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Dec 23 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454

Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly
situated, ... Respondents,

v.

Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a Pacifica
Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Petitioners.

APPENDIX

Jonathan G. Roquemoire (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Petitioners

INDEX

Petitioner’s Final Brief.....	1
Respondent’s Final Brief	16
Petitioner’s Final Reply Brief	36
Record on Appeal	45
Court of Appeals Opinion No. 316	157
Petitioner’s Petition for Rehearing and Supplement the Record on Appeal.....	160
Respondent’s Return to Petition for Rehearing and Supplement the Record on Appeal	203
Court of Appeals Order Denying Petition for Rehearing	210

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	2
ARGUMENT	3
I. The circuit court erred in denying Pacifica’s Motion to Compel Arbitration.....	3
A. The circuit court erred in finding the arbitration provision did not evince a mutual intent to be bound.	3
B. The circuit court erred in finding the Agreement’s arbitration provision is not supported by sufficient consideration.	6

TABLE OF AUTHORITIES

Cases

<i>Barnacle Broad., Inc. v. Baker Broad., Inc.</i> , 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000).....	6
<i>Duke Energy Corp. v. S.C. Dep’t of Revenue</i> , 415 S.C. 351, 782 S.E.2d 590 (2016).....	3
<i>Electro-Lab of Aiken, Inc. v. Sharp Const. Co. of Sumter, Inc.</i> , 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004)	7
<i>Evatt v. Campbell</i> , 234 S.C. 1, 106 S.E.2d 447 (1959).....	7
<i>Furman Univ. v. Walker</i> , 124 S.C. 68, 117 S.E. 356 (1923).....	7
<i>Johnson v. Heritage Healthcare Estill, LLC</i> , 416 S.C. 508, 788 S.E.2d 216 (2016)	2
<i>Kindred Nursing Centers Ltd. Partnership v. Clark</i> , 137 S.Ct. 1421 (2017).....	8
<i>Munoz v. Green Tree Financial Corp.</i> , 343 S.C. 531, 542 S.E.2d 360 (2001)	3
<i>O’Neil v. Hilton Head Hospital</i> , 115 F.3d 272 (4th Cir. 1997).....	5, 7, 11
<i>Player v. Chandler</i> , 299 S.C. 101, 382 S.E.2d 891 (1989)	4
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395, 87 S.Ct. 1801 (1967).....	4, 10
<i>Rickborn v. Liberty Life Ins. Co.</i> , 321 S.C. 291, 468 S.E.2d 292 (1996).....	7
<i>Smith v. D.R. Horton, Inc.</i> , 417 S.C. 42, 790 S.E.2d 1 (2016)	4, 10
<i>Stanley Smith & Sons v. Limestone Coll.</i> , 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984)	4
<i>Thornton v. Trident Med. Ctr., L.L.C.</i> , 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003).....	3

Rules

Rule 12(b)(1), SCRCP.....	2
Rule 12(b)(6), SCRCP.....	2

ISSUES ON APPEAL

1. Whether the circuit court erred in denying Pacifica’s motion to compel Plaintiffs’ claims to arbitration.
 - a. Whether the circuit court erred in finding the Agreement’s arbitration provision did not evince a mutual intent to be bound to binding arbitration.
 - b. Whether the circuit court erred in finding the Agreement’s arbitration provision was not supported by sufficient consideration.

STATEMENT OF THE CASE

This appeal arises from a putative class action, filed on February 8, 2022, related to alleged deficiencies with the independent senior living accommodations at Pacifica Senior Living Skylyn (“Pacifica” or “the Facility”). (R. 12-23.). Plaintiff Ed Medford (“Plaintiff”) was a resident of an independent living apartment on Pacifica’s campus, and had lived on Pacifica’s campus for five years at the time this suit was filed. (R. 12.). Plaintiff brought this action individually and on behalf of a putative class of other residents, alleging breach of contract, negligence, and related causes of action against: Pacifica; allegedly related entities R Cucamonga, LLC and Pac R Cucamonga, LP; former director Matthew Arledge; management consultant ETROS, LLC; and individual Deepak Israni as an alleged “manager” of Pacifica. (R. 12-23.). The allegations relate to the operation and maintenance of the facility and non-medical services provided by Pacifica; all allegations stem from Plaintiff’s residence in independent living at Pacifica, though Plaintiff purports to represent a class of residents living in both the independent living apartment building and a separate assisted living facility on the campus. (*Id.*).

Plaintiff signed a Residence and Care Agreement (“the Agreement”) that governed the terms of his residency at Pacifica. (R. 53-66). Section H of the Agreement contains numerous “Miscellaneous” provisions, including a provision requiring binding arbitration of disputes in subparagraph 11, titled “**ARBITRATION.**” (R. 64-65.). 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. . . .” (*Id.*). 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.*). Plaintiff personally signed the arbitration clause on November 7, 2018, the same date on which the Agreement was executed by Plaintiff and the executive director of Pacifica. (*Id.*).

On April 11, 2022, Pacifica filed a Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), SCRCF, or in the alternative, to Stay and Compel Arbitration. (R. 24-41.). Following a hearing, the circuit court denied the Motion to Compel Arbitration on July 28, 2022. (R. 1-11, 85-109). This appeal timely followed.

STANDARD OF REVIEW

A trial court’s determination concerning arbitrability is subject to de novo review. See *Johnson v. Heritage Healthcare Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016). Nevertheless, a trial court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003). Issues of law, however, are reviewed without any particular deference to the trial court. See *e.g. Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016).

ARGUMENT

I. The circuit court erred in denying Pacifica’s motion to compel arbitration.

The circuit court concluded the Agreement’s arbitration clause failed to form a valid contract because it lacked mutual intent to be bound or sufficient consideration. (R. 4-8). The circuit court erred in failing to consider the arbitration clause as a whole or the demonstrated intent of the parties. Contrary to the circuit court’s conclusion, the arbitration clause demonstrates a mutual intent to be bound, and contains concurrent, mutual promises sufficient to provide consideration for a valid and enforceable contract. Thus, this Court should reverse the circuit court’s order denying Pacifica’s Motion to Compel Arbitration.

A. The circuit court erred in finding the arbitration provision did not evince a mutual intent to be bound.

General contract principles of state law apply to arbitration clauses governed by the Federal Arbitration Act (“FAA”). *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). Plaintiff did not challenge the applicability of the FAA to the parties’ dispute, and the circuit court’s order assumes the application of the FAA. (R. 2-3.). As noted in the order, arbitration clauses implicating the FAA are subject to judicial challenge based on generally applicable contract defenses, provided that the contractual defense is limited “to the arbitration agreement itself, and not the contract as a whole.” *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967)). Plaintiff’s assertion of generally applicable contractual defenses was the sole challenge to Pacifica’s motion to compel arbitration and the basis of the circuit court’s order. Thus, the dispositive issue is whether Plaintiff has established a viable contractual defense to the arbitration agreement.

South Carolina law requires a meeting of the minds between the parties as to all essential and material terms of a contract, and the parties must manifest a mutual intent to be bound by the terms of the contract. *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). Here, the circuit court erred in determining the arbitration agreement did not demonstrate a mutual intent to be bound to arbitration.

The circuit court's analysis focuses almost exclusively on the following language in the Agreement's arbitration clause:

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.

(R. 64-65.).

The circuit court erred in its conclusion that the term "you" indicates only the Plaintiff agreed to arbitration. A similar argument was addressed by the Fourth Circuit applying South Carolina law in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997). 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.

Plaintiff's grammatical argument focusing on the word "you" in the Agreement's arbitration clause is just as misplaced as the one before the Fourth Circuit in *O'Neil*. Here, the mutual intent to be bound is clear from the whole scope and effect of the language used in the arbitration clause. 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 circuit court erred in limiting 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." (R. 64-65.) (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.*). 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 independent living facility according to the terms of the

Agreement and lived at the independent living facility for five years prior to filing suit. (R. 12.). Additionally, Pacifica promptly filed a motion to compel arbitration and has consistently maintained that Plaintiff's claims are subject to binding arbitration. (R. 24-25.). 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.

B. The circuit court erred in finding the Agreement's arbitration provision is not supported by sufficient consideration.

Under South Carolina law, mutual and concurrent promises set forth within a contract afford sufficient legal consideration to validate the contract. *Furman Univ. v. Walker*, 124 S.C. 68, 117 S.E. 356 (1923); *see also Electro-Lab of Aiken, Inc. v. Sharp Const. Co. of Sumter, Inc.*, 357 S.C. 363, 369, 593 S.E.2d 170, 173 (Ct. App. 2004) ("A typical contract contains mutual promises and is created by an acceptance constituting a return promise by the offeree."). 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 *O'Neil*, discussed in Section A above, the Fourth Circuit addressed the plaintiff's argument that the arbitration agreement was not supported by adequate consideration. 115 F.3d at 275. The Fourth Circuit noted that the defendant employer included the arbitration agreement in a job offer to the plaintiff, which clearly implied "that both the employer and the employee would be bound by the arbitration process." *Id.* The Fourth Circuit held "[a] mutual promise to arbitrate constitutes sufficient consideration" for a valid arbitration agreement under South Carolina law. *Id.* The *O'Neil* court noted that the employer was committed to the arbitration process because it sought the arbitration forum. *Id.*

Here, Pacifica included the contract to arbitrate in its offer to provide an independent living facility to Plaintiff, which clearly implied Pacifica's promise to be bound by the arbitration process. Additionally, Pacifica filed its motion to compel arbitration promptly after Plaintiff filed suit, "demonstrating its commitment to the arbitration process." As in *O'Neil*, the only party seeking to avoid the arbitration forum is Plaintiff.

The arbitration clause in this case contained mutual promises to submit to binding arbitration "any and all claims and disputes arising from or related to" the Agreement. (R. 64-65.). Such a clause should be construed broadly to include mutual and concurrent promises between Pacifica and Plaintiff to submit all claims arising from the Agreement to arbitration. 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, the Agreement includes mutual and concurrent promises sufficient to provide valid, legal consideration.

The circuit court relied on an exception in the arbitration clause which provides that certain claims are excluded from the agreement to arbitrate, including eviction proceedings and claims that can be brought in small claims court, "unless both parties agree to arbitrate" such claims. (R. 9). The circuit court erroneously concluded that this exception indicates Pacifica did not promise to be bound to arbitration of any claims "unless both parties agree." (*Id.*). Contrary to the circuit court's conclusion, the whole scope and effect of the language in the arbitration clause clearly demonstrates mutual and concurrent promises to arbitrate all claims arising from the Agreement, except for eviction proceedings or claims that can be brought in small claims court. (R. 64-65). The parties agreed to "mutually" decide on a single arbitrator for arbitration proceedings, and the

“parties” agreed to treat the arbitration decision confidentially. (*Id.*). Pacifica’s motion to compel Plaintiff’s claims to arbitration is further evidence of Pacifica’s promise to submit all claims arising out of the Agreement—such as Plaintiff’s claims in this litigation—to binding arbitration. Therefore, the circuit court erred in finding the arbitration clause was not supported by sufficient consideration for a valid contract.

Finally, Pacifica would further point to other portions of the Agreement as evidence of the clear intent of the parties to be bound by mutual promises and obligations, including an agreement to arbitrate all disputes. For example, the first page of the Agreement includes the following introductory provisions: “The purpose of this Agreement is to provide a statement of the accommodations and 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.” (R. 53) The first page goes on to state in all capital, underlined letters, “THIS AGREEMENT IS SUBJECT TO ARBITRATION. See Section II.H.11 below.” (*Id.*)

The circuit court erred in expressly rejecting references to any portion of the Agreement other than the arbitration clause itself. The order discusses the “framework” for analyzing the validity of the arbitration provision over the course of several pages, correctly identifying *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), as the key authority guiding its analysis. (R. 4.) See also *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1 (2016) (analyzing the “*Prima Paint* doctrine”). *Prima Paint* stands for the proposition “that to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole.” *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

Pacifica agrees that the court must focus on the terms of the arbitration clause itself to find that the arbitration clause is invalid. However, the circuit court's order deploys *Prima Paint* for a slightly different proposition and purpose. The purpose of the *Prima Paint* doctrine is to advance the rights of parties to arbitration under the FAA— it isolates the arbitration clause and protects its validity despite the existence of contractual defenses to other portions of the agreement. The circuit court, rather than isolating the arbitration clause to *protect* the arbitration clause, isolated the arbitration clause to *attack* it. The difference is subtle but meaningful. The circuit court found that *Prima Paint* required the arbitration clause to be “severed and extracted” and that “only the terms of the arbitration agreement could be analyzed in order to decide validity.” (R. 3-4.). As a result, the circuit court failed to consider provisions on the first page of the Agreement that provided context as to the intent of the parties to enter into a mutually binding agreement. Thus, the circuit court effectively utilized the *Prima Paint* doctrine to attack the arbitration agreement, frustrating the very purpose of the doctrine.

In this regard, it is worth observing that the Fourth Circuit in *O'Neil*, decided well after *Prima Paint*, found it logical and persuasive to rely upon “the multiple references in the [defendant's] employee handbook” when examining whether there was a mutual intent to be bound by the arbitration agreement and adequate consideration. *O'Neil*, 115 F.3d at 275. Indeed, the *O'Neil* court's concluding observations apply equally to this action:

The Supreme Court has repeatedly emphasized that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. The district court's analysis turned this clear injunction on its head, pursuing every possible avenue to avoid the binding arbitration agreement between [plaintiff] and [defendant].

115 F.3d at 276 (internal marks and citations omitted).

The arbitration clause at issue was separately signed by Plaintiff himself. The clause's scope is broad and there is no dispute that it encompasses the controversy. Its language applies equally to both parties and is fair—there has been no allegation that the arbitration clause contains any unconscionable terms. Yet, the circuit court still found an avenue to avoid arbitration, finding that the arbitration clause lacked mutual intent and consideration because it used the pronoun “you.” For the reasons outlined above, Pacifica respectfully submits there is ample evidence of mutual intent and consideration within the arbitration clause itself and the Agreement as a whole, and requests reversal of the circuit court's order denying Pacifica's Motion to Dismiss and/or Compel Arbitration.

CONCLUSION

For the foregoing reasons, Pacifica requests this Court reverse the circuit court and stay this action in favor of arbitration of Plaintiff's claims, or remand the case to the circuit court with instructions to stay the case and compel the Plaintiff's claims to arbitration.

Respectfully submitted,

HEDRICK GARDNER KINCHELOE & GAROFALO
LLP

s/ Paul E. Allen, Jr.

Jonathan G. Roquemore (SC Bar No. 68274)

Joshua D. Shaw (SC Bar No. 77835)

Paul E. Allen, Jr. (SC Bar No.: 104062)

1230 Main Street, Suite 325

Columbia, SC 29201

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
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J. Mark Hayes, II, Circuit Court Judge

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Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a
Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Final Brief of Appellants in the above-captioned
case has been served on the following parties via e-mail, on July 11, 2023:

Patrick E. Knie
Knie & Shealy Attorneys at Law
250 Magnolia Street
Spartanburg, SC 29306
pknie@knielaw.com

Mitch Slade
Mitch Slade Law Office, P.A.
PO Box 1007
Spartanburg, SC 29304
mitch@mitchsladelaw.com
Attorneys for Plaintiffs/Respondents

s/Paul E. Allen Jr.
Paul E. Allen, Jr.

July 11, 2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

CERTIFICATE OF COUNSEL

It is hereby certified that the foregoing Final Brief of Appellants in the above-captioned
case complies with the requirements of Rule 211(b), SCACR.

s/ Paul E. Allen, Jr.

Jonathan G. Roquemore (SC Bar No. 68274)

Joshua D. Shaw (SC Bar No. 77835)

Paul E. Allen, Jr. (SC Bar No.: 104062)

1230 Main Street, Suite 325

Columbia, SC 29201

Attorneys for Appellants

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Jun 28 2023

SC Court of Appeals

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v.

**Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga LP; Pacifica Skylyn, LLC, d/b/a
Pacifica Senior Living Skylyn, Etros, LLC; and Matthew Arledge, ... Appellants.**

FINAL BRIEF OF RESPONDENT

**PATRICK E. KNIE, P.A.
Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone: (864) 582-5118
Telefax: (864) 585-1615
pat@knieshealy.com**

**MITCH SLADE LAW OFFICE, P.A.
Mitch Slade
S.C. Bar No. 5146
PO Box 1007
Spartanburg, S.C. 29304
Telephone: (864) 582-4212
mitch@mitchsladelaw.com**

Attorneys For Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW	2
ARGUMENT.....	2
I. THE CIRCUIT COURT CORRECTLY FOUND THAT THE ARBITRATION AGREEMENT DID NOT OBJECTIVELY MANIFEST A MUTUAL INTENT TO BE BOUND.....	2
A. The Circuit Court Properly Applied South Carolina Contract Law To Conclude That Pacifica Did Not Objectively Manifest Its Assent To Be Bound To Arbitrate Its Own Claims.	2
B. Pacifica’s “Whole Scope” Argument Is Contradicted By Its Admission That The First Sentence Contains The “Operative Language” Required To Make The Agreement Valid.	5
C. Pacifica States That <u>O’Neil</u> Rejected The Resident’s Argument. In Fact, Subsequent Decisions Have Rejected <u>O’Neil</u> ’s Policy Based Reasoning.	6
II. THE CIRCUIT COURT CORRECTLY FOUND THAT PACIFICA DID NOT MAKE THE MUTUAL PROMISE REQUIRED TO MAKE THE ARBITRATION AGREEMENT VALID	9
A. Where The Consideration Is Provided By Mutual Promises, Each Party Must Promise Something Of Value To The Other.	9
B. The Plain And Ordinary Meaning Of The Language Of The Arbitration Agreement Shows That Pacifica Did Not Make A Promise To Submit Its Claims To Arbitration.	10
C. Pacifica’s Arguments Reveal That It Recognizes That The Agreement It Drafted Does Not Contain The Mutual Promises Necessary For Consideration.	11
III. IN BOLD FACED TYPE, PACIFICA OBJECTIVELY MANIFESTS THAT ONLY ONE PARTY AGREES TO ARBITRATE AND GIVE UP ITS RIGHT TO TRIAL.	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<i>Bannon v. Knauss</i> , 282 S.C. 589, 320 S.E.2d 470 (Ct. App. 1984).....	4, 5, 13
<i>Dean v. Heritage Healthcare of Ridgeway, LLC</i> , 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014).....	2
<i>Grier v. AMISUB of South Carolina, Inc.</i> , 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012).....	2
<i>Humble Oil & Refining Co. v. DeLoach</i> , 297 F.Supp. 647 (1969)	9
<i>McCord v. Laurens County Health Care System</i> , 429 S.C. 286, 838 S.E.2d 220 (Ct. App.)....	8, 11
<i>O’Neil v. Hilton head Hosp.</i> , 115 F.3d 272 (1997)	6-9
<i>Palmetto Construction Group, LLC v. Restoration Specialists, LLC</i> , 432 S.C. 633, 856 S.E.2d 150 (2021).....	7
<i>Simmons v. Benson Hyundai, LLC</i> , 438 S.C. 1, 881 S.E.2d 646 (Ct. App. 2022)	4, 7, 10
<i>Southern Glass & Plastics Co., Inc. v. Kemper</i> , 399 S.C. 483, 732 S.E.2d 205 (Ct. Appl. 2012)	8
<i>York v. Dodgeland of Columbia, Inc.</i> , 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013)	6

RULES

Rule 12(b)(1), SCRCF	1
Rule 12(b)(6), SCRCF	1

STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court correctly rule that Pacifica failed to manifest the intention to be bound to submit its claims to arbitration?
- II. Did the circuit court correctly rule that Pacifica's failure to make a mutual promise constituted a lack of consideration?

STATEMENT OF THE CASE

This is an appeal from Judge Hayes' Order Denying Defendants' Motion To Dismiss Pursuant To Rules 12(b)(1) And 12(b)(6), SCRPC, Or In The Alternative To Stay And Compel Arbitration.

Ed Medford, in his individual capacity and on behalf of others similarly situated, the Respondent, (Resident), filed the Complaint in the action on February 8, 2022. Resident's Complaint alleged negligent supervision, breach of contract accompanied by a fraudulent act, and related causes of action based on the living conditions at the Pacifica Senior Living Skylyn facility in Spartanburg, South Carolina. The Resident, former president of the Residents' Council at Pacifica Senior Living Skylyn, alleges that conditions at the facility have deteriorated to the point that bedbug and rodent infestations are routine, apartments do not have heat, the food is not properly prepared, and the elevators are often out of service.

On April 11, 2022, Appellants filed Defendants' Motion To Dismiss Pursuant To Rules 12(b)(1) And 12(b)(6), SCRPC, Or In The Alternative To Stay And Compel Arbitration (Motion).

Both Appellants and Resident filed Memoranda of Law in support of their positions.

A hearing on Appellants' Motion was heard, in the virtual courtroom, before the Honorable Mark Hayes on June 29, 2022.

At the hearing, Appellants argued that the arbitration agreement embedded in the residence contract that Resident signed was valid, and that the court should order the parties to

arbitrate. Resident argued that the arbitration agreement was invalid as a matter of law because of a lack of mutual assent and a failure of consideration.

On July 28, 2022, Judge Hayes issued his Order denying Appellants' Motion.

Appellants filed their Notice of Appeal on August 29, 2022.

STANDARD OF REVIEW

Arbitrability determinations are subject to *de novo* review. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). Questions of law are decided without any deference to the court below. Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012).

ARGUMENT

The circuit court correctly denied Pacifica's motion to compel arbitration for two separate and independent reasons. First, the court found that Pacifica failed to manifest its mutual intent to be bound to arbitrate. The arbitration agreement was invalid for that reason. Second, the court also found that Pacifica failed to provide consideration and that the arbitration agreement was invalid for that reason as well. This Court should affirm.

I. THE CIRCUIT COURT CORRECTLY FOUND THAT THE ARBITRATION AGREEMENT DID NOT OBJECTIVELY MANIFEST A MUTUAL INTENT TO BE BOUND.

A. The Circuit Court Properly Applied South Carolina Contract Law To Conclude That Pacifica Did Not Objectively Manifest Its Assent To Be Bound To Arbitrate Its Own Claims.

Pacifica's first argument is that the circuit court erred in holding that only one party manifested the intention to arbitrate its claims. This argument is directly contradicted by the words Pacifica itself used to create its arbitration agreement.

The first sentence of Pacifica's arbitration agreement reads:

11. 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.

(R. p. 39) (emphasis added).

When Pacifica drafted this arbitration agreement, it decided which parties it would require to "agree" to submit claims to arbitration. The drafter of the contract selects words for the contract for the purpose of objectively manifesting its intention for the contract. Pacifica designated the pronoun "you" to designate only the Resident. Thus, only one party to the contract was required to agree to submit its claims to binding arbitration.

It is undisputed that this first sentence of the arbitration agreement is the key sentence. At the hearing in circuit court, Pacifica conceded that this sentence contains the key language of the arbitration agreement. Pacifica stated:

And then toward the bottom of the agreement, actually, the second to last page – third to last page is the arbitration agreement clause itself. Section H-11, it's titled arbitration. I'm not going to read the whole provision [i.e., the whole arbitration agreement] to Your Honor, *but the first sentence is the key language.*

(R. p. 90, lines 16-21) (explanatory brackets added) (emphasis added). Then, four lines later in the transcript, Pacifica acknowledges that it is the first sentence that contains the “operative language.” Pacifica’s counsel argued, “And I left out a few words there, but *that’s the operative language that we are asserting is valid under the FAA and requires this matter to be arbitrated.*” (R. p. 91, lines 1-4) (emphasis added).

But in the Brief of Appellants, Pacifica’s basic criticism of the circuit court’s decision is that the court erroneously focused its analysis on the first sentence. This is the same sentence Pacific admitted in court that contains the “operative language” which “requires this matter to be arbitrated”.

Contrary to the arguments in its Brief, Pacifica’s admission that the first sentence is the “operative” sentence reveals that, if the arbitration agreement is in fact valid, the words manifesting Pacifica’s assent to be bound to arbitration must be found in the first sentence.

The question of whether the first sentence manifests Pacifica’s mutual intent to be bound must be decided by applying South Carolina contract law: “we now proceed to the first step: deciding if the parties have an agreement to arbitrate, which we decide applying South Carolina contract law.” Simmons v. Benson Hyundai, LLC, 438 S.C. 1, 7 881 S.E.2d 646 (Ct. App. 2022) (citation omitted).

South Carolina contract law required the court to interpret the first sentence by 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. It does not depend on the subjective, after the fact meaning one party assigns to it.” Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984) (citation omitted).

The drafter chose the word “you” to designate solely one party. The drafter then deliberately chose only that party to “agree” to submit its claims to arbitration. The objective manifestation of the words Pacifica chose for the “operative language” of its agreement plainly shows that only one party agreed to arbitrate its claims.

As the circuit court stated in its Order, “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.” (R. p. 5). Bannon holds that the contract must be interpreted by the objective manifestation of the parties’ assent at the time the contract was made, not by any subjective after the fact interpretations, as Pacifica attempts here.

The circuit court correctly applied South Carolina contract law to this arbitration agreement when it found, “There is no objective manifestation in this arbitration agreement of a mutual intent to be bound.” (R. p. 8).

B. Pacifica’s “Whole Scope” Argument Is Contradicted By Its Admission That The First Sentence Contains The “Operative Language” Required To Make The Agreement Valid.

Pacifica admitted in court that the first sentence of the arbitration agreement contains the “operative language” of the agreement. If Pacifica’s “operative language” did not objectively manifest its intent to be bound, no agreement was formed. On page two of its Brief, Pacifica describes the sentences that follow the key first sentence as “parameters for arbitration” (Br. of App. p. 2). According to Pacifica these sentences set out the “parameters”, or terms, for a contract. These terms, or “parameters”, include provisions for allocating the costs of arbitration and choosing an arbitrator. South Carolina law characterizes terms like these as ancillary logistical terms, not required in an arbitration contract. “[Plaintiff] cites no authority for the proposition that discovery rules, cost allocations, or arbitration initiation procedures are material

terms that an arbitration agreement must explicitly designate. Rather, these terms are ‘ancillary logistical’ ones not required within an arbitration agreement.” York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013). “Ancillary logistical” terms or “parameters” cannot themselves form the mutual intent to be bound if Pacifica did not objectively manifest its intent to be bound to arbitrate its claims in the first sentence. In the “ancillary logistical” terms that Pacifica characterizes as the “whole scope” of the agreement, neither party is manifesting its assent to give up its right to trial and submit to arbitration. Any significance due the sentences that follow first sentence is wholly dependent on **both parties** objectively manifesting the agreement to submit their respective claims to arbitration in the first sentence. However many “ancillary logistical” claims are amassed together in the “whole scope”, by themselves they cannot form the objective manifestation of assent required of both parties.

This argument does not provide any grounds for error in the circuit court’s finding that Pacifica failed to objectively manifest its asset to submit its claims to arbitration.

C. Pacifica States That O’Neil Rejected The Resident’s Argument. In Fact, Subsequent Decisions Have Rejected O’Neil’s Policy Based Reasoning.

O’Neil v. Hilton Head Hospital, 115 F.3d 272 (1997) was decided in 1997, over 25 years ago. It was decided in an era in which the legal cliché, “the strong federal policy in favor of arbitration”, *Id.* at 273, served to resolve all manner of contractual infirmities and flawed analysis in favor of arbitration.

In 1997, the O’Neil court was firmly committed to this cliché. It both began and ended its opinion by declaring it adherence to this policy.

At the beginning of its opinion, in the second paragraph, it stated, “The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption in favor of the validity of arbitration agreements.”, *Id.* at 273.

Then, in the last paragraph of its opinion, O’Neil reiterates its adherence to the policy of favoring arbitration. “The Supreme Court has repeatedly emphasized that ‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’” *Id.* at 276 (citation omitted).

O’Neil, a Fourth Circuit decision applying South Carolina law, has never been binding on South Carolina courts’ analysis of state contract law. Now, since Palmetto Constr. Grp., LLC v. Restoration Specialists, 432 S.C. 633, 856 S.E.2d 150 (2021), O’Neil’s analytical framework favoring arbitration has been rejected by our supreme court. See Palmetto Constr. Grp., LLC, 432 S.C. at 639, 856 S.E.2d at 153 (“There is, however, no public policy – federal or state – ‘favoring’ arbitration.”).

South Carolina courts have now recovered and restored the proper meaning to the cliché that the law “favors arbitration”. In Simmons v. Benson Hyundai, 438 S.C. at 4, 881 S.E.2d at 647 (citation omitted), the court said:

Our supreme court has recently returned the legal cliché that the law “favors” arbitration to its proper context, reminding that “statements that the law ‘favors’ arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy – federal or state – ‘favoring’ arbitration.”

Now that our courts have restored the proper context to construing arbitration contracts, the cliché’s longstanding power to absolve contractual flaws vanishes.

With the power of the cliché removed, the flaws in O’Neil’s reasoning are more apparent.

In the first instance, O'Neil's reasoning departs from the law by considering a party's subsequent conduct in interpreting the arbitration contract. *See McCord v. Laurens Cty. Health Care Sys.*, 429 S.C. 286, 294, 838 S.E.2d 220, 224 (Ct. App. 2020) (stating that where the contract language is "unambiguous, the parties' intentions must be determined from the contract language itself.").

Instead of confining its analysis to the plain and clear language of the O'Neil arbitration contract, the O'Neil court focuses on the subsequent conduct of a party. "Not only has the hospital consistently argued that it is bound by the arbitration agreement, *it has, by virtue of this suit, shown its commitment to the arbitration process.*" O'Neil, 115 F.3d at 275 (emphasis added). Despite the unambiguous language of the arbitration contract it is construing, the O'Neil court departs from the law by considering the party's subsequent conduct, judging its intent in the contract by the fact it brought a lawsuit after the formation of the contract. Rather than confining its analysis to the language of the contract, the court focuses on subsequent conduct.

In the second instance, the O'Neil court applied bilateral contract law, which by definition requires at least two reciprocal promises, to a unilateral, one promise employment contract. There is no mutual promise in the arbitration contract O'Neil construed. *See O'Neil*, 115 F.3d at 273. Ms. O'Neil formed a valid arbitration contract by accepting a job which required arbitration as a condition for acceptance. "*A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance.* A bilateral contract, on the other hand, exists when both parties exchange mutual promises.'" S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012) (citations omitted) (emphasis added). While O'Neil's arbitration contract was a valid unilateral contract, there were no mutual promises in it. The O'Neil court simply applied the

now disavowed strong presumption in favor of arbitration and declared that mutual promises existed in a unilateral contract. It provides no support for Pacifica's argument.

Neither Pacifica's "whole scope" argument, nor the argument it derived from O'Neil's reasoning, support Pacifica's contention that the circuit court erred when it found "There is no objective manifestation in this arbitration agreement of a mutual intent to be bound." (R. p. 8).

II. THE CIRCUIT COURT CORRECTLY FOUND THAT PACIFICA DID NOT MAKE THE MUTUAL PROMISE REQUIRED TO MAKE THE ARBITRATION AGREEMENT VALID.

A. Where The Consideration Is Provided By Mutual Promises, Each Party Must Promise Something Of Value To The Other.

Pacifica explicitly acknowledges that in this arbitration agreement, the necessary consideration must be provided by mutual promises. "Contrary to the circuit court's conclusion, *the arbitration clause demonstrates a mutual intent to be bound, and contains concurrent, mutual promises sufficient to provide consideration for a valid and enforceable contract.*" (Br. of App. p. 3) (emphasis added).

When the consideration for the contract is provided by mutual promises, both parties must make a promise, and they must promise each other something of value. "In the law of contracts, mutuality, both in definition and application, is largely synonymous with consideration. *It demands that there be obligations assumed by both parties, that there be a promise for a promise.*" Humble Oil & Refining Co. v. DeLoache, 297 F. Supp. 647, 658 (1969) (internal citation omitted) (emphasis added). If the consideration is provided by mutual promises, both parties must be obligated by their respective promises to provide something of value. Moreover, it stands to reason that where mutual promises for something of value constitute consideration, those mutual promises must be objectively manifested in the words of

the arbitration agreement. *See Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 7, 881 S.E.2d 656, 649 (Ct. App. 2022). The question then becomes, what particular thing of value did Pacifica objectively promise to the Resident in exchange for his promise to give up his right to trial and submit his claims to arbitration?

B. The Plain And Ordinary Meaning Of The Language Of The Arbitration Agreement Shows That Pacifica Did Not Make A Promise To Submit Its Claims To Arbitration.

The first sentence of the arbitration agreement is the key sentence because it contains the language that is indispensable to bind a party to a contract based on mutual promises. Pacifica acknowledges that this sentence contains the language operative for forming the arbitration contract.

The first sentence states in full:

11. 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.

(R. p. 39). This first sentence is the only sentence in the agreement in which a party agrees to be bound to arbitrate its claims against the other party, and in which a party promises something of value – agreeing to arbitrate and forgoing the right to trial – to the other party. In this sentence, the Resident is the only party that agreed to arbitrate its claims. Pacifica can point to no sentence in the entire Agreement where it agreed to submit its claims to arbitration and forgo the right to trial.

The plain language of this sentence, chosen by Pacifica as the drafter, says that only “you” agree. “You” is the word chosen by Pacifica to designate one party – the Resident. In construing a contract, “We look first to the language of the contract. If that language is clear and unambiguous, ‘the language alone, understood in its plain, ordinary, and popular sense, determines the contract’s force and effect.’” McCord v. Laurens Cty. Health Care Sys., 429 S.C. at 292, 838 S.E.2d at 223.

The plain and ordinary meaning of the operative language of the arbitration agreement shows that Pacifica did not make a mutual promise to arbitrate its claims. As the circuit court correctly found, “Defendant Pacifica has not provided any consideration to the other party to the contract.” (R. p. 9). Pacifica describes the ancillary logistical terms which follow the first sentence as necessary to interpreting the “whole scope” of the arbitration agreement. In its Brief, Pacifica itself describes these terms as “parameters for arbitration”. (Br. of App. p. 2). These terms are simply ancillary terms in which neither party is promising to arbitrate its claims or forgo its right to trial. Any significance due to the sentences following the first sentence is wholly dependent on a valid arbitration agreement being formed in the first sentence.

C. Pacifica’s Arguments Reveal That It Recognizes That The Agreement It Drafted Does Not Contain The Mutual Promises Necessary For Consideration.

In order for Pacifica’s argument to succeed, it must show that it made a mutual promise in the first sentence of the arbitration agreement.

Since the key to forming a valid arbitration agreement is for both parties to “agree” to arbitrate, determining which parties “agree” to arbitrate is crucial to deciding whether the arbitration agreement is valid.

In the actual arbitration agreement at issue here, only one party, the Resident (designated by “you”), agrees to arbitrate its claims. The fact that only “you” has agreed to arbitrate is demonstrated in the first portion of 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.... (R. p. 39) (boldface added).

This quotation from the actual arbitration agreement shows that when Pacifica drafted this agreement, only one party, “you”, agreed to arbitrate. The words “you agree” are the most crucial words in the entire arbitration agreement.

Yet in its Brief, when Pacifica refers to this portion of the first sentence, Pacifica omits the words “...you agree that...”. Here is that same portion of the first sentence as Pacifica refers to it on page two of its Brief:

“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....’ (*Id.*)” (Br. Of App. p. 2) (boldface added).

Pacifica omits the words from the actual arbitration agreement that immediately precede its quotation. Instead of those words, Pacifica replaces them with words indicating a mutual promise, “...the parties agreed to binding arbitration of ...”.

The words Pacifica omitted show that only one party made a promise. Pacifica omitted those words (which it put in the actual agreement) and replaced them with different words which do indicate that Pacifica made a mutual promise.

The words that Pacifica inserted before its quotation from the first sentence have a different meaning from the words it put in the original arbitration agreement. In order for

Pacifica to argue for the meaning it needs to make the arbitration agreement valid, it has to make its argument with different words that have a different meaning from the words it put in the actual document.

Pacifica employs this same type of argument on page seven of its Brief: “The arbitration clause in this case contained **mutual promises to submit to binding arbitration** ‘any and all claims and disputes arising from or related to’ the Agreement. (R. p. 39).” (Br. of App. p. 7). (boldface added).

The words Pacifica inserted before its quotation from the first sentence seem to show that mutual promises were made in the first sentence. But the words Pacifica inserted are not in the actual first sentence. The words from the actual first sentence, which Pacifica has omitted, show that only one party made a promise. Pacifica replaces the omitted words with words which are needed to form mutual promises.

Pacifica’s argument requires it to omit the words it used to make the original agreement, and instead insert words with the meaning it needs to make the agreement valid.

But the arbitration agreement must be construed according to the objective manifestation of the meaning at the time the contract was made. Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E2d 470, 472 (Ct. App. 1984) (“Interpretation of the contract is governed by the objective manifestation of the parties’ assent at the time the contract was made.”).

Pacifica’s own arguments show that it recognizes that the actual arbitration agreement did not contain mutual promises.

III. IN BOLDFACED TYPE, PACIFICA OBJECTIVELY MANIFESTS THAT ONLY ONE PARTY AGREES TO ARBITRATE AND GIVE UP ITS RIGHT TO TRIAL.

The entire purpose of an arbitration agreement is for a party to relinquish its right to trial in favor of resolving disputes through arbitration. A valid arbitration agreement, based on mutual promises to arbitrate, requires “both parties” to give up their right to trial and accept the use of arbitration. As the drafter of the arbitration agreement, Pacifica had a specific intention in mind when it chose the wording for the agreement. The words Pacifica chose for creating the agreement objectively manifest Pacifica’s intention for creating the agreement. To ensure that it objectively manifested its specific intention for creating the arbitration agreement, Pacifica put the purpose for creating it in boldfaced type: **“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.”** (R. p. 39). Pacifica intended specifically what it wrote in boldfaced type. When Pacifica wrote this arbitration agreement, it intended for just one party to give up its right to trial, and Pacifica named that party in boldfaced type: **“You”**. The circuit court correctly held that this arbitration agreement does not objectively manifest Pacifica’s intent to be bound, nor did Pacifica provide consideration for the Resident’s promise to arbitrate.

CONCLUSION

The circuit court found that Pacifica’s arbitration agreement failed to form a valid arbitration contract. The Court should affirm the circuit court.

Respectfully submitted,

PATRICK E. KNIE, P.A.

/s/ Patrick E. Knie

Patrick E. Knie

S.C. Bar No. 3564

P.O. Box 5159

250 Magnolia Street

Spartanburg, S.C. 29304
Telephone: (864) 582-5118
Telefax: (864) 585-1615
pat@knieshealy.com

/s/ Mitch Slade
Mitch Slade
Mitch Slade Law Office, P.A.
S.C. Bar No. 5146
P.O. Box 1007
Spartanburg, S.C. 29304
Telephone: (864) 582-4212
mitch@mitchsladelaw.com

ATTORNEYS FOR RESPONDENT

June 28, 2023

RECEIVED

Jun 28 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454
Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly
situated, ... Respondent,

v.

Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga LP; Pacifica Skylyn, LLC, d/b/a
Pacifica Senior Living Skylyn, Etros, LLC; and Matthew Arledge, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the *Final Brief of Respondent* complies with Rule 211(b), SCACR. Pursuant to Rule 211(b)(2), SCACR, Respondent corrected four typographical errors.

On page four of Respondent's Final Brief, in the first sentence of the second paragraph, the word "Initial", which had preceded the words "Brief of Appellants", has been deleted.

On the Table of Contents page, a section heading and a subsection heading have been corrected to accurately represent those headings in the body of the Brief.

Under Argument I.C., the phrase, "The Law Has Rejected O'Neil's Policy Based Reasoning" has been deleted and replaced with the phrase actually in the body of the Brief at that point: "Subsequent Decisions Have Rejected O'Neil's Policy Based Reasoning."

The section heading for Section II on the Table of Contents page read, “Pacifica Concedes That Mutual Promises Are Required To Provide The Necessary Consideration For The Arbitration Contract. But The Plain Ordinary Meaning Of Its Arbitration Agreement Proves That Pacifica Did Not Promise To Arbitrate Its Claims.” That section heading has been corrected to read as it does in the body of the Brief.

The references to Rules 12(b)(1) and 12(b)(6), SCRCp, in Judge Hayes’ Order were inadvertently left out of the Table of Authorities in Respondent’s Initial Brief. That oversight has been corrected in the Table of Authorities for Respondent’s Final Brief.

June 28, 2023

/s/ Mitch Slade
Mitch Slade
Mitch Slade Law Office, P.A.
S.C. Bar No. 5146
P.O. Box 1007
Spartanburg, S.C. 29304
Telephone: (864) 582-4212
mitch@mitchsladelaw.com

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Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

Jonathan G. Roquemoire (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT.....	1

TABLE OF AUTHORITIES

Cases

<i>Barnacle Broad., Inc. v. Baker Broad., Inc.</i> , 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000).....	2
<i>Kindred Nursing Centers Ltd. Partnership v. Clark</i> , 137 S.Ct. 1421 (2017).....	1
<i>O’Neil v. Hilton Head Hosp.</i> , 115 F.3d 272 (4th Cir. 1997).....	3
<i>Southern Atl. Fin. Servs., Inc. v. Middleton</i> , 349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002)	1
<i>Thomas–McCain, Inc. v. Siter</i> , 268 S.C. 193, 232 S.E.2d 728 (1977)	1
<i>York v. Dodgeland of Columbia, Inc.</i> , 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013).....	2

ARGUMENT

I. Plaintiff's argument that a single word controls the meaning and intent of the Agreement is without merit.

Plaintiff's contention that this Court should limit its review of the subject arbitration clause to one word—"You"—is in direct conflict with two of the most fundamental principles of contract law. South Carolina law is clear: when construing a contract, a court's primary objective is to ascertain and give effect to the intent of the parties to the contract, and the court must look to the language of the entire agreement in doing so. *See e.g. Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80–81, 562 S.E.2d 482, 484–85 (Ct. App. 2002); *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977). These principles apply with equal force when analyzing whether parties have demonstrated a mutual intent to be bound by the terms of the contract, or whether a contract is supported by sufficient consideration. The circuit court did not consider the language of the entire agreement, nor did it give effect to the demonstrated intent of the parties. This Court should correct this fundamental error in the circuit court's analysis, and reverse the Order Denying Pacifica's Motion to Compel Arbitration.

Pacifica and Plaintiff agree that the parties to a contract must manifest a mutual intent to be bound by the terms of the contract. Plaintiff, however, contends this mutual intent must be demonstrated in the first sentence of the subject arbitration clause. The circuit court erred in adopting Plaintiff's novel approach to contract interpretation, and effectively placed the arbitration agreement 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"). Plaintiff assigns great weight to Pacifica's counsel referring to the first sentence of the arbitration clause as containing the "operative language." (R. 91). However, by making this observation, Pacifica's counsel did not

ask the circuit court to ignore the remainder of the arbitration clause, nor could such a statement relieve the circuit court of its obligation to consider the “whole scope and effect of the language used” in the arbitration clause. (R. 93-94). See *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000).

Plaintiff cites *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013), for the proposition that “ancillary logistical terms” or “parameters” cannot form a mutual intent to be bound if Pacifica did not objectively manifest an intent to arbitrate claims in the first sentence of the arbitration clause. In *York*, this Court held that ancillary logistical terms are not required for a valid arbitration clause. *Id.* at 82-83, 749 S.E.2d at 146-47. This Court did not hold that ancillary logistical terms found within the four corners of an arbitration clause cannot be considered as evidence of the parties’ mutual intent to be bound. Here, the ancillary logistical terms, or parameters for arbitration, provide clear evidence of the parties’ objective intent at the time the Agreement was executed. (Pacifica’s Initial Br. at p. 5-6).

Additionally, this Court quoted the operative language in the arbitration clause at issue in *York* as follows:

PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING, OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT....

Id. at 81-82, 749 S.E.2d at 146. This Court found the above language demonstrated “the parties’ unambiguous, mutual intent to arbitrate.” *Id.* The arbitration language in *York* is drafted similarly to the language at issue in the present case insofar as the arbitration provision references only the “purchaser” in the operative language. Thus, even when considering only the first sentence of the subject arbitration clause, Plaintiff and Pacifica demonstrated a mutual intent to be bound.

Finally, Plaintiff's criticism of *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997), is without merit.¹ The utility of *O'Neil* in the present case is that the Fourth Circuit was presented with a nearly identical argument to the one Plaintiff makes here. While it is true that *O'Neil* involved an employment contract, its reasoning is instructive in this case:

O'Neil first argues the contract to arbitrate was not supported by adequate consideration because the agreement was not binding on the hospital. O'Neil's argument fails because its premise is mistaken.

Here the agreement to be bound by arbitration 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. If an employer asks an employee to submit to binding arbitration, it cannot then turn around and slip out of the arbitration process itself.

O'Neil, 115 F.3d at 273. Here, Plaintiff's premise is similarly mistaken. Pacifica proffered the contract to arbitrate, clearly implying that Pacifica would be bound by the arbitration process.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Pacifica's initial brief, Pacifica requests this Court reverse the circuit court and stay this action in favor of arbitration of Plaintiff's claims, or remand the case to the circuit court with instructions to stay the case and compel the Plaintiff's claims to arbitration.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

¹ Pacifica notes that this Court recently cited *O'Neil* with approval in an unpublished opinion addressing an argument similar to the one Plaintiff makes in this case. See *Hackworth v. Bayview Manor, LLC*, Op. No. 2023-UP-096 (S.C. Ct. App. Filed March 15, 2023). Pacifica recognizes this case does not have precedential value pursuant to Rule 268(d)(2), SCACR, and has therefore not included it in the table of authorities.

Respectfully submitted,

HEDRICK GARDNER KINCHELOE & GAROFALO
LLP

s/ Paul E. Allen, Jr.

Jonathan G. Roquemoire (SC Bar No. 68274)

Joshua D. Shaw (SC Bar No. 77835)

Paul E. Allen, Jr. (SC Bar No.: 104062)

1230 Main Street, Suite 325

Columbia, SC 29201

Attorneys for Appellants

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Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Final Reply Brief of Appellants in the
above-captioned case has been served on the following parties via e-mail, on July 11, 2023.

Patrick E. Knie
Knie & Shealy Attorneys at Law
250 Magnolia Street
Spartanburg, SC 29306
pknie@knielaw.com

Mitch Slade
Mitch Slade Law Office, P.A.
PO Box 1007
Spartanburg, SC 29304
mitch@mitchsladelaw.com
Attorneys for Plaintiffs/Respondents

s/Paul E. Allen Jr.
Paul E. Allen, Jr.

July 11, 2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454

Ed Medford, in his individual capacity, and on behalf of those similarly
situated, ... Respondents,

v.

Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a
Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

CERTIFICATE OF COUNSEL

It is hereby certified that the foregoing Final Reply Brief of Appellants in the
above-captioned case complies with the requirements of Rule 211(b), SCACR.

s/ Paul E. Allen, Jr.

Jonathan G. Roquemore (SC Bar No. 68274)

Joshua D. Shaw (SC Bar No. 77835)

Paul E. Allen, Jr. (SC Bar No.: 104062)

1230 Main Street, Suite 325

Columbia, SC 29201

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454
Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly
situated, ... Respondents,

v.

Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga LP; Pacifica Skylyn, LLC, d/b/a Pacifica
Senior Living Skylyn; Etros, LLC; and Matthew Arledge, ... Appellants.

RECORD ON APPEAL

Jonathan G. Roquemore
Joshua D. Shaw
Paul E. Allen, Jr.
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Appellants

Patrick E. Knie
Knie & Shealy Attorneys at Law
250 Magnolia Street
Spartanburg, SC 29306

Mitch Slade
Mitch Slade Law Office, P.A.
PO Box 1007
Spartanburg, SC

Attorneys for Respondents

INDEX

J. Hayes Order Denying Defendants' Motion to Compel Arbitration	1
Complaint.	12
Defendants' Motion to Dismiss or Compel Arbitration	24
Defendants' Memorandum of Law in Support of Motion to Compel Arbitration	42
Plaintiff's Memorandum of Law in Opposition to Motion to Compel Arbitration.	67
Transcript of Hearing on Motion to Compel Arbitration.	85
Certificate of Counsel.	110

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,)

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

Plaintiff,)

v.)

**ORDER DENYING DEFENDANTS' MOTION
TO DISMISS PURSUANT TO RULES 12(B)(1) AND
12(B)(6), SCRPC, 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), SCRPC, 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
SEVENTH CIRCUIT

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

Plaintiff,)

v.)

CLASS ACTION COMPLAINT
(Jury Trial Demanded)

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.)

Plaintiff, in his individual capacity, and on behalf of those similarly situated, alleges the following:

STATEMENT OF THE PARTIES

1. He is a resident of Pacifica Skylyn LLC, d/b/a Pacifica Senior Living Skylyn, in Spartanburg, South Carolina, and has been for over 5 years.

2. Defendant Deepak Israni is the manager of Defendant Pacifica Skylyn LLC (see *Attachment 1*), and is the general manager of R Cucamonga LLC (see *Attachment 2*), which is the general partner of PAC R Cucamonga LP, which is, upon information and belief, the general partner of Pacifica Skylyn LLC (see *Attachment 1*).

3. Defendant R Cucamonga LLC, is a California limited liability company and is the general partner of Defendant PAC R Cucamonga LP, and is doing business in Spartanburg, South Carolina as the general partner of Defendant PAC R Cucamonga LP.

4. Defendant PAC R Cucamonga LP, is a California limited partnership and is, upon information and belief, the general partner of Defendant Pacifica Skylyn LLC, and is doing business in Spartanburg, South Carolina as the general partner of Pacifica Skylyn LLC.

5. Defendant Pacifica Skylyn LLC, is a South Carolina limited liability company, doing business at 1705 Skylyn Drive in Spartanburg, South Carolina, as Pacifica Senior Living Skylyn.

6. Defendant Matthew Arledge is the director of Pacifica Senior Living Skylyn and was the director during much of the time relevant to this Complaint.

7. Defendant ETROS, LLC, is a Delaware limited liability company, doing business at Pacifica Skylyn LLC's facility at 1705 Skylyn Drive, Spartanburg, South Carolina, as a management consultant for Defendants Deepak Israni, R Cucamonga LLC, PAC R Cucamonga LP, and Pacifica Skylyn LLC.

NATURE OF THE ACTION

8. This case involves the Defendants' chronic ongoing failure to maintain a habitable place to live for the residents in its Independent Living and Assisted Living programs since December 2019.

9. The Defendants' gross negligence in properly maintaining the facility has resulted in chronic bedbug infestations, rodent infestations, continual and repeated failures to provide heat, ongoing elevator breakdowns, and inadequate and poorly prepared food in the Independent Living and Assisted Living programs.

FACTUAL ALLEGATIONS

10. The Defendants have undertaken a contractual obligation with each resident of their Independent and Assisted Living programs to provide each one with a habitable place to live.

11. Notwithstanding their obligation to provide each resident with a habitable place to live, Defendants have continually failed to take the measures necessary to end the bedbug and rodent infestations, and to provide heat and to maintain elevators in regular working order and to provide healthy, nutritious, and appetizing meals.

FOR A FIRST CAUSE OF ACTION **Negligent Supervision** **(as to Defendant Deepak Israni only)**

12. All of the preceding paragraphs are re-alleged here and below.

13. Defendant Deepak Israni (Defendant Israni) is the manager of Defendant Pacifica Skylyn LLC, (Defendant Pacifica) and the general manager of Defendant R Cucamonga LLC.

14. Defendant Pacifica, doing business as Pacifica Senior Living Skylyn, has undertaken a duty to provide its residents in its Independent Living and Assisted Living programs a habitable place to live.

15. Since December 2019, the living conditions in Defendant Pacifica's Independent Living and Assisted Living programs have deteriorated to the point where rodent and bedbug infestations have become routine; elevators frequently don't work; many apartments have no heat; and the food is not properly prepared or properly served.

16. Upon information and belief, Defendant Israni has actual and constructive knowledge of the longstanding failure of Defendant Pacifica, Defendant Matthew Arledge

(Defendant Arledge), and Defendant ETROS LLC (Defendant ETROS), to provide the residents of Defendant Pacifica's Independent Living and Assisted Living programs a habitable place to live.

17. Upon information and belief, Defendant Israni has actual and constructive knowledge of the continual rodent and bedbug infestations, the continually malfunctioning elevators, and the chronic failure to provide heat, and the poor quality of the food, all of which constitute the ongoing failures of Defendants Pacifica, Arledge, and ETROS to provide the residents of Defendant Pacifica's Independent and Assisted Living programs a habitable place to live.

18. Defendant Israni has failed to supervise the employees of Defendant Pacifica, including Defendant Arledge, and has failed to supervise Defendant ETROS so that Defendant Pacifica, Defendant Arledge, and Defendant ETROS are not in chronic breach of their duty to provide the residents of Defendant Pacifica's Independent and Assisted Living programs a habitable place to live.

19. Plaintiff and the members of the class have suffered physical, mental, emotional and economic damages as a proximate result of Defendant Israni's grossly negligent failure to supervise Defendant Pacifica's employees, including Defendant Arledge, and Defendant ETROS.

20. Defendant Israni's continual failure to supervise Defendants Pacifica, Arledge, and ETROS so that they were not in chronic breach of their duty to the residents of Defendant Pacifica's Independent and Assisted Living programs is an aggravated and unjustified interference with the contractual rights of the Plaintiff and members of the class and subjects Defendant Israni to an assessment of punitive damages.

FOR A SECOND CAUSE OF ACTION
Breach of Contract Accompanied by a Fraudulent Act

21. All of the preceding paragraphs are re-alleged here and below.

22. The Defendants (Defendant Israni, Defendant R Cucamonga LLC, Defendant PAC R Cucamonga LP, Defendant Pacifica, Defendant Arledge, and Defendant ETROS) have undertaken a contractual duty to provide the residents of Defendant Pacifica's Independent and Assisted Living programs a habitable place to live.

23. The Defendants have breached their contractual duty to provide the residents of Defendant Pacifica's Independent and Assisted Living programs with a habitable place to live by failing to effectively treat rodent and bedbug infestations; by failing to keep elevators in good working order; in failing to provide heat; and in failing to provide those residents with properly prepared and properly served food.

24. The Defendants know of the contractual breaches identified above, and know of the physical, mental, emotional and economic damage to the Independent and Assisted Living residents caused by their longstanding and continual breaches.

25. Notwithstanding their knowledge of the physical, mental, emotional, and economic damage to the residents of Defendant Pacifica's Independent and Assisted Living programs caused by their unrelenting refusal to remedy the breaches, the Defendants have refused to invest or expend the resources necessary to remedy these longstanding and continual breaches.

26. The Defendants' conduct constitutes a conscious and deliberate course of unfair dealing and dishonesty in fact.

27. As a direct and proximate result of the Defendants' breaches of contract accompanied by the fraudulent acts of unfair dealing and dishonesty in fact, the Plaintiff and members of the class have suffered physical, mental, emotional, and economic damages.

28. The Defendants' gross negligence and conscious indifference to the physical, mental, emotional, and economic damages caused by their conduct subjects them to an assessment of punitive damages.

FOR A THIRD CAUSE OF ACTION
Breach of Contract

29. All of the preceding paragraphs are re-alleged here and below.

30. In exchange for the payment of set monthly fees paid by Plaintiff and each member of the class, the Defendants agreed to provide Pacifica's residents with a habitable place to live.

31. The Defendants breached their contracts with Plaintiff and members of the class by, among other things, failing to provide aggressive and continuous treatment to eliminate and prevent rodent and bedbug infestations, and failing to keep elevators in good working order, and in failing to provide heat, and in failing to provide properly prepared and properly served food.

32. Plaintiff and the class have suffered physical, mental, emotional, and economic damages because of the breaches listed in the preceding paragraphs.

33. Plaintiff and the class seek judgment against the Defendants for the fees charged since December 2019 and for prejudgment and post-judgment interest.

FOR A FOURTH CAUSE OF ACTION
Breach of Implied Contract

34. All of the preceding paragraphs are re-alleged here and below.

35. To the extent there is no express contract pursuant to which Defendants agreed to provide effective and continuous treatment to eliminate and prevent rodent infestations, bedbug infestations, and to provide regular and functioning elevator service, and to provide heat, and to provide properly prepared and served food, the Defendants impliedly contracted to do so.

36. Defendants breached their implied contracts with Plaintiff and the class members by, among other things, failing to provide effective and continuous treatment to eliminate and prevent rodent infestations, bedbug infestations, and to provide regular and functioning elevator service and to provide heat and to provide properly prepared and served food.

37. Plaintiff and the class seek judgment against the Defendants for the fees paid by Plaintiff and the class since December 2019 and seek prejudgment and post-judgment interest.

FOR A FIFTH CAUSE OF ACTION
Unjust Enrichment

38. All of the preceding paragraphs are re-alleged here and below.

39. The Plaintiff and the class conferred a non-gratuitous benefit on the Defendants in the form of fees paid.

40. The Defendants realized the value of the benefits that Plaintiff and the class conferred on them.

41. It would be unjust for the Defendants to retain the benefits that Plaintiff and the class conferred on them.

42. Retention by the Defendants of the wrongfully obtained fees would violate the fundamental principles of justice, equity and good conscience.

43. Plaintiff and the class seek judgment against the Defendants for the fair value of the benefits Plaintiff and the class conferred on Defendants, namely the fees paid to Defendants since December 2019.

FOR A SIXTH CAUSE OF ACTION
Constructive Trust

44. All of the preceding paragraphs are re-alleged here and below.

45. The circumstances in which Defendants acquired from Plaintiff and the class the fees which are at issue make it inequitable that they should be retained by Defendants.

46. A constructive trust arises from Defendants' violations of their legal obligations to Plaintiff and the class arising under South Carolina law, the contracts at issue in this case, and other authorities.

47. Plaintiff seeks an order from the Court declaring the monthly payments and fees collected from Plaintiff and the class by the Defendants to be a constructive trust for the benefit of Plaintiff and the class.

48. The establishment of the constructive trust shall be for the payment of the damages sought by the Plaintiff and the class in this case.

FOR A SEVENTH CAUSE OF ACTION
Negligence

49. All of the preceding paragraphs are re-alleged here and below.

50. The damages suffered by Plaintiff and the class as a direct and proximate result of the willful, wanton, negligent, grossly negligent, reckless, and careless conduct of the Defendants are as follows:

- a.) in failing to maintain effective and continuous treatment to eliminate rodents and bedbugs and prevent their return; in failing to keep elevators in good

working order; in failing to provide heat; and in failing to provide properly prepared and properly served food;

- b.) in failing to routinely inspect its facility for rodents, bedbugs, malfunctioning elevators, apartments without heat, and failing to routinely inspect for properly prepared and properly served food;
- c.) in failing to have proper policies and procedures in effect to eliminate and prevent rodent and bedbug infestations, to provide regular and functioning elevator service, to provide heat for residents, and to provide properly prepared and properly served food;
- d.) in failing to follow their own policies;
- e.) in failing to provide alternate housing for Plaintiff and the class.

51. As a direct result of these instances of Defendants' conduct, Plaintiff and the class have been damaged financially and have suffered physically, mentally, and emotionally.

52. Defendants' willful, wanton, negligent, grossly negligent, reckless, careless, and conscious indifference subjects them to an assessment of punitive damages.

CLASS ACTION ALLEGATIONS

53. Pursuant to Rule 23, SCRCP, Plaintiff brings this action on behalf of himself and the Plaintiff's class, initially defined as:

All residents of Pacifica's facility at 1705 Skylyn Drive, Spartanburg, South Carolina, who were residents of Defendant Pacifica's Independent Living or Assisted Living programs during:

- a.) the chronic bedbug infestation; or
- b.) the chronic rodent infestation; or
- c.) the weeks and months in which the elevators were not working; or
- d.) weeks and months in which Defendants did not provide heat for their apartments; or

- e.) the months in which residents were served poorly prepared food, or poorly served food.

Excluded from the Plaintiff's class are:

- a.) Defendants and any entities in which Defendants have a controlling interest;
- b.) any entities in which Defendant Pacifica or its officers, directors, or employees are employed, and any of Defendant Pacifica's legal representatives, heirs, successors, or assigns;
- c.) to the extent the class certification order permits exclusion, all class persons who timely submit proper requests for exclusion from Plaintiff's class; and
- d.) any attorneys representing Plaintiff or the class.

54. Plaintiff reserves the right to modify or amend the class definition if necessary and further investigation reveals that the class should be expanded, divided into subclasses, or modified in any way.

55. Upon information and belief, the Plaintiff's class consists of a few hundred residents, making individual joinder impracticable in satisfaction of Rule 23(a)(1), SCRCF. The disposition of the claims of the class members in a single class action will provide substantial benefits to all parties and to the Court.

56. There are questions of law and fact common to Plaintiff and the class, thereby satisfying Rule 23(a)(2), SCRCF. These questions include, but are not limited to, the following:

- a.) whether the Defendants failed to provide a habitable place to live for their residents at their facility at 1705 Skylyn Drive, Spartanburg, South Carolina, which was free of chronic rodent and bedbug infestations, and provided with functioning elevators and heat, and which provided properly prepared and served meals;
- b.) whether Plaintiff and the class will suffer, or have suffered, financial, physical, mental, and emotional damages.

57. Resolution of these common questions in a single action will eliminate the risk of inconsistent and varying adjudications and will allow class members to present their claims efficiently and share the costs of litigation, experts, and discovery.

58. Plaintiff's claims are typical of the claims of the class members, thereby satisfying Rule 23(a)(3), SCRCP. Plaintiff's claims arise from the same nucleus of operative facts and are intended to correct the same improper conduct that has been imposed identically upon Plaintiff and class members.

59. Plaintiff will fairly and adequately represent and protect the interests of the class as required by Rule 23(a)(4), SCRCP. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of Plaintiff's class, and they will have the financial and intellectual wherewithal to do so. Neither Plaintiff nor his counsel have any interests adverse to those of Plaintiff's class.

60. Plaintiff and the class members have each suffered damages that exceed \$100.00 per person as required by Rule 23(a)(5), SCRCP.

JURY TRIAL DEMAND AND PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, demands a jury trial and prays that the Court enter judgment against the Defendants and award the following relief:

- A. Certification of the proposed class under Rule 23, SCRCP;
- B. Appointment of Plaintiff as class representative;
- C. Appointment of the undersigned attorneys as class counsel;

- D. Granting Plaintiff and each class member a judgment for all damages allowed by law and equity, including punitive damages;
- E. Granting the undersigned attorneys reasonable attorneys' fees and costs;
- F. Ordering the establishment of a "common fund" out of which the aforementioned damages and attorneys' fees and associated costs shall be paid; and
- G. Such other and further judicial determinations and relief as may be appropriate in this proceeding.

February 8, 2022
Spartanburg, South Carolina

PATRICK E. KNIE, P.A.

/s/ Patrick E. Knie
Patrick E. Knie
SC Bar No. 3564
PO Box 5159
250 Magnolia St.
Spartanburg SC 29304
Tel. No.: 864-582-5118
Telefax No.: 864-585-1615
pknie@knielaw.com

/s/ Mitch Slade
Mitch Slade
Mitch Slade Law Office, P.A.
SC Bar No. 5146
PO Box 1007
Spartanburg SC 29304
Tel: 864-582-4212
mitch@mitchsladelaw.com

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Civil Action No. 2022-CP-42-00454

ED MEDFORD, IN HIS INDIVIDUAL
CAPACITY, AND ON BEHALF OF
THOSE SIMILARLY SITUATED,

Plaintiff,

v.

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.

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

As an initial matter, Defendant Deepak Israni has not been served with the Summons and Complaint in this matter. Therefore, in making this motion, Defendant Israni is not waiving any rights he has as to improper service/non-service of the Summons and Complaint.

Defendants Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a/ Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, by and through counsel, hereby move, pursuant to Rules 12(b)(1) and 12(b)(6), SCRCPP, 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 Residence and Services 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.

Hedrick Gardner Kincheloe & Garofalo, LLP

By: s/ Jonathan G. Roquemore
JONATHAN G. ROQUEMORE
S.C State Bar No.: 68274
JOSHUA D. SHAW
S.C. State Bar No.: 77835
1230 Main Street, Suite 325
Columbia, SC 29201
803-727-1200
jroquemore@hedrickgardner.com
jshaw@hedrickgardner.com

April 11, 2022

Attorneys for Defendants

PACIFICA SENIOR LIVING
RESIDENCE AND SERVICES AGREEMENT
Independent Living
SOUTH CAROLINA



TABLE OF CONTENTS

	<u>Page</u>
I. SERVICES	1
A. BASIC SERVICES AND AMENITIES	1
B. OPTIONAL SERVICES	4
C. EXCLUDED SERVICES	4
II. TERMS AND OBLIGATIONS	4
A. TERM OF AGREEMENT	4
B. FEES	4
C. TRANSFERS FROM APARTMENT	6
D. TERMINATION	7
E. USE AND MAINTENANCE OF PREMISES	9
F. YOUR PROPERTY RIGHTS AND OBLIGATIONS	9
G. OTHER PERSONAL OBLIGATIONS	10
H. MISCELLANEOUS	11

APPENDIX A FEES FOR OPTIONAL SERVICES

Pacifica Senior Living Skylyn
RESIDENCE AND SERVICES AGREEMENT

This Residence and Services Agreement ("Agreement") is made between Pacifica Senior Living of Skylyn ("we," "us," or "our"), on the one hand, and **Roy Edwin Medford** (you" or "Resident") on the other. (If more than one person is signing this Agreement, the terms "you" or "Resident" refer to each of you individually and to both of you together.)

Pacifica Companies owns Pacifica Senior Living of Skylyn (the "Community"), a residential community for seniors, located at 1705 Skylyn Drive, Spartanburg SC 29307. The Community is operated on a non-discriminatory basis and affords equal treatment and access to services to eligible persons regardless of race, color, religion, creed, gender, national origin, ancestry, or sexual orientation.

You have applied to receive accommodations and services at the Community and we have accepted your application. The purpose of this Agreement is to provide a statement of the accommodations and 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.

THIS AGREEMENT IS SUBJECT TO ARBITRATION. See Section II.H.11 below.

I. SERVICES

A. BASIC SERVICES AND AMENITIES

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

1. LIVING ACCOMMODATIONS

a. **Residence.** You have chosen to live in Apartment #205 ("your Apartment") at the Community. You may live in your Apartment on a month-to-month basis, subject to the terms of this Agreement and to the general rules and regulations of the Community contained in the Resident Handbook, as it now exists and as it may later be amended. The Resident Handbook is incorporated by reference in this Agreement and made an express part of it.

b. **Utilities.** Your Apartment will be furnished with water, electricity, garbage removal, heat and air conditioning. You will be responsible for telephone and cable television services, which will be billed directly to you by the responsible company or as set forth in **Appendix A**.

c. **Furnishings.** Your Apartment comes equipped with kitchen appliances and floor and window coverings. You may furnish your Apartment with your own furniture. You are also free to use your appliances and special equipment, provided that the Community's safety standards are met. We reserve the right to limit the number and type of furnishings and appliances in your Apartment if they present a safety hazard.

d. **Maintenance and Repairs.** You have examined your Apartment, including its furnishings, if any, appliances and fixtures, and agree that your Apartment is clean and in operating condition. You agree to keep your Apartment and all its appliances, fixtures and accessories in a clean, sanitary and safe condition. We will perform all necessary maintenance and repairs of your Apartment at our expense. However, you will be responsible for reimbursing us for any repairs not caused by normal wear and tear. You will be responsible for repairs to your personal property.

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

f. **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, and recreational rooms. We may change or reconfigure common spaces in the future in our discretion.

2. LAUNDRY

Laundry facilities are available for resident use. You shall be responsible for your personal dry cleaning.

3. HOUSEKEEPING

We will provide weekly housekeeping services in your Apartment as described in the Resident Handbook. Additional housekeeping services as needed or requested are available for an additional charge (see Appendix A).

4. PERSONAL SUPPLIES

You shall provide your own supplies for personal care and hygiene.

5. MEALS

a. **Dining Room.** We will make available to you two (2) meals each day. These meals are included in your Monthly Fee. If you do not receive meals because of a continuous absence from your Apartment of fourteen (14) or more days due to a medical condition or other circumstance, you will receive a per day credit beginning on the fifteenth (15th) day as set forth in **Appendix A**, which will be credited to your account and reflected in your monthly statement. You will also be charged a fee for any special food services and products that you request and that we agree to provide.

b. **Room Service.** We will provide room service to your Apartment as set forth in **Appendix A**.

c. **Guests.** Guests are welcome to any meal as set forth in the Resident Handbook. There will be a fee for guest meals (see **Appendix A**).

6. PLANNED ACTIVITIES

We offer a program of social, intellectual, physical, spiritual and vocational wellness 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 offered by us that require additional supplies or services provided by an outside vendor, or that involve outings away from the Community (see **Appendix A**).

7. TRANSPORTATION

We will make available to residents scheduled unescorted transportation for shopping, medical and dental appointments, religious services, other errands, and planned social events.

8. EMERGENCY RESPONSE AND FIRE PROTECTION

Your Apartment will be equipped with a smoke detector, carbon monoxide detector, and sprinkler system.

9. GUESTS

You are welcome to have guests visit you at the Community. Before any guest stays in your Apartment overnight you must obtain permission from the Executive Director or his or her designee. All guests must abide by any applicable rules contained in the Resident Handbook, including any limitations on the length of stay or frequency of visits. You will be responsible for assuring that your guests abide by these rules and are not disruptive.

10. PARKING

If you own a car, parking may be made available to you in accordance with the provisions of the Resident Handbook.

B. OPTIONAL SERVICES

We will make several optional services available to you at an extra charge, to be billed on a monthly basis. The current fees for optional services at the Community are set forth in **Appendix A**, and are subject to change as provided in Section II.B.3 below. Optional services offered by us may include:

1. Room service;
2. Guest meals;
3. Repairs and maintenance of personal items;
4. Beauty/barber shop services (if such services are provided by an outside vendor, the vendor will bill you directly); and
5. Any other services that we elect to offer in the future.

C. EXCLUDED SERVICES

We shall not be responsible for furnishing or paying for any of your assisted living (personal care) nursing, or health care needs, including but not limited to acute care; assistance with the tasks of daily living; the services of private duty aides, physicians, and nurses; medications; and other items and services that may require a license to provide.

II. TERMS AND OBLIGATIONS

A. TERM OF AGREEMENT

The term of this Agreement shall be month-to-month, unless and until it is terminated as set forth in this Agreement.

B. FEES

1. COMMUNITY FEE

You shall pay a non-refundable community fee of One thousand dollars (\$1000.00) prior to move-in to the Community. This fee is used to support the costs of various programs and services at the Community, such as wellness, maintenance and upkeep. The fee is also used to help us attract and retain qualified and well-trained staff. The community fee is not an application fee, screening or processing fee, security deposit, or rental payment.

2. MONTHLY FEE

Your initial Monthly Fee for occupancy of your Apartment under this Agreement is \$1,795.00 (A special rate for November, 2018 of \$199). The initial fee for occupancy of your apartment is \$1,995.00. Prior to occupancy of your Apartment, you will be responsible to pay your entire initial Monthly Fee. If you begin occupying your Apartment on a day after the first day of the calendar month, your initial Monthly Fee will be prorated accordingly and appear on your first monthly statement. 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 tenth (10th) day of the month. Must be in by 1:00 pm to get credited. It shall be payable to Pacifica Senior Living, Skylyn by check or money order. If two residents occupy your Apartment and it reverts to single occupancy, the remaining resident shall pay the then current Monthly Fee for single occupancy. Your right to occupy and use your 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.

3. ADJUSTMENTS TO FEES OR SERVICES

- a. **Fees.** Except as stated below, we may change your Monthly Fee or any charges for optional services upon thirty (30) days' advance written notice.
- b. **Services.** We may modify the scope and/or frequency of services provided to you under this Agreement upon thirty (30) days' prior written notice to you.

4. 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. If you fail to pay your Monthly Fee or other charges within five (5) days of the due date, we may charge you a late payment of One hundred fifty dollars (\$150.00) on your then-current Monthly Fee for each delinquent payment. Returned checks shall be subject to a fifty dollar (\$50.00) penalty. If you fail to pay your Monthly Fee or other fees by the tenth (10th) day of the calendar month, we may terminate this Agreement and take legal action to regain possession of your Apartment according to the provisions in Section II.D.2.

5. PAYOR/GUARANTOR

Your care and services at the Community shall be paid for by Roy Edwin Medford ("Payor") or guaranteed by N/A ("Guarantor"). You agree immediately to give us written notice of any change in Payor's or Guarantor's financial condition, address, or telephone number. By signing below, Payor agrees promptly to pay all fees and charges incurred by you or on your behalf under this Agreement, and Guarantor agrees promptly to pay any such fees or charges that are not paid by you in a timely manner. Guarantor (if any) shall be required to sign a separate Guaranty Agreement with us, at our option.

Roy Edwin Medford

Signature of Guarantor

4-11-7-18

Date

Signature of Payor_____
Date**C. TRANSFERS FROM APARTMENT****1. YOUR CAPACITY FOR RESIDENTIAL APARTMENT LIVING**

The portion of the Community in which you reside ("Residential Housing") consists of residential apartments with convenience services designed for persons who are capable of providing for their own health care and personal care needs. The Residential Housing portion of the Community is not licensed to offer and does not offer assistance with medications, bathing, dressing, mobility needs, supervision, monitoring of your health or safety, or other personal care activities. It is your responsibility to provide for your own health care and personal care needs so long as you reside in Residential Housing. You represent to us that you are capable of providing for your own health care and personal care needs and will provide for all such needs for as long as you reside in Residential Housing. If you utilize any private duty caregivers or companions while you reside in the Residential Housing, you agree to comply with the Community's applicable policies for such personnel.

2. TRANSFER DUE TO CARE NEEDS

If at any time you become incapable of providing or fail to provide for your health care or personal care needs, or if you develop a physical or mental condition that creates a danger to yourself or others, you agree to move promptly out of your Apartment and into the assisted living facility operated by us at the Community, or to an appropriate outside accommodation of your choice. Any determination that you are required to move for the reasons set forth in this paragraph shall be made in the sole judgment of the Community's Executive Director.

3. 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 applicable, on a pro rata basis. You will be responsible for all costs associated with the move, including an apartment transfer fee as set forth in **Appendix A**.

4. SUBSTITUTION OF APARTMENT

We may need to substitute your Apartment with another apartment 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 reasonable efforts to substitute your Apartment with a reasonably comparable one. You agree to pay the Monthly Fee applicable to the new Apartment.

D. TERMINATION

1. TERMINATION BY RESIDENT

You may terminate this Agreement at any time, with or without cause, by giving us thirty (30) days' prior written notice of termination. You need not cite a specific reason for the termination. With the exception of your death where this Agreement terminates automatically, you will continue to be responsible for your Monthly Fee until the thirty (30) day notice period has expired or you have vacated your Apartment as described in Section II.D.5 below, whichever occurs later.

2. TERMINATION BY US

a. **Upon Five (5) Days' Written Notice.** We may terminate this Agreement at any time upon five (5) days' written notice to you of our intention to terminate this Agreement if you fail to pay the Monthly Fee due in Section II.B.2 on time.

b. **Upon Fourteen (14) Days' Written Notice.** We may terminate this Agreement upon fourteen (14) days' written notice if:

1. You fail to comply with State or local law, or any section of this Agreement, other than sections regarding nonpayment;
2. You fail to comply with Section 27-40-510 of the South Carolina Code of Laws in a way that materially affects the health and safety of other residents or staff at the Community or the physical condition of the Community; or
3. You fail to use your Apartment as a dwelling unit as required by Section 27-40-540 of the South Carolina Code of Laws.

c. **Right to Remedy Certain Types of Non-Compliance.** If we provide you with a five (5) day or fourteen (14) day notice to terminate this Agreement under Section II.D.2.a or b above and the reason for termination involves something that you can correct, the written notice will state that you have an opportunity to remedy the non-compliance within the notice period.

3. DEATH OF RESIDENT

This Agreement shall terminate automatically upon our receipt of notice of your death. Termination shall be effective thirty (30) days following the last Monthly Fee payment before your death. If your estate does not remove your property from your Apartment before the effective date of termination, we will store or dispose of it in accordance with Section II.D.5 below.

4. COUPLES

If there are two residents under this Agreement, and one dies or permanently vacates your Apartment, this Agreement shall continue in full force and effect with respect to the remaining resident and the current Monthly Fee applicable to single occupancy of your Apartment shall apply to the remaining resident.

5. VACATING APARTMENT

Upon any termination of this Agreement, you or your estate agree to vacate and remove all your property from your Apartment and restore it to its original clean condition, excluding normal wear and tear. You or your estate shall remain liable for payment of the Monthly Fee until the effective termination date or until your Apartment is vacated, all of your property is removed from it, and it is restored to its original clean condition (except for normal wear and tear), whichever occurs later. If you or your estate fails to remove your personal property from the Apartment after the effective date of termination, we will provide you (or your estate) a written notice that sets forth your rights regarding abandoned personal property. We shall have the right to charge a reasonable storage fee and/or dispose of any such property in accordance with South Carolina law.

6. REFUND

Within thirty (30) calendar days after your Apartment has been vacated in accordance with Section II.D.5 above, we shall refund to you or your estate any amounts that we owe to you minus any expense we have incurred to store your personal property (see Section II.D.5) and clean your Apartment (beyond normal wear and tear). If the sum you owe us exceeds the unused portion of your final Monthly Fee, we will bill you or your estate for the difference.

7. SURVIVAL OF PROVISIONS

Sections II.D.5 and 6 of this Agreement shall survive the termination of this Agreement.

E. USE AND MAINTENANCE OF PREMISES**1. USE OF PREMISES**

You agree to use and occupy your Apartment solely as your residence and to maintain it in a clean and orderly manner and in compliance with all applicable governmental requirements, including all public and health and police regulations, to the full extent permitted by law. You agree not to: permit another person to reside in your Apartment without our prior approval; use or operate any equipment or machinery or engage in any conduct that is harmful to your Apartment, the Community, residents, staff, or us, or is disturbing to other residents; engage in any commercial activity at the Community; employ any person in or about your Apartment whose employment may create a liability on our the part; or hire any of our employees to perform any services at the Community without our consent.

2. CONDITION OF PREMISES

You acknowledge that we have made no representations regarding the condition or state of repair of your Apartment except as expressly set forth in this Agreement. You agree not to cause or permit any waste, misuse or neglect of your Apartment and to pay for any damages so caused.

3. RIGHT OF ENTRY

You agree to permit our authorized employees or agents to enter your Apartment to perform the services described in this Agreement or other necessary services, respond to emergencies, make necessary or agreed-upon repairs and improvements, and to show the Apartment to prospective residents (after notice of termination has been given by either party). Additional locks are not permitted on the entrance door to your Apartment. Except in cases of emergency, if you have abandoned or surrendered your Apartment, or if you are present and consent to our entry, we will give you twenty-four (24) hours' written notice of our intent to enter and will arrange to do so during normal business hours, unless you consent to allow us to enter at other times.

F. YOUR PROPERTY RIGHTS AND OBLIGATIONS**1. NO MANAGEMENT OR PROPERTY INTEREST**

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

2. DAMAGE TO COMMUNITY PROPERTY

You shall be liable for damage that you or your guests, invitees or licensees cause to the Community's property or the property of others at the Community. You agree to reimburse us for any loss of or damage

to our property, inside or outside your Apartment, caused by you or your guests or invitees, excluding normal wear and tear.

3. 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.

G. OTHER PERSONAL OBLIGATIONS

1. YOUR LIABILITY TO OTHERS

You accept full responsibility for any injury, damage, or loss caused to others at the Community, or suffered by you, as a result of your own acts or omissions, and those of your guests, invitees, or licensees, and you indemnify 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 (as applicable) in an amount and form sufficient to cover such liability.

2. YOUR PERSONAL OBLIGATIONS

We will not be responsible for any debts or obligations incurred by you or on your account. We will also not be responsible for giving you support, maintenance, board, or lodging, or any credit toward your Monthly Fee while you are absent from the Community.

3. PERSONAL AFFAIRS

You agree to make reasonable advance arrangements in the event of your death or incompetence. You may want to assign a Durable Powers of Attorney (POA) for health care and financial decision-making. We encourage you to seek appropriate professional or legal advice regarding your options and request that you provide us with a copy of your POA, if applicable. If you have assigned Power of Attorney, the individual(s) agree to sign this Agreement along with any Guarantor as set forth in Section II.B.5.

4. PRIVATE DUTY AIDES

All outside caregivers, companions, private duty aides, and other personnel employed or retained by you to render services at the Community shall be subject to Community policies and rules. All such personnel must obtain security clearances required under South Carolina law and must be employed by a licensed agency with insurance coverage satisfactory to SLS in its sole discretion.

H. MISCELLANEOUS

1. ACCURACY OF APPLICATION DOCUMENTS

As part of your application to the Community, you have filed application forms, which are incorporated by reference into this Agreement and made an express part of it. 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.

2. MOTORIZED CARTS

If you at any time intend to utilize a motorized cart, you must abide by the Community's rules set forth in the Resident Handbook and a separate Motorized Cart Policy.

3. OTHER RESIDENTS

You shall have no right to object to or determine the admission, terms of admission, placement, or dismissal of any resident or non-resident participating in any of the Community's programs. We may enter into agreements with other residents that contain terms different from those contained in this Agreement. Despite such differences, this Agreement alone sets forth your rights and obligations with respect to your residency at the Community.

4. RESIDENT HANDBOOK

You agree to abide by the general rules and regulations of [Community Name] contained in the Resident Handbook, as it now exists and as it may later be amended at our discretion. See **Appendix B** for a current copy of the Resident Handbook. You understand that failure to abide by such rules and regulations may result in our termination of this Agreement under Section II.D.2 above. You hereby acknowledge receipt of a copy of the current Resident Handbook.

5. NO SUBLETTING, SUBLEASING OR ASSIGNMENT

You shall not sublet your Apartment or transfer your right to use the services and accommodations at the Community to any other individual or entity without our express written permission. We reserve the right to assign this Agreement to any successor-in-interest selected by it.

6. SMOKING POLICY

The Community is a smoke free community and smoking is not permitted in your Apartment or any of the common areas of the Community. Smoking is only allowed in designated smoking areas of the community

7. PET POLICY

The Community is a pet friendly community. If you receive prior approval from the Executive Director to keep a pet at the Community, you will be required to: (1) sign a separate Pet Policy with us; (2) adhere to the rules and regulations of the Community regarding pets; and (3) pay a pet fee as set forth in **Appendix A**. Service animals providing assistance to residents with disabilities shall not be subject to the pet fee or any common area restriction.

8. NOTICES

All notices given under this Agreement shall be in writing and shall be addressed to us at our administrative office at the Community or to you at your Apartment. The Executive Director is authorized to receive legal notices on our behalf. All notices shall be effective when personally delivered or two (2) days after being deposited in the United States mail, first class postage prepaid.

9. PERFORMANCE OF AGREEMENT/ASSIGNMENT

We are solely responsible for the performance of this Agreement, and no other person or corporation, whether related or unrelated to us, shall assume any such responsibility except by our written agreement. We reserve the right to assign this Agreement to any successor-in-interest selected by us. You agree to look only to us or our successor-in-interest for the performance of this Agreement.

10. WAIVER

Our failure in any one or more instances to insist upon your strict performance, observance, or compliance with any of the terms of this Agreement, or our waiver of your breach of any of the provisions of this Agreement shall not be construed to be a waiver of our right to insist on your strict performance, observance and compliance with all the terms of this Agreement in the future or of any other breach.

11. 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.

Roy Edwin Medford
Resident Signature

X 11-7-18
Date

12. ENTIRE AGREEMENT

This Agreement (together with the referenced appendices and documents incorporated by reference) constitutes the entire agreement between the parties and may be amended only by a written instrument signed by you and by our authorized representative. 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.

(This portion of the page left intentionally blank)

13. GOVERNING LAW

This Agreement shall be governed by South Carolina law.

RESIDENT:

x Roy Edwin Medford
Signature
x Roy Edwin Medford
Typed or Printed Name
x 11-7-18
Date

RESIDENT:

Signature

Typed or Printed Name

Date

I understand and agree to all the terms contained in this Agreement.

PAYOR (if other than Resident):

Signature

Typed or Printed Name

Address

Date

GUARANTOR (if applicable):

Signature

Typed or Printed Name

Address

Date

Signature

Printed Name

Address

Phone Number

Date

COMMUNITY:

By: [Signature]
Its: Executive Director
Date: 11/7/18

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Civil Action No. 2022-CP-42-00454

**ED MEDFORD, IN HIS INDIVIDUAL
CAPACITY, AND ON BEHALF OF
THOSE SIMILARLY SITUATED,**

Plaintiff,

v.

**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.

**DEFENDANTS' MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION TO
COMPEL ARBITRATION**

Defendants¹ submit this memorandum of law in support of their motion to dismiss, or in the alternative, to stay and compel arbitration of Plaintiff's claims.

INTRODUCTION

Plaintiff Ed Medford is a former resident of an independent living apartment on the campus of Pacifica Senior Living Skylyn ("Pacifica"). His Complaint alleges a variety of issues related to maintenance of the facility. (See Compl.) He has brought this action individually and on behalf of a putative class of other residents, alleging breach of contract, negligence, and related causes of action against Pacifica; allegedly related entities R Cucamonga, LLC and Pac R Cucamonga, LP; former director Matthew Arledge; management consultant ETROS, LLC; and

¹ Defendant Deepak Israni has not been served with the Summons and Complaint in this matter. An Order for service by publication was entered on June 6, 2022. However, South Carolina law does not permit service by publication against an out-of-state resident under these circumstances. S.C. Code Ann § 15-9-710; Rule 4(f), SCRCF. Therefore, any effort to accomplish service by publication will be legally insufficient and contrary to South Carolina law. Lack of service was raised in Defendants' Motion to Dismiss and is re-iterated here for the purposes of preserving all rights and defense Mr. Israni possesses with respect to improper service/non-service of the Summons and Complaint.

individual Deepak Israni as an alleged “manager” of Pacifica. All allegations stem from Mr. Medford’s residence in independent living at Pacifica, though Mr. Medford purports to represent a class of residents living in both the independent living apartment building and a separate assisted living facility on the campus.

Mr. Medford signed a Residence and Care Agreement (“the Agreement”) that governed the terms of his residency at Pacifica. (See Ex. A.) Section H of the Agreement contains numerous “Miscellaneous” provisions, including a provision requiring binding arbitration of disputes in subparagraph 11, 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. . . .” (Ex. A at Section H.11.)

Based on the agreement of the parties to arbitrate all claims between them and the strong state and federal policies favoring enforcement of arbitration agreements, Defendants submit the instant dispute, arising from alleged maintenance issues in apartment-style independent living, should be resolved by binding arbitration in accordance with the procedures outlined in the Agreement’s arbitration clause. Defendants, therefore, filed the instant motion seeking dismissal of Plaintiff’s claims for lack of subject matter jurisdiction, 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). 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 validly entered into by Mr. Medford and contains an enforceable written arbitration clause.

Section H.11 of the Agreement is a “written provision . . . in a contract . . . to settle by arbitration a controversy thereafter arising out of such a contract.” 9 U.S.C.A § 2. Mr. Medford himself signed the Agreement, both at the end of the document, as well as directly underneath the arbitration provision in Section H.11 indicating his express assent to resolve any dispute related to his residency through binding arbitration. (Ex. A.) The Agreement is counter signed by a representative of Pacifica. (*Id.*) The Agreement was validly entered into by Mr. Medford

and 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 Envtl. 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 that

[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 clarified the correct interpretation of the phrase "evidencing a transaction"

and specifically rejected any argument that the phrase 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 independent living on the campus of a senior living facility implicates interstate commerce. For example, the Agreement at issue required the provision of meals to Mr. Medford, which is in fact one of the issues he alleges in his Complaint. Moreover, the Agreement contemplates the provision of 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 AGREED TO SUBMIT ALL DISPUTES TO BINDING ARBITRATION.

The arbitration clause in the Agreement covers all of the 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, whether made against the Community or any other individual or entity, ...” (Ex. A. at H.11.) This language plainly covers all parties and causes of action asserted in the Complaint, all of which arise from the residency and services provided to Mr. Medford while he was resident of independent living 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)). Moreover, “A clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract is construed broadly.” *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). As explained by the South Carolina Supreme Court in *Landers*,

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. at 109-10, 739 S.E.2d at 214 (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).

A dispute related to utilities and maintenance of the Pacifica facility falls squarely within the category of disputes that are subject to the broad arbitration clause in the Agreement.

Moreover, the fact that Mr. Medford has asserted claims against individuals and entities affiliated with Pacifica that are not signatories to the Agreement does not alter the outcome that all of his individual claims are subject to arbitration. First, the Agreement itself recognizes that all claims arising out of residency, “whether made against the Community **or any other individual or entity**”, are subject to arbitration. (Ex. A at H.11.) Additionally, South Carolina has recognized “a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint ... because this would nullify the rule requiring arbitration.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012)(citing *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993)). As a signatory to the Agreement, Mr. Medford consented to arbitration along with the other terms of his residency, which he received the benefit of over several years of residency (he was admitted in 2018), even though he now complains about the quality of the facility. “[A] party may not ‘rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.’” *Id.* (quoting *Jackson v. Iris.com*, 524 F.Supp.2d 742, 750 (E.D.Va. 2007)). Moreover, Mr. Medford has lumped Defendants into a single group in his Complaint and sued all for breach of contract, (see Compl. ¶¶ 21-37), demonstrating that his claims against each defendant are premised on the Agreement containing the arbitration clause.

Therefore, each of Mr. Medford’s claims should be compelled to arbitration. Moreover, because the arbitration clause does not expressly approve of class arbitration, only Mr. Medford’s claims can be compelled to arbitration, not the putative class action claims. “[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010).

This straightforward holding from the United States Supreme Court makes clear that the class claims are not subject to arbitration unless expressly permitted in the arbitration agreement, which is not the case in the Agreement between Plaintiff and Defendants. Thus, only Mr. Medford's individual claims can be compelled to arbitration.

CONCLUSION

For the reasons stated herein, the written arbitration provision is valid, irrevocable, and enforceable by this Court pursuant to the FAA. Defendants respectfully request an Order dismissing this action for lack of subject matter jurisdiction or, alternatively, dismissing the class action claims and staying the action as to Mr. Medford's individual claims while they are submitted to binding arbitration pursuant to the terms of the Agreement.

Hedrick Gardner Kincheloe & Garofalo, LLP

By: s/ Joshua D. Shaw
JONATHAN G. ROQUEMORE
S.C State Bar No.: 68274
JOSHUA D. SHAW
S.C. State Bar No.: 77835
1230 Main Street, Suite 325
Columbia, SC 29201
803-727-1200
jroquemo@hedrickgardner.com
jshaw@hedrickgardner.com

June 24, 2022

Attorneys for Defendants

PACIFICA SENIOR LIVING
RESIDENCE AND SERVICES AGREEMENT
Independent Living
SOUTH CAROLINA



TABLE OF CONTENTS

	<u>Page</u>
I. SERVICES	1
A. BASIC SERVICES AND AMENITIES	1
B. OPTIONAL SERVICES	4
C. EXCLUDED SERVICES	4
II. TERMS AND OBLIGATIONS	4
A. TERM OF AGREEMENT	4
B. FEES	4
C. TRANSFERS FROM APARTMENT	6
D. TERMINATION	7
E. USE AND MAINTENANCE OF PREMISES	9
F. YOUR PROPERTY RIGHTS AND OBLIGATIONS	9
G. OTHER PERSONAL OBLIGATIONS	10
H. MISCELLANEOUS	11

APPENDIX A FEES FOR OPTIONAL SERVICES

Pacifica Senior Living Skylyn
RESIDENCE AND SERVICES AGREEMENT

This Residence and Services Agreement ("Agreement") is made between Pacifica Senior Living of Skylyn ("we," "us," or "our"), on the one hand, and **Roy Edwin Medford** (you" or "Resident") on the other. (If more than one person is signing this Agreement, the terms "you" or "Resident" refer to each of you individually and to both of you together.)

Pacifica Companies owns Pacifica Senior Living of Skylyn (the "Community"), a residential community for seniors, located at 1705 Skylyn Drive, Spartanburg SC 29307. The Community is operated on a non-discriminatory basis and affords equal treatment and access to services to eligible persons regardless of race, color, religion, creed, gender, national origin, ancestry, or sexual orientation.

You have applied to receive accommodations and services at the Community and we have accepted your application. The purpose of this Agreement is to provide a statement of the accommodations and 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.

THIS AGREEMENT IS SUBJECT TO ARBITRATION. See Section II.H.11 below.

I. SERVICES

A. BASIC SERVICES AND AMENITIES

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

1. LIVING ACCOMMODATIONS

a. **Residence.** You have chosen to live in Apartment #205 ("your Apartment") at the Community. You may live in your Apartment on a month-to-month basis, subject to the terms of this Agreement and to the general rules and regulations of the Community contained in the Resident Handbook, as it now exists and as it may later be amended. The Resident Handbook is incorporated by reference in this Agreement and made an express part of it.

b. **Utilities.** Your Apartment will be furnished with water, electricity, garbage removal, heat and air conditioning. You will be responsible for telephone and cable television services, which will be billed directly to you by the responsible company or as set forth in **Appendix A**.

c. **Furnishings.** Your Apartment comes equipped with kitchen appliances and floor and window coverings. You may furnish your Apartment with your own furniture. You are also free to use your appliances and special equipment, provided that the Community's safety standards are met. We reserve the right to limit the number and type of furnishings and appliances in your Apartment if they present a safety hazard.

d. **Maintenance and Repairs.** You have examined your Apartment, including its furnishings, if any, appliances and fixtures, and agree that your Apartment is clean and in operating condition. You agree to keep your Apartment and all its appliances, fixtures and accessories in a clean, sanitary and safe condition. We will perform all necessary maintenance and repairs of your Apartment at our expense. However, you will be responsible for reimbursing us for any repairs not caused by normal wear and tear. You will be responsible for repairs to your personal property.

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

f. **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, and recreational rooms. We may change or reconfigure common spaces in the future in our discretion.

2. LAUNDRY

Laundry facilities are available for resident use. You shall be responsible for your personal dry cleaning.

3. HOUSEKEEPING

We will provide weekly housekeeping services in your Apartment as described in the Resident Handbook. Additional housekeeping services as needed or requested are available for an additional charge (see Appendix A).

4. PERSONAL SUPPLIES

You shall provide your own supplies for personal care and hygiene.

5. MEALS

a. **Dining Room.** We will make available to you two (2) meals each day. These meals are included in your Monthly Fee. If you do not receive meals because of a continuous absence from your Apartment of fourteen (14) or more days due to a medical condition or other circumstance, you will receive a per day credit beginning on the fifteenth (15th) day as set forth in **Appendix A**, which will be credited to your account and reflected in your monthly statement. You will also be charged a fee for any special food services and products that you request and that we agree to provide.

b. **Room Service.** We will provide room service to your Apartment as set forth in **Appendix A**.

c. **Guests.** Guests are welcome to any meal as set forth in the Resident Handbook. There will be a fee for guest meals (see **Appendix A**).

6. PLANNED ACTIVITIES

We offer a program of social, intellectual, physical, spiritual and vocational wellness 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 offered by us that require additional supplies or services provided by an outside vendor, or that involve outings away from the Community (see **Appendix A**).

7. TRANSPORTATION

We will make available to residents scheduled unescorted transportation for shopping, medical and dental appointments, religious services, other errands, and planned social events.

8. EMERGENCY RESPONSE AND FIRE PROTECTION

Your Apartment will be equipped with a smoke detector, carbon monoxide detector, and sprinkler system.

9. GUESTS

You are welcome to have guests visit you at the Community. Before any guest stays in your Apartment overnight you must obtain permission from the Executive Director or his or her designee. All guests must abide by any applicable rules contained in the Resident Handbook, including any limitations on the length of stay or frequency of visits. You will be responsible for assuring that your guests abide by these rules and are not disruptive.

10. PARKING

If you own a car, parking may be made available to you in accordance with the provisions of the Resident Handbook.

B. OPTIONAL SERVICES

We will make several optional services available to you at an extra charge, to be billed on a monthly basis. The current fees for optional services at the Community are set forth in **Appendix A**, and are subject to change as provided in Section II.B.3 below. Optional services offered by us may include:

1. Room service;
2. Guest meals;
3. Repairs and maintenance of personal items;
4. Beauty/barber shop services (if such services are provided by an outside vendor, the vendor will bill you directly); and
5. Any other services that we elect to offer in the future.

C. EXCLUDED SERVICES

We shall not be responsible for furnishing or paying for any of your assisted living (personal care) nursing, or health care needs, including but not limited to acute care; assistance with the tasks of daily living; the services of private duty aides, physicians, and nurses; medications; and other items and services that may require a license to provide.

II. TERMS AND OBLIGATIONS

A. TERM OF AGREEMENT

The term of this Agreement shall be month-to-month, unless and until it is terminated as set forth in this Agreement.

B. FEES

1. COMMUNITY FEE

You shall pay a non-refundable community fee of One thousand dollars (\$1000.00) prior to move-in to the Community. This fee is used to support the costs of various programs and services at the Community, such as wellness, maintenance and upkeep. The fee is also used to help us attract and retain qualified and well-trained staff. The community fee is not an application fee, screening or processing fee, security deposit, or rental payment.

2. MONTHLY FEE

Your initial Monthly Fee for occupancy of your Apartment under this Agreement is \$1,795.00 (A special rate for November, 2018 of \$199). The initial fee for occupancy of your apartment is \$1,995.00. Prior to occupancy of your Apartment, you will be responsible to pay your entire initial Monthly Fee. If you begin occupying your Apartment on a day after the first day of the calendar month, your initial Monthly Fee will be prorated accordingly and appear on your first monthly statement. 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 tenth (10th) day of the month. Must be in by 1:00 pm to get credited. It shall be payable to Pacifica Senior Living, Skylyn by check or money order. If two residents occupy your Apartment and it reverts to single occupancy, the remaining resident shall pay the then current Monthly Fee for single occupancy. Your right to occupy and use your 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.

3. ADJUSTMENTS TO FEES OR SERVICES

- a. **Fees.** Except as stated below, we may change your Monthly Fee or any charges for optional services upon thirty (30) days' advance written notice.
- b. **Services.** We may modify the scope and/or frequency of services provided to you under this Agreement upon thirty (30) days' prior written notice to you.

4. 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. If you fail to pay your Monthly Fee or other charges within five (5) days of the due date, we may charge you a late payment of One hundred fifty dollars (\$150.00) on your then-current Monthly Fee for each delinquent payment. Returned checks shall be subject to a fifty dollar (\$50.00) penalty. If you fail to pay your Monthly Fee or other fees by the tenth (10th) day of the calendar month, we may terminate this Agreement and take legal action to regain possession of your Apartment according to the provisions in Section II.D.2.

5. PAYOR/GUARANTOR

Your care and services at the Community shall be paid for by Roy Edwin Medford ("Payor") or guaranteed by N/A ("Guarantor"). You agree immediately to give us written notice of any change in Payor's or Guarantor's financial condition, address, or telephone number. By signing below, Payor agrees promptly to pay all fees and charges incurred by you or on your behalf under this Agreement, and Guarantor agrees promptly to pay any such fees or charges that are not paid by you in a timely manner. Guarantor (if any) shall be required to sign a separate Guaranty Agreement with us, at our option.

Roy Edwin Medford

Signature of Guarantor

4-11-7-18

Date

Signature of Payor_____
Date**C. TRANSFERS FROM APARTMENT****1. YOUR CAPACITY FOR RESIDENTIAL APARTMENT LIVING**

The portion of the Community in which you reside ("Residential Housing") consists of residential apartments with convenience services designed for persons who are capable of providing for their own health care and personal care needs. The Residential Housing portion of the Community is not licensed to offer and does not offer assistance with medications, bathing, dressing, mobility needs, supervision, monitoring of your health or safety, or other personal care activities. It is your responsibility to provide for your own health care and personal care needs so long as you reside in Residential Housing. You represent to us that you are capable of providing for your own health care and personal care needs and will provide for all such needs for as long as you reside in Residential Housing. If you utilize any private duty caregivers or companions while you reside in the Residential Housing, you agree to comply with the Community's applicable policies for such personnel.

2. TRANSFER DUE TO CARE NEEDS

If at any time you become incapable of providing or fail to provide for your health care or personal care needs, or if you develop a physical or mental condition that creates a danger to yourself or others, you agree to move promptly out of your Apartment and into the assisted living facility operated by us at the Community, or to an appropriate outside accommodation of your choice. Any determination that you are required to move for the reasons set forth in this paragraph shall be made in the sole judgment of the Community's Executive Director.

3. 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 applicable, on a pro rata basis. You will be responsible for all costs associated with the move, including an apartment transfer fee as set forth in **Appendix A**.

4. SUBSTITUTION OF APARTMENT

We may need to substitute your Apartment with another apartment 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 reasonable efforts to substitute your Apartment with a reasonably comparable one. You agree to pay the Monthly Fee applicable to the new Apartment.

D. TERMINATION

1. TERMINATION BY RESIDENT

You may terminate this Agreement at any time, with or without cause, by giving us thirty (30) days' prior written notice of termination. You need not cite a specific reason for the termination. With the exception of your death where this Agreement terminates automatically, you will continue to be responsible for your Monthly Fee until the thirty (30) day notice period has expired or you have vacated your Apartment as described in Section II.D.5 below, whichever occurs later.

2. TERMINATION BY US

a. **Upon Five (5) Days' Written Notice.** We may terminate this Agreement at any time upon five (5) days' written notice to you of our intention to terminate this Agreement if you fail to pay the Monthly Fee due in Section II.B.2 on time.

b. **Upon Fourteen (14) Days' Written Notice.** We may terminate this Agreement upon fourteen (14) days' written notice if:

1. You fail to comply with State or local law, or any section of this Agreement, other than sections regarding nonpayment;
2. You fail to comply with Section 27-40-510 of the South Carolina Code of Laws in a way that materially affects the health and safety of other residents or staff at the Community or the physical condition of the Community; or
3. You fail to use your Apartment as a dwelling unit as required by Section 27-40-540 of the South Carolina Code of Laws.

c. **Right to Remedy Certain Types of Non-Compliance.** If we provide you with a five (5) day or fourteen (14) day notice to terminate this Agreement under Section II.D.2.a or b above and the reason for termination involves something that you can correct, the written notice will state that you have an opportunity to remedy the non-compliance within the notice period.

3. DEATH OF RESIDENT

This Agreement shall terminate automatically upon our receipt of notice of your death. Termination shall be effective thirty (30) days following the last Monthly Fee payment before your death. If your estate does not remove your property from your Apartment before the effective date of termination, we will store or dispose of it in accordance with Section II.D.5 below.

4. COUPLES

If there are two residents under this Agreement, and one dies or permanently vacates your Apartment, this Agreement shall continue in full force and effect with respect to the remaining resident and the current Monthly Fee applicable to single occupancy of your Apartment shall apply to the remaining resident.

5. VACATING APARTMENT

Upon any termination of this Agreement, you or your estate agree to vacate and remove all your property from your Apartment and restore it to its original clean condition, excluding normal wear and tear. You or your estate shall remain liable for payment of the Monthly Fee until the effective termination date or until your Apartment is vacated, all of your property is removed from it, and it is restored to its original clean condition (except for normal wear and tear), whichever occurs later. If you or your estate fails to remove your personal property from the Apartment after the effective date of termination, we will provide you (or your estate) a written notice that sets forth your rights regarding abandoned personal property. We shall have the right to charge a reasonable storage fee and/or dispose of any such property in accordance with South Carolina law.

6. REFUND

Within thirty (30) calendar days after your Apartment has been vacated in accordance with Section II.D.5 above, we shall refund to you or your estate any amounts that we owe to you minus any expense we have incurred to store your personal property (see Section II.D.5) and clean your Apartment (beyond normal wear and tear). If the sum you owe us exceeds the unused portion of your final Monthly Fee, we will bill you or your estate for the difference.

7. SURVIVAL OF PROVISIONS

Sections II.D.5 and 6 of this Agreement shall survive the termination of this Agreement.

E. USE AND MAINTENANCE OF PREMISES**1. USE OF PREMISES**

You agree to use and occupy your Apartment solely as your residence and to maintain it in a clean and orderly manner and in compliance with all applicable governmental requirements, including all public and health and police regulations, to the full extent permitted by law. You agree not to: permit another person to reside in your Apartment without our prior approval; use or operate any equipment or machinery or engage in any conduct that is harmful to your Apartment, the Community, residents, staff, or us, or is disturbing to other residents; engage in any commercial activity at the Community; employ any person in or about your Apartment whose employment may create a liability on our the part; or hire any of our employees to perform any services at the Community without our consent.

2. CONDITION OF PREMISES

You acknowledge that we have made no representations regarding the condition or state of repair of your Apartment except as expressly set forth in this Agreement. You agree not to cause or permit any waste, misuse or neglect of your Apartment and to pay for any damages so caused.

3. RIGHT OF ENTRY

You agree to permit our authorized employees or agents to enter your Apartment to perform the services described in this Agreement or other necessary services, respond to emergencies, make necessary or agreed-upon repairs and improvements, and to show the Apartment to prospective residents (after notice of termination has been given by either party). Additional locks are not permitted on the entrance door to your Apartment. Except in cases of emergency, if you have abandoned or surrendered your Apartment, or if you are present and consent to our entry, we will give you twenty-four (24) hours' written notice of our intent to enter and will arrange to do so during normal business hours, unless you consent to allow us to enter at other times.

F. YOUR PROPERTY RIGHTS AND OBLIGATIONS**1. NO MANAGEMENT OR PROPERTY INTEREST**

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

2. DAMAGE TO COMMUNITY PROPERTY

You shall be liable for damage that you or your guests, invitees or licensees cause to the Community's property or the property of others at the Community. You agree to reimburse us for any loss of or damage

to our property, inside or outside your Apartment, caused by you or your guests or invitees, excluding normal wear and tear.

3. 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.

G. OTHER PERSONAL OBLIGATIONS

1. YOUR LIABILITY TO OTHERS

You accept full responsibility for any injury, damage, or loss caused to others at the Community, or suffered by you, as a result of your own acts or omissions, and those of your guests, invitees, or licensees, and you indemnify 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 (as applicable) in an amount and form sufficient to cover such liability.

2. YOUR PERSONAL OBLIGATIONS

We will not be responsible for any debts or obligations incurred by you or on your account. We will also not be responsible for giving you support, maintenance, board, or lodging, or any credit toward your Monthly Fee while you are absent from the Community.

3. PERSONAL AFFAIRS

You agree to make reasonable advance arrangements in the event of your death or incompetence. You may want to assign a Durable Powers of Attorney (POA) for health care and financial decision-making. We encourage you to seek appropriate professional or legal advice regarding your options and request that you provide us with a copy of your POA, if applicable. If you have assigned Power of Attorney, the individual(s) agree to sign this Agreement along with any Guarantor as set forth in Section II.B.5.

4. PRIVATE DUTY AIDES

All outside caregivers, companions, private duty aides, and other personnel employed or retained by you to render services at the Community shall be subject to Community policies and rules. All such personnel must obtain security clearances required under South Carolina law and must be employed by a licensed agency with insurance coverage satisfactory to SLS in its sole discretion.

H. MISCELLANEOUS

1. ACCURACY OF APPLICATION DOCUMENTS

As part of your application to the Community, you have filed application forms, which are incorporated by reference into this Agreement and made an express part of it. 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.

2. MOTORIZED CARTS

If you at any time intend to utilize a motorized cart, you must abide by the Community's rules set forth in the Resident Handbook and a separate Motorized Cart Policy.

3. OTHER RESIDENTS

You shall have no right to object to or determine the admission, terms of admission, placement, or dismissal of any resident or non-resident participating in any of the Community's programs. We may enter into agreements with other residents that contain terms different from those contained in this Agreement. Despite such differences, this Agreement alone sets forth your rights and obligations with respect to your residency at the Community.

4. RESIDENT HANDBOOK

You agree to abide by the general rules and regulations of [Community Name] contained in the Resident Handbook, as it now exists and as it may later be amended at our discretion. See **Appendix B** for a current copy of the Resident Handbook. You understand that failure to abide by such rules and regulations may result in our termination of this Agreement under Section II.D.2 above. You hereby acknowledge receipt of a copy of the current Resident Handbook.

5. NO SUBLETTING, SUBLEASING OR ASSIGNMENT

You shall not sublet your Apartment or transfer your right to use the services and accommodations at the Community to any other individual or entity without our express written permission. We reserve the right to assign this Agreement to any successor-in-interest selected by it.

6. SMOKING POLICY

The Community is a smoke free community and smoking is not permitted in your Apartment or any of the common areas of the Community. Smoking is only allowed in designated smoking areas of the community

7. PET POLICY

The Community is a pet friendly community. If you receive prior approval from the Executive Director to keep a pet at the Community, you will be required to: (1) sign a separate Pet Policy with us; (2) adhere to the rules and regulations of the Community regarding pets; and (3) pay a pet fee as set forth in **Appendix A**. Service animals providing assistance to residents with disabilities shall not be subject to the pet fee or any common area restriction.

8. NOTICES

All notices given under this Agreement shall be in writing and shall be addressed to us at our administrative office at the Community or to you at your Apartment. The Executive Director is authorized to receive legal notices on our behalf. All notices shall be effective when personally delivered or two (2) days after being deposited in the United States mail, first class postage prepaid.

9. PERFORMANCE OF AGREEMENT/ASSIGNMENT

We are solely responsible for the performance of this Agreement, and no other person or corporation, whether related or unrelated to us, shall assume any such responsibility except by our written agreement. We reserve the right to assign this Agreement to any successor-in-interest selected by us. You agree to look only to us or our successor-in-interest for the performance of this Agreement.

10. WAIVER

Our failure in any one or more instances to insist upon your strict performance, observance, or compliance with any of the terms of this Agreement, or our waiver of your breach of any of the provisions of this Agreement shall not be construed to be a waiver of our right to insist on your strict performance, observance and compliance with all the terms of this Agreement in the future or of any other breach.

11. 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.

Roy Edwin Medford
Resident Signature

X 11-7-18
Date

12. ENTIRE AGREEMENT

This Agreement (together with the referenced appendices and documents incorporated by reference) constitutes the entire agreement between the parties and may be amended only by a written instrument signed by you and by our authorized representative. 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.

(This portion of the page left intentionally blank)

13. GOVERNING LAW

This Agreement shall be governed by South Carolina law.

RESIDENT:

x Roy Edwin Medford
Signature
x Roy Edwin Medford
Typed or Printed Name
x 11-7-18
Date

RESIDENT:

Signature

Typed or Printed Name

Date

I understand and agree to all the terms contained in this Agreement.

PAYOR (if other than Resident):

Signature

Typed or Printed Name

Address

Date

GUARANTOR (if applicable):

Signature

Typed or Printed Name

Address

Date

Signature

Printed Name

Address

Phone Number

Date

COMMUNITY:

By: [Signature]
Its: Executive Director
Date: 11/7/18

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,)

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

Plaintiff,)

v.)

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO 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.)

Plaintiff, responding to Defendants' Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B) (6), SCRCPP, or in the Alternative to Stay and Compel Arbitration, would show unto the Court as follows:

INTRODUCTION

The Plaintiff, individually and on behalf of those similarly situated, brought the within lawsuit as a former resident of Pacifica Skylyn regarding uninhabitable living conditions which existed at the Spartanburg facility at 1705 Skylyn Drive, Spartanburg, South Carolina 29307 for a period of time from December 2019 through the present. Those conditions included, but were not limited to, chronic bed bug infestation, rat, mouse, and other vermin infestation, inedible food, chronically broken elevators, and other related problems.

This lawsuit was filed on February 8, 2022. On April 11, 2022, the Defendants filed a Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B)(6), SCRCPP, or in 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, 404, n.12 (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.2nd 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 D.R. Horton dissent underscores this principle. The dissent focuses on the necessity of severing the arbitration agreement from the rest of the contract in order to comply with Prima Paint. Prima Paint stands for the proposition that under the FAA, the first requirement for the court is to determine whether the arbitration agreement is a valid contract. And to reach that conclusion, the Prima Paint court approves the lower court's holding that "...arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded..."¹

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.

¹ See Prima Paint, 388 U.S. at 402.

Other cases which have decided the validity of arbitration agreements have implicitly incorporated into their reasoning the requirement that the arbitration agreement be analyzed separately and distinctly from the rest of the contract. Even if these courts do not explicitly state that the arbitration agreement must be decided solely on its own language, apart from the whole of the contract, the contract principles that they apply make it clear that they have analyzed the arbitration agreement separately. When the court in Hooters of America, Inc. v. Phillips set out the framework for its decision in that case, it stated, "...the grounds for revocation must relate specifically to the arbitration clause and not just to the contract as a whole." Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938, citing to Prima Paint and Wick v. Atlantic Marine, Inc.

Then the Hooters court uses this framework to apply the principles of contract analysis to examine the arbitration agreement for "...contractual formation defects...". *Id.*, 173 F.3d at 938.

When the Hooters court uses principles of contract analysis to specifically examine an arbitration agreement for contractual formation defects (apart from the contract as a whole), it is necessarily treating the arbitration agreement as a contract which is separate and distinct from the contract as a whole. It is necessarily treating the arbitration agreement as a contract in itself if it is applying the principles of contract analysis to decide if the arbitration agreement has validly formed a contract.

The arbitration agreement is a contract separable from the contract as a whole because the Supreme Court in Prima Paint requires that it be treated as such and the South Carolina Supreme Court in Munoz requires it to be treated as such. 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. 589, 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.

Plaintiff's Residence And Services Agreement, II.H.11.
(See **Attachment 1**)

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.

Which of the two parties is the "you" in this clause referring to?

In the very first paragraph of the contract between Defendant Pacifica Skylyn and Plaintiff, the drafter of the contract, Defendant Pacifica Skylyn (Defendant Pacifica), designates the pronouns it will use for itself and for the Plaintiff throughout the contract. Defendant Pacifica designates the pronoun "you" for the Plaintiff. Nowhere in the contract does Defendant Pacifica designate the pronoun "you" to apply to itself. This is the first paragraph of the contract between Defendant Pacifica and Plaintiff which the drafter uses to designate the pronouns which it will apply to the parties:

Pacifica Senior Living Skylyn

RESIDENCE AND SERVICES AGREEMENT

This Residence and Services Agreement (“Agreement”) is made between Pacifica Senior Living of Skylyn (“we,” “us,” or “our”), on the one hand, and **Roy Edwin Medford** (you” or “Resident”) on the other. (If more than one person is signing this Agreement, the terms “you” or “Resident” refer to each of you individually and to both of you together.)

Plaintiff’s Residence And Services Agreement
(First paragraph)
(See **Attachment 2**)

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

“we”

“us”

“our”²

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, Ed Medford.

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

² “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.

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 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.

The drafter further defines the types of claims that will be arbitrated by specifying claims likely to be made only by one party, the Resident, who is the Plaintiff. The possibility that the Community will likely bring “wrongful death claims” against the Resident is almost non-existent. Likewise for a personal injury claim. On the other hand, wrongful death and personal injury claims are frequently made against parties who own and operate facilities like the “Community”.

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 his 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 his 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 of 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.2d 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.2nd 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 promisee.” 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 his 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 1**)

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 his relinquishment of his right to a jury trial.

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.

/s/ Mitch Slade

Mitch Slade

Mitch Slade Law Office, P.A.

S.C. Bar No. 5146

P.O. Box 1007

Spartanburg, S.C. 29304

Telephone: (864) 582-4212

mitch@mitchsladelaw.com

PATRICK E. KNIE, P.A.

/s/ Patrick E. Knie

Patrick E. Knie

S.C. Bar No. 3564

P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone: (864) 582-5118
Telefax: (864) 585-1615
pknie@knielaw.com

ATTORNEYS FOR PLAINTIFF

June 24, 2022

7. PET POLICY

The Community is a pet friendly community. If you receive prior approval from the Executive Director to keep a pet at the Community, you will be required to: (1) sign a separate Pet Policy with us; (2) adhere to the rules and regulations of the Community regarding pets; and (3) pay a pet fee as set forth in **Appendix A**. Service animals providing assistance to residents with disabilities shall not be subject to the pet fee or any common area restriction.

8. NOTICES

All notices given under this Agreement shall be in writing and shall be addressed to us at our administrative office at the Community or to you at your Apartment. The Executive Director is authorized to receive legal notices on our behalf. All notices shall be effective when personally delivered or two (2) days after being deposited in the United States mail, first class postage prepaid.

9. PERFORMANCE OF AGREEMENT/ASSIGNMENT

We are solely responsible for the performance of this Agreement, and no other person or corporation, whether related or unrelated to us, shall assume any such responsibility except by our written agreement. We reserve the right to assign this Agreement to any successor-in-interest selected by us. You agree to look only to us or our successor-in-interest for the performance of this Agreement.

10. WAIVER

Our failure in any one or more instances to insist upon your strict performance, observance, or compliance with any of the terms of this Agreement, or our waiver of your breach of any of the provisions of this Agreement shall not be construed to be a waiver of our right to insist on your strict performance, observance and compliance with all the terms of this Agreement in the future or of any other breach.

11. 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.

Roy Edwin Medford
Resident Signature

X 11-7-18
Date

12. ENTIRE AGREEMENT

This Agreement (together with the referenced appendices and documents incorporated by reference) constitutes the entire agreement between the parties and may be amended only by a written instrument signed by you and by our authorized representative. 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.

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Pacifica Senior Living Skylyn**RESIDENCE AND SERVICES AGREEMENT**

This Residence and Services Agreement ("Agreement") is made between Pacifica Senior Living of Skylyn ("we," "us," or "our"), on the one hand, and **Roy Edwin Medford** (you" or "Resident") on the other. (If more than one person is signing this Agreement, the terms "you" or "Resident" refer to each of you individually and to both of you together.)

Pacifica Companies owns Pacifica Senior Living of Skylyn (the "Community"), a residential community for seniors, located at 1705 Skylyn Drive, Spartanburg SC 29307. The Community is operated on a non-discriminatory basis and affords equal treatment and access to services to eligible persons regardless of race, color, religion, creed, gender, national origin, ancestry, or sexual orientation.

You have applied to receive accommodations and services at the Community and we have accepted your application. The purpose of this Agreement is to provide a statement of the accommodations and 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.

THIS AGREEMENT IS SUBJECT TO ARBITRATION. See Section II.H.11 below.

I. SERVICES**A. BASIC SERVICES AND AMENITIES**

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

1. LIVING ACCOMMODATIONS

a. **Residence.** You have chosen to live in Apartment #205 ("your Apartment") at the Community. You may live in your Apartment on a month-to-month basis, subject to the terms of this Agreement and to the general rules and regulations of the Community contained in the Resident Handbook, as it now exists and as it may later be amended. The Resident Handbook is incorporated by reference in this Agreement and made an express part of it.

b. **Utilities.** Your Apartment will be furnished with water, electricity, garbage removal, heat and air conditioning. You will be responsible for telephone and cable television services, which will be billed directly to you by the responsible company or as set forth in **Appendix A**.

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	2022-CP-42-00454
	)	
	)	
	)	
	)	
ED MEDFORD,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
DEEPAK ISRANI, ET AL,	)	
DEFENDANTS.	)	
_____	)	

June 29, 2022
Via WebEx

B E F O R E:

THE HONORABLE J. MARK HAYES, II, JUDGE.

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

PATRICK E. KNIE, ESQ.
MITCH SLADE, ESQ.
Attorney for the Plaintiffs

JOSHUA SHAW, ESQ.
Attorney for the Defendant

Proceedings recorded via DCRP
Transcribed by Penny M. Johnson

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits submitted.)

P R O C E E D I N G S

THE COURT: I've got that the first case for the afternoon is Medford vs. Deepak with Mr. Knie and Mr. Slade, Mr. Rockmoor and Mr. Shaw.

I see Mr. Knie and Mr. Slade, I'm looking for Mr. Rockmoor and Mr. Shaw. Do y'all know if they're going to show up?

MR. KNIE: We have no idea, Your Honor. I would have assumed they would be on by WebEx.

THE COURT: We don't show them in the holding room.

MR. KNIE: Would you like me to moot myself and try to call real quickly to Mr. Rockmoor?

THE COURT: Yeah, if you wouldn't mind, that would be a big help.

MR. KNIE: I'll do that right now.

(Pause.)

THE COURT: Mr. Shaw just showed up.

MR. SHAW: Your Honor, can you hear me okay?

THE COURT: You're a little soft, but I can hear you okay.

MR. SHAW: Okay. Thank you. I'll try to speak up.

MR KNIE: Judge, I just went ahead and hung up because I saw Mr. Shaw's name pop up.

THE COURT: Okay.

MR. SLADE: Can you hear me?

1 THE COURT: Yes, Mr. Slade, we can hear you and see
2 you.

3 Mr. Shaw, do you have a video at all?

4 MR. SHAW: Your Honor, I'm checking on that right now.

5 THE COURT: Okay.

6 (Pause.)

7 THE COURT: Okay, I see you.

8 MR. SHAW: I apologize for that.

9 THE COURT: Okay. I've got that this is Defendant's
10 motion to dismiss pursuant to 12(b)(1) and 12(b)(6) or in
11 the alternative to stay and compel arbitration. So I'll be
12 more than happy to hear from Mr. Shaw.

13 MR. SHAW: Yes, Your Honor. Thank you. I will try to
14 speak up. Please let me know if I need to make a different
15 arrangement.

16 This is Defendant's motion. This case is a punitive
17 class action brought by Mr. Medford relating to building
18 maintenance and services at his apartment building, which is
19 on the campus of Pacifica, one of the Defendants.

20 And one thing that should be clarified from the outset
21 is that even though the Pacifica campus contains long-term
22 and assisted living care, Mr. Medford resided in independent
23 living. In other words, he was not at Pacifica receiving
24 any medical care or medical services. He simply lived in an
25 apartment-style living on that campus since about late 2018

1 when the lease was signed.

2 And just for some context, the layout of that campus is
3 such that there's, basically, one large apartment building
4 for folks in independent living and another separate
5 building for folks in assisted living. The apartment
6 buildings are connected to the main building by a hallway.
7 So the residents don't have to go outside to get to the
8 recreational area, the dining hall, the chapel, those
9 community services. Some meals and other nonmedical
10 services are provided to those in independent living, but,
11 otherwise, this is just an apartment building that Mr.
12 Medford was living in.

13 And as I alluded to, the allegations in this case
14 pertain to maintenance and services issues. The food, the
15 HVAC, the elevators, insects and rodents. It's not about
16 providing medical services. And I don't think Mr. Medford
17 is claiming personal injury from our reading of the
18 complaint, but I'm sure Mr. Knie will correct me if I'm not
19 characterizing the complaint correctly.

20 Bottom line, Mr. Medford was a tenant of Pacifica in
21 independent living. He had complaints about the facilities
22 and we are here today asking the Court to compel Mr.
23 Medford's claims to arbitration pursuant to the federal
24 arbitration act.

25 So, Your Honor, turning straight to the lease agreement

1 between Mr. Medford and Pacifica, there is clearly an
2 arbitration provision and Plaintiff, Mr. Medford, in this
3 case signed that provision, including an agreement to
4 arbitrate this matter -- or any matter.

5 The complete agreement between Mr. Medford and Pacifica
6 was submitted both in our motion and memo in support as
7 Exhibit A. Page 3 of that Exhibit A, which is the first
8 page with any substance on it, I would just would note
9 states in all capital letters, this agreement is subject to
10 arbitration. Now, we're not moving under the South Carolina
11 Act, so it doesn't have to have those statutory
12 requirements. This agreement does not have to have those
13 statutory requirements under the South Carolina Act, but I
14 just note that -- because we're moving under the Federal
15 Act, but I just note that it does state that there.

16 And then toward the bottom of the agreement, actually,
17 the second to last page -- third to last page is the
18 arbitration agreement clause itself. Section H-11, it's
19 titled arbitration. I'm not going to read the whole
20 provision to Your Honor, but the first sentence is the key
21 language. By signing below, you agree that any and all
22 claims and disputes arising from or related to this
23 agreement or your residency, care or services at the
24 community, whether made against the community or any other
25 individual or entity shall be resolved by submission to

1 neutral binding arbitration. And I left out a few words
2 there, but that's the operative language that we are
3 asserting is valid under the FAA and requires this matter to
4 be arbitrated.

5 Also, on the exhibit that's been attached, the
6 agreement, I note that there's a signature, Ed Medford,
7 dated 11/7/18, November 7th, 2018, directly under that
8 arbitration clause indicating Mr. Medford's agreement to
9 arbitration. We don't believe there's any question about
10 whether this agreement is subject to the FAA. We briefed
11 this issue and I will, therefore, not spend much time on it
12 unless the Court has questions, of course.

13 The bottom line is that the FAA applies to all
14 agreements involving interstate commerce and that phrase has
15 been interpreted broadly by the United States Supreme Court
16 as any activity affecting interstate commerce. So things
17 like the provisions of meals and utilities, which are
18 included in this agreement trigger the application of the
19 FAA. And there's a South Carolina case right on that point,
20 Dean vs. Heritage Healthcare, which is cited in our brief.

21 So we have a signed agreement to arbitrate subject to
22 the FAA. Because this agreement was signed by Mr. Medford
23 himself -- and this isn't a personal injury case. I think a
24 lot of the issues we typically see in arbitration cases
25 aren't really present here. And the issue before Your Honor

1 is pretty narrow. So rather than drone on about the
2 arbitration case law that's out there, I'd like to address
3 Plaintiff's argument that there's no mutuality or
4 consideration for this agreement. And that's really what we
5 would present to the Court barring any questions.

6 With that, Plaintiff's briefing focuses on the
7 terminology of the arbitration agreement and, more
8 specifically, the pronouns used in the agreement to argue
9 that the agreement doesn't bind Pacifica to anything. They
10 point out that the arbitration clause uses the terminology
11 "you agree" rather than "the parties agree" and "your
12 rights" rather than "the parties' rights".

13 Plaintiff's argument, we would submit, boils down to
14 effectively trying to capitalize on all the terminology that
15 gets inserted into these clauses to try to make them clear
16 and understandable to a person entering into the residence
17 agreement. You agree that all claims shall be resolved by
18 arbitration. You understand you're giving up a
19 constitutional right. You understand you don't have to
20 enter into this arbitration clause and are doing so
21 voluntarily.

22 These are the phrases and the type of terminology that
23 help people who aren't as sophisticated to understand what
24 they're agreeing to. But here, they're now being used
25 against the facility under technical grammatical argument

1 that somehow Pacifica hasn't agreed to arbitration in this
2 clause.

3 And I'd point the Court to a very similar circumstance
4 in the case law. It's a Fourth Circuit opinion interpreting
5 South Carolina Law, O'Neal vs. Hilton Head Hospital. It's
6 115 F.3d 272. In that case, the arbitration clause signed
7 by an employee used language in the first person, "I"
8 understand, "I" agree to submit complaints to arbitration,
9 "I" accept the arbitration as the outcome of my complaints,
10 the arbitration process.

11 And in O'Neal, the Plaintiff argued the same thing that
12 Plaintiff is arguing in this instance, that the Defendant
13 employer didn't agree to anything here, it says I agree and
14 the employee signed it. The Defendant employer didn't agree
15 to anything here. It says I agree and the employee signed
16 it.

17 And the Court rejected that argument for the same
18 reasons we are urging. It's clear from the agreement as a
19 whole in the context that both the resident and Pacifica
20 would be bound by arbitration, the arbitration process. The
21 O'Neal court said it would be different if the arbitration
22 clause said well Plaintiff must arbitrate and be bound by
23 the outcome, but Pacifica wouldn't be. But that's not the
24 case with the arbitration clause before the Court.

25 A fair and common sense reading of the arbitration

1 clause is that it applies equally to both parties to all
2 claims. And in that situation, as the O'Neal court upheld,
3 quote, A mutual promise to arbitrate constitutes sufficient
4 consideration for this arbitration agreement. And the
5 Fourth Circuit decided, Rickborn vs. Liberty Life Insurance
6 Company, a 1996 Supreme Court case, for that proposition.

7 So very similar circumstance and the outcome that --
8 you know, the technical argument based on the terminology
9 that, again, is sort of designed to help people understand
10 what they're agreeing to was not going to effectively avoid
11 arbitration.

12 And there's one more point on this issue of the
13 grammar. We would submit that the Plaintiff's grammatical
14 argument is incomplete. It focuses on the use of the
15 pronoun "you" in the clause, but it ignores the phrase that
16 the arbitration shall be conducted in Spartanburg, South
17 Carolina by a mutually agreed-upon, single neutral
18 arbitrator. It also says the parties shall select an
19 arbitrator. And it goes on to say each party shall bear its
20 own costs and fees in connection with the arbitration.
21 Those aren't second person singular pronouns.

22 The Plaintiff's argument ignores the fact that Pacifica
23 is not -- they say Pacifica is not agreeing to anything here
24 in this clause and I would simply submit that the other
25 language used in the clause gives a clear indication that

1 there's a mutual obligation here.

2 I do want to say Plaintiff's briefing is very well done
3 in crafting that grammatical argument. It gets deep into
4 dissecting this particular arbitration clause and principles
5 of contract arbitration, but it also doesn't really cite
6 rules of construction. That is not a subject I deal with on
7 a day-to-day basis, so I started researching it. The first
8 case I came across provides the principle that we think
9 supports our position and, although not cited, what I think
10 guided the O'Neal court despite them not citing it.

11 From the South Carolina Supreme Court in Farr vs. Duke
12 Power, 265 S.C. 356, quote, Common sense and good faith are
13 the leading touch stones of the inquiry. Where a
14 construction of a contract makes it unusual or extraordinary
15 and another construction equally consistent with the
16 language employed would make it reasonable, fair and just,
17 the latter construction must prevail. An interpretation
18 which leads the more reasonable and probable contract should
19 be adopted and a construction leading to an observed result
20 should be avoided.

21 Reading this arbitration provision such that Pacifica
22 is not agreeing to arbitration is not a common sense, fair
23 and reasonable interpretation. Reading it as though both
24 parties are agreeing to arbitrate their disputes is, we
25 submit, a fair and reasonable interpretation. And if that's

1 the case, then Plaintiff's argument about lack of
2 consideration would fail. An arbitration provision that
3 contains mutual promises to submit any and all claims and
4 disputes from or relating to the agreement satisfies the
5 requirement for consideration. And that's just -- that goes
6 back to black letter contract law.

7 So, Your Honor, with that, I've been going for a while,
8 I did want to jump to Plaintiff's argument and address that.
9 Again, I think it was well crafted, we just don't think that
10 it, ultimately, carries the day. So for those reasons and
11 the reasons stated in our brief, we'd respectfully request
12 that Mr. Medford's claims be compelled to arbitration.

13 THE COURT: Thank you very much.

14 MR. SHAW: Thank you.

15 THE COURT: Yes, sir, gentlemen. I guess Mr. Knie is
16 going to argue this, or Mr. Slade?

17 MR. KNIE: Actually, Mr. Slade is going to argue.

18 THE COURT: Okay.

19 Yes, sir, Mr. Slade.

20 MR. SLADE: Your Honor, I would first like to deal with
21 a point that Mr. Shaw made about the language in this
22 arbitration agreement being crafted to put the
23 unsophisticated resident or the unsophisticated person who
24 is signing it on notice that they are giving up their right
25 to trial. Nothing in the problems that he cited with this

1 would prohibit Pacifica, if that's what they wanted to do,
2 from making it very clear to anybody that they are giving up
3 the right to trial. The question is did they form a valid
4 contract?

5 Mr. Shaw didn't address this, so I'm assuming he agrees
6 with this. I think the case law is unanimous at this point
7 that in order to determine if the arbitration agreement is a
8 valid contract, the arbitration agreement has to be
9 extracted from the contract as a whole. And in order to
10 determine if it's a valid contract, that has to be decided
11 from the language that is in the -- within the four corners
12 of the arbitration agreement.

13 It's also clear that in order to determine whether that
14 contract, the arbitration contract within the larger
15 contract is a valid contract, we have to use the principles
16 of South Carolina contract law to make that analysis. And
17 one of the essential elements of contract -- of a valid
18 contract, as the Court of Appeals just said in Simmons vs.
19 Benson Hyundai that we cited in our memo, Your Honor, it's
20 very clear and I'm quoting here from the opinion itself, The
21 parties must also manifest a mutual intent to be bound. A
22 mutual intent to be bound.

23 We also cite in our memo, Your Honor, the fact that
24 there must be an objective manifestation of these terms in a
25 valid contract. So that leads us to what I agree with Mr.

1 Shaw, that the first sentence of the arbitration agreement
2 is the key sentence because that contains the language of
3 who's agreeing to what.

4 So in the arbitration agreement itself, it first says:
5 By signing below, you agree that any and all claims and
6 disputes arising from or related to the agreement, and the
7 language following that. But the important point of that
8 is, Your Honor, that only one party is agreeing to arbitrate
9 in that sentence.

10 The drafter of this agreement said from the beginning
11 that the pronoun "you" was the one that was going to apply
12 to the resident, was going to apply to the Plaintiff in this
13 case. And the only party agreeing to arbitrate in this
14 first clause here is the Plaintiff. None of the pronouns
15 that the drafter has chosen to use for himself are included
16 and it doesn't say both parties agree that all -- any and
17 all claims and disputes will be arbitrated.

18 Your Honor, we thought and we argued in our memo that
19 it's very clear that the drafter understood that there has
20 to be an objective manifestation that both parties agree
21 because in the second clause of his arbitration agreement,
22 which starts on the fourth line down, Your Honor, after the
23 words Federal Arbitration Act, it says: Except in any claim
24 or dispute involving unlawful detainer proceedings, eviction
25 or any claims that can be brought in small claims court

1 shall not be subject to arbitration unless both parties
2 agree to arbitrate.

3 So, Your Honor, we thought that that provides a very
4 strong inference that the drafter clearly understood
5 contract law and clearly understood the significance of
6 using only the pronoun that designated -- or that he chose
7 to designate one party to say that they're agreeing.

8 But, Your Honor, we don't -- I think in the Defendant's
9 memo, he has relieved us of relying on that inference that
10 they knew exactly what they were doing when they just put
11 the name of one party as agreeing. Because if you look at
12 the Defendant's memo on Page 2 and you see the word
13 arbitration in the middle of the page or about a third of
14 the way down, and I'm going to start with -- this is a part
15 of the Defendant's memo where he argues the terms of the
16 agreement. But in order to argue the terms of the
17 arbitration agreement, he is arguing that it is actually a
18 valid contract. So in order to argue it is a valid
19 contract, he uses the language -- and you see it right below
20 the word arbitration there, The parties agree to binding
21 arbitration of any and all claims.

22 The significance of that is, Your Honor, that in the
23 actual agreement when he uses those terms, he only says you
24 agree and uses the exact same language that he uses in his
25 memo. So, Your Honor, the Defendant can't use the words

1 that he put in his arbitration agreement, which is you agree
2 that any and all terms will be arbitrated. He has to use --
3 he has to change the words to say the parties agree to
4 binding arbitration of these exact same terms.

5 So his argument depends entirely -- I mean, he can say
6 it's simply a grammatical argument, but it's clear there has
7 to be an objective manifestation of a mutual intent to be
8 bound. And when he wants to argue that there was that
9 mutual intent to be bound, in his memo, he uses the terms,
10 The parties agree to arbitration of any and all claims.

11 So I think it's pretty clear. It's probably an
12 inadvertent admission on his part that there has to be
13 language that both parties agree to arbitrate, but it's
14 clear that they understand that because in their memo when
15 they're trying to persuade us that there is a valid,
16 mutually binding contract here that they use the terms that
17 are proper to make that a mutually binding agreement.

18 And, Your Honor, that's reinforced by the fact that in
19 this second clause, the Defendant specifically states that
20 the Defendant is not going to be subject to arbitration
21 unless both parties, he clearly knows how to use those
22 terms. And in the last sentence of the key language that
23 Mr. Shaw agreed is the key language, it says: You give up
24 your constitutional right. It says nothing about both
25 parties giving up their constitutional right.

1 And, again, I think Mr. Shaw's argument, and correct me
2 if I'm wrong, was that this is simply language to make sure
3 unsophisticated people understand it. Well, they can
4 certainly put that kind of language in there, but it has to
5 include the fact that both parties are giving up their right
6 to a trial.

7 Your Honor, the second part of our -- the second reason
8 that this contract does not make a valid contract to
9 arbitrate is that, again, we're under the South Carolina
10 rules of contract interpretation. We interpret this whether
11 or not this is a valid contract to arbitrate based on
12 established principles of South Carolina contract law. It
13 is elemental that for every valid contract, there has to be
14 consideration. In this contract, Your Honor, the only
15 person who is giving anything up is Mr. Medford, the
16 Plaintiff. There's no wording in what Mr. Shaw himself
17 designates as the key language that Pacifica is giving
18 anything up.

19 The language that he cites that's on the second page of
20 the arbitration agreement about a mutually agreed-upon,
21 single arbitrator and that kind of language is only
22 effective if there is an agreement to arbitrate. So I don't
23 know if they're inadvertently backing themselves into an
24 elusory contract where they haven't promised to arbitrate,
25 but they're setting terms of what would happen if there was

1 an arbitration agreement. That doesn't affect an
2 arbitration agreement. There's no mutual consideration
3 given up or any consideration giving up by Pacifica.

4 So for those two reasons, Your Honor, they failed to
5 form a valid contract to arbitrate.

6 THE COURT: Okay. Thank you for that.

7 Do you have anything in reply to close, Mr. Shaw?

8 MR. SHAW: Briefly, Your Honor. Mr. Slade said I
9 didn't address one component of their argument. It doesn't
10 necessarily mean we agree, it's the proposition that you
11 have to isolate the arbitration agreement and determine that
12 it satisfies every aspect of contract law. And they cite
13 Prima Paint, which is United States Supreme Court precedent
14 for that, and then South Carolina precedent that follows it,
15 Smith vs. D.R. Horton.

16 I'm not disagreeing with the propositions that they
17 cited. I merely would like to point out that the argument
18 that they're making is that, effectively, the arbitration
19 agreement requires something more than a contract. In other
20 words, you have to single it out for separate treatment.
21 That, we know you can't do under United States Supreme Court
22 precedent, Kindred Nursing Centers vs. Clark.

23 It reads to me like Plaintiff is urging the Court to
24 ignore the remainder of the agreement and view the
25 arbitration clause in isolation in order to attack it. And

1 that, generally speaking, would run afoul of another rule of
2 contract construction, which is that the intention of the
3 parties to a contract must be gathered from the contents of
4 the entire agreement, not from any particular clause or
5 agreement.

6 So they're correct that Prima Paint and Smith vs. D.R.
7 Horton say well, you have to look at the arbitration clause
8 independently. The reason they're doing that is to enforce
9 the arbitration clause when the contract as a whole may be
10 tainted by unconscionability or in Prima Paint, it was
11 actually an allegation that the contract was -- there was a
12 fraud in the inducement. So the Supreme Court said there
13 may have been fraud in the inducement in entering into the
14 contract, but not as to the arbitration clause.

15 So they are singling out the arbitration clause for
16 special treatment to enforce it as opposed to attack it and
17 say it standing on its own must contain every element of
18 contract. Well, if that was the case, then you wouldn't be
19 -- an arbitration clause wouldn't be enforceable as
20 Paragraph 11 to an agreement, any agreement, because it
21 would have to be separate consideration, separate
22 signatures, et cetera.

23 So it goes back to the point that we think that there
24 is a mutuality here under a fair reading of this clause. In
25 the agreement as a whole, there's mutuality, there is

1 expressed mutuality we feel as a fair reading of this clause
2 and that's the reason we would say that there is valid
3 consideration.

4 THE COURT: Let me tell you what I just heard from you
5 and see if this is correct, I'm hearing it properly. That
6 when a court is asked to interpret an arbitration clause,
7 that if it's being asked to enforce the clause, we are
8 supposed to view it broadly and in the context of the entire
9 agreement, but if we're asked to not enforce it, i.e. accept
10 an argument attacking the clause, then we are to -- the only
11 way we could do that would be based on an argument that
12 isolates the clause?

13 MR. SHAW: Yes, Your Honor, I think that's a fair
14 summary. It's simply that they're using Prima Paint and
15 Smith vs. D.R. Horton for the opposite of what those cases
16 are trying to accomplish, which is to save an arbitration
17 clause. And they're using them to say arbitration clauses
18 are special and we have to isolate them and they must
19 independently on their own meet all these elements.

20 And I'm just saying, generally speaking, that's not
21 contract interpretation principle. Generally, you look at
22 the whole contract to determine the intent of the parties.
23 So you're looking at the whole contract here and there is an
24 intent to enter into an agreement that's binding both
25 parties to certain things, including arbitration.

1 THE COURT: So if I look at it that there's a big
2 agreement, then it really doesn't matter what's in the -- if
3 I understand your argument. If I look at the entire
4 agreement and I come to this idea, this broad idea that
5 okay, these parties had an agreement, those parties entered
6 into a contract, then when it gets to the specifics as to
7 what the arbitration provision has in it really takes on a
8 very minor role and doesn't matter?

9 MR. SHAW: Well, Your Honor, I think there can be
10 problems with an arbitration clause, such as
11 unconscionability, one-sided, you're bound, I'm not bound,
12 you pay, I don't pay. Those are the things the courts have
13 traditionally looked at to say okay, the arbitration clause
14 itself is unconscionable. But Smith vs. D.R. Horton, the
15 whole issue there is you can take unconscionable parts of a
16 contract, which D.R. Horton did according to the court, they
17 had waivers of remedies, and you can remove those and save
18 the arbitration agreement unless they're inextricably
19 intertwined with the arbitration clause.

20 So yeah, I'm not suggesting -- just to be clear, Your
21 Honor. I don't want to be misunderstood. I'm not saying
22 that it doesn't matter what's in the arbitration clause, but
23 here, you're not receiving arguments from the Plaintiff that
24 this is an unconscionable arbitration clause. At least,
25 that hasn't been presented. I think the reason is because

1 there is mutuality to it. They're saying all disputes are
2 subject to arbitration, except we're taking eviction
3 proceedings and small claims proceedings, it makes no sense
4 to arbitrate those in any world, so we're not going to
5 arbitrate those unless both parties agree. That's the way
6 we read this arbitration clause. So it doesn't have those
7 traditional markers of an unconscionable arbitration clause,
8 which is one-sided, unfair and oppressive terms.

9 THE COURT: Mr. Slade, do you -- you heard my questions
10 to Mr. Shaw, do you have any comments about my questions?

11 MR. SLADE: Yes, sir, I do, Your Honor. I'm going to
12 quote from Simmons vs. Benson Hyundai, the recent -- I think
13 it was decided about three months ago or published about
14 three months ago where the Court of Appeals decides whether
15 or not an arbitration agreement was formed. And what it
16 says here is, Having settled the grounds rules is a
17 reference to Prima Paint, quote, we now proceed to the first
18 step, deciding if the parties have an agreement to
19 arbitrate, which we decide applying South Carolina contract
20 law.

21 Well, if you're going to apply South Carolina contract
22 law to decide the issue if there is a contract, an
23 agreement, a valid, legally enforceable agreement to
24 arbitrate, if you're going to use the principles of South
25 Carolina contract law as Simmons says, then you necessarily

1 apply the principles of whether or not this is a valid
2 contract.

3 And the very -- not the very next, but the second
4 sentence following that, I'm assuming following up on the
5 court's statement that we used South Carolina contract law
6 to decide this, it says, quote, the parties must also
7 manifest a mutual intent to be bound. And that mutual
8 intent to be bound to arbitrate has to appear within the
9 four corners of the arbitration agreement.

10 The whole point of -- I disagree with Mr. Shaw's
11 interpretation of Prima Paint and the other arbitration case
12 he cited as applying the contract rules to try to save the
13 arbitration clause. The rules of contract interpretation
14 are applied to the arbitration clause to determine if it's a
15 valid contract, not to save it, not to invalidate it.

16 Either way, it's like every other principle that a
17 court applies, they're not trying to seek a specific result
18 that the Plaintiff wants or the Defendant wants, it's
19 applying the rules of contract interpretation to see if
20 there's objectively manifest language within that
21 arbitration contract that there is a mutually binding
22 agreement between the two parties to arbitrate. The whole
23 point of the arbitration clause -- agreement is for both
24 parties to agree to arbitrate and objective evidence that
25 Pacifica has agreed to arbitrate is entirely lacking from

1 that arbitration agreement.

2 THE COURT: Anything to close, Mr. Shaw? I think I got
3 it now. I think I got it, but Mr. Shaw, you want to close
4 with anything?

5 MR. SHAW: No, Your Honor. I just was pulling up
6 Simmons vs. Benson Hyundai. I'm trying to do two things at
7 once. I don't hear Mr. Slade saying that he thinks that
8 case controls this one. I would submit it doesn't because
9 there are some financing -- it's a car issue, car purchase
10 issue and some financing failed, which meant the arbitration
11 agreement wasn't entered into. Not a very good analysis for
12 Your Honor, admittedly, but I'm just pointing out that that
13 is factually distinct from here where Mr. Medford signed
14 right beneath the arbitration agreement saying I understand.

15 Thank you, Your Honor.

16 THE COURT: Thank y'all both for the arguments. I'll
17 take a look at it and get back with you. Thank y'all very
18 much. Thank y'all for showing up. Now since we do this
19 stuff remotely, y'all don't have to come to the courthouse,
20 but I'm here.

21 Thank y'all very much.

22 MR. SLADE: Thank you.

23 MR. SHAW: Thank you, Judge.

24

25

CERTIFICATE OF TRANSCRIBER

I, PENNY M. JOHNSON, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

October 31, 2022

Penny M. Johnson
Penny M. Johnson
Court Reporter III

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454
Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly
situated, ... Respondents,

v.

Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga LP; Pacifica Skylyn, LLC, d/b/a Pacifica
Senior Living Skylyn; Etros, LLC; and Matthew Arledge, ... Appellants.

CERTIFICATE OF COUNSEL

I certify that the foregoing Record on Appeal contains all material proposed to be included
by any of the parties and not any other material.

Respectfully submitted,

s/ Paul E. Allen, Jr.

Jonathan G. Roquemore

Joshua D. Shaw

Paul E. Allen, Jr.

Hedrick Gardner Kincheloe & Garofalo LLP

1230 Main Street, Suite 325

Columbia, SC 29201

Attorneys for Appellants

June 21, 2023

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ed Medford, in his individual capacity, and on behalf of
those similarly situated, Respondent,

v.

Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga
LP; Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living
Skylyn, Etros, LLC; and Matthew Arledge, Appellants.

Appellate Case No. 2022-001210

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2024-UP-316
Submitted September 25, 2024 – Filed September 25, 2024

AFFIRMED

Jonathan Gamble Roquemore, Joshua Daniel Shaw, Paul
Edward Allen, Jr., all of Hedrick Gardner Kincheloe &
Garofalo, LLP, of Columbia, for Appellants.

Patrick E. Knie, of Knie & Shealy Attorneys at Law, of
Spartanburg; and Sam Mitchell Slade, Jr., of
Spartanburg, for Respondent.

PER CURIAM: Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga LP; Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC; and Matthew Arledge (Appellants) appeal the circuit court's order denying their "Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) [of the South Carolina Rules of Civil Procedure], or in the Alternative to Stay and Compel Arbitration." On appeal, Appellants argue the circuit court erred by finding the Arbitration Agreement within the Residence and Services Agreement did not evince a mutual intent to be bound and was not supported by sufficient consideration. We affirm pursuant to Rule 220(b), SCACR.

We hold the circuit court did not err by denying Appellants' motion to compel arbitration because the language of the Arbitration Agreement does not evince a mutual intent to be bound. See *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008) ("Appeal from the denial of a motion to compel arbitration is subject to de novo review."); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002) ("However, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them."); *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019) ("A party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement."); *id.* ("The consideration of contract validity is normally addressed applying general principles of state law governing the formation of contracts."); *Mart v. Great S. Homes, Inc.*, 441 S.C. 304, 312, 893 S.E.2d 360, 364 (Ct. App. 2023) ("Arbitration clauses are separable from the contracts in which they are imbedded." (quoting *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 366, 887 S.E.2d 534, 539 (Ct. App. 2023))); *id.* at 312-13, 893 S.E.2d at 364 ("Whether an arbitration clause is valid 'is distinct from the substantive validity of the contract as a whole.'" (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001))); *Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 7, 881 S.E.2d 646, 649 (Ct. App. 2022) (holding that whether the parties have an agreement to arbitrate is decided applying South Carolina law, and "the parties must also manifest a *mutual intent* to be bound" (emphasis added) (quoting). Further, because Appellants did not evince a mutual intent to be bound and did not otherwise provide consideration to Ed Medford, the Arbitration Agreement was not supported by consideration. See *Miller v. Dillon*, 432 S.C. 197, 208, 851 S.E.2d 462, 468 (Ct. App. 2020) ("The necessary elements of a contract are an offer, acceptance, and valuable consideration." (quoting *Stanley Smith & Sons v. Limestone Coll.*, 283 S.C. 430,

433, 322 S.E.2d 474, 477 (Ct. App. 1984))); *S. Glass & Plastics, Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012))); *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012) ("Valuable consideration may consist of 'some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'" (quoting *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998))); *Furman Univ. v. Waller*, 124 S.C. 68, 85, 117 S.E. 356, 362 (1923) (providing a "[p]romise for promise is a sufficient consideration" to support a bilateral contract (quoting *Rice v. Sims*, 8 Rich. 416 (1832))).

AFFIRMED.¹

WILLIAMS, C.J., and MCDONALD and TURNER, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED

Oct 10 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454
Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly
situated, ... Respondents,

v.

Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a Pacifica
Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the South Carolina Rules of Appellate Procedure, Appellants, Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a/ Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge (collectively "Pacifica") respectfully request rehearing regarding this Court's September 25, 2024, opinion affirming the circuit court's denial of Pacifica's Motion to Compel Arbitration in this case. In the alternative, Pacifica moves this Court to supplement the Record on Appeal with excerpts of Respondent Ed Medford's deposition testimony (taken by Respondent's counsel after briefing was closed), submitted herewith as Exhibit A.

Respondent's sole argument to avoid his agreement to arbitrate his claim rests on the use of the word "you" in his Residence and Care Agreement ("Agreement") with Pacifica. The circuit court placed arbitration agreements on an unequal plane with other contracts by ignoring long-standing contract interpretation principles in finding a lack of mutual intent to be bound. Respondent has now testified that he understood there was a mutual intent to be bound, (*see* Section 3, *infra*), but such testimony was unnecessary for this Court to apprehend the circuit court's error and reverse. In affirming, this Court overlooked South Carolina case law enforcing arbitration provisions drafted similarly to the one executed by Pacifica and Respondent. In support of this petition, Pacifica submits the following:

ARGUMENT

1. The Court overlooked South Carolina case law that enforces similarly drafted arbitration provisions to the one here. For example, the arbitration provision in *York v. Dodgeland of Columbia, Inc.* provided as follows:

PURCHASER AGREES THAT ANY AND ALL DISPUTES IN
ANY WAY RELATED TO ANY NEGOTIATION OR
POTENTIAL PURCHASE, FINANCING, OR ACTUAL
PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER
SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT
. . . .

406 S.C. 67, 81-82, 749 S.E.2d 139, 146 (Ct. App. 2013).

By comparison, the Agreement at issue states as follows:

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. . . shall be resolved by
submission to neutral, binding arbitration in accordance with the
Federal Arbitration Act

Like the arbitration provision here, the *York* arbitration provision used a single term to identify the offeree – "Purchaser" – who had the power to either accept or reject the contract's

terms. *Cf. Carolina Amusement Co. v. Connecticut Nat. Life Ins.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (“The offer identifies the bargained for exchange and creates a power of acceptance in the offeree.”) (citing *Restatement (Second) of Contract* § 24 (1981)). Pacifica also used a single term—“you”—to identify the offeree, and the words following “you agree” demonstrate that Pacifica, as the offeror, also promised to submit “**any and all claims and disputes** arising from or **related to this Agreement** or your residency, care, or services at the Community” to arbitration. (emphasis added) (R. 64-65.). In offering the Agreement to Respondent, Pacifica manifested its intent to arbitrate any and all claims arising from the Agreement with only limited exceptions related to specific claims. *Cf. O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997) (“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. If an employer asks an employee to submit to binding arbitration, it cannot then turn around and slip out of the arbitration process itself.”). The arbitration provision did not include language allowing Pacifica to avoid arbitration, nor has Pacifica sought to avoid arbitration in this litigation. Accordingly, the Court should grant rehearing and reverse the circuit court’s Order and compel arbitration of Respondent’s claims.

2. The Court overlooked the “whole scope and effect of the language used” in the arbitration provision in this case. *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000). While the arbitration provision does include the term “you” to identify the offeree with power to accept or reject the offer, the provision also includes other agreed upon parameters for arbitration that reflect the mutual intent to submit claims to arbitration. The provision calls for the use of a “mutually agreed upon” arbitrator and requires “each party” to bear its own costs and fees in arbitration. (R. 64-65). The provision also provides that if any part

of the arbitration provision is found to be unenforceable, “the remaining portions of the clause shall remain valid and shall be enforced by the **parties**.” (emphasis added) (*Id.*).

3. Finally, the contract element of “mutual intent to be bound” has now been established by the testimony of Respondent himself, and Pacifica moves in the alternative to supplement the Record on Appeal under Rule 212(a), SCACR. After briefing closed in this appeal, Respondent moved the trial court for an order permitting depositions pending appeal. The trial court granted the motion, over Pacifica’s objection, and permitted Respondent Ed Medford’s deposition. Pacifica submits this Court should consider Respondent’s deposition testimony, submitted herewith as Exhibit A, as evidence of the intention of the parties concerning the applicable arbitration provision. Specifically, Respondent testified that he understood the arbitration provision in this case required all disputes arising from the Agreement to be submitted in arbitration, whether such dispute was initiated by Respondent or Pacifica. (*See*, Ex. A at p. 65). In other words, Respondent himself understood Pacifica intended to be bound to arbitration when it presented the arbitration provision to him for execution. Pacifica recognizes the deposition testimony was not before the trial court when ruling on Pacifica’s Motion to Compel Arbitration; however, Pacifica submits that Respondent’s testimony should be considered because the testimony at issue was taken after the trial court issued its Order and after briefing closed in the appeal. Furthermore, it would be manifestly unjust for the Court to deny arbitration on the basis of lack of “mutual intent to be bound” when Respondent’s own testimony reveals there was a mutual intent to be bound. Accordingly, Pacifica moves in the alternative to supplement the Record on Appeal under Rule 212(a), SCACR.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing and reverse the trial court's denial of Pacifica's Motion to Compel Arbitration or, in the alternative, issue an Order permitting Pacifica to supplement the Record on Appeal with Respondent Ed Medford's deposition testimony for this Court's consideration. Pacifica also incorporates into this petition all the arguments it raised in briefing to this Court and does not abandon such arguments.

Respectfully submitted,

**HEDRICK GARDNER KINCHELOE &
GAROFALO LLP**

s/ Paul E. Allen, Jr.

Jonathan G. Roquemore (SC Bar No. 68274)

Joshua D. Shaw (SC Bar No. 77835)

Paul E. Allen, Jr. (SC Bar No.: 104062)

1230 Main Street, Suite 325

Columbia, SC 29201

Attorneys for Appellant

)

)

PURSUANT TO NOTICE and/or agreement of the parties, the De Bene
Esse Video Deposition was held February 19, 2024, at 1:36
p.m.-4:52 p.m.; February 20, 2024, 1:32 p.m.-4:29 p.m.; February
21, 2024, 1:28 p.m.-4:05 p.m.; March 5th, 2024, 1:30 p.m.-4:35
p.m.; and March 13, 2024, 1:32 p.m.-5:13 p.m., at 250 Magnolia
Street, Spartanburg, South Carolina; attended by Counsel, as follows:



1 APPEARANCES:

2 Mitch Slade, Esquire
3 MITCH SLADE LAW OFFICE
4 145 n. Church Street
5 Spartanburg, South Carolina 29306
6 and

7 Patrick E. Knie, Esquire
8 KNIE & SHEALY LAW FIRM
9 250 Magnolia Street
10 P.O. Box 5159 (29304)
11 Spartanburg, South Carolina 29306
12 Attorneys for Plaintiff
13

14 Jonathan G. Roquemoire, Esquire
15 HEDRICK GARDNER KINCHELOE GAROFALO
16 1230 Main Street, Suite 325
17 Columbia, South Carolina 29201
18 Attorney for Defendants
19

20 VIDEOGRAPHER: Cliff Williams, CLVS
21 ARGYLE MULTIMEDIA, LLC
22 cliff@argylemultimedia.com
23

24 REPORTED BY: Sandy Satterwhite Reporting
25 Satterwhite@Charter.net/(864) 706-5698

1	INDEX	Page
2		
3	Cross Examination by Mr. Roquemore	5
4	Certificate of Reporter	126
5	EXHIBITS MARKED:	
6	Plaintiff's Exhibit No. 12	35
7	Plaintiff's Exhibit No. 13	101
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
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1 STIPULATIONS:

2 It is agreed by and between the counsel for the parties
3 that all formalities shall be waived until the time of the
4 trial, except as to the form of the question and/or the
5 responsiveness of the answer.

6 SIGNATURE:

7 Deponent expressly reserved his right to read over and
8 sign this deposition transcript.

9 * * * * *

10 ED MEDFORD, being duly sworn to tell the truth, the whole truth
11 and nothing but the truth, testified as follows:

12 BY MR. ROQUEMORE:

13 So, before we get started, we want to memorialize
14 our continuing agreement regarding several things in this
15 case. The first is that all objections to any question on
16 any basis are reserved until the time of trial. No
17 objection is waived by not making it within the confines
18 of this deposition.

19 Related to that, the defense asking questions on a
20 topic is not a waiver of a later objection to the
21 admissibility of those questions and answers; and by
22 participating in the deposition, prior or today, the
23 Defendants are not waiving any rights they have asserted
24 via Motions to Dismiss previously filed in the case.

25 I think that covers anything.

1 Q. And you've already talked about this some, but --- and you
2 kind of described it as one of the reasons why you were at
3 least initially interested in a community like Pacifica
4 Skylyn, which was, I think they call it, like the
5 continuum of care where you can ---

6 A. Right. Yes.

7 Q. --- initially come in and basically live in an apartment
8 and be totally independent and that can transition all the
9 way to being totally dependent at the other ---

10 A. Right.

11 Q. --- end of the spectrum?

12 A. Yes, sir.

13 Q. And, just so we're clear, when you moved into Pacifica
14 Skylyn, and after the entire time you lived there, you
15 were in independent living, correct?

16 A. Yes, sir.

17 Q. And so you effectively lived in an apartment unit?

18 A. It was an apartment unit in the independent living section
19 ---

20 Q. Yes, sir.

21 A. --- of Pacifica.

22 Q. All right.

23 You were never a resident of any other area of
24 Pacifica Skylyn's campus other than independent living?

25 A. No, sir.

1 Q. All right. Mr. Medford, we're --- let's just mark this as
2 the --- I'm fine if we just mark them consecutively. Just
3 pick up where you left off. That's fine with me.

4 This would be Exhibit?

5 BY COURT REPORTER:

6 Twelve.

7 BY MR. ROQUEMORE:

8 Twelve.

9 (PLAINTIFF'S EXHIBIT NO. 12 MARKED FOR IDENTIFICATION)

10 CROSS EXAMINATION CONTINUED BY MR. ROQUEMORE:

11 Q. Mr. Medford, I'm going to scoot that down your way, and
12 really Exhibit 12, I've grouped some stuff together that
13 we probably don't even need to talk about, but the primary
14 thing I want to talk to you about is the what's called the
15 Residents and Services Agreement that begins at page
16 three, but why don't you just take a moment to orient
17 yourself.

18 A. Uh-huh (affirmative response).

19 Q. And just kind of flip through, see what's here, and when
20 you get done, I'm going to --- I'm going to have a general
21 question of along the lines of does it look like these
22 documents are the ones that would have been completed
23 either by you or the facility in connection with you
24 becoming a resident at Pacifica Skylyn?

25 A. Yes, sir.

1 Q. You know, I honestly didn't pay attention to whether a
2 copy of the Residence and Services Agreement was in the
3 documents that --- that you produced. Did you keep a copy
4 of it? Do you remember if you did?

5 A. I don't think I still have a copy of it.

6 Q. All right.

7 A. No, sir. I don't think I have a copy of it.

8 Q. Do you think you had one at some point in time?

9 (OFF THE RECORD)

10 BY THE WITNESS:

11 To the --- to my knowledge these first two pages,
12 now this one and this one, this independent living like
13 the Lease Agreement, that's my signature, and I had that.
14 These first two pages I was never given those.

15 CROSS EXAMINATION CONTINUED BY MR. ROQUEMORE:

16 Q. Yes, sir. This is --- and you're right to make that
17 distinction. I think this is a --- this --- this exhibit
18 is ---

19 A. Yeah.

20 Q. --- kind of a compilation ---

21 A. Right. Yeah.

22 Q. --- of more Pacifica documents?

23 A. Right.

24 Q. For record keeping or whatever reasons.

25 A. Yes, sir.

- 1 Q. Versus something like that the Residence and Services
2 Agreement, the Lease Agreement, as you called it, that you
3 would have received a copy of, correct?
- 4 A. Yes, sir. Yes, sir.
- 5 Q. Let me just ask you a few things. On --- if you go to
6 page two of the --- I'm sorry. Go back the other way.
7 Page two of the whole thing. That right there.
- 8 A. Okay. Uh-huh (affirmative response).
- 9 Q. Is that your handwriting, any of that? It says, "Face
10 Sheet"?
- 11 A. Yes, sir. That's my handwriting.
- 12 Q. Okay. So, it looks like you completed that, that form?
- 13 A. Yes. Uh-huh (affirmative response).
- 14 Q. And --- and this is what I was asking you about earlier
15 about some of your medical history.
- 16 A. Uh-huh (affirmative response).
- 17 Q. This is where I was reading from ---
- 18 A. Right.
- 19 Q. --- and where I got your Social and date of birth from.
- 20 A. Right.
- 21 Q. Do you see your Social up there? Is that correct? Don't
22 say it out loud on the record.
- 23 A. Yes, sir.
- 24 Q. And just for the record, we're not admitting any of this
25 into evidence right now. So, if we get to the point where

1 anybody wants to do that, Mr. Medford, I wanted to let you
2 know, we'll --- people will make sure that your
3 identifying information gets redacted. I don't want you
4 to worry about that.

5 A. Okay.

6 Q. Okay, and then at page three of the Exhibit 12, that's
7 where the Lease Agreement begins; is that right?

8 A. Yes, sir.

9 Q. And it looks like, well, and I did a poor job, because I
10 didn't number these pages. So, we'll see if we can find
11 another way to do this. Bear with me just a second.

12 If you'll flip back and keep flipping, you'll get to
13 a page that says, "Appendix B," and I think you're
14 getting close to it.

15 A. Yes.

16 Q. All right, and so there are, the Lease Agreement contains
17 some appendixes ---

18 A. Uh-huh (affirmative response).

19 Q. --- that are in the back, but do --- do you agree
20 generally that from the Residence and Services Agreement
21 cover page back to that page just before Appendix B that
22 that's the Lease Agreement that you signed with Pacifica
23 Skylyn?

24 A. Yes, sir.

25 Q. Okay, and at that --- that last page before Appendix B, so

1 flip back one page with me. Is that where it --- does
2 that page say, "Governing Law" at the top?

3 A. Yes, sir.

4 Q. And under Resident it says, "Roy Edwin Medford." Is that
5 your signature on that page?

6 A. Yes, sir.

7 Q. Okay, and if you flip back or maybe forward.

8 A. This?

9 Q. Yes, right there. That page where it says you see at the
10 bottom it says, "Entire Agreement" there at number 12?

11 A. Yes, sir.

12 Q. And above that there's a signature block that says, "Roy
13 Edwin Medford." Is that your signature?

14 A. Yes, sir.

15 Q. And then if we flip back forward, you're going to see your
16 --- and I apologize again for not having page numbers.

17 You're going to see your signature at the top of a page,
18 at the very top right there, and underneath is that your
19 signature at the top of that page, Mr. Medford?

20 A. Yes, sir.

21 Q. And that's a page where the first substantive language
22 begins, "C. Transfers from Apartment," is that right?

23 A. Yes, sir.

24 Q. All right. I think that's all the signatures in there.

25 I noted that the dates, it looks like, for all of

1 those signatures are November the 7th of 2018, and do you
2 think that accurately reflects the, the date that you made
3 those three signatures in this document?

4 A. Yes, sir.

5 Q. And then it also looks like, and I know you don't know who
6 this is, but on the last page where you signed, there's a
7 --- that's it?

8 A. Executive director.

9 Q. Portends to be an executive director's signature there
10 that frankly I can't read, but you don't ---

11 A. I think her name was Sylvia something, but I can't
12 remember her last name.

13 Q. And that looks a little bit like an S-y to start.

14 A. It might have been Sylvia Diaz or something like that, but
15 I can't remember exactly what her name, because, like I
16 said earlier, she was only there for a few weeks before
17 she left.

18 Q. Fair enough, and back when you signed this document and
19 during the period of time that you lived at Pacifica, were
20 you making your own decisions for yourself financial,
21 medical, otherwise?

22 A. Yes, sir.

23 Q. You didn't have a POA that was making decisions for you?

24 A. I had a POA, but it was a medical POA, but I didn't have
25 one that was making decisions for me. No, sir.

1 Q. Yes, sir, and so in terms of entering this Lease Agreement
2 with Pacifica Skylyn, that's a decision that you were
3 capable of making on your own and that you did make on
4 your own?

5 A. Yes, sir.

6 Q. Okay, and --- and you entered into the agreement freely
7 and voluntarily. Would you agree with that?

8 A. Yes, sir.

9 Q. All right.

10 I'm going to have a few questions about this
11 document. Do you want to take a break for a few minutes,
12 or do you want me to ask those and then we take a break?

13 A. You can ask those, and we'll take a break.

14 Q. Let's do that.

15 All right. If you'll flip all the way back to the
16 front of the agreement for me, please, sir, and it's going
17 to be ---

18 A. Okay.

19 Q. It's going to be page three. The cover page is page one,
20 then there's a Table of Contents.

21 A. Uh-huh (affirmative response).

22 Q. There, and then the next page is where I want to start.

23 A. Okay.

24 Q. It says, "Pacifica Senior Living Skylyn" at the top,
25 "Residence and Services Agreement." Is that right?

1 A. Yes, sir.

2 Q. All right, and then it indicates that the agreement is
3 made between Pacifica Senior Living Skylyn and Roy Edwin
4 Medford, correct?

5 A. Yes, sir.

6 Q. And that's you, correct?

7 A. Yes, sir.

8 Q. And you agree that or do you agree that this document
9 governed the relationship between you and to Pacifica with
10 respect to your lease of the apartment at Pacifica Skylyn?

11 A. Yes, sir.

12 Q. And it looks like, if we come, just scoot down the same
13 page a little bit maybe three-quarters down, there's a
14 reference to your apartment number being 205?

15 A. Yes, sir.

16 Q. And did you live in apartment 205 the entire time you
17 lived at Pacifica Skylyn?

18 A. Yes, sir. That was the only apartment I lived in the
19 whole time I lived there.

20 Q. Did you --- well, we'll get to that in a minute, and I
21 thought I saw or maybe you said, was that a one-bedroom
22 unit?

23 A. Yes, sir. One bedroom. One bedroom, one bath.

24 Q. In that same paragraph, so it's 1a, Living Accommodations,
25 Residence, it says, "You have chosen to live --- to live

1 in Apartment No. 205," correct?

2 A. Yes, sir.

3 Q. And then it says in the next sentence, "You may live in
4 your apartment on a month-to-month basis, subject to the
5 terms of this agreement and to the general rules and
6 regulations of the community contained in the resident
7 handbook, as it now exists and as it may later be
8 amended." Did I read that correctly?

9 A. Yes, sir.

10 Q. Do you agree that your lease of the apartment at Pacifica
11 Skylyn was month-to-month?

12 A. Explain what you mean by month-to-month, please, sir?

13 Q. I'm going to ---

14 A. You're saying it wasn't a yearly lease? Is that what
15 we're saying?

16 Q. That would be --- that would be one thing that it would
17 indicate is that it was not for a term of one year.

18 A. Right. Well, no, I was explained to, when I first moved
19 in, that it was a yearly lease. I did not think I was
20 living a month-to-month. It was a yearly lease that I was
21 told when I first moved in by that executive director that
22 it was a one-year lease.

23 Q. Okay, and we'll --- I'll keep having --- I'll have some
24 more questions about that as we go through. You agree
25 that the Lease Agreement says it's month-to-month?

1 A. Month-to-month. Yes, sir.

2 Q. All right, and bear with me just a second.

3 If you'll flip seven pages back from where you are,
4 and I'm hoping you're going to end up on a page that has,
5 Section D, Termination.

6 A. Yes.

7 Q. Close to the top.

8 A. D, Termination.

9 Q. Yes, sir, and it indicates there, "You may terminate this
10 agreement at any time, with or without cause, by giving us
11 30 days prior written notice of termination. You do ---
12 you need not cite a specific reason for the termination."
13 Did I read that correctly?

14 A. Yes, sir.

15 Q. All right, and --- and did you understand that you could
16 terminate this agreement at any time by simply giving
17 Pacifica 30 days' written notice of the termination?

18 A. Yes, sir.

19 Q. Okay. Would that suggest to you that this was a
20 month-to-month lease?

21 A. Well, I didn't take it as that.

22 Q. Do you agree that a 30-day termination window is
23 consistent with the language in the Lease Agreement
24 stating that it is month-to-month?

25 A. Yes, sir.

1 Q. Okay, and you agree that based on the terms that we read
2 under Termination, well, and just for foundational
3 purposes, this, the title of this section is Termination
4 by Resident, correct?

5 A. Uh-huh (affirmative response). Yes, sir.

6 Q. And you were the resident, correct?

7 A. Yes, sir.

8 Q. And this is saying that you, Ed Medford, could have left
9 Pacifica Skylyn at any point in time while you lived there
10 by giving 30 days' written notice?

11 A. Yes, sir.

12 Q. And you agree you had the ability to do that under this
13 Lease Agreement?

14 A. Yes, sir.

15 Q. And you agree that that term regarding termination is
16 consistent with the language saying this is a
17 month-to-month lease?

18 A. Yes, sir.

19 Q. Is there anything --- well, that will be a bad way to ask
20 that.

21 Did you read the Lease Agreement before you signed
22 it?

23 A. I read parts of it. I didn't read all of it.

24 Q. All right. Now, I may ---

25 A. I didn't read it for word for word.

1 Q. Sitting here, and this might be silly, so you tell me if
2 it's silly. We are talking, what are we, five-and-a-half
3 years, roughly, since you signed this document, late 2018
4 to early 2024?

5 A. Yes, sir.

6 Q. Something like that?

7 A. Yes, sir.

8 Q. Do you have a recollection sitting here today as to which
9 sections you read for word for word and which you did not?

10 A. Well, I --- I glanced over every section, and if I got the
11 gist of it, I didn't read the whole document word for
12 word.

13 Q. Okay.

14 A. But I read most of it. I'd say 90 percent of it I read
15 word for word.

16 Q. All right, and --- and sitting here today can you point
17 out the approximate ten percent that you did not read word
18 for word? Would that be possible for you to do at this
19 point?

20 A. No, sir.

21 Q. Now your --- the majority of your working career was in
22 HR, correct?

23 A. Yes, sir.

24 Q. And would you agree that working in the HR field you had
25 one of your strengths was attention to detail?

1 A. Yes, sir.

2 Q. All right, and was that an important characteristic to
3 have working in HR to have a strong attention to detail?

4 A. Yes, sir.

5 Q. Some people call having a strong attention to detail being
6 inclined to cross every t and dot every i.

7 Are you familiar with that phrase?

8 A. Yes, sir.

9 Q. Do you agree that in performing your functions in the HR
10 world you --- you were mindful of crossing every t and
11 dotting every i?

12 A. Yes, sir.

13 Q. Because in the HR field it's important to be able to
14 document how an employee has been handled in case the
15 handling has to be defended at a later date; is that
16 right?

17 A. Yes, sir.

18 Q. Did you --- were you involved with employment contracts
19 when you worked in the HR world?

20 A. Yes, sir.

21 Q. Did you have one yourself?

22 A. Yes, sir.

23 Q. And did you deal with others who --- whose employment
24 arrangement was --- the word is escaping me --- was
25 handled through a written contract?

1 A. Yes, sir. As I hired HR managers for stores, they signed
2 an employment contract.

3 Q. All right, and so in your professional career you were
4 accustomed to reading contracts?

5 A. Yes, sir.

6 Q. And I assume on some level you were accustomed to
7 explaining contracts?

8 A. Yes, sir.

9 Q. And certainly, being in the HR field, you knew it was
10 important before you signed a contract to read and
11 understand what it is you were signing, correct?

12 A. Yes, sir.

13 Q. Okay, and that was important to you when you signed the
14 Lease Agreement, and Exhibit 12, it was important to you
15 that you read and understand what you were signing? Would
16 you agree with that?

17 A. Yes, sir, within the time limit they give you to read it
18 while you --- before you sign it.

19 Q. Okay. Well, I mean did you --- are you telling me you
20 didn't feel like you had an opportunity to ---

21 A. At --- at the time I signed it, no, I didn't have enough
22 time to read every word. I glanced through it and got the
23 --- the gist of the document, but when I signed it, I did
24 not read every word, because they were sitting there
25 staring at me, and I didn't --- I didn't have time to read

1 the whole document.

2 Q. Yes, sir. Did you ask for additional time or some privacy

3 so that you could fully read ---

4 A. No, sir.

5 Q. --- the document?

6 A. No, sir.

7 Q. Did you complete your review later ---

8 A. Yes.

9 Q. --- after you had signed it?

10 A. Yes, sir.

11 Q. All right, and did you, based on your later review, go

12 back to anyone and say, "Oh, I signed this, but I had not

13 had an opportunity to fully read it, and I've got some

14 questions or concerns about what I've apparently agreed to

15 do"?

16 A. No, sir.

17 Q. In your --- in the --- your time in HR, did the employment

18 agreements that folks signed contain arbitration

19 agreements?

20 A. Yes, sir.

21 Q. All right. Is --- is an arbitration agreement something

22 you were familiar with before you became a resident at

23 Pacifica Skylyn?

24 A. I was very familiar with Lowe's arbitration commitment

25 that they signed in their employment contract.

1 Q. I assume it was pretty standard from agreement to
2 agreement?

3 A. It was pretty standard, but it was pretty in detail.

4 Q. Yes, sir.

5 A. So.

6 Q. And I meant, let me ask a better question.

7 The --- generally the same arbitration language
8 showed up from Lowe's contract to Lowe's contract to
9 Lowe's contract as opposed to it being reworked every
10 time?

11 A. Yes. Yes, sir.

12 Q. Okay.

13 A. It was the same time over and over every time.

14 Q. That's what I thought you meant.

15 A. Yep. Yes, sir.

16 Q. And I think you even mentioned earlier that, when I asked
17 you about whether you had given another deposition, you
18 said, "No, but I --- I have been involved in
19 arbitrations," and so, have you actually had to attend
20 arbitration hearings or conferences before?

21 A. Yes. I attended arbitration hearings and conferences with
22 Lowe's attorneys whenever there was a suit that went to
23 the EEOC. We would go to the arbitration, and I would go
24 with a Lowe's attorney present with me.

25 Q. Yes, sir. So, the concept of arbitration, what it is, was

1 not foreign to you when you moved into Pacifica Skylyn?

2 A. No, sir.

3 Q. And you understood it was different than being in --- in
4 court?

5 A. Yes, sir.

6 Q. Okay, because I also assumed that at some point in time in
7 your career, one or more of your employers perhaps a case
8 advanced past the EEOC process and ended up in a lawsuit?

9 A. Yes.

10 Q. Is that true?

11 A. Yes, sir.

12 Q. Okay. So, you understood before you moved into Pacifica
13 Skylyn the difference between filing a lawsuit and being
14 in court with a jury versus being in the arbitration
15 forum?

16 A. Yes, sir.

17 Q. I'll try to direct you without you doing too much work, so
18 sit tight for a second. Okay?

19 All right. If you'll go, I think it's four pages
20 back, oh, from --- from where you were, not ---

21 A. Four pages back from where I was there?

22 Q. Well, you're --- you're going from the wrong place now.
23 From ---

24 A. Here?

25 Q. No, sir. From the page where we were talking about

1 termination. Go one more page, I think. Okay. Keep
2 going. Four pages from there, and it's the page that
3 says, "Pet Policy," at the top. When you get there, we're
4 in the same place.

5 A. I don't see it. Am I missing it?

6 Yeah, there it is.

7 Q. There you go.

8 A. I've got it.

9 Q. Does that say, does your say, "Seven, Pet Policy"?

10 A. Yes, sir.

11 Q. All right, and then if you come down that page at the
12 bottom, number eleven is Arbitration; is that right?

13 A. Yes, sir.

14 Q. And then if you just --- just peek to the next page for a
15 second, and we've already established that right above
16 number 12, "Entire Agreement," that's your signature, "Roy
17 Edwin Medford," correct?

18 A. Yes, sir.

19 Q. Okay, and above the signature is a paragraph that says,
20 "By signing below, you warrant that this Arbitration
21 Agreement has been explained to you, that you understand
22 its significance, that you voluntarily agree to be bound
23 by it, and that you understand that agreeing to
24 arbitration is not a condition of admission to the
25 community." Did I read that language correctly?

1 A. Yes, sir.

2 Q. All right, and you signed beneath that language, correct?

3 A. Yes, sir.

4 Q. All right. Did you read the arbitration provision before
5 you signed it?

6 A. No, sir.

7 Q. You did not?

8 A. No, sir.

9 Q. All right. So, that's a part of the, you said you
10 reviewed 90 percent of the contract word for word before
11 signing it, and that you did not remember which portions
12 you may not have read word for word. Are you telling me
13 that the arbitration section is one you did not read for
14 word for word?

15 A. I glanced over it, because --- and when I glanced over it,
16 I knew the gist of arbitration from Lowe's, so I didn't
17 read word for word what it said.

18 Q. Okay. So, you're --- you're telling me that when you got
19 to the arbitration section, you --- you basically knew
20 what arbitration was, and so you didn't feel the need to
21 read the --- that section word for word?

22 A. Word for word.

23 Q. All right.

24 A. I asked questions to the then executive director who
25 somewhat explained it to me and the marketing director.

1 Q. All right. So, rather than read the arbitration language
2 for yourself, when you were accustomed to reading
3 arbitration provisions, you opted instead to just ask the
4 people there about the arbitration provision?

5 A. I glanced over it and got the gist of it, and then asked
6 some questions. After I signed the entire document, I took
7 and I read it later.

8 Q. Okay.

9 A. Like I did all the rest of it. After I left that, when I
10 got home, I read the entire document.

11 Q. All right, and a couple of things to follow up.

12 A. Uh-huh (affirmative response).

13 Q. After you got home and read the entire document word for
14 word, including the arbitration provision at paragraph
15 eleven, correct?

16 A. Yes, sir.

17 Q. Okay. You read the language. If you'd go to the next
18 page, please. You read the language in bold there that
19 says, "You may withdraw your agreement to arbitrate within
20 30 days after signing this agreement by giving written
21 notice of your withdrawal to the community," correct?

22 A. Yes, sir.

23 Q. Okay, and you did not do that, correct?

24 A. No, sir.

25 Q. Let me --- I think --- I think a bad question called for

1 an answer ---

2 A. Yeah.

3 Q. --- that doesn't make sense, because I think I know what
4 you were saying.

5 Did you give any notice in writing to the community
6 to Pacifica Skylyn of your intent to withdraw your
7 agreement to arbitrate?

8 A. No, sir, I did not. At that point I didn't feel the need.

9 Q. Yes, sir, and when you indicated a few minutes ago, that
10 while you were sitting, and I'm making an assumption here,
11 when you signed these documents, you were sitting in an
12 --- in an office or conference room at Pacifica Skylyn; is
13 that right?

14 A. Conference room at Pacifica Skylyn.

15 Q. Yes, sir.

16 A. Yes.

17 Q. I wanted to make sure they didn't like come to you or
18 something ---

19 A. No, sir.

20 Q. --- wherever you were?

21 A. I was at Pacifica Skylyn on the facility there in the
22 conference room.

23 Q. Yes, sir, and the people in the room with you, you
24 mentioned somebody in marketing. Could you give us that
25 person's name? I may not have asked.

1 A. I think her name was Donna, but I don't remember her last
2 name.

3 Q. Yes, sir, and then it's not for the whole time, but at
4 some point in time, the person you understood to be the
5 then current executive director came in?

6 A. Right.

7 Q. And that may be Sylvia?

8 A. Right. Prior to that time, I had never met her. Now
9 prior to meeting Sylvia for that few minutes, I had spoken
10 to, I think her name was Donna, like I said. I had spoken
11 to her numerous times on the phone. We communicated back
12 and forth.

13 Q. Yes, sir, and anybody else in the room during the meeting
14 where you're signing documents, other than we think Donna,
15 the marketing person?

16 A. Uh-huh (affirmative response).

17 Q. And perhaps Sylvia, the person that we think was the then
18 executive director. Anybody else in the room?

19 A. I had a friend with me.

20 Q. Okay. Who was that?

21 A. I can't remember his name. He's a long, long friend.
22 Greg Smith.

23 Q. Okay, and what was the purpose of bringing Mr. Smith
24 along?

25 A. At that point I wasn't --- I did --- I didn't want to

1 drive, and I wasn't driving a whole lot then. So, he
2 drove me to the Pacifica to go over the things.

3 Q. Understood.

4 A. He --- in fact, he went with me when I went and did the
5 tour, the original tour there. He went with me.

6 Q. So, you were, as you were kind of entering Pacifica
7 Skylyn, you were already being very mindful of ---

8 A. Yes, sir.

9 Q. --- whether you thought it was safe for you to operate a
10 vehicle or not?

11 A. Yes, sir.

12 Q. You're doing a really good job of being res --- responding
13 audibly.

14 You're --- you're jumping in a little bit quickly.

15 A. Okay.

16 Q. Because I'm asking questions a little bit slowly. I'm not
17 fussing at you.

18 A. Okay. I understand.

19 Q. Just --- just check up just a hair.

20 A. Okay.

21 Q. And I --- and I didn't tell you that at the beginning. If
22 you find me cutting you off before you're done, ---

23 A. Okay.

24 Q. --- because you may pause or something, ---

25 A. Uh-huh (affirmative response).

1 Q. --- then you just tell me.

2 A. Okay.

3 Q. "I wasn't done, and I want to finish."

4 A. Okay.

5 Q. And I'll stop.

6 A. All right.

7 Q. Fair enough?

8 A. Yes, sir.

9 Q. Very good. I lost track for a second.

10 Mr. Smith was with you.

11 A. Uh-huh (affirmative response).

12 Q. To drive you there, and you think he was in the room when

13 you were going over the documents?

14 A. Yes, sir.

15 Q. And what's Mr. Smith up to now?

16 A. He's passed away.

17 Q. I'm sorry. Anybody else in the room while you're

18 reviewing and signing the documents?

19 A. No, sir, not that I remember.

20 Q. Okay. Now you said that you didn't feel the need to

21 review or I'm sorry. You didn't feel the need to read

22 word for word the arbitration language before signing

23 because you were familiar with arbitration.

24 Let me just ask you as a general principle. Do you

25 think it's important to read all of the words in a

1 document before you sign it if your signature is
2 acknowledging that you are agreeing to the contents of
3 that document?

4 A. Yes, sir.

5 Q. Okay, and that --- that was kind of a personal policy that
6 you had put into practice in your professional career in
7 HR for years, correct?

8 A. Yes, sir.

9 Q. Now you indicated there was --- some dis --- some
10 questions, I think, that you asked of someone in the room,
11 and I understood you to be saying those questions were
12 related to the arbitration provision?

13 A. No, sir.

14 Q. Oh, I misunderstood you.

15 A. They weren't ---

16 Q. I'm sorry.

17 A. They weren't all --- what --- what they did, when they
18 went through this with me, and it was, first of all, it
19 was, I think her name Donna.

20 Q. Okay.

21 A. The marketing director, she had this checklist that she
22 had in front of her, and that was a checklist she used and
23 dated things and things like that, which it might not have
24 been that exact checklist, but she flipped through it, and
25 she said, "This is the furnishings." She gave me the gist

1 of that, and then when she got to the arbitration, she
2 said, "This is the arbitration clause. This is the gist
3 of it," and I was glancing over it, and then she was
4 moving on to other parts of the document while I was ---
5 and I didn't have time to read the whole document, no.

6 Q. So, sort of --- sort of a CliffsNotes versions going
7 through the ---

8 A. Uh-huh (affirmative response).

9 Q. --- document?

10 A. Yes, sir.

11 Q. And do you agree that you could have said, "I want you to
12 stop. Slow down. I want to read this thing word for
13 word, and I'll tell you when I'm ready to move on to the
14 next section"?

15 A. Yes, sir.

16 Q. That's a thing you could have done?

17 A. Yes, sir.

18 Q. And you did not do that?

19 A. No, sir.

20 Q. What --- do you have any recollection of --- I might be
21 unclear on this, so let me ask it so I understand.

22 I'm unclear on whether you asked specific questions
23 about the arbitration language or if you were saying that
24 Donna simply explained it in some simple terms?

25 A. Donna simply explained it in some simple terms, and I

1 asked her one or two questions and compared it to a
2 employee contract from Lowe's, and she somewhat explained
3 a little bit of the difference.

4 Q. What do you remember asking about the arbitration
5 provision?

6 A. To be honest with you I don't remember my exact questions.

7
8 I remember something we discussed about the
9 arbitration in --- in the manner of I asked her about
10 evictions and that kind of stuff with arbitration if any
11 --- if anybody was ever evicted, explain the arbitration
12 to me there, or --- and I --- I think I asked her
13 something about pertaining to if I left and had an issue,
14 how would I handle that. Now she explained a little bit
15 of that, but she did not go into detail, because her exact
16 words, and I remember her exact words, she said she didn't
17 --- she didn't know completely all about the arbitration.

18 Q. Okay. Do you remember, outside of saying, "She," being
19 Donna?

20 A. Yes, sir. Donna.

21 Q. That's the name we've assigned to her.

22 A. Donna.

23 Q. Or we think that's who it was?

24 A. Yes, sir.

25 Q. Saying something along the lines of, I think what you're

1 telling me is, "I'm not --- I don't completely understand
2 it," or something like that?

3 A. Well, I didn't really say, "I don't completely un" ---

4 Q. But not you?

5 A. No, her. Her.

6 Q. Yeah.

7 A. Donna said she didn't completely understand it, the whole
8 ---

9 Q. That's what I understood you ---

10 A. Yes, sir.

11 Q. --- to be saying.

12 A. Yes, sir.

13 Q. Okay.

14 A. Yes, sir.

15 Q. Outside of that, do you remember like when you said,
16 "Okay. How do --- how's eviction get handled under this?"
17 Do you remember what she said?

18 A. She told me she didn't know how evictions got settled,
19 because that was done by the executive director.

20 Q. Okay, and the other thing you mentioned was, and I'm going
21 to get this wrong, but it was something like, "What if I
22 leave," ---

23 A. Uh-huh (affirmative response).

24 Q. --- and I've kind of forgotten. You said something like,
25 "What if I leave and had something happen," or I didn't

1 understand what you were saying there.

2 A. What I was saying there is I asked her a general question,
3 "What if I were to leave the facility on my own, and I had
4 an issue with the facility, and I file something against
5 them, how would that be handled?"

6 Q. Okay, and do you --- do you remember how she responded to
7 that?

8 A. She responded to me that she said in the gist of the
9 arbitration contract they would prefer the corporate
10 office, and they, and when I said, "They," I mean
11 corporate office, and the executive director would prefer
12 that you go through arbitration instead of straight to a
13 court trial. That's the way she explained it.

14 Q. All right, and --- and then at some point you indicated
15 that you read the document word for word, I think you said
16 after you got home?

17 A. Yes, sir.

18 Q. Okay, and was it that same day?

19 A. I started it that same day. I didn't finish it that same
20 day, because it was late in the afternoon, but I did
21 finish it over the next two or three days.

22 Q. Yes, sir.

23 A. I read the entire document.

24 Q. Okay, and --- and you understood, after reading the
25 arbitration provision, for example, that if you had

1 concerns about having signed it, you could have said, "Hey
2 community, I'm going to exercise my right under this term
3 here to withdraw my consent to arbitrate"?
4 A. Yes, sir.
5 Q. Correct?
6 A. Yes, sir.
7 Q. I wanted to follow up on something else. I don't think
8 you were suggesting this to me, but you may have been.
9 Did you have a Lowe's Arbitration Agreement with you when
10 you went to Pacifica to sign the document?
11 A. No, sir.
12 Q. Okay.
13 A. No, sir, I did not.
14 Q. I think you ---
15 A. I was com ---
16 Q. I'm talking over you.
17 A. I was comparing what theirs, what I remember that their
18 arbitration clause said in the employment contract with
19 what she was explaining to me there.
20 Q. I thought that's what you meant.
21 A. Yes.
22 Q. You had --- you kind of had bits and pieces of it in your
23 head ---
24 A. Yes, sir.
25 Q. --- from having dealt with it for so long?

1 A. Yes, sir.

2 Q. After you had an opportunity to review or after you
3 exercised the opportunity to review the document word for
4 word after you had signed it, did you understand that
5 disputes between you and Pacifica would be resolved via
6 arbitration unless it was an eviction action, and it was
7 funny you mentioned eviction earlier, or something that
8 could be handled in small claims court? Did you have that
9 understanding?

10 A. Say that again, please, sir. Rephrase or repeat that.

11 Q. Yes, sir. After --- I know you didn't read it or you've
12 testified you didn't read it word for word the arbitration
13 provision before you signed it, but you did within a day
14 or two, and after reading it word for word, did you
15 understand that disputes between you and Pacifica,
16 regardless of who's initiating the dispute, would be
17 resolved by arbitration unless they met one of the
18 categories that are exempted from arbitration, which would
19 be eviction and matters that can be brought in small
20 claims court? Was that your understanding?

21 A. Yes, sir, I think so.

22 Q. Okay.

23 A. Can we take a quick break?

24 Q. We can.

25 Let's take a break.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454

Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly
situated, ... Respondents,

v.

Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a
Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

PROOF OF SERVICE

It is hereby certified that Appellants' Petition for Rehearing in the above-captioned case
has been served on the following parties via e-mail, on October 10, 2024:

Patrick E. Knie
Knie & Shealy Attorneys at Law
250 Magnolia Street
Spartanburg, SC 29306
pknie@knielaw.com

Mitch Slade
Mitch Slade Law Office, P.A.
PO Box 1007
Spartanburg, SC 29304
mitch@mitchsladelaw.com
Attorneys for Plaintiffs/Respondents

[Appellant Counsel's Signature on Following Page]

Respectfully submitted,

s/ Paul E. Allen, Jr.

Jonathan G. Roquemore

Joshua D. Shaw

Paul E. Allen, Jr.

Hedrick Gardner Kincheloe & Garofalo LLP

1230 Main Street, Suite 325

Columbia, SC 29201

Attorneys for Appellants

October 10, 2024

Oct 24 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

The present appeal resulted from Appellants' attempt to enforce an arbitration clause in a residence contract for a senior living facility. The Appellants' arbitration clause did not objectively manifest a mutual intent to be bound, and the Circuit Court denied the Appellants' Motion. On appeal to this Court, this Court denied the relief sought by the Appellants in a *per curiam* decision. Appellants are now before this Court on a Petition for Rehearing.

ARGUMENT

THE APPELLANTS' ARGUMENT IN THE CIRCUIT COURT

In the Circuit Court, Appellants argued that the first sentence of their Arbitration Agreement (Agreement) provided the language essential to forming a valid contract. There, in

the Circuit Court, the Appellants asserted that the first sentence of the Agreement was the “key language” of the Agreement, and that it was the “operative language” that “requires this matter to be arbitrated.” (R. 90-91.).

So the Appellants’ argument in the Circuit Court asserted that it was the first sentence of the Agreement that made the Agreement a valid contract. The Circuit Court found that the first sentence of the Agreement was essential to determining if there was a mutual intent to be bound. (*See* R. 5.).

The Circuit Court found that the first sentence of the Agreement bound only one party, the Respondent, who was designated by the pronoun “you”, and did not bind Pacifica, the other party to the purported contract. The Circuit Court concluded that the Agreement did not form a valid contract because it did not evince a mutual intent to be bound. The Circuit Court denied Appellants’ Motion.

APPELLANTS’ ARGUMENT IN THE COURT OF APPEALS

In their appeal to this Court, and now in their Petition for Rehearing, Appellants no longer argue that the first sentence of the Agreement is the “operative language”, which “requires this matter to be arbitrated.” (R. 91.).

Instead, Appellants base their argument in this Court on what they term the “whole scope” of the Agreement, in an attempt to shift focus away from what they previously described in Circuit court as the operative language of the Agreement.

They now argue that the ancillary terms of the Agreement, taken as a whole, somehow substitute for language evincing a mutual intent to be bound; language which they omitted from the Agreement.

They make this argument despite the Circuit Court’s finding that the first sentence of the Agreement in fact does contain the “operative language” of the Agreement, but fails to form a valid contract. (*See* R. 5.).

They now argue that the ancillary terms, accumulated and taken together, transform into the reciprocal promise to arbitrate that they omitted from the operative language of the Agreement. But even after extracting every possible favorable inference from the accumulated ancillary terms, Appellants cannot argue that Pacifica promised to arbitrate without using the word “promise” in the crux of their argument. (*See* Appellants’ Petition for Rehearing, p. 3). But the word “promised” is the very word they omitted from the Agreement they drafted.

The following passage from Appellants’ Petition for Rehearing illustrates how the Appellants are compelled to use the word “promised” to attempt to transform the accumulation of ancillary terms into a promise.

‘...the words following “you agree” demonstrate that Pacifica, as the offeror, also *promised* to submit “**any and all claims and disputes** arising from or **related to this Agreement** or your residency, care, or services at the Community” to arbitration.’

Appellants’ Petition for Rehearing, p. 3
(bolded emphasis in original)
(italicized emphasis added)

But nowhere in the operative language of the Agreement does Pacifica “promise” to submit its claims and disputes to arbitration. Nor, in the operative language, does Pacifica “agree” to submit its claims and disputes to arbitration. (*See* R. 64-65.).

Appellants’ argument that the accumulated ancillary terms can be transformed into a promise to arbitrate collapses because in order for Pacifica to promise to arbitrate, Pacifica must use the word “promise”. Appellants betray their tacit understanding of this fact when they have to use the word “promised” to argue that Pacifica promised to arbitrate. In the operative

language of the Agreement, Pacifica did not promise or agree to arbitrate because it did not state that it “promised” to arbitrate. Only one party, the Respondent, agreed to arbitrate and therefore there was no mutual intent to be bound.

APPELLANTS’ NEW, POSTDECISION ARGUMENT

Respondent previously addressed Appellants’ violations of Rule 212, SCACR in his Motion To Address Appellants’ Violations of SCACR, filed with this Court on October 15, 2024.

However, Respondent did not address the substance of Appellants new, postdecisional argument in that Motion, and therefore does so now.

Appellants base their new argument on deposition testimony of the Respondent which was taken over 18 months after the Circuit Court heard Appellants’ motion to compel arbitration.

Contrary to Appellants’ new argument, the interpretation of the contract is governed by the objective manifestation of the parties’ assent at the time the contract is made. *Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984) (citing *Blakely v. Rabon*, 266 S.C. 68, 221 S.E.2d 767 (1976)).

Both the Circuit Court and this Court have construed the Agreement that Appellants themselves drafted and found that the operative language did not evince a mutual intent to be bound. The question of whether the Agreement evinces a mutual intent to be bound is a question of law.

The construction of a clear and unambiguous contract simply presents a question of law, which is to be decided by the court. *See Conner v. Alvarez*, 285 S.C. 97, 101, 328 S.E.2d 334 (1985) (citing *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984)). Both the Circuit court and this Court have ruled on this question of law.

In the Agreement that Appellants drafted, the operative language of the Agreement clearly lacks the mutual intent to be bound. The clear language of the Agreement provides that it is invalid and cannot be enforced.

This Court correctly ruled that a purported contract which does not evince a mutual intent to be bound cannot be enforced.

CONCLUSION

Respondent respectfully requests that Appellants' Motion for Rehearing be denied.

Respectfully submitted,

/s/ Mitch Slade
Mitch Slade
Mitch Slade Law Office, P.A.
S.C. Bar No. 5146
P.O. Box 1007
Spartanburg, S.C. 29304
Telephone: (864) 582-4212
mitch@mitchsladelaw.com

KNIE & SHEALY
Patrick E. Knie
S.C. Bar No. 3564
P.O. Box 5159
250 Magnolia Street
Spartanburg, S.C. 29304
Telephone: (864) 582-5118
Telefax: (864) 585-1615
pat@knieshealy.com

ATTORNEYS FOR RESPONDENT

October 24, 2024

RECEIVED

Oct 24 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454
Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly
situated, ... Respondent,

v.

Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga LP; Pacifica Skylyn, LLC, d/b/a
Pacifica Senior Living Skylyn, Etros, LLC; and Matthew Arledge, ... Appellants.

PROOF OF SERVICE

The undersigned certifies that a copy of the **RESPONDENT'S RETURN TO PETITION FOR REHEARING** has been served on counsel for Appellants via electronic mail at the email addresses stated in the Attorney Information System as set forth below on October 24, 2024:

HEDRICK GARDNER KINCHELOE & GAROFALO LLP

Jonathan G. Roquemore

jroquemore@hedrickgardner.com

Joshua D. Shaw

jshaw@hedrickgardner.com

Paul E Allen, Jr.

pallen@hedrickgardner.com

Attorneys for Appellants

s/ Mitch Slade

Mitch Slade

October 24, 2024

Law Office Of

MITCH SLADE

Mailing Address Post Office Box 1007
Spartanburg, SC 29304
Tel: (864)582-4212
Email: Mitch@MitchSladeLaw.com

RECEIVED

Oct 24 2024

SC Court of Appeals

October 24, 2024

The Honorable Jenny Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

*****VIA EMAIL: ctappfilings@sccourts.org*****

RE: **Ed Medford, in his individual capacity, and on behalf of those similarly situated v. Deepak Israni, et al.**
Civil Action No.: 2022-CP-42-00454
Appellate Case No.: 2022-001210

Dear Ms. Kitchings:

Enclosed for filing is Respondent's Return to Petition for Rehearing. I have also enclosed the Certificate of Service for filing.

With kind regards,

s/Mitch Slade

Mitch Slade

MS/tqf

Enclosures

cc: All Counsel of Record (via email)

The South Carolina Court of Appeals

Ed Medford, in his individual capacity, and on behalf of
those similarly situated, Respondent,

v.

Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga
LP; Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living
Skylyn, Etros, LLC; and Matthew Arledge, Appellants.

Appellate Case No. 2022-001210

ORDER

Appellants have filed a petition for rehearing, requesting this court to rehear its case, or, in the alternative, to permit Appellants to supplement the record on appeal with excerpts from Respondent's deposition, which occurred after the order on appeal before this court. Respondent filed a return to the petition for rehearing and a "Motion to Address Appellants' Violations of SCACR," arguing this court should strike or dismiss sections of Appellants' petition for rehearing that discuss or seek to insert new material into the record, post-opinion, that was not part of the record before the circuit court. After careful consideration, Appellants' motion to supplement the record is denied and Respondent's motion to strike the portion of the petition for rehearing that addresses the proposed supplemental material is granted.

Further, after careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. B. Wooten C.J.

Stephen P. McConnell J.

[Signature] J.

Columbia, South Carolina

cc:

Jonathan Gamble Roquemore, Esquire

Joshua Daniel Shaw, Esquire

Paul Edward Allen, Jr., Esquire

Patrick E. Knie, Esquire

Sam Mitchell Slade, Jr., Esquire

FILED
Nov 21 2024