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SC Court of Appeals

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

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2018-CP-42-03421
Appellate Case No. 2020-001146

Armando J. Acevedo,
through his Attorney-in-Fact,
Marianne Acevedo,

Respondent,

v.

Hunt Valley Holdings, LLC;
THI of South Carolina, LLC; and
THI of South Carolina at Camp Care, LLC,
d/b/a Lake Emory Post-Acute Care,

Appellants.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

C.A. No: 2018-CP-42-03421

Armando J. Acevedo, through his Attorney-In-Fact, Marianne Acevedo,

Plaintiffs,

v.

**PROPOSED ORDER DENYING
MOTION TO COMPEL ARBITRATION**

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post-Acute Care;

Defendants.

This matter came before the Court on February 1, 2019 for Defendant THI of South Carolina at Camp Care, LLC's Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and reviewed the parties' legal memoranda, and for the reasons more fully set forth below, the Court hereby denies the Motion to Compel Arbitration.

I. BACKGROUND

This matter arises out of allegations of nursing home neglect and corporate negligence resulting in the injuries to Armando Acevedo. Marianne Acevedo is Armando's wife and power of attorney. The claims are brought against the nursing home facility THI of South Carolina at Camp Care, LLC, as well as Hunt Valley Holdings, LLC (HVH).

Decedent was admitted into THI of South Carolina at Camp Care, LLC ("Facility") on July 12, 2017 according to the Admission Agreement. The Admission Agreement governed the type of care Decedent would receive at the Facility and Armando's financial obligation to pay for those services. No mention of arbitration is contained in this Agreement.

A separate contract called "Arbitration Agreement" was also signed on July 12, 2019 during the admission process but was not a condition of admission. It was a separate contract that

did not merge with the Admission Agreement. The alleged Arbitration Agreement, purportedly a contract between the Facility and Armando, does not contain the legal name of the Defendant but rather references a name of a nonexistent entity not registered with the South Carolina Secretary of State called “Lake Emory Post-Acute Care”. That agreement provides for alternative dispute resolution to any claim a party may bring against another arising out of Armando’s care at the Facility.

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement.¹ When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing party the benefit of all reasonable doubts and inferences that may arise.² “A party seeking judicial enforcement of a contract bears the burden of persuasion.”³ Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract. Whether the parties agreed to arbitrate is a question of substantive state law.⁴ In Chassereau v. Global Sun Pools, Inc.⁵, the Supreme Court stated: “Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.”

While there is a presumption in favor of arbitration agreements, this presumption only applies *after* the court finds there is a valid enforceable arbitration agreement.⁶ The FAA applies to its arbitration agreement. In enacting the FAA, Congress did not intend to force parties to arbitrate in the absence of a valid and enforceable agreement, and therefore the “existence of an

¹ See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008).

² See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).

³ THI of N.M. at Vida Encantada, LLC v. Archuleta (D. N.M., 2013)

⁴ Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”)

⁵ 644 S.E.2d 718 (S.C. 2007)

⁶ EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked.”⁷ When the parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration disappears.⁸ The FAA requires that state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. See 9 U.S.C. § 2. The Federal Arbitration Act ("FAA") provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added).

Not all arbitration clauses are enforceable per se. Arbitration agreements may thus be invalidated by generally applicable contract defenses, such as vagueness, indefiniteness, lack of consideration, fraud, duress, or unconscionability.⁹ Courts rely on state law to decide the threshold questions of contract formation.¹⁰ Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.¹¹ The FAA is intended to promote inexpensive, fair, and reasonable arbitration alternatives to litigation. It is not a license for businesses to take advantage of consumers by the imposition of one-sided, unfair, and legally unconscionable arbitration schemes. We will not allow our courts to be used to enforce unconscionable arbitration clauses any more than we will allow them to be used to enforce any other unconscionable contract in South Carolina. The judicial inquiry includes an examination of contractual defects such as lack of

⁷ Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1286 (10th Cir. 1997).

⁸ Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).

⁹ Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2776 (2010).

¹⁰ Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

¹¹ Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.¹² A court should only decide as a matter of law whether the parties entered into an agreement to arbitrate when there is no genuine issue of material fact concerning the formation of the agreement.¹³

Consideration is a prerequisite to the legal formation of a valid contract. To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent. Consideration is essential to the enforcement of a promise. Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. The Arbitration Agreement was not part of the Admission Contract. The Arbitration Agreement was a separate document, and thus, separate consideration was required.¹⁴

There was no consideration given to Armando Acevedo to sign the Arbitration Agreement, because Armando had already been admitted. The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise. Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party or undertaken by the other.

Unconscionability, on the other hand, is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party.¹⁵ Plaintiffs also allege that the Court should consider that federal regulations still prohibit pre-dispute mandatory arbitration

¹² See Sydnor v. Conesco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

¹³ See Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).

¹⁴ See Thompson v. THI of New Mexico at Casa Arena Blanca, LLC, , 2006 WL 4061187, at *12 (D.N.M. Sept. 12, 2006) THI of N.M. at Vida Encantada, LLC v. Archuleta (D. N.M., 2013).

¹⁵ Figueroa v. Thi of New Mexico At Casa Arena Blanca LLC, 306 P.3d 480 (N.M. App., 2012)(“Unconscionability is examined by the court where, in spite of adequate consideration to support a contract, the unfair terms of the contract do not warrant enforcement.”).

agreements despite the current Administration's refusal to enforce or replace the regulation. 42 CFR 483.70(n) applies which prohibits mandatory pre-dispute arbitration in nursing home cases. The regulation states:

(n) *Binding arbitration agreements.*

(1) A facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility.

II. STATEMENT OF ISSUES

A. The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.

The necessary elements of a contract are an offer, acceptance, and valuable consideration.¹⁶ It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration.¹⁷ Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case. In determining whether adequate consideration exists in a contract or arbitration agreement under the FAA guided by principles of contract law, we must examine and stay within the confines of the four corners of the instrument.¹⁸ The contract is silent as to any consideration exchanged between the parties. The arbitration agreement itself contains insufficient consideration in the form of a mutual exchange of promises to arbitrate.

¹⁶ Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d161, 166 (2003) "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).

¹⁷ Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984).

¹⁸ State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. Defendants argue that the Agreement requires both sides to be bound by arbitration. That is exactly the problem: the only party that is going to bring a “dispute over care” is the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. The mutual promise to arbitrate is illusory and of no benefit to Decedent or Plaintiff. Any such attempt to find a benefit would have been futile given the Court of Appeals’ unambiguous ruling in Thompson, which held that **“any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement’s] requirement that [resident] waive her right to access the courts and her right to a jury trial.”**¹⁹

There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the admission agreement. Admission can be the “direct benefit” that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. In sum, Defendants cannot meet their burden to prove merger, consideration, or any other benefit for the arbitration agreement. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a single contract. If the jury waiver was not a precondition to admission, then it fails for lack of consideration. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement.²⁰ Additionally, neither party

¹⁹ 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

²⁰ Plantation, 386 S.C. at 206, 687 S.E.2d at 718.

suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. *Id.* Additionally, there was no bargain for exchange nor consideration to the Arbitration Agreement.

Federal regulations prohibit “additional consideration” to be accepted by the Facility. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full.²¹ Any nursing home facility that accepts Medicare or Medicaid funds for resident care is *expressly forbidden* from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility. 42 U.S.C. § 1369r(c)5(A)(iii)l 42 CFR § 486.12(d)(3) expressly states that a:

Nursing home facility *shall not change, solicit, or accept, or receive*, in addition to any amount otherwise required to be paid under the State’s Medicaid plan any gift, money, donation, or *other consideration* as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual’s continued stay in the facility. [emphasis added]

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants’ nursing home in this case.

B. The Arbitration Agreement is missing material terms and lacks definiteness, and cannot be enforced without the Court providing material omitted terms which would violate the FAA and applicable case law.

South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.²² An agreement which neglects material terms may be found unenforceable for indefiniteness.²³ “Ordinarily, a court will not supply omitted terms to an

²¹ See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15.

²² *Player v. Chandler*, 299 S.C. 101, 105, 1989 (citing *Hughes v. Edwards*, 265 S.C.529 (1975)).

²³ *Lindsay v. Lindsay*, 491 S.E.2d 583 (S.C. App. 1997).

agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced.” *Id.* In this case, even if the Arbitration Agreement was validly executed, there was no "meeting of the minds" as to the terms of arbitration, specifically the choice of arbitrator, rules of evidence or allowance of pre-hearing discovery. The arbitration agreement does not allow for any pre-trial discovery. No rules for arbitration were included in the clause or attached to the contract or provided to the Plaintiff.

Contracts may be rescinded based upon **an omission of some material element affecting the subject matter** or terms and stipulations of the contract.²⁴ The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court.²⁵ There was no “meeting of the minds” as to who will arbitrate proposed disputes, which evidence rules would govern the proceedings, and whether discovery would be permitted. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate. Without a designated arbitrator (or even a designated process for selecting one), the court would be forced to “fill in” the parties’ alleged contract with an arbitrator selection clause – a task courts are loath to undertake.²⁶ “Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced.”²⁷ As a result, the promise that the dispute “shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules” is ineffective. The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, scheduling, deadlines, discovery issues, costs, expenses, and appeals.

²⁴ *Truck South, Inc. v. Patel*, 339 S.C. 40, 50, 528 S.E.2d 424, 429 (2000).

²⁵ See Defendants’ Exhibit – Arbitration Agreement. “The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry.” This language fails to show any type of specific agreement between the parties regarding the selection of an arbitrator and is therefore unenforceable.

²⁶ *Ebert v. Ebert*, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995).

²⁷ *Lindsay v. Lindsay*, 491 S.E.2d 583 (S.C. App. 1997).

None of this was negotiated or discussed by the parties. No agreement or meeting of the minds to material terms exists. The agreement is silent as to this material and essential term. Defendant demands that the Court fill in the omitted material term. This the Court cannot do. The Court finds the Arbitration Agreement is unenforceable because essential and material terms are missing, vague, or indefinite. There has been no meeting of the minds as to material terms including the choice of arbitrator, rules of evidence, and allowance of discovery.

C. The Arbitration Agreement is both procedurally and substantively unconscionable.

A contract is unconscionable if one of its parties lacked a meaningful choice due to one-sided contract provisions and the contract's terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them.²⁸ If a court finds any provision of a contract was unconscionable when the contract was entered, the court may refuse to enforce.²⁹ In analyzing claims of unconscionability in the context of arbitration contracts, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.³⁰

Absence of meaningful choice generally speaks to the fundamental fairness of the bargaining process.³¹ Courts should take into account: 1) the nature of the injuries suffered by the plaintiff; 2) whether the plaintiff is a substantial business concern; 3) the relative disparity in the parties' bargaining power; 4) the parties' relative sophistication; 5) whether there is an element of surprise in the inclusion of the challenged clause; and 6) the conspicuousness of the clause.³²

²⁸ Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

²⁹ Simpson, 373 S.C. at 24-25, 644 S.E.2d at 668.

³⁰ See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999).

³¹ See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989).

³² Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17 A Am.Jur.2d Contracts§ 279 (2004))).

A family's choice to place their loved one in a nursing home is typically made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse.³³ The decision must be made quickly³⁴ and nursing home admissions are often unplanned with little time to investigate options or to wait for an opening at a nursing home of choice.³⁵ Time pressure significantly impairs the ability to seek and carefully consider alternatives.³⁶ Many facilities lack a coherent admissions process, adding to the chaos surrounding admission.³⁷ Residents and their family members rarely have time to read and deliberate on the terms of the agreement. An arbitration clause is not part of the core transaction involved in a contract for medical care or service.³⁸ It is not, therefore, likely to get much attention from the non-drafting party.³⁹ As is true in the present action, facilities often present the contract *after* the person decides to apply for admission, rather than beforehand, when the individual can assess the rights affected by the contract.⁴⁰

³³ See, e.g., *Podolosky v. First Healthcare Corp.*, 58 Cal.Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (citing Donna Ambrogio, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 258 (1990)); see also Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 N.E. J. on Crim. & Civ. Confinement. 1, 3 (1998) (stating that an older person's move to a nursing home also follows a period of acute hospitalization, when their care giving family is unable to adequately manage the demands of home care).

³⁴ In the 1980's, the government changed the way hospitals were paid for their Medicare patients; since the change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health and Aging 145, 150 (2000). See also Maureen Armour, *A Nursing Home's Good Faith Duty "to" Care: Redefining A Fragile Relationship Using the Law of Contract*, 39 St. Louis L.J. 217, 222 (1994).

³⁵ Denise Ashbugh Vlosky, et al., "Say-so" as a Predictor of Nursing Home Readiness, 93 J. of Family & Consumer Science 59 (2001).

³⁶ Potential residents and their family members can experience panic when they feel there is insufficient time to consider different facilities, and they may choose a facility they would not have chosen if they had more time to weigh their options. Whitton, *supra*, at 150.

³⁷ Donna Ambrogio & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 The Gerontologist 82, 83-88 (1988).

³⁸ See Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 987 (1972) ("The arbitration provision, viewed from the perspective of the patient, is indeed subsidiary to the primary exchange of medical services for an undertaking of payment.")

³⁹ The drafting party, on the other hand, has a great deal of information about these repetitive transactions and a great deal of incentive to prepare form contracts so that they are optimal from the drafter's perspective. Melvin Aaron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan.L.Rev. 211, 243 (1995).

⁴⁰ California Advocates for Nursing Home Reform, *Better Read the Small Print! An Analysis of Admission Agreements in California's Residential Care Facilities for the Elderly* 1 (Mar. 2003).

The following undisputed facts support the court's decision on unconscionability:

1. Resident lacked a meaningful choice;
2. The terms in the Arbitration Agreement are vague, oppressive, and one-sided;
3. The Arbitration Agreement was an adhesion contract;
4. The Arbitration Agreement was presented on a take-it-or leave it basis;
5. Resident did not contribute to the drafting of the Arbitration Agreement;
6. Resident did not possess any bargaining power to negotiate the terms of the Arbitration Agreement;
7. An inherent disparity in bargaining power existed between the parties to the transaction;
8. The Arbitration Agreement was inconspicuous;
9. The Arbitration Agreement was not part of the Admission Contract;
10. Resident did not have sufficient time to allow any meaningful explanation of the terms and significance of the alleged arbitration agreement, considering the number and complexity of admission documents other than that alleged arbitration agreement.

The Arbitration Agreement's terms do have earmarks of unfairness. For example, the Arbitration Agreement does not allow for discovery. Because the Arbitration Agreement is silent on discovery, FAA provisions indicate that there will be no pre-hearing discovery. The lack of discovery alone makes the agreement unconscionable when Defendants possess all the material information about the operation of the nursing home and what happened to Armando at their facility.

The agreement also is silent as to the rules of evidence agreed upon by the parties for the arbitration, and the costs of the arbitration are not disclosed. Also, the cost of the arbitration must be paid by the parties including Armando who has no money or assets and is permanently disabled. Plaintiff did not and does not have the financial wherewithal to pay or prepay arbitration fees. The cost of arbitration far outweighs the cost of proceeding in Court adding support that the agreement is unconscionable. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff. The Court conclude there is reasonable evidence to support the finding that in this particular case, Plaintiff has

established that he has a fixed, limited income that would make it extremely difficult, if not impossible, to pay to arbitrate the claim.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, must be denied. The claims in this case are not subject to arbitration.



Spartanburg Common Pleas

Case Caption: Armando Acevedo , plaintiff, et al VS Hunt Valley Holdings, Llc ,
defendant, et al
Case Number: 2018CP4203421
Type: Order/Other

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2019-10-21 12:41:29 page 13 of 13

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. **2018-CP-42-03421**

Armando J. **ACEVEDO**,

HUNT VALLEY Holdings, LLC, et al.,

Plaintiff(s)

Defendant(s)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ S. C. Code Ann. Section 56-36-100
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other .

IT IS ORDERED AND ADJUDGED: ☒ formal order to follow; ☒ Statement of Judgment by the Court:

This matter is now before the Court on Defendants' Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration.

This matter was originally before this court (1) on motion of the defendant Hunt Valley Holdings, LLC to dismiss the complaint filed 11/08/2018 at 6:36 pm; (2) on motion of the defendant THlofSC at Camp Care, LLC d/b/a Lake Emory Post-Acute Care to dismiss, compel arbitration, and to stay proceedings filed 11/08/2018 at 6:41 pm; and (3) on motion of THlofSC to stay the proceedings filed on 11/12/2018 at 6:21 pm.

After consideration of the argument and submissions made with regard to the motion and filed with the Court, this Court finds that the defendants' **MOTION** pursuant to Rule 59, SCRPC, should be and **IS** therefore **GRANTED** to the extent that clarification is needed for the benefit of defendant's counsel.

Counsel for the plaintiff is requested to submit a proposed Order for the court's consideration separately addressing each defendant's motion(s) and its grounds presented in support of the relief requested and to specifically state that Hunt Valley Holdings, LLC's motion is denied, THlofSC at Camp Care, LLC d/b/a Lake Emory Post-Acute Care's motions are denied, and THlofSC's motion is denied.

J. DERHAM COLE,

PRESIDING JUDGE

This judgment was entered on the _____ day of _____ and a copy mailed first class this _____ day of _____ to attorneys of record or to parties (when appearing pro se) as follows:

GARY W. POLIAKOFF, Esq.
RAYMOND P. MULLMAN, JR., Esq.
PATRICK E. KNIE, Esq.
E. JOHN WAELEDE, Esq.

D. JAY DAVIS, JR., Esq.
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ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

AMY W. COX, CLERK OF COURT



Spartanburg Common Pleas

Case Caption: Armando Acevedo , plaintiff, et al VS Hunt Valley Holdings, Llc ,
defendant, et al

Case Number: 2018CP4203421

Type: Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-06-09 16:16:11 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Armando J. Acevedo, through his Attorney-In-Fact, Marianne Acevedo,

Plaintiffs,

v.

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post-Acute Care;

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No: 2018-CP-42-03421

ORDER DATED JUNE 29, 2020

This matter came before the Court on Defendants' Motion to Alter or Amend the Order entered October 21, 2019. THI of South Carolina at Camp Care, LLC filed their Motion to Compel Arbitration on November 8, 2019. Hunt Valley Holdings, LLC filed their Motion to Dismiss on November 8, 2018. THI of South Carolina filed their Motion to Stay on November 12, 2018. The first hearing on all of Defendants' Motions was conducted on February 1, 2019. The Court issued its Order on October 21, 2019. Defendants filed the Motion to Reconsider on October 31, 2019. A hearing was held on Defendants' Motion to Reconsider on January 22, 2020. A Form 4 Order granting Defendants' Motion to Clarify the October 31, 2019 Order was issued on June 9, 2020.

Having listened to oral arguments from counsel and reviewed the parties' legal memoranda and exhibits, and for the reasons more fully set forth below, the Court hereby denies THI of South Carolina at Camp Care, LLC's Motion to Compel Arbitration; Hunt Valley Holdings, LLC's Motion to Dismiss for Lack of Personal Jurisdiction; and THI of South Carolina, LLC's Motion to Stay. The Order of October 21, 2019 has been modified to clarify Defendants' concerns. The Order is replaced with the Ruling below.

I. BACKGROUND

This matter arises out of allegations of nursing home neglect and corporate negligence resulting in the injuries to Armando Acevedo. Marianne Acevedo is Armando's wife and holds power of attorney. The claims are brought against the nursing home facility THI of South Carolina at Camp Care, LLC, as well as Hunt Valley Holdings, LLC (HVH).

Decedent was admitted into THI of South Carolina at Camp Care, LLC ("Facility") on July 12, 2017 according to the Admission Agreement. The Admission Agreement governed the type of care Decedent would receive at the Facility and Armando's financial obligation to pay for those services. No mention of arbitration is contained in this Agreement.

A separate contract called "Arbitration Agreement" was also signed during the admission process but was expressly not a condition of admission. It was a separate contract that did not merge with the Admission Agreement. The alleged Arbitration Agreement, purportedly a contract between the Facility and Armando, does not contain the legal name of the Defendant but provides a name of a nonexistent entity, not registered with the South Carolina Secretary of State, called "Lake Emory Post-Acute Care". That agreement provides for alternative dispute resolution to any claim a party may bring against another arising out of Armando's care at the Facility.

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement.¹ When faced with a motion to compel arbitration that is based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing party the benefit of all reasonable doubts and inferences that may arise.² "A party seeking judicial enforcement of a contract bears the burden of persuasion."³ Pro-arbitration policy does not

¹ See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008).

² See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).

³ THI of N.M. at Vida Encantada, LLC v. Archuleta (D. N.M., 2013)

validate a contract that lacks the building blocks of a binding contract. Whether the parties agreed to arbitrate is a question of substantive state law.⁴ In Chassereau v. Global Sun Pools, Inc.⁵, the Supreme Court stated: “Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.”

While there is a presumption in favor of arbitration agreements, this presumption only applies *after* the court finds there is a valid enforceable arbitration agreement.⁶ The FAA applies to the arbitration agreement. In enacting the FAA, Congress did not intend to force parties to arbitrate in the absence of a valid and enforceable agreement, and therefore the “existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked.”⁷ When the parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration disappears.⁸ The FAA requires that state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. See 9 U.S.C. § 2. The Federal Arbitration Act (“FAA”) provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added).

Not all arbitration clauses are enforceable per se. Arbitration agreements may thus be invalidated by generally applicable contract defenses, such as vagueness, indefiniteness, lack of

⁴ Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”)

⁵ 644 S.E.2d 718 (S.C. 2007)

⁶ EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

⁷ Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1286 (10th Cir. 1997).

⁸ Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).

consideration, fraud, duress, or unconscionability.⁹ Courts rely on state law to decide the threshold questions of contract formation.¹⁰ Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.¹¹ The FAA is intended to promote inexpensive, fair, and reasonable arbitration alternatives to litigation. It is not a license for businesses to take advantage of consumers by the imposition of one-sided, unfair, and legally unconscionable arbitration schemes. We will not allow our courts to be used to enforce unconscionable arbitration clauses any more than we will allow them to be used to enforce any other unconscionable contract in South Carolina. The judicial inquiry includes an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.¹² A court should only decide as a matter of law whether the parties entered into an agreement to arbitrate when there is no genuine issue of material fact concerning the formation of the agreement.¹³

Consideration is a prerequisite to the legal formation of a valid contract. To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent. Consideration is essential to the enforcement of a promise. Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. The Arbitration

⁹ Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2776 (2010).

¹⁰ Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

¹¹ Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

¹² Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

¹³ Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).

Agreement was not part of the Admission Contract. The Arbitration Agreement was a separate document, and thus, separate consideration was required.¹⁴

There was no consideration given to Armando Acevedo to sign the Arbitration Agreement, because Armando had already been admitted. The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise. Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party or undertaken by the other.

Unconscionability, on the other hand, is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party.¹⁵ Plaintiffs also allege that the Court should consider that the existing federal regulations still prohibit pre-dispute mandatory arbitration agreements, irrespective of the level of enforcement. 42 CFR 483.70(n) applies, which prohibits mandatory pre-dispute arbitration in nursing home cases. The regulation states:

(n) *Binding arbitration agreements.*

(1) A facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility.

II. **STATEMENT OF ISSUES**

A. The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.

The necessary elements of a contract are an offer, acceptance, and valuable consideration.¹⁶

It is well settled that to be valid and enforceable, a contract must be supported by valuable

¹⁴ Thompson v. THI of New Mexico at Casa Arena Blanca, LLC, 2006 WL 4061187, at *12 (D.N.M. Sept. 12, 2006) THI of N.M. at Vida Encantada, LLC v. Archuleta (D. N.M., 2013).

¹⁵ Figueroa v. Thi of New Mexico At Casa Arena Blanca LLC, 306 P.3d 480 (N.M. App., 2012) (“Unconscionability is examined by the court where, in spite of adequate consideration to support a contract, the unfair terms of the contract do not warrant enforcement.”).

¹⁶ Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d161, 166 (2003) “Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance,

consideration.¹⁷ Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case. In determining whether adequate consideration exists in a contract or arbitration agreement under the FAA, guided by principles of contract law, we must examine and stay within the confines of the four corners of the instrument.¹⁸ Here, the contract is silent as to any consideration exchanged between the parties. The arbitration agreement itself contains insufficient consideration in the form of a mutual exchange of promises to arbitrate.

There also exists a lack of mutuality that makes the Arbitration Agreement unenforceable. Defendants argue that the Agreement requires both sides to be bound by arbitration. Yet the problem is that the only party that is going to bring a “dispute over care” is the patient. It is virtually inconceivable that Defendants would sue their patient regarding a dispute over care. The mutual promise to arbitrate is illusory and of no benefit to Decedent or Plaintiff. Any such attempt to find a benefit would be futile, given the Court of Appeals’ unambiguous ruling in Thompson, which held that **“any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement’s] requirement that [resident] waive her right to access the courts and her right to a jury trial.”**¹⁹

There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the admission agreement. Admission can be the “direct benefit” that requires Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. In sum, Defendants cannot meet their burden to prove merger, consideration, or any other benefit

detriment, loss or responsibility given, suffered or undertaken by the other.” Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).

¹⁷ Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984).

¹⁸ State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

¹⁹ 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

for the arbitration agreement. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a single contract. If the jury waiver was not a precondition to admission, then it fails for lack of consideration. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission, but on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. The Plaintiff gained no right, interest, profit or benefit by agreeing to the Arbitration Agreement.²⁰ Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party, when agreeing to the Arbitration Agreement. *Id.* Additionally, there was no bargain for exchange nor consideration to the Arbitration Agreement.

Federal regulations prohibit “additional consideration” to be accepted by the Facility. Federal regulations require Medicare and Medicaid certified facilities (including the Defendant Facility) to accept Medicare/Medicaid reimbursement rates as payment in full.²¹ Any nursing home facility that accepts Medicare or Medicaid funds for resident care is *expressly forbidden* from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility. 42 U.S.C. § 1369r(c)5(A)(iii)l 42 CFR § 486.12(d)(3) expressly states that a:

Nursing home facility *shall not change, solicit, or accept, or receive*, in addition to any amount otherwise required to be paid under the State’s Medicaid plan any gift, money, donation, or *other consideration* as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual’s continued stay in the facility. [emphasis added]

²⁰ Plantation, 386 S.C. at 206, 687 S.E.2d at 718.

²¹ See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15.

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case.

B. The Arbitration Agreement is missing material terms and lacks definiteness, and cannot be enforced without the Court providing material omitted terms which would violate the FAA and applicable case law.

South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.²² An agreement which neglects material terms may be found unenforceable for indefiniteness.²³ “Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced.” *Id.* In this case, even if the Arbitration Agreement was validly executed, there was no "meeting of the minds" as to the terms of arbitration, specifically the choice of arbitrator, rules of evidence or allowance of pre-hearing discovery. The arbitration agreement does not allow for any pre-trial discovery. No rules for arbitration were included in the clause or attached to the contract or provided to the Plaintiff.

Contracts may be rescinded based upon **an omission of some material element affecting the subject matter** or terms and stipulations of the contract.²⁴ The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court.²⁵ There was no “meeting of the minds” as to who will arbitrate proposed disputes, which evidence rules would govern the proceedings, and whether discovery would be permitted. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate. Without a designated

²² *Player v. Chandler*, 299 S.C. 101, 105, 1989 (citing *Hughes v. Edwards*, 265 S.C.529 (1975)).

²³ *Lindsay v. Lindsay*, 491 S.E.2d 583 (S.C. App. 1997).

²⁴ *Truck South, Inc. v. Patel*, 339 S.C. 40, 50, 528 S.E.2d 424, 429 (2000).

²⁵ See Defendants' Exhibit – Arbitration Agreement. “The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry.” This language fails to show any type of specific agreement between the parties regarding the selection of an arbitrator and is therefore unenforceable.

arbitrator (or even a designated process for selecting one), the court would be forced to “fill in” the parties’ alleged contract with an arbitrator selection clause – a task courts are loath to undertake.²⁶ “Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced.”²⁷ As a result, the promise that the dispute “shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules” is ineffective. The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, scheduling, deadlines, discovery issues, costs, expenses, and appeals. None of this was negotiated or discussed by the parties. No agreement or meeting of the minds to material terms exists. The agreement is silent as to these material and essential terms. Defendant demands that the Court fill in the omitted material terms. This the Court cannot do. The Court finds the Arbitration Agreement is unenforceable because essential and material terms are missing, vague, or indefinite. There has been no meeting of the minds as to material terms including the choice of arbitrator, rules of evidence, or allowance of discovery.

C. The Arbitration Agreement is both procedurally and substantively unconscionable.

A contract is unconscionable if one of its parties lacked a meaningful choice due to one-sided contract provisions, and the contract’s terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them.²⁸ If a court finds any provision of a contract was unconscionable when the contract was entered, the court may refuse to enforce.²⁹ In analyzing claims of unconscionability in the context of arbitration contracts, the Fourth Circuit

²⁶ Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995).

²⁷ Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

²⁸ Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

²⁹ Simpson, 373 S.C. at 24-25, 644 S.E.2d at 668.

has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.³⁰

Absence of meaningful choice generally speaks to the fundamental fairness of the bargaining process.³¹ Courts should take into account: 1) the nature of the injuries suffered by the plaintiff; 2) whether the plaintiff is a substantial business concern; 3) the relative disparity in the parties' bargaining power; 4) the parties' relative sophistication; 5) whether there is an element of surprise in the inclusion of the challenged clause; and 6) the conspicuousness of the clause.³²

A family's choice to place their loved one in a nursing home is made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse.³³ The decision must be made quickly³⁴, and nursing home admissions are often unplanned with little time to investigate options or to wait for an opening at a nursing home of choice.³⁵ Time pressure significantly impairs the ability to seek and carefully consider alternatives.³⁶ Many facilities lack a coherent admissions process, adding to the chaos surrounding

³⁰ See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999).

³¹ See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989).

³² Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17 A Am.Jur.2d Contracts§ 279 (2004))).

³³ See, e.g., Podolosky v. First Healthcare Corp., 58 Cal.Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (citing Donna Ambrogio, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 258 (1990)); see also Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 N.E. J. on Crim. & Civ. Confinement. 1, 3 (1998) (stating that an older person's move to a nursing home also follows a period of acute hospitalization, when their care giving family is unable to adequately manage the demands of home care).

³⁴ In the 1980's, the government changed the way hospitals were paid for their Medicare patients; since the change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health and Aging 145, 150 (2000). See also Maureen Armour, *A Nursing Home's Good Faith Duty "to" Care: Redefining A Fragile Relationship Using the Law of Contract*, 39 St. Louis L.J. 217, 222 (1994).

³⁵ Denise Ashbugh Vlosky, et al., "Say-so" as a Predictor of Nursing Home Readiness, 93 J. of Family & Consumer Science 59 (2001).

³⁶ Potential residents and their family members can experience panic when they feel there is insufficient time to consider different facilities, and they may choose a facility they would not have chosen if they had more time to weigh their options. Whitton, *supra*, at 150.

admission.³⁷ Residents and their family members rarely have time to read and deliberate on the terms of the agreement. An arbitration clause is not part of the core transaction involved in a contract for medical care or service.³⁸ It is not, therefore, likely to get much attention from the non-drafting party.³⁹ As is true in the present action, facilities often present the contract *after* the person decides to apply for admission, rather than beforehand, when the individual can assess the rights affected by the contract.⁴⁰

The following undisputed facts support the Court's decision on unconscionability:

1. Resident lacked a meaningful choice;
2. The terms in the Arbitration Agreement are vague, oppressive, and one-sided;
3. The Arbitration Agreement was an adhesion contract;
4. The Arbitration Agreement was presented on a take-it-or leave it basis;
5. Resident did not contribute to the drafting of the Arbitration Agreement;
6. Resident did not possess any bargaining power to negotiate the terms of the Arbitration Agreement;
7. An inherent disparity in bargaining power existed between the parties to the transaction;
8. The Arbitration Agreement was inconspicuous;
9. The Arbitration Agreement was not part of the Admission Contract;
10. Resident did not have sufficient time to allow any meaningful explanation of the terms and significance of the alleged arbitration agreement, considering the number and complexity of admission documents other than that alleged arbitration agreement.

The Arbitration Agreement's terms do have earmarks of unfairness. For example, the Arbitration Agreement does not allow for discovery. Because the Arbitration Agreement is silent on discovery, FAA provisions indicate that there will be **no** pre-hearing discovery. The lack of

³⁷ Donna Ambroggi & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 *The Gerontologist* 82, 83-88 (1988).

³⁸ See Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 987 (1972) ("The arbitration provision, viewed from the perspective of the patient, is indeed subsidiary to the primary exchange of medical services for an undertaking of payment.")

³⁹ The drafting party, on the other hand, has a great deal of information about these repetitive transactions and a great deal of incentive to prepare form contracts so that they are optimal from the drafter's perspective. Melvin Aaron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *Stan.L.Rev.* 211, 243 (1995).

⁴⁰ California Advocates for Nursing Home Reform, *Better Read the Small Print! An Analysis of Admission Agreements in California's Residential Care Facilities for the Elderly* 1 (Mar. 2003).

discovery alone makes the agreement unconscionable when Defendants possess all the material information about the operation of the nursing home and what happened to Armando at their facility.

The agreement also is silent as to any rules of evidence agreed upon by the parties for the arbitration, and the costs of the arbitration are not disclosed. Further, the cost of the arbitration must be paid by the parties including Armando who has no money or assets and is permanently disabled. Plaintiff states that Plaintiff did not and does not have the financial wherewithal to pay or prepay arbitration fees. The cost of arbitration far outweighs the cost of proceeding in Court adding support that the agreement is unconscionable. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff. The Court conclude there is reasonable evidence to support the finding of that in this particular case, Plaintiff has established that he has a fixed, limited income that would make it extremely difficult, if not impossible, to pay to arbitrate the claim.

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, must be **DENIED**. The claims in this case are not subject to arbitration. Therefore, THI of South Carolina, LLC's Motion to Stay is **DENIED** as moot.

DEFENDANT HUNT VALLEY HOLDINGS, LLC'S MOTION TO DISMISS

Defendant Hunt Valley Holdings, LLC's filed a Motion to Dismiss for Lack of Personal Jurisdiction under Rule 12(b)(2) of the South Carolina Rules of Civil Procedure. The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of

each particular case.⁴¹ A hearing was held on February 1, 2019, and both parties have submitted various filings in support of their positions. For the reasons stated below, this Court determines it may exercise personal jurisdiction over Defendant.

South Carolina case law is settled that at the pre-trial stage of the proceedings, the plaintiff need only make prima facie showing of personal jurisdiction.⁴² “There is no ‘other evidence’ requirement for personal jurisdiction where the complaint itself demonstrates jurisdiction.”⁴³ Rather, “[t]he relevant question is whether [the plaintiff] made a sufficient prima facie showing.”⁴⁴ To determine whether a plaintiff has satisfied this burden, the court must construe the facts in the light most favorable to the plaintiff, drawing all inferences and resolving all factual disputes in its favor, and assuming plaintiff’s credibility.

Plaintiff contends that Mr. Acevedo’s injuries resulted from his receipt of substandard care at a nursing home owned and operated by Hunt Valley Holdings L.L.C through its agents Fundamental Administrative Services and Fundamental Clinical and Operational Services. Plaintiffs contend that Mr. Acevedo’s injuries were caused by a “systemic failure” that implicates all of Defendants’ general operations, staffing levels, employee training, and budget allocations. In addition to pleading several causes of action related to nursing home neglect and direct corporate negligence, Plaintiff also asserts a claim based on the vicarious liability of Hunt Valley’s agents that provide services to the facility in South Carolina.

Having carefully considered the record of this case in the light most favorable to the Plaintiff, the Court finds that the Plaintiff has made prima facie showing of personal jurisdiction

⁴¹ Cribb v. Spatholt, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009).

⁴² Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 332, 426 S.E.2d 777, 779 (1993).

⁴³ Id citing Springmasters, Inc. v. D & M Mfg., 303 S.C. 528, 402 S.E.2d 192 (Ct.App.1991)).

⁴⁴ Id.

over HVH. The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are "sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."⁴⁵ If a subsidiary performs functions that the parent would otherwise have to perform, the subsidiary then functions as merely the incorporated department of its parent, and due process safeguards allow jurisdiction over the parent. The allegations and evidence currently in the record are clearly sufficient to conclude that the Rule 12 motions should be denied. Additionally, the Court finds persuasive Plaintiffs' argument that discovery is needed to resolve factual disputes of material issues. Accordingly, Defendant Hunt Valley Holdings, LLC's Motion to Dismiss should be and therefore is **DENIED**.

IT IS SO ORDERED.

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⁴⁵ Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994).



Spartanburg Common Pleas

Case Caption: Armando Acevedo , plaintiff, et al VS Hunt Valley Holdings, Llc ,
defendant, et al

Case Number: 2018CP4203421

Type: Order/Other

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-07-10 14:35:53 page 15 of 15

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

C.A. No: 2018-CP-42-

Armando J. Acevedo, through his Attorney-In-Fact, Marianne Acevedo,

Plaintiffs,

v.

SUMMONS
(Survival Action)

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post-Acute Care; and Rusty Flathmann,

Defendants.

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at their offices, 215 Magnolia Street, Post Office Box 1571, Spartanburg, South Carolina, 29306 (29304) within thirty (30) days after service thereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/ Gary W. Poliakoff

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Date: October 3, 2018

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Armando J. Acevedo, through his Attorney-In-Fact, Marianne Acevedo

Plaintiffs,

v.

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post-Acute Care; and Rusty Flathmann,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No: 2018-CP-42-

COMPLAINT
(Survival Action)

The Plaintiff, Armando J. Acevedo, through his Attorney-In-Fact, Marianne Acevedo, does hereby respectfully allege as follows:

PARTIES & JURISDICTION

1. That the Plaintiff, Armando Acevedo, is a citizen and resident of the County of Duval, State of Florida. Plaintiff brings this action for damages recoverable pursuant to § 15-5-90, Code of Laws of South Carolina (1976).
2. That the Plaintiff, Armando Acevedo, was a resident of THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post-Acute Care ("Lake Emory") during the relevant time period.
3. That, upon information and belief, Defendant Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings, LLC, (hereinafter "Hunt Valley") is a Delaware limited liability corporation operating within the State of South Carolina, but has no registered agent in the State of South Carolina.

4. At all times relevant herein, Hunt Valley is and was a business which owns and controls related entities, including the Defendants, pursuant to 42 CFR § 413.17 as part of the “Fundamental family of companies”, a national for-profit nursing home chain with revenues exceeding \$1 billion dollars per year.
5. Upon information and belief, the “Fundamental family of companies,” through its individual actions and acts of their agents, and in concert with the other Defendants, owns and operates a chain of nursing homes in at least 17 states, which includes Lake Emory and derives substantial revenue therefrom.
6. That through its individual actions and the acts of its agents, and in concert with the other Defendants, Hunt Valley engaged in oversight, management, direction, and operation of nursing home facilities in Spartanburg County, South Carolina, deriving substantial revenue therefrom.
7. In addition to the direct liability of the Defendants as alleged elsewhere in this Complaint, Defendants are each vicariously liable and legally responsible for the harm to Plaintiffs as Lake Emory is a mere instrumentality, agency, conduit or adjunct of Hunt Valley.
8. That the Stock Purchase Agreement between Hunt Valley and THI Holdings, LLC gave Hunt Valley the right and authority to choose the management companies and Home Offices for the facilities including Lake Emory.
9. That Hunt Valley created agents Fundamental Clinical and Operational Services, LLC (hereinafter FCOS); and Fundamental Administrative Services, LLC (hereinafter FAS) to manage and operate the facilities on its behalf and act as the Home Office pursuant to the Medicaid Home Office Cost Reports.

10. That Hunt Valley's Operating Agreement states that its business purpose is the business of managing and operating long-term care facilities, including skilled nursing facilities.
11. That Hunt Valley's Operating Agreement states that all management powers over the business and affairs of Hunt Valley and its related companies shall be rested in managers designated by the Members of Hunt Valley which is, upon information and belief, Murray Forman.
12. That Hunt Valley's Operating Agreement lists further powers of the Managers including, but not limited to, the following:
 - a. authorizing, executing, delivering, and performing services relating to the business of managing and operating long-term care facilities including skilled nursing facilities, including approving a management agreement with related entities;
 - b. incurring and refinancing the debts of Hunt Valley and its subsidiaries including revolving credit agreements;
 - c. controlling the purchase of insurance for Hunt Valley and any litigation involving the company;
 - d. hiring and firing of employees, agents, and contractors including affiliates or persons affiliated with Murray Forman;
 - e. establishing the duties, authority, and responsibilities of any employee in the company;
 - f. adopting and approving budgets, projections, forecasts, and financial reports; and
 - g. executing and delivering the limited liability company operating agreements of any subsidiaries of Hunt Valley.
13. That Hunt Valley, through its officers and agents, entered into a Revolving Credit Agreement with a Lender to create a line of credit for the chain to use for operating costs.
14. The Revolving Credit Agreement was signed on behalf of the facility by agents of Hunt Valley's officers/owners and at the direction of Murray Forman.
15. The Revolving Credit Agreement also states that Hunt Valley and Hunt Valley's facilities are jointly and severally liable for the debt.

16. That the Revolving Credit Agreement is evidence that Hunt Valley, through its officers and agents, exerts significant control by requiring each facility to maintain certain occupancy rates and profit margins thereby showing Hunt Valley's control of the facility.
17. That the Revolving Credit Agreement allowed Hunt Valley to control how the facility's revenue was used and stripped from the facility any right it may have had on its revenues.
18. That the facility's revenue is commingled by the means of the central cash management system controlled by Hunt Valley, and controlled exclusively at the corporate level.
19. That the Administrative Policies and Procedures of the chain found in the "Resource Manual for New Management" show that Hunt Valley's agents FAS and FCOS have significant control over the policies and procedures, budgets, staffing, training, and operation of the facility through agents, the Regional Director of Operations and/or Vice-President of Operations or similarly named titles and positions, who at all times relevant hereto was an employee of either FAS or FCOS.
20. That Hunt Valley also filed a federal tax return showing the following:
 - a. each facility in the chain is treated as a disregarded entity for tax purposes;
 - b. the product/service provided by Hunt Valley is "nursing services and personal care;" and
 - c. the annual gross revenue exceeds \$1 billion.
21. That during the residency period of July 12, 2017 to July 15, 2017, Hunt Valley used the trademark 'Fundamental' which was used on the "www.Fundltc" website and on the policies and procedures of the facility including, but not limited to, the following policies:
 - a. Fundamental Fire and Disaster Plan;
 - b. Fundamental Resident Alarm System;
 - c. Fundamental Weight Management;
 - d. Fundamental Paid Time Off;
 - e. Fundamental Policy on Illegal Drugs and Abuse on Alcohol;

- f. Fundamental Corporate Compliance;
 - g. Fundamental Employee Benefit Enrollment Plan;
 - h. Fundamental Time Clock and Meal Deduction;
 - i. Fundamental Direct Payroll Deposit.
- 22. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the Defendants, Fundamental Clinical and Operational Services, LLC, (“FCOS”) engaged in the oversight, management, direction, and operation of the Defendants’ facility in Spartanburg County, South Carolina, on behalf of Hunt Valley deriving substantial revenue therefrom.
- 23. At times relevant hereto, Fundamental Administrative Services, LLC, (“FAS”) is listed on the cost reports of the Defendants’ facility as the Accounting Firm and as the Home Office pursuant to CMS regulations.
- 24. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the Defendants, FAS engaged in the oversight, management, direction, and operation of the Defendants’ facility in Inman, South Carolina, on behalf of Hunt Valley deriving substantial revenue therefrom.
- 25. That, upon information and belief, Lake Emory is a Delaware corporation operating within the State of South Carolina, with a registered agent in the State of South Carolina. At all times relevant to this case, Lake Emory operated a nursing home facility on behalf of Hunt Valley and did business in Inman, South Carolina, deriving substantial revenue therefrom.
- 26. That, upon information and belief, Defendant THI of South Carolina (hereinafter “THI” is a Delaware limited liability company operating on behalf of the national for-profit chain as its agent within the State of South Carolina, and has a registered agent in the State of South Carolina.

27. Upon information and belief, FCOS and FAS employ an officer to act as a member of the governing body of Lake Emory.
28. 42 C.F.R. § 483.70(d)(1) states: The facility must have a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility.
29. 42 C.F.R. §483.70(d)(2) states: The governing body appoints the administrator who is—
 - (i) Licensed by the State, where licensing is required;
 - (ii) Responsible for management of the facility; and
 - (iii) Reports to and is accountable to the governing body.
30. That, upon information and belief, Defendant Rusty Flathmann (hereinafter “Flathmann”) is a citizen and resident of South Carolina and is doing business in the County of Spartanburg, State of South Carolina. Upon information and belief, Defendant Flathmann, at all times relevant hereto, was an employee of FCOS as a regional supervisor, and a member of the governing body of Lake Emory. Pursuant to 42 C.F.R. § 483.75(d), said Defendant is liable and legally responsible for the operation of the facility.
31. That, upon information and belief, Hunt Valley owns, operates, and controls the nursing home facility in question as part of a national for-profit chain as defined by CMS-15 §2150, and exerts control over the other Defendants including the acts and delicts by agents/subsidiaries relating to the operation of Lake Emory. Upon information and belief, all or most of the following factors exist between Hunt Valley and its subsidiaries/agents:
 - a. Common ownership;
 - b. Common directors or officers;
 - c. Financing of the subsidiary by the parent through loan agreements;
 - d. Gross inadequacy of capital for the subsidiaries;
 - e. Incorporation and/or organization of the subsidiaries by the parent;

- f. Payment by the parent of the salaries and other expenses or losses of the subsidiaries;
 - g. Lack of business dealings by the subsidiary except with the parent and lack of assets except those conveyed to it by parent;
 - h. Lack of independent action by the executives of the subsidiaries, who instead take their orders from the parent corporate in the latter's interest.
- 32. That, upon information and belief, Defendants deliver nursing home care for a profit and executed the delivery of nursing home care to Plaintiff Armando Acevedo during his residency at Lake Emory.
- 33. That, upon information and belief, Defendants were involved in a joint venture to own, operate, and manage nursing homes for profit including Lake Emory where Armando Acevedo resided.
- 34. That, upon information and belief, Defendant Hunt Valley through its agents FCOS and FAS and other related entities were directly involved in controlling the revenue and the budget which affected the care, services, staffing, training, supervision, development and/or implementation of policies and procedures for Lake Emory.
- 35. Defendants implemented a business plan for Lake Emory that sought to maximize profits at the expense of patient care.
- 36. Defendants controlled all aspects of Lake Emory, including but not limited to, receiving and controlling all revenues generated by Lake Emory, preparing the budget, and establishing inadequate staffing levels.
- 37. In order to maximize profits, Defendants excessively and dangerously underfunded Lake Emory such that neither nursing staff in adequate numbers nor adequate training of such staff could be provided to protect Lake Emory residents from foreseeable harm.

38. Despite the legal obligation that “A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial wellbeing of each resident” (42 CFR §483.70), Defendants withheld resources from Lake Emory to the physical, mental, and psychosocial detriment of its residents.
39. Funds which were required by law to be used for the protection of Lake Emory residents were instead intentionally diverted to increase the profits of Defendants.
40. Defendants made matters worse by encouraging the admission of residents whose care needs were higher than average, which resulted in higher financial gain from those residents. However, Defendants failed to provide the increased resources necessitated by admitting these high acuity residents, and did not adequately staff, or provide the necessary training to accommodate the level of care these residents required, particularly registered nurses, which put all residents of Lake Emory at even greater risk of harm.
41. That, upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of Hunt Valley, including but not limited to, FCOS, FAS, and THI, Lake Emory, and Flathmann acted on behalf of Hunt Valley’s managers/owners.
42. That, upon information and belief, Hunt Valley at all times relevant hereto totally dominated and controlled the other Defendants through loans, leases, and contracts. Defendants were so organized and controlled, and their business conducted in such a manner that they were merely an agency, instrumentality, adjunct, and/or alter ego of Hunt Valley who is therefore liable and responsible for the acts and delicts of all Defendants.

43. That, upon information and belief, all Defendants or their agents have engaged in substantial business activities in South Carolina, including the management, operation, control and/or ownership of Lake Emory at various times, and derived substantial revenue from services provided in South Carolina.
44. That, upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of Hunt Valley including agents FCOS, FAS, THI, Lake Emory, and Flathmann, acted on behalf of themselves and on behalf of Hunt Valley.
45. That, upon information and belief, at all times relevant herein, Hunt Valley including agents FCOS, FAS, THI, Lake Emory, and Flathmann as well as their agents, employees, servants, and apparent agents owed a duty to Plaintiffs and were all jointly, directly, and vicariously liable for the care and treatment Armando Acevedo received as a resident at Lake Emory.
46. That, upon information and belief, at all times relevant herein, Hunt Valley, FCOS, FAS, THI, and Lake Emory are and have been operating as an amalgamation of interest creating a blurred corporate identity by sharing an internet website, officers, shareholders, and locations, policies and procedures, ownership, headquarters, in-house counsel, and by commingling funds and revenue.
47. That the Court has jurisdiction over the parties and subject matter.
48. That the acts and delicts referred to herein occurred at Defendants' facility in the County of Inman, State of South Carolina.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

49. Relevant and consistent allegations contained in paragraphs 1-48 are incorporated by reference as if written verbatim herein.
50. On or about July 12, 2017, Armando Acevedo was admitted to the Defendants' skilled nursing facility as a high fall risk with the understanding that he would be provided with the care that Armando's health conditions reasonably required.
51. On July 14, Armando Acevedo suffered a preventable fall from his wheelchair when the facility caregivers removed him from his safe bed and transferred him to a wheelchair without any safety devices (including a wheelchair alarm) allowing him to fall unsupervised causing a painful hip fracture.
52. That the Defendants, their subsidiaries, related entities, officers, agents, servants, and employees negligently and carelessly failed to properly manage, operate, and provide care to and keep Armando Acevedo safe.
53. That, upon information and belief, Armando Acevedo's health conditions were aggravated and exacerbated by the Defendants' repeated failure to properly supervise him and monitor his medical conditions.
54. These deviations from the standard of care were the proximate causes of conscious pain and suffering, mental distress, medical bills, and loss of dignity.
55. Upon information and belief, Defendants failed to provide adequate and proper medical services to Armando Acevedo. Further, that the Defendants, directly or indirectly, received federal and state funds as reimbursement for the care of residents including Armando Acevedo.

56. That while residing at Defendants' facility, Armando Acevedo was damaged and injured as a result of neglect, negligence, recklessness, and violations of the standard of care for nursing and custodial care.
57. That Armando Acevedo was a resident of Defendants' facility from admission on July 12, 2017 until his transfer to the hospital on July 15, 2017, more than 12 hours after he suffered a preventable fall.
58. That during Armando Acevedo's residency at Lake Emory, the acts and delicts of Defendants caused, and were the proximate causes of Armando Acevedo's conscious pain and suffering, mental distress, medical bills, disability, loss of dignity, and loss of quality of life to decedent.
59. That the provisions of the Omnibus Reconciliation Act of 1987 ("OBRA") were applicable with regard to the administration and operation of the facility and the provision of care and services to Plaintiff throughout the residency.
60. Defendants were under an obligation to follow all rules and regulations of OBRA as well as all applicable state and federal laws, rules, regulations, and guidelines including S.C. Regulations 61-17, the Board of Nursing Advisory Opinions, the South Carolina Adult Protection Act, the South Carolina Nurse Practice Act, S.C. Code § 40-33-5 et. seq., and the South Carolina Long Term Health Care Administrators statute, S.C. Code 40-35-5 et seq.
61. Defendants were under an obligation to follow the provisions and standards of the Federal Nursing Home Act applicable to the administration and operation of the facility and the provision of services, care and treatment as well as all applicable state laws, rules,

regulations, and guidelines including but not limited to The Adult Protection Act of South Carolina Code § 43-35-5, et. seq.; South Carolina Department of Health and Environmental Control regulations for Nursing Homes at Regulation 61-17, et. seq.; the South Carolina Nursing Practice Act; Board of Nursing Advisory Opinions; South Carolina Code of Laws Title 40 Chapter 35; and South Carolina Code of Regulations Chapter 93.

62. That the Defendants were liable and responsible for the acts and delicts of their employees, agents, and servants under the principle of respondeat superior, and actual and apparent agency.
63. That the Defendants held Lake Emory out to the State of South Carolina, the South Carolina Department of Health and Environmental Control, the public at large, and to Armando Acevedo and his family, specifically, as being:
 - a. skilled in the performance of nursing, rehabilitative, and other medical support services;
 - b. properly staffed, supervised and equipped to meet the total needs of its residents;
 - c. able to specifically meet the total nursing, personal care, medical, and physical therapy needs of its residents; and,
 - d. Licensed by the South Carolina Department of Health and Environmental Control and complying on a continual basis with all state and federal rules, regulations, and standards established for nursing homes in South Carolina.
64. That the Defendants held Lake Emory out to the United States of America, the Centers for Medicare and Medicaid Services, the public at large, and Armando Acevedo and his family, specifically, as being a skilled nursing facility and as a nursing facility meeting the requirements of 42 CFR Part 483.
65. To protect nursing home residents like Plaintiff, the federal government mandates that if a nursing home voluntarily accepted Medicare or Medicaid funds, the nursing home would be required to follow strict mandates for patient safety, documentation, and costs and

- expenditures. These mandates became known as the OBRA regulations at 42 CFR 483.1-et seq. For example, one of the regulations simply states, "skilled nursing facilities participating in Medicare must meet certain specified requirements." 42 C.F.R. 483.1.
66. The regulations are designed to reduce or eliminate accidents, assure proper staffing and supervision, and establish and maintain a reasonable quality of life for each resident.
67. OBRA regulations go to great lengths to ensure nursing home patients will be "in an environment that promotes maintenance or enhancement of [resident's] quality of life." 42 C.F.R. 483.10.
68. They state that each patient "must" receive, and the facility "must" provide the necessary care and services to "attain or maintain the highest practicable physical, mental, and psychosocial well-being[.]" See e.g. 42 C.F.R. 483.24.
69. The OBRA regulations require that each nursing home has sufficient staff to provide the necessary care and services. 42 C.F.R. 483.35(a).
70. The facility must provide services by sufficient numbers on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans.
71. Defendants specifically violated the applicable standard for the administration of a nursing home found at §483.70 which expressly states: "A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident."
72. Defendants must submit "cost reports" to both state and federal agencies which include additional staffing information as well as the expenditures of the Defendants on staffing costs, facility costs, supplied, operating and management fees, etc. submitted by Defendants to government agencies under penalty of perjury. 42 C.F.R. 413.24(f)(4)(iv).).

73. These regulations and reporting have a distinct purpose: "Collectively, these reports establish a basis for evaluation of the reasonableness of the rate paid to the nursing homes and determination of what constitutes an economically and efficiently operated facility." Nursing Home Cost Report Instruction Manual.
74. In particular, Defendants use their multiple limited liability company business structure as a means to evade the federal requirement that their nursing homes, including the subject Facility, be administered in a manner that enables them to use their resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. See 42 CFR § 483.70.
75. By siphoning profits to related entities in non-arms' length transactions, Defendants deny the Facility sufficient resources to care for its residents.
76. Additionally, Defendants' use of "shell" limited liability companies and trusts serves to further the unjust practice of concealment and misrepresentation of the identity of the responsible ownership, management, and financial interest, or concealment of personal business activities.
77. This is an integral part of Plaintiffs' corporate negligence claim which include allegations that Defendants siphoned profits away from resident care to related parties.
78. This is a concept noted in the federal regulations and seen in nursing home operations across the country.

. . .when services, facilities, or supplies are furnished to a provider by a "related organization," there is "a significant likelihood that charges incurred by providers . . . will be artificially inflated because of the absence of bona fide arms-length bargaining." *American Hosp. Management Corp. v. Harris*, 638 F.2d 1208, 1212 (9th Cir. 1981). . . "Reasonable costs" for such a provider are the actual costs incurred by the related supplier, rather

than the amount the provider pays to it. 42 C.F.R. § 405.427(a) (1982).

Biloxi Reg'l Med. Ctr. v. Bowen, 266 U.S. App. D.C. 281, 835 F.2d 345, 349-50 (1987).

79. Part of determining an economically and efficiently operated facility includes disclosure of “related organizations.” “Federal Regulations, 42 CFR 447.284, requires the nursing home to identify related organizations and to summarize costs incurred in transactions between the NH and such related organizations.” (“A related organization is one in which there is a common ownership or controlling interest existing between the vendor and the NH.) Cost Report Manual.
80. Defendants are also required to report “related organizations” under 42 CFR §420.206.
81. The cost reports mentioned supra include information regarding transactions with what are referred to as “related parties”. CMS considers a party to be “related” to a nursing facility when the nursing facility “to a significant extent is associated or affiliated with or ... is controlled by the organization furnishing the services, facilities, or supplies.” 42 C.F.R. §413.17(b)(1).
82. The cost reports provide information about the number of patients, acuity or illness levels of patients, and the staffing of the facility to meet the patients' needs. Additionally, there are reporting mandates to the entity for information such as staffing and expenditures. 42 CFR 413.20 (Cost reports are required from providers on an annual basis. . .) and 42 CFR 413.24 (Providers must submit adequate cost data).
83. Not only do the cost reports contain information on expenditure, they must contain information about the facility’s residents, in particular their acuity levels as determined by the RUG scores. CMS 2540 Cost Report Instruction Manual.

84. Defendants knew or should have known that a number of studies have found that for-profit ownership is related to poorer quality of care than nonprofit ownership (Hillmer et al. 2005; Comondore et al. 2009).
85. Defendants knew or should have known that there is evidence that nursing home chains, defined as companies that own or operate two or more facilities, also have lower staffing, poor resident outcomes, and more deficiencies (violations of regulations) (Cohen and Spector 1996; Grabowski 2001a, b; Harrington et al. 2001; Banaszak- Holl et al. 2002; O'Neill et al. 2003; Harrington, Mullan, and Carrillo 2004; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).
86. Because of their joint venture, Defendants had a joint obligation to sufficiently fund Lake Emory to ensure that each of their residents received the necessary care and services in order for them to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with their residents' comprehensive assessments and plans of care.
87. This joint obligation required Defendants to sufficiently fund Lake Emory so that there would be enough staff and resources in order to meet the needs of their residents.
88. Lake Emory was totally dependent on Defendants' generosity in their decision-making process as to whether they would allow them to keep the money they were earning.
89. Federal law requires nursing facilities to disclose information on related parties that meet the following criteria:
 - a. anyone with direct or indirect ownership in the nursing facility of 5% or more;
 - b. officers, director, and partners;
 - c. managing employees; and

- d. anyone who is an “additional disclosable party” which is defined as any person or entity who
 - 1) exercises operational, financial, or managerial control over the nursing facility or a part thereof, provides policies or procedures for any of the operations, or provides financial or case management services to the nursing facility;
 - 2) leases or subleases real property to the nursing facility, or owns a whole or part interest of 5% of more of the total property value of the nursing facility; or
 - 3) provides management services, administrative services, clinical consulting services, accounting services, or financial services to the nursing facility.

(See 42 U.S.C. §1320a-3).

- 90. By definition, FCOS and FAS, are among a group of corporations that would be considered “related parties” of Hunt Valley.
- 91. “Cost Reports” submitted by or on behalf of Lake Emory show overpayments to related parties by Defendants in 2017.
- 92. Plaintiffs allege that while holding Lake Emory out to Armando Acevedo and other members of the public as providing excellent care, Defendants and their related parties extracted considerable profits through the management and operation of Lake Emory by overpaying Defendants herein and other related parties from funds which should have been utilized instead to hire, train, and retain a sufficient number of qualified staff to meet the needs of all of their residents including Armando Acevedo.
- 93. Plaintiffs allege that these overpayments to related parties left Lake Emory with insufficient cash to provide sufficient and qualified staff to meet the individual needs of the residents in their facility during Armando Acevedo’s period of residency therein.
- 94. Plaintiffs allege that throughout 2017, Defendants, through their operational, budgetary, consultation, and managerial decisions and actions, provided grossly inadequate

capitalization as measured by the nature and magnitude of the corporate undertaking of ensuring that each of their residents received the necessary care and services in order for them to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with each residents' comprehensive assessments and plans of care including those of Armando Acevedo.

95. In other words, Defendants' actions in 2017 resulted in an underfunded nursing home during Armando Acevedo's residency.
96. Plaintiffs allege that this underfunding and corresponding understaffing, although profitable for Defendants and their related parties, directly resulted in their failure to provide the necessary and basic services to Armando Acevedo that he needed in order to prevent him from developing pressure injuries.
97. Defendants knew or should have known that the US GAO (2009a) found that the most poorly performing nursing homes in the United States tended to be owned by for-profit chains.
98. Defendants knew or should have known that studies have found that poor nursing home quality is directly related to inadequate staffing levels (Harrington et al. 2000; US Centers for Medicare and Medicaid Services [CMS] 2001; Schnelle et al. 2004; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).
99. Defendants knew or should have known that nurse staffing levels have been documented to have a positive impact on both the process and the outcomes of nursing home care, such as improved functional status, better mortality rates, and fewer deficiencies for poor quality (Cohen and Spector 1996; Harrington et al. 2000; Grabowski 2001a, b; US CMS 2001;

- Schnelle et al. 2004; Zhang and Grabowski 2004; Castle and Engberg 2007, 2008; Castle 2008).
100. Defendants knew or should have known that a systemic review of 87 research articles and reports from 1975 to 2003 found that high total staffing levels, especially licensed staff, were associated with higher quality of care (Bostick et al. 2006).
 101. Defendants knew or should have known that the Relationship of Nursing Home Staffing to Quality of Care at HSR: Health Services Research 39:2 (April 2004) study is supported by other correlational data documenting a relationship between staffing (particularly RNs) and a variety of outcomes, including: lower death rates, higher rates of discharges to home, improved functional outcomes such as fewer urinary tract infections, lower urinary catheter use, and less antibiotic use (Linn, Gurel, and Linn 1977; Nyman 1988; Munroe 1990; Cherry 1991; Spector and Takada 1991; Aaronson, Zinn, and Rosko 1994; Bliesmer et al. 1998; Harrington et al. 2000; U.S. Department of Health and Human Services 2000b).
 102. Defendants knew or should have known that inadequate staffing has been associated with inadequate feeding assistance during meals, poor skin care, lower activity participation, and less toileting assistance (Spector and Takada 1991; Kayser-Jones 1996, 1997; Kayser-Jones and Schell 1997).
 103. Defendants knew or should have known that lower staffing levels, especially RN staffing, translate into lower labor costs, which appears to be a management strategy by the top 10 chains as well as other for-profit facilities to reduce costs. Nurse Staffing and Deficiencies in the Largest For-Profit Nursing Home Chains and Chains Owned by Private Equity Companies. DOI: 10.1111/j.1475-6773.2011.01311.x

104. Defendants knew or should have known that low staffing levels are a major concern because low staffing, especially RN staffing, have been associated with more federal deficiencies and poorer resident outcomes as noted in previous studies (Cohen and Spector 1996; Harrington et al. 2000; Grabowski 2001a, b; US CMS 2001; Schnelle et al. 2004; Zhang and Grabowski 2004; Bostick et al. 2006; Castle and Engberg 2007, 2008; Castle 2008; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).
105. Defendants knew or should have known that a clear link has been demonstrated between lower nurse staffing levels in nursing homes and adverse patient outcomes.
106. Defendants knew or should have known that numerous studies have shown positive relationships between staffing levels for different types of staff (RN, LPN, nursing assistant) and a range of quality measures (e.g. number of deficiencies, functional improvement, and discharged home). See Feuerberg M, Reilly K, Kramer AM, Kane RA. "Review of selected research on nursing home staffing and resident outcomes. Chapter 6 in Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes." Health Care Financing Administration, 2000; Bliesmer MM, Smayling M, Kane RL, Shannon I. The relationship between nursing staffing levels and nursing home outcomes. J Aging Health 1998; 10(3):351-371; Cohen JW, Spector WD. The effect of Medicaid reimbursement on quality of care in nursing homes. J Health Econ 1996; 15:23-48; Harrington C, Zimmerman D, Karon S, Robinson J, Bjorkling F. Nursing home staffing and its relationship to deficiencies. (This research was funded by the Health Care Financing Administration and the Agency for Health Policy & Research). 1999; and Spector WD, Takada HA. Characteristics of nursing homes that affect resident outcomes. J Aging Health 1991;

- 3(4):427-454.
107. According to the CMS Technical User Guide for Design for Nursing Home Compare Five-Star Quality Rating System, there is considerable evidence of a relationship between nursing home staffing levels and resident outcomes.
 108. The CMS Nursing Home Compare program serves to provide consumers of long-term care services “easily accessible, readily understandable” information about nursing facilities. 42 CFR § 1395i-3(i)(1)(A).
 109. The information that must be made available includes specific staffing information – which is reported by the facilities themselves.
 110. This information on “Nursing Home Compare” is compiled into what is commonly called a “Star Rating.”
 111. A portion of the CMS Star rating formulation includes a calculation of the differential between reported and expected staffing levels for a facility.
 112. Medicare/CMS clearly states on their website and in their manuals to providers, including Defendants, that part of the reason for their star rating system is that there “is evidence of a relationship between nursing home staffing levels, staffing stability, and resident outcomes.
 113. The CMS Staffing Study found a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at a substantially higher risk of quality problems.” Nursing Home Compare Five Year Report. The staffing rating is a combination of RN and total nurse staffing.
 114. Staffing is the biggest issue in the star rating system as CMS has noted that “staffing has

the lowest proportion of any domain receiving five stars.”

115. CMS gives a Star rating based in large part on RN staffing provided by the facility:

Table 5						
Staffing Points and Rating (updated February 2015)						
RN rating and hours		Total nurse staffing rating and hours (RN, LPN and nurse aide)				
		1	2	3	4	5
		<3.262	3.262 – 3.660	3.661 – 4.172	4.173 – 4.417	≥4.418
1	<0.283	★	★	★★	★★	★★★
2	0.283 – 0.378	★	★★	★★★	★★★★	★★★★
3	0.379 – 0.512	★★	★★★	★★★★	★★★★★	★★★★★
4	0.513 – 0.709	★★	★★★	★★★★	★★★★★	★★★★★
5	≥0.710	★★★	★★★	★★★★	★★★★★	★★★★★

Note: Adjusted staffing values are rounded to three decimal places before the cut points are applied.

116. The CMS Staffing Study found a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at substantially higher risk of quality problems. See Kramer AM, Fish R. “The Relationship Between Nurse Staffing Levels and the Quality of Nursing Home Care.” Chapter 2 in Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes: Phase II Final Report. Abt Associates, Inc., Winter 2001.
117. Defendants knew or should have known that more RN direct care time per resident per day (examined in 10-minute increments up to 30 to 40 minutes per resident per day) was associated with fewer hospitalizations, and UTIs; less weight loss, catheterization, and deterioration in the ability to perform ADLs; and greater use of oral standard medical nutritional supplements.
118. Defendants knew or should have known adequate fluid intake can be achieved by simple

- interventions such as offering residents preferred liquids systematically and by having an adequate number of supervised staff help them to drink while properly positioned.
119. Because of their joint venture, Defendants have a joint obligation to sufficiently staff the facility to ensure that each of their residents received the necessary care and services in order for them to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the resident's comprehensive assessment and plan of care.
120. This joint obligation required Defendants to base the number of Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and Certified Nurse Aides (CNAs) to be provided at Lake Emory not only upon the number of residents residing in their facility (commonly referred to as "resident census") but also on the intensity of nursing care required by their residents.
121. Expected hours are calculated by summing the nursing times in minutes (from the CMS Time Study found in Appendix Table A1) connected to each RUG category across all residents in the category and across all categories. The total minutes are then divided by the number of residents included in the calculations. The number of minutes per resident is converted to hours by dividing by 60. The result is the "expected" number of hours per resident day for each nursing category.
122. The term used by caregivers and health science literature to describe the intensity of nursing care required by a resident is "acuity level".
123. Acuity levels are reflected in the resident's "Resource Utilization Group" classification or "RUGs".
124. RUGs are mutually exclusive categories that reflect the amount of resources that will be needed in order to meet the needs of a particular resident in nursing facilities.

125. RUGs are assigned to residents based on data derived from an assessment tool referred to as a “Minimum Data Set” (MDS”).
126. An MDS is prepared for each resident of a nursing facility regardless of who is paying for their stay in the nursing facility.
127. MDSs are required to be prepared when a resident initially arrives at the facility and periodically thereafter depending on the course of the resident’s medical profession.
128. At a minimum, an MDS is to be prepared for every resident in a nursing facility on a quarterly basis.
129. The completion of an MDS by a nursing facility is a part of the federally mandated process for clinical assessments of all residents in nursing facilities.
130. MDSs need to be as detailed and comprehensive as possible so that they reflect all of the needs of each of the residents in the nursing facility.
131. When done properly, an MDS provides a comprehensive assessment of each resident’s functional capabilities and helps the staff of a nursing facility identify all of the health problems of each of their residents.
132. The information contained in an MDS is used to slot the resident into a RUG. RUGs are organized in a hierarchy from residents who will need the greatest amount of resources to residents who will need the least amount of resources during their stay at the nursing facility.
133. 70% of RUG reimbursement rate is attributable to the labor requirements associated with the RUG score.
134. Defendants knew or should have known that CMS publishes quarterly the facility’s

- expected HPPD for direct care caregivers at CMS.gov.
135. The CMS "expected" staffing associated with the monthly or quarterly reports and the CMS "estimated" staffing associated with RUG scores are notice of potential under-staffing and knowledge of the dangers associated therewith.
 136. The government has recognized the "considerable evidence of a relationship between nursing home staffing levels and resident outcomes." (CMS Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide). A government staffing study found "a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at substantially higher risk of quality problems."
 137. In conjunction with these facts, Medicare has promulgated staffing 'expectations' based on the number and acuity of patients as reported by nursing homes. These expected staffing numbers drive higher quality of care and also serve as a basis for how much nursing homes are paid.
 138. The staffing data is in the public domain via the CMS website and provides notice to nursing homes of CMS' expectations and estimated staffing requirements based on the facilities' average RUG scores.
 139. That labor is the biggest component of the nursing home budget.
 140. That nursing labor is the biggest component of the labor budget.
 141. That RNs are the highest paid employees among the nursing staff.
 142. That experienced, more senior, RNs cost more on an hourly basis than less experienced, less senior RNs.

143. According to the Federal Nursing Home Act at 42 CFR 483.35, the facility must have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §483.70(e).
144. The federal requirement for staffing is that the nursing home must provide sufficient staffing to meet all of the needs of all of the residents at all times. 42 CFR 483.30(a).
145. Providing adequate and appropriate staffing, resources and financial solvency to a facility is crucial to meeting the needs of the residents.
146. The regulations are exact in what information must be provided:
- (i) **Staffing data for each facility (including resident census data and data on the hours of care provided per resident per day) based on data submitted under section 1128I(g) [42 USCS § 1320a-7j(g)]**, including information on staffing turnover and tenure, in a format that is clearly understandable to consumers of long-term care services and allows such consumers to compare differences in staffing between facilities and State and national averages for the facilities. Such format shall include--
 - (I) concise explanations of how to interpret the data (such as a plain English explanation of data reflecting "nursing home staff hours per resident day");
 - (II) **differences in types of staff (such as training associated with different categories of staff);**
 - (III) **the relationship between nurse staffing levels and quality of care;** and
 - (IV) an explanation that appropriate staffing levels vary based on patient case mix.
- 42 USCS § 1395i-3.
147. Residents who will need the greatest amount of resources are assigned to higher groups in

- the RUG hierarchy.
148. RUGs also determine the level of compensation a nursing facility will receive in order to provide the level of care necessary for each of their residents.
 149. Residents in higher RUGs place higher demands for care and services on the nursing facility and its staff.
 150. Providing care to residents in higher RUGs is more costly and is, therefore, reimbursed at a higher level.
 151. The RUG assigned to a resident can be found in section Z of each resident's MDS.
 152. The only way to determine the total acuity level and corresponding RUG of each of the residents at Lake Emory on any given day is by examining section Z of **every** MDS in effect on that day.
 153. The Centers for Medicare and Medicaid Services ("CMS") is the federal agency that is tasked with regulating all nursing facilities in this country.
 154. Through the years, CMS has sponsored multiple studies to determine the amount of time that RNs, LPNs, and CNAs in nursing facility spend providing direct care to residents as well as other elements of resident care.
 155. Because of these studies, CMS is able to set a number of hours of direct care that they expect to be provided to residents by RNs, LPNs, and CNAs based on the nursing facility's total acuity level. This expectation is expressed in terms of "hours per patient day" or "HPPD".
 156. Using the information contained in the MDSs of every resident in a nursing facility, CMS is able to determine an HPPD that is expected for each nursing facility in the country. This

- is referred to as the “expected HPPD” and can be found on the CMS.gov website.
157. CMS is also able to adjust the HPPD per facility on a quarterly basis based on the updated MDSs that are provided to them.
158. Nursing facilities are required to submit an annual “Medicare Cost Report” to CMS known as “CMS Form 2540-10”.
159. The cost report is a financial report that identifies the cost and charges related to healthcare treatment activities in a particular nursing facility.
160. Included in the costs are extensive details as to how much money the nursing facility spent on RNs, LPNs, and CNAs during that year based on payroll records.
161. The cost report also reports the resident census, hours paid, and the hourly rate that the nursing facility paid each category of direct caregivers during that year.
162. By dividing the paid hours by the resident census it is possible to determine how many hours the nursing facility paid for each category of direct caregivers per resident, per day for the time period covered by that particular cost report. This number is referred to as the “reported HPPD”.
163. The reported HPPD is actually an inflated number due to the fact that hours paid includes sick pay and vacation pay.
164. By removing the sick pay and vacation pay from the hours paid the resulting HPPD would be closer to the actual HPPD provided by caregivers to residents in nursing facilities.
165. The actual HPPD for any given nursing facility can be determined by examining the data that nursing facilities use to track the number of hours their employees work.
166. This information is easily accessed through reports that are commonly referred to as “Time

Detail Reports”, “Punch Detail Data Reports”, or some other similarly named report depending on the time-keeping system used by the particular nursing facility.

167. This information can reveal the actual HPPD for any period of time including a year, a quarter, a month, or even a day.
168. Defendants are required to report their staffing levels for RNs, LPNs and aides, the combination of which is commonly called “direct-care providers.”
169. The understaffing was particularly egregious as to RN staffing levels.
170. This flagrant understaffing is of particular import, as it is indisputable that highly trained RNs are required to perform comprehensive assessments, to create patient care plans, and to provide a greater level of care to patients in need.
171. By failing to provide adequate RN and other staffing, Defendants put their residents, including Armando Acevedo, at greater risk. Indeed, Armando Acevedo’s injuries are directly attributable to a lack of assessment and care planning because of the lack of RN staffing.
172. According to CMS published expectations, in 2017, Defendants failed to provide the level of staffing necessary to meet the needs of their residents including Armando Acevedo.

January 2017 RN, LPN & CNA Time			
Reported Hours Per Resident Per Day			
Aides	LPNs	RNs	Total Nursing
2.0747	.73253	.9012	1.63373
2 hours 4 minutes	44 minutes	54 minutes	1 hour 38 minutes
Expected Hours Per Resident Per Day			
Aides	LPNs	RNs	Total Nursing
2.491666	.617914	1.135442	1.753356
2 hours 30 minutes	37 minutes	1 hour 8 minutes	1 hour 45 minutes
October 2017 RN, LPN & CNA Time			
Reported Hours Per Resident Per Day			

Aides	LPNs	RNs	Total Nursing	
1.99367	.95	.73228	1.68228	
2 hours	57 minutes	44 minutes	1 hour 41 minutes	
Expected Hours Per Resident Per Day				
Aides	LPNs	RNs	Total Nursing	
2.563848	.594956	1.033571	1.628527	
2 hours 34 minutes	36 minutes	1 hour 2 minutes	1 hour 38 minutes	
Difference in RN Time				
Data Set--2017	Reported Time	Expected Time	Difference	% Below/Above Expected
January	54 minutes	1 hour 8 minutes	14 minutes	-20.63%
October	44 minutes	1 hour 2 minutes	17 minutes	-29.15%

173. The staffing at the facility was significantly below what CMS expected based on the acuity of the residents who resided therein during the residency. If sick time and vacation time were removed from the “hours paid” in each of these categories of caregivers the actual level of understaffing would turn out to be greater than these numbers indicate. Additionally, whenever more accurate staffing information is made available to Plaintiffs, by way of employee time cards, the percentage of understaffing will likely increase significantly.
174. Based on the CMS cost reports, the facility’s understaffing allowed them to profit from the short-staffing.
175. The lack of RN staffing leads to lack of assessments or allowing unqualified LPNs to assess which is outside their scope of practice in violation of the Board of Nursing’s Advisory Opinions.
176. Plaintiffs allege that Defendants jointly exercised control over the operation and management of Lake Emory prior to and during Armando Acevedo’s period of residency

therein, including but not limited to, the creation, setting, funding and/or implementation of budgets; the monitoring of resident acuity levels; the monitoring of staffing levels; control over resident admissions and discharges; and control over the number of hours of direct care provided to the residents by RNs, LPNs, and CNAs.

177. Plaintiffs allege that each of these managerial and operational functions had a direct impact on the amount and quality of care delivered to Armando Acevedo while he resided at Lake Emory and were taken in furtherance of operational and managerial objectives.
178. Plaintiffs allege that Defendants engaged in a systematic process of ensuring Lake Emory staff to meet the individual needs of their residents during Armando Acevedo's period of residency therein.
179. According to the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(6) "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health or safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services. Neglect may be repeated conduct or a single incident which has produced or can be proven to result in serious physical or psychological harm or substantial risk of death. Noncompliance with regulatory standards alone does not constitute neglect.
180. Neglect includes the inability of a vulnerable adult, in the absence of a caretaker, to provide for their own health or safety which produces or could reasonably be expected to produce serious physical or psychological harm or substantial risk of death.
181. According to the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11), a "Vulnerable adult" means a person eighteen years of age or older who has a

physical or mental condition which substantially impairs the person from adequately providing for their own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

182. Plaintiff decedent was a resident of Lake Emory and was therefore a vulnerable adult under the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11).
183. S.C. Regulation 61-17 Section 603(A) states that the facility must meet the following standard: "There shall be direct care staff adequate in number and skill in the facility at all times to provide nursing and related care and services to attain or maintain the highest practicable physical, mental, and psychosocial health and safety of each resident, as determined by resident assessments and ICPs.[care plans]"
184. S.C. Regulation 61-17 Section 605(A) states that the facility must meet the following standard: "An adequate number of licensed nurses shall be on duty to meet the total nursing needs of residents. Licensed nursing staff shall be assigned to duties consistent with their scope of practice as determined through their licensure and educational preparation.
185. S.C. Regulation 61-17 Section 605(B) states that the facility must meet the following standard for unlicensed Nursing Staff: "The required number of nurse aides and other unlicensed nursing staff shall be determined by the number of residents assigned to beds at the facility. Additional staff members shall be provided if the minimum staff requirements are inadequate to provide appropriate care and services to the residents of a facility."

186. S.C. Regulation 61-17 Section 601(E) states that the facility must meet the following standard regarding staffing information: "Time schedules shall be maintained indicating the numbers and classification of all staff, including relief staff, who work on each shift of duty. The time schedules shall reflect all changes so as to indicate who actually worked."
187. S.C. Regulation 61-17 Section 601(H) states that the facility must meet the following standard regarding third party providers: "When a facility engages a source other than the facility to provide services normally provided by the facility, *e.g.*, staffing, training, recreation, meal service, social services, professional consultant, maintenance, transportation, there shall be a written agreement with the source that describes how and when the services are to be provided, the exact services to be provided, and the requirement that these services are to be provided by qualified individuals. The source shall comply with this regulation in regard to resident care, treatment, services, and rights.
188. S.C. Regulation 61-17 Section 607(A) states that the facility must meet the following standard regarding training: "Staff members shall be provided the necessary training to perform the duties for which they are responsible."
189. S.C. Regulation 61-17 Section 607(B) states that the facility must meet the following standard regarding training: "Before performing any duties, all newly-hired staff members shall be oriented to the facility organization and physical plant, specific duties and responsibilities of staff members, and residents' needs. All staff members shall be instructed in the provisions of S.C. Code Section 43-35-5 et seq., "Omnibus Adult Protection Act" and S.C. Code Section 44-81-10 et seq., "Bill of Rights for Residents of

Long-Term Care Facilities” as well as other rights and assurances as required in this regulation.

190. S.C. Regulation 61-17 Section 607(C) states that the facility must meet the following standard regarding training: "All staff shall be provided in-service training programs that identify training needs related to problems, needs, care of residents and infection control and are sufficient to assure staff's continuing competency. Training for the tasks each staff member performs shall be conducted in order to provide the care, treatment, procedures, and/or services delineated in Section 1000."
191. S.C. Regulation 61-17 Section 601(D) states that the facility must meet the following standard regarding employee information: "There shall be accurate current information maintained regarding all staff members of the facility that shall include:
 1. Name, address and telephone number;
 2. Date of hire;
 3. Past employment, experience, and education;
 4. Professional licensure or registration number or certificate or letter of completion;
 5. Position in the facility and job description;
 6. Documentation of orientation to the facility, including residents' rights, regulation compliance, policies and procedures, job duties, in-service training and on-going education;
 7. Health status, health assessment, and tuberculin testing results;
 8. Evidence that a criminal record check has been completed;
 9. For former staff members, the date of separation;
 10. Date of initial resident contact may be maintained by the facility.
192. According to the South Carolina Board of Nursing Advisory Opinion #21 which constitutes competent and safe nursing practice, the State Board of Nursing for South Carolina has determined that it is NOT within the role and scope of practice for the licensed practical nurse (LPN) to perform physical assessments. It is within the role of the LPN to assist with

the collection of patient health data to be used for the complete physical assessment. However, the analysis and synthesis of clinical information and the formulation of problem statements and/or nursing diagnoses requires the knowledge base and skills that are within the scope of practice of the registered nurse (RN) and may NOT be delegated to the LPN.

193. S.C. Code 40-33-20 (48) states the scope of practice for registered nursing which means the performance of health care acts in the nursing process that involve assessment, analysis, intervention, and evaluation. This practice requires specialized independent judgment and skill and is based on knowledge and application of the principles of biophysical and social sciences.
194. S.C. Code 40-33-20 (48) states the scope of practice of registered nursing includes, but is not limited to:
 - a. assessing the health status of persons and groups;
 - b. analyzing the health status of persons and groups;
 - c. establishing outcomes to meet identified health care needs of persons and groups;
 - d. prescribing nursing interventions to achieve outcomes;
 - e. implementing nursing interventions to achieve outcomes;
 - f. administering and delivering medications and treatments prescribed by an authorized licensed provider;
 - g. delegating nursing interventions to qualified others;
 - h. providing for the maintenance of safe and effective nursing care rendered directly or indirectly;
 - i. providing counseling and teaching for the promotion and maintenance of health;
 - j. evaluating and revising responses to interventions, as appropriate;
 - k. teaching and evaluating the practice of nursing;
 - l. managing and supervising the practice of nursing;
 - m. collaborating with other health care professionals in the management of health care;
 - n. participating in or conducting research, or both, to enhance the body of nursing knowledge;
 - o. consulting to improve the practice of nursing; and

- p. performing additional acts that require special education and training and that are approved by the board.

195. S.C. Regulation 61-17 Section 803(B) states that the facility must meet the following standard regarding the resident's Individual Care Plan (ICP): The ICP shall describe:
- 1. The needs of the resident, including the services that are to be furnished, *i.e.*, what assistance, how much, who will provide the assistance, how often, and when;
 - 2. Advance directives and healthcare power-of-attorney, as applicable;
 - 3. Recreational and social activities that are suitable, desirable, and important to the resident;
 - 4. Dietary needs and preferences of resident as approved by a physician;
 - 5. Discharge planning, to include assessing continuing care needs and developing a plan designed to assure the resident's needs will be met after discharge or transfer.
196. S.C. Regulation 61-17 Section 805(B) states that the facility must meet the following standard regarding the resident's Electronic Resident Records: "A facility that maintains electronic records shall:
- 1. Retain the hard copy originals of any materials that cannot be electronically stored;
 - 2. Employ an off-site backup storage system as protection in the event that the on-site system is damaged or destroyed;
 - 3. Use an imaging mechanism that is able to copy documents with signatures;
 - 4. Assure that records, once put in electronic form, are unalterable.
197. S.C. Regulation 61-17 Section 805(C) states that the facility must meet the following standard regarding the resident's Electronic Resident Records: "Electronic signatures may be used any place in the resident or outpatient record that requires a signature, provided signature identification can be verified and an electronic signature may be legally used. Electronic authorization shall be limited to a unique identifier (confidential code) used only by the individual making the entry to preclude the improper or unauthorized use of any electronic signature.

198. The facility as a health care provider maintains electronic records which requires the facility to maintain an audit trail. See the requirements of 45 CFR §164.312.
199. The audit trail is a document that shows the sequence of events related to the use of and access to an individual patient's electronic health records (EHR). For instance, the audit trail will reveal who accessed a particular patient's records, when, and where the health care provider accessed the record.
200. The audit trail shows what the provider did with the records—e.g., simply reviewed them, prepared a note, or edited a note. Each time a patient's EHR is opened, regardless of the reason, the audit trail documents this detail.
201. The audit trail cannot be erased and all events related to the access of a patient's EHR are permanently documented in the audit trail.
202. 45 C.F.R. § 164.306(a)(1) commands the facility . . . to "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information [that it] creates, receives, maintains, or transmits;"
203. 45 C.F.R. § 164.304 provides that "availability" in this context means "that data or information is accessible and useable upon demand by an authorized person;"
204. 45 C.F.R. § 164.308(a)(7)(ii) provides that a facility . . . must "[e]stablish and implement procedures to create and maintain retrievable exact copies of electronic protected health information;"
205. 45 C.F.R. § 164.312(b) provides that a facility . . . must "[i]mplement hardware, software, and/or procedural mechanisms that record and examine activity in information systems that contain or use electronic protected health information;"

206. 45 C.F.R. § 170.210(b) requires that "[t]he date, time, patient identification, user identification . . . must be recorded when electronic health information is created, modified, accessed, or deleted; and an indication of which action(s) occurred and by whom must be recorded;"
207. 21 C.F.R. § 11.10(e) provides that a facility shall employ procedures and controls including the "[u]se of secure, computer generated, time-stamped audit trails to independently record the date and time of operator entries and actions that create, modify, or delete electronic records" and that "[s]uch audit trail documentation shall be retained for a period at least as long as that required for the subject electronic records . . . ;"
208. 21 C.F.R. § 11.10(k)(2) states that a facility shall employ appropriate controls over systems documentation including "[r]evision and change control procedures to maintain an audit trail that documents time-sequenced development and modification of systems documentation;"
209. 42 U.S.C. § 1320d-2(d)(2) provides that a facility . . . "shall maintain reasonable and appropriate administrative, technical, and physical safeguards —(A) to ensure the integrity and confidentiality of the [health] information; (B) to protect against any reasonably anticipated—(I) threats or hazards to the integrity of the information; and (ii) unauthorized uses or disclosures of the information. . . ;"
210. 42 U.S.C. § 1320d(6) provides that "individually identifiable health information" is defined to include "any information . . . created or received by a health care provider . . . [that] relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the

provision of health care to an individual, and . . . identifies the individual; or . . . can be used to identify the individual"

211. According to §483.20 applicable to nursing homes, a Resident Assessment requires the facility to provide with ongoing assessment information necessary to develop a care plan, to provide the appropriate care and services for each resident, and to modify the care plan and care/services based on the resident's status. The facility is expected to use resident observation and communication as the primary source of information when completing the RAI. In addition to direct observation and communication with the resident, the facility should use a variety of other sources, including communication with licensed and non-licensed staff members on all shifts and may include discussions with the resident's physician, family members, or outside consultants and review of the resident's record.
212. According to CMS' Long-Term Care Facility Resident Assessment Instrument 3.0 User's Manual Section 2.4, the Federal regulatory requirement at 42 CFR 483.20(d) requires nursing homes to maintain all resident assessments completed within the previous 15 months in the resident's active clinical record.
213. According to Defendants' Nursing Policies and Procedures regarding physician communication and changes of condition, the facility is required to documents all assessments and changes in condition:
214. According to §483.21 applicable to nursing homes related to Comprehensive Care Plans states: The facility must develop and implement a baseline care plan for each resident that includes the instructions needed to provide effective and person-centered care of the resident that meet professional standards of quality care.
215. The baseline care plan must:

- (i) Be developed within 48 hours of a resident's admission.
 - (ii) Include the minimum healthcare information necessary to properly care for a resident including, but not limited to—
 - (A) Initial goals based on admission orders.
 - (B) Physician orders.
 - (C) Dietary orders.
 - (D) Therapy services.
 - (E) Social services.
 - (F) PASARR recommendation, if applicable.
216. Defendants' facility had a duty to properly assess, care plan, and attempt interventions to prevent falls, and other preventable injuries.
217. According to §483.25 related to Quality of Care requires the facility to provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.
218. According to §483.25(d) related to Accidents, the facility must ensure that:
- (1) The resident environment remains as free from accident hazards as is possible; and
 - (2) Each resident receives adequate supervision and assistance devices to prevent accidents.
219. S.C. Regulation 61-17 Section 701(A) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall maintain a record of each accident and incident, including each serious accident and incident as defined in Section 701.B, involving residents or staff members or volunteers, occurring in the facility or on the facility grounds. A facility's record of each accident and incident shall be reviewed, investigated if necessary, evaluated in accordance with facility policies and procedures, and retained by the facility for six (6) years after the resident stops receiving services.

220. S.C. Regulation 61-17 Section 701(E) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall retain a copy of every serious accident and incident with all of the information provided to the Department and the names, injuries, and treatments associated with each resident, staff, and/or visitor involved. A facility shall retain all serious accident and incident records for six (6) years after the resident stops receiving services."
221. S.C. Regulation 61-17 Section 801(B) states that the facility must meet the following standard regarding documentation in the resident record: "Contents of the resident record may be stored in separate files, in separate areas within the facility, and the record shall include the following information:
1. Medical history and physical examination;
 2. Consent form for treatment signed by the resident or his legal representative;
 3. Care and services agreement;
 4. Healthcare directives and special information, *e.g.*, advance directive information, do-not-resuscitate (DNR) orders, and allergies;
 5. **Incidents involving the resident;**
 6. Medical treatment;
 7. Orders, including telephone and standing orders, for all medication, care, services, therapy, procedures, and diet from physicians or other legally authorized healthcare providers, which shall be completed prior to, or at the time of admission, and subsequently, as warranted;
 8. Individual Care Plan;
 9. Provisions for routine and emergency medical care, to include the name and telephone number of the resident's physician;
 10. Assessments and progress notes, *e.g.*, dietary, activity, therapy;
 11. Record of administration of each dose of medication;
 12. Record of the use of restraints, if applicable, including time, type, reason and authority for applying;
 13. Treatment, procedure, wound care report (dictated or written into the record after treatment, procedure, or wound care) to include at least:
 - a. Description of findings;
 - b. Techniques utilized to perform treatments and procedures;
 - c. Specimens removed, if applicable;
 - d. Name of provider;

- e. Progress notes generated by physicians and healthcare professionals;
- f. Notes of observation, including temperature, pulse, respiration, blood pressure and weight when indicated by physician's orders or by a change in the resident's condition;
- g. Special procedures and preventive measures performed, *e.g.*, isolation for symptoms, diagnosis, and/or treatment of infectious conditions including but not limited to tuberculosis, influenza, pneumonia, therapies;
- h. Reports of all laboratory, radiological, and diagnostic procedures along with tests performed and the results appropriately authenticated;
- i. Consultations by physicians or other healthcare professionals;
- j. Photograph of resident, if the resident or his responsible party approves;
- k. Date and hour of discharge or transfer, as applicable;
- l. Discharge and/or transfer summary, including care and condition at discharge or transfer, date and time of discharge or transfer, instructions for self-care, instructions for obtaining post-treatment or procedure emergency care, and signature of physician authorizing discharge or transfer;
- m. Date and circumstances of death, as applicable.

222. The federal regulation at §483.70(i) related to documentation in the clinical records requires: "In accordance with accepted professional standards and practices, the facility must maintain medical records on each resident that are—
- (i) Complete;
 - (ii) Accurately documented;
 - (iii) Readily accessible; and
 - (iv) Systematically organized"
223. Defendants' facility had a duty to document the respective interventions and incidents adequately in the nurses' notes.
224. S.C. Regulation 61-17 Section 701(D) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall submit a written report of its investigation of every serious accident and incident to the Department within five (5) days of the serious accident or incident. A facility's written report to the Department shall provide at a minimum:
- 1. Facility name;
 - 2. License number;
 - 3. Type of accident or incident;

4. Date accident or incident occurred;
5. Number of residents directly injured or affected;
6. Resident record number or last four (4) digits of Social Security Number;
7. Resident age and sex;
8. Number of staff directly injured or affected;
9. Number of visitors directly injured or affected;
10. Name(s) of witness(es);
11. Identified cause of accident or incident;
12. Internal investigation results if cause unknown; and
13. Brief description of the accident or incident including the location of occurrence and treatment of injuries."

225. S.C. Regulation 61-17 Section 701(B) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall report every serious accident and incident that results in resident's death or significant loss of function or damage to a body structure, not related to the natural course of a resident's illness or underlying condition or normal course of treatment, and resulting from an accident or incident occurring to resident within the facility or on the facility grounds. Serious accidents and incidents requiring reporting include, but are not limited to:

1. Crime(s) against resident;
2. Confirmed or suspected cases of abuse, neglect, or exploitation;
3. Medication error with adverse reaction;
4. Hospitalization as a result of the accident or incident;
5. Severe hematoma, laceration, or burn requiring medical attention or hospitalization;
6. **Bone fracture or joint fracture;**
7. Severe injury involving use of restraints;
8. Attempted suicide; or
9. Fire.

226. S.C. Regulation 61-17 Section 500(A) states that the facility must meet the following standard: "There shall be written policies and procedures addressing the manner in which the requirements of this regulation shall be met. The written policies and procedures shall accurately reflect actual facility practice regarding care, treatment, procedures, services,

record keeping and reporting, admission and transfer, physician services, nursing services, social services, resident rights and assurances, medication management, pharmaceutical services, meal service operations, emergency procedures, fire prevention, maintenance, housekeeping and infection control, the operation of the facility, and other special care and procedures as identified in this section. The policies and procedures shall address the provision of any special care offered by the facility that would include how the facility shall meet the specialized needs of the affected residents such as Alzheimer's disease and/or related dementia, physically or developmentally disabled, in accordance with any laws that pertain to that service offered, for example, Alzheimer's Special Care Disclosure Act."

227. S.C. Regulation 61-17 Section 500(C) states that the facility must meet the following standard: "All policies and procedures shall:
 1. Establish a time period for review of policies and procedures in writing and such reviews shall be documented;
 2. Be revised as appropriate in order to reflect actual facility practice; and
 3. Be accessible to staff, printed or electronically, at all times."
228. The facility Administrator shall be licensed as a nursing home Administrator in accordance with S.C. Code Section 40-35-30. In addition, all other applicable provisions of S.C. Code Title 40, Chapter 35, shall be followed.
229. S.C. Regulations applicable to nursing homes found in 61-17 Section 602 requires that "each facility shall have a full-time licensed Administrator".
230. S.C. Code Section 40-35-110 states that "Misconduct" includes the following:
 - (1) acting in a manner inconsistent with the health or safety of the patients of the nursing home or community residential care facility;
 - (2) failing to ensure that the nursing home or community residential care facility in

which he is an administrator complies with the provisions of law and regulations of the licensing or supervising authority or agency, whether federal, state, or local, having jurisdiction over the operation and licensing of the nursing home or community residential care facility;

(3) intentional or knowing, direct or indirect, violation of or the aiding and abetting in the violation of this chapter or a regulation promulgated under this chapter;

(4) failing to operate a nursing home or community residential care facility in a manner that ensures the safety, health, and welfare of the patients;

(5) use of a false, fraudulent, or forged statement in the practice of nursing home administration or community residential care facility administration.

231. The federal regulation at §483.25(l) states that: “Each resident's drug regimen must be free from unnecessary drugs.”

232. An unnecessary drug is any drug when used:

(i) In excessive dose (including duplicate therapy); or

(ii) For excessive duration; or

(iii) Without adequate monitoring; or

(iv) Without adequate indications for its use; or

(v) In the presence of adverse consequences which indicate the dose should be reduced or discontinued; or

(vi) Any combinations of the reasons above.

233. Based on a comprehensive assessment of a resident, the facility must ensure that:

(i) Residents who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and

(ii) Residents who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs.

234. The federal regulation at §483.25(j) requires that: “The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health.

235. The federal regulation at §483.75(j) requires that: “The facility must provide or obtain laboratory services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.”

236. The intent of this regulation is to assure that laboratory services are accurate and timely so that the utility of laboratory testing for diagnosis, treatment, prevention or assessment is maximized. The facility is responsible for quality and timely laboratory services whether or not services are provided by the facility or an outside agency.
237. The federal regulation at §483.75(j) requires that: “The facility must ensure that
- (1) The medical care of each resident is supervised by a physician; and
 - (2) Another physician supervises the medical care of residents when their attending physician is unavailable.”
238. The intent of this regulation is to ensure the medical supervision of the care of nursing home residents by a personal physician.
239. The federal regulation at §483.50(b) requires that: “The facility must provide or obtain radiology and other diagnostic services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.”
240. That while at Fundamental facility, Armando Acevedo suffered preventable falls that caused mental anguish, pain and suffering, including one that resulted in a fractured hip requiring surgery.
241. That the facility failed to keep Armando Acevedo safe from preventable falls.
242. That the facility failed to utilize safety devices with Armando Acevedo.
243. That the facility failed to monitor Armando Acevedo for changes in condition.
244. Defendants’ facility had a duty to ensure that proper preventative measures were in place to keep the resident safe and free from avoidable and preventable pressure injuries.
245. Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Armando Acevedo.

- 246. That at all times relevant hereto, Defendants were required to exercise due care in the supervision and care of their residents to prevent the occurrence of new adverse health conditions and to prevent currently existing adverse health conditions from deteriorating.
- 247. That the facility must develop a comprehensive care plan for each resident that includes measurable objectives and timetables to meet the resident's medical nursing, nutritional, mental, and psychological needs as identified in the comprehensive assessment.
- 248. That the facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care.
- 249. That treatment and prevention of infection in the nursing home should be part of an interdisciplinary approach.
- 250. That several types of personnel have essential roles in the assessment, care planning, prevention, and treatment of infection.
- 251. That evaluation, multi-disciplinary documentation of treatment, and detailed individual care plans must be developed and implemented.
- 252. That the acts and delicts of Defendants caused, and were the proximate causes of, Armando Acevedo's falls, loss of dignity, hospitalization, conscious pain and suffering, mental distress, medical bills and disability.
- 253. That the Defendants were jointly, directly, and vicariously liable and responsible for the acts and delicts of their employees, agents, and servants.

254. That the Defendants hold themselves out as specialists in the field of adult - geriatric care with the expertise necessary to maintain the health, safety, and highest practicable quality of life of persons unable to adequately care for themselves.
255. That the Defendants were under a duty to provide reasonable, appropriate and adequate care to Armando Acevedo pursuant to state and federal laws, rules, regulations, guidelines, and existing industry standards.
- a. Defendants failed to provide the highest practicable level of care, training, competency.
 - b. Defendants repeatedly failed to maintain nursing and other staffing at levels necessary to meet the needs of Armando Acevedo.
 - c. Defendants failed to provide proper and timely assessments, and provide a 1:1 sitter, throughout Armando Acevedo's stay and on the days of the subject falls.
 - d. Defendants repeatedly failed to follow proper skilled nursing care standards to maximize the health, safety, and well-being of Armando Acevedo.
 - e. Defendants repeatedly failed to ensure that Armando Acevedo was safe, free from abuse, neglect, and accorded the dignity and respect owed.
256. Defendants failed to follow, implement, and adhere to all physician's orders.
257. Defendants failed to establish and implement a resident care plan for Armando Acevedo based upon his needs.
258. That at all times pertinent hereto, Armando Acevedo resided at the above-named facility and as such was under the exclusive control and care of Defendants and their employees, agents, officers, and servants while a resident.
259. That the Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Armando Acevedo.
260. That, upon information and belief, at all times prior to and during Armando Acevedo's residency, the facility was understaffed, suffered a high turnover rate, and failed to properly

screen, train, supervise, and discipline their staff, and failed to put them in suitable positions for their skills, experience, and competence.

261. That, upon information and belief, Defendants Hunt Valley through their agents FCOS, FAS, THI, Lake Emory, and Flathmann were involved in the budget and staffing decisions of the facility, and were more concerned about profits and siphoning funds to Hunt Valley than creating a budget that provided adequate staffing and quality care to the residents.
262. That, upon information and belief, at all times prior to and during Armando Acevedo's residency, the facility was underfunded, under-supplied, and under-equipped to care for residents, and was forced to operate on a budget that did not allow for the best care of the residents, including Armando Acevedo.
263. That, upon information and belief, Defendants Hunt Valley through their agents FCOS, FAS, THI, and, Lake Emory, and Flathmann were jointly, directly, and vicariously liable and also liable as alter ego defendants in creating the budget for the facility and siphoning money away from the facility to related entities with common ownership to the Defendants.
264. Plaintiffs allege that Defendants were engaged in a joint venture in the operation of Lake Emory.
265. Defendants' joint venture in the operation of Lake Emory included:
- a. an agreement, express or implied, among the members of the group;
 - b. a common purpose to be carried out by the group;
 - c. a community of pecuniary interest in that purpose, among the members; and
 - d. an equal right to a voice in the direction of the enterprise, which give an equal right of control.
266. Because of the joint venture, Defendants owed a joint duty to Armando Acevedo to provide the same level of care and treatment as any other reasonable, prudent, similar business that

owns, operate, manages, and/or controls a nursing facility would have provided under the same or similar circumstances taking into consideration Armando Acevedo's known medical condition.

FIRST CAUSE OF ACTION
(Negligence/Recklessness)

267. Relevant and consistent allegations contained in paragraphs 1-266 are incorporated by reference as if written verbatim herein.
268. That Defendants Hunt Valley through agents FCOS, FAS, THI, Lake Emory, and Flathmann had a duty of due care to their patients and residents, to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from harm.
269. The Defendants by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Armando Acevedo. More particularly the Defendants were negligent in the following particulars:
 - a. failing to properly supervise as required, and as promised to the family upon admission;
 - b. failing to provide the care, supervision and monitoring of patients, residents, and in particular Armando Acevedo, which was required by law and which was necessary for his health and safety;
 - c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Armando Acevedo;
 - d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Armando Acevedo;
 - e. failing to abide by applicable federal and state laws governing long term care facilities and nursing care;
 - f. failing to hire a sufficient number of trained and competent staff;
 - g. failing to follow the licensing and regulatory rules of the State of South Carolina;
 - h. failing to develop and follow an appropriate Plan of Care;

- i. failing to properly train employees to deal with residents who were unable to care for themselves;
 - j. failing to follow physicians' orders;
 - k. failing to properly monitor Armando Acevedo;
 - l. failing to appropriately assess Armando Acevedo's condition;
 - m. failing to update the written plan of care to include necessary interventions to promote safety;
 - n. failing to prevent Armando Acevedo from suffering a preventable fall;
 - o. failing to prevent Armando Acevedo's multiple hospitalizations;
 - p. failing to monitor and assess Armando Acevedo adequately for pain and discomfort;
 - q. failing to treat Armando Acevedo with dignity and respect;
 - r. failing to exercise due care; and
 - s. by other negligent acts and/or omissions yet to be determined or defined.
270. That the Defendants independently and through their agents, servants, and employees demonstrated conscious and intentional disregard of and indifference to the rights and safety of Armando Acevedo and other patients at Lake Emory as demonstrated by:
- a. Their business practice of attempting to care for residents with an inadequate number of trained staff, which their officers and managers knew or should have known was reasonably likely to result in injury to Armando Acevedo and their other patients; and
 - b. Their business practice of failing to supervise and train their staff in order to ensure that their policies and procedures were known to and adhered to by licensed staff, and that licensed staff practiced within their scopes of practice.
271. That as a result, Armando Acevedo experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills.
272. That the aforesaid acts and delicts were the sole and proximate cause of Armando Acevedo's damages, and injuries.

SECOND CAUSE OF ACTION
(Corporate Negligence)

273. Relevant and consistent allegations contained in paragraphs 1-272 are incorporated by reference as if written verbatim herein.
274. That Defendants had a duty of due care to residents; to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from harm.
275. That the Fundamental facility was negligently managed by Defendants Hunt Valley through agents FCOS, FAS, THI, Lake Emory, and Flathmann who were working together to manage and operate the facility for the benefit of Murray Forman.
276. That the facility was negligently administrated in violation of 42 C.F.R. 483.70 by Defendants who were working jointly to govern, administer, control, manage and operate the facility.
277. That the Defendants, by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Armando Acevedo. More specifically, the Defendants were negligent in the following particulars:
- a. failing to properly supervise as required, and as promised to the Plaintiffs upon admission;
 - b. failing to provide the care, supervision and monitoring of patients, residents, and in particular Armando Acevedo, which was required by law and which was necessary for his health and safety;
 - c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Armando Acevedo;
 - d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Armando Acevedo;
 - e. failing to abide by applicable federal and state laws governing long term care facilities and nursing care;
 - f. failing to hire a sufficient number of trained and competent staff;
 - g. failing to follow the licensing and regulatory rules of the State of South Carolina;

- h. failing to develop and follow an appropriate Plan of Care;
 - i. failing to properly train employees to deal with residents who were unable to care for themselves;
 - j. failing to follow physicians' orders;
 - k. failing to properly monitor Armando Acevedo;
 - l. failing to appropriately assess Armando Acevedo's condition;
 - m. failing to keep Armando Acevedo's chart free of fraudulent documentation;
 - n. failing to prevent Armando Acevedo from suffering preventable falls;
 - o. failing to prevent Armando Acevedo from being hospitalized;
 - p. failing to prevent Armando Acevedo from sustaining a fracture;
 - q. failing to treat Armando Acevedo with dignity and respect;
 - r. failing to exercise due care; and
 - s. by other negligent acts and/or omissions yet to be determined or defined.
278. That as a result, Armando Acevedo experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills.
279. That the aforesaid acts and delicts were the sole and proximate cause of Armando Acevedo's injuries.

THIRD CAUSE OF ACTION
(Joint Venture)

280. Relevant and consistent allegations contained in paragraphs 1-279 are incorporated by reference as if written verbatim herein.
281. That a joint venture is an association of two or more individuals engaged in a solitary business enterprise for profit without actual partnership or incorporation.
282. That the elements of joint venture in the State of South Carolina are:
- a. an agreement;
 - b. a joint interest in a common business;
 - c. an understanding that profits and losses will be shared, and;
 - d. a right to joint control.
283. That a joint venture exists when there is:
- a. contribution of resources by both parties;

- b. joint proprietorship and control over the subject matter of the property engaged in the venture;
 - c. sharing of profits by express or implied agreement, and;
 - d. an express or implied contract showing joint venture.
284. That Defendants Hunt Valley and its agents FCOS, FAS, THI, Lake Emory, and Flathmann were involved in a joint venture in the operation and management of the nursing home.

FOURTH CAUSE OF ACTION
(Alter Ego/Piercing the Corporate Veil)

285. Relevant and consistent allegations contained in paragraphs 1-284 are incorporated by reference as if written verbatim herein.
286. That, upon information and belief, Lake Emory was dominated and controlled by Defendant Hunt Valley before, during, and after Armando Acevedo's residency.
287. Hunt Valley and its related entities, agents, and managers siphoned profits from the nursing home chain through self-dealing between the entities, excessively compensated themselves and other executives, and participated in other methods of divesting the licensee entities of needed capital and assets, while allowing the chain to suffer financial losses and provide uniformly poor care across the country as a result of inadequate capitalization and consequently inadequate supplies, resulting in untold numbers of unnecessary injuries and suffering, including that of Armando Acevedo at Lake Emory.

FIFTH CAUSE OF ACTION
(Amalgamation of Interests)

288. Relevant and consistent allegations contained in paragraphs 1-287 are incorporated by reference as if written verbatim herein.

289. That Defendants Hunt Valley through agents FCOS, FAS, THI, Lake Emory, and Flathmann are and have been operating as an amalgamation of interest creating a blurred corporate identity through an integrated enterprise and/or joint venture.
290. That Defendants Hunt Valley through agents FCOS, FAS, THI, and Lake Emory share a common internet website and intranet site.
291. That Defendants Hunt Valley and its agents FCOS, , and FAS share a common location at The Highlands, Ridgebrook Road, Sparks, MD 21152; common headquarters; common policies and procedures; and common in-house counsel.
292. That, upon information and belief, Defendants Hunt Valley and its agents FCOS, FAS, THI, and Lake Emory share common executives and officers, attorneys, policies and procedures, and trademarks.
293. That Defendants Hunt Valley, THI and Lake Emory participate in the commingling of funds and revenue and file one tax return for all Fundamental chain entities.

SIXTH CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

294. Relevant and consistent allegations contained in paragraphs 1-293 are incorporated by reference as if written verbatim herein.
295. That, according to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Armando Acevedo was considered a vulnerable adult.
296. That, according to the South Carolina Adult Protection Act, "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing,

- medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.
297. That Defendants failed to provide care to Armando Acevedo to keep him safe and to prevent injuries from a preventable fall.
298. That Defendants failed to supervise Armando Acevedo and allowed him to suffer preventable fall causing significant injuries.
299. That Defendants failed to provide care, goods, and services to Armando Acevedo in the form of fall prevention and fall prevention devices.
300. That Armando Acevedo trusted in, confided in and relied upon Defendants to use their expertise and discretion for Plaintiff's care.
301. That Defendants Hunt Valley, THI, Lake Emory, and Flathmann accepted Armando Acevedo's trust and reliance and so became responsible for Armando Acevedo's health while residing at the nursing home facility.
302. That as a result of aforementioned reliance and trust upon Defendants Hunt Valley, THI, Lake Emory, and Flathmann, Armando Acevedo's physical, mental and emotional health was placed in the hands of Defendants Hunt Valley, Lake Emory, and Flathmann.
303. That Defendants Hunt Valley and its agents FCOS, FAS, THI, Lake Emory, and Flathmann received compensation for the care and treatment they were responsible for providing to Armando Acevedo during his residency but did not provide that care and treatment.
304. That as a direct and proximate result of Defendants' negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and

employees, Armando Acevedo was severely injured in Lake Emory incurring almost \$200,000 in medical bills and impairment.

305. That the sole and proximate cause of all the harms, losses, and injuries suffered by Armando Acevedo was the combined and concurrent acts and delicts of all the Defendants and their agents acting in a joint venture and integrated enterprise.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for actual and punitive damages in the sums deemed appropriate by the jury, for the costs of the action, and for such other and further relief as this Court may deem just and proper.

s/Gary W. Poliakoff
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Date: October 3, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ARMANDO J. ACEVEDO, THROUGH	)	CASE NO. 2018-CP-42-03421
HIS ATTORNEY-IN-FACT,	)	
MARIANNE ACEVEDO,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC; THI	)	THI OF SOUTH CAROLINA, LLC'S
OF SOUTH CAROLINA, LLC; THI OF	)	ANSWER TO THE COMPLAINT
SOUTH CAROLINA AT CAMP CARE,	)	
LLC, D/B/A LAKE EMORY POST	)	
ACUTE CARE AND RUSTY	)	
FLATHMANN ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: GARY W. POLIAKOFF AND RAYMOND P. MULLMAN, JR., ATTORNEYS FOR THE PLAINTIFF:

The Defendant, THI of South Carolina, LLC, hereinafter referred to as “this Defendant”, *subject to and without waiving any right to compel this matter to arbitration*, hereby responds to the allegations set forth in 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. This defendant is without sufficient knowledge or information to respond to the allegations in Paragraph 1 of Plaintiff’s Complaint and therefore denies the same and demands strict proof thereof.

3. The allegations set forth in Paragraphs 3, 4, 5, and 6 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

4. This Defendant denies the allegations set forth in Paragraph 7 of Plaintiff's Complaint.

5. The allegations set forth in Paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

6. Responding to Paragraph 26 of Plaintiff's Complaint, this Defendant admits it is a Delaware limited liability company with a registered agent in South Carolina. The remainder of the allegations set forth in the above Paragraph are denied.

7. The allegations set forth in Paragraph 27 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

8. The allegations set forth in Paragraphs 28 and 29 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations call for damages or liability against this Defendant, they are denied.

9. The allegations set forth in Paragraphs 30 and 31 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent

those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

10. This Defendant denies the allegations set forth in Paragraphs 32 and 33 of Plaintiff's Complaint.

11. The allegations set forth in Paragraph 34 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or assert or imply liability as to this Defendant, they are denied.

12. This Defendant denies the allegations set forth in Paragraphs 35, 36, 37, 38, 39, 40, and 41 of Plaintiff's Complaint.

13. The allegations set forth in Paragraph 42 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or assert or imply liability as to this Defendant, they are denied.

14. This Defendant denies the allegations set forth in Paragraphs 43, 44, 45, and 46 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

15. The allegations set forth in Paragraphs 47 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages as to this Defendant.

16. This Defendant denies the allegations set forth in Paragraph 48 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

17. Responding to Paragraph 49 of Plaintiff's Complaint, this Defendant reasserts its responses to the above as if stated again verbatim.

18. To the extent those allegations are directed at this Defendant, this Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 50 and 51 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

19. This Defendant denies the allegations set forth in Paragraphs 52, 53, 54, 55, and 56 of Plaintiff's Complaint.

20. To the extent those allegations are directed at this Defendant, this Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 57 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind.

21. This Defendant denies the allegations set forth in Paragraph 58 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

22. The allegations set forth in Paragraphs 59 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

23. This Defendant denies the allegations set forth in Paragraph 60, 61, 62, 63, and 64 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. To the extent those allegations call for legal conclusions, no response is required.

24. The allegations set forth in Paragraphs 65, 66, 67, 68, and 69 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

25. The allegations set forth in Paragraph 70 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or assert liability as to this Defendant, they are denied.

26. This Defendant denies the allegations set forth in Paragraphs 71 and 72 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. To the extent those allegations call for legal conclusions, no response is required.

27. The allegations set forth in Paragraph 73 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege liability as to this Defendant, they are denied.

28. This Defendant denies the allegations set forth in Paragraphs 74, 75, 76, and 77 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. To the extent those allegations call for legal conclusions, no response is required.

29. The allegations set forth in Paragraph 78, 79, 80, 81, 82, and 83 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

30. This Defendant denies the allegations set forth in Paragraphs 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, and 106 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or

relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

31. The allegations set forth in Paragraphs 107, 108, 109, 110, 111, 112, 113, 114, 115, and 116 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege liability as to this Defendant, they are denied.

32. This Defendant denies the allegations set forth in Paragraphs 117, 118, 119, and 120 of Plaintiff's Complaint. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

33. The allegations set forth in Paragraphs 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, and 133 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege liability as to this Defendant, they are denied.

34. This Defendant denies the allegations set forth in Paragraphs 134 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

35. The allegations set forth in Paragraphs 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, and 167 of Plaintiff's Complaint are legal conclusions and therefore no

response is required. To the extent those allegations allege liability as to this Defendant, they are denied.

36. This Defendant denies the allegations set forth in Paragraphs 168, 169, 170, 171, 172, 173, 174, 175, 176, and 177 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant.

37. The allegations set forth in Paragraph 178 of Plaintiff's Complaint are unintelligible as drafted and therefore this Defendant can neither confirm nor deny those allegations. To the extent those allegations allege liability or damages against this Defendant, they are denied.

38. The allegations set forth in Paragraphs 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, and 215 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege liability as to this Defendant, they are denied.

39. This Defendant denies the allegations set forth in Paragraphs 216 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. Defendant admits the facility has a duty to comply with the standard of care.

40. The allegations set forth in Paragraphs 217, 218, 219, 220, 221, and 222 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

41. This Defendant denies the allegations set forth in Paragraph 223 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. Defendant admits only that the facility has the duty to comply with the standard of care.

42. The allegations set forth in Paragraphs 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, and 238 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege liability as to this Defendant, they are denied.

43. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 240 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. Further responding, this Defendant denies the allegations set forth in the above Paragraph to the extent it asserts or implies that this Defendant operates the facility at issue in Plaintiff's Complaint.

44. The allegations set forth in Paragraphs 241, 242, and 243 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required; this Defendant denies those allegations and demands strict proof thereof.

45. This Defendant denies the allegations set forth in Paragraphs 244, 245, and 246 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any

medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

46. The allegations set forth in Paragraphs 247 and 248 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages as to this Defendant.

47. The allegations set forth in Paragraphs 249, 250, and 251 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege liability as to this Defendant, they are denied.

48. This Defendant denies the allegations set forth in Paragraphs 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, and 266 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

49. Responding to Paragraph 267 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

50. This Defendant denies the allegations set forth in Paragraphs 268, 269, 270, 271, and 272 of Plaintiff's Complaint.

51. Responding to Paragraph 273 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

52. This Defendant denies the allegations set forth in Paragraphs 274, 275, 276, 277, 278, and 279 of Plaintiff's Complaint.

53. Responding to Paragraph 280 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

54. The allegations set forth in Paragraphs 281, 282, and 283 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

55. This Defendant denies the allegations set forth in Paragraphs 284 of Plaintiff's Complaint as stated and demands strict proof thereof.

56. Responding to Paragraph 285 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

57. The allegations set forth in Paragraph 286 of Plaintiff's Complaint are directed at parties other than this defendant and therefore no response is required. To the extent those allegations are directed at this Defendant, they are denied.

58. This Defendant denies the allegations set forth in Paragraph 287 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

59. Responding to Paragraph 288 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

60. This Defendant denies the allegations set forth in Paragraphs 289, 290, 291, 292, and 293 of Plaintiff's Complaint as stated and demands strict proof thereof.

61. Responding to Paragraph 294 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

62. The allegations set forth in Paragraphs 295 and 296 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

63. This Defendant denies the allegations set forth in Paragraphs 297, 298, 299, 300, 301, 302, 303, 304, and 305 of Plaintiff's Complaint. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

64. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

65. 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 Facility Defendant 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

66. 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, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

67. 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 Rules of Civil Procedure 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

68. Plaintiff's right to a recovery in this 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 SC Code §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

69. This Defendant would affirmatively assert that, to the extent it is alleged to be liable to Plaintiff, which is vehemently denied, 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

70. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

71. This Defendant would assert that some, or all, of the standards alleged by the Plaintiff do not create a standard of care applicable to Plaintiff's claims or private right of action in this matter.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

72. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff, if any, were due to, caused and occasioned by a natural disease process over which

this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

73. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

74. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

75. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims he alleges.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

76. This Defendant would assert that it owes no duty of care to the Plaintiff or his 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

77. 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. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter.

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.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant
THI of South Carolina, LLC

Charleston, South Carolina

Dated: November 8, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ARMANDO J. ACEVEDO, THROUGH	)	CASE NO. 2018-CP-42-03421
HIS ATTORNEY-IN-FACT,	)	
MARIANNE ACEVEDO,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC; THI	)	HUNT VALLEY HOLDINGS, LLC'S
OF SOUTH CAROLINA, LLC; THI OF	)	ANSWER TO THE COMPLAINT
SOUTH CAROLINA AT CAMP CARE,	)	
LLC, D/B/A LAKE EMORY POST	)	
ACUTE CARE AND RUSTY	)	
FLATHMANN ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: GARY W. POLIAKOFF AND RAYMOND P. MULLMAN, JR., ATTORNEYS FOR THE PLAINTIFF:

The Defendant, Hunt Valley Holdings, LLC, hereinafter referred to as “this Defendant”, *specifically reserving its right to move to dismiss Plaintiff’s Complaint for lack of personal jurisdiction*, hereby responds to the allegations set forth in 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. This Defendant is without sufficient knowledge or information to respond to the allegations in Paragraphs 1 and 2 of Plaintiff’s Complaint and therefore denies the same and demands strict proof thereof.

3. Responding to the allegations set forth in Paragraph 3 of Plaintiff's Complaint, this Defendant affirmatively states that it is a Delaware limited liability company with no registered agent in South Carolina. The remainder of the allegations set forth in the above Paragraph are denied.

4. This Defendant denies the allegations set forth in Paragraph 4 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent those allegations call for legal conclusions, no response is required.

5. This Defendant denies the allegations set forth in Paragraph 5 of Plaintiff's Complaint as stated and demands strict proof thereof.

6. This Defendant denies the allegations set forth in Paragraphs 6 and 7 of the Plaintiff's Complaint and demands strict proof thereof.

7. This Defendant denies the allegations set forth in Paragraph 8 of Plaintiff's Complaint as stated and demands strict proof thereof.

8. This Defendant denies the allegations set forth in Paragraph 9 of the Plaintiff's Complaint and demands strict proof thereof.

9. This Defendant denies the allegations set forth in Paragraphs 10, 11, and 12 of Plaintiff's Complaint as stated and demands strict proof thereof.

10. This Defendant denies the allegations set forth in Paragraphs 13, 14, and 15 of Plaintiff's Complaint as stated and demands strict proof thereof.

11. This Defendant denies the allegations set forth in Paragraphs 16 and 17 of Plaintiff's Complaint as stated and demands strict proof thereof.

12. This Defendant denies the allegations set forth in Paragraphs 18, 19, 20, and 21 of Plaintiff's Complaint and demands strict proof thereof.

13. The allegations set forth in Paragraphs 22, 23, 24, 25, 26, and 27 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

14. The allegations set forth in Paragraphs 28 and 29 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

15. The allegations set forth in Paragraph 30 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

16. This Defendant denies the allegations set forth in Paragraphs 31 and 32 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

17. This Defendant denies the allegations set forth in Paragraph 33 as stated and demands strict proof thereof.

18. This Defendant denies the allegations set forth in Paragraphs 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against 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.

19. Responding to Paragraph 49 of Plaintiff's Complaint, this Defendant reasserts its responses to the above as if stated again verbatim.

20. This Defendant is without sufficient information to form an opinion as to the truth of the allegations set forth in Paragraphs 50 and 51 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

21. This Defendant denies the allegations set forth in Paragraphs 52, 53, 54, 55, and 56 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against 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.

22. This Defendant denies the allegations set forth in Paragraphs 57 and 58 of Plaintiff's Complaint and demand strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

23. This Defendant responds that the statements set forth in Paragraph 59 of Plaintiff's Complaint attempt to assert Plaintiff's interpretation of various provisions of the

Omnibus Reconciliation Act of 1987. Defendant responds that the Act speaks for itself and denies any allegation intended to allege liability and/or damages against this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

24. This Defendant denies the allegations set forth in Paragraphs 60 and 61 Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

25. The allegations set forth in Paragraph 62 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are not directed at this Defendant, they are denied.

26. This Defendant denies the allegations set forth in Paragraphs 63 and 64 of Plaintiff's Complaint and demand strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

27. This Defendant responds that the statements set forth in Paragraph 65 of Plaintiff's Complaint attempt to assert Plaintiff's interpretation of various provisions of the

Omnibus Reconciliation Act of 1987. Defendant responds that the Act speaks for itself and denies any allegation intended to allege liability and/or damages against this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

28. The allegations set forth in Paragraphs 66, 67, 68, and 69 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

29. The allegations set forth in Paragraph 70 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

30. This Defendant denies the allegations set forth in Paragraphs 71 and 72 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

31. The allegations set forth in Paragraph 73 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

32. This Defendant denies the allegations set forth in Paragraphs 74, 75, 76, 77, and 78 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

33. The allegations set forth in Paragraph 79 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

34. This Defendant denies the allegations set forth in Paragraph 80 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

35. The allegations set forth in Paragraphs 81, 82, and 83 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

36. This Defendant denies the allegations set forth in Paragraphs 84 and 85 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

37. This Defendant denies the allegations set forth in Paragraphs 86, 87, and 88 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

38. The allegations set forth in Paragraphs 89 and 90 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

39. This Defendant denies the allegations set forth in Paragraphs 91 and 92 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

40. This Defendant denies the allegations set forth in Paragraphs 93, 94, 95, and 96 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

41. This Defendant denies the allegations set forth in Paragraphs 97, 98, 99, 100, 101, 102, 103, 104, 105, and 106 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

42. The allegations set forth in Paragraphs 107, 108, 109, 110, 111, 112, 113, 114, 115, and 116 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

43. This Defendant denies the allegations set forth in Paragraphs 117 and 118 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction

or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

44. This Defendant denies the allegations set forth in Paragraphs 119 and 120 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

45. The allegations set forth in Paragraphs 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, and 133 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

46. This Defendant denies the allegations set forth in Paragraph 134 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are not directed at this Defendant, they are denied.

47. The allegations set forth in Paragraphs 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, and 168 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

48. This Defendant denies the allegations set forth in Paragraphs 169, 170, 171, 172, 173, 174, and 175 of Plaintiff's Complaint to the extent those allegations are directed at this

Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

49. This Defendant denies the allegations set forth in Paragraphs 176, 177, and 178 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

50. The allegations set forth in Paragraphs 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, and 191 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

51. The allegations set forth in Paragraphs 192, 193, 194, 195, 196, and 197 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

52. This Defendant denies the allegations set forth in Paragraphs 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, and 210 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a

skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

53. The allegations set forth in Paragraphs 211, and 212 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

54. This Defendant denies the allegations set forth in Paragraph 213 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

55. The allegations set forth in Paragraphs 214, and 215 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

56. This Defendant denies the allegations set forth in Paragraph 216 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

57. The allegations set forth in Paragraphs 217, 218, 219, 220, 221, and 222 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

58. This Defendant denies the allegations set forth in Paragraphs 223 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

59. The allegations set forth in Paragraphs 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, and 239 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

60. This Defendant denies the allegations set forth in Paragraphs 240, 241, 242, 243, 244, 245, and 246 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent

those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

61. The allegations set forth in Paragraphs 247 and 248 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant is without sufficient knowledge or information to respond to those allegations but denies the same to the extent they allege liability or damages against this Defendant. To the extent those allegations are directed at parties other than this Defendant, no response is required.

62. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 249, 250, and 251 of Plaintiff's Complaint and therefore denies the same to the extent they allege liability or damages against this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are directed at parties other than this Defendant, no response is required.

63. This Defendant denies the allegations set forth in Paragraphs 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, and 263 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

64. This Defendant denies the allegations set forth in Paragraphs 264, 265, and 266 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a

licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

65. Responding to Paragraph 267 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

66. This Defendant denies the allegations set forth in Paragraphs 268, 269, 270, 271, and 272 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

67. Responding to Paragraph 273 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

68. This Defendant denies the allegations set forth in Paragraphs 274, 275, 276, 277, 278, and 279 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

69. Responding to Paragraph 280 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

70. The allegations set forth in Paragraphs 281, 282, and 283 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

71. This Defendant denies the allegations set forth in Paragraph 284 of Plaintiff's Complaint as stated and demands strict proof thereof.

72. Responding to Paragraph 285 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

73. This Defendant denies the allegations set forth in Paragraph 286 and 287 of Plaintiff's Complaint and demands strict proof thereof.

74. Responding to Paragraph 288 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

75. This Defendant denies the allegations set forth in Paragraphs 289, 290, 291, 292, and 293 of Plaintiff's Complaint and demands strict proof thereof.

76. Responding to Paragraph 294 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

77. The allegations set forth in Paragraphs 295 and 296 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

78. This Defendant denies the allegations set forth in Paragraphs 297, 298, 299, 300, 301, 302, 303, 304, and 305 of Plaintiff's Complaint and demand strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

79. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

80. This Court lacks jurisdiction over this Defendant pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 36-2-803. Accordingly, Plaintiff's claims against this Defendant must be dismissed.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

81. 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, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

82. 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 Rules of Civil Procedure 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

83. Plaintiff's right to a recovery in this 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 SC Code §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

84. This Defendant would affirmatively assert that, to the extent it was is liable to Plaintiff, which is vehemently denied, 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

85. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

86. This Defendant would assert that some, or all, of the standards alleged by the Plaintiff do not create a standard of care applicable to Plaintiff's claims or private right of action in this matter.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

87. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural

disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

88. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

89. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

90. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

91. 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

92. 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. Furthermore, this

Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice as this Court lacks personal jurisdiction over this Defendant, 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.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

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Attorneys for the Hunt Valley Holdings, LLC

Charleston, South Carolina

Dated: February 12, 2019

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 Armando J. Acevedo, through)
5 his Attorney-In-Fact,)
6 Marianne Acevedo,) TRANSCRIPT OF RECORD
7) 2018-CP-42-03421
8 Plaintiff,)
9 -vs-)
10 Hunt Valley Holdings, LLC;)
11 THI of South Carolina, LLC;)
12 and THI of South Carolina at)
13 Camp Care, LLC, d/b/a)
14 Lake Emory Post-Acute Care,)
15 Defendants.) February 1, 2019
16) Spartanburg, South Carolina

17 B E F O R E:

18 HONORABLE J. DERHAM COLE, JUDGE

19 A P P E A R A N C E S:

20 GARY W. POLIAKOFF, ESQUIRE
21 RAYMOND PAUL MULLMAN, JR., ESQUIRE
22 Attorneys for the Plaintiff

23 PERRY MCPHERSON BUCKNER, IV, ESQUIRE
24 Attorney for the Defendants

25
Linda D. Moffitt
Circuit Court Reporter

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Motions -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 (Proceedings February 1, 2019)

2 THE COURT: Armando vs. Hunt.

3 MR. BUCKNER: Yes, Your Honor. Acevedo vs. Hunt
4 valley Holdings. Perry Buckner on behalf of all three
5 defendants that are named.

6 We have two pending motions before the Court. Hunt
7 valley Holdings has a 12(b)(2) personal jurisdiction motion
8 and THI of South Carolina and Camp Care, LLC, has a motion
9 to compel arbitration.

10 We have worked out with plaintiff's counsel. We are
11 going to withdraw the 12(b)(2) motion by Hunt valley
12 Holdings reserving our rights to later refile after
13 discovery at a summary judgment stage. But we are
14 withdrawing the 12(b)(2) motion for purpose of today's
15 hearing.

16 THE COURT: Do you have a copy of this document?
17 Because I'm going to ask you if you're talking six, seven
18 and eight.

19 MR. BUCKNER: I am talking about seven being
20 withdrawn.

21 THE COURT: Okay. Just No. 7 is withdrawn?

22 MR. BUCKNER: Correct.

23 MR. MULLMAN: No. That's the old one, I think.

24 THE COURT: Show him.

25 (Pause.)

1 MR. BUCKNER: Yes, six. It was formerly seven. And
2 then there remains a motion to dismiss and a motion to
3 stay. There are four.

4 THE COURT: Let me do this.

5 All right. So No. 6 is withdrawn. That's the Hunt
6 valley filing.

7 MR. BUCKNER: Yes, Your Honor.

8 THE COURT: All right. No. 7, which is THI, that's
9 still to be heard?

10 MR. BUCKNER: Yes, Your Honor. There's THI of South
11 Carolina, LLC, and then there's THI of South Carolina at
12 Camp Care, LLC.

13 THI of South Carolina, LLC, has a motion to stay,
14 which still remains pending before the Court.

15 THE COURT: That's the last one on the list. That's
16 No. 9.

17 What about No. 8? It doesn't have any filing parties.
18 Is that the same as seven?

19 MR. BUCKNER: I assume that may be referring to Rusty
20 Flathmann's motion to dismiss, and we've agreed to a
21 stipulation of dismissal with regard to him.

22 THE COURT: All right. Is -- is that No. 8? Do you
23 need to look at -- do you have a list with you?

24 MR. MULLMAN: I don't, but it probably is. Those
25 stays are related to the arbitration. In other words, if

1 there's an arbitration he'd like to stay.

2 THE COURT: Okay. I got it.

3 MR. MULLMAN: This one is, so that must be.

4 MR. BUCKNER: That must be Flathmann because there's
5 only four defendants.

6 MR. MULLMAN: Yeah. So eight is Flathmann and nine is
7 THI of South Carolina, LLC.

8 THE COURT: All right. So we're only dealing with
9 No. 7 -- excuse me -- No. 8.

10 MR. MULLMAN: That's outcome determinative if you --
11 if you believe --

12 THE COURT: That's being heard today?

13 MR. BUCKNER: Well, eight, I believe, is the Flathmann
14 one.

15 MR. MULLMAN: Yeah. Flathmann -- I'm sorry. You're
16 right. Flathmann is -- we're dismissing that one.

17 THE COURT: All right. Seven and nine are what we're
18 hearing today.

19 MR. BUCKNER: Seven and nine are what we're hearing.

20 THE COURT: Okay. Good.

21 MR. MULLMAN: Sorry, Your Honor.

22 MR. BUCKNER: So the only -- the only substantive
23 legal issue before the Court -- although there are two
24 separate motions -- is regarding the validity of an
25 arbitration agreement which was signed by plaintiff's

1 client's wife, Marianne Acevedo, who had a power of
2 attorney over her husband at the time of the execution of
3 the arbitration agreement -- Armando Acevedo.

4 And then of course there's a collateral motion to stay
5 filed by THI of South Carolina.

6 But, Your Honor, obviously, I know that many
7 arbitration motions are before the Court and more recently
8 in our appellate courts, most of those having to do with
9 authority and who can bind a loved one and whether or not
10 they have sufficient legal authority to waive the
11 constitutional right to a jury trial.

12 Those issues are not before the Court, because Ms.
13 Acevedo had a power of attorney over her husband. The
14 plaintiff is not challenging authority.

15 There are only three issues. Obviously, unlike most
16 motions, until we get the plaintiff's memorandum in
17 opposition we don't know what they're going to argue. We
18 simply have a valid signed contract.

19 My understanding after reviewing plaintiff's memo that
20 was filed this week is that there are three basic arguments
21 for lack of enforcement here, that being, the first being,
22 a lack of consideration.

23 We've also briefed the subject in ours that plaintiff
24 argues that more is needed for consideration of this
25 context of mutual promises to arbitrate. And of course

1 there are cases in South Carolina in the employment context
2 regarding noncompetes where our courts have found that, but
3 no South Carolina court and no court in the nation that I'm
4 aware of has ever found that mutual promises to arbitrate
5 are not valid in this context, the arbitration context.

6 Both parties here, the facility, THI Camp Care, and
7 Mr. Acevedo, being acted upon by his wife, waived their
8 right to a jury trial, quid pro quo. We think that's
9 bedrock black letter contract law where two parties agree
10 to do something that that is sufficient consideration.

11 Our brief cites the O'Neil case in the Fourth Circuit
12 which holds exactly that. Mutual promises to arbitrate are
13 valid legal consideration. O'Neil remains good law in the
14 Fourth Circuit and it remains good law in South Carolina.

15 There's certainly no case on point other than the fact
16 that plaintiff's counsel has suggested that more is needed
17 and is asking the Court to adopt principles that have been
18 found in the employment context, but they're certainly not
19 factually on point, would be our position regarding that.

20 The second grounds for opposition to the enforcement
21 of the agreement is that the agreement's lacking in
22 material terms such that it should be deemed unenforceable.

23 Well, the agreement itself, which is Exhibit A to
24 defendant's memorandum, has a very detailed explanation for
25 how the arbitrator himself or herself would be selected.

1 The parties are going to try to select one from a
2 certain group of individuals. If those individuals, that
3 we cannot come to an agreement, then the Court is vested
4 with the authority to appoint an arbitrator. The
5 agreement, obviously, includes a reference to the South
6 Carolina Alternative Dispute Resolution Rules and
7 incorporates those rules as governing the process.

8 I have never in all of my years of representing
9 nursing homes seen an arbitration agreement that says this
10 is exactly how interrogatories, requests for production and
11 evidentiary rulings shall be governed throughout.

12 This exact agreement that is in dispute here today has
13 been litigated probably four or five times in federal
14 court, two of which with Mr. Mullman and Mr. Poliakoff's
15 firm.

16 No court has ever found this agreement to be lacking
17 in material terms such that it should be unenforceable.

18 The Gilbert agreement is substantially similar if not
19 identical. We've cited that federal court case in our
20 brief. The Court found that that was not a sufficient
21 argument to warrant invalidity of the agreement.

22 Obviously, there are sufficient details. We think
23 that nothing is materially lacking that would render it
24 subject to invalidity.

25 The last argument the plaintiff makes is regarding

1 unconscionability. Again, this exact agreement has been
2 attacked on grounds of unconscionability.

3 As Your Honor is well aware, in South Carolina the
4 Simpson vs. MSA of Myrtle Beach case is particularly
5 instructive on this point. South Carolina law requires a
6 finding of both substantive and procedural
7 unconscionability. It's plaintiff's burden to prove both.

8 In this case what we have purported to meet procedural
9 unconscionability by plaintiff's counsel is an affidavit
10 from Ms. Acevedo saying she doesn't remember signing this
11 agreement and doesn't remember what was discussed but does
12 remember feeling rushed.

13 We have also submitted an affidavit as part of our
14 brief from Darlene Rice who is the signatory on behalf of
15 Camp Care.

16 She remembers this process very well as is set forth
17 in her declaration, that she remembers Mrs. Acevedo coming
18 in and then sitting down, getting a chance to explain what
19 the process entails, asking her if she had any questions.
20 And, obviously, Mrs. Acevedo ultimately executed the
21 arbitration agreement on behalf of her husband.

22 Again, I don't know, you know, even if Mrs. Acevedo
23 had a specific recollection of this process and what it
24 entailed, that would be sufficient to overcome their burden
25 in light of Ms. Rice's affidavit, but certainly there's

1 nothing in the Acevedos' affidavit that shows anything near
2 what would be required to meet procedural
3 unconscionability. And even if they were able to meet
4 procedural unconscionability, obviously, they still have to
5 show substantive unconscionability, the terms are so
6 oppressive as to warrant the agreement not being enforced.

7 Again, there is nothing in the record before this
8 Court that shows any sort of oppressive terms. There's
9 complete mutuality of remedies here.

10 Both parties are submitted to arbitration for a final,
11 valid, binding resolution by a third-party neutral.

12 Again, I would cite to the Gilbert case because this
13 exact agreement was argued to be substantively
14 unconscionable. Obviously, procedural unconscionability
15 wouldn't count from case to case, but substantively it
16 would.

17 The Court -- I believe that was Judge McDonald over in
18 the Greenville District Court -- found the agreement was
19 not substantively unconscionable.

20 And we cited a litany of other federal court orders
21 that have found this exact agreement was not substantively
22 unconscionable.

23 The plaintiff's counsel has made reference as part of
24 their consideration argument in their brief that the
25 agreement should be rendered unenforceable additionally

1 because it is an illegal contract. And they cite the two
2 bases for that.

3 One is a Medicare -- or excuse me -- a federal
4 regulation as part of OBRA that deals with additional
5 consideration and what -- it basically prohibits facilities
6 from requiring additional consideration as part of the
7 admission to the nursing home. And in this case, as an
8 affidavit of Darlene Rice states, arbitration is not a
9 precondition for admission.

10 No one is making Mr. and Mrs. Acevedo sign an
11 arbitration agreement if they want to come to Camp Care.
12 The arbitration agreement itself acknowledges that, and
13 it's the longstanding policy of the facility that they're
14 not required.

15 And of course this exact issue, this
16 additional-consideration issue, has been argued in federal
17 courts and throughout the United States frequently.

18 No court has ever found that these arbitration
19 agreements qualify as additional consideration such that
20 they should be prohibited under the OBRA rules.

21 Plaintiff's counsel has also argued that this
22 agreement should be considered illegal because the center
23 for Medicaid -- C.M.S. -- for Medicaid reimbursement
24 services did come out in 2016 at the end of the Obama
25 administration and actually outlawed pre-dispute

1 arbitration agreements. However, before that decision on
2 C.M.S. ever went into effect it was enjoined and reversed
3 and never has been found to have had any validity by any
4 court.

5 In preparing for the hearing we were able to locate a
6 district court case in Massachusetts, GGNSC Chestnut Hill,
7 LLC vs. Schrader, which gives a pretty fairly detailed
8 history of the C.M.S. regulation. And I think plaintiff's
9 counsel would probably concede that it has been reversed
10 and never went into effect. So that would not preclude
11 enforcement of the agreement either.

12 The only other issue before the Court regarding this
13 enforcement is that plaintiff's counsel wants the Court to
14 if -- find if the arbitration agreement is valid that all
15 other defendants must go, and of course in this case that's
16 only THI of South Carolina and Hunt Valley Holdings, LLC.

17 Neither of those parties are moving to seek
18 enforcement of any arbitration rights. There are no
19 motions before Your Honor to do that.

20 THI of South Carolina has filed a motion to stay.
21 Hunt Valley Holdings until today had a 12(b)(2) motion
22 before the Court. Neither party desires to go to
23 arbitration.

24 If plaintiff's counsel would acknowledge the validity
25 of the agreement and file a motion to compel arbitration

1 against those entities we might have a despicable
2 controversy before the Court, but at present those parties
3 are not seeking to go to arbitration and take no position
4 with regard to the validity of the agreement other than
5 that under the Federal Arbitration Act if the Court finds
6 the agreement to be valid parties to the lawsuit are
7 entitled to a stay as a federal right under the provisions
8 of Section Four of the F.A.A. Those are the only positions
9 they're taking regarding the agreement.

10 And so besides addressing anything in reply that
11 plaintiff's counsel may have, that's all I have, Your
12 Honor.

13 THE COURT: Do you have a hard copy of your motion? I
14 mean, excuse me. Of your brief.

15 MR. BUCKNER: I do. I can bring it up.

16 THE COURT: Mr. Mullman.

17 MR. MULLMAN: Thank you, Your Honor.

18 Let's look at the contract that the defendant is
19 trying to enforce.

20 THI of South Carolina at Camp Care, LLC, is the
21 defendant attempting to enforce this agreement.

22 The contract actually is between Lake Emory Post-Acute
23 Care and Armando Acevedo.

24 Lake Emory Post-Acute Care is not the proper
25 defendant. It's not the proper legal name. It doesn't

1 exist. I don't think it's ever existed. And it certainly
2 is not the same as THI of South Carolina at Camp Care, LLC.
3 That's one. So we have a different name on the contract
4 than the legal name of the entity.

5 The second thing is we believe this is unenforceable
6 for several reasons, and those reasons, as Perry indicated,
7 are lack of consideration, lack of mutuality and
8 unconscionability and missing material terms. And they all
9 kind of play into each other.

10 For example, how do you get started? It doesn't say
11 you can, you know, how to initiate the arbitration. So for
12 me to initiate the arbitration I still have to file it in a
13 Y [sic], wait 120 days, participate in a mediation and then
14 file a complaint, and then they can file a motion to
15 compel.

16 They should have filed a motion to compel or filed a
17 petition in federal court, which they often do, as soon as
18 they heard that we -- as soon as they got their notice of
19 intent, Your Honor.

20 All of this delay is a waste, because here's the
21 reason. If you'll look at the fourth paragraph it says the
22 parties shall select an arbitrator from a panel having
23 experience and knowledge of the healthcare industry.

24 Where do we get this panel? Where is the list? Perry
25 said there's a list of people we can choose from. Where is

1 this list?

2 It doesn't say that arbitrators have to be certified.
3 It doesn't say they have to be from South Carolina even.

4 It doesn't give us or the Court any guidance on how to
5 pick an arbitrator, and of course under the Grant case and
6 the Powell case, which were both Fundamental cases, the
7 most essential term is the choice of the arbitrator,
8 because the choice of the arbitrator is going to dictate
9 all the other rules -- the rules of discovery, the rules of
10 evidence, the rules of procedure, who pays, who -- the
11 timing of it all, because that is all not in this contract.
12 There's nothing about rules of discovery.

13 Now, that's fine if you have two commercial
14 enterprises who have equal access to the information. But
15 this is unconscionable, because in this case one party has
16 all the information about what happened to Armando Acevedo,
17 a 55-year-old man who entered Lake Emory, as they call
18 it -- THI of South Carolina at Camp Care -- after brain
19 surgery July 5th. He enters July 12th.

20 For some reason at 11:30 at night they have him in his
21 wheelchair by the nurses station. He falls and fractures
22 his hip and dislodges his brain shunt.

23 They throw him back in bed. They don't tell the
24 family. They don't call, tell, the doctor. They don't
25 call E.M.S.

1 They wait 12 hours of him complaining and screaming
2 about hip pain and then they finally send him to the
3 hospital. And now he's permanently disabled.

4 So we're only talking about a 4-day residency. Clear
5 liability. But this agreement doesn't mention anything
6 about how to pick an arbitrator, who can be an arbitrator,
7 any rules of discovery, any rules of evidence.

8 Now, they say in their memo, well, look, it mentions a
9 South Carolina alternative dispute resolution in the A.D.R.
10 rules. Well, those A.D.R. rules, which we made a copy,
11 Exhibit 10, Your Honor, don't have any rules when it comes
12 to discovery procedure, cost, time or choice of arbitrator.

13 The rules they have relate to either mediation or
14 nonbinding arbitration. They don't apply to binding
15 arbitrations like this one.

16 So, literally, there are no rules to follow for the
17 arbitrator. And what happens is we've done this. We've
18 agreed to arbitrating.

19 We go in front of the arbitrator. There's no
20 discovery. It's -- it's trial by ambush, and it's a
21 nightmare. Nobody -- they don't even know who our experts
22 are. They don't know who our witnesses are. And we just
23 show up one day.

24 And all they can do is subpoena the records to the
25 hearing. So they don't even have the medical records.

1 It's just a nightmare of a procedure. Because of that it's
2 unconscionable. You cannot get a fair hearing based on
3 that agreement.

4 Now, two other things related to this agreement that
5 is very interesting, and it gets into the mutuality,
6 because if we argue like the cases we cite here, the orders
7 from Holmes and Rawl, that there's no benefit to the
8 plaintiff to agree to arbitration.

9 It's really an illusionary promise by the defendant to
10 arbitrate, because it's limited to people deriving their
11 claims through or on behalf of resident. So we couldn't
12 bring any Fundamental clinical operation or the medical
13 director. This is only limited to people who drive their
14 care from -- through the resident, so we don't have all of
15 these other indispensable parties.

16 The second thing it says that -- well, we've already
17 talked about that.

18 Now, the procedure on conscionability is this guy
19 comes in. He's been admitted within -- and they sign an
20 admission contract.

21 After he's admitted and they sign an admission
22 contract, they also then give him an arbitration agreement.
23 Well, there's no consideration for that. The mutual
24 promise, they've already promised to admit him and provide
25 the care, which they are required to under the Medicare

1 regulations. They can't ask for additional consideration.

2 So that's part of the unconscionability, that they're
3 rushed. They don't have time to review it. No lawyer
4 reviews it. They don't really understand it. It's not
5 explained to them. They don't understand what the A.D.R.
6 rules are. They're not giving it to them.

7 So we think it's an adhesion contract, take it or
8 leave it.

9 We also disagree that no court has found this to be
10 unconscionable.

11 I don't believe that to be true. I think there are
12 several cases that where the courts have found this
13 unenforceable because of material terms like in the Powell
14 case, which I think is part of our exhibits, the Hipp case
15 which you handled years ago. You found it unconscionable
16 in that case.

17 So I'm a little confused with that they don't think
18 that this is unconscionable. We just had a hearing a
19 couple of weeks ago in front of Judge Stilwell and he
20 ruled -- he hasn't signed the order yet but he ruled that
21 it may or may not be --

22 MR. BUCKNER: Judge --

23 MR. MULLMAN: -- in front of --

24 MR. BUCKNER: -- I've got to intervene there. Judge
25 Stilwell has indicated that he did not find the

1 agreement --

2 MR. MULLMAN: Well, we wanted all of them in the order
3 then.

4 MR. BUCKNER: He said that he actually specifically
5 said this agreement, he did not agree with plaintiff's
6 position regarding --

7 MR. MULLMAN: That's not exactly what he said but
8 we'll -- we'll give you the order when it is signed, Your
9 Honor, and we can said what he said.

10 But the problem here is that there's no consideration,
11 there's no consideration mentioned in the contract, which
12 is what you look at.

13 Defendant argues mutual promise, but that's a
14 ridiculous argument. And they talk about that in the
15 Holmes order and the Rawl order, both from 2018, where they
16 say but if it's derived from the care when will the
17 defendant ever sue the plaintiff for the care provided. It
18 just doesn't exist. It's any illusionary promise.

19 Second, the mutual promise to arbitrate as adequate
20 valuable consideration.

21 I've only seen it applied in employment cases or
22 charitable cases. Employment cases because really the
23 consideration is the continued employment. In charitable,
24 which they cited Furman vs. -- well, they say walker. It's
25 actually waller, and which is charitable. And in there

1 they say, hey, there's really no mutual promise here except
2 unless they relied on it and prejudiced themselves as a
3 result of that mutual promise. Here you don't have that.

4 So I suggest you read those cases that defendant picks
5 or chooses to rely on for that issue. On page six Furman
6 vs. Waller, Johnson vs. Spartanburg County Fair Association
7 and of course O'Neil and Towles, because they don't say
8 what they say they said.

9 Okay. Those aren't -- alone it doesn't say mutual
10 promise is adequate consideration. Those are all
11 employment cases or charitable cases where there was, like
12 I said, reliance and prejudice or continued employment as a
13 consideration.

14 In fact, in O'Neil, which they rely on, it says
15 specifically in the agreement, "I also understand that as a
16 condition of employment and continued employment I agree to
17 submit any complaints to arbitration.

18 So there was an additional consideration here which
19 does not exist in the nursing home case and cannot exist in
20 a nursing home case, because, one, you cannot ask for
21 additional consideration.

22 That sanguines perfectly into the Obama administration
23 in October of 2016 making prohibiting previous mandatory
24 arbitration agreements in the admission paperwork. Yes.
25 There was an injunction for states to not enforce it.

1 That's still a valid regulation that courts such as
2 yourself can look at and review to determine if this is
3 unconscionable.

4 And we put in here on -- I believe it was Exhibit 3 --
5 all of the reasons why in October 4th of 2016, why the
6 federal government that decided that pre-dispute mandatory
7 arbitrations in nursing home cases are unconscionable.

8 They talk about unequal bargaining power, that it
9 hurts public policy because people don't find out about
10 neglect and abuse and those kind of things. So we gave you
11 a highlighted copy of that.

12 Now, in July of 2017 when this admission took place it
13 was still prohibited at that point, I believe. I thought
14 the injunction occurred after that. So at this point in
15 time it was still a valid regulation, and it's still a
16 valid regulation today.

17 That court, that injunction, only prevented states
18 from punishing nursing homes that still use pre-dispute
19 until it's resolved. And no new regulation has replaced
20 that. It's still active; it's still on the books right
21 now. It didn't make it void. It just put an injunction
22 for states not to penalize nursing homes who still use a
23 pre-dispute arbitration. So I still think it's strong
24 evidence of unconscionability.

25 We also think, you know, lack of consideration,

1 unconscionability, there's no benefit, it's not enforceable
2 because it only relates to the care so there's no mutual
3 promise.

4 The vague, indefinite missing material terms,
5 essential terms.

6 Like I said, there's no rules of discovery, no choice
7 of arbitrator, no -- no method for you to choose the
8 arbitrator.

9 We are not going to agree on an arbitrator. We've
10 tried. We're not going to. There's a couple of reasons
11 for that. They always want a defense lawyer; we always
12 want a plaintiff's lawyer. We want somebody from
13 Spartanburg. We think that will keep the cost down.

14 Well, there's another argument we have on
15 unconscionability, is the cost.

16 Armando Acevedo is now a ward of Florida, the State of
17 Florida. He is permanently disabled. He had to move down
18 to Florida where his brother is a doctor who can take care
19 of him. His wife and daughter are still in Spartanburg.
20 He is permanently disabled and cannot contribute to the
21 cost of the arbitration.

22 When that happens, under several cases, we cannot
23 vindicate our rights, therefore it's not enforceable unless
24 the arbitrator or yourself makes them pay for it. That has
25 happened before. They're not offering that at the time.

1 Under the case law that we cite in our memo courts are
2 loathed to supply terms to a contract when the parties
3 didn't -- when the parties omitted them.

4 So I think courts should be very hesitant to add such
5 an essential term as the choice of arbitrator, especially
6 when there's no guidance from the parties on how to choose
7 that arbitrator based on the agreement.

8 It just -- like I said, it just says the parties shall
9 select an arbitrator from a panel having experience and
10 knowledge of the healthcare industry. I mean, where is
11 this panel? who are they talking about?

12 And if you go, because I tried yesterday to go to the
13 clerk of court to try to get me a list of all of the
14 Spartanburg listed certified arbitrators. They don't have
15 one. They couldn't find it. So I'm not sure how you do
16 this.

17 The people -- you know, whoever you pick, we'd like it
18 to be somebody from Spartanburg to keep the cost down.
19 we'd also, if you find it to be enforceable, that all the
20 defendants have to.

21 And we've quoted not only their own case in Hawthorne
22 in Pennsylvania where they compelled as a group saying,
23 hey, we all want joint venture, we all should be in
24 arbitration, but the Pearson case and other cases that
25 support if it's one big joint venture, one big group, they

1 all should be placed in arbitration under the International
2 Shoe case which is quoted in our case.

3 we don't find this contract enforceable. we would
4 like you to, obviously, read Coleman, Hodge and Thompson,
5 the Supreme Court cases about merger to -- for the
6 understanding that the admission contract is different than
7 the arbitration agreement.

8 And then we'd like you to read the orders in our
9 memo -- Holmes, Rawl, Powell and Murphy which all talk
10 about lack of consideration, lack of mutuality, no benefit
11 to the resident or the resident's family, or it talks about
12 the essential term as a choice of arbitrator.

13 So the first thing if you find that this contract is
14 unenforceable for one or the cumulative effect of all
15 three -- mutuality, consideration, unconscionability and
16 cost -- then that kind of ends the story and we move on.

17 If you find that there's a valid contract to
18 arbitrate, then we would like you to compel Hunt Valley
19 Holdings and THI of South Carolina to participate.

20 I guess we'll have to file a motion to compel
21 separately if you find that out, if you can find a valid,
22 enforceable agreement.

23 And then, thirdly, we'd like you to choose an
24 arbitrator if you feel like you should under this
25 agreement.

1 We are not going to agree. Here's why. I recently
2 read where somebody agreed to an arbitrator after they
3 challenged the enforceability of the arbitration agreement,
4 and the Court of Appeals ruled that you waived your appeal
5 to challenge the enforceability of the arbitration
6 agreement by agreeing to an arbitrator as indicated by this
7 agreement.

8 So I don't want to agree to somebody and then waive my
9 right to appeal the decision to arbitrate later on, if that
10 makes sense.

11 So based on this agreement we want you to choose an
12 arbitrator, and we would just ask that it be somebody from
13 Spartanburg. We'd prefer it not to be a defense attorney
14 and that's -- well, we're not arguing jurisdiction.

15 I don't think the stay is appropriate either for THI
16 of South Carolina either. The F.A.A. allows for a stay,
17 but that's when the party has been compelled to arbitrate.

18 If THI of South Carolina or Hunt Valley Holdings is
19 not going to arbitrate, then there's no need to stay the
20 case. We can just keep going against them in this court if
21 they're not going to arbitrate.

22 So either have to pick a forum to go to, either we
23 stay here and we proceed or everybody gets sent to
24 arbitration and we proceed. You can't just have a stay.
25 When would we ever sue then? And if -- let's say we have

1 to wait until the end of arbitration is over. They'll
2 argue that these two other entities have a setoff. So we
3 would never be able to go against those two entities. So
4 it doesn't make sense for them to have a stay.

5 That is not what the F.A.A. stay is intended to do.
6 It's intended to stop the litigation so the parties can go
7 to arbitration, not just to stop the litigation against all
8 of the defendants, the ones that aren't going to
9 arbitration. So that's my argument on the stay.

10 Thank you, Your Honor.

11 THE COURT: Do you have a hard copy of your brief?

12 MR. MULLMAN: I do not. It's -- I can get that to
13 you.

14 MR. POLIAKOFF: We can bring it over in a few minutes.

15 THE COURT: All right. Mr. Buckner.

16 MR. BUCKNER: Thank you, Your Honor.

17 A number of things to respond to, but I'll try to be
18 very quick.

19 First of all in the interest of saving the Court some
20 time, Coleman and Thompson and Hodge are light years away
21 from being relevant in this proceeding.

22 All of those cases have to do with where someone
23 doesn't have a power of attorney and the nursing home
24 resident is incompetent and the party seeking enforcement
25 of the arbitration agreement is attempting to bootstrap the

1 signatory's authority to admit the resident to then
2 bootstrap that authority to their ability to bind the
3 resident to arbitration, which happened for a number of
4 years.

5 All three of these cases sort of diminished that
6 ability. All three of those cases effectively stand for
7 the proposition that just because a loved one of a nursing
8 home resident can admit them pursuant to the healthcare --
9 I think it's called the South Carolina Healthcare Attorney
10 Act. That doesn't give someone the right to waive their
11 constitutional right to a jury trial.

12 Here we've got a power of attorney. So absolutely no
13 reason for Coleman, Thompson or Hodge to be instructive of
14 anything in this case whatsoever.

15 Trying to address everything chronologically,
16 plaintiffs filed a 27-page brief. Nowhere in that brief
17 does it mention that the Lake Emory Post-Acute Care, the
18 business name of THI of South Carolina at Camp Care, makes
19 this agreement invalid.

20 You don't have to have a full legal name on a
21 contract. The business name they operate under, the d/b/a,
22 as plaintiff's own complaint shows, is Lake Emory
23 Post-Acute Care. That certainly is not material or prevent
24 enforcement. There are dozens of contracts that are signed
25 every day in the business world that don't have the exact

1 legal name.

2 what's clear is that we know who the parties were
3 intending to bind to arbitration, the nursing home facility
4 that is referenced in the opening paragraph.

5 Plaintiff's counsel also, you know, made reference to
6 the idea that we delayed this by participating in the
7 N.O.I., waiting 120 days.

8 The South Carolina Court of Appeals has addressed that
9 exact argument in Dean vs. Heritage Healthcare. I
10 apologize, Your Honor. I did not cite that in my brief as
11 I was not aware this was going to be an argument, but we
12 are under the impression after Dean, which gives us
13 guidance for this exact issue, that participating in
14 mediation and the underlying process does not waive one's
15 right to arbitrate. There is -- it's certainly unclear
16 whether 15-79-125 in the N.O.I. process would still be
17 mandatory or not.

18 In other words, you might still have to do that before
19 you go to arbitration. But, nonetheless, Dean has said
20 participating in that isn't a waiver.

21 Mr. Mullman recited to the Court the idea that the
22 selection of an arbitrator is lacking in material terms
23 when he read the first sentence. "The parties shall select
24 an arbitrator from a panel having experience and knowledge
25 of the healthcare industry."

1 Then he omitted the next three sentences, which
2 obviously are instructive. "If the parties cannot reach a
3 mutual decision on the selection of an arbitrator the
4 parties agree that an arbitrator shall be selected by the
5 Court. The arbitrator shall hear and decide the
6 controversy and the decision shall be binding on all
7 parties and may be enforced by a court of competent
8 jurisdiction."

9 He recited the courts are loathsome to supply terms of
10 the contract as suggested by the Court picking an
11 arbitrator -- their supplying terms. That contract itself
12 says the Court shall pick and we can't decide. So the
13 parties have already done this.

14 And the reason that that paragraph is included is so
15 that we don't just pick an arbitrator and they then stand
16 up and we file this motion saying we didn't have any say in
17 this.

18 We're trying to create a cooperative process where we
19 first try to agree on one. I disagree that we can't agree
20 on an arbitrator. I think we ultimately could. We've
21 tried and had no success thus far. But, obviously, I think
22 we'd be able to. And if we can't Your Honor can pick it.
23 And that's what the parties agreed to. We're not making
24 that up.

25 Lastly, I am unaware of any case -- I can say a

1 hundred percent sure in South Carolina but anywhere in the
2 United States -- where this agreement has been found
3 unconscionable.

4 Contrary to what plaintiff said, I can assure you that
5 if Your Honor found this agreement to be unconscionable in
6 the Hipp case, which I was part of, it would be an exhibit
7 to their brief. It was not. I do not have it in front of
8 me, but I do not believe Your Honor found it to be
9 unconscionable.

10 I do have the Powell order from, I believe, another
11 judge. Maybe it was Judge Nettles in Florence. I'm not
12 sure. It does not find this agreement to be
13 unconscionable.

14 There is no case that plaintiff has recited to this
15 Court that says this agreement is unconscionable. The
16 McCutcheon decision that we've cited in our brief, the
17 Wiggins decision, the Vinson decision and the Gilbert
18 decision all say it's not unconscionable. I'm not aware of
19 any order in this state that says it is. So I did want to
20 clarify that.

21 The last thing is that most of what we heard for why
22 this would be unconscionable because of the lack of a
23 specific provision on evidence and discovery is
24 Mr. Mullman's past experience with arbitrations. That is
25 not sufficient to meet their burden of proving that the

1 agreement itself is substantively unconscionable because it
2 provides complete mutuality of remedies.

3 We are not taking the position in this case, although
4 the agreement hasn't even been before us, that no discovery
5 would be allowed.

6 Just because in another case someone else did, whether
7 they're a related entity or not, does not foreclose the
8 idea that no other arbitration agreement could be enforced.
9 And in that case Judge Couch -- he's referring to, I
10 believe, the Campson case -- ordered arbitration of this
11 exact agreement. We went forward. Past experience with a
12 different defendant would not be evidence of substantive
13 unconscionability.

14 I think that addresses everything else. I'd be happy
15 to supply anything else that the Court would want.

16 I would also say that the -- there's case law citing
17 to Section Four of the F.A.A. which provides -- actually
18 Section Two of the F.A.A. which warrants a stay for parties
19 during the pendency of the arbitration proceedings.

20 There is case law that says in federal circuits that
21 that does not just apply to those parties in arbitration.

22 Obviously, if the facility, nursing facility here,
23 goes to arbitration they'd be entitled to a stay.
24 Codefendants that do not seek enforcement of arbitration
25 are also entitled to a stay so that we don't have

1 collateral proceedings and the same issues are being
2 litigated through different courts.

3 The arbitration proceeds, there's a result, and then
4 you come back. The F.A.A. intentionally provides that.

5 There is no limitation upon being a party seeking
6 arbitration such that those are the only folks that warrant
7 the stay.

8 That's all I have, Your Honor. Thank you for your
9 time.

10 THE COURT: Okay. I'll review the briefs and issue an
11 order.

12 Let me ask y'all to simply submit proposed orders
13 while I'm reviewing all of that.

14 MR. BUCKNER: Okay.

15 MR. MULLMAN: Thank you, Your Honor.

16 THE COURT: Then I can select one or edit one as I see
17 fit.

18 END OF REQUESTED TRANSCRIPT OF RECORD
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 1st day of February 2019.

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

August 26, 2020

s/ Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 Armando J. Acevedo, through)
5 his Attorney-In-Fact,)
6 Marianne Acevedo,) TRANSCRIPT OF RECORD
7 Plaintiff,) 2018-CP-42-03421
8 -VS-)
9 Hunt Valley Holdings, LLC;)
10 THI of South Carolina, LLC;)
11 and THI of South Carolina at)
12 Camp Care, LLC, d/b/a)
13 Lake Emory Post-Acute Care,)
14 Defendants.) January 22, 2020
15 Spartanburg, South Carolina

13 B E F O R E:

14 HONORABLE J. DERHAM COLE, JUDGE

16 A P P E A R A N C E S:

17 RAYMOND PAUL MULLMAN, JR., ESQUIRE
18 Attorney for the Plaintiff

19 RUSSELL G. HINES, ESQUIRE
20 Attorney for the Defendants

21
22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

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Motion -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 (Proceedings January 22, 2020)

2 MR. HINES: Your Honor, may it please the Court.

3 If you're ready to hear from me, Russ Hines for the
4 movent.

5 THE COURT: I am.

6 MR. HINES: This is motion to reconsider, Your Honor,
7 and so, obviously, I'm going to be brief as humanly
8 possible. I've got a copy of our motion if it would be
9 helpful for me to bring it up to you.

10 THE COURT: That'd be great.

11 MR. HINES: Your Honor, this case is a nursing home
12 malpractice case. The motion that was made previously, and
13 what we're asking for reconsideration of today, is a motion
14 to compel arbitration. Your Honor denied that motion by
15 order filed October 21 of 2019.

16 The arbitration agreement in this case -- and
17 sometimes I'm not sure. You've likely heard instances
18 where there's an effort to enforce an arbitration agreement
19 where it was signed by somebody -- the arbitration
20 agreement that is -- that did not have authority or did not
21 have an expressed basis of authority to sign it for the
22 person being bound. In this case we're talking about the
23 resident, Mr. Acevedo.

24 In this case the arbitration agreement was signed by
25 his spouse, and it was signed pursuant to Mrs. Acevedo's

1 status as his attorney-in-fact, duly filed recorded power
2 of attorney. There is no dispute here as to whether or not
3 the power of attorney covered the ability to sign an
4 arbitration agreement on Mr. Acevedo's behalf. There's no
5 question there about her authority.

6 The order found on the basis of lack of consideration,
7 unconscionability -- and let me make sure I've got both of
8 those bases covered or all of my bases covered, Your Honor.

9 (Pause.)

10 MR. HINES: And the idea of material terms were
11 omitted.

12 Very quickly, Your Honor, this is an arbitration
13 agreement that is covered by the Federal Arbitration Act.
14 And the import of that is that the Federal Arbitration Act
15 requires that the courts treat arbitration agreements or
16 place arbitration agreements on equal footing when we a
17 contract, which is to say the court certainly may refuse to
18 enforce an arbitration agreement but it may only do so on a
19 basis that would be applicable to any other contract.
20 Can't single out or discriminate against arbitration
21 agreements.

22 In this case -- and so the Court is correct in that
23 its used lack of consideration, lack of legal terms and
24 unconscionability as reasons to not enforce this. Every
25 one of those would be an appropriate basis to not enforce

1 it if, Your Honor, respectfully it would apply. Our
2 argument is simply that they don't apply.

3 And taking them off in order, lack of consideration.
4 In this case looks like the Court's order focused on
5 whether or not there was a benefit to Mr. Acevedo from the
6 arbitration agreement.

7 Respectfully, that analysis is -- well, it's not
8 exactly the correct analysis to apply, Your Honor.

9 THE COURT: You're saying it is ludicrous?

10 MR. HINES: No, not calling it ludicrous, Your Honor.
11 I am saying that it's perhaps a misapprehension of the
12 standard, and the standard is a mutual exchange of binding
13 and concurrent promises.

14 The question is not asked to look at whether or not
15 Mr. Acevedo has benefited by this arbitration agreement
16 relative to his prospects of litigation.

17 The question is do we have mutual and binding promises
18 to arbitrate, and we do. Mr. Acevedo has promised to
19 arbitrate and the facility has also promised to arbitrate.

20 And there's a case, the O'Neil case, and I know we've
21 cited it in our brief. It is a Fourth Circuit case, but it
22 applies to South Carolina law. And it also cites a South
23 Carolina older decision called Rickborn which stands for
24 the proposition that mutual concurrent promises are
25 sufficient considerations to support a contract. And I

1 submit that if there's sufficient consideration to support
2 any contract it must be sufficient to support a contract to
3 arbitrate a cause the F.A.A. requires that the arbitration
4 agreements be placed on equal footing.

5 Your Honor, the next point is about material terms
6 being omitted in an arbitration agreement.

7 It's a 1-page document, and one of the main things
8 that Your Honor sort of focused on was the lack of clarity
9 under the arbitration agreement for determining who the
10 arbitrator would be.

11 And I think where plaintiff was coming from in making
12 that argument was that there is language in the arbitration
13 agreement that provides parties shall select an arbitrator
14 from a panel having experience and knowledge of healthcare
15 industry. And then it goes on to say if the parties are
16 not able to agree upon an arbitrator a court will select or
17 the Court will select an arbitrator.

18 And I think where the plaintiff was coming from was
19 arguing that, well, if don't have an agreement, because I
20 think there would be no basis to argue that there'd be a
21 problem here if the parties could agree on an arbitrator.
22 That would be -- obviously, not involve the Court at all.

23 But they're saying if we can't agree and we have to
24 ask the Court to determine an arbitrator that would require
25 the Court to supply material terms that are missing.

1 And, Your Honor, I would respectfully submit that's
2 not a proper view of that. It does not ask the Court to
3 supply any term. It simply asks the Court to enforce the
4 terms that are already there, the terms whereby the parties
5 agreed that if we can't agree the Court will select one.

6 So the Court's selection of an arbitrator is not
7 supplying a term. Rather it's enforcing a term. And I
8 think that was the largest part of this order.

9 I would also note that there's no question, again,
10 that the arbitration agreement itself, it's a 1-page
11 document, and I submit that that's a good thing as far as
12 having one that's shorter rather than longer and that it's
13 all there on one page and it should be that much easier to
14 read and to comprehend.

15 And I would note in passing that the presumption is in
16 South Carolina that someone who signs an arbitration
17 agreement is deemed, presumed anyways, to have read it,
18 understood it and consented to it.

19 But the arbitration agreement, it provides for the
20 discoverable disputes to be arbitrated, which are
21 essentially disputes arising out of the admission to the
22 facility.

23 It also addresses, Your Honor, the, as I mentioned,
24 the -- where the arbitrator will be determined. It
25 provides that arbitration would be in accordance with South

1 Carolina A.D.R. rules, and it provides that it will be
2 binding. I submit that's all of the terms that it would
3 not need to have.

4 And, again, in determining whether or not it has all
5 of the terms that a binding contract needs the question
6 cannot be does it have all of the terms that an arbitration
7 agreement will need.

8 At least it cannot focus on that in some way it's
9 discriminatory to arbitration. So it needs to be that this
10 would be enforceable or not enforceable in the same way as
11 any other contract.

12 And so respectfully, Your Honor, we do believe that it
13 is enforceable insofar as it has the adequate consideration
14 and all the material terms are stated.

15 And one last point on that, that it is a certain
16 amount of -- and I say this respectfully --
17 disingenuousness. I think the plaintiff would have to --
18 to be acting with to say that the material terms are not
19 present. And what I mean is that both parties to a
20 contract are obligated to good faith and fair dealing. And
21 I think there is a point in time where to cry uncertainty
22 is in conflict with that.

23 Now, there is legitimate cases on certainty that could
24 exist. Respectfully, they're not here. But I suggest that
25 to bend over backwards to find a way to make a contract

1 somehow vague is there is a point in time for that, and I
2 submit that it'd be here in which it would be in conflict
3 with the duty of good faith and fair dealing.

4 Lastly, Your Honor, unconscionability. This -- two
5 prongs to the unconscionability argument. One is the
6 procedural, meaning that is there an absence of a choice.
7 And if you have unconscionability you have to have only the
8 absence of a fair choice. You have to have oppressive
9 terms which are so unreasonably oppressive that they note
10 that basically no decent soul would -- would accept them
11 or -- or enforce them.

12 Your Honor, that is not, respectfully that's not, what
13 we have here, not even as to the procedural
14 unconscionability.

15 This agreement was -- I think it is fair to call it an
16 adhesion contract. However, it wasn't a
17 take-it-or-leave-it in the sense that you can either sign
18 it or go somewhere else. It was a voluntary and not a
19 precondition of admission.

20 So and on the first page of it, and, again, it is only
21 one page, there's acknowledgment that there are other
22 facilities that can provide the services that the resident
23 needs.

24 So you have sort of two prongs to the procedural
25 point, which is, number one, they were for you to go

1 somewhere else, as they've acknowledged, but, number two,
2 they were free not to sign. They being Ms. Acevedo. They
3 were free not to sign the agreement to begin with. It was
4 voluntary.

5 Number two -- and this is one thing I've always
6 struggled with on unconscionability in arbitration
7 conflict -- context is that in both state and federal law
8 arbitration is -- has a favored status. At least that's
9 what's the plain language is of the cases. And I think
10 there's some reference to that fact even in the -- in the
11 introductory part of the order, which is that -- is that it
12 will be favored in our courts. Again, federal and state
13 favor arbitration.

14 And I think the main import of the -- of the
15 substantive prong, the unfairness prong of
16 unconscionability, is whether or not -- this is stated in
17 the case law -- Simpson and others. I can't recall the
18 name right now. But, anyway, it's whether or not the
19 arbitration agreement is geared towards a fair decision by
20 an unbiased decision maker.

21 I submit there's absolutely nothing about this
22 arbitration agreement that would provide for anything other
23 than that. I mean, it's entirely possible the arbitrator
24 could render a decision that is -- the defendants or the
25 party now civilly moving to the arbitration is very unhappy

1 with. And there's no suggestion and no reason at all to
2 suggest that the fix is somehow in. This is simply an
3 effort to resolve this dispute in the alternative path, or
4 path, which is, in fact, favored under state and federal
5 policy.

6 One last thing, and then I'll sit. There is a note in
7 here, and I don't know if the Court came all the way down
8 to rule on this basis but about there can be a violation of
9 federal law, the federal law having to do with Medicaid and
10 Medicare reimbursements, if this were a -- this arbitration
11 agreement were considered an additional consideration for
12 admission to the facility.

13 And specifically where I'm coming from and the
14 statutory language, the plaintiffs rely on making an
15 argument is this nursing home facility shall not change --
16 excuse me -- charge, solicit, accept or receive in addition
17 to any amount otherwise required to be paid under the
18 state's Medicaid plan any gift, money, donation or other
19 consideration -- and there's that afore language, Your
20 Honor -- as a precondition of admitting or expediting the
21 admission of the individual to the facility, or it's a
22 requirement for the individual's continued stay. And all
23 of that is -- if you'll forgive me -- perhaps a little long
24 way, limited way of saying that does not apply here because
25 this is not a precondition.

1 The whole argument fails in its essential premise.
2 And to be fair I don't see that Your Honor's order actually
3 went so far as to say that it was ruling upon that basis
4 but -- but just to the extent that it was material I wanted
5 to point out that it would not an appropriate basis to
6 refuse a portion of our motion, nor would -- this is also
7 mentioned in the introductory part of the order -- the idea
8 that there's some sort of misidentification of contracting
9 parties.

10 I think the plaintiff argued that it was insufficient
11 to identify our facility whose legal name is THI of South
12 Carolina at Camp Care, LLC, to not identify it as that in
13 that the arbitration agreement but to call it by the name
14 under which it does business, Lake Emory Post-Acute Care.

15 Respectfully, Your Honor, I don't think there's any --
16 and, Your Honor, it's alluded to in the factual development
17 of this order, but nowhere in the sort of meat of the order
18 do I see where the Court has come down on that being the
19 basis to not enforce the arbitration agreement. But I'd
20 say to the extent that it could be interpreted that way we
21 would respectfully oppose that on the basis that the -- the
22 question in terms of contractual identification or
23 identification of the parties is really a question of
24 reasonableness.

25 To use the d/b/a, we submit, is certainly clear enough

1 to identify the parties to the contract, the parties being
2 Mrs. Acevedo for herself and her husband, and the facility.
3 And furthermore of course, obviously, signing the agreement
4 in conjunction with his admission to the facility and not
5 as a precondition certainly was in conjunction. It makes
6 it clear there could be no other party if they were
7 contracting with the facility in which he was being
8 admitted.

9 So unless the Court has any questions, I do appreciate
10 the Court's indulgence for the argument time, and I'll be
11 seated.

12 THE COURT: Thank you, Mr. Hines.

13 MR. MULLMAN: Thank you, Your Honor. Ray Mullman for
14 Mr. and Mrs. Acevedo who was admitted into THI of South
15 Carolina at Camp Care, LLC, July 12th. And by
16 July 14th his hip was fractured due to the defendant's
17 negligence.

18 And I find it interesting that Fundamental who causes
19 these arbitration agreements to be signed just to get
20 nursing home care at their facility is accusing the
21 Acevedos of violating good faith and fair dealing. I just
22 find that ironic on its face.

23 But we're here to discuss the order that you denied
24 their motion to compel arbitration, Your Honor. And we
25 didn't do an additional memoranda. We thought we'd rely on

1 our previous memo and exhibits which included the factual
2 circumstances of the contract entered into by Mrs. Acevedo
3 and of course Mr. Poliakoff's affidavit about the cost and
4 expense of an arbitration.

5 But today we just want to basically reiterate that the
6 Court's order is well supported by South Carolina law, the
7 Simmons case, Thompson case, Wilson vs. Willis, the recent
8 case. All of those support your order, and I think that
9 Russell makes some good arguments that we can discuss in
10 front of the Court of Appeals and let them resolve these
11 issues which have been burning in this court for over ten
12 years.

13 So we think that the order is well supported and we
14 look forward to the appeal to defend your order, Your
15 Honor. Thank you.

16 THE COURT: I'll review the memo I received this
17 morning. It was filed in October, but I've never read it.
18 So I'll read it now and issue an order.

19 MR. HINES: Thank you, Your Honor.

20 MR. MULLMAN: Thank you, Your Honor.

21 END OF REQUESTED TRANSCRIPT OF RECORD
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 22nd day of January 2020.

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

August 26, 2020

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

RE: Armando Acevedo
 DOB: */**/**

My name is Paige Swatman. I am a Registered Nurse with 23 years' experience in the long-term care field. My experience includes Director of Nursing Service, Regional Clinical consultant, Vice President of Clinical services, and Long-term care surveyor of the South Carolina department of Health and Environmental control.

I have reviewed the medical records of Armando Acevedo for the time period of 7/5/17 through 7/19/17. These records include Spartanburg Regional Medical Center and Lake Emory Post-Acute care.

Based on the medical records review, it is my professional opinion that during the time period of 7/12/17 and 7/15/17 Lake Emory Post-Acute care deviated from the standard of care for prevention of falls with acute injury and identification and timely treatment of acute injury.

My findings are based on review of the medical records as follows:

1. Mr. Acevedo had a traumatic brain injury from a fall at home on 4/24/17 that required surgery to remove excess fluid on the brain and placement of a Ventriculoperitoneal shunt for continued drainage on 7/5/17.
2. He was sent to Lake Emory post-acute care for rehabilitation on 7/12/17.
3. His diagnoses included Hypertension, conversion disorder with seizures, Anxiety disorder, Liver transplant, major depressive disorder, altered mental status, history of falls with head trauma.

Concerns:

1. A care plan was written on 7/17/17 that stated, "At risk for falls"

The goal was "Will be free from injury"

The approaches were: "Wheel chair and bed alarm" and "Call light at all times"

- The care plan was not written until two days after a fall resulting in a fractured left hip and discharge.
- A Physician's order was written on 7/12/17 for alarms to wheelchair and bed.
- There is no documentation that alarms or fall preventions were ever implemented.

2. There are no nursing notes for 7/13/17.
3. There are no nursing notes regarding the details of the fall on 7/14/17 at 11:30 PM. The last entry was written on 7/14/17 at 1 PM.
4. Mr. Acevedo was in a wheelchair at the nurse's station at the time of the fall. There is no documentation that states why he was up at 11:30 PM or that an alarm was used.
5. There is no documentation that the Physician or family was notified at the time of the fall.
6. A nursing note written on 7/15/17 at 9AM states, "Favors right hip and moans out in pain when moved. Resident states his hip hurts. Still waiting on Mobilex."
7. At 10 AM, the nurse wrote, "Called Mobilex to check on ETA. They said they will call back with ETA."
8. At 11AM, the nurse wrote, "Resident anxious. B/P 166/101, P 101, R 22. Still c/o pain. Mobilex notified again. ETA unknown. Dr. Wheeler notified. Order received to send to ER."
9. The documentation indicates that an assessment for a fractured hip following the fall was not done per standards of care. Mr. Acevedo's leg was not examined for shortening or rotation nor immobilized even though he complained of severe pain.
10. Mr. Acevedo was admitted back to the hospital with a fractured left hip and incomplete draining of the cerebral shunt.
11. The diagnosis and treatment for the fracture was delayed 11.5 hours as evidenced by the nursing documentation.
12. The staff continued to document on Activities of Daily Living sheet on 7/16, 7/17, and 7/19/17 after Mr. Acevedo was discharged on 7/15/17.

Immediate Post- Fall Evaluation of the Older Patient by Gerald F. Driscoll, MSN, CRNP, and Elizabeth Capezuti, PhD, RN, CRNP, FAAN states in part:

"A fractured hip will cause the involved extremity to be shorter than the other extremity and externally rotated."

"Any possible fracture should be immobilized in a position of comfort to reduce pain and decrease the risk of additional damage to the injury site."

"For suspected fractures of the hip and pelvis, a long board immobilization is required. Keep these patients on the floor until long board immobilization can be provided."

"In a non-acute setting such a psychiatric hospital, nursing home, assisted living or adult day care facility, a nurse is often the first professional to evaluate a potential fall related

injury. A thorough yet quick physical evaluation can reveal conditions requiring immediate attention or interventions to prevent further injury.”

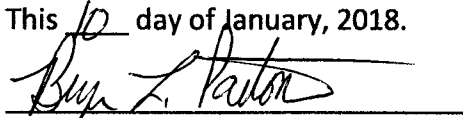
Summary:

The staff at Lake Emory Post-Acute care failed to implement and monitor safety devices as ordered by the Physician to prevent falls. Mr. Acevedo was out of his room and in a wheelchair at 11:30 PM and was allowed to fall and sustain a fractured left hip. The staff at Lake Emory failed to assess Mr. Acevedo’s injury per standards of care, and delayed treatment for 11.5 hours.

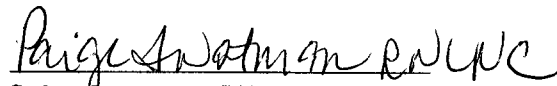
Conclusion:

It is my professional opinion that Lake Emory Post-Acute care contributed in a direct and proximate way to the traumatic injury and decline of Armando Acevedo.

Sworn to and subscribed before me,
This 10 day of January, 2018.



Notary Public


Paige Swatman, RN LNC



STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Armando J. Acevedo, through his
Attorney-In-Fact, Marianne Acevedo,

NOTICE OF INTENT

Plaintiffs,

C. A No. 2018-NI-42

vs.

Hunt Valley Holdings, LLC; THI of South
Carolina, LLC; THI of South Carolina at
Camp Care, LLC, d/b/a Lake Emory Post-
Acute Care,

Defendants.

YOU WILL PLEASE TAKE NOTICE that Marianne Acevedo as Attorney-In-Fact for Armando J. Acevedo, pursuant to §15-79-125 of the South Carolina Code of Laws hereby submits this Notice of Intent to file suit against the Defendants named above. If Defendants do not raise arbitration, Plaintiffs will assume no arbitration clause exists or Defendants have abandoned any alleged claim to arbitration. This notice is being filed based on the following facts:

STATEMENT OF FACTS ENTITLING PLAINTIFF TO RELIEF

Armando J. Acevedo was a resident of Defendants' facility in Inman, SC from July 12, 2017 through July 15, 2017. Defendants are and have been acting in a joint enterprise to operate and manage the facility in order to provide care and treatment to vulnerable adults including Armando J. Acevedo.

Numerous failures, deficiencies, omissions, and breaches of the standard of care have been committed by the Defendants with respect to Armando J. Acevedo. These include, but are not limited to: neglect; corporate negligence and mismanagement; failure to exercise independent judgment as patient advocates; failure to ensure proper preventative measures were in place to keep resident safe; failure to properly assess resident; failure to properly train staff; failure to properly supervise; and failure to abide by applicable federal and state laws governing long term care facilities and skilled nursing facilities. The above deficiencies, neglect, and failures caused Armando J. Acevedo pain and suffering, a hip fracture, and medical bills. See Affidavit of Paige Swatman, RN, LNC.

Also, pursuant to S.C. Code §15-79-125(c), you are notified of the statutory requirement to participate in a mediation conference "within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit..." Plaintiff is ready and willing to schedule such mediation immediately. If mediation proves unsuccessful, Plaintiff will file the Summons and Complaint, as provided in S.C. Code §15-79-125.

Additionally, by filing this Notice pursuant to S.C. Code §15-79-125, Plaintiff does not waive Plaintiff's right to object to the constitutionality of the code section. Plaintiff contends that S.C. Code §15-79-125 violates the equal protection clause of the United States and South Carolina Constitutions.

(SIGNATURE BLOCK BELOW)

POLIAKOFF & ASSOCIATES, PA

s/Gary W. Poliakoff

Gary Poliakoff, Esq., S.C. Bar # 4488

atty@gpoliakoff.com

Ray Mullman, Esq., S.C. Bar# 8662

rmullmanjr@gmail.com

Attorneys for Plaintiffs

215 Magnolia Street

Spartanburg, SC 29306

(864) 582-5472

Date: January 26, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ARMANDO J. ACEVEDO, THROUGH	)	CASE NO. 2018-CP-42-03421
HIS ATTORNEY-IN-FACT,	)	
MARIANNE ACEVEDO,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC; THI	)	DEFENDANT HUNT VALLEY
OF SOUTH CAROLINA, LLC; THI OF	)	HOLDINGS, LLC'S MOTION TO
SOUTH CAROLINA AT CAMP CARE,	)	DISMISS PLAINTIFF'S COMPLAINT
LLC, D/B/A LAKE EMORY POST	)	
ACUTE CARE AND RUSTY	)	
FLATHMANN,	)	
	)	
DEFENDANTS.	)	
	)	

TO: GARY W. POLIAKOFF AND RAYMOND P. MULLMAN, JR., ATTORNEY FOR THE PLAINTIFF:

Please take notice that Defendant Hunt Valley Holdings, LLC (hereinafter referred to as this "Defendant"), 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 pursuant to Rule 12(b)(2) and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the grounds that this Court lacks personal jurisdiction over this Defendant.

This motion is supported by the statutory and case law 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.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner IV

J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

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

Attorneys for the Defendant

Hunt Valley Holdings, LLC

Charleston, South Carolina

Dated: November 8, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ARMANDO J. ACEVEDO, THROUGH	)	CASE NO. 2018-CP-42-03421
HIS ATTORNEY-IN-FACT,	)	
MARIANNE ACEVEDO,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	THI OF SOUTH CAROLINA AT CAMP
	)	CARE, LLC D/B/A LAKE EMORY POST-
HUNT VALLEY HOLDINGS, LLC; THI	)	ACUTE CARE'S MOTION TO DISMISS
OF SOUTH CAROLINA, LLC; THI OF	)	PLAINTIFF'S COMPLAINT, COMPEL
SOUTH CAROLINA AT CAMP CARE,	)	ARBITRATION AND STAY STATE
LLC, D/B/A LAKE EMORY POST	)	COURT PROCEEDINGS
ACUTE CARE AND RUSTY	)	
FLATHMANN ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: GARY W. POLIAKOFF AND RAYMOND P. MULLMAN, JR., ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (hereinafter referred to as "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 pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant for "Negligence/Recklessness", "Corporate Negligence", "Joint Venture", "Alter Ego/Piercing the Corporate Veil", "Amalgamation of Interests", and "Neglect of a Vulnerable Adult" pursuant to the Plaintiff's residency at the

Facility. However, prior to being admitted to the Facility, Plaintiff entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**).

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration.

Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

This Motion and Petition are 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.

[signature block on following page]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

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

Attorneys for the Defendant

THI of South Carolina at Camp Care, LLC

d/b/a Lake Emory Post-Acute Care

Charleston, South Carolina

Dated: November 8, 2018

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between **LAKE EMORY POST ACUTE CARE** ("Facility"), its agents, employees and servants, and **ARMANDO ACEVEDO** ("Resident") or ("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.

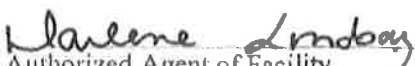
I understand and agree that I am giving up and waiving my right to a jury trial.

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.


Resident/Representative Signature

7/12/17
Date

MARIANNE ACEVEDO
Printed Name of Resident/Representative


Authorized Agent of Facility

7/12/17
Date

DARLENE LINDSAY CRD
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ARMANDO J. ACEVEDO, THROUGH	)	CASE NO. 2018-CP-42-03421
HIS ATTORNEY-IN-FACT,	)	
MARIANNE ACEVEDO,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	
HUNT VALLEY HOLDINGS, LLC; THI	)	THI OF SOUTH CAROLINA, LLC'S
OF SOUTH CAROLINA, LLC; THI OF	)	MOTION TO STAY
SOUTH CAROLINA AT CAMP CARE,	)	
LLC, D/B/A LAKE EMORY POST	)	
ACUTE CARE AND RUSTY	)	
FLATHMANN ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: GARY W. POLIAKOFF AND RAYMOND P. MULLMAN, JR., ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant THI of South Carolina, LLC, hereinafter referred to as "this Defendant", 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 staying this action.

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final

decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, 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.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

J. Joseph Owens

P.O. Box 993, Charleston, SC 29402

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

Attorneys for the Defendant

THI of South Carolina, LLC

Charleston, South Carolina

Dated: November 12, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ARMANDO J. ACEVEDO, THROUGH	)	CASE NO. 2018-CP-42-03421
HIS ATTORNEY-IN-FACT,	)	
MARIANNE ACEVEDO,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	DEFENDANT THI OF SOUTH
	)	CAROLINA AT CAMP CARE, LLC D/B/A
	)	LAKE EMORY POST ACUTE CARE'S
	)	MEMORANDUM OF SUPPORT OF
HUNT VALLEY HOLDINGS, LLC; THI	)	MOTION TO DISMISS PLAINTIFF'S
OF SOUTH CAROLINA, LLC; THI OF	)	COMPLAINT, COMPEL ARBITRATION
SOUTH CAROLINA AT CAMP CARE,	)	AND STAY STATE COURT
LLC, D/B/A LAKE EMORY POST	)	PROCEEDINGS
ACUTE CARE AND RUSTY	)	
FLATHMANN ,	)	
	)	
DEFENDANTS.	)	
	)	

The Defendant, THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care (hereinafter "Lake Emory", "the facility", of "this Defendant"), by and through its undersigned counsel, hereby respectfully submits this Memorandum in Support of its Motion to Dismiss and Compel Arbitration and Stay Court Proceedings. For the reasons set forth below, a valid, binding agreement for arbitration exists, and the Court must enter an Order compelling this matter to arbitration in accordance with the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*

FACTUAL BACKGROUND

On July 12, 2017, Plaintiff, Armando Acevedo, was admitted to Lake Emory after a short hospital stay. Upon admission, an arbitration agreement was executed by his wife, Marianne Acevedo, on his behalf. (**Arbitration Agreement attached hereto as Exhibit A**). At the time, Ms. Acevedo held a General Durable Power of Attorney over her husband, which was duly executed and filed in Spartanburg County on June 21, 2014. (**General Durable Power of**

Attorney attached hereto as Exhibit B). Without question, pursuant to that Power of Attorney, Ms. Acevedo possessed actual legal authority to act as her husband's agent in all affairs, including with regard to the execution of the instant Arbitration Agreement.

The Arbitration Agreement was presented separately from all other admission paperwork, a stand-alone document that specifically delineated that Ms. Acevedo was waiving her husband's right to jury trial. The Arbitration Agreement includes specific provisions regarding governing law, how an arbitrator will be chosen, and details the type of claims that must be submitted to arbitration. In bold, it is noted that the agreement should be "read carefully" and specifically notes in a stand-alone paragraph that both parties "understand and agree that [they] are waiving [their] right to a jury trial." *Id.* The agreement was executed by Darlene Lindsay, Admission Coordinator for Lake Emory, on behalf of the facility at the same time. *Id.*

Mr. Acevedo remained at Lake Emory for three days, ultimately being discharged on July 15, 2017. During Mr. Acevedo's brief residency at Lake Emory, the Plaintiff (nor any family member or Mr. Acevedo himself) never contested, questioned, or raised any single concerns regarding the Arbitration Agreement. On October 3, 2018, Plaintiff instituted the instant lawsuit asserting claims which fall directly within the governance of the Arbitration Agreement.

On November 16, 2018, this Defendant filed the instant Motion asserting its right to arbitration.

ARGUMENT & CITATION OF AUTHORITY

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favors arbitrating disputes. *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.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

I. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

As an initial matter, the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. *See* Ex. A; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014)(holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA). Under the FAA, any written provision in “a contract evidencing a transaction involving commerce” providing that disputes be settled by arbitration is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

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

9 U.S.C. § 4 (emphasis added). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to

arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). While a court a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not invalidate an arbitration agreement 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, 197 L. Ed. 2d 806 (2017)(citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. As discussed and further described herein, such a binding and enforceable written agreement to arbitrate disputes exists in this case and Plaintiff’s claims should be dismissed and compelled to arbitration.

II. BINDING PRECEDENT FROM THE UNITED STATES SUPREME COURT REQUIRES ENFORCEMENT OF THE ARBITRATION AGREEMENT

In *Kindred*, the United States Supreme Court, under facts substantially similar to the case at the bar, held that arbitration agreements executed on behalf of residents being admitted to skilled nursing facilities were binding against those residents when the person who executed the document on the resident’s behalf had a durable power of attorney for the admitting resident. 137 S. Ct. 1421, 1429, 197 L. Ed. 2d 806 (2017). In that case, two individuals, each holding powers of attorney, checked family members into a nursing home. *Id.* at 1425. As part of the admissions process, both individuals executed separate arbitration agreements. *Id.* After the family members died, the individuals filed suits in state court. *Id.* Subsequently, the nursing home moved to dismiss the case, seeking enforcement of the arbitration agreements. *Id.* The trial court denied the

nursing home's motions and both the Court of Appeals and Supreme Court of Kentucky affirmed. *Id.*

The United States Supreme Court reversed, finding that the Supreme Court of Kentucky erroneously held that one of the arbitration agreements was unenforceable despite the fact that the individual who signed the agreement was acting pursuant to a power of attorney. Furthermore, the Supreme Court held that the Kentucky's Court's ruling violated the FAA, noting that it "fail[ed] to put arbitration agreements on an equal plane with other contracts," as required by the FAA. *Id.* at 1426-1427. Along similar lines, the Court noted that the Supreme Court of Kentucky's "reasoning would allow States to pronounce any attorney-in-fact incapable of signing an arbitration agreement—even if a power of attorney specifically authorized her to do so." *Id.* at 1428. According to *Kindred*, an arbitration agreement signed by a power of attorney holder on behalf of a resident is valid and enforceable, and cannot be treated as anything other than a contract under the FAA.

As such, a decision in the instant case not to enforce the Arbitration Agreement would run afoul of the Supreme Court's holding in *Kindred* applying the FAA, as well as the substantial state and federal policy in favor of arbitration. In this case, like in *Kindred*, Plaintiff held a Power of Attorney when she admitted her husband to Lake Emory. Unquestionably, Plaintiff possessed the power and authority to bind her husband to the terms of the Arbitration Agreement, and did in fact bind her husband to its terms once she signed it as his valid and durable power of attorney. Any argument to the contrary should be disregarded, and this Court should grant this Defendant's Motion and compel this matter to arbitration pursuant to the valid and enforceable contract between the parties.

III. THE ARBITRATION AGREEMENT IS SUPPORTED BY VALID, LEGAL CONSIDERATION AND CONTAINS COMPLETE MUTUALITY OF REMEDIES

To the extent Plaintiff argues the contrary, the Arbitration Agreement possesses valid, legal consideration because the parties exchanged mutual promises to arbitrate by voluntarily assenting to the provision that both parties' right to a jury trial would be waived.

Indeed, it is well-settled under South Carolina law that mutual and concurrent promises set forth within a contract afford sufficient legal consideration to validate that contract. *Furman v. Walker*, 124 S.C. 68, 117 S.E.2d 356 (1923); *Johnson v. Spartanburg County Fair Ass'n*, 201 S.C. 56, 41 S.E.2d 599 (1947); *O'Neil*, 115 F.3d 272, 275 (4th Cir. 1997)(applying South Carolina Law). Notably, other cases from the federal and state courts within the Fourth Circuit and beyond have echoed this very same principle. *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 545 (4th Cir. 2005)(applying Maryland law); *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 120, 516 S.E.2d 879, 882, writ denied, review denied, 350 N.C. 832, 539 S.E.2d 288 (1999); *Williams-Jackson v. Innovative Senior Care Home Health of Edmond, LLC*, 727 F. App'x 965, 968 (10th Cir. 2018)(applying Oklahoma law); *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 309 (Tex. App. 2009); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 358 (Tenn. Ct. App. 2001); *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013); *Santos v. Gen. Dynamics Aviation Servs. Corp.*, 984 So. 2d 658, 661 (Fla. Dist. Ct. App. 2008).

This undisputed notion is bedrock, black-letter contract law. Moreover, this long standing principle is of equal application in the context of arbitration agreements, where both parties mutually assent to arbitration. *O'Neil*, 115 F.3d 272 (4th Cir. 1997)(holding a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement);

Towles v. United HealthCare Corp., 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999)(citing *O’Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration.).

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both the Defendant and Mr. Acevedo and representatives (and his heirs, personal representatives, etc.). See **Exhibit A** (“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 claims through or on behalf of Resident.”). Accordingly, the Arbitration Agreement contains adequate consideration in the form of mutual promises to arbitrate, and any claims to the contrary should be disregarded.

To require further, additional consideration above and beyond the mutual exchange of promises would be to impose a rule in violation of the United States Supreme Court’s holdings in *Concepcion*, *Marmet Healthcare Center, Inc. v. Brown* 565 U.S. 530 (2012), and *Kindred*, all of which stand for the proposition that arbitration agreements must be put on “equal footing with all other contracts.” See *Kindred* at 1423. As a result, this Court cannot deny enforcement of the Arbitration Agreement on grounds of lack of consideration.

II. THE ARBITRATION AGREEMENT IS CLEAR AND UNAMBIGUOUS WITH RESPECT TO THE INTENT OF THE PARTIES AND CONTAINS ALL ESSENTIAL AND MATERIAL TERMS

To the extent Plaintiff attempts to argue the contrary, the Arbitration Agreement is clear, unambiguous, and represents an unequivocal understanding between the Defendant and Plaintiff with respect to its essential and material terms such that enforcement is required. The Arbitration Agreement includes specific, explicit provisions regarding how an arbitrator is chosen, what rules will govern the arbitration itself, and what types of claims must be submitted to arbitration.

Indeed, the Agreement expressly denotes that the arbitration must be conducted in accordance with the South Carolina Alternative Dispute Resolution Rules, which itself contains exacting details such as the location of the arbitration, how evidentiary rulings should be made, when subpoenas can be issued, rules for confidentiality of the proceedings, compensation of arbitrators, and nearly every conceivable aspect of the arbitration itself. Moreover, the lack of a specifically delineated arbitrator should not be held against the Arbitration Agreement, which attempts to create a cooperative process wherein the parties attempt to mutually agree upon an arbitrator before seeking court assistance. Furthermore, arbitration agreements which are substantially similar to the one here have been held to be enforceable and were not void because they lacked the terms that the Plaintiff urges are required. *See THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *7 (D.S.C. Sept. 13, 2011); *See also THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015).

IV. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE

The Arbitration Agreement at issue cannot be invalidated upon grounds of unconscionability. An arbitration agreement may only be found invalid for "unconscionability" if this Court makes a two-fold determination: (1) that there is "absence of meaningful choice on the part of one party due to one-sided contract provisions" and (2) 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 v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

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*, 53 1

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 instance, it is therefore Plaintiff's burden to prove unconscionability.

"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. As such, "meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. Any argument suggesting Ms. Acevedo lacked sophistication or played no part in drafting the agreement is not sufficient to demonstrate procedural unconscionability. *Id.* Any notion that Ms. Acevedo was forced to sign the Arbitration Agreement without option is demonstrably false. **(Declaration of Darlene Lindsay, attached hereto as Exhibit C).** Indeed, Ms. Lindsay, the Admissions Coordinator for this Defendant, specifically recalls these events with great clarity. *Id.*

The fact that Ms. Acevedo is an individual and this Defendant is a commercial entity is 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 Lake Emory, a skilled nursing facility, unilaterally drafted this agreement and presented it to Ms. Acevedo for consideration cannot justify a finding of unconscionability. *See, Munoz v. Green Tree Fin. 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.").

Furthermore, the Arbitration Agreement was not "forced" or mandatory. To the contrary, this Admission Agreement was not a pre-condition for admission. *See Exhibit C.* The Arbitration Agreement was, in fact, a separate agreement from the admissions agreement. Additionally, by executing and consenting to the Arbitration Agreement, Ms. Acevedo expressly

acknowledged that she “[was] not required to use the aforesaid facility for [her husband’s] healthcare needs and that there are numerous other health care providers in the State where [Defendant] is located that are qualified to provide such care to [him.]” Plaintiff cannot cite to any limitation or restriction upon where Mr. Acevedo could have been admitted to ensure that he was properly provided care and treatment.

Ms. Acevedo was given the option of entering into the Arbitration Agreement and made the decision to proceed. She did not have to accept this offer nor has there been any allegation or evidence that she was actually coerced into signing this document. The waiver of Mr. Acevedo’s right to a jury trial was presented as a separate contract, and Ms. Acevedo was expressly instructed to read carefully before executing the Arbitration Agreement.

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.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to jointly select a third party arbitrator “from a panel having experience and knowledge of the health care industry.” If the parties are unable to agree upon such an arbitrator, the Court is vested with authority to make such 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. These provisions cannot be deemed oppressive or unjust. As a result, the Arbitration Agreement cannot be deemed unconscionable.

Lastly, the District Court of South Carolina has repeatedly upheld the validity of arbitration agreement nearly identical to the one at issue in this matter. In evaluating these agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *3 (D.S.C. Dec. 15, 2011) (Norton, C.J.); *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 v. THI of S.C. at Lake Emory at Spartanburg, LLC, C.A.* 7:11-2613-HMH. 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 to the clear precedent under *Kindred* and the FAA that arbitration agreements must be placed on equal footing with all other contracts. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and therefore fails.

V. NO WAIVER OF ARBITRATION RIGHTS HAS OCCURRED

Any argument that this Defendant somehow has waived its rights under the Arbitration Agreement by not providing it in response to a prior medical records request is unfounded. As set forth, “[t]he FAA requires courts to resolve ‘any doubts concerning the scope of arbitrable issues... 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.’” *Dean*, 408 S.C. at 387, 759 S.E.2d at 736 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*,

460 U.S. 1, 24-25 (1983)). Accordingly, “*there is a presumption against finding that a party has waived its right to compel arbitration[.]*” *Id.*, 408 S.C. at 388, 759 S.E.2d at 736. (emphasis added). To overcome this presumption, “the party seeking to avoid arbitration ‘must show prejudice through an undue burden caused by delay in demanding arbitration.’” *Id.* (quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). “Mere inconvenience to an opposing party is not sufficient to establish prejudice.” *Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003)(citing *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct.App.2003)). South Carolina “follow[s]the approach adopted by the federal courts of the Fourth Circuit and other jurisdictions which require a showing of actual prejudice before finding waiver.” *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct. App. 2003)

In this case, no real delay has occurred and no prejudice has been suffered. This Defendant was served with process of the Notice of Intent to File Suit on January 31, 2018. Less than 45 days later, on March 7, 2018 Plaintiff’s counsel was in possession of the Arbitration Agreement. **(See E-Mail Correspondence attached hereto as Exhibit D).** As a result, any allegation by Plaintiff that Defendant participated in pre-suit mediation without mentioning the arbitration clause is false and should be given no credence by this Court. Additionally, participation in the NOI process alone is not grounds for waiver of arbitration, and under South Carolina law, there is no obligation to seek enforcement upon service of the NOI. *See Dean, supra*, at 388 (“We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity.”)

Here, upon service of the Summons and Complaint, Defendant immediately filed a motion to compel arbitration in lieu of a responsive pleading after the complaint was filed and served. Under binding South Carolina precedent, this conduct cannot amount to a waiver.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Honorable Court GRANT its Motion, thereby dismissing Plaintiff's Complaint and compelling this matter to arbitration in accordance with the valid, binding Arbitration Agreement executed between there parties to this litigation. This Defendant hereby further requests any other relief which this Court deems just and proper.

YOUNG CLEMENT RIVERS, LLP

By: s/ Perry M. Buckner, IV
D. Jay Davis, Jr.
Perry M. Buckner, IV
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Carolina at Camp Care, LLC d/b/a Lake Emory
Post Acute Care*

Charleston, South Carolina

Dated: January 29, 2019

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

INFORMATION ABOUT THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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:

- A. 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.
- B. A PERSON WHO IS DIRECTLY FINANCIALLY RESPONSIBLE FOR YOUR MEDICAL CARE.
- C. A PERSON WHO IS NAMED IN YOUR WILL, OR, IF YOU HAVE NO WILL, WHO WOULD INHERIT YOUR PROPERTY BY INTESTATE SUCCESSION.
- D. A BENEFICIARY OF A LIFE INSURANCE POLICY ON YOUR LIFE.
- E. THE PERSONS NAMED IN THE HEALTH CARE POWER OF ATTORNEY AS YOUR AGENT OR SUCCESSOR AGENT.
- F. YOUR PHYSICIAN OR AN EMPLOYEE OF YOUR PHYSICIAN.
- G. 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.

7. 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.
8. 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.

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

1. DESIGNATION OF HEALTH CARE AGENT

I, ARMANDO J. ACEVEDO, hereby appoint:
(Principal)

(Agent's Name) Marianne T. Acevedo

(Agent's Address) REDACTED

Telephone: home: REDACTED work: REDACTED mobile: REDACTED

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: Jorge Acevedo

Address: REDACTED

Telephone: home: REDACTED work: REDACTED mobile: REDACTED

b. Second Alternate Agent: Charlie Acevedo

Address: REDACTED

Telephone: home: REDACTED work: REDACTED mobile: REDACTED

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:

N/A

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may AA; may not _____ 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) AA **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) _____ **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) AA 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) _____ 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 day of August, 20 16. My current home address is:

REDACTED

Principal's Signature: _____

Print Name of Principal: _____

ARMANDO J. ACERDO

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: Christopher Meyer Date: 8/27/2016

Print Name: Christopher Meyer Telephone: REDACTED

Address: REDACTED

Witness No. 2

Signature: Mary L. Inman Date: 8-27-16

Print Name: Mary L. Inman Telephone: REDACTED

Address: REDACTED

(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: _____

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMONS PLEAS
) FOR THE SEVENTH JUDICIAL CIRCUIT
)

COUNTY OF SPARTANBURG

) CASE NO. 2018-CP-42-03421
)ARMANDO J. ACEVEDO, THROUGH
HIS ATTORNEY-IN-FACT, MARIANNE
ACEVEDO,

Plaintiff,

DECLARATION OF DARLENE RICEHUNT VALLEY HOLDINGS, LLC; THI
OF SOUTH CAROLINA, LLC; THI OF
SOUTH CAROLINA AT CAMP CARE,
LLC, D/B/A LAKE EMORY POST
ACUTE CARE AND RUSTY
FLATHMANN

Defendants.

I, Darlene Rice, respectfully submit this Declaration in support of Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care's ("Lake Emory" or the "facility") Motion to Dismiss and Compel Arbitration in the above-captioned case:

1. I am over the age of eighteen, am otherwise competent, and a resident of the State of South Carolina.
2. I served as the Admissions Director for Lake Emory during the time period at issue in the Plaintiff's Complaint.
3. I personally conducted the admissions process for the Plaintiff, Armando Acevedo, during his admission to Lake Emory on July 12, 2017. Mr. Avecedo's wife, Marianne Acevedo,

was present for the admissions process and completed all admissions paperwork, identified and set forth below, on behalf of her husband.

4. As part of the admissions process, each admitting resident, or his representative on the resident's behalf, reviews an Admissions Agreement and various other documents that must be completed by the resident or his representative for admission to the facility.
5. The admitting resident and his representative also receives a written copy of the Facility's Handbook, a written copy of the resident's rights under applicable state laws, a written copy of the facility's policy on Advance Directives, a written explanation of the charges for services provided by facility, a separate listing of local and government resources furnished by the state Ombudsman and other state/local advocacy groups, a separate listing of all medical professionals available to provide on-site services, and a written copy of the facility's policy on the use of physical/chemical restraints, in addition to other administrative documents. The admitting resident, or the resident's representative on behalf of the resident, initials an Acknowledgement Form as part of this admissions process, acknowledging that he or she has received and reviewed these respective items.
6. The admitting resident, or the resident's representative on behalf of the resident, also has the option to enter into an Arbitration Agreement with the facility during the admissions process, whereby any future claims by and between the resident and the facility based on the admitting resident's residency at the facility must be submitted to mandatory arbitration. Completion of the Arbitration Agreement is not a condition for admission to the facility.
7. The admissions process normally takes approximately one hour, depending on the admitting resident, but can take longer depending on certain variables, including whether the resident's family members are present for the admission process, whether the resident or family members have any questions about the admissions documents, and what the resident's medical condition is during the admissions process.
8. During the admissions process on July 12, 2017, I personally reviewed and explained each of the admissions documents, described above, to Mrs. Acevedo to ensure that she

reviewed, was comfortable with, and understood each and every document, including the Admission Agreement and Arbitration Agreement.

9. I specifically told Mrs. Acevedo that completion of the Arbitration Agreement was not a condition of her husband's admission to the facility.
10. During the admissions process, Mrs. Acevedo was talkative, alert, and oriented. I did not have any reasons to suspect Mrs. Acevedo was suffering from any mental or cognitive inabilities at the time.
11. It appeared Mrs. Acevedo was listening to me and understood me as I explained each of the admissions documents during the admissions process, and Mrs. Acevedo did not voice any objections as to any of the admissions documents, including the Arbitration Agreement.
12. Mrs. Acevedo did ask several questions during the admissions process. Specifically, she asked questions about the length of stay for her husband, as well as certain questions about co-pay. Mrs. Acevedo did not ask any questions about the Admissions Agreement or Arbitration Agreement.
13. Mrs. Acevedo spoke English well, and did not indicate that she was unable to read or understand any of the admissions documents as I explained them, including the Admissions Agreement and Arbitration Agreement, during the admissions process.
14. Mrs. Acevedo signed each of the admissions documents, including the Admissions Agreement and Arbitration Agreement, on behalf of her husband. *See* Admissions Agreement and Arbitration Agreement, attached as **Exhibit 1** and **Exhibit 2**, respectively.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on January 29, 2019

Spartanburg, South Carolina

Darlene Rice
Darlene Rice

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

C.A. No: 2018-CP-42-03421

Armando J. Acevedo, through his Attorney-In-Fact, Marianne Acevedo,

Plaintiffs,

v.

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO MOTION TO
COMPEL ARBITRATION**

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post-Acute Care; and Rusty Flathmann,

Defendants.

TO: JAY DAVIS, ATTORNEY FOR DEFENDANTS:

Plaintiffs, through their attorney, respectfully submit this Memorandum of Law in Opposition to Defendants' Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings.

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 - c. *The Arbitration Agreement is both procedurally and substantively unconscionable, and should not be enforced even if the Court finds it is a valid agreement.*
 - d. *The nonmoving Corporate Defendants should be compelled to arbitrate if the court finds a valid and enforceable agreement to arbitrate exists. A stay is not necessary for those Defendants because either the case should proceed as a jury trial against those Defendants or those Defendants should also be bound by the alleged Arbitration Agreement.*
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I. FACTUAL BACKGROUND

This action arises out of a four-day residency at Defendants' nursing home that left 55 year-old Armando Acevedo injured, hospitalized, and permanently disabled. Marianne Acevedo ("Plaintiff") is Armando's wife and has power of attorney over Armando who was admitted into Lake Emory on July 12, 2017 for short-term rehabilitation with discharge plans to return home to his family. The Complaint details allegations of corporate negligence and nursing home neglect resulting in the hip fracture; permanent disability; and pain and suffering of Armando Acevedo. **(Exhibit 1 – Complaint).**

The Facility is owned and operated by the billion-dollar national for-profit nursing home chain Hunt Valley Holdings, LLC, (HVH) formerly known as Fundamental Long Term Care Holdings. The claims are brought against HVH as owner and operator, and the nursing home facility THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care. THI of South Carolina LLC is a shell company used to insulate HVH from accountability and transparency. Plaintiffs allege that while the Corporate Defendants did not provide direct care to Armando, they exerted significant control over the management, administration, and operation of the nursing home and are, therefore, indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care received by the residents of the facility. The Corporate Defendants should be included in the arbitration proceedings if the Court finds a valid and enforceable agreement to arbitrate exists.

The Admission Agreement has not been provided by Defendants but it typically governs the type of care Armando would receive at the Facility and Armando's financial obligation to pay for those services. Upon information and belief, the Admission Agreement's final page, labeled as

“Page 12 of 12,” contains a clause with an “Entire Agreement”¹ provision indicating these 12 pages constituted “the entire agreement and understanding between the parties” concerning Armando’s admission to the Facility. The Admission Agreement does not contain an arbitration provision.

Another separate contract called “Arbitration Agreement” was allegedly signed on July 12, 2017. (**Exhibit 2 – Arbitration Agreement**). This contract was not part of the Admission Agreement but was its own separate agreement (labeled “Page 1 of 1”) with its own signature blocks. The contracts do not merge and should be treated as separate contracts. No consideration was given for this agreement. Defendants do not and cannot claim that agreeing to arbitrate was a prerequisite to admission at the Facility or a condition of admission. The Arbitration Agreement provides for alternative dispute resolution for any claim a party may bring against another arising out of Armando’s care at the Facility. Interestingly, this Arbitration Agreement specifically references the Admission Agreement (that has not been produced despite repeated requests): **“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.....** The arbitration agreement is not valid or enforceable as discussed below. Defendants’ motion, memorandum, and attached documents do not meet this burden, and the Court should deny the motion to compel arbitration.

II. BURDEN OF PROOF

The Facility seeks to compel arbitration. Defendant carries the burden to prove that a valid and enforceable arbitration agreement exists. The party seeking to establish contractual waiver of

¹ “I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties.”

jury trial bears the burden of proof to establish that the waiver was signed in a “knowing, voluntary and intentional” capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized “the basic principle that ambiguities in a contract are construed against the drafting party.”² While there is a presumption in favor of arbitration agreements, this presumption only applies *after* the court finds there is a valid enforceable arbitration agreement.³ Not all arbitration clauses are enforceable. This is evident from the FAA provisions: “The court shall make an order directing the parties to proceed to arbitration” but only “upon being satisfied that the making of the agreement...is not in issue.” 9 U.S.C. § 4. The FAA looks to state law to decide the threshold questions of contract formation.⁴

Whether the parties agreed to arbitrate is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007)(“General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.”). In Chassereau v. Global Sun Pools, Inc., 644 S.E.2d 718 (S.C. 2007), the Supreme Court stated:

Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case.

The U.S. Supreme Court has held that the FAA’s savings provision allows for denial of enforcement of agreements susceptible to the general contract defenses of fraud, duress, and

² Nat’l Acceptance Co., 381 F.Supp. at 271).

³ EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

⁴ Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (“the court should apply ‘ordinary state-law principles that govern the formation of contracts.’”).

unconscionability.⁵ Other contract defenses such as lack of consideration, lack of mutuality, and vagueness and indefiniteness also may be considered in denying enforcement.

Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.⁶ The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.⁷ The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement.⁸ Pro-arbitration policy does not validate a contract that lacks the essential building blocks of a binding contract.

III. STATEMENT OF ISSUES

The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.

The alleged Arbitration Agreement provided by Defendants was allegedly signed on **July 12, 2017**. The necessary elements of a contract are an offer, acceptance, and valuable consideration.⁹ "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."¹⁰ Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No adequate consideration exists in this case. Defendant now claims that the "mutual promise to arbitrate" is sufficient consideration for an arbitration

⁵ Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2.

⁶ Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

⁷ See Sydnor v. Conesco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

⁸ See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008).

⁹ Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d161, 166 (S.C. 2003)

¹⁰ Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 503 S.E.2d 184, 186 (Ct.App.1998)).

agreement. That is absurd. The contract itself cannot be the consideration for the contract. Where there is an alleged mutual promise to arbitrate, there must be additional consideration. In this case, the mutual promise to arbitrate is illusory and of no benefit to Plaintiff. However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confines of the four corners of the instrument.¹¹ Therefore, our courts must assess whether the arbitration agreement itself contains sufficient benefit in the form of a mutual exchange of promises to arbitrate.

The agreement is silent as to any consideration to support the agreement. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the admission agreement. Admission can be the “direct benefit” that forces Plaintiff to arbitrate **only if admission and arbitration are governed by the same contract**. Based on recent decisions by the South Carolina Supreme Court, the Admission Agreement and Arbitration Agreement in this case are clearly separate contracts that do not merge.¹² Thompson and Hodge applied Coleman and provided further examples of factors demonstrating “separateness” and preventing merger that apply to the facts of this case.¹³

An admission contract with an “Entirety of Agreement” provision is separate “on its face” from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. “this [Admission] Agreement *or* in the Arbitration Agreement.” Coleman, 407 S.C. at 355, 755

¹¹ State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

¹² See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the merger doctrine because language in the contracts “recognize[d] the ‘separateness’ of the admission and arbitration agreements.” 407 S.C. at 355, 755 S.E.2d at 455.

¹³ See 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has “Arbitration Agreement” atop its first page, these factors further “indicate the parties’ intent for it to stand by itself as an independent contract.” Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Upon information and belief, the “Admission Agreement” presented to Marianne and typically used by this chain and facility contains an “Entire Agreement” provision stating that “this Agreement represents the entire agreement” related to admission to the Facility. Thus, “Agreement” is a defined term in this contract and, as stated in the contract’s opening paragraph, is limited to the “Admission Agreement,” not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission Agreement ends with “Page 12 of 12” while the Arbitration Agreement is “Page 1 of 1.” As in Thompson, the arbitration agreement states its independence with its “Arbitration Agreement” title. To the extent there are any ambiguities in this contract language, they must be resolved against merger. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman). The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. In sum, Defendants cannot meet their burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

Additionally, an illegal contract is unenforceable.¹⁴ “The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.” *Id.* Defendants request for additional consideration to support the arbitration agreement violated federal regulations at the time of admission. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must “not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual’s continued stay at the facility.” 42 U.S.C. § 1396r(c)(5)(A)(iii).

It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration.¹⁵ In the instant case, it is undisputed that Decedent was a Medicare and Medicaid beneficiary while residing at Defendants’ facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent’s care. Any nursing home facility that accepts Medicare or Medicaid funds for resident care is *expressly forbidden* from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility. 42 U.S.C. § 1369r(c)5(A)(iii)l 42 CFR § 486.12(d)(3) expressly states that a:

Nursing home facility *shall not change, solicit, or accept, or receive*, in addition to any amount otherwise required to be paid under the State’s Medicaid plan any gift, money, donation, or *other consideration* as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual’s continued stay in the facility. [emphasis added]

¹⁴ *Berkebile v. Outen*, 426 S.E.2d 760, 762 n. 2 (1993).

¹⁵ *Benya v. Gamble*, 321 S.E.2d 57, 60 (Ct.App.1984).

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case. The fact is if a facility were to charge an additional five dollar fee to Medicaid beneficiaries as a condition for any reason, this would be strictly prohibited. Therefore, a facility should not be able to demand a waiver of a constitutional right as the price of admission. The question of enforceability turns on the lack of consideration where the jury waiver provision is not a mandatory part of the Admission Agreement and was not a required pre-condition to admission.

Plaintiffs also rely upon the fact that the federal government at the time prohibited a nursing home from requiring a current resident to sign an arbitration agreement as a condition of continued residency, relying on a policy set forth by the Center for Medicaid and State Operations ("CMS") on January 9, 2003. The memorandum states: "A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. § 483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident." In 2016, the Obama Administration promulgated final regulations that revised and updated the Requirements of Participation, the federal standards of care that nursing facilities must meet in order to be eligible to receive Medicare or Medicaid reimbursement. (**Exhibit 3** – 81 Fed. Reg. 68688 (Oct. 4, 2016)). The Obama rules explicitly prohibit facilities from entering into pre-dispute mandatory arbitration agreement with a resident or resident representative or from requiring a resident to agree to binding arbitration as a condition of admission. The preamble to the final rules includes a lengthy discussion of the reasons that led the Centers for Medicare & Medicaid Services (CMS) to prohibit pre-dispute mandatory arbitration contracts. CMS relied on literature review, review of court decisions involving arbitration and nursing facilities, and public comments it received on the proposed rules. In its careful and measured response to the issue, the Obama

administration's agency did not prohibit post-dispute arbitration agreements or invalidate existing pre-dispute arbitration agreements. It only prohibited pre-dispute arbitration contracts going forward.

In the final rules, the Obama CMS first acknowledged that the nursing home industry overwhelmingly urged the agency not to prohibit pre-dispute mandatory arbitration agreements while "members of the public, advocates, and members of the legal community" predominantly supported a firm prohibition. In addition, 34 Senators, three Representatives, 16 state attorneys general, the American Bar Association, and the American Arbitration Association, among others, all endorsed prohibiting pre-dispute arbitration contracts. Further, the Obama CMS summarized analyses of arbitration in long-term care facilities including:

the unequal bargaining power between the resident and the LTC facilities; inadequate explanations of the arbitration agreement; the inappropriateness of presenting the agreement upon admission, an extremely stressful time for the residents and their families; negative incentives on staffing and care as a result of not having the threat of a substantial jury verdict for sub-standard care; and the unfairness of the arbitration process for the resident.

Thus, the Obama CMS found that arbitration clauses have a detrimental effect on patient safety and that compared to litigation, arbitration as a forum for dispute resolution limits discovery, limits grounds for appeal, is secretive, and does not make decisions publicly available.

42 CFR 483.70(n) prohibited mandatory pre-dispute arbitration in nursing home cases at the time of Armando's admission. The regulation states:

(n) *Binding arbitration agreements.*

(1) A facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility.

Defendants admit that the arbitration agreement was not a condition of admission. Under similar circumstances, the Honorable Judge Perry Buckner held in Holmes v. Bayview that the arbitration agreement was not enforceable. See Judge Buckner's Order (**Exhibit 4**) which states:

Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration. As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission and care) counsel agreed there was none. Here, Defendants cannot have it both ways. **They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.**

The Honorable Judge Diane Goodstein had a similar analysis in Rawl v. West Ashley (**Exhibit 5**):

The Arbitration Agreement was not necessary for admission. **Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement.**

Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. **Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement.** In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. A lack of mutuality also makes the agreement unconscionable. An agreement may lack mutuality where it permits one party to seek relief through the courts, but does not allow the same relief for the

other party. The agreement provides that claims primarily brought by patients, such as those for medical malpractice, claims arising from the provision of services by defendant, and elder abuse claims are to be arbitrated. Defendants argue that the Agreement requires both sides to be bound by arbitration. That is exactly the problem: the only party that is going to bring a “dispute over care” is the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. Since admission is unavailable as a “direct benefit” to support estoppel, Defendants would be required to point to some benefit Mr. Acevedo received from the Arbitration Agreement alone. (See **Exhibit 6 - McKinnon Order**). Any such attempt to find a benefit would have been futile given the Court of Appeals’ unambiguous ruling in Thompson, which held that **“any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement’s] requirement that [resident] waive her right to access the courts and her right to a jury trial.”** 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

IV. The Arbitration Agreement is missing material terms and lacks definiteness, and cannot be enforced without the Court providing material omitted terms which would violate the Federal Arbitration Act and applicable case law.

South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties **with regard to all essential and material terms of the agreement.**¹⁶ The forum chosen for the arbitration to take place is just that, essential and material. Contracts may be rescinded based upon **an omission of some material element affecting the subject matter** or terms and stipulations of the contract.¹⁷ An agreement which neglects material terms may be found unenforceable for indefiniteness.¹⁸ “Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to

¹⁶ Player v. Chandler, 299 S.C. 101, 105, 1989 (citing Hughes v. Edwards, 265 S.C.529 (1975)).

¹⁷ Truck South, Inc. v. Patel, 528 S.E.2d 424, 429 (S.C. 2000).

¹⁸ Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

essential terms will simply not be enforced.” *Id.* In this particular case, even if the contract was validly executed, there was no "meeting of the minds" as to the terms of arbitration, specifically the choice of arbitrator, rules of evidence or allowance of pre-hearing discovery. Defendants have previously taken the position that this very arbitration agreement does not allow for ANY discovery outside the limited powers of the arbitrators under FAA. See **Exhibit 7 - Campsen v. THI of SC Motion for Clarification and/or Protection from Discovery** and **Exhibit 8 - Campsen v. THI of SC Brief in Opposition to Plaintiff’s Motion to Compel** for further argument outlining Defendants’ believed position that the arbitration agreement precludes any pre-hearing discovery.

The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, to say otherwise undermines the purpose of the arbitration process. See the Honorable Judge Kristi Lee Harrington’s Order in Powell v. Fundamental Long-Term Care Holdings, LLC, attached as **Exhibit 9**.

No rules for arbitration were included in the clause or attached to the contract or provided to the Plaintiff. Defendant misrepresents the terms of the agreement in the Memorandum in Support. Defendant’s Memo states:

The Arbitration Agreement includes specific, explicit provisions regarding how an arbitrator is chosen, what rules will govern the arbitration itself, and what types of claims must be submitted to arbitration. Indeed, the Agreement expressly denotes that the arbitration must be conducted in accordance with the South Carolina Alternative Dispute Resolution Rules, which itself contains exacting details such as the location of the arbitration, how evidentiary rulings should be made, when subpoenas can be issued, rules for confidentiality of the proceedings, compensation of arbitrators, and nearly every conceivable aspect of the arbitration itself. (Memo pp.7-8)

This is patently false. The “agreement” states that the parties will agree or the Court will choose but it doesn’t explain how or what criteria should be used to pick an arbitrator. The agreement does not mention any rules that will govern a binding arbitration. The South Carolina ADR Rules do

not state how the arbitration should be governed and Rule 12 only applies to non-binding arbitration agreements. **(Exhibit 10 – ADR Rules)**(Most of the Rules refer only to mediations). The SC ADR Rules do not contain “exacting details” on the rules of evidence, use of subpoenas, and how to proceed with arbitration. There was no “meeting of the minds” as to choice of arbitrator or as to prohibition of discovery or rules of evidence at the arbitration hearing. For these reasons, there is growing resistance to the enforcement of pre-dispute arbitration clauses in printed “contracts” that disadvantage the weaker party in efforts to enforce contractual or statutory rights. For example, the Commission on Health Care Dispute Resolution¹⁹ adopted recommended principles that would allow binding arbitration of disputes involving patients only where the parties agree to do so *after* the dispute has arisen.²⁰ The American Arbitration Association has recently announced that it will no longer accept the administration of cases involving individual patients without a *post-dispute* agreement to arbitrate.²¹ **(Exhibit 11 – AAA Statement)**. Three arbitration organizations (AHLA, NAF and AAA) refuse to participate in contracts similar to the one at bar. **(Exhibit 11 – AAA Statement, Exhibit 12 – NAF Statement, and Exhibit 13 – AHLA Statement)**.

The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court.²² However, “Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not

¹⁹ This was a joint project of the American Arbitration Association, the American Bar Association, and the American Medical Association. See Health Care Due Process Protocol, Draft Final Report, July 27, 1998, available at <http://www.adr.org/upload/LIVESITE/focusArea/Healthcare/healthcare.pdf>.

²⁰ *Id.*, Principle 3: Knowing and Voluntary Agreement to Use ADR.

²¹ AAA Health Care Policy Statement, at https://www.adr.org/sites/default/files/document_repository/AAA_Healthcare_Policy_Statement.pdf (policy effective January 1, 2003).

²² See **Exhibit 2 – Arbitration Agreement**. “The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry.” This language fails to show any type of specific agreement between the parties regarding the selection of an arbitrator and is therefore unenforceable.

be enforced”.²³ As a result, the promise that the dispute “shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules” is moot and ineffective. The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, scheduling, deadlines, discovery issues, costs, expenses, and appeals. None of this was negotiated or discussed by the parties. No agreement or meeting of the minds to material terms exists. Even if there is a valid agreement between Armando and the Defendants, the Court should find that the arbitration clause contained in the Admission Contract at hand is unenforceable because a material part of the arbitration clause exists. There has been no meeting of the minds as to the choice of arbitrator which is the key material term to the whole agreement. The choice of the arbitral forum is one of the most important and material terms in an agreement to arbitrate. (**Exhibit 9 – Harrington Order - Powell v. FLTCH**).

V. The Arbitration Agreement is both procedurally and substantively unconscionable, and should not be enforced even if the Court finds it is a valid agreement.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann. § 36-2-302(1) (2003). In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared

²³ Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

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. See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," Id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17 A Am.Jur.2d Contracts§ 279 (2004))); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

The choice of a nursing home is made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse.²⁴ The need to find a placement arises quickly²⁵ and nursing home admissions are often unplanned; there is little

²⁴ See, e.g., Podolosky v. First Healthcare Corp., 58 Cal.Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (citing Donna Ambrogio, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 258 (1990)); see also Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 N.E. J. on Crim. & Civ. Confinement. 1, 3 (1998) (stating that an older person's move to a nursing home also follows a period of acute hospitalization, when their care giving family is unable to adequately manage the demands of home care).

²⁵ In the 1980's, the government changed the way hospitals were paid for their Medicare patients; since the change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health and Aging 145, 150 (2000). See also Maureen Armour, *A Nursing Home's Good Faith Duty "to" Care: Redefining A Fragile Relationship Using the Law of Contract*, 39 St. Louis L.J. 217, 222 (1994).

time to investigate options or to wait for an opening at a nursing home of choice.²⁶ Time pressure significantly impairs the ability to seek and carefully consider alternatives.²⁷ Mrs. Acevedo had no choice or time in making such a decision. Many facilities lack a coherent admissions process, adding to the chaos surrounding the admission of a resident.²⁸ Residents and their family members do not have time to read and deliberate on the terms of the agreement. An arbitration clause is not part of the core transaction involved in a contract for medical care or service.²⁹ It is not, therefore, likely to get much attention from the non-drafting party.³⁰ As is true in the present action, facilities often present the contract *after* the person decides to apply for admission, rather than beforehand, when the individual can assess the rights affected by the contract.³¹ The Honorable Judge Diane Goodstein found an arbitration agreement unconscionable in similar circumstances in Rawl v. West Ashley Rehab (**Exhibit 5**) based on the following facts that also apply to the circumstances in this case:

1. Resident lacked a meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms.
2. Upon admission the standard Arbitration Agreement form was presented on a take-it-or leave it basis.
3. Resident did not contribute to the drafting of the Arbitration Agreement
4. Resident did possess the bargaining power to negotiate the terms of the Arbitration Agreement.
5. An inherent disparity in bargaining power between the parties to the transaction.

²⁶ Denise Ashbugh Vlosky, et al., “Say-so” as a *Predictor of Nursing Home Readiness*, 93 J. of Family & Consumer Science 59 (2001).

²⁷ Potential residents and their family members can experience panic when they feel there is insufficient time to consider different facilities, and they may choose a facility they would not have chosen if they had more time to weigh their options. Whitton, *supra*, at 150.

²⁸ Donna Ambrogi & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 The Gerontologist 82, 83-88 (1988).

²⁹ See Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 987 (1972) (“The arbitration provision, viewed from the perspective of the patient, is indeed subsidiary to the primary exchange of medical services for an undertaking of payment.”)

³⁰ The drafting party, on the other hand, has a great deal of information about these repetitive transactions and a great deal of incentive to prepare form contracts so that they are optimal from the drafter’s perspective. Melvin Aaron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan.L.Rev. 211, 243 (1995).

³¹ California Advocates for Nursing Home Reform, *Better Read the Small Print! An Analysis of Admission Agreements in California’s Residential Care Facilities for the Elderly* 1 (Mar. 2003).

6. The Arbitration Agreement was inconspicuous.
7. The injuries include wrongful death.
8. Resident did not have sufficient time to allow any meaningful explanation of the terms and significance of the alleged arbitration agreement, considering the number and complexity of admission documents other than that alleged arbitration agreement.³²

The terms of the Arbitration Agreement are unfair and no person would voluntarily agree to them. The arbitration agreement at issue does not allow for any discovery. It does not provide the rules of the arbitration including evidence. The costs of the arbitration are not disclosed. The lack of discovery alone makes the agreement unconscionable *when Defendants possess all the material information about the operation of the nursing home and what happened to Armando at their facility.*

The agreement states that the FAA applies. Because the arbitration agreement is silent as to pre-hearing discovery, the FAA applies and FAA§ 7 prohibits **any** pre-hearing discovery. Under the sole discovery provision of the FAA, arbitrators may summon, in writing, any person as a witness and, in a proper case, may require the witness to bring tangible things and documents to the hearing. 9 U.S.C. § 7. In pertinent part, § 7 reads:

The arbitrators may summon in writing any person to *attend before them* or any of them as a witness and in a proper case to bring with them any book, record, document, or paper which may be deemed material as evidence in the case ... Said summons shall issue in the name of the arbitrator or arbitrators ... and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify *before the court*. If any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators ... are sitting *may compel the attendance of such persons before said arbitrator* .. in the same manner provided by law for securing the attendance of witnesses ... for neglect or refusal to attend in the courts of the United States. (emphasis added).

No other FAA provision discusses any allowed compulsion of witnesses or discovery by the

³² The Admission paperwork included dozens of pages of complicated legal and medical documents for the resident to review and sign. These documents typically include the following: Admission Agreement, Admissions and Re-admissions, Arbitration Agreement, Assignment Agreement, Consent for Release of Medical Records, Consent to Treat, Pharmacy Consultant, Questionnaire, Room and Board Rates, Statement for Disclosures, and Therapy Services.

parties. *See* 9 U.S.C. § 1, *et seq.* In fact, parties to a private arbitration agreement “relinquish the right to certain procedural niceties which are normally associated with a formal trial...*one of these accoutrements is the right to pre-trial discovery.*”³³ A hallmark of arbitration is its limited discovery process. *See Id.* at 391. The “essence of arbitration is its freedom from the formality of ordinary judicial procedure.”³⁴

Arbitration, by its very nature, does not lend itself to discovery outside the parameters set by § 7: “The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one *and its superfluity and utter incompatibility in the other.*”³⁵ As Judge Learned Hand eloquently stated, when [parties] have adopted [arbitration], they must be content with its informalities; *they may not hedge it with those procedural limitations which is precisely its purpose to avoid.* They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.³⁶

Arbitrators alone are afforded the power to call witnesses and subpoena tangible evidence and documents at the hearing. 9 U.S.C. § 7. This power is not extended to the parties to the arbitration. *Burton*, 614 F.2d at 390-91; *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, (7th Cir. 2002) (“[F]or the sake of economy and in contrast to the practice in adjudication, *“parties to an arbitration do not conduct discovery, the arbitrators do”.*) (emphasis added). Put simply, because an arbitrator controls discovery pursuant to the strictures of § 7, Plaintiff has no

³³ *See Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980) (emphasis added).

³⁴ *Harvey Aluminum, Inc. v. United Steelworkers of Am., AFL-CIO*, 263 F. Supp. 488, 491 (C.D. Cal. 1967) (quoting *Canuso v. City of Philadelphia*, 326 Pa. 302, 307, 192 A. 133, 136).

³⁵ *Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957) (emphasis added).

³⁶ *Am. Almond Products Co. v. Consol. Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944) (emphasis added).

right to serve discovery requests upon Defendant. The power granted to the Arbitrator is simply to compel attendance at hearings of witnesses and documents at the hearing.

The Federal Arbitration Act, 9 U.S.C.A. §§ 1-307 does not authorize an arbitrator to subpoena third parties during pre-hearing discovery, absent a showing of special need or hardship.³⁷ The subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA. The statute provides, in pertinent part: “arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material” 9 U.S.C.A. § 7. Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear “before them;” that is, to compel testimony by non-parties at the arbitration hearing. See *id.* The FAA provides that a federal court may “compel the attendance of [a subpoenaed person] before said arbitrator” 9 U.S.C.A. § 7. The enforcement provision does not expand the arbitrator's subpoena authority, which remains simply the power to compel non-parties to appear before the arbitration tribunal. Arbitrators do not have the authority to issue a deposition subpoena or a subpoena *duces tecum* prior to the arbitration hearing itself. In the litigation setting, the power to issue subpoenas derives from the applicable rule of civil procedure. See Rule 45, SCRCPP; Fed. R. Civ. P. 45. The rules speak specifically of “courts” and do not confer similar power to cases in alternative dispute resolution. Power to issue pre-hearing subpoenas is also not provided by the other authorities governing arbitration proceedings.

³⁷ See *Comsat Corp. v. Nat'l Science Foundation*, 190 F.3d 269 (4th Cir., 1999).

Then-Judge Samuel Alito agreed with the Fourth Circuit's position when, writing for the Third Circuit, he concluded FAA Section 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."³⁸

Further the cost of arbitration far outweighs the cost of proceeding in Court and therefore the agreement is unconscionable. (See **Exhibit 14 - Affidavit of Gary W. Poliakoff** and **Exhibit 15 – Affidavit of Marianne Acevedo**). Also, the cost of the arbitration must be paid by the parties including Armando Acevedo who has no money or assets, is now disabled, and is a ward of the State of Florida. Plaintiff does not have the financial wherewithal to pay or prepay arbitration fees. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff.

Although the costs of arbitration may be a basis for determining that an agreement to arbitrate is substantially unconscionable, **since Green Tree the issue of the prohibitive costs of arbitration has developed into a separate defense to the enforcement of an arbitration agreement.** See Zephyr Haven, 122 So.3d at 921–22. "[W]here 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.' " Id. at 921 (quoting Green Tree, 531 U.S. at 92, 121 S.Ct. 513). In determining whether the costs of arbitration in a fee splitting arrangement are so prohibitive as to render the agreement unenforceable because it denies the plaintiff access to the arbitral forum, a case-by-case analysis is appropriate. Id. at 922. **The focus is on the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigating in court, and whether the cost differential is so substantial as to deter the bringing of the claims.** Id. In order to invalidate the arbitration agreement, the plaintiff, at an evidentiary hearing, must show the expected cost of arbitrating the specific claim is greater than litigating it and that the cost of arbitration would be prohibitively expensive. Id.

³⁸ Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); see also CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 708 (9th Cir. 2017) ("we reject the proposition that section 7 [of the FAA] grants arbitrators implicit powers to order document discovery from third parties prior to a hearing"); Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008) (citing Hay Group and finding FAA "does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding").

Fi-Tampa, LLC v. Kelly-Hall, 135 So.3d 563 (Fla. App., 2014)

An arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to “deny a potential litigant the opportunity to vindicate his or her rights.” [Cite omitted] Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (holding that excessive arbitration costs may preclude litigants from effectively vindicating their rights). The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive. [cites omitted] **Whether arbitration is prohibitively expensive is a question of fact that depends on the unique circumstances of each case.** See Harrington, 119 P.3d at 1055 (explaining that “the Supreme Court adopted a case-by-case approach to determining whether fees imposed under an arbitration agreement deny a potential litigant the opportunity to vindicate his or her rights”) (citing Randolph, 531 U.S. at 92, 121 S.Ct. 513). In determining whether arbitration costs are prohibitively expensive, courts have considered several factors. **First, the party seeking to invalidate the arbitration agreement must present evidence concerning the cost to arbitrate. [cite omitted]. This evidence cannot be speculative; it must be based on specific facts showing with reasonable certainty the likely costs of arbitration.** [cite omitted] see also Phillips v. Assocs. Home Equity Servs., Inc., 179 F.Supp.2d 840, 847 (N.D.Ill.2002) (party must make “a reasonable, good faith effort to estimate” arbitration costs). **Second, a party must make a specific, individualized showing as to why he or she would be financially unable to bear the costs of arbitration. This evidence must consist of more than conclusory allegations stating a person is unable to pay the costs of arbitration. Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration.** **Third, a court must consider whether the arbitration agreement or the applicable arbitration rules referenced in the arbitration agreement permit a party to waive or reduce the costs of arbitration based on financial hardship.** *Id.* (holding an arbitration agreement was not substantively unconscionable because, in part, the agreement provided that any claim or dispute would be resolved under the American Arbitration Rules (“AAA”); the applicable AAA rules provided for waiver or reduction in arbitration fees based on “extreme hardship”); Jones v. Gen. Motors Corp., 640 F.Supp.2d 1124, 1134 (D.Ariz.2009) (finding arbitration fee not substantively unconscionable under Arizona law in part because arbitration rules referenced in arbitration agreement provided for waiver and deferral of fees based on financial hardship). We conclude there is reasonable evidence to support the trial court's finding that “[i]n this particular case, Plaintiff has established that he has a fixed, limited income that would make it extremely difficult, if not impossible, to pay to arbitrate the claim.”

Clark v. Renaissance W., LLC, 232 Ariz. 510, 307 P.3d 77, 666 Ariz. Adv. Rep. 29 (Ariz. App., 2013). (**Exhibit 16**).

VI. *The nonmoving Corporate Defendants have not moved to compel arbitration; A stay is not necessary for those Defendants.*

Either all Defendants should be ordered to arbitration or Plaintiffs should be able to go forward with the case against other Defendants and dismiss the Facility. All Defendants are all related entities³⁹ of the nursing home and have a significant relationship in the ownership, operation, and management of the nursing home, and derive significant economic benefits from its revenue. Judge Nettles's Order in Coleman (**Exhibit 17**) covers this issue as well:

Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid portions of the claims along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. **Should this be allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.**

Instructive on this issue is the matter of Birl v. Heritage Care, LLC, 172 Cal.App.4th 1313, 91 Cal. Rptr.3d 777. In Birl a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility sought to compel arbitration. Of relevance, the Court here noted that “(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement.” In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted that “the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not joined to the court action with the other defendants... Different triers of fact in different proceedings could come to different conclusions...” Id. at 1321.

While the circumstances of the current actions differ slightly from those of Birl, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in Birl. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson's estate would be effectively forced to litigate claims arising from the same or related events in two separate forums.

³⁹ Related entity is an industry term that means the entities have common ownership, management, and control.

In Hawthorne v. Fundamental et al., these same Defendants moved to compel arbitration on behalf of the Corporate related entities stating that “The arbitration agreement contractually *is enforceable by each of the moving defendants as either a parent company, agent or as an employee of the facility and legally is enforceable by these defendants under the circumstances* and Pennsylvania law in any event. In addition, Defendants argued that decedent and his estate equitably are estopped from arguing that the arbitration agreement is not binding and enforceable *by each of the defendants.*” See the Honorable Judge Cercone’s Order in Hawthorne (**Exhibit 18**) which states:

Each of the moving defendants are entitled to enforce the arbitration agreement. Plaintiff essentially alleges that each defendant may be held accountable under theories of ownership and control, agency, joint venture and integrated enterprise. Specifically, it is averred that defendants collectively managed the (1) operation, (2) planning and (3) quality control of the facility, which included control over the quality of care provided.

THI of Pennsylvania is a parent corporation of the facility and THI of Baltimore is the parent corporation of THI of Pennsylvania. Fundamental Clinical and Operational Services, LLC, and Fundamental Clinical Consulting, LLC, were agents providing services to the facility. The arbitration agreement is expressly applicable to plaintiff's claims against the facility's parent entities, purposes underlying enactment of the [FAA].”).

A parent company has been forced to arbitrate under a valid and enforceable contract even though the parent company was not a party to the agreement when the subsidiary was a party to the agreement under a theory of equitable estoppel. Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993). Pearson v. Hilton Head Hosp. (S.C. App., 2012). See **Exhibit 19 - Pearson v. Hilton Head Hospital**.

As the Honorable Judge Robin Stillwell decided in Young v. NHC attached as **Exhibit 20** the Corporate Defendants should be included in the arbitration proceedings if a valid and enforceable arbitration agreement is found by the Court:

Further, the Court finds that the Corporate NHC Defendants were intended beneficiaries of the Arbitration Agreement; therefore, the order compelling arbitration of the Survival Action shall also apply to the Corporate NHC Defendants as the allegations against those Defendants are based on the same facts and are inherently inseparable from the claims made against NHC-Mauldin. *See Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000); *see also Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012).

Furthermore, plaintiff claims against all the moving parties are based on a theory of unified operation and control. Each is said to have participated in exactly the same wrongful conduct. Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party “where the interests of such parties are directly related to, if not congruent with, those of a signatory.” Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)). Under all accounts advanced by plaintiff each of the moving parties is a parent entity, agent or employee of the facility that shares a congruent interest. Plaintiff thus presumptively would be able to enforce any judgment from the proceeding against these defendants and in turn each can rely on the principles of agent law and the broad scope of the FAA to compel and participate in the arbitration agreement. Cf. *Id.* (“Where the parties to such a clause unmistakably intend to arbitrate all controversies, which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories.”); Sharp Properties, 998 F.2d at 155 (“Applying Barrowclough [v. Kidder, Peabody & Co.], 752 F.2d 923 (3d Cir. 1985)]’s logic here, because Bared’s and ARI’s interests are directly related, if not in fact congruent, it can fairly be assumed that within the arbitration proceedings

ARI advanced arguments protective of Bared's interests. There is, therefore, no reason to conclude that the Federal Arbitration Act's overarching policy favoring the enforcement of arbitration awards does not apply to this case.”).

In summary, there is no basis for any Stay of the claims against the Corporate Defendants. Plaintiffs will show that the arbitration clause is not valid as to any Defendant. However, should the Court determine that the arbitration clause is valid as to claims against the facility, then Plaintiffs’ claims against the remaining Defendants should proceed, in one forum or another.

VII. CONCLUSION

For the foregoing reasons, Defendants’ Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, must be denied. The claims in this case are not subject to arbitration. In the alternative, should this Court find the arbitration clause to be valid, then this Court should further rule that all claims against the Corporate Defendants are subject to arbitration, or such claims should be allowed to proceed in Court at this time. Under no scenario would a stay be appropriate. All claims should proceed in some forum.

SIGNATURE BLOCK ON FOLLOWING PAGE

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Date: January 30, 2019

Spartanburg, SC

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	
COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
	)	
Armando J. Acevedo, through his	)	
Attorney-In-Fact, Marianne Acevedo,	)	CA No. 2018-CP-42-03421
	)	
Plaintiffs,	)	AFFIDAVIT OF GARY W. POLIAKOFF
	)	
vs.	)	
	)	
Hunt Valley Holdings, LLC; THI of South	)	
Carolina, LLC; THI of South Carolina at	)	
Camp Care, LLC, d/b/a Lake Emory Post-	)	
Acute Care, and Rusty Flathmann,	)	
	)	
Defendants.	)	

Personally appeared before me Gary W. Poliakoff, who having been duly sworn, deposes and states:

1. That he is above the age of 18 years and is competent to execute this Affidavit.
2. That he is attorney for the Acevedo in the above-captioned matter (a case in which the Acevedos allege neglect by a nursing home).
3. That he has been licensed as an attorney in the State of South Carolina for over 41 years (since November of 1977), has handled litigation extensively, is double Board Certified in Civil Trial Advocacy and Civil Pretrial Practice Advocacy by the National Board of Trial Advocacy, has won various professional awards, and has handled nursing home litigation extensively for the last 20 years. (A copy of his Curriculum Vitae is attached hereto as **Exhibit 1**).
4. That he has also handled various matters which have been handled in Arbitration proceedings as well as in trial courts, including nursing home litigation.
5. That, based upon his own experience as well as knowledge obtained in his

profession, the process of Arbitration is often much more expensive, and therefore more burdensome to litigants (particularly to plaintiffs), who are typically unable to pay such costs. Frequently the fees and costs of the Arbitrator or Arbitrators alone can be tens of thousands of dollars, if not hundreds of thousands of dollars, in involved matters. This is compared to trial courts, where a modest filing fee (\$150.00 in State Court; \$400.00 in Federal Court) covers the entire cost to the litigants of the Judge and Jury.

6. As examples of the above:

(A) In Arbitration proceedings in a nursing home neglect case, tried for two weeks before a panel of three Arbitrators in 2013, the total fees and costs of the Arbitrators alone exceeded \$220,000.00. (In State Court, the entire cost for the Judge and Jury to the litigants would have been \$150.00, plus \$25.00 fees for Motions). These Arbitration fees and costs were in addition to all other typical costs of litigation, including but not limited to expert witness fees and costs, travel costs, court reporters fees for depositions, service of process, investigative costs, and others. The costs and expenses for these other litigation needs was as expensive in Arbitration as it would have been in a Court Trial. The difference in overall costs was the amounts paid to the Arbitrators – over \$220,000.00, as opposed to what would have been approximately \$200.00 for filing fees and motion fees in State Court.

(B) In Arbitration proceedings managed by the American Arbitration Association (AAA), utilizing Arbitrators arranged through AAA, in a case several years ago involving students and a for-profit college, the total fees and costs of the Arbitrators and the AAA exceeded \$100,000.00. In that case no hearing on the merits was held, as the matter was ended at the Summary Judgment stage. Said amount covered pre-trial matters

only. This is compared to what would have been a filing fee of \$150.00 in State Court, plus \$25.00 fees for motions. All other litigation costs – expert fees, court reporters fees, travel expenses, service of process, investigation costs, and others – were the same in Arbitration as would have been in Court proceedings.

(C) That the undersigned himself served as an Arbitrator, in an environmental litigation matter in which the parties, post-dispute, agreed to arbitrate a narrowed, specified portion of a pending case, and agreed to the undersigned as the Arbitrator. The fees of the undersigned, to arbitrate said narrowed, specified portion of the case, exceeded \$19,000.00. The comparable cost in Court would have been approximately \$200.00 (\$150.00 filing fee and \$25.00 fees for motions). In that particular matter, Plaintiff and Defendant were both corporations, with educated and sophisticated principals, both ably represented by competent counsel, who, post-dispute, negotiated and determined to submit that narrowed, specified portion of the case to Arbitration. In that case both parties were fully aware of the implications and costs of Arbitration when they negotiated and determined to submit it to Arbitration. In that case both parties were fully able to pay the cost of Arbitration.

7. That the Acevedos are unable to pay such fees and costs for Arbitration. The imposition of such fees and costs upon the Acevedos is overly burdensome and oppressive. The Acevedos have limited income and assets, and imposition of fees and costs of Arbitration would make it extremely difficult, if not impossible, for the Acevedos to pay such fees and costs to arbitrate their case. Arbitration of this matter would be prohibitively expensive.

8. That the undersigned would show that in involved matters such as the case at hand, the fees and costs to arbitrate are so excessive as to deny the Acevedos the opportunity to vindicate their rights. Accordingly, the undersigned would show that Arbitration in this case is

unconscionable.

9. That the undersigned, based on extensive experience in litigation, particularly including nursing home neglect cases, predicts that case presentation of the merits would require approximately two weeks of hearing, preceded by several Motion Hearings, and presentation and review of various Briefs. Based upon experience and acquired knowledge regarding Arbitration, and based upon the issues in this case, the undersigned predicts that the total fees and costs of a single Arbitrator could well exceed \$75,000.00, if not \$100,000.00, in the case at hand. The issues in this case will likely include discovery disputes to be resolved, including but not limited to disputes over nursing home records, corporate records and financial issues. The hearing on the merits will include complex corporate issues, as well as complex clinical issues such as treatment to prevent falls; signs and symptoms of fractured hip, treatment for fractured hip, and causation and damages. The above predictions are based not only on the extensive experience of the undersigned in civil litigation, particularly including nursing home neglect cases, but also on extensive prior litigation against most of the same nursing homes/corporate defendants as in this case, and their law firms. Further, qualified Arbitrators in this area typically charge approximately \$400.00 or more per hour, plus travel costs, to arbitrate similar matters. In the case referred to in paragraph 6(A) above, the Arbitrators charged \$550.00 per hour each.

10. That the Acevedos in the present litigation are unable to pay the likely costs of Arbitration in this case. More specifically, Armando Acevedo has no assets and only a modest Social Security check as income, which is entirely used to pay nursing home expenses. The Attorney-In-Fact, Marianne Acevedo has no significant assets and only modest income and is sole provider for their daughter.

11. That the alleged Arbitration Clause in the present case does not permit a party to

waive or reduce the costs of Arbitration based on financial hardship or any other hardship.

12. In addition to the enormous costs to Arbitrate this case (which would not be charged in court proceedings), it is estimated that the Acevedos will require three or more experts and various witnesses, and other costs of litigation, further imposing financial burdens on the Acevedos.

13. That, based upon extensive litigation experience for over 41 years, including extensive nursing home neglect litigation, and knowledge acquired in this field, as well as experience in Arbitration matters and knowledge acquired in said field, and based upon an understanding of the complex issues involved in nursing home litigation, and more specifically, the complex issues present in the case at hand, it is predicted that the costs of Arbitration (over and above the anticipated costs in litigating this case in any forum) will be enormous. Based upon the limited assets, income and resources of the Acevedos, requiring the Acevedos to Arbitrate this case would significantly impair the ability of the Acevedos to obtain redress for their claims, and would therefore be unconscionable.

SWORN and subscribed to before
me this 30 day of January 2019.

Melanie Waddell
Notary Public for South Carolina
My Commission Expires: 3/8/2023

Gary W. Poliakoff
Gary W. Poliakoff, SC Bar # 4488
Attorney for the Acevedos

MELANIE WADDELL Notary Public, State of South Carolina My Commission Expires March 8, 2028
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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Armando J. Acevedo, through his
Attorney-In-Fact, Marianne Acevedo,

CA No. 2018-CP-42-03421

Plaintiffs,

AFFIDAVIT OF MARIANNE ACEVEDO

vs.

Hunt Valley Holdings, LLC; THI of South
Carolina, LLC; THI of South Carolina at
Camp Care, LLC, d/b/a Lake Emory Post-
Acute Care, and Rusty Flathmann,

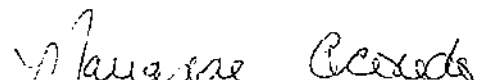
Defendants.

PERSONALLY APPEARED BEFORE ME, THE UNDERSIGNED, AFTER DULY BEING
SWORN, HEREBY STATES AND ATTESTS THAT THE FOLLOWING IS TRUE AND
CORRECT UNDER PENALTIES OF PERJURY:

1. That I am the wife and Attorney-In-Fact for Armando Acevedo.
2. My husband is disabled and presently living in a nursing home facility in Florida and is a Medicaid recipient.
3. Armando is unable to help support the household expenses and the expenses related to raising our daughter.
4. I have no memory of signing an arbitration agreement during the admission process.
5. I have no memory of anyone explaining the arbitration agreement to me during the admission process.
6. The Admission process was quick and occurred while my husband was being transferred into his room. There was no time to review the dozens of pages shown to me.
7. I was under significant pressure to sign all the paperwork so I could return to my husband.
8. I have a daughter who is dependent on me and my income for food, clothing, and shelter.

- 9 That based on my income and assets, I am unable to pay the likely costs of arbitration.
- 10 I live on a fixed income and have no money to spare for arbitration proceedings.
11. I am unable to pay the administrative fee or the arbitrator's fees needed to arbitrate the case.
12. That I am presently employed at Walter Kucaba, DDS, PA.
13. I have been employed there for more than 31 years.
14. I work approximately 32 hours per week.
15. I am paid \$26.00 per hour. I have no other revenue or income.

Executed this ____ day of January, 2019.


Marianne Acevedo

SWORN and subscribed
before me this 29 day of
January 2019.

 (SEAL)
Notary Public for South Carolina

My Commission Expires:

OLIVIA G. WEEKS
Notary Public, State of South Carolina
My Commission Expires Aug. 3, 2028

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	CASE NO. 2018-CP-42-03421
ARMANDO J. ACEVEDO, through his	)	
Attorney-in-Fact, MARIANNE ACEVEDO,	)	
	)	
Plaintiff,	)	
vs.	)	MOTION TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
	)	MOTION TO COMPEL ARBITRATION
HUNT VALLEY HOLDINGS, LLC;	)	
THI OF SOUTH CAROLINA, LLC;	)	
THI OF SOUTH CAROLINA AT CAMP	)	
CARE, LLC, D/B/A LAKE EMORY POST-	)	
ACUTE CARE; and RUSTY FLATHMANN,	)	
	)	
Defendants.	)	

TO: THE HONORABLE J. DERHAM COLE, Presiding Judge, and GARY W. POLIAKOFF, ESQUIRE, and RAYMOND P. MULLMAN, JR., ESQUIRE, POLIAKOFF & ASSOCIATES, P.A., and PATRICK E. KNIE, ESQUIRE, PATRICK E. KNIE LAW OFFICES, Attorneys for Plaintiff

NOW COME Defendants Hunt Valley Holdings, LLC (“HVH”); THI of South Carolina, LLC (“THISC”); and THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post-Acute Care (the “Facility”) (collectively, “Defendants”), by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby move this Honorable Court to alter, amend, and/or reconsider its “Proposed Order Denying Motion to Compel Arbitration,” filed October 21, 2019 (the “Subject Order”).

1. The Subject Order is captioned as a “Proposed” order.¹

Please know that Defendants do not mean to pester the Court with mere trivialities; nor do they contend that the mere presence of the word “Proposed” in the Subject Order affects its validity, as it is obvious on inspection that the Court has adopted (i.e., signed and filed) the Subject

¹ (Subject Order 1.)

Order as its own. It is only out of an abundance of caution, in case the Court has any concern about this apparently inadvertent language confusing the record, that Defendants bring it to the Court's attention here.

2. **Respectfully, the scope of the Subject Order is unclear: Defendants expressly request that the Court clarify whether the Subject Order disposes of the Facility's motion to compel arbitration only or if it also disposes of THISC's motion to stay and/or HVH's motion to dismiss.**

The Facility's motion to compel arbitration was heard on February 1, 2019. Also before the Court were motions by THISC, for a stay of this action pending the outcome of the arbitrability dispute/arbitration proceedings, and HVH, for its dismissal from the case for lack of personal jurisdiction. According to the public index, all these motions were completed on February 1, 2019. (See Exhibit A, attached hereto and incorporated by reference.) Given the interrelated nature of the Facility's motion to compel arbitration and THISC's motion to stay and the fact that these motions, along with HVH's motion to dismiss, were marked as completed together, *Defendants hereby expressly request that the Court clarify the scope of the Subject Order, specifically, that the Court clarify whether the Subject Order disposes of the Facility's motion to compel arbitration only or if it also disposes of THISC's motion to stay and/or HVH's motion to dismiss.*

3. **For all motions disposed of via the Subject Order—be that the Facility's motion to compel arbitration only or THISC's motion to stay and/or HVH's motion to dismiss—Defendants expressly request that the Court (re)consider and expressly rule on each and every distinct issue/argument raised in support of the motion(s) (whether raised in writing, to include, without limitation, in the proposed order that was submitted by Defendants' counsel, or orally), all of which Defendants incorporate 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).

4. The Facility is sufficiently named as a party to the Admission Agreement.

The Subject Order states, “The alleged Arbitration Agreement, purportedly a contract between the Facility and Armando, does not contain the legal name of the Defendant but rather references a name of a nonexistent entity not registered with the South Carolina Secretary of State called ‘Lake Emory Post-Acute Care.’” (Subject Order p. 2.) The significance, if any, of this language is not clear, i.e., it is not clear whether the Court sees this point (which appears only the “Background” section of the Subject Order) as dispositive, but assuming it does, most respectfully, it is mistaken.

As an arbitration agreement covered by the FAA,² the subject Arbitration Agreement “must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to [its] terms[.]” *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011). The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. *Litchfield Co. of S. C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986). Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). “An interpretation which establishes the more reasonable and probable agreement of the parties

² (Subject Order p. 2 (“The FAA applies to its arbitration agreement.”); *see also Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732–33 (2014) (finding the FAA applied to arbitration agreement signed in conjunction with admission to skilled nursing facility because “the terms of the residency agreement implicate interstate commerce and, thus, the FAA”).

should be adopted while an interpretation leading to an absurd result should be avoided.” *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008). For a contract to be ambiguous, “the terms of the contract [must be] *reasonably* susceptible of more than one interpretation.” See *S.C. Dep’t of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (emphasis added); see also *Rodarte v. University of South Carolina*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (“[A]n unambiguous contract is by definition capable of only one *reasonable* interpretation.”) (citation omitted) (emphasis added).

There is no ambiguity about the identification of the contracting parties here. The Arbitration Agreement is not *reasonably* susceptible of more than one interpretation in this regard. The Subject Order itself recognizes that the Arbitration Agreement was “signed . . . during the admission process” (Subject Order p. 1.) Who else but the Facility, i.e., the facility into which Mr. Acevedo was then being admitted, would be the other party to the contract? Moreover, “[a] contract is good between the parties, no matter how incorrect the names used in the paper may be, if it appears they were intended as the names of the parties to be bound by the contract or to receive its benefits.” *Cobb & Seal Shoe Store v. Aetna Ins. Co.*, 78 S.C. 388, 58 S.E. 1099 (1907). Without question, the names of the parties to be bound to the contract at issue, i.e., the Arbitration Agreement, were sufficiently stated/identified here, and refusal to enforce the Arbitration Agreement cannot properly be based on the (supposed) discrepancy at issue.

5. The Subject Order erroneously concludes that the Arbitration Agreement is not enforceable because of a lack of consideration and mutuality.

It is settled South Carolina law that mutual and concurrent promises set forth within a contract afford sufficient legal consideration to validate that contract. *Furman v. Walker*, 124 S.C. 68, 117 S.E.2d 356 (1923); see also *Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) (“Mutual promises ... constitute a good consideration.”); *Johnson v. Spartanburg County Fair*

Ass'n, 201 S.C. 56, 41 S.E.2d 599 (1947); *O'Neil*, 115 F.3d 272, 275 (4th Cir. 1997) (applying South Carolina Law). The rule is no different for mutual, concurrent promises to arbitrate. *O'Neil*, 115 F.3d at 275 (“[A] mutual promise to arbitrate is sufficient consideration for [an] arbitration agreement.”) (emphasis added) (citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996) (emphasis added); accord *Johnson v. Circuit City Stores*, 148 F.3d 373, 378 (4th Cir. 1998)(“[N]o consideration above and beyond the agreement to be bound by the arbitration process [is] required.”); see also *Towles v. United HealthCare Corp.*, 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999) (citing *O'Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration). Moreover, the rule cannot be any different with respect to mutual promises to arbitrate because of the FAA’s requirement that arbitration agreements “must [be] place[d] . . . on equal footing with other contracts” *Concepcion*, 563 U.S. at 339.

Contrary to the conclusion reached in the Subject Order, the Arbitration Agreement is supported by valid consideration in the form of the parties’ mutual, concurrent promises to arbitrate, with each side voluntarily agreeing to waive their right to a jury trial and voluntarily conferring upon the other a right to an alternative dispute resolution process. (See Mem. in Supp. of Mot. to Compel Arbitration at Ex. 1 (“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 claims through or on behalf of Resident.”)). Undoubtedly, these binding promises constitute sufficient consideration under South Carolina; and to conclude otherwise, as the Subject Order does, is to either apply an erroneous legal standard as to what constitutes valid consideration under general South Carolina contract law and/or to erroneously place the Arbitration Agreement on unequal footing with other contracts.

Indeed, the quote from *Thompson v. Pruitt Corp.*, 416 S.C. 43, 60, 784 S.E.2d 679, 688 (Ct. App. 2016), that “any possibly benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement’s] requirement that [the resident] waive her right to access the courts and her right to a jury trial,”³ is plainly erroneous in that it places arbitration agreements on unequal footing from other contracts. Aside from the fact that the *Thompson* Court was discussing the issue of equitable estoppel—not the question of consideration/mutuality—it simply cannot, i.e., as a matter of law, it legally cannot be, the case that mutual promises constitute sufficient consideration to form a binding agreement except in the case of arbitration agreements. This is plainly improper under the FAA. Moreover, the very idea that mutual promises to arbitrate do not effect an exchange of benefits to both sides is irreconcilable with the existence of the “presumption in favor of arbitration agreements” that the Subject Order itself acknowledges. (Subject Order p. 2.) There is no way to square the logic of the quote from *Thompson*—which reflects an overtly hostile view of arbitration—with the undeniable policy preference in favor of arbitration under both South Carolina and federal law. The whole point of arbitration is to make use of an alternative—i.e., outside the traditional litigation process—form of dispute resolution. The giving up—on both sides—of this process (and all that comes along with it) is the benefit; or at the very least where, as here (see Mem. in Supp. of Mot. to Compel Arbitration at Ex. C (Decl. of Darlene Rice)), parties have voluntarily agreed to arbitration, they have made the decision that the benefits of arbitration outweigh the benefits of litigation.

³ (Subject Order p. 6 (emphasis omitted).)

6. **To the extent the Subject Order relies on the premise that admission to the Facility is the consideration supporting the Arbitration Agreement, it is erroneous.**

As explained above (and previously), the parties' mutual, concurrent promises to arbitrate constitute sufficient consideration under South Carolina law to support the Arbitration Agreement.

7. **To the extent the Subject Order relies on the premise that the Arbitration Agreement violates federal regulations, it is erroneous.**

The regulations referenced in the Subject Order speak solely in terms of "consideration as a *precondition of adm[ission]*" (Subject Order p. 7 (emphasis added).) By the Subject Order's own admission, however, the Arbitration Agreement "was *not* a condition of admission." (Subject Order p. 1 (emphasis added).)

8. **The Subject Order's view that "the only party that is going to bring a 'dispute over care' is the patient"⁴ and that the "promise to arbitrate is illusory"⁵ is erroneous.**

To begin with, this view takes an unduly limited view of the scope of the Arbitration Agreement, which does not merely apply to "dispute[s] over care," but to "any controversy of 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" (Mem. in Supp. of Mot. to Compel Arbitration at Ex. A.) Moreover, it simply assumes that the patient/resident could not have their own reasons for preferring the arbitral forum—an assumption which is, here again, irreconcilable

⁴ (Subject Order p. 6.)

⁵ (Subject Order p. 6.)

with the undeniable policy preference in favor of arbitration, as recognized under both state and federal law.

As far as the promise to arbitrate being illusory, again, the Subject Order relies on an impermissibly negative view of arbitration agreements, contrary to be the state and federal policies favoring them and the requirement, under the FAA, that they be placed on equal footing with all other contracts. Moreover, the Subject Order is contradicted by the authorities (cited previously) providing that mutual promises (including, of course, mutual promises to arbitrate) constitute sufficient consideration. Further still, the Subject Order relies upon a concept of illusoriness that is foreign to the general South Carolina law of contracts. A true illusory promise is one which is not really a promise at all. In other words, the promisor has not in fact been bound to anything. For example, A's promise to sell B his car for \$10,000 if he (A) decides he wants to is an illusory promise, A having not actually obligated to do anything other than as he may choose. The promises at issue here (mutual promises to arbitrate) are not illusory. Here, unlike A, both sides have bound themselves to do something, to participate in arbitration in lieu of litigation, transferring and accepting legally enforceable rights and obligations to/from each other. There is nothing illusory about it. *See, e.g., Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 18, 738 S.E.2d 480, 490 (Ct. App. 2013) ("Respondents maintain Columbia Heart's promise to pay \$60,000 in severance after termination was illusory because they will not receive the money if they compete in violation of Article 5. However, a promise is not illusory merely because its enforceability depends upon the performance of a reciprocal promise.").

9. The Subject Order is erroneous in concluding that the Arbitration Agreement is unconscionable and relies upon improper factual premises.

As explained previously, there was, in fact, no absence of meaningful choice. While the Arbitration Agreement was presented by the Facility, as the Subject Order itself admits, it was not

a condition of Mr. Acevedo's admission to the Facility. The Subject Order's reasoning about the difficulties facing family's placing loved one's in nursing facilities etc.⁶ is wholly misplaced. Without question, as, again, the Subject Order expressly acknowledges, the Arbitration Agreement was not a "take it or leave it deal" in that it had to be taken in order for Mr. Acevedo to be admitted. It was offered for voluntarily consideration and was duly accepted, as explained in Ms. Rice's declaration. (See Mem. in Supp. of Mot. to Compel Arbitration at Ex. C.) And, respectfully, it appears from the Subject Order that the Court failed to give Ms. Rice's affidavit meaningful consideration (nowhere is it even mentioned, much less discounted in any way) and instead founded the Subject Order on mere speculation and generalization en route to factual premises that are not supported by the evidentiary record. Indeed, even the Subject Order itself states, "A court should only decide as a matter of law where the parties entered into an agreement to arbitrate when there is no genuine issue of material fact concerning the formation of the agreement." (Subject Order p. 4.) But the Court itself went on to violate this rule by relying on numerous factual premises about which there surely is a genuine dispute of material fact. Here again, please see Ms. Rice's declaration and the very different picture it paints about the circumstances of Mr. Acevedo's admission from that reflected in the Subject Order. Indeed, the Subject Order flat out incorrectly identifies 10 supposedly "*undisputed* facts." (Subject Order p. 11.) In fact, all of these points are either completely disputed or subject to at least some material qualification. For example, Defendants completely deny that there was a lack of a meaningful choice, that the terms of the Arbitration Agreement were oppressive, that the Arbitration Agreement was inconspicuous etc. And even though Arbitration Agreement may be fairly categorized as an adhesion contract, given

⁶ (See Subject Order pp. 10–11.)

that it is form agreement, there is no evidence in the record that any revision was ever proposed or that it would not have been considered if it had.

Lastly, here again, the Subject Order relies on an impermissibly negative view of arbitration agreements to find this one unconscionable, contrary to be the state and federal policies favoring them and the requirement, under the FAA, that they be placed on equal footing with all other contracts. The Court's reasoning effectively establishes a different standard for arbitration agreements than for other contracts and, at that, is founded on the premise that arbitration is intrinsically bad—which is exactly the opposite of the avowed state and federal policy. The Subject Order itself even recognizes the Fourth Circuit's instruction “to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.” (Subject Order p. 9.) Never does it in any way suggest how the Arbitration Agreement is not.

10. The Subject Order is erroneous in concluding the Arbitration Agreement lacks definiteness.

As explained previously, there was, in fact, no absence of meaningful choice. Without question, the Arbitration Agreement clearly sets forth the parties' mutual, concurrent promises to subject the defined “Disputes” to arbitration “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.” All material terms are present, with no need for the Court to have to “supply” any missing terms—asking the Court, as here, to enforce or interpret an agreement is not the same as asking the Court to write the agreement. Moreover, here again, the Subject Order relies on an impermissibly negative view of arbitration agreements to find this one lacking in definiteness, contrary to be the state and federal policies favoring them and the requirement, under the FAA, that they be placed on equal footing with all other contracts. The Court's reasoning effectively establishes a different standard for arbitration agreements than for other contracts and,

at that, is founded on the premise that arbitration is intrinsically bad—which is exactly the opposite of the avowed state and federal policy.

WHEREFORE, for the foregoing reasons (and, for that matter, for all of the reasons previously advanced to the Court in support of Defendants’ motions, whether in written or oral form, all of which Defendants now ask the Court to reconsider and expressly rule upon), Defendants ask that the Court alter, amend, and/or reconsider the Subject Order and either vacate it in favor of an order(s) granting Defendants’ various motions.

PLEASE NOTE: Defendants reserve 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.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

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Attorneys for Defendants

Charleston, South Carolina

October 31, 2019

EXHIBIT

A



Spartanburg County Seventh Judicial Circuit Public Index



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Switch View

Armando Acevedo , plaintiff, et al VS Hunt Valley Holdings, Llc , defendant, et al

Case Number:	2018CP4203421	Court Agency:	Common Pleas	Filed Date:	10/03/2018
Case Type:	Common Pleas	Case Sub Type:	Personal Injury 350	File Type:	Mediator - Jury
Status:	Pending/ADR Sanctions	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:		Disposition Date:		Disposition Judge:	
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Acevedo, Armando	NEF(10-21-2019 12:50:24 PM) Order/Other	Filing		10/21/2019-12:50		
Acevedo, Armando	Order/Other	Order		10/21/2019-12:50		
Acevedo, Armando	NEF(10-09-2019 10:01:09 AM) Proposed Order/Other	Filing		10/09/2019-15:42		
Acevedo, Armando	Order/Order Cover Sheet \$25.00	Filing		10/09/2019-10:01		
Thi Of South Carolina At Camp Care, Llc	NEF(10-08-2019 04:22:13 PM) Answer/Answer	Filing		10/08/2019-16:34		
Thi Of South Carolina At Camp Care, Llc	Answer/Answer	Filing		10/08/2019-16:22		
Lake Emory Post Acute Care	NEF(08-15-2019 11:46:10 AM) Notice/Other	Filing		08/15/2019-13:23		
Lake Emory Post Acute Care	Notice/Other	Filing		08/15/2019-11:46		
Acevedo, Armando	ADR/Notice of ADR	Action		08/08/2019-11:24		
Acevedo, Armando	SENT IN ERROR-FORGOT TO ADD MEDIATORS	Action		08/08/2019-11:21		
Lake Emory Post Acute Care	NEF(06-11-2019 01:25:02 PM) Order/Protection from Court ...	Filing		06/11/2019-13:25		
Lake Emory Post Acute Care	Order/Protection from Court Appearance	Order		06/11/2019-13:25		
Lake Emory Post Acute Care	NEF(06-04-2019 04:10:31 PM) Letter/Letter	Filing		06/06/2019-14:19		
Lake Emory Post Acute Care	Letter/Letter	Filing		06/04/2019-16:10		
Lake Emory	Order/Order Cover Sheet \$25.00	Filing		06/04/2019-		

<https://publicindex.sccourts.org/Spartanburg/PublicIndex/CaseDetails.aspx?County=42&CourtAgency=42002&Casenum=2018CP4203421&CaseType...> 2/4

McPherson IV	of Motions Roster Publication			15:05		
Buckner, Perry McPherson IV	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Buckner, Perry McPherson IV	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Buckner, Perry McPherson IV	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Davis, Donald Jay Jr.	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Davis, Donald Jay Jr.	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Buckner, Perry McPherson IV	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
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Davis, Donald Jay Jr.	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Davis, Donald Jay Jr.	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Davis, Donald Jay Jr.	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Owens, John Joseph	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Owens, John Joseph	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Owens, John Joseph	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Owens, John Joseph	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Buckner, Perry McPherson IV	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Buckner, Perry McPherson IV	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
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Davis, Donald Jay Jr.	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
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Owens, John Joseph	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
Owens, John Joseph	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
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Buckner, Perry McPherson IV	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
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Mullman, Raymond Paul Jr.	2/1/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		01/08/2019- 15:05		
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Raymond Paul Jr.	of Motions Roster Publication			15:05		
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Thi Of South Carolina, Llc	NEF(11-12-2018 06:21:15 PM) Motion/Stay	Filing		11/14/2018-13:12		
Flathmann, Rusty	NEF(11-12-2018 06:13:00 PM) Motion/Dismiss	Filing		11/14/2018-13:11		
Thi Of South Carolina At Camp Care, Llc	NEF(11-08-2018 06:41:11 PM) Notice/Notice of Appearance	Filing		11/14/2018-12:10		
Hunt Valley Holdings, Llc	NEF(11-08-2018 06:36:56 PM) Notice/Notice of Appearance	Filing		11/14/2018-12:08		
Thi Of South Carolina, Llc	Notice/Notice of Appearance	Filing		11/12/2018-18:21		
Thi Of South Carolina, Llc	Motion/Stay	Motion		11/12/2018-18:21	02/01/2019-18:21	
Flathmann, Rusty	Motion/Dismiss	Motion		11/12/2018-18:13	02/01/2019-18:13	
Flathmann, Rusty	Notice/Notice of Appearance	Filing		11/12/2018-18:13		
Thi Of South Carolina, Llc	NEF(11-08-2018 06:44:15 PM) Notice/Notice of Appearance	Filing		11/09/2018-08:33		
Thi Of South Carolina, Llc	Answer/Answer	Filing		11/08/2018-18:44		
Thi Of South Carolina, Llc	Notice/Notice of Appearance	Filing		11/08/2018-18:44		
Thi Of South Carolina At Camp Care, Llc	Motion/Dismiss	Motion		11/08/2018-18:41	02/01/2019-18:41	 
Thi Of South Carolina At Camp Care, Llc	Notice/Notice of Appearance	Filing		11/08/2018-18:41		
Hunt Valley Holdings, Llc	Notice/Notice of Appearance	Filing		11/08/2018-18:36		
Hunt Valley Holdings, Llc	Motion/Dismiss	Motion		11/08/2018-18:36	02/01/2019-18:36	
Acevedo, Armando	NEF(10-26-2018 09:13:21 AM) Service/Acceptance Of Servic...	Filing		10/26/2018-09:19		
Acevedo, Armando	Service/Acceptance Of Service on Rusty Flathmann	Filing		10/26/2018-09:13		
Acevedo, Armando	NEF(10-19-2018 02:34:02 PM) Service/Certificate Of Servi...	Filing		10/19/2018-15:38		
Acevedo, Armando	Service/Certificate Of Service	Filing		10/19/2018-14:34		
Acevedo, Armando	NEF(10-12-2018 03:23:24 PM) Service/Certificate Of Servi...	Filing		10/12/2018-15:25		
Acevedo, Armando	Service/Certificate Of Service	Filing		10/12/2018-15:23		
Acevedo, Armando	Service/Certificate Of Service	Filing		10/12/2018-15:23		
Acevedo, Armando	Summons & Complaint	Filing		10/03/2018-13:24		
Acevedo, Armando	Affidavit/Affidavit of	Filing		10/03/2018-13:24		

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

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-
Circuit Court Case No. 2018-CP-42-03421

Armando J. Acevedo, through his Attorney-in-Fact, Marianne
Acevedo,

Respondent,

v.

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; and
THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory
Post Acute Care,

Appellants.

NOTICE OF APPEAL

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
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Attorneys for Appellants

Other Counsel of Record:

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(843) 614-8888

Attorneys for Respondent

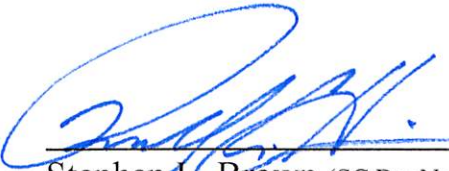
Defendants, Hunt Valley Holdings, LLC; THI of South Carolina, LLC; and THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post Acute Care (collectively, "Appellants"), hereby appeal the following orders of the Honorable J. Derham Cole, Circuit Court Judge:

- Order Denying Motion to Compel Arbitration filed October 21, 2019;
- Form 4 Order regarding Defendants' Motion to Alter, Amend, and/or Reconsider Order Denying Motion to Compel Arbitration filed June 9, 2020; and
- Order Dated June 29, 2020, filed July 10, 2020.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on July 10, 2020.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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Attorneys for Appellants

Charleston, South Carolina

Dated: 8/10/20

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

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Armando J. Acevedo, through his Attorney-in-Fact, Marianne
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Respondent,

v.

Hunt Valley Holdings, LLC; THI of South Carolina, LLC; and
THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory
Post Acute Care,

Appellants.

PROOF OF SERVICE

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Attorneys for Appellants

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the Appellant above named, do hereby certify that I have served the **NOTICE OF APPEAL** on the above-named Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on August 10, 2020, addressed as follows to Respondent's counsel (and via E-filing the Notice of Appeal in the lower court, which will also effect service of the Notice of Appeal on Respondent's counsel):

Poliakoff & Associates, P.A.
Gary W. Poliakoff, Esquire
Raymond P. Mullman, Jr., Esquire
Edward John Waelde, Esquire
P.O. Box 1571
Spartanburg, SC 29304
Attorneys for Respondent

YOUNG CLEMENT RIVERS, LLP

By:



Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellants

Charleston, South Carolina

Dated: 8/10/20

RECEIVED

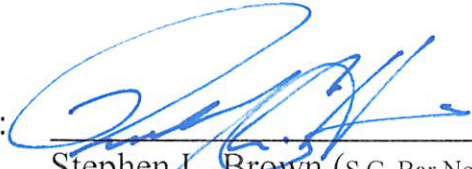
Mar 22 2021

Certificate of Counsel

SC Court of Appeals

The undersigned counsel for Appellants 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.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: 

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Attorneys for Appellants

Charleston, South Carolina

March 22, 2021