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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. William P. Keesley, Circuit Court Judge

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Case No. 2021-CP-42-02473

Appellate Case No. 2023-001343

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Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated, ..... Respondents,

v.

Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ..... Petitioners.

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APPENDIX

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## **ISSUES ON APPEAL**

1. Whether the circuit court erred in denying Pacifica's motion to compel Plaintiffs' claims to arbitration where Pacifica provided uncontroverted evidence of the full text of the Arbitration Agreement contained in the Residence and Services Agreement executed by Plaintiffs' attorney-in-fact Karen Ward?

## **STATEMENT OF THE CASE**

This appeal arises from a putative class action related to air conditioning outages at Pacifica Senior Living Skylyn ("Pacifica" or "the Facility"). (R. 7-20). Plaintiffs Eugene and Ruth Villanova resided in independent living apartments at the Facility and brought this action through their attorney-in-fact, Karen Ward, on behalf of themselves and a putative class of other residents. The chief allegation is that air conditioning outages in July of 2021 were caused by Pacifica's failure to properly maintain the facility. (R. 16-17).

In December 2019, Ms. Ward executed Pacifica's standard Residence and Services Agreement on behalf of Plaintiffs ("the Residence and Services Agreement" or "the Agreement"), and Plaintiffs moved into Pacifica. (R. 38-61). The Agreement outlines the terms and conditions governing Plaintiffs' residence at Pacifica, including an Arbitration Agreement. (*Id.*). In connection with this litigation, Pacifica searched for and located a copy of the Agreement executed by Ms. Ward on behalf of Plaintiffs. (*Id.*). The Agreement includes the following provision above paragraph twelve:

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 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.

(R. 42) (emphasis added) (this portion of the Agreement is hereafter referred to as the “Arbitration Agreement”). Ms. Ward’s signature immediately followed. (*Id.*). The Agreement is missing the page immediately preceding the above Arbitration Agreement.

Pacifica moved to compel Plaintiffs’ claims to arbitration pursuant to the Arbitration Agreement within the Residence and Services Agreement. (R. 27-28). Although Pacifica did not locate a complete copy of the Agreement, Pacifica submitted an affidavit from Debra Kimbrell, the Business Office Director for Pacifica, testifying to the language of the full Arbitration Agreement included in all of Pacifica’s Residence and Services Agreements at the time Plaintiffs moved into the Facility. (R. 62-63). As more fully explained in Ms. Kimbrell’s affidavit, the Agreement is missing the page preceding Ms. Ward’s signature, which is labeled subparagraph eleven and titled “**Arbitration**”. (R. 63, 68) As is evident from the complete Arbitration Agreement attached to Ms. Kimbrell’s affidavit, the scope of the signed arbitration clause is broad – the parties agreed to binding arbitration of “any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims”. (R. 101-102).

On April 1, 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. 27-28). Following a hearing, the circuit court denied the Motion to Compel Arbitration on July 13, 2022. (R. 1-3).

Plaintiffs did not dispute that Ms. Ward signed the Agreement containing the Arbitration Agreement; instead, Plaintiffs asserted that Pacifica's failure to produce a full copy of the Arbitration Agreement precluded arbitration in this case. (R. 123-125; 140). The circuit court concluded that, because Pacifica did not "produce a copy of an executed contract containing the full arbitration agreement," Pacifica could not make the necessary showing that the right to a jury trial was waived. (R. 2).

Pacifica filed a timely Motion to Reconsider pursuant to Rule 59(e), SCRCP, and sought clarification concerning the basis of the court's ruling given the undisputed fact that Plaintiffs' lawful attorney-in-fact signed the Arbitration Agreement. (R. 126-129). Specifically, Pacifica asked the court to clarify whether it found that Pacifica was legally precluded from supplying certain terms of the Agreement by extrinsic evidence, or whether it found that the specific evidence presented by Pacifica in this case was insufficient to supply the missing terms. (*Id.*). The circuit court denied the Motion to Reconsider without clarifying the basis for its ruling beyond reiterating that a complete copy of the Agreement had not been produced. (R. 5). 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 clear language of the Agreement, considered with the uncontroverted affidavit testimony of Pacifica Business Office Director Deb Kimbrell, yields only one conclusion: the Agreement included a valid Arbitration Agreement at the time it was signed by Plaintiffs' attorney-in-fact. The circuit court erred in concluding that Pacifica did not make the necessary showing that Plaintiffs agreed to arbitration merely because Pacifica could not produce a complete copy of the 2019 Residence and Services Agreement at the time Plaintiffs filed their lawsuit in 2021.

The circuit court's Order denying Pacifica's Motion to Compel Arbitration necessarily rested on one of two premises: (a) that a party may not refer to extrinsic evidence to supply a missing term in an arbitration agreement as a matter of law; or (b) that a party may refer to extrinsic evidence to supply a missing term, but the uncontroverted affidavit testimony and supporting documentation submitted by Pacifica was insufficient to do so in this case.

Neither the Plaintiffs nor the circuit court cited any authority that precludes consideration of extrinsic evidence, such as Ms. Kimbrell's affidavit testimony, to supply the missing portion of the Arbitration Agreement. Pacifica submitted credible and uncontroverted evidence concerning the terms of the missing portion of the Arbitration Agreement. Thus, the circuit court erred in disregarding the uncontroverted evidence of the terms of the full Arbitration Agreement, and Pacifica respectfully requests this Court reverse the circuit court and compel arbitration pursuant to the Arbitration Agreement.

**A. Pacifica proved the terms of the Arbitration Agreement by affidavit testimony.**

In determining whether parties agreed to submit a particular dispute to arbitration, “the court should apply ‘ordinary state-law principles that govern the formation of contracts.’” *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4<sup>th</sup> Cir.1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920 (1995)); *see also Arrants v. Buck*, 130 F.3d 636, 640 (4<sup>th</sup> Cir.1997) (“Courts decide whether there is an agreement to arbitrate according to common law principles of contract law.”). Under South Carolina law, a court ordinarily is not allowed to consider extrinsic, or parol, evidence related to the meaning of contractual terms where the written contract appears to express the whole agreement of the parties. *See Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 520, 386 S.E.2d 259, 261 (Ct. App. 1989). However, “where a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent.” *Id.* In cases where “the writings laid down show upon their face an incompleteness, then that which makes them complete may be shown by parol [evidence].” *Midland Timber Co. v. Furman*, 111 S.C. 287, 289-90, 97 S.E. 831, 831 (1919).

The missing page in the Agreement creates an ambiguity as to the intention of the parties because, while it is clear the Agreement contained an Arbitration Agreement, the Agreement does not contain the provision in its entirety. (R. 42). In an effort to clarify this ambiguity, Pacifica submitted affidavit testimony with its Motion to Compel Arbitration demonstrating that the Arbitration Agreement included, *inter alia*, the following language:

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. 63; 101-102). Ms. Kimbrell further testified that Pacifica used the same arbitration clause in each of its Residence and Services Agreements at the time Plaintiffs were admitted to the facility. (R. 62-63).

The circuit court erred in concluding that a missing page of the Agreement precludes compelling arbitration in this case. (R. 2). Plaintiffs have not disputed the authenticity of the Agreement produced by Pacifica with its Motion to Compel Arbitration and have not denied that Ms. Ward separately signed the Arbitration Agreement in connection with the Villanovas' admission to the Facility. (R. 140). Likewise, Plaintiffs did not challenge the substance or admissibility of Ms. Kimbrell's affidavit testimony. Plaintiffs have not presented any generally applicable contract defenses to the Agreement or criticisms of the terms of the Arbitration Agreement as supplied by Ms. Kimbrell's affidavit, and they did not present any authority suggesting the court could not properly consider such evidence to supply the missing terms of the Arbitration Agreement.

Even though Pacifica produced a copy of the Agreement that includes Ms. Ward's signature immediately below the language acknowledging that Ms. Ward understood and agreed to the Arbitration Agreement, Plaintiffs contend that they should not be bound to arbitration because Pacifica is missing a page of the Agreement. In short, Plaintiffs seek to avoid their contractual obligations because Pacifica misplaced a page of the Agreement.

The fact that there are missing pages to the Agreement is of no import in analyzing whether to compel arbitration because the missing terms are easily supplied through an objective method. "[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold

the parties to their bargain.” *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91, 575 N.E.2d 104, 106 (1991) (citing 1 Williston, Contracts § 46, at 152–153 (3d ed.)). *See also* 12 Williston on Contracts § 34:3 (4th ed.) (“Any doubt concerning the terms of an agreement or to supply missing terms in an otherwise valid agreement may be resolved in light of any relevant course of dealing, usage of trade, or course of performance.”) (citing *Rossi v. University of Utah*, 2021 UT 43, 496 P.3d 105 (Utah 2021)). These authorities are in accord with South Carolina law. *See e.g. Columbia East Associates*, 299 S.C. at 520, 386 S.E.2d at 261 (explaining when it is appropriate to refer to extrinsic evidence in interpreting a contract); *Frewil, LLC v. Price*, 411 S.C. 525, 531, 769 S.E.2d 250, 253 (Ct. App. 2015) (permitting parol evidence where written contract contained an ambiguity); *Figgie Int’l, Inc. v. Destileria Serralles, Inc.*, 190 F.3d 252, 254 (4th Cir. 1999) (applying South Carolina law to conclude that usage of trade, established via affidavit, could supply terms of sale where a manufacturer lost the original sales agreement).

Here, the affidavit of Debra Kimbrell establishes the terms of the Arbitration Agreement through an objective method of comparison to other Residence and Services Agreements signed during the same general time frame. (R. 62-63). The arbitration provision in each of the agreements is identical, and the portion of the Arbitration Agreement contained in the Agreement signed by Ms. Ward matches those other agreements word for word. (R. 68; 101-102). The circuit court erred in disregarding this uncontroverted evidence and failed to give effect to the true and complete intent of the parties to the Agreement. In so doing, the court effectively placed an arbitration clause on unequal footing with contracts generally, in violation of a well-established principle in the arbitration setting. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). This point can be illustrated with a simple example. Assume, for example, that the same parties had a disagreement concerning the monthly rent for the Villanovas’ apartment

and the only copy of the parties' agreement was illegible with respect to the rent amount. It is inconceivable that the court would refuse to consider evidence presented by Pacifica as to its standard rent amount during the time frame when the admission occurred, supported by affidavit testimony and Residence and Services Agreements entered with other residents during that same period. Yet here the circuit court erroneously disregarded credible, unchallenged evidence concerning the missing terms of the Arbitration Agreement.

Plaintiffs' only challenge to Ms. Kimbrell's affidavit testimony is that the affidavit does not say that Ms. Ward was presented with the full Arbitration Agreement at the time she executed the Agreement. (R. 123-124; 140-141). However, Ms. Kimbrell *did* testify that, based on her investigation, "the only reasonable inference" is that the complete Arbitration Agreement was included when Ms. Ward signed the Agreement because Ms. Ward acknowledged as much when she separately signed the Arbitration Agreement. (R. 63). Ms. Ward is presumed to have read and understood the consequences of the Arbitration Agreement by virtue of her signature after the following language: "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." (R. 68).

"A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. . . . Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). Ms. Ward acknowledged that the Agreement included an Arbitration Agreement and that she read and understood the significance of the provision. Thus, to ascertain the true intent of the parties to the

Agreement, this Court must consider the uncontroverted affidavit testimony of Ms. Kimbrell in relation to the missing portion of the Arbitration Agreement.<sup>1</sup>

**B. The terms of the Arbitration Agreement constitute a valid, binding arbitration provision that encompasses Plaintiffs' claims in this suit.**

The Arbitration Agreement that was contained in the Residence and Services Agreement covers all the parties to this action and all the claims asserted in the Complaint. The arbitration provision is broadly written to encompass and apply to “any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community. . . .” This language plainly covers all causes of action asserted in the Complaint, all of which arise from the Villanovas' residence at Pacifica.<sup>2</sup>

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

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<sup>1</sup> Neither of the circuit court's Orders appear to reach a factual conclusion as to the weight of Ms. Kimbrell's affidavit testimony. Therefore, Pacifica submits this Court is permitted to review this factual issue *de novo*.

<sup>2</sup> The application of the Federal Arbitration Act has not been challenged in this case and was not addressed by the circuit court, so a full discussion of the issue is not included in this brief. However, Pacifica included a thorough explanation for why the FAA applies in this case in its memorandum in support of Pacifica's motion to compel arbitration. (R. 31-35). 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.”).

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 mandatory arbitration pursuant to the Arbitration Agreement in the Residence and Services Agreement.

Additionally, as the Plaintiffs’ attorney-in-fact, Ms. Ward clearly had authority to enter into the Agreement, including the agreement to arbitrate all claims relating to the Plaintiffs’ residence at Pacifica. *See Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1429, 197 L. Ed. 2d 806 (2017) (reversing state law frustrating Federal Arbitration Act’s purpose where agreement to arbitrate was within scope of power of attorney in nursing home context). Importantly, Plaintiffs have not challenged Ms. Ward’s capacity to agree to the Arbitration Agreement on their behalf. Thus, Plaintiffs are compelled to arbitrate their claims in this case pursuant to the valid and binding Arbitration Agreement contained in the Residence and Services Agreement.

## **CONCLUSION**

For the foregoing reasons, Pacifica requests this Court reverse the circuit court and stay this lawsuit in favor of arbitration or remand the case to the circuit court with instructions to compel the lawsuit to arbitration.<sup>3</sup>

Respectfully submitted,

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<sup>3</sup> Because the Arbitration Agreement does not expressly approve of class arbitration, only the Villanovas' claims can be compelled to arbitration, not the putative class action claims. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 1775 (2010) (“[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.”).

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. William P. Keesley, Circuit Court Judge

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Case No. 2021-CP-42-02473

Appellate Case No. 2023-001343

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Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated, ..... Respondents,

v.

Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ..... Appellants.

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CERTIFICATE OF COUNSEL

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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.

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**Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their  
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**v.**

**Pacifica Skylyn, LLC d/b/a Pacifica Senior Living Skylyn, and Matthew  
Arledge.....Appellants.**

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| <i>Player v. Chandler</i> , 299 S.C. 101, 382 S.E.2d 891 (1989).....                          | 3    |
| <i>Prima Paint Corp. v. Flood &amp; Conklin Mfg. CA.</i> , 388 U.S. 395 (1967).....           | 6    |
| <i>Reed v. Boykin</i> , 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984).....                      | 3    |
| <i>Simmons v. Benson Hyundai, LLC</i> , 438 S.C. 1, 881 S.E.2d 646 (Ct. App. 2022).....       | 4, 6 |
| <i>Thornton v. Trident Med. Ctr., L.L.C.</i> , 357 S.C. 91, 592 S.E.2d 50 (Ct.App. 2003)..... | 2    |
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### **RULES**

|                           |   |
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## STATEMENT OF ISSUES ON APPEAL

- I. Whether the circuit court correctly denied Pacifica's Motion to Compel Plaintiffs' claims to arbitrate where Pacifica could not produce the complete arbitration agreement executed by Plaintiffs' attorney-in-fact, Karen Ward.

## STATEMENT OF THE CASE

This appeal arises from a putative class action relating to air conditioning outages at Pacifica Senior Living Skylyn ("Pacifica"). (R. p. 13.).

The Plaintiffs, who were independent living residents of Pacifica, brought this action through their attorney-in-fact, Karen Ward, on behalf of themselves and a putative class of other residents. The chief complaint is that there was a complete air conditioning outage beginning in July of 2021 which lasted sixty (60) consecutive days caused by Pacifica's failure to properly maintain the facility. (R. p. 13). As a result, temperatures routinely exceeded one hundred (100) degrees at Pacifica.

In December of 2019, Ms. Ward executed Pacifica's Residence and Services Agreement on behalf of the Plaintiffs. (R. pp. 38-54). The Agreement intended to outline the terms and conditions governing Plaintiffs' residence at Pacifica, including an arbitration agreement. (R. pp. 38-54). The arbitration agreement signed by Ms. Ward omitted much of the key language of the Agreement including, but not limited to, the following:

**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.**

Pacifica moved to compel Plaintiffs' claims to arbitration pursuant to a purported arbitration agreement which did not include this essential language necessary for a valid

arbitration agreement. (R. pp. 38-54). Pacifica attempted to demonstrate what should have been in the arbitration agreement but what in fact was omitted. On April 1, 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. pp. 27-28).

Following the hearing, the circuit court denied the Motion to Compel Arbitration on July 13, 2022. (R. p. 2). In pertinent part, Judge Keesley's Order states as follows:

The ability to avail oneself of access to the courts to resolve disputes is a fundamental constitutional right, and the court finds that the defendants have not made the necessary showing that this right was waived. Since the defendants are unable to produce a copy of an executed contract containing **the full arbitration agreement** and have no evidence that plaintiffs are responsible in any way for the full documents being unavailable, the motion is respectfully denied.

Pacifica filed a timely motion to reconsider pursuant to Rule 59(e), SCRCF. The circuit court denied the motion to reconsider reiterating that a complete copy of the agreement had not been produced. (R. p. 5). This appeal 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).

## ARGUMENT

### **I. The circuit court correctly denied the Motion of Pacifica to Compel Arbitration.**

The arbitration agreement contained within the Residence and Services Agreement executed by Ms. Ward did not include critical language including exactly what rights the executing party would be giving up including, but not limited to the following:

**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 missing arbitration agreement is purportedly controlled by the FAA which requires that an arbitration clause is separate from the contract in which it is imbedded and the issue of its validity is distinct from its substantive validity of the contract as a whole. Since a separate contract does not exist within the body of the Residence Agreement but simply some references to an arbitration agreement, there is in fact no agreement to arbitrate in the contract at issue in this case.

South Carolina law requires that in order to have a valid and enforceable contract, there must be a meeting of minds between the parties with regard to all of the essential and material terms of the agreement. *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009), citing *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

The parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. Vague expressions or indefiniteness and uncertainty as to any of the essential terms of the agreement have been held to prevent the creation of an enforceable contract. *Reed v. Boykin*, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984). Here, the matter of waiving Plaintiff's right to a jury trial is worse than indefinite or

vague, it is completely absent from the contract. Without showing that the full terms of an arbitration agreement and jury trial waiver were in the executed contract, Pacifica cannot prove an agreement to arbitrate existed. See *Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 6, 881 S.E. 2d 646, 648 (Ct. App. 2022) (“Our first step, then, is to decide whether [the parties] formed an agreement to arbitrate. If we conclude they did not, the first step would also be the last because the FAA cannot make parties arbitrate when they have not agreed to do so.”).

**II. The Defendants have been unable to make the necessary showing that Plaintiffs waived their right to a jury trial.**

Finally, an agreement that omits material terms may be determined to be unenforceable for indefiniteness. A contract leaving material terms open for future agreement is void for indefiniteness. *Ellis v. Taylor*, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1984).

Defendant bears the burden for proving both the arbitration clause contains all material provisions and that it describes them in definite terms. *Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016). Defendants argue that they are entitled to introduce parol evidence by way of the Affidavit testimony of Debra Kimbrell who was the business office director of Pacifica. (R. pp. 62-63). In her Affidavit, Ms. Kimbrell admits that after a diligent search she was unable to locate a copy of the Residence and Services Agreement for the Plaintiffs which contained the language necessary to form a valid arbitration agreement. (R. p. 62). In her Affidavit, Ms. Kimbrell further states that she investigated the Residence and Services Agreement which were used during the time frame that the Plaintiffs would have signed the Agreement and a copy of an exemplar of that agreement was attached to her Affidavit. (R. pp. 88-121). Nothing in Ms. Kimbrell’s Affidavit in any way establishes that the complete

arbitration agreement was part of the document signed by Karen Ward on behalf of the Plaintiffs, and she acknowledges that a page containing a portion of the arbitration agreement is omitted from the document signed by Ms. Ward. (R. p. 63). The portion which was omitted reads as follows:

## 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 of 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

From reading the omitted portion, it is clear that the Plaintiffs were never advised

that they were giving up their constitutional right to having the dispute decided in a court of law before a jury. The omitted portion also includes other important facts to establish an arbitration agreement that were never before Ms. Ward when she signed the Residence and Services Agreement.

There is no parol evidence in this case. Karen Ward was never presented with the language set forth above, and therefore, it is a misnomer to claim that such language is in fact parol evidence.

The Defendants also claim the policy of South Carolina is to favor arbitration in other disputes citing a 2001 decision in that regard. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Later South Carolina cases have found just the opposite. The *Simmons*' court in a March 2022 opinion followed the language of *Prima Paint* in stating:

The Federal Arbitration Act (FAA), 9 USC 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*, 438 S.C. 1, 4, 881 S.E.2d 646 (Ct. App. 2022). *See also, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 404, n. 12. (1967).

In the present case, however, there is no complete arbitration agreement, and no explanation that there was an expectation that the Plaintiffs would be waiving their constitutional right to a jury trial. Under these circumstances where there is no contract to arbitrate, the lower court correctly denied the motion to compel arbitration.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs request this Court to affirm the circuit court and remand this case to circuit court.

Respectfully submitted,

KNIE & SHEALY

*/s/ Patrick E. Knie*

---

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*Attorneys for Respondents*

April 23, 2024

Apr 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. William P. Keesley, Circuit Court Judge

---

Case No. 2021-CP-42-02473  
Appellate Case No. 2023-001343

---

Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated,.....Respondents,

v.

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 Respondents complies with Rule 211(b), SCACR. Pursuant to Rule 211(b)(2), SCACR, Respondents corrected one typographical error.

On page four of Respondents' Final Brief, in the last two sentences, the page numbers of the agreement attached to the Affidavit of Debra Kimbrell has been replaced with (R. pp. 88-121) rather than (p. 2).

KNIE & SHEALY

*/s/ Patrick E. Knie*

---

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April 24, 2024

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. William P. Keesley, Circuit Court Judge

---

Case No. 2021-CP-42-02473

Appellate Case No. 2023-001343

---

Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated, ..... Respondents,

v.

Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ..... Appellants.

---

RECORD ON APPEAL

---

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## FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP4202473

Eugene W. Villanova, By And Through His Atty In Fact, Karen Lynn Ward et al  
PLAINTIFF(S)

Pacifica Skylyn, Llc DbA Pacifica Senior Living Skylyn et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

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

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

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

The defendants' motion to dismiss this case or to stay the case pending binding arbitration is denied. Please see page 2.

**ORDER INFORMATION**

This order ☐ ends ☒ does not end the case.

☒ See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/13/2022 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

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

---

The plaintiffs are residents of an elder care facility operated by the defendants which has accommodations that range from independent living to more intensive levels of care. A July 2021 failure of the HVAC system at the complex is alleged to have subjected the residents to temperatures around 100 degrees Fahrenheit for approximately two months. The issue is whether the plaintiffs can be compelled to submit this dispute to binding arbitration based on a contract. The problem is that neither the defendants nor the plaintiffs have a complete copy of the contract, so that sections related to the executed documents containing the full arbitration agreement are not in existence. It is unknown whether the complete version of the contract was executed, which is a distinct possibility. The defendants have produced a well-written and carefully researched brief in support of their motion, as well as affidavits which purport to show what the missing pages would have contained. The ability to avail oneself of access to the courts to resolve disputes is a fundamental constitutional right, and the court finds that the defendants have not made the necessary showing that this right was waived. Since the defendants are unable to produce a copy of an executed contract containing the full arbitration agreement and have no evidence that the plaintiffs are responsible in any way for the full documents being unavailable, the motion is respectfully denied.



## Spartanburg Common Pleas

**Case Caption:** Eugene W. Villanova, By And Through His Atty In Fact, Karen Lynn Ward , plaintiff, et al VS Pacifica Skylyn, Llc DbA Pacifica Senior Living Skylyn , defendant, et al  
**Case Number:** 2021CP4202473  
**Type:** Order/Dismissal

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2022-07-13 11:56:57 page 3 of 3

## FORM 4

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

## JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP4202473

Eugene W. Villanova, By And Through His Atty In Fact, Karen Lynn Ward et al  
PLAINTIFF(S)

Pacifica Skylyn, Llc DbA Pacifica Senior Living Skylyn et al  
DEFENDANT(S)

## DISPOSITION TYPE (CHECK ONE)

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

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

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

The defendants filed a timely motion to reconsider an order dated July 13, 2022, which denied their motion to dismiss under Rules 12(b)(1) and 12(b)(6), SCRPC. The court alters and amends its prior order to reflect that it was not the court's intention to make a finding on the ultimate issue of the existence of a complete version of the contract that purportedly requires arbitration, nor was the order intended to foreclose the ability to raise the issue of arbitration following discovery. The court denies the defendants' challenge to the ruling that the motion for dismissal or to stay the lawsuit should have been denied at the preliminary stages of this litigation. This order is issued based on the court's finding that further briefing or argument is unnecessary. However, if either party files an objection to the procedure of deciding without oral argument or briefing within 10 days from the date of this order, briefing will be permitted under Rule 59(f), SCRPC. Please see page 2.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☒ See Page 2 for additional information.

## For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/24/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

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

---

Through oversight, the reconsideration motion was not noted by the court on its matters under advisement list. The prior ruling hinged on the assertion that neither party was able to produce a full copy of the contract that contained the purported arbitration clause. The defendants challenge the overall ruling denying dismissal or staying the case to allow for arbitration, but also maintain that the court should clarify statements about the non-existence of a complete copy and rulings that seem to foreclose raising the issue at a later stage following discovery on the existence of a binding contract requiring arbitration. The body of the prior order is modified, as follows:

"The plaintiffs are residents of an elder care facility operated by the defendants which has accommodations that range from independent living to more intensive levels of care. A July 2021 failure of the HVAC system at the complex is alleged to have subjected the residents to temperatures around 100 degrees Fahrenheit for approximately two months. The issue is whether the plaintiffs can be compelled to submit this dispute to binding arbitration based on a contract. The problem is that neither the defendants nor the plaintiffs were able to produce a complete copy of the contract at the hearing. It is unknown whether the complete version of the contract was executed, which is a distinct possibility. The defendants have produced a well-written and carefully researched brief in support of their motion, as well as affidavits which purport to show what the missing pages would have contained. The ability to avail oneself of access to the courts to resolve disputes is a fundamental constitutional right, and the court finds that the defendants have not made the necessary showing that this right was waived. Since the defendants are unable to produce a copy of an executed contract containing the full arbitration agreement at this time and have no evidence at this point that the plaintiffs are responsible in any way for the full documents being unavailable, the motion is respectfully denied. This ruling is being made prior to discovery, and nothing contained herein prevents the plaintiff from raising the issues contained in its motion following discovery.



Spartanburg Common Pleas

**Case Caption:** Eugene W. Villanova, By And Through His Atty In Fact, Karen Lynn Ward , plaintiff, et al VS Pacifica Skylyn, Llc Dba Pacifica Senior Living Skylyn , defendant, et al  
**Case Number:** 2021CP4202473  
**Type:** Order/Electronic Form 4

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2023-07-24 10:07:51 page 3 of 3



**Entity Name:** PACIFICA SKYLYN LLC

**Jurisdiction:** SC

**Date:** 8/4/2021

**Receipt Method:** Certified Mail

**Case Number:** 2021-CP-42

**Plaintiff:** EUGENE W. VILLANOVA; ET AL.

**Defendant:** PACIFICA SKYLYN, LLC D/B/A PACIFICA SENIOR LIVING SKYLYN; ET AL.

**Document Type:** Summons, Complaint & Attachment(s)/Exhibit(s)

PATRICK E. KNIE, P.A.  
Attorney at Law  
P.O. Box 5159  
Spartanburg, S.C. 29304-5159

CERTIFIED MAIL



7016 1970 0001 0620 3814

Paracorp Incorporated  
2 Office Park Court, Suite 103  
Columbia, South Carolina 29223

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

U.S. POSTAGE PAID  
FCM LETTER  
SPARTANBURG, SC  
29306  
AUG 02, 21  
AMOUNT  
\$7.40  
R2304Y122714-24



29223



1000

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August 2, 2021

Paracorp Incorporated  
2 Office Park Court, Suite 103  
Columbia, South Carolina 29223

RE: Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated  
C/A No. 2021CP4202473

Dear Sir/Madam:

Please find enclosed a filed copy of the Summons and Complaint which I am forwarding to you as registered agent for Pacifica Skylyn, LLC in the above-entitled matter.

Please consider this as valid service under Rule 4(d)(8) of the South Carolina Rules of Civil Procedure.

Sincerely,



Patrick E. Knie

PEK:mbg  
Enclosure

CERTIFIED MAIL - 7016 1970 0001 0620 3814  
RETURN RECEIPT REQUESTED

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT  
CASE NO.: 2021-CP-42-\_\_\_\_\_

Eugene W. Villanova and )  
Ruth L. Villanova, by and )  
through Karen Lynn Ward, )  
their attorney in fact, )  
and on behalf of those )  
similarly situated, )  
Plaintiffs, )  
vs. )  
Pacifica Skylyn, LLC )  
d/b/a Pacifica Senior )  
Living Skylyn, and )  
Matthew Arledge, )  
Defendants. )  
SUMMONS

TO: PACIFICA SKYLYN, LLC D/B/A PACIFICA SENIOR LIVING SKYLYN,  
AND MATTHEW ARLEDGE, DEFENDANTS

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

DATED at Spartanburg, South Carolina, on the 2<sup>nd</sup> day of  
August, 2021.

PATRICK E. KNIE, P.A.

*/s/ Patrick E. Knie*

---

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE SEVENTH JUDICIAL CIRCUIT  
 COUNTY OF SPARTANBURG ) CASE NO.: 2021-CP-42-\_\_\_\_\_

Eugene W. Villanova and )  
 Ruth L. Villanova, by and )  
 through Karen Lynn Ward, )  
 their attorney in fact, )  
 and on behalf of those )  
 similarly situated, )

Plaintiffs, )

CLASS ACTION COMPLAINT

vs. )

Pacifica Skylyn, LLC )  
 d/b/a Pacifica Senior )  
 Living Skylyn, and )  
 Matthew Arledge, )

Defendant. )

The above-named Plaintiffs, individually and on behalf of those similarly situated, complaining of the above-named Defendants, alleges and states as follows:

**STATEMENT OF THE PARTIES**

1. Karen Lynn Ward is a resident of Spartanburg County and the duly appointed and authorized attorney-in-fact for Eugene W. Villanova and Ruth L. Villanova.

2. Eugene W. Villanova is a citizen of the State of South Carolina residing in Spartanburg County and currently a resident of Pacifica Senior Living Skylyn.

3. Ruth L. Villanova is a citizen of the State of South Carolina residing in Spartanburg County and currently a resident of Pacifica Senior Living Skylyn.

4. Upon information and belief, Pacifica Skylyn, LLC

("Pacifica") d/b/a Pacifica Senior Living Skylyn ("Facility") is a limited liability corporation organized and existing under the laws of the State of South Carolina which owns, operates, and manages the Facility in Spartanburg, South Carolina.

5. Upon information and belief, the Defendant, Matthew Arledge, ("Arledge") was the licensed Administrator for the Facility during July 2021 and is a resident of Spartanburg, South Carolina.

#### NATURE OF THE ACTION

6. This case involves the failure by the Defendants to properly maintain their Facility in a manner suitable for human habitation in that it has had two (2) serious air conditioning failures during the month of July which have resulted in interior temperatures for residents as high as ninety-seven (97) degrees.

#### FACTUAL ALLEGATIONS

7. As part of their mission, the Defendants are responsible for maintaining an assisted living facility which provides comfortable living conditions including, but not limited to, air conditioning.

8. During July of 2021, the Facility has had two significant air conditioning failures resulting in temperatures of up to ninety-seven (97) degrees in the apartments occupied by its residents.

9. As a result, residents have sought the need to

flee from the Facility and stay with relatives, if nearby.

10. Others, who do not have nearby relatives, have been forced to endure the stifling and life-threatening heat inside the Facility, all of whom have suffered damages as a result.

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

**AS TO DEFENDANT PACIFICA**

a. In failing to maintain its air conditioning servicing its residents;

b. In failing to routinely inspect its air conditioning systems servicing its residents;

c. In failing to have proper policies and procedures in effect regarding the routine maintenance and inspection of such systems;

d. In failing to follow its own policies;

e. In failing to have appropriately trained service personnel available to inspect, maintain, and repair its air conditioning systems when needed, or in the alternative, in failing to hire appropriately and sufficiently trained personnel to inspect, maintain, and repair its air conditioning systems;

f. In failing to follow proper governmental regulations and industry standards regarding the foregoing;

g. In failing to obtain and install adequate large portable air conditioning units to cool the Facility;

h. In failing to provide alternate housing for members of the class;

i. In failing to comply with 42 CFR 483.10(i)(6) which states:

(i) **Safe environment.** The resident has a right to a safe, clean, comfortable and homelike environment, including but not limited to receiving treatment and supports for daily living safely. The facility must provide -

(6) Comfortable and safe temperature levels. Facilities initially certified after October 1, 1990 must maintain a temperature range of 71 to 81 °F.

AS TO DEFENDANT ARLEDGE

a. In failing to maintain the Defendant Pacifica's air conditioning servicing its residents;

b. In failing to routinely inspect the Defendant Pacifica's air conditioning systems servicing its residents;

c. In failing to have proper policies and procedures in effect regarding the routine maintenance and inspection of such systems;

d. In failing to follow the Defendant Pacifica's own policies;

e. In failing to have appropriately trained service

personnel available to inspect, maintain, and repair the Defendant Pacifica's air conditioning systems when needed, or in the alternative, in failing to hire appropriately and sufficiently trained personnel to inspect, maintain, and repair the Defendant Pacifica's air conditioning systems;

f. In failing to follow proper governmental regulations and industry standards regarding the foregoing;

g. In failing to obtain and install adequate large portable air conditioning units to cool the Facility;

h. In failing to provide alternate housing for members of the class;

i. In failing to comply with 42 CFR § 483.10(i)(6) which states:

- (i) **Safe environment.** The resident has a right to a safe, clean, comfortable and homelike environment, including but not limited to receiving treatment and supports for daily living safely. The facility must provide -
  - (6) Comfortable and safe temperature levels. Facilities initially certified after October 1, 1990 must maintain a temperature range of 71 to 81 °F.

12. As a direct result, Plaintiffs and the class have been damaged financially and suffered physically and mentally.

#### **CLASS ACTION ALLEGATIONS**

13. Pursuant to Rule 23, SCRCP, Plaintiffs bring this

action on behalf of themselves and the plaintiffs' class,  
initially defined as:

All residents of the Facility who  
have been without air conditioning  
at various times during the month  
of July 2021.

Excluded from the plaintiffs' class are:

- a. Defendants and any entities in which  
Defendants have a controlling interest;
- b. Any entities in which the 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 the plaintiffs' class; and
- d. Any attorneys representing Plaintiffs or the  
class.

14. Plaintiffs reserve 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.

15. Upon information and belief, the plaintiffs' class  
consists of a few hundred residents, making individual joinder  
impracticable in satisfaction of Rule 23(a)(1), SCRCP. 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.

16. There are questions of law and fact common to

Plaintiffs and the class, thereby satisfying Rule 23(a)(2).

These questions include, but are not limited to, the following:

- a. Whether the Defendants were willful, wanton, negligent, grossly negligent, and careless in failing to provide liveable conditions for the residents of the Facility;
- b. Whether the Plaintiffs and the class will or have suffered financial, physical, and mental damages.

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

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

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

20. Plaintiffs and the class members have each

suffered damages that exceed \$100.00 per person as required by Rule 23(a)(5), SCRCF.

**JURY TRIAL DEMAND AND PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, demand a jury trial and pray that the Court enter judgment against Defendants and award the following relief:

- a. Certification of the proposed class under Rule 23, SCRCF;
- b. Appointment of Plaintiffs as class representatives;
- c. Appointment of the undersigned attorney as class counsel;
- d. Granting Plaintiffs and each class member a judgment for all damages allowed by law and equity;
- e. Granting the undersigned attorney reasonable attorney's fees and costs;
- f. Ordering the establishment of a "common fund" out of which the aforementioned damages and attorney's fees and associated costs shall be paid;
- g. Such other and further judiciary determinations and relief as may be appropriate in this proceeding.

PATRICK E. KNIE, P.A.

*/s/ Patrick E. Knie*

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August 2, 2021

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-42-02473

EUGENE W. VILLANOVA AND  
RUTH L. VILLANOVA, BY AND  
THROUGH KAREN LYNN WARD,  
THEIR ATTORNEY IN FACT,  
AND ON BEHALF OF THOSE  
SIMILARLY SITUATED,

**Plaintiffs,**

v.

PACIFICA SKYLYN, LLC D/B/A  
PACIFICA SENIOR LIVING SKYLYN,  
AND MATTHEW ARLEDGE,

**Defendants.**

**DEFENDANTS' ANSWER**

Defendants, Pacifica Skylyn, LLC d/b/a Pacifica Senior Living Skylyn and Matthew Arledge (“Defendants”), answer Plaintiffs’ Complaint as follows:

**FOR A FIRST DEFENSE**

1. The allegations of paragraph 1 are admitted, upon information and belief.
2. Answering paragraphs 2 and 3, it is admitted that Eugene W. Villanova and Ruth L. Villanova are residents in independent living at Pacifica Senior Living Skylyn in Spartanburg County.
3. Answering paragraph 4, it is admitted that Pacific Skylyn, LLC is a South Carolina limited liability company that owns and operates Pacifica Senior Living Skylyn in Spartanburg, South Carolina.

4. Answering paragraph 5, it is admitted that Matthew Arledge is and was in July 2021 the executive director of and licensed administrator for the Pacifica Senior Living Skylyn campus.

5. Answering paragraph 6, it is admitted that there were two HVAC outages impacting certain areas of Pacifica Senior Living Skylyn in the month of July 2021 and that these outages resulted in times where there were elevated temperatures inside certain areas of the Pacifica Senior Living Skylyn campus. The remaining allegations of paragraph 6 are denied.

6. Answering paragraph 7, it is admitted that Pacifica Senior Living Skylyn offers several living options, including assisted living, and that the assisted living areas have air conditioning. The Villanovas were not residents in assisted living.

7. Answering paragraph 8, it is admitted that there were two HVAC outages impacting certain areas of Pacifica Senior Living Skylyn in the month of July 2021 and that these outages resulted in times where there were elevated temperatures inside certain areas of the Pacifica Senior Living Skylyn campus. The remaining allegations of paragraph 8 are denied.

8. Answering paragraph 9, it is admitted that some individuals decided to stay with relatives at times during the HVAC outages referenced above.

9. The allegations of paragraphs 10, 11, including all subparts as to both Defendants, and 12 are denied.

10. Paragraphs 13 and 14 are pleading devices to which no response is required. To the extent a response is required, these allegations are denied.

11. The allegations of paragraphs 15, 16, 17, 18, 19 and 20 are denied.

12. Defendants deny Plaintiffs are entitled to any of the relief requested in their prayer for relief.

13. Defendants deny any allegations of the Complaint not specifically admitted above.

**FOR A SECOND DEFENSE**

14. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, the factual allegations in Plaintiffs' Complaint give rise to a disputed matter that the parties have agreed by contract to resolve through binding arbitration and thus the Court lacks subject matter jurisdiction over Plaintiffs' claims, which should be dismissed or stayed and referred for arbitration, pursuant to Rule 12(b)(1), SCRCP, and pursuant to the contract between the parties.

**FOR A THIRD DEFENSE**

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

**FOR A FOURTH DEFENSE**

16. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, Defendants plead any and all applicable defenses to punitive damages, including but not limited to the following:

(a) the provisions of S.C. Code Ann. §§15-32-520 and -530 concerning various aspects of punitive damages, including but not limited to the applicable cap; and

(b) an award of punitive damages would violate the 5th, 6th, and 14th Amendments to the United States Constitution and Article One, Section 3 of the South Carolina Constitution.

**FOR A FIFTH DEFENSE**

17. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, it fails to state a claim for class relief under the dictates of Rule 23, SCRCP.

**FOR A SIXTH DEFENSE**

18. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, Plaintiffs do not possess the same interest and have not suffered the same injury as putative class members and are not members of the class they purport to represent; therefore, class action status should be denied.

**FOR A SEVENTH DEFENSE**

19. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, class action status is inappropriate and should be denied because joinder is not impracticable for those residents who suffered a cognizable injury, if any.

**FOR AN EIGHTH DEFENSE**

20. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, the amount in controversy does not exceed one hundred dollars for each member of the class; therefore, class action status should be denied.

**FOR A NINTH DEFENSE**

21. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, class action status is inappropriate and should be denied because named Plaintiffs and unnamed putative class members entered into an arbitration agreement evidencing an intent and agreement to resolve

disputes through bi-lateral binding arbitration rather than through a class action or class arbitration.

**FOR A TENTH DEFENSE**

22. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, there are not sufficient questions of law or fact common to the alleged putative class for the action to be maintained as a class action.

**FOR AN ELEVENTH DEFENSE**

23. IN ORDER TO PRESERVE ALL POTENTIAL DEFENSES ON THIS ISSUE AND FURTHER ANSWERING PLAINTIFFS' COMPLAINT, to the extent the Complaint attempts to set forth a claim for personal injury, individual questions of law and fact predominate and class certification is inappropriate.

**FOR A TWELFTH DEFENSE**

24. FURTHER ANSWERING PLAINTIFFS' COMPLAINT, Defendants have asserted that the dispute set forth in the Complaint is subject to binding arbitration and therefore that the Plaintiffs' individual claims should be referred to arbitration, resulting in this action being dismissed or stayed. To the extent that this action is not dismissed or stayed, Defendants expressly reserve the right to demand a jury trial and further reserve the right to assert additional defenses and do not waive any additional or further defenses as may be revealed by additional information that may be acquired during the course of discovery or otherwise in this action.

WHEREFORE, having fully and truly answered Plaintiffs' Complaint, Defendants pray that it be dismissed, that class certification be denied, that they recover their costs, and for such other and further relief as this Court deems just and proper.

(SIGNATURE BLOCK ON FOLLOWING PAGE)

**HEDRICK GARDNER KINCHELOE & GAROFALO LLP**

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STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS  
Civil Action No. 2021-CP-42-02473

EUGENE W. VILLANOVA AND  
RUTH L. VILLANOVA, BY AND  
THROUGH KAREN LYNN WARD,  
THEIR ATTORNEY IN FACT,  
AND ON BEHALF OF THOSE  
SIMILARLY SITUATED,

Plaintiffs,

v.

PACIFICA SKYLYN, LLC D/B/A  
PACIFICA SENIOR LIVING SKYLYN,  
AND MATTHEW ARLEDGE,

Defendants.

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

Defendants, by and through counsel, hereby move, pursuant to Rules 12(b)(1) and 12(b)(6), SCRCF, and the Federal Arbitration Act, 9 U.S.C. §§ 1 through 16, that Plaintiffs' 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 Plaintiffs' Complaint give rise to a disputed matter that the parties have agreed by contract to resolve through binding arbitration. Specifically, Eugene W. Villanova's and Ruth L. Villanova's attorney in fact, Karen Ward, signed an agreement at the time Mr. and Mrs. Villanova became residents at Pacifica Senior Living Skylyn in which it was agreed that all claims pertaining to Mr. and Mrs. Villanova's residency would be resolved through binding arbitration. Therefore, the Court lacks subject matter jurisdiction over Plaintiffs' claims and Plaintiffs' 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.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Civil Action No. 2021-CP-42-02473

EUGENE W. VILLANOVA AND  
RUTH L. VILLANOVA, BY AND  
THROUGH KAREN LYNN WARD,  
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PACIFICA SKYLYN, LLC D/B/A  
PACIFICA SENIOR LIVING SKYLYN,  
AND MATTHEW ARLEDGE,

Defendants.

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

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

**INTRODUCTION**

Eugene and Ruth Villanova ("Villanovas") are residents of an independent living apartment on the campus of Pacifica Senior Living Skylyn ("Pacifica"). They complain of air conditioning outages in July 2021 at the Pacifica property resulting in excessive temperatures. They have brought this action through their attorney-in-fact, Karen Ward, on behalf of themselves and a putative class of other residents, alleging negligence, recklessness, and/or willful conduct on the part of Pacifica and its administrator in relation to the air conditioning outages. All allegations stem from the Villanovas' residence in independent living at Pacifica.

Karen Ward is the Villanovas' duly appointed an authorized attorney-in-fact, (Compl. ¶ 1), and signed the Residence and Care Agreement ("the Agreement") that governed the terms of

Villanovas' residency at Pacifica. (Portions of Agreement attached as Ex. A.) At this time, Pacifica has not located a complete copy of the Agreement, but as explained in the accompanying affidavit of Debra Kimbrell, Pacifica is in possession of the page wherein Ms. Ward signed the arbitration clause within the Agreement. (Ex. B, Aff. of D. Kimbrell, ¶ 5.) As more fully explained in the accompanying affidavit, Pacifica's copy of the Agreement is missing the page preceding Ms. Ward's signature, which is labeled subparagraph 11 and titled "**Arbitration**". (Ex. B at ¶ 6.) As is evident from the complete arbitration clause attached to Ms. Kimbrell's affidavit, the scope of the signed arbitration clause is broad – the parties agreed to binding arbitration of "any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims". (Ex. B.)

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 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 and for failure to state facts sufficient to constitute a cause of action, or in the alternative, seeking an order compelling arbitration of each and every claim asserted by Plaintiff and dismissing or staying the lawsuit pending binding arbitration.

### **LEGAL STANDARDS, ARGUMENT, AND ANALYSIS**

Absent agreement by the parties to the contrary, the question of arbitrability of a claim is an issue for the court. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitration of Plaintiff's claims is mandated by the Federal Arbitration Act ("FAA").

The FAA provides as follows:

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

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

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

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

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

The Complaint identifies Karen Ward as the attorney-in-fact for the Villanovas, and there is no dispute that Karen Ward signed the arbitration clause within the Agreement. The fact that there are missing pages to the Agreement is of no import in analyzing whether to compel arbitration because the missing terms are easily supplied through an objective method. “[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain.” *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88,

91, 575 N.E.2d 104, 106 (1991)(citing 1 Williston, Contracts § 46, at 152–153 [3d ed]). *See also* 12 Williston on Contracts § 34:3 (4th ed.)(“Any doubt concerning the terms of an agreement or to supply missing terms in an otherwise valid agreement may be resolved in light of any relevant course of dealing, usage of trade, or course of performance.”)(citing *Rossi v. University of Utah*, 2021 UT 43, 496 P.3d 105, 395 Ed. Law Rep. 838 (Utah 2021)). Here, the affidavit of Debra Kimbrell establishes the terms of the arbitration clause through an objective method of comparison to other Residence and Care Agreements signed during the same general time frame. (Ex. B at ¶ 6.) The arbitration clause in each of the agreements is identical, and the portion of the arbitration clause contained in the signed Villanova agreement matches those agreements word for word. (Ex. B.)

As the Villanova’s attorney-in-fact, Ms. Ward clearly had authority to enter into the Agreement, including agreeing to arbitrate claims relating to the Agreement or the residence of the Villanovas. *See Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1429, 197 L. Ed. 2d 806 (2017) (reversing state law frustrating Federal Arbitration Act’s purpose where agreement to arbitrate was within scope of power of attorney in nursing home context); *Arredondo v. SNH SE Ashley River Tenant, LLC*, No. 2017-001298, 2019 WL 3814725, at \*2 (Ct. App. 2019) (“[A] power of attorney does not need to explicitly refer to arbitration in order to grant the agent authority to execute an arbitration agreement as long as the powers granted are broad enough to include such an act.”).

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

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

Arbitration should be compelled under the FAA. Consistent with the FAA and the trend towards more liberal enforcement of arbitration agreements, South Carolina courts have consistently enforced arbitration agreements pursuant to the FAA, even where those agreements did not conform to the rigid requirements of the SCUAA. *See, e.g., Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 47 (1977); *Soil Remediation Co. v. Nu-Way 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 Villanovas, in addition to utilities such as cable television and electricity, services that unquestionably involve interstate contracts. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (finding nursing home residency agreement implicated interstate commerce

because, *inter alia*, defendant was “contractually required to provide meals and medical supplies, which are instrumentalities of interstate commerce” and noting “many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA.”). Consequently, the Agreement evidences a transaction involving interstate commerce, and the arbitration clause contained therein is enforceable pursuant to the FAA.

## **II. THE PARTIES 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, . . .”. This language plainly covers all causes of action asserted in the Complaint, all of which arise from the residency and services provided to the Villanovas while they were residents 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. Therefore, the Villanovas claims should be compelled to arbitration. Moreover, because the arbitration clause does not expressly approve of class arbitration, only the Villanovas 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. Thus, only the Villanovas individual claims should 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 the Villanovas' individual claims while they are submitted to binding arbitration pursuant to the terms of the Agreement.

### **Hedrick Gardner Kincheloe & Garofalo LLP**

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*Attorneys for Defendants*



# PACIFICA SENIOR LIVING

## RESIDENCE AND SERVICES AGREEMENT

**Independent Living**

**SOUTH CAROLINA**

12848603.1

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

This Residence and Services Agreement ("Agreement") is made between Pacifica Senior Living of Skylyn ("we", "us", "our" or "Pacifica"), on the one hand, and Eugene & Ruth Vilanova ("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 # 198 ("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.

### 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 three (3) 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 (15<sup>th</sup>) 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.

### 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

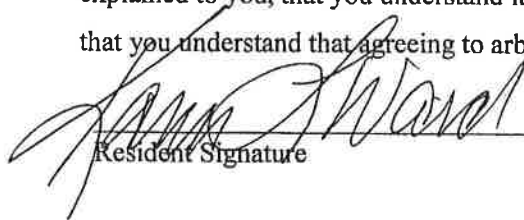
You shall pay a non-refundable community fee of [REDACTED] dollars (\$ [REDACTED]) prior to move-in to the Community. This fee is used to support the costs of various programs and services at the Community, such as wellness, maintenance and upkeep. The fee is also used to help us attract and retain qualified 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 single occupancy of your Apartment under this Agreement is [REDACTED] dollars (\$ [REDACTED]). The initial Monthly Fee for double occupancy is 1075 dollars (\$ 1075). 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 fifth (5<sup>th</sup>) day of the month. 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.

required by court order. Each party shall bear its own costs and fees in connection with the arbitration, unless otherwise provided by law. **You may withdraw your agreement to arbitrate within thirty (30) days after signing this Agreement by giving written notice of your withdrawal to the Community.** After termination of the Agreement, this arbitration clause shall remain in effect for the resolution of all claims and disputes that are unresolved as of that date. In the event that any part of this arbitration clause is determined to be unenforceable, the remaining portions of the clause shall remain valid and shall be enforced by the parties. The parties shall select an arbitrator in accordance with the Federal Arbitration Act. If the Federal Arbitration Act does not permit arbitration in accordance with this clause, then the matter shall be arbitrated in accordance with State law.

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

  
Resident Signature

12/10/19  
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.

#### 13. GOVERNING LAW

This Agreement shall be governed by South Carolina law.



## HOUSE RULES

**During your stay with us at PACIFICA SENIOR LIVING, our Management Team and Staff will do all that we can to make sure you are comfortable and pleasant. In return, we ask that you do your part by keeping in mind the following:**

1. Dress appropriately when in public areas of the building, including meals in the dining room, attending activities, and other social functions.
2. Cooperate with general policies of the community that make it possible for residents to live together.
3. Keep safety in mind while in and out of your apartment, on community outings, or on community grounds.
4. We are a smoke free community.
5. Pay bills timely. Bills are due and payable on the first of each month and are considered late if paid after the fifth (5<sup>th</sup>).
6. Maintain the volume of conversations, stereos, tape players, TV's and radios at a tolerable level for the benefit of neighboring Community residents.
7. Be thoughtful and considerate of others in the community with appropriate language, comments or remarks.
8. Treat the property of others and the community respectfully, as you will be held accountable for damage that could have been prevented.
9. Inform Management and arrange when expecting overnight guests.
10. Comply with all state and local laws, as well as community policies.
11. Keep Community Management informed of any additional assistance that you require or changes in your health conditions.
12. Exterior doors on the outside of the building should be locked at all times, unless Resident is using patios. It is a good safety habit to get into.
13. Leave the laundry room neat and tidy after use. Ask housekeeping or attendants for assistance if necessary. An ironing board and iron are ready for your use.

A handwritten signature in black ink, appearing to read "John W. Ward", is written over the bottom of the list of rules.

12-20-191

74.03  
5  
370.15

## **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.

### 3. DEATH OF RESIDENT

Following your death or discharge due to medical reasons, this Agreement shall terminate fifteen (15) days after the date upon which we receive notice of your discharge or death. Your estate (or Responsible Party) will continue to be responsible for all outstanding fees due at the time of our death and for fees accruing until your personal property is removed from your apartment. 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. In the event your Apartment is jointly occupied, upon the death or discharge of one resident for medical reasons, this Agreement shall continue with respect to the remaining resident. This is subject to South Carolina Department of Health regulations.

### 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.

**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 RESPONSIBILITY WITH YOURSELF (RISK OF FALLS)**

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

**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.



# PACIFICA

## SENIOR LIVING

### NEW RESIDENT IL CHECKLIST

#### SECTION IV-MISCELLANEOUS

RESIDENT NAME: Eugene & Ruth Vilanova APT. NO. 198 M/I DATE: 12/27/19

| Items                                                                | Manager's<br>Initials | Date |
|----------------------------------------------------------------------|-----------------------|------|
| Durable Power of Attorney for Healthcare/Living Will (if applicable) |                       |      |
| Theft and Loss Policy                                                |                       |      |
| Model Release                                                        |                       |      |
| Podiatrist Letter                                                    |                       |      |
| Move Out Responsibility                                              |                       |      |
| Resident Biography                                                   |                       |      |
| Evacuation Hurricane Directive                                       |                       |      |
| Resident Checklist                                                   |                       |      |
| Apartment Entry Release                                              |                       |      |
|                                                                      |                       |      |
|                                                                      |                       |      |
|                                                                      |                       |      |
|                                                                      |                       |      |
|                                                                      |                       |      |

(4.0 New Resident Checklist Section IV.doc)

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# PACIFICA SENIOR LIVING

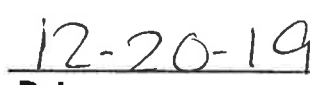
## RESIDENT THEFT AND LOSS POLICY

1. **THEFT & LOSS** – It is the policy of Pacifica Senior Living to document the loss of personal property and to report any loss over \$25.00 within 72 hours of the community's discovery of such loss.
  - a. **RECORDS** – Pacifica Senior Living will maintain a theft and loss record that will show the: (1) resident's name; (2) description of the missing article; (3) article's current value; (4) suspected date and time of loss; and (5) action to be taken.
  - b. **EVALUATING LOSS** – The value of the missing property
  - c. **HIGH VALUE ITEMS** – Our Administrator must report any property loss reasonably valued by the Administrator at over \$100.00 to the local law enforcement agency within 36 hours of our discovery of the loss.
2. **NOTIFICATION**
  - a. It is the policy of Pacifica Senior Living to notify interested parties about the Residential Care Theft & Loss Policy and to provide them with copies of applicable state laws. All Residents will be given a copy of the Health and Safety Codes Sections 1569.152 and 1569.154.
  - b. A copy to the Health and Safety Code sections listed above will be distributed to all employees.
3. **TRAINING** – All employees of Pacifica Senior Living will receive an orientation to this policy within 90 days of employment.
4. **POSTING** – This policy shall be posted in a location easily visible to the residents of Pacifica Senior Living.

  
Resident or Responsible Party

  
Date

  
Community Representative

  
Date



**MODEL RELEASE AGREEMENT**

1. For valuable consideration, for you photographing/video taping, and knowing you have and will expend substantial expenses and time in reliance upon this Release, I irrevocably consent to the unrestricted use by PACIFICA SENIOR LIVING and those acting with their permission and authority, for my name, likeness, any and all photographs/videos and historical background or other information which I have freely given which may be included for all purposes, in any and all media, without limitation, including advertising or trade.
2. I hereby waive rights to inspect or approve finalized photographs, advertising copy, videos, or printed matter that may be used in connection therewith, or to the eventual use that may be applied.
3. I release PACIFICA SENIOR LIVING and those acting under their authority, from any liability concerning the blurring, distortion, or alteration whether intentional or otherwise, that may occur or to be produced in the taking of the photographs and/or video.
4. This agreement constitutes the sole, complete and exclusive agreement between PACIFICA SENIOR LIVING and me. I am not relying on any other representative whether oral or written.

Resident (Please Print)

Eugene & Ruth Villanova Apt # 198

Resident or Responsible Party Signature

[Signature]

Date: 12/20/19

(Model Release Agreement.doc)



**PACIFICA**  
SENIOR LIVING

Dunes Podiatry are podiatrists who will be visiting PACIFICA SENIOR LIVING every three months. They are board certified. Because they visit many facilities like PACIFICA SENIOR LIVING, they are especially experienced in geriatric foot problems.

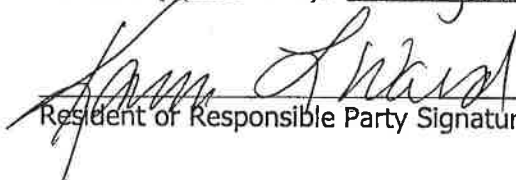
The visit includes an examination in which they look for circulation problems, abnormal skin conditions, and symptoms of systemic disease, which often appear first in feet. Their treatment will usually include reducing thick nails, removing ingrown nail edges, debridging corns and calluses and treating any nail or skin infections.

Dunes Podiatry are Medicare providers. Please be advised that Medicare does not cover some services. This will be determined at the initial visit. If you have different insurance, they are not able to bill that insurance (HMO, FHP, Secure Horizons, or Kaiser) which does not cover these services, she will bill resident or family member.

If you would like to have this care as a patient or as a responsible party for a patient, please notify the Resident Services Director.

Thank you.

Resident (Please Print): Eugene & Ruth Vilanova Apt # 198

  
Resident or Responsible Party Signature

Date: 12/20/19

( Sample.Podiatry Service.doc )



# PACIFICA SENIOR LIVING

## MOVE OUT RESPONSIBILITY

Resident Name:

Eugene & Ruth Vilanova

Apartment Number:

198

I hereby agree and understand that when Karen Ward vacates his/her apartment at PACIFICA SENIOR LIVING for any reason, with or without notification, the current apartment rate will be charged and in effect until all personal items (clothing, furniture, toiletry, pictures, etc.) are removed from his/her apartment. This will also apply to any trash or other items including; hangers, vases, paper, etc. Everything in the apartment must be disposed of, if anything is left, PACIFICA SENIOR LIVING will charge the resident a disposal fee.

In the event that the above resident decides to donate any items to a charity, they are likewise responsible to contact the charity and arrange for pick-up. Apartment charges will accumulate as stated above until charity picks up items and the apartment is cleared.

The apartment and mailbox keys must be returned to a PACIFICA SENIOR LIVING designated representative upon final move-out. Any keys that are not returned and signed off, will result in a \$50.00 charge.

  
Resident or Responsible Party Signature

Date:

12/20/19

(MoveOutResponsibility)



# PACIFICA SENIOR LIVING

## APARTMENT ENTRY RELEASE

The below-named persons have my permission to enter my apartment and collect property and/or information while I am not on the premises. I give PACIFICA SENIOR LIVING permission to use the master key to allow them to enter. I understand that I can make changes to this list at any time by notifying the Executive Director in writing. Only those persons listed on my latest Apartment Entry Release form will be admitted; except for employees or agents of PACIFICA SENIOR LIVING and Department of Social Services personnel.

Resident Name: Eugene & Ruth Vilanova

Apartment Number 198

[Signature]  
Resident or Responsible Party Signature

12/20/19  
Date

Name: Karen L. Ward

Relationship: Daughter

Name: Jeff Ward

Relationship: Son-in-law

Name: Lorri Andrew

Relationship: Daughter

Name: Rachel Traxler

Relationship: Grand Daughter

Name: \_\_\_\_\_

Relationship: \_\_\_\_\_

Name: \_\_\_\_\_

Relationship: \_\_\_\_\_

(ApartmentEntryRelease)



# PACIFICA SENIOR LIVING

## Evacuation and Hurricane Directive

Eugene & Ruth Vilanova  
Resident's Name

Pacifica Senior Living is a shelter-in-place community, and as such, evacuation will not be required in most cases when severe weather threatens. The community is equipped with emergency generators and stocks emergency supplies of food for such situations. In the event an evacuation is ordered, however, family members have the choice of joining a resident and evacuating with the community, or to remove the resident from the community and make their own arrangements for evacuation.

Please indicate your choice by checking below.

- ☒ I will join the resident in the evacuation,  
☐ I will NOT join the resident in the evacuation  
☐ I will remove the resident from the community and make other arrangements for evacuation.

Date: 12-20-19 Signed: [Signature]  
Responsible Party for Resident and Care Agreement



Attach Copy of ID Here

Attach Copy of Insurance Cards Here

**South Carolina** <sup>SC USA</sup> DRIVER'S LICENSE

NOT FOR FEDERAL IDENTIFICATION

44 DL# 105105784

1 WILLAMONA  
2 791 WILSONWOOD RD  
3 WELFORD SC 29384204

4 DOB 03/24/1934  
5 Issued: 11/10/2018  
6 Expires: 03/23/2026

7 Sex: F 8 Hgt: 5'-04"  
9 Wgt: 160 lb 10 Eyes: BRN  
11 Glasses: D 12 End: None

13 Restrictions: None

DD 4200460002250776831

*[Signature]*  
Governor

**South Carolina** <sup>SC USA</sup> DRIVER'S LICENSE

44 DL# 105105810

1 WILLAMONA  
2 791 WILSONWOOD RD  
3 WELFORD SC 29384206

4 DOB 03/23/1931  
5 Issued: 11/10/2018  
6 Expires: 03/23/2026

7 Sex: M 8 Hgt: 5'-07"  
9 Wgt: 160 lb 10 Eyes: BLU  
11 Glasses: D 12 End: None

13 Restrictions: None

DD 4200460002250776838

*[Signature]*  
Governor

## REFUNDABLE COMMUNITY FEE AGREEMENT

☐ Studio ☐ 1 Bedroom ☒ 2 Bedroom ☐ Shared

Phone: 864-414-0118

\$[REDACTED] community fee has been received to reserve apartment number 198

For the rate of [REDACTED]

App. 087



**PACIFICA**  
SENIOR LIVING

**RESIDENT FINANCIAL/RESPONSIBILITY FORM**

**RESIDENT NAME:** Eugene & Ruth Vilanova

**Move-In Date:** 12-27-19

**Apartment Number/Type:** 198

**Apartment Rate:** [REDACTED]

**Pet Fee:** [REDACTED]

**Community Fee:** [REDACTED]

**Incentives (if any)** NA

**Responsible Party:** Karen Ward

**Address:** 753 Neighborhood Rd

Wellford, SC 29385

**Phone Number:** (864) 414-0118

**Email Address:** 205-2085 Jeff

Ward

[Signature]  
Resident/Responsible Party

12-20-19  
Date

[Signature]  
Community Representative Signature

12-27-19  
Date

(ResidentFinlRespForm.2015)



**NEW RESIDENT IL CHECKLIST**  
**SECTION II – FINANCIAL**

RESIDENT NAME: Eugene & Ruth Villanova APT. NO. 198 M/I DATE: 12-27-19

| Items                                             | Manager's<br>Initials | Date |
|---------------------------------------------------|-----------------------|------|
| Refundable Community Fee/Deposit Agreement Form   |                       |      |
| Respite Deposit Agreement                         |                       |      |
| Copy of Check for Community Fee                   |                       |      |
| Resident Financial/Responsibility Form            |                       |      |
| Authorization for Direct Payment                  |                       |      |
| Copies of Driver's License/ID and Insurance Cards |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |

(2.0 2015New Resident Checklist Section I.doc)

Mail bill to  
Karen Ward



## AUTHORIZATION FOR DIRECT PAYMENT

Facility Name: \_\_\_\_\_

Resident ID: \_\_\_\_\_ Resident Name: \_\_\_\_\_

Financial Institution Name: \_\_\_\_\_  
(Bank, Credit Union, or other)

- |                                           |                                          |
|-------------------------------------------|------------------------------------------|
| <input type="checkbox"/> Bank             | <input type="checkbox"/> Credit Union    |
| <input type="checkbox"/> Checking Account | <input type="checkbox"/> Savings Account |

The date of payment is the 1st business day of the month of the rent.

Is this a new authorization: ☐ Yes ☐ No

Month and year to commence service \*:      \_ \_ \_ \_ \_

I (we) authorize Pacifica Senior Living, LLC to initiate debit entries to my (our) Checking or Savings account at the financial institution specified above, for the monthly services and care received from and invoiced by the Pacifica facility referred above. This authorization is to remain in full force and effect for the duration of the resident's stay at the Pacifica facility referenced above, or until Pacifica Senior Living, LLC receives written notification from either of us of its termination. Notification should be received at least 10 days before scheduled direct payment date.

Signed: \_\_\_\_\_ Signed: \_\_\_\_\_  
(must be signed by all owner(s) of account)

Name(s): \_\_\_\_\_

Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Date: \_\_\_\_\_ Telephone: (days)

(evenings)

\* If no month/year specified, deduction will start the next month of service

*Please attach a copy of a VOIDED CHECK (not a deposit slip).*



# PACIFICA

## SENIOR LIVING

Attach Copy of Community Fee Here

Attach Copy of Move In Check Here

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Civil Action No. 2021-CP-42-02473

EUGENE W. VILLANOVA AND  
RUTH L. VILLANOVA, BY AND  
THROUGH KAREN LYNN WARD,  
THEIR ATTORNEY IN FACT,  
AND ON BEHALF OF THOSE  
SIMILARLY SITUATED,

Plaintiffs,

AFFIDAVIT OF DEBRA KIMBRELL

v.

PACIFICA SKYLYN, LLC D/B/A  
PACIFICA SENIOR LIVING SKYLYN,  
AND MATTHEW ARLEDGE,

Defendants.

1. I, Debra Kimbrell, am over the age of eighteen (18) years of old and am competent to testify with regard to the matters stated herein.
2. I am the business office director of Pacifica Skylyn, LLC d/b/a Pacifica Senior Living Skylyn
3. I am familiar with the admission process and have supervisory responsibilities related to record keeping at the facility.
4. Eugene and Ruth Villanova reside in an independent living apartment on the campus of Pacifica Senior Living Skylyn. The Residence and Service Agreements for residents in independent living are housed in a physical file in the main office at the facility.
5. After a diligent search, I have been unable to locate a complete copy of the Residence and Service Agreement for Eugene and Ruth Villanova signed in December of 2019. However, I have located a copy which includes the signature of the Responsible Party, Karen L. Ward (the attorney-in-fact for the Villanovas), on numerous pages in relation the Residence and Service Agreement and admission process. One location where Ms. Ward has signed indicating her agreement to the terms of the Residence and Service

Agreement concerns the mutual agreement of the parties to arbitrate any disputes arising between the parties, which is on the 5th page of the attached Ex. 1 to my affidavit.

6. One of the pages that is missing from Pacifica's copy of the Villanova's Residence and Service Agreement is the preceding page, which contains a portion of the arbitration clause. As part of my job duties, I have access to and regularly review Residence and Service Agreements. I have undertaken to review Residence and Service Agreements for independent living entered into during the timeframe when Ms. Ward signed the Residence and Service Agreement on behalf of Mr. and Mrs. Villanova. Based on that review, it is apparent that Pacifica was using the same arbitration clause in the Residence and Service Agreements for all new admissions at the time that the Villanovas were admitted. The complete arbitration clause is contained in Exhibit 2, which contains exemplar Residence and Service Agreements for independent living (with resident names redacted). Moreover, I have compared the portion of the arbitration clause in the Villanova's incomplete Residence and Service Agreement to that of other agreements entered around the same time period, and they are identical. Therefore, based on my knowledge of the facility's records and investigation, the only reasonable inference is that Exhibit 2 contains examples of the complete arbitration agreement that Ms. Ward signed on 12/20/19 on behalf of Mr. and Mrs. Villanova.

Further the affiant sayeth not.



**Debra Kimbrell**

SWORN TO AND SUBSCRIBED  
BEFORE ME THIS 15 DAY  
OF June, 2022



Notary Public for Spartanburg County  
My Commission Expires: 2030



# PACIFICA SENIOR LIVING

## RESIDENCE AND SERVICES AGREEMENT

**Independent Living**

**SOUTH CAROLINA**

12848603.1

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

This Residence and Services Agreement ("Agreement") is made between Pacifica Senior Living of Skylyn ("we", "us", "our" or "Pacifica"), on the one hand, and Eugene & Ruth Vilanova ("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 # 198 ("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.

### 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 three (3) 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 (15<sup>th</sup>) 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.

### 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

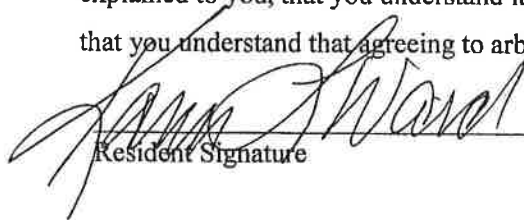
You shall pay a non-refundable community fee of [REDACTED] dollars (\$ [REDACTED]) prior to move-in to the Community. This fee is used to support the costs of various programs and services at the Community, such as wellness, maintenance and upkeep. The fee is also used to help us attract and retain qualified 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 single occupancy of your Apartment under this Agreement is [REDACTED] dollars (\$ [REDACTED]). The initial Monthly Fee for double occupancy is 785 dollars (\$ 107). 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 fifth (5<sup>th</sup>) day of the month. 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.

required by court order. Each party shall bear its own costs and fees in connection with the arbitration, unless otherwise provided by law. **You may withdraw your agreement to arbitrate within thirty (30) days after signing this Agreement by giving written notice of your withdrawal to the Community.** After termination of the Agreement, this arbitration clause shall remain in effect for the resolution of all claims and disputes that are unresolved as of that date. In the event that any part of this arbitration clause is determined to be unenforceable, the remaining portions of the clause shall remain valid and shall be enforced by the parties. The parties shall select an arbitrator in accordance with the Federal Arbitration Act. If the Federal Arbitration Act does not permit arbitration in accordance with this clause, then the matter shall be arbitrated in accordance with State law.

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

  
Resident Signature

12/10/19  
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.

#### 13. GOVERNING LAW

This Agreement shall be governed by South Carolina law.



## HOUSE RULES

**During your stay with us at PACIFICA SENIOR LIVING, our Management Team and Staff will do all that we can to make sure you are comfortable and pleasant. In return, we ask that you do your part by keeping in mind the following:**

1. Dress appropriately when in public areas of the building, including meals in the dining room, attending activities, and other social functions.
2. Cooperate with general policies of the community that make it possible for residents to live together.
3. Keep safety in mind while in and out of your apartment, on community outings, or on community grounds.
4. We are a smoke free community.
5. Pay bills timely. Bills are due and payable on the first of each month and are considered late if paid after the fifth (5<sup>th</sup>).
6. Maintain the volume of conversations, stereos, tape players, TV's and radios at a tolerable level for the benefit of neighboring Community residents.
7. Be thoughtful and considerate of others in the community with appropriate language, comments or remarks.
8. Treat the property of others and the community respectfully, as you will be held accountable for damage that could have been prevented.
9. Inform Management and arrange when expecting overnight guests.
10. Comply with all state and local laws, as well as community policies.
11. Keep Community Management informed of any additional assistance that you require or changes in your health conditions.
12. Exterior doors on the outside of the building should be locked at all times, unless Resident is using patios. It is a good safety habit to get into.
13. Leave the laundry room neat and tidy after use. Ask housekeeping or attendants for assistance if necessary. An ironing board and iron are ready for your use.

A handwritten signature in black ink, appearing to read "John W. Ward", is written over the bottom of the list of rules.

12-20-191

74.03  
5  
370.15

## **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.

### 3. DEATH OF RESIDENT

Following your death or discharge due to medical reasons, this Agreement shall terminate fifteen (15) days after the date upon which we receive notice of your discharge or death. Your estate (or Responsible Party) will continue to be responsible for all outstanding fees due at the time of our death and for fees accruing until your personal property is removed from your apartment. 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. In the event your Apartment is jointly occupied, upon the death or discharge of one resident for medical reasons, this Agreement shall continue with respect to the remaining resident. This is subject to South Carolina Department of Health regulations.

### 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.

**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 RESPONSIBILITY WITH YOURSELF (RISK OF FALLS)**

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

## 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.



# PACIFICA

## SENIOR LIVING

### NEW RESIDENT IL CHECKLIST

#### SECTION IV-MISCELLANEOUS

RESIDENT NAME:

Eugene & Ruth  
Vilanova

APT. NO.

198

M/I DATE:

12/27/19

| Items                                                                | Manager's<br>Initials | Date |
|----------------------------------------------------------------------|-----------------------|------|
| Durable Power of Attorney for Healthcare/Living Will (if applicable) |                       |      |
| Theft and Loss Policy                                                |                       |      |
| Model Release                                                        |                       |      |
| Podiatrist Letter                                                    |                       |      |
| Move Out Responsibility                                              |                       |      |
| Resident Biography                                                   |                       |      |
| Evacuation Hurricane Directive                                       |                       |      |
| Resident Checklist                                                   |                       |      |
| Apartment Entry Release                                              |                       |      |
|                                                                      |                       |      |
|                                                                      |                       |      |
|                                                                      |                       |      |
|                                                                      |                       |      |
|                                                                      |                       |      |

(4.0 New Resident Checklist Section IV.doc)

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# PACIFICA SENIOR LIVING

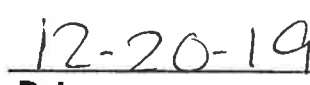
## RESIDENT THEFT AND LOSS POLICY

1. **THEFT & LOSS** – It is the policy of Pacifica Senior Living to document the loss of personal property and to report any loss over \$25.00 within 72 hours of the community's discovery of such loss.
  - a. **RECORDS** – Pacifica Senior Living will maintain a theft and loss record that will show the: (1) resident's name; (2) description of the missing article; (3) article's current value; (4) suspected date and time of loss; and (5) action to be taken.
  - b. **EVALUATING LOSS** – The value of the missing property
  - c. **HIGH VALUE ITEMS** – Our Administrator must report any property loss reasonably valued by the Administrator at over \$100.00 to the local law enforcement agency within 36 hours of our discovery of the loss.
2. **NOTIFICATION**
  - a. It is the policy of Pacifica Senior Living to notify interested parties about the Residential Care Theft & Loss Policy and to provide them with copies of applicable state laws. All Residents will be given a copy of the Health and Safety Codes Sections 1569.152 and 1569.154.
  - b. A copy to the Health and Safety Code sections listed above will be distributed to all employees.
3. **TRAINING** – All employees of Pacifica Senior Living will receive an orientation to this policy within 90 days of employment.
4. **POSTING** – This policy shall be posted in a location easily visible to the residents of Pacifica Senior Living.

  
Resident or Responsible Party

  
Date

  
Community Representative

  
Date



### MODEL RELEASE AGREEMENT

1. For valuable consideration, for you photographing/video taping, and knowing you have and will expend substantial expenses and time in reliance upon this Release, I irrevocably consent to the unrestricted use by PACIFICA SENIOR LIVING and those acting with their permission and authority, for my name, likeness, any and all photographs/videos and historical background or other information which I have freely given which may be included for all purposes, in any and all media, without limitation, including advertising or trade.
2. I hereby waive rights to inspect or approve finalized photographs, advertising copy, videos, or printed matter that may be used in connection therewith, or to the eventual use that may be applied.
3. I release PACIFICA SENIOR LIVING and those acting under their authority, from any liability concerning the blurring, distortion, or alteration whether intentional or otherwise, that may occur or to be produced in the taking of the photographs and/or video.
4. This agreement constitutes the sole, complete and exclusive agreement between PACIFICA SENIOR LIVING and me. I am not relying on any other representative whether oral or written.

Resident (Please Print)

Eugene & Ruth Villanova Apt # 198

Resident or Responsible Party Signature

Date: 12/20/19

(Model Release Agreement.doc)



Dunes Podiatry are podiatrists who will be visiting PACIFICA SENIOR LIVING every three months. They are board certified. Because they visit many facilities like PACIFICA SENIOR LIVING, they are especially experienced in geriatric foot problems.

The visit includes an examination in which they look for circulation problems, abnormal skin conditions, and symptoms of systemic disease, which often appear first in feet. Their treatment will usually include reducing thick nails, removing ingrown nail edges, debridging corns and calluses and treating any nail or skin infections.

Dunes Podiatry are Medicare providers. Please be advised that Medicare does not cover some services. This will be determined at the initial visit. If you have different insurance, they are not able to bill that insurance (HMO, FHP, Secure Horizons, or Kaiser) which does not cover these services, she will bill resident or family member.

If you would like to have this care as a patient or as a responsible party for a patient, please notify the Resident Services Director.

Thank you.

Resident (Please Print): Eugene & Ruth Vilanova Apt # 198

[Signature]  
Resident or Responsible Party Signature

Date: 12/20/19

( Sample.Podiatry Service.doc )



# PACIFICA SENIOR LIVING

## MOVE OUT RESPONSIBILITY

Resident Name:

Eugene & Ruth Vilanova

Apartment Number:

198

I hereby agree and understand that when Karen Ward vacates his/her apartment at PACIFICA SENIOR LIVING for any reason, with or without notification, the current apartment rate will be charged and in effect until all personal items (clothing, furniture, toiletry, pictures, etc.) are removed from his/her apartment. This will also apply to any trash or other items including; hangers, vases, paper, etc. Everything in the apartment must be disposed of, if anything is left, PACIFICA SENIOR LIVING will charge the resident a disposal fee.

In the event that the above resident decides to donate any items to a charity, they are likewise responsible to contact the charity and arrange for pick-up. Apartment charges will accumulate as stated above until charity picks up items and the apartment is cleared.

The apartment and mailbox keys must be returned to a PACIFICA SENIOR LIVING designated representative upon final move-out. Any keys that are not returned and signed off, will result in a \$50.00 charge.

  
Resident or Responsible Party Signature

Date:

12/20/19

(MoveOutResponsibility)



# PACIFICA SENIOR LIVING

## APARTMENT ENTRY RELEASE

The below-named persons have my permission to enter my apartment and collect property and/or information while I am not on the premises. I give PACIFICA SENIOR LIVING permission to use the master key to allow them to enter. I understand that I can make changes to this list at any time by notifying the Executive Director in writing. Only those persons listed on my latest Apartment Entry Release form will be admitted; except for employees or agents of PACIFICA SENIOR LIVING and Department of Social Services personnel.

Resident Name: Eugene & Ruth Vilanova

Apartment Number 198

[Signature]  
Resident or Responsible Party Signature

12/20/19  
Date

Name: Karen L. Ward

Relationship: Daughter

Name: Jeff Ward

Relationship: Son-in-law

Name: Lorri Andrew

Relationship: Daughter

Name: Rachel Traxler

Relationship: Grand Daughter

Name: \_\_\_\_\_

Relationship: \_\_\_\_\_

Name: \_\_\_\_\_

Relationship: \_\_\_\_\_

(ApartmentEntryRelease)



# PACIFICA SENIOR LIVING

## Evacuation and Hurricane Directive

Eugene & Ruth Vilanova  
Resident's Name

Pacifica Senior Living is a shelter-in-place community, and as such, evacuation will not be required in most cases when severe weather threatens. The community is equipped with emergency generators and stocks emergency supplies of food for such situations. In the event an evacuation is ordered, however, family members have the choice of joining a resident and evacuating with the community, or to remove the resident from the community and make their own arrangements for evacuation.

Please indicate your choice by checking below.

- ☒ I will join the resident in the evacuation,  
☐ I will NOT join the resident in the evacuation  
☐ I will remove the resident from the community and make other arrangements for evacuation.

Date:

12-20-19

Signed:

[Signature]

Responsible Party for Resident and Care Agreement



Attach Copy of ID Here

Attach Copy of Insurance Cards Here

**South Carolina** <sup>SC USA</sup> DRIVER'S LICENSE

NOT FOR FEDERAL IDENTIFICATION

44 DL# 105105784

1 WILLANOVA  
2 791 WILSONWOOD RD  
3 WELFORD SC 29384204

4 EOB 03/23/1931  
5 Issued: 11/10/2018  
6 Expires: 03/23/2026

7 Sex: F 8 Hgt: 5'-07"  
9 Wgt: 160 lb 10 Eyes: BLU  
11 Glasses: D 12 End: None

13 Restrictions: None

DD 4200460002280776831

*[Signature]*  
Governor

**South Carolina** <sup>SC USA</sup> DRIVER'S LICENSE

44 DL# 105105810

1 WILLANOVA  
2 791 WILSONWOOD RD  
3 WELFORD SC 29384206

4 EOB 03/23/1931  
5 Issued: 11/10/2018  
6 Expires: 03/23/2026

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11 Glasses: D 12 End: None

13 Restrictions: None

DD 4200460002280776838

*[Signature]*  
Governor



# PACIFICA

## SENIOR LIVING

### REFUNDABLE COMMUNITY FEE AGREEMENT

☐ Studio ☐ 1 Bedroom ☒ 2 Bedroom ☐ Shared

Applicant's Name(s): Eugene & Ruth Vilanova  
 Address: 753 Weichhorst Rd Wellford, SC 29385  
 Phone: 864-414-0118

\$ [REDACTED] community fee has been received to reserve apartment number 198  
 For the rate of [REDACTED]

Currently your move-in date is scheduled for 12-27-19. The Community Fee will reserve an apartment for a period not to exceed 30 days. After that time, the reservation will be cancelled, and the apartment may be made available to another party.

There is a one-time Community Fee for Living Accommodations and Standard Services (not including the assisted living fees). The Community Fee is used to help cover the costs associated with processing paperwork, completing resident assessments and orientation of the resident to PACIFICA SENIOR LIVING SANTA FE, and to cover other costs associated with the operation of the community including preparing your living accommodations for you.

Prior to your assessment and move into the PACIFICA SENIOR LIVING SKYLYN, the Community Fee is entirely refundable.

\*\* Rates quoted are not guaranteed after month end

I/We have read the information set forth above and understand and agree to the terms of the Community Fee.

[Signature]  
 Community Representative Signature

12-20-19  
 Date

[Signature]  
 Responsible Party Signature

12-20-19  
 Date

(Refundable Community Fee Agreement.doc)

\$\$\$) ♦ ▼ • ♦ \$\$\$

\$\$\$ @ \$\$\$

\$\$\$ @ \$\$\$

\$\$\$ @ \$\$\$



**PACIFICA**  
SENIOR LIVING

**RESIDENT FINANCIAL/RESPONSIBILITY FORM**

**RESIDENT NAME:** Eugene & Ruth Vilanova

**Move-In Date:**

12-27-19

**Apartment Number/Type:**

198

**Apartment Rate:**



**Pet Fee:**

**Community Fee:**

**Incentives (if any)**

NA

**Responsible Party:**

Karen Ward

**Address:**

753 Neighborhood Rd

Wellford, SC 29385

**Phone Number:**

(864) 414-0118

**Email Address:**

205-2085 Jeff Ward

**Resident/Responsible Party**

**Date**

12-20-19

**Community Representative Signature**

**Date**

12-27-19

(ResidentFinlRespForm.2015)



**NEW RESIDENT IL CHECKLIST**  
**SECTION II – FINANCIAL**

RESIDENT NAME: Eugene & Ruth Villanova APT. NO. 198 M/I DATE: 12-27-19

| Items                                             | Manager's<br>Initials | Date |
|---------------------------------------------------|-----------------------|------|
| Refundable Community Fee/Deposit Agreement Form   |                       |      |
| Respite Deposit Agreement                         |                       |      |
| Copy of Check for Community Fee                   |                       |      |
| Resident Financial/Responsibility Form            |                       |      |
| Authorization for Direct Payment                  |                       |      |
| Copies of Driver's License/ID and Insurance Cards |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |
|                                                   |                       |      |

(2.0 2015New Resident Checklist Section I.doc)

Mail bill to  
Karen Ward



## AUTHORIZATION FOR DIRECT PAYMENT

Facility Name: \_\_\_\_\_

Resident ID: \_\_\_\_\_ Resident Name: \_\_\_\_\_

Financial Institution Name: \_\_\_\_\_  
(Bank, Credit Union, or other)

- |                                           |                                          |
|-------------------------------------------|------------------------------------------|
| <input type="checkbox"/> Bank             | <input type="checkbox"/> Credit Union    |
| <input type="checkbox"/> Checking Account | <input type="checkbox"/> Savings Account |

The date of payment is the 1st business day of the month of the rent.

Is this a new authorization: ☐ Yes ☐ No

Month and year to commence service \*:      \_ \_ \_ \_ \_

I (we) authorize Pacifica Senior Living, LLC to initiate debit entries to my (our) Checking or Savings account at the financial institution specified above, for the monthly services and care received from and invoiced by the Pacifica facility referred above. This authorization is to remain in full force and effect for the duration of the resident's stay at the Pacifica facility referenced above, or until Pacifica Senior Living, LLC receives written notification from either of us of its termination. Notification should be received at least 10 days before scheduled direct payment date.

Signed: \_\_\_\_\_ Signed: \_\_\_\_\_  
(must be signed by all owner(s) of account)

Name(s): \_\_\_\_\_

Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Date: \_\_\_\_\_ Telephone: (days)

(evenings)

\* If no month/year specified, deduction will start the next month of service

*Please attach a copy of a VOIDED CHECK (not a deposit slip).*



# PACIFICA

## SENIOR LIVING

Attach Copy of Community Fee Here

Attach Copy of Move In Check Here

**PACIFICA SENIOR LIVING**  
**RESIDENCE AND SERVICES AGREEMENT**  
**Independent Living**  
**SOUTH CAROLINA**

12848603.1

**EXHIBIT**

App. 118

**2**

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## **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 [REDACTED] (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 # [REDACTED] ("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 (15<sup>th</sup>) 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 \$ [REDACTED] (A special rate for November, 2018 of [REDACTED]). The initial fee for occupancy of your apartment is \$ [REDACTED]. 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 (10<sup>th</sup>) 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 (10<sup>th</sup>) 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 [REDACTED] ("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.

\_\_\_\_\_  
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.

  
Resident Signature

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:**

Signature \_\_\_\_\_  
Typed or Printed Name \_\_\_\_\_  
Date 11-7-18

**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 \_\_\_\_\_

**POWER OF ATTORNEY:**

**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



# PACIFICA SENIOR LIVING

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## RESIDENCE AND SERVICES AGREEMENT

Independent Living

SOUTH CAROLINA

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**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", "our" or "Pacifica"), on the one hand, and [REDACTED] ("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 # [REDACTED] ("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 cable television, water, electricity, garbage removal, heat and air conditioning. You will be responsible for telephone and any additional 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. Up to two loads of laundry each week are included in the Monthly Fee. Personal laundry and linen services are described in the Resident Handbook and services beyond those included in the Monthly Fee are available for an additional charge as set forth in **Appendix A**. 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 three (3) 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 (15<sup>th</sup>) 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 an emergency call system, smoke detector, carbon monoxide detector, and sprinkler system. The call system is monitored 24 hours per day to alert staff to emergencies and illnesses. If a member of the staff of the Community determines, in his or her judgment, that an emergency exists, he or she will call 911.

## **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. Housekeeping and laundry services (beyond those included in Monthly Fee);
4. Repairs and maintenance of personal items;
5. Beauty/barber shop services (if such services are provided by an outside vendor, the vendor will bill you directly); and
6. 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 [REDACTED] dollars (\$ [REDACTED]) 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 single occupancy of your Apartment under this Agreement is [REDACTED] dollars (\$ [REDACTED]). The initial Monthly Fee for double occupancy is [REDACTED] dollars (\$ [REDACTED]). 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 fifth (5<sup>th</sup>) day of the month. 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 up to five percent (5%) on your then-current Monthly Fee for each delinquent payment. Returned checks shall be subject to a thirty dollar (\$30.00) penalty. If you fail to pay your Monthly Fee when due, 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 \_\_\_\_\_ ("Payor") or guaranteed by \_\_\_\_\_ ("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.

\_\_\_\_\_  
Signature of Guarantor

\_\_\_\_\_  
Signature of Payor

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

11-24-19

## 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

her waitlisted Apartment (No charge to move to new Apartment (No transfer fee) AB/CRD

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 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. In the event of discharge due to medical reasons (or death), this Agreement will terminate fifteen (15) days after the date upon which we receive notice of discharge or death. Your estate (or Responsible Party) will be responsible for all outstanding and fees accruing until your Apartment is vacated and cleared of all personal belongings as described in Section II.D.5. This is subject to South Carolina Department of Health regulations.

**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

Following your death or discharge due to medical reasons, this Agreement shall terminate fifteen (15) days after the date upon which we receive notice of your discharge or death. Your estate (or Responsible Party) will continue to be responsible for all outstanding fees due at the time of our death and for fees accruing until your personal property is removed from your apartment. 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. In the event your Apartment is jointly occupied, upon the death or discharge of one resident for medical reasons, this Agreement shall continue with respect to the remaining resident. This is subject to South Carolina Department of Health regulations.

### 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.<sup>60</sup>

**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 RESPONSIBILITY WITH YOURSELF (RISK OF FALLS)**

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

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

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

### **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.

  
Resident Signature

11-24-19  
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.

## 13. GOVERNING LAW

This Agreement shall be governed by South Carolina law.

This Agreement shall be effective as of \_\_\_\_\_ and shall be completed and signed in duplicate. One (1) copy shall be retained by the Community and one (1) copy shall be given to the Resident

**RESIDENT:**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Date

**RESIDENT:**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Date

**RESPONSIBLE PARTY:**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
Phone Number

\_\_\_\_\_  
Date

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 ) FOR THE SEVENTH JUDICIAL CIRCUIT  
COUNTY OF SPARTANBURG ) CASE NO.: 2021-CP-42-02473

Eugene W. Villanova and )  
Ruth L. Villanova, by and )  
through Karen Lynn Ward, )  
their attorney in fact, )  
and on behalf of those )  
similarly situated, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
Pacifica Skylyn, LLC )  
d/b/a Pacifica Senior )  
Living Skylyn, and )  
Matthew Arledge, )  
 )  
Defendants. )

MEMORANDUM IN OPPOSITION TO  
DEFENDANTS' MOTION TO COMPEL  
ARBITRATION

## BACKGROUND

This matter comes before the Court on Defendants' Motion to Compel Arbitration in a class action filed by the Plaintiff, Karen Lynn Ward, as attorney-in-fact for her parents, Eugene W. Villanova and Ruth L. Villanova. It is alleged that while the Villanovas were residents of Pacifica Senior Living Skylyn, hereinafter referred to as "Pacifica Skylyn" which operates a combination skilled care assisted living and independent living facility in Spartanburg County, there were untenable living conditions. The allegation in Plaintiffs' Complaint is that during July 2021 the facility had significant air conditioning failures resulting in dangerous living conditions when temperatures spiked to near one hundred (100) degrees. The problem lasted for a period of two (2) months

before it was repaired. Plaintiffs and the proposed class seek financial damages as a result of the untenable living conditions suffered by the residents.

#### DEFENDANTS' MOTION

Defendant, Pacifica Skylyn, claims it is entitled to arbitrate the claims of the Plaintiffs and the proposed class based on a Residence and Services Agreement entered into by and between the Defendant, Pacifica Skylyn, and Karen L. Ward as the attorney-in-fact for the Villanovas. The agreement provided by the Defendants has an attachment to the motion and makes reference to an arbitration agreement which in fact is missing from the Residence and Services Agreement.

Plaintiffs have requested that the Defendant, Pacifica Skylyn, produce the complete agreement, however, Defendant, Pacifica Skylyn, has been unable to produce the same.

#### ARGUMENT

The missing arbitration agreement is purportedly controlled by the FAA which requires that an arbitration clause is separate from the contract in which it is imbedded and the issue of its validity is distinct from its substantive validity of the contract as a whole. Since a separate contract does not exist within the body of the Residence Agreement but simply some references to an arbitration agreement, there is in fact no agreement to arbitrate in the contract at issue in this case.

South Carolina law requires that in order to have a

valid and enforceable contract, there must be a meeting of minds between the parties with regard to all of the essential and material terms of the agreement. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009), citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

The parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. Vague expressions or indefiniteness and uncertainty as to any of the essential terms of the agreement have been held to prevent the creation of an enforceable contract. Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (S.C. App. 1984).

Finally, an agreement that omits material terms may be determined to be unenforceable for indefiniteness. A contract leaving material terms open for future agreement is void for indefiniteness. Ellis v. Taylor, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1984).

Defendant bears the burden for proving both the arbitration clause contains all material provisions and that it describes them in definite terms. Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016).

The Defendant's brief, while a very thorough memorandum on arbitration claims under the FAA, fails to address the central issue that the essential terms and body of the agreement are simply missing from the Residence and Services Agreement.

Defense counsel has failed to explain what the terms and conditions of the agreement are because they don't exist in the document signed by Karen L. Ward.

CONCLUSION

For the reasons set forth herein, this Court should deny Defendants' Motion to Compel Arbitration.

Respectfully submitted,

PATRICK E. KNIE, P.A.

*/s/ Patrick E. Knie*

---

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July 11, 2022

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS  
Civil Action No. 2021-CP-42-02473

EUGENE W. VILLANOVA AND  
RUTH L. VILLANOVA, BY AND  
THROUGH KAREN LYNN WARD,  
THEIR ATTORNEY IN FACT,  
AND ON BEHALF OF THOSE  
SIMILARLY SITUATED,

Plaintiffs,

v.

PACIFICA SKYLYN, LLC D/B/A  
PACIFICA SENIOR LIVING SKYLYN,  
AND MATTHEW ARLEDGE,

Defendants.

**DEFENDANTS' MOTION TO  
RECONSIDER**

Pursuant to Rule 59(e), SCRCP, Defendants submit this Motion to Reconsider the Court's Order Denying Defendants' Motion to Dismiss, or in the alternative to Stay and Compel Arbitration ("the Order"), and request that the Court reconsider its ruling and issue an Order compelling this matter to binding arbitration. In the alternative, Defendants respectfully request that the Court clarify the basis of its ruling that the Plaintiffs' action is not subject to binding arbitration. "A party *may* wish to file such a motion when he believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

As noted in the Order, the issue before the Court was whether Plaintiffs' claims should be compelled to binding arbitration where Defendants presented a signed arbitration agreement but

where a portion of the arbitration agreement was not presented to the Court by either party. Because of South Carolina case law providing that a Defendant risks waiving its right to compel arbitration by participating in the discovery process, *e.g.*, *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007), no discovery had been undertaken in the case prior to the hearing on Defendant's Motion to Compel Arbitration. Under these circumstances, Defendants submit it was premature for the Court to make a finding that "sections of the executed documents containing the full arbitration agreement are not in existence."

While the Order goes on to clarify that there is a "distinct possibility" that the complete version of the contract was executed, Defendants submit that there was evidence presented to the Court that the Villanova Residence and Services Agreement ("Agreement") was in fact signed with the complete arbitration clause. The affidavit of Debra Kimbrell, the business office director for the Defendant facility, discusses the efforts of Ms. Kimbrell to investigate this issue and concludes, "the only reasonable inference is that Exhibit 2 contains examples of the complete arbitration agreement that Ms. Ward signed on 12/20/19 on behalf of Mr. and Mrs. Villanova." Defendants respectfully submit that the Court failed to fully consider this evidence in concluding that there was a mere "distinct possibility" that the complete version of the Agreement was executed. Plaintiffs did not submit any competing affidavit testimony or evidence that the Agreement signed by Ms. Ward was missing a portion of the arbitration clause. Thus, the only evidence before the Court supported a finding that the Agreement signed by Ms. Ward contained a complete arbitration clause. Furthermore, the portion of the arbitration clause that was present in the Agreement and signed by Ms. Ward states, "By signing below, you warrant that this Arbitration Agreement has been explained to you [and] that you understand its significance." Ms. Ward's express assent to the statement that the arbitration clause was explained to her and that she

understood it is further compelling evidence that the Agreement presented to, and signed by, Ms. Ward contained an enforceable arbitration clause. (Ex. A to Defs.' Memo in Support.)

Assuming the Court finds that the Agreement signed by Ms. Ward contained a complete arbitration clause, there were no further arguments advanced by Plaintiffs as to why their claims should not be compelled to binding arbitration. However, even if the Court does not reconsider its ruling on that point, Defendants respectfully request clarification of the Court's Order. Defendants cited to case law from other jurisdictions finding that where a contract's missing term can be supplied by an objective method, the Court should enforce the contract. (See Defs.' Memo in Support, Section I.a., p. 3-4.) Defendants endeavored to meet this standard by supplying the missing portions of the arbitration clause within the Agreement through an objective method – namely the process outlined in the affidavit of Debra Kimbrell. (See Ex. B. to Defs.' Memo in Support.) The Order finds that Defendants “have not made the necessary showing” that the fundamental right to a jury trial was waived. However, it is not clear to Defendants whether the Court was saying (a) where a contract is missing a page or section that contains a purported arbitration agreement or jury trial waiver, the law does not allow a party to supply the missing term; or (b) where a contract is missing a page or section that contains a purported arbitration agreement or jury trial waiver, the law does allow a party to supply the missing term, but Defendants have failed to meet the standard for doing so in this instance.

For the foregoing reasons, Defendants respectfully request the Court reconsider its ruling and issue an Order compelling this matter to binding arbitration, or, alternatively, clarify the basis of its ruling that the Plaintiffs' action is not subject to binding arbitration.

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**Hedrick Gardner Kincheloe & Garofalo LLP**

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*Attorneys for Defendants*

July 25, 2022  
Columbia, SC

|                              |   |                       |
|------------------------------|---|-----------------------|
| STATE OF SOUTH CAROLINA      | ) |                       |
|                              | ) | COURT OF COMMON PLEAS |
| COUNTY OF SPARTANBURG        | ) | 2021-CP-42-02473      |
|                              | ) |                       |
|                              | ) |                       |
|                              | ) |                       |
|                              | ) |                       |
| EUGENE W. VILLANOVA, ET AL,  | ) |                       |
| PLAINTIFFS,                  | ) |                       |
|                              | ) |                       |
| vs.                          | ) | TRANSCRIPT OF RECORD  |
|                              | ) |                       |
| PACIFICA SKYLYN, LLC, ET AL, | ) |                       |
| DEFENDANTS.                  | ) |                       |
| _____                        | ) |                       |

July 13, 2022  
Via WebEx

B E F O R E:

THE HONORABLE WILLIAM P. KEESLEY, JUDGE.

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

PATRICK KNIE, ESQ.  
Attorney for the Plaintiff

JOSHUA SHAW, ESQ.  
Attorney for the Defendant

Proceedings Recorded by 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: Let's go on the record on 2021-CP-42-02473, Eugene W. Villanova, V-I-L-L-A-N-O-V-A, and others vs. Pacifica, P-A-C-I-F-I-C-A, Skylyn, S-K-Y-L-Y-N, LLC, and others. This hearing is being held on July 13, 2022 at 10:09 a.m. using the WebEx virtual courtroom. Court administration does not assign court reporters for these type of proceedings. If a transcript is needed, one will be prepared by a transcriptionist using the WebEx recorder.

The August 2021 order of the Supreme Court requires the consent of both sides to continue in this fashion. For the Plaintiff, I have Patrick Knie, K-N-I-E.

Do you consent, Mr. Knie?

MR. KNIE: Yes, Your Honor.

THE COURT: For the Defense, I have Joshua Shaw, S-H-A-W.

Do you consent, Mr. Shaw?

MR. SHAW: Yes, Your Honor.

THE COURT: You're asked, please, to speak clearly, not to talk over each other and, if possible, say your name before you start talking since no court reporter is present to take down who is speaking at any given time.

I read the file last night. There are two motions. Are both of them still active, a motion to compel and a motion to dismiss?

1           MR. SHAW: Your Honor, Josh Shaw on behalf of the  
2 Defendants. I think the motion -- I don't want to speak for  
3 Mr. Knie, but I think the motion to compel is related to  
4 motion to compel discovery, which kind of turns based on  
5 whether the case is compelled to arbitration or not. We  
6 agree if the case is not compelled to arbitration that we  
7 would have to respond to his discovery.

8           THE COURT: So Mr. Knie, your understanding is I'm  
9 going to hear the motion to require the case to be  
10 arbitrated today?

11          MR. KNIE: Yes, Your Honor.

12          THE COURT: That's your understanding, Mr. Shaw?

13          MR. SHAW: Correct, Your Honor.

14          THE COURT: And I will not hear the discovery motion at  
15 this time.

16          Is that correct, Mr. Shaw?

17          MR. SHAW: It's Mr. Knie's motion, but, yeah, we will  
18 -- we will respond to discovery depending on the outcome of  
19 the arbitration order.

20          THE COURT: So Mr. Knie, is it okay with you if I  
21 continue this discovery motion until a ruling on the other  
22 motion?

23          MR. KNIE: That's fine.

24          THE COURT: All right. So Mr. Shaw, let me hear your  
25 argument, please.

1           MR. SHAW: Thank you, Your Honor. Josh Shaw on behalf  
2 of the Defendants. This is a putative class brought by the  
3 Villanovas through their attorney-in-fact, Karen Ward,  
4 against Pacifica Skylyn and its former executive director,  
5 Matthew Arledge, relating to HVAC issues at their apartment  
6 building.

7           One thing I just want to clarify from the outset is  
8 that even though the Pacifica Campus in Spartanburg contains  
9 long term care and assisted living, the Villanovas resided  
10 in independent living. In other words, they were not at  
11 Pacifica receiving any medical care or medical services.  
12 They simply lived there in apartment-style living.

13           The campus is laid out sort of so that there's sort of,  
14 basically, one large apartment building for folks in  
15 independent living and a separate one for folks in assisted  
16 living. And then those buildings are connected to the main  
17 building by hallways so that the residents don't have to go  
18 outside to get to the recreational area, dining area and  
19 chapel, those places.

20           Some meals and other non-medical services are provided  
21 to those in independent living such as the Villanovas, but,  
22 otherwise, this is an apartment building that the Villanovas  
23 were living in. And as I alluded to, the allegations in the  
24 case pertain primarily, if not exclusively, to an HVAC  
25 outage in July of 2021. Again, it's not about providing

1 medical services and I don't think there's a claim of  
2 personal injury as well.

3 The bottom line is the Villanovas were tenants of  
4 Pacifica in independent living. There was an HVAC outage,  
5 which they make various allegations about in terms of the  
6 reasons for the outage and the length of the outage. We're  
7 here today asking the Court to compel the Villanovas' claims  
8 to arbitration.

9 Turning to the lease agreement between the Villanovas  
10 and Pacifica, there is clearly an arbitration provision.  
11 And Ms. Ward, as the attorney-in-fact, clearly signed that  
12 provision indicating agreement to arbitrate. I don't want  
13 to -- well, the Villanova agreement is Exhibit A to our memo  
14 in support and it's, also, included in Exhibit B as an  
15 attachment to an affidavit from the facility's business  
16 office director, which I'll explain in just a minute.

17 But whichever version you look at, it's clear on Page  
18 2. It says, the agreement is subject to arbitration. And  
19 then on Page 5 of Exhibit A, there is a signature of Karen  
20 Ward -- again, she's the attorney-in-fact -- which is from  
21 the Complaint indicating an agreement to an arbitration  
22 provision.

23 So there's no question about whether there is an  
24 arbitration agreement in the residence and service  
25 agreement. Frankly, we would say there's no question that

1 the agreement is subject to the FAA. We've briefed that  
2 issue and it wasn't challenged in Plaintiff's briefing, so  
3 I'll move along unless the Court has questions about  
4 application of the FAA.

5 We have the signed agreement to arbitrate that's  
6 subject to the FAA, but there is a question for the Court  
7 that is an interesting question and we think the only real  
8 question that we perceive. When we got this lawsuit and  
9 pulled the Villanova file, the residence and services  
10 agreement, the one that I was just referring to and is  
11 attached, it is missing certain pages, including a portion  
12 of the arbitration clause that's separately signed.

13 We've studied that document, Your Honor, and we've  
14 asked around the office, but nobody has a recollection or  
15 explanation for why some pages are present and other pages  
16 are missing in Pacifica's copy.

17 We provided to the Court the agreement that we received  
18 in the exact form that we received it. The pages are out of  
19 order. It's missing some pages, but we wanted to be  
20 transparent in that regard. It may, certainly, be the case  
21 that either Ms. Ward or the Villanovas have the complete  
22 agreement, but because of South Carolina case law stating  
23 that participation in the discovery process can constitute a  
24 waiver of arbitration rights, we've deliberately not engaged  
25 in written discovery and, thus, the motion to compel that

1 Your Honor already addressed with us.

2 So, regardless, we don't think that the fact that pages  
3 were missing from the 2019 agreement signed by Ms. Ward  
4 creates an obstacle to the Court compelling the matter to  
5 arbitration. And I'll explain that.

6 I'll be frank with the Court. I, actually, researched  
7 this myself and asked another attorney in my office to look  
8 at it and we did not find a case directly on point in terms  
9 of there being a clear agreement, signed agreement, but  
10 where a page was missing. And I'm talking not just in the  
11 arbitration context, but generally, which was a little  
12 surprising to me that isn't out there. You have this fear  
13 that it may be out there and we missed it.

14 But what we did find is a lot of South Carolina law  
15 saying that where there's an ambiguity in the contract,  
16 extrinsic evidence can be consulted to determine the intent  
17 of the parties.

18 We, also, found a line of cases which we cited,  
19 including Williston on contract section, which stand for the  
20 proposition that where missing terms can be determined by an  
21 objective method, the Court should enforce the agreement.

22 Here, the objective method is not difficult to supply  
23 the missing pages. This residence agreement was a standard  
24 agreement for Pacifica at the time of the Villanovas  
25 admission. So we simply had the business officer manager

1 pull a couple of other agreements to show what the missing  
2 portion of the arbitration clause said. It's pretty  
3 straightforward and that is laid out in the affidavit of Deb  
4 Kimbrell. That's Exhibit B to our memo in support.

5 She went ahead -- and we've attached to her affidavit,  
6 both the Villanova lease and these other lease/residents  
7 agreements. And the operative language of the arbitration  
8 clause is -- it's in Section H, Paragraph 11. And that's,  
9 actually, on Page 40 of our Exhibit B.

10 And it's standard arbitration language, by signing  
11 below, you agree that any and all claims and disputes  
12 arising from or related to this agreement or your residency  
13 care or services at the community shall be resolved by  
14 submission to neutral binding arbitration in accordance with  
15 the Federal Arbitration Act.

16 And, Your Honor, just one more quick point. You don't  
17 have to take Deb Kimbrell's word for it on what this  
18 arbitration clause says because as pointed out, we have a  
19 portion of the Villanovas' arbitration clause. And one can  
20 compare the portion to the other agreements and see that  
21 it's identical.

22 So by reference to the other identical lease  
23 agreements, we can supply the missing terms of the  
24 arbitration clause through an objective method. At that  
25 point, the arbitration analysis is typical and fairly

1 straightforward. The agreement requires the Villanovas to  
2 submit any dispute they have related to their residence in  
3 independent living to binding arbitration.

4 They've raised through their civil action a dispute  
5 about the air conditioning in the building and that's a  
6 dispute we feel is plainly covered by the arbitration  
7 agreement. And for those reasons, we respectfully request  
8 that the Villanovas' claims be compelled to binding  
9 arbitration.

10 THE COURT: Thank you.

11 Mr. Knie.

12 MR. KNIE: Thank you. Patrick Knie for the Plaintiff,  
13 Your Honor. I've got a very succinct brief, three and a  
14 half pages long, because it's a very narrow, tailored issue  
15 involved in this case. It's true the Villanovas were  
16 residents of Pacifica Senior Living. It is of no  
17 consequence that they lived in independent living as opposed  
18 to skilled nursing or assisted nursing. It's all one  
19 building and it's all connected. And it's one air  
20 conditioning system that runs the whole complex. So if it  
21 failed as to them, it failed as to everybody. Our putative  
22 class is to represent everybody.

23 Basically, the nexus is that in July of 2021, the  
24 system failed and it took them two months to repair it. And  
25 during that period of time, which was exceptionally hot,

1 temperatures were in the 100-degree range. It's a  
2 three-story building.

3 With respect to the recorded arbitration agreement  
4 itself, Your Honor, all they have is a signature of our  
5 client and some reference to an agreement, but they don't  
6 have the agreement itself. There's nothing in the affidavit  
7 that said when presented with this document to sign that the  
8 Villanovas or Ms. Ward on behalf of the Villanovas actually  
9 had the whole agreement before them. In fact, that's just  
10 not the case. The Villanovas can't produce it either  
11 because for whatever reason Pacifica Skylyn failed to  
12 present them with the full agreement.

13 I mean, there is nothing that Ms. Ward signed that said  
14 you are agreeing to waive your Constitutional right to a  
15 jury trial and be compelled to arbitration. And in the  
16 absence of words to that effect, clearly, they cannot compel  
17 arbitration.

18 The nursing home, Pacifica Skylyn, is the moving party.  
19 The burden is on them to establish what the meeting of the  
20 minds was and there was no meeting of the minds because  
21 there was no agreement.

22 And they refer to the FAA, well, there's nothing in the  
23 document that is Exhibit A that refers to the FAA. But even  
24 if it were governed by the FAA, the FAA's case law says that  
25 within a contract for services for independent living or

1       assisted living or skilled nursing care, there has to be a  
2       separate independent arbitration agreement that can stand  
3       alone. They can't produce it. For all we know, it could be  
4       the Magna Carta or the Declaration of Independence. I mean,  
5       it's just they cannot tell us what, in fact, it is other  
6       than what it is in other cases.

7               But you cannot say well, we always do it this way so  
8       this is the way we do it in this case. They have to prove  
9       that in this case they presented Ms. Ward with the wording  
10      that they claim was in the document. They can't prove that.  
11      They don't have a witness that says that. The affidavit  
12      doesn't say that.

13             The case law is pretty straightforward. The parties  
14      cannot be said to have a meeting of the minds on matters  
15      that are indefinite, vague, uncertain or even  
16      incomprehensible. An agreement that omits material terms  
17      may be determined to be unenforceable for indefiniteness.  
18      Again, they have the burden to establish it. They haven't  
19      established what was in the agreement or that that page was  
20      ever presented to Ms. Ward.

21             So even though Mr. Shaw gave a very thorough recitation  
22      in his memorandum of FAA arbitration agreements, there is  
23      none in this case. And for those reasons, we believe the  
24      Court is compelled to deny their motion.

25             THE COURT: Mr. Shaw.

1           MR. SHAW: Briefly, Your Honor. On the subject of what  
2       -- we agree with the case law that says about meeting of the  
3       minds that Mr. Knie is referring to, what we're saying is  
4       that we can through an objective method, and have,  
5       demonstrated what the language of the agreement was. So to  
6       the extent that's our burden, that it's been carried.

7           Your Honor, in the part that Ms. Ward signed, again,  
8       it's not as though there's just a signature and we don't  
9       know what's there. There is, I don't know how many lines,  
10      about 13 or 14 lines of the arbitration agreement and the  
11      last portion says by signing below, you warrant this  
12      arbitration agreement has been explained to you, that you  
13      understand its significance and that you voluntarily agree  
14      to be bound by it.

15          And so that would be the response, I think, to the  
16      argument that we have no idea what they signed. We know.  
17      She's acknowledging here that she has read an arbitration  
18      agreement and we have a portion of that. That's all, Your  
19      Honor.

20          THE COURT: Do you have anything else, Mr. Knie?

21          MR. KNIE: No, Your Honor.

22          THE COURT: I'll notify you of my decision in writing.  
23      Thank you very much. The hearing is concluded at 10:27 a.m.

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 18, 2023

Penny M. Johnson  
Penny M. Johnson  
Transcriber



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

CATHERINE S. HARRISON  
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September 25, 2024

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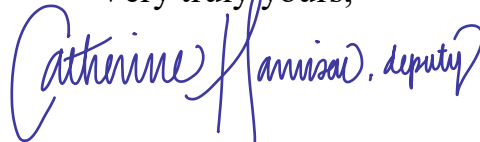
Re: Eugene W. Villanova v. Pacifica Skylyn, LLC  
Appellate Case No. 2023-001343

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by

Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

  
CLERK

cc: The Honorable William P. Keesley

**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**

Eugene W. Villanova and Ruth L. Villanova, by and  
through Karen Lynn Ward, their attorney-in-fact, and on  
behalf of those similarly situated, Respondents,

v.

Pacifica Skylyn, LLC d/b/a Pacifica Senior Living  
Skylyn, and Matthew Arledge, Appellants.

Appellate Case No. 2023-001343

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Appeal From Spartanburg County  
William P. Keesley, Circuit Court Judge

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Unpublished Opinion No. 2024-UP-318  
Submitted September 19, 2024 – Filed September 25, 2024

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**AFFIRMED**

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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, both for Respondents.

---

**PER CURIAM:** Pacifica Skylyn, LLC d/b/a Pacifica Senior Living Skylyn, and Matthew Arledge (Appellants) appeal the circuit court's order denying their motion to compel arbitration. On appeal, Appellants argue they provided uncontroverted evidence of the full text of the Arbitration Agreement contained in the Residence and Services Agreement executed by Eugene W. Villanova and Ruth L. Villanova's attorney-in-fact, Karen Ward. We affirm pursuant to Rule 220(b), SCACR.

We hold the circuit court did not err by denying Appellants' motion to compel arbitration because Appellants have not met their burden of proof regarding whether there was a valid Arbitration Agreement. *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 [Federal Arbitration Act] 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."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

**AFFIRMED.**<sup>1</sup>

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

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<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. William P. Keesley, Circuit Court Judge

Case No. 2021-CP-42-02473

Appellate Case No. 2023-001343

Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated, ..... Respondents,

v.

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 Pacifica Skylyn, LLC, d/b/a/ Pacifica Senior Living Skylyn, 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.

Pacifica's appeal was premised on an important and novel issue of contract interpretation in South Carolina – whether a party may supply a missing term to a contract and, if so, the evidentiary standard a party must satisfy to do so. The circuit court neglected to rule on the legal question raised by Pacifica in its initial Order or in response to a focused Motion to Reconsider

highlighting the issue of law. Likewise, the Court’s Opinion does not address the key legal question posed by Pacifica or cite any case law addressing the issue. Pacifica respectfully submits the Court overlooked or misapprehended two important points in this case, discussed below, and asks the Court to grant rehearing in this case.

## **ARGUMENT**

The scenario giving rise to the issue before the Court is neither incredible nor uncommon. The Villanova’s and Pacifica had a contractual relationship. When this dispute arose, reference to the parties’ agreement was the natural and proper initial step in responding to the dispute. Pacifica located the agreement, but certain pages were missing. Pacifica produced the page of the Agreement wherein Respondent’s attorney in fact signed an acknowledgment that she understood the significance and importance of the arbitration provision. But Pacifica could not locate the page containing other terms of the arbitration provision.

The unanswered legal question here is what happens when a party loses a page (or portion of a page) within a contract but presents undisputed evidence of the contractual terms contained in the missing page. Put another way, can a filing mistake invalidate a binding contractual obligation where all other elements of contract are met, and the terms are objectively proven? Pacifica submits that neither the trial court nor this Court has answered this question.

### **1. The Court misapprehended or overlooked Pacifica’s undisputed evidence proving the Agreement’s missing terms through an objective method.**

By analogy to South Carolina case law and citation to out-of-state case law addressing this exact issue, Pacifica argued that missing terms in a contract could be supplied if there was an objective method for doing so. This Court’s Opinion does not address this point or cite any case law addressing this point. In affirming the trial court, this Court overlooked the uncontroverted evidence of the “missing terms” that Pacifica submitted in support of the Motion to Compel

Arbitration. Pacifica submitted an affidavit from Debra Kimbrell, the Business Office Director for Pacifica, testifying to the language of the full arbitration provision included in Respondent's Residence and Services Agreement ("the Agreement"), including examples of other agreements entered into during the same time frame with identical language. (R. 62-63). Respondent has not challenged the substance or admissibility of Ms. Kimbrell's affidavit testimony at any point in this litigation and has presented no authority suggesting the Court could not properly consider such evidence to supply the missing terms of the arbitration provision.<sup>1</sup> Ms. Kimbrell's affidavit testimony presents an objective method of clarifying the ambiguity created by a missing page in the Agreement. *See, e.g., Columbia E. Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 520, 386 S.E.2d 259, 261 (Ct. App. 1989) (explaining that "where a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent"); *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91, 575 N.E.2d 104, 106 (1991) ("[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain.") (citing 1 Williston, Contracts § 46, at 152–153 (3d ed.)). Accordingly, Pacifica submits this Court should grant rehearing and reverse the circuit court's denial of Pacifica's Motion to Compel Arbitration based on the undisputed evidence of the terms of the Agreement's arbitration provision.

**2. The Court misapprehended or overlooked the fact that Respondents' attorney in fact signed a binding arbitration agreement.**

The Court also misapprehended the importance of the portions of the Agreement that Pacifica did produce. Pacifica produced a portion of the arbitration provision wherein

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<sup>1</sup> Importantly, Respondent has not presented any generally applicable contract defenses to the arbitration provision as supplied by Ms. Kimbrell's affidavit or challenged his attorney in fact's capacity to enter such an agreement.

Respondents' attorney in fact acknowledged understanding the significance of the arbitration provision included in the Agreement. (R. 68). *See Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. . . . Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."). In other words, the Respondent's attorney in fact signed the Arbitration Agreement. (*Id.*). Pacifica submits the Court overlooked or misapprehended this point in concluding, "Appellants have not met their burden of proof regarding whether there was a valid Arbitration Agreement." The dispositive question is not whether Respondent's Agreement included an arbitration provision, but whether the provision encompasses Respondent's claims here. Pacifica submits that Ms. Kimbrell's unchallenged affidavit testimony is sufficient for this Court to conclude that Pacifica has met its burden of proof in establishing that Respondent's claims are subject to mandatory arbitration.

### **CONCLUSION**

The Court should grant rehearing and reverse the circuit court's Order denying Pacifica's Motion to Compel Arbitration based on the arguments herein. Pacifica also incorporates into this petition all the arguments it raised in briefing to this Court and does not abandon such arguments.

***SIGNATURE BLOCK ON FOLLOWING PAGE***

Respectfully submitted,

**HEDRICK GARDNER KINCHELOE &  
GAROFALO LLP**

*s/ Paul E. Allen, Jr.*

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Joshua D. Shaw (SC Bar No. 77835)

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*Attorneys for Appellant*

October 10, 2024

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. William P. Keesley, Circuit Court Judge

Case No. 2021-CP-42-02473

Appellate Case No. 2023-001343

Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated, ..... Respondents,

v.

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 Appellants' Petition for Rehearing in the above-captioned case has been served on the following parties via e-mail, on October 10, 2024:

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Mitch Slade  
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Spartanburg, SC 29304  
[mitch@mitchsladelaw.com](mailto:mitch@mitchsladelaw.com)  
*Attorneys for Plaintiffs/Respondents*

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

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. William P. Keesley, Circuit Court Judge

Case No. 2021-CP-42-02473

Appellate Case No. 2023-001343

Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated,.....Respondents,

v.

Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge.....Appellants.

**RESPONDENTS' RETURN TO PETITION FOR REHEARING**

The present appeal resulted from Appellants' attempt to enforce an arbitration clause in a nursing home case. The Circuit Court Judge rightfully denied Appellants' Motion and denied their Request for Reconsideration. On appeal this Court, in a per curiam decision, denied the relief sought by the Appellants. The Appellants are now before this Court seeking a Petition for Rehearing.

**ARGUMENT**

Appellants' position for rehearing centers around their effort to "objectively prove" what was contained in a missing portion of the arbitration agreement. The Appellants gloss over the important fact that they are unable to prove that Karen Ward, as attorney in fact for

Eugene W. and Ruth L. Villanova, was ever presented with the full Residence and Services Agreement when she signed it. In fact, Appellants admit that they cannot find a “missing page” of the agreement. The Appellants secured the Affidavit of Debra Kimbrell who was the office director. Ms. Kimbrell admits that after a diligent search she was unable to find a copy of the Residence and Services Agreement for the Respondents which contained the language necessary to form a valid Arbitration Agreement. (*See*, Aff. of D. Kimbrell @ p. 1). Nothing in Ms. Kimbrell’s Affidavit in any way establishes that the complete arbitration agreement was signed by Karen Ward on behalf of the Respondents. The portion which was omitted reads as follows:

## 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 of 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

It is clear that Respondents were never advised that they were giving up their constitutional right to have the dispute decided in a Court of law before a jury. The omitted portion also includes other important facts to establish an arbitration agreement.

Appellants' attempt to establish what should have been in the agreement is of no avail because Appellants cannot prove that in fact the missing page was part of the agreement that Ms. Ward signed.

South Carolina law requires that in order to have a valid and enforceable contract, there must be a meeting of minds between the parties with regard to all of the essential and material terms of the agreement. *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009), citing *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

The parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. Vague expressions or indefiniteness and uncertainty as to any of the essential terms of the agreement have been held to prevent the creation of an enforceable contract. *Reed v. Boykin*, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984). Here, the matter of waiving Respondents' rights to a jury trial is worse than indefinite or vague, it is completely absent from the contract. Without showing that the full terms of an arbitration agreement and jury trial waiver were in the executed contract, Pacifica cannot prove an agreement to arbitrate existed. *See Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 6, 881 S.E. 2d 646, 648 (Ct. App. 2022).

This Court simply cannot enforce an agreement with missing terms which Karen Ward, on behalf of the Respondents, never sought.

**CONCLUSION**

Respondents respectfully submit that Appellants' Motion for Rehearing be denied.

Respectfully submitted,

KNIE & SHEALY

*/s/ Patrick E. Knie*

---

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October 21, 2024

Oct 21 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. William P. Keesley, Circuit Court Judge

Case No. 2021-CP-42-02473  
Appellate Case No. 2023-001343

Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated,.....Respondents,

v.

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 Respondents' Return to Petition for Rehearing in the above-captioned case has been served on the following parties via e-mail, on October 21, 2024, pursuant to the South Carolina Supreme Court Order No. 2020-000447, as amended on May 5, 2022:

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*Attorneys for Appellants*

*/s/ Patrick E. Knie*

---

Patrick E. Knie (S.C. Bar No. 3564)

October 21, 2024

# KNIE & SHEALY

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October 21, 2024

VIA E-MAIL

The Honorable Jenny A. Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

RE: Eugene W. Villanova and Ruth L. Villanova, by and through Karen  
Lynn Ward, their attorney in fact, and on behalf of those similarly  
situated, Respondents, v. Pacifica Skylyn, LLC, d/b/a Pacifica  
Senior Living Skylyn, Etros, LLC, and Matthew Arledge, Appellants  
Civil Action No.: 2021-CP-42-02473  
Appellate Case No.: 2023-001343

Dear Ms. Kitchings:

Enclosed for filing is Respondents' Return to Petition for Rehearing in the  
above-entitled matter. I have also enclosed the Certificate of Service for filing.

Sincerely,

*Patrick E. Knie*

Patrick E. Knie

PEK:mbg  
Enclosures

cc: All Counsel of Record (Via Email)

# The South Carolina Court of Appeals

Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney-in-fact, and on behalf of those similarly situated, Respondents,

v.

Pacifica Skylyn, LLC d/b/a Pacifica Senior Living Skylyn, and Matthew Arledge, Appellants.

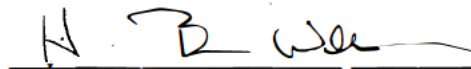
Appellate Case No. 2023-001343

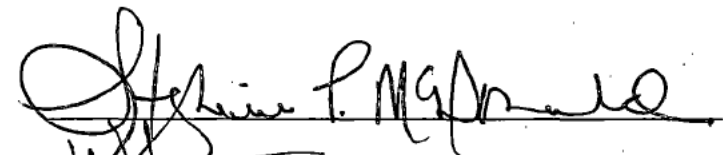
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## ORDER

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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.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

Jonathan Gamble Roquemore, Esquire  
Patrick E. Knie, Esquire

**FILED**  
**Nov 21 2024**

Sam Mitchell Slade, Jr., Esquire  
Joshua Daniel Shaw, Esquire  
Paul Edward Allen, Jr., Esquire  
The Honorable William P. Keesley