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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. William A. McKinnon, Circuit Court Judge

Appellate Case No. 2024-000468

Lorraine Voros, by and through her duly appointed Attorney-In-Fact, John Voros, . Respondents,

v.

Pacifica Skylyn, LLC, ... Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH CIRCUIT

Lorraine Voros, by and through her)
duly appointed attorney-in-fact,)
John Voros,)

C.A. No.: 2023-CP-42-04147

Plaintiff,)

v.)

Pacifica Skylyn, LLC,)

Defendant.)
_____)

**ORDER DENYING DEFENDANT’S MOTION
TO DISMISS PURSUANT TO RULES 12(B)(1)
AND 12(B)(6), SCR.P, OR IN THE ALTERNATIVE
TO STAY AND COMPEL ARBITRATION**

This matter came before the Court on Tuesday, January 30, 2022, on Defendant’s Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B)(6), SCR.P, or in the Alternative to Stay and Compel Arbitration.

The Defendant is represented by Jonathan G. Roquemore and the Plaintiff was represented by Patrick E. Knie. Both parties provided the Court with memorandums of law arguing their respective positions. The hearing was held in the virtual courtroom. After hearing the arguments of counsel, and after careful consideration of each side’s memorandum, the Defendant’s Motion is **DENIED**.

BACKGROUND

The Plaintiff was a resident of the Defendant Pacifica Skylyn LLC, d/b/a Pacifica Senior Living Skylyn. On December 27, 2021, John Voros the duly appointed attorney-in-fact for

Lorriane Voros signed a contract with Defendant Pacifica entitled Pacifica Senior Living Residence and Service Agreement (The Residence Agreement). A copy of the Residence Agreement was attached to Defendant's memorandum. The Residence Agreement governs the terms of Plaintiff's residence at Defendant Pacifica's facility. The Residence Agreement contains an arbitration agreement found at XI P in the Residence Agreement.

THE ISSUES

The Plaintiff challenges the validity of the arbitration agreement contained within the Residence Agreement. Specifically Plaintiff contends there is a complete lack of mutuality and consideration which are basic elements in the formation of a contract under the principles of South Carolina contract law.

LEGAL ANALYSIS

The South Carolina Supreme Court in Simmons v. Benson Hyundai LLC, followed language of the US Supreme Court in Prima Paint Corp, in stating that the Federal Arbitration Act commands that arbitration agreements be treated the same as all other contracts, no more, no less. Simmons v. Benson Hyundai, LLC, 2022 WL791174 (Mar 16, 2022). Under the Federal Arbitration Act, an arbitration clause is separated from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. Munozv Green Tree Financial Corporation, 343 S.C. 531, 540, 542 S.E. 2d 361, 364(2002). Therefore in order to determine if an arbitration agreement is valid and binding the Court must

apply state contract law principles to the language of the arbitration agreement without regard to the language of the rest of the agreement.

It is clear that South Carolina Contract Law requires the parties to the contract to manifest mutual intent to be bound. Simmons v. Benson Hyundai, 2022 WL 791174 (Mar 16, 2022).

The body of the arbitration agreement repeatedly uses the words “you agree.” In the arbitration agreement “you” is designated as the resident. The Defendant Pacifica is designated as (we), (us), (our), or (community). This court finds nothing in the arbitration agreement to indicate that Defendant Pacifica intended to be bound by the arbitration agreement. In the event that Defendant Pacifica did intend to be bound by the arbitration agreement Defendant Pacifica could have easily used the words “the parties agree”. It is also noteworthy that Defendant Pacifica was the author of the arbitration agreement and thus any ambiguity in the agreement should be held against Defendant Pacifica as its author.

Plaintiff further argues that the agreement lacks consideration which is another necessary element of a contract under South Carolina contract law. This Court has examined the arbitration agreement and finds that the Plaintiff has theoretically given up her right to a jury trial. However, there is nothing in the agreement that reflects the Defendant has provided her with any consideration within the four corners of the arbitration agreement in exchange for giving up her right to a jury trial. This court finds there is a lack in consideration flowing from Defendant Pacifica to the Plaintiff and therefore the arbitration agreement is invalid for that reason alone.

CONCLUSION

After consideration of the arguments of counsel and their memorandums, this Court finds and concludes that the arbitration agreement found within the Residence Agreement fails to form a valid and binding contract.

It is therefore ORDERED that the Defendant's Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B)(6), SCRP, or in the Alternative to Stay and Compel Arbitration be and is hereby **DENIED**.



Spartanburg Common Pleas

Case Caption: Lorraine Voros, By And Through Her Attorney-In-Fact, John Voros
VS Pacifica Skylyn, Llc

Case Number: 2023CP4204147

Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Electronically signed on 2024-02-05 14:08:55 page 5 of 5

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP4204147

Lorraine Voros, By And Through Her Attorney-In-Fact, John Voros
PLAINTIFF(S)

Pacifica Skylyn, Llc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

Defendant's Motion to Reconsider is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/20/2024 .

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.



Spartanburg Common Pleas

Case Caption: Lorraine Voros, By And Through Her Attorney-In-Fact, John Voros
VS Pacifica Skylyn, Llc

Case Number: 2023CP4204147

Type: Order/Electronic Form 4

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Electronically signed on 2024-02-20 11:12:23 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Lorraine Voros, by and	)	
through her duly appointed	)	SUMMONS
attorney-in-fact, John	)	
Voros,	)	Jury Trial Requested
	)	
Plaintiff,	)	C/A No. 2023-CP-42-_____
	)	
vs.	)	
	)	
Pacifica Skylyn, LLC	)	
	)	
	)	
Defendant.	)	

TO: PACIFICA SKYLYN, DEFENDANT

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the undersigned at his office located at P.O. Box 5159, 250 Magnolia Street, Spartanburg, S.C. 29304, within thirty (30) days after the service hereof, exclusive of the day of such service, unless you received your copy by certified mail, in which case you must serve a copy of your answer on the subscriber within thirty-five (35) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

DATED at Spartanburg, South Carolina, on the 26th day of October, 2023.

KNIE & SHEALY, P.A.

/s/ Patrick E. Knie

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ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. No:
	)	
Lorraine Voros, by and	)	
through her duly appointed	)	COMPLAINT
attorney-in-fact, John	)	
Voros,	)	Jury Trial Requested
	)	
Plaintiff,	)	
	)	
VS.	)	
	)	
Pacifica Skylyn, LLC,	)	
	)	
Defendant.	)	

The Plaintiff, complaining of the Defendant, by and through her duly appointed attorney-in-fact, alleges:

1. That she is a citizen and resident of Spartanburg County, South Carolina.
2. The Defendant (hereinafter referred to as Pacifica Skylyn) is a nursing home located in Spartanburg, South Carolina.
3. That the acts and delicts referred to herein occurred at Pacifica Skylyn.
4. On or about January of 2022, the Plaintiff became a resident of Pacifica Skylyn.
5. The Plaintiff suffered from various medical conditions for which she received treatment at Pacifica Skylyn.
6. The Plaintiff suffers from Multiple Sclerosis which leads her to be non-verbal. She further has been diagnosed as having an intellectual disability.
7. These diagnoses cause her to be unable to consent to

sexual intercourse.

8. According to South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11), a "Vulnerable adult" means a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

9. S.C. Regulation 61-84.101(A)(1) defines physical abuse as "the act of intentionally inflicting or allowing to be inflicted physical injury on a resident by an act or failure to act." This definition includes "actual or attempted sexual battery."

10. S.C. Regulation 61-84.101(F) defines alzheimers special care unit or program as "a facility or area within a facility providing a secure special program or unit for residents with a diagnosis of alzheimers disease and/or related dementia to prevent or limit access by a resident outside the designated or separated areas."

11. S.C. Regulation 61-84.101(II) defines neglect as "the failure or omission of a direct care staff member... to provide the care, goods, or services necessary to maintain the health or

safety of a resident." Definition neglect also includes the "failure to provide adequate supervision resulting in harm to residents, including altercations or acts of assault between residents."

12. S.C. Regulation 61-84 Section 503(A) states that a facility must meet the following standard: "There shall be a staff member actively on duty and present in the facility at all times that the facility is occupied by residents and to whom the resident can report injuries, symptoms of illness, or emergencies."

13. S.C. Regulation 61-84 Section 503(B) states that the facility must meet the following standard: "the number in qualification of staff members/direct care volunteers shall be determined by the number and condition of the residents." There shall be sufficient staff members/direct care volunteers to provide supervision, direct care, and basic services for all residents. The minimum number of staff members/direct care volunteers that shall be maintained in all facilities:

1. In each building, there shall be at least one staff member/direct care volunteer for each eight residents or fraction thereof on duty during all periods of peak hours.

2. In each building, during non-peak hours, there shall be at least one staff member/volunteer on duty for each thirty (30) residents or fraction thereof. A staff member/volunteer shall be awake and dressed at all times.

14. S.C. Regulation 61-84.503(C) states that the facility must "maintain documentation to ensure the facility meets Sections 503.b.1 and 503.b.2.

15. S.C. Regulation 61-84 Section.501.b states that the facility must meet the following standard regarding training: "Staff members/volunteers shall be provided the necessary training to perform the duties for which they are responsible in an effective manner."

16. S.C. Regulation 61-84 Section 601(A) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall maintain a record of each accident and/or incident, including usage of mechanical/physical restraints involving residents, staff members, or volunteers, occurring in the facility or on the facility grounds. A facility's record of each accident and/or incident shall be documented, reviewed, investigated, and if necessary, evaluated in accordance with facility policies and procedures, and retained by the facility for six (6) years after the resident stops receiving services."

17. S.C. Regulation 61-84 Section 601(E) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall retain a copy of every serious accident and incident with all of the information provided to the Department and the names, injuries, and treatments associated with each resident, staff, and/or visitor involved. A facility

shall retain all serious accident and incident records for six (6) years after the resident stops receiving services."

18. S.C. Regulation 61-84 Section 601(D) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall submit a written report of its investigation of every serious accident and incident to the Department within five (5) days of the serious accident or incident. A facility's written report to the department shall provide at a minimum:

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

18. S.C. Regulation 61-84 Section 601(B) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall report every serious accident and incident that results in resident's death or significant loss of function or damage to a body structure, not related to the natural course of a resident's illness or underlying condition or normal course of treatment, and resulting from an accident or incident occurring to resident within the facility or on the

facility grounds. Serious accidents and incidents requiring reporting include, but not limited to:

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

19. S.C. Regulation 61-84.701 requires "that the facility shall initiate and maintain on site an organized record for each resident. The record shall contain sufficient documented information to identify the resident and the agency and/or person responsible for each resident; support the diagnosis, secure the appropriate care/services (as needed); justify the care/services provided to include the course of action taken and results; the symptoms or other indications of sickness or injuries; changes in physical/mental condition; the response/reaction to care medication and diet provided; and promote continuity of care among providers, consistent with acceptable standards of practice."

20. S.C. Regulation 61-84.703 requires that "the facility" using a written assessment, "shall develop within seven (7) days of admission in ICP with participation of the resident, administrator (or designate), and/or the sponsor or responsible party when appropriate, as evidence by their signatures and date.

The ICP shall be reviewed and/or revised as changes in resident's needs occur, but not less than semi-annually with the resident, administrator (or designate), and/or the sponsor or the responsible party as evidenced by their signatures and date.

21. S.C. Regulation 61-84.901b requires that "the facility shall coordinate with residents to provide care." This care "shall be detailed in the ICP."

FOR A FIRST CAUSE OF ACTION

Negligence

22. Plaintiff hereby incorporates by reference and realleges every allegation of all of the paragraphs as if fully set forth herein.

23. On December 11, 2022 the Plaintiff, was lying in her bed with a shirt and an adult diaper on.

24. A male who is a resident of the memory care ward entered the room and had sexual intercourse with the plaintiff.

25. She did not consent to such sexual intercourse and, in fact, could not consent on the account of her diagnoses.

26. The staff stated to EMS that they had been taking the patient into the male's room in memory care and letting them have intercourse in the memory care section for weeks. This despite her diagnoses which were known to Pacifica Skylyn.

27. Her diagnoses had been disclosed to Pacifica Skylyn in December of 2021 preceding her admission.

28. The standard of care, for a nursing home, among other

things, requires the following;

- a. timely evaluation and assessment of Lorraine Voros' condition, outlining all risk factors with which she presented in order to design an appropriate plan of care;
- b. appropriate environment to protect Lorraine Voros's well-being;
- c. appropriate and timely monitoring of persons within the facility who could possibly injure or assault Lorraine Voros;

29. The Defendant, by and through its agents, servants, and employees, was negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of care and learning in the treatment of Lorraine Voros. More particularly the Defendant was negligent in the following particulars:

- a. failing to properly supervise Lorraine Voros as required, and as promised to the family upon admission;
- b. failing to provide the care, supervision and monitoring of patients, residents, and in particular, Lorriane Voros, which was required by law and which was necessary for Lorraine Voros' health and safety;
- c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Lorraine Voros;
- d. failing to provide sufficient numbers of qualified personnel including nurses and nurse assistants to meet the total needs of Lorraine Voros;
- e. failing to abide by applicable federal and state laws governing long term care facilities and nursing care;
- f. failing to hire a sufficient number of trained and

competent staff;

- g. failing to schedule a sufficient number of trained and competent staff per floor;
- h. failing to follow the licensing and regulatory rules of the State of South Carolina;
- i. failing to timely evaluate and assess Lorraine Voros' risk factors with which she presented in order to design an appropriate plan of care;
- j. failing to develop and follow an appropriate Plan of Care which protected Lorraine Voros' health and well-being;
- k. failing to properly train employees to deal with residents who were unable to care for themselves;
- l. failing to provide timely and comprehensive monitoring of Lorraine Voros and any changes thereto;
- m. failing to properly monitor the memory care unit and its residents;
- n. failing to protect Lorraine Voros from sexual assault;
- o. Having insufficient security with respect to its alzheimer special care unit to prevent or limit access by other residents into that secure area;
- p. failing to exercise due care;
- q. failing to comply with Federal and State Regulations; and
- r. by other negligent acts and/or omissions yet to be determined or defined.

30. That the acts and omissions of Pacifica Skylyn caused and was the proximate cause of Plaintiff's injuries and damages including present and future medical bills, pain and suffering, permanent injury, physical disability and loss of enjoyment of

life.

FOR A SECOND CAUSE OF ACTION
Neglect of a Vulnerable Adult

31. The Plaintiff realleges each and every paragraph contained hereinabove incorporating them by reference.

32. That, according to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff was considered a vulnerable adult.

33. That, according to the South Carolina Adult Protection Act, "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

34. The Defendant failed to properly protect the Plaintiff from an aggressive resident.

35. That Plaintiff trusted in, confided in, and relied on Defendant to use its expertise and discretion for Plaintiff's care.

36. That Defendant accepted Plaintiff's trust and reliance and so became responsible for Plaintiff's health while residing at the nursing home facility.

37. As a result of aforementioned reliance and trust upon

Defendant, Plaintiff's physical, mental, and emotional health was placed in the hands of Defendant.

38. Defendant received compensation for the care and treatment, and it was responsible to provide Plaintiff with the appropriate care and treatment as a result of being paid such compensation.

39. As a direct and proximate result of the failure to properly protect the Plaintiff, the Plaintiff has suffered current and future medical expenses, physical and emotional pain and suffering, permanent and physical impairment, disability, and loss of enjoyment of life.

WHEREFORE, Plaintiff pray for judgement against the Defendant for actual damages in the amount deemed appropriate by a jury, for the costs of this action, for such punitive damages as a jury may award, and for such other and further relief as this Court may deem just and proper.

KNIE & SHEALY,

/s/ Patrick E. Knie

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ATTORNEYS FOR PLAINTIFF

October 26, 2023

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
Civil Action No. 2023-CP-42-04147

LORRAINE VOROS, BY AND
THROUGH HER DULY APPOINTED
ATTORNEY-IN-FACT, JOHN VOROS,

Plaintiff,

v.

PACIFICA SKYLYN, LLC,

Defendant.

DEFENDANT'S ANSWER

As an initial matter, the factual allegations in Plaintiff's Complaint give rise to a disputed matter that the parties have agreed by contract to resolve through binding arbitration and thus the Court lacks subject matter jurisdiction over Plaintiff's claims, which should be dismissed or stayed and referred to arbitration, pursuant to Rules 12(b)(1) and (6), SCRPC, and pursuant to the contract between the parties.

Subject to Defendant's previously filed Motion to Dismiss, Defendant answers Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. Defendant lacks knowledge or information sufficient to form a belief as to the truthfulness of the allegations of paragraph 1.
2. Answering paragraph 2, Defendant admits that Pacifica Skylyn is located in Spartanburg, South Carolina and that Ms. Voros was a resident of the community residential care facility, also known as assisted living, at Pacifica Skylyn.

3. Answering paragraph 3, Defendant admits that Plaintiff alleges certain events occurred at Pacifica Skylyn. Defendant denies the remaining allegations of paragraph 3.

4. Answering paragraph 4, Defendant admits that Ms. Voros became a resident of the community residential care facility at Pacifica Skylyn in January 2022.

5. Answering paragraphs 5 and 6, Defendant admits only that Ms. Voros had been diagnosed with certain medical conditions, including, upon information and belief, multiple sclerosis and an intellectual disability, by her medical providers prior to her becoming a resident of the community residential care facility at Pacifica Skylyn.

6. Defendant denies the allegations of paragraph 7.

7. Paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, second paragraph numbered 18, 19, 20 and 21 contain conclusions of law to which no response is required. Further, these paragraphs cite to various statutes and regulations and thus Defendant craves reference to the actual text of the specific statutes and regulations and denies any allegations of these paragraphs that are inconsistent therewith.

8. Answering paragraph 22, Defendant references paragraphs 1 through 7 above.

9. Defendant lacks knowledge or information sufficient to form a belief as to the truthfulness of the allegations of paragraphs 23, 24, 25 and 26, and therefore, it denies these allegations and demands strict proof thereof.

10. Answering paragraph 27, Defendant admits only that Ms. Voros had been diagnosed with certain medical conditions by her medical providers prior to her becoming a resident of the community residential care facility at Pacifica Skylyn, as is noted in Ms. Voros' admission paperwork.

11. Answering paragraph 28, Defendant denies that Ms. Voros resided in a nursing home or skilled nursing facility and thus denies all allegations of paragraph 28, including each discrete subpart.

12. Defendant denies the allegations of paragraphs 29, including each discrete subpart, and 30.

13. Answering paragraph 31, Defendant references paragraphs 1 through 12 above.

14. Paragraph 32 contains conclusions of law to which no response is required.

15. Paragraph 33 contains conclusions of law to which no response is required. Further, paragraph 33 cites generically to a South Carolina statute and thus Defendant craves reference to actual text of the specific statute and denies any allegations of this paragraph that are inconsistent therewith.

16. Defendant denies the allegations of paragraph 34.

17. Defendant lacks knowledge or information sufficient to form a belief as to the truthfulness of the allegations of paragraph 35, and therefore, it denies these allegations and demands strict proof thereof.

18. Defendant denies the allegations of paragraphs 36 and 37 as pled.

19. Answering paragraph 38, Defendant admits only that Ms. Voros paid to reside in the community residential care facility at Pacifica Skylyn and that, in exchange for such payment, Defendant agreed to provide the applicable care and services required by South Carolina law and the written agreement between Defendant and Ms. Voros. The remaining allegations of paragraph 38 are denied.

20. Defendant denies the allegations of paragraph 39.

21. Defendant denies that Plaintiff is entitled to the relief requested in the “WHEREFORE” paragraph following paragraph 39.

22. Defendant denies any allegations contained in the Complaint not specifically admitted above.

FOR A SECOND DEFENSE

23. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFF’S COMPLAINT, it fails to state facts, in whole or in part, upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), SCRCF.

FOR A THIRD DEFENSE

24. IN ORDER TO PRESEVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTEHR FURTHER ANSWERING PLAINTIFF’S COMPLAINT, an award of punitive damages in this case would violate the 5th, 6th and 14th Amendments to the United States Constitution and Article One, Section 3 of the South Carolina Constitution in that:

a) The unfettered power to award punitive damages in any manner is wholly devoid of a meaningful standard and is inconsistent with due process guarantees; and

b) Even it if could be argued that the standard governing punitive damages exists, the standard is void for vagueness.

FOR A FOURTH DEFENSE

25. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFF’S COMPLAINT, an award of punitive damages in this matter, if any, is subject to the cap and other provisions set forth in South Carolina Code §§ 15-32-520 and -530.

FOR A FIFTH DEFENSE

26. FURTHER ANSWERING PLAINTIFFS' COMPLAINT, to the extent that this action is not dismissed or stayed and referred to binding arbitration, Defendant demands a jury trial and reserves the right to assert additional defenses as may be revealed by additional information that may be acquired during the course of discovery or otherwise in this action.

WHEREFORE, having fully and truly answered Plaintiff's Complaint, Defendant prays that it be dismissed, or in the alternative be stayed and referred to binding arbitration, that it recover its costs, and for such other and further relief as this Court deems just and proper.

HEDRICK GARDNER KINCHELOE & GAROFALO LLP

s/ Jonathan G. Roquemoire

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
Civil Action No. 2023-CP-42-04147

LORRAINE VOROS, BY AND
THROUGH HER DULY APPOINTED
ATTORNEY-IN-FACT, JOHN VOROS,

Plaintiff,

v.

PACIFICA SKYLYN, LLC,

Defendant.

**DEFENDANT'S MOTION TO DISMISS
PURSUANT TO RULES 12(B)(1) AND
12(B)(6), SCRPC, OR IN THE
ALTERNATIVE TO STAY AND COMPEL
ARBITRATION**

Defendant Pacifica Skylyn, LLC, by and through counsel, hereby moves, pursuant to Rules 12(b)(1) and 12(b)(6), SCRPC, and the Federal Arbitration Act, 9 U.S.C. §§ 1 through 16, that Plaintiff's Complaint in this action be dismissed, or in the alternative, that this action be stayed and referred to binding arbitration. The basis for this Motion is that the factual allegations in Plaintiff's Complaint give rise to a disputed matter that the parties have agreed by contract to resolve through binding arbitration (the Arbitration Agreement at issue is attached as Exhibit A). Therefore, the Court lacks subject matter jurisdiction over Plaintiff's claims and Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and thus should be dismissed. As an alternative remedy, this action should be stayed and the claims asserted herein should be referred to arbitration. This Motion is based on the applicable law and rules of procedure, the contract between the parties, and a memorandum of law to be submitted prior to hearing.

[SIGNATURE PAGE FOLLOWS]

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PACIFICA

SENIOR LIVING

RESIDENCE AND CARE AGREEMENT (Assisted Living)

SOUTH CAROLINA

**EXHIBIT
A**

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RESIDENCE AND CARE AGREEMENT

This Residence and Care Agreement ("Agreement") is made by and between Pacifica Senior Living Skylyn ("we", "us", "our" or "Pacifica") and Lorraine Voros ("you" or "Resident") and John Voros (Resident's "Responsible Person", if any). (If more than one person is signing this Agreement, "you" refers to each of you individually and to both of you together.)

We own Pacifica Senior Living Skylyn ("the Community"), a Community Residential Care (Assisted Living) Facility licensed by the South Carolina Department of Health and Environmental Control, located at 1705 Skylyn Dr, Spartanburg, SC 29307. The Community provides residence, care and services to persons 62 years of age and older. We manage and operate the Community on a non-discriminatory basis and afford equal treatment and access to services to eligible persons.

You have applied for accommodations at the Community and your application has been accepted. The purpose of this Agreement is to provide a statement of the services that we will furnish to you at the Community, and the other legal obligations that we will assume. This Agreement also sets forth your legal obligations to us, both financial and non-financial.

Please note that as a Community Residential Care (Assisted Living) Facility, the Community is not permitted to use restraints on its residents, and the use of restraints is also inconsistent with our philosophy. We encourage our residents to participate in physical activities to the extent of their capabilities. Daily living activities in the Community, as in all settings, may result in falls, accidents and other personal injuries due to a variety of reasons, including age-related factors. Thus, the residents should be aware of that risk and make their part, while continue to get the most out of their freedom and quality of life. If you are not comfortable with this type of environment of the Community, we suggest that you consider a higher level of care.

THIS AGREEMENT IS SUBJECT TO ARBITRATION. See Section XI.P below.

I. RESIDENTIAL SERVICES

You will be provided with the following residential services at the Community, subject to the terms of this Agreement. These services are included in your Monthly Fee unless otherwise

indicated.

A. Living Accommodations.

1. Residence. You have chosen to live in Apartment # 44 ("the Apartment") at the Community. You may live in the Apartment on a month-to-month basis, subject to the terms of this Agreement and to the general policies of the Community, contained in the Resident Handbook, as it now exists and as it may later be amended, and to the other written rules and policies of the Community.

2. Utilities. Your Apartment will be furnished with basic cable television hook-up, water, electricity, garbage removal, heat and air conditioning. You will be responsible for telephone, cable television, and internet services which will be billed directly to you by the responsible company or companies.

3. Furnishings. Your Apartment comes equipped with appliances and floor and window coverings. You are also free to use your appliances and special equipment, provided that the Community's safety standards are met. You may furnish the Apartment with your own furniture. You or your estate will be responsible for removing all of your furnishings when the Apartment is vacated. You will continue to be charged the Monthly Fees set forth in Section VI.A below until your furnishings are removed from your Apartment. If you are unable to provide your own furniture or you choose not to provide it, we will provide you with basic furniture, for an additional fee, as set forth in **Appendix A**.

4. Maintenance. We will perform all necessary maintenance and repairs of the Apartment at our expense. However, you will be responsible for reimbursing us for any repairs not caused by normal wear and tear.

5. Alterations. Any physical change to the Apartment requires the prior written approval of the Executive Director of the Community (the "Executive Director"), and shall be made at your own expense. If you obtain such approval, you will be responsible for restoring the original décor when the Apartment is vacated, unless we specifically exempt you from this requirement in writing.

6. Common Facilities. You will be entitled to share with all other residents of the Community the use of the common areas, including the main dining room, lounge areas, library, beauty/barber shop, and multi-purpose room and recreation rooms. We may change or reconfigure common spaces in the future at our discretion.

B. Laundry.

Laundry facilities are available for resident use. Personal laundry services are described in the Resident Handbook and charged as set forth in **Appendix A**. You shall be responsible for your personal dry cleaning.

C. Housekeeping.

We will provide weekly housekeeping services in your Apartment as described in the Resident Handbook. You agree to keep your Apartment in a clean and sanitary condition. If you fail to do so, you understand that we may provide additional housekeeping services to your Apartment, and you shall agree to pay for such services, as we deem necessary. We will provide additional housekeeping services beyond the standard weekly services for an additional fee, as described **Appendix A**.

D. Personal Supplies.

We assume that residents wish to provide their own supplies for personal care and hygiene. However, if you are unable to provide such supplies or choose not to provide them, we will provide you with basic personal items for an additional fee, as described in **Appendix A**.

E. Meals.

1. Dining Room. We will serve three (3) nutritionally balanced meals and snacks daily to residents at the Community. These meals and snacks are included in your Monthly Fee. We will also accommodate some special diets, if prescribed by your physician as a medical necessity.

2. Tray Service. We will provide tray service to your Apartment when you are medically unable to access the dining area for meals. During other times, we will provide optional tray service to you at your request for an additional charge, as set forth in **Appendix A**.

3. Guests. You may invite guests to any meal, but we request at least two (2) hours' advance notice so that proper accommodations can be made. There will be a fee for guest meals as provided in **Appendix A**.

F. Planned Activities.

We shall make available to you a program of social, intellectual and recreational activities, both at and away from the Community. You are welcome to participate in such activities as desired. There may be an extra charge for some of the activities we offer, including, but not limited to charges for special supplies, activities provided by an outside vendor, or activities away from the Community.

G. Transportation.

We will make available to residents, or otherwise assure the provision of, scheduled transportation to local medical facilities at no additional charge. We will also make available to residents, at no extra charge, scheduled transportation for shopping and for other errands and planned social events in and around the local area. The staff at the Community will also arrange personal transportation for residents for an extra fee as listed in **Appendix A**.

H. Emergency Response and Fire Protection.

Your Apartment will be equipped with an emergency call system, smoke detector and sprinkler system. When the staff at the Community determines that, in its judgment, an emergency situation exists, staff will call 911. You hereby authorize us to call emergency response agencies on your behalf and at your expense. Please notify us if you have an advance health care directive that contains information on your desires regarding life-sustaining treatment or intervention.

I. Observation and Consultation

The staff at the Community will observe your health status to identify your dietary, social and health care needs and will provide you with consultations regarding social and health-related issues.

II. PERSONAL ASSISTANCE AND CARE

In accordance with your plan of care and applicable law, we will provide you assistance, as needed, with activities of daily living, such as bathing, dressing, ambulating, and assistance with medications. We will also assist you, as needed, with scheduling of medical and dental appointments and with accessing community resources and transferring to outside facilities, as needed and prescribed by your primary care physician.

We provide different personal care service packages to residents of the Community depending on their specific needs. We may change the scope and pricing of these levels of assisted living services in our discretion upon thirty (30) days' written notice to you.

When you applied for admission to the Community, the professional staff performed an assessment of your needs and determined with you the appropriate level of service for you, as set forth in Section VI.A. We will reassess you as needed in light of your changing needs to determine the appropriate level of service that you require. The current fee schedule for the various Levels of Care at the Community is set forth in **Appendix B**. These fees are subject to change as provided in Section VI.D below. As described in Section VI.F below, if you begin receiving a different level of care, the rate for the new level of care shall be charged immediately.

III. OPTIONAL SERVICES

We will make available to you several optional services at an extra charge, to be billed on a monthly basis as described in the Resident Handbook. The current fees for optional services at the Community are set forth in **Appendix A**, and are subject to change as provided in Section VI.D below.

IV. EXCLUDED HEALTH-RELATED SERVICES

We shall not be responsible for furnishing or paying for any health care items or services not expressly included in this Agreement, including but not limited to home health, hospice, physicians' services, nursing services, surgery, hospital care, private duty care or other care or equipment beyond our routine levels of staffing and equipment, treatment or examination of eyes or teeth, medications, medical supplies, vitamins, eyeglasses, contact lenses, hearing aids,

orthopedic appliances, prosthetic devices, laboratory tests, x-ray services, toiletries and personal supplies not required to be provided under Section I.D above.

V. TERM OF AGREEMENT

This Agreement shall be in effect from month-to-month, unless and until it is terminated as set forth in Section VIII below.

VI. FEES

A. Monthly Fee.

Your initial Monthly Fee is:

Fee for Residential Services for Resident One:

Fee for Level of Care Services (if applicable):

Total Monthly Fee for Resident One:

If applicable, the initial Monthly Fee for a second resident residing in your Apartment is:

Fee for Residential Services for Second Resident:

Fee for Level Care Services (if applicable):

Total Monthly Fee for Second Resident:

Total for Both Residents (if applicable):

\$2000.00

\$4195.00

All-Inclusive

\$4195.00

~~_____~~
~~_____~~
~~_____~~
~~_____~~

If you begin occupying your Apartment on a day after the first day of the calendar month, your Monthly Fee for the first month will be prorated accordingly. If your Apartment is occupied by two Residents and it reverts to single occupancy, the remaining Resident shall pay the fee for "Residential Services for Resident One" and the Fee for the appropriate level of care for that resident. The Monthly Fee is payable in advance by the first (1st) day of each calendar month, and is considered delinquent if not received by the fifth (5th) day of the month. Your right to occupy and use the Apartment and to receive services at the Community is contingent upon timely payment of the Monthly Fee and all other applicable charges and fees under this Agreement.

B. Fees for Levels of Care and Optional Services.

The charges for all Levels of Care and for all optional services at the Community shall be as set forth in **Appendix A** and **Appendix B**.

C. Community Fee.

You shall pay a one-time nonrefundable Community Fee of Two thousand dollars (\$ 2000) upon your admission to the Community. The Community Fee is used to help defray the costs associated with evaluating you, reviewing your application and physician's report, admitting and orienting you to the Community and preparing your Apartment for occupancy. The Community Fee is not a security deposit.

D. Adjustments to Fees or Services.

We shall give thirty (30) days' prior written notice to you of any change in the Monthly Fee, fees for levels of care, or in the charges for optional services. However, as described in Section VI.F, if you begin receiving a different level of care, the rate for the new level of care shall be charged immediately. We will give you written notice of a level of care rate increase within two (2) business days after providing services at the new level of care. In the event of a rate increase, we will include with the notice of the increase the reasons for the increase and a general summary of the additional costs that led to the increase.

E. Payment and Failure to Make Payments.

You will be required to make all payments due to us in a timely manner and otherwise fulfill your financial obligations to us. We shall charge you a late fee as identified in **Appendix A** for any late payment made after the fifth (5th) day of each month. If you fail to pay your Monthly Fee or other fees by the tenth (10th) day of any calendar month, we may terminate this Agreement upon thirty (30) days' written notice to you.

F. Change of Level of Care.

The staff of the Community will perform a periodic reassessment of your needs.

If we determine that you need a different level of care than that which you are currently receiving, we will provide you and your Responsible Person, if applicable, with written notice of the change. You agree to change to a level of care appropriate to your needs. The rate for the new level of care shall apply immediately.

VII. TRANSFERS FROM APARTMENT

A. Transfer for More Appropriate Care.

The Community is licensed as a Community Residential Care (Assisted Living) Facility and is not designed to provide higher levels of care, such as nursing, or care for serious mental or emotional disorders. You may remain in the Apartment at the Community as long as doing so is permitted by applicable licensure laws and fire safety standards, and, in the judgment of the staff of the Community, your care needs and levels of functioning are consistent with those of other residents and with the level of staffing and facilities offered at the Community, and your presence does not create a danger to yourself or others. If we determine that it is inappropriate for you to remain in your Apartment, you will be asked to move from the Community, and this Agreement will terminate in accordance with Section VIII. If you do not move out under these circumstances, and we determine that it is necessary to provide you with one-on-one care in order to protect your health or safety or the health or safety of others, we will provide such care and you will be charged for it in accordance with **Appendix A**.

B. Substitution of Apartment.

We may need to substitute your Apartment with another to comply with any law or lawful order of any authorized public official, or for any other reasonable purpose, as determined by us. If this occurs, we shall make every reasonable effort to substitute your Apartment with a reasonably comparable apartment. Your request for an apartment substitution will be granted in our discretion and subject to availability.

C. Voluntary Apartment Change.

Your request for a change of apartment may be granted at our discretion. You will pay the then-applicable Monthly Fee for the new apartment beginning on your first day of

occupancy. If you move on a day other than the first day of the month, any difference in rates between your current Apartment and the new apartment will be credited or debited to your account, as the case may be, on a pro rata basis. You will be responsible for all costs associated with the move, including an apartment transfer fee as noted in **Appendix A**. You may request that staff move your belongings to the new apartment, for an additional fee as noted in **Appendix A**.

VIII. TERMINATION

A. Termination by Resident.

You may terminate this Agreement at any time, with or without cause by giving the Executive Director fourteen (14) days' prior written notice. We request, however, that you give the Executive Director thirty (30) days' prior written notice of any termination so that we may have adequate time to prepare for your transition. You need not cite a specific reason for the termination. Your termination is not considered voluntary if you terminate because you require a higher level of care or your health, safety, or welfare is endangered. You will continue to be responsible for payment of your full Monthly Fee until you have vacated your Apartment. If you fail to provide at least fourteen (14) days' prior written notice of termination, you will continue to be responsible for payment of your full Monthly Fee for fourteen (14) days from the earlier of the date that you move or the date that the Executive Director actually received notice. If another resident moves into your Apartment during the required notice period, we will notify you in writing and will prorate your Monthly Fee accordingly.

B. Termination by Us

1. Upon Thirty (30) Days' Notice. We may terminate this Agreement upon thirty (30) days' written and verbal notice to you and your personal representative if any of the following events occur:

- a. Nonpayment of any fees owing to us within ten (10) days of the due date;
- b. Your failure to comply with State or local law after receiving written notice of the alleged violation;

c. Your failure to comply with the general policies of the Community.

[These policies are as described below and in the Resident Handbook]; or

d. If after admission, we determine that you have a need not previously identified and the Community cannot appropriately meet your needs.

2. Upon Less than Thirty (30) Days' Notice. In addition, we may, terminate this Agreement with less than thirty (30) days' notice if you are engaging in behavior which is a threat to the mental and/or physical health or safety of yourself or to the mental and/or physical health or safety of others at the Community.

3. Reassessment and Termination. Please note that the following conditions, among others, may lead to a reassessment and a termination of this Agreement in accordance with Section VIII.B.1.d above. This Agreement may terminate and we may transfer or discharge you if:

- a. You do not meet the requirements for residency established by the South Carolina Department of Health and Environmental Control regulations;
- b. You present an immediate physical threat or danger to yourself or others;
- c. You have active communicable tuberculosis or another similar communicable disease;
- d. You require 24-hour, skilled nursing or intermediate care;
- e. You are not elderly and have needs in conflict with other residents or the programs of services offered, or require more care and supervision than other residents;
- f. You have a primary need for care and supervision that results from dementia or a mental disorder resulting in ongoing behavior which would upset the general resident group, or which would require us to provide to you a greater amount of care and supervision than other residents at the Community or if you cannot generally benefit from the program of services available at the Community;
- g. You are "bedridden" (other than for a temporary illness or for recovery from surgery) as defined by State law and licensing regulations;
- h. You refuse to accept services required in order for us to meet your needs;
- i. You have health care or other needs that cannot be met at the Community for reasons such as licensure, design or staffing;
- j. Your personal physician has determined that you require services not available at the Community;

- k. Your condition changes so that you are considered a wandering risk or you are unable to respond to verbal instructions in an emergency;
- l. You have stage 3 or stage 4 pressure sores;
- m. You require gastrostomy care;
- n. You have a staph infection or other serious infection;
- o. You depend on others to perform all activities of daily living, as set forth in the Community Residential Care (Assisted Living) Facility Law; or
- p. You have a tracheostomy.

C. Death.

This Agreement shall terminate automatically upon your death.

D. Refund Policy.

1. Vacating Apartment. If this Agreement is terminated, you or your estate must vacate the Apartment and remove all of your property from it. You or your estate shall remain liable for the Monthly Fee until the effective termination date and all property is removed from your Apartment and it is restored to a clean condition (except for normal wear and tear), whichever occurs later. We may also remove your property from the Apartment and charge you or your estate a property storage fee if either you or your estate fails to vacate the Apartment and remove your personal belongings from it by the effective termination date. If you or your estate abandons your personal property following termination of this Agreement, we shall have the right to dispose of such abandoned property in accordance with South Carolina law.

2. Refund of Unused Portion of Monthly Fee. Following termination of this Agreement, we will pay you or your estate a refund equal to any amount that we owe to you, minus the following: (i) the amount of any unpaid Monthly Fees or other charges that you owe to us under this Agreement; (ii) the costs of repairing any damage to the Apartment that is not caused by normal wear and tear; (iii) the costs of repairing any of our property that was damaged by you or your visitors; and (iv) any expense incurred by us to remove and/or store any of your property that was not removed when you vacated the Apartment. You or your estate will receive any refund that is due within thirty (30) days following the effective termination date.

3. Survival. This Section VIII.D shall survive the termination of this Agreement.

E. Couples.

If there are two residents under this Agreement, and one dies or permanently vacates the Apartment, this Agreement shall continue in full force and effect, and the then-current Monthly Fee applicable to single occupancy of the Apartment at the level of care for the remaining resident shall apply.

IX. YOUR PROPERTY RIGHTS AND OBLIGATIONS

A. No Management or Property Interest.

This Agreement shall give you no property right or management interest in the Community, us or any of our assets. In addition, you shall have no right to any of our personal property, including furnishings and fixtures in the Apartment or in the common areas at the Community.

B. Damage to Our Property.

You agree to maintain your Apartment in a clean, sanitary and orderly condition. You further agree to reimburse us for any loss of, or damage to, our property, inside or outside the Apartment, caused by you or your guests or invitees, excluding normal wear and tear.

C. Damage to Your Property.

We shall not be responsible for the loss of any personal property belonging to you due to theft, fire, or any other cause, unless the loss or damage was caused by our negligence or that of our employees. We strongly recommend that you obtain, at your own expense, insurance for the replacement value of your personal property, at adequate coverage and liability limits.

X. OTHER PERSONAL OBLIGATIONS

A. Your Liability to Others.

You accept full responsibility for any injury or damage caused to others, or suffered by you, as a result of your own acts or omissions, and those of your guests or invitees,

and you indemnify us and hold us and our directors, agents and employees harmless from any and all liability for such injury or damage. We recommend that you maintain general liability and workers' compensation insurance, if applicable, in an amount and form sufficient to cover such liability.

B. Your Responsibility with Yourself and the Risk of Falls

You understand that because you will be given as much independence, privacy, and personal decision-making as possible, there may be times when you are injured while trying to independently perform your activities of daily living such as walking, getting dressed, bathing, transferring from your bed to bathroom, chair to bed, etc.

As we get older, generally we begin to experience an increase in falls and other accidents, often due to our decreased eyesight, weaker muscles, balance problems, slower response time, shuffling gait and/or side effects of our medications. You understand that the Community cannot guarantee that you will not experience a fall, or an injury from a fall, at the Community, as the risk of falls is inherent to the aging process. You and the other residents should not feel uncomfortable for using a walker or cane, as assistive devices could be very helpful to maintain and improve your mobility. You also should wear good-fitting shoes, with slip-resistant soles. Residents, like you, should speak up and converse with their doctors, family and staff if you are concerned about falling.

In addition, you also agree that for any activity designated by your doctor as requiring supervision or assistance, which you decide to perform without reasonably requesting or waiting for Staff supervision or assistance, and which thereby results in an injury to you, is not the fault of the Community.

Therefore, you hereby understand that Pacifica keeps residents' safety as their highest priority and works together with residents to keep them safe and prevent falls, but Pacifica is not able to prevent all falls from happening PV (RESIDENT'S INITIALS)

C. Personal Affairs.

You agree to make reasonable advance arrangements in the event of your death or incompetence. We have forms of Durable Powers of Attorney for health care and financial

decision-making and encourage you to review them and to seek appropriate professional advice regarding your options.

D. Private Duty Aides.

If you require home health agency personnel or hospice or other outside assistance, we will assist you in accessing these services as well. For any services provided to you at the Community you must abide by the Community's policies for such outside providers. These policies provide that you may utilize home health agencies or other providers of your choice provided that such agencies or providers abide by the rules and regulations set forth in the Home Health Agency/Private Duty Policy, and that we may exclude providers that do not comply. Please note that while we will provide observation as described elsewhere in this Agreement, we do not monitor the services of outside providers. You shall be solely responsible for the cost of all services of your private duty personnel, which they will bill directly to you. You also understand and agree that we shall not be liable for any loss or injury to you or any other resident of the Community caused by such personnel. You shall not directly or indirectly engage the services of a current or past Community employee, unless expressly approved by the Executive Director of the Community.

XI. MISCELLANEOUS

A. Right of Entry.

For your safety and comfort, the staff of the Community must be permitted to enter the Apartment to perform basic housekeeping services, respond to emergencies, make repairs and improvements, and perform other management functions as we deem necessary or advisable. In addition, because the Apartment is licensed under the Community Residential Care (Assisted Living) Facility Law, any duly authorized agent of the Department of Health and Environmental Control may, upon stating the purpose of the visit, enter and inspect any licensed portion of the Community, including your Apartment, without advance notice. We shall also have the right to show the Apartment to prospective residents at any reasonable time during the thirty (30)-day period prior to the termination date for this Agreement. Whenever feasible, our

staff will attempt to give you reasonable notice before entering the Apartment.

B. Accuracy of Application Documents.

As part of your application to the Community, you have filed application forms. You warrant that all information contained in these documents is true and correct, and you understand that we have relied on this information in accepting you for residency at the Community.

C. Examination of Records.

You acknowledge that the South Carolina Department of Health and Environmental Control or any other State licensing agency may inspect your residency and care records as part of an evaluation of the Community.

D. Resident Handbook. You agree to abide by the general policies of the Community contained below and in the Resident Handbook, as it now exists or as it may later be amended in our discretion. A copy of the current Resident Handbook is attached as **Appendix D** and made part of this Agreement. We reserve the right to change the Resident Handbook at any time. You will be provided with a new Resident Handbook if we change it in the future. You understand that your failure to abide by our general policies may result in our termination of the Agreement. In accordance with State law, these policies must be reasonable. By signing this Agreement, you acknowledge that you have reviewed the Resident Handbook and the general policies of the Community and agree that they are reasonable. The following additional general policies apply:

1. Residents of the Community must pay all fees and charges that are owing to us in accordance with their Residence and Care Agreements when due.
2. Residents may not breach any representation, covenant, agreement or obligation of the resident under their Residence and Care Agreements, including but not limited to any representation regarding financial status.
3. Residents must not engage in conduct that poses a danger to themselves or others at the Community, must not be disruptive, must not create unsafe conditions, and must not be physically or verbally abusive to other residents or staff.

4. Residents must ensure that their family members, guardians, personal representatives or guests are not disruptive, do not create unsafe conditions, and are not physically or verbally abusive to the detriment of the resident, other residents or staff.

5. Residents must not engage in conduct that violates federal, State or local laws or ordinances.

If you wish to suggest changes to the general policies of the Community, you may do so at any time by notifying the Executive Director.

E. Guest Visits and Communications.

We encourage family visits and communication. Your guests are welcome to visit and participate in appropriate activities at the Community, if you so desire, provided they respect the rights of other residents and staff and abide by our visitor and guest policies, including reasonable limitations on the length of stay and frequency of visits. You will be responsible for assuring that your guests abide by these rules and are not disruptive. All visitors must register at the front desk when entering the Community. We reserve the right to remove or deny entry to the Community to any visitor whom we determine is disruptive or dangerous.

F. Smoking Policy.

You may smoke only in designated smoking areas in accordance with our smoking policy, which is set forth in the Resident Handbook. Smoking in Apartments will not be allowed due to safety hazards.

G. Pet Policy.

You may have a pet at the Community, if you obtain prior written approval from the Executive Director and abide by the Community's pet policy, as set forth in the Resident Handbook.

H. Motorized Cart

If you utilize a motorized cart, you must abide by the Motorized Cart Policy, which is set forth in the Resident Handbook.

I. Assignment.

We reserve the right to assign this Agreement to any successor-in-interest selected by us. You may not transfer or assign your right to use the services and accommodations at the Community to any other individual or entity.

J. Personal Rights.

Consistent with South Carolina law, you shall have the rights set forth in the Residents' Bill of Rights, which is attached to this Agreement as **Appendix C**.

K. Notices.

All notices given under this Agreement shall be in writing and shall be addressed to us at our administrative office at 1705 Skylyn Dr, Spartanburg, SC 29307 or to you at your Apartment. Such notices shall be effective when personally delivered or two (2) days after being deposited in the United States mail, properly addressed and first class postage prepaid.

L. Grievances.

If you have a grievance or complaint regarding the Community, you may contact the Executive Director or our corporate office at 1775 Hancock St Ste 200, San Diego, CA 92110. A copy of the Community's grievance procedure for resolution of resident complaints is available upon request. In addition, you have the right to contact the South Carolina Department of Health and Environmental Control or the Long-Term Care Ombudsman.

M. Entire Agreement.

This Agreement (together with the documents and appendices referenced herein) constitutes the entire agreement between you and us and may be amended only by a written instrument signed by you and by our authorized representative, unless otherwise provided in this Agreement. If any part of this Agreement is held to be invalid or unenforceable, the remainder of the Agreement shall remain valid and enforceable, unless the context requires otherwise. In the event of any inconsistency between the terms of this Agreement and the Resident Handbook, the terms of this Agreement shall control.

N. Waiver.

Our failure in any instance or instances to insist upon your strict performance or observation of or compliance with, any of the terms or provisions of this Agreement, shall not be construed to be a waiver or relinquishment of our right to insist upon your strict compliance with all of the terms and provisions of this Agreement. In addition, our acceptance of any payment from you after your breach of any term of this Agreement or after providing you with a notice of termination based on a reappraisal as described in Section VIII.B.1.d, above, shall not constitute a waiver of our right to insist upon full performance of all terms of this Agreement, nor shall it waive our right to terminate this Agreement for any breach previously committed or to terminate in accordance with Section VIII.B.1.d.

O. Governing Law.

This Agreement shall be governed by South Carolina law. By signing on the following page, you acknowledge that you have read and understand this Agreement, including its appendices and attachments, and you agree to abide by their terms. You also acknowledge that you have been given the opportunity to consult with legal counsel or any other advisors of your choosing prior to signing this Agreement.

P. Arbitration.

By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings. If someone other than the resident signs this arbitration clause, he/ she understands and agrees that he/she is agreeing to arbitrate on behalf of the resident and on behalf of him/herself as an individual. **You give up your constitutional right to have any such dispute decided in a court of law before a jury, and instead accept the use of arbitration. The**

arbitration shall be conducted in Spartanburg, South Carolina by a mutually agreed upon single neutral arbitrator. In reaching a decision, the arbitrator shall prepare a written decision that includes findings of fact, the reasons underlying the decision, and conclusions of law. The parties agree not to disclose the existence, content, or results of the arbitration without the prior written consent of the parties, unless disclosure is required by court order. Each party shall bear its own costs and fees in connection with the arbitration, unless otherwise provided by law. **You may withdraw your agreement to arbitrate within thirty (30) days after signing this Agreement by giving written notice of your withdrawal to the Community.** After termination of the Agreement, this arbitration clause shall remain in effect for the resolution of all claims and disputes that are unresolved as of that date. In the event that any part of this arbitration clause is determined to be unenforceable, the remaining portions of the clause shall remain valid and shall be enforced by the parties. The parties shall select an arbitrator in accordance with the Federal Arbitration Act. If the Federal Arbitration Act does not permit arbitration in accordance with this clause, then the matter shall be arbitrated in accordance with State law.

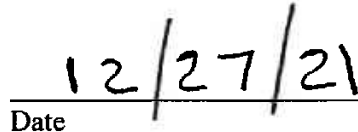
By signing below, you warrant that this Arbitration Agreement has been explained to you, that you understand its significance, that you voluntarily agree to be bound by it, and that you understand that agreeing to arbitration is not a condition of admission to the Community.

Resident Signature



Responsible Party Signature

Date



Date

[Remainder of page intentionally left blank]

Resident Acknowledgment.

By signing below, you acknowledge all of the following:

1. You have received a signed copy of this Residence and Care Agreement, which specifies the services and accommodations that you will receive at the Community and the charges for such services;
2. You have received a written copy of the Resident Handbook (**Appendix D**), which contains the rules and regulations for the Community residents and the Community's grievance procedure; and
3. You have received a copy of the Residents' Bill of Rights, which is attached to this Agreement as **Appendix C**.

[Remainder of page intentionally left blank]

This Agreement shall be effective as of _____.

RESIDENT:

Signature

Printed Name

Date

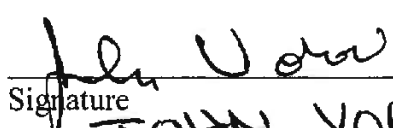
RESIDENT:

Signature

Printed Name

Date

RESPONSIBLE PERSON:



Signature

JOHN VOROS

Printed Name

105 WHITE OAK RD
SPARTANBURG, SC 29301

Address

804-517-5816

Phone Number

12/27/21

Date

EXECUTIVE DIRECTOR:

Born:



Signature

Deb Kimbrell

Printed Name

12/27/21

Date

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
Civil Action No. 2023-CP-42-04147

LORRAINE VOROS, BY AND
THROUGH HER DULY APPOINTED
ATTORNEY-IN-FACT, JOHN VOROS,

Plaintiff,

v.

PACIFICA SKYLYN, LLC,

Defendant.

**DEFENDANT’S MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION TO
DISMISS PURSUANT TO RULES
12(B)(1) AND 12(B)(6), SCRCP, OR IN
THE ALTERNATIVE TO STAY AND
COMPEL ARBITRATION**

Defendant Pacifica Skylyn, LLC, (“Pacifica”) hereby submits this memorandum of law in support of its motion to dismiss, or in the alternative, to stay and compel arbitration of Plaintiff’s claims.

INTRODUCTION

Lorraine Voros (“Plaintiff”) was a resident of Pacifica Senior Living Skylyn’s (“Pacifica”) assisted living facility in Spartanburg, South Carolina. Her duly authorized power of attorney, John Voros, has asserted claims against Pacifica for negligence and neglect of a vulnerable adult. All causes of action stem from Voros’ residency and care at Pacifica. (See Compl.).

John Voros, acting pursuant to a validly executed Power of Attorney, signed the Residence and Care Agreement (“the Agreement”) that governed the terms of Plaintiff’s residency at Pacifica. (The Agreement is attached as Exhibit A to Defendant’s Motion to Dismiss.). The first page of the Agreement states in all capital, underlined letters, “THIS AGREEMENT IS SUBJECT TO ARBITRATION.” See Section XI.P below.” The Agreement contains numerous “Miscellaneous” provisions, including a provision requiring binding arbitration of disputes in subparagraph P., titled “Arbitration”. The scope of the arbitration clause is broad – the parties agreed to binding

arbitration of “any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims.” (Ex. A to Pacifica’s Mot. to Compel Arbitration at p. 18). The arbitration clause includes an exception for “any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court” unless both parties agree to arbitrate such a claim.” (*Id.*). Additionally, the arbitration clause includes an agreement concerning certain parameters for arbitration—the parties must mutually agree upon an arbitrator in accordance with the Federal Arbitration Act, and each party must bear its own costs for arbitration. (*Id.*).

The Agreement contains the mutual promise of both parties to arbitrate all claims between them. Considered with the strong state and federal policies favoring enforcement of arbitration agreements, Pacifica submits the instant dispute should be resolved by binding arbitration in accordance with the procedures outlined in the Agreement’s arbitration clause. Pacifica filed the instant motion seeking dismissal of Plaintiff’s claims for lack of subject matter jurisdiction and for failure to state facts sufficient to constitute a cause of action, or in the alternative, seeking an order compelling arbitration of each and every claim asserted by Plaintiff and dismissing or staying the lawsuit pending binding arbitration.

LEGAL STANDARDS, ARGUMENT, AND ANALYSIS

Absent agreement by the parties to the contrary, the question of arbitrability of a claim is an issue for the court. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc.*,

344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). Arbitration of Plaintiff's claims is mandated by the Federal Arbitration Act ("FAA"). The FAA provides as follows:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2. Generally, a party seeking to compel arbitration under the FAA must establish the following four elements: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the Relationship of the transaction, which is evidenced by the Agreement, to interstate or foreign commerce; and (4) the failure of, neglect or refusal of the [other party] to arbitrate the dispute.

Whiteside v. Te/tech Corp., 940 F.2d 99, 102 (4th Cir. 1991); *McCutcheon v. THI*, 2011 U.S. Dist. Lexis 144288 (D.S.C. 2011). As addressed herein, these four elements are all established by the nature and terms of the Agreement, and the dispute as set forth in the pleadings filed in this action. Thus, the FAA is applicable and the arbitration provision in the Agreement is deemed "valid, enforceable and irrevocable" under the FAA.

Because the arbitration provision is valid and enforceable, the instant case should be dismissed or stayed pending arbitration pursuant to the FAA. 9 U.S.C. §3.

I. THE ARBITRATION CLAUSE IS VALID AND ENFORCEABLE UNDER THE FAA.

a. The Agreement was signed by Ward, who was authorized to enter into the Agreement, including the arbitration clause.

The Complaint identifies John Voros as the attorney-in-fact for Plaintiff, and there is no dispute that John Voros signed the arbitration clause within the Agreement. As Plaintiff's attorney-in-fact, John Voros clearly had authority to enter into the Agreement, including the agreement to arbitrate claims relating to the Agreement or Plaintiff's residence at the facility. See *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429, 197 L. Ed. 2d 806 (2017) (reversing state law that "impeded the ability of attorneys-in-fact to enter into arbitration

agreements” in the nursing home context); *Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 75, 856 S.E.2d 550, 554 (2021) (noting that an explicit reference to arbitration is not required in a power of attorney to authorize the attorney to enter into an arbitration agreement).

Here, John Voros was Plaintiff’s duly authorized attorney in fact and had authority to enter into the arbitration agreement. The executed power of attorney document, attached hereto as Exhibit A, provided John Voros with the authority to “institute, maintain, defend, compromise, arbitrate or otherwise dispose of any and all actions, suits, attachments, or other legal proceedings for or against me.” (Ex. A at p. 4). Further, John Voros had authority “to do any act or thing that [Plaintiff] could do in [her] proper person if personally present.” (Ex. A at p. 7). *See Kindred*, 137 S. Ct. at 1429 (explaining the power of attorney, which provided the agent power “to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way,” and “generally to do and perform for me and in my name all that I might do if present,” was broad enough to authorize the execution of a pre-dispute arbitration agreement). Thus, John Voros had authority to agree to arbitrate any and all claims and disputes arising from or related to the Agreement or Plaintiff’s residency at the Facility.

The arbitration clause is a provision in a written contract that was validly entered into by Plaintiff’s attorney in fact and should be enforced. Therefore, the arbitration clause is deemed valid and enforceable under federal law. 9 U.S.C.A. § 2.

b. The Arbitration Agreement at issue evidences a transaction involving interstate commerce.

Arbitration should be compelled under the FAA. Consistent with the FAA and the trend towards more liberal enforcement of arbitration agreements, South Carolina courts have consistently enforced arbitration agreements pursuant to the FAA, even where those agreements did not conform to the rigid requirements of the SCUAA. *See, e.g., Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 47 (1977); *Soil Remediation Co. v. Nu-Way Env'tl. Inc.*,

323 S.C. 454, 476 S.E.2d 149 (1996); *Munoz v. Greentree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001).

Since the United States Supreme Court announced the expansive interpretation of the scope and reach of the FAA in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the South Carolina Supreme Court has recognized,

[b]eginning in the mid-1980's, the United States Supreme Court, interpreting the FAA, essentially "federalized" the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause. The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements.

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 591-92, 553 S.E.2d 110, 115 (2001).

Following these principles, an arbitration provision is valid and enforceable under the FAA if the provision is contained in “a contract evidencing a transaction involving commerce.” 9 U.S.C.A. § 2; *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995). In *Dobson*, the Court specifically rejected any argument that the phrase “evidencing a transaction” requires a contract to evidence “on its face” a transaction involving interstate commerce. Thus, the *Dobson* court determined that the question is not whether the contract itself evidences a transaction involving interstate commerce, but whether the transaction underlying the contract does. 513 U.S. at 273. *See also Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 123, 747 S.E.2d 461, 465 n.5 (2013) (overruling *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) “to the extent it determined the FAA did not apply because the contract on its face failed to demonstrate that the parties contemplated an interstate transaction”).

The *Dobson* Court also defined the appropriate scope of the FAA by broadly interpreting the phrase “involving commerce” as the equivalent of “affecting commerce,” thereby reaching the fullest contours of Congress’ Commerce Clause powers. *Id.* at 277. The South Carolina Supreme

Court has cited *Dobson* for this very proposition and elaborated as follows: “Under the reach of the Commerce Clause, ‘Congress has authority to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce ... and (3) those activities having a substantial relation to interstate commerce.’” *Cape Romain Contrs., Inc.*, 405 S.C. at 125, 747 S.E.2d at 464 (quoting *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009)). Furthermore, “Congress’[s] Commerce Clause power ‘may be exercised in individual cases without showing any effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice ... subject to federal control.’” *Citizens Bank v. Alababco, Inc.*, 539 U.S. 52, 56-57 (2003) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)).

Under this standard, there can be no question the Agreement in question evidences a transaction involving interstate commerce. Providing admission and services in the context of assisted living on the campus of a senior living facility implicates interstate commerce. For example, the Agreement at issue required the provision of meals to Voros, in addition to utilities such as cable television and electricity, services that unquestionably involve interstate contracts. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (finding nursing home residency agreement implicated interstate commerce because, *inter alia*, defendant was “contractually required to provide meals and medical supplies, which are instrumentalities of interstate commerce” and noting “many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA.”). Consequently, the Agreement evidences a transaction involving interstate commerce, and the arbitration clause contained therein is enforceable pursuant to the FAA.

II. THE PARTIES MUTUALLY AGREED TO SUBMIT ALL DISPUTES TO BINDING ARBITRATION.

a. The Agreement encompasses Plaintiff's claims in this lawsuit.

The arbitration clause in the Agreement covers both parties to this action and all of the claims asserted in the Complaint. The arbitration provision is broadly written to encompass and apply to “any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, . . .”. This language plainly covers all causes of action asserted in the Complaint, all of which arise from the residency and services provided to Plaintiff while she was a resident at Pacifica.

The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). “[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119 (citing *S.C. Pub. Serv. Auth. v. Great W Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)). As explained by the South Carolina Supreme Court in *Landers v. FDIC*,

Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract, **but embraces every dispute between the parties having a significant relationship to the contract.**

402 S.C. 100, 109-10, 739 S.E.2d 209, 214 (2013) (internal citations omitted) (emphasis added).

Stated differently, an agreement to arbitrate will be enforced unless a party, in signing the agreement to arbitrate, could not possibly have been agreeing to arbitrate claims arising from wholly unexpected tortious conduct. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). Any doubts concerning the scope of arbitrable issues should be resolved in favor of

arbitration. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 110. *See also Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (“The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.”) (internal citations omitted).

The arbitration provision in the Agreement is clearly broad enough to encompass the claims asserted in Plaintiff’s complaint. The arbitration provision applies to “any and all claims and disputes arising from or related to” the Agreement or Plaintiff’s “residency, care or services” at the Facility. *See Landers*, 402 at 109, 739 S.E.2d at 213 (“A clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract is construed broadly.”). Thus, the Agreement’s arbitration provision should be construed broadly to encompass Plaintiff’s claims in this suit.

b. The Agreement contains mutual promises to submit disputes to arbitration.

The arbitration provision contains mutual promises sufficient to provide valid consideration. *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989); *Stanley Smith & Sons v. Limestone Coll.*, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984). The Agreement provides, in relevant part:

By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.

(Ex. A to Pacifica’s Mot. to Compel at p. 18).

A similar arbitration provision was addressed by the Fourth Circuit applying South Carolina law in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997).¹ In *O'Neil*, the arbitration clause at issue used the pronoun “I”, and the plaintiff argued that the agreement was invalid because it was not binding on the defendant hospital. The Fourth Circuit rejected the argument: “Here the agreement to be bound by was a mutual one. The contract to arbitrate was proffered by the employer. Such a proffer clearly implies that both the employer and the employee would be bound by the arbitration process.” *O'Neil*, 115 F.3d at 274. The Court continued,

[Plaintiff's] argument is especially misplaced in the circumstances of this case. Not only has the [defendant] consistently argued that it is bound by the arbitration agreement, it has, by virtue of this suit, shown its commitment to the arbitration process. Indeed, the only party to this case who has shown a desire to avoid binding arbitration is [plaintiff] herself.

Id. at 275.

Here, the mutual intent to be bound is clear from the whole scope and effect of the language used in the arbitration provision. *See Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) (“The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the *whole scope and effect of the language used.*”) (emphasis added). For example, the parties agreed that arbitration under the provision “shall be conducted in Spartanburg, South Carolina by a *mutually agreed upon* single neutral arbitrator.” (Ex. A to Pacifica’s Mot. to Compel at p. 18). Additionally, “[t]he *parties*” agreed to treat the results of arbitration as confidential unless the “parties” provide written consent to disclose the results. (*Id.* at p. 18-19). Concerning the cost of arbitration, “[e]ach party” agreed

¹ The South Carolina Court of Appeals recently cited *O'Neil* with approval in an unpublished opinion. *See Hackworth v. Bayview Manor, LLC*, Op. No. 2023-UP-096 (S.C. Ct. App. Filed March 15, 2023). There, the Court of Appeals noted that an arbitration provision is supported by adequate consideration where each party agrees to arbitrate claims. *Id.* Here, Pacifica, as the offeror, and Plaintiff, as the offeree who accepted the provision, each agreed to arbitrate claims related to the Agreement.

to bear its own costs and fees. (*Id.*). In the event any portion of the arbitration agreement is found unenforceable, the agreement provides that “the remaining portions of the clause shall remain valid and shall be enforceable by *the parties.*” (*Id.*). Thus, the terms of the arbitration clause demonstrate a mutual intent to be bound by both parties.

The mutual intent to be bound is also evident by the conduct of each party following the execution of the Agreement. Plaintiff and Pacifica each performed under the Agreement. For example, Plaintiff moved into the assisted living facility according to the terms of the Agreement and lived at the assisted living facility prior to filing suit. Additionally, Pacifica promptly filed a motion to compel arbitration and maintains that Plaintiff’s claims are subject to binding arbitration. Therefore, the terms of the Agreement’s arbitration clause, as well as the conduct by each party, demonstrate a clear mutual intent to submit claims arising from the Agreement to binding arbitration.

CONCLUSION

For the reasons stated herein, the written arbitration provision is valid, irrevocable, and enforceable by this Court pursuant to the FAA. Defendant respectfully requests an Order dismissing this action for lack of subject matter jurisdiction or, alternatively, staying the action while Plaintiff’s claims are submitted to binding arbitration pursuant to the terms of the Agreement.

[SIGNATURE PAGE FOLLOWS]

HEDRICK GARDNER KINCHELOE & GAROFALO LLP

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Attorneys for Defendant

DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT**WARNING TO PERSON EXECUTING THIS DOCUMENT - THE POWERS YOU GRANT BELOW
CONTINUE TO BE EFFECTIVE SHOULD YOU BECOME DISABLED OR INCOMPETENT**

CAUTION: This is an important legal document and upon proper execution will create a Durable Power of Attorney. This gives the person whom you designate as your attorney-in-fact broad powers to handle your property during your lifetime, which may include powers to mortgage, sell, or otherwise dispose of any real or personal property without advance notice to you or approval by you.

These powers will continue to exist even if you become disabled or incompetent. You do have the right to terminate or revoke the Power of Attorney and any or all powers granted within at any time up to the point of your incapacity.

This document does not authorize anyone to make medical or other health care decisions. You may execute a health care proxy (also known as a health care or medical power of attorney) to do this.

If there is anything about this document that you do not understand, you should ask a lawyer to explain it to you.

THIS DURABLE POWER OF ATTORNEY for financial management is given by me, Lorraine Voros (the "Principal"), presently of 891 Catalina Dr. Newport News, in the Commonwealth of Virginia, on this 26th day of SEPTEMBER 2015

Nature of Power

1. THIS IS A DURABLE POWER OF ATTORNEY and the authority of my Attorney-in-fact shall not terminate if I become disabled or incapacitated.

Previous Power of Attorney

2. I REVOKE any previous durable power of attorney granted by me.

EXHIBIT A

1 OF 10 POA
LORRAINE VOROS

Attorney-in-fact

3. I APPOINT John Paul Voros, Jr, of 2400 Grayland Ave, Richmond, Virginia, to act as my Attorney-in-fact. ~~_____~~
~~_____~~

Governing Law

4. This document will be governed by the laws of the Commonwealth of Virginia. Further, my Attorney-in-fact is directed to act in accordance with the laws of the Commonwealth of Virginia at any time he or she may be acting on my behalf.

Liability of Attorney-in-fact

5. My Attorney-in-fact will not be liable to me, my estate, my heirs, successors or assigns for any action taken or not taken under this document, except for willful misconduct or gross negligence.

Effective Date

6. Power of Attorney will start immediately and will continue notwithstanding my mental incapacity or mental infirmity which may occur after my execution of this Power of Attorney.

Powers of Attorney-in-fact

7. My Attorney-in-fact will have the following power(s):

Initials

- a. Xlm Real Estate Transactions

To deal with any interest I may have in real property and sign all documents on my behalf concerning my interest, including, but not limited to, real property I may subsequently acquire or receive. These powers include, but are not limited to, the ability to:

- i. Purchase, sell, exchange, accept as gift, place as security on loans, convey with or without covenants, rent, collect rent, sue for and receive rents, eject and remove tenants or other persons, to pay or contest taxes or assessments, control any legal claim in favor of or against me, partition or consent to partitioning, mortgage, charge, lease, surrender, manage or otherwise deal with real estate and any interest therein; and

2 OF 10 POA

- ii. Execute and deliver deeds, transfers, mortgages, charges, leases, assignments, surrenders, releases and other instruments required for any such purpose.

b. XLMV **Maintain Property and Make Investments**

To retain any assets owned by me at the date this Durable Power of Attorney becomes effective, and the power to reinvest those assets in similar investments. In addition, my Attorney-in-fact may invest my assets in any new investments, of his or her choosing, regardless of whether or not they are authorized by any applicable legislation.

c. XLMV **Banking Transactions**

To do any act that I can do through an attorney-in-fact with a bank or other financial institution. This power includes, but is not limited to, the power to:

- i. Open, maintain or close bank accounts (including, but not limited to, checking accounts, savings accounts, and certificates of deposit), brokerage accounts, retirement plan accounts, and other similar accounts with financial institutions;
- ii. Conduct any business with any banking or financial institution with respect to any of my accounts, including, but not limited to, making deposits and withdrawals, negotiating or endorsing any checks or other instruments with respect to any such accounts, obtaining bank statements, passbooks, drafts, money orders, warrants, and certificates or vouchers payable to me by any person, firm, corporation or political entity;
- iii. Borrow money from any banking or financial institution if deemed necessary by my Attorney-in-fact, and to manage all aspects of the loan process, including the placement of security and the negotiation of terms;
- iv. Perform any act necessary to deposit, negotiate, sell or transfer any note, security, or draft of the United States of America, including U.S. Treasury Securities;
- v. Have access to any safe deposit box that I might own, including its contents; and
- vi. Create and deliver any financial statements necessary to or from any bank or financial institution.

3 of 10 POA

d. XLMV **Business Operating Transactions**

To take any action my Attorney-in-fact deems necessary with any business that I may own or have an interest in by doing any act which can be done through an attorney-in-fact. This power includes, but is not limited to, the power to execute, seal and deliver any instrument; participate in any legal business of any kind; execute partnership agreements and amendments; to incorporate, reorganize, consolidate, merge, sell, or dissolve any business; to elect or employ officers, directors and agents; and to exercise voting rights with respect to any stock I may own, either in person or by proxy.

e. XLMV **Insurance Transactions**

To do any act that I can do through an attorney-in-fact with any insurance policy. This power includes, but is not limited to, the power to pay premiums, start, modify or terminate policies, manage all cash payouts, borrow from insurers and third parties using insurance policies as collateral, and to change the beneficiaries on any insurance policies on my life. Unless my Attorney-in-fact was already a beneficiary of any policy before the signing of this document, my Attorney-in-fact cannot name himself or herself as a beneficiary of such policy.

f. XLMV **Claims and Litigation Matters**

To institute, maintain, defend, compromise, arbitrate or otherwise dispose of, any and all actions, suits, attachments or other legal proceedings for or against me. This power includes, but is not limited to, the power to: appear on my behalf or retain an attorney and any other professional personnel necessary to defend or assert any claim before any court, board, or tribunal, and the power to settle any claim against me in whichever forum or manner my Attorney-in-fact deems prudent, and to receive or pay any resulting settlement.

g. XLMV **Tax Matters**

To act for me in all matters that affect my local, state and federal taxes and to prepare,

4 of 10 POA

sign, and file documents with any governmental body or agency, including, but not limited to, authority to:

- i. Prepare, sign and file income and other tax returns with federal, state, local and other governmental bodies, and to receive any refund checks; and
- ii. Obtain information or documents from any government or its agencies, and represent me in all tax matters, including the authority to negotiate, compromise, or settle any matter with such government or agency.

h. XLNV **Government Benefits**

To act on my behalf in all matters that affect my right to allowances, compensation and reimbursements properly payable to me by the Government of the United States or any agency or department thereof. This power includes, but is not limited to, the power to prepare, file, claim, defend or settle any claim on my behalf and to receive and manage, as my Attorney-in-fact sees fit, any proceeds of any claim.

i. XLNV **Retirement Benefit Transactions**

To act for me and represent my interests in all matters affecting any retirement savings or pension plans I may have. This power includes, but is not limited to, the power to continue contributions, change contribution amounts, change investment strategies and options, move assets to other plans, receive and manage payouts, and add or change existing beneficiaries. My Attorney-in-fact cannot add himself or herself as a beneficiary unless he or she is already a designated beneficiary as of the signing of this document.

j. XLNV **Family Care**

To make whatever expenditures are required for the maintenance, education, benefit, medical care and general advancement of me, my spouse and dependent children, and other persons that I have chosen or which I am legally required to support, any of which may include my Attorney-in-fact. This power includes, but is not limited to, the power to pay for housing, clothing, food, travel and other living costs.

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k. XL MN Chattel and Goods Transactions

To purchase, sell or otherwise deal with any type of personal property I may currently or in the future have an interest in. This includes, but is not limited to, the power to purchase, sell, exchange, accept as gift, place as security on loans, rent, lease, to pay or contest taxes or assessments, mortgage or pledge.

l. XL MN Estate Transactions

To do any act that I can do through an attorney-in-fact with regard to all matters that affect any trust, probate estate, conservatorship, or other fund from which I may receive payment as a beneficiary. This power includes the power to disclaim any interest which might otherwise be transferred or distributed to me from any other person, estate, trust, or other entity, as may be appropriate. However, my Attorney-in-fact cannot disclaim assets to which I would be entitled, if the result is that the disclaimed assets pass directly or indirectly to my Attorney-in-fact or my Attorney-in-fact's estate.

m. XL MN Living Trust Transactions

To transfer any of my assets to the trustee of any revocable trust created by me, if such trust is in existence at the time of such transfer. This property can include real property, stocks, bonds, accounts, insurance policies or other property.

n. XL MN Gift Transactions

To make gifts to my spouse, children, grandchildren, great grandchildren, and other family members on special occasions, including birthdays and seasonal holidays, including cash gifts, and to such other persons with whom I have an established pattern of giving (or if it is appropriate to make such gifts for estate planning and/or tax purposes), in such amounts as my Attorney-in-fact may decide in his or her absolute discretion, having regard to all of the circumstances, including the gifts I made while I was capable of managing my own estate, the size of my estate and my income requirements.

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o. X LNV **Charity Transactions**

To continue to make gifts to charitable organizations with whom I have an established pattern of giving (or if it is appropriate to make such gifts for estate planning and/or tax purposes), in such amounts as my Attorney-in-fact may decide in his or her absolute discretion, having regard to all of the circumstances, including the gifts I made while I was capable of managing my own estate, the size of my estate and my income requirements.

p. X LNV **Employ Required Professionals**

To appoint and employ any agents, servants, companions, or other persons, including nurses and other health care professionals for my care and the care of my spouse and dependent children, and accountants, attorneys, clerks, workers and others for the management, preservation and protection of my property and estate, at such compensation and for such length of time as my Attorney-in-fact considers advisable.

q. X LNV **General Authority**

To do any act or thing that I could do in my own proper person if personally present, including managing or selling tangible assets, disclaiming a probate or non-probate inheritance and providing support for a minor child or dependent adult. Other specifically enumerated powers are not intended as a limitation on this broad general power.

Attorney-in-fact Compensation

8. My Attorney-in-fact will receive compensation as per the guidelines governing the compensation for agents or trustees or other such legislated rate in the Commonwealth of Virginia in addition to reimbursement of all out of pocket expenses associated with the carrying out my wishes. If no guidelines or usual practices exist for the compensation of an attorney-in-fact then my Attorney-in-fact will be entitled to reimbursement for all out of pocket expenses associated with the carrying out of my wishes and may pay himself or herself a reasonable amount based on the size of my estate.

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Co-owning of Assets and Mixing of Funds

9. My Attorney-in-fact may continue to co-own assets and have any funds owned by him or her mixed with my funds to the same extent that the co-owning of assets and mixing of funds existed before operation of this Power of Attorney.

Personal Gain from Managing My Affairs

10. My Attorney-in-fact is allowed to personally gain from any transaction he or she may complete on my behalf if the transaction is completed in good faith and with my Attorney-in-fact believing it is in my best interest.

Delegation of Authority

11. My Attorney-in-fact may delegate any authority granted under this document to a person of his or her choosing. Any delegation must be in writing and state the extent of the power delegated and the period of time in which the delegation will be effective.

Nomination of Guardian or Conservator

12. In the event that a court decides that it is necessary to appoint a guardian or conservator for me, I hereby nominate my Attorney-in-fact to be considered by the court for appointment to serve as my guardian or conservator, or in any similar representative capacity.

Attorney-in-fact Restrictions

13. This Power of Attorney is not subject to any conditions or restrictions other than those noted above.

Notice to Third Parties

14. Any third party who receives a valid copy of this Power of Attorney can rely on and act under it. A third party who relies on the reasonable representations of my Attorney-in-fact as to a matter relating to a power granted by this Power of Attorney will not incur any liability to the Principal or to the Principal's heirs, assigns, or estate as a result of permitting the Attorney-in-fact to exercise the authority granted by this Power of Attorney up to the point of revocation of this Power of Attorney. Revocation of this Power of Attorney will not be effective as to a third party until the third party receives notice and has actual knowledge of the revocation.

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Severability

15. If any part of any provision of this document is ruled invalid or unenforceable under applicable law, such part will be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of such provisions or the remaining provisions of this document.

Acknowledgment

16. I, **Lorraine Voros**, being the Principal named in this Durable Power of Attorney hereby acknowledge:
- a. I have read and understand the nature and effect of this Durable Power of Attorney;
 - b. I recognize that this document gives my Attorney-in-fact broad powers over my assets, and that these powers will continue past the point of my incapacity;
 - c. I am of legal age in the Commonwealth of Virginia to grant a Durable Power of Attorney; and
 - d. I am voluntarily giving this Durable Power of Attorney and recognize that the powers given in this document will become effective as of the date of my incapacity or as specified within.

IN WITNESS WHEREOF I hereunto set my hand and seal at the City of Newport News in the Commonwealth of Virginia, this 26th day of September, 2015.

Lorraine Voros

Lorraine Voros (Principal)

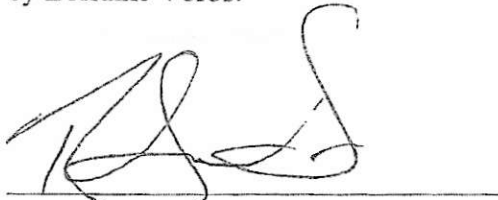
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NOTARY ACKNOWLEDGMENT

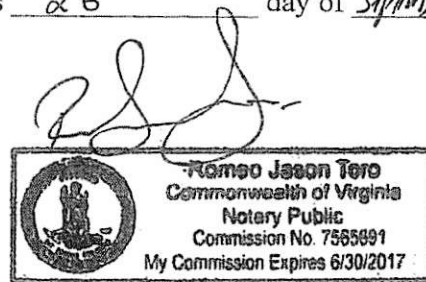
COMMONWEALTH OF VIRGINIA

City
COUNTY OF Newport News

The foregoing instrument was acknowledged before me this 26th day of September, 2015,
by Lorraine Voros.



Notary Public



My commission expires: 6/30/2017

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Original

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH CIRCUIT

Lorraine Voros, by and through her)
duly appointed attorney-in-fact,)
John Voros,)

C.A. No.: 2023-CP-42-04147

Plaintiff,)

v.)

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO ARBITRATION**

Pacifica Skylyn, LLC,)

Defendant.)

_____)

The Plaintiff, brought the within lawsuit on behalf of his sister as her Power of Attorney. She was a former resident of Pacifica Skylyn. Mr. Voros alleges that his sister, who has MS and is non-verbal, was sexually attacked by another resident on December 11, 2022. Because of her various diagnoses, she was unable to consent.

This lawsuit was filed on October 26, 2023. On November 29, 2023, the Defendants filed a Motion to Dismiss pursuant to Rules 12(B)(1) and 12 (B)(6), SCRCPP, or the Alternative to Stay and Compel Arbitration.

ANALYSIS

- 1. PRIMA PAINT AND THE SOUTH CAROLINA CASES WHICH FOLLOW IT REQUIRE THAT THE ARBITRATION AGREEMENT BE TREATED AS A CONTRACT IN ITSELF, SEPARATE AND DISTINCT FROM THE CONTRACT AS WHOLE.**

“...the purpose of Congress, in 1925, was to make arbitration agreements as enforceable as other contracts but not more so.” Prima Paint v. Food & Conklin Mfg. Co., 388 U.S. 395 (1967).

South Carolina law declaring an arbitration agreement to be a contract is completely in line with the Supreme Court’s position that an arbitration agreement is a contract in and of itself. The Simmons court in a March 2022 opinion followed the language of Prima Paint in stating “The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (2018) commands that arbitration agreements be treated the same as all other contracts - no more, no less.” Simmons v. Benson Hyundai, LLC, 2022 WL 791174 (March 16, 2022).

When the validity of the arbitration agreement is challenged, the court must look solely to the arbitration agreement alone to determine if it is a valid contract. When it analyzes the arbitration agreement to determine if it is a contract, the court is prohibited from using the language or terms from the contract in which the arbitration agreement is embedded because the arbitration agreement is separable from the contract as a whole. “Under the FAA [Federal Arbitration Act], an arbitration clause is separable from the contract in which it is embedded and *the issue of its validity is distinct from the substantive validity of the contract as a whole.*” Munoz v GreenTree Financial Corp., 343 S.C. 531, 540, 542 S.E.2d 361, 364 (2002) citing Prima Paint, 87 S.Ct. at 1801. (explanatory brackets and emphasis added)

In a recent South Carolina case which ruled on the validity of an arbitration clause, Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016), both the majority opinion and the dissent recognized that the first question for the court to decide when the arbitration agreement is challenged is to determine the validity of the arbitration agreement itself. It must determine if the arbitration agreement is, on its own, a contract. And the validity of the

arbitration agreement must be decided solely from the language of the arbitration agreement.

Munoz, cited above, requires that the arbitration agreement's validity be decided without regard to any contract language outside of the arbitration agreement.

The arbitration agreement must be severable so that it can be independently analyzed apart from the rest of the contract. This independent analysis is required in order to comply with Prima Paint and the FAA. Otherwise, if the arbitration agreement is not considered separate and distinct from the rest of the contract, the analysis of its validity cannot be done without regard to the whole of the contract.

Therefore, in order to determine if an arbitration agreement is valid and binding, the court must apply state contract law principles to the language of the arbitration agreement without regard to the language in the rest of the contract.

**2. AN ARBITRATION AGREEMENT MAY NOT
BE A VALID CONTRACT WITHOUT
MUTUALITY OF CONSENT, A MUTUAL
INTENT TO BE BOUND.**

“Under South Carolina law, a contract cannot be formed without a meeting of the minds between the parties as to all essential and material terms.” Simmons v. Benson Hyundai, LLC, 2022 WL 791174 (March 16, 2022), [citing Player v. Chandler, 299 S.C. 101, 105 (1989)]. It is clear that South Carolina contract law requires that the parties to the contract manifest a mutual intent to be bound. “The parties must also ‘manifest a *mutual intent* to be bound’.” Simmons v. Benson Hyundai, 2022 WL 791174 (March 16, 2022), [citing Stanley Smith & Sons v. Limestone Coll., 283 S.C. 430, 433 (Ct. App. 1989)]. (emphasis added)

Contract law requires that the question of whether the parties each agreed to be bound by a contract must be decided by an objective standard. “Interpretation of the contract is governed by the objective manifestation of the parties’ assent at the time the contract was made.

It does not depend on the subjective, after the fact meaning one party assigns to it.” Bannon v. Knauss, 282 S.C. 5890, 593 (Ct. App. 1984) (internal cite omitted).

In Defendant Pacifica’s arbitration agreement, the language that is alleged to create a valid contract is in the first sentence of the agreement.

2.A. THE FIRST INDEPENDENT CLAUSE

This sentence is a compound sentence composed of two independent clauses.

The two independent clauses in this sentence are separated by a semi-colon.

By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.

This is the first independent clause of the sentence. It ends at the semi-colon:

By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act;

The subject of this first independent clause is the pronoun “you”. The verb describing the action that the pronoun “you” takes is the verb “agree”. What follows after the verb “agree” is a long noun clause which functions as the direct object of the verb “agree”. The grammatical purpose of this direct object is to describe exactly the terms that the subject “you” is “agreeing” to in this first independent clause.

The pronouns which Defendant Pacifica designates to identify itself throughout this contract are these pronouns:

“we”

“us”

“our”¹

Defendant Pacifica also uses the word “Community” to identify itself throughout this contract.

So according to the pronoun designations that Defendant Pacifica, the drafter of this contract, is using, the only party that is agreeing to the terms set out in the noun clause immediately following the word “agree” is “you”, which designates the Plaintiff, Lorraine Voros, by and through her duly appointed attorney-in-fact, John Voros.

The fact that only one party, “you”, the Plaintiff, is agreeing to the terms of the alleged arbitration contract set out the noun clause following the word “agree” is supported by an analysis of the terms contained in that clause.

The first part of the noun clause following the word “agree” describes the types of claims and disputes that will be decided by arbitration. And it describes the type of claims that will be arbitrated by the naming those against whom the arbitration eligible claims will be made by the subject of the sentence: “you,” who is the Plaintiff.

First, claims made against the Community will be arbitrated. To find out whether one party or both parties are being subjected to arbitration, we look at which party would be making a claim against the Community. “Community” is one of the names Defendant Pacifica designates for itself in this contract. The “Community,” Defendant Pacifica, would not be the

¹ “A possessive pronoun is a pronoun that is used to express ownership or possession.” The word “our” is a possessive pronoun. Cite from www.thesaurus.com/grammar/possessive-pronouns/ downloaded 06/09/2022.

party making a claim against the Community. The only party which would be making a claim against the Community is the “you,” the Plaintiff, who is the only party agreeing to the terms contained in this clause. The grammatical structure of this clause shows that the only subject which would be making claims against the Community, or any other individual or entity is the pronoun “you,” which is the Plaintiff.

So the evidence from the first independent clause, beginning with the words “*you agree*” (emphasis added), supplemented with an analysis of the grammar of that clause, shows that only one party, the Resident, has agreed to submit her claims to arbitration.

2.B. THE SECOND INDEPENDENT CLAUSE.

The language of the second clause provides the direct proof that Defendant Pacifica does not intend to be bound by the terms the first clause imposes on the Resident.

This is the language the drafter employs in the second independent clause. This language follows the semi-colon at the end of the first clause:

...except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.

“...unless *both parties agree* to arbitrate....” (emphasis added). Nowhere in the first clause does the drafter, Defendant Pacifica, use the words that it explicitly states are necessary to bind it, Defendant Pacifica, to any arbitration agreement. In this second clause, Defendant Pacifica, the drafter of this contract, deliberately states that **both parties** must agree to arbitrate for Defendant Pacifica to be bound by an arbitration agreement. When the drafter deliberately uses language which makes clear that “...both parties...” must “agree” in one clause, and deliberately leaves out language stating “both parties agree” in the first clause, that gives rise to the inference that the drafter deliberately avoided stating “both parties agree” in the

first clause. It gives rise to the inference that when, in the first clause, the drafter uses the words “you agree,” that the drafter is intentionally avoiding the use of the words “both parties agree” because the drafter knows that using those words will bind the Defendant Pacifica to arbitration. The drafter deliberately chose the words “you agree” in the first clause, instead of stating “both parties agree” because Defendant Pacifica did not intend to be bound to any arbitration agreement.

2.C. THE THIRD SENTENCE OF THE ARBITRATION AGREEMENT

Defendant Pacifica, the drafter, makes its intention not to be bound to any arbitration agreement even more clear in the third sentence of the alleged arbitration agreement. It clearly reveals its intention not to be bound in bold print in the third sentence of the alleged arbitration agreement:

You give up your constitutional right to have any such dispute decided in a court of law before a jury, and instead accept the use of arbitration.

The entire purpose of arbitration is preclude a jury trial by mutual waiver of the right to jury trial.

After deliberately stating the fact that it will not be bound by an arbitration agreement unless “both parties agree”, Defendant Pacifica, the drafter of this statement, in bold print, specifically tells the Resident that “you” are giving up your right to a jury trial. Nowhere in the arbitration agreement it drafted does Defendant Pacifica use the pronouns it designated for itself: “we”, “us”, “our” to state that it is giving up its right to a jury trial. Nor does it state, in language it drafted, that “both parties agree” to give up their right to a jury trial.

Given the consistency that Defendant Pacifica exercises using only the pronoun it has designated for the Plaintiff (“you”) in the language purporting to bind the Resident to

arbitration and purporting to acknowledge the waiver of the right to jury trial, the inference is inescapable that Defendant Pacifica has made these word choices deliberately intending to bind the Plaintiff to arbitration while exempting itself.

In this arbitration agreement, the Defendant seeks to bind the Plaintiff to waive her right to a jury trial without making any corresponding waiver of its right to a jury trial.

In the objective meaning of the words the drafter chose to use in the arbitration agreement, the drafter, Defendant Pacifica, agrees to nothing. Only “you”, the Resident, agrees to arbitrate. Defendant Pacifica specifically states it refuses to be bound to any arbitration agreement unless “both parties agree to arbitrate”.

Under the principles of contract law, the words the drafter deliberately chose do not objectively manifest an intention for the drafter, Defendant Pacifica, to be bound to arbitrate. There is no mutual assent. There is no objective manifestation of a mutual intent to be bound because the drafter deliberately chose to not use the pronouns it designated for itself as the subject “agreeing” to arbitrate. The agreement is invalid on that basis.

3. THE ARBITRATION AGREEMENT ALSO FAILS TO CREATE A VALID CONTRACT BECAUSE IT LACKS ANOTHER ELEMENT REQUIRED FOR A VALID CONTRACT: CONSIDERATION.

In Munoz , the court stated that “...an arbitration clause is *separable* from the contract in which it is embedded and the issue of its validity is *distinct* from the substantive validity of the contract as a whole.” Munoz v. Green Tree Financial Corp., 343 S.C. 531, 540, 542 S.E.2d 360 (2001), [(citing Prima Paint) (emphasis added)].

This means that the language and terms of the contract to arbitrate must be analyzed separate and apart from any language and terms of the contract as a whole.

This principle from Munoz simply takes a longstanding state law rule of contract interpretation and applies it to the contract to arbitrate. This rule of contract interpretation is that when the contract is clear, the meaning of the contract must be determined solely from the contents of the contract. In other words, the meaning of the contract must be determined from the four corners alone the contract and from that alone. In The State Accident Fund v. South Carolina Second Injury Fund, a 2010 Court of Appeals case applies this rule:

In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, *its meaning must be determined by its contents alone*; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. The State Accident Fund v. South Carolina Second Injury Fund, 288 S.C. 67, 76, 693 S.E.2nd 441 (Ct. App. 2010), (quoting McPherson v. J.E. Sirrine) (emphasis added).

So the question of whether the contract to arbitrate was validly formed must be decided from the four corners of the contract to arbitrate.

Consideration is a necessary element of a valid contract.

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 406, 581 S.E.2d 161 (2003)

Black's Law Dictionary, Abridged 7th edition, defines consideration as “1.

Something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promise.” Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do.

In order to be a valid contract for arbitration, Defendant Pacifica must provide consideration to Plaintiff by promising to do something it had no legal obligation to do or forbear from doing something it had a legal right to do.

Under state law rules of contract interpretation, there must be language found in the four corners of the arbitration contract which objectively manifest that Defendant Pacifica is giving consideration to Plaintiff in exchange for Plaintiff's relinquishment of her right to a jury trial.

The sentences in the arbitration agreement that Defendant Pacifica drafted have no language which can be reasonably interpreted as Defendant Pacifica giving any consideration to Plaintiff.

The third sentence in the agreement, which in bolded language states that "you" (Defendant Pacifica's designated pronoun for Plaintiff) give up your constitutional right to a jury trial, explicitly and deliberately excludes any language which binds Defendant Pacifica from giving up its right to a jury trial.

The second independent clause of the first sentence of the arbitration agreement, the independent clause after the semi-colon which separates the two clauses, states in no uncertain terms that Defendant Pacifica will not be bound to any arbitration contract unless that written contract has the specific language that "both parties agree to arbitrate such proceedings."

...except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings."

Plaintiff's Residence And Services Agreement, II.H.11
(See attachment to Defendant's Motion)

This independent clause is simply a straightforward statement of the terms in which Defendant Pacifica, the drafter, will agree to be bound to an arbitration contract. Therefore, the Defendant gives no consideration to Plaintiff in this clause.

In the first independent clause of the Defendant's arbitration agreement, the only party to the arbitration contract agreeing to do anything, the only party promising to do anything, is the party designated as "you," the Plaintiff. The fact that the language only shows one party, the Plaintiff, agreeing to do anything is supported by the analysis of that clause's grammar. The only subject which is before the verb "agree" is the pronoun "you," which designates only one party. So nowhere in this clause is the Defendant Pacifica promising to do something it has no legal obligation to do, nor is it promising to forbear doing something it had the legal right to do.

In this first independent clause Defendant Pacifica, the drafter, deliberately avoids using the language that it specifically states (in the second clause) is required to bind it to an arbitration contract.

A close reading of the Defendant's arbitration agreement under state contract law principles and rules of interpretation shows that nowhere in its arbitration agreement does it give the Plaintiff any consideration for her relinquishment of her right to a jury trial.

**4. A CIRCUIT COURT JUDGE HAS
HERETOFORE DENIED THIS
DEFENDANT'S MOTION TO DISMISS OR
ARBITRATE IN AN ARBITRATION
AGREEMENT WITH IDENTICAL
LANGUAGE.**

In another lawsuit filed against Pacifica Skylyn, an identical motion was filed with this Court asking that matter to be dismissed, or in the alternative, to grant arbitration.² A hearing was held on that motion in front of the Honorable J. Mark Hayes, II who issued an Order

²Medford, in his individual capacity, and on behalf of those similarly situated, v. Deepak Israni, et al., C/A No. 2022CP4200454.

dated July 28, 2022, a copy of which is attached, denying defendant's motion based on a lack of mutuality and a lack of consideration.

While the Order of Judge Hayes does not act as precedent, nonetheless, his well written Order provides great insight to this Court in formulating its decision, and we respectfully invite this Court's attention thereto.

CONCLUSION

For the reasons stated above, Defendant Pacifica simply has not established an independent contract by and between the parties wherein both sides give valid consideration for entering into the contract. In essence, while the Plaintiff gives valid consideration, the Defendant Pacifica does nothing, offers nothing, and promises nothing.

Plaintiff therefore respectfully asks this Court to deny Defendant's Motion to Compel Arbitration.

KNIE & SHEALY, P.A.

/s/ Patrick E. Knie

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ATTORNEYS FOR PLAINTIFF

January 29, 2024

**ORDER OF JUDGE HAYES
IN *MEDFORD* CASE**

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH CIRCUIT

ED MEDFORD, in his individual)
capacity, and on behalf of those)
similarly situated,)
Plaintiff,)

C.A. No.: 2022-CP-42-00454

v.)

**ORDER DENYING DEFENDANTS' MOTION
TO DISMISS PURSUANT TO RULES 12(B)(1) AND
12(B)(6), SCRCP, OR IN THE ALTERNATIVE TO
STAY AND COMPEL ARBITRATION**

DEEPAK ISRANI,)
R CUCAMONGA LLC,)
PAC R CUCAMONGA LP,)
PACIFICA SKYLYN LLC, d/b/a)
PACIFICA SENIOR LIVING)
SKYLYN, ETROS, LLC, and)
MATTHEW ARLEDGE,)
Defendants.)

This matter came before the Court on Wednesday, June 29, 2022, on Defendants' Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B)(6), SCRCP, or in the Alternative to Stay and Compel Arbitration (Defendants' Motion).

Defendants were represented by Joshua B. Shaw, and the Plaintiff was represented by Patrick E. Knie and Mitch Slade. Both parties provided the Court with memorandums of law arguing their respective positions. The hearing was held in the virtual courtroom. After hearing the arguments, and after careful consideration of each side's memorandum, the Defendants' Motion is **DENIED**.

BACKGROUND

The Plaintiff was a resident at Defendant Pacifica Skylyn LLC, d/b/a Pacifica Senior Living Skylyn (Defendant Pacifica). On November 7, 2018, Plaintiff signed a contract with

Defendant Pacifica titled “Pacifica Senior Living Residence and Services Agreement” (The Residence Agreement).¹ The Residence Agreement governs the terms of Plaintiff’s residence at Defendant Pacifica’s facility. The Residence Agreement contains an arbitration agreement found at Section II, Subsection H., 11, and it is labelled “Arbitration”.

On February 8, 2022, Plaintiff filed suit, in his individual capacity, and on behalf of others, alleging various ongoing deficiencies in Defendants’ operation of Defendant Pacifica’s facility. Plaintiff demanded a jury trial and Defendants responded with Defendants’ Motion,² in which it moved the Court to compel arbitration based on the arbitration agreement found at Section II, Subsection H., 11 in the Residence Agreement.

THE ISSUE

The Plaintiff challenges the validity of the arbitration agreement contained within the Residence Agreement. He contends that it is invalid because it lacks elements essential to the formation of a valid contract, elements which have been deemed essential by long established principles of South Carolina contract law.

LEGAL ANALYSIS

A. BASIS OF THE FRAMEWORK FOR ANALYZING THE ARBITRATION AGREEMENT FOR VALIDITY.

The framework for the analysis of the validity of an arbitration agreement was laid down by Prima Paint³, the foundational text for analysis of arbitration agreements. The specific holding of Prima Paint is that a court analyzing a challenge to an arbitration agreement must restrict itself

¹ Defendants attached a copy of the Residence Agreement to their memorandum as Exhibit A.

² Defendant Deepak Israni notes that he had not been served as of the time of the hearing, and disputes the validity of Plaintiff’s effort at service by publication. The argument on his behalf is made by special appearance.

³ Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801 (1967).

solely to the consideration of issues bearing directly on the **formation and performance of the arbitration agreement itself:**

We hold, therefore that in passing upon a s3 [Section 3 of the FAA] application for a stay while the parties arbitrate, a federal court *may consider only issues relating to the making and performance of the agreement to arbitrate.*⁴

Since Prima Paint, courts have reasoned through issues concerning the validity of arbitration agreements and the basic principles of arbitration analysis have been established. One of these principles, outlined in Prima Paint's holding, is that the validity of the arbitration agreement must be analyzed separate and apart from the contract in which it is embedded.

The South Carolina Supreme Court consistently upholds this principle in analyzing arbitration agreements.

In Smith v. D.R. Horton, Inc.⁵, a case cited in Plaintiff's argument and memorandum, the South Carolina Supreme Court analyzed an arbitration agreement. While the challenge to the arbitration agreement was based on unconscionability, the crux of the disagreement between the majority and the dissent was over which terms were to be included in the arbitration agreement. Implicit in the arguments of both the majority and the dissent was the recognition of the principle that only the terms of the arbitration agreement could be analyzed in order to decide validity. Both sides recognized that validity must be decided solely from terms within the four corners of the arbitration agreement. Thus, the disagreement was over how wide the four corners of that arbitration agreement were. It is clear and well established that the arbitration agreement must be

⁴ Prima Paint, 388 U.S. at 404 (emphasis added)

⁵ Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 SE 2d 1 (2016).

severed and extracted from the contract in which it is embedded in order for the court to conduct the analysis of its validity.

Once the arbitration agreement is severed and extracted from the contract in which it is embedded, the analysis of its validity must be conducted according to established principles of contract law. This requirement also follows from Prima Paint. Prima Paint declared that, under the FAA, the arbitration agreement is a contract, subject to judicial challenge on the same basis as any other contract challenged in a court:

[T]he purpose of Congress in 1925 [enacting the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge...would be to elevate it over other forms of contract....⁶

From Prima Paint's categorical assertion that arbitration agreements are contracts subject to judicial challenge just as other forms of contract are, it necessarily follows that the arbitration agreement is a contract to be treated, and therefore analyzed, by the same principles of contract law as other forms of contract.

And this is exactly what South Carolina courts do: "The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et. seq.* (2018) commands that *arbitration agreements be treated the same as all other contracts* – no more, no less".⁷

Therefore, this Court must apply the established principles of contract law to the analysis of the arbitration agreement in the Residence Agreement.

B. THE APPLICATION OF THE PRINCIPLES OF CONTRACT ANALYSIS TO THE INSTANT ARBITRATION AGREEMENT

1. The Mutual Intent to be Bound is a Necessary Element.

⁶ Prima Paint, 388 U.S. 395, 404 n.12 (1967).

⁷ Simmons v. Benson Hyundai, Inc., Appellate Case No. 2019-000344, 2022 WL 791174, at *1 (Ct. App. Mar. 16, 2022). (emphasis added)

It is an established principle of contract law that each of the parties to the contract must manifest a mutual intent to be bound to the contract. This principle was recently re-affirmed in Simmons v. Benson Hyundai: “The parties must also ‘manifest a mutual intent to be bound’.”⁸ It is critical that the parties’ mutual intent to be bound be manifested – plainly shown – because the court must interpret the contract according to the objective manifestation of the parties’ assent at the time the contract was made. “Interpretation of the contract is governed by the objective manifestation of the parties’ assent at the time the contract was made.”⁹

The language in the arbitration agreement which purports to form a valid contract is found in the first sentence:

“By signing below, *you* agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.”¹⁰

In oral argument, Plaintiff pointed out that the word “you” is the term that Defendant Pacifica specifically designated for the Plaintiff.

Then according to Defendant Pacifica’s own designation for the parties, only one party, the Plaintiff, is agreeing to this contract, the arbitration agreement. Construing this contract according to the designations of the parties chosen by Defendant Pacifica, there is no objective manifestation of both parties’ mutual intent to be bound.

⁸ *Id.* at *3. (citing Stanley Smith & Sons v. Limestone Coll., 283 S.C. 430, 433, 322 SE 2d 474, 477 (Ct. App. 1984)).

⁹ Bannon v. Knauss, 282 S.C. 589, 593, 320 SE 2d 470, 472 (Ct. App. 1984) (citing Blakely v. Rabon, 266 S.C. 68, 221 SE 2d 767 (1976)).

¹⁰ The Residence Agreement, Section II, Subsection H., 11, first sentence. (emphasis added)

The court must conclude that there is no objective manifestation of a mutual intent to be bound, and therefore, no contract has been formed.

The court's conclusion is supported by the Defendants' own argument. The Defendants' Memorandum of Law in Support of Its Motion to Compel Arbitration contains this sentence arguing the validity of the arbitration agreement:

The scope of the arbitration clause is broad – *the parties agreed* to binding arbitration of “any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity....” (Ex. A at Section H. 11)¹¹

The language within the quotation marks is taken directly from the first sentence of Defendant Pacifica's arbitration agreement. The words that Defendant Pacifica actually put in the arbitration agreement immediately preceding the language Defendants quote in their memorandum are:

By signing below, *you agree* that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity....¹²

This comparison shows that in the arbitration agreement itself, the words “the parties agreed to binding arbitration” do not precede the language Defendants quote from the arbitration agreement. The words “the parties agreed to binding arbitration” do not appear anywhere in the arbitration agreement. In the arbitration agreement, the actual words that precede the quoted language are “you agree that”. When they cited language from the arbitration agreement to argue validity, Defendants deleted the words “you agree that” and substituted the words “the parties agreed to

¹¹ Defendants' Memorandum of Law in Support of Its Motion to Compel Arbitration, p. 2. (emphasis added)

¹² The Residence Agreement, Section II, Subsection H, 11 (emphasis added)

binding arbitration”. The significance of this substitution is that it substitutes a term signifying that only one party agreed (“you”) for a term which signifies both parties agreed (“parties”). This substitution of the words “the parties agreed to binding arbitration” for the words actually in the contract (“you agree”) shows that the Defendants recognize that both parties must mutually agree to be bound to the contract. But that is not the language they put into this arbitration agreement. When Defendants recognize the need to change the names (or pronoun designations) of the parties agreeing to the contract in order to make their argument that the contract is valid, they are implicitly revealing the lack of mutual agreement to be bound that renders this agreement invalid.

The Defendants provide additional proof that Defendant Pacifica did not intend to be bound in this arbitration agreement by its explicit statement that it would not be subjected to arbitration “...unless both parties agree...”. In the second clause of the first sentence, Defendant Pacifica underscores the necessity for both parties to agree to arbitrate in order to form a valid arbitration agreement:

...except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court *shall not be subject to arbitration unless both parties agree to arbitrate* such proceedings.”¹³

Here Defendant Pacifica’s explicit recognition that both parties must agree to arbitrate underscores the fact that language manifesting a mutual agreement to arbitrate is objectively lacking from the first part of the sentence.

In oral argument, Defendants asserted that the emphasis on the word “you” in this agreement is to simply provide adequate warning to a person in Plaintiff’s position that he or she is about to give up the right to trial.

¹³ Residence Agreement, Section II, Subsection H, 11, (second clause of first sentence). (emphasis added)

There is merit to emphasizing that persons in Plaintiff's position are being asked to relinquish a right, but this is unconvincing as a rebuttal to Plaintiff's challenge to the agreement's validity.

In the first place, nothing prevents or precludes Defendant Pacifica from using terms for both parties' agreement in addition to language putting a person in Plaintiff's position on notice that he or she is giving up the right to trial. In the third sentence under Section II, Subsection H. 11, ARBITRATION, Defendant Pacifica makes this statement in bold letters:

You give up your constitutional right to have any such dispute decided in a court of law before a jury, and instead accept the use of arbitration.

Defendant Pacifica had complete control of the words it put into this arbitration agreement. Had it wanted to, it could have easily included a similar sentence acknowledging that Defendant Pacifica too was giving up its right to trial. But it did not choose to objectively manifest that it was also giving up its right to trial.

Secondly, whatever emphasis Defendant Pacifica desires give to language clearly stating that the person in Plaintiff's position is giving up the right to trial, that desire in no way vitiates the essential requirement that there be an objective manifestation of the parties' mutual intent to be bound.

There is no objective manifestation in this arbitration agreement of a mutual intent to be bound.

That finding alone is sufficient to conclude that the arbitration agreement is invalid, but another element essential to the formation of a valid contract is also missing from this arbitration agreement.

2. Consideration is a Necessary Element to Form a Valid Contract.

It is well settled that consideration is a necessary element of a valid contract. In Sauner v. Public Service Authority of South Carolina, the Supreme Court stated: “The necessary elements of a contract are offer, acceptance and valuable consideration.”¹⁴

Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. This definition of consideration has longstanding support in South Carolina caselaw: ‘ “Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other” ’.¹⁵

In the arbitration agreement it drafted, Defendant Pacifica objectively manifests neither a promise to do something it has no legal obligation to do, nor does it promise to forbear doing something it has a legal right to do. To the contrary, Defendant Pacifica explicitly states that it will not be bound to arbitration “...unless both parties agree to arbitrate...”. In each instance where Defendants now argue that both parties have agreed to arbitrate, or give up their right to trial, Defendant Pacifica has, without exception, used the word “you” instead of using the words “both parties”. By the language that Defendant Pacifica chose to use in the arbitration agreement, only “you” give up your constitutional right to a trial, and only “you” agree that any and all claims shall be resolved by arbitration.

Defendant Pacifica has not provided any consideration to the other party to the contract. There is a lack of consideration and therefore this arbitration agreement is invalid for that reason.

¹⁴ Sauner v. Public Service Authority of South Carolina, 354 S.C. 377, 406, 581 SE 2d 161 (2003).
¹⁵ Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 SE 2d 714 (Ct. App. 2009) (citing Prestwick Golf club, Inc. v. Prestwick Ltd. P’ship, 331 S.C. 385, 389, 503 SE 2d 184, 186 (Ct. App. 1998)).

CONCLUSION

After consideration of the parties' arguments and their memorandums, the Court finds that the arbitration agreement in the Residence Agreement fails to form a valid contract.

THEREFORE, The Defendants' Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B)(6), SCRCP, or in the Alternative to Stay and Compel Arbitration is **DENIED**.



Spartanburg Common Pleas

Case Caption: Ed Medford, Indi.& On Behalf Of Others Similarly Situated VS Depek
Israni , defendant, et al
Case Number: 2022CP4200454
Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

Electronically signed on 2022-07-28 11:43:22 page 11 of 11

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
Civil Action No. 2023-CP-42-04147

**LORRAINE VOROS, BY AND
THROUGH HER DULY APPOINTED
ATTORNEY-IN-FACT, JOHN VOROS,**

Plaintiff,

v.

PACIFICA SKYLYN, LLC,

Defendant.

**DEFENDANT PACIFICA SKYLYN,
LLC'S RULE 59(e), SCRPC, MOTION
TO RECONSIDER**

Pursuant to Rule 59(e), SCRPC, Defendant Pacifica Skylyn, LLC, ("Pacifica") hereby moves this Court to Reconsider its Order Denying Pacifica's Motion to Compel Arbitration, and states as follows.

BACKGROUND

This Motion arises from the Court's February 5, 2024, Order Denying Pacifica's Motion to Compel Arbitration ("the Order"). The Order concludes that the Residence and Services Agreement ("the Agreement") Pacifica offered in support of its Motion to Compel Arbitration did not contain a valid arbitration provision because the arbitration provision did not contain mutual promises or sufficient consideration. The Order focuses on the use of the phrase "you agree" in the arbitration provision as evidence that only Plaintiff agreed to submit claims to arbitration. Pacifica submits this conclusion does not consider the arbitration provision as a whole, but instead isolates one phrase to render the remaining language meaningless. This approach fails to place the arbitration provision on an equal plane with other contracts. Thus, Pacifica respectfully requests this Court reconsider the Order and determine whether the arbitration provision, in its entirety, demonstrates a mutual intent to be bound.

ARGUMENT

Initially, Pacifica notes that the Order suggests the arbitration provision must be supported by both mutual promises and valid consideration. However, South Carolina law has long held that mutual promises constitute sufficient consideration to support a valid, enforceable contract. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996); *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1959). In other words, if the arbitration provision contains mutual promises, it is supported by sufficient consideration to constitute a valid contract under South Carolina law. To require something more for valid, legal consideration would place the arbitration provision on an unequal plane with other contracts. *See Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421, 1426-27 (2017) (invalidating a state rule that failed “to put arbitration agreements on an equal plane with other contracts”). Thus, Pacifica respectfully requests the Court clarify that an arbitration provision is subject to the same rules concerning mutuality and consideration as other contracts.

Turning to the issue of mutual promises in the Agreement’s arbitration provision, Pacifica submits that the Court should reconsider the Order to assess whether the whole scope and effect of the language used in the arbitration provision demonstrates a mutual intent to be bound. *See Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) (“The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the *whole scope and effect of the language used.*”) (emphasis added). The Order limits its analysis to selected clauses or words in the arbitration clause without reference to the “whole scope” of the clause. For example, the parties agreed that arbitration under the provision “shall be conducted in Spartanburg, South Carolina by a *mutually agreed upon* single neutral arbitrator.” (Residence and Services Agreement, Ex. 1 to Mem. in Supp. of Mot. to Compel

Arbitration at Section H.11) (emphasis added). Additionally, “[t]he *parties*” agreed to treat the results of arbitration as confidential unless the “parties” provide written consent to disclose the results. (*Id.*). Concerning the cost of arbitration, “[e]ach party” agreed to bear its own costs and fees. (*Id.*). In the event any portion of the arbitration agreement is found unenforceable, the agreement provides that “the remaining portions of the clause shall remain valid and shall be enforceable by *the parties*.” (*Id.*). The Order does not appear to consider the myriad examples of mutuality in the arbitration provision and should be reconsidered.

Finally, Pacifica urges this Court to reconsider the application of *O’Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997) in this case. The arguments made in opposition to arbitration in *O’Neil* are strikingly similar to the arguments made by Plaintiff here. Like the defendant hospital in *O’Neil*, Pacifica offered the agreement to arbitrate in connection with Plaintiff’s admission to Pacifica’s facility. Such a proffer, considered with Pacifica’s demonstrated commitment to the arbitration provision by moving to compel arbitration, demonstrates that Pacifica was bound to the arbitration provision. Thus, Pacifica respectfully requests this Court reconsider the Order and conclude that the Agreement includes mutual and concurrent promises sufficient to provide valid, legal consideration.

CONCLUSION

For the foregoing reasons, Pacifica respectfully requests the Court reconsider its ruling and issue an Order compelling this matter to binding arbitration.

SIGNATURE BLOCK ON FOLLOWING PAGE

**HEDRICK GARDNER KINCHELOE &
GAROFALO LLP**

s/Paul E. Allen, Jr.

Jonathan G. Roquemoire (SC Bar No. 68274)

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February 15, 2024

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	2023-CP-42-04147
COUNTY OF SPARTANBURG	)	
	)	
	)	
LORRAINE VOROS, BY AND	)	
THROUGH HER DULY APPOINTED	)	
ATTORNEY-IN-FACT, JOHN	)	
VOROS,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
PACIFICA SKYLYN, LLC,	)	
DEFENDANT.	)	
	)	

January 30, 2024
Via Web Conferencing

B E F O R E:

THE HONORABLE WILLIAM A. MCKINNON, JUDGE

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

PATRICK E. KNIE, ESQ.
Attorney for the Plaintiff

JONATHAN GAMBLE ROQUEMORE, ESQ.
Attorney for the Defendant

Transcribed by:
CHERYL A. SMITH
Circuit Court Reporter
from DCRP, Digital
Courtroom Recorder
Project

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

THE COURT: Next up we have Voros vs. Pacifica Skylyn.

MR. ROQUEMORE: Good morning, Your Honor. Jonathan Roquemore for the defendant.

THE COURT: Good morning, Mr. Roquemore.

MR. KNIE: Pat Knie for the plaintiff.

And, Your Honor, I'm unfortunately under the weather so I am working from home today.

THE COURT: No problem. I am working from home too.

MR. KNIE: And I may have to mute myself if I have a coughing attack.

THE COURT: That is okay.

MR. KNIE: All right. Thank you.

THE COURT: Give me just one second to pull up the electronic case file.

All right. Mr. Roquemore, all yours.

MR. ROQUEMORE: Thank you, Your Honor. May it please the Court. Good morning.

Mr. Knie, sorry to hear you're not feeling well. Hope you feel better soon.

MR. KNIE: Thank you.

MR. ROQUEMORE: Your Honor, this is defendant Pacifica Skylyn, LLC's who I represent motion to dismiss the plaintiff's complaint or to stay it and compel the

1 case to binding arbitration. The motion was filed in
2 association with the answer effectively, so right off the
3 shoots. And I think we have a pretty discrete issue here,
4 so I'm not going to waste the Court's time with a bunch of
5 arbitration talk.

6 I will tell you that there is no dispute in this case
7 that Ms. Voros had a POA. That's the same person who
8 filed the lawsuit on her behalf, Mr. John Voros who signed
9 a residence and care agreement when Ms. Voros became a
10 resident of Pacifica Skylyn in Spartanburg. And there's
11 no dispute that he signed it, that he also signed an
12 acknowledgment related to an arbitration agreement that's
13 contained in that contract. There's no dispute that he
14 had the authority to enter the arbitration agreement based
15 on the scope of the POA. And then thereafter, in
16 accordance with that contract, Ms. Voros became a resident
17 of Pacifica Skylyn, and Pacifica Skylyn began providing
18 certain services pursuant to the contract.

19 During her residency, the complaint alleges that
20 Ms. Voros was the subject of a sexual assault at the
21 facility and filed this lawsuit related to that event. I
22 don't believe, Your Honor, there's any dispute that the
23 arbitration language would be broad enough or is broad
24 enough to cover the claim that is the subject of the
25 lawsuit.

1 So the argument that has been raised in response to
2 the motion to dismiss and compel arbitration is that the
3 agreement does not demonstrate an intent by Pacifica to be
4 bound by its terms, the terms of the arbitration
5 agreement. In other words, it's not mutual, and therefore
6 there's no consideration, and the arbitration provisions
7 fail. That's the plaintiff's position as I understand it,
8 Your Honor, and I'm sure they will address it.

9 THE COURT: It's basically a pronoun argument, right?

10 MR. ROQUEMORE: It is effectively, Your Honor.

11 Let me mention two things. First, let me mention
12 because this is raised in the plaintiff's brief, we've
13 argued this exact same issue once before, like identical
14 issue. It's the same facility, different resident but
15 same contractual language, but the same argument advanced
16 by the plaintiff that because a number of references in
17 the arbitration agreement are to "you," that the
18 arbitration provision fails because Pacifica is not
19 agreeing to be bound by anything.

20 Judge Hayes denied our motion to compel arbitration
21 in that other case. It's currently on appeal with the
22 Court of Appeals.

23 Your Honor, I didn't want to burden you with a bunch
24 of paper. We did submit a brief. Plaintiff did too. And
25 I guess we could provide you with the appellate briefing

1 if you so desire. I will not do that unless you ask us
2 to.

3 But, yeah. You zeroed in on the issue. And our
4 position is, very quickly, Your Honor, there's a couple of
5 things. Pacifica presented the contract and arbitration
6 agreement to Ms. Voros or to her POA in this case.
7 Pacifica, in response to this lawsuit, filed a motion to
8 compel arbitration.

9 In addition, if you look at the language, and it's
10 really kind of the first couple of sentences of the
11 arbitration agreement, Your Honor. Now, the full
12 residence and care agreement is attached as Exhibit A to
13 our motion, but then the language is cited in both
14 parties' briefs that I want to point you to.

15 And it says that -- and this is the language that the
16 plaintiff cites to: By signing below, you agree that any
17 and all claims and disputes, et cetera, shall be resolved
18 by submission to neutral binding arbitration in accordance
19 with the Federal Arbitration Act. And then it says, Your
20 Honor: Except that any claim or dispute involving
21 unlawful detainer proceedings, eviction or any claims that
22 can be brought in Small Claims Court shall not be subject
23 to arbitration unless both parties agree to arbitrate such
24 proceedings, leaving it such that, Your Honor, everything
25 gets arbitrated between -- either way. Everything gets

1 arbitrated by the plaintiff or by Ms. Voros, the resident,
2 against the facility or by the facility against Ms. Voros
3 unless it is an eviction action which only Pacifica would
4 have, or it's otherwise a matter that can be handled in
5 Small Claims Court, in magistrate's court. And in those
6 -- in either of those instances, there has to be a
7 separate agreement to arbitrate because everything's
8 subject to arbitration except those two things. And so
9 that suggests in and of itself that Pacifica is agreeing
10 to be bound by the terms of the arbitration agreement,
11 again, that it presented to Ms. Voros.

12 THE COURT: Mr. Roquemore, you didn't draft this
13 contract, did you?

14 MR. ROQUEMORE: Say again, Your Honor?

15 THE COURT: You didn't draft this contract, did you?

16 MR. ROQUEMORE: I did not draft it, Your Honor.

17 THE COURT: Okay. Because this is a master class in
18 how not to draft a contract.

19 MR. ROQUEMORE: Well, Your Honor, I do want to point
20 out -- and so yeah, I did not draft it. Nobody in my law
21 firm drafted it.

22 I want to point out that there's no case law cited by
23 the plaintiff to support this contention that by having
24 the singular form here, only one party is agreeing to do
25 anything. We cited to the case of O'Neil vs. Hilton Head

1 Hospital in our brief, Your Honor. This is a 1997 Fourth
2 Circuit case. It was a case filed in state court, removed
3 to federal court and ultimately arbitration was compelled.

4 And the reason we point it out, Your Honor, is that
5 the language in that arbitration agreement that was the
6 subject of that case was "I." And this is an
7 employee-employer contract between the plaintiff and the
8 hospital, the employer. And the arbitration provision
9 that she agreed to says I understand, I also understand as
10 a condition of employment, I agree to submit any
11 complaints to final arbitration. And the plaintiff in
12 that case took the position that because the word "I" is
13 used, that the hospital, the employer, wasn't agreeing to
14 do anything, and so this was a one-way street in terms of
15 arbitration.

16 And the Court determined in that that the agreement
17 to be bound by arbitration was a mutual one and pointed to
18 the fact that the agreement or the contract had been
19 proffered by the employer which implies that both -- that
20 the employer intends to be bound by it. It also cited as
21 important that the employer had moved to compel
22 arbitration in response to the complaint which is, again,
23 evidence that it had agreed to arbitrate claims.

24 So we think it's just -- you know, it's a case that's
25 pretty close to on point in terms of that singular

1 language being used which might suggest, oh, there's only
2 one party agreeing to do something here.

3 THE COURT: Well, except that as Mr. Knie points out
4 in his memo, you've got that other clause that talks about
5 unless both parties agree to arbitrate. That -- that's I
6 think which makes Mr. Knie's argument strong, the separate
7 provision in the contract that emphasizes both parties
8 have to agree. Isn't there?

9 MR. ROQUEMORE: Your Honor, yes. And maybe if you'll
10 hang on just one second, Your Honor. If it is helpful for
11 you at any point so you don't have to dig -- let me do
12 this. On page 8 of our memo ---

13 THE COURT: Hold on one second. Hold on. Let me
14 pull it up.

15 MR. ROQUEMORE: It's called out elsewhere, too, but
16 that's just one spot that might be easy to get to.

17 THE COURT: Page 8, you said?

18 MR. ROQUEMORE: Yes, Your Honor, of our memorandum in
19 support.

20 THE COURT: Okay. I'm there.

21 MR. ROQUEMORE: All right. So at the bottom, this is
22 the callout that includes the information -- the language
23 I believe you're referencing that Mr. Knie cites too. And
24 this is simply basically the first -- let me make sure I'm
25 right about this. Yeah. This is the first two sentences

1 effectively of the arbitration agreement.

2 And so the first sentence is this part about you
3 agree to do these various things. And then -- and I guess
4 it's actually one long sentence because there's a
5 semicolon here. It says: Except that any claim or
6 dispute involving unlawful detainer proceedings -- in a
7 parenthetical, eviction -- or any claims that can be
8 brought in Small Claims Court shall not be subject to
9 arbitration unless both parties agree to arbitrate such
10 proceedings.

11 So when you read that full sentence all together, it
12 is saying that all claims are subject to arbitration
13 except those claims that can be filed in Small Claims
14 Court or an eviction action which is typically in Small
15 Claims Court, too. And in the case of those exceptions,
16 then they can still be arbitrated, but both parties --
17 since they're an exception to the rule, both parties then
18 have to agree to arbitrate those. So this suggests to me,
19 Your Honor, that, okay, we've got this universe of
20 potential claims here, and all of them are subject to this
21 arbitration provision except for the ones that are called
22 out as not subject to it. And for those we have them
23 here: eviction and Small Claims Court.

24 That would be my response to your question, Your
25 Honor.

1 THE COURT: Okay. Let me hear from Mr. Knie.
2 Mr. Knie?

3 MR. KNIE: Can you hear me now, sir?

4 THE COURT: Yes. I can hear you now. Yes, sir.

5 MR. KNIE: I had myself muted just in case I coughed.

6 THE COURT: Okay.

7 MR. KNIE: Just to focus in on what the Court focused
8 on, if you look at the first part of the arbitration
9 agreement, it refers to the word "you." And "you" is
10 defined by Pacifica Skylyn as the resident or the
11 plaintiff in this case. "You" does not mean Pacifica
12 Skylyn. And nowhere -- nowhere in the agreement does it
13 say "the parties shall be bound," or "we" or "us." And
14 those are words to identify Pacifica Skylyn.

15 And what's important is that this is a bilateral
16 contract, and so there has to be mutuality under South
17 Carolina contract law and there simply isn't any. And to
18 the extent that the agreement is ambiguous, I would argue
19 it's a contract of adhesion. We don't have a right to
20 change the language of it. You either sign this contract
21 to get who you want to get in the facility or you can't
22 come in. So if there is an ambiguity, it's on Pacifica
23 Skylyn.

24 Secondly, Your Honor, they make -- straight to their
25 argument seems to be this O'Neil case. And this was a

1 Fourth Circuit decision, O'Neil vs. Hilton Head Hospital
2 in 1997. That was back in the era when arbitration was
3 held by the courts to be preferred. That's no longer the
4 case in South Carolina. I quoted South Carolina case law
5 that says an arbitration contract is just another
6 contract. It should be given no more weight or no less
7 weight. But in O'Neil, they gave it great weight. But
8 the most important thing about O'Neil, Your Honor, is that
9 O'Neil is a unilateral contract meaning that it's a
10 contract for employment where there's only one signature
11 line. One person has to sign, and that's the employee.
12 And in our case we have a bilateral contract where both
13 parties have to sign, and both parties in fact did sign.
14 And so that's the material distinction between O'Neil and
15 our case. And it's just simply not applicable to our
16 case.

17 But the third thing that I would like to point out is
18 there also has to be valid consideration. And there is no
19 valid consideration. The residents, the plaintiff,
20 promises to do everything, and there are no promises made
21 by the defendant. So I think it fails both on mutuality
22 and ---

23 THE COURT: Well, that one, I mean, isn't admission
24 in the facility consideration? That seems to me that --
25 I mean, if you don't sign it, you don't get in, right?

1 MR. KNIE: Well, but keep in mind the courts have
2 held that an arbitration agreement is a contract within a
3 contract so you can't consider the promises -- other
4 promises in the contract. You simply have to look at the
5 arbitration agreement, and within the language of the
6 arbitration agreement itself, there has to be separate
7 consideration, which there is not I would respectfully
8 submit, Your Honor.

9 And again, Mr. Roquemore and I in another case
10 litigated the identical language. It was before Judge
11 Hayes. Judge Hayes, in a well-written decision I think on
12 July 28, 2022, ruled against arbitration for the very
13 reasons that I'm arguing, literally I'm arguing from this
14 order today, Your Honor.

15 THE COURT: Mr. Knie, let me get back to your
16 colleague for a second.

17 Is it Roquemore or Roquemore? Which do you prefer?

18 MR. ROQUEMORE: It's Roquemore like R-O-C-K, Your
19 Honor.

20 THE COURT: Roquemore. Okay. Mr. Roquemore, would
21 you agree with me that if the contract intentionally was
22 written in such a way that the residents were required to
23 arbitrate their claims but the facility was not, that
24 would be unenforceable in South Carolina?

25 MR. ROQUEMORE: All right. Your Honor, I think I

1 understand your question. Yeah. If there is -- I think
2 that would result in there being no consideration for the
3 plaintiff's promise to -- or I keep saying plaintiff --
4 the resident's promise to arbitrate. Because that's our
5 position here is that the consideration is the -- is the
6 counterpoint promise to arbitrate by Pacifica which is
7 valid consideration in South Carolina. And so if ---

8 THE COURT: If it's there, right? So where the two
9 questions collapsed into the same question, right?

10 MR. ROQUEMORE: Correct, Your Honor. If it's -- if
11 it's there.

12 And I think one of the things I wanted to highlight
13 about -- before I say that, you're asking me questions.
14 I'll stop.

15 THE COURT: No. Go ahead.

16 MR. ROQUEMORE: Okay. Just in response to three
17 things Mr. Knie mentioned. I'll start with the second one
18 which was the idea that it's an important distinction that
19 the hospital, that the O'Neil case was unilateral, and
20 here there's signatures for both parties. I think maybe
21 the way the O'Neil case was was effectively, by accepting
22 employment with the hospital, the plaintiff in that case
23 had agreed to the terms of the arbitration. Maybe there
24 was an actual signature, too. I'm not sure. But it would
25 seem to me that it would be less likely to be enforced if

1 you only had one signature because there's otherwise no
2 indication that the hospital had agreed, whereas here you
3 have a signature by the facility agreeing to the terms of
4 the contract that is presented. I wanted to mention that.

5 I don't know that it's of any import necessarily,
6 Your Honor, but Mr. Voros who signed this on behalf of his
7 sister did not have to agree to arbitration. If you read
8 -- we haven't focused on that, but if you read the
9 remainder of the arbitration agreement, it's not mandatory
10 that it be signed. And after you sign it, you can decide
11 -- you can change your mind within 30 days, too. I did
12 want to point that out, Your Honor.

13 And I did want to start back where your question
14 started which is the consideration here is the mutual
15 promise to arbitrate if the Court were to find that a
16 mutual promise to arbitrate exists here. And we believe,
17 again, the language -- I think in a sense certainly the
18 first part of the arbitration agreement is in language
19 that a layperson can understand. You're agreeing to do
20 these things. You need to make it clear you understand
21 you're agreeing to do these things. And admittedly, it's
22 not as clear that the facility is also agreeing to do this
23 because language like "we are also agreeing to do this" is
24 not in there. But when you read that full sentence as a
25 whole, why would you need exceptions to the types of

1 claims that have to be arbitrated between the parties if
2 Pacifica wasn't agreeing to do anything? And clearly,
3 Pacifica is agreeing to be bound by the arbitration
4 agreement because there are things called out that only
5 Pacifica can do like an eviction action that are expressly
6 not subject to that provision.

7 THE COURT: Where does that provision appear? I'm
8 looking at the contract now. Where is the exception in
9 the contract?

10 MR. ROQUEMORE: Yes, Your Honor. So under
11 arbitration, if you flip through the first -- are you --
12 just so I can help you, are you looking at the actual
13 agreement now?

14 THE COURT: Yes.

15 MR. ROQUEMORE: Okay. So if you go down where you've
16 got that super indent by signing below, if you go down
17 two, three, four ---

18 THE COURT: Right. I see it.

19 MR. ROQUEMORE: --- the fifth line.

20 THE COURT: Okay.

21 MR. ROQUEMORE: Yeah. You've got that provision that
22 says: you agree -- okay. Five lines of stuff. And then:
23 except that any claim or dispute involving these types of
24 things shall not be subject to arbitration. Well, if
25 Pacifica wasn't agreeing to arbitrate anything, there

1 wouldn't need to be exceptions for things that it has
2 agreed to arbitrate. That in and of itself suggests
3 there's this -- you know, we've got this pot of stuff.
4 We've got all these kind of claims that can happen. We're
5 agreeing to arbitrate those except for things that you can
6 file in magistrate's court, things that we can file in
7 magistrate's court which would include, of course, an
8 eviction proceeding.

9 Now I'll be quiet, Your Honor.

10 MR. KNIE: May I argue just for another minute, Your
11 Honor?

12 THE COURT: Yeah. Let me read for a second,
13 Mr. Knie. Then I'll be happy to hear from you. I'm just
14 thinking this through.

15 (Pause in proceedings.)

16 THE COURT: All right. Mr. Knie, go ahead.

17 MR. KNIE: Your Honor, that exception that
18 Mr. Roquemore basically stands on really hurts them
19 because in fact what it's saying is that everywhere else
20 you, not the parties agree, but you meaning the resident,
21 agree to arbitrate and to do other things. And then when
22 it gets down to the point about evictions, that's the only
23 time that the parties have mutual rights. And so I think
24 that even -- even more clarifies the fact that this is not
25 a mutual bilateral agreement.

1 And then if you look at the third sentence of the
2 arbitration agreement, Your Honor -- and I believe it's in
3 bold print. I don't have the agreement in front of me.
4 Just my brief. It says, once again, you give up your
5 constitutional right to have any such dispute decided in a
6 court of law before a jury and instead accept the use of
7 arbitration. Again, it doesn't say "the parties" or "we."
8 It just says "you," and "you" is defined as the resident.
9 And, you know, they -- unfortunately for them, Pacifica
10 Skylyn directed to have this document prepared, and I
11 think they have to rely on it to their detriment because
12 of its ambiguity.

13 THE COURT: Mr. Roquemoire, let me just make sure I --
14 your best argument, if I'm understanding it correctly, is
15 that under the exception, there's an exception for
16 eviction proceedings, which of course an eviction
17 proceeding can only be brought by the facility. And if
18 there's an exception for eviction proceedings, that must
19 mean then that other claims by the facility would also be
20 subject to arbitration? Is that -- is that the argument?

21 MR. ROQUEMORE: That is, yeah. Correct, Your Honor.
22 That is our argument with respect to that language, that
23 you wouldn't need that language if Pacifica had -- wasn't
24 agreeing to arbitrate everything. there'd be no need for
25 it, in addition to the fact that Pacifica presented this,

1 Your Honor. Obviously, it's agreeing to arbitrate if it's
2 presenting it and then has moved to compel arbitration.

3 In addition to -- and this is in the brief, so these
4 are smaller points. But throughout the rest of the
5 arbitration agreement, there are maybe three or four
6 instances of "the parties" or "mutuality" with respect to
7 various pieces and parts of the arbitration process which
8 would also suggest mutuality with respect to arbitration,
9 Your Honor.

10 THE COURT: Okay. All right. Mr. Roquemoire, I think
11 you have done an outstanding job and you made the very
12 best argument you can with the contract you did not draft
13 which is not a good contract for your clients. I'm going
14 to rule for the plaintiff in this case. The basis for my
15 ruling is what both parties have talked about. I mean,
16 the language, I mean, it was drafted by the facility. Any
17 ambiguity is construed against them. There's no mention
18 at all of any obligation by the facility to arbitrate any
19 claims. And then on top of that, looking at one more
20 minor part, it's talking about you agree that any and all
21 claims arising from the agreement, you know, whether made
22 against the community or any other individual or entity,
23 it doesn't say "or against you." It seems to, again, be
24 talking about claims against the community or doctors,
25 nurses, other -- you know, it's all one way you giving up

1 this right to bring a lawsuit. So -- and there's some --
2 some possible ambiguity introduced by the exception. And
3 logically I think you've got a point, Mr. Roquemore, but
4 your client drafted the contract. It very clearly places
5 all the arbitration obligations on the resident and not
6 the facility. So I'm going to deny the motion.

7 MR. ROQUEMORE: Thank you for your time, Your Honor.

8 THE COURT: You bet.

9 Mr. Knie, will you draft an order?

10 MR. KNIE: I will, Your Honor. Thank you.

11 THE COURT: Yes, sir.

12 Mr. Roquemore, well argued.

13 MR. ROQUEMORE: Thank you, Your Honor. It's always a
14 pleasure to be in front of you. I hope you have a great
15 day.

16 THE COURT: Likewise. You too.

17 MR. KNIE: Thank you, Your Honor.

18 THE COURT: Mr. Knie, very nice to see you as always.

19 MR. KNIE: Thank you, sir. I didn't know if I was
20 muted or not.

21 THE COURT: That's okay.

22 (End of transcript of record.)
23
24
25

1 CERTIFICATE OF REPORTER
2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF SPARTANBURG)
5
6

7 I, CHERYL A. SMITH, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South
9 Carolina, do hereby certify that the foregoing is a true,
10 accurate and complete Transcript of Record, to the best of
11 my ability based on the audio and notes provided, of the
12 WebEx recorded proceedings had and evidence introduced in
13 the trial of the captioned case, relative to appeal, in
14 the Court of Common Pleas for Spartanburg County, South
15 Carolina, on the 30th day of January, 2024.

16 I do further certify that I am neither of kin,
17 counsel, nor interest to any party hereto.
18

19 April 11, 2024
20
21

22 Cheryl A. Smith

23 Cheryl A. Smith, CVR-M

24 Court Reporter
25