping set this up  
15 and for your patience in this matter. All right?

16 THE DEPUTY CLERK: My pleasure, Judge.

17 THE COURT: All right. You all take care. Can I sign  
18 out?

19 MR. HINES: You too. Thank you.

20 MR. PACELLA: Thanks, Russ.

21 MR. HINES: Thanks, Mario.

22 (End of Transcript of Record)

23

24

25





CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

Matthew O. Riddle

SC State Bar ID No.: 76650

Kara S. Grevey

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*Attorneys for the Defendant Fundamental Long  
Term Care Holdings, LLC*

Charleston, South Carolina

Dated: August 18, 2021



## LEGAL STANDARD

The question for the court is whether in the light most favorable to the Plaintiff, and with every doubt resolved in her behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008); citing *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the “facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case,” then dismissal under Rule 12(b)(6) is improper. *Id.*; citing *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

## ARGUMENT

The Plaintiff in this case, Tammy China, as Personal Representative for the Estate of Emma Lee James, filed a Complaint on June 9, 2021, asserting claims for negligence and/or gross negligence; negligence per se; “vicarious liability, ostensible agency and/or respondeat superior;” wrongful death; and a survival cause of action. See *Plaintiff’s Complaint* (“*Compl.*”) ¶¶ 59-92, attached hereto as **EXHIBIT A**. Plaintiff’s claims stem from allegedly deficient care and treatment rendered to Ms. James during her residency at Hallmark Healthcare Center (“the Facility”) from August 1, 2018 to October 15, 2018. Finally, the Plaintiff has asserted that “[u]pon information and belief, at all times relevant to this Complaint, Defendant Fundamental Long Term Care has been a for-profit holding company, and has provided administration, payroll, human resources, and staffing services, in addition to having an ownership interest in, of over 400 long-term and skilled nursing companies nationwide, including facilities in South Carolina, such as Defendant Hallmark.” See *Compl.* ¶ 9.

The Plaintiff has improperly named this Defendant in this lawsuit, and the claims against it must be dismissed. As will be further established through supporting affidavits and documents,

there is no such entity as “Fundamental Long Term Care.” Additionally, this Defendant, Fundamental Long Term Care Holdings, LLC, has no conceivable connection to the facts of this case. Contrary to the incorrect assertion in the Plaintiff’s Complaint, this Defendant does not provide, nor has it ever provided, administrative, payroll, human resources, or any other such services to the Facility, including during Ms. James’s residency at the Facility. Moreover, this Defendant did not have an ownership interest in the Facility during the period of Ms. James’s residency in 2018. As a result, this Defendant did not owe the Plaintiff or the Plaintiff’s decedent a legal duty of care with respect to the alleged injuries suffered in this action, and the Plaintiff has not alleged any facts that could conceivably give rise to such a duty. The Plaintiff’s claims as to this Defendant must therefore be dismissed.

### **CONCLUSION**

For the foregoing reasons, this Defendant respectfully submits that this Court should dismiss this action against it pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, because Plaintiff has not plead sufficient facts to constitute a cause of action. This Defendant reserves the right to submit additional supporting affidavits, memoranda, and/or other relevant documents in response to any submissions of the Plaintiff, and in support of additional grounds for dismissal pursuant to Rules 12(b)(4) and 12(b)(5), SCRCPP, as set forth in its Motion.

**[SIGNATURE BLOCK ON FOLLOWING PAGE.]**

CLEMENT RIVERS, LLP

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*Attorneys for the Defendant Fundamental Long  
Term Care Holdings, LLC*

Charleston, South Carolina

Dated: October 27, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 1st JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
	)	C/A No. 2021-CP-18-01030
Tammy China, as Personal Representative	)	
of the Estate of Emma Lee James,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Palmetto Hallmark Operating, LLC	)	
d/b/a Hallmark Healthcare Center,	)	
Fundamental Long Term Care, THI of	)	
South Carolina, LLC, THI of	)	
Baltimore, Inc., and Elite Patient Care of	)	
South Carolina, PC,	)	
	)	
Defendants.	)	
	)	

---

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT  
FUNDAMENTAL LONG TERM CARE, LLC’S MOTION TO DISMISS**

Plaintiff, Tammy China, as the Personal Representative of the Estate of Emma Lee James, files this Memorandum in Opposition to the Motion to Dismiss by Defendant Fundamental Long Term Health Care, LLC’s (“Defendant” or “Defendant Fundamental”). As of the time of this filing, Plaintiff has only seen a bare bones motion alleging that her Complaint should be dismissed for insufficiency of process, insufficiency of service of process, and failure to state a claim pursuant to Rules 12(b)(4), 12(b)(5), and 12(b)(6) of the South Carolina Rules of Civil Procedure, respectively. Defendant’s Motion, as filed at this time, does not cite any facts or law which would entitle it to relief under these rules, and as such it should be denied. However, Plaintiff expressly reserves the right to supplement and/or modify this memorandum as necessary in response to any support of this Motion filed by Defendants at a later time, and which is permitted by the Court.

## BACKGROUND

This matter arises out of the death of Ms. Emma Lee James on November 4, 2018. (*See Exhibit 1*, Complaint, C/A No. 2021-CP-18-01030). Ms. James' death certificate listed sepsis and sacral pressure ulcer as the causes of death. (*Id.*) Ms. James had been under the care of Defendants at Hallmark Health Care Center, 255 Midland Parkway, Summerville, SC 29485. (*Id.*)

## STANDARD OF REVIEW

Under the South Carolina Rules of Civil Procedure, a complaint is subject to dismissal only where it "fail[s] to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRPC. According to the South Carolina Supreme Court, dismissal under Rule 12(b)(6) is only appropriate if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, do not entitle the plaintiff to relief on any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Flateau v. Harrelson*, 355 S.C. 197, 201–02, 584 S.E.2d 413, 415 (Ct. App. 2003) (citations omitted).

## ANALYSIS

### **I. Plaintiff properly alleged facts pleading Defendant Fundamental as a party**

Plaintiff's Complaint, which was filed and served along with a Summons and attached hereto as **Exhibit 1**, alleged as follows:

At all times relevant to this complaint, and upon information and belief, Defendant Hallmark is owned, operated and controlled, in whole or in part, by Defendants Fundamental Long Term Care, THI of South Carolina, LLC, and THI of Baltimore, LLC (collectively the "Fundamental Defendants").

(Exhibit 1, Paragraph 1). Further, Plaintiff's Complaint alleged:

Upon information and belief, at all times relevant to this Complaint, Defendant Fundamental Long Term Care has been a for-profit holding company, and has provided administration, payroll, human resources, and staffing services, in addition to having an ownership interest in, of over 400 long-term and skilled nursing companies nationwide, including facilities in South Carolina, such as Defendant Hallmark.

(Exhibit 1, Paragraph 9).

While the identity, role, and assets of different entities in nursing home litigation is a constantly moving target, Plaintiff's inclusion of this entity was based on research which linked Defendant Fundamental to the Hallmark facility. Attached hereto as **Exhibit 2** is a copy of a page from Defendant Fundamental's website, dated today, which confirms that Defendant Hallmark Healthcare Center, located at 255 Midland Parkway, Summerville, SC 29485, either is now, or was at some point, one of Defendant Fundamental Long Term Care's facilities. Neither Plaintiff nor the Court have been provided with any suitable information or assurance at this point that Defendant Fundamental is not a proper party to this lawsuit. As such, Defendant Fundamental's Motion to Dismiss should be denied.

## **II. Plaintiff properly served Defendant Fundamental**

Defendant Fundamental Long Term Care is an LLC organized under Maryland law which is not currently registered or authorized to conduct business in South Carolina. It is unclear to Plaintiff as of this time if it ever was, despite its having operated several facilities here. However, pursuant to S.C. Code Ann. § 15-9-245, such a business may be served through the South Carolina Secretary of State. This is precisely what Plaintiff did. Proof of acceptance of service is attached hereto as **Exhibit 3**. As such, Defendant's Motion to Dismiss should be denied.

## **III. Defendant has waived any argument not raised by its pending motion**

Defendant's Motion alleges that Plaintiff's Complaint must be dismissed pursuant to

Rules 12(b)(4), 12(b)(5), and 12(b)(6). However, it does not allege how service or the Complaint itself, either from a legal or factual standpoint, was deficient. Rule 7(b)(1), SCRCF, provides:

An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, **shall state with particularity the grounds therefor**, and shall set forth the relief or order sought.

South Carolina courts have interpreted the particularity requirement with flexibility. *Lucey v. Meyer*, 401 S.C. 122, 736 S.E.2d 274 (Ct.App. 2012) (emphasis added). However, “[b]y requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.” *Lucey*, 401 S.C. at 131-32, 736 S.E.2d at 279, quoting *Calderon v. Kansas Dept. of Soc. & Rehab Servs.*, 181 F.3d 1180, 1186 (10<sup>th</sup> Cir. 1999).

Plaintiff files this memorandum in opposition without the benefit of having received anything else yet other than Defendant’s boilerplate motion. Defendant should be precluded from setting forth any new grounds in a subsequent supporting memorandum which are not previously raised. Should Defendant raise additional grounds for the first time at argument or in a memorandum filed by Defendant contemporaneously with Plaintiff’s motion, Plaintiff would respectfully request time to respond prior to the Court’s decision.

### CONCLUSION

Defendant, as of this time, has failed to state with any particularity the basis, factual or legal, for its Motion under Rules 12(b)(4), 12(b)(5), or 12(b)(6). Thus, the Motion should be denied.

This 27th, day of October, 2021.

[SIGNATURE PAGE FOLLOWS]

STROM LAW FIRM, LLC

/s/ Mario A. Pacella

Mario A. Pacella (S.C. Bar No. 68488)

Amy E. Willbanks (S.C. Bar No. 69331)

6923 N. Trenholm Road, Suite 200

Columbia, SC 29206

TEL: (803) 252-4800

FAX: (803) 252-4801

[mpacella@stromlaw.com](mailto:mpacella@stromlaw.com)

[awillbanks@stromlaw.com](mailto:awillbanks@stromlaw.com)



**Fundamental believes in the simple** power of one person caring for another. It is a phenomenon that begins where technology leaves off.

If we, as caregivers, are able to reach a person's heart, and speak to who they are, then at the end of the day, the life that is changed most is often our own.

### Hallmark Healthcare Center

---

255 Midland Parkway  
Summerville, SC 29485

---

Phone: (843)821-5005  
Fax: (843)821-5001

---

Number of Beds: **88**

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State of South Carolina  
Office of the Secretary of State  
The Honorable Mark Hammond

1205 PENDLETON STREET, SUITE 525  
COLUMBIA, SC 29201

803-734-2178  
www.sos.sc.gov



July 22, 2021

ELECTRONIC CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Fundamental LongTerm Care  
920 Ridgebrook Road  
Sparks, MD 21152

RE: Fundamental LongTerm Care, 2021-CP-18-01030

Dear Madam/Sir:

In accordance with South Carolina Code § 15-9-245, we are enclosing herewith a copy of the Summons; Complaint; and Exhibit 1 in the above-entitled case. Service was accepted on July 19, 2021 and a copy has been duly filed in our office as of this date. The fee of \$10.00 has been paid.

Yours very truly,

A handwritten signature in blue ink that reads "Allyson Green".

Allyson Green  
South Carolina Secretary of State's Office

Enclosures

cc: Strom Law Firm, LLC  
Traci Clark  
6923 N Trenholm Rd. Ste 200  
Columbia, SC 29206

ELECTRONICALLY FILED - 2021 Jul 27 3:31 PM - DORCHESTER - COMMON PLEAS - CASE#2021CP1801030  
FILED - 2021 Oct 27 6:20 PM - DORCHESTER - COMMON PLEAS - CASE#2021CP1801030

Corporations  
803-734-2158

UCC  
803-734-2175

Charities  
803-734-1790

Boards & Commissions  
803-734-2512

Notaries  
803-734-2512

Trademarks  
803-734-0629

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
TAMMY CHINA, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF EMMA LEE JAMES,	)	CASE NO. 2021-CP-18-01030
	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
PALMETTO HALLMARK OPERATING, LLC D/B/A HALLMARK HEALTHCARE CENTER, FUNDAMENTAL LONG TERM CARE, THI OF SOUTH CAROLINA, LLC, THI OF BALTIMORE, INC., AND ELITE PATIENT CARE OF SOUTH CAROLINA, PC,	)	<b>STIPULATION OF DISMISSAL WITHOUT PREJUDICE AS TO FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC, THI OF SOUTH CAROLINA, LLC, AND THI OF BALTIMORE, INC.</b>
	)	
	)	
DEFENDANTS.	)	
	)	

TO: MARIO A. PACELLA, AMY E. WILLBANKS, AND JESSICA L. FICKLING, ATTORNEYS FOR PLAINTIFF:

The Plaintiff, Tammy China, as Personal Representative for the Estate of Emma Lee James, and Defendants, Fundamental Long Term Care Holdings, LLC (incorrectly named in Plaintiff’s Complaint as “Fundamental Long Term Care”), THI of South Carolina, LLC, and THI of Baltimore, Inc., subject to their objections to personal jurisdiction, hereby agree and stipulate to the following:

1. That the Plaintiff hereby dismisses *without prejudice* pursuant to Rule 41(a)(1)(A)(ii) of the South Carolina Rules of Civil Procedure Fundamental Long Term Care Holdings, LLC (incorrectly named in Plaintiff’s Complaint as “Fundamental Long Term Care”), THI of South Carolina, LLC, and THI of Baltimore, Inc. in the above-captioned matter.

2. The parties further agree that the statute of limitations is hereby tolled for two years until December 29, 2023 (“tolled date”) with regard to all claims Plaintiff has asserted in this action as to these Defendants. Should the Plaintiff commence suit against these defendants on or before the tolled date, then the suit will be deemed to have been commenced on August 31, 2020.
3. The parties further agree that, by entering into this agreement, no claims or defenses shall be considered waived or abandoned, including these Defendants’ objections to the personal jurisdiction of this Court. This stipulation does not revive any previously time barred claims. Entering into this agreement shall not be considered a voluntary appearance by any party.

STROM LAW FIRM, LLC

CLEMENT RIVERS, LLP

By: /s/ Mario A. Pacella  
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Amy E. Willbanks  
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*Attorneys for the Defendants Fundamental  
Long Term Care Holdings, LLC, THI of  
South Carolina, LLC and THI of Baltimore,  
Inc.*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
TAMMY CHINA, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF EMMA LEE JAMES,	)	CASE NO. 2021-CP-18-01030
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	<b>DEFENDANT PALMETTO HALLMARK OPERATING, LLC D/B/A HALLMARK HEALTHCARE CENTER'S MOTION TO COMPEL ARBITRATION</b>
PALMETTO HALLMARK OPERATING, LLC D/B/A HALLMARK HEALTHCARE CENTER AND ELITE PATIENT CARE OF SOUTH CAROLINA, PC,	)	
	)	
DEFENDANTS.	)	
	)	

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**TO: MARIO A. PACELLA, ATTORNEY FOR PLAINTIFF:**

PLEASE TAKE NOTICE that Defendant Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (“this Defendant” or “the Facility”), by and through its undersigned attorneys, will move before this Honorable Court at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action and compelling arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* and South Carolina Rules of Civil Procedure 12(b)(1) and (6). This Defendant bases this Motion on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Emma Lee James’ admission to the Facility. (*See* “Facility-Resident/Representative Arbitration Agreement,” attached as **Exhibit A.**) The Arbitration Agreement is expressly binding on this Defendant and Plaintiff and requires that Plaintiff’s claims be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions

or discovery filed or served by Plaintiff while the current motion is pending. This Motion is supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits, or other evidence which may be submitted prior to the hearing on this Motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

**CLEMENT RIVERS, LLP**

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

*Attorney for the Defendant Palmetto Hallmark*

*Operating, LLC d/b/a Hallmark Healthcare Center*

Charleston, South Carolina

Dated: January 21, 2022

**PLEASE READ CAREFULLY**

**FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT**

This Agreement is made between HALLMARK HEALTHCARE ("Facility"), its agents, employees and servants, and Dear Sir or Madam, Emma James ("Resident") or Emma James ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that 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 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.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

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 Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

**I understand and agree that I am giving up and waiving my right to a jury trial.**

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

X Emma Dunham  
Resident/Representative Signature Date

X Emma A Dunham  
Printed Name of Resident/Representative

Alicia Anderson 8-7-18  
Authorized Agent of Facility Date

Alicia Anderson  
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
TAMMY CHINA, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF EMMA LEE JAMES,	)	CASE NO. 2021-CP-18-01030
	)	
PLAINTIFF,	)	
	)	
vs.	)	<b>DEFENDANT PALMETTO HALLMARK OPERATING, LLC D/B/A HALLMARK HEALTHCARE CENTER'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION</b>
	)	
PALMETTO HALLMARK OPERATING, LLC D/B/A HALLMARK HEALTHCARE CENTER AND ELITE PATIENT CARE OF SOUTH CAROLINA, PC,	)	
	)	
DEFENDANTS.	)	
	)	

---

Defendant Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (“this Defendant” or the “Facility”), hereby submits the following Memorandum in Support of its Motion to Compel Arbitration filed on January 21, 2022, pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq. and South Carolina Rules of Civil Procedure 12(b)(1) and (6).

Emma Lee James (“Ms. James”) was a resident of the Facility from early August 2018 to October 15, 2018. After her discharge, Ms. James passed away on November 4, 2018. Plaintiff (Ms. James’ granddaughter) filed this action in her alleged capacity as Personal Representative of Ms. James’ Estate on August 31, 2020. She asserted five claims against the Facility: negligence/gross negligence, negligence per se, vicarious liability, wrongful death, and survival. However, in conjunction with Ms. James’ admission to the Facility, Ms. James’ daughter and healthcare power of attorney, Emma Dunham, on behalf of Ms. James, executed an Arbitration Agreement that is enforceable—or, alternatively, that Plaintiff should be estopped to deny the enforceability of—that covers the entirety of Plaintiff’s claims against the Facility. As such, this

Defendant respectfully requests that this Honorable Court stay the pending action and compel this matter to arbitration.

### **BACKGROUND**

With the help of her daughter and healthcare power of attorney, Emma Dunham, Ms. James, age 93, was admitted to Defendant's Facility, Hallmark Healthcare Center, in August of 2018. Ms. Dunham handled the paperwork in conjunction with Ms. James' admission, and in so doing, Ms. Dunham executed an Admission Agreement and an Arbitration Agreement on Ms. James' behalf, both of which were duly countersigned by the Facility's representative Alicia Anderson. (Attached hereto as **Exhibits 1** and **2**, respectively.)

Based on the Admission Agreement and pursuant to the terms thereof, the Facility admitted Ms. James and she received skilled nursing care and treatment. During her two-and-a-half-month stay at the Facility, Ms. James received and accepted the benefits of the Admission Agreement, which included the Facility furnishing Ms. James a room, providing routine meals, and rendering nursing, personal, and custodial care. Plaintiff has not challenged the validity of any agreement until now, nor has Plaintiff asserted that the Admission Agreement is invalid or that Ms. James entered the Facility unwillingly or without consent.

Upon admission, Ms. Dunham represented that she was authorized to admit Ms. James to the Facility and to execute the documents she executed on her behalf, including the Arbitration Agreement. In fact, the first provision of the Admission Agreement states that all information provided, including her authority to bind her mother, is "true and correct."

The Arbitration Agreement defines Hallmark Healthcare as the "Facility" and Emma James as the "Resident." Emma Dunham signed above the line "Resident/Representative

Signature” and printed her name above the line “Printed Name of Resident/Representative.” *See*

**Ex. 2.** The Arbitration Agreement provides:

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.

*Id.* The Arbitration Agreement further provides:

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 Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

*Id.* Finally, regarding Ms. Dunham’s authority to sign on behalf of her mother, the Arbitration Agreement states, “By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.”

*Id.*

The acts complained of in Plaintiff’s Complaint fall squarely within the scope of the Arbitration Agreement. The Court therefore should stay these proceedings and compel this matter to arbitration as agreed.

## ARGUMENT

### I. BOTH STATE AND FEDERAL POLICY FAVOR ARBITRATION.

There is a strong presumption in favor of the validity of arbitration agreements because of the federal and state policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997); *see also Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) (“The policy of the United States and this State is to favor arbitration of disputes.”). “This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, “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.” *Id.* at 41, 524 S.E.2d at 846 (internal quotations and citations omitted).

### II. THE FAA GOVERNS THE ARBITRATION AGREEMENT.

The Arbitration Agreement, by its terms and by law, is governed by the FAA. ”). 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.

(*See Ex. 2.*) 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 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).

### **III. 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>1</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

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<sup>1</sup> *Allied–Bruce*, 513 U.S. at 270.

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. Concepcion*, 563 U.S. 333, 339 (2011)). Under the FAA, “courts *must* place arbitration agreements on *equal footing with other contracts . . .*” *Concepcion*, 563 U.S. 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>2</sup>

Under the FAA, a party seeking arbitration must show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is

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<sup>2</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.

contained within a contract involving interstate commerce. 9 U.S.C. § 2. A binding and enforceable written agreement to arbitrate disputes exists in this case; therefore, Plaintiff's claims should be stayed and compelled to arbitration.

#### **IV. 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 Ms. Dunham's signature on behalf of Ms. James, along with Ms. Dunham's express representation that she is authorized to sign for Ms. James.<sup>3</sup> It is countersigned by Ms. Anderson 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 defined scope of disputes to binding arbitration<sup>4</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. 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.

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<sup>3</sup> By virtue of her signature, Ms. Dunham 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. James' 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 Ms. Dunham is no less bound by this covenant than the Facility.

<sup>4</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

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 party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); *accord Marzulli v. Tenet S.C., Inc.*, No. 2015-002363, 2018 WL 1531507, at \*3 (S.C. Ct. App. Mar. 28, 2018). In this case, Plaintiff bears that burden. “Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.” *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. “Meaningful choice” refers specifically to the bargaining process involved in entering into the Arbitration Agreement. The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident. *See Ex. 2, ¶ 2.*

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: “**I understand and agree that I am giving up and waiving my right to a jury trial.**” *See Ex. 2, ¶ 6.*

By signing the Arbitration Agreement and Admission Agreement, Ms. Dunham, acting

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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.”).

on behalf of Ms. James, represented that she understood and assented to their terms. Indeed, she was given the option of entering into the Arbitration Agreement – *or not* – and she freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or “take it or leave it” contract. Ms. Dunham had the option not to enter into the Arbitration Agreement on behalf of her mother, yet she voluntarily did so, voluntarily did not retract her agreement thereto, and her mother stayed at the Facility and received skilled nursing care after admission.

The fact that this Defendant is a commercial entity is also not sufficient grounds, standing alone, to prove the absence of a “meaningful choice.” While disparity in bargaining power and relative sophistication are factors to be considered under *Simpson*, the fact that the Facility drafted this agreement and presented it to Ms. James’ representative for consideration cannot justify a finding of unconscionability. See *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (2001) (“[I]nequality of bargaining power alone will not invalidate an arbitration agreement.”).

Defendant gave Ms. James the option of entering into the Arbitration Agreement and her authorized agent made the decision to proceed. She did not have to accept this offer nor has there been any allegation or evidence that she was coerced into signing this contract. Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case, as Plaintiff must still show that the “terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

When determining this aspect of unconscionability, this Court must focus on “whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker.” *Id.* at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to select a third party arbitrator *jointly* “from a panel having experience and knowledge of the health care industry.” *See Ex. 2.* If the parties are unable to agree upon such an arbitrator, the agreement vests the Court with authority to make a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is “binding on all parties.” As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, something that, again, is expressly favored as a matter of both state and federal policy. 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. 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.”

Lastly, the United States District Court for the District of South Carolina and trial courts around South Carolina have repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these arbitration agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon, supra*, at \*3; *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at \*6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson, supra*. Along similar lines, any holding that the Arbitration Agreement at issue is

unconscionable simply because it was executed in the context of an admission to the skilled nursing facility would be in violation of the clear precedent under *Kindred* and the FAA which instruct that arbitration agreements must be placed on equal footing with all other types of contracts. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and must be rejected.

**V. PLAINTIFF’S CLAIMS ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.**

Without question, Plaintiff’s claims against the Facility 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.”).

**VI. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE, OR, ALTERNATIVELY, PLAINTIFF SHOULD BE ESTOPPED TO DENY ITS ENFORCEABILITY.**

**A. The Plain Language of the Agreement Binds Plaintiff.**

Ms. James' daughter and healthcare power of attorney,<sup>5</sup> Emma Dunham, represented to the Facility's staff and admissions personnel that she was her mother's representative with the authority to sign documents on her behalf and to bind Ms. James and the Facility pursuant to those documents. Clearly, it was Ms. Dunham's intention to bind Ms. James according to the terms of the Admission Agreement and Arbitration Agreement, which applies to the instant dispute. Ms. James evinced no intentions or directions to the contrary.

This Court faced facts similar to the ones at the bar in *Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC, et al.*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018). (*See Price* decision, attached as **Exhibit 4.**) In *Price*, the plaintiff was the wife of a skilled nursing home resident at a skilled nursing facility in Inman, South Carolina. The wife executed a number of documents on her husband's behalf upon the latter's admission to the facility, including an admissions agreement and arbitration agreement identical to the agreements in the case at bar. *See Ex. 4*, p. 2-3 (emphasis added). The court determined that "the terms of the Arbitration Agreement clearly apply to the instant dispute[.]" in that it was the intent of the wife to bind her husband (and herself, as personal representative) according to the terms of the Admission and Arbitration Agreement. *Ex. 4*, p. 5.

**B. Ms. Dunham Possessed the Apparent and Inherent Authority to Bind Ms. James to the Arbitration Agreement and/or Plaintiff Should be Estopped to Deny Ms. Dunham's Authority.**

**1. Agency Relationship**

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<sup>5</sup> *See Exhibit 3*, "South Carolina Health Care Power of Attorney," dated October 27, 2017.

Ms. Dunham, Ms. James's daughter, portrayed an agency relationship such that the Arbitration Agreement should be deemed enforceable. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "A true agency relationship may be established by evidence of actual or apparent authority." *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

*Carraway v. Beverly Enters. Ala., Inc.*, 978 So.2d 27 (Ala. 2007) involves facts that are similar to those in the present case. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. *Id.* at 28. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the time. *Id.* Nevertheless, the admissions agreement in *Carraway* provided that plaintiff was his sister's legal representative for the purposes of admission, as he was her next-of-kin and

represented himself to be authorized to make health care decisions on her behalf. The arbitration agreement in *Carraway*, as in this case, was a separate document and was not a condition of admission to the facility. *Id.* at 33.

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the “authorized representative” of his sister. *Id.* at 30. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision, holding that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* at 30-31; *see also Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010) (holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in *Carraway* was applied as “persuasive authority” by the *Price* Court. *See Ex. 4*, p. 8.

Here, Ms. Dunham held herself out as an agent for her mother without any indication to the contrary when she executed various admission documents on her behalf, including the Arbitration Agreement. She executed these documents in her capacity as “representative.” Further, she was her mother's Power of Attorney for healthcare decisions, lending further credence to the Facility's reasonable belief that Ms. Dunham was her mother's authorized representative. *See Ex. 3*. The Facility therefore was justified in concluding Ms. Dunham had the authority to execute the documents on Ms. James' behalf.

Moreover, by allowing Ms. Dunham to procure her admission to the Facility and thereafter by accepting the benefits of the contracts entered into in connection with that

admission, Ms. James represented that her daughter was her authorized representative to act on her behalf in connection with admission. *See R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, “either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances”) (emphasis added).

A holding to the contrary would go against the fundamental concept of apparent agency: that an agency relationship is based on a third party’s understanding of a principal’s manifestations and a reasonable belief that the agent has been authorized to act. The Facility had reason to believe that by allowing Ms. Dunham to sign the admissions paperwork, including the documents providing for Ms. James’ stay and the skilled nursing care provided at the Facility, Ms. James bestowed her daughter with the authority to execute those documents. Ms. James did not repudiate or invalidate her daughter’s actions, and instead, Ms. James accepted the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services, thereby ratifying Ms. Dunham’s actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, the Facility was further justified in believing Ms. James had authorized her daughter to execute it. Therefore, an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

Even if Ms. Dunham lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. South Carolina courts recognize such powers and use them to enforce agreements where supposed unauthorized actions “accompany or are incidental to transactions which the

agent is authorized to conduct....” See §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975) (*abrogated on unrelated grounds*) (examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7th Cir. 1987) (“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals”) (citing *Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for this inherent-agency doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established law follows from one of the cardinal principles of agency: third parties, such as the Facility, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether Ms. Dunham was authorized to admit her mother to the Facility. To the extent Plaintiff takes issue with Ms. Dunham’s authority to bind Ms. James to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to Ms. Dunham’s authority to admit her mother as a resident at the Facility.

## **2. Agency by Estoppel**

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G*, 343 S.C. at

433, 540 S.E.2d at 118. To prove estoppel in South Carolina, Defendant must show: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.” *Boyd v. Bellsouth Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In *Price, supra*, the court ruled that the plaintiff was estopped from denying that she was her husband’s authorized agent during the latter’s admission to the skilled nursing facility:

In the case at the bar, [the facility] had no knowledge or reason to believe that Plaintiff was not [her husband’s] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

**Ex. 4**, p. 9. Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) the United States District Court for the District of South Carolina concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration. (*See Exhibit 5*, attached hereto.) The plaintiff in *McCutcheon* executed a number of documents on his wife’s behalf upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. The admissions agreement in *McCutcheon* provided that the plaintiff was his wife’s legal representative for the purposes of admission, as he was her next-of-kin and represented himself as authorized to make health care decisions on her

behalf. The court reasoned, “It would be inequitable . . . to allow plaintiff to assert that [plaintiff] had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement.” Therefore, the court concluded that the plaintiff was estopped from denying authority to sign the arbitration agreement on behalf of his wife. *Id.* at \*3.

Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow the Plaintiff in this case to assert that Ms. Dunham was Ms. James’ authorized agent as to the Admissions Agreement, but not the Arbitration Agreement. The Facility had no knowledge or reason to believe that Ms. Dunham was not Ms. James’ authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. The Facility relied on the affirmative representations of Ms. Dunham in admitting her mother to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by the Facility, only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

C. **The Arbitration Agreement and the Admission Agreement Merged (i.e., Should be Construed Together as a Single Contract), and Plaintiff Should Be Estopped from Denying the Enforceability of the Arbitration Agreement.**

As an additional ground to compel arbitration, the Admissions Agreement and Arbitration Agreement should be construed together (i.e., merged) and, Ms. James having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be equitably estopped to deny the enforceability of the Arbitration Agreement merged therewith.

1. **Merger**

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). “[A]bsent evidence indicating a contrary intention, when 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 generally consider and construe them together on the theory that the instruments are effectively one instrument or contract.” *Id.*, see also *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). And even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See *Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord *Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

Indeed, in *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the particular facts of the case, it nonetheless confirmed the validity of the general proposition of law on which the *Coleman* appellants based their merger/equitable estoppel argument in the very context of nursing home admission agreements and arbitration agreements. 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (“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.”).

As indicated previously, the court in *McCutcheon* analyzed facts almost identical to this case and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575. Courts have cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See *Abrams v. Fundamental Long-term Care Holdings, LLC, et al.*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC, et al.*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (See *Abrams*, *Campsen* decisions attached hereto as **Exhibits 6** and **7**.)

The Admission Agreement and the Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.<sup>6</sup> They should be considered merged, i.e., they should be considered and construed together as effectively one contract.

## 2. Equitable Estoppel of Merged Agreement

“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . .

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<sup>6</sup> To be clear, *Coleman* unequivocally answers the question of whether the Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. 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* executed

estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019). “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)); *see also Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in *International Paper Co.* to reverse the circuit court’s denial of a motion to compel arbitration); *Wilson*, 426 S.C. at 339–345, 827 S.E.2d at 174–177 (2019) (favorably discussing the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which the Facility contends Plaintiff is estopped to deny the enforceability of the Arbitration Agreement here, where Ms. James received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged); *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).

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*at the same time, by the same parties, for the same purposes, and in the course of the same*

Because of the doctrine of merger referenced above, this legal principle applies in this case. The doctrine of equitable estoppel “exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.” *S. Ill. Beverage, Inc. v. Hansen Bev. Co.*, 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that “no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” *United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) (citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the federal District Court in *Jackson v. Iris.com*:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

. . .

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

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*transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (citing *Int'l Paper Co.*, 206 F.3d at 416) (internal quotations omitted)).<sup>7</sup>

The key to determining when direct benefits estoppel may be applied is whether the contractual benefits flowing to the nonsignatory, i.e., the party to be estopped, are direct or indirect. *See Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause while at the same time denying that the arbitration clause is enforceable. In a recent Order entered by Judge Young, he agreed, and held that an Arbitration Agreement was enforceable against a nursing home resident’s representative based on merger and equitable estoppel. (*See Haynes* Order, attached as **Exhibit 8**.)

In the present case, Ms. James embraced all aspects of the Admission Agreement with the Facility. Indeed, her receipt of direct benefits under the Admission Agreement (with which the

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<sup>7</sup> *See also THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11–888–CMC, 2011 WL 4089435, at \*6 (D.S.C. Sept.13, 2011) (“Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); *accord THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at \*4 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

Arbitration Agreement merged) cannot reasonably be denied. Undoubtedly, Ms. James received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility about which Plaintiff does not complain). To deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's Complaint does not go nearly so far as that. (*See generally* Compl.)

It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiff cannot “have it both ways” by relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to her disadvantage.

Plaintiff's allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against Defendant based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement, and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Moreover, as evidenced above, numerous courts have held that where a plaintiff receives the benefits of the contract—which Ms. James certainly did—the non-signatory is estopped from denying an arbitration agreement merely because she did not sign the contract under which she received all of the benefits.

**3. *Coleman, Thompson, and Hodge are Distinguishable.***

To the extent Plaintiff argues the Admission Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), *Coleman*, 407 S.C. 346, 755 S.E.2d 450, and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 769 (Ct. App. 2016), such reliance is misplaced.

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Ms. Coleman brought suit after her sister's death and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the South Carolina Supreme Court found, “On its face, this clause recognizes the ‘separatedness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate.” *Id.* at 452. “By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” *Id.*

Similarly, in *Hodge*, the admission agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating “[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.” *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no

such indication. *Id.* In *Thompson*, the arbitration agreement also contained a disclaimer provision but the admission agreement did not.

Unlike the arbitration agreements in *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement and Admission Agreement in the case at bar should not be considered “separate” for purposes of denying merger. Unlike *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Further, it did not have to be agreed to as a precondition to admission to the Facility.

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admission and Arbitration Agreements were signed by Emma Dunham on her mother’s behalf and the Facility on or about August 7, 2018. The exact same people signed each document: Emma Dunham as representative for her mother and Alicia Anderson as representative for the Facility. The documents were signed for the same purpose and transaction of establishing Ms. James’ residency at the skilled nursing facility.

Unlike the arbitration agreements at issue in *Coleman*, *Thompson*, and *Hodge*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. Indeed, directly contradicting the idea of “separatedness” (in

the parlance of the *Coleman* Court<sup>8</sup>), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed “separatedness.” And without question, 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) (“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).

Also, absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing “This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.”) *with* Arbitration Agreement (providing that, “because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).) Essentially, both instruments provide that South Carolina law applies except where it is displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the termination provisions provide no evidence of “separatedness.” Again, the only reason for the Arbitration Agreement is the Admission Agreement—the only point of the

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<sup>8</sup> 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike in the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration agreement and, thus,

Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still *connected* to the Admission Agreement even after the termination of the Admission Agreement. This is simply how agreements to arbitrate work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

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>9</sup> as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties possessed a contrary intention. *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

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“recognize[d] the ‘*separatedness*’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

<sup>9</sup> *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

here. It does not even make sense that the parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

Such superficial things as the fact that the admission arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To point to such things is really to do no more than to point out that the admission agreement and 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 would 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 to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that, as a matter of law, *merger is the default position*, i.e., it is *presumed*, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents 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.

As noted above, the arbitration agreement was not a precondition to Ms. James' admission. Notwithstanding, the two instruments worked hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the arbitration agreement is not necessary to the admission agreement, the converse is not true; the admission agreement is indeed necessary to the arbitration agreement. In other words, the admission agreement *could* have stood on its own, without the arbitration agreement ever having been executed, in which case no question of merger would have even arisen to begin with; *but that is not what happened*. The arbitration agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the admission agreement, however, which is capable of making sense either standing alone or, alternatively, together with the arbitration agreement, the arbitration agreement only makes sense together with the admission agreement, which is its (the arbitrations agreement's) sole reason for being.

It matters not whether the arbitration agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission. Here, there can be no question that the arbitration agreement—once agreed upon—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. James' relationship with this Defendant: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. As explained above, this conclusion finds direct support in the Admission Agreement's "Entire Agreement," which

expressly contemplates its own *non*-“separatedness” by its incorporation of “other Admissions materials” by reference. Had the Arbitration Agreement not been executed, it would not be among this other admissions material, but, of course, it was executed, so it is. Most respectfully, to conclude otherwise simply does not make sense.

The material facts of *Coleman*, *Thompson*, and *Hodge*, are different from the material facts of the instant case, and those other cases do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

**VII. SHOULD THE COURT DECIDE TO DENY DEFENDANT’S MOTION, THE PARTIES SHOULD BE PERMITTED TO CONDUCT ADDITIONAL DISCOVERY.**

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum or asserted at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised herein or at the hearing, and in particular, the nature of Emma Dunham’s agency relationship with Ms. James and the circumstances surrounding the admissions process. In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother’s authority to execute an Arbitration Agreement on her son’s behalf in connection with his admission to a skilled nursing facility. *See James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018) (attached hereto as **Exhibit 9.**)

Critical to the court’s decision in the *Boyd* case was whether the son’s conduct and admissions director’s understanding of that conduct created apparent agency so as to bind the son to an arbitration agreement. The court permitted the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the

hospital the son was transferred from. After considering the testimony of those individuals, the court found there was evidence to support a finding of apparent agency. The case at the bar involves Ms. Dunham's authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd*, if the Court determines the record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

This Defendant respectfully requests that if the Court should make such a determination, it allow this Defendant to engage in some appropriately limited discovery to attempt to protect its arbitration rights. This Defendant moved to compel arbitration under a facially valid arbitration agreement, which was not called into question until Plaintiff disavowed Ms. Dunham's express representations of authority to oppose arbitration. Defendant had no reason to conduct discovery until this dispute arose, and even then, it still maintained its primary position that the arbitration agreement was enforceable based on the record as is. If further development of the record is needed on any point material to arbitrability, the Court should expressly allow this Defendant to protect its legitimate interests through discovery into the relevant subject matter without exposing itself to a claim of waiver by Plaintiff, i.e., without having to expose itself to a potential Catch-22 where it could be said to have waived its arbitration rights simply by endeavoring to prove them.

### **CONCLUSION**

For the reasons set forth herein, Defendant respectfully requests that this Court enter an Order staying the pending action and compelling arbitration. Alternatively, and if the Court is not inclined to grant Defendant's Motion on any of the grounds asserted above or at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised above. Defendant also requests permission to be heard after such discovery is conducted

and requests that it be permitted to submit supplemental memoranda along with any additional evidence procured.

**CLEMENT RIVERS, LLP**

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

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*Attorney for the Defendant Palmetto Hallmark  
Operating, LLC d/b/a Hallmark Healthcare Center*

Charleston, South Carolina

Dated: April 8, 2022

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME: Emma James

RESIDENT NUMBER:

DATE OF ADMISSION: 8-1-18

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among HALLMARK HEALTHCARE ("Facility"), Emma James ("Resident") and/or Emma James ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

**I. GENERAL CONDITIONS**

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.
2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aids and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.
3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.
4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.
5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

## II. AGREEMENT FOR CARE

### A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.
2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.
3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.
4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.
5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.
6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserve the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.
8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative have the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
9. Provide an activities program for Resident, components of which will be at the discretion of Facility.
10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

Original: Business File • Photocopy: Resident/Representative

**B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:**

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.
2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.
3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative have the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.
5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.
6. Provide and be responsible for personal items of clothing and property.
7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.
8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.
9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

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10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.
11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.
12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.
13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.
14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.
15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.
16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.
17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.
18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.
19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

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20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

### III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (-private) (-semi-private) accommodations, for a basic fee of \$ 242.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.
  - a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
  - b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
  - c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.
2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.
3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

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state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

#### IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.
2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.
3. This Agreement may be terminate immediately upon the occurrence of any of the following:
  - a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
  - b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
  - c. Resident's death
  - d. The safety or health of individuals in the Facility is endangered.
  - e. Resident and/or his/her legal representative have failed to pay for his/her stay.
  - f. Facility ceases to operate or is no longer able to provide services to Resident.
  - g. Sanctions or remedies imposed by the Department.
4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

#### V. MEDICAID BENEFICIARIES

1. **Eligibility.** Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

**It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission.** This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

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2. **Covered Services.** If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services.**

- a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.
- b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agree to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals.** Resident and/or Representative authorize Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remain responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

## VI. MEDICARE BENEFICIARIES

1. **Covered Services.** If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

- a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.
- b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (e.g., a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.
- c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agree to cooperate with Facility in collecting all proceeds due from Medicare.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorize Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remain responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

## VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10<sup>th</sup> day of the month.

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2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agree to cooperate with Facility in collecting all proceeds due from such insurance company.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorize Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not

6. Not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remain responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

### VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

HALLMARK HEALTHCARE  
255 MIDLAND PARKWAY  
SUMMERVILLE, SC 29485

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

HALLMARK HEALTHCARE  
255 MIDLAND PARKWAY  
SUMMERVILLE, SC 29485

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

#### **IX. GOVERNING LAW**

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

#### **X. SEVERABILITY**

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

#### **XI. CAPTIONS**

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

#### **XII. MODIFICATIONS**

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

#### **XIII. WAIVER**

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

#### **XIV. RESIDENT**

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

#### **XV. ASSIGNABILITY**

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

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## XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days' notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.
2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.
3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.
4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

## XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.
2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.
3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.
4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, and durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

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**(6) DESIGNATION OF HEALTH CARE AGENT**

I, **Emma Lee James**, hereby appoint: (Principal)

(Agent's Name) Emma J. Dunham

(Agent's Address) REDACTED

Telephone: home: REDACTED work: \_\_\_\_\_ mobile: \_\_\_\_\_

as my agent to make health care decisions for me as authorized in this document.

Successor Agent: If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively in the order named:

(A) First Alternate Agent: Samuel James

Address: REDACTED

Telephone: home: 803 work: \_\_\_\_\_ mobile: REDACTED

(B) Second Alternate Agent: Earl China

Address: REDACTED

Telephone: home: REDACTED work: REDACTED mobile: \_\_\_\_\_

Unavailability of Agent(s): If at any relevant time the agent or successor agents named here are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

**2. EFFECTIVE DATE AND DURABILITY**

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence, except as provided in Paragraph 3 below.

**3. HIPAA AUTHORIZATION**

When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Information Portability and

Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

#### 4. AGENT'S POWERS

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by the provisions specified below, my agent is authorized as follows:

- A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;
- B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;
- C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;
- D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.
- E. The powers granted above do not include the following powers or are subject to the following rules or limitations:

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may \_\_\_\_\_; may not ELJ consent to the donation of all or any of my tissue or organs for purposes of transplantation.

6. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL)

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does

not apply.

7 STATEMENT OF DESIRES CONCERNING LIFE-SUSTAINING TREATMENT

With respect to any Life-Sustaining Treatment, I direct the following:

(INITIAL ONLY ONE OF THE FOLLOWING 3 PARAGRAPHS)

(1) ELJ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

(2) ELJ DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

a. if I have a condition that is incurable or irreversible and, without the administration of life- sustaining procedures, expected to result in death within a relatively short period of time: or

b. if I am in a state of permanent unconsciousness. OR

(3) \_\_\_\_\_ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

8 STATEMENT OF DESIRES REGARDING TUBE FEEDING

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that in situations where life-sustaining treatment is being withheld or withdrawn pursuant to Item 7, (INITIAL ONLY ONE OF THE FOLLOWING THREE PARAGRAPHS):

(a) ELJ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged by tube feeding if my agent believes the burdens of tube feeding outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making this decision.

OR

(b) ELJ DIRECTIVE TO WITHHOLD OR WITHDRAW TUBE FEEDING. I do not want my  
life  
prolonged by tube

feeding. OR

(c) \_\_\_ DIRECTIVE FOR PROVISION OF TUBE FEEDING. I want tube feeding to be  
provided within the standards of accepted medical practice, without regard to my condition,  
the chances I have for recovery, or the cost of the procedure, and without regard to whether  
other forms of life-sustaining treatment are being withheld or withdrawn.

IF YOU DO NOT INITIAL ANY OF THE STATEMENTS IN ITEM 8, YOUR AGENT WILL  
NOT

HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

9. ADMINISTRATIVE PROVISIONS

A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

B. This power of attorney is intended to be valid in any jurisdiction in which it is presented. BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on this 27<sup>th</sup> day of Oct, 2017. My current home address is:

Principal's *Emma J. Dunham*  
Signature:

Print Name of EMMA J. DUNHAM  
Principal:

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud, or undue influence. I am not related to the principal by blood, marriage, or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Health Care Agent or Successor Health Care Agent by this document.

Witness No. 1

Signature: *Veronica D. Goe*  
Date: 27<sup>th</sup> Oct 2017

\_ Print Name: \_

Telephone: \_

\_ Address: \_

Witness No. 2

Signature: \_

\_ Date: \_

Print Name:

Telephone: \_

\_ Address: \_

(This portion of the document is optional and is not required to create a valid health care power of attorney.)

STATE OF SOUTH CAROLINA

COUNTY OF

The foregoing instrument was acknowledged before me by Principal on  
, 20\_\_\_\_\_.

Notary Public for South Carolina\_

\_ My Commission Expires: \_

any will or as an heir by intestate succession; nor the beneficiary of a life insurance policy of the Declarant; nor the Declarant's attending physician; nor an employee of the attending physician; nor a person who has a claim against the Declarant's decedent's estate as of this time. No more than one of us is an employee of a health facility in which the Declarant is a patient. If the Declarant is a resident in a hospital or nursing care facility at the date of execution of this Declaration, at least one of us is an ombudsman designated by the State Ombudsman. Office of the Governor.

Witness  
Witness

Subscribed, sworn to, and acknowledged before me by \_\_\_\_\_, the Declarant, and  
subscribed and sworn to before me by \_\_\_\_\_ and \_\_\_\_\_  
, the witnesses, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

*Veronica D. Goe* (SEAL)  
Notary Public for South Carolina  
My Commission Expires: May 14<sup>th</sup>, 2025

**INFORMATION ABOUT THIS DOCUMENT**

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

- 5. THIS DOCUMENT GIVES THE PERSON YOU NAME AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOU CANNOT MAKE THE DECISION FOR YOURSELF. THIS POWER INCLUDES THE POWER TO MAKE DECISIONS ABOUT LIFE- SUSTAINING TREATMENT. UNLESS YOU STATE OTHERWISE, YOUR AGENT WILL HAVE THE SAME AUTHORITY TO MAKE DECISIONS ABOUT YOUR HEALTH CARE AS YOU WOULD HAVE.
- 6. THIS POWER IS SUBJECT TO ANY LIMITATIONS OR STATEMENTS OF YOUR DESIRES THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TREATMENT YOU DO NOT DESIRE OR TREATMENT YOU WANT TO BE SURE YOU RECEIVE. YOUR AGENT WILL BE OBLIGATED TO FOLLOW YOUR INSTRUCTIONS WHEN MAKING DECISIONS ON YOUR BEHALF.

YOU MAY ATTACH ADDITIONAL PAGES IF YOU NEED MORE SPACE TO COMPLETE THE STATEMENT.

7. AFTER YOU HAVE SIGNED THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE HEALTH CARE DECISIONS FOR YOURSELF IF YOU ARE MENTALLY COMPETENT TO DO SO. AFTER YOU HAVE SIGNED THIS DOCUMENT, NO TREATMENT MAY BE GIVEN TO YOU OR STOPPED OVER YOUR OBJECTION IF YOU ARE MENTALLY COMPETENT TO MAKE THAT DECISION.
8. YOU HAVE THE RIGHT TO REVOKE THIS DOCUMENT, AND TERMINATE YOUR AGENT'S AUTHORITY, BY INFORMING EITHER YOUR AGENT OR YOUR HEALTH CARE PROVIDER ORALLY OR IN WRITING.
9. IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A SOCIAL WORKER, LAWYER, OR OTHER PERSON TO EXPLAIN IT TO YOU.
10. THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS TWO PERSONS SIGN AS WITNESSES. EACH OF THESE PERSONS MUST EITHER WITNESS YOUR SIGNING OF THE POWER OF ATTORNEY OR WITNESS YOUR ACKNOWLEDGMENT THAT THE SIGNATURE ON THE POWER OF ATTORNEY IS YOURS.

THE FOLLOWING PERSONS MAY NOT ACT AS  
WITNESSES:

3. YOUR SPOUSE, YOUR CHILDREN, GRANDCHILDREN, AND OTHER LINEAL DESCENDANTS; YOUR PARENTS, GRANDPARENTS, AND OTHER LINEAL ANCESTORS; YOUR SIBLINGS AND THEIR LINEAL DESCENDANTS; OR A SPOUSE OF ANY OF THESE PERSONS.
4. A PERSON WHO IS DIRECTLY FINANCIALLY RESPONSIBLE FOR YOUR MEDICAL CARE.
5. A PERSON WHO IS NAMED IN YOUR WILL, OR, IF YOU HAVE NO WILL, WHO WOULD INHERIT YOUR PROPERTY BY INTESTATE SUCCESSION.

6. BENEFICIARY OF A LIFE INSURANCE POLICY ON YOUR LIFE.
7. THE PERSONS NAMED IN THE HEALTH CARE POWER OF ATTORNEY AS YOUR AGENT OR SUCCESSOR AGENT.
8. YOUR PHYSICIAN OR AN EMPLOYEE OF YOUR PHYSICIAN.
9. ANY PERSON WHO WOULD HAVE A CLAIM AGAINST ANY PORTION OF YOUR ESTATE (PERSONS TO WHOM YOU OWE MONEY).

IF YOU ARE A PATIENT IN A HEALTH FACILITY, NO MORE THAN ONE WITNESS MAY BE AN EMPLOYEE OF THAT FACILITY.

11. YOUR AGENT MUST BE A PERSON WHO IS 18 YEARS OLD OR OLDER AND OF SOUND MIND. IT MAY NOT BE YOUR DOCTOR OR ANY OTHER HEALTH CARE PROVIDER THAT IS NOW PROVIDING YOU WITH TREATMENT; OR AN EMPLOYEE OF YOUR DOCTOR OR PROVIDER; OR A SPOUSE OF THE DOCTOR, PROVIDER, OR EMPLOYEE: UNLESS THE PERSON IS A RELATIVE OF YOURS.
12. YOU SHOULD INFORM THE PERSON THAT YOU WANT HIM OR HER TO BE YOUR HEALTH CARE AGENT. YOU SHOULD DISCUSS THIS DOCUMENT WITH YOUR AGENT AND YOUR PHYSICIAN AND GIVE EACH A SIGNED COPY. IF YOU ARE IN A HEALTH CARE FACILITY OR A NURSING CARE FACILITY, A COPY OF THIS DOCUMENT SHOULD BE INCLUDED IN YOUR MEDICAL RECORD.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
 FOR THE 1st JUDICIAL CIRCUIT

C/A No. 2021-CP-18-01030

Tammy China, as Personal Representative )  
 for the Estate of Emma Lee James, )  
 )  
 Plaintiff, )

**PLAINTIFF’S MEMORANDUM  
 IN OPPOSITION TO DEFENDANT’S  
 MOTION TO COMPEL ARBITRATION**

v. )  
 )  
 Palmetto Hallmark Operating, LLC, D/B/A )  
 Hallmark Healthcare Center and Elite )  
 Patient Care of South Carolina, PC )  
 )  
 Defendant. )

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S  
 MOTION TO COMPEL ARBITRATION**

Plaintiff, Tammy China, (hereinafter “Plaintiff”) as the Personal Representative of the Estate of Emma Lee James (hereinafter “Resident” or “Decedent”), files this Memorandum in Opposition to the Motion to Compel Arbitration filed by Defendant Palmetto Hallmark Operating, LLC D/B/A Hallmark Healthcare Center (hereinafter “Defendant,” “Defendant Palmetto Hallmark,” “Defendant Hallmark”), and would demonstrate that because Defendant has failed to provide sufficient evidence of an enforceable arbitration agreement, Defendant’s Motion must be denied.

Defendant filed a Motion to Compel Arbitration on January 21, 2022, attaching an arbitration agreement signed by Emma Dunham, without any representation as to who Ms. Dunham is or what authority she was given by Decedent to bind her to an agreement waiving her constitutional right to a jury trial. The boilerplate motion left Plaintiff to wonder what the actual basis was for Defendant’s motion until Friday, April 8, 2022, almost three months later. Plaintiff was left wondering because,

although she knew that Ms. Dunham was her mother and the daughter of decedent, Plaintiff only had in her possession a healthcare power of attorney document that was not executed by Decedent. See Exhibit 3 to Defendant's Memorandum. Upon receipt of Defendant's Memorandum in Support of Its Motion to Compel Arbitration, it is clear that Defendants are relying on an unexecuted healthcare power of attorney form. The lack of legal authority given to Ms. Dunham to waive Decedent's constitutional rights, including the right to a jury trial under the Seventh Amendment to the United States' Constitution, renders the putative arbitration agreement unenforceable against Decedent's estate.

### **STANDARD OF REVIEW**

In order to compel arbitration, the facility bears the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are *per se* enforceable. 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 (Ct. App. 2008). Courts interpret a jury trial waiver narrowly and construe contract ambiguities against the facility as the party that drafted the arbitration agreement. WDI Meredith & Co. v. Am. Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004). Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not reverse those findings. Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

### **ARGUMENT**

The question of arbitrability of a claim is usually an issue for judicial determination, unless the parties submit otherwise. Zabinski v. Bright Acres Associates, 346 S.C. 580, 553 S.E.2d 110 (2001); AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 649, 106 S.Ct.

1415, 1419 89 L.E.2d 648 (1986); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 554, 813 S.E.2d 292, 297 (Ct.App. 2018). “Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” Zabinski, 346 S.C. at 597, 553 S.E.2d at 118.

A party moving to compel arbitration must demonstrate first that a valid arbitration agreement exists. Weaver, 2020 WL 4342679 at \*1; Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct.App. 2008). While there is a presumption in favor of arbitration, “it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement.” Wilson, 426 S.C. at 337, 827 S.E.2d at 173; EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.E.2d 755 (2014); *see* Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.E.2d 488 (1989) (“[W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so”).

**A. Defendants Failed to Present a Valid Healthcare Power of Attorney for Decedent, Rendering the Arbitration Agreement Defective.**

This motion can be resolved by a South Carolina Supreme Court case from March of 2021. Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69 (2021), is on point, dispositive, and conspicuously absent from Defendant’s memorandum, despite counsel’s telephone acknowledgment that its argument is inconsistent with Arredondo. In Arredondo, the South Carolina Supreme Court held that a general durable power of attorney for decisions regarding all types of personal and real property, including “choses in action,” does not provide the agent the authority to sign pre-dispute arbitration agreements requiring arbitration of certain claims by a resident against a facility. Arredondo, 433 S.C. at 78-79. The Supreme Court further held that the provision of a general

durable power of attorney permitting the agent to enter agreements concerning transfers of property also did not authorize the signing of an arbitration agreement. In this regard, the Court noted the difference between a property right and a constitutional right. Arredondo, 433 S.C. at 79. Thus, unless the general durable power of attorney permitted decisions related to constitutional rights, it would appear that a durable power of attorney does not convey the right to the holder or agent to waive constitutional rights, including the right to a jury trial under the Seventh Amendment. However, it is clear in this case, Ms. Dunham did not have durable power of attorney.

Moreover, Ms. Dunham does not have healthcare power of attorney, as Exhibit 3 is not signed by Decedent. In fact, the signature for principal reflects Ms. Dunham's signature, witnessed by Veronica Gee. (Exhibit 3 to Defendant's Memorandum at 6.) Defendant's memorandum fails to explain this facially invalid healthcare power of attorney, glossing over the lack of execution by Decedent. Nonetheless, even if this healthcare power of attorney was valid, which it is not, it still would not convey authority to Ms. Dunham to waive Decedent's constitutional rights. Arredondo sets forth the standard regarding whether a healthcare power of attorney can convey the authority to waive a principal's constitutional rights. In Arredondo, the Supreme Court held that language in a healthcare power of attorney giving the holder the right to make necessary healthcare decisions could not give the right to sign an arbitration agreement unless the arbitration agreement was necessary to the implantation of a health care decision. Arredondo, 433 S.C. at 81-84. Further, a healthcare power of attorney authorizing the holder or agent to pursue legal action does not grant the agent the authority to execute an arbitration clause. Arredondo, 433 S.C. at 85. Thus, Arredondo implies that courts can consider whether the arbitration agreement is necessary for the facility to provide care in making the determination as to the effect of an arbitration agreement.

However, here, Defendant is estopped from making this argument, as its Memorandum in Support of its Motion to Compel Arbitration states that “[t]he Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or “take it or leave it” contract. Ms. Dunham had the option not to enter into the Arbitration Agreement on behalf of her mother”. (Defendant’s Memo at 9.)

Here, because Ms. Dunham did not have healthcare power of attorney or general power of attorney conveying the authority to waive constitutional rights, the Arbitration Agreement has no effect as to Decedent, her estate, or her heirs.

## **II. Defendant’s Merger Argument Suffers from the Same Defect as the Arbitration Agreement.**

Defendant argues that the Arbitration Agreement merges into the Agreement for Care. However, the Agreement for Care was signed by Ms. Dunham. Exhibit 1 to Defendant’s Memorandum at 12. As set forth above, Defendant possessed the invalid and unexecuted power of attorney, and thus, Defendants know that Ms. Dunham did not have the legal authority to bind Decedent or her estate with respect to the terms of the Agreement for Care. Thus, there is not valid agreement to consider for purposes of merger.

## **III. Defendant’s Apparent Authority Argument Is Misplaced.**

Defendant knew or should have known that Ms. Dunham did not hold a legally valid healthcare power of attorney, as it is in the business of contracting with individuals with healthcare power of attorney on a regular basis. Further, Defendant was in the position validate same before undertaking care of Decedent to ensure that it did not commit a battery on Decedent. Nonetheless, Ms. Dunham’s mistake as to her authority was, at worst, mutual mistake, leaving Defendant with equitable remedies such as quantum meruit for payment for services rendered. Mutual mistake does not validate an otherwise invalid contract.

“A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another.” Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). “To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value.” Inglese v. Beal, 403 S.C. 290, 297, 742 S.E.2d 687, 691 (Ct.App.2013). This equitable remedy would not extend to the arbitration agreement, as the remedy does not enforce a contract, but simply is the remedy in the absence of a contract. Thus, merger into an invalid agreement for care is improper.

### **CONCLUSION**

As Defendant lacks a valid arbitration agreement executed by either Decedent or someone with legal authority on her behalf, Defendant’s Motion to Compel Arbitration must be denied.<sup>56</sup> Leinbach Invs., LLC v. Magnolia Paradigm, Inc., 411 S.C. 466, 479, 769 S.E.2d 242, 249 (Ct. App. 2014)

Respectfully submitted, this 11th, day of April, 2022.

STROM LAW FIRM, LLC

*s/ Mario A. Pacella*

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Dorchester County First Judicial Circuit - Roster Details  
4/13/2022 Virtual Motion Roster - Hon. R. Markley Dennis Jr.

Court Agency	Common Pleas	Judge	Roster Begin Date	Dennis	Roster End Date	717					
Roster Type	Motions		04/13/2022		04/13/2022						
Number of motions = 38											
#	Date	Time	hr:mm	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
1	04/13/2022	10:00 AM	0:15	Motion/Dismiss 12b6 (no image - see answer)	Jeffrey McClure-DEF	01/21/2022	2021CP1802237 Tanya White VS Jeffrey McClure	Auto Arbri 610 (\$5)	Tanya White (843) 452-7324	Penn Wickenberg Ely (843) 577-2026	
2	04/13/2022	10:00 AM	0:20	Motion/Strike (NOA/Answer of Allstate)	Cheyne Stroble-PLT	01/27/2022	2021CP1802170 Cheyne Stroble , plaintiff, et al VS Elizabeth Jones	Personal Injury 350	Mark Joseph Bringardner (843) 400-0550 Michael Andrew Monastra (843) 722-8048 Bert Glenn Usey III (843) 970-2700 x105	David Starr Cobb (843) 576-2803	
3	04/13/2022	10:00 AM	0:15	Motion/Approve Minor Settlement & Appt GAL (no image)	Charde Hardee-PLT	01/14/2020	2020CP1800068 Charde Hardee , plaintiff, et al VS North Penn YMCA	Minor Settlement 730	Lynn Seithel (843) 557-1699 Joy D. Stoney-Reid (843) 763-1300	Robert Edward Kneec III (843) 576-2829	3/21/22-- Dickson/WebEx - Continued 90 days
4	04/13/2022	10:00 AM	0:30	Motion/Consolidate	Chantell Hilton-PLT	02/23/2022	2021CP1800612 Chantell Hilton , plaintiff, et al VS Diamond Delucien , defendant, et al	Personal Injury 350	David Patrick Conway (843) 764-3334		
5	04/13/2022	10:00 AM	0:30	Motion/Compel Arbitration	Hallmark Healthcare Center-DEF	01/21/2022	2021CP1801030 Tammy China , plaintiff, et al VS Palmetto Hallmark Operating Lic , defendant, et al	Wrongful Death 360	Jessica Lerer Fickling (803) 252-4800 Mario Anthony Pacella (912) 264-6465 Army E. Willbanks (803) 252-4800	Donald Jay Davis Jr. (843) 720-5406 Kara Shea Grevey (843) 720-5445 Hunter Adam Morgan (843) 737-8668 Matthew Oliver Riddle (843) 720-5422 Joseph John Tierney Jr. (843) 737-8668	Not a year old until 6/9/2022
6	04/13/2022	10:00 AM	0:15	Motion/Damages Hearing (No image)	Angela Taylor-PLT	01/28/2022	2021CP1801800 Angela Taylor VS Chelsea Treadwell	Motor Veh Accid 320	Phillip Edward Brasher Jr. (843) 297-8485		
7	04/13/2022	10:00 AM	0:15	Motion/Dismiss	WECO River District Lic-DEF	02/14/2022	2021CP1802008 Bundy McDonald Lic VS WECO River District Lic	Breach of Cont 140	Walker Henry Bundy Jr. (843) 212-0525	Henry Pickett Wall (803) 252-7693	
8	04/13/2022	10:00 AM	0:20	Defendants Joint Motion/Dismiss	Ashley River Lumber Company Inc-DEF	02/07/2022	2021CP1802238 Virginia B Crum , plaintiff, et al VS Dorchester County , defendant, et al	Real Prop/Other 499	W. Andrew Gowder Jr. (843) 727-2229	John G. Frampton (843) 832-0097 E. Brandon Gaskins (843) 579-7038 Bradley Allan Mitchell (843) 832-0097	
9	04/13/2022	10:00 AM	0:15	Motion/Refer to Master or Special Referee	Sharla Sheppard-PLT	02/22/2022	2022CP1800072 Sharla Sheppard VS	Breach of Cont 140	Andrew T. Shepherd (843)	Roman Vincent Hammes (843) 261	

**Dorchester County First Judicial Circuit - Roster Details**  
**4/13/2022 Virtual Motion Roster - Hon. R. Markley Dennis Jr.**

Court Agency	Common Pleas	Judge	Roster Id	Roster End Date	717						
Roster Type	Motions	Roster Begin Date	Dennis	04/13/2022	04/13/2022						
Number of motions = 38											
#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
10	04/13/2022	10:00 AM	0:15	Motion/Approve Minor Settlement/GAL	Abel Preciado-PLT	03/15/2022	2022CP1800455 Abel Preciado , plaintiff, et al VS Chad Lockey	Minor Settlement 730	Jody Vann McKnight (843) 577-6040	-7026	
11	04/13/2022	2:00 PM	0:15	Motion/Compel (Discovery)	Liberty Mutual Insurance Company -PLT	02/15/2022	2019CP1801834 Liberty Mutual Insurance Company , plaintiff, et al VS West Locating Service Llc	Person Inj/Other 399	William Joseph Horvath (843) 579-8305	Donald Jay Davis Jr. (843) 720-5406 Robert Pruitt Gruber (843) 720-5482	3/14/2022 -- settled
12	04/13/2022	2:00 PM	0:30	Motion/Partial Summary Judgment	West Locating Service Llc-DEF	03/04/2022	2019CP1801834 Liberty Mutual Insurance Company , plaintiff, et al VS West Locating Service Llc	Person Inj/Other 399	William Joseph Horvath (843) 579-8305	Donald Jay Davis Jr. (843) 720-5406 Robert Pruitt Gruber (843) 720-5482	3/14/2022 -- settled
13	04/13/2022	2:00 PM	0:15	Motion for Expenses/Cost/Attorney Fees	Liberty Mutual Insurance Company -PLT	02/24/2022	2019CP1801834 Liberty Mutual Insurance Company , plaintiff, et al VS West Locating Service Llc	Person Inj/Other 399	William Joseph Horvath (843) 579-8305	Donald Jay Davis Jr. (843) 720-5406 Robert Pruitt Gruber (843) 720-5482	3/14/2022 -- settled
14	04/13/2022	2:00 PM	0:15	Amended Motion/Partial Summary Judgment	Trolley Square LLC -DEF	02/02/2022	2020CP1801025 Cynthia Smith , plaintiff, et al VS Mark Harris , defendant, et al	Premises Liab 330	Justin Tyler Bamberg (803) 956-5088 Christopher John Murphy (843) 832-1120	Robert T. Lyles, Jr. (843) 577-7730	
15	04/13/2022	2:00 PM	0:15	Motion/Partial Summary Judgment	Trolley Square LLC -DEF	02/01/2022	2020CP1801025 Cynthia Smith , plaintiff, et al VS Mark Harris , defendant, et al	Premises Liab 330	Justin Tyler Bamberg (803) 956-5088 Christopher John Murphy (843) 832-1120	Robert T. Lyles, Jr. (843) 577-7730	
16	04/13/2022	2:00 PM	0:20	Motion/Summary Judgment	Nationwide General Insurance Company-DEF	02/15/2022	2020CP1801743 Johnny Cheney , Ldr Construction Inc , defendant, et al	Breach of Cont 140	Eric B. Laquiere (843) 556-2958	Edward Hood Dawson III (864) 335-8808 John Martin Grantland (803) 454-1237 Andrew Steven Halls (843) 577-5200 Jody Clinton Lyles (803) 782-4163 Frank Sanders Stem (864) 672-8040 Franklin H. Turner III	

Dorchester County First Judicial Circuit - Roster Details  
4/13/2022 Virtual Motion Roster - Hon. R. Markley Dennis Jr.

Court Agency	Common Pleas	Judge	Roster Begin Date	Dennis	Roster End Date	717					
Roster Type	Motions		04/13/2022			04/13/2022					
Number of motions = 38											
#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
17	04/13/2022	2:00 PM	0:30	Motion/Damages/Antwo n Lamar Flute ONLY	Eileen Mcgeady-PLT	02/03/2022	2020CP1801958 Eileen Mcgeady , plaintiff, et al VS Chase Ausbrooks , defendant, et al	Motor- Veh Accid 320	Jarrel L. Wigger (843) 553-9800	Joshua David Giancola (843) 566 -2075 William Mark Koontz (843) 225- 4252	
18	04/13/2022	2:00 PM	0:10	Motion/Summary Judgment	120 S Main Summerville Llc- PLT	02/16/2022	2021CP1800444 120 S Main Summerville Llc VS Angela Gast , defendant, et al	Breach of Cont 140	James Howard Leflew IV (843) 576-6307		
19	04/13/2022	2:00 PM	0:30	Motion/Enforce Settlement	Joseph Jensen-PLT	01/25/2022	2021CP1800503 Joseph Jensen VS David G Ferguson , defendant, et al	Fraud/Bad Faith 150	Peter Gerard McGrath (843) 606 -2755	David W. Patterson (864) 993-1830	
20	04/13/2022	2:00 PM	0:15	Motion/Summary Judgment	Bank Of America Na-PLT	02/21/2022	2021CP1800855 Bank Of America Na VS David S Tahaei	Debt Collection 110	Joseph Ernest Brown (864) 605- 3832 x4003 Adam S. Tesh (864) 605-3832 x4004	Edward J. Dennis IV (843) 761-5212	Not a year old until 5/10/2022
21	04/13/2022	2:00 PM	0:20	Motion/Damages Hearing (no image)	Tori Bing-PLT	12/13/2021	2021CP1800924 Tori Bing VS Willie M Harris , defendant, et al	Motor- Veh Accid 320	Keith Edward Robinson (843) 747-2455		Not a year old until 5/25/2022
22	04/13/2022	2:00 PM	0:30	Motion/Summary Judgment	TD Bank, N.A-PLT	02/25/2022	2021CP1801012 TD Bank, N.A, plaintiff, et al VS Brandon Graham Lawing	Debt Collection 110	Benjamin E Grimmsley (803) 233 -1177		
23	04/13/2022	2:00 PM	0:15	Motion/Compel	Thomas Scott Holland-PLT	02/18/2022	2021CP1801370 Thomas Scott Holland VS Caitlyn Shoemaker , defendant, et al	Personal Injury 350	Jared Cyle Williams (803) 991-6528	Donald Jay Davis Jr. (843) 720-5406 Christopher William Nickels (843) 720- 0806 Matthew Oliver Riddle (843) 720- 5422	Completed:04/05/2022
24	04/13/2022	2:00 PM	0:30	Motion/Dismiss	Trident Health Systems-DEF	09/01/2021	2021CP1801384 Nancy Deanne Dew , plaintiff, et al VS James M Benner , defendant, et al	Medical Malprac 220	Jarrel L. Wigger (843) 553-9800	Jack G Gresh (843) 720-3474 Lauren Spears Gresh (843) 720- 3460	
25	04/13/2022	2:00 PM	0:30	Motion/Compel Arbitration	Oakbrook Health And Rehabilitation Center-DEF	11/15/2021	2021CP1801410 Steve Rickenkaker VS Oakbrook Healthcare Llc , defendant, et al	Personal Injury 350	Lee Deer Cope (803) 943-2111	Donald Jay Davis Jr. (843) 720-5406 Gaillard Townsend Dotterer III (843) 720-5474 Robert Michael	

Dorchester County First Judicial Circuit - Roster Details  
4/13/2022 Virtual Motion Roster - Hon. R. Markley Dennis Jr.

Court Agency	Common Pleas	Judge	Roster Begin Date	Roster End Date	Roster Id	717					
Roster Type	Motions		04/13/2022			04/13/2022					
Number of motions = 38											
#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
26	04/13/2022	2:00 PM	0:15	Motion/Summary Judgment	Discover Bank-PLT	01/28/2022	2021CP1801433 Discover Bank VS David Bautista	Debt Collection 110	Jerry T. Myers (919) 250-2133	Ehridge (843) 345-9777 James D. Gandy III (843) 720-5452 Jack G. Gresh (843) 720-3474 Dylan Carlyle Kidd (843) 614-7686 Jennie Marie Smith (843) 810-2675	
27	04/13/2022	2:00 PM	0:15	Motion/Damages Hearing (No Image)	Cheyenne Killion-PLT	01/28/2022	2021CP1802009 Cheyenne Killion VS Chelsea Treadwell	Motor Veh Accid 320	Phillip Edward Brasher Jr. (843) 297-8485		
28	04/13/2022	4:00 PM	0:15	Motion/Summary Judgment	Us Bank National Association-PLT	03/07/2022	2021CP1801997 Us Bank National Association, plaintiff, et al VS Kimberly D Sexton	Debt Collection 110	William Price Stork (803) 724-1499		3/7/22-- PPO/Continuance to CAJ
29	04/13/2022	4:00 PM	0:15	Motion/Dismiss/Compel Arbitration and Stay Case	Oakbrook Health Care Lic-DEF	02/23/2022	2021CP1800541 Lola Halford, plaintiff, et al VS Oakbrook Health Care Lic, defendant, et al	Wrongful Death 360	Brian Montgomery Barrwell (803) 978-6111 Jescelyn Tillman Spitz (803) 968-9169 Charles E. Usry (803) 978-6111	Donald Jay Davis Jr. (843) 720-5406 Kara Shea Grevey (843) 720-5445 Ted Ashton Phillips III (843) 577-4000	#15 for trial
30	04/13/2022	4:00 PM	0:15	Motion/Compel Discovery	Joseph R Davis-PLT	02/11/2022	2020CP1801856 Joseph R Davis, plaintiff et al VS River Oaks Homeowners Association Inc, defendant, et al	Special-Comp/Oh 699	Mary Leigh Arnold (843) 971-6053 David Conor Keys (843) 906-3998	Thomas B Boger (843) 647-7774 Andrew W. Countryman (843) 253-4477 Neil S. Haldrup (843) 329-9500 William Chase McNear (843) 266-9780 Kevin W. Milms (843) 410-4713 Andrew T. Shepherd (843) 900-3575 Ford Hamby Thrift (843) 329-9500	2/18/22 Roster Meeting - DSG cont'd from 2/28 roster ... Evidentiary Hearing to be held 4/14/2022 beginning at 10:00 am - all day.
31	04/13/2022	4:00 PM	0:15	Motion/Compel Discovery	Klaus Michalski-PLT	02/23/2022	2021CP1800199 Klaus Michalski VS PPI LLC, defendant, et al	Breach of Cont 140	Christopher Anthony Frank Bojarski (843) 571-2996 Christopher Francis	William Kodessworth Swope (843) 852-4925	

Dorchester County First Judicial Circuit - Roster Details  
4/13/2022 Virtual Motion Roster - Hon. R. Markley Dennis Jr.

Court Agency	Common Pleas	Judge	Roster Begin Date	Dennis	Roster End Date	717					
Roster Type	Motions			04/13/2022		04/13/2022					
Number of motions = 38											
#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
32	04/13/2022	4:00 PM	0:30	Motion/Compel Discovery	Grove at Oakbrook -DEF	02/16/2022	2021CP1800550 Alexandra Lukac VS Julia Keefe , defendant, et al	Personal Injury 350	Heather A. Hartoin (843) 832-6000	Brittany Tanva Bihun (843) 408-2816 Joshua W. Dixon (703) 687-6200 Julianne Farnsworth (843) 714-2502 Julia Keefe (803) 578-1922	
33	04/13/2022	4:00 PM	0:15	Motion/Compel Discovery	Dorchester County-PLT	02/11/2022	2021CP1800606 Dorchester County VS Dennis H Green II , defendant, et al	Condemnation 410	Bradley Allan Mitchell (843) 832-0097	Kiera Courtney Dillon (803) 898-5213 Dennis H Green II	
34	04/13/2022	4:00 PM	0:30	Motion/Compel Discovery	Summerville Town Of-DEF	02/11/2022	2021CP1801219 Thomas Bohl VS Summerville Town Of , defendant, et al	Premises Lab 330	Heather A. Hartoin (843) 832-6000	Jonathan J. Anderson (843) 576-2070 Jonathan Lee Anderson (843) 723-0185 Timothy Alan Dornin (843) 577-2026	Not a year old until 7/8/2022
35	04/13/2022	4:00 PM	0:15	Motion/Compel	James M Green Sr-DEF	02/15/2022	2021CP1801567 Kenneth W Green VS James M Green Sr	Premises Lab 330	Beth Branham Davis (843) 357-1851	John Austin Hood (800) 774-8242	
36	04/13/2022	4:00 PM	0:15	Motion/Compel Discovery	Rita Bustillo Gomez -DEF	02/09/2022	2021CP1802019 Sophia Prioleau VS Rita Bustillo Gomez , defendant, et al	Motor Veh Accid 320	Max Capper Spanwasser (843) 864-6444	Nickisha M Woodward (843) 576-2805	Completed:03/30/2022
37	04/13/2022	4:00 PM	0:15	Motion/Compel	Scott Jackson Eadie-PLT	10/29/2021	2021CP1800226 Scott Jackson Eadie , plaintiff, et al VS Everett Furman Eadie , defendant, et al	Real Prop/Other 499	James Earle Reeves (843) 832-7337 Peter Brandt Shelbourne (843) 871-2210	Ashton Eadie (843) 312-8901 Everett Furman Eadie Lori Eadie	
38	04/13/2022	4:00 PM	0:30	Motion/Compel/Discovery	Lola Halford Personal Representative-PLT	02/22/2022	2021CP1800541 Lola Halford , plaintiff, et al VS Oakbrook Health Care Lic , defendant, et al	Wrongful Death 360	Brian Montgomery Barrwell (803) 978-6111 Jescelyn Tillman Spitz (803) 968-9169 Charles E. Usry	Donald Jay Davis Jr. (843) 720-5406 Kara Shea Grevey (843) 720-5445 Ted Ashton Phillips III	#15 for trial

Dorchester County First Judicial Circuit - Roster Details  
4/13/2022 Virtual Motion Roster - Hon. R. Markley Dennis Jr.

Court Agency	Common Pleas	Judge	Dennis	Roster Id	717						
Roster Type	Motions	Roster Begin Date	04/13/2022	Roster End Date	04/13/2022						
Number of motions = 38											
#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
									(803) 978-6111	(843) 577-4000	

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 ) FIRST JUDICIAL CIRCUIT  
COUNTY OF DORCHESTER )  
 ) CASE NO. 2021-CP-18-01030

TAMMY CHINA, )  
as Personal Representative )  
for the Estate of Emma Lee James, )  
 )  
 )  
Plaintiff, )

vs. )

PALMETTO HALLMARK OPERATING, )  
LLC d/b/a Hallmark Healthcare Center and )  
ELITE PATIENT CARE OF SOUTH )  
CAROLINA, PC, )  
 )  
 )  
Defendants. )

**MOTION TO ALTER, AMEND, AND/OR  
RECONSIDER ORDER DENYING  
MOTION TO COMPEL ARBITRATION**

TO: THE HONORABLE R. MARKLEY DENNIS, JR., Presiding Judge, and MARIO A. PACELLA, ESQUIRE, JESSICA L. FICKLING, ESQUIRE, and AMY E. WILLBANKS, ESQUIRE, all of STROM LAW FIRM, Attorneys for Plaintiff

NOW COMES Defendant Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (the “Facility”), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCF, and, on the grounds set forth below, hereby most respectfully moves this Honorable Court to alter, amend, and/or reconsider its Order filed May 4, 2022, denying the Facility’s motion to compel arbitration (the “Subject Order”).

- 1. The Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument it raised in support of the Underlying Motion,<sup>1</sup> i.e., each and every distinct issue/argument set forth in the Underlying Motion itself, in the Memo in Support of the Underlying Motion,<sup>2</sup> and via oral argument, all of which is/are hereby incorporated herein by reference.**

*See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

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<sup>1</sup> The “Underlying Motion” refers to the motion that was decided via the Subject Order, i.e., the Facility’s Motion to Compel Arbitration, which was filed January 21, 2022, and heard April 13, 2022, via WebEx.

<sup>2</sup> The “Memo in Support of the Underlying Motion” refers to the Facility’s supporting memorandum filed April 8, 2022.

2. **The merger/equitable estoppel analysis in the Subject Order is erroneous, to include, without limitation, the Court’s citation to irrelevant authority that pertains to the wrong test for equitable estoppel. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. James effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.**
- (a) **The Subject Order reflects the Court’s misapprehension of the Facility’s merger/equitable estoppel argument, as evidenced by the following incorrect statements contained therein:**
- (i) **“The basis of [the Facility’s] Motion is that a valid and enforceable arbitration agreement exists between the parties.”<sup>3</sup>**
- (ii) **“Because Emma Dunham lacked legal authority to enter into legal agreements on behalf of her mother, neither the Arbitration Agreement nor the Admission Agreement can be considered to be valid.”<sup>4</sup>**
- (iii) **“[T]he Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Decedent James’ estate would be equitably estopped from denying the Arbitration Agreement’s validity, *and* (2) if Ms. Dunham had actual or apparent authority to enter the Arbitration Agreement on behalf of Decedent James.”<sup>5</sup>**

The Facility’s merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Dunham or otherwise on the existence of any valid and enforceable agreement between the parties. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of

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<sup>3</sup> (Subject Order p. 1.)

<sup>4</sup> (Subject Order p. 2.)

<sup>5</sup> (Subject Order p. 2.)

enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that “Appellants’ equitable estoppel argument,” which “[wa]s premised on [Appellants’] contention that, under state law, the admission agreements and the [arbitration agreements] merged,” as follows: “Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement’s] enforceability.*”) (emphasis added).

Conceptually, the Facility’s merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Plaintiff to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Ms. James having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability not only of the Admission Agreement and but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility’s argument in favor of direct benefits estoppel is based on the direct benefits Ms. James received under the Admission Agreement (with which the Arbitration merged), this argument applies with equal force to estop Plaintiff from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

Accordingly, as to the Facility’s merger/equitable estoppel argument, any analysis by the Court regarding the Admission Agreement/Arbitration Agreement’s supposed lack of enforceability—e.g., that Ms. Dunham lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Ms. James under the law of agency<sup>6</sup> and/or under the South Carolina Adult Health Care Consent Act (the “AHCCA”), S.C. Code Ann. §§ 44-66-

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<sup>6</sup> (See Subject Order pp. 6–7 (regarding principles of agency).)

10 to -80,<sup>7</sup> and/or because Ms. Dunham lacked power of attorney over Ms. James<sup>8</sup>—is beside the point and unavailing to refute the Facility’s merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Plaintiff is estopped to deny its enforceability.

**(b) The Court’s merger analysis is erroneous.**

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).

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<sup>7</sup> (See Subject Order pp. 2, 4 (regarding the AHCCA).)

Here, the Court has erred in rejecting the Facility’s merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (Subject Order pp. 4–6.) 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>9</sup> as indeed the Admission Agreement and the Arbitration Agreement were here,<sup>10</sup> there is evidence 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,” our 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>8</sup> (See Subject Order pp. 2–3, 6–7 (regarding power of attorney).)

<sup>9</sup> *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

<sup>10</sup> To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observes 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).

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless 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. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge.

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court<sup>11</sup>), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed “separatedness.” (Admission Agreement p. 12.) Without question, 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) (“The

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<sup>11</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

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); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement.*") (emphasis added)). The Court's conclusory finding that there is ambiguity in this regard<sup>12</sup> is unsupported and erroneous.

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Ms. James to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. 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).

Moreover, 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. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give

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agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts." (emphasis added).

<sup>12</sup> (Subject Order pp. 4–5 ("While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the other details of

rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (*See* Arbitration Agreement (providing for arbitration 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 . . . .”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .”).)

Even though the Arbitration Agreement was not a *condition* of admission, it was 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. James’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. (*Compare* Admission Agreement (setting forth the terms of Ms. James’s admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. James’s admission to the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing “This Agreement will be governed by and construed in accordance with applicable

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the agreements, it creates at best an ambiguity as to merger when taken in context of the totality

Federal regulations and those laws of the State in which Facility is located.”) *with* Arbitration Agreement (providing that, “because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, and contrary to the view expressed in the Subject Order,<sup>13</sup> the survival of the Arbitration Agreement is no evidence of “separatedness.” The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an

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of the circumstances . . . .”).)

intent contrary to merger. Respectfully, to point to such things, as the Subject Order does,<sup>14</sup> is really to do no more than to point out 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—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents 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

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<sup>13</sup> (Subject Order p. 4 (“Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any ‘breach of this Agreement or the Admission Agreement.’”).)

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.

Respectfully, the Court’s finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent. It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as they all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. James’s admission to the Facility and would not have been done at all but for her admission to the

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<sup>14</sup> (Subject Order p. 4.)

Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

**(c) The Court's equitable estoppel analysis is erroneous.**

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court's decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel). The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. James received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *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). In other words, *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, without any resort to another test for equitable estoppel, such as that addressed in the *Kelly* and *Strickland* cases cited in the Subject Order. (Subject Opinion p. 5 ("Further, the Estate of Emma James cannot be equitably estopped from denying enforcement of the Arbitration Agreement. 'Equitable estoppel is a

contract defense and the party asserting this defense bears the burden of proving all of its elements.’ *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Palmetto Hallmark cannot meet its burden to establish this element.”)<sup>15</sup>

Moreover, the Subject Order incorrectly interprets *Wilson* as follows:

As the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought his lawsuit under a negligence theory arising from common law duties.

(Subject Order p. 6.)

What *Wilson* actually explains is that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 (“Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine 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. Stated another way, [u]nder

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<sup>15</sup> To be clear, neither *Kelly* nor *Strickland* was an arbitration case, and both cases relied on the traditional six-factor test for estoppel, *Kelly*, 383 S.C. at 638, 682 S.E.2d at 7,

the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .”) (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

Here, Ms. James was a direct beneficiary. Indeed, to deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night’s stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff’s complaint does not go nearly so far as that. (*See Comp.*)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. James received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is

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*Strickland*, 375 S.C. at 84–85, 650 S.E.2d at 470, not the direct benefits test.

estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Ms. James having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.

- 3. The Subject Order incorrectly states—in conclusory fashion, without actually citing any legal or factual support—that “the only relevant and necessary evidence for the Court to make its determination is already available for the Court’s review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.”<sup>16</sup>**

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal’s control.” *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

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<sup>16</sup> (Subject Order p. 7.)

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

Moreover, authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) (“Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent.”). “Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent.” *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent’s act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) (“The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.”).

These principles relating to the law of agency potentially provide an additional, independent basis on which to grant the Underlying Motion. Their application is fact dependent, and in no reasonable way can it be said “that the only relevant and necessary evidence for the Court to make its determination [thereon] is already available for the Court’s review” such that “further discovery with the goal of revisiting the arbitrability of this case would only serve to

protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.”

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motion (both those advanced in writing and those advanced via oral argument), all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon in full), the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motion.

PLEASE NOTE: the Facility reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

**<SIGNED ON THE FOLLOWING PAGE>**

Respectfully submitted,  
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May 16, 2022

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FIRST JUDICIAL CIRCUIT  
COUNTY OF DORCHESTER ) CASE NO. 2021-CP-18-01030

TAMMY CHINA, )  
as Personal Representative )  
for the Estate of Emma Lee James, )  
 )  
Plaintiff, )

vs. )

PALMETTO HALLMARK OPERATING, )  
LLC d/b/a Hallmark Healthcare Center and )  
ELITE PATIENT CARE OF SOUTH )  
CAROLINA, PC, )  
 )  
Defendants. )

**MOTION TO ALTER, AMEND, AND/OR  
RECONSIDER ORDER FILED  
NOVEMBER 28, 2022**

TO: THE HONORABLE ROBERT BONDS, Presiding Judge, and MARIO A. PACELLA, ESQUIRE, JESSICA L. FICKLING, ESQUIRE, and AMY E. WILLBANKS, ESQUIRE, all of STROM LAW FIRM, Attorneys for Plaintiff

NOW COMES Defendant Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (the “Facility”), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCF, and, on the grounds set forth below, hereby most respectfully moves this Honorable Court to alter, amend, and/or reconsider its Order filed November 28, 2022 (the “Subject Order”).

**BACKGROUND**

The Facility is a skilled nursing facility in Dorchester County, and in this wrongful death and survival action, Plaintiff asserts the Facility is liable for damages because of allegedly deficient care the decedent, Ms. James, received as a resident of the Facility. (*See* Compl.)

On January 21, 2022, the Facility moved to compel Plaintiff’s claims against it to arbitration (the “Motion to Compel Arbitration”). (*See* Def. Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center’s Mot. to Compel Arbitration; *see also* Def. Palmetto

Hallmark Operating, LLC d/b/a Hallmark Healthcare Center's Mem. in Supp. of Mot. to Compel Arbitration.)

The Motion to Compel Arbitration was heard on April 13, 2022, before the Honorable R. Markley Dennis Jr., who denied the motion by order filed May 4, 2022 ("Judge Dennis's Order of May 4<sup>th</sup>"). (See Order filed May 4, 2022.)

On May 16, 2022, the Facility timely moved for reconsideration of Judge Dennis's Order of May 4<sup>th</sup> (the "Motion to Reconsider the May 4<sup>th</sup> Order"). (See Mot. to Alter, Amend, and/or Reconsideration Order Denying Mot. to Compel Arbitration.)<sup>1</sup>

Prior to ruling on the Motion to Reconsider the May 4<sup>th</sup> Order, Judge Dennis retired from the bench and went into the private practice of law.

The Honorable Diane Schafer Goodstein, Chief Judge for Administrative Purposes, Circuit 1 – CP, convened a status conference in this case on October 24, 2022, and based on that status conference, it is the Facility's counsel's understanding that Judge Goodstein determined that, because, due to his retirement, Judge Dennis was unable to rule on the Motion to Reconsider the May 4<sup>th</sup> Order, it was necessary for the Motion to Compel Arbitration to be reheard.

Accordingly, it is the Facility's counsel's understanding that the hearing that took place in this matter before Judge Bonds on November 17, 2022, was a hearing on the Motion to

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<sup>1</sup> Rule 59(e), SCRCP, provides, "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 6(a), SCRCP, provides, "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday." Computing time in accordance with Rule 6(a), Monday, May 16, 2022, was the 10<sup>th</sup> day after the filing of Judge Dennis's Order on May 4, 2022.

Compel Arbitration, as opposed to a hearing on the Motion to Reconsider the May 4<sup>th</sup> Order. In other words, it was the Facility's counsel's understanding that the Motion to Compel Arbitration was being heard anew by Judge Bonds, as if it were being heard for the first time.<sup>2</sup>

The Subject Order, however, reads as follows: "Defendant's Motion to Reconsider was heard Nov 17, 2022. After hearing arguments of council and reviewing the order of Judge Dennis, this court agrees with Judge Dennis' findings, conclusions of law and Order and therefore, affirms his ruling. The Defendant's motion to Reconsider is respectfully, denied." (Subject Order.)

The instant Rule 59(e) motion timely follows the filing of the Subject Order on November 28, 2022.

### **GROUND**

**I. Based on the aforementioned procedural posture, it is the Facility's understanding that the Subject Order constitutes a ruling on (specifically, the denial of) the Motion to Compel Arbitration, but to the extent this is not so, the Facility asks the Court to clarify the scope of the Subject Order.**

Please know that the Facility's counsel does not wish to make this matter unduly complicated, only to protect the Facility's interests by protecting the record. Again, it is the Facility's counsel's understanding that the hearing that took place in this matter before Judge Bonds on November 17, 2022, was a hearing on the Motion to Compel Arbitration, as opposed to a hearing on the Motion to Reconsider the May 4<sup>th</sup> Order, because Judge Dennis's Order of May 4<sup>th</sup> was effectively nullified by his retirement, given that Judge Dennis had, as a result of his retirement, become unable to rule on the Motion to Reconsider the May 4<sup>th</sup> Order and the nature of the motion was such that it could not be ruled on by another judge, as Judge Goodstein

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<sup>2</sup> The Facility's counsel does not yet have the transcript of the November 17, 2022, motion hearing, but to the best of the undersigned's recollection, Plaintiff's counsel confirmed

advised at the October 24, 2022, status conference. Accordingly, though purporting to be an order denying a “Motion to Reconsider,” it seems the Subject Order was effectively an order denying the Motion to Compel Arbitration. But to the extent this is not so, to try to protect the record and avoid any potential for undue confusion, the Facility asks the Court to clarify the scope of the Subject Order.

**II. The Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument it raised in support of the Motion to Compel Arbitration, i.e., each and every distinct issue/argument set forth in support thereof, whether in writing or via oral argument, all of which is/are hereby incorporated herein by reference.**

*See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

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that this was his understanding as well at the outset of the hearing.

**III. The Subject Order states that the Court “agrees with Judge Dennis’ findings, conclusions of law and Order [of May 4<sup>th</sup>] and therefore, affirms his ruling.” But Judge Dennis’s Order of May 4<sup>th</sup> and, in turn, the Subject Order (as it echoes and adopts Judge Dennis’s Order of May 4<sup>th</sup> as its own), is erroneous.**

**A. The merger/equitable estoppel analysis in the Subject Order is erroneous, to include, without limitation, the Court’s citation to irrelevant authority that pertains to the wrong test for equitable estoppel. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. James effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.**

**1. The Subject Order reflects the Court’s misapprehension of the Facility’s merger/equitable estoppel argument, as evidenced by the following incorrect statements contained therein:**

- (a) “The basis of [the Facility’s] Motion is that a valid and enforceable arbitration agreement exists between the parties.”<sup>3</sup>**
- (b) “Because Emma Dunham lacked legal authority to enter into legal agreements on behalf of her mother, neither the Arbitration Agreement nor the Admission Agreement can be considered to be valid.”<sup>4</sup>**
- (c) “[T]he Court must determine (1) if the Arbitration Agreement merged with and was a part of the Admission Agreement such that Decedent James’ estate would be equitably estopped from denying the Arbitration Agreement’s validity, and (2) if Ms. Dunham had actual or apparent authority to enter the Arbitration Agreement on behalf of Decedent James.”<sup>5</sup>**

The Facility’s merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Dunham or otherwise on the existence of any valid and enforceable agreement between the parties. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles

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<sup>3</sup> (Judge Dennis’s Order of May 4th p. 1.)

<sup>4</sup> (Judge Dennis’s Order of May 4th p. 2.)

of contract and agency law, including . . . estoppel.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that “Appellants’ equitable estoppel argument,” which “[wa]s premised on [Appellants’] contention that, under state law, the admission agreements and the [arbitration agreements] merged,” as follows: “Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement’s] enforceability.*”) (emphasis added).

Conceptually, the Facility’s merger/equitable estoppel argument is *not* an argument for the enforceability of the Admission Agreement/Arbitration Agreement but rather an argument for Plaintiff to be estopped to deny the enforceability of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Ms. James having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability not only of the Admission Agreement and but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility’s argument in favor of direct benefits estoppel is based on the direct benefits Ms. James received under the Admission Agreement (with which the Arbitration merged), this argument applies with equal force to estop Plaintiff from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

Accordingly, as to the Facility’s merger/equitable estoppel argument, any analysis by the Court regarding the Admission Agreement/Arbitration Agreement’s supposed lack of enforceability—e.g., that Ms. Dunham lacked authority to sign the Admission

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<sup>5</sup> (Judge Dennis’s Order of May 4th p. 2.)

Agreement/Arbitration Agreement on behalf of Ms. James under the law of agency<sup>6</sup> and/or under the South Carolina Adult Health Care Consent Act (the “AHCCA”), S.C. Code Ann. §§ 44-66-10 to -80,<sup>7</sup> and/or because Ms. Dunham lacked power of attorney over Ms. James<sup>8</sup>—is beside the point and unavailing to refute the Facility’s merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Plaintiff is estopped to deny its enforceability.

## 2. The Court’s merger analysis is erroneous.

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).

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<sup>6</sup> (See Judge Dennis’s Order of May 4th pp. 6–7 (regarding principles of agency).)  
<sup>7</sup> (See Judge Dennis’s Order of May 4th pp. 2, 4 (regarding the AHCCA).)  
<sup>8</sup> (See Judge Dennis’s Order of May 4th pp. 2–3, 6–7 (regarding power of attorney).)

*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).

Here, the Court has erred in rejecting the Facility’s merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The Subject Order wrongfully concludes that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. (Judge Dennis’s Order of May 4th pp. 4–6.) 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>9</sup> as indeed the Admission Agreement and the Arbitration Agreement were here,<sup>10</sup> there is evidence 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

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<sup>9</sup> *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

<sup>10</sup> To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observes 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).

th[e] [parties'] intention,” our 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.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless 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. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge.

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court<sup>11</sup>), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly

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<sup>11</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

contemplating the lack of its own supposed “separatedness.” (Admission Agreement p. 12.) Without question, 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) (“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); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 (“Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement.*”) (emphasis added)). The Court’s conclusory finding that there is ambiguity in this regard<sup>12</sup> is unsupported and erroneous.

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for Ms. James to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. 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).

Moreover, 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. That is, the Admission Agreement *could* have stood on its own, i.e.,

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agreement and, thus, “recognize[d] the ‘*separatedness*’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

<sup>12</sup> (Judge Dennis’s Order of May 4th pp. 4–5 (“While the Admission Agreement purports to incorporate admissions materials into itself “by reference herein”, when viewed

without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (See Arbitration Agreement (providing for arbitration 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 . . . .”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .”).)

Even though the Arbitration Agreement was not a *condition* of admission, it was 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. James’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. (*Compare* Admission Agreement (setting forth the terms of Ms. James’s admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. James’s admission to the Facility).)

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alongside the other details of the agreements, it creates at best an ambiguity as to merger when taken in context of the totality of the circumstances . . . .”).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing “This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.”) *with* Arbitration Agreement (providing that, “because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, and contrary to the view expressed in the Subject Order,<sup>13</sup> the survival of the Arbitration Agreement is no evidence of “separatedness.” The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina

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<sup>13</sup> (Judge Dennis’s Order of May 4th p. 4 (“Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the

arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things, as the Subject Order does,<sup>14</sup> is really to do no more than to point out 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—besides the fact, explained elsewhere, that there is no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless*

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Arbitration Agreement will survive any ‘breach of this Agreement or the Admission Agreement.’”).)

<sup>14</sup> (Judge Dennis’s Order of May 4th p. 4.)

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.

Respectfully, the Court’s finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent. It must be remembered that the presumption of merger arises only where the four elements of time, parties, purpose, and transaction coincide—as they all do here. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. If even one of these is lacking there is no merger. This is why, for the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. James's admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

**3. The Court's equitable estoppel analysis is erroneous.**

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court's decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel). The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. James received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *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). In other words, *Wilson* supports the use of the direct benefits test to answer

the question of equitable estoppel in an arbitration case like this, without any resort to another test for equitable estoppel, such as that addressed in the *Kelly* and *Strickland* cases cited in the Subject Order. (Judge Dennis’s Order of May 4th p. 5 (“Further, the Estate of Emma James cannot be equitably estopped from denying enforcement of the Arbitration Agreement. ‘Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.’ *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped acted in a way amounting to a false representation. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). Palmetto Hallmark cannot meet its burden to establish this element.”).)<sup>15</sup>

Moreover, the Subject Order incorrectly interprets *Wilson* as follows:

As the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the contract. Here, as explained above and below, the Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought his lawsuit under a negligence theory arising from common law duties.

(Judge Dennis’s Order of May 4th p. 6.)

What *Wilson* actually explains is that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 (“Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract

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<sup>15</sup> To be clear, neither *Kelly* nor *Strickland* was an arbitration case, and both cases relied on the traditional six-factor test for estoppel, *Kelly*, 383 S.C. at 638, 682 S.E.2d at 7,

containing an arbitration clause. In the arbitration context, the doctrine 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. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

Here, Ms. James was a direct beneficiary. Indeed, to deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff's complaint does not go nearly so far as that. (*See Comp.*)

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*Strickland*, 375 S.C. at 84–85, 650 S.E.2d at 470, not the direct benefits test.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. James received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Ms. James having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.

**B. The Subject Order incorrectly states—in conclusory fashion, without actually citing any legal or factual support—that “the only relevant and necessary evidence for the Court to make its determination is already available for the Court’s review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.”<sup>16</sup>**

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal’s control.” *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal

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<sup>16</sup> (Judge Dennis’s Order of May 4th p. 7.)

may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

Moreover, authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) (“Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent.”). “Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent.” *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent’s act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) (“The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.”).

These principles relating to the law of agency potentially provide an additional, independent basis on which to grant the Motion to Compel Arbitration. Their application is fact

dependent, and in no reasonable way can it be said “that the only relevant and necessary evidence for the Court to make its determination [thereon] is already available for the Court’s review” such that “further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, waste judicial resources, and increase costs for both parties unnecessarily.”

### **CONCLUSION**

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Motion to Compel Arbitration (both those advanced in writing and those advanced via oral argument), all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon in full), the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration.

PLEASE NOTE: the Facility reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

**<SIGNED ON THE FOLLOWING PAGE>**

Respectfully submitted,  
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Charleston, South Carolina

December 8, 2022

**RECEIVED**

**Dec 28 2022**

**SC Court of Appeals**

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

---

Appeal from Dorchester County  
Court of Common Pleas

Robert Bonds, Circuit Court Judge  
R. Markley Dennis, Jr., Circuit Court Judge

---

Case No. 2021-CP-18-01030

---

Tammy China,  
as Personal Representative of the  
Estate of Emma Lee James,

Respondent,

v.

Palmetto Hallmark Operating, LLC  
d/b/a Hallmark Healthcare Center, and  
Elite Patient Care of South Carolina, PC,

Defendants,

Of which Palmetto Hallmark Operating, LLC  
d/b/a Hallmark Healthcare Center is

Appellant.

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**NOTICE OF APPEAL**

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*Attorneys for Defendant*

*Elite Patient Care of South Carolina, PC*

Defendant/Appellant Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center (“Appellant”) hereby appeals the following orders the Honorable R. Markley Dennis, Jr., Circuit Court Judge, and the Honorable Robert Bonds, Circuit Court Judge, respectively:

- Order of the Honorable R. Markley Dennis, Jr., Circuit Court Judge, filed May 4, 2022;
- Order of the Honorable Robert Bonds, Circuit Court Judge, filed November 28, 2022; and
- Order of the Honorable Robert Bonds, Circuit Court Judge, filed December 28, 2022.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellant received written notice of entry of the most recent order on December 28, 2022.

Respectfully submitted,  
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December 28, 2022

**RECEIVED**

**Dec 28 2022**

**SC Court of Appeals**

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

---

Appeal from Dorchester County  
Court of Common Pleas

Robert Bonds, Circuit Court Judge  
R. Markley Dennis, Jr., Circuit Court Judge

---

Case No. 2021-CP-18-01030

---

Tammy China,  
as Personal Representative of the  
Estate of Emma Lee James,

Respondent,

v.

Palmetto Hallmark Operating, LLC  
d/b/a Hallmark Healthcare Center, and  
Elite Patient Care of South Carolina, PC,

Defendants,

Of which Palmetto Hallmark Operating, LLC  
d/b/a Hallmark Healthcare Center is

Appellant.

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**PROOF OF SERVICE**

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*Attorneys for Appellant*

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that Appellant's **NOTICE OF APPEAL** was served on Respondent and Defendant Elite Patient Care of South Carolina, PC, on December 28, 2022, by emailing (see attached email) a copy of the same to their counsel of record:

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I also certify that a copy of this **NOTICE OF APPEAL** was this day, December 28, 2022, E-Filed with the lower court (see attached NEF), which also, i.e., in addition to service by email, effected service of the notice today on all counsel of record via the E-Filing System.

Respectfully submitted,  
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Charleston, South Carolina

December 28, 2022

## Hines, Russell

---

**From:** Hines, Russell  
**Sent:** Wednesday, December 28, 2022 1:28 PM  
**To:** Mario Pacella; Jessica Fickling; Amy Willbanks; 'Joseph Tierney, Jr'; Hunter A. Morgan; 'billy.sweeny@rogerstownsends.com'  
**Cc:** 'Brown, Steve'; Davis, Jay; Riddle, Matthew; Grevey, Kara S.; Wakeham, Rebecca (Becky); Peterson, Susan; Justman, Aimee; Bell, Pollyana (Polly)  
**Subject:** China v. Palmetto Hallmark (Case No. 2021-CP-18-01030) -- Notice of Appeal  
**Attachments:** China v. Palmetto Hallmark (Case No. 2021-CP-18-01030) -- Notice of Appeal.pdf; Order of the Honorable R. Markley Dennis, Jr., Circuit Court Judge, filed May 4, 2022.pdf; Order of the Honorable Robert Bonds, Circuit Court Judge, filed November 28, 2022.pdf; Order of the Honorable Robert Bonds, Circuit Court Judge, filed December 28, 2022.pdf

Attached regarding the above-referenced case please find Palmetto Hallmark Operating, LLC d/b/a Hallmark Healthcare Center's **Notice of Appeal** and copies of the **Appealed Orders**, which are incorporated therein by reference.

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**\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\***  
**NOTICE OF ELECTRONIC FILING [NEF]**

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**A filing has been submitted to the court RE:** 2021CP1801030

**Official File Stamp:** 12-28-2022 01:36:38 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Dorchester  
**Case Caption:** Tammy China , plaintiff, et al VS Palmetto Hallmark Operating Llc , defendant, et al  
**Document(s) Submitted:** Appeal/Notice of Appeal to Court of Appeals  
- Exhibit/Filing of Exhibits  
- Exhibit/Filing of Exhibits  
- Exhibit/Filing of Exhibits  
**Filed by or on behalf of:** Russell Grainger Hines

This notice was automatically generated by the Court's auto-notification system.

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**The following people were served electronically:**

Russell Grainger Hines for Hallmark Healthcare Center, Palmetto Hallmark Operating Llc  
Amy E. Willbanks for Tammy China et al  
Donald Jay Davis, Jr. for Hallmark Healthcare Center, Palmetto Hallmark Operating Llc  
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Joseph John Tierney, Jr. for Elite Patient Care Of South Carolina Pc  
Jessica Lerer Fickling for Tammy China  
Hunter Adam Morgan for Elite Patient Care Of South Carolina Pc  
Mario Anthony Pacella for Tammy China

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

Sep 13 2023

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

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