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SC Court of Appeals

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

Appeal from Greenville County
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2020-CP-23-01728
Appellate Case No. 2022-000398

Debbie Stroud,
Guardian ad Litem for James C. Stroud,

Respondent,

v.

THI of South Carolina at Greenville, LLC
d/b/a Magnolia Manor-Greenville,
THI of Baltimore, Inc., and
THI of South Carolina, LLC,

Appellants.

RECORD ON APPEAL

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¹ The "Facility" refers to Defendant/Appellant THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor-Greenville.

² "THIB" refers to Defendant/Appellant THI of Baltimore, Inc.

³ "THISC" refers to Defendant/Appellant THI of South Carolina, LLC.

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2301728

Debbie Stroud et al
PLAINTIFF(S)

THI Of South Carolina At Greenville LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

Matter was taken under advisement by the Court. Attorney Charles Daniel Pruitt and Ross Hines to submit proposed orders within 30 days from the date of this order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/30/2021 .

Alexandra Jordan Ginsburg for THI Of South Carolina At Greenville LLC, THI Of South Carolina LLC, THI Of Baltimore Inc, Magnolia Manor - Greenville

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Greenville Common Pleas

Case Caption: Debbie Stroud , plaintiff, et al vs. THI Of South Carolina At Greenville LLC , defendant, et al

Case Number: 2020CP2301728

Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2020-CP-23-01728
	)	
Debbie Stroud, Guardian ad Litem for	)	
James C. Stroud,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	ORDER
THI of South Carolina at Greenville, LLC	)	
d/b/a Magnolia Manor - Greenville, THI of	)	
Baltimore, Inc., and THI of South Carolina,	)	
LLC,	)	
	)	
Defendants.	)	
	)	

Hearing Date:	June 29, 2021 at 2 PM
Hearing Judge:	Alex Kinlaw, Jr.
Counsel for Plaintiff:	C. Daniel Pruitt
Counsel for Defendants:	Russell G. Hines

This matter was before the Court on Tuesday, June 29, 2021 at 2 pm in Greenville, South Carolina, the Thirteenth Judicial Circuit upon Defendants' Motions to Dismiss and Compel Arbitration. Attorney C. Daniel Pruitt was present representing the interests of Plaintiff. Russell G. Hines of Young, Clement, Rivers, LLP was present representing the interests of Defendants.

Procedural Background and Facts

James C. Stroud, a Medicare recipient, was admitted to Magnolia Manor of Greenville (hereinafter Defendants' facility) on March 6, 2017. According to the allegations of the Complaint, which was filed with the Court on March 19, 2020, while a resident of Defendants' facility, Mr.

Stroud experienced a series of falls with resulting injury and other circumstances that deviated from the accepted standard of care.

As part of the admissions process, Defendants' representative required Mrs. Debbie Stroud, Mr. Stroud's wife, to sign the Facility- Resident/Representative Arbitration Agreement on March 3, 2017. Defendants' Ex. A. Notably, the agreement is signed only by Debbie Stroud, in her representative capacity, not by James C. Stroud, the resident.

Defendants have filed Motions to Dismiss and to Compel Arbitration or in the alternative for additional time to conduct discovery on the issue of the arbitration issue. Defendants filed the Admission Agreements and the Arbitration Agreements in question. In addition, the Defendants filed the relevant Power of Attorney which Mr. Stroud executed in favor of his wife Debbie Stroud and which the Defendants were provided at the time of Mr. Stroud's admission. Defendants did not file any Affidavits or Deposition testimony in support of their Motions.

Law and Analysis

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause"). The courts, not arbitrators, are charged with deciding certain "gateway matters," including "whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy." Simpson, 373 S.C. at 23, 644 S.E.2d at 668; See also New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

I. Whether Debbie Stroud had actual or apparent authority to sign the Arbitration Agreements for James Stroud .

In deciding a motion to compel arbitration, the Court looks to contract law to determine whether a valid and enforceable contract to arbitrate has been entered by the parties. "[A]rbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. See Gaddy v. Douglass, 359 S.C. 329, 344-45, 597 S.E.2d 12, 20 (Ct. App. 2004). "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney." Watson v. Underwood, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting In re Thames, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)). "Our courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney." Stott v. White Oak Manor, Inc., 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019).

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Id.* (quoting Watson v. Underwood, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting Watson, 407 S.C. at 455, 756 S.E.2d at 161).

Earlier this year, our Supreme Court ruled that the specific language of a Power of Attorney determines whether the principal has authorized his attorney-in-fact to execute an agreement for binding arbitration. Arredondo v. SNH Ashley River Tenant, LLC, Op. 28011, S.C. Filed March 10, 2021. Absent the grant of such authority, the Attorney-in-Fact has no authority or legal capacity to enter the arbitration agreement in question. The arbitration agreement is invalid and unenforceable if the Attorney-in-Fact had no authority to waive the right to jury trial or enter an arbitration agreement. Arredondo at 2. In Arredondo, the Supreme Court made clear that the beginning of the inquiry is to read a relevant Power of Attorney and determine not just whether the Power of Attorney appears broad but whether the language can be read so as to conclude that it grants unto the attorney in fact the authority to enter an agreement to waive the right to jury trial and replace the resolution of disputes with binding arbitration before any actual dispute even arises. *Id.*

In the present case, this Court must examine the relevant Power of Attorney which the Defendants filed with the Court. Article VII of the Power of Attorney signed by Mr. Stroud in favor of his wife on November 22, 2016 contains specific restrictions on the authority granted by Mr. Stroud to his attorney-in-fact. Section (6) provides as follows:

Reservation of Right to Trial by Jury. I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements.

Durable Power of Attorney of James C. Stroud, Article VII, paragraph (6)(emphasis in original).

As a result of the specific restrictions in Mr. Stroud's Power of Attorney, the present case is an even stronger case for denial than the one at issue in the recent Supreme Court reviewed in Arredondo cited above. Here, the Power of Attorney document, in clear and unambiguous language, specifically states that the Principal chose **not** to grant the power to waive the right to jury trial or enter into arbitration agreements. The plain language of the Power of Attorney controls. The Arbitration Agreement is not valid or enforceable because it is expressly beyond the scope of authority granted to Mrs. Stroud by her husband. Mrs. Stroud had no authority, express or apparent, to enter the agreement for binding arbitration in question here.

The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that "a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption." Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), rev'd on other grounds, citing Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982); Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986).

South Carolina law requires that to prove apparent authority, the Defendants must show "... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id. The present case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do such. In all three cases, the Courts found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. See Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). The present case is nearly identical to Hodge and Thompson.

Here, the Defendants have submitted no evidence that Mr. Stroud said or did anything other than the clear restrictive language contained in the Power of Attorney. The clear language of the

present Power of Attorney controls. Defendants' representative had an obligation of due diligence to review the Power of Attorney to determine whether in fact Mrs. Stroud had authority granted to her to sign the Arbitration Agreement. A simple review of the Power of Attorney would make clear that such authority was simply beyond the scope of authority granted to Mrs. Stroud.

II. Whether a mandatory agreement for binding arbitration is enforceable where the resident in question is a recipient of Medicare.

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50,53 n.2, 426 S.E.2d 760, 762 n.2 (1993). "The general rule is that courts will not enforce a contract is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare reimbursement rates as payment in full. See 42 C.F.R Section 489.30; 42 C.F.R. Section 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. Section 1396r(c)(5)(A)(iii).

Clearly here, it is undisputed that Mr. Stroud was a recipient of Medicare at the time of his admission and throughout his stay at Defendants' facility and the Defendants' facility was billing and accepting payment from Medicare for Mr. Stroud's care. As such, the purported agreement for binding arbitration which the facility mandated that Mrs. Stroud sign is not valid or enforceable because by its terms it violates federal law.

III. Whether the agreement for binding arbitration was not valid or enforceable where not supported by valuable consideration.

It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) (“a contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act”). Consideration 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.” Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).

The clear language of the purported arbitration agreement makes clear that the Defendants required Mrs. Stroud to sign as condition of admission to their facility. As such, this requirement was a clear violation of Federal Law. 42 U.S.C. Section 1396r(c)(5)(A)(iii) prohibits a facility such as Defendants’ from soliciting or accepting “any other consideration” as a condition to admission outside of the Medicare payments when admitting a patient in Mr. Stroud’s position. By requiring Mrs. Stroud to sign the document attempting to require waiver of the right to jury trial as a condition of admission, Defendants were requiring and accepting consideration in addition to Medicare payments. Therefore, the arbitration agreement in question is not valid or enforceable.

IV. Whether the Defendants are entitled to conduct discovery as to the Arbitration Agreement.

The Defendants had the burden to prove that there was an enforceable Arbitration Agreement. Defendants had the opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration. This case was pending for a sufficient period such that Defendants’ could have prepared Affidavits or taken limited Depositions on any issues related to the Arbitration issue. The Court noted in Hodge, discovery issues are within the discretion of the trial court. Hodge

v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018). Further, as noted in Hodge, additional discovery would likely not change the outcome of the Court's decision as issues related to Mrs' Stroud's actions are not relevant to any implied or apparent authority. Id. It is the actions of Mr. Stroud that would be relevant; therefore, discovery is not necessary as the discoverable information would not change the outcome of the Court's decision as the discovery issues would not be dispositive. The actual language of the Power of Attorney which was submitted here is dispositive.

Conclusion

After careful consideration of the pleadings, motions, memoranda, documents filed, and arguments of counsel, I find that there is no valid Arbitration Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendants' Motions to Dismiss and Compel Arbitration are denied; and further

Defendants' Motion to Conduct additional discovery as to the Arbitration Agreement issue is denied.

IT IS SO ORDERED.

Honorable Alex Kinlaw, Jr.
Resident Judge, Thirteenth Circuit

Dated:
Greenville, South Carolina



Greenville Common Pleas

Case Caption: Debbie Stroud , plaintiff, et al vs. THI Of South Carolina At Greenville LLC , defendant, et al

Case Number: 2020CP2301728

Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Debbie Stroud, Guardian ad
Litem for James C. Stroud,
Plaintiff

vs.

THI of South Carolina At
Greenville, LLC d/b/a Magnolia
Manor-Greenville, THI of
Baltimore, Inc., and THI of
South Carolina, LLC,
Defendants

IN THE COURT OF COMMON PLEAS

2020-CP-23-01728

ORDER DENYING DEFENDANTS' MOTION
TO ALTER, AMEND OR RECONSIDER

22 MAR 1 PM 2:19
Paul Wickensimer COC GUL SC

This matter was originally heard by the Court on June 29, 2021 with an order being filed with the Court dated August 17, 2021. The Court previously denied Defendants' Motion but an order was not filed with the Office of the Clerk. The Court finds nothing in its review of the prior order as well as the record which would warrant an amendment or revision of its original order. Therefore, the Defendants' Rule 59(e) Motion is Respectfully Denied.

Greenville, South Carolina
February 28, 2022


Alex Kinlaw, Jr.
Circuit Court Judge

Copy mailed to

Attorneys: Charles Pruitt, Alexandra Ginsburg,
on 3 1 2022. Matthew Riddle

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2020-CP-23-_____

Debbie Stroud, Guardian ad Litem for)
 James C. Stroud,)
)
 Plaintiff,)

v.)

SUMMONS

THI of South Carolina at Greenville, LLC)
 d/b/a Magnolia Manor - Greenville, THI of)
 Baltimore, Inc., and THI of South Carolina,)
 LLC,)
)
 Defendants.)

TO THE DEFENDANTS ABOVE NAMED:

You are hereby summoned and required to answer the Complaint herewith served upon you, which was filed in the Office of the Clerk of Court, and to serve a copy of your answer to same upon the subscriber at 300 Pettigru Street, Greenville, South Carolina 29601, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer within that time, the Plaintiff will apply to the Court for the relief demanded herein.

Respectfully Submitted,

s/ C. Daniel Pruitt

Bar # 66497

Attorney for Plaintiff

300 Pettigru Street

Greenville, South Carolina 29601

(864) 232-4273

danlaw@bellsouth.net

Dated: March 19, 2020
 Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2020-CP-23-_____

Debbie Stroud, Guardian ad Litem for
James C. Stroud,

Plaintiff,

v.

THI of South Carolina at Greenville, LLC
d/b/a Magnolia Manor - Greenville, THI of
Baltimore, Inc., and THI of South Carolina,
LLC,

Defendants.

**COMPLAINT
(JURY DEMANDED)**

The Plaintiff, by and through her undersigned counsel, for a Complaint against the Defendant, does hereby respectfully allege as follows:

PARTIES

Plaintiff

1. The Plaintiff, Debbie Stroud, is a citizen and resident of the County of Greenville, State of South Carolina and is the spouse and duly appointed Guardian ad Litem for James Stroud. She brings this action on behalf of James Stroud for damages recoverable pursuant to §15-5-90, Code of Laws of South Carolina (1976).

2. Before filing this Complaint, Plaintiff filed a Notice of Intent along with an Affidavit of Karen Coleman in accordance with the South Carolina Code of Laws. A copy of this Affidavit is attached as "Exhibit A".

Defendant

3. Upon information and belief, THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor - Greenville (hereinafter "Defendants") is a for profit corporation

incorporated under the laws of the State of South Carolina and is licensed and doing business in the County of Greenville, State of South Carolina.

4. Upon information and belief, THI of Baltimore, Inc. (hereinafter “Defendants”) is a for profit corporation incorporated under the laws of the State of Maryland and is licensed and doing business in the County of Greenville, State of South Carolina.

5. Upon information and belief, THI of South Carolina, LLC (hereinafter “Defendants”) is a for profit corporation incorporated under the laws of the State of South Carolina and is licensed and doing business in the County of Greenville, State of South Carolina.

6. Upon information and belief, Defendant own and operate a long-term care facility located at 411 Ansel Street, Greenville, South Carolina.

7. Defendants’ facility delivers nursing home care for a fee and had authority, express or implied, to control the means and agencies employed to execute the delivery of nursing home care to the decedent during her residency at Defendants’ facility.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

8. At all times material to this complaint, the decedent was residing at the facility known as Magnolia Manor-Greenville.

9. The Plaintiff is informed and believes that at all times material to this Complaint that all of the employees of Defendants’ facility were acting within the course and scope of their employment in regard to their care and treatment of James Stroud.

10. The Plaintiff is informed and believes that at all times material to this Complaint the Defendants’ employees and/or agents were acting on behalf of or, in place of Defendant(s) in making decisions regarding the care of James Stroud.

11. At the time of his admission to Defendants' facility, Mr. Stroud was dependent upon the care provided by employees and agents of the Defendants' facility in order to live his life.

12. Upon information and belief, Defendants were licensed under the laws of the State of South Carolina and were required to provide reasonable and prudent nursing home care to Mr. Stroud.

13. Defendants' facility had an obligation to employ nursing assistants, nurses and other personnel who were qualified to render reasonable care to a patient in the condition of James Stroud.

14. Upon information and belief, Defendants' facility failed to assign sufficient staff to ensure that all necessary care was delivered to James Stroud.

15. Upon information and belief, Defendants' facility failed to ensure that the proper treatment and standard of care was delivered to Mr. Stroud.

16. Upon information and belief, Defendants' facility failed to properly train, monitor and supervise the staff necessary to provide a reasonably prudent standard of care to James Stroud.

17. On or around March 6, 2017, Mr. James Stroud was admitted to the Defendants' facility for rehabilitation. On admission to Defendants' facility, his skin was assessed and he was found to have a Stage IV pressure ulceration to his sacrum, which remained present for the duration of his stay at Defendants' facility. While at the Defendants' facility, Mr. Stroud also developed a deep tissue injury to his left heel.

18. Mr. Stroud suffered from diagnoses of Dementia with Lewy bodies, a severe case of Parkinson's disease, and had been diagnosed with Cognitive communication deficit. In addition to Dementia, Mr. Stroud had severe aphasia which caused mumbled, unintelligible speech and incomprehensible words. His cognitive and communication

problems resulted in him having difficulty understanding others, poor communication, and poor ability to express his wants and needs to staff. Thus, the staff at the Defendants' facility had a duty to anticipate and meet the needs of Mr. Stroud.

19. During his residency at the Defendants' facility, Mr. Stroud required complete and total care by staff to ensure that all of his needs related to his activities of daily living were met; these included the need for one to two (1-2) staff members to provide for his turning and repositioning needs, as well as the use of a Hoyer lift for transfers.

20. While at Defendants' facility, Mr. Stroud also required a catheter for the majority of the time. In addition to this, he was also incontinent for all of his hygiene and toilet needs; as such, he relied on the staff at the Defendants' facility to provide for these needs. While Mr. Stroud was under the care of the staff at Defendants' facility, he was provided with anticoagulation medications. The use of anticoagulation medications increased the risk of spontaneous bleeding if Mr. Stroud were to fall and be injured. Therefore, the staff at Defendants' facility had an increased responsibility and duty to be diligent when caring for Mr. Stroud, to reduce the risk of injury to this total care resident.

21. During his time at Defendants' facility, Mr. Stroud developed several UTIs. On or around October 2018, he became septic from a Urinary Tract Infection (UTI), as his admitting diagnosis to St. Francis included sepsis due to E. Coli UTI. He also had a UTI, when he was admitted to St. Francis on or around May 11, 2019.

22. On or around August 16, 2017, Mr. Stroud fell out of his bed. A resident CNA called for someone to come and help. When Stacey Whitfield, RN, entered Mr. Stroud's room, the nurse found Mr. Stroud on the floor with blood coming from his head. She then turned Mr. Stroud over and observed a cut above his right eye, which was very painful to him. Pressure was applied to the site to help stop the bleeding and an order was

received from Michele Sweet, NP, to send Mr. Stroud to the hospital for further evaluation.

23. On or around August 16, 2017 at 4:09 PM, the staff of Defendants' facility requested EMS assistance, as Mr. Stroud's fall resulted in a right forehead hematoma. A staff member at Defendants' facility reported that Mr. Stroud had rolled out of the bed, landed on his right side, and hit the right side of his head. No loss of consciousness was reported, but bleeding was noted from the painful hematoma on his forehead. Bleeding was controlled with gauze prior to the arrival of EMS.

24. In the emergency room at St. Francis, EMS gave report to Nurse Tracey L. Lehman-Mallory; this report included the presence of a hematoma to Mr. Stroud's forehead, as well as a laceration to his right forehead and two smaller lacerations above and to the side of the large laceration. While in the ER, blood was spraying from the laceration/arterial bleed; pressure was again applied to the area to control the bleeding.

25. When seen in the ER by Dr. Dat Thanh Ta, history provided by EMS and Mrs. Stroud included that she had been told that Mr. Stroud had turned and rolled off of the bed, hitting his head on the ground. Mrs. Stroud reported that she was informed of this by way of telephone, and that she was told that a staff member was unable to prevent the fall from occurring. Following the fall, Mr. Stroud was reported to have an altered mental status and decreased level of consciousness. Visible post fall injuries included two large lacerations to the right forehead, as well as an arterial bleed from a laceration on the right side of the patient's forehead. Periorbital and facial bruising were also noted; the swelling caused his eyes to be swollen shut. Additional injuries included, but were not limited to: significant bruising to both arms, a large skin tear to the right elbow with several layers of skin removed, as well as skin tears to the right hand, right wrist and lower forearm, left elbow, and right lateral leg and calf. The two large lacerations to his

forehead were sutured in the ER. Mr. Stroud's admitting labs were also consistent with dehydration.

26. Due to the recent and significant fall that altered his mental status, use of anticoagulants, and two lacerations to the right side of his head, a CT scan of Mr. Stroud's head was performed in the emergency room on or around August 16, 2017. The results of the CT scan revealed that Mr. Stroud was suffering from severe intracranial hemorrhaging. Because of the traumatic intracranial hemorrhage, with the most likely cause of the bleeding being fall related, Mr. Stroud was admitted to the Intensive Care Unit. Mr. Stroud's admitting diagnosis to St. Francis included a fall from the bed followed by a traumatic head injury, lacerations to his head, intracranial hemorrhage, and traumatic stupor and coma greater than an hour with major complications and comorbidity.

27. A repeat CT scan on or around August 17, 2017 revealed worsening of the intracranial bleed. Neurosurgery deemed Mr. Stroud's condition as inoperable. Verbal and non-verbal signs of pain were noted while Mr. Stroud was hospitalized. Non-verbal indicators of pain included, but were not limited to: whimpering, guarding, constant frown, clenched jaw, quivering chin, grimacing, frowning, wrinkling of his forehead, tearing at intervals, and restlessness.

28. On or around August 17, 2017, Mrs. Stroud was made aware of how the current brain hemorrhage changes the prognosis for Mr. Stroud significantly. Much like his condition at Defendants' facility, while at St. Francis, Mr. Stroud was noted to be completely immobile, non-ambulatory, non-weight bearing, bed-fast, and in need of total care.

29. While Mr. Stroud was hospitalized at St. Francis, during a conversation with the hospital staff, Mrs. Stroud voiced her concern regarding how Mr. Stroud could

have experienced a fall from the bed at the Defendants' facility since Mr. Stroud is unable to move. Mrs. Stroud also told the case manager, that she had pictures and was fretful of possible neglect by the staff that led to his fall that resulted in Mr. Stroud's admission to St. Francis hospital. Although Mrs. Stroud wanted her spouse sent to a different long-term care facility at the time of his discharge from St. Francis, the case manager advised Mrs. Stroud that her best option was to allow Mr. Stroud to return to the Defendants' facility and then request a transition to a different facility. Mrs. Stroud agreed to allow Mr. Stroud to return to the Defendants' facility because she did not want to lose long term placement and she planned on going to the Defendants' facility every day to check on Mr. Stroud.

30. Mr. Stroud was discharged back to the Defendants' facility on or around August 22, 2017. On or around September 12, 2017, Mr. Stroud was seen by his neurologist, Dr. Fredy Jesus Revilla. At the time of this visit, Mrs. Stroud reported to the doctor that since her husband was last seen by Dr. Revilla, Mr. Stroud had fallen on August 16, 2017. Mrs. Stroud further reported that since the fall, Mr. Stroud was not back to his baseline, as she had noticed increased rigidity and more contractures with a general worsening of his symptoms. Assessment by Dr. Revilla revealed that Mr. Stroud was making a slow recovery following the traumatic head injury.

31. On or around October 27, 2017, Nurse Morton, LPN was on duty. It was at this time that Mr. Stroud was found on floor next to his bed in between his mattress and bed-rail. He was noted to have a small abrasion to the left side of his neck, an abrasion to the top of his left foot, and a bleeding loose tooth in the top of his mouth. Mrs. Stroud wanted him sent to the emergency room for evaluation. Therefore, an order was obtained from Michele Sweet, NP, and EMS was called for transport.

32. On or around October 27, 2017, Mr. Stroud was sent to St. Francis. Upon arrival it was reported to the ER staff that Mr. Stroud, who was non-ambulatory and bedridden, was found out of his bed on the floor at the Defendant's facility. It was not known if he hit his head or not when he fell. Imaging studies were negative for any fractures. The CT scan of the head revealed resolution of the right temporal hematoma and intraventricular hemorrhage, as well as a developing right temporal encephalomalacia. Following evaluation, Mr. Stroud was sent back to the Defendants' facility.

33. While in the care of the staff at Defendants' facility, in addition to his falls, Mr. Stroud encountered multiple skin tears. Also, while at Defendants' facility, prior to the insertion of a feeding tube, Mr. Stroud was found to have blood labs consistent with dehydration and was provided fluids through an IV on multiple occasions. On arrival to St. Francis on or around October 5, 2018, before feeding tube insertion, one of his admitting diagnoses was dehydration.

34. While hospitalized on or around October 5, 2018 through October 19, 2018, Mr. Stroud had a feeding tube placed. From this point forward, while at Defendants' facility, he was fed and provided with fluids by way of a feeding tube. After feeding tube insertion, Mr. Stroud still became dehydrated and malnourished. He also had other incidences of elevations in his BUN (Blood Urea Nitrogen) after his feeding tube was placed.

**FOR A FIRST CAUSE OF ACTION
(Negligence – Survivorship Action)**

35. Plaintiff reiterates and realleges paragraphs 1 through 34 as though set forth herein verbatim.

36. The Defendants had an obligation to employ nursing assistants, nurses and other personnel who were qualified to render reasonable care to a patient in the condition of Mr. Stroud.

37. While James Stroud was under the care of Defendants' facility, said Defendants departed from the prevailing professional standards of care and treatment and were thereby negligent, careless, grossly negligent, reckless and acted in violation of the duties owed to Mr. Stroud in that they committed one or more of the following acts of omission or commission, any and all of which were departures from the prevailing professional standards of care:

- (a) Failure to provide diligent care during the provision of activities of daily living.
- (b) Failure to provide two-person, total staff assistance with bed mobility
- (c) Failure to have a care plan in place to direct staff of the level of assistance and number of staff required to safely meet his bed mobility needs.
- (d) Failure to report the fall with head trauma and intracranial hemorrhage to Department of Health and Environmental Control.
- (e) Failure to provide total staff assistance with meal and fluid intake.
- (f) Failure to care plan the need to provide total staff assistance with meal and fluid intake.
- (g) Failure to document and record fluid and meal intake on a consistent daily basis.
- (h) Failure to care plan the need to document meal and fluid intake daily on each shift.
- (i) Failure to maintain adequate records to verify water flushes and tube feeding amounts provided on each shift, after the feeding tube was inserted.
- (j) Failure to adhere to the written plan of care.
- (k) Failure to provide meal substitutes, when intake of meals was 50% or less and failure to care plan this need.
- (l) Failure to put forth all necessary measures to prevent urinary tract infections.

- (m) Failure to provide medications and treatments, as per physician's orders.
- (n) Failure to provide necessary measures to promote wound healing and prevent additional pressure ulcerations from forming.
- (o) Failure to provide and maintain complete, adequate and consistent medical records.
- (p) In such other particulars as may be ascertained through discovery procedures undertaken pursuant to the South Carolina Rules of Civil Procedure.

38. As a direct and proximate result of the negligent, careless, willful, reckless, wanton, and grossly negligent care and departure from the professional standards of care by defendants, Mr. Stroud suffered from severe debilitating injuries which resulted in his pain and suffering

WHEREFORE, Plaintiff respectfully prays for judgment against the Defendant for actual damages, punitive damages, special damages and consequential damages, in an amount to be determined by the jury at the trial of this action, attorneys fees and treble damages for violations of South Carolina Code §39-5-10 et seq., the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

s/ C. Daniel Pruitt

Bar # 66497

Attorney for Plaintiff

300 Pettigru Street

Greenville, South Carolina 29601

(864) 232-4273

danlaw@bellsouth.net

Dated: March 19, 2020
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
DEBBIE STROUD, GUARDIAN AD	)	CASE NO. 2020-CP-23-01728
LITEM FOR JAMES C. STROUD,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	THI OF SOUTH CAROLINA AT
	)	GREENVILLE, LLC D/B/A MAGNOLIA
THI OF SOUTH CAROLINA AT	)	MANOR- GREENVILLE’S ANSWER TO
GREENVILLE, LLC D/B/A MAGNOLIA	)	PLAINTIFF’S COMPLAINT
MANOR-GREENVILLE, THI OF	)	
BALTIMORE, INC. AND THI OF	)	
SOUTH CAROLINA, LLC,	)	
	)	
DEFENDANTS.	)	
	)	

TO: C. DANIEL PRUITT, ATTORNEY FOR PLAINTIFF:

The Defendant, THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor – Greenville (hereinafter “this Defendant”), *subject to and without waiving its 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 form an opinion as to the truth of the allegations contained in Paragraph 1 of the Complaint and therefore denies the same and demands strict proof thereof. To the extent the allegations contained in Paragraph 1 of the Complaint call for legal conclusions, no response is required. To the extent the allegations

allege liability or damages caused by this Defendant, they are denied. Any and all remaining allegations set forth in Paragraph 1 are denied and strict proof thereof is demanded.

3. This Defendant admits the allegations in Paragraph 2 that Plaintiff filed a Notice of Intent along with an Affidavit of Karen Coleman but denies any and all other allegations set forth in Paragraph 2, including but not limited to any and all allegations contained in such Notice of Intent and accompanying Affidavit.

4. This Defendant admits the allegations set forth in Paragraph 3 of Plaintiff's Complaint only insofar as it is alleged that this Defendant is licensed to do business in Greenville County and the State of South Carolina. Any and all remaining allegations set forth in Paragraph 3 of Plaintiff's Complaint are denied. This Defendant would further assert that it is a limited liability company organized and existing under the laws of Delaware.

5. The allegations set forth in Paragraphs 4 and 5 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required.

6. This Defendant admits the allegations in Paragraph 6 of Plaintiff's Complaint to the extent it is directed at this Answering Defendant.

7. Answering the allegations in Paragraph 7 of Plaintiff's Complaint, this Defendant admits such allegations only insofar as it is alleged that this Defendant provides skilled nursing care and does charge for such services depending on the care required for each respective resident. All remaining allegations call for pure legal conclusions which do not require a response.

8. Responding to the allegations set forth in Paragraph 8 of the Plaintiff's Complaint, this Defendant admits that Mr. Stroud was a resident of the facility but craves reference to his medical records and skilled nursing chart to confirm the dates of his residency. Any and all allegations inconsistent with those records are hereby denied and strict proof is demanded thereof.

9. The allegations set forth in Paragraphs 9 and 10 of the Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, these allegations are denied as stated and strict proof is demanded. To the extent these allegations refer to Plaintiff's decedent's clinical condition, this Defendant would crave reference to the skilled nursing chart for its contents.

10. In answering the allegations set forth in Paragraph 11 of Plaintiff's Complaint, this Defendant would crave reference to Plaintiff's decedent's skilled nursing chart and other pertinent medical records. This Defendant denies any and all allegations inconsistent therewith.

11. This Defendant admits the allegations in Paragraph 12 of Plaintiff's Complaint to the extent it alleges that this Defendant is licensed under the laws of the State of South Carolina to operate a nursing home and that it is subject to a certain standard of care with respect to such operation. Any and all other allegations in Paragraph 12 inconsistent with or not specifically admitted in this response are hereby denied and this Defendant demands strict proof thereof.

12. This Defendant admits the allegations in Paragraph 13 of Plaintiff's Complaint to the extent it alleges that this Defendant had a duty to comply with the nursing standard of care during the time period that Plaintiff's decedent was a resident of this Defendant's facility. Any and all other allegations in Paragraph 13 inconsistent with or not specifically admitted in this response are hereby denied and this Defendant demands strict proof thereof.

13. This Defendant denies the allegations in Paragraphs 14, 15, and 16 of Plaintiff's Complaint and demands strict proof thereof.

14. This Defendant admits the allegations in Paragraph 17 of Plaintiff's Complaint only to the extent that Mr. James Stroud was admitted to this Defendant's facility on or around March 6, 2017. Answering as to any and all other allegations of Paragraph 17, this Defendant craves

reference to the skilled nursing chart and the medical records of Mr. Stroud and denies any and all allegations inconsistent therewith or absent therefrom. This Defendant would further assert that it complied with the standard of care and denies any and all assertions of liability set forth in Paragraph 17 of Plaintiff's Complaint.

15. Answering the allegations in Paragraph 18 of Plaintiff's Complaint, this Defendant craves reference to the skilled nursing chart and the medical records of Mr. Stroud and denies any and all allegations inconsistent therewith or absent therefrom. This Defendant would further assert that it complied with the standard of care and denies any and all assertions of liability set forth in Paragraph 18 of Plaintiff's Complaint.

16. Answering the allegations in Paragraphs 19, 20, 21, 22, and 23 of Plaintiff's Complaint, this Defendant craves reference to the skilled nursing chart and the medical records of Mr. Stroud and denies any and all allegations inconsistent therewith or absent therefrom. This Defendant would further assert that it complied with the standard of care and denies any and all assertions of liability set forth in Paragraphs 19, 20, 21, 22, and 23 of Plaintiff's Complaint.

17. This Defendant is without sufficient knowledge and information to form an opinion as to the allegations set forth in Paragraphs 24, 25, 26, and 27 of Plaintiff's Complaint and, therefore, these allegations are denied and strict proof thereof is demanded. This Defendant also craves reference to the medical records of Mr. Stroud and denies any and all allegations inconsistent therewith or absent therefrom. This Defendant would further assert that it complied with the standard of care and denies any and all assertions of liability set forth in Paragraphs 24, 25, 26, and 27 of Plaintiff's Complaint.

18. This Defendant is without sufficient knowledge and information to form an opinion as to the allegations set forth in Paragraphs 28 and 29 of Plaintiff's Complaint and, therefore, these allegations are denied and strict proof thereof is demanded.

19. This Defendant admits the allegations in Paragraph 30 of Plaintiff's Complaint only to the extent that Mr. Stroud was discharged back to this Defendant's facility on or around August 22, 2017. Answering as to any and all other allegations of Paragraph 30, this Defendant craves reference to the medical records of Mr. Stroud and denies any and all allegations inconsistent therewith or absent therefrom. This Defendant would further assert that it complied with the standard of care and denies any and all assertions of liability set forth in Paragraph 30 of Plaintiff's Complaint.

20. Answering the allegations in Paragraphs 31, 32, 33, and 34 of Plaintiff's Complaint, this Defendant craves reference to the skilled nursing chart and the medical records of Mr. Stroud and denies any and all allegations inconsistent therewith or absent therefrom. This Defendant would further assert that it complied with the standard of care and denies any and all assertions of liability set forth in Paragraphs 31, 32, 33, and 34 of Plaintiff's Complaint.

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

22. The Defendant admits the allegations in Paragraph 36 of Plaintiff's Complaint to the extent it alleges this Defendant had a duty to comply with the standard of care during the time period decedent was a resident of this Defendant's facility. Any and all other allegations in Paragraph 36 inconsistent with or not specifically admitted in this response are hereby denied and this Defendant demands strict proof thereof.

23. This Defendant denies the allegations in Paragraphs 37 and 38 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

24. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief, including but not limited to, Plaintiff's demand for judgment and damages.

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

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

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

26. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered into between this Defendant and Plaintiff's decedent, and therefore this matter should be dismissed pursuant to rule 12(b)(1) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

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

27. The 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 Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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

28. This Defendant would assert that this matter should be dismissed pursuant to Rule 12(b)(5) of the South Carolina Rules of Civil Procedure for insufficient service of process on this Defendant.

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

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

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

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

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

31. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties not a party to this action.

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

32. To the extent this Defendant is required to raise the affirmative defenses 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**

33. This Defendant would assert that some, or all, of the state and federal laws cited 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**

34. This Defendant would allege, upon information and belief, that some of the injuries or damages sustained by James Stroud 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 defense to this action.

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

35. Some or all of the Plaintiff's claims are barred by the applicable statute of limitations.

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

36. This Defendant would assert the election of remedies as an affirmative defense in this matter.

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

37. 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**

38. This Defendant denies that it committed any form of negligence in the care and treatment of James Stroud.

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

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

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

[Signature block on following page.]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Matthew O. Riddle

Alexandra J. Ginsburg

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mriddle@ycrlaw.com; aginsburg@ycrlaw.com

*Attorneys for the Defendant THI of South Carolina
at Greenville, LLC d/b/a Magnolia Manor -
Greenville*

Charleston, South Carolina

Dated: May 22, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
DEBBIE STROUD, GUARDIAN AD	)	CASE NO. 2020-CP-23-01728
LITEM FOR JAMES C. STROUD,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	THI OF BALTIMORE, INC'S ANSWER
THI OF SOUTH CAROLINA AT	)	TO PLAINTIFF'S COMPLAINT
GREENVILLE, LLC D/B/A MAGNOLIA	)	
MANOR-GREENVILLE, THI OF	)	
BALTIMORE, INC. AND THI OF	)	
SOUTH CAROLINA, LLC,	)	
	)	
DEFENDANTS.	)	
	)	

TO: C. DANIEL PRUITT, ATTORNEY FOR PLAINTIFF:

The Defendant, THI of Baltimore, Inc. (hereinafter "this Defendant"), *subject to and without waiving the right to move to dismiss this action 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. As to any and all allegations set forth in Plaintiff's Complaint referencing "Defendants'" nursing home, long-term care facility or facility, this Defendant affirmatively asserts that it is not a licensee or operator of THI of South Carolina at Greenville. Any and all such allegations and references not hereinafter specifically responded to in this manner are hereby denied and strict proof thereof is demanded.

3. To the extent this Defendant hereafter responds to allegations made against “Defendants,” any such responses are being made by this Defendant as to itself and not on behalf of any other defendants.

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

5. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations contained in Paragraph 1 of the Complaint and therefore denies the same and demands strict proof thereof. To the extent the allegations contained in Paragraph 1 of the Complaint call for legal conclusions, no response is required. To the extent the allegations allege liability or damages caused by this Defendant, they are denied. Any and all remaining allegations set forth in Paragraph 1 are denied and strict proof thereof is demanded.

6. This Defendant admits the allegations in Paragraph 2 that Plaintiff filed a Notice of Intent along with an Affidavit of Karen Coleman but denies any and all other allegations set forth in Paragraph 2, including but not limited to any and all allegations contained in such Notice of Intent and accompanying Affidavit.

7. The allegations set forth in Paragraph 3 of Plaintiff’s Complaint are directed toward a party other than this Defendant and therefore requires no response.

8. The allegations set forth in Paragraph 4 of Plaintiff’s Complaint are denied.

9. The allegations set forth in Paragraph 5 of Plaintiff’s Complaint are directed toward a party other than this Defendant and therefore require no response. To the extent any allegations are directed to this Defendant, they are denied.

10. Answering the allegations in Paragraphs 6 and 7 of Plaintiff's Complaint, to the extent any or all of the allegations in Paragraphs 6 and 7 are directed at this Defendant, they are denied. This Defendant affirmatively asserts that it does not manage, operate or control any skilled nursing facility, including the facility at issue in this matter (the "Facility"), and has never delivered nursing care to any person, including James C. Stroud ("Mr. Stroud").

11. The allegations in Paragraph 8 of Plaintiff's Complaint are directed at a party other than this Defendant. To the extent they are directed at this Defendant, this Defendant is without sufficient information and knowledge to form an opinion as to the allegations in Paragraph 8 and, therefore, they are denied and strict proof thereof is demanded.

12. This Defendant denies the allegations in Paragraphs 9, 10, 11 of Plaintiff's Complaint and demands strict proof thereof. This Defendant asserts that it has never operated, managed or controlled any nursing facility, including the Facility, does not have employees and/or agents at the Facility and has never provided care and treatment to any person, including Mr. Stroud. This Defendant further denies any interaction or relationship with Mr. Stroud of any kind. To the extent these allegations are directed at a party other than this Defendant, no response is required. Any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof thereof is demanded.

13. The allegations set forth in Paragraphs 12, 13, 14, 15, and 16 of Plaintiff's Complaint are, in part directed toward a party other than this Defendant and therefore do not require a response from this Defendant to that extent. To the extent a response is required to the allegations in Paragraphs 12, 13, 14, 15, and 16 by this Defendant, they are denied.

14. The allegations set forth in Paragraphs 17 through 34 of Plaintiff's Complaint are, in part, directed toward a party other than this Defendant and therefore do not require a response

from this Defendant to that extent. To the extent a response is required to the allegations in Paragraphs 17 through 34 by this Defendant, this Defendant is without sufficient knowledge and information to respond to such allegations. This Defendant has never operated, managed or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Mr. Stroud. This Defendant further denies any interaction or relationship with Mr. Stroud of any kind.

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

16. The allegations set forth in Paragraph 36 of Plaintiff's Complaint are, in part, directed toward a party other than this Defendant and therefore no response from this Defendant is required. To the extent a response is required to the allegations in Paragraph 36 by this Defendant, they are denied. This Defendant has never operated, managed or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Mr. Stroud. This Defendant further denies any interaction or relationship with Mr. Stroud of any kind.

17. This Defendant denies the allegations in Paragraphs 37 and 38, including all subparts, and demands strict proof thereof.

18. This Defendant denies the allegations in Plaintiff's Prayer for Relief, including but not limited to, Plaintiff's demand for judgment and damages.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

19. 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**

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

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

21. 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**

22. The 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 Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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

23. This Defendant would assert that this matter should be dismissed pursuant to Rule 12(b)(5) of the South Carolina Rules of Civil Procedure for insufficient service of process on this Defendant.

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

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

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

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

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

26. This Defendant would affirmatively assert the defenses of intervening and superseding negligence of third parties not a party to this action.

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

27. To the extent this Defendant is required to raise the affirmative defenses 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
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28. This Defendant would assert that some, or all, of the state and federal laws cited 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**

29. This Defendant would allege, upon information and belief, that some of the injuries or damages sustained by James Stroud 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 defense to this action.

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

30. Some or all of the Plaintiff's claims are barred by the applicable statute of limitations.

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

31. This Defendant would assert the election of remedies as an affirmative defense in this matter.

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

32. 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**

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

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

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

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Matthew O. Riddle

Alexandra J. Ginsburg

P.O. Box 993, Charleston, SC 29402

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

mriddle@ycrlaw.com; aginsburg@ycrlaw.com

Attorneys for the Defendant THI of Baltimore, Inc.

Charleston, South Carolina

Dated: May 22, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
DEBBIE STROUD, GUARDIAN AD	)	CASE NO. 2020-CP-23-01728
LITEM FOR JAMES C. STROUD,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	THI OF SOUTH CAROLINA, LLC'S
THI OF SOUTH CAROLINA AT	)	ANSWER TO PLAINTIFF'S COMPLAINT
GREENVILLE, LLC D/B/A MAGNOLIA	)	
MANOR-GREENVILLE, THI OF	)	
BALTIMORE, INC. AND THI OF	)	
SOUTH CAROLINA, LLC,	)	
	)	
DEFENDANTS.	)	
	)	

TO: C. DANIEL PRUITT, ATTORNEY FOR PLAINTIFF:

The Defendant, THI of South Carolina, LLC, hereinafter referred to as "this Defendant," 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. As to any and all allegations set forth in Plaintiff's Complaint referencing "Defendants'" nursing home, long-term care facility or facility, this Defendant affirmatively asserts that it is not a licensee or operator of THI of South Carolina at Greenville. Any and all such allegations and references not hereinafter specifically responded to in this manner are hereby denied and strict proof thereof is demanded.

3. To the extent this Defendant hereafter responds to allegations made against “Defendants,” any such responses are being made by this Defendant as to itself and not on behalf of any other defendants.

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

5. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations contained in Paragraph 1 of the Complaint and therefore denies the same and demands strict proof thereof. To the extent the allegations contained in Paragraph 1 of the Complaint call for legal conclusions, no response is required. To the extent the allegations allege liability or damages caused by this Defendant, they are denied. Any and all remaining allegations set forth in Paragraph 1 are denied and strict proof thereof is demanded.

6. This Defendant admits the allegations in Paragraph 2 that Plaintiff filed a Notice of Intent along with an Affidavit of Karen Coleman but denies any and all other allegations set forth in Paragraph 2, including but not limited to any and all allegations contained in such Notice of Intent and accompanying Affidavit.

7. The allegations set forth in Paragraphs 3 and 4 of Plaintiff’s Complaint are directed toward parties other than this Defendant and therefore require no response.

8. The allegations set forth in Paragraph 5 of Plaintiff’s Complaint are denied.

9. Answering the allegations in Paragraphs 6 and 7 of Plaintiff’s Complaint, to the extent any or all of these allegations are directed at this Defendant, they are denied. This Defendant affirmatively asserts that it does not manage, operate or control any skilled nursing

facility, including the facility at issue in this matter (the “Facility”), and has never delivered nursing care to any person, including James C. Stroud (“Mr. Stroud”).

10. The allegations in Paragraph 8 of Plaintiff’s Complaint are directed at a party other than this Defendant. To the extent they are directed at this Defendant, this Defendant is without sufficient information and knowledge to form an opinion as to the allegations in Paragraph 8 and, therefore, they are denied and strict proof thereof is demanded.

11. This Defendant denies the allegations in Paragraphs 9, 10, 11 of Plaintiff’s Complaint and demands strict proof thereof. This Defendant asserts that it has never operated, managed or controlled any nursing facility, including the Facility, does not have employees and/or agents at the Facility and has never provided care and treatment to any person, including Mr. Stroud. This Defendant further denies any interaction or relationship with Mr. Stroud of any kind. To the extent these allegations are directed at a party other than this Defendant, no response is required. Any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof thereof is demanded.

12. The allegations set forth in Paragraphs 12, 13, 14, 15, and 16 of Plaintiff’s Complaint are, in part directed toward a party other than this Defendant and therefore do not require a response from this Defendant. To the extent a response is required to the allegations in Paragraphs 12, 13, 14, 15, and 16 by this Defendant, they are denied.

13. The allegations set forth in Paragraphs 17 through 34 of Plaintiff’s Complaint are, in part, directed toward a party other than this Defendant and therefore do not require a response from this Defendant. To the extent a response is required to the allegations in Paragraphs 17 through 34 by this Defendant, this Defendant is without sufficient knowledge and information to respond to such allegations. This Defendant has never operated, managed or controlled any

skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Mr. Stroud. This Defendant further denies any interaction or relationship with Mr. Stroud of any kind.

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

15. The allegations set forth in Paragraph 36 of Plaintiff's Complaint are, in part, directed toward a party other than this Defendant and therefore do not require a response from this Defendant. To the extent a response is required to the allegations in Paragraph 36 by this Defendant, they are denied. This Defendant has never operated, managed or controlled any skilled nursing facility, including the Facility, and has never provided care or treatment to any person, including Mr. Stroud. This Defendant further denies any interaction or relationship with Mr. Stroud of any kind.

16. This Defendant denies the allegations in Paragraphs 37 and 38, including all subparts, and demands strict proof thereof.

17. This Defendant denies the allegations in Plaintiff's Prayer for Relief, including but not limited to, Plaintiff's demand for judgment and damages.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

18. 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**

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

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

20. The 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 Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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

21. This Defendant would assert that this matter should be dismissed pursuant to Rule 12(b)(5) of the South Carolina Rules of Civil Procedure for insufficient service of process on this Defendant.

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*Attorneys for the Defendant THI of South Carolina,
LLC*

Charleston, South Carolina

Dated: May 22, 2020

INDEX

(SW) - Denotes State's Witness
(DW) - Denotes Defense Witness
(IC) - Denotes In Camera

PAGE

There were no witnesses called.

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
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There were no exhibits introduced.

P R O C E E D I N G S

(WHEREUPON, proceedings commenced at 2:43 p.m.)

THE COURT: This is in the interest of Debbie Stroud, plaintiff, vs. THI of South Carolina. I think I've got one, two, three -- three motions in the case. 2020-CP-23-1728.

We've got Mr. Pruitt. I saw Mr. Pruitt. Mr. Pruitt is here on behalf of the plaintiff. And then I've got under the mask Mr. ---

MR. HINES: Your Honor, Russ Hines.

THE COURT: --- Russ Hines.

MR. HINES: I think as I rode up here today, my appearance may have been actually formally noticed in the case, but I work with Jay Davis and other lawyers who you'll see on your ---

THE COURT: Okay. But you're R-U-S-S?

MR. HINES: Yes, Your Honor.

THE COURT: H-I-N-E-S?

MR. HINES: Correct. From Clement Rivers in Charleston on behalf of the defendants.

THE COURT: All right. Okay.

MR. HINES: And, Your Honor, I was only keeping this mask on for a moment because I have a -- we filed -- well, especially with the exhibits a memo in support. And if Your Honor would allow me to approach or if you would

1 appreciate a hard copy of it to flip through as I talk, I
2 have that for you.

3 THE COURT: All right. Bring them up here. Let me
4 sanitize it.

5 MR. HINES: Oh, well, you know, if it's going to be
6 harder -- more trouble than it's worth to the Court, then
7 I'll be happy to ---

8 THE COURT: No. I sanitize. I sanitize everything
9 anybody give me. I let them know I'm sanitizing. I ain't
10 going to hide it from you. I don't want you to see the
11 spray going and then you're wondering what I'm doing. I'm
12 telling you what I'm doing.

13 MR. HINES: I appreciate it. It certainly makes
14 perfect sense to me.

15 THE COURT: All right. Let's see. We've got several
16 motions.

17 MR. HINES: Your Honor, and hopefully I can
18 streamline that a bit.

19 THE COURT: Yeah. Go ahead.

20 MR. HINES: There are three motions. We represent
21 all of the defendants. And each of the defendant has made
22 -- each of the defendants has made a motion.

23 THE COURT: All right.

24 MR. HINES: And two of the motions are what I would
25 call tagalong motions to what is really the primary

1 motion, which is the motion to compel arbitration.

2 THE COURT: Okay.

3 MR. HINES: And -- well, let me go back to the very
4 beginning and say may it please the Court.

5 THE COURT: Yeah. Go ahead.

6 MR. HINES: And then beyond that I will say just a
7 little bit of background about this case.

8 This is a nursing home malpractice case.

9 THE COURT: Could you speak up just a little louder
10 for me? Just a little bit.

11 MR. HINES: Yes, Your Honor. This is a nursing home
12 malpractice case.

13 THE COURT: Okay.

14 MR. HINES: The nursing home facility is called
15 Magnolia Manor of Greenville.

16 THE COURT: I know exactly where it's at.

17 MR. HINES: And then there are -- that's the -- and
18 that is the party I'll call "the facility." They're the
19 main -- they have the primary motion that's being made
20 here today which is the motion to compel arbitration.

21 The other two parties are two other corporate
22 entities. One's called THI of Baltimore, Incorporated,
23 the other is called THI of South Carolina, LLC. They have
24 made motions which I'm calling just for shorthand
25 "tagalong motions" in that they tag along with that

1 primary motion in asking for this relief which is another
2 defendant in this case has asked to compel arbitration.
3 We ask the Court, in light of that motion, to stay this
4 action as to us until that motion and the arbitration
5 question raised by that motion is finally decided. And so
6 really the reason I say that is to say that the main
7 thrust of what I want to argue to you today is this motion
8 to compel arbitration with these other two defendants
9 saying, hey, we recognize that motion's being made. We're
10 asking the Court simply to stay the litigation as to us
11 until the arbitration question has been settled so that
12 the case doesn't go forward in a piecemeal fashion without
13 them, and furthermore, the basis for that, which is
14 included in their motions which comes from the UCC --
15 excuse me -- the FAA rather, Federal Arbitration Act,
16 Section 3, I believe.

17 In that binder of materials that I've handed up to
18 Your Honor, what that -- and I also provided a copy to
19 opposing counsel in the same form. It's got the
20 memorandum in support of the facility's motion to compel
21 arbitration and the exhibits with tabs that tab out, and
22 in one of -- the front pocket I included copies of the
23 three motions just for ease of reference.

24 THE COURT: And you filed them, too. I read them
25 yesterday.

1 MR. HINES: Yes, sir. They've been filed.

2 THE COURT: E-filed. I read them all.

3 MR. HINES: What I've handed up to you doesn't have
4 the file stamps on it, but it is the pdf's that were
5 submitted through the e-filing system.

6 Thank you, Your Honor. I appreciate the Court's
7 patience because it takes me a moment to lay out this
8 argument but I'll try to do it in as orderly of a fashion
9 as possible.

10 THE COURT: Take your time.

11 MR. HINES: Thank you.

12 Again, the motion here or the backdrop here is a case
13 of alleged nursing home malpractice. The resident of the
14 nursing home is Mr. Stroud. This case is being brought by
15 his wife, Mrs. Stroud, as his guardian ad litem.

16 Mr. Stroud was originally admitted to the facility
17 back in March of 2017. At that time Mrs. Stroud signed
18 the admissions documents on his behalf which included most
19 notably an admission agreement and an arbitration
20 agreement. I want to make clear that Mr. Stroud did not
21 sign any of the documents that I'm going to talk about
22 today, although he is the party against whom we are
23 seeking to enforce this arbitration agreement. And so the
24 -- what the case law refers to -- calls him is a
25 nonsignatory.

1 I would also make clear at the outset, and this isn't
2 a case that we cite in our brief, but it's a case called
3 Wilson vs. Willis from our Supreme Court from a couple
4 years back. And if the Court will indulge me just a tiny
5 bit of reading, I want to make clear ---

6 THE COURT: Go ahead.

7 MR. HINES: --- South Carolina has recognized several
8 theories that combine nonsignatories to arbitration
9 agreements under general principles of contract and agency
10 law including incorporation by reference; two, assumption;
11 three, agency; four, veil piercing/alter ego; and five,
12 estoppel. The one that I want to concentrate on today,
13 Your Honor, in the time that we have for oral argument is
14 estoppel.

15 There's a slight factual wrinkle that I do not
16 believe is material but I'll mention it just so Your Honor
17 is aware that there actually was an initial admission for
18 Mr. Stroud in March of 2017. It became -- he ultimately
19 was -- left the facility, I believe, for a treatment at
20 the hospital but was readmitted in October of 2018. Both
21 at the time of his initial admission and his readmission,
22 Mrs. Stroud signed on his behalf an admission agreement
23 and an arbitration agreement. The language of those two
24 documents, which are provided in Exhibits 2 through 5 of
25 the binder there respectively, are identical. So there's

1 no significance to -- you know, there's no need for the
2 Court to be aware of any nuance between those various
3 documents. They just were essentially redone when he was
4 readmitted.

5 Now, this motion -- and I'll have to be candid with
6 the Court. Our motion filing references the -- a power of
7 attorney that was executed by Mr. Stroud in favor of
8 Mrs. Stroud in November of 2016. As in a case where you
9 have a power of attorney that embraces within the powers
10 granted the right to -- to -- well, to enter into an
11 arbitration agreement on behalf of the -- well, the person
12 giving the power, it allows the attorney-in-fact under the
13 power to give -- to do that, then it's a very clear-cut
14 situation. And you have a situation where they're signing
15 under -- you know, by virtue of their authority under the
16 power, and it's ---

17 THE COURT: That language was contained in
18 Mr. Stroud's durable power of attorney?

19 MR. HINES: Well, and here's the thing about that,
20 Your Honor. The durable power of attorney is 20 pages
21 long.

22 THE COURT: Yeah. I'm looking at it.

23 MR. HINES: It has a broad grant authority in general
24 terms. And then as you read, I think, on page 4, there's
25 a grant of authority that's broad, and I certainly would

1 argue embraces the ability to waive arbitration -- or
2 agree to arbitration and waive jury trial rights.
3 However, as you continue on through the document, on
4 page 15, there is the following language.

5 THE COURT: Let's go back to page 4.

6 MR. HINES: Yes, sir.

7 THE COURT: And tell me where there's some reference
8 to arbitration.

9 MR. HINES: On that point, Your Honor, and I need to
10 make -- well, let me start by answering the Court's
11 question directly. I'm sure that's irritating if I don't
12 do that. I believe it's on page 4, Your Honor, but it's
13 possible that I ---

14 THE COURT: I don't see anything on page 4 about
15 arbitration.

16 MR. HINES: Your Honor, I beg your pardon. It's
17 page 5. The next page under Item 12, Power with Respect
18 to Legal and Other Actions.

19 THE COURT: Okay.

20 MR. HINES: And, Your Honor -- well, I'd be happy to
21 read this to the Court.

22 THE COURT: You can read the first line.

23 MR. HINES: It says, "Power with Respect to Legal and
24 Other Actions." And then it says, "To institute,
25 supervise, prosecute, defend, intervene in, abandon,

1 compromise, arbitrate, settle, dismiss an appeal from any
2 and all legal, equitable, judicial or administrative
3 hearings, actions, suits, proceedings."

4 Your Honor, for the court reporter's benefit, I'm
5 sorry. I won't talk so fast and I'll stop reading.

6 THE COURT: You're from Charleston, aren't you?

7 MR. HINES: Yes, Your Honor. But North Carolina
8 originally.

9 But, Your Honor, so it does actually specifically say
10 -- in here it references the ability to -- the power with
11 respect to arbitration.

12 Now, Your Honor, the thing that is, well, a bit of a
13 wrinkle is on page 15 ---

14 THE COURT: 15. Okay.

15 MR. HINES: --- where it specifically includes a
16 reservation of right to trial by jury. And in this --
17 this is on Item 6 on page 15.

18 THE COURT: Okay.

19 MR. HINES: And it says, "I reserve unto myself and
20 do not grant to my attorney-in-fact the power to waive my
21 right to a jury trial and enter into arbitration
22 agreements. I do not favor arbitration, and for that
23 reason, I do not grant unto my attorney-in-fact the power
24 to enter arbitration agreements."

25 Well, obviously, Your Honor, that is pretty

1 straightforward language if you look at it all by itself.
2 Now, I would argue, I suppose if we needed to, that is an
3 internal contradiction. But I want to make clear my
4 argument for you today is not that this arbitration
5 agreement should be enforced because of the authority
6 granted by this power of attorney, Your Honor. I'm
7 recognizing this reservation in it. However, in
8 conjunction with my equitable estoppel argument, Your
9 Honor, because really, what I'm trying to argue in the
10 time I have here today, Your Honor, is to argue -- again,
11 I'm not -- we've obviously filed a memo that addresses my
12 points, but the one that I am focusing on now is this idea
13 of estoppel.

14 When Mr. Stroud was admitted, Mrs. Stroud handled the
15 admissions paperwork ---

16 THE COURT: Okay.

17 MR. HINES: --- provided this document to us as
18 evidence -- well, I'm not suggesting that it is exhaustive
19 of her authority to act, but was provided to our people.
20 That's why it was found in our documents and our file for
21 Mr. Stroud. And also signed both the admission agreement
22 and arbitration agreement on two different occasions.
23 This is language that's contained in the arbitration
24 agreement on both instances, the same document: By
25 his/her signature below, the executing party represents

1 that he/she has the authority to sign on resident's
2 behalf. So it's to bind the resident as well as the
3 representative. So she's representing her authority in
4 this document as well.

5 The point -- I'm really mentioning that, Your Honor,
6 just because it needs to be said. And this is a little
7 bit nuanced because there is a power of attorney, but I'm
8 having to candidly recognize to Your Honor that on page 15
9 of a 20-page document in a provision that while itself is
10 straightforward, it does seem to be contradictory to a
11 provision that precedes it.

12 THE COURT: And I'm assuming the provision on page 5.

13 MR. HINES: Correct, Your Honor. That is -- I'm
14 referencing the express referenced arbitration there and
15 the restriction that's contained there. But I'm not
16 asking Your Honor right now to resolve -- I'm not asking
17 Your Honor to rely on this power as the grant of
18 authority.

19 Where I'm heading with this, Your Honor, is sort of a
20 two-step argument on estoppel. And it's recognized in our
21 case law, there's something called the doctrine of merger.
22 And there's a case called Coleman vs. Mariner Health Care,
23 which we cite to.

24 In Coleman vs. Mariner Health Care, it was somewhat
25 similar situation where you had an effort to enforce

1 arbitration against a nonsignatory, and it was an
2 admission agreement and an arbitration agreement, just
3 like we have here in the broad strokes of it. There's
4 some important differences.

5 Now, the main point of Coleman was that the argument
6 in favor of arbitration there was that the authority that
7 was granted to the surrogate, to the person who signed it
8 on the behalf of the resident, came from South Carolina's
9 Adult Healthcare Consent Act. And in Coleman, the main
10 point of Coleman was that our Supreme Court said, no, that
11 act does not extend so far as to grant that authority.
12 One of the alternate bases for enforcement of the
13 agreement in that case, however -- and ultimately, it lost
14 under the facts of Coleman. But it's a fact-driven
15 question.

16 What Coleman is important for is Coleman makes very
17 clear that the legal principle on which I'm arguing to the
18 Court is a valid and recognized principle starting with
19 merger. And merger says that where multiple instruments
20 are executed at the same time by the same parties in the
21 course of the same transaction and for the same purpose,
22 the documents are presumed to be merged into a single
23 contract. And what I'm arguing now, Your Honor, is the
24 first part of my argument, which is that the admission
25 agreement and the arbitration agreement should be deemed

1 merged under the doctrine of merger. And let me
2 foreshadow why that's important.

3 THE COURT: Say that again?

4 MR. HINES: The admission agreement and the
5 arbitration agreement -- and I know they were done twice.

6 THE COURT: She signed the admission agreement.

7 MR. HINES: Correct.

8 THE COURT: Arbitration agreement.

9 MR. HINES: Correct.

10 THE COURT: She signed both.

11 MR. HINES: She did.

12 THE COURT: You're merging them.

13 MR. HINES: And I'm suggesting they should be merged
14 and treated as if they are a single contract that includes
15 -- even though they're multiple instruments. And that's
16 what the doctrine of merger -- the doctrine of merger,
17 again, in the Coleman port, what it recognized was that
18 that's a valid doctrine. And keep in mind, Your Honor,
19 the ---

20 THE COURT: Did they do that in Coleman?

21 MR. HINES: In Coleman they found facts that
22 suggested -- what Coleman said is if there is evidence
23 that shows that the party's intentions were contrary to
24 merger, then the documents will be treated separately so
25 that what they're recognizing here is that

1 circumstantially, when you have documents that are
2 executed at the same time by the same parties for the same
3 purpose and, of course, the same transaction, which
4 Coleman recognized that all of those checkmarks were there
5 in Coleman, because that's exactly what was happening in
6 the admission process.

7 But what Coleman said is, okay, you're onto something
8 here, but here's why the proponent of arbitration in
9 Coleman, why you lose is because if the evidence shows
10 nonetheless, in spite of all that same time, purpose,
11 parties, transaction, that the merger presumption being
12 triggered, if the evidence shows that there was still the
13 parties did not have an intent to merge, then it overcomes
14 the presumption and there's no merger.

15 And in Coleman they said two main things. They said,
16 number one, the arbitration agreement has a provision in
17 it and ours doesn't, but it has a provision in it that
18 says it can be disclaimed and revoked at any time within
19 30 days. It just drops away. So the Coleman court's
20 saying, well, how are you going to merge these documents
21 if one of them can just vanish out of thin air? Ours
22 doesn't have that.

23 The other thing that I think maybe is even more
24 important, and it's very materially different here, is
25 that in the admission agreement in Coleman, there was an

1 entire agreement clause that made reference to the
2 arbitration agreement in a way that the Court concluded
3 referred to it as a separate, standalone document. The
4 Court said this is direct textual evidence of a -- well,
5 the Court used the word "separatedness," an intent of the
6 parties not to merge but rather to keep these documents
7 separate. We don't have that here, Your Honor. In fact,
8 it's quite the opposite.

9 In the admission agreement -- and this is on page 12,
10 and this is -- the same language is on Exhibit 2 which is
11 the initial admission agreement, and I believe Exhibit 3
12 is the re-admission. The undersigned further acknowledges
13 that he/she has received and read the admissions handbook
14 and other admissions materials and understands these
15 documents are made a part of this agreement by reference
16 herein.

17 Well, Your Honor, the arbitration agreement -- and
18 this is the point that needs to be made clear. It is not
19 -- in plaintiff's memo in opposition, it's asserted that
20 it is a condition as in a requirement of admission to our
21 facility that one agrees to arbitration. That's not true.
22 It is optional. But -- and so while it's not a condition
23 of admission, it certainly is something that's done in
24 conjunction with admission. And my point is that it's not
25 the requirement for admission, but once it is, in fact,

1 executed, as it was here, it becomes -- it is one of the
2 other admissions materials.

3 And it's just a -- well, an example of sort of the
4 plain language appeal or persuasiveness of that argument,
5 I just happened to notice this one day when I was reading
6 this case for another reason. This is a case called Stott
7 vs. White Oak Manor, a Court of Appeals case from 2019.

8 And this is just in the factual -- or facts procedural
9 history part of the opinion. And in this case, the
10 skilled nursing facility was called White Oak, and the
11 plaintiff was -- last name was Stott. But the Court says
12 here: The same day as decedent's admission to White Oak,
13 Stott, acting as decedent's authorized representative,
14 signed White Oak's admission documentation -- and then it
15 has a dash -- including the arbitration agreement. The
16 point is just the language "admission documentation."
17 It's just a recognition here, Your Honor, in terms of
18 plain language. I'm not suggesting to your court that
19 that was a litigated point and the Court held that it
20 constituted that. But I am saying that it didn't even
21 raise any eyebrows that the admission documentation
22 included the arbitration agreement.

23 And so what I'm suggesting to you here about in that
24 Coleman case, the facts in Coleman that tended against
25 merger and overcame the presumption are materially

1 different. So Coleman gives me the legal peg to hang my
2 hat on even though in Coleman the effort failed because
3 those facts didn't measure up. I can measure up here,
4 Your Honor, respectfully, and that is because, again, we
5 don't have that revocation provision in the arbitration
6 agreement, and, again, I think more importantly, the
7 entire agreement -- in contrast to Coleman, the admission
8 agreement here has an entire agreement clause, and its
9 language is, to use the language of the Coleman court, it
10 expresses the opposite sentiment to separatedness, because
11 the Coleman court talks in terms of separatedness of
12 instruments. This reflects a connectiveness of an
13 instrument, specifically admissions materials.

14 And, Your Honor, the arbitration agreement is --
15 within the plain and ordinary meaning of that term, it's
16 an admission material. It was signed in conjunction with
17 it. Again, not a condition, but it was voluntarily signed
18 as an option at the time of admission.

19 And, Your Honor, if you'll go along with me that
20 they're merged, then the argument gets to, well, the basis
21 for estoppel. Because if the one document -- one
22 contract, rather -- includes admission and arbitration,
23 then we get to principle that's recognized in the case
24 called Wilson vs. Willis, I mentioned it earlier, about
25 what's called direct benefits estoppel. And the basic

1 idea is is that a party cannot receive direct benefits
2 under one part of a contract and deny the enforceability
3 of provisions under another. And if you will agree with
4 me that we have a merged contract that includes both
5 admission and arbitration agreement, well, the benefits
6 were recently received by Mr. Stroud by virtue of his
7 admission to the facility.

8 Now, I understand that Mr. Stroud is making -- or
9 Mrs. Stroud on his behalf is claiming malpractice at the
10 facility, but I want to be -- in this part, for one, the
11 purpose of today is not to adjudicate the merits of that
12 contention. But Mr. Stroud doesn't even -- or the
13 plaintiff doesn't even contend that Mr. Stroud received no
14 benefit from his admission whatsoever. I mean, he did, of
15 course, receive room and board, various care and treatment
16 throughout his time there. So, you know, there can be no
17 reasonable contention that he did not receive what in the
18 contemplation of the direct benefits test are benefits
19 directly emanating from the -- his reliance on or his
20 treating the contract as enforceable.

21 And, again, I'm referring now to the merged contract,
22 because that's why it's a two-part argument. You've got
23 to go with me on merger for me to then make my estoppel
24 claim, because I'm saying that you can't accept the
25 benefits of admission -- and, Your Honor, when I say that,

1 I mean the logic of it is you, obviously -- I'm not
2 suggesting to you there's only -- I understand you may not
3 be with me on merger or any of it, but I'm saying that
4 someone to follow my argument is it's sort of a one-two
5 punch. I have to -- I'm arguing to you on this -- at
6 least on this merger estoppel argument is I need to have a
7 merged contract first. And I've explained to the Court
8 why I believe that's ---

9 THE COURT: Can I interrupt and ask you a question?

10 MR. HINES: Certainly, Your Honor.

11 THE COURT: You know, I guess what I'm trying to wrap
12 my head around, maybe Mr. Pruitt will talk about it in
13 just a few minutes, but I'll ask you, you would assume
14 that Mr. Stroud, at the time that he gave a durable power
15 of attorney to his wife, Ms. Stroud, you would assume that
16 he was of sound mind, you would assume that he knew -- the
17 assumption would be that he knew what he was doing. Would
18 you agree with that?

19 MR. HINES: It would have to be. Yes, sir.

20 THE COURT: Yeah. And this is -- having practiced
21 law as many years as I did, this crafted durable power of
22 attorney is a very good one. I mean, it's very specific.
23 It covers -- I mean, there's explicit language. There's
24 no gray languages that I see as I read while you were
25 talking. And if you go to -- and I understand your

1 argument on merger, you know, and the whole Coleman case.
2 But when you go to the last provision in the -- let me --
3 bear with me for a second. Bear with me. Let me find it.
4 Here we go. In Article -- well, Number 6. I'm still on
5 page 15. This language: I reserve unto myself -- and
6 this is obviously Mr. Stroud ---

7 MR. HINES: Correct.

8 THE COURT: --- speaking through ---

9 MR. HINES: The document.

10 THE COURT: --- the document. I reserve unto myself
11 and do not grant unto my attorney-in-fact the power to
12 waive my right to a jury trial and enter into arbitration
13 agreements.

14 Not only -- he could have ended right there. But
15 then the next statement says: I do not favor arbitration,
16 and for that reason, I do not grant to my attorney-in-fact
17 the power to enter arbitration agreements. In that
18 paragraph the word "arbitration" is mentioned one, two,
19 three times by Mr. Stroud.

20 MR. HINES: Correct.

21 THE COURT: Okay. I'm just, you know ---

22 MR. HINES: Your Honor, on the face of this one
23 provision ---

24 THE COURT: Yes.

25 MR. HINES: --- I believe what Your Honor is pointing

1 out is how this is very clear language.

2 THE COURT: You know, and I think there was an
3 argument made on page 5 that spells out those different --
4 I think you said that they were -- to use your words,
5 there were competing sections of the power of attorney.

6 MR. HINES: There was a contradiction or there
7 was ---

8 THE COURT: I don't want to -- I want to hear from
9 Mr. Pruitt. Let me just shut up and let me hear from both
10 sides and then I'll -- but I'll let you finish. Go ahead.

11 MR. HINES: Thank you, Your Honor.

12 Maybe I'm pouring out something that's for an
13 argument that I'm not making. But what I was -- if you
14 think about it -- excuse me -- as I think about it, the
15 very fact that he is suggesting some power with respect to
16 arbitration was on one hand while on the other hand saying
17 that not only you have -- you, attorney-in-fact, have no
18 power to agree to arbitration, but I personally don't
19 favor arbitration, then to me there is an irreconcilable
20 contradiction between the two because there should be no
21 arbitration for him to be participating in. If no one has
22 the power to agree to it for him and he won't agree to it
23 himself because he doesn't favorite it, why would there be
24 an arbitration at all?

25 Now, that point is really, again, may be one -- the

1 only real relevance of that point, Your Honor, is this, is
2 this document, we are not relying on this document to give
3 the authority to sign. We're recognizing for the purpose
4 of this argument, you get to page 15 and he completely
5 undoes what appeared to be the argument -- the authority
6 that was granted earlier.

7 Nonetheless, it was on page 15 of 20 which was given
8 to our folks at the time of admission in furtherance of an
9 express representation, which is contained in the
10 arbitration agreement itself, of all due authority to sign
11 on his behalf. And this authority does not necessarily
12 have to come strictly from a power of attorney. It
13 obviously could have been done through agency. Someone
14 could have express agency that would allow someone else to
15 act on their behalf. She's not limiting ---

16 THE COURT: When Ms. Stroud signed that, do you have
17 any information that would indicate that she did not know
18 that this language was contained in the power of attorney?
19 When she signed that, do you know whether she saw this?

20 MR. HINES: Your Honor, I think that the real -- I'm
21 trying to think about -- I don't know that I have any
22 information to answer Your Honor's question directly. I
23 don't have evidence on that point.

24 THE COURT: Okay.

25 MR. HINES: I think what I would point to though,

1 Your Honor, is if it comes down to -- I think Your Honor
2 though is perhaps helping me get to the real point that
3 I'm trying to fend off. To the extent it's argued that
4 the facility needed to comb through this document and find
5 this provision on page 15 as opposed to taking
6 Ms. Stroud's word for it, I don't think that the facility
7 can be prejudiced by not having done that with respect to
8 the estoppel argument I'm making, because inasmuch as I
9 don't have information that Ms. Stroud knew she was
10 representing something that wasn't true. In fact, I
11 think, you know, not only -- I mean, inasmuch as I don't
12 have information that Mrs. Stroud knew she was
13 representing something that wasn't true in terms of her
14 authority, there's no evidence that the facility should
15 have known Mrs. Stroud was representing something that
16 wasn't true. I mean, it's at least a wash in terms of
17 that exchange. And that allows me to get to my equitable
18 estoppel argument which says, hey, I'm not arguing that
19 this -- that gave her authority to do it. I'm arguing
20 that under principles of equitable estoppel, based upon
21 the merger of admission and arbitration and the receipt of
22 the benefits -- direct benefits that go along with
23 admission and having received those, you can't say we're
24 going to just not agree -- you're estopped to argue the
25 lack of enforceability of the arbitration part of it. So

1 I'm not having to prove under this theory that it is
2 enforceable. My argument is that the plaintiff is
3 estopped to deny its enforceability based upon the
4 application of merger and then onto that the equitable
5 principles that underly estoppel, in particular direct
6 benefits estoppel that was recognized in the Wilson vs.
7 Willis case.

8 And, well, Your Honor, you've been incredibly
9 indulgent. I thank you very much for the argument time,
10 and now I'll yield for Mr. Pruitt to make an argument.

11 THE COURT: All right. Mr. Pruitt.

12 MR. PRUITT: Thank you, Your Honor. May it please
13 the Court. I will try to keep this very brief and direct.

14 To speak specifically about Mr. Stroud, he -- I've
15 known him and his wife for many years, and they -- long
16 marriage. He had significant health issues including
17 Parkinson's disease and otherwise and knew that his
18 capacity was limited, et cetera. He was going to be
19 getting older and it was a progressive illness.

20 And so when he went to sign -- went to the nursing
21 home, he had advanced health issues. And the reason that
22 they did not get him to sign the admission agreement and
23 other documents himself is that by that point he had
24 become incapacitated because of his health issues. So we
25 had Mrs. Stroud.

1 So it's important to keep in mind, and this is always
2 -- there's so many technical legal things that go on. You
3 hate for that to get in the way of just the
4 straightforward facts.

5 Mr. Stroud, we called him the principal. She, you
6 know, regardless of her relationship, she was his wife, is
7 his wife, the attorney-in-fact. You would call her maybe
8 the agent. And then the nursing home is third parties.
9 So -- but anyway, he didn't sign because of his
10 incapacity. And really, when he came to know the
11 defendants in this case, because of his incapacity, you
12 cannot say that he as the principal did anything to alter
13 the relationship that had been established by the power of
14 attorney.

15 So when I read their motion, and we've been doing
16 this for about since 1999, handled some two, 300 cases
17 involving nursing home neglect. And it is very common.
18 Family goes in time of need to a nursing home. They hand
19 them not only a 12-page admission agreement and then --
20 which is labeled 1 of 12 and then a power of attorney
21 which is labeled 1 of 1, you know, separate agreements all
22 maybe at the same time but clearly separate agreements.
23 But I suspect, although there has been no evidence of it,
24 that there were multiple other documents, the patient bill
25 of rights, documents related to Medicare reimbursement

1 because he was a Medicare recipient. Clearly in the
2 paragraph -- the footnote in their memo says they had the
3 power of attorney.

4 Just by way of clearing up, there are many different
5 types of alternative dispute resolution, mediation, and
6 arbitration is not necessarily binding. There are many
7 people, in fact, there are many counties, I think, in
8 South Carolina where nonbinding arbitration is a favored
9 way of resolving a case like we do mediation a lot up
10 here. But arbitration, the word "arbitration" on page 5
11 does not in and of itself say, you know, preincident,
12 forced, binding arbitration like that arbitration clause
13 said and like that reservation of rights on page 13 would
14 preclude, the argument would . . .

15 Anyway, so there's a case from the South Carolina
16 Supreme Court. I thought this is going to be an easy one.
17 So when they filed their motion, I was waiting for their
18 memo to get filed, and I had already heard of this case
19 called Arredondo which came out South Carolina Supreme
20 Court this year. I wanted to see if they had a novel
21 argument. I didn't get it so I went ahead and filed my
22 memo and called and said, hey, what -- there's no reason
23 to have a hearing in this case because we have, under the
24 Arredondo case, a very clear-cut situation here.

25 There is a -- typically speaking, if there's no power

1 of attorney in South Carolina, then a person signing -- I
2 won't say never, but it's unlikely to be able to waive
3 that individual's right to a jury trial. That's kind of
4 where our court is right now. When there is a power of
5 attorney, then we've always said we've got to read the
6 power of attorney. But in Arredondo, which came out -- it
7 was filed March 10, 2021 -- the Court said in that case
8 there was a fairly broad power of attorney, and it gave
9 the person, the attorney-in-fact lots of authority to make
10 and sign and execute and sign and transfer, conduct
11 significant business where in the past, say, well, gosh,
12 that's a general durable power of attorney, you know.
13 Isn't that enough? And the Court says, in a fairly
14 detailed decision, no, it's not enough. You have to
15 actually look and see what was the scope of authority that
16 the principal gave to the attorney-in-fact.

17 And so in this case, the power of attorney says you
18 can do this, this, this, this. There's no specific
19 reservation. The case that we're talking about today
20 should be fairly clear because the Court -- the Supreme
21 Court reversed the Court of Appeals and saying, no, we
22 cannot enforce arbitration. We're going to look at
23 contract principles. This was beyond the scope of
24 authority for the attorney-in-fact to have signed that or
25 it's not enforceable. And so that was what I thought

1 would be fairly clear.

2 There are two other arguments that I included in my
3 memo related to the fact that since he is a recipient of
4 Medicare, then there are these provisions in the federal
5 regulations that I've cited in my brief that say, you
6 know, in essence, that a facility that accepts Medicare
7 and Medicaid must not charge, solicit, accept or receive,
8 in addition to any amount otherwise required to be paid,
9 any other consideration as a precondition of admitting or
10 expediting the admission of the individual. It is to
11 basically require a Medicare recipient to sign an
12 arbitration agreement. If you require it, then you're
13 running afoul of the federal regulations regarding
14 Medicare. And if you say it's optional, then really what
15 you're saying is that additional agreement is without
16 consideration.

17 And so there are a number of orders from state --
18 from the trial courts have been included by the defendant.
19 We didn't include any. I cited several appeals court
20 decisions including the Supreme Court's very recent
21 decision in Arredondo. I'm happy to submit there are at
22 least, you know, five or six or seven trial court
23 decisions, you know, that I have available to point out
24 where, in essence, in a case like this where it's very
25 clear that the principal did not grant unto his

1 attorney-in-fact the ability to enter an agreement for
2 binding arbitration or waive his right to a jury trial,
3 that that would be pretty clear.

4 There are two other quick points I'd like to make
5 since we're on the record. And who knows. I think a lot
6 of these, when we fight arbitration in these cases, a lot
7 of times we end up, you know, headed to the Court of
8 Appeals. And so I would like to make sure that I don't
9 leave out these two additional things in addition to
10 there's no actual authority in that the contract was
11 either illegal and without consideration and that the next
12 one would be there's also no apparent authority.

13 When we look at the issue of apparent authority and
14 estoppel, we don't look at what the attorney-in-fact did.
15 There are many cases in South Carolina that say the
16 defendant must show that the purported principal, meaning
17 Mr. Stroud, consciously or impliedly represented another
18 to be his agent, that there was reliance, that there was a
19 change of position. And then it goes on to say that it
20 would have to be reasonable for them to have been misled.

21 Well, at this point, by the time they met the
22 principal, Mr. Stroud, he was incapacitated and they
23 didn't look to him to say or do anything. They're
24 basically blaming Mrs. Stroud for in a time of need when
25 she's trying to help her husband with his advanced health

1 issues, they gave her a bunch of documents to sign and
2 said, here, sign here. You know, she did. And she gave
3 them the power of attorney.

4 And we always kind of -- we often hear the argument
5 that he made in sort of the flip side to say, oh, this is
6 a 12-page or 30-page document, how can we be expected to
7 read those three paragraphs related to binding arbitration
8 on page 17? Well, you know, here we have people who were
9 dealing, and she gave them the document that set forth
10 very explicitly her scope of authority given by the
11 principal to her as attorney-in-fact. And we all know
12 that there is a duty of one dealing with an agent to use
13 due care to ascertain the scope of the agent's authority.
14 And if we don't, then, in essence, what happened here is
15 that they didn't necessarily read the document, but they
16 took it in and they put it in the file. So we deem that
17 they read it and understood it, because that's really kind
18 of what the law does. This is contract-type situations.
19 They had a duty. They received it, which was altogether
20 reasonable, but they cannot claim willful ignorance
21 because they didn't get -- they're sophisticated. They've
22 got I don't know whether it's hundreds or 200 -- this is a
23 very large national corporation that has, you know,
24 attorneys on staff in every state. They do this as a
25 matter of course. You know, they know that they have to

1 use reasonable diligence in dealing with agents. And they
2 didn't. And so they cannot claim estoppel because, one,
3 the principal did nothing, and two, they cannot blame or
4 somehow say that she did something wrong. She gave them
5 the power of attorney.

6 Anyway, so I think that I have given enough argument
7 to try to make this appear to be as straightforward and
8 clear for the Court as it is for me. You know, we've
9 dealt with some that are very complicated. This one seems
10 to be very straightforward that there is no authority for
11 her to sign, and it depended on what authority he gave
12 her, and then under the Arredondo case that she did not
13 have the authority to sign or bind him to a non -- sorry
14 -- to bind him to bind an arbitration in this agreement.
15 But it -- we would ask the Court to deny the motion put
16 forth by the defendants.

17 THE COURT: All right.

18 MR. HINES: Very briefly, Your Honor. I mean, I
19 think I've already -- well, probably -- Your Honor has
20 probably heard from me quite enough as far as -- I want to
21 just reiterate the distinction I'm drawing about relying
22 on the power of attorney for its actual authority versus
23 the equitable estoppel argument, which is, again, my
24 argument is not about -- it's the difference between
25 saying this document is enforceable versus saying this

1 document -- or that the arbitration agreement, rather, the
2 plaintiff is estopped to deny its enforceability. And so
3 anyway, there are two different tracks to get to the same
4 point, the point being the grant of this motion and the
5 tagalong motions. But just a couple odds and ends I need
6 to mention.

7 Oh, argument from the plaintiff about the
8 consideration or the arbitration agreement is not
9 required. There's no evidence that it is required in this
10 record. On its face it does not say that. It's not
11 required for admission. So the idea that that then would
12 result in some sort of extra consideration is not allowed
13 with respect to Medicare is completely undercut.

14 The sort of heads I win, tails I lose the way I --
15 excuse me -- heads I win, tails you lose are the nature of
16 the argument is that I understood plaintiff to be making,
17 it doesn't quite work out that way. It just doesn't work
18 out that way because the consideration for entering into
19 an arbitration agreement, and we've got this in our brief,
20 but is the mutual exchange of promises to arbitrate. That
21 is sufficient consideration. So there's not a want of
22 consideration issue there even if it's not required for
23 admission. So I don't think it's one of those lose one
24 way or the other situations. It's not.

25 I think maybe this goes without saying, but -- and

1 plaintiff's counsel, obviously being a good advocate and
2 also knowing apparently, you know, the particular clients
3 in this case, gave some -- well, some color to the
4 argument about things like in their time of need and at
5 the -- and I guess I need to make clear at least the
6 objection to using facts that aren't in evidence. And I'm
7 not trying -- by the way, I should make clear the point
8 about I'm not trying to catch plaintiff's counsel short on
9 anything or play any kind of got-you game. What I'm
10 suggesting is that to the extent the facts that are not in
11 evidence might bear upon the Court's ruling, for instance,
12 the idea about the capacity of Mr. Stroud, that really
13 allows me to get to a springboard about my sort of
14 fall-back position on this motion, which is to ask the
15 Court to allow us to conduct targeted discovery that
16 addresses these issues related to arbitration.

17 Again, I want to be clear as plaintiff's counsel has
18 been very courteous to me in continuing this motion
19 actually multiple times, and I appreciated that courtesy.
20 And I'm not suggesting here that the absence of some
21 evidentiary presentation by plaintiff's counsel, an
22 affidavit or something, that not having that today is --
23 I'm not suggesting that's a problem. I'm just suggesting
24 that to the extent we need to get into evidentiary
25 questions that we ought to have each of us a fair shot at

1 doing so through targeted discovery.

2 And the reason I ask the Court to allow that and call
3 it targeted discovery is we don't want to take any chance
4 of using the tools of discovery to pursue and vindicate
5 our arbitration rights only to have that effort doom our
6 arbitration rights by an argument of waiver, meaning you
7 can't claim you want arbitration on one hand and then use
8 the litigation tools on the other hand. In this case we
9 argue that there is certainly no intent on our part to do
10 any waiver of arbitration rights.

11 But if the Court is -- if the Court has any
12 inclination that the question of competency or, you know,
13 I think plaintiff's counsel said something along the lines
14 of, you know, sort of setting the scene as it were about
15 how these documents were presented to Mrs. Stroud or, for
16 instance, about the manpower or attorneys that are
17 available to review documents, all that stuff is -- it
18 adds -- I mean, I understand it by way of argumentation,
19 but to the extent that that is something the Court would
20 actually rely upon, you know, it's evidence that we don't
21 have. And I'm simply asking the Court as a fallback to
22 the arguments I've made for granting the motion that the
23 Court table the issue of whether or not to grant the
24 motion to compel arbitration and allow both parties an
25 opportunity without the proponent of arbitration, let us,

1 risking a waiver by discovery that's targeted at the
2 arbitration issues.

3 The other thing, Your Honor, the last couple things
4 here -- oh, this thing about having a duty to determine
5 the scope of the agent's authority, for one, I think that
6 is particularly a proposition that is applicable really in
7 terms of agency. And I think we're talking about a true
8 agency there, something that is a bit different than a
9 power of attorney.

10 So I don't know if that -- if that doctrine is
11 directly applicable to the case of power of attorney
12 issue. But more importantly even than that, Your Honor,
13 we're talking about a situation where it was -- I mean,
14 the idea that there was something unreasonable about a
15 person who presents themselves as power of attorney and
16 having all due authority and in addition to that signs the
17 document representing that authority, the document in
18 particular being the arbitration agreement, I don't see
19 how that finding could be held against us in that regard,
20 and at the same time because it would require overlooking
21 the fact that, you know, we did collect the power of
22 attorney, did have Mrs. Stroud -- by virtue of her
23 signature, our law presumes that she read, understood and
24 accepted the terms of what she was signing which included
25 her representation of authority.

1 And, of course, she's bound by covenant of good faith
2 and fair dealing. And so I'm really just pushing back
3 there against any sort of finding of fault or, you know,
4 some sort of lack of attentiveness on the part of the
5 facility that undercuts this motion. Respectfully, Your
6 Honor, I don't think there's evidence or law that would
7 support that.

8 And last, plaintiff's counsel mentioned that the
9 documents themselves, this goes to the merger point, one
10 says 1 of 12, the other says 1 of 1 page numbering, Your
11 Honor, I submit to you that that provides no basis
12 whatsoever to show any intention contrary to merger.
13 You're always going to have multiple instruments for the
14 question of merger to even arise. So it's a bit of a --
15 well, it's a specious, respectfully, Your Honor, point to
16 say this one has page 1 of 12 while this has page 1 of 1,
17 for instance, or this has a signature page and this one
18 also has one. You're always going to have separate
19 instruments.

20 So, Your Honor, again, I thank you very much for your
21 indulgence. And unless the Court has questions, I will
22 rest.

23 THE COURT: No. I don't have any questions.

24 Let me tell you what I'm going to do. I'll need you
25 -- I'll need to read that case, that Arredondo.

1 MR. PRUITT: Arredondo.

2 THE COURT: I'm going to read that case. But what I
3 would like for you two lawyers to do for me, to submit
4 proposed orders within 30 days from today.

5 MR. HINES: Certainly.

6 THE COURT: If you need more time than that, please
7 let me know. And obviously, you've got some piggyback
8 motions that all of them really essentially the same
9 thing. So you're really addressing all of them.

10 MR. HINES: Unless Your Honor would prefer otherwise,
11 I think it would suffice to address all of them in a
12 single ---

13 THE COURT: Just address all of them at the same
14 time.

15 And give me the cite on that. You said it's March of
16 this year. So is that in advance sheets? You got a cite
17 on it?

18 MR. PRUITT: There would be a need for Your Honor to
19 -- if I could approach, you can sterilize it or at least
20 get the cite.

21 THE COURT: Yeah. We'll spray it down.

22 MR. PRUITT: May I approach?

23 THE COURT: Yeah. Give it to my sprayer here. I'll
24 tell you what. You want her to make a copy of it and give
25 it back to you?

1 MR. PRUITT: It's yours, Your Honor.

2 THE COURT: It's mine.

3 MR. PRUITT: I have it in my -- it's referenced in my
4 memorandum and I have -- that's for the Court.

5 THE COURT: Okay. All right. So 30 days. Is that
6 okay, Counsel?

7 MR. HINES: Of course, Your Honor.

8 THE COURT: That works for you?

9 MR. PRUITT: Yes, sir.

10 THE COURT: All right. And if there's any issue that
11 may come up between now and then, just arrange a
12 conference call through my assistant.

13 MR. PRUITT: Yes, Your Honor.

14 (WHEREUPON, proceedings concluded at 3:35 p.m.)
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, CHERYL A. SMITH, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 29th day of June, 2021.

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

May 24, 2022



Cheryl A. Smith, CVR-M

Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
DEBBIE STROUD, GUARDIAN AD	)	CASE NO. 2020-CP-23-01728
LITEM FOR JAMES C. STROUD,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	THI OF SOUTH CAROLINA AT
	)	GREENVILLE, LLC D/B/A MAGNOLIA
THI OF SOUTH CAROLINA AT	)	MANOR-GREENVILLE'S MOTION TO
GREENVILLE, LLC D/B/A MAGNOLIA	)	STAY ACTION AND COMPEL
MANOR-GREENVILLE, THI OF	)	ARBITRATION
BALTIMORE, INC. AND THI OF	)	
SOUTH CAROLINA, LLC,	)	
	)	
DEFENDANTS.	)	
	)	

TO: C. DANIEL PRUITT, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor-Greenville (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 staying this action and compelling arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C §1, et seq. and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. This motion is based on the terms and provisions of a valid and binding Arbitration Agreement (attached as **Exhibit A**), which James Stroud’s wife Debbie Stroud (Plaintiff in this action) executed at the time of Mr. Stroud’s admission to the Facility pursuant to her authority granted by a duly executed and recorded Durable Power of Attorney (attached as **Exhibit B**). The Arbitration Agreement is expressly binding on all parties and requires that the Plaintiff’s claims be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any 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, Durable Power of Attorney, 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 the matter.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Matthew O. Riddle

Alexandra J. Ginsburg

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mriddle@ycrlaw.com; aginsburg@ycrlaw.com

*Attorneys for THI of South Carolina at Greenville,
LLC d/b/a Magnolia Manor- Greenville*

Charleston, South Carolina

Dated: February 12, 2021

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between Magnolia Manor of Greenville ("Facility"), its agents, employees and servants, and Debbie Strand ("Resident") or Debbie Strand ("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.

<u>Debbie Strand</u>	<u>3/3/17</u>	<u>Debbie Strand</u>
Resident/Representative Signature	Date	Printed Name of Resident/Representative
<u>[Signature]</u>	<u>3/3/17</u>	<u>Nick Adams</u>
Authorized Agent of Facility	Date	Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

**DURABLE POWER OF ATTORNEY
OF
JAMES C. STROUD**

Introductory Provision. I, JAMES C. STROUD, as principal (the "Principal") have this day appointed **DEBBIE STROUD** to serve as my agent ("Agent") and to exercise the powers and discretions set forth below. In addition, to provide for succession in the event that my Agent cannot serve or continue to serve, I appoint **DEBORAH GARCIA** to serve as alternate Agent to my Agent named above.

Statement of Intent to Create Durable Power of Attorney Under State Statute. By this instrument I intend to create a Durable Power of Attorney under South Carolina law.

Revocation of Prior Powers of Attorney. I hereby revoke all powers of attorney, general and/or limited, heretofore created by me as principal and terminate all agency relationships created thereunder, including those of all successor Agents named therein, if any, except that powers granted by me on forms provided by financial institutions granting the right to write checks on, deposit funds to and withdraw funds from accounts to which I am a signatory or granting access to a safe deposit box shall not be revoked, but shall continue in full force and effect.

Delegation of All Powers Lawful to Delegate. I herewith delegate to my Agent each and every power that I may lawfully delegate, subject only to those limitations specifically set forth in this instrument.

ARTICLE I

ASSET POWERS

Introduction. My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, with respect to any and all of my property and interests in property, real, personal, intangible and mixed, as follows:

(1) **Power to Sell.** To sell any and every kind of property that I may own now or in the future, real, personal, intangible and/or mixed, including without being limited to contingent and expectant interests, marital rights and any rights of survivorship incident to joint tenancy or tenancy by the entirety, on such terms and conditions and security as my Agent shall deem appropriate and to grant options with respect to sales thereof; to make such disposition of the proceeds of such sale or sales, including expending such proceeds for my benefit, as my Agent shall deem appropriate

(2) **Power to Buy.** To buy every kind of property, real, personal, intangible and/or mixed, on such terms and conditions as my Agent shall deem appropriate; to obtain options with respect to such purchases; to arrange for appropriate disposition, use, safekeeping and/or insuring of any such property; to buy United States Government bonds redeemable at par in payment

of the federal estate tax imposed at my death; to borrow money for the purposes described herein and to secure such borrowings in such manner as my Agent shall deem appropriate; to use any credit card held in my name to make such purchases and to sign such charge slips as may be necessary to use such credit cards; to repay from any funds belonging to me any money borrowed and to pay for any purchases made or cash advanced using credit cards issued to me.

(3) **Power to Invest.** To invest and reinvest all or any part of my property in any property or interests, including undivided interests, in property, real, personal, intangible and/or mixed, wherever located, including without being limited to securities of all kinds, stocks of corporations regardless of class, interests in limited partnerships, real estate or any interest in real estate whether or not productive at the time of investment, commodities contracts of all kinds, interests in trusts, investment trusts, whether of the open and/or closed fund types, and participation in common, collective or pooled trust funds or annuity contracts without being limited by any statute or rule of law concerning investments by fiduciaries; to sell, including short sales, and terminate any investments whether made by me or my Agent; to establish, utilize and terminate savings and money market accounts with financial institutions of all kinds; to establish, utilize and terminate accounts with securities brokers and in such accounts, to make short sales and to buy on margin and, for such purposes, my Agent may pledge any securities so held or purchased with such brokers as security for loans and advances made to the account; to establish, utilize and terminate agency accounts with corporate fiduciaries; to employ, compensate and terminate the services of financial and investment advisors and consultants.

(4) **Power to Manage Real Property.** With respect to real property, including but not limited to any real property I may hereafter acquire or receive and my personal residence, my Agent is authorized to lease, sublease, release; to eject and remove tenants or other persons from, and recover possession of by all lawful means; to accept real property as a gift or as security for a loan; to collect, sue for, receive and receipt for rents and profits and to conserve, invest or utilize any and all of such rents, profits and receipts for the purposes described in this paragraph; to do any act of management and conservation, to pay, compromise, or to contest tax assessments and to apply for refunds in connection therewith; to employ laborers; to subdivide, develop, dedicate to public use without consideration, and/or dedicate easements over; to maintain, protect, repair, preserve, insure, build on, demolish, alter or improve all or any part thereof; to obtain or vacate plats and adjust boundaries; to adjust differences in valuation on exchange or partition by giving or receiving consideration; to release or partially release real property from a lien; to sell and to buy real property; to mortgage and/or convey by deed of trust or otherwise encumber any real property now or hereafter owned by me, whether acquired by me or for me by my Agent.

(5) **Power to Manage Personal Property.** With respect to personal property; to lease, sublease, and release; to recover possession of by all lawful means; to collect, sue for, receive and receipt for rents and profits therefrom; to maintain, protect, repair, preserve, insure, alter or improve all or any part thereof; to sell and to buy the same or other personal property; to mortgage or grant deeds of trust, pledge and/or grant other security interests in any personal property or intangibles now or hereafter owned by me, whether acquired by me or for me by my Agent.

(6) **Power to Operate Businesses.** To continue the operation of any business (including a ranch or farm) belonging to me or in which I have a substantial interest, for such time and in such manner as my Agent shall deem appropriate, including but not limited to hiring and discharging my employees, paying my employees' salaries and providing for employee benefits, employing legal, accounting, financial and other consultants; continuing, modifying, terminating, renegotiating and extending any contractual arrangements with any person, firm, association or corporation whatsoever made by me or on my behalf; executing business tax returns and other government forms required to be filed by my business, paying all business related expenses, transacting all kinds of business for me in my name and on my behalf, contributing additional capital to the business, changing the name and/or the form of the business, incorporating the business, entering into such partnership agreement with other persons as my Agent shall deem appropriate, joining in any plan of reorganization, consolidation or merger of such business, selling, liquidating or closing out such business at such time and on such terms as my Agent shall deem appropriate and representing me in establishing the value of any business under "Buy-out" or "Buy-Sell" agreements to which I may be a party; to create, continue or terminate retirement plans with respect to such business and to make contributions which may be required by such plans; to borrow and pledge business assets; to exercise any right, power, privilege or option I may have or may claim under any contract of partnership whether as a general, special or limited partner; to modify or terminate my interest on such terms and conditions as my Agent may deem appropriate; to enforce the terms of any such partnership agreement for my protection, whether by action, proceeding or otherwise as my Agent shall deem appropriate; to defend, submit to arbitration, settle or compromise any action or other legal proceeding to which I am a party because of my membership in such partnership.

(7) **Power to Exercise Rights in Securities.** To exercise all rights with respect to corporate securities which I now own or may hereafter acquire, including the right to sell, grant security interests in and to buy the same or different securities; to establish, utilize and terminate brokerage accounts, including margin accounts; to make such payments as my Agent deems necessary, appropriate, incidental or convenient to the owning and holding of such securities; to receive, retain, expend for my benefit, invest and reinvest or make such disposition of as my Agent shall deem appropriate all additional securities, cash or property, including the proceeds from the sales of my securities, to which I may be or become entitled by reason of my ownership of any securities; to vote at all meetings of security holders, regular or special; to lend money to any corporation in which I hold any shares and to guarantee or endorse loans made to such corporation by third parties.

(8) **Power to Demand and Receive.** To demand, arbitrate, settle, sue for, collect, receive, deposit, expend for my benefit, reinvest or make such other appropriate disposition of as my Agent deems appropriate, all cash, rights to the payment of cash, property, real, personal, intangible and/or mixed, debts, dues rights, accounts, legacies, bequests, devises, dividends, annuities, rights and/or benefits to which I am now or may in the future become entitled, regardless of the identity of the individual or public or private entity involved, including but not limited to benefits payable to or for my benefit by any governmental agency or body, such as Supplemental Social Security (SSI), Medicaid, Medicare, and Social Security Disability Insurance (SSDI) and for the purposes of receiving Social Security benefits, my Agent is herewith appointed my "Representative Payee"; to

utilize all lawful means and methods to recover such assets and/or rights, qualify me for such benefits and claim such benefits on my behalf, and to compromise claims and grant discharges in regard to the matters described herein; to utilize all lawful means and methods to recover such assets and/or rights, qualify me for such benefits and claim such benefits on my behalf. The authority herein granted shall include but not be limited to converting my assets into assets that do not disqualify me from receiving such benefits or divesting me of such assets. In any divestment actions or asset conversions, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt such plan, then my Agent is directed to use my Agent's best efforts to restore such plan as and when the opportunity to do so is available to my Agent. If a transfer of cash by my Agent is made to a pecuniary legatee under my will, my Agent shall ensure that such transfer is deemed a satisfaction of such legacy, pro tanto.

(9) **Power with Respect to Employment Benefits.** To create and contribute to an employee benefit plan, including a plan for a self-employed individual, for my benefit; to elect retirement on my behalf; to select any payment option under any IRA or employee benefit plan in which I am a participant, including plans for self-employed individuals, or to change options I have selected; to make voluntary contributions to such plans; to make "roll-overs" of plan benefits into other retirement plans; to apply for and receive payments and benefits; to waive rights given to nonemployee spouses under state or federal law; to borrow money and purchase assets therefrom and sell assets thereto, if authorized by any such plans; to make revocable and irrevocable beneficiary designations and to change revocable beneficiary designations; to consent and/or waive consent in connection with the designation of beneficiaries and the selection of joint and survivor annuities under any employee benefit plan.

(10) **Power with Respect to Bank Accounts.** To establish accounts of all kinds, including checking and savings, for me with financial institutions of any kinds, including but not limited to banks and thrift institutions; to modify, terminate, make deposits to and write checks on or make withdrawals from and grant security interests in all accounts in my name or with respect to which I am an authorized signatory, except accounts held by me in a fiduciary capacity, whether or not any such account was established by me or for me by my Agent, to negotiate, endorse or transfer any checks or other instruments with respect to any such accounts; to contract for any services rendered by any bank or financial institution, and to execute, on my behalf as principal, agency or power of attorney forms furnished by any bank with respect to accounts with such bank, appointing as my Agent or any other person or persons.

(11) **Power with Respect to Safe-Deposit Boxes.** To contract with any institution for the maintenance of a safe-deposit box in my name; to have access to all safe-deposit boxes in my name or with respect to which I am an authorized signatory, whether or not the contract for such safe-deposit box was executed by me, either alone or jointly with others, or by my Agent in my name; to add to and remove from the contents of any such safe deposit box and to terminate any and all contracts for such boxes.

(12) **Power with Respect to Legal and Other Actions.** To institute, supervise, prosecute, defend, intervene in, abandon, compromise, arbitrate, settle, dismiss, and appeal from any and all legal, equitable, judicial or administrative hearings, actions, suits, proceedings, attachments, arrests or distresses, involving me in any way, including but not limited to claims by or against me arising out of property damages or personal injuries suffered by or caused by me or under such circumstances that the loss resulting therefrom will or may be imposed on me and otherwise engage in litigation involving me, my property or any interest of mine, including any property or interest or person for which or whom I have or may have any responsibility.

(13) **Power to Disclaim, Renounce, Release, or Abandon Property Interests.** To renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift, testate or intestate succession; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts, including the right to alter, amend, revoke or terminate, and to exercise any right to claim an elective share in any estate or under any will. In exercising such discretion, my Agent shall consider any reduction in estate or inheritance taxes that may be due on my death, and the effect of such renunciation or disclaimer on persons interested in my estate and persons who would receive the renounced or disclaimed property; provided, however, that my Agent shall make no disclaimer that is expressly prohibited by other provisions of this instrument.

(14) **Power with Respect to Insurance.** To purchase, maintain, surrender, collect, or cancel (a) life insurance or annuities of any kind on my life or the life of any one in whom I have an insurable interest, (b) liability insurance protecting me and my estate against third party claims, (c) hospital insurance, medical insurance, Medicare supplement insurance, custodial care insurance, and disability income insurance for me or any of my dependents, and (d) casualty insurance insuring assets of mine against loss or damage due to fire, theft or other commonly insured risk; to pay all insurance premiums, to select any options under such policies; to increase coverage under any such policy, to borrow against any such policy, to pursue all insurance claims on my behalf, to adjust insurance losses, and the foregoing powers shall apply to private and public plans, including but not limited to Medicare, Medicaid, SSI and Worker's Compensation.

(15) **Power with Respect to Taxes.** To represent me in all tax matters; to prepare, sign, and file federal, state, and/or local income, gift and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time to file returns and/or pay taxes, extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts, including the tax court, regarding tax matters, and any and all other tax related documents, including but not limited to consents and agreements under Section 2032A of the Internal Revenue Code or any successor section thereto and consents to split gifts, closing agreements and any power of attorney form required by the Internal Revenue Service and/or any state and/or local taxing authority with respect to any tax year; to pay taxes due, collect and make such disposition of refunds as my Agent shall deem appropriate, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service and/or any state and/or local taxing authority; to exercise any elections I may have under federal, state or local tax law; to allocate any generation-skipping tax

exemption to which I am entitled, and generally to represent me or obtain professional representation for me in all tax matters and proceedings of all kinds and for all periods before all officers of the Internal Revenue Service and state and local authorities and in any and all courts; to engage, compensate and discharge attorneys, accountants and other tax and financial advisers and consultants to represent and/or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have an interest or responsibility; and on my behalf to execute IRS Form 2848 and appoint my Agent or any suitable person selected by my Agent as my representative before the Internal Revenue Service.

(16) **Power to Make Gifts.** To make gifts, grants or other transfers without consideration either outright or in trust (including the forgiveness of indebtedness), to such person or organizations as my Agent shall select; provided, however, that my Agent shall not make any gifts that are not excluded from gift tax by my federal gift tax annual exclusion (unless I am married and my spouse has agreed to consent to "gift-splitting" under Section 2513 of the Internal Revenue Code in which case such gifts shall not exceed the amount that may be excluded from the federal gift tax by the federal gift tax annual exclusions available to my spouse and me) and this annual right shall be noncumulative and shall lapse at the end of each calendar year; provided, however, if I am married and my spouse is not my Agent, then any gifts my Agent may make directly or indirectly to himself, his estate, his creditors or the creditors of his estate must qualify for the federal gift tax annual exclusion and shall not exceed in value the federal gift tax annual exclusion amount in any one calendar year, and this annual right shall be noncumulative and shall lapse at the end of each calendar year; to make payments for the college and postgraduate tuition of any descendant of mine; to make payments for the medical expenses of any descendant of mine; if I am married to consent to the splitting of gifts under Section 2513 of the Internal Revenue Code and any successor sections thereto and/or similar provisions of any state or local gift tax laws; to prepare, execute and file any gift tax return required by any such gift and pay any gift tax that may arise by reason of such gift; provided, however, that gifts made by my Agent to a charitable, scientific, or educational institution or organization must qualify for a charitable deduction under the income and gift tax provisions of the Internal Revenue Code as from time to time amended.

ARTICLE II

CARE AND CONTROL OF THE PERSON

Introduction. My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, with respect to the control and management of my person, as follows:

(1) **Power to Provide for Principal's Support.** To do all acts necessary for maintaining my customary standard of living, to provide a place of residence by purchase, lease or other arrangement, or by payment of the operating costs of my existing place of residence, including interest, amortization payments, repairs and taxes, to provide normal domestic help for the operation of my household, to provide clothing, transportation, medicine, food and incidentals, and if necessary to make all necessary arrangements, contractual or otherwise, for me at any hospital,

hospice, nursing home, convalescent home or similar establishment, or in my own residence should I desire it, and to assure that all of my essential needs are provided for at such a facility or in my own residence, as the case may be. If in the judgment of my Agent I will never be able to return to my place of residence from a hospital, hospice, nursing home, convalescent home or similar establishment, to lease, sublease or assign my interest as lessee in any lease or protect or sell or otherwise dispose of my place of residence, investing the proceeds of any such sale as my Agent deems appropriate, for such price and on such terms, conditions and security, if any, as my Agent shall deem appropriate; and to store and safeguard or sell for such price and on such terms, conditions and security, if any, as my Agent shall deem appropriate or otherwise dispose of any items of tangible personal property remaining in my place of residence which my Agent believes I will never need again, and pay all costs thereof. As an alternative to such storage and safeguarding, to transfer custody and possession, but not title, for such storage and safekeeping of any such tangible personal property of mine to the person, if any, named in my will or any trust as the recipient of such property entitled to receive such property on my death.

(2) **Power to Make Advance Funeral Arrangements.** To make advance arrangements for my funeral and burial, including the purchase of a burial plot and marker, and such other related arrangements as my Agent shall deem appropriate; if I have not previously done so myself.

(3) **Power to Change Domicile.** To establish a new residency or domicile for me, from time to time and at any time, within or without the state, and within or without the United States, for such purposes as my Agent shall deem appropriate, including but not limited to any purpose for which this instrument was created.

ARTICLE III

HEALTH CARE

Introduction. My Agent is authorized in my Agent's discretion from time to time and at any time to exercise the authority described below relating to matters involving my health care. In exercising the authority granted to my Agent herein, I first direct my Agent to try to discuss with me the specifics of any proposed decision regarding my health care and treatment if I am able to communicate in any manner, however rudimentary. If I am unable to consent, or refuse to consent, to health care, and my Agent cannot determine the choice I would want made under the circumstances, my Agent shall give, withhold, modify, or withdraw such consent for me based on any health care choices that I may previously have expressed on the subject while competent, whether under this instrument or otherwise. If my Agent cannot determine the treatment choice I would want made under the circumstances, then my Agent shall make such choice for me based on what my Agent believes to be in my best interests. Accordingly, my Agent is authorized as follows:

(1) **Power of Access and Disclosure of Medical Records and Other Personal Information.** To request, receive and review any information, verbal or written, regarding my personal affairs or my physical or mental health, including medical and hospital records, and to

execute any releases or other documents that may be required to obtain such information, and to disclose or deny such information to such persons, organizations, firms or corporations as my Agent shall deem appropriate.

(2) **Power to Employ and Discharge Health Care Personnel.** To employ and discharge health care personnel including physicians, psychiatrists, dentists, nurses, and therapists as my Agent shall deem necessary for my physical, mental and emotional well-being, and to pay them, or cause them to be paid, reasonable compensation.

(3) **Power to Give, Withhold, or Withdraw Consent to Health Care Treatment.** To give, withhold, withdraw or modify consent to any health care procedures, tests or treatments, including surgery; to arrange for my hospitalization, convalescent care, hospice or home care; to summon paramedics or other emergency medical personnel and seek emergency treatment for me, as my Agent shall deem appropriate; to give, withhold, withdraw or modify consent to such procedures, tests and treatments, as well as hospitalization, convalescent care, hospice or home care which I or my Agent may have previously allowed or consented to or which may have been implied due to emergency conditions. My Agent's decisions should be guided by taking into account (1) the provisions of this instrument, (2) any reliable evidence of preferences that I may have expressed on the subject whether before or after the execution of this document, (3) what my Agent believes I would want done in the circumstances if I were able to express myself, and (4) any information given to my Agent by the physicians treating me as to my health care diagnosis and prognosis and the intrusiveness, pain, risks, and side effects of the treatment.

(4) **Power to Give or Withhold Consent to Psychiatric Treatment.** To arrange, on the execution of a certificate by two independent psychiatrists who have examined me and in whose opinions I am in immediate need of hospitalization because of mental disorder, alcoholism or drug abuse, for my voluntary admission to an appropriate hospital or institution for treatment of the diagnosed problem or disorder; to arrange for private psychiatric and psychological treatment for me; and to revoke, modify, withdraw or change consent to such hospitalization, institutionalization or private treatment which I or my Agent may have previously given. The consent of my Agent to my hospitalization for psychiatric help, alcoholism or drug abuse shall have the same legal effect, subject to applicable local law, as a voluntary admission made by me.

(5) **Power to Maintain Me in My Residence.** To take whatever steps are necessary or advisable to enable me to remain in my personal residence as long as it is reasonable under the circumstances. I realize that my health may deteriorate so that it becomes necessary to have round-the-clock nursing care if I am to remain in my personal residence, and I direct my Agent to obtain such care, including any equipment that might assist in such care, as is reasonable under the circumstances. Specifically, I do not want to be hospitalized or put in a convalescent or similar home as long as it is reasonable to maintain me in my personal residence.

(6) **Power to Exercise My Health Care Right of Privacy.** To exercise all state and federal rights that I may have, including but not limited to my right of privacy to make decisions

regarding my health care even though the exercise of those rights might hasten my death or be contrary to conventional health care advice.

(7) **Power to Authorize Relief from Pain.** To consent to and arrange for the administration of pain-relieving drugs of any kind, or other surgical or health care procedures calculated to relieve my pain, including unconventional pain-relief therapies which my Agent believes may be helpful to me, even though such drugs or procedures may lead to permanent physical damage, addiction or even hasten the moment of, but not intentionally cause, my death.

(8) **Power to Grant Releases.** To grant, in conjunction with any instructions given under this Article, releases to hospital staff, physicians, nurses and other health care providers who act in reliance on instructions given by my Agent or who render written opinions to my Agent in connection with any matter described in this Article from all liability for damages suffered or to be suffered by me; to sign documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice" as well as any necessary waivers of or releases from liability required by any hospital or physician to implement my wishes regarding medical treatment or nontreatment.

ARTICLE IV

REFUSAL OF HEALTH CARE TREATMENT

Introduction and Recitals. I wish to live and enjoy life as long as possible. However, I do not wish to receive health care treatment that will only postpone the moment of my death from an incurable and terminal condition or prolong an irreversible coma. For purposes of this instrument, (1) "terminal condition" shall refer to a condition that is reasonably expected to result in my death within twelve (12) months regardless of the treatment I may receive, and (2) "irreversible coma" shall refer to a permanent loss of consciousness from which there is no reasonable possibility that I will return to a cognitive and sapient life and shall include but shall not be limited to that condition known as a persistent vegetative state.

Therefore, if two licensed qualified physicians who are familiar with my condition have diagnosed and noted in my medical records that:

(i) I am unable to give informed consent to health care treatment that is proposed or available for my condition and my condition is terminal as defined above, or

(ii) I have been in a coma for at least sixty (60) days and that the coma is irreversible as defined above,

then my Agent is authorized to:

(1) direct that health care which will only postpone the moment of my death or prolong my irreversible coma, whether or not such treatment is directed toward my terminal condition, be withheld or, if previously begun, to direct that such treatment be withdrawn whether or not such treatment is related to my terminal condition or irreversible coma; and

(2) request, require or consent to the writing of a "No-Code" or "Do Not Resuscitate" order by any of my attending physician; and

(3) sign on my behalf any documents necessary to carry out the authorizations described in this instrument, including waivers or releases of liability required by any health care provider; and

(4) order whatever is appropriate to keep me as comfortable and free of pain as is reasonably possible, including the administration of pain relieving drugs of any kind or other surgical or medical procedures calculated to relieve my pain, including unconventional pain-relief therapies which my Agent believes may be helpful, even though such drugs or procedures may lead to permanent physical damage, addiction or hasten the moment of, but not intentionally cause, my death.

I desire that my wishes be carried out through the authority given to my Agent by this instrument despite any contrary feelings, beliefs or opinions of members of my family, relatives, friends, conservator or guardian.

In exercising the authority given to my Agent herein, my Agent shall first follow the instructions of this document and any other subsequent instructions, oral or written, that I may give my Agent while I am competent. Notwithstanding such instruction, if my Agent cannot determine the treatment choice I would want made under the circumstances, then my Agent should make such choice for me based on what my Agent believes to be in my best interest.

If no Agent designated in this instrument is available or able or willing to serve as my Agent or to exercise the powers granted in this Article, then I request that this instrument be given the same force and effect as any other written expression of intent under applicable law.

It is my intention that this instrument, both as a self-executing document and a delegation of power to my Agent, shall be deemed an exercise of all rights and interests that I may have under the United States Constitution, the constitution of the state of my domicile, state and federal laws, rules, regulations and decisions, judicial and administrative, to refuse health care treatment, including but not limited to artificial nutrition and artificial hydration.

I authorize my Agent to establish a new residency or domicile for me, from time to time and at any time, within or without the state, and within or without the United States, for the purpose of exercising effectively the powers granted to my Agent in this Article.

In addition, if I have been in an irreversible coma, as defined above, for sixty (60) days or more, or if because of my terminal condition as defined above it is no longer possible to nourish me without severe discomfort, and the two physicians described above also conclude that the nourishment will not improve my physical condition and I will not experience pain as a result of the withdrawal of nutrition and hydration, then my Agent may require that procedures used to provide me with nutrition and hydration, including, by way of example only, all forms of intravenous and parenteral feeding, all forms of tube feeding and misting, be withheld or, if previously instituted, to require that they be withdrawn.

In addition, my Agent is authorized to receive and retain custody of any instrument signed by me that is effective under law to require the withdrawal or withholding of life sustaining treatment or procedures, including but not limited to a "Living Will," "Directive to Physician" and a "Declaration of Desire for Natural Death," (hereinafter referred to in the aggregate as "Advance Directives") and if the circumstances described above authorizing my Agent to require that life sustaining treatment be withheld or withdrawn have occurred, then as an alternative or supplemental act, I authorize my Agent to deliver to my physicians, health care providers and other appropriate recipients, this instrument and any other writings and Advance Directives signed by me that express my desire under the circumstances to require the withholding or withdrawal of futile, health care treatment, and to instruct such physicians, health care providers and other appropriate recipients to act immediately in accordance with my desires.

ARTICLE V

INCIDENTAL POWERS

Introduction. In connection with the exercise of the powers and discretions herein described, my Agent is fully authorized and empowered to perform any acts and things and to execute and deliver any documents, instruments, affidavits, certificates, and papers necessary or appropriate, to such exercise or exercises, including without limitation the following:

(1) **Resort to Courts.** To seek on my behalf and at my expense:

(a) a declaratory judgment from any court of competent jurisdiction interpreting the validity of this instrument and any of the acts authorized by this instrument, but such declaratory judgment shall not be necessary in order for my Agent to perform any act authorized by this instrument.

(b) a mandatory injunction requiring compliance with my Agent's instructions by any person, organization, corporation, or other entity obligated to comply with instructions given by me.

(c) actual and punitive damages and the recoverable costs, fees and expenses of such litigation, against any person, organization, corporation or other entity obligated to comply

with instructions given by me who negligently or willfully fails or refuses to follow such instructions.

(2) **Hire and Fire - All Personnel.** To employ, compensate and discharge such domestic, health care and professional personnel including lawyers, accountants, doctors, nurses, brokers, financial consultants, advisors, consultants, companions, servants and employees as my Agent deems appropriate.

(3) **Sign Documents and Incur Costs in Implementing the Agent's Instructions.** To sign, execute, endorse, seal, acknowledge, deliver and file or record instruments and documents, including but not limited to contracts, agreements and conveyances of real and personal property, instruments granting and perfecting security instruments and obligations, orders for the payment of money, receipts, releases, waivers, elections, vouchers, consents, satisfactions and certificates. In addition, any Agent of mine who has the authority to incur costs on my behalf may render the bills for such costs to any Agent of mine who has been granted the authority to pay such costs or to any trustee of any revocable living trust of mine, or guardian, committee or conservator who has authority to pay such costs. I request that costs be paid promptly. Any recipient thereof (i.e. my Agent with authority to pay or my trustee) shall promptly receipt for such costs.

(4) **Payment of Medical Expenses.** My Agent is directed to pay, or cause to be paid, all bills incurred and presented by any agent representing me under a Durable Power of Attorney for Health Care.

(5) **Borrow, Spend, Liquidate, Secure.** To expend my funds and to liquidate my property or to borrow money to produce such funds and to secure any such borrowings with security interests in any property, real, personal, or intangible that I may now or hereafter own.

(6) **Power to Do Miscellaneous Acts.** To open, read, respond to and redirect my mail; to represent me before the U.S. Postal Service in all matters relating to mail service; to establish, cancel, continue or initiate my membership in organizations and associations of all kinds, to take and give or deny custody of all of my important documents, including but not limited to my will, codicils, trust agreements, deeds, leases, life insurance policies, contracts and securities and, bearing in mind the confidential nature of such documents, to disclose or refuse to disclose such documents; to obtain and release or deny information or records of all kinds relating to me, to any interest of mine or to any person for whom I am responsible; to house or provide for housing, support and maintenance of any animals or other living creatures that I may own and to contract for and pay the expenses of their proper veterinary care and treatment; and if the care and maintenance of such animals or other living creatures shall become unreasonably expensive or burdensome in my Agent's opinion, to irrevocably transfer such animals to some person or persons willing to care for and maintain them.

ARTICLE VI

THIRD PARTY RELIANCE

Introduction. For the purpose of inducing all persons, organizations, corporations and entities including but not limited to any physician, hospital, nursing home, health care provider, bank, broker, custodian, insurer, lender, transfer agent, taxing authority, governmental agency, or other party (all of whom will be referred to in this Article as a "Person") to act in accordance with the instructions of my Agent as authorized in this instrument, I hereby represent, warrant and agree that:

(1) **Third Party Liability for Revocation and Amendments.** If this instrument is revoked or amended for any reason, I, my estate, and my personal representative will hold any person, organization, corporation or entity, hereinafter referred to in the aggregate as "Person", harmless from any loss suffered, or liability incurred by such Person in acting in accordance with the instructions of my Agent acting under this instrument prior to the receipt by such Person of actual written notice of any such revocation or amendment.

(2) **Agent Has Power to Act Alone.** The powers conferred on my Agent by this instrument may be exercised by my Agent alone and my Agent's signature or act under the authority granted in this instrument may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. Consequently, all acts lawfully done by my Agent hereunder are done with my consent and shall have the same validity and effect as if I were personally present and personally exercised the powers myself, and shall inure to the benefit of and bind me and my estate and my personal representative.

(3) **No Liability to Third Parties for Reliance on Agent.** No Person who relies in good faith on the authority of my Agent under this instrument shall incur any liability to me, my estate or my personal representative. In addition, no Person who acts in reliance on any representations my Agent may make as to (a) the fact that my Agent's powers are then in effect, (b) the scope of my Agent's authority granted under this instrument, (c) my competency at the time this instrument is executed, (d) the fact that this instrument has not been revoked or amended, or (e) the fact that my Agent continues to serve as my Agent shall incur any liability to me, my estate or my personal representative for permitting my Agent to exercise any such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property by my Agent. Any party dealing with any Person named as Agent (including any Person named as an Alternate Agent hereunder) may rely on as conclusively correct an affidavit or certificate of such Agent that (i) my Agent's powers are then in effect, (ii) the action my Agent desires to take is within the scope of my Agent's authority granted under this instrument, (iii) I was competent at the time this instrument was executed, (iv) this instrument has not been revoked, and/or (v) my Agent continues to serve as my Agent.

(4) **Alternate Agent May Give Affidavit or Certificate That He or She Currently Serves.** Any party dealing with any person named as Alternate Agent hereunder may

rely on as conclusively correct an affidavit or certificate under penalties of perjury of such Alternate Agent that those persons named as prior Agents are no longer serving.

(5) **Affidavits or Certificates Given by Agent Bind Principal.** No Person who relies on any affidavit or certificate under penalties of perjury that this instrument specifically authorizes my Agent to execute and deliver to such person shall incur any liability to me, my estate or my personal representative for permitting my Agent to exercise any such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property by my Agent.

(6) **Authorization to Release Information to Agent.** All Persons from whom my Agent may request information regarding me, my personal or financial affairs or any information which I am entitled to receive are hereby authorized to provide such information to my Agent without limitation and are released from any legal liability whatsoever to me, my estate or my personal representative for complying with my Agent's requests.

(7) **Authorization to Release Medical Information.** I hereby authorize all physicians and psychiatrists who have treated me, and all other providers of health care, including hospitals, to release to my Agent all information or photocopies of any records which my Agent may request. If I am incapacitated at the time my Agent shall request such information, all Persons are authorized to treat any such request for information by my Agent as the request of my legal representative and to honor such requests on that basis. I hereby waive all privileges which may be applicable to such information and records and to any communication pertaining to me and made in the course of any confidential relationship recognized by law. My Agent may also disclose such information to such Persons as my Agent shall deem appropriate.

ARTICLE VII

RESTRICTION ON POWERS

Introduction. Notwithstanding any provision herein to the contrary, my Agent:

(1) **Prohibition on Power Over Life Insurance on Agent's Life.** Shall have no power or authority whatsoever with respect to any interest in or incidents of ownership in any policy of insurance I may own on the life of my Agent.

(2) **Prohibition on Power Over Prior Transfers.** Shall have no power or authority whatsoever with respect to (a) any irrevocable trust created by my Agent as to which I am a trustee or a beneficiary or (b) any asset given to me by my Agent.

(3) **Prohibition on Power to Benefit Agent.** Shall be prohibited, except as specifically authorized in this instrument, from (a) appointing, assigning or designating any of my assets, interests or rights directly or indirectly to my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (b) exercising any power of appointments I may hold in favor

of my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (c) disclaiming assets to which I would otherwise be entitled if the effect of such disclaimer is to pass assets directly or indirectly to my Agent or his or her estate, or (d) using my assets to discharge any of my Agent's legal obligations, including any obligation of support which my Agent may owe to others, excluding those whom I am legally obligated to support.

(4) **Prohibition on Exercise of Fiduciary Powers.** Shall be prohibited from exercising any discretionary fiduciary powers that I now hold or may hereafter acquire.

(5) **Avoid Disrupting Principal's Estate Plan.** If it becomes necessary for my Agent to liquidate my assets to provide support for me, or if liquidation or conversion of assets becomes necessary for any other reason, whether specified in this instrument or otherwise, or such liquidation is deemed by my Agent to be appropriate or convenient, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent, whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt the dispositive provisions of such plan, then my Agent is directed to use my Agent's best efforts to restore the dispositive provisions of such plan as and when the opportunity to do so is available to my Agent. My Agent shall make reasonable efforts to obtain and review my estate plan and any person having knowledge thereof or possession of any documents implementing such estate plan is authorized to make disclosure thereof to my Agent, and to furnish my Agent with copies of such documents.

(6) **Reservation of Right to Trial By Jury.** I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration agreements.

ARTICLE VIII

DURABILITY PROVISION

Immediate Power. This Power of Attorney shall not be affected by any physical disability or mental incompetence which renders me incapable of managing my own estate, nor will this power of attorney be affected by lapse of time.

ARTICLE IX

ADMINISTRATIVE PROVISIONS

Introduction. The following provisions shall apply:

- (1) **Reimbursement and Compensation of Agent.** My Agent shall be entitled to reimbursement for all reasonable costs and expenses, including reasonable attorney's fees, actually incurred and paid by my Agent on my behalf at any time under any provision of this instrument. My Agent shall not be entitled to compensation for services rendered hereunder but shall be entitled to reimbursement for reasonable expenses.
- (2) **Waiver of Acts of Omission and Commission.** My Agent (and my Agent's estate and personal representative), acting in good faith, are hereby released and forever discharged from any and all civil liability and from all claims or demands of all kinds whatsoever by me or my estate and personal representative arising out of the acts or omissions of my Agent, except for willful misconduct or gross negligence.
- (3) **Waiver of Duty to Produce Income, Authority for Transactions between Agent as Agent and Agent as Individual and Eligibility of Agent to Serve in Other Fiduciary Capacities for Principal.** My Agent shall have no responsibility to make my property productive of income, to increase the value of my estate or to diversify my investments. My Agent shall have no liability for entering into transactions authorized by this instrument with my Agent in my Agent's individual capacity as long as my Agent believes in good faith that such transactions are in my best interests or the best interests of my estate and those persons interested in my estate. My Agent shall be eligible to serve in all other fiduciary capacities, for me or my benefit (but not in my place where I may serve as a fiduciary for others), including but not limited to serving as Trustee, Guardian, Conservator, Committee, Personal Representatives.
- (4) **No Duty to Monitor Health.** My Agent shall have no responsibility to monitor on any regular basis the state of my physical health or mental capacity to determine if any actions need be taken under this instrument.
- (5) **Severability.** If any part of any provision of this instrument shall be invalid or unenforceable under applicable law, such part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of such provision or the remaining provisions of this instrument.
- (6) **This Instrument Unaffected by Lapse of Time.** This power of attorney shall be legally unaffected by reason of lapse of time or staleness.
- (7) **Agent Authorized to Sign Power of Attorney Forms.** In carrying out the authorizations set forth in this instrument, if in the sole opinion of my Agent it is necessary or convenient for my agent to sign my name, as principal, on forms of powers of attorney (the "Forms")

required by governmental agencies, corporations or other entities in transactions with me, my agent is authorized to execute such Forms, and to appoint an agent or other person on the Forms to represent.

(8) **Governing Law and Applicability to Foreign Jurisdictions.** This instrument shall be governed by the laws of the State of South Carolina in all respects, including its validity, construction, interpretation and termination. To the extent permitted by law, this power of attorney shall be applicable to all property of mine, real, personal, intangible or mixed, wherever and in whatever state of the United States or foreign country the situs of such property is at any time located and whether such property is now owned by me or hereafter acquired by me or for me by my Agent. In addition, in regard to health care treatment affecting me, I intend for this Power of Attorney to be honored in any jurisdiction in which it may be presented and given the most liberal interpretation available for purposes of granting my Agent the fullest amount of discretion in making health care decisions on my behalf. I also intend that any such jurisdiction refer to the laws of the state referred to above to interpret and determine the validity of this instrument and any of the powers granted hereunder. Should any physician or health care provider fail to honor this Power of Attorney, then my Agent is authorized to terminate the services of such persons and to transfer my care to another physician or health care provider that will honor the instructions of my Agent.

(9) **Definitions.** Whenever the word:

(a) "Agent" or any modifying or equivalent word or substituted pronoun therefor is used in this instrument, such word or words shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof.

(b) "Guardian" or "Conservator" or any modifying or equivalent word or substituted pronoun is used in this instrument, such word or words shall be held and taken to mean respectively the fiduciary, appointed by a court of competent jurisdiction or by other lawful means, responsible for the person and/or the property of an individual.

(10) **Revocation, Amendment and Resignation.** This instrument may be amended or revoked by me at any time by the execution by me of a written instrument of revocation or amendment, delivered to my Agent and to all Alternate Agents. If this instrument has been filed or recorded in the public records, then the instrument of revocation or amendment shall be filed or recorded in the same public records. My Agent and any Alternate Agent may resign by the execution of a written resignation delivered to me or, if I am mentally incapacitated, by delivery to any person with whom I am residing or who has the care and custody of me or, in the case of an Agent's resignation, by delivery to the Alternate Agent.

(11) **Substitute/Successor Agent Appointed by Court.** If at any time there is no person serving as Agent named herein, my successor or substitute Agent shall be some suitable person or institution, appointed by the court having jurisdiction over this instrument, ex parte, without the necessity of a hearing.

(12) **Appointment of Ancillary Agent.** If at any time my Agent deems it necessary or desirable in my Agent's discretion to appoint one or more Agents to act in another jurisdiction under this power of attorney (such Agent or Agents being hereinafter referred to in the aggregate as my "Ancillary Agent") my Agent from time to time and at any time may appoint one or more such Ancillary Agents. In making such appointment my Agent may execute and deliver such documents and instruments including living wills, Declarations of Desire for Natural Death, Health Care Declarations or Powers of Attorney as may be necessary, desirable, convenient or proper to effectuate any such ancillary appointment, and my Agent may grant to any Ancillary Agent, some or all of the powers and duties and authorities granted to my Agent hereunder, but may not grant to any such Ancillary Agent powers which are inconsistent with or different from those powers granted to my Agent hereunder.

(13) **Agent's Resignation and Selection of Substitute.** If my Agent desires to resign as my Agent, and there is no successor Agent named in this instrument who is willing and able to serve as my Agent, and I am incapacitated at the time of such resignation, then on such resignation my Agent is authorized and empowered to appoint a substitute Agent to act and serve as my Agent, such appointment to be made in a written instrument that shall be (i) signed by my Agent, (ii) delivered to my substitute Agent, and (iii) attached to this instrument.

(14) **Agent's Death, Incapacity, or Resignation and Selection of Substitute.** At any time after my incapacity, my Agent at any time may appoint a future successor Agent to act and serve as my Agent in the event that my Agent shall die or become mentally incapacitated or shall resign prior to my death, and my Agent at any time during my Agent's service as Agent may also revoke any such appointment theretofore made by my Agent, provided, however, that my Agent may not revoke, modify or supersede any appointment of a successor Agent made by me in this power of attorney. Any appointment made by my Agent shall be made in a written instrument that shall (i) specify the event or events on which such substitution shall become effective, (ii) be signed by my Agent, (iii) be delivered to my substitute Agent, and (iv) be attached to this instrument.

(15) **Counterpart Originals.** If this instrument has been executed in multiple counterpart originals, each such counterpart original shall have equal force and effect.

(16) **Photocopies.** My Agent is authorized to make photocopies of this instrument as frequently and in such quantity as my Agent shall deem appropriate. Each photocopy shall have the same force and effect as any original.

(17) **Binding Effect.** This instrument and actions taken by my Agent properly authorized hereunder shall be binding on me, my estate and my personal representative.

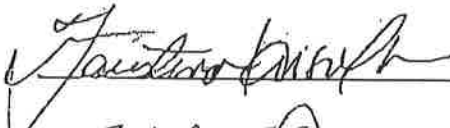
IN WITNESS WHEREOF, I have executed this Power of Attorney this ____ day of (2), 1999, and I have directed that photographic copies of this power be made which shall have the same force and effect as an original.



 JAMES C. STROUD, PRINCIPAL

ATTESTATION

The foregoing Durable Power of Attorney was this 22nd day of November, 2016, signed, sealed, published and declared by the said Principal as and for the Principal's Durable Power of Attorney in our presence, and at the Principal's request and in the Principal's presence, and in the presence of each other, have hereunto subscribed our names as witnesses on the above date.


 _____ of Greenville County, South Carolina


 _____ of Greenville County, South Carolina

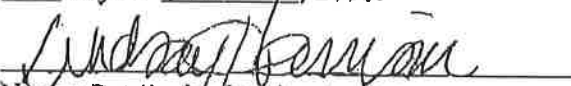
STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

P R O B A T E

PERSONALLY appeared the undersigned witness and made oath that (s)he saw the within named Principal duly authorized, sign, seal and as the Principal's act and deed deliver the within Durable Power of Attorney and that deponent with the other witness whose name is subscribed above witnessed the execution thereof.



SWORN to before me this
22nd day of Nov, 2016.



 Notary Public for South Carolina

My Commission expires: 5/22/19

ELECTRONICALLY FILED - 2021 Feb 12 6:41 PM - GREENVILLE - COMMON PLEAS - CASE#2020CP2301728

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
DEBBIE STROUD, GUARDIAN AD	)	CASE NO. 2020-CP-23-01728
LITEM FOR JAMES C. STROUD,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	
	)	THI OF BALTIMORE, INC.'S MOTION
THI OF SOUTH CAROLINA AT	)	TO STAY COURT PROCEEDINGS
GREENVILLE, LLC D/B/A MAGNOLIA	)	
MANOR-GREENVILLE, THI OF	)	
BALTIMORE, INC. AND THI OF	)	
SOUTH CAROLINA, LLC,	)	
	)	
DEFENDANTS.	)	
	)	

TO: C. DANIEL PRUITT, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant THI of Baltimore, Inc. (hereinafter referred to as “this Defendant”), by and through its undersigned attorneys, will move before this Honorable Court, at 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 Greenville, LLC d/b/a Magnolia Manor-Greenville (“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 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.

Matthew O. Riddle

Alexandra J. Ginsburg

P.O. Box 993, Charleston, SC 29402

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

mriddle@ycrlaw.com; aginsburg@ycrlaw.com

Attorneys for THI of Baltimore, Inc.

Charleston, South Carolina

Dated: February 12, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
DEBBIE STROUD, GUARDIAN AD	)	CASE NO. 2020-CP-23-01728
LITEM FOR JAMES C. STROUD,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	THI OF SOUTH CAROLINA, LLC'S
	)	MOTION TO STAY COURT
THI OF SOUTH CAROLINA AT	)	PROCEEDINGS
GREENVILLE, LLC D/B/A MAGNOLIA	)	
MANOR-GREENVILLE, THI OF	)	
BALTIMORE, INC. AND THI OF	)	
SOUTH CAROLINA, LLC,	)	
	)	
DEFENDANTS.	)	
	)	

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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 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 Greenville, LLC d/b/a Magnolia Manor-Greenville (“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 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.

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Attorneys for THI of South Carolina, LLC

Charleston, South Carolina

Dated: February 12, 2021

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) C.A. NO.: 2020-CP-23-01728

Debbie Stroud, Guardian ad Litem for)
James C. Stroud,)
))
Plaintiff,)
))
v.)
))
THI of South Carolina at Greenville, LLC)
d/b/a Magnolia Manor - Greenville, THI of)
Baltimore, Inc., and THI of South Carolina,)
LLC,)
))
Defendants.)
_____)

**MEMORANDUM IN
OPPOSITION TO MOTION
TO COMPEL ARBITRATION**

Statement of Facts/ Procedural Posture

James C. Stroud, a Medicare recipient, was admitted to Magnolia Manor of Greenville (hereinafter Defendants' facility) on March 6, 2017. While a resident, Mr. Stroud experienced a series of falls with resulting injury and other circumstances that deviated from the accepted standard of care. As a precondition to his admission there, Defendants' representative required Mrs. Debbie Stroud, Mr. Stroud's wife, to sign the Facility- Resident/Representative Arbitration Agreement on March 3, 2017. Defendants' Exh. A. Notably, the agreement is signed only by Debbie Stroud, in her representative capacity, not by James C. Stroud.

The agreement purports to waive Mr. Stroud's right to Jury Trial and require that any controversy or dispute between the parties be submitted to binding arbitration in accordance with the South Carolina Alternate Dispute/ Resolution Rules. Plaintiff subsequently filed a lawsuit in Greenville County in the Court of Common Pleas seeking compensation on account of Mr. Stroud's injuries. Defendants have filed a Motion to Compel Arbitration. Plaintiff strongly objects to the

Motion because the purported agreement is invalid and unenforceable for the reasons detailed below.

I. Whether a valid power of attorney authorized the attorney-in-fact to enter an agreement for binding arbitration.

In deciding a motion to compel arbitration, the Court looks to contract law to determine whether a valid and enforceable contract to arbitrate has been entered by the parties. "[A]rbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." [*Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 \(2009\)](#). A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. See [*Gaddy v. Douglass*, 359 S.C. 329, 344-45, 597 S.E.2d 12, 20 \(Ct. App. 2004\)](#). "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney." [*Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 \(Ct. App. 2014\)](#) (quoting [*In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 \(Ct. App. 2001\)](#)). "Our courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney." [*Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 \(Ct. App. 2019\)](#).

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Id.* (quoting [*Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 \(Ct. App. 2014\)](#)). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting [*Watson*, 407 S.C. at 455, 756 S.E.2d at 161](#)). Accordingly, here, the specific language of the Power of Attorney

determines whether Mr. Stroud authorized his attorney-in-fact to execute an agreement for binding arbitration. Arredondo v. SNH Ashley River Tenant, LLC, Op. 28011, S.C. Filed March 10, 2021. Absent the grant of such authority, his Attorney-in-Fact had no authority or legal capacity to enter the arbitration agreement in question. The arbitration agreement is invalid and unenforceable if the Attorney-in-Fact had no authority to waive the right to jury trial or enter an arbitration agreement. Arredondo at 2.

Article VII of the Power of Attorney signed by Mr. Stroud in favor of his wife on November 22, 2016 contains specific restrictions on the authority granted by Mr. Stroud to his attorney-in-fact. Section (6) provides as follows:

Reservation of Right to Trial by Jury. I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements.

Durable Power of Attorney of James C. Stroud, Article VII, paragraph (6)(emphasis in original).

The present case is an even stronger case for denial than the one at issue in the recent Supreme Court reviewed in Arredondo cited above. Here, the Power of Attorney specifically states that the Attorney in Fact is not granted the power to waive the right to jury trial or enter into arbitration agreements. The plain language of the Power of Attorney controls. The Arbitration Agreement is not valid or enforceable because it is expressly beyond the scope of authority granted to Mrs. Stroud by her husband.

II. Whether a mandatory agreement for binding arbitration is enforceable where the resident in question is a recipient of Medicare.

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50,53 n.2, 426 S.E.2d 760, 762 n.2 (1993). “The general rule is that courts will not enforce a contract is violative of public policy, statutory law, or provisions of the Constitution.” Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare reimbursement rates as payment in full. See 42 C.F.R Section 489.30; 42 C.F.R. Section 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. Section 1396r(c)(5)(A)(iii).

Clearly here, it is undisputed that Mr. Stroud was a recipient of Medicare at the time of his admission and throughout his stay at Defendants’ facility and the Defendants’ facility was billing and accepting payment from Medicare for Mr. Stroud’s care. As such, the purported agreement for binding arbitration which the facility mandated that Mrs. Stroud sign is not valid or enforceable because by its terms it violates federal law.

III. Whether the agreement for binding arbitration was not valid or enforceable where not supported by valuable consideration.

It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) (“a contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act”). Consideration may consist of “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.” Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).

The clear language of the purported arbitration agreement makes clear that the Defendants required Mrs. Stroud to sign as condition of admission to their facility. As such, this requirement was a clear violation of Federal Law. 42 U.S.C. Section 1396r(c)(5)(A)(iii) prohibits a facility such as Defendants’ from soliciting or accepting “any other consideration” as a condition to admission outside of the Medicare payments when admitting a patient in Mr. Stroud’s position. By requiring Mrs. Stroud to sign the document attempting to require waiver of the right to jury trial as a condition of admission, Defendants were requiring and accepting consideration in addition to Medicare payments. Therefore, the arbitration agreement in question is not valid or enforceable.

Conclusion

The arbitration agreement was not valid because the Principal, Mr. Stroud, decided not to grant the power to waive his right to jury trial or enter arbitration agreements to his Attorney-in-Fact. In addition, the agreement used by Defendants is also not valid or enforceable because it is illegal and without consideration. As Such, Plaintiff respectfully asks the Court to deny Defendants’ Motion.

Respectfully Submitted,

s/ C. Daniel Pruitt

Bar # 66497

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Dated: April 2, 2021
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
DEBBIE STROUD, GUARDIAN AD	)	CASE NO. 2020-CP-23-01728
LITEM FOR JAMES C. STROUD,	)	
	)	
PLAINTIFF,	)	DEFENDANT THI OF SOUTH
	)	CAROLINA AT GREENVILLE, LLC
vs.	)	D/B/A MAGNOLIA MANOR-
	)	GREENVILLE'S MEMORANDUM IN
THI OF SOUTH CAROLINA AT	)	SUPPORT OF ITS MOTION TO STAY
GREENVILLE, LLC D/B/A MAGNOLIA	)	ACTION AND COMPEL ARBITRATION
MANOR-GREENVILLE, THI OF	)	AND REPLY TO PLAINTIFF'S
BALTIMORE, INC., AND THI OF	)	MEMORANDUM IN OPPOSITION
SOUTH CAROLINA, LLC,	)	
	)	
DEFENDANTS.	)	

Defendant THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor-Greenville ("Magnolia Manor" or the "Facility"), by and through its undersigned counsel, submits this Memorandum in Support of its Motion to Stay Action and Compel Arbitration.

INTRODUCTION

In this nursing home malpractice lawsuit, Plaintiff, Debbie Stroud ("Plaintiff" or "Mrs. Stroud"), as guardian ad litem for her husband, James C. Stroud ("Mr. Stroud"), has sued the Facility, a skilled nursing facility in Greenville County, based on allegations that arise solely out of and concern Mr. Stroud's residency at the Facility. On two separate occasions, however, the first in conjunction with Mr. Stroud's initial admission to the Facility in March 2017, the second in conjunction with his readmission to the Facility in October 2018, Ms. Stroud, presenting herself as her husband's attorney-in-fact pursuant to a Durable Power of Attorney ("Power of

Attorney”)¹ and otherwise expressly representing herself as duly authorized to act for him in all respects material to the instant motion, and knowing that the Facility was relying on the same, executed not only an Admission Agreement but also an Arbitration Agreement on Mr. Stroud’s behalf. **See Exhibit 1** – Stroud Power of Attorney; **See Exhibit 2** – Admission Agreement for Initial Admission²; **See Exhibit 3** – Admission Agreement for Readmission on October 19, 2018; **See Exhibit 4** – Arbitration Agreement for Initial Admission; **See Exhibit 5** – Arbitration Agreement for Readmission on October 19, 2018. The Arbitration Agreement covers all allegations raised in the Complaint and, according to its express terms, requires that Plaintiff and the Facility submit this matter to arbitration. **See Exs. 4 & 5.** Further, the Arbitration Agreement explicitly binds not only the parties to the agreement, but “also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.” **See Id.**

When the Arbitration Agreements were signed by Debbie Stroud on March 3, 2017, and October 19, 2018, respectively, Mrs. Stroud presented the Power of Attorney to the Facility and otherwise represented herself to the Facility as being duly authorized to sign the Admission Agreements and Arbitration Agreements for Mr. Stroud, and the Facility relied upon such representations. Plaintiff provided a photocopy of the Power of Attorney when entering the Admission Agreement and Arbitration Agreement. Furthermore, Mr. Stroud himself and Plaintiff presented Plaintiff to the Facility as having authority to act on behalf of Mr. Stroud and, as a matter

¹ The Power of Attorney was found in the Facility’s file for Mr. Stroud, Mrs. Stroud having presented it to the Facility.

² It appears that Mrs. Stroud dated this Admission Agreement “2/3/17” rather than “3/3/17.” This was clearly a scrivener’s error, as Mr. Stroud was in fact admitted to the facility on 3/3/17, which is the date the Facility’s representative signed the Admission Agreement, and Mrs. Stroud and the Facility’s representative both signed and dated the corresponding Arbitration Agreement on “3/3/17.”

of law, the Facility may rely on such apparent authority to enter into a valid, binding, and enforceable contract.³

There is absolutely no evidence that either Arbitration Agreements were entered into under duress. Further, neither Arbitration Agreement is substantively or procedurally unconscionable by its terms. Plaintiff has never repudiated or canceled the Arbitration Agreement at any point in time prior to her opposition to the Facility's efforts to enforce the Arbitration Agreement. In fact, Plaintiff signed the Arbitration Agreement on admission and readmission to the Facility. Plaintiff had ample opportunity to re-evaluate and re-analyze the Arbitration Agreement upon readmission. Moreover, Plaintiff does not now dispute and has never disputed that she had authority to admit Mr. Stroud to the Facility on March 6, 2017 or October 19, 2018 (or keep him there). *Plaintiff should be estopped from claiming that she had authority to enter into the Admission Agreement and for Mr. Stroud to receive the benefits thereunder but refute the authority (which Plaintiff expressly represented to the Facility that she had) to enter into the Arbitration Agreement, which, under the doctrine of merger, is part and parcel of the Admission Agreement, the two instruments having been signed at the same time, by the same parties, for the same purpose, and in the course of the same transaction.* Therefore, as discussed further herein, the Facility respectfully requests that the Court compel arbitration of Plaintiff's claims pursuant to the Arbitration Agreement, as it is valid and binding or, at the least, Plaintiff is equitably estopped to deny its validity, and, accordingly, dismiss or stay Plaintiff's Complaint in favor of said arbitration.

³ To be clear, the Facility's argument in support of the instant motion does *not* rely on any contention that Mrs. Stroud had authority to bind her husband to arbitration pursuant to the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80.

BACKGROUND

Plaintiff's husband, Mr. James C. Stroud, was admitted to the Facility for short-term rehabilitation on March 6, 2017. Prior to his admission to the Facility, on November 22, 2016, James C. Stroud and Plaintiff, Debbie Stroud, executed a durable power of attorney. **See Ex. 1.** The Power of Attorney, effective that day, granted Mrs. Stroud broad powers related to financial, legal, and healthcare matters for her husband. **See Ex. 1.** Unbeknownst to the Facility, however, and despite Mrs. Stroud's presentation of the Power of Attorney to the Facility in furtherance of (but not as the sole basis of) her authority to act on Mr. Stroud's behalf in all material respects, buried on page 15 of 20, the Power of Attorney—contradictory to, among other things, the express grant of "**Power with Respect to Legal and Other Actions**" on page 4⁴—contains a provision entitled "**Reservation of Right to Trial By Jury**," purporting to deny Mrs. Stroud the power to enter into arbitration agreements on Mr. Stroud's behalf. **See Ex. 1** at p. 15.

Approximately two (2) months following Mrs. Stroud's execution of the Power of Attorney, on January 20, 2017, Mr. Stroud was admitted to North Greenville Hospital with a problem list to include, (1) Parkinson's disease, (2) anemia, (3), Stage 4 sacral pressure ulcer, (4) sacral osteomyelitis, (5) atypical Parkinsonism, (6) chronic kidney disease stage 3, (7) essential hypertension, (8) lewy body dementia, (9) coronary atherosclerotic disease (CAD), (10) benign prostate hyperplasia (BPH), (11) urinary retention, (12) debility, and (13) malnutrition. He was treated with antibiotics and provided complex wound care for osteomyelitis and a stage 4 sacral decubitus ulcer. Mr. Stroud was discharged from the long-term acute care hospital on March 6, 2017 to Defendant's skilled nursing facility.

⁴

See Ex. 1 at p. 4.

On admission, Mr. Stroud entered into a number of contracts and consents with the Facility, by and through his wife and agent attorney, Mrs. Stroud, for the mutual benefit of both him and the Facility and their respective representatives and agents. Each of the contracts and written consents related to Mr. Stroud's residency, care, and treatment at the Facility was signed by Mrs. Stroud, who was represented as duly authorized to do so. **See Exhibit 4 – Arbitration Agreement for Initial Admission; Exhibit 2 – Resident Admission Agreement for Initial Admission.**

Based on the Admission Agreement and pursuant to the agreements set forth therein, Mr. Stroud was admitted to the Facility and received skilled nursing care and treatment. During his stay at the Facility, Mr. Stroud accepted the benefits of the contracts entered into on his behalf by Mrs. Stroud. Such benefits included, but are not limited to, Mr. Stroud's residency at the Facility and his receipt of the skilled nursing care provided therein.

Mr. Stroud was later admitted to St. Francis Downtown on October 5, 2018 for severe anemia and esophageal dysplasia. Mr. Stroud remained hospitalized for fourteen (14) days and was discharged back to the Facility on October 19, 2018 for long-term care. Upon Mr. Stroud's return to the Facility, Mrs. Stroud, again represented as having all due right, power, and authority to do so, again entered into various contracts and consents for readmission on behalf of her husband. These contracts and consents are identical to those signed on Mr. Stroud's initial admission. **See Exhibit 3 – Admission Agreement for Readmission on October 19, 2018; Exhibit 5 – Arbitration Agreement for Readmission on October 19, 2018.** Plaintiff and his family have never challenged any agreement's validity until now—after two opportunities to thoroughly review the Admission Agreement and Arbitration Agreement. **Notably, Plaintiff does not assert that either Admission Agreement is invalid or that Mr. Stroud entered the Facility unwillingly or without consent.**

Upon admission and readmission, Mrs. Stroud explicitly represented that she was authorized to admit her husband to the Facility and execute documents on his behalf, including the Arbitration Agreement. Besides the presentation of the Power of Attorney to the Facility, Mrs. Stroud expressly signed both the Admission Agreements and the Arbitration Agreements as “‘Resident’s[⁵] Durable Power of Attorney for Health Care’/‘Resident’s Legal Guardian’/‘Resident’s Responsible Party.’” The Admission Agreement expressly includes Mrs. Stroud’s acknowledgement that the “promises and representations [she made therein were] in order to induce Facility to enter into this Agreement” and her understanding that the “Facility [wa]s relying upon the truthfulness of the promises and representations [she] made.” By signing the Arbitration Agreement, Mrs. Stroud expressly “represent[ed] that . . . she ha[d] authority to sign on [Mr. Stroud’s] behalf so as to bind [him] as well as [herself].” **See Ex. 2 and Ex. 3.** Therefore, Mrs. Stroud signed the Admission Agreement and Arbitration Agreement on behalf of Mr. Stroud as his “Representative,” as defined therein, and she “is presumed to have read, understood, and assented to its terms.” Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019).

The Arbitration Agreement at issue defines Magnolia Manor of Greenville as the “Facility” and “Debbie Stroud” as the “Representative.”⁶ The relevant provisions of the Arbitration Agreement state the following:

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

⁵ In both the Admission Agreements and the Arbitration Agreements, Mr. Stroud is referred to as the “Resident.”

⁶ This Defendant acknowledges that the “Resident” is left blank; however, the Arbitration Agreement, Admission Agreement, and Durable Power of Attorney are included within the business file. The documents expressly identify “James C. Stroud” as the resident of the Facility.

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.

See Ex. 4 & 5.

The Arbitration Agreement further provides:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law.

See Ex. 4 & 5.

Regarding Mrs. Stroud's authority to sign on behalf of her husband, the Arbitration Agreement states:

By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf **so as to bind the Resident as well as the Representative.**

See Ex. 4 & 5 (emphasis added).

The Arbitration Agreement was executed by Mrs. Stroud as "Representative" of Mr. Stroud, and an authorized Representative from the Facility signed on behalf of Magnolia Manor of Greenville. Because the acts complained of by Plaintiff fall within the scope of the Arbitration Agreement, the Court should stay these proceedings, and compel this matter to arbitration. 9 U.S.C. § 3.

ARGUMENT

I. POLICY IN FAVOR OF ARBITRATION

As a general matter, there is a strong presumption in favor of the validity of arbitration agreements because of strong policy considerations 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.”). “The federal policy favoring arbitration, as expressed in the [Federal Arbitration Act], is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements.” Zabinski v. Bright Acres, 346 S.C. 580, 590, 553 S.E.2d 110 (S. Ct. 2001). Further, arbitration agreements are presumed valid, and “[t]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” Green Tree Fin. Corp.- Ala. v. Randolph, 531 U.S. 79, 91 (2000).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND MANDATES THAT THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT BE COMPELLED TO ARBITRATION.

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. 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 (FAA) leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). 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).

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”⁷ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). Thus, while a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” Kindred Nursing Centers, 137 S. Ct. at 1423 (citing

⁷ Allied–Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270 (1995).

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

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 compelled to arbitration.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.

A. Plaintiff’s Attestation of Authority in the Arbitration Agreement Binds Plaintiff to the Arbitration Agreement as it is a Facially Valid Contract.

Mrs. Debbie Stroud represented herself to staff and admissions personnel at Magnolia Manor as her husband’s representative, with the authority to sign documents on his behalf, make decisions on his behalf and bind Mr. Stroud and herself pursuant to those documents. Indeed, immediately above Plaintiff’s signature on the Arbitration Agreement, Plaintiff attests in bold font:

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.**

See **Ex. 4 & 5** (emphasis added).

Plaintiff indisputably represented to Magnolia Manor that she had authority to act on behalf of her husband in executing the Arbitration Agreement. It was clearly Plaintiff's intention to bind both her husband, Mr. Stroud, and herself on the face of the Arbitration Agreement according to its plain language.

Notably, the Court faced facts similar to the ones at bar in Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. al, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (See Price Order Granting Defendant's Motion to Compel Arbitration, attached hereto as **Exhibit 6**) and in Josephine Spears v. Rehab Center of Cheraw, LLC et al, 2019-CP-13-00308 (January 10, 2020) (See Spears Order Granting Defendant's Motion to Compel Arbitration, attached hereto as **Exhibit 7**). In both of these cases, the plaintiff was the family member of a skilled nursing home resident at a skilled nursing facility in South Carolina. Further, the applicable resident's family member executed a number of documents on her husband's behalf upon the latter's admission to the facility, including an admissions agreement and arbitration agreement similar to the ones in the case at bar. (See **Ex. 6** p. 2-3; see **Ex. 7**, p. 1). In both Price and Spears, despite each family member's representation to the respective skilled nursing facility that she had authority to enter into the arbitration agreement on behalf of her husband, after the defendant skilled nursing facility moved to compel arbitration, each family member subsequently filed an affidavit refuting that she actually had authority in opposition to the defendant's motion to compel arbitration. **However, in both Price and Spears this Court found that the signatory plaintiff's attestation of authority in the arbitration agreement bound plaintiff to its terms.** The circumstances are no different in the instant matter before the Court.

Specifically, this Court determined in Price that “the terms of the Arbitration Agreement clearly apply to the instant dispute[,]” because was it clearly the intent of the family member to bind the resident (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See Ex. 6, p. 5). Likewise, in Spears, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident very similar to Plaintiff’s attestation in the Arbitration Agreement noted above.⁸ As such, this Court in Spears held, in part, that the family member’s authority to sign the arbitration agreement at issue was “valid on its face” by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff’s authority beyond her own attestation. (See Ex. 7, p. 4).

As in Price and in Spears, Plaintiff in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of her husband, Mr. Stroud, and herself. By signing the Arbitration Agreement, Plaintiff is “presumed to have read, understood, and assented to [the] terms” of it. Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019)(“[O]ne who has signed a contract is presumed to have read, understood and assented to its terms.”). Therefore, the Court should find that Plaintiff is bound by the plain language of the Arbitration Agreement and the authority that she attested to therein is sufficient to enforce the Arbitration Agreement and compel this matter to arbitration.

⁸ The arbitration agreement at issue in Spears contained the exact same attestation of authority as this case: “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.”

B. Mrs. Stroud Possessed the Apparent and Inherent Authority to Bind Mr. Stroud under the Arbitration Agreement, or Agency by Estoppel applies.

1. Agency Relationship – Apparent Authority

Mrs. Stroud possessed both apparent and inherent authority to bind Mr. Stroud to both the Admission Agreement and Arbitration Agreement. A true agency relationship may be established by evidence of actual or apparent authority. R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control.” Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992).

The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. Eadie v. H.A. Sack Co., 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

Magnolia Manor points to Carraway v. Beverly Enters. Ala., Inc., 978 So. 2d 27 (Ala. 2007), as persuasive authority in this case. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents

as his sister's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in Carraway provided that plaintiff was his sister's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. Also like in this case, the arbitration agreement in Carraway was a separate document and was not a condition of admission to the facility. Id.

When signing the arbitration agreement, the brother in Carraway left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. Id. See also, Tenn. Health Mgmt. v. Johnson, 49 So. 3d 175 (Ala. 2010)(holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in Carraway was applied as "persuasive authority" by this Court in Price, *supra*. Ex. 6, p. 8.

Clearly, **Mr. Stroud presented his wife, Plaintiff, as his agent and representative with authority to make decisions on his behalf with the Facility.** Likewise, on March 3, 2017 and again on October 19, 2018, just prior to admission and readmission, Plaintiff expressly represented to the Facility that she was an agent for her husband when she executed various admission documents on behalf of her husband, including the Arbitration Agreement. (See **Ex.2-5**). She executed these documents in her capacity as Mr. Stroud's "representative." Mrs. Stroud

signed numerous consent documents, and helped make numerous decisions regarding Mr. Stroud's health while at the Facility.

This continuity of decision-making by Plaintiff further led the Facility staff to believe that Mrs. Stroud was acting as Mr. Stroud's agent during this time. Furthermore, the Care Plan Conference summary dated September 18, 2018, indicated that Mr. Stroud's "family is very involved." Neither **Plaintiff nor any other family member of Mr. Stroud ever repudiated that Plaintiff, Mr. Stroud's wife, was authorized and able to act on his behalf and make decisions as to all matters related to his residency at Magnolia Manor– health, residential-related, or otherwise.**

The staff at Magnolia Manor naturally and reasonably deduced that Mrs. Stroud was acting pursuant to the authority cloaked on her by Mr. Stroud due to her attestation to authority on the documents themselves, and in conjunction with the Power of Attorney presented, as well as Mrs. Stroud's decision making with respect to Mr. Stroud's care. This apparent authority continued throughout her residency, as Mrs. Stroud continued *in the exact same way throughout Mr. Stroud's residency*, as she continued to interact with the Facility as she had on March 3, 2017. Therefore, it was Magnolia Manor's reasonable and justified belief that, Plaintiff was her husband's authorized agent/representative and that she had the authority to execute the documents on his behalf, including the Arbitration Agreement.

Moreover, by allowing Mrs. Stroud to procure his admission to the Facility and thereafter by accepting the benefits of the contracts entered into in connection with that admission, Mr. Stroud represented that his wife was his authorized representative to act on his behalf in connection with admission. See R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000)(If a principal holds another out as having the

authority to act on his behalf or knowingly permits another to act as his agent, “either **generally** or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances”)(emphasis added).

A holding that Plaintiff, as Mr. Stroud’s wife and frequent communicator of her husband’s desires, wants and needs to Magnolia Manor was *not* Mr. Stroud’s apparent agent would go against the fundamental concept of apparent agency: **that an agency relationship is based on a third party’s understanding of a principal’s manifestations and a reasonable belief that the agent has been authorized to act.** Magnolia Manor had reason to believe that by allowing Mrs. Stroud to sign the admissions paperwork, including the documents providing for Mr. Stroud’s stay and the skilled nursing care provided at the Facility, Mr. Stroud cloaked his wife with the authority to execute the various documents related to his admission, including the Arbitration Agreement. Further, neither Mr. Stroud nor any member of his family repudiated or invalidated his wife’s/Plaintiff’s actions. Instead, Mr. Stroud accepted the benefits of the contracts with Magnolia Manor by remaining at the Facility and receiving skilled nursing care and services.

It is clear that an apparent agency relationship existed between Mr. Stroud and Mrs. Stroud such that the Arbitration Agreement should be deemed enforceable.

2. Inherent Agency Authority

Even if Plaintiff lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such inherent powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions “accompany or are incidental to

transactions which the agent is authorized to conduct....” See, §§ 8A, 161 Restatement (Second) of Agency (1958); Smith v. Fitton & Pittman, Inc., 264 S.C. 129, 212 S.E.2d 925 (1975)(*abrogated on unrelated grounds*)(examining whether party had properly demonstrated the existence of inherent agency powers); Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r, 309 P.3d 372 (Wash. 2013); Daly v. Aspen Ctr. for Women's Health, Inc., 134 P.3d 450, 452 (Colo. App. 2005); Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210-11 (Ind. 2000); Cange v. Stotler & Co., 826 F.2d 581, 591 (7th Cir. 1987)(“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”)(citing to Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co., 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for the doctrine of inherent agency is that, as between an equally innocent principal and third party with reference to an agent’s purportedly “unauthorized” actions, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as Magnolia Manor, should not be disadvantaged because they dealt with an agent rather than a principal.

As set forth above, there is no dispute as to whether the Plaintiff was authorized to admit her husband to Magnolia Manor. *Plaintiff does not repudiate her authority to have admitted Mr. Stroud – which is based on the very same authority that she had to enter into the Arbitration Agreement.* To the extent Plaintiff takes issue with her own authority to bind her husband to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to her authority to admit her husband as a resident at Magnolia Manor. Magnolia Manor should not be disadvantaged for acting in accordance with the express representations of Plaintiff regarding her authority to execute the various documents related to the admission,

including the Arbitration Agreement, and her authority to act on behalf of Mr. Stroud as his agent in communicating with Magnolia Manor.

3. Agency by Estoppel

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” R & G, supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, this Defendant must show: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.” Boyd v. Bellsouth Tel.Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In Price, supra, this Court ruled that the Plaintiff was equitably estopped from denying that she was her husband’s authorized agent during the latter’s admission to the skilled nursing facility:

In the case at the bar, [the facility] had not knowledge or reason to believe that Plaintiff was not [her husband’s] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

(See Ex. 10, p. 9).

Similarly, in McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), the facts are also substantially similar to the case at bar- if the Court were to invalidate the Power of Attorney. (See McCutcheon – Order Granting Defendant’s Motion to Compel, attached hereto as **Exhibit 8**). There, the plaintiff was the family member of a resident of a nursing home facility in South Carolina who executed a number of documents on the resident’s behalf upon her admission to the facility, including an arbitration agreement. The family member signed the documents as his resident’s authorized representative but did not have a power of attorney for the resident at the time. Nevertheless, the admissions agreement in McCutcheon provided that plaintiff was the resident’s legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. Also like here, the Arbitration Agreement in McCutcheon was a separate document and was not a condition of admission to the facility.

In McCutcheon, the United States District Court of South Carolina determined that the arbitration and admission agreements should be merged under general principles of contract law (See Sec. III.D below - merger argument). **Id.** at *4. In addition, the McCutcheon court concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration, holding:

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

Id. at *5.

As in Price and McCutcheon, it would be disingenuous and inequitable to allow Mr. Stroud, by and through Plaintiff, to effectively admit that his wife was his authorized agent as to the Admission Agreement, but not the Arbitration Agreement.⁹ In the case at bar, Magnolia Manor had no knowledge or reason to believe that Plaintiff was not Mr. Stroud's authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. Indeed, the facility record reflects ample reason to believe that she was his agent. Magnolia Manor relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by Magnolia Manor, only for the Plaintiff through the instant lawsuit to seemingly ignore the binding agreement. It is simply not equitable for Plaintiff to hold herself out to Magnolia Manor as Mr. Stroud's agent and representative, as further affirmed by Mrs. Stroud's own holding out of Plaintiff to Magnolia Manor, for the entirety of his residency and on the date of admission, but conveniently repudiate that she had any authority in response to this instant Motion. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

Relevant to the application of this equitable principle in the matter at bar is that there is an implied covenant of good faith and fair dealing in every contract, Adams v. G.J. Creel & Sons, Inc., and Plaintiff is no less bound by this covenant than Magnolia Manor. Plaintiff, on

⁹ To the extent Plaintiff argues that neither the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), nor the Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10 to -70 (the "Resident's Bill of Rights"), gave Mrs. Stroud authority to sign the Arbitration Agreement on Mr. Stroud's behalf, these arguments would be of no moment because the instant Motion does not rely on the AHCCA or the Resident's Bill of Rights as having granted Mrs. Stroud the authority to sign the Arbitration Agreement for Mr. Stroud.

behalf of *herself*, agreed to be bound by the terms of the Arbitration Agreement. Indeed, above Plaintiff's signature on the Arbitration Agreement, she acknowledges and agrees: **"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."** See Ex. 3(emphasis added).

There is no doubt, of course, that Plaintiff could and did bind herself to the Arbitration Agreement and there is no question here as to Plaintiff's own competency to have done so. Thus, Mrs. Stroud owes Magnolia Manor covenants of good faith and fair dealing, and it would be *inequitable, unfair* and *not in good faith* to permit Mrs. Stroud to bind Mr. Stroud to the Admission Agreement, to bind herself to the Arbitration Agreement and hold herself out throughout Mr. Stroud's residency as having authority to bind Mr. Stroud to the Arbitration Agreement, yet succeed in repudiating that position now just because Magnolia Manor seeks to enforce the terms of the Arbitration Agreement. **As stated previously, Mrs. Stroud claims the same basis for authority to enter into the Admission Agreement as she had to enter into the Arbitration Agreement.** To require good faith and fair dealing from Magnolia Manor as a contracting party, but not to require the same of Plaintiff, acting on her own behalf and on behalf of her husband, just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed "on *equal footing* with other contracts." Concepcion, 563 U.S. at 339.

IV. PLAINTIFF/MR. STROUD SHOULD BE ESTOPPED TO DENY THE ENFORCEABILITY OF THE ARBITRATION AGREEMENT.

A. The Arbitration Agreement and Admission Agreement Must be Construed Together (Merged), and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration.

1. Merger

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

The Arbitration Agreement and Admission Agreement were executed by Mrs. Stroud on behalf of her husband, Mr. Stroud. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that “any controversy or dispute between the parties *arising out of or relating to Facility’s Admission Agreement . . . or relating in any way to Resident’s stay at Facility*” shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. See **Ex. 4 and 5 – Arbitration Agreement (emphasis added)**. As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by Mrs. Stroud on behalf of her husband on the same day, at the same time, and in connection with the same subject matter and transaction – Mr. Stroud’s residency at Magnolia Manor and receipt of skilled nursing care there.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. Klutts Resort Realty, Inc. v. Down'Round Development Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). Absent evidence showing a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. Id. See also Saro Investments v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See Plaza Development Services v. Joe Hardin Builder, Inc., 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord Cafe Associates, Ltd v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991).

As indicated previously, the court in McCutcheon analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011WL6318575 (See **Exhibit 8**). Indeed, this Court has cited to McCutcheon on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. See Abrams v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). See Abrams and Campsen attached hereto as **Exhibits 9 and 10, respectively**.

Accordingly, Mr. Stroud, by and through the acts of his agent and representative, Mrs. Stroud, and the Facility, both contemplated that the terms of the agreement to admit Mr. Stroud were contained in the Admissions Agreement and Arbitration Agreement- twice. Mrs. Stroud executed the Arbitration Agreement and the Admissions Agreement at the same time – on March 3, 2017, as well as October 19, 2018; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction – Mr. Stroud’s residency at the Facility and receipt of residential and skilled nursing services; the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

2. Equitable Estoppel of Merged Agreement

“Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999)); see also Pearson v. Hilton Head Hosp., 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in International Paper Co. to reverse the circuit court’s denial of a motion to compel arbitration); Wilson, 426 S.C. at 339–345, 827 S.E.2d at 174–177 (discussing direct benefits test).

Because of the doctrine of merger referenced above, this legal principle is properly applied in this case. The doctrine of equitable estoppel “exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.” S. Ill. Bev., Inc. v. Hansen Bev. Co., 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that “no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates S.A.S., 269 F.3d 187, 200 (3d Cir. 2001)(citing Am.

Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in Jackson v. Iris.com:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

. . . .

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting in part Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp., 659 F.2d 836, 839 (7th Cir. 1981) (citing in part Int'l Paper Co., 206 F.3d at 416) (internal quotations omitted)).¹⁰

Mr. Stroud embraced the Admission Agreement with the Facility. **Plaintiff does not dispute the validity of the Admission Agreement or her husband's admission to the Facility. She never removed Mr. Stroud from the Facility and, by all accounts, approved of presence at the Facility/did not seek his discharge.** Therefore, it would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the

¹⁰ See also THI of S.C. at Columbia, LLC v. Wiggins, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); accord THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

arbitration provisions. In other words, Plaintiff cannot “have it both ways” by relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to her disadvantage.

As described, the Plaintiff’s allegations fall within the scope of the Arbitration Agreement. Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of the direct benefits test endorsed in Wilson, 426 S.C. 326, 827 S.E.2d 167. The Wilson Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the Wilson Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which it is now contended that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here. Wilson, 426 S.C. at 340–345, 827 S.E.2d at 175–177; see also id. at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the Wilson Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added). Without question Mr. Stroud received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

3. *Coleman, Thompson, and Hodge are Distinguishable*

To the extent Plaintiff argues the Admission Agreement and Arbitration Agreement are not merged pursuant to Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), Coleman, 407 S.C. at 350, 755 S.E.2d at 452, and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 769 (Ct. App. 2016), such reliance is misplaced.

However, these cases are distinguishable as it relates to the issue of “separateness” and the doctrine of merger, as described further below.

In Coleman, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme Court found, “On its face, this clause recognizes the ‘separatedness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate.” Id. at 452. “By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” Id.

Similarly, in Hodge, the admission agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in Coleman, the arbitration agreement in Hodge recognized a separateness, as it referenced the two documents separately, stating “[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.” Id. Finally, the arbitration agreement in Hodge stated

it could be revoked within thirty days, whereas the admission agreement contained no such indication. Id. In Thompson, the arbitration agreement also contained a disclaimer provision but the admission agreement did not.

Unlike the arbitration agreements in Coleman, Thompson, and Hodge, the Arbitration Agreement and Admission Agreement in the case at bar should not be considered “separate” for purposes of denying merger. Unlike Coleman, Thompson, and Hodge, the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (citing Klutts, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).¹¹ Specifically, the Admission and Arbitration Agreements were signed by the Mrs. Stroud on Mr. Stroud’s and her own behalf, and the Facility on March 3, 2016. The documents were signed by the exact same people: Mrs. Stroud as representative for her husband and by the Admissions Coordinator for the Facility. The documents were signed for the same purpose and transaction of establishing Mr. Stroud’s residency at the skilled nursing facility.

While the Admission Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn’t refer to it at all). Moreover,

¹¹ To be clear, even though the Coleman Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the Coleman Appellants’ based their merger argument, i.e., the Coleman Court expressly observed that the admission agreements and arbitration agreements before it (which, in this respect, are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), “the documents were [indeed] executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

the Arbitration Agreement at issue contains no disclaimer provision, unlike Coleman, Thompson, and Hodge. Also, absent here is the type of discrepancy the Hodge Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (Compare Admission Agreement p. 10 (providing “This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.”) *with* Arbitration Agreement (providing that, “because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).)

Further still, it must be remembered that the merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹² as indeed the admission and arbitration agreements were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. Cf. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). Such superficial things as the fact that the admission arbitration agreements have

¹² Coleman, 407 S.C. at 355, 755 S.E.2d at 455.

their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To point to such things is really to do no more than to point out that the admission agreement and arbitration agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of merger is to *merge* separate documents.

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; *but that is not what happened*. The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Stroud’s relationship with Defendant. Indeed, this conclusion finds direct support in the Admission Agreement’s “Entire Agreement” provision, which states, “[t]he undersigned further acknowledges that he/she has received and read the Admission Handbook and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.” See Ex. 2 and 3, p. 12 (emphasis added). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

Respectfully, the material facts of Coleman, Thompson, and Hodge, are different from the material facts of the instant case, and they do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

V. ASSUMING, *ARGUENDO*, THE ISSUES OF UNCONSCIONABILITY AND/OR CONSIDERATION ARE RAISED/RELEVANT, NEITHER STANDS AS AN IMPEDIMENT TO THE GRANT OF THE INSTANT MOTION.

A. The Arbitration Agreement is Not Unconscionable

“In analyzing claims of unconscionability of arbitration agreements, . . . [courts should] focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.” One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 60, 791 S.E.2d 291 (Ct. App. 2016)(internal quotations

omitted).

Should Plaintiff contend in any supplemental briefing that this Arbitration Agreement is unenforceable because it is unconscionable, the law and facts surrounding Mrs. Stroud entering into this Arbitration Agreement and the clear language of the Agreement demonstrates this is clearly not the case. As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration agreements identical to the one *sub judice* are not unconscionable. See McCutcheon v. THI of S.C. at Charleston, LLC, *supra*, at 6* - *8; Benson v. THI of S.C. at Charleston, LLC, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011)(attached hereto as **Exhibit 11**); Abrams v. Fundamental Long-term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Anyone who enters into a written contract has a duty to read the contract which she or he signs. Maw v. McAlister, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. Sims v. Tyler, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

The Arbitration Agreement clearly articulates that the resident entering into the

Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where the Facility is located that are qualified to provide such care to Resident.

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: **"I understand and agree that I am giving up and waiving my right to a jury trial."** See Ex. 4 and 5 (emphasis in original).

Since Mr. Stroud's representative and agent, Mrs. Stroud, had a duty to read and understand the documents she was signing on her husband's behalf under proper authority, she also had a duty to communicate those terms to Mr. Stroud as his agent. To the extent she did not, Plaintiff cannot now claim that Mr. Stroud was unaware of the terms of the Arbitration Agreement that Mrs. Stroud voluntarily and with proper authority executed on her husband's behalf, and which Mr. Stroud later ratified.

B. Mutual, Valid Consideration Is Present

The Arbitration Agreement possesses valid, legal consideration because the parties exchanged mutual promises by voluntarily agreeing to waive their respective right to a jury trial and by voluntarily bestowing upon each other a right to an alternative dispute resolution process. The promises by Mr. Stroud and the Facility, respectively, are mutual and concurrent.

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).

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). In *O'Neil*, the court specifically held that **“a mutual promise to arbitrate is sufficient consideration for [an] arbitration agreement.”** 115 F.3d at 275 (4th Cir. 1997)(citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996)(emphasis added); 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).

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both the Facility and Mr. Stroud and their respective representatives (among others), including the Plaintiff as the Guardian Ad Litem to Mr. Stroud. See **Ex. 4 and 5, ¶ 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.”). Accordingly, the Arbitration Agreement contains adequate consideration in the form of mutual promises to arbitrate, and Plaintiff’s claims to the contrary should be disregarded.

Plaintiff’s Memorandum in Opposition also suggests the Arbitration Agreement is illegal, and therefore is void, because the Arbitration Agreement constitutes “other consideration” in violation of pertinent Medicare and Medicaid regulations. This argument has been dispensed by seemingly every single court that has ever addressed it. See *Benson v. THI of South Carolina at Magnolia Place at Spartanburg, LLC*, No. CA 7:11-2613- HMH (D.S.C. Nov. 3, 2011) (citing cases from Indiana, Alabama, Tennessee, Ohio, and Florida for the ruling that arbitration agreements do not violate 42 U.S.C. 1396r(c)(5)(A)(iii) or 42 C.F.R. §483.12(d)(3)). Again,

Plaintiff cites to no legal precedent to support his argument. As a result, such an argument should similarly fail and arbitration should be compelled accordingly.

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, valid legal consideration is present as to this contract and this Court cannot deny enforcement of the Arbitration Agreement on grounds of lack of consideration.

VI. SHOULD THE COURT DECIDE TO DENY THIS DEFENDANT'S MOTION, THE PARTIES SHOULD BE PERMITTED TO CONDUCT ADDITIONAL DISCOVERY

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum and asserted at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised herein or at the hearing. In a case involving whether a similar arbitration agreement was a valid contract, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a signatory's authority to execute an Arbitration Agreement on behalf of the resident in connection with his admission to a skilled nursing facility. *See James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018) (attached hereto as **Exhibit 12**). The court permitted limited discovery on issues related to whether the arbitration agreement was a valid contract. After considering witness testimony, the court found there was sufficient evidence to support a finding that the parties entered a valid contract. As in *Boyd*, if the Court

determines the record is insufficient to grant this Defendant's Motions before it, additional discovery should be permitted as necessary.

Most respectfully, if the Court should make such a determination, it is only fair to allow this Defendant to engage in some appropriately limited discovery to attempt to protect its arbitration rights. It must be remembered that this Defendant has moved to compel arbitration under a facially valid arbitration agreement, which was not called into question until Plaintiff filed the present Complaint involving allegations that fall squarely within the provisions of the agreement. Defendant had no reason to conduct discovery until this dispute arose, and even then, it still maintained its primary position that the arbitration agreement was enforceable based on the record as is. If further development of the record is needed on any point material to arbitrability, the Court should expressly allow Defendant to protect its legitimate interests through discovery into the relevant subject matter without exposing itself to a claim of waiver by Plaintiff, i.e., without having to expose itself to a potential Catch-22 where it could be said to have waived its arbitration rights simply by endeavoring to prove them.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order staying the pending action and compelling arbitration.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
CLEMENT RIVERS, LLP

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Charleston, South Carolina

June 28, 2021

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: James Stroud
 RESIDENT NUMBER: 300564
 DATE OF ADMISSION: 3/6/17

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among MM 6 ("Facility"), Debbie Stroud ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.
2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.
3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.
4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.
5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.
2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.
3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.
4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.
5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.
6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.
8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
9. Provide an activities program for Resident, components of which will be at the discretion of Facility.
10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

Original: Business File • Photocopy: Resident/Representative

B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.

2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.

3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.

5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.

6. Provide and be responsible for personal items of clothing and property.

7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.

8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.

9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

Original: Business File • Photocopy: Resident/Representative

10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

Original: Business File • Photocopy: Resident/Representative

20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☒ private) (☐ semi-private) accommodations, for a basic fee of \$ 225 .00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

- a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
- b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
- c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

Original: Business File • Photocopy: Resident/Representative

state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

- a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
- b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
- c. Resident's death
- d. The safety or health of individuals in the Facility is endangered.
- e. Resident and/or his/her legal representative has failed to pay for his/her stay.
- f. Facility ceases to operate or is no longer able to provide services to Resident.
- g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

V. MEDICAID BENEFICIARIES

1. **Eligibility.** Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

Original: Business File • Photocopy: Resident/Representative

2. **Covered Services.** If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services.**

- a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.
- b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VI. MEDICARE BENEFICIARIES

1. **Covered Services.** If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

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toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

- a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.
- b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (e.g., a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.
- c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicare.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.

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2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from such insurance company.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

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XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

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5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

XVIII. ENTIRE AGREEMENT

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.

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident

Date

Printed Name of Resident

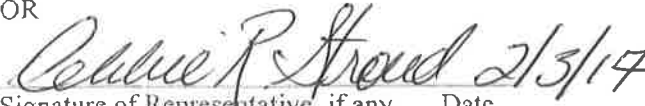
Resident Social Security Number

Witness Signature

Date

Printed Name of Witness

OR

 2/3/17
Signature of Representative, if any Date


Printed Name of Representative

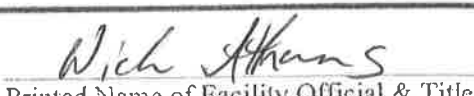
Witness Signature

Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)


Signature of Facility Official


Printed Name of Facility Official & Title

Date

3/3/17

Original: Business File • Photocopy: Resident/Representative

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME:

James Stroud

RESIDENT NUMBER:

DATE OF ADMISSION:

10/19/18

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among
MMGREENVILLE ("Facility"),
 ("Resident") and/or Debbie Stroud ("Resident's Durable Power of Attorney for
 Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively
 "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.

2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.

4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.
2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.
3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.
4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.
5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.
6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.
8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
9. Provide an activities program for Resident, components of which will be at the discretion of Facility.
10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

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B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.

2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.

3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.

5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.

6. Provide and be responsible for personal items of clothing and property.

7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.

8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.

9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

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10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

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20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☒-private) (☐-semi-private) accommodations, for a basic fee of \$ 235.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

- a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
- b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
- c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

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state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

- a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
- b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
- c. Resident's death
- d. The safety or health of individuals in the Facility is endangered.
- e. Resident and/or his/her legal representative has failed to pay for his/her stay.
- f. Facility ceases to operate or is no longer able to provide services to Resident.
- g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

V. MEDICAID BENEFICIARIES

1. **Eligibility.** Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

Original: Business File • Photocopy: Resident/Representative

2. **Covered Services.** If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services.**

- a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.
- b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VI. MEDICARE BENEFICIARIES

1. **Covered Services.** If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

Original: Business File • Photocopy: Resident/Representative

toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

- a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.
- b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (e.g., a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.
- c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicare.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.

Original: Business File • Photocopy: Resident/Representative

2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from such insurance company.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

**Magnolia Manor Greenville
411 Ansel Street
Greenville, SC 29601
(864) 232-5368**

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative

IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

Original: Business File • Photocopy: Resident/Representative

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

Original: Business File • Photocopy: Resident/Representative

5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

XVIII. ENTIRE AGREEMENT

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.

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident

Date

Printed Name of Resident

Resident Social Security Number

Witness Signature

Date

Printed Name of Witness

OR

Debbie R. Stroud 10/19/18
Signature of Representative, if any Date

Debbie R. Stroud
Printed Name of Representative

Witness Signature

Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Emily Duncan
Signature of Facility Official
10/19/18
Date

Emily Duncan
Printed Name of Facility Official & Title

Original: Business File • Photocopy: Resident/Representative

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE
ARBITRATION AGREEMENT

This Agreement is made between Magnolia Manor Greenville ("Facility"), its agents, employees and servants, and Debbie Stroud ("Resident") or Debbie Stroud ("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.

<u>Debbie Stroud</u>	<u>10/19/18</u>	<u>Debbie Stroud</u>
Resident/Representative Signature	Date	Printed Name of Resident/Representative
<u>Emily Duncan</u>	<u>10/19/18</u>	<u>Emily Duncan</u>
Authorized Agent of Facility	Date	Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2020-CP-23-01728

Debbie Stroud, Guardian ad Litem for	)
James C. Stroud,	)
	)
Plaintiff,	)
	)
v.	)
	)
THI of South Carolina at Greenville, LLC	)
d/b/a Magnolia Manor - Greenville, THI of	)
Baltimore, Inc., and THI of South Carolina,	)
LLC,	)
	)
	)
Defendants.	)
_____	)

ORDER

Hearing Date:	June 29, 2021 at 2 PM
Hearing Judge:	Alex Kinlaw, Jr.
Counsel for Plaintiff:	C. Daniel Pruitt
Counsel for Defendants:	Russell G. Hines

This matter was before the Court on Tuesday, June 29, 2021 at 2 pm in Greenville, South Carolina, the Thirteenth Judicial Circuit upon Defendants' Motions to Dismiss and Compel Arbitration. Attorney C. Daniel Pruitt was present representing the interests of Plaintiff. Russell G. Hines of Young, Clement, Rivers, LLP was present representing the interests of Defendants.

Procedural Background and Facts

James C. Stroud, a Medicare recipient, was admitted to Magnolia Manor of Greenville (hereinafter Defendants' facility) on March 6, 2017. According to the allegations of the Complaint, which was filed with the Court on March 19, 2020, while a resident of Defendants' facility, Mr.

Stroud experienced a series of falls with resulting injury and other circumstances that deviated from the accepted standard of care.

As part of the admissions process, Defendants' representative required Mrs. Debbie Stroud, Mr. Stroud's wife, to sign the Facility- Resident/Representative Arbitration Agreement on March 3, 2017. Defendants' Ex. A. Notably, the agreement is signed only by Debbie Stroud, in her representative capacity, not by James C. Stroud, the resident.

Defendants have filed Motions to Dismiss and to Compel Arbitration or in the alternative for additional time to conduct discovery on the issue of the arbitration issue. Defendants filed the Admission Agreements and the Arbitration Agreements in question. In addition, the Defendants filed the relevant Power of Attorney which Mr. Stroud executed in favor of his wife Debbie Stroud and which the Defendants were provided at the time of Mr. Stroud's admission. Defendants did not file any Affidavits or Deposition testimony in support of their Motions.

Law and Analysis

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) citing S.C. Code Ann. § 15-48-20(a) (2005). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Id.* (quoting Watson v. Underwood, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting Watson, 407 S.C. at 455, 756 S.E.2d at 161).

Earlier this year, our Supreme Court ruled that the specific language of a Power of Attorney determines whether the principal has authorized his attorney-in-fact to execute an agreement for binding arbitration. Arredondo v. SNH Ashley River Tenant, LLC, Op. 28011, S.C. Filed March 10, 2021. Absent the grant of such authority, the Attorney-in-Fact has no authority or legal capacity to enter the arbitration agreement in question. The arbitration agreement is invalid and unenforceable if the Attorney-in-Fact had no authority to waive the right to jury trial or enter an arbitration agreement. Arredondo at 2. In Arredondo, the Supreme Court made clear that the beginning of the inquiry is to read a relevant Power of Attorney and determine not just whether the Power of Attorney appears broad but whether the language can be read so as to conclude that it grants unto the attorney in fact the authority to enter an agreement to waive the right to jury trial and replace the resolution of disputes with binding arbitration before any actual dispute even arises. *Id.*

In the present case, this Court must examine the relevant Power of Attorney which the Defendants filed with the Court. Article VII of the Power of Attorney signed by Mr. Stroud in favor of his wife on November 22, 2016 contains specific restrictions on the authority granted by Mr. Stroud to his attorney-in-fact. Section (6) provides as follows:

Reservation of Right to Trial by Jury. I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements.

Durable Power of Attorney of James C. Stroud, Article VII, paragraph (6)(emphasis in original).

As a result of the specific restrictions in Mr. Stroud's Power of Attorney, the present case is an even stronger case for denial than the one at issue in the recent Supreme Court reviewed in Arredondo cited above. Here, the Power of Attorney document, in clear and unambiguous language, specifically states that the Principal chose **not** to grant the power to waive the right to jury trial or enter into arbitration agreements. The plain language of the Power of Attorney controls. The Arbitration Agreement is not valid or enforceable because it is expressly beyond the scope of authority granted to Mrs. Stroud by her husband. Mrs. Stroud had no authority, express or apparent, to enter the agreement for binding arbitration in question here.

The legal consequences of an agent's actions can only be attributed to the principle when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that "a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption." Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), rev'd on other grounds, citing Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982); Watkins v. Mobil Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986).

South Carolina law requires that to prove apparent authority, the Defendants must show “... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party’s detriment.” Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id. The present case is very similar to Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, either the South Carolina Supreme Court or the South Carolina Court of Appeals found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have any actual authority to do such. In all three cases, the Courts found that no implied authority and that no estoppel applied. As the Court noted in Thompson and in Hodge, there was no evidence that the resident being admitted to the nursing home took any action to create an agency relationship for Son. See Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d, 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 567, 813 S.E.2d 292, 304 (Ct. App. 2018). The present case is nearly identical to Hodge and Thompson.

Here, the Defendants have submitted no evidence that Mr. Stroud said or did anything other than the clear restrictive language contained in the Power of Attorney. The clear language of the

present Power of Attorney controls. Defendants' representative had an obligation of due diligence to review the Power of Attorney to determine whether in fact Mrs. Stroud had authority granted to her to sign the Arbitration Agreement. A simple review of the Power of Attorney would make clear that such authority was simply beyond the scope of authority granted to Mrs. Stroud.

II. Whether a mandatory agreement for binding arbitration is enforceable where the resident in question is a recipient of Medicare.

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50,53 n.2, 426 S.E.2d 760, 762 n.2 (1993). "The general rule is that courts will not enforce a contract is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare reimbursement rates as payment in full. See 42 C.F.R Section 489.30; 42 C.F.R. Section 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. Section 1396r(c)(5)(A)(iii).

Clearly here, it is undisputed that Mr. Stroud was a recipient of Medicare at the time of his admission and throughout his stay at Defendants' facility and the Defendants' facility was billing and accepting payment from Medicare for Mr. Stroud's care. As such, the purported agreement for binding arbitration which the facility mandated that Mrs. Stroud sign is not valid or enforceable because by its terms it violates federal law.

III. Whether the agreement for binding arbitration was not valid or enforceable where not supported by valuable consideration.

It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) (“a contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act”). Consideration 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.” Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).

The clear language of the purported arbitration agreement makes clear that the Defendants required Mrs. Stroud to sign as condition of admission to their facility. As such, this requirement was a clear violation of Federal Law. 42 U.S.C. Section 1396r(c)(5)(A)(iii) prohibits a facility such as Defendants’ from soliciting or accepting “any other consideration” as a condition to admission outside of the Medicare payments when admitting a patient in Mr. Stroud’s position. By requiring Mrs. Stroud to sign the document attempting to require waiver of the right to jury trial as a condition of admission, Defendants were requiring and accepting consideration in addition to Medicare payments. Therefore, the arbitration agreement in question is not valid or enforceable.

IV. Whether the Defendants are entitled to conduct discovery as to the Arbitration Agreement.

The Defendants had the burden to prove that there was an enforceable Arbitration Agreement. Defendants had the opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration. This case was pending for a sufficient period such that Defendants’ could have prepared Affidavits or taken limited Depositions on any issues related to the Arbitration issue. The Court noted in Hodge, discovery issues are within the discretion of the trial court. Hodge

v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 576, 813 S.E.2d 292, 309 (Ct. App. 2018). Further, as noted in Hodge, additional discovery would likely not change the outcome of the Court's decision as issues related to Mrs' Stroud's actions are not relevant to any implied or apparent authority. Id. It is the actions of Mr. Stroud that would be relevant; therefore, discovery is not necessary as the discoverable information would not change the outcome of the Court's decision as the discovery issues would not be dispositive. The actual language of the Power of Attorney which was submitted here is dispositive.

Conclusion

After careful consideration of the pleadings, motions, memoranda, documents filed, and arguments of counsel, I find that there is no valid Arbitration Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendants' Motions to Dismiss and Compel Arbitration are denied; and further

Defendants' Motion to Conduct additional discovery as to the Arbitration Agreement issue is denied.

IT IS SO ORDERED.

Honorable Alex Kinlaw, Jr.
Resident Judge, Thirteenth Circuit

Dated:
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	CASE NO. 2020-CP-23-01728
DEBBIE STROUD,	)	
Guardian ad Litem for James C. Stroud,	)	[Defendants' Proposed Order]
	)	
Plaintiff,	)	
	)	ORDER GRANTING
vs.	)	MOTION TO COMPEL ARBITRATION
	)	AND RELATED MOTIONS TO STAY
	)	
THI OF SOUTH CAROLINA AT	)	
GREENVILLE, LLC d/b/a	)	
Magnolia Manor-Greenville,	)	
THI OF BALTIMORE, INC., and	)	
THI OF SOUTH CAROLINA, LLC,	)	
	)	
Defendants.	)	

This matter is before the Court on three motions, all of which were filed on February 12, 2021, and heard at the Greenville County Courthouse on June 29, 2021 (collectively, the “Subject Motions”).¹ Chief among the Subject Motions is the motion of Defendant THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor-Greenville (the “Facility”) to compel the claims asserted against it in this action to arbitration (the “Motion to Compel Arbitration”). Secondary to that motion are two identical motions—one by each of Defendants THI of Baltimore, Inc., and THI of South Carolina, LLC (collectively, the “Other Defendants”)—to stay the action pending the ultimate outcome of the Motion to Compel Arbitration (the “Motions to Stay”). After careful consideration, the Court GRANTS the Subject Motions. Its reasoning is set forth below.

¹ All parties appeared for the hearing via counsel.

I.

BACKGROUND

The Facility is a skilled nursing facility. With the help of his wife, Plaintiff, Debbie Stroud (“Plaintiff”), James C. Stroud (“Mr. Stroud”) was twice admitted as a resident of the Facility: first in March of 2017, then again, on the heels of a two-week hospital stay, in October of 2018. Both times, Plaintiff handled the paperwork. Both times, this included Plaintiff’s execution of an Admission Agreement and an Arbitration Agreement on Mr. Stroud’s behalf.²

Plaintiff represented to the Facility that she was authorized to admit Mr. Stroud and to execute all associated documents on his behalf, including the Arbitration Agreement. To this end, Plaintiff identified herself as Mr. Stroud’s attorney-in-fact pursuant to a Durable Power of Attorney (the “Power of Attorney”); however, unbeknownst to the Facility—and, presumably, even to Plaintiff herself³—despite granting Plaintiff broad authority over Mr. Stroud’s affairs, to expressly include his legal affairs, even, seemingly, expressly in respect of arbitration,⁴ the Power of Attorney

² Respectively, the two Admission Agreements and the two Arbitration Agreements are identical to one another. Hereinafter, for ease of reference, the Court simply refers to the “Admission Agreement” and the “Arbitration Agreement” in the singular.

³ It is undisputed that Plaintiff presented the Power of Attorney to the Facility as evidence of her authority to act on Mr. Stroud’s behalf.

⁴ All told, the Power of Attorney is 20 pages. On Page 5, under Article I(12), headed “Power with Respect to Legal and Other Actions” (original bold print and underlining omitted), it grants Plaintiff the power “[t]o institute, supervise, prosecute, defend, intervene in, abandon, compromise, *arbitrate*, settle, dismiss, and appeal from *any and all* legal, equitable, judicial or administrative hearings, actions, suits, proceedings, attachments, arrests or distresses, *involving [Mr. Stroud] in any way . . .*” (emphasis added.) Additionally, on Page 3, under Article I(6), headed “Power to Operate Businesses” (original bold print and underlining omitted), it speaks of Plaintiff’s power “to defend, *submit to arbitration*, settle or compromise any action or other legal proceeding to which [Mr. Stroud is] a party because of [his] membership in [a] partnership.” (emphasis added.) And, again on Page 3, under Article I(8), headed “Power to Demand and Receive” (original bold print and underlining omitted), it speaks of Plaintiff’s power “[t]o demand, *arbitrate*, settle, sue for, collect, receive, deposit, expend for [Mr. Stroud’s benefit] benefit, reinvest or make such other appropriate disposition of as [Plaintiff] deems appropriate, all cash,

contains a provision, located toward the end of the document, prohibiting Plaintiff from entering into arbitration agreements on Mr. Stroud's behalf and disavowing any other provision therein to the contrary.⁵

But the Power of Attorney is not the only way in which Plaintiff represented to the Facility her authority to act on Mr. Stroud's behalf. Plaintiff signed both the Admission Agreement and the Arbitration Agreement as "'Resident's^[6] Durable Power of Attorney for Health Care'/'Resident's Legal Guardian'/'Resident's Responsible Party.'" In signing the Admission Agreement, Plaintiff expressly acknowledged that the "promises and representations [she made therein were] in order to induce Facility to enter into this Agreement" and that the "Facility [wa]s relying upon the truthfulness of the promises and representations [she] made." And in signing the Arbitration Agreement itself, Plaintiff expressly "represent[ed] that . . . she ha[d] authority to sign on [Mr. Stroud's] behalf so as to bind [him] as well as [herself]."

In this lawsuit, Plaintiff, as Mr. Stroud's guardian ad litem, asserts claims arising out of alleged deficiencies in his care/treatment at the Facility.

Citing the Arbitration Agreement, the Facility, via the Motion to Compel Arbitration, asks the Court to stay this action and compel Plaintiff's claims against it to arbitration. In turn, the Other Defendants, via the Motions to Stay, ask the Court to stay the action pending the ultimate outcome

rights to the payment of cash, property . . . rights and/or benefits to which [Mr. Stroud is] now or may in the future become entitled" (emphasis added.)

⁵ Specifically, this provision is Article VII(6). It begins on Page 14 with "[n]otwithstanding any provision herein to the contrary . . . ," then skips to Page 15 and concludes: "I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements."

⁶ Mr. Stroud is the referenced "Resident."

of the Motion to Compel Arbitration, i.e., until arbitrability is finally determined and any arbitration proceedings resulting from that determination are themselves finally concluded.

II.

ANALYSIS

A. Re: the Motion to Compel Arbitration

The core question here is this: Is the Arbitration Agreement (which Plaintiff signed for Mr. Stroud) enforceable against Mr. Stroud, and thus enforceable against Plaintiff as his guardian ad litem, even though it was not signed by Mr. Stroud himself? The Court answers this question in the affirmative: The Arbitration Agreement is enforceable against Mr. Stroud and, in turn, against Plaintiff, his guardian ad litem—or more precisely, Mr. Stroud and, in turn, Plaintiff, his guardian ad litem, is estopped to deny that the Arbitration Agreement is enforceable. Thus, since Plaintiff’s claims against the Facility are clearly within the scope of the Arbitration Agreement, they should proceed in arbitration, not litigation. The Court’s findings/analytical steps in reaching this conclusion follow.

1. Both state and federal policy favor arbitration.

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

2. The Arbitration Agreement is governed by the FAA⁷.

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

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

And this must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) ("We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties 'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term.") (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed the subject contract involved interstate commerce)). Moreover, and in any event, the FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

⁷

The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

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

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”⁸ and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*”) (emphasis added).

While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Under the FAA, “courts *must* place arbitration agreements on *equal footing with other contracts . . .*” *Concepcion* at 339 (emphasis added); *see also Allied–Bruce*, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses,

⁸ *Allied–Bruce*, 513 U.S. at 270.

under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted).⁹

4. The Arbitration Agreement is valid on its face.

The Arbitration Agreement is valid on its face. In other words, nothing within the four corners of the document itself calls its validity into question.

It is plain on the face of the Arbitration Agreement that it is supported by sufficient consideration and that it sets forth all necessary terms, containing, as it does, the parties’ mutual promise to submit a certain defined scope of “Disputes” to binding arbitration,¹⁰ before an arbitrator who is either agreed upon by the parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction.¹¹ And it expressly attests to

⁹ To be clear, what the FAA requires is for arbitration agreements to be placed on *at least* equal footing with all other contracts under state law. As explained above, both state and federal policy *favor* arbitration. The FAA prohibits arbitration agreements from being singled out for *disfavored* treatment relative to other contracts, but it does not prohibit the *avored* treatment of arbitration agreements relative to other contracts.

¹⁰ The parties’ mutual promise to arbitrate constitutes sufficient consideration. *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) (“A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.”) (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E. 292 (1996)); *see also Rickborn*, 321 S.C. at 304, 468 S.E.2d at 300 (“Valuable consideration for a contract may consist of some forbearance given or detriment suffered.”).

¹¹ In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the South Carolina Arbitration Act, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

Plaintiff's authority to sign on behalf of Mr. Stroud.¹² To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

Plaintiff's contention that the Arbitration Agreement either is not supported by adequate consideration or is supported by illegal consideration in violation of federal law governing Medicare/Medicaid reimbursements is without merit. Again, the Arbitration Agreement clearly states the parties' mutual promise to arbitrate, which alone is sufficient consideration. *O'Neil*, 115 F.3d at 275; *see also Rickborn*, 321 S.C. at 304, 468 S.E. at 300. As for the Arbitration Agreement's supposed illegality, this argument fails of its essential premise, namely, the premise that agreeing to the Arbitration Agreement was a condition of Mr. Stroud's admission to the Facility. According to Plaintiff, *if* the Arbitration Agreement was a condition of Mr. Stroud's admission to the Facility, it constitutes an improper benefit or other consideration in violation of federal law governing Medicare/Medicaid reimbursements. But this argument necessarily fails because the Facility denies that the Arbitration Agreement was a condition of Mr. Stroud's admission, and there is nothing in the Arbitration Agreement itself or anywhere else in the record to support a reasonable conclusion otherwise.

¹² No question is raised here as to Plaintiff's competency. Indeed, if she were incompetent, she could not pursue this action for Mr. Stroud as his guardian ad litem. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."), including, of course, the express representation therein of her authority to act on Mr. Stroud's behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) ("There exists in every contract an implied covenant of good faith and fair dealing."), and Plaintiff is no less bound by this covenant than the Facility.

To be clear, in observing that the Arbitration Agreement is valid on its face, the Court is not finding that Plaintiff in fact had authority (whether under principles of common law agency or pursuant to the Power of Attorney) to sign the Arbitration Agreement on Mr. Stroud's behalf; however, the Court is rejecting the notion that the Facility should be faulted for not taking further action to confirm Plaintiff's authority to sign on Mr. Stroud's behalf—which, authority, again, as explained above, Plaintiff represented to the Facility both via her presentation of the Power of Attorney and her execution of the Arbitration Agreement itself.¹³

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

In pertinent part, the Arbitration Agreement reads as follows:

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

This plain language clearly embraces the subject matter of Plaintiff's claims. Moreover, even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration" *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839,

¹³ With particular regard to Plaintiff's presentation of the Power of Attorney, as stated above, presumably she was herself unaware that the Power of Attorney did not give her authority to sign the Arbitration Agreement for Mr. Stroud—and this presumption is all the more compelling considering the Power of Attorney's length and complexity and the potential for confusion relating to its express and affirmative language about power to "arbitrate," and even power to "submit to arbitration." But either way, i.e., whether Plaintiff honestly or dishonestly presented the Power of Attorney to the Facility as evidence of her authority to sign the Arbitration Agreement, the Facility should not be faulted here for taking Plaintiff at her word.

846 (Ct. App. 1999) (quoting *O'Neil*, 115 F.3d at 273–74) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (internal quotation marks omitted).

6. The Arbitration Agreement is enforceable against Mr. Stroud/Plaintiff.

Even though Mr. Stroud is a nonsignatory to the Arbitration Agreement, i.e., even though he did not sign the Arbitration Agreement himself, it is nonetheless enforceable against him and, in turn, against his guardian ad litem, Plaintiff.

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

Conceptually, the Facility’s merger/equitable estoppel argument is not about showing that the Arbitration Agreement is enforceable but about showing that Plaintiff is estopped to deny that the Arbitration Agreement is enforceable. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Stroud having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Mr. Stroud in bringing this action) is estopped to deny the enforceability of the Arbitration Agreement with which the

Admission Agreement merged. Accordingly, counterarguments by Plaintiff aimed at denying the Arbitration Agreement's enforceability (e.g., arguments based on Plaintiff's lack of authority to sign the Arbitration Agreement on behalf of Mr. Stroud) are beside the point and unavailing.

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

Merger

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

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

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

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

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

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

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

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹⁴ as undoubtedly the Admission Agreement and the Arbitration Agreement were,¹⁵ evidence exists to upset the presumption in favor of merger, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention . . .*”) (emphasis added). And “in attempting to ascertain th[e] [parties’] intention,” the Court “endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

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

¹⁴ *Id.* at 355, 755 S.E.2d at 455.

¹⁵ As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

Although the Admission Agreement does contain an “Entire Agreement” clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, “other Admissions materials . . . are made a part of this Agreement by reference herein.” Clearly, the Arbitration Agreement is among the “other Admissions materials.” See *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (recognizing “admission documentation” to include an arbitration agreement: “The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s *admission documentation—including the Arbitration Agreement.*”) (emphasis added) (internal footnote omitted). This directly contradicts the notion of any intended “separatedness” (in the parlance of the *Coleman* Court¹⁶) between the Admission Agreement and the Arbitration Agreement.

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

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

Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission.

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

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

And even assuming, *arguendo*, there is some ambiguity in this regard, to fall back on the idea that it should be construed against the Facility as the drafter is uncalled for in this context.

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

Equitable Estoppel

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

to benefit him.”) (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int’l Paper*, 206 F.3d at 418).

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

Without question, Mr. Stroud received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. To deny his receipt of such benefits is illogical and objectively unreasonable and would require wholly discrediting the entirety of his residency: every meal, every instance of care/treatment he received, essentially every moment at the Facility—even Plaintiff’s complaint does not go nearly so far as that. Mr. Stroud having effectively embraced and directly benefitted from the Admission Agreement, he/Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

B. Re: the Motions to Stay

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. *See* 9 U.S.C. § 3 (“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.”) (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (“[The] FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.”). But even assuming, *arguendo*, staying the action as to the Other Defendants is not mandatory here, for the sake of judicial economy, of avoiding piecemeal litigation and the potential for inconsistent obligations, and of the orderly administration of its own docket, the Court exercises its discretion to impose such a stay. *See State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) (“[A] court’s power to hear and decide cases ‘carries with it the inherent power to control the order of its business.’”) (quoting *Williams v. Bordon’s, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) (“The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.”).

III.

CONCLUSION

The Subject Motions are hereby GRANTED, and this action is hereby STAYED. As between Plaintiff and the Facility, the action is stayed in favor of arbitration, and as between Plaintiff and the Other Defendants, the action is stayed pending the ultimate outcome of arbitration between Plaintiff and the Facility.

IT IS SO ORDERED.

ALEX KINLAW, JR., Presiding Judge
Thirteenth Judicial Circuit
Court of Common Pleas
Greenville County

Greenville, South Carolina

Dated: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	CASE NO. 2020-CP-23-01728
DEBBIE STROUD,	)	
Guardian ad Litem for James C. Stroud,	)	
	)	
Plaintiff,	)	MOTION TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
vs.	)	DEFENDANTS' RESPECTIVE MOTIONS
	)	TO COMPEL ARBITRATION
	)	AND TO STAY
THI OF SOUTH CAROLINA AT	)	
GREENVILLE, LLC d/b/a	)	
Magnolia Manor-Greenville,	)	
THI OF BALTIMORE, INC., and	)	
THI OF SOUTH CAROLINA, LLC,	)	
	)	
Defendants.	)	

TO: THE HONORABLE ALEX KINLAW, JR., Presiding Judge, and C. DANIEL PRUITT, ESQUIRE, Attorney for Plaintiff

NOW COME Defendant THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor-Greenville (the "Facility") and the Other Defendants,¹ 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 order denying Defendants' respective motions to compel arbitration and to stay, filed August 17, 2021 (the "Subject Order").

¹ The "Other Defendants" are Defendants THI of Baltimore, Inc., and THI of South Carolina, LLC, collectively. Where this motion simply refers to "Defendants," it refers to the Facility and the Other Defendants, collectively.

1. **Most respectfully, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Motion to Compel Arbitration² and the Motions to Stay³, i.e., each and every distinct issue/argument raised in/via the Motion to Compel Arbitration, the Memo in Support of Arbitration⁴, the Motions to Stay, Defendants' Proposed Order,⁵ and oral argument, all of which is/are hereby incorporated herein by reference.**

See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

2. **Without limiting the comprehensive nature of the foregoing request (i.e., 1 above), Defendants most respectfully ask the Court to reconsider the Subject Order in respect of the following:**
 - a. **The Subject Order erroneously states, “As part of the admissions process, Defendants’ representative required Mrs. Debbie Stroud, Mr. Stroud’s wife, to sign the Facility-Resident/Representative Arbitration Agreement” (Subject Order p. 2.)**

As an initial matter, it is erroneous for the Subject Order to refer to the Facility’s personnel as “Defendants’” representative.⁶ Defendants are separate and distinct entities. The Facility’s

² The “Motion to Compel Arbitration” refers to the Facility’s Motion to Stay Action and Compel Arbitration, filed February 12, 2021.

³ The “Motions to Stay” refers, collectively, to the Other Defendants’ respective Motions to Stay Court Proceedings, filed February 12, 2021.

⁴ The “Memo in Support of Arbitration” refers to the Facility’s memo in support of the Motion to Compel Arbitration, filed June 28, 2021.

⁵ “Defendants’ Proposed Order” refers to Defendants’ proposed Order Granting Motion to Compel Arbitration and Related Motions to Stay, which was, in accordance with the Court’s directive, submitted to His Honor via email on July 30, 2021.

⁶ To be clear, this goes not only for this specific instance but also for all other instances where Defendants’ separate and distinct nature is unduly disregarded or blurred.

personnel are the Facility's personnel and not the Other Defendants' personnel, and there is no evidence otherwise.

Additionally, it is erroneous for the Subject Order to state that Mrs. Stroud was "required" to sign the Arbitration Agreement. The Facility denies that the Arbitration Agreement was required—for Mr. Stroud or any other resident—to gain admission to the Facility, and there is no evidence in the record to the contrary.

And to be clear, the record provides no support for the idea that the Facility required that Mrs. Stroud be the one who signed the Arbitration Agreement (or any other document). Rather, the record shows that, in acting on her husband's behalf, Mrs. Stroud expressly represented to the Facility that she was authorized to do in the Arbitration Agreement itself and that Mrs. Stroud further represented her authority to act on Mr. Stroud's behalf by presenting the Power of Attorney to the Facility.

- b. The Subject Order erroneously states, "Defendants' representative had an obligation of due diligence to review the Power of Attorney to determine whether in fact Mrs. Stroud had authority granted to her to sign the Arbitration Agreement. A simple review of the Power of Attorney would make clear that such authority was simply beyond the scope of authority granted to Mrs. Stroud." (Subject Order p. 7.)**

As an initial matter, while it is true that the Power of Attorney contains a provision, located toward the end of the document, prohibiting Mrs. Stroud from entering into arbitration agreements on Mr. Stroud's behalf and disavowing any other provision therein to the contrary,⁷ it cannot reasonably be said that the Power of Attorney is a "simple" document. As explained previously,

⁷ Specifically, this provision is Article VII(6). It begins on Page 14 with "[n]otwithstanding any provision herein to the contrary . . .," then skips to Page 15 and concludes: "I reserve unto myself and do not grant unto my Attorney in Fact the power to waive my right to jury trial and enter into Arbitration Agreements. I do not favor Arbitration, and for that reason I do not grant unto my Attorney in Fact the power to enter Arbitration Agreements."

all told, the Power of Attorney is 20 pages. On Page 5, under Article I(12), headed “Power with Respect to Legal and Other Actions” (original bold print and underlining omitted), it grants Mrs. Stroud the power “[t]o institute, supervise, prosecute, defend, intervene in, abandon, compromise, arbitrate, settle, dismiss, and appeal from *any and all* legal, equitable, judicial or administrative hearings, actions, suits, proceedings, attachments, arrests or distresses, involving *[Mr. Stroud]* in *any way . . .*” (emphasis added.) Additionally, on Page 3, under Article I(6), headed “Power to Operate Businesses” (original bold print and underlining omitted), it speaks of Mrs. Stroud’s power “to defend, *submit to arbitration*, settle or compromise any action or other legal proceeding to which *[Mr. Stroud is]* a party because of *[his]* membership in *[a]* partnership.” (emphasis added.) And, again on Page 3, under Article I(8), headed “Power to Demand and Receive” (original bold print and underlining omitted), it speaks of Mrs. Stroud’s power “[t]o demand, *arbitrate*, settle, sue for, collect, receive, deposit, expend for *[Mr. Stroud’s benefit]* benefit, reinvest or make such other appropriate disposition of as *[Mrs. Stroud]* deems appropriate, all cash, rights to the payment of cash, property . . . rights and/or benefits to which *[Mr. Stroud is]* now or may in the future become entitled . . .” (emphasis added.)⁸

Beyond this, the Power of Attorney is not the only way in which Mrs. Stroud represented her authority to act on Mr. Stroud’s behalf. She signed both the Admission Agreement and the Arbitration Agreement as “‘Resident’s^[9] Durable Power of Attorney for Health Care’/‘Resident’s

⁸ As explained previously, with particular regard to Mrs. Stroud’s presentation of the Power of Attorney to the Facility, presumably she was herself unaware that the Power of Attorney did not actually give her authority to sign the Arbitration Agreement for Mr. Stroud—and this presumption is all the more compelling considering the Power of Attorney’s length and complexity and the potential for confusion relating to its express and affirmative language about power to “arbitrate,” and even power to “submit to arbitration.” But either way, i.e., whether Mrs. Stroud honestly or dishonestly presented the Power of Attorney to the Facility as evidence of her authority to sign the Arbitration Agreement, the Facility should not be faulted for taking her at her word.

⁹ Mr. Stroud is the referenced “Resident.”

Legal Guardian’/‘Resident’s Responsible Party.’” In signing the Admission Agreement, she expressly acknowledged that the “promises and representations [she made therein were] in order to induce Facility to enter into this Agreement” and that the “Facility [wa]s relying upon the truthfulness of the promises and representations [she] made.” And in signing the Arbitration Agreement itself, she expressly “represent[ed] that . . . she ha[d] authority to sign on [Mr. Stroud’s] behalf so as to bind [him] as well as [herself].” Mrs. Stroud is “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”), including, of course, the express representation therein of her authority to act on Mr. Stroud’s behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (“There exists in every contract an implied covenant of good faith and fair dealing.”), and Mrs. Stroud is no less bound by this covenant than the Facility.

And in any event, the Subject Order cites no legal authority to support the proposition that the Facility was required to do the said “due diligence”—and to the best of the Facility’s knowledge, there is none—and to require more just because an arbitration agreement is in issue would violate the FAA’s requirement that arbitration agreements be placed on equal footing with all other contracts. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, “courts *must* place arbitration agreements on *equal footing with other contracts*”) (emphasis added); *see also Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”); *Allied–Bruce Terminix Cos., Inc.*

v. Dobson, 513 U.S. 265, 281 (1995) (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted).

- c. **The Subject Order erroneously characterizes the Arbitration Agreement as a “mandatory agreement” (Subject Order p. 7) and erroneously states, “The clear language of the purported arbitration agreement makes clear that Defendants required Mrs. Stroud to sign as [a] condition of admission” (Subject Order p. 8.)**

As explained previously, the idea that the Arbitration Agreement is founded on illegal consideration in violation of federal law governing Medicare/Medicaid reimbursements is without merit and necessarily untenable because the Facility denies that the Arbitration Agreement was “required” for or otherwise a condition of Mr. Stroud’s admission (it was *voluntarily* executed by Mrs. Stroud on Mr. Stroud’s behalf), and there is nothing in the Arbitration Agreement itself or anywhere else in the record to support a reasonable conclusion otherwise.

- d. **The Subject Order erroneously finds that the Arbitration Agreement is not supported by sufficient consideration. (Subject Order p. 8.)**

As explained previously, the Arbitration Agreement clearly states the parties’ mutual promise to arbitrate, which alone is sufficient consideration. *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) (“A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.”) (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E. 292 (1996)); *see also Rickborn*, 321 S.C. at 304, 468 S.E.2d at 300 (“Valuable consideration for a contract may consist of some forbearance given or detriment suffered.”).

e. **The Subject Order erroneously states, “The actual language of the Power of Attorney . . . is dispositive.” (Subject Order p. 9.)**

As explained previously, the Facility’s merger/equitable estoppel argument, is unscathed by the language in the Power of Attorney disallowing Mrs. Stroud authority to agree to arbitration on Mr. Stroud’s behalf. Conceptually, the Facility’s merger/equitable estoppel argument is not about showing that the Arbitration Agreement is enforceable but about showing that Mr. Stroud, and in turn Plaintiff, his guardian ad litem, is estopped to deny that the Arbitration Agreement is enforceable. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Stroud having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Mr. Stroud in bringing this action) is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments by Plaintiff aimed at denying the Arbitration Agreement’s enforceability (e.g., arguments based on Plaintiff’s lack of authority to sign the Arbitration Agreement on behalf of Mr. Stroud) are beside the point and unavailing. So again, without limiting the comprehensive nature of 1 above, the Facility most respectfully observes that the Subject Order does not rule on its merger/equitable estoppel argument and asks the Court to fully and fairly address and rule upon it now.

Even though Mr. Stroud is a nonsignatory to the Arbitration Agreement, i.e., even though he did not sign the Arbitration Agreement himself, it is nonetheless enforceable against him and, in turn, against his guardian ad litem, Plaintiff. “South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450,

455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: “Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”). As explained below (and previously), the Arbitration Agreement is enforceable against Mr. Stroud/Plaintiff based on merger and equitable estoppel.

Merger

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

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

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

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

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

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

407 S.C. at 354–55, 755 S.E.2d at 455 (emphasis added).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹⁰ as undoubtedly the Admission Agreement and the Arbitration Agreement were,¹¹ evidence exists to upset the presumption in favor of merger, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary intention . . .”) (emphasis added). And “in attempting to ascertain th[e] [parties’] intention,” a court “endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question (i.e., the Admission Agreement and the Arbitration Agreement) were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances that gave rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can support a

¹⁰ *Id.* at 355, 755 S.E.2d at 455.

¹¹ As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here.

Although the Admission Agreement does contain an “Entire Agreement” clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, “other Admissions materials . . . are made a part of this Agreement by reference herein.” Clearly, the Arbitration Agreement is among the “other Admissions materials.” *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (recognizing “admission documentation” to include an arbitration agreement: “The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s *admission documentation—including the Arbitration Agreement.*”) (emphasis added) (internal footnote omitted). This directly contradicts the notion of any intended “separatedness” (in the parlance of the *Coleman* Court¹²) between the Admission Agreement and the Arbitration Agreement.

While the Arbitration Agreement was not required for Mr. Stroud’s admission to the Facility, all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed, which, without question, it was—and under the very circumstances (same time, parties, purpose, and transaction) that give rise to the presumption of merger. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was certainly agreed

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

to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument, governing various interrelated aspects of Mr. Stroud's relationship with the Facility: the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission.

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

That the Admission Agreement and the Arbitration Agreement have their own titles and are separately paginated and signed admits of no reasonable inference of an intent contrary to merger. To point to such things is to do no more than to observe that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the

necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

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

Equitable Estoppel

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Stroud/Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of the direct benefits test our Supreme Court endorsed in *Wilson*. See 426 S.C. at 340, 827 S.E.2d at 175 (“Under direct benefits estoppel, ‘[a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when [the nonsignatory] receives a direct benefit from a contract containing an arbitration clause.’”) (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen &*

Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000)); *id.* (“In the arbitration context, the doctrine [of direct benefits estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*”) (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int’l Paper*, 206 F.3d at 418).

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

Without question, Mr. Stroud received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. To deny his receipt of such benefits is illogical and objectively unreasonable and would require wholly discrediting the entirety of his residency: every meal, every instance of care/treatment he received, essentially every moment at the Facility—even Plaintiff’s complaint does not go nearly so far as that. Mr. Stroud having effectively embraced

and directly benefitted from the Admission Agreement, he/Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

f. To be clear, the Subject Order should have not only granted the Motion to Compel Arbitration but also the Motions to Stay.

As explained previously, the relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. *See* 9 U.S.C. § 3 (“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.”) (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (“[The] FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.”). But even assuming, *arguendo*, staying the action as to the Other Defendants is not mandatory here, for the sake of judicial economy, of avoiding piecemeal litigation and the potential for inconsistent obligations, and of the orderly administration of its own docket, the Court should exercise its discretion to impose such a stay. *See State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) (“[A] court’s power to hear and decide cases ‘carries with it the inherent power to control the order of its business.’”) (quoting *Williams v. Bordon’s, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) (“The fact that Federal is not a party to an

arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.”).

WHEREFORE, for the foregoing reasons, Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration and the Motions to Stay.

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,
CLEMENT RIVERS, LLP

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(843) 724-6695
Attorneys for Defendants

Charleston, South Carolina

August 27, 2021

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

Appeal from Greenville County
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2020-CP-23-01728

Debbie Stroud,
Guardian ad Litem for James C. Stroud,

Respondent,

v.

THI of South Carolina at Greenville, LLC
d/b/a Magnolia Manor-Greenville,
THI of Baltimore, Inc., and
THI of South Carolina, LLC,

Appellants.

NOTICE OF APPEAL

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Matthew O. Riddle (SC Bar No. 76650)
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Attorneys for Appellants

Other Counsel of Record:

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Attorney for Respondent

Defendants, THI of South Carolina at Greenville, LLC d/b/a Magnolia Manor-Greenville (the “Facility”), THI of Baltimore, Inc. (“THIB”), and THI of South Carolina, LLC (“THISC”) (collectively, “Appellants”), hereby appeal the following orders of the Honorable Alex Kinlaw, Jr., Circuit Court Judge:

- **Order [Denying the Facility’s Motion to Stay Action and Compel Arbitration and Denying THIB and THISC’s Motions to Stay Court Proceedings]**, filed August 17, 2021, and
- **Order Denying Defendants’ Motion to Alter, Amend, or Reconsider**, filed March 1, 2022.

Copies of the appealed orders are attached hereto and incorporated herein by reference.¹

Respectfully submitted,
CLEMENT RIVERS, LLP

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Attorneys for Appellants

Charleston, South Carolina

March 30, 2022

¹ Because the service of this Notice of Appeal is within 30 days of entry of the most recent appealed order, the date Appellants received written notice of such entry is not jurisdictionally relevant; however, out of an abundance of caution, Appellants would note that no NEF appears to have been generated for the order and that instead, as stated thereon, the clerk’s office mailed out a copy of the order to counsel on March 1, 2022.

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

RECEIVED

Mar 30 2022

SC Court of Appeals

Appeal from Greenville County
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2020-CP-23-01728

Debbie Stroud,
Guardian ad Litem for James C. Stroud,

Respondent,

v.

THI of South Carolina at Greenville, LLC
d/b/a Magnolia Manor-Greenville,
THI of Baltimore, Inc., and
THI of South Carolina, LLC,

Appellants.

PROOF OF SERVICE

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Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **NOTICE OF APPEAL** was served on Respondent on March 30, 2022, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

C. Daniel Pruitt, Esquire
danlaw@bellsouth.net
300 Pettigru Street
Greenville, SC 29601
Attorney for Respondent

I further certify that a copy of Appellants' **NOTICE OF APPEAL** was this day, March 30, 2022, E-Filed with the lower court (see attached NEF), thus also, i.e., in addition to service by email, effecting service of the notice today on Respondent's above-identified counsel of record via the E-Filing System.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)
Attorneys for Appellants

Charleston, South Carolina

March 30, 2022

Hines, Russell

From: Hines, Russell
Sent: Wednesday, March 30, 2022 1:11 PM
To: danlaw@bellsouth.net
Cc: 'Dan Pruitt-paralegal'; Davis, Jay; 'Brown, Steve'; Riddle, Matthew; Wakeham, Rebecca (Becky); Peterson, Susan; Justman, Aimee; Bell, Pollyana (Polly)
Subject: Stroud v. THI (Case No. 2020-CP-23-01728) -- Notice of Appeal
Attachments: Stroud v. THI -- Notice of Appeal.pdf; Appealed Order 1 (filed 8-17-21) -- Denying MTCA and MTSS.pdf; Appealed Order 2 (filed 3-1-22) -- Denying MTR.pdf

Attached regarding the above-referenced matter, please find Defendants' **Notice of Appeal** and copies of the **Appealed Orders**.

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Mar 30 2022
SC Court of Appeals



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

A filing has been submitted to the court RE: 2020CP2301728

Official File Stamp: 03-30-2022 01:03:22 PM
Court: CIRCUIT COURT
Common Pleas
Greenville
Case Caption: Debbie Stroud , plaintiff, et al vs. THI Of South Carolina At Greenville LLC , defendant, et al
Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
Filed by or on behalf of: Russell Grainger Hines

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

The following people were served electronically:

Matthew Oliver Riddle for THI Of South Carolina At Greenville LLC et al
Charles Daniel Pruitt for Debbie Stroud et al
Russell Grainger Hines for THI Of South Carolina At Greenville LLC et al
Donald Jay Davis, Jr. for THI Of South Carolina At Greenville LLC et al

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

Alexandra Jordan Ginsburg for THI Of South Carolina At Greenville LLC et al

Certificate of Counsel

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.

RECEIVED
Feb 02 2023
SC Court of Appeals

Respectfully submitted,
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February 2, 2023